

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

IN RE: Taraco

AAD No. 91-007/AHE  
AAD No. 91-005/AHE  
AAD No. 91-002/AHA

DECISION AND ORDER

This matter is before the Hearing Officer on the Motion for Order to Issue Hazardous Waste Transporters Permit filed by Taraco ("Respondent") in the above-entitled matters. The Division of Air and Hazardous Materials ("DAHM") filed a timely objection to said Motion. Neither party requested oral argument.

Respondent filed the subject motion with the Administrative Adjudication Division ("AAD") on November 26, 1991 wherein it requested that DAHM be ordered to immediately issue a Hazardous Waste Transporters Permit ("Permit") to Taraco. The above entitled matters have been consolidated at the request of the Respondent and are presently awaiting hearing before the AAD.

The essential facts concerning the instant motion do not appear in dispute and may be stated briefly as follows;

1. DAHM had previously issued a Hazardous Waste Transporters Permit (#RI-596) to Taraco pursuant to the provisions of the Hazardous Waste Management Act of 1978 (Chapter 19.1 of Title 23 of the R.I.G.L.).
2. DAHM issued a Notice of Violation and Penalty to Taraco dated February 9, 1991 (AAD no. 91-005/AHE).
3. DAHM issued a Notice of Intent to Revoke Permit and Order to Taraco dated February 19, 1991 (AAD No. 91-007/AHE).

4. Taraco made timely application to renew its Permit.

5. DAHM, without a hearing thereon, issued a Denial of Hazardous Waste Transporters Permit Renewal Application by letter to Taraco dated October 16, 1991.

6. DAHM stated in its denial of the renewal of Taraco's Permit that it was based on Taraco's prior performance records; that a review of the Department records reveals a consistent pattern and practice of non-compliance; that Taraco has failed to exhibit sufficient reliability, expertise, and competency in the area of hazardous waste management. DAHM specified the evidence upon which it based its determination.

7. DAHM, in addition to notifying Taraco that its Permit would not be renewed and that Taraco will not be permitted to transport hazardous waste in or through the State of Rhode Island, also notified Taraco that it must immediately cease any practices which may be in violation of the Rules and Regulations for Hazardous Waste Generation, Transportation, Treatment, Storage and Disposal or the General Laws of Rhode Island Hazardous Waste Management Act. Further, that Taraco must also cease making public representations regarding their status as a permitted hazardous waste transporter.

8. Taraco filed an appeal of the Denial of Hazardous Waste Transporters Permit Renewal Application with the AAD on or about November 8, 1991 (AAD No. 91-002/AHA).

9. A hearing on the renewal denial is scheduled to commence on Monday, December 9, 1991 at 9:30 a.m..

10. Taraco filed the instant Motion for Order to Issue Permit on November 26, 1991.

Taraco contends that the denial letter clearly indicates that the reasons for the action are the same as those cited in these pending proceedings.

Respondent argues that since the law provides that Taraco's permit cannot be revoked, suspended, annulled or withdrawn without a hearing, it should follow logically that renewal cannot be denied without following the same process. That the right to be heard on the revocation of a one year permit would be meaningless if a license could be allowed to expire and a renewal denied, which would effectively put the licensee out of business unless and until the denial could be successfully appealed.

Respondent in its memorandum maintains that R.I.G.L. § 42-35-14 (b) stands for the proposition that Taraco's license continues in force until the licensee foregoes its right to an appeal or a hearing, or until an expiration date is established by the reviewing court. Wherefore Taraco moves that the State be ordered to immediately issue it a Permit and cease and desist from all attempts to limit Taraco's right to advertise and to conduct its business in the State of Rhode Island.

DAHM disputes Respondent's assertions that the reasons for the DAHM's action are the same as those cited in these pending proceedings, but more strenuously contests Respondent's statement of the law governing Respondent's Motion. DAHM argues that Taraco's Permit expired by operation of law and also that the instant motion is untimely.

DAHM acknowledges that pursuant to Statute a licensee such as Taraco may

enjoy the benefits of rights conferred by the license denied on a renewal application until such time as the appeal period attaching to that decision of denial expires. However, DAHM argues that the additional days contemplated by the Statute for the appeal period of the renewal denial were tacked onto the effective period of the Permit. That since both the annual period of the Permit and the tacking periods provided by the Statute have expired, Taraco no longer possesses a valid Permit. DAHM argues that Respondent's Motion should be denied since a wrongful refusal to license is not a bar to prosecution for acting without a license. Also, DAHM contends that Respondent's Motion is untimely because it was not filed within fifteen days of the renewal application denial, nor within thirty days of said denial wherefore DAHM seeks a denial of Taraco's Motion.

R.I.G.L. § 42-35-14 provides:

"Licenses. - (a) Whenever the grant, denial, or renewal of a license is required to be proceeded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(b) 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.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency sent notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health,

safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined."

R.I.G.L. § 23-19.1-10 (b)(8) provides:

"Any applicant who is denied an initial permit pursuant to this section shall, upon written request transmitted to the director within thirty (30) days of the denial, be afforded the opportunity for a hearing thereon. Any permittee who receives a notice of intent to revoke or refuse to renew a permit shall have fifteen (15) days from the receipt of the notice to transmit to the director a request for a hearing."

R.I.G.L. § 23-19.1-10 (c) provides:

"Permits for hazardous waste transporters shall be issued for a period not to exceed one year. Permits for hazardous waste management facilities shall be issued subject to such terms and conditions, including duration of the permit, as the director may require, and subject to suspension, revocation, modification, or amendment as provided in subsection (e). The director shall review each permit at least every five years and shall notify each hazardous waste management facility, in writing, when the permit review has been completed. Any changes in permit conditions shall be included in the notification."

Although Respondent's Motion requested only that DAHM be ordered to immediately issue a Permit to Taraco, the Respondent's Memorandum additionally requested a cease and desist order.

Respondent's request for the immediate issuance of a Permit does not specify the period of time or duration for which said Permit should be issued. Even if we were to assume a request for a period of time was intended, Respondent's position would still be untenable. § 42-35-14 (b) compels the conclusion that although a Permit may not expire under certain situations, it does not require that a Permit be issued as requested. Said

section presupposes that there will be occasions where an "agency" will not act prior to the normal expiration date of a license, and it provides for that contingency by extending the life of the license... until the last date provided by law for seeking review of the "agency's" post-expiration date action. Chernov Enterprises, Inc. v. Sarkas 109 R.I. 283, 284 A.2d 61 (1971). It follows therefore that Respondent's request for an Order for the immediate issuance of a Permit must be denied.

Even if we were to assume that the Administrative Adjudication Division has the authority to issue cease and desist Orders, it is abundantly clear that the facts do not warrant the issuance of same. None of the pending actions require a consideration of whether the Permit has expired and the instant Motion does not require consideration of same. Respondent has timely requested a hearing concerning the DAHM's refusal to renew its Permit (AAD No. 91-002/AHA) and this matter (along with the consolidated matters) has been assigned for hearing.

The Respondent relies on its interpretation of the meaning of § 42-35-14 (b) to establish a right to a hearing prior to the Division's denial of the renewal of its Permit; however, no such right is conferred by said Statute. A cursory reading of § 23-19.1-10 (b) (8) makes it abundantly clear that hearing request shall be made within fifteen days from the receipt by Respondent of the Notice of Intent to Renew the Permit issued by the Division.

Respondent's argument in support of its position that it would effectively be put out of business is not persuasive. Neither the Statutes nor the Regulations require the issuance of a Permit prior to a final agency

decision to be rendered in accordance with the hearing presently pending before this Hearing Officer.

The facts to be considered as to whether DAHM validly denied the renewal of the Permit must be presented at the hearing presently scheduled before the AAD on Taraco's request for a hearing concerning same, and a determination will be made at that time via a final agency decision on the pending matters. It would be manifestly unsound to allow any person challenging any Statute or regulations to compel the issuance of a Permit so that it could engage in the regulated activity prior to a hearing on the merits. The power to regulate specific activity is a function of the police power of the state and is designed to protect the health, safety and welfare of the general population. State v. Alix 110 R.I. 350, 293 A.2d 298 (1972).

The question of when the existing Permit expires is not properly before the AAD at this time. Questions concerning the interpretation of § 42-35-14 and other statutes, Rules or Orders may properly be considered by way of a Petition for a Declaratory Ruling, not by way of a Motion for Order to Issue Hazardous Waste Transporters Permit. I therefore respectfully decline to reach this issue.

A Motion to Issue Hazardous Waste Transporters Permit is premature at this juncture. I defer consideration of permit issuance until such time as issues are adjudicated at a duly constituted hearing scheduled for Monday December 9, 1991.

Based on the foregoing it is hereby

ORDERED

1. That Respondent's Motion for Order to Issue it a Hazardous Waste

Transporters Permit is premature and is therefore DENIED.

2. That the Hearing Officer is without jurisdiction to entertain Respondent's request for a cease and desist order at the present time and such request is therefore DENIED.

Entered as an Administrative Order this 6th day of December, 1991.

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

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to Philip W. Noel, Esq., McGovern, Noel, Falk, Pannone, Procaccini & O'Leary, Inc., 321 South Main Street, Providence, RI 02903; and via inter-office mail to Mark Siegars, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908; Barbara Nestingen, Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 6th day of December, 1991.

  
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