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

RE: ROLLINGWOOD ACRES, INC./SMITHFIELD PEAT CO., INC./SMITHFIELD CRUSHING CO., LLC NOTICE OF VIOLATION OC&I/WP 06-07

AAD NO. 06-004/WRE

DECISION AND ORDER

This matter has come before Hearing Officer David Kerins as the result of an Order and Final Judgment issued by the Honorable Patricia A. Hurst J. issued on September 3, 2013 (Attachment A). The Order and Final Judgment reflects the analysis and conclusions of law as stated in that certain Decision by Justice Hurst in a Superior Court appeal entitled Rollingwood Acres, Inc. et al v. Rhode Island Department of Environmental Management, et al C.A. No. PC 2012-6341 (Attachment B). The above referenced appeal was taken by Respondents, Rollingwood Acres, Inc., Smithfield Peat Co., Inc.. and Smithfield Crushing Co., LLC (the "Respondents" or "Rollingwood") from a Decision issued by this Hearing Officer on September 18, 2012 in the matter of Re: Rollingwood Acres, Inc./Smithfield Peat Co., Inc./ Smithfield Crushing Co., LLC Notice of Violation OC&I/ WP 06-07 AAD No. 06-004/WRE (Attachment C). The AAD Decision was issued in response to Respondents' Motion to Recover Litigation Expenses dated July 27, 2012 (Attachment D).

The AAD Decision (Attachment C) from which the Superior Court appeal was taken denied Respondents' Motion to Recover Litigation Expenses pursuant to R.I.G.L. § 42-92-1 seq the Equal Access to Justice for Small Business and Individuals Act ("EAJA"). In the AAD Decision, the Motion for Recovery of Litigation Expenses was denied on the grounds that the Respondents did not meet the requirements of EAJA due to the fact that they were not a "Party" by reason of the net worth requirement. This Hearing Officer did not rule on the remaining

factors for entitlement under EAJA because of his ruling on the fundamental question of standing as a "Party".

In her Order and Final Judgment in the Superior Court Appeal (Attachment A) Justice Hurst ruled that the AAD Decision "was affected by error of Law, in that it incorrectly determined that Plaintiffs are not a "party" within the meaning of the EAJA, by reason of the net worth requirement". In her Order, Judge Hurst ordered the matter to be "remanded to the Chief Hearing Officer to make findings of fact adequate to support conclusions of law whether Plaintiffs are entitled to reasonable litigation expenses, as set forth in written decision dated August 23, 2013". This decision will attempt to comply with the Court's direction.

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 (RI1972), Iorio v. Chin, 446 A2d 1021, 1022, (RI1982).

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 a preponderance of the

evidence. United States v. Yoffe 775 F2d 448, 450 (DRI1985).

In accordance with federal case law, Petitioners, as the moving parties, bear the burden of showing that they are a party within the meaning of the EAJA. If the Petitioners demonstrate that they meet 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.

Standard of Review

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. §42-92-3 and codified in AAD Rule 19.00. The EAJA states:

(a) Whenever the 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 proceedings 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, an informal disposition, or termination of the proceeding by the agency. The decision of the adjudicatory 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 award.

R.I.G.L. §42-92-4 **Procedures** provides that "any Agency authorized to conduct an adjudicatory proceeding shall, by Rule, establish uniform procedures for the submission and consideration of applications for an award under this section".

The Director of RIDEM pursuant to Chapters 42-35, 42-92 and 42-17.7 of the Rhode Island General Laws adopted Rules for the Administrative Adjudication Division ("AAD Rules"). Rule 20.00 of the AAD Rules entitled "Filing for Recovery of Litigation Expenses" provides

for the procedure and standard for the application for the award of reasonable attorney's fees pursuant to EAJA. In Rule 20.00 (f) Decision it states:

(1) "Except as provided in Rule 20.00 (f) (2), the AHO shall award reasonable litigation expenses to the Petitioner if he or she finds that the record in the case establishes by a preponderance of the evidence:

a. That the Petitioner is a Party as defined in the R.I.G.L. §42-92-2 (a);

b. That the Respondent has prevailed against the Division in the underlying Adjudicatory Proceeding;

c. That the Department instituted the underlying Adjudicatory Proceeding without substantial justification; and

d. The amount of reasonable litigation expenses as defined in R.I.G.L. §42-92-2 (c) which may include a recalculation of the expenses and a finding that some or all of the litigation expenses qualify as reasonable litigation expenses under the statute.

(2) a. The AHO shall deny an award of litigation expenses to the Petitioner if:

(i) The Petitioner failed to meet the burden of proof established in Section 20.00 (f) (1);

(ii) The Division was substantially justified in the actions leading to the proceedings and in the proceeding itself; or

(iii) The Division was charged by stature with investigating a complaint, which led to the Adjudicatory Proceeding.

b. The AHO may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust."

1. **Are the Petitioners Parties as defined in R.I.G.L. § 42-92-2 (5) ?**

In the previous AAD decision (Attachment C) this Hearing Officer found that

Petitioners were not "Parties" based on my interpretation of the net worth provision. In the Superior Court Appeal (Attachment B) Judge Hurst ruled that the net worth provision did not apply and that the petitioners were in fact entitled to bring the action as "parties". So based on Judge Hurst's decision and for the purposes of this decision the petitioners satisfy the statutory definition as "parties".

2. **Did the Petitioners prevail against the Division in the underlying Adjudicatory Proceeding ?**

On November 6, 2006, DEM issued a notice of violation, alleging that Plaintiffs had violated Sections 42-12-5 (a) and (b) of the Rhode Island Water Pollution Act; Rules 9(A), 11 (B), and 13 (A) of DEM's Water Quality Regulations; Section 46-12.5.1-3 of the Rhode Island Oil Pollution Control Act; Sections 6 (a), 12 (b) (2), and 12 (b) (3) of the DEM's Oil Pollution Control Regulations; and Rule 31 (a) (1) (vii) of the DEM's Regulations for the Rhode Island Pollution Discharge Elimination System. (Pls.' Ex. F, In re Rollingwood Acres, /Smithfield Peat Co., Inc./ Smithfield Crushing Co., LLC, No. OC&I/ Water Pollution 06-07, Rhode Island Department of Environmental Management Office of Compliance and Inspection, Hereinafter, ("NOV"), at 4-5.

Plaintiffs appealed the NOV to the Administrative Adjudication of DEM. After multiple Hearings in 2011 and 2012, this Hearing Officer issued a decision on June 27, 2012, dismissing a substantial portion of the allegations against Plaintiffs, all but approximately 7% of the fine imposed against Plaintiffs. (pls.' Ex. A, in re Rollingwood Acres, Inc./ Smithfield Peat Co., Inc./ Smithfield Crushing Co., LLC, AAD Decision.) In that Decision this Hearing Officer further concluded that the DEM had failed in its burden of proving any violation of the

Rhode Island Water Pollution Act or the DEM's Water Quality Regulations. Based on the above it is clear that the Petitioners prevailed in five (5) of the (6) charges in the NOV.

3. **Did the Division have "substantial justification" for initiating and proceeding with the Administrative Proceedings?**

The Division should be relieved from paying the Petitioners' litigation expenses if it can demonstrate "substantial justification" for its actions, in compliance with the EAJA. The "substantial justification" exception to the EAJA is found at R.I.G.L. §42-93-3(a), which states in pertinent part:

> "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 proceedings and in the proceeding itself."

"Substantial justification" is further defined in the EAJA to mean "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." R.I.G.L. § 42-93-3 (7).

a. **Was the Division "substantially justified" in initialing the Administrative Proceedings?**

The Division may qualify for the "substantial justification" exception to the EAJA if it demonstrates that under R.I.G.L. §42-92-2 (2) and AAD Rule 20.00(f)(2)(a)(iii) that it is per se substantially justified, it can meet the test outlined in R.I.G.L. §42-92-2(7).

The EAJA statute and the AAD Rules "create a legal presumption" that RIDEM when "charged by statute to investigate complaints is automatically substantially justified for investigating the complaint and any subsequent investigation." *Id.* The EAJA provides that

"[a]ny 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." R.I.G.L. §42-92-2(2). The AAD Rules state that OC&I is substantially justified if it "was charged by statute with investigating a complaint which let to the Adjudicatory Proceeding." AAD Rule 20.00(f) (2) (a) (iii).

In *In Re: Truk-Away*, the hearing officer evaluated RIDEM's "substantial justification" defense and said that "to determine if a complaint precipitated the actions taken by the Department....the Hearing Officer reviewed the evidence and testimony received during the administrative hearing." *In Re: Truk-Away* at 7. The hearing officer then looked at the evidence before her to determine whether RIDEM had "received a complaint....and as a result of that complaint conducted a routine investigation which subsequently led to the notice of violation and hearing" *Id.* The hearing officer in that case found that there was no *per se* "substantial justification" because "[i]n light of the testimonial and documentary evidence provided in the administrative hearing record, the Hearing Officer finds by a preponderance of the evidence that the [NOV] issued to the Respondent was not initiated upon a complaint against Truk-Away."

In the instant case the investigation was initiated as a result of a complaint filed by Bill Riccio of the Rhode Island Department of Transportation (RIDOT) on 12/3/96 (Exhibit R-T Full) (Attachment E). The complaint stated "Smithfield Peat has tied into the street drainage on Rt. 7 and is discharging silt laden (unreadable) into a wetland area". The testimony and evidence in this case shows that the investigations conducted at the subject property occurred because of a complaint that was reported to OC&I. The complaint resulted in site inspections,

where OC&I staff observed what they believed to be violations of the Rhode Island Water Pollution Act and the Rhode Island Oil Pollution Control Act. Once those observations occurred, OC&I was obligated, by statute, to enforce the provisions of the Rhode Island Water Pollution Act and the Rhode Island Oil Pollution Control Act.

The Petitioners point out that the NOV was not issued until ten (10) years after the initial "complaint". The fact is that the file opened as a result of the initial complaint was never closed. It remained open when Mr. Naumann stopped to re-inspect the subject property on February 9, 2005. The fact that OC&I attempted to resolve the matter without formal enforcement over the course of many years does not affect the fact that it was initially "substantially justified". The EAJA says that the "substantial justification" exception applies to investigations and subsequent proceedings: the exact language of the EAJA states that the "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". R.I.G.L. § 42-92-2(2) states that any subsequent actions taken by RIDEM are substantially justified, so long as the statute requires that RIDEM investigate a complaint.

These facts support OC&I's defense that, under the EAJA, RIDEM is an agency charged by statute with investigating complaints and "shall be deemed to have a substantial justification for the investigation and for the proceedings subsequent to the investigation." R.I.G.L. § 42-92-2(2). This *per se* "substantial justification is an exception to the Petitioners' motion and their demands for litigation expenses should therefore be denied.

b. **Was the Division "substantially justified" in proceeding with theAdministrative Proceedings?**

OC&I's initial position on this matter, to cite the Petitioners in the underlying NOV, and the continuation of its initial position at hearing was reasonable in light of the facts and applicable law. The most common way an agency demonstrates that it was substantially justified in its actions is to meet the test outlined in R.I.G.L. § 42-92-2 (7). This statute states

> (7) "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.

According to the Rhode Island Supreme Court, "[a]n award of attorney's fees will not be granted if the agency was substantially justified in its decision." *Krikorian v. D.H.S.*, 606 A2.d 671, 675 (R..I. 1993). Further, "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." *Taft v. Pare, 536 A.2d 888, 892(R.I. 1988).* The Rhode Island Supreme Court has further defined "substantial justification" as "encompassing agency decisions which are clearly reasonable, well founded in law and fact, solid though not necessarily correct." *Krikorian* at 675.

In Taft, the Rhode Island Supreme Court found, as a fact, that the Rhode Island Department of Motor Vehicles, without substantial justification, "deprived respondent licensee of the right to a hearing, which hearing the Legislature intended such a person to have when his or her license is suspended ex-parte." *Taft* at 892. In so finding, the *Taft* Court indicated the agency in question's position and actions violated state law and were therefore "not well founded in Law." *Taft* at 892-93

Here, the underlying NOV alleges that the Petitioners violated the Rhode Island Water Pollution Act R.I.G.L. § 46-12-5. That Act states:

> § 46-12-5 (b) It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and Regulations promulgated hereunder and pursuant to the terms and conditions of a permit.

According to the definitions section of the Rhode Island Water Pollution Act, R.I.G.L. § 46-12-1 (4) and (14), the term "discharge" means "the addition of any pollutant to the waters from any point source" and point source is defined as "any discernible, confined, and discrete conveyance, including, but not limited to, any pipe..." In this case, OC&I provided ample evidence at the hearing that turbid water, emanating from the Petitioners' property; the point source began at the time the turbid water entered the pipe on the Property.

It has always been RIDEM's position, throughout the hearing process, that regardless of the Petitioners' defense, the Petitioners are solely responsible for the turbid water coming from their property, under the Rhode Island Water Pollution Act, as the party "discharging" turbid water into water of the State R.I.G.L. §46-12-5 (b). That position was based on OC&I staff-conducted investigations at the subject property in accordance with state law and RIDEM regulations. RIDEM followed the requirements of the subject statute to conduct its initial investigations, to cite the responsible parties and to maintain its position at the administrative hearing.

OC&I's decisions were based on a third-party complaint, staff site inspections, staff observations, water quality samples taken by trained OC&I staff and analyzed by a laboratory; all procedures that are regularly employed by the agency to carry out RIDEM's obligations under state law. The issuance of the NOV and the conduct and position at the hearing were "clearly reasonable" and "well founded in law and fact." *Taft* at 892-93. Also, even though this hearing officer disagreed with the case presented by OC&I, that disagreement does not rise

to the level of "arbitrary and capricious" as the *Taft* Court described. OC&I's position satisfied the standard of "solid though not necessarily correct" as outlined by the *Krikorian* Court. *Krikorian* at 675.

4. **Are the Litigation Expenses requested by the Petitioners "Reasonable" ?**

The Division was "reasonably justified" in the initiation and proceeding of the Adjudicatory Action and therefore, the Petitioners are not entitled to recovery of Reasonable Litigation Expenses. I will, however, review and make findings of fact and conclusions of law on the reasonability of the Petitioners litigation expenses to best present a complete record in the event the matter is appealed to the Superior Court.

R.I.G.L. §42-92-2 (6) "Reasonable litigation expenses" are defined 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 costs and expenses as were reasonable incurred, except that:

a. The award of attorney's fees may not exceed one hundred and twenty -five dollars ($125) per hour, unless the court determines that special factors justify a higher fee;

b. No expert witness may be compensated at a rate in excess of the highest rate of compensation for experts paid by this state.

The attorney for Petitioners submitted an affidavit with his Motion for Recovery of Litigation Expenses dated July 27, 2012 which he identified as Exhibit 1 in which he listed his total legal fees requested as $78, 768.75. It should be noted that this reflects 630.15 hours using

the standard rate imposed by R.I.G.L. § 42-92-2 (6) of $125/hour. In a subsequent affidavit entitled Revised Affidavit of Michael A. Kelly, Esquire counsel for Petitioners listed legal fees, as amended at $78, 800.

In her Objection to Petitioners' Motion, counsel for the Division suggested that counsel for Petitioners had requested payment of legal fees for a portion of the violations for which he had not prevailed. Counsel for Petitioners subsequently on or about September 17, 2012 submitted a "Second Revised Affidavit of Michael A. Kelly, Esquire". This affidavit revised the total hours of time spent in defending the matter at 555.65 hours for a total fee of $69, 581.25. Counsel later states that this reflects the removal of time spent on the non prevailing issue. The sum of $69, 581.25 represents reasonable and appropriate legal fees in the prevailing matters.

The Petitioners have requested that they be reimbursed for certain expert fees. In the Affidavit of Jackson Despres dated July 27, 2012 and submitted as Exhibit 2 of the Petitioners' Motion, the expert fees are delineated. Mr. Despres states that Millstone Engineering, P.C. was paid $6, 088.75 for assisting in the appeal and testifying before the AAD. Mr. Despres states that Natural Resource Services, Inc. was paid $9,116.57 for assisting in the appeal and testifying before the AAD. Mr. Despres states that the Petitioners hired John P. Caito Corporation to prepare a remedial plan to address the NOV and incurred approximately $34, 183.00 in fees. Finally, Mr. Despres states that Petitioners paid $5,628.75 in fees to stenographers for the transcripts relating to the hearing.

In her Objection, counsel for the Division objects to Petitioners' request for repayment of fees paid to John P. Caito Corporation on the basis that the fees do not represent litigation expenses but expenses relating to a remedial plan. I find that the fees paid to John P. Caito Corporation do not fit the definition of Reasonable Litigation Expenses and therefore should not be allowed.

Turning to the fees charged by the Petitioners other two (2) experts, I find that the services performed by the experts were involved in the litigation and if properly presented should be included in expenses if recoverable. The problem presented to this Hearing Officer is with the statutory language in R.I.G.L. § 42-92-2 (6) (ii) "No expert witness may be compensated **at a rate in excess of the highest rate of compensation for experts paid by the state".** (emphasis added)In reviewing the five (5) affidavits provided by the Petitioners together with exhibits there is no representation or statement to address this limitation.

The Petitioners have not provided a basis to satisfy this question or even a general statement that their expert fees are not "in excess of the highest rate of compensation for experts paid by the state". I cannot make a finding related to the reasonableness of Petitioners' expert based on what has been presented. I find that the stenographic fees are reasonable and would be awardable if petitioners had prevailed in their Motion.

CONCLUSION

The petition of the Petitioners for reasonable litigation expenses should be denied based

on the fact that the Division was "reasonably justified" in the initiation and proceeding of the Adjudicative Action. The Petitioners failed to present appropriate proof of the fact that their litigation expenses were reasonable as they relate to expert fees and reports as described in greater detail previously in this decision.

Findings of Fact

After consideration of the affidavits filed by the Petitioners I make the following findings of fact:

1. That this matter came before the Administrative Adjudication Division pursuant to a Request by the Petitioners for reasonable litigation expenses under the terms and conditions set forth in the Equal Access to Justice Act and the Administrative Rules of Practice and Procedures for the Administrative Adjudication Division for Environmental Matters;
2. That the Petitioners filed the request for litigation expenses on July 27, 2012;
3. That the Department of Environmental Management filed an objection to the request for litigation expenses on August 20, 2012;
4. That Jackson Despres is the Managing Member of Smithfield Crushing Co., LLC;
5. That Smithfield Crushing Co., LLC is a Rhode Island corporation doing business in Rhode Island, independently owned and operated, which has always employed less than one hundred (100) persons and is not dominant in its field;
6. That Jackson Despres is the President of Smithfield Peat Co., Inc.;
7. That Smithfield Peat Co., Inc. is a Rhode Island corporation, doing business in

Rhode Island, is independently owned and operated, has always employed less than one hundred (100) persons and is not dominant in its field;

8. That Jackson Despres is Vice President of Rollingwood Acres, Inc.;
9. That Rollingwood Acres, Inc. is a Rhode Island corporation doing business in Rhode Island, is independently owned and operated, which has always employed less than one hundred (100) persons and is not dominant in its field;
10. On September 3, 2013 the matter of Rollingwood Acres, Inc. et als v. Rhode Island Department of Environmental Management et als C.A. No. 12-6341 the Superior Court issued a Final Judgment that the Petitioners were proper "parties" to bring an action under the EAJA;
11. That the Petitioners prevailed in the underlying action based on the fact that five (5) of the violations alleged were dismissed;
12. On 12/3/96 a complaint was filed by Bill Riccio (Exhibit R-T) (Attachment E) alleging water pollution;
13. The Department of Environmental Management had substantial justification to initiate the enforcement action against Petitioners;
14. The Department of Environmental Management had substantial justification to proceed with the Adjudicatory Proceedings against Petitioners:
15. The Petitioners have not presented evidence that their expert witnesses charge fees at a rate that is not in excess of the highest rate of compensation for experts paid by the state;
16. The Petitioners are not entitled to recovery of expert fees;
17. The Petitioners are not entitled to recover fees expended in the preparation of a remedial plan;

18. The revised Attorneys fees presented by the Petitioners in the amount of $69,581.25 are "reasonable" litigation expenses;

19. The fees for stenographic record expended by the Petitioners in the amount of $5628.85 are "reasonable" litigation expenses;

20. The Petitioners are not entitled to recover their reasonable litigation expenses due to the fact that they did not prevail in their petition.

Conclusions of Law

Based on the above Findings of Fact I make the following Conclusions of Law:

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

2. That Petitioners filed a timely request for litigation fees pursuant to R.I.G.L. §42-92-2 and AAD Rule 20.00 (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 20.00 (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 20.00 (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 Petitioners motion to

R.I.G.L. §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 Petitioners have the burden of proof by preponderance of the evidence to show they are parties as defined in the Equal Access to Justice Act.

10. That Judge Hurst of the Rhode Island Superior Court has ruled that the Petitioners are "parties under the EAJA.

11. That reasonable litigation expenses do not include costs of a remedial plan.

12. That reasonable litigation expenses do not include expert witness fees unless it is demonstrated that they are not at a rate in excess of the highest rate of compensation for experts paid by the state (R.I.G.L. § 42-92-2 (6) (b)).

13. That stenographic fees are reasonable litigation expenses.

14. That attorney's fees are reasonable litigation expenses when limited to $125.00 per hour (R.I.G.L. § 42-92-2 (6) (a)).

15. That A Petitioner is not entitled to recovery of reasonable litigation expenses if the action taken by the Division was initiated with substantial justification (R.I.G.L. § 42-93-3 (a)).

16. That the Division is charged by statute with the duty to investigate complaints in the areas of Water Quality Regulations, Water Pollution and Oil Pollution Control.

17. That the underlying action for Water Pollution was initiated by a complaint and the Division has per se substantial justification to initiate an enforcement action.

18. That the standard for proceeding based on substantial justification exists when decisions by the agency is reasonable although not necessarily correct.

19. That the Division proceeded with the Administrative Action with substantial justification.

20. That the Petitioners are not entitled to recover reasonable litigation expenses upon the showing by the Division that it's decision to initiate and proceed with the enforcement action was based on substantial justification.

Wherefore, it is therefore

ORERED

1. Petitioners Petition for Recovery of Reasonable Litigation Expenses pursuant to R.I.G.L. § 42-92-1 et seq is **DENIED**

Entered as an Administrative Order this 28th day of February, 2014.

David Kerins
Chief Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Status Conference Order to be forwarded by first-class mail, postage prepaid to: Michael A. Kelly, Esq., and Joelle Sylvia, Esq. 128 Dorrance Street, Suite 300, Providence, RI 02903; and via interoffice mail to Marisa Desautel, Esq., DEM Office of Legal Services and David Chopy, Chief, DEM Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 28th day of February, 2014.

Lynn K. Stewart

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

ROLLINGWOOD ACRES, INC., *et als*
Plaintiffs

v.

RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, *et als*
Defendants

C.A. No. 12-6341

ORDER AND FINAL JUDGMENT

After being assigned to the Honorable Justice Patricia A. Hurst, a written decision was filed with the Court in the above-captioned matter on August 26, 2013. After consideration of the certified record and the parties' memoranda, it is hereby:

ORDERED, ADJUDGED and DECREED

1. The Decision of the Chief Hearing Officer of the Administrative Adjudication Division of the Rhode Island Department of Environmental Management was affected by error of law, in that it incorrectly determined that Plaintiffs are not a "party" within the meaning of the EAJA, by reason of the net worth requirement;

2. Substantial rights of the Plaintiffs have been prejudiced;

3. The above-captioned matter is remanded to the Chief Hearing Officer to make findings of fact adequate to support conclusions of law on whether Plaintiffs are entitled to reasonable litigation expenses, as set forth in the written decision dated August 26, 2013.

ENTERED as an Order of this Court on this 3rd day of SEPTEMBER, 2013.

ENTERED:

Patricia A. Hurst, J.

PER ORDER:

Robert T. Lynch
Dep Clk 9-3-13

SUPERIOR COURT
FILED
2013 SEP -3 P 3:20

Respectfully submitted,

Smithfield Crushing Co., LLC,
Smithfield Peat Co., Inc., and
Rollingwood Acres, Inc.

By and through their attorneys,

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CERTIFICATION

I certify that on August 28, 2013, I served the within pleading via electronic mail, upon:

Marisa Desautel, Esq.
Office of Legal Services
Department of Environmental Management
235 Promenade Street
Providence, Rhode Island 02908

N:\Smithfield Peat (Jackson Despres)\DEM Violations\Administrative Appeals\EAJA Appeal - 12-6341\Pleadings\Drafts\Order And Final Judgment.Docx