

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

IN RE: Elizabeth Laliberte
Notice of Violation No. C90-0114

DECISION AND ORDER ON
THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT'S MOTION TO COMPEL
AND OBJECTION TO RESPONDENT'S SUPPLEMENTAL DISCOVERY

1. DEM'S MOTION TO COMPEL

The Department of Environmental Management (DEM) has filed a motion to compel production pursuant to Rule 37 alleging that Respondent failed to respond to its April 16, 1992 request for production. A prehearing conference was held on this matter on April 2, 1992 and a Prehearing Conference Record reflecting all aspects of that conference was compiled by the Hearing Officer on May 18, 1992. According to the Prehearing Conference Record, both parties fulfilled their discovery obligations delineated in the Prehearing Conference Order and R.I.G.L. § 42-17.2-5. If specific evidence or exhibits have not been provided by the Respondent to the State, DEM should file a motion specifying which missing evidence is being sought. Therefore, DEM's motion to compel is denied.

2. THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT'S OBJECTION TO
RESPONDENT'S SUPPLEMENTAL PREHEARING MEMORANDUM AND WITNESS

The State has requested that an additional witness provided by the Respondent on May 18, 1992 in a supplemental prehearing memo be excluded and the supplemental prehearing memo be deleted from the record.

At the prehearing conference held on April 2, 1992, both parties were given supplemental time to provide any additional witnesses or exhibits. The prehearing conference record reflects that any further discovery was to be provided by May 1, 1992. Respondent filed a supplemental prehearing memo on May 18, 1992 which added engineer Paul Gadoury to his list of witnesses. Respondent enclosed a copy of Mr. Gadoury's resume and a summary of his proposed testimony. Discovery is an important aspect of the hearing process. Discovery rules are established to ensure procedural fairness and to provide both parties with an opportunity to review facts and testimony prior to the hearing. The State's sole reason for excluding Respondent's witness appears to be that it was not provided by the Respondent by May 1, 1992. Refusing to allow a party to call a witness is a drastic sanction applied by the courts even in criminal cases only for the most egregious discovery violations (Robert Votolato, FWL Application No. 89-0848F, Final Agency Decision 1/15/92, quoting St. v. Corcoron 457 A.2d 1350 RI 1982).

In the instant case, the State does not allege nor establish that it has been prejudiced for failing to know this information from May 1, 1992 to May 18, 1992. Any real or imagined prejudice DEM may have incurred was certainly cured once Respondent provided a copy of the witness' resume and proposed testimony. Since this matter has not yet been scheduled for hearing, DEM has ample time to review this information. In the event the State finds after reviewing


Respondent's evidence that additional witnesses will be required to prove its case-in-chief, the Hearing Officer has no objection to DEM adding those witnesses to its witness list.

Objections by DEM which relate to the expected testimony of Mr. Gadoury are premature. Since no hearing has been conducted, the Hearing Officer cannot judge the relevancy nor materiality of the witness' testimony.

The Prehearing Conference Record compiled by the Hearing Officer is designed to reflect what has transpired at the prehearing conference and to coordinate all evidence for the benefit of the Respondent, DEM and the Hearing Officer. Supplements to or deletions from the Prehearing Conference Record may occur prior to the hearing. This record is not evidence and should not be considered as part of the hearing.

Therefore, for the reasons stated above, DEM's motions to dismiss are denied.

Entered as an Administrative Order this 29th day of May, 1992.



Patricia Byrnes
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to Paul P. Baillargeon, Esq., Park Square Place, Suite 201, 176 Eddie Dowling Highway, North Smithfield, RI 02895 and via interoffice mail to Patricia C. Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 29th day of May, 1992.

Tracy Shields