STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN RE: MOTION OF RHODE ISLAND SOLID WASTE MANAGEMENT CORPORATION FOR RECONSIDERATION/MODIFICATION OF CERTAIN PERMIT CONDITIONS RELATING TO QUONSET POINT RESOURCE RECOVERY FACILITY; AND SUPPLEMENTAL MOTION, RELATING THERETO

This matter is before the hearing officer on the above referenced Motion for Reconsideration/Modification and Supplemental Motion, dated respectively October 17 and November 23, 1988, and submitted by its attorneys on behalf of the Rhode Island Solid Waste Management Corporation (RISWMC). Specifically, RISWMC has, pursuant to Rule 14.00-3(b) of the Administrative Rules of Practice and Procedure of the Rhode Island Department of Environmental Management, petitioned for reconsideration, modification and/or clarification of the following Conditions of the hearing officer's Decision and Order of October 3, 1988; PSD Conditions 1, 4, 21, 24, 28, 29, 30, 31, 32, 33, 35 and 37; Solid Waste Facility Conditions 4, 7, 10(d), 15, 17, 21, 22, 29, 30, 34, 35, 42, 43, 47, 48, 50, 51 and 57.

On October 24, 1988, the Town of North Kingstown, CONCERN, Inc., and the Division of Air and Hazardous Materials of the Department of Environmental Management (RIDEM) as parties of record each filed Objections to RISWMC's Motion and reserved a right to submit Memoranda in Support of their Objections upon receipt of RISWMC's Supplemental Motion. Memoranda were subsequently submitted in a timely fashion on December 30, 1988 by the Town and the Division.

In their October 24 Objections, the Town of North Kingstown and CONCERN also requested that a public hearing be scheduled on RISWMC's Motion pursuant to Rule 7.00(a)(1) of RIDEM's Administrative Rules of Practice and Procedure. In correspondence to the parties dated November 3, 1988, the hearing officer granted the request for a hearing. In subsequent correspondence to the parties dated December 1, 1988, the hearing officer scheduled that hearing for January 18, 1989 at 7:00 p.m. in the North Kingstown High School Auditorium.

The scheduled hearing went forward pursuant to the Rhode Island Administrative Procedures Act, RIGL §42-35-1 et seq. and RIDEM's Administrative Rules of Practice and Procedure. By order of the hearing officer, the substance of the hearing was limited to oral argument on RISWMC's Motion. All such argument was ordered to be confined to evidence already placed into the record of the hearing per the aforementioned Rule 14.00-3(b) and to address itself to the following questions:

1. Should the Decision and Order be opened to reconsideration and/or modification?

2. Does a proposed modification provide an equally effective alternative means of complying with the terms and conditions of the Decision and Order and with the requirements of the applicable regulations?

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3. Has the hearing officer misinterpreted the hearing record so as to justify reconsideration and amendment of the Decision and Order?

The parties to the proceeding were the applicant, RISWMC, represented by Attorneys Richard Sherman and Daniel Schatz, the Division of Air and Hazardous Materials represented by Attorney Claude Cote, the Town of North Kingstown, represented by Attorneys Harlan Doliner and Mark McSally and CONCERN, Inc., represented by Paul Plunkett. Attorney Kendra L. Beaver served as Legal Counsel to the hearing officer.

The applicant, RISWMC, had the burden of proving by a preponderance of the evidence that the facility as modified pursuant to its Motion would be constructed and operated in compliance with all applicable General Laws and regulations based on evidence on the record.

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PROCEDURAL ISSUES

1. Timeliness:

The Town of North Kingstown has objected to RISWMC's November 23 Request for Modification/Reconsideration of PSD License Conditions 24 and 32 and Solid Waste Facility License Conditions 7, 10(d), 15, 17, 22, 30, 42, 50 and 57 on the basis that the requested relief relative to these Conditions was not filed within the ten days allowed by regulation (Rule 14.00-3(b) RIDEM Administrative Rules of Practice and Procedure).

At the January 18 hearing, RISWMC by way of rebuttal argued that it had reserved its right to request modification of permit conditions in addition to those identified in its October 17 Motion by placing the hearing officer and parties on notice that it expected to submit a Supplemental Memorandum (Richard Sherman letter of October 17 to Robert Bendick, Malcolm Grant). It further argued that by their failure to object to the filing of a Supplemental Memorandum, the hearing officer and parties waived any right to object to the introduction of new permit conditions to the list of those from which relief was sought. RISWMC finally argued that no party was prejudiced by its request for additional relief since all had been afforded adequate time to respond.

In reviewing the arguments on this issue, the hearing officer concludes as follows:

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1. There is no right which can be reserved to petition for relief from unnamed permit conditions at an applicant's leisure.

2. The applicant afforded neither the hearing officer nor the parties any reason to believe in its October 17 letter that its Supplemental Memorandum would include a request for relief from additional Conditions. Consequently, the parties did not waive their objections to the subsequently requested modifications. In fact, the plain meaning of the language employed by Mr. Sherman in his October 17 letter suggests that the Supplemental Memorandum would be limited to additional argument regarding the relief already sought in the October 17 Motion:

> The Corporation expects to submit promptly a Supplemental Memorandum setting forth in more detail the grounds for modification of certain permit conditions referred to in the Motion. (emphasis added).

3. RISWMC's argument regarding prejudice to the parties is moot. It cannot reasonably be argued that relief first sought seven weeks after a Decision is rendered is timely when the unambiguous regulatory deadline is ten days.

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4. Notwithstanding the above, the hearing officer sees no harm to any party in this proceeding by clarifying his meaning regarding certain conditions where the only relief sought, timely or not, is obtaining such clarification. I refer specifically to Solid Waste Facility License Conditions 7, 15, 17, 22 and 30.

Therefore, the hearing officer declines to reconsider RISWMC's requests to modify or reconsider PSD License Conditions 24 and 32 and Solid Waste Facility License Conditions 10(d), 42, 50 and 57 as they are untimely.

2. New Evidence:

Both the Town's and the Division of Air and Hazardous Materials' reply Briefs argue that RISWMC inappropriately attempts to buttress its argument for modification/reconsideration of various permit conditions by introducing evidence not already in the record of the hearing as is required by Rule 14.00-3(b). The Town argues that the hearing officer cannot consider such new evidence in ruling on RISWMC's Motion; the Division argues that if the hearing officer does consider evidence not on the record he must reopen the hearing and provide other parties an opportunity to cross-examine and rebut.

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RISWMC argued at the January 18 hearing in turn that it did not attempt to introduce new evidence, but rather explained and/or argued issues that were raised for the first time in the Decision and Order. It further represented that the "essence" of the factual support for its Motion is based on the record.

The hearing officer concludes that this is a dispute that cannot be resolved on a generic level and will instead consider each requested permit modification separately.

3. RISWMC's Right to Appeal:

The Town has argued that RISWMC has waived its ability to assert legal errors in the language or substance of the Decision and Order by failing to appeal that Decision and Order. RISWMC argued that pending the hearing officer's Decision on its Motion for Reconsideration a final decision has not been issued for purposes of appeal.

The hearing officer concludes that this matter is not within his jurisdiction and must be addressed by the Superior Court.

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PSD LICENSE CONDITIONS

1. PSD Condition #1:

RISWMC requests that this Condition (which sets a 10% opacity limit on stack emissions) be modified to exclude uncombined water vapor. As the Division of Air and Hazardous Materials points out in its Memorandum, RIDEM's Air Pollution Control Regulations exclude the presence of uncombined water vapor as a basis for determining a violation.

The hearing officer concludes per Air Pollution Control Regulation 1.4, no modification of Condition #1 is necessary to achieve the result sought by RISWMC.

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2. PSD Condition #4:

This Condition requires that all components of the facility involved in the handling of ash residue be fully enclosed and vented through a fabric filter baghouse approved by the Division of Air and Hazardous Materials. RISWMC has asked that the Condition be modified so that the ash conveyor system which runs through an enclosed and appropriately vented conveyor "gallery" not be required to be separately enclosed.

Based on RISWMC's hearing representation that the gallery containing the conveyor system would be fully enclosed and vented through a fabric filter [Transcript, p. 95-96] and a review of Solid Waste Facility Application Plan Q.P.-05-40-01(Rev. C); "General Arrangement, Ash and Residue Handling System", which appears to confirm this representation, the hearing officer sees in Condition #4 as written no requirement that the ash conveyor belt itself be separately contained and vented. Accordingly, no modification of this Condition is required.

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3. PSD Condition #21:

This Condition sets a lower emissions limit for a number of pollutants, most of them metals, than that recommended by the Division of Air and Hazardous Materials in its Permit Conditions and Emission Limitations (Exhibit 6C).

In its Motion and Supplemental Motion, RISWMC has requested that the hearing officer provide it one of three forms of relief. The first and preferred option is that he reverse himself and accept the Division's Ambient Air Levels (AALs) as protective of the broader environment as well as human health and thereby exorcise Condition #21 in its entirety (Motion, p. 2). The second proposal, if the first is deemed unacceptable, is that he accept the AALs as a regulatory maximum, but require RISWMC to nevertheless make "every reasonable effort" to meet the Condition #21 levels and to take "reasonable [corrective] steps" if post-operational monitoring shows facility emissions causing violations of EPA ambient water quality criteria in Fry's Pond or Narragansett Bay (Motion, p. 4). The third and final option, then, is that for the time being the hearing officer accept the AALs as a regulatory maximum, but that he also direct the Division of Air and Hazardous Materials to promulgate within six months new emission limits which based on a rule-making proceeding [hearing] it determines to be protective of a broad range of environmental parameters [listed] (Supplemental Motion, pp. 12-13).

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RISWMC sets forth numerous arguments in support of its underlying contention that Condition #21 emissions limits are unrealistically low and in fact unachievable. In summary fashion these include the following:

1. The emissions data in Exhibit #69 from which the Condition #21 levels are extracted are <u>averages</u> and are highly variable from one facility to the next. Therefore, the proposed facility would reasonably be expected to emit at both higher and lower levels at various times.
2. The emissions data in Exhibit #69 represents only those metals emissions associated with suspended particulate matter (TSP). Since total emissions of metals, including those emitted in a gaseous form, are actually much higher, Condition #21 levels if applied to <u>total</u> emissions are unachievably low.
3. No [air pollution control equipment] vendor will guarantee Condition #21 levels at all times.
4. The facilities from which Exhibit #69 emissions data is extracted and other new comparably equipped facilities are regulated by their host jurisdictions at levels higher than the Exhibit #69 averages.

In support of its proposed second and third alternatives, RISWMC additionally argued a regulatory distinction between so called "direct" emissions impacts

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which it represented were addressed by the AALs and NAAQS limits and "indirect" impacts which would best be protected against by future regulatory enforcement actions. It further questioned the hearing officer's authority to revise emissions limitations set by Division of Air and Hazardous Materials' experts and his failure to defer to those experts in setting emissions limits.

In its Brief, the Town of North Kingstown acknowledges that the Exhibit #69 emissions data used by the hearing officer in Condition #21 reflect only the particulate fraction of total emissions and may be potentially unrealistic as totals. It goes on to observe, however, that RISWMC cannot then on the one hand employ these data to project environmental impacts of its facility and on the other hand reject them as limits to be imposed on its emissions. These themes were repeated in the Town's January 18 hearing argument.

In its Memorandum, the Division of Air and Hazardous Materials reiterates its confidence in the AALs, but questions the regulatory significance of RISWMC's proposal to make "good faith" and/or "reasonable effort[s]" to meet Condition #21 emissions limits. In its hearing argument, the Division proposes that the hearing officer accept the AALs as protective of soils and vegetation from "short term" impacts while directing that the Condition #21 emissions levels be modelled to establish pollutant ground level

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concentrations (GLCs) which could then be compared to monitoring data (required elsewhere by the Decision and Order) to protect from "long term" impacts and thereby support enforcement actions.

In response to the various arguments placed before him and after a careful review of the record as it relates to the matters in dispute, the hearing officer finds as follows:

1. Nothing has been argued or presented which would lead the hearing officer to conclude that he has erred in his Findings of Fact pertaining to Rule 7, specifically #16 relating to protection of terrestrial or aquatic plant life and Finding #19 relating to protection of birds, reptiles, amphibians, and all marine and aquatic biota.
2. RISWMC's proposal to "make every reasonable effort", but not actually be bound to achieve Condition #21 emissions levels (Transcript, p. 57) is a commendable expression of intent, but has no regulatory meaning and is consequently both unenforceable and meaningless as a matter of law.
3. The hearing officer's questioning of RISWMC counsel regarding the "reasonable [corrective] steps" RISWMC would take, should post-operational monitoring show a water quality violation, suggests that RISWMC would do nothing more or less than it is already required to do by law and regulation if confronted with an alleged

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violation (Transcript, p. 59). Again, this is commendable, but hardly addresses RISWMC's proactive obligation to demonstrate as a licensing prerequisite compliance with Air Pollution Control Rule 7.

4. RISWMC's suggestion that the entire matter of appropriate emissions limits be in effect remanded to the Division of Air and Hazardous Materials to be rethought as a rule-making exercise, particularly after an exhaustive adjudicatory proceeding has been completed, or virtually so, is both untimely and transparently self-serving.

5. RISWMC's assertion that the hearing officer has no authority to revise emission limits set by the Division of Air and Hazardous Materials directly contradicts the provisions of RIDEM's Administrative Rules of Practice and Procedure and, again, is both untimely and self-serving.

6. RISWMC's distinction between "direct [environmental] impacts" and "indirect [environmental] impacts" as it relates to its Rule 7 regulatory burdens has no meaning in law or regulation. In response to the hearing officer's questions, RISWMC counsel conceded that Rule 7 makes no such distinctions between types or levels of environmental impact and does not in fact even employ the terms in question (Transcript, p. 46).

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7. There is similarly no regulatory foundation for, nor significance to, the distinction drawn by the Division of Air and Hazardous Materials between "short term" and "long term" [environmental] impacts. Moreover, its recommendation that Condition #21 emission levels be employed to model facility derived ground level pollutant concentrations (GLCs) for purposes of post-operational impact monitoring and enforcement fails to address RISWMC's proactive obligation to demonstrate as a licensing prerequisite compliance with Air Pollution Control Rule 7.

8. The record supports RISWMC's representation that Exhibit #69 emissions data as corrected for Quonset Point facility emissions are averages. However, the only point on which the record is unambiguous is that these "averages" are averages of a reported emissions level for each pollutant obtained from up to six similarly equipped facilities from which data was extracted. This suggests that proposed Quonset Point facility emission limits are set at levels which are precisely half way between (an average of) the highest and lowest emissions levels reported from these six similarly equipped facilities.

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9. The record provides little or no insight into the emissions data obtained from the individual facilities upon which Exhibit #69 is based. It is, therefore, impossible to weigh either the merits of RISWMC's argument that it cannot meet the Exhibit #69 levels "at all times" or more importantly the environmental consequences of its exceeding those limits. In response to the hearing officer's questions at the January 18 hearing, for instance, Counsel for RISWMC expressed ignorance of the number and identity of facilities for which their Exhibit #69 emissions data reflects an average of multiple tests (Transcript, p. 62), no knowledge of the averaging time of such multiple tests (Transcript, p. 63), no awareness of the range [high/low] of emissions reported for individual facilities (Transcript, p. 63) and no information as to the frequency or duration of elevated emissions (Transcript, p. 64).

10. Absent this basic emissions information foundation RISWMC has been unable to, and has in fact not attempted to, analyze the impact of its facility on several key environmental parameters at any level higher than that projected in Table 3 of Exhibit #69, a fact conceded by RISWMC counsel at the January 18 hearing (Transcript, pp. 64-5). The environmental parameters to which I

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refer include Rhode Island's oft-cited and much editorialized about "most valuable natural resource", Narragansett Bay, all its life forms, animal and plant, and all those species which consume those life forms as they are projected to be effected by the proposed facility's steady-state, cumulative and worst case [storm related] emissions impacts (Transcript, pp. 64-5). The hearing officer is, therefore, bound by regulation to set the emissions levels he has set as maximums, regardless of their characterization by RISWMC as averages, since they are the absolute highest levels at which RISWMC has demonstrated its facility to be protective of Narragansett Bay and its resources (Transcript, pp. 64-5). To guess that the facility might operate in an environmentally acceptable manner at unspecified higher emissions levels which are the upper end of a range of which Exhibit #69 represents an "average" would, given the paucity of information regarding this "average" placed on the record by RISWMC, be inexcusable given the resources at stake.

11. The record supports RISWMC's representation that Exhibit #69 emissions data, including projected Quonset Point facility emissions, reflect only that fraction of total emissions associated with/attached to suspended particulates. The record does not, however, shed any

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light on the total volume of emissions, including those fractions such as gaseous forms of metals, not associated with particulate releases. In this regard, RISWMC's representations relative to total mercury emissions represent new evidence and are not properly before the hearing.

12. Per 11, above, the record provides the hearing officer no basis for determining the amount of hardship, if any, Condition #21 imposes on RISWMC. Furthermore, the hearing officer finds it logically inconsistent for RISWMC on the one hand to object to the use of particulate data to set an emissions limit for its facility while on the other hand, as conceded by its counsel at the January 18 hearing, employing just such particulate data in all its environmental modelling exercises including Exhibits 23-28 inclusive and Exhibits 60, 71 and 72 (Transcript, pp. 51-53). One would reasonably presume that had RISWMC wished to be regulated at a higher emissions level, it would have performed its environmental modelling exercises and demonstrated its ability to comply with Rule 7 at something more nearly approximating those higher levels.

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13. The record neither supports nor refutes RISWMC's representation that no air pollution control system vendor will guarantee Condition #21 emissions levels at all times. The matter is simply not addressed as conceded by RISWMC counsel at the January 18 hearing (Transcript, p. 53).

14. The record similarly neither supports nor refutes RISWMC's representation in its Motion and Supplemental Motion that the facilities from which Exhibit #69 emissions data were obtained and other more recent comparably equipped facilities are actually regulated at substantially higher levels. The data provided in the Motion and Supplemental Motion in support of these representations is by admission of RISWMC's counsel not on the record of the hearing (Transcript, p. 66) and may not, therefore, be considered by the hearing officer in rendering a decision.

Based upon the evidence of record, the Motion to Repeal and/or Modify Condition #21 is, therefore, DENIED.

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4. PSD Condition #28:

This Condition requires the Division of Air and Hazardous Materials to perform an inspection of the completed facility and to confirm that all applicable permit conditions have been satisfied before the facility is authorized to start up, shakedown or operate.

RISWMC requests that inspection of substantially complete systems and components be permitted as well as start-up, shakedown and operation of such substantially complete systems and components upon approval by the Division of Air and Hazardous Materials. It argues in defense of this request that some plant systems need to be brought on line well before MSW can be burned and that failure to allow this would cause it substantial delay and significant financial harm.

In their written argument, the Town and the Division appear to agree that Condition #28 as written does not preclude shakedown of individual plant systems or components.

The hearing officer concludes that a clarification of intent is all that is necessary to provide for the measure of relief sought by RISWMC. To this end, Condition #28 describes and requires a final pre-operational inspection performed after the facility is fully constructed and before it is authorized to process MSW. It does not preclude prior inspection and approval for start up, shakedown, and operation of individual plant components.

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5. PSD Condition #29:

RISWMC requests that the requirement for a fully automatic system to cut in auxilliary gas burners at 1,500 degrees F be modified to allow for manual operation of the gas burners at temperatures above 1,500 degrees. There were no objections to this request so long as the automatic system was not modified to allow for manual by-pass.

The hearing officer finds that the proposed modification constitutes an equally effective alternative means of complying with the terms and conditions of the Decision and Order and it is, therefore, ORDERED that PSD Condition #29 is hereby modified as follows:

> A fully automatic system, capable of being started manually, but not otherwise susceptible to operator manipulation or bypass, shall start auxilliary gas burners when the temperature, at a point representative of one second downstream of secondary air injection, drops to or below 1,500 degrees F.

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6. PSD Condition #30:

This Condition sets the maximum MSW throughput of the facility at 377 tons per boiler, not to exceed 710 tons per day (TPD) total throughput. RISWMC requests that it be permitted an average daily throughput of 750 TPD of MSW on an annual basis, not to exceed 234,000 tons per year (TPY).

In its Motion for Reconsideration RISWMC argues that the requested modification is justified because:

1. An average 750 TPD capacity is the clear intent of RIGL §23-19-11.1(a);

2. 750 TPD is the basis upon which its contract with Blount was negotiated;

3. A lower limit would adversely effect the orderly processing of MSW;

4. A lower limit would result in more MSW being landfilled;

5. A lower limit would cause significant financial harm to RISWMC and Blount;

In its Supplemental Motion, RISWMC further argues that all its environmental impact modelling, including that utilizing its Exhibit #69 emissions test data was based on an assumed throughput of 777 TPD for a full 365 day year, a level (at 283,650 TPY) well in excess of and, therefore, conservative relative to the statutory maximum of 234,000 TPY.

By way of rebuttal, the Town of North Kingstown in its Brief argued that RISWMC's representations regarding the orderly processing of MSW and of significant financial harm

were unsupported by evidence on the record and should consequently be ignored. It further argued that RISWMC's representation that the Special House Commission intended the facility to have a 750 TPD average capacity was inaccurate, that capacity rather being set as a maximum subject to environmental considerations. Further, at the hearing of January 18 the Town represented that the emissions projections set forth in Exhibit #69 were not in fact calculated as RISWMC had argued based on operating all 365 days of the year, but rather factored in an 85% availability factor, thereby reflecting an annual MSW throughput of 240,000 tons as opposed to the 280,000 tons stated by RISWMC (Transcript, p. 34).

Also during the course of the January 18 hearing, RISWMC reiterated its written argument as above summarized (Transcript, pp. 13-15, 81). In response to questioning by the hearing officer, RISWMC established that the terms "nominal capacity" "nameplate capacity" and "maximum continuous rating" all meant the same thing, 14.8 tons per hour per boiler or 29.6 tons per hour total (Transcript, p. 81). RISWMC confirmed the hearing officer's understanding that its witnesses had testified that in reality the facility could only operate at its "peak load" of 16.2 tons per hour per boiler (32.4 tons per hour total) two hours out of twenty-four (Transcript, p. 84). However, RISWMC argued that the hearing officer's assumption that the facility would

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operate at its "nominal" or "nameplate" levels at all times when it was not operating at "peak" was wrong and, therefore, the hearing officer's conclusion that the facility was incapable of operating at the levels proposed was also wrong (Transcript, p. 85).

Based on a review of the argument and evidence of record regarding this issue, the hearing officer finds as follows:

1. RIGL §23-19-11.1(a) sets the nominal capacity of the proposed facility at 750 TPD of MSW as a maximum, with the amount of capacity actually permitted to reflect environmental considerations.
2. "Nominal" or "nameplate" capacity is not strictly speaking an "average" capacity as represented by RISWMC but is a design throughput level which is nevertheless less than peak load capacity. Relative to the proposed facility, nominal or nameplate capcity is 29.6 tons per hour or 710 tons per day, while peak load capacity is 32.4 tons per hour or 777 tons per day. The nominal capacity of the proposed facility is, therefore, less than the statutory maximum.
3. The record does not address RISWMC's argument that a lower limit would adversely effect the orderly processing of MSW or cause it and/or Blount Energy significant financial harm.

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4. The record supports RISWMC's argument that a 710 TPD throughput limit would result in additional landfilling of MSW.

5. The record supports RISWMC's contention that it performed all its environmental impact modelling using an assumed MSW throughput of 777 TPD, which is peak load.

6. The record does not support RISWMC's contention that it performed all its environmental modelling based on a full 365 day year's emission at peak load, however. The modelling period employed for purposes of Exhibit #23, Estimate of Particulate Loading to Narragansett Bay Resulting from the Dry Deposition of OPRRF Emissions, is twenty days. Moreover, the emissions projections included in Exhibit #69, are "corrected ... for the per cent of time the facilty is expected to be off line for maintenance or other shutdowns" [0.85] (Prediction of Emission from OPRFF Based on Scrubber-Baghouse Equipped Facility Emissions Data, p. 2).

7. Even at a presumed availability of 0.85 (85%), however, all environmental impact modelling based on Exhibit #69 reflects a level of annual MSW throughput which is slightly in excess of that allowed by law (241,000 TPY as opposed to 234,000 TPY). As a consequence, modelled environmental impacts may reasonably be expected to be slightly conservative.

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8. RISWMC has satisfactorily demonstrated that the hearing officer has misinterpreted the hearing record as to the meaning of "nominal capacity". As a consequence the maximum MSW throughput of the facility was inappropriately set at a level lower than that at which RISWMC has demonstrated an ability to operate in an environmentally acceptable manner.

ORDERED, therefore, that based upon the evidence of record, Condition #30 be modified as follows:

> Maximum allowable MSW throughput shall be ~~777~~ 388.5 tons per boiler per day, not to exceed ~~710~~777 tons total for both boilers in any given twenty-four hour period and further not to exceed an average of 750 TPD on an annual basis and a total of 234,000 tons of MSW in a year.

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7. PSD Condition #31:

Condition #31 prohibits bypassing of any air pollution control system component during any period, including start up or shutdown and regardless of whether the plant is operating with auxiliary gas or MSW furnaces. RISWMC requests that this prohibition apply only to periods when MSW is being burned and even then to allow bypassing when any component of the boiler feedwater system or spray dryer absorber fails.

RISWMC argues that bypassing while operating under auxiliary gas burners is necessary because the spray dryer needs to be preheated prior to use to avoid blinding of the baghouse fabric filters by wet lime slurry. It further argues that the dryer-baghouse does not control NOx emissions from burning natural gas and that bypassing of the baghouse in cases of boiler feedwater or spray dryer failure is necessary to avoid excess temperatures and resultant fire in the baghouse.

The Town in its Brief argues that RISWMC has presented no evidence to support the need for bypassing. It argues that baghouse fires can be prevented by designing the system to shutdown before temperatures rise to a dangerous level. In its Memorandum, the Division of Air and Hazardous Materials cites the potential for abuse of a bypass capability in objecting to RISWMC's proposal.

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The hearing officer concludes that the Division's Memorandum is correct in its representation that the bypass issue was argued and testified to at length during the course of the hearing and that RISWMC has introduced no new arguments which would justify reconsideration of the Findings upon which Condition #31 is based. The requested modification is, therefore, DENIED.

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8. PSD Condition #33:

This Condition requires that the charging of MSW and the initiation of shutdown procedures be implemented immediately upon an emissions monitor signalling an emissions exceedance or when an air pollution control system component fails. RISWMC requests that it not be required to cease charging of MSW until the "averaging time" for emissions exceedance (after the alarm) has elapsed. It proposes a minimum three hour period for all emissions parameters for which no averaging time is set. It further proposes that Condition #33 be waived in its entirety during start up to accomodate "fine-tuning" of plant systems and finally that the averaging time "clock" not be started until monitor malfunction or calibration drift are eliminated as possible causes of a reported exceedance. In support of the requested modifications, RISWMC argues that they would avoid needless shutdowns and thereby have a net positive environmental benefit.

The Town of North Kingstown argues in its Brief that various of RISWMC arguments are in fact new evidence and that RISWMC's representation that continued operation during a period of emissions exceedance would have a net positive environmental benefit is unsubstantiated by evidence on the record.

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The Division of Air and Hazardous Materials argues in its Memorandum that since averaging time controls when a violation is deemed to have occured, the Condition as written requires no modification to accomodate RISWMC's basic request. Mr. Cote reiterated this position at the hearing of January 18 in response to the hearing officer's questions [Transcript, pp. 98-99].

The hearing officer concludes that Condition #33 does nothing more than specify the steps the plant operator must take and when he must take them when a certain triggering event occurs, that triggering event being the indication of an emissions exceedance by a monitor. While the Decision and Order both sets and incorporates by reference various emissions limitations, the term "exceedance" was given no specific meaning, and should, therefore, be interpreted consistently with the policies and practices of the Division as usually employed in enforcement of its regulations. It would appear that the Division interprets the term "exceedance" in a manner that provides for an averaging time during which the facility operator could initiate the corrective actions RISWMC has argued that it needs time to pursue prior and as a preferred alterntive to commencing shutdown. RISWMC's request for additional relief in the form of minimum averaging times, start up waivers and/or monitor verification, however, are not supported by evidence in the record. The proposed modification of Condition #33 is, therefore, DENIED.

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9. PSD Condition #35:

This Condition requires the permanent shutdown of the existing oil fired Quonset Point steam plant prior to start up or shakedown of the proposed facility unless an approved interactive air quality modelling analysis demonstrates that concurrent operation will not violate emissions standards or limitations attached to the Decision and Order. RISWMC has requested that it be allowed to operate (concurrently) with its gas fired auxiliary boilers during start up or shakedown so long as the emissions from these boilers do not exceed applicable limitations.

In their Briefs, both the Town and the Division of Air and Hazardous Materials maintain their opposition to concurrent operation of the old and new plants without interactive air quality modelling to demonstrate compliance with applicable air quality standards.

During the hearing of January 18, RISWMC in response to questioning by the hearing officer argued that since the principal emissions from the oil fired plant would be SO2, CO and TSP and the principal emission from the facility's gas auxiliaries would be NOx, they would not be interacting sources (Transcript, page 100). However, when pressed by the hearing officer as to whether RISWMC objected to performing the interactive air quality modelling required by Condition #35, RISWMC counsel stated that if this was a condition precedent to concurrent operations, then RISWMC would comply (Transcript, page 101).

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The hearing officer concludes based on counsel's representation as above cited that RISWMC is prepared to do what Condition #35 requires it to do as a precedent to concurrent operation of the existing steam plant and the proposed facility's gas boilers and, further, that the record does not support the relief sought in RISWMC's Motion. No modification of Condition #35 is, therefore, required and the request for modification is, therefore, DENIED.

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10. PSD Condition #37:

This Condition incorporates by reference Division of Air and Hazardous Materials Permit Conditions and Emissions Limitations, Etc. (Exhibit 6C and its Guidance On Resource Recovery Facilities (Exhibit 7). RISWMC requests clarification as to which document controls when their provisions conflict. It also requests that baghouse inlet temperature limitations (set forth in Exhibits 6C and 7) be raised from 300 degrees F to 320 degrees F during start up; that the Division's requirement for an "array" of furnace temperature probes be modified to require only one probe in each boiler; that the CO emissions limit set forth in Exhibit 6C be revised in line with that set forth in Exhibit 7; and that a CO waiver be granted during start up operations.

In its Memorandum, the Division argues that in conflict situations with its Guidance, its Permit Conditions (Exhibit 6C) should control since these were prepared with specific reference to the proposed facility. It observes that no justification for raising baghouse inlet temperature is provided and that the number of temperature probes should be addressed in the continuous emissions monitoring plan which RISWMC is required to submit to the Division for its approval. With reference to CO emissions, the Division argues that applicant's witness, Mr. Hittinger, had testified that the facility was capable of meeting the limits set by the Division and had agreed that these were BACT.

Questioning by the hearing officer at the January 18 hearing suggests that RISWMC's concern with Condition #37 is at least in part due to the possibility it might compel the Division to interpret its own requirements and limitations in an unreasonable way, particularly during start up conditions.

Regarding the various modifications sought by RISWMC in Condition #31, the hearing officer concludes as follows:

1. Where either Exhibit 6C, Permit Conditions, or Exhibit 7, Guidance, conflict with the Decision and Order, the Decision and Order controls. Where they conflict with each other, the Permit Conditions control.
2. The Division of Air and Hazardous Materials during facility start up only may provide such relief to baghouse inlet temperatures and CO emissions limits set forth in its Permit Conditions as it deems appropriate. This may most certainly include no relief.
3. The exact number of temperature probes to be installed in each furnace shall be established by the Division after review of RISWMC's continuous emissions monitoring plan, but at a minimum two probes, one a backup, shall be required in each furnace.

The hearing officer finds that 1-3 above clarify the intent of Condition #37 without requiring its modification.

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11. Solid Waste Condition #4:

This Condition requires that shop drawings for major plant components be reviewed and approved by the Division of Air and Hazardous Materials prior to construction or installation of those components. It also requires the Division to give notice as to those components it wishes to so review within sixty days of issuance of the Decision and Order.

RISWMC requests that the Condition be modified so as to require the Division to complete its review process and notify RISWMC in writing of its approval or disapproval within ten days of receipt of shop drawings. In support of its request, RISWMC argues that any delays by the Division would cause it to incur substantial financial penalties since its contract with Blount requires review to be completed within fifteen days.

In its Memorandum, the Division argues that acceding to RISWMC's request would adversely affect the interests of other regulated parties. By way of response at the hearing of January 18, RISWMC counsel suggested that the Division limit itself to only those major shop drawings which it specifically requests an opportunity to review (Transcript, p. 20).

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The hearing officer finds upon a review of the record that RISWMC's contract with Blount is not in evidence to substantiate counsel's representation that it requires a fifteen day review, while RISWMC's Solid Waste Application, which is in evidence as Exhibit 12, indicates in its Appendix F, Technical Specifications, that in all instances the shop drawing review time is set at thirty days. The record consequently provides no grounds for resolving this inconsistency in RISWMC's favor.

The hearing officer further concludes that RISWMC in its argument at the January 18 hearing, as above cited, proposes that the Division limit the scope of its review in exactly the same manner as it already required by the plain language of the Condition as written.

No reasonable justification for modifying Condition #31 has been presented and the Motion to Modify is consequently DENIED.

12. Solid Waste Condition #7:

RISWMC has requested clarification that Condition #7, which prohibits salvage, does not prohibit recovery of ferrous metals from ash residue.

It was not the hearing officer's intent in Condition #7 to prohibit the recovery of metals from ash residue and such recovery is not prohibited.

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13. Solid Waste Conditions #15, 17, 22 and 30:

These Conditions all in various ways require RISWMC to design facility components and/or operate in ways that comply with RIDEM's hazardous waste regulations, particularly those relating to the temporary storage, handling and/or transportation of liquid hazardous waste. RISWMC has requested that the hearing officer identify the specific rules and regulations which he intends should apply, particularly as between 40 CFR Part 264 and 265.

In its Memorandum, the Division of Air and Hazardous Materials argues that the manner in which RIDEM's hazardous waste regulations apply to the proposed facility is set forth in those regulations under legal authority which is independent of the Decision and Order. In order to avoid conflicts between the Decision and the regulations the Division argues that the portions of 40 CFR which are incorporated in RIDEM's hazardous waste regulations are those with which RISWMC must comply.

The hearing officer, by way of clarifying his intent in Conditions #15, 17, 22 and 30, intends that RISWMC will seek the assistance of the Division of Air and Hazardous Materials as the appropriate regulator, if it has a question as to the interpretation of its regulatory obligations under RIDEM hazardous waste management regulations. Accordingly, these Conditions do not require modification.

14. Solid Waste Condition #21:

This Condition requires that suspected hazardous material be removed from the facility by a licensed hazardous waste hauler within 24 hours of being placed in the facility's temporary storage area. RISWMC requests that 48 hours be provided for removal because results from tests to confirm the presence of hazardous waste typically take longer than 24 hours to obtain.

In its Memorandum, the Division of Air and Hazardous Materials notes that sampling results can take in excess of 24 hours to obtain and that these results must be in hand before hazardous waste can be manifested off the site. The Town did not present an argument against modification of this Condition.

The hearing officer finds based on a review of the argument and record that relief of the sort requested by RISWMC is appropriate. ORDERED, therefore, that Solid Waste Condition #21 be modified as follows:

> The Division and the operator's licensed hazardous waste hauler shall be immediately notified upon the transfer of any suspect hazardous material into a temporary storage container and the suspected material must be removed from the site within ~~twenty-four~~ forty-eight hours of such notification.

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15. Solid Waste Condition #29:

Among other provisions, this Condition requires RISWMC to commit monies from funds it is otherwise by law or agreement obligated to pay the Town of North Kingstown for the specific purpose of supporting mutually agreed upon levels of municipal service in the areas of hazardous waste emergency response and firefighting in general. RISWMC requests that a specific disclaimer be added relieving it of any obligation to compel the Town to expend such funds for any particular purpose since it has no such power.

No argument against this request was made by the other parties to the proceeding.

Although the hearing officer reads into the present language of Condition #29 no inference that RISWMC is directed to compel the Town to spend the monies in question for the purposes identified in this Condition and although the hearing officer agrees that RISWMC has no such authority, he finds no harm to result in accomodating the modification sought by RISWMC. ORDERED, therefore, that Solid Waste Condition #29 for purposes of clarification be modified as follows:

> The applicant shall immediately initiate discussions with appropriate Town officials and the North Kingstown Fire Department regarding the department's personnel, equipment and training needs as they relate to managing hazardous waste related emergencies and fire fighting responsibilities. The applicant and the Town shall prepare a capital improvement plan, training schedule and operating budget as necessary to support local emergency services to be provided by the Town. The applicant shall provide funds from monies it is otherwise required

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by law or agreement to pay the Town for the specific purpose of supporting agreed upon levels of service, but the applicant is not required to compel the Town to expend any such funds for any particular purpose. An agreement regarding provision of and payment for such local emergency and firefighting services shall be in place at least six months prior to the scheduled beginning of facility operations; provided that if the Town and applicant are unable to reach agreement, the Division may authorize the applicant to negotiate a similar agreement with another nearby fire department, the Rhode Island Port Authority or to provide the necessary services with its own equipment and employees.

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16. Solid Waste Condition #34:

RISWMC has requested clarification of this Condition as to the requirement that residue ash tested to be hazardous must be removed within forty-eight hours to a licensed temporary storage facility pending RISWMC entering into a contract with a licensed hazardous waste landfill for permanent disposal.

This Condition was included to address a problem identified by RISWMC's witness, Russel Carlson, in his testimony of March 8, 1988 regarding the industry practice relative to hazardous waste disposal contracts. Testifying to the substance of Exhibits #34 and #35, letters to RISWMC from SCA Chemical Services and CECOS International, respectively, Mr. Carlson represented that the operators of licensed hazardous waste landfills do not as a matter of practice contract for the acceptance of waste material until they are provided test samples of the material in question (Transcript, 3/18/88; page 58). This practice, therefore, would effectively make it impossible for RISWMC to enter into a contract for permanent disposal until after hazardous ash had actually been generated.

Condition #34 would allow for removal of hazardous ash to a licensed temporary storage facility during the time necessary to arrange and contract for final disposal, thereby avoiding a needless shutdown due to a backup of ash residue in the on-site ash storage building.

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17. Solid Waste Condition #35:

RISWMC has requested that it be relieved from the requirement that the duration of its operating permit not exceed the capacity in years of the facility's designated ash disposal site. RISWMC argued that this language would adversely affect its ability to obtain financing.

The Town of North Kingstown in its Brief argued that under no circumstances should the facility be allowed to operate without access to a licensed ash disposal site. The Division of Air and Hazardous Materials in its Memorandum argued that the issue is moot because RIDEM regulations set the maximum duration of an RRF operating permit at one year.

RISWMC, upon reflection, apparently agreed with the Division's argument and the request for modification of Solid Waste Condition #35 was withdrawn at the January 18 hearing (Transcript, p. 91).

18. Solid Waste Condition #43:

This Condition requires that a backup diesel electric generator be installed to run the facility's fire fighting pumps and emergency lighting system in case of a power failure. RISWMC has requested that emergency lights be battery powered.

In further pressing its case at the January 18 hearing, RISWMC argued that this requirement and others relating to fire safety should be reviewed and ultimately decided upon by the State Fire Marshal who under state building and fire codes was represented as having the authority to alter, amend or reject in their entirety any modification to Decision and Order conditions relating to fire control (Transcript, pp. 21-2).

While the hearing officer will not address whose requirements will have priority in the event of a conflict between the Decision and Order and the State Building and/or Fire Codes, I find that powering emergency lighting systems with batteries represents an equally effective alternative means of complying with the terms and conditions of the Decision and Order. ORDERED, therefore, based upon the evidence of record, that Condition #43 be modified as follows:

> The applicant shall install a backup diesel electrical generator which shall be of a generating capacity sufficiently large to support the facility's firefighting pumps and other firefighting equipment, ~~including~~, providing that emergency lighting systems may be battery powered. This backup generator, and these emergency lighting systems shall be capable of operating automatically in case of a power failure.

19. Solid Waste Condition #47:

RISWMC interprets this Condition as written to require a fire rated emergency escape route from the crane pulpit to the tipping hall and argues that it would be safer to require a corridor from the crane pulpit to a planned stairwell leading to the outside of the building. It further requests that the corridor floor not be fire rated since the chances that it would be exposed to fire are extremely remote.

In its Brief, the Town of North Kingstown argues that RISWMC has misread the Condition which requires an escape corridor to the outside of the tipping hall, not into it. It further argues that RISWMC's arguments regarding the potential for fire damage to the escape corridor's floor is unsupported by evidence on the record.

The Division of Air and Hazardous Materials in its Memorandum argues that the proposed modification as it relates to routing comports with the intent of the Condition as written and should be allowed.

The hearing officer concludes that the record does not support removing the requirement that the escape corridor's floor be fire rated. The purpose of this requirement is to afford the crane operator, who by RISWMC's own testimony would be a first line of defense in fighting a fire in the

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refuse bunker, some reasonable assurance he could safely escape his post if it became necessary and therefore, provide him some modest incentive to stay and fight a fire from which, absent a safe escape route, he might otherwise be predisposed to distance himself sooner rather than later.

As to RISWMC's proposed modification of escape routes, the hearing officer concludes that so long as the proposed connecting corridor and stairway are fire rated in accordance with the condition as written the proposed modification represents an equally effective alternative means of complying with the terms and conditions of the Decision and Order. ORDERED, therefore, based on the evidence of record, that Condition #47 be modified as follows:

> An emergency fire escape route consisting of a corridor connecting the crane pulpit to a stairwell leading to the outside of the building at ground level shall be provided and shall be fitted with two hour fire rated walls, ceilings and floor.

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20. Solid Waste Condition #48:

RISWMC has requested that this Condition be modified to remove the requirement that air intake fans in the walls and roof of the tipping hall be reversible on the basis that no such fans are incorporated in the facility's design. It further argues that the fans which provide combustion air to the boilers and are located in their immediate proximity need not be reversible since if run in reverse they would draw flue gas from the boilers and blow it into the tipping hall rather than up the stack.

The Town of North Kingstown argues in its Brief the experience of the North Andover Fire Department in fighting an incinerator fire, testified to by the Town Fire Chief at the April 13, 1988 public hearing, as supporting the need for reversible fans. In response to questions from the hearing officer at the January 18 hearing, however, the Town was unable to establish that RISWMC had, in fact, proposed to install air intake fans in the walls or ceiling of the tipping hall (Transcript, pp. 93-4).

The hearing officer concludes upon review of the evidence of the record and argument that he misinterpreted that record as to the design of the facility's combustion air intake system. RISWMC's representation that no air intake fans are proposed to be installed in the walls, roof or ceiling of the tipping hall is found to be true. Further, RISWMC's argument

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that it makes no sense to have the primary and secondary boiler air intake fans reversible is well taken. However, while it clearly would be counterproductive to vent flue gases through the tipping hall during a fire emergency, the record suggests it would still be useful to have the capability to eliminate the building's negative pressurization. This in turn would require that the facility operators have the capability to shut down the combustion air induction fans in case of a fire.

ORDERED, therefore, based upon the evidence of record, that Condition #48 be modified as follows:

> The tipping hall shall be fitted with manually operated or heat fuse linked vent openings of sufficient size and number to allow for the release of heat and smoke caused by a fire. These shall be located in or near the roof of the building. ~~All fans used in the normal operation of the building shall be capable of being shut down in case of a fire emergency and shall be controllable from the main facility control room.~~ Primary and secondary combustion air induction fans shall be capable of being shut down in case of a fire emergency and shall be controllable from the main facility control room.

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21. Solid Waste Condition #51:

RISWMC has requested that it be relieved of the obligation to provide for two fire fighting system tie ins to the Industrial Park water system on the basis that this would be unduly expensive and provide no significant fire fighting benefit. In support of its argument it cited the opinion of a Mr. Howard Cohen of the Rhode Island Port Authority.

The Town of North Kingstown in its Brief argues that a second tie in for fire fighting purposes provides obvious benefits in case of a supply interruption to the main feeder. It also argues that Mr. Cohen's alleged statements are not in the record of the hearing and are, therefore, improperly before the hearing officer.

At the January 18 hearing RISWMC counsel, in response to a question from the hearing officer, acknowledged that Mr. Cohen's opinion was not, in fact, a matter of record.

The hearing officer concludes that the record and argument before him do not support deleting Condition #51 and RISWMC's Motion regarding this Condition is DENIED.

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The foregoing is hereby recommended to the Director for adoption as a final Decision and Order.

2-3-89
Date

Malcolm J. Grant
in his capacity as Hearing Officer

Date

Robert L. Bendick, Jr.
Director, Department of
Environmental Management

CERTIFICATION

I hereby certify that a true and accurate copy of the within has been sent first class mail, postage prepaid to Mark A. McSally, Esq., McSally & Taft, P. O. Box 8830, 21 Garden City Drive, Cranston, R. I. 02920, Richard A. Sherman, Esq., Tillinghast, Collins and Graham, One Old Stone Square, Providence, R. I. 02903, George West, Esq., Manning, West, Santaniello & Pari, 711 Fleet Bank Building, Providence, R. I. 02903, Harlan M. Doliner, Esq., McGregor, Shea & Doliner, P.C., 18 Tremont Street, Suite 900, Boston, MA 02108 and Paul O. Plunkett, Concern, Inc., 2 First Street, North Kingstown, R. I. 02852 and by interoffice mail to Claude A. Cote, Esq., 9 Hayes Street, Providence, R. I. on this _____day of _____, 1989.