

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

In Re: Birchwood Realty, Inc.
AAD No. 93-001/AHA

SUPPLEMENTAL RECOMMENDED DECISION AND ORDER AS TO THE
APPLICABILITY OF STATUTES AND RULES AND REGULATIONS

TRAVEL: This matter is before this Hearing Officer for a supplemental recommended decision pursuant to the directive of the Acting Director that I make a determination of which statutes and regulations the Applicant must demonstrate compliance with in order to obtain approval of its application to construct and operate its proposed landfill. Said determination is to be in the form of a recommended decision and order containing specific conclusions of law.

The history and background of this matter are detailed in the Decision on Motion in Limine and Ruling as to the Applicability of Statutes and Rules and Regulations by this Hearing Officer dated February 3, 1994.

The Acting Director, by Declaratory Ruling sent to this Hearing Officer on January 24, 1994, determined that two Final Agency Decisions should be issued in this matter. The first decision will determine which statutes and regulations will govern the application. The second decision will determine the merits of the application pursuant to these statutes and regulations.

The Hearing Officer had previously ruled by Recommended Order dated February 3, 1994 that the hearing should be limited to the issues delineated by the Rhode Island Supreme Court in its opinion dated June 25, 1993, and that the presentation of evidence should be limited to evidence that has some bearing on Applicant's ability to demonstrate that its facility will be built and operated as proposed. I further ruled that the later rules, regulations and statutes that relate to the Applicant's burden of proof as to the issues identified by the Court should be considered at the hearing.

In compliance with the instructions of the Acting Director, I have considered which statutes and regulations govern this proceeding and make the following determinations prior to the hearing. Accordingly, I conclude the following as a matter of law:

CONCLUSIONS OF LAW

1. Chapter 42-17.7 of the General Laws of Rhode Island (the 1989 legislation that established the Administrative Adjudication Division for Environmental Matters) and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters promulgated thereunder are applicable to these proceedings and shall govern the hearing in this matter.

2. The Rules and Regulations for Solid Waste Management Facilities (effective June 18, 1992) are applicable to these proceedings in that Applicant bears the burden of proving that:

(a) its proposed facility meets all relevant criteria established by these Regulations to protect human health and the environment.

(b) its proposed facility will be constructed and operated as proposed; and

(c) the construction, design and operation of its facility will prevent the off-site migration of contaminants and will not pollute the surface waters and groundwater of the state¹.

3. The provisions of The Refuse Disposal Act, R.I.G.L. § 23-18.9-9 apply to this proceeding as follows:

(a) The specific provisions of R.I.G.L. § 23-18.9-9(a) requiring that a certificate of final determination from the municipality in which the facility is to be situated (that the site conforms with all applicable local land use and control ordinances, etc.) and that a certificate of approval of the proposed site by the state planning council be submitted simultaneously with the application are not applicable to this matter. As a general rule, properly enacted subsequent statutes

¹ Nothing contained herein relieves Applicant, should a license be issued, from compliance with the existing Solid Waste Regulations as provided in Rule 23.00 of the Solid Waste Rules.

would apply to pending applications. See Ocean Road Partners v. State of Rhode Island, 612 A.2d 1107 (R.I. 1992). However, to require Applicant to comply with these administrative requirements so late in the proceedings would, in my opinion, be unjust. The remainder of 23-18.9-9(a) applies.

(b) Considering the stage to which these proceedings have progressed, R.I.G.L. § 23-18.9-9(a) (1), (2), (3), (4) and (5) are not now applicable to this remanded proceeding.

(c) The remaining provisions of R.I.G.L. § 23-18.9-9 are applicable.

4. The Rhode Island Groundwater Protection Act of 1985, as amended, R.I.G.L. Chapter 46-13.1 and the Rules and Regulations for Groundwater Quality (promulgated May, 1992 and amended July, 1993) are applicable to this permit proceeding. The reclassification of groundwater is not to be determined by Administrative Adjudication Division, but rests with the Groundwater Section. The Applicant is therefore on notice that groundwater quality certification by the Groundwater Section is required by the Rules and Regulations for Solid Waste Management Facilities before a solid waste management facility license approval may be granted.

5. The Water Quality Regulations for Water Pollution Control (effective October 19, 1988) are not applicable to these proceedings.

The pending application does not appear to propose any discharge that would subject Applicant to the provisions of said Regulations. This is not to say that Applicant or its facility may not be subject to said Regulations or the Regulations for the Rhode Island Pollutant Discharge Elimination System should it place or discharge pollutants into the waters of this State, or perform any activities which would bring the facility within the purview of the RIPDES Regulations.

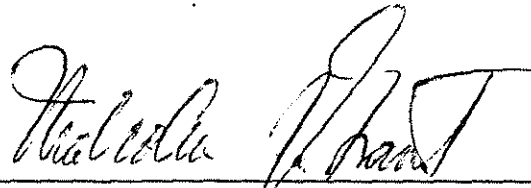
I hereby recommend that the Acting Director adopt the foregoing Recommended Decision.

MARCH 31, 1994

Joseph F. Baffoni

Joseph F. Baffoni
Hearing Officer
Administrative Adjudication Division
Department of Environmental Management
One Capitol Hill, Third Floor
Providence, RI 02908

Entered as a Final Agency Order and Decision regarding
statutory and regulatory jurisdiction this 5th day of
APRIL, 1994.



Malcolm J. Grant
in his capacity as Acting Director
Department of Environmental Management
22 Hayes Street
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded via regular mail, postage prepaid to Dean N. Temkin, Esq., 10 Dorrance Street, Providence, RI 02903; Michael Rubin, Esq., Department of the Attorney General, 72 Pine Street, Providence, RI 02903; Christopher H. Little, Esq., Christopher H. Little & Assoc., P.C., 20 Washington Place, Providence, RI 02903, R. Daniel Prentiss, Esq., 170 Westminster Street, Providence, RI 02903; Laurie Barber, Executive Director, WPWA 203 B. Arcadia Road, Hope Valley, RI 02832; Robert Mendoza, Chief of Water Supply Section, U.S. Environmental Protection Agency, Region I, JFK Building, Federal Building, Boston, MA 02203; and Audobon Society, 12 Sanderson Road, Smithfield, RI 02917 and via interoffice mail to Claude Cote, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 6th of April, 1994.

