

**STATE OF RHODE ISLAND  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION**

**IN RE: POND VIEW RECYCLING INC.  
Petition for Declaratory Ruling**

**AAD# 03-001/WMA**

**ORDER OF THE DIRECTOR UPON PETITION**

This matter came before the Director of the Department, upon Petition for Declaratory Ruling by the Attorney General, Patrick C. Lynch on May 12, 2005, pursuant to the General Laws § 42-35-8, and the Administrative Rules of Practice and Procedure for the Department, Section 6:00. The basis for the Petition, is the legally advised refusal of a subpoenaed employee-witness to answer a question of the Attorney General's representative, regarding an area in which the employee is uniquely qualified, and is relying upon his expertise for such answer. The employee-witness was ordered to respond by the presiding Department Hearing Officer, and upon the advice of counsel for the opposing party, Office of Waste Management, refused to answer the question presented, on grounds that it would compel "expert testimony" against the Department-employer, and otherwise violate the legal proscription against forced expert testimony.

The underlying issue of the Hearing Officer's authority to compel an answer to the question presented was also raised as a defense by the Office of Waste Management, in the counseled refusal to respond to the question presented.

After review of Petition of the Attorney General, Objection to the Petition by the Office of Waste Management, and other pleadings, I find as follows:

1. The proper vehicle for the Petitioner to address the conflict of legal interpretation and testimonial impasse is the within Petition for Declaratory Relief, presented to the Director.
2. The Hearing Officer can, by statute, compel attendance, testimony, and examination of books and documents, within the context of an appeal before the Administrative Adjudication Division, that she deems necessary and proper for a full and fair adjudication of the matter before her. R. I. Gen. Laws § 42-17.7-8.
3. The question presented involves an area of fact-specific expertise which is publicly transparent, and invites a straight-forward, "non-opinion" response, as part of the regulatory process, by the witness-employee.
4. The witness-employee is therefore ORDERED to answer the question presented, and all such other fact-specific, "non-opinion" inquiries ruled upon by the Hearing Officer, during the course of his testimony.
5. Counsel for the Office of Waste Management may register and preserve his objections, but interpose testimonial admonishment, only where "opinion" testimony is elicited, or privilege prohibitions, allow.

So **ORDERED**, as a Final Decision, and Agency Action, this 14<sup>th</sup> day of June, 2005.

  
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W. Michael Sullivan, PhD.  
Acting Director, Rhode Island Department  
of Environmental Management.  
Office of the Director,  
235 Promenade Street, Providence 02908

CERTIFICATION OF SERVICE

The undersigned hereby Certifies that a true copy of the within Order Of The Director was mailed, postage prepaid and/or hand delivered, to the following Counsel of Record: Terence J. Tierney, Esq., Office of Attorney General Patrick Lynch, 150 South Main Street, Providence, RI, 02903; Dennis Baluch, Esq., Baluch, Gianfrancesco, Mathieu & Szerlag, Attorneys At Law, 155 South Main Street, Providence, RI, 02903; William Maaia, Esq., Law Offices, 349 Warren Avenue, East Providence, RI, 02914; John A. Langlois, Esq., Office of Legal Services, RIDEM, 235 Promenade Street, Providence, RI, 02908; and, to Leo Hellested, Office of Waste Management, RIDEM, 235 Promenade Street, Providence, RI, 02908, on this 15 day of June, 2005.

Kay A. Costa

STATE OF RHODE ISLAND  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: POND VIEW RECYCLING INC.  
Appeal of Construction  
and Demolition License

AAD# 03-001/WMA

PETITION FOR DECLARATORY RULING

Now comes Attorney General Patrick C. Lynch, and pursuant to Rhode Island Gen. Laws §42-35-8 and Section 6.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management, hereby petitions the Director of Environmental Management for a Declaratory Ruling.

1. The statute, rule, and Orders on which the declaratory ruling are sought are:

- (a) R.I. Gen. Laws §42-17.7-8 entitled “Oaths – Subpoenas – Powers of Hearing Officer;”
- (b) Administrative Adjudication Division Rule 15(K)(4) entitled “Contumacy;” and
- (c) The May 14, 2004 Orders of A.A.D. Hearing Officer Mary McMahon, which were issued to the RIDEM Chief of the Office of Waste Management Leo Hellested, to answer a question posed by the Attorney General at the administrative hearing in the matter of In Re Pond View Recycling, Inc. A.A.D. No. 03-011/WMA. (See Ex. A. Transcript, May 14, 2004, p. 36 “I am ordering you to answer the question”).

R.I.D.E.M.’s Rules of Practice and Procedure for its Administrative Adjudication Division authorize the issuance of subpoenas requiring the attendance and testimony of witnesses that may be necessary or proper for the determination and decision of any question, See: Rule 15(k). Rule 15(K)(4), entitled “Contumacy” provides: “In cases of contumacy or refusal to obey

the command of the subpoena so issued, the Superior Court shall have jurisdiction in accordance with R.I. Gen. Laws § 42-17.7-8.”

R.I. Gen. Laws § 42-17.7-8, entitled “Oaths – Subpoenas – Powers of hearing officers” provides in pertinent part that Administrative Adjudication Division hearing officers are empowered to summon and examine witnesses and compel evidence necessary for the determination and decision of any question before the Administrative Adjudication Division, and that:

“In cases of contumacy or refusal to obey the command of the subpoena so issued, the superior court shall have jurisdiction upon application of the director with proof by affidavit of the fact, to issue a rule or order returnable in not less than two (2) nor more than five (5) days directing such person to show cause why he or she should not be adjudged in contempt. Upon return of such order, the justice before whom the matter is brought for hearing shall examine under oath such person, and such person shall be given an opportunity to be heard, and if the justice shall determine that this person has refused without reasonable cause or legal excuse to be examined or to answer a legal or pertinent question, he or she may impose a fine upon this offender or forthwith commit the offender to the adult correctional institutions until he or she submits to do the act which he or she was so required to do, or is discharged according to law.

As demonstrated by Ex. B “Affidavit of Special Assistant Attorney General Terence J. Tierney,” and Ex. A “Transcript of May 14, 2004, Hearing, p. 36”:

- 1) the clerk of RIDEM’s Administrative Adjudication Division issued subpoenas at the request of Petitioner to certain witnesses employed by RIDEM in order to compel them to provide evidence that had been deemed by the hearing officer to be necessary and proper for the determination and decision of the appeal pending before her in this matter;

- 2) the first of the several witnesses under subpoena, i.e. Leo Hellested, appeared and initially obeyed the command of the subpoena by testifying that he makes recommendations on whether to issue or deny applications for solid wastes licenses and in the process of doing so consults the rules and regulations promulgated by RIDEM;
- 3) counsel for RIDEM's office of Waste Management objected when Mr. Hellested was asked if said regulations "contain provisions relative to construction demolition and debris processing facilities" on the ground that the question allegedly called for the witness to provide "expert testimony";
- 4) the hearing officer decided that the question at issue did not seek expert testimony, overruled the objection of counsel, and repeatedly ordered the witness to answer the question; and
- 5) notwithstanding the command of a valid RIDEM subpoena, and the direct order of the A.A.D. hearing officer, the witness refused to provide the necessary and proper evidence required of him.

2. Your Petitioner is affected by the statute, rule, and Orders as follows:

(a) R.I. Gen. Laws § 42-17.7-8:

The hearing officer's Order's at issue directly affect the Petitioner in that they require the witness to provide crucial testimonial evidence which is not only relevant and proper, but also necessary for the hearing officer's determination of the issues raised in the license appeal being heard by her. The Orders protect the rights of the Petitioner, as a party appealing the DEM's decision to allow a construction and demolition debris facility to more than triple the size of its

operations, by permitting him to present essential evidence germane to the issues being decided in the appeal.

RIDEM's Rule 15(K)(4) adversely affects the procedural, substantive, constitutional, and common law rights of the Petitioner to present necessary and relevant evidence to RIDEM's hearing officer, by stripping the hearing officer of her statutory authority under R.I. Gen. Laws § 42-17.7-8 to "summon and examine witnesses and to compel the production and examination of . . . legal evidence that may be necessary or proper for the determination and decision of any questions before . . . the hearing officer." The process RIDEM relies upon under Rule 15(K)(4) is unlawful and violative of due process of law.

R.I. Gen. Laws § 42-17.7-8 affects the Petitioner's rights in a way which will protect his rights only if the Director chooses to invoke the Superior Court's jurisdiction to enforce the subpoena issued by RIDEM, and in this matter RIDEM has not only failed to do so but has actually resisted the Petitioner's efforts to enforce the very subpoena which the Department issued.

A statement of uncontested facts upon which this request is based is attached hereto as Exhibit B "Affidavit of Special Assistant Attorney General Terence J. Tierney."

3. The ruling is sought as a result of Superior Court proceedings entitled "In Re: Petition to Enforce Subpoena" CA# 04-2899":

Faced with the refusal by a RIDEM employee to obey the command of a valid subpoena issued by his own department, and the further refusal by the witness to follow the direct orders of a hearing officer employed by his agency, and RIDEM's counsel's instruction to the witness not to answer the question he was ordered to respond to, the Attorney General was forced to resort to

the Superior Court to seek enforcement of the subpoena, and therefore filed a Petition to Enforce Subpoena.

Judge Rubine conducted a hearing on the matter on April 18, 2005, wherein RIDEM asserted that the Court lacked jurisdiction over the Petition because it allegedly had not been brought by, or on behalf of, the Director. Judge Rubine observed that the customary administrative hearing process involves allowing hearing officer's to make rulings which counsel and witnesses then abide by, and that any objections thereto are preserved on the record and resolved on appeal, but that in this matter after the hearing officer had ruled against it. RIDEM appeared to be trying to force an intermediate appeal before the hearing concluded.

The Court further opined that the matter involved an evidentiary ruling and RIDEM had to "live with" such rulings and had no authority to instruct the witness to refuse to comply with the hearing officer's rulings on such questions. After asking counsel whether the RIDEM Director wouldn't want to "keep sacred" the hearing officer's rulings, and characterizing the issue as not "whether the hearing officer was right, but if she has the authority to make a ruling which is enforceable in the hearing" Judge Rubine declared that he was "troubled" by RIDEM's position and asked that the Director of RIDEM appear before him personally in order to determine whether he supported the position espoused by RIDEM.

A further hearing was held on May 4, 2005, but RIDEM's Director did not attend and counsel were "not sure" when he would be available. Judge Rubine stated that he assumed any director, when faced with a witness who refused an order to testify would argue the witness is obligated to obey it, and if the current director fails to support the hearing officer's discretion and authority, and declines to enforce the subpoena he wanted to know that — "on the record" so the he may "consider my options."

4. The statute, rule and Orders should be interpreted as follows:

The hearing officer's order at issue should be interpreted as a valid ruling made with full statutory authority to which her own agency is bound to follow.

Rule 15(K)(4) as written should be interpreted as a fundamentally unfair, flawed, unlawful, and one-sided rule which purports to strip the hearing officer of her statutory power to compel evidence.

The statute should be interpreted as one imposing a duty upon the director to enforce the subpoenas issued by his or her department and the rulings thereon of hearing officers serving RIDEM and the public.

In La Petite Auberge, Inc. N. R.I. Commission for Human Rights, 419 A.2d 274 (1980) the Rhode Island Supreme Court considered the extent to which "basis fairness require[s] the commission to make its subpoena powers available to respondents," Id., at 280, and held that "if fairness is to characterize the hearing, discovery may not be unilateral." Id., at 281. The Court cited the case of Shively v. Stewart, 65 Cal.2d 475, 421 P.2d 65 (1966) and agreed with "this fairness principles enunciated in Shively" to the effect that "the procedures mentioned in the statutes may be augmented by the common law when fairness requires additional safeguards" Id., at 281-282.

5. Other persons who may be affected if the Department adopts the Petitioner's position include:

The general public, and all business entities in this state which appear before RIDEM's A.A.D. will be affected if the department provides a level playing field for the first time by allowing all parties, not just itself, to compel necessary evidence.

6. The Petitioner has the aforementioned matter pending in the Providence County Superior Court which may be affected by the declaratory ruling sought herein.

In addition, all other administrative hearings that involve subpoenas which are now pending at the A.A.D., and all such proceedings which will hereafter be filed, will be affected by the Director's ruling on this Petition. The A.A.D. rules which now exist purport to allow only RIDEM itself, rather than all participants to the A.A.D. hearing process, to enforce the RIDEM hearing officer's directives to witnesses who are under the command of subpoenas issued by the Department. Such a rule is fundamentally unfair to all litigants except RIDEM itself, which it appears promulgated the rule in a way which gives itself an undue advantage in the administrative hearing process by being able to compel and secure relevant and necessary testimony while denying such a basic right to those appealing its decisions. Such a "one-sided" rule of procedure is violative of due process of law on its face, and as applied in this case (and as it will be applied in any similar circumstances). Each and every decision rendered by the A.A.D. is made based on Rules of Practice and Procedure which contain this unfair and prejudicial provision, and consequently all such decisions may be of questionable legal validity, and are clearly susceptible to being overturned on appeal by the Superior Court under the Administrative Procedures Act (see R.I. Gen. Laws 42-35-15(g) "The Court may . . . reverse or modify the decision if . . . (3) made upon unlawful procedure."

### Conclusion

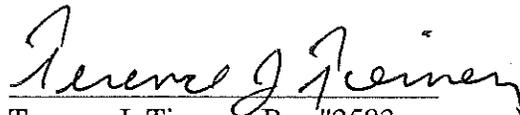
In the interest of fundamental fairness and the determination of the facts, the Petitioner requests that the Director give effect to the rulings of the Hearing Officer employed by RIDEM.

As the R.I. Supreme Court has observed "not unlike a Court trial, an administrative hearing involving serious charges of violation of law should be 'less a game of blindman's bluff

(than) a fair contest with the basic issues and facts disclosed to the fullest practicable extent." La Petite Auberge, supra, at p. 282 (citing U.S. vs Proctor & Gamble Co., 356 U.S. 677, 682 (1958)).

PETITIONER,  
ATTORNEY GENERAL  
PATRICK C. LYNCH

By his Attorney,



Terence J. Tierney, Bar #2583  
Special Assistant Attorney General  
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**CERTIFICATION**

I hereby certify that a true copy of the within Petition for Declaratory Ruling and supporting documents was mailed, postage prepaid to: Dennis Baluch, Esq., Baluch, Gianfrancesco, Mathieu & Szerlag, 155 South Main Street, Providence, RI 02903; William Maia, Esq., 349 Warren Avenue, East Providence, RI 02914; John Langlois, Esq., Office of Legal Services, RI DEM, 235 Promenade Street, Providence, RI 02908; Leo Hellestead, Esq., Office of Waste Management, RI DEM, 235 Promenade Street, Providence, RI 02908; and the Honorable Kathleen Lanphear, Chief Hearing Officer, Admin. Adjudication Division, RI DEM, 235 Promenade Street, Providence, RI 02908, on this 12<sup>th</sup> day of May, 2004.



**EXHIBIT LIST**

- A) Transcript of hearing, May 14, 2004, p. 36.
- B) Affidavit of Special Assistant Attorney General Terence J. Tierney.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
OFFICE OF THE DIRECTOR

In Re: **Pond View Recycling, Inc.**

**OFFICE OF WASTE MANAGEMENT'S OBJECTION TO  
PETITION FOR DECLARATORY RULING**

INTRODUCTION

Now comes the DEM Office of Waste Management (hereinafter, "OWM") and hereby responds to the Petition for Declaratory Ruling filed by the Rhode Island Attorney General (hereinafter, "RIAG") on May 12, 2005.

A well-known legal maxim sets forth, "*Ab abusu ad usum non valet consequentia*" which means, "A conclusion about the use of a thing from its abuse is invalid." Black's Law Dictionary, 7<sup>th</sup> Ed., p. 1616.

The result sought by the RIAG in his Petition is the product of an abuse of the administrative process by the RIAG so egregious that it has never before occurred in the history of the Rhode Island Department of Environmental Management. Indeed, Superior Court Judge Silverstein characterized this entire matter as "unseemly."<sup>1</sup> The OWM concurs with the Superior Court's assessment and implores the Director to use his response to this Petition to re-focus this appeal on completing the administrative hearing.

With his Petition, the RIAG is attempting to goad the DEM into a Superior Court duel on

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<sup>1</sup> During an *in camera* conference with parties on June 8, 2004, Judge Silverstein strongly urged the parties to settle this matter to spare the taxpayers of Rhode Island further wasted resources. In response to the judge's entreaty, the OWM made several efforts to resolve this matter. Each of these efforts was rebuffed by the RIAG. It should also be

the authority of DEM to enforce its own rules. Such a Superior Court battle has the potential to diminish the power of the DEM Director and embolden the parties suing the Department. Joining the Superior Court action will also indefinitely delay the adjudication of the ultimate issue in this appeal, which is the validity of the Pond View solid waste license.

Pond View deserves a timely determination on its license. The RIAG's appeal has already dragged on for over two years with no end in sight. The Director should take this opportunity to redirect the parties toward the goal of completing the administrative hearing so Pond View may obtain closure on its license.

#### FACTS AND TRAVEL

Pond View Recycling, Inc. (hereinafter, "Pond View") is a recycling facility doing business at 1 Dexter Road, in the City of East Providence, Rhode Island. Pond View recycles construction and demolition debris ("C&D"). In its recycling process, Pond View receives C&D that would otherwise be destined for the Central Landfill and reuses much of the waste and sends the residue to Ohio for disposal. Pond View removes and reuses metal, wood, plastic and concrete from the C&D waste stream. The recycling objectives at the Pond View facility are heartily encouraged by the Department of Environmental Management.<sup>2</sup>

Pond View has been operating since obtaining a C&D recycling registration from DEM in 1997. At that time, the facility was limited to 150 tons of C&D per day.

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noted that the OWM is the *only* party in this action that has initiated any settlement discussions.

<sup>2</sup> "Provision for necessary, cost efficient, and environmentally sound systems, facilities, technology, and services for solid waste management and resource recovery is a matter of **important public interest and concern**, and action taken in this regard will be for a **public purpose and will benefit the public welfare . . .**" R.I. Gen. Laws §23-19-2(8) 2001 Reenactment. (Emphasis added.)

In July of 2000, Pond View submitted an application to renew its 150 ton per day registration. On August 22, 2000, the OWM notified Pond View that the Rhode Island Refuse Disposal Act had been amended and the maximum amount of C&D accepted at a registered facility was now fifty (50) tons per day. The very next day, Pond View filed with the OWM a new application and Ten Thousand (\$10,000.00) Dollar fee for a license to operate a 500 ton per day Construction and Demolition Debris Processing Facility.

The OWM reviewed and commented on Pond View's application and Pond View submitted a substantial amount of additional material to support its application at the request of the OWM. On July 3, 2002, the OWM issued a Notice of Intent to Issue License. As required by the Rhode Island Refuse Disposal Act, an informational workshop was held by OWM on July 24, 2002. At this workshop, the applicant was given the opportunity to explain its application and the public was afforded the opportunity to ask questions of the applicant and of the OWM. The OWM also conducted public comment hearings on September 10 and September 11, 2002. Following the September 11, 2002 hearing, the OWM accepted written comments on the application for another thirty (30) days.

On January 10, 2003, the OWM notified Pond View that the application review was completed and that Pond View's application for a license to operate a C&D processing facility for 500 tons per day was approved. On April 1, 2003, the RIAG filed a request for hearing at the DEM Administrative Adjudication Division.<sup>3</sup>

This appeal by the RIAG is unique. Never before has the RIAG appealed a DEM license decision. Never before has the RIAG even attempted to interfere with a licensing decision by the DEM. Never before have the lawyers in the Attorney General's Office sought to substitute their

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<sup>3</sup> Two other parties (the East Providence Coalition and Save the Bay) also entered the AAD appeal, but have

judgment for that of the scientists, biologists, engineers and technicians at DEM who reviewed the license application.<sup>4</sup> Never before has the RIAG attempted to usurp the regulatory authority of DEM. The net result of this RIAG action has been this rock fight between two agencies of the State that has dragged on for over two years.

After a one-year delay by the RIAG in prosecuting its appeal, the administrative hearing commenced on April 12, 2004. The RIAG called a neighbor of Pond View and a wetland biologist hired by the RIAG. The RIAG also attempted to subpoena seven witnesses who are employed by the Department of Environmental Management, but the subpoena was defective and had to be reissued. After re-issuance of the subpoenas, the RIAG called the Chief of OWM, Leo Hellested, to testify.<sup>5</sup>

Prior to Mr. Hellested's testimony, counsel for the OWM had informed the RIAG that the DEM would object to any DEM personnel being compelled to testify as an expert. The OWM offered any and all Department personnel as fact witnesses only. The OWM also filed a motion *in limine* to resolve the expert witness question, but Hearing Officer McMahon ruled that she would not address the issue until a DEM witness was asked an expert question.

Shortly into his testimony, Mr. Hellested was asked, "And do those (solid waste) regulations contain provisions relative to construction, demolition and debris processing facilities?" May 14, 2004 Transcript, p. 32.<sup>6</sup> OWM counsel objected that the question called for expert

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subsequently withdrawn from the appeal.

<sup>4</sup> Although the RIAG asserts that the DEM was incorrect in its technical analysis of the Pond View application, the RIAG did not hire its own consultant until five months after filing the appeal. The fallacy of the RIAG's position, therefore, is readily apparent in that he did not have any qualified individual to review the Department's decision at the time he filed the administrative appeal.

<sup>5</sup> As of this date, the RIAG has never made payment of the witness fees due to the DEM witnesses as required by R.I. Rules of Civil Procedure Rule 45(b); R.I. Gen. Laws §9-27-7 and 42-17.7-8. In addition, the subpoenas were sent to OWM counsel and were not served upon the individual DEM witnesses as required by R.I. Rules of Civil Procedure Rule 45(b) and R.I. Gen. Laws §9-17-4.

<sup>6</sup> This memo will explain in detail later why this question seeks expert testimony.

testimony by Mr. Hellested about the content of DEM Solid Waste Regulations. The Hearing Officer overruled the objection stating, "I don't believe that's expert testimony at this point. It's overruled." May 14, 2004 Transcript, p. 33. When counsel for OWM pointed out that, under the AAD enabling statute, only the Superior Court has the power to enforce an AAD subpoena, the Hearing Officer agreed, stating, "Based on the statute, 42-17.7-8, as everybody here knows, or as legal counsel knows, **I have no authority by statute to compel this witness to answer this question, or any other question.**" May 14, 2004 Transcript, pp. 37-38 (emphasis added.). Instead, she asked the RIAG whether he would pursue this matter in Superior Court and the RIAG agreed to do so. The testimony was halted by the hearing officer to allow the RIAG to appear in Superior Court.

On June 2, 2004, the RIAG filed a Petition to Enforce Subpoena in Superior Court.<sup>7</sup> The parties met with Judge Silverstein in June of 2004. The Judge did not take any action on the matter, but recommended that the parties pursue settlement through the intervention of the Governor's Office. The parties then met with the Governor's Office in the Summer of 2004, but no settlement was achieved.

By February of 2005, the RIAG had taken no action on either the AAD appeal or the Superior Court Petition so the Hearing Officer rescheduled the matter for hearing in late February. The RIAG immediately requested that the Superior Court stay the AAD appeal until he could adjudicate the Superior Court matter. A 30 day stay was granted by the Superior Court, but again the RIAG failed to proceed on either action during the 30 day stay.

In April, 2004, the Superior Court matter was transferred from Judge Silverstein to Mr. Justice Rubine. Judge Rubine agreed with Judge Silverstein's opinion that the matter was

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<sup>7</sup> As with the subpoenas, this Superior Court petition was never properly served upon the RIDEM, but was merely

“unseemly”. OWM counsel moved to dismiss the Superior Court petition because the applicable statute only allowed the DEM Director (and not the RIAG) to file an action to enforce an AAD subpoena. The judge reviewed the statute, but refused to rule on the motion to dismiss. Instead, the judge said that he would like to hear from the Director personally on the issue. OWM counsel informed the Court that the Director’s position was in transition so the court re-scheduled the hearing.

At the second hearing before Judge Rubine, DEM Executive Counsel informed the Court that an Acting Director had been appointed only two days before. The Judge asked if there was an alternate procedure to get this matter before him without bringing in the new Director. OWM counsel suggested a petition to the Director for a declaratory ruling under the DEM Rules and Regulations. The Court agreed and ordered the RIAG to file such a petition as soon as possible. The Court then stayed the AAD testimony by any DEM witnesses for twenty days to allow the petition to be filed.

## DISCUSSION

### I. Authority of AAD Hearing Officers by Statute

Rhode Island General Laws Title 42, Chapter 17.7 created the DEM Administrative Adjudication Division (“AAD”). R.I. Gen. Laws § 42-17.7-1 *et seq.* The first section of the statute established the Division and then set forth that, “[s]uch division shall exercise its functions under the control of the director of environmental management.” R.I. Gen. Laws § 42-17.7-1. The

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mailed to OWM counsel.

statute went on to require that regulations governing AAD hearings be promulgated by the director. R.I. Gen. Laws § 42-17.7-2. The statute also provides that, following an AAD hearing, the hearing officer is required to submit to the Director written proposed findings of fact and proposed conclusions of law. R.I. Gen. Laws § 42-17.7-6(1). The Director then must exercise his discretion to adopt, modify, or reject the findings of fact and/or conclusions of law set forth in the recommended decision of the hearing officer. *Id.*

This AAD statute, therefore, is very clear that all of the power asserted by the hearing officers flow entirely from the office of the DEM Director. The DEM hearing officers have no independent authority. The first section of the statute unequivocally states that the hearing officers are “under the control of the Director”. R.I. Gen. Laws § 42-17.7-1. Even their decisions after hearing are merely “recommended decisions” for the Director’s review. There can be no dispute, therefore, that the AAD hearing officers have no independent authority other than that which they derive from the Director.

Section 8 of the AAD statute provides for the issuance of subpoenas for AAD hearings. R.I. Gen. Laws § 42-17.7-8. The AAD subpoenas are to be signed by a hearing officer or by the clerk of the AAD. *Id.* This section is so important that it should be repeated. The subpoena may be signed by *either* a hearing officer or the administrative clerk. Other than that subpoena authority also provided to the clerk, the statute grants no additional subpoena power to the hearing officers. Accordingly, if an AAD subpoena may be signed by either the clerk or the hearing officer, then the clerk shall have as much authority as the hearing officer with regard to subpoenas.

In addition to signing subpoenas, the AAD statute provides that the AAD clerk is in general charge of the office. R.I. Gen. Laws § 42-17.7-4. The clerk is also tasked with keeping the

full record of proceedings; filing and preserving documents; and preparing papers and notices for the director and the hearing officers. *Id.* Another of the duties assigned to the clerk of AAD is to issue subpoenas. *Id.* The signing of subpoenas is just another ministerial duty of the clerk. It would be ridiculous to conclude from the clerk's signature on the subpoena that the signature of the clerk somehow empowered the clerk to personally enforce the subpoena. The same conclusion should be drawn from the hearing officer's authority to sign subpoenas. The signature is a mere validation that the subpoena was issued from AAD. The signature should not be construed to mean that the clerk or the hearing officer is empowered to enforce the subpoena merely because they signed it.

The statute does *not* grant the hearing officers any power to enforce subpoenas. On the contrary, the statute expressly states that, “[I]n cases of contumacy or refusal to obey the command of the subpoena so issued, the superior court shall have jurisdiction upon application of the **director . . .**” *Id.* (emphasis added). Therefore, the DEM Director is the only authority with jurisdiction to enforce an AAD subpoena by petitioning the Superior Court. The hearing officers and clerk merely sign the subpoenas. The hearing officers and clerk have no power to enforce AAD subpoenas. On this point, the statute is absolutely clear.

## II. Hearing Officer's Position on Authority of AAD Hearing Officers

Hearing Officer McMahon herself stated on the record, “Based on the statute, 42-17.7-8, as everybody here knows, or as legal counsel knows, **I have no authority by statute to compel**

**this witness to answer this question, or any other question.”** May 14, 2004 Transcript, pp. 37-38 (emphasis added.) In making this statement on the record, Hearing Officer McMahon unequivocally articulated her clear understanding of the statute. The Hearing Officer’s understanding of the statute is consistent with the statute’s plain language.

“I have no authority . . .” *Id.* That statement espouses the same sentiment as the OWM with regard to the hearing officer’s enforcement powers. The hearing officer has no authority to order a witness to answer a question. The hearing officer may issue a subpoena, but the enforcement of that subpoena is vested exclusively in the Director through the Superior Court. The Hearing Officer’s legal conclusion in this regard is entirely correct: she has no authority.

### III. The Director’s Authority

The Director is the only entity allowed to seek enforcement of an AAD subpoena in Superior Court. R.I. Gen. Laws § 42-17.7-8. Section 8 of the AAD statute mentions only one Superior Court petitioner, the Director. *Id.* The hearing officer who signs subpoenas is not empowered to seek redress in Superior Court. The clerk who signs subpoenas is not so empowered. The party who requested the subpoena is not so empowered. The statute is unambiguous: only the Director may petition the Superior Court to enforce an AAD subpoena.

Judge Rubine agreed with this interpretation of the statute after he reviewed the statute during the hearing. He immediately inquired of the RIAG how the RIAG had standing to petition the court when the statute was so clear that only the Director could file such a petition. The RIAG responded that, on this occasion, he was “standing in the shoes of the DEM Director.” This

assertion by the RIAG was so patently absurd that the judge quickly moved on to another subject. It is important to note, however, that Judge Rubine recognized that the statute was very clear that only the DEM Director may petition the court for enforcement of an AAD subpoena. That is why the judge requested that the Director appear to discuss whether the Director will be exercising his exclusive authority in this instance.

The Director's sole authority to enforce a subpoena is not "fundamentally unfair, flawed unlawful, and one-sided" as asserted by the RIAG in his Petition for Declaratory Ruling. Rather, this assertion by the RIAG demonstrates his utter lack of understanding of the administrative process.

The AAD exists under the control of the Director. The powers exercised by the AAD hearing officers are delegated to the hearing officers by the Director. The hearing officers' role is purely advisory. They hear evidence and make recommendations to the Director. The hearing officers do not decide cases. They merely advise the Director in much the same way as the DEM Office of Legal Services advises the Director. The Director may adopt the hearing officer's recommendations or he may reject the recommendations. The hearing officers recommendations are not binding. Other than orders concerning prehearing procedure, the statute does not grant the hearing officers any authority to issue orders. That is the administrative process at DEM.

When read in conjunction with the entire AAD statute, the section authorizing the Director to petition the Superior Court regarding AAD subpoenas is not unfair, flawed, unlawful or one-sided. Rather, the person with the ultimate authority at DEM, the Director, is empowered to seek redress in Superior Court. The subpoena is the Director's order to appear, not the hearing officer's or the clerk's or the party who requested the subpoena. Logically, it would be the

Director, therefore, who should seek to enforce his subpoena in Superior Court. The statute is entirely consistent with this logic in that it authorizes only the Director to petition the Superior Court and no one else.

In his Petition for Declaratory Ruling, the RIAG asserts that the hearing officer's "order" is being ignored. As set forth herein, the hearing officer had no authority to issue such an order. In fact, after issuing such an order, the hearing officer later corrected herself and admitted that she had no authority to compel the witness to answer. Therefore, no order of the hearing officer was ignored by Mr. Hellested.

#### IV. Unique Circumstances

The circumstances of this case are so unique that they warrant extraordinary treatment by the DEM Director. Due to the unprecedented actions of the RIAG, two agencies of the State of Rhode Island have been wasting vast taxpayer's resources on an ill-conceived and meritless matter that never should have been commenced. Even the hearing officer agreed during the hearing that, "this is a particularly unique case." April 20, 2004 Transcript, p. 74.

At stake in this appeal is the license of a multi-million dollar recycling operation that employs over sixty-five people. If the Department were to deny Pond View's solid waste license, the recycling facility would be forced to cease operation immediately. Such a closure would result in all of the C&D currently recycled by Pond View to be disposed at the already overburdened Central Landfill. The metal, wood and plastic from the C&D would not be recycled. The employees would be laid off. The economies of both the City of East Providence and the State of Rhode Island would suffer. The consequences of this license denial would be grave indeed.

When the need arises, however, the Department does not hesitate to close a facility. In recent memory, the Department has forced the closure of Global Waste Recycling, Inc.; Ocean State Steel; and New England Ecological Development. In each of these cases, however, the facilities had repeated environmental violations and posed a significant threat to the public health and the environment.

There is no such threat to the public health or the environment from Pond View. During the three-year application review, the Department scrutinized every potential impact of the Pond View operation on the environment. The Department analyzed data on surface water, stormwater runoff, groundwater, air quality, dust, soil contamination, and even noise and truck traffic. The Department found no impact that warranted a denial of the license.

The sole justification for this Pond View appeal is, and always has been, politics. The complaining neighbors of Pond View mobilized the local politicians who were campaigning for election during the time when the Pond View license was pending in 2002. The then-Attorney General Sheldon Whitehouse was campaigning for Governor. These politicians turned out in force at the public comment hearings to use the Pond View license as a campaign issue. It should be noted that since 2002 election concluded, not one politician or neighbor has complained to DEM about the Pond View facility. **Not one complaint has been filed at DEM against Pond View in over two years.**

Unfortunately, this political fiasco continues to not only waste taxpayer's money, but it also has the potential to create some extremely dangerous precedent for the DEM. This ugly battle between the two agencies has created unique legal questions that have never before been adjudicated.

One of these unique legal questions involves the RIAG calling DEM personnel as the expert witnesses for the RIAG. Rather than prove his case by hiring his own experts as is done in every other AAD and Superior Court case, the RIAG has subpoenaed DEM witnesses to testify on his behalf despite the fact that the DEM is the adverse party in the action. On many, many occasions the DEM has objected to any attempt to compel DEM personnel to be free experts. This issue arises frequently because private litigants would like to elicit the expert testimony of DEM scientists, biologists, engineers, surveyors and technicians for free rather than hire private experts as witnesses. The DEM has always steadfastly refused to become a free expert witness service.

In the instant matter, the RIAG asserts that the DEM personnel are State employees and the RIAG represents the State, so the DEM personnel should be his witnesses. The RIAG stated that he could compel any state employee, including the Supreme Court Chief Justice or the Governor, to appear at the RIAG's beck and call because "no man is above the law."<sup>8</sup> Neither Hearing Officer McMahon nor Judge Silverstein saw any merit in that argument.

Hearing Officer McMahon, however, did allow the RIAG to call DEM witnesses. When DEM objected that DEM personnel should not be compelled to provide expert testimony, the hearing officer ruled that she could not decide that issue until she heard each question posed to the DEM employees. This odd ruling opened the door to the situation that now confronts this Director.

During the hearing, the RIAG asked a question of DEM employee, Leo Hellested. OWM counsel asserted that the answer to the question would constitute expert testimony. The hearing

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<sup>8</sup> This presumes of course, that the RIAG is "the law".

officer disagreed and initially ordered the witness to answer. She then changed her mind and opined that she had no authority to compel him to answer the question.

This situation created various issues. One such issue is whether the question posed by the RIAG to Leo Hellested sought expert testimony. The OWM asserts that the answer would very clearly be expert testimony pursuant to the Rhode Island Rules of Evidence. Rule 702 defines expert testimony as “specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact at issue.” R.I. Rule of Evidence, R. 702. The Rhode Island Supreme Court further refined expert testimony to be testimony “of a mechanical, scientific, professional or like nature, none of which is within the understanding of [a] layman of ordinary intelligence and where the witness seeking to testify possesses special knowledge, skill or information about the subject matter acquired by study, observation, practice or experience.” Morgan v. Washington Trust Co., 105 R.I. 13, 249 A.2d 48 (1969).

The question asked by the RIAG to Mr. Hellested very clearly fit into the definition of expert testimony. The RIAG asked the Chief of the Office of Waste Management whether the DEM Solid Waste Regulations were applicable to construction and demolition debris. Clearly, the RIAG asked Mr. Hellested that question because Mr. Hellested “possesses special knowledge, skill or information” about the Solid Waste Regulations that his office administers. Would a layperson of average intelligence know the answer to that question? Absolutely not. The average person in Rhode Island would not be able to answer a very specific question about the content of the DEM Solid Waste Regulations. The question was posed to Mr. Hellested precisely because this witness is an expert on the Solid Waste Regulations. Therefore the testimony sought was expert testimony.

In addition, the information sought by the RIAG's question was a subject matter requiring specialized knowledge "of a mechanical, scientific, professional or like nature". The question posed was very specific to the content of the DEM Solid Waste Regulations. Knowledge of the intricacies of the Solid Waste Regulations is most definitely "specialized knowledge". Mr. Hellested gained this knowledge through "study, observation, practice or experience" as a long-time employee of the Office of Waste Management. Clearly, his answer would have been "specialized knowledge" of a "professional nature". As such, his answer would have met the definition of expert testimony. Accordingly the hearing officer's ruling was incorrect.

Ordinarily, the OWM will accept a ruling with which it disagrees and proceed with the hearing. In the unique circumstances of this case, however, the OWM had no choice but to refuse to answer the question when the hearing officer ruled incorrectly. If Mr. Hellested had answered that question, he would have opened a "Pandora's Box" that could not be closed. The RIAG would have continued to ask more and more expert questions and Mr. Hellested would have been required to answer. The OWM would be without recourse to stop the questioning and the witness would, in effect, be compelled to provide expert testimony. This result would establish a model for the RIAG to question the other six DEM witnesses.<sup>9</sup>

Further, the hearing officer admitted several times on the record that she was willing to let the RIAG introduce inadmissible and irrelevant evidence "just to get this (case) moving". The hearing officer said, "it gets to the point where it's better to get irrelevant information in than to continue with all of these objections and sustaining it, et cetera." April 20, 2004 Transcript, p. 85. The hearing officer went on to say, " we are going to have to move through this more quickly; and

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<sup>9</sup> This statement is not mere speculation. The RIAG attempted just such a strategy during depositions of two DEM experts in the Pond View case.

I'm going to recognize that there are going to be a lot of times when I am going to overrule your objection just to get this moving. Okay?" April 20, 2004 Transcript, p. 85.

Did the hearing officer also overrule the objection of the OWM on this question merely to keep this case moving? If so, then the potential exists for a flood of expert questions from the RIAG if the hearing officer refuses to sustain objections merely because she wants to speed up the hearing. The OWM submits that the consequences are so significant in this case that the witness was justified in refusing to answer the question despite the hearing officer's ruling.

#### V. Dangerous Precedent

It is often said that, "Bad cases make bad law." This Pond View case is so bad that its aftereffects threaten to disrupt the Department for years to come. The potential for a very dangerous precedent from this case is very real for the Department. For instance, query: how does the Department respond in the next AAD matter when the opposing side calls DEM employees as that party's expert witnesses? Do DEM employees have to appear at every such hearing and have each expert question litigated to determine whether this witness should answer that one question? Such testimony would be an enormous drain on Department resources.

This case is being closely monitored by other opponents of DEM. If the RIAG is allowed to establish a procedure to compel DEM personnel to provide free expert testimony, then other opponents of DEM will surely use the same tactic.

The potential also exists for the Department to be subpoenaed into cases in which the DEM is not even a party. If the hearing officer's interpretation that she has to hear each question

to determine whether it seeks expert testimony is correct, then DEM personnel will be frequently called to testify in private civil matters until a judge hears the particular question. DEM personnel may also be deposed to provide free expert testimony to private litigants. At such a deposition, DEM employees will have no ability to refuse to answer the question because the issue of whether the question calls for expert testimony will not be resolved until after the deposition. Clearly, this issue has colossal ramifications for the Department.

Indeed, this issue has ramifications for all State agencies. If DEM experts are compelled to provide expert testimony, should the same be expected of Department of Health doctors; Department of Transportation engineers; and Division of Taxation accountants?<sup>10</sup> The cost to the taxpayers is incalculable. This practice has to stopped immediately before the State is at the mercy of any litigant with a subpoena.

#### IV. Conclusion

As set forth herein, the OWM objects to the Petition for a Declaratory Ruling. The RIAG compelling the expert testimony of Mr. Hellested would be inconsistent with the statute and caselaw and would set a very ominous precedent. While the OWM recognizes that refusing to answer a question at AAD is an extreme measure, the consequences of answering justify the refusal on this rare occasion. The Director should assert his authority over AAD and not require Mr. Hellested to answer the question posed.

The consequences of not answering the question are very vastly different for the Department as opposed to the RIAG. The consequences to Department are much more significant

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<sup>10</sup> Such a prospect is precisely what moved Judge Silverstein to refer the parties to the Governor's Office.

consequences to the RIAG.

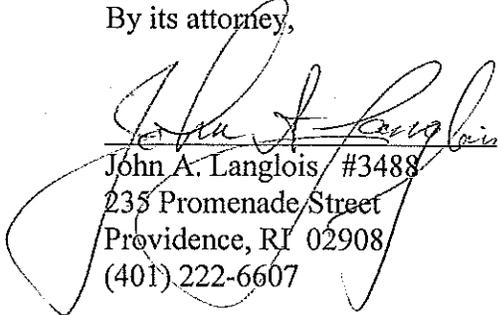
The direct impact on the RIAG of Mr. Hellested's not answering this single question is miniscule. If Mr. Hellested is not required to answer this question, then the RIAG may proceed with his case without Mr. Hellested's answer. In his post-hearing memorandum, the RIAG can use any such refusal to bolster his case. If he loses his administrative appeal, he may appeal to the Superior Court and re-argue the issue in that forum. Therefore, no grave harm will befall the RIAG if Mr. Hellested does not answer this question. Substantial recourse is available to the RIAG.

No such recourse is available to the OWM. If Mr. Hellested is required to answer the question, then the dangerous precedent described above will come to pass for DEM. DEM experts will become the marionettes of parties opposing the Department. DEM will be powerless to stop it. The OWM cannot appeal this decision to Superior Court. Therefore, the model for DEM employees to be compelled to answer expert questions will be firmly established. The entire DEM will suffer repercussions from this case that will resonate for years to come.

The RIAG attempts to portray the OWM refusal as an affront to the authority of the hearing officer. Nothing could be further from the truth. The OWM and its counsel have always treated the hearing officers with dignity and respect. In this case, the RIAG's perversion of the DEM administrative process has created this awkward situation. The RIAG should not be rewarded for this effort.

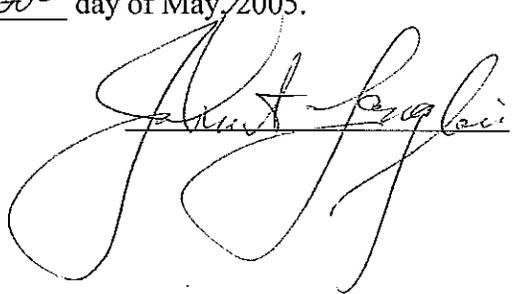
The OWM respectfully recommends that the Director deny the Petition for Declaratory Ruling. The Superior Court will then be without jurisdiction to hear the RIAG's petition to enforce the subpoena and the administrative hearing will be able to proceed to its conclusion. Only then will this two-and-a-half year fiasco move toward closure.

Respectfully submitted,  
Office of Waste Management  
By its attorney,

  
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#### CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the within Objection to be mailed, postage prepaid, to the parties on the attached list on this 20<sup>th</sup> day of May, 2005.

  
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STATE OF RHODE ISLAND  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: POND VIEW RECYCLING INC.

AAD# 03-001/WMA

ATTORNEY GENERAL'S REPLY TO O.W.M'S  
OBJECTION TO PETITION FOR DECLARATORY RULING

The only reason this Declaratory Ruling Petition and the related Superior Court action even exist is because RIDEM's Hearing Officer agreed with the binding caselaw precedent cited by the Attorney General and ordered a witness under subpoena to answer a routine question. The Office of Waste Management (OWM) chose to disobey the Hearing Officer's order and now asks the Director to join it in defying her lawful order. The Director should certainly decline to follow such bad advice.

Contrary to the OWM's accusation, no "egregious abuse of the administrative process" is involved with the Attorney General's attempt to merely enforce the direct orders of the Hearing Officer who is in charge of the administrative hearing.

The facts and travel of the case described by the OWM neglect to mention the long history of Pond View's repeated noncompliance with applicable RIDEM solid waste and freshwater wetlands regulations which are indisputable based on RIDEM's own records.<sup>1</sup> By its own account however, the OWM acknowledges that Pond View failed to apply for the license at issue until just 10 days before its existing "Registration" expired,

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<sup>1</sup> While too numerous to fully recount here, such noncompliance includes the failure to secure a required wetlands alteration permit, failures to comply with its approved Operating Plan, stockpiling of non-C&D trash, receipt of large quantities of non-C&D, inadequate drainage, etc.

and that RIDEM nevertheless allowed it to continue to operate on an expired Registration for another two and a half years.

In fact, the license application which Pond View was required to file was woefully deficient in a number of respects, and RIDEM could not approve it under applicable law. Rather than enforcing its existing rules, RIDEM instead coddled Pond View and shepherded it through the licensing process. In the process of doing so, and continuing through these license appeal proceedings, RIDEM has effectively abandoned its role as an objective enforcer of state environmental regulations and in essence has become the advocate for the licensee. Indeed, Pond View never filed a prehearing memorandum, and has chosen not to present any witnesses or documentary evidence of its own in the administrative hearing, relying almost completely upon D.E.M. to keep its license.

The O.W.M. apparently cannot accept the reality that its view of the controlling law is erroneous and has been repeatedly rejected by the Hearing Officer. For example, at the hearing conducted on April 13, 2004, the O.W.M. made a "motion in limine" to preclude the Attorney General from compelling expert testimony from D.E.M. witnesses, and in support thereof filed a legal brief containing the same arguments now raised in its objection. See: Transcript, 4/20/04, p. 39-49; On April 20, 2004 the Hearing Officer heard argument on O.W.M.'s motion and ruled:

"The parties are basically agreed that the general principle is that you cannot compel by subpoena, compel a witness for the other side to provide expert testimony. As both parties have recognized, however, the courts apparently have recognized exceptions to the rule, specifically Owens versus Silvia, which is a Rhode Island Supreme Court case that came down December 27, 2003.

And in that case the court recognized, well, if the general rule applied, that you cannot compel an expert, a

non-party expert, and as they specifically stated, absent extraordinary circumstances not present in this case, and then it goes to a footnote, but the quote continues, "a nonparty expert cannot be compelled to give opinion testimony against his or her will."

The footnote reads, as both parties have recognized, "Such circumstances might exist, for example, when there are no other experts available who can address the substance of the issues in the case or when the expert in question is uniquely qualified to do so." \*\*\* And as the Attorney General's office has pointed out, it's not so much a matter of the witnesses being expert in solid waste, solid waste management or in wetlands, but the specific focus that the Attorney General has established is the issue of DEM interpretation of the rules and regulations.

I recognize that this is fundamental to the Attorney General's case. Their request for hearing, as we've previously discussed, concerns whether DEM properly applied its own rules and regulations, both solid waste regulations and wetlands regulations.

Transcript 4/20/04 p. 71-73

Unwilling to accept the binding effect of this ruling, the O.W.M. on April 28, 2004 filed a Motion for Reconsideration of the decision, which by then was the established law of the case. Although the parties had agreed that this ruling on the expert witness issue was "clear enough." Id. p. 75, OWM's new motion alleged that it "creates more uncertainty than it resolves." This Motion again raised essentially the same arguments the O.W.M. persists in making in its objection to the Declaratory Ruling Petition. On May 14, 2004 the Hearing Officer determined that OWM's Motion for Reconsideration "misstates what my ruling was." Transcript, 5/14/04, p. 4. Given the Attorney General's position that RIDEM's application of its regulations was not consistent with its own interpretation of its rules, the Hearing Officer ruled:

"I have to have testimony as to how DEM interprets its regulations. Some of that may or may not require expert testimony.

The courts have also indicated in numerous cases that, as Mr. Tierney point out, that the administrative agency is accorded great deference in its interpretation of its regulations.”

My ruling, as I stated, of April 20<sup>th</sup> dealt specifically with the interpretation of the regulations, ...\*\*\*

And I do find it a little ironic that while in many other, largely in enforcement matters but in other matters too, that DEM offers their experts in interpretation of the regulations. In this case, they’re saying that there are other individuals out there who are experts in the interpretation of the regulations, which seems to be inconsistent with past practice.

But, in any case, I’ve considered what’s been provided by the parties in the motion to reconsider and in the objection, and I find that my ruling was appropriate back on April 20<sup>th</sup> and it stands. It will be narrowly applied. It is not as represented by Mr. Langlois in his motion to reconsider. The motion to reconsider is therefore denied.

Id. P 6-8

In denying OWM’s “Motion for Reconsideration” (Id. p. 8, 11, 15-16), the Hearing officer also denied OWM’s request for a stay of the hearing (in order to obtain a Declaratory Ruling from its own Director) after finding that “this is an evidentiary matter....” (Id. p. 12).

Had O.W.M. simply accepted the two separate rulings of the Hearing Officer on its two different motions, and/or the rulings made during the hearing itself, the hearing could have proceeded to a timely conclusion. Instead, the O.W.M. chose to openly defy such orders, forcing the Attorney General to resort to Superior Court litigation.<sup>2</sup>

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<sup>2</sup> “Hearing Officer McMahon:

Mr. Langlois are you trying to put yourself in a contempt situation?

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Mr. Langlois:

So if the Attorney General has a ruling from the Superior Court that this witness is required to answer them I’ll instruct this witness to answer, but until then, I submit that this witness should not be required to provide that answer”

Transcript, 5/14/05, p. 35.

Following a meeting convened to discuss a possible out-of-court resolution of the dispute, the Attorney General prepared and forwarded to RIDEM proposed stipulations concerning the testimony of the several witnesses under subpoena, but RIDEM declined to agree to a single one.

OWM's claim that its "moved to dismiss" the Attorney General's petition but the Superior Court "refused to rule" on it is simply erroneous. To date, RIDEM has not even submitted an Answer to the Petition, which was filed in June, 2004. The Superior Court Rules of Civil Procedure require all such dispositive Motions to be in writing and supported by a Memorandum of Law, and as the record reflects, RIDEM has never filed one.

OWM's claim that RIDEM Hearing Officers are "under the control of the Director," and "have no independent authority" and "merely sign the subpoenas" stands in stark contrast to the plain meaning of the words which were used by the R.I. General Assembly in expressly granting such Hearing Officers the statutory authority to:

"summon and examine witnesses and to compel the production and examination of... legal evidence that may be necessary or proper for the determination and decision of any questions before... the hearing officer."

RI Gen Laws § 42-17.7-8.

While O.W.M disputes the Attorney General's contention that the Director's refusal to enforce the subpoena issued by his own department is fundamentally unfair and one-sided, it at least acknowledges that "Logically, it would be the Director, therefore, who should seek to enforce his subpoena in Superior Court." O.W.M.'s objection, p. 11. We agree with this statement. The problem here is that this "logic" is not being followed

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by the Director, who to date has utterly failed to comply with his obligations to enforce his department's subpoenas, and worse – has actually allowed counsel of OWM to strenuously resist an attempt to enforce the RIDEM subpoena on his behalf.

O.W.M.'s contention that denial of Pond View's license to more than triple in size would require a closure of the facility, and that this would result "in all of the C & D currently recycled by Pond View to be disposed at the already overburdened Central Landfill" is a complete fabrication. As RIDEM is well aware, several other licensed C & D facilities exist to absorb the C & D now being processed at Pond View, and the law provides many options for continued operations (at legal limits) in the event the expansion license is deemed to have been improperly issued as the Attorney General contends.

Notwithstanding O.W.M.'s insistence to the contrary, whether public health and the environment are threatened by Pond View's massive expansion is the very question which the Hearing Officer now has before her. To determine such question, she should be allowed to hear the evidence she has ruled is necessary and proper.

Like its positions on the law relative to issuance of subpoenas, O.W.M.'s position with regard whether the A.G. sought "expert" testimony (in simply asking if the regulations relied on by RIDEM in granting the license "contain provisions relative to construction and demolition debris processing facilities") is simply erroneous. As the Hearing Officer has correctly ruled, "expert" testimony was not elicited by such examination. But, even if it were, the Attorney General has been deemed to be entitled to compel such testimony. As evidenced by the travel of this case, O.W.M. apparently has a difficult time accepting adverse evidentiary rulings, and moving on with the rest of the administrative proceedings.

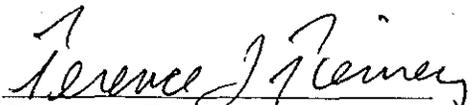
Finally, as demonstrated by the Hearing Officer's orders, the Attorney General has set forth a sound legal basis for all of his actions, and can only assume the O.W.M.'s reference to "politics" is yet another attempt to unfairly blame others for the results of its own disobedience to the commands of a valid subpoena and the Hearing Officer's orders.

CONCLUSION

Rather than joining in the O.W.M.'s disobedience, the Director should reign in the actions of the O.W.M. which have been taken in outright defiance of a valid RIDEM subpoena, and the Hearing Officer's orders. The Attorney General has every right to contest the license decision at issue, and the orders of RIDEM's own Hearing Officer demonstrate that a valid legal basis exists for the Attorney General's actions. The O.W.M. staff's reliance on the erroneous legal advice furnished in this matter has resulted in delays and litigation, which may quickly be ended by simply having RIDEM employees obey its own Hearing Officers.

PETITIONER,  
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PATRICK C. LYNCH

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CERTIFICATION

I hereby certify that a true copy of the within was mailed, postage prepaid, on this 26<sup>th</sup> day of May, 2005 to the following:

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Colleen Cole

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
OFFICE OF THE DIRECTOR

In Re: **Pond View Recycling, Inc.**

**OFFICE OF WASTE MANAGEMENT'S OBJECTION TO  
ATTORNEY GENERAL'S REPLY**

The "Reply" filed by the Rhode Island Attorney General ("RIAG") is procedurally improper and should be ignored. The DEM Rules of Practice and Procedure only allow for a petition and a response from the Division. There is no provision in the Regulations for "reply" memoranda or continuing debate beyond the initial petition and the Division's response. Therefore, the "Reply" is procedurally inappropriate and should not be considered.

Further, the allegations in the RIAG's "Reply" are factually inaccurate and legally defective. The OWM responds to these factual and legal deficiencies as follows:

1. The RIAG asserts that the OWM "coddled" Pond View by allowing Pond View to continue to operate while its license application was pending. The Rhode Island Administrative Procedures Act states, "Whenever a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court." R.I. Gen. Laws § 42-35-14(b). Therefore, the OWM was required by law to allow Pond View to continue to operate. OWM did not "coddle" Pond View. OWM

complied with the law.

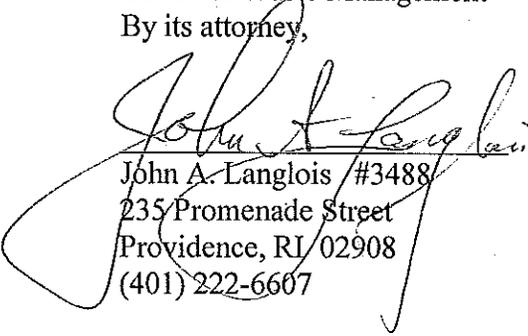
2. The RIAG asserts that Pond View did not apply to renew its registration until 10 days before its expiration. At a Prehearing Conference at AAD on March 25, 2004, the RIAG agreed to the following Stipulations, “3. The Pond View registration was valid for three years, expiring on **September 1, 2000**. 4. In **July of 2000**, Pond View submitted an application to renew the 150 ton per day registration.” AAD Prehearing Order dated March 30, 2004, p. 2 (emphasis added). The RIAG has stipulated that Pond View applied for its license **two months** before the registration expired. Despite agreeing to the dates in these Stipulations, the RIAG asserted in its “Reply” that “Pond View failed to apply for the license at issue until just 10 days before its existing ‘registration’ expired . . . .” RIAG Reply Memorandum, P. 1. This statement by the RIAG contradicts his own Stipulations.
3. The RIAG repeatedly misstates the rulings of Hearing Officer McMahon by taking many of her quotes out of context. When the Hearing Officer ruled on DEM witnesses being compelled to provide expert testimony, she expressly stated that she would have to hear the question posed prior to deciding whether the witness would be required to answer. Her statement was, “We’re going forward, and as far as the question-by-question basis, its only going to come when Mr. Tierney tries to elicit expert testimony. At that point I assume you will be objecting, and then I will have to determine whether the individual, based on questioning, is uniquely qualified. That to me is the test.” May 14, 2004 Transcript, pp. 15-16. The RIAG misstates this ruling by stating, “the Attorney General has been deemed to be entitled to

compel such testimony.” RIAG Reply, p. 6. The Hearing Officer never ruled that the RIAG was entitled to compel expert testimony. The Hearing Officer merely said that she had to hear the question first and then she would rule.

4. The RIAG also asserts that OWM never moved to dismiss the Superior Court petition. OWM counsel made an oral motion during the court hearing before Judge Rubine. Such oral motion is authorized by Rule 12(h) of the Rhode Island Rules of Civil Procedure which states, “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Rhode Island Rules of Civil Procedure, R. 12(h). Therefore, a written motion, supported by memoranda, is *not* required to make a motion to dismiss.
5. The RIAG also incorrectly asserts that other C&D processing facilities could easily absorb the C&D now processed at Pond View if Pond View were to close. That statement is false. The only other C&D processing facilities in Rhode Island are at capacity. The Coastal Recycling facility is limited to 50 tons per day. The Rhode Island Resource Recovery Corporation Recovermat facility closes its gates by 10:30 a.m. nearly every day because it has reached its C&D quota for that day. If Pond View were to close, the effect on the Rhode Island waste and construction industries would be monumental.

For the above reasons, the RIAG’s Petition for Declaratory Ruling should be denied.

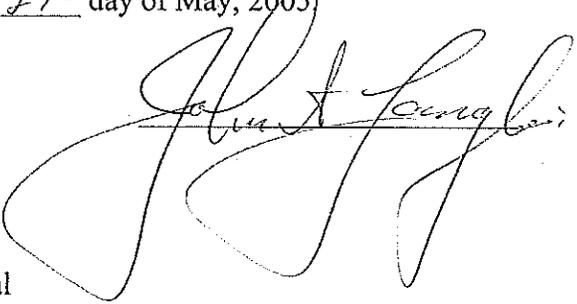
Respectfully submitted,  
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the within Objection to be mailed, postage prepaid, to the parties on the attached list on this 27<sup>th</sup> day of May, 2005



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