

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc. SUPERIOR COURT

Town of RICHMOND )  
VS. ) CASE NO: PC/05-3772  
RHODE ISLAND DEM. )  
ET AL )

HEARD BEFORE THE HONORABLE  
MR. JUSTICE STEPHEN FORTINATO, JR.,  
OCTOBER 17, 2005



APPEARANCE:

CHRISTOPHER LITTLE, ESQ., ON BEHALF OF THE PLAINTIFF  
TIMOTHY PAVILONIS, ESQ., ON BEHALF OF THE DEFENDANT DEM  
ALEXANDRA CALLAM, ESQ., ON BEHALF OF THE DEFENDANT  
CHAUBERT, DIVISION OF NSA CORP.

PATTI M. AHEARN  
COURT REPORTER

C E R T I F I C A T I O N

I, PATTI M. AHEARN, hereby certify that the succeeding pages 1 thru 23, inclusive, are a true and accurate transcript of my stenographic notes.

Patti M. Ahearn  
PATTI M. AHEARN  
COURT REPORTER

I-N-D-E-X

DIRECT    CROSS REDIRECT    RECROSS

WITNESS:

NONE

EXHIBITS

NO.	DESCRIPTION	ID	FULL
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NONE



1 Town of Richmond, entered into a consent agreement  
 2 without any input from the Town of Richmond, and the Town  
 3 says, in effect, look, we were admitted as a full party,  
 4 and, yet, the matter was resolved without notice to us  
 5 and thereby no consultation or input from us.

6 The defendants, for their part, say, well, that's  
 7 too bad. We have every right in the world to turn the  
 8 contested hearing into a non contested hearing, and once  
 9 that happened Richmond is out of the loop and, therefore,  
 10 what we did by way of working out our agreement is of no  
 11 moment to Richmond and, subsequently, Richmond could not  
 12 come here and seek any relief. Moreover, they say  
 13 Richmond seeks a declaratory judgment as distinguished  
 14 from appealing from an administrative order to this Court  
 15 under the Administrative Procedures Act.

16 Does that pretty much sum things up from the point  
 17 of view of the parties?

18 MR. LITTLE: Yes, your Honor.

19 MR. PAVILONIS: Yes, your Honor, with the exception  
 20 regarding the facts of the case in that the agency did to  
 21 a limited extent consult with the Town on its interests  
 22 in the case. It is not as if the agency had no  
 23 communication or dialogue with the Town and wasn't  
 24 concerned about the Town's interests in this case once  
 25 the Town was granted intervenor status.

1 THE COURT: But at some point, and certainly correct  
2 me if I'm wrong, at some point whatever consultation you  
3 had with the Town became a thing of the past and the  
4 Department and Chaubert, without the Town's  
5 participation, crafted a settlement agreement that those  
6 two parties thought they would live by and thereby  
7 terminated the case.

8 MS. CALLAM: Well, it was actually in the opposite  
9 order in time sequence. The settlement was reached with  
10 -- Chaubert reached the settlement with DEM prior to the  
11 Town obtaining intervenor status but did not execute it  
12 because they obtained intervenor status and then held  
13 several meetings, got a lot of comments, got Chaubert to  
14 agree to them, and there was no formal meeting with  
15 everybody, but, in essence, they participated by voicing  
16 their concerns to DEM, DEM telling Chaubert they needed  
17 to add them and we did execute it. It was the plan all  
18 along to settle this on Chaubert's part and not to take  
19 it to a hearing as Chaubert did not want to go to a  
20 hearing. Chaubert is the only entity that has the right  
21 to that hearing, and there was never any hearing held,  
22 never even got to that point.

23 THE COURT: However, at the time the hearing officer  
24 granted intervenor status to Richmond, the hearing  
25 officer had not been presented with, and, therefore, had

1 not approved the settlement reached between Chaubert and  
2 the Department.

3 MS. CALLAM: The hearing officer has no jurisdiction  
4 over --

5 THE COURT: Well, that's another question. We'll  
6 get to that.

7 MS. CALLAM: Well, that is correct --

8 THE COURT: Just a minute, please. Am I correct in  
9 saying that at the time the hearing officer granted  
10 intervenor status to the Town of Richmond the --

11 MS. CALLAM: There had been no formal settlement  
12 agreement filed with the hearing officer, that's correct.

13 THE COURT: All right.

14 MS. CALLAM: Thank you.

15 MR. LITTLE: Your Honor, I think the parties do not  
16 disagree that the first time Richmond received knowledge  
17 of a settlement, the terms of a settlement between DEM  
18 and Chaubert, was on June 29th when they received a  
19 proposed draft, and on July 5th it was executed, and  
20 thereafter -- and prior to that time Richmond was not  
21 privy to any of the discussions because it thought that  
22 it was going to be getting discovery to be able to  
23 assess, among other things, what chemical constituents --  
24 what are the chemical constituent elements of the waste  
25 water that is going into the ground and the area.

1           There are just a couple of points that I wonder if I  
 2           could just briefly address. There is an underlying  
 3           argument by DEM and Chaubert that this Court has no  
 4           jurisdiction under the declaratory judgment count of the  
 5           Complaint. Frankly, I was puzzled by that assertion in  
 6           light of at least two things. One is the language of  
 7           9-31 and also Superior Court Rules of Civil Procedure, 57  
 8           which says, "The existence of another adequate remedy  
 9           does not preclude a judgment or declaratory relief where  
 10          it is appropriate." And in light of the APA which  
 11          specifically provides in --

12           THE COURT: 42-35-7.

13           MR. LITTLE: 42-35-7, that this Court has discretion  
 14          to construe a rule of an agency. If we go back as far  
 15          back as Eastern Van Lines versus Norbert, 1974, the  
 16          Supreme Court reaffirms that the fact that there may be a  
 17          pending administrative proceeding in no respect bars this  
 18          Court from exercising its discretion where it determines  
 19          it appropriate to enter declaratory relief. Certainly,  
 20          even the Department's own rules say on the first page,  
 21          "Issues not addressed in these rules or for which a party  
 22          seeks clarity are to be considered in light of Chapter  
 23          42-35 and 42.17.7. Beyond that I think it is very clear  
 24          this Court has the discretion, and in Norbert the Court  
 25          affirmed the Court's -- the Superior Court's decision to



1 exercise its discretion in a case that was adverse to a  
 2 plaintiff seeking review, but the Court made it clear  
 3 that you have the discretion regardless of the other  
 4 pending proceedings.

5 We aren't going to restate. The Court has read the  
 6 briefs, and it is clear throughout these rules of the  
 7 agency that once you're a party, and we are a party  
 8 because we established that we had suffered an injury, in  
 9 fact, and we suffered to the satisfaction of the hearing  
 10 officer that DEM could not adequately represent the  
 11 interest of the citizens of Richmond, and upon that  
 12 finding we are entitled to the rights of a party, and it  
 13 makes it very clear, even at the very end of the rules  
 14 which Rule 17 says that the parties, the parties to a  
 15 hearing may dispose of a matter by a consent decree. Of  
 16 course they can. What our position has been, your Honor,  
 17 is that --

18 THE COURT: Well, they can if they get the approval  
 19 of the hearing officer.

20 MR. LITTLE: Either we have to have approval or,  
 21 simply enough, they have to schedule a hearing and say we  
 22 want to have a settlement, and if Richmond can satisfy  
 23 the hearing officer that the settlement or the consent  
 24 decree is inappropriate, then that is what the hearing  
 25 officer is to determine, and that in and of itself is

1 subject to review if any party thinks it should be  
2 reviewed.

3 But simply put to say two parties, when there are  
4 three parties to a case, three parties can settle a case  
5 without either Court approval or the consent of the  
6 parties is totally contrary to the rules of intervention  
7 as they set forth by the agency and construed by the  
8 Rhode Island Supreme Court.

9 What we have been really asking for in this ruling  
10 is simply that the Court declare that we had rights as an  
11 intervenor, that it could not be resolved or dismissed  
12 absent a hearing by the hearing officer or consent, and  
13 that it simply be vacated and remanded to the agency for  
14 further proceedings consistent with its own rules.

15 THE COURT: What does the Department say to that?

16 MR. PAVLONIS: Your Honor, there are a number of  
17 problems with that scenario. I think the underlying  
18 issue is whether or not a DEM, administrative enforcement  
19 action in an environmental case is the same as  
20 intervention generally under the Superior Court Rules of  
21 Civil Procedure; and the Department takes a position that  
22 they are not the same. It is a different animal in that  
23 the Department is statutorily charged with enforcing  
24 environmental laws, regulations promulgated thereunder  
25 and assessing penalties and orders at AAD, and that is

1 created by statute by the General Assembly. The General  
2 Assembly didn't empower private parties to enforce those  
3 rules at AAD, at the administrative proceeding.

4 THE COURT: But the hearing officer says Richmond is  
5 a party, and the APA says in 42-35-1(f) "Party means each  
6 person or agency named or admitted as a party or properly  
7 seeking and entitled as of right to be admitted as a  
8 party." So, the hearing officer lets Richmond in. Once  
9 they are a party it doesn't mean that Richmond is going  
10 to get what it wants out of this proceeding, far from it.  
11 But once they are in as a party, they are a party; aren't  
12 they?

13 MR. PAVILONIS: They are a party to the hearing,  
14 your Honor. The rules say they are a party to the  
15 hearing. I agree that as a party they can seek  
16 discovery, they can hire experts, they can present  
17 factual witnesses, they can cross-examine any witnesses  
18 presented; however, they carry no burden of proof at this  
19 hearing.

20 Additionally, the statute allows for a respondent, a  
21 party who receives a notice of violation, to either  
22 withdraw its request or simply not request a hearing.  
23 And in that case you're left with an agency, an  
24 intervenor, and no one else.

25 THE COURT: Of course, your rules, meaning the

1 Department rules, distinguish, do they not, between a  
2 party intervenor and a so-called --

3 MR. PAVILONIS: Participant.

4 THE COURT: -- participant.

5 MR. PAVILONIS: Yes, your Honor.

6 THE COURT: Anybody -- I guess an environmental  
7 group or any citizen in Richmond could show up and, in  
8 effect, be an amicus curiae, file a brief, maybe make an  
9 argument, but it does not have the same exalted status,  
10 if you will, of a party.

11 MR. PAVILONIS: That's correct. There is a  
12 participant status provided for a participant who can  
13 follow the proceedings, can be heard, can present  
14 questions to a hearing officer, but isn't able to present  
15 its own witnesses, isn't able to conduct a direct or  
16 cross-examination of other witnesses. So, it certainly  
17 is a lesser status.

18 THE COURT: Okay.

19 MR. PAVILONIS: The AAD rules provide for intervenor  
20 generally. The rules don't in clear terms distinguish  
21 between an enforcement action, which is this case or  
22 where the agency is telling some party, you violated the  
23 state law, you violated Rhode Island DEM regulations,  
24 you're ordered to do these certain measures to correct  
25 those violations, and you're ordered to pay a penalty.

1 That's this scenario. The other scenarios that AAD  
2 handles are applications matter. There are numerous  
3 applications that the agency receives to grant licenses  
4 or permits also covered under the Administrative  
5 Procedures Act. The AAD rules generally provide for both  
6 scenarios; interventions under enforcement matters and  
7 application cases. However, they are very different  
8 cases, and in the enforcement context the General  
9 Assembly said DEM carries the burden of proof to prove  
10 that a certain party violated the law. No one else has  
11 that burden.

12 An intervenor may wish to be heard, may intervene on  
13 the side of DEM, and also wish to prove that a party  
14 violated the law. Ostensibly, I guess an intervenor  
15 could come in on the side of a respondent, and that case  
16 might be a scenario where DEM charges a particular party  
17 with violating the law, orders that party to do  
18 something, and that party is, say, a tenant where a  
19 property owner wasn't named, and a property owner comes  
20 in and says, "Wait a second. I'm affected here too by  
21 that order because I own the land to which this order  
22 applies." That is another scenario. But in this  
23 scenario the Town of Richmond has intervened, they have  
24 been granted that status. It is not clear to me exactly  
25 what they're looking for in this hearing. As an initial

1 matter they sought to amend the notice of violation  
2 itself, to add additional charges to it, to add  
3 additional orders or relief sought by the agency. The  
4 hearing officer simply doesn't have authority to do that,  
5 to direct the notice of violation be expanded. Here, the  
6 hearing officer said so.

7 So, if we were to go back to DEM and have a hearing  
8 on this matter it creates an unusual result where the  
9 respondent has already withdrawn its request for a  
10 hearing, they are not in the case, the agency is left to  
11 try to prove all of the violations against the respondent  
12 to obtain some relief that the agency believes it has  
13 obtained 90 percent of anyway.

14 We believe we've obtained a very good settlement in  
15 this case. We've amended the settlement based on  
16 Richmond's comments. We certainly haven't amended it  
17 such that we've given Richmond everything they wanted.  
18 But some of that is based on the scientific testing of  
19 soils that were found on site. We waited for those tests  
20 results to come in before finalizing any consent  
21 agreement because one of the major issues in this case  
22 was these dirt piles; can they stay on site or have to be  
23 removed. And the agency as an initial matter alleged  
24 that those piles are either solid waste or hazardous  
25 waste and have to be removed.

1           After analysis of the piles, the agency felt that it  
2           doesn't have jurisdiction under its remediation  
3           regulations, the body of regulations that govern these  
4           piles to say that they have to be removed. So, we agreed  
5           that the piles can stay.

6           We've also asked the respondent to get rid of  
7           additional piles if they are generated. Whether or not  
8           we can enforce that if we ordered that as an initial  
9           matter, that would have to be determined in court, but we  
10          felt it was a good resolution.

11          In terms of these lagoons on site, Richmond has  
12          said, DEM, shut down those lagoons, tell them they can't  
13          have them. The branch at DEM that is responsible for  
14          these underground injection control systems, this is the  
15          division that ordered the permit, doesn't feel that they  
16          have jurisdiction to shut them down as a result of this  
17          case. The agency feels that these things are permitted.

18          Aside from those two major aspects of the case, I  
19          don't know if there is much of a difference between what  
20          the Town wants and what DEM obtained through an informal  
21          settlement.

22          THE COURT: What does the company say?

23          MS. CALLAM: Let me go back to a few of the points  
24          you made earlier. In terms of being a party intervenor  
25          in a DEM enforcement action, it is quite different than

1 an intervenor in the Superior Court. I think the Town's  
2 complaint is based on a faulty premise that it somehow is  
3 an intervenor and now it is a plaintiff intervenor that  
4 it now has its own claims that it can bring in this  
5 enforcement action or that it can bring DEM claims or  
6 different types of claims under DEM regulations. The  
7 Town has no claims against Chaubert in this case and no  
8 claims are being forced against it. What it is trying do  
9 here is really force Chaubert, the only party that can  
10 contest the NOV, because the NOV's only issue against it  
11 to force it to go to a hearing in violation of its right  
12 not to choose to do that -- Chaubert is the only entity  
13 that has that right. Chaubert also is the only entity  
14 that has the right to settle these claims with DEM, and  
15 DEM is the only entity that can settle them. The Town  
16 can't settle our claims, and we can't settle DEM's claims  
17 with the Town.

18 I've cited in my brief as well the three different  
19 APA, DEM authorizing statute and DEM regulations that  
20 allow DEM as they do in every enforcement case I know of  
21 to settle these via a consent agreement, and as DEM regs  
22 say, prior to a hearing, prior to going to a formal  
23 hearing which they almost never have at DEM, these are  
24 settled informally, and the word informally is used in  
25 the APA, in the DEM statute and the DEM regulations, and



1 the only parties that can do that are these two parties.

2 What happened here is pretty typical in most cases  
3 except there was an intervenor, but that intervenor  
4 status that the Town got -- obtained was solely dependent  
5 on the Chaubert seeking that in the first place. There  
6 wasn't a hearing to contest the NOV. It filed that  
7 request within 20 days to preserve that right.  
8 Otherwise, the NOV becomes a final order.

9 You do that and then we go in and settle. We had  
10 seven months before the Town gave intervenor status to  
11 conduct settlements. So, some of these allegations, the  
12 Town was frozen out, they were not part of this, are  
13 simply inaccurate. Once they obtained intervenor status,  
14 as I outlined in my brief, they met with the Town. In  
15 fact, I think the Town invited them in for meetings. I  
16 went through that before about how the settlement was  
17 reached, but I really think it doesn't have any relevance  
18 to this because that settlement agreement is a validly  
19 executed settlement agreement between two parties to  
20 this, DEM and NOV. The Town is not a party to the NOV.  
21 It was a party to the hearing that we chose not to  
22 continue to pursue, and once we withdraw that right that  
23 hearing ends, and it is a violation of our rights to  
24 force an entity to pursue and become an aggrieved party  
25 and have a final order issued against it at some point or

1 relating to it. The Town has no rights here as an  
2 aggrieved party under the APA, and that's why it seeks a  
3 DJ action.

4 I don't have the exact cites, but I believe what the  
5 Town's counsel is referring to are not the cites it  
6 sought declaratory action under. It did not seek under  
7 the APA this Court's review to clarify what a ruling  
8 means. That's a specific declaratory judgement action,  
9 and it did not do that. It sought to determine what an  
10 intervenor means. So that you could say this AAD  
11 proceeding was then terminated unlawfully and that is an  
12 APA --

13 THE COURT: Well, under the rules of notice  
14 pleading, no one in this courtroom participating in this  
15 litigation should have any question but that the Town has  
16 invoked the jurisdiction of this Court to enter some sort  
17 of a declaratory judgment relative to intervenor status  
18 at the hearing level; isn't that so?

19 MS. CALLAM: I guess if you would end it there you  
20 would wonder what then the point of the claim was. The  
21 same sentence, I think, in the Complaint or the hearing  
22 memo was so that you could then determine because it was  
23 an intervenor these AAD proceedings were terminated  
24 unlawfully. It wasn't simply to stand alone and say --

25 THE COURT: Well, that is for sure.

1 MS. CALLAM: And that really is an APA claim. You  
2 have to review the underlying proceeding and on what  
3 standards do you review them. You review them under the  
4 standards of the APA. Under the standards of the APA, I  
5 don't -- we would state that the Court has no subject  
6 matter -

7 THE COURT: Well, in 42-35-7 that this Court can  
8 determine the validity or applicability of any rule that  
9 is being applied by a hearing officer whose functioning  
10 under the APA; isn't that so?

11 MS. CALLAM: I would say that is correct, but in the  
12 context of this case that is not what the Town has  
13 requested, for simply to be declared that somehow the  
14 hearing officer declared that they were an intervenor  
15 status and they were a full party to the hearing, we  
16 would agree with that.

17 THE COURT: Oh, no, it goes another step, that  
18 somehow or another the hearing officer has taken Rule 17  
19 or other participants in the proceedings, perhaps in  
20 contravention of 42-35-13, have had ex parte dealings  
21 with each other, by that I simply mean to the exclusion  
22 of the Town, and have fashioned the settlement; and this  
23 issue seems to me, and I so conclude, that it is  
24 recognizable by this Court. I think I understand the  
25 positions of the parties.

1 Under the APA and, indeed, under the Department of  
2 Regulations, which were affixed to the replied memorandum  
3 in Appendix C, that's the reply memorandum submitted by  
4 Chaubert, it seems that once the intervenor or once a  
5 party seeking intervention is granted intervention, they  
6 become a party. Now, they may or may not have all the  
7 prerogatives of any other party in the action because of  
8 the obviously different statuses of the other parties,  
9 but, nonetheless, they are a full party. Once they are a  
10 party they have at least all the procedural protections  
11 that a party enjoys, and one of those certainly is to  
12 have notice of all proceedings and to be able to  
13 participate in them.

14 Now, a hearing officer could certainly determine  
15 that a given party to the proceeding, because of their  
16 different statuses, can participate in different ways  
17 once the hearing is underway, but I do not believe that  
18 the hearing officer can say, and I so conclude, the  
19 hearing officer cannot turn to a party and say, "You're  
20 now out of the loop", unless something is called to the  
21 hearing officer's attention, and then the party that is  
22 threatened with, in effect, being ousted from the case is  
23 given an opportunity to disabuse the hearing officer of  
24 that notion, which, of course, did not happen here

25 I think the Town is correct in saying that a couple

1 of things have to happen if there is to be a consent  
2 order even in a case like this. (Number one) all of the  
3 parties must agree. It is a fundamental principle of our  
4 jurisprudence and it obtains in court cases and at  
5 administrative hearings, and that is that the hearing  
6 officer, the fact finder -- and sometimes we know the  
7 fact finder is also the individual who determines the  
8 controlling law and how it should be applied to the facts  
9 -- but the fact finder cannot force a stipulation on  
10 anybody. That is a fundamental rule of jurisprudence.  
11 So, there is no possible way that the hearing officer  
12 could have said to Richmond, "Here is the agreement that  
13 I like, here is the agreement that the Department and the  
14 corporation have agreed to. Therefore, Richmond, you  
15 must sign on to this, and I'm compelling you to sign on  
16 to this and to stipulate and agree that this is the  
17 content order." The hearing officer cannot do that. So,  
18 if the three parties cannot agree, then the hearing  
19 officer is obliged to proceed with the hearing. It may  
20 well be that the hearing officer will determine that what  
21 the company and the Department are advocating for and  
22 what the Town is opposed to will, indeed, be the hearing  
23 officer's decision, the hearing officer will conclude  
24 that the Department's right and the company's right, and  
25 that is what should happen, and the Town of Richmond is

1 wrong, too bad, you don't like it, we've had our hearing,  
2 take your appeal to the Superior Court or to the next  
3 level if there is one provided.

4 Now, the hearing officer clearly has substantial  
5 discretion here, and we know that from Rule 17 of the  
6 Department's own rules. Upon receiving such an  
7 agreement, and by that I mean had all three people  
8 agreed, or all three parties agreed, even then the  
9 hearing officer can either accept it and issue the order  
10 agreed upon. (Number two) The hearing officer can reject  
11 it and reschedule a hearing, which is another way of  
12 saying I reject it and proceed to a hearing. And then  
13 (three) take such other action as he or she deems  
14 appropriate. And I know that in your briefs the  
15 defendants focused on this rule, at least in part, and  
16 noted, "The provision of this rule shall not preclude  
17 settlement of the proceedings in any other manner." And  
18 I conclude that that would permit, I think, the hearing  
19 officer to take an appropriate case, maybe refer to an  
20 arbitrator or a Master of some sort, and, then, upon  
21 receiving the report from that individual approving that  
22 or rejecting it, it is not inconceivable that halfway  
23 through a hearing it appears that the parties could  
24 settle the matter, perhaps with the assistance of a  
25 hearing officer, and that that settlement reached on the

1 record could be approved even though there has already  
2 been four days of testimony with four remaining. So,  
3 there is a lot of scenarios that one could envision. But  
4 what one cannot envision and what the law cannot  
5 countenance is the exclusion of one of the parties from  
6 the final resolution of a dispute.

7 I think that instructive in this matter is  
8 Narragansett Electric versus Burke at 122 RI 13, decided  
9 in 1979. In that case the principal dispute was between  
10 Narragansett Electric Company and the Public Utilities  
11 Commission. However, the Consumer's Council had come in  
12 as an intervenor, or somehow got themselves in the mix  
13 before the PUC, and the PUC and the Narragansett Electric  
14 worked out an agreement that was satisfactory to those  
15 two entities, but the agreement did not include the  
16 Consumer Council and the Supreme Court said that that  
17 made the settlement defective. So, the Supreme Court at  
18 Page 20 and 21 went onto say, "The record clearly  
19 supports the finding by the PUC that an ex parte meeting  
20 occurred between those two entities..." And it didn't  
21 require that there be animus toward the Consumer's  
22 Council. But they went onto say that, in effect, that  
23 once the other party was in the matter, it was a  
24 contested case, and because the legal rights, duties or  
25 privileges of both Narragansett and the public were

1 determined without a hearing, the proceedings violated  
2 42-35-13, which prohibits agency members from  
3 communicating with any person or its representative  
4 concerning their perspective findings of fact or  
5 decisions of law in a contested case absent notice and an  
6 opportunity for all parties to the case to participate."  
7 Admittedly, this is somewhat different, but to the extent  
8 that the hearing officer either exercised discretion in  
9 approving the settlement or took a hike, so to speak, and  
10 didn't pay any attention to a settlement reached between  
11 the parties in a contested case without any reference to  
12 what Richmond thought about or could have added at a  
13 hearing to this, then the proceeding below becomes  
14 unlawful and a nullity.

15 Accordingly, the request of the Town that the  
16 consent order be set aside and, in effect, this matter  
17 proceed to an appropriate hearing in which the party  
18 intervenor, Richmond, is permitted to participate, that  
19 request is granted. So, the matter will be remanded back  
20 to the hearing officer for actions consistent with this  
21 decision.

22 MS. CALLAM: Is that a decision under the  
23 declaratory judgment count, your Honor?

24 THE COURT: It grants the relief sought, as I  
25 understood it, asking for that very relief. In reaching



1 that I've determined that I have jurisdiction, both under  
2 the Declaratory Judgment Act and also 42-35-7 of the APA.  
3 So, you're on your way back to the Commission unless you  
4 take a different route.

5 MR. PAVILONIS: Can I clarify one point, your Honor?

6 THE COURT: Yes.

7 MR. PAVILONIS: So, I guess I understand. At the  
8 agency level now, Richmond can be heard on its objection  
9 to the consent agreement and the hearing officer then  
10 could make a determination as to --

11 THE COURT: No. I'm setting aside the consent  
12 agreement because the hearing officer cannot approve a  
13 consent agreement reached by two of the three parties.  
14 If you can prevail upon Richmond to agree into some sort  
15 of an agreement, that is a different story. There is no  
16 valid consent agreement now for the hearing officer to  
17 act upon, so the hearing officer must do what I believe  
18 the hearing officer would agree under that set of  
19 circumstances and that is to proceed to a hearing.

20 I hasten to add, I'm not telling the hearing officer  
21 what to do. I haven't made any findings on the merit  
22 about -- I know earlier counsel for the Department said  
23 we don't think we have the jurisdiction to order removal  
24 of some waste materials from the land or the lagoon.

25 MR. PAVILONIS: It certainly hasn't been litigated,

1 we agree to that, your Honor. Not withstanding the  
2 consent agreement, Chaubert had withdrawn its request for  
3 a hearing. Arguably, that was done I guess in reliance  
4 on a consent agreement which no longer is valid. Perhaps  
5 we can clarify now, we withdraw the request of the  
6 hearing which would no longer be --

7 THE COURT: I leave it to the fertile imagination of  
8 counsel as to how to create an ultimate resolution of  
9 this dispute. I'm only acting on what is in front of me.  
10 The consent agreement I found to be improper in terms of  
11 its acceptance by the hearing officer or if that is not  
12 exactly what took place, it was improper for two parties  
13 before a hearing officer waiting to adjudicate a hearing.  
14 It was improper for them to ex parte agree that this is  
15 how we're going to resolve the case and that is why I  
16 call your attention to Narragansett Electric versus  
17 Burke. Thank you.

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