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

RE: VINAGRO, LOUIS JR. **AAD NO. 99-033/WME**
NOTICE OF VIOLATION OC&I/SW 99-029

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the DEM Office of Compliance and Inspection ("OCI") on October 13, 1999. The hearing was held on July 8, 9, 10, 17, 25 and 29, 2002; on August 8, 2002; on September 3 and 4, 2002; on October 1, 2002; and on November 12, 2002. A site visit was conducted on the premises located at Old Pocasset Road, Johnston, Rhode Island on August 1, 2002.

Following the hearing on November 12, 2002, the OCI waived the filing of a post-hearing memorandum and of any reply memorandum. Respondent's post-hearing memorandum was filed on November 27, 2002 and the hearing was deemed to have concluded on that date.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 *et seq.*); Chapter 17.6 of Title 42 entitled "Administrative Penalties for Environmental Violations"; the Administrative Procedures Act (R.I. GEN. LAWS § 42-35-1 *et seq.*); the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules"); and the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations").

PREHEARING CONFERENCE

A prehearing conference was conducted on June 13, 2002. At the conference, the parties agreed to the following stipulation of fact:

> Louis Vinagro, Jr. is the owner of real property located on Old Pocasset Road in Johnston, Rhode Island otherwise identified as Assessor's Plat 44.4, Lot 293.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

At the hearing, the OCI called four (4) witnesses: **James M. Ashton**, a Principal Environmental Scientist in the DEM Office of Compliance and Inspection; **John P. Leo**, a Hazardous Waste Engineer with the Emergency Response section; **Thomas E. Goodrich**, an employee of NEED, Inc. since 1994 and the company's current asset manager; and **Steven Cardin**, an employee of NEED for twelve (12) years, in charge of maintenance in 1999 and presently in charge of municipal trash and recycling.

Witnesses Goodrich and Cardin were found to be witnesses identified with an adverse party and questioned according to the provisions of Rule 611 of the Rhode Island Rules of Evidence.

The OCI also sought to call Respondent **Louis Vinagro, Jr.** Although under subpoena, Mr. Vinagro did not appear when called to testify. Upon information and belief, Mr. Vinagro was incarcerated at the Donald W. Wyatt Detention Facility awaiting sentencing for a violation of federal law. At the conclusion of the hearing, The OCI moved to default Respondent for his failure to appear as required by the subpoena. In consideration of the provisions of R.I. GEN. LAWS § 42-17.7-8 (under which the OCI could seek relief in Superior Court but did not do so), that motion was, and is hereby Denied.

Respondent did not call any witnesses.

Numerous oral and written motions were made by Respondent at the hearing, including a Motion In Limine/Motion for Protective Order; a Motion to Suppress and/or Motion to Exclude Evidence; a further Motion for Protective Order; a Motion for Stay; several motions for continuance of the hearing; and a Motion to Withdraw by one of Respondent's co-counsel, Emile Martineau. All motions were addressed and ruled upon on the record at the Administrative Hearing.

I. The Notice of Violation

The NOV issued to Respondent on October 13, 1999 concerns property located on Old Pocasset Road, Johnston, Rhode Island, otherwise identified as Assessor's Plat 44.4, Lot 293 (the "Property"). As indicated by stipulation of the parties, that property is owned by the Respondent, Louis Vinagro, Jr. The NOV cites Respondent for violating R.I. GEN. LAWS § 23-18.9-8(a) relating to operating a solid waste management facility without a license.

Although R.I. GEN. LAWS § 23-18.9-8 was amended in the year 2000 (to require facilities to have fire protection plans), subsection (a) was not affected. That section is set forth below as it was in effect in 1999; my review of later amendments reveals that all changes are unrelated to the issues in this particular case.

> 23-18.9-8. Licenses. – (a)(1) No person shall operate any solid waste management facility or construction and demolition (C&D) debris processing facility or expand any existing facility unless a license therefor is obtained from the director. The director shall have full power to make all rules and regulations establishing standards to be met for the issuance of the licenses.

R.I. GEN. LAWS § 23-18.9-7 lists several definitions that are applicable in this matter, including the following:

> **"Construction and demolition (C&D) debris"** means nonhazardous solid waste resulting from the construction, remodeling, repair, and demolition of utilities and structures; and uncontaminated solid waste resulting from land clearing. Such waste includes, but is not limited to wood (including painted,

treated and coated wood and wood products), land clearing debris, wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles and other roof coverings, glass, plastics
Specifically excluded from the definition of construction and demolition debris is solid waste (including what otherwise would be construction and demolition debris) resulting from any processing technique, other than that employed at a department-approved C&D debris processing facility, that renders individual waste components unrecognizable, such as pulverizing or shredding.

"Segregated solid waste" means material separated from other solid waste for reuse.

"Solid waste" means garbage, refuse and other discarded solid materials generated by residential, institutional, commercial, industrial and agricultural sources, but does not include solids or dissolved material in domestic sewage or sewage sludge, nor does it include hazardous waste as defined in chapter 19.1 of this title, nor does it include used asphalt, concrete, Portland concrete cement, or tree stumps.

"Solid waste management facility" means any plant, structure, equipment, real and personal property, except mobile equipment or incinerators with a capacity of less than one thousand pounds (1,000 lbs.) per hour, operated for the purpose of processing, treating, or disposing of solid waste but not segregated solid waste.

Respondent is also cited for violating Rule 1.4.01 of the Rules and Regulations for Composting Facilities and Solid Waste Management Facilities, January 1997 ("Solid Waste Regulations"), relating to the requirement for obtaining approval and a license from the Department.

Rule 1.4.01 of the Solid Waste Regulations provides as follows:

1.4.01 General: No person shall construct, develop, establish, manage, own or maintain a solid waste management facility or composting facility, without first having obtained approval issued by the Department. No person shall operate a solid waste management facility or composting facility without first having obtained a license or registration to operate from the Department.

The Solid Waste Regulations has more than nineteen (19) pages of definitions. The Regulations include definitions substantively similar to those set forth in the statute, but also contain many more, some of which were the subject of testimony at the hearing. The most pertinent definition to the alleged violation of Rule 1.4.01 is set forth in section 1.3.121 of the Solid Waste Regulations:

> **"Operating a Solid Waste Management Facility"** shall mean receiving solid waste at any facility, whether knowingly or unknowingly. For purposes of disposal, such receipt must be in an amount greater than three cubic yards, per Rhode Island General Law § 23-18.9-5; and any property owner is considered to be operating a solid waste management facility if an amount of solid waste greater than three cubic yards exists on their property.

R.I. GEN. LAWS § 23-18.9-5 prohibits disposal of solid waste at other than a licensed solid waste management facility. That statute defines "dispose of solid waste" to mean the depositing, casting, throwing, leaving or abandoning of a quantity greater than three (3) cubic yards of solid waste.

As a consequence of Respondent's alleged violations of R.I. GEN. LAWS § 23-18.9-8 (a) and of Rule 1.4.01 of the Solid Waste Regulations, the NOV ordered Respondent to immediately cease the disposal of solid waste on his property; to remove the solid waste and dispose of it at a licensed solid waste management facility within ninety (90) days; and to submit to the OCI documentation of the disposal at a licensed solid waste management facility within ten (10) days of the completion of the solid waste removal. The NOV also ordered Respondent to pay an administrative penalty in the amount of $75,160.45.

II. Operating a Solid Waste Management Facility

James M. Ashton was called as OCI's first witness. Mr. Ashton testified that he is a Principal Environmental Scientist and the supervisor of the Department's Solid Waste Program since 1988. Following questioning by OCI counsel and *voir dire* by Respondent's attorney as to the witness' education, experience and previous qualification as an expert witness, Mr. Ashton was qualified as an expert in solid waste management and the solid waste regulatory requirements as they relate to this matter.

On February 11, 1999, Mr. Ashton visited Respondent's property at Old Pocasset Road to investigate a complaint that solid waste had been disposed of on the lot. Mr. Ashton testified that the vacant lot was filled with approximately 86,000 cubic

yards of solid waste. He described the waste as processed and treated wood, plastic, paper, wallboard and metal. He stated that the material was that typically found in construction and demolition ("C&D") debris. He based this conclusion on visits to approximately one hundred (100) sites of processed and unprocessed C&D debris licensed landfills and facilities, as well as to unlicensed ones. The witness described some of the processing involved with C&D debris: grinding or chipping, screening, and removing recyclable materials, like metal, that can be resold. Other materials, not recyclable product, must then be disposed of as solid waste. He stated that the material located at the site on Old Pocasset Road was byproduct and residue from processed C&D debris, not recyclable product.

With the assistance of Michael Gray, an engineer in the Office of Compliance and Inspection, Mr. Ashton measured the two piles of C&D debris on the property. He calculated that one pile amounted to 70,833 cubic yards and the second one at 15,111 cubic yards. The total was 85,944 cubic yards of processed C&D material.

The witness noted that there were no signs of other activity at the site, no trucks, no processing of the material. It was his expert opinion that the 85,944 cubic yards of processed C&D material was solid waste.

Mr. Ashton also visited the site on April 14, 1999. During this inspection he noted that the piles remained in the same condition as in the earlier inspection. No material had been removed.

The witness stated that he checked with the Office of Waste Management, which issues licenses, to determine whether Respondent had a license for this property. He found that no license had been issued for this property nor was it part of any other facility's license.

Under cross-examination, the witness stated that although no survey was done to determine the property lines, Mr. Vinagro had pointed out the boundary lines during

an unrelated inspection in 1996. He also explained a discrepancy in OCI 1 that reports one stockpile, while in his testimony he had spoken of two; this was because one stockpile was actually on top of the other. It was his observation that the C&D debris forming the bottom pile had been used to fill a depression and then piled upward.

Mr. Ashton was also queried about the use of screenings as alternative cover pursuant to Rule 7.3.02 of the Solid Waste Regulations. He stated that that Rule provides that the material can only be used as alternative daily cover at a landfill if it meets the criteria of the Regulations. Specifically, until they are approved by the Department as alternative cover, screenings are processed C&D material – solid waste. Under further questioning, he repeated that if the material was not tested and was not approved, then it was solid waste. He also stated that the processed C&D debris on site was not the "segregated solid waste" defined in the Solid Waste Regulations because that material must be separated for reuse.

The witness conceded that he had not taken any college courses in volumetric measuring and that variations in the contour of the pile in height and width would affect the calculation, as would grade variations of the original soil. He acknowledged that the volume measurement of the pile was important because it was necessary for the determination that the pile was greater than three (3) cubic yards and for the penalty calculation. One of the factors to be considered in calculation of the penalty is the volume of material; the volume measurement was also necessary in determining the economic benefit portion of the penalty.

In later questioning by OCI counsel, the witness explained that he had been on the property in 1996 because Mr. Vinagro had complained that someone had dumped waste on his property. Mr. Ashton stated that that material had been removed and was not the same material he observed on site in his inspections in February and April 1999. He also clarified that his calculations as to the volume of the stockpile were

based on averages that allowed for variations in height and width from his field measurements.

John P. Leo, a Hazardous Waste Engineer in the Department's Emergency Response section, provided brief testimony about the inspection that occurred on the property on April 14, 1999. He stated that he observed a pile on top of a pile with a road to allow dumping on the higher pile. He wheel tape-measured the top length of the pile at 280 feet with a width measured from the bottom of the pile to its peak and down again, at 34 feet. The pile measured more than three (3) cubic yards.

Under cross-examination the witness testified that he had never been to the site before and was not told who owned the property prior to his arrival. He had been told to bring a crew with him because it was a large pile and he would be digging pits to take samples. He testified that the measurements for the lower pile were 132 feet long by 70 feet wide; he did not measure the height because the material was in a ravine.

The OCI also called two (2) witnesses who were ruled to be identified with an adverse party. Upon motion by OCI counsel, they were allowed to be interrogated through leading questions. Thomas E. Goodrich testified that he has been an employee of NEED, Inc. since 1994. He stated that Louis Vinagro, Jr. is the primary owner of the company. He was on the Old Pocasset Road property on February 11, 1999 on behalf of Louis Vinagro, Jr. He stated that he had never seen the property before that day and that the site was not part of the NEED facility.

He testified that he could see the "pile of dirt" from Old Pocasset Road; that there was no heavy equipment at the site; and that he was present to observe DEM at the site. He stated that the material on site could have been processed C&D debris.

The witness was also present at the site on April 14, 1999. He stated that he believed the pile to be in the same condition as in the February visit.

Mr. Goodrich was questioned about several DEM photographs that were taken during the two inspections. Those photographs are contained in OCI 2 and OCI 3. He stated that the pile looked like that shown in photograph OCI 2 F; that it looked like dirt. He acknowledged that the material shown in photograph OCI 3 J "could be processed C&D"; that the material in OCI 3 I "appears to be wood chips"; and that the material in OCI 3 E "appears to be bricks, wood chips".

When questioned by Respondent's counsel, the witness stated that he did not recall shingles, metal, wires, garbage or trash at the site.

The second individual, Steven Cardin, had been an employee of NEED for twelve (12) years. In 1999 he had been in charge of maintenance. He stated that Louis Vinagro was the principal owner of NEED.

Mr. Cardin was at the Old Pocasset Road property on February 11, 1999. Although he was familiar with both processed and unprocessed C&D material, he stated that he could not identify the material on site as processed C&D because he was "not a specialist". He did acknowledge, however, that the material in photographs OCI 2 D and E looked like wood chips and leaves. He also stated that the pile was larger than the hearing room, more than three (3) cubic yards. The witness stated that he thought he was at the site again on April 14, 1999 but was unable to recall his observations or actions.

When questioned by Respondent's counsel, Mr. Cardin stated that the material in photographs OCI 2 D and E looked like the alternative cover at the Central Landfill and that the material in photograph OCI 3 A was similar to the compost manufactured at the NEED facility.

The witness was further questioned by OCI counsel. He detailed NEED's process of sorting clean wood from other C & D material to grind and shred it; adding

color to the wood chips that would be used for groundcover and landscaping; and preparing others for transport to be used as fuel in Maine.

Conclusion

I have not discussed above any witness testimony dealing with Respondent's assertion that evidence obtained from the two inspections should be excluded as the fruit of a warrantless search. Respondent's argument on this issue was addressed during the hearing and the Motion to Suppress and/or Motion to Exclude Evidence was denied. Respondent again raises the issue in *Respondent's Posthearing Memorandum* ("*Memorandum*") at 2-7. I am not persuaded that my ruling should be reconsidered.

Respondent also claims "extreme prejudice" as a result of his failure to receive a copy of the initial complaint that triggered the inspection on February 11, 1999. *Memorandum* at 7-8. This matter was also addressed at the hearing. I see no reason to disturb my earlier ruling.

The third issue raised by Respondent in his *Memorandum* is that the evidence adduced at the hearing does not support a finding that Respondent was operating a solid waste management facility on the site in violation of R.I. GEN. LAWS § 23-18.9-8(a). Respondent claims that the site was not a "facility" as defined in Rule 1.3.121 of the Solid Waste Regulations because the definition requires that the property be owned specifically for the purpose of processing, treating or disposing of solid waste. There was no evidence that Respondent's ownership of the property was for that purpose. *Memorandum* at 9.

Respondent also asserts that the material on site is not solid waste at all. Respondent contends that since the material was identified as "screenings", it was segregated out of the waste stream and thus is excluded from the definitional scope of

a "solid waste management facility". *Memorandum* at 10. He submits that if screenings have a use, then it is not solid waste. *Memorandum* at 10-11.

OCI's counsel in closing argument claimed that the testimony of James Ashton proved that Respondent violated section 1.3.121 of the Solid Waste Regulations. According to Mr. Ashton's unrefuted testimony, the Respondent received solid waste, knowingly or unknowingly, in an amount greater than three (3) cubic yards. Counsel maintained that if it is an amount greater than three (3) cubic yards, then the individual is operating a solid waste management facility.

I have reviewed the statutes and Solid Waste Regulations and conclude that Respondent has misread the definition of "Operating a Solid Waste Management Facility"; misapplied the definition of "Segregated Solid Waste"; and contorted the term "screenings" to mean all screenings can be reused and is therefore not solid waste.

Contrary to Respondent's assertion, Rule 1.3.121 of the Solid Waste Regulations does not require that the property be owned specifically for the purpose of processing, treating or disposing of solid waste. That Rule acknowledges that solid waste could be deposited on the property, "knowingly or unknowingly". The Rule also provides that a property owner is considered to be operating a solid waste management facility if an amount of solid waste greater than three (3) cubic yards exists on the property. This definition is consistent with R.I. GEN. LAWS § 23-18.9-5 wherein the disposal of solid waste at other than a licensed solid waste management facility is prohibited. That statute defines "dispose of solid waste" to mean the depositing, casting, throwing, leaving or abandoning of a quantity greater than three (3) cubic yards of solid waste.

Respondent has focused on the definition of "Solid Waste Management Facility" set forth in both R.I. GEN. LAWS § 23-18.9-7 and in section 1.3.171 of the Solid Waste Regulations. He ignores the fact that "facility" also means real property owned or

operated for the purpose of processing, treating or disposing of solid waste and that those terms are to be read *in pari materia* with the other definitions and purposes of the statutes and Regulations discussed above. "Operating a Solid Waste Management Facility," as defined in Rule 1.3.121, does not require knowledge or intent of the property owner.

Respondent has argued that the screenings on the Property are segregated solid waste. The definition of "segregated solid waste" is material separated from the waste stream for reuse. For the screenings to be considered segregated solid waste (for use as alternative daily cover at the landfill or for use at roadsides and medians, golf courses, cemeteries, etc.), the screenings have to be separated from the other debris, be tested and meet the standards set forth in section 7.3.02 (c) of the Solid Waste Regulations and have received prior approval from the Department. That is not what happened here. The solid waste screenings were not approved and therefore the material is not segregated solid waste.

Mr. Ashton testified that the material located at the site on Old Pocasset Road was solid waste. Mr. Cardin agreed with the two Department employees that the pile was greater than three (3) cubic yards. Mr. Ashton also testified that Respondent did not have a license for this property nor was it part of any other facility's license.

The two adverse witnesses clearly were uncooperative and their testimony was only enlightening for how little information was provided. Mr. Cardin was unable to tell if the material was processed C&D debris yet seemed fairly familiar with NEED's processing of similar material. Respondent did not present any witnesses and none of Respondent's exhibits were admitted into evidence.

I conclude that the OCI has proved by a preponderance of the evidence that Respondent violated R.I. GEN. LAWS § 23-18.9-8(a) and Rule 1.4.01 of the Solid Waste Regulations as set forth in the NOV.

VII. Assessment of an Administrative Penalty

As indicated in the NOV, the OCI seeks the assessment of an administrative penalty in the amount of Seventy-five Thousand One Hundred Sixty Dollars and Forty-five Cents ($75,160.45) against Respondent. The Penalty Summary and Worksheet, however, shows a total proposed penalty of $75,216.45. The NOV states that the penalty was assessed pursuant to R.I. GEN. LAWS § 42-17.6-2 and was calculated pursuant to the Penalty Regulations.

§ 12(c) of the Penalty Regulations provides the following:

> In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The Department's interpretation of this provision requires the OCI to prove the alleged violation by a preponderance of the evidence and "includes establishing, in evidence, the penalty amount and its calculation." The violator then bears the burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995.

Section 10 of the Penalty Regulations provides for the calculation of the penalty through the determination of whether a violation is a Type I, Type II or Type III violation and whether the Deviation from Standard is Minor, Moderate or Major. Once the Type and Deviation from Standard are known, a penalty range for the violation can be determined by reference to the appropriate penalty matrix.

The penalty amount and its calculation were established in evidence through the introduction of a copy of the Notice of Violation (OCI 9) with its attached Penalty Summary and Worksheet and the testimony of James Ashton. Mr. Ashton testified that he has drafted hundreds of NOVs and participated in the drafting of this one.

The Penalty Summary and Worksheet established in evidence a total proposed administrative penalty of $75,216.45 as well as the determination that the violation was classified as a Type I Major Deviation from Standard. OCI 9 at 4-6. The penalty amount was calculated at $1,000 from the penalty matrix times thirty-three (33) weeks, equaling $33,000.00. Mr. Ashton testified that the multiplier 33 was used since it was 33 weeks from the date of the February 11, 1999 site inspection to the date of issuance of the NOV. The economic benefit portion of the penalty was calculated to be $40,000.00. Mr. Ashton explained that this sum was derived from an EPA computer model that calculated how much it would have cost to properly dispose of 21,486 tons of solid waste. He stated that this tonnage was a conservative estimate of the solid waste at the Old Pocasset Road site.

The witness stated that DEM had incurred additional costs: testing by ESS Analysis in the amount of $1,567.20 and the use of a backhoe provided by Cyn Environmental Services for a cost of $649.25. The total administrative penalty, according to Mr. Ashton and the Penalty Summary and Worksheet, was calculated to be $75,216.45.

Respondent cross-examined Mr. Ashton about his estimate of the size of the pile and his determination that it was a Type I violation when no odors, vectors or leachate had been detected. The witness explained that the violation was considered Type I because operating a solid waste management facility without a license was directly related to protecting the health, safety, welfare or environment. He noted that

although no odors, vectors or leachate had been observed, there remained a potential for such which caused the violation to be classified as a Type I violation.

Conclusion

The OCI proved by a preponderance of the evidence that Respondent violated R.I. GEN. LAWS § 23-18.9-8(a) and Rule 1.4.01 of the Solid Waste Regulations as set forth in the NOV. The proposed assessment of the penalty for operating a solid waste management facility without a license was $75,160.45 in the "Assessment of Penalty" paragraph of the NOV (OCI 9 at 2) but was also established in evidence at an amount $56.00 higher. Mr. Ashton explained that several people had reviewed the proposed assessment and undoubtedly some changes had been made in the NOV so that it was not consistent with the worksheet. He testified that the $75,216.45 penalty set forth in the worksheet was the accurate amount.

A review of the provisions of R.I. GEN. LAWS § 42-17.6-3 indicates that whenever the Director seeks to assess an administrative penalty, a written notice of the intent to assess the penalty is to be served on the person. The notice is required to include the alleged act; the statute or regulation that has been violated as a result of the alleged act; the amount of the penalty; a statement of the person's right to an adjudicatory hearing and the requirements the person must comply with to avoid being deemed to have waived the right to an adjudicatory hearing. The notice also includes the manner of payment if the person elects to waive the right to a hearing.

The NOV in this case was signed by Dean Albro, Chief of the Office of Compliance and Inspection, on behalf of the Director. Mr. Albro did not testify at the hearing. It is unclear whether he approved the worksheet amount, but he certainly signed the NOV. The body of the NOV contains the notice requirements of R.I. GEN. LAWS § 42-17.6-3. Based upon the evidence and the provisions of the statute, I

conclude that the assessment of the penalty as set forth in the body of the NOV, not the worksheet, controls in this instance.

The Type and Deviation from Standard were established in evidence. In the determination of Respondent's economic benefit from noncompliance with the statutes and Solid Waste Regulations, Mr. Ashton's measurements of the size of the pile were challenged by Respondent under cross-examination. No countering evidence was presented, however, and Mr. Ashton's calculations stand unrefuted.

I conclude that Respondent has failed to prove by a preponderance of the evidence that the assessment of an administrative penalty in the amount of $75,160.45 was not in accordance with the Penalty Regulations.

Wherefore, after considering the stipulation of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. Louis Vinagro, Jr. (the "Respondent") is the owner of real property located on Old Pocasset Road in Johnston, Rhode Island otherwise identified as Assessor's Plat 44.4, Lot 293 (the "Property").

2. On February 11, 1999 and April 14, 1999, DEM personnel conducted investigations on the Property.

3. On February 11, 1999, DEM personnel measured approximately eighty-five thousand nine hundred forty-four (85,944) cubic yards of processed C & D debris on the Property.

4. On April 14, 1999, DEM personnel observed that the Property remained in the same condition as it had appeared on February 11, 1999; no material had been removed.

5. The screenings at the site did not receive approval for reuse from the Department.

6. The processed C & D debris on the Property was not recyclable product.

7. The Property is not part of a licensed solid waste management facility.

8. The Respondent does not have a license from the DEM to operate a solid waste management facility on the Property.

9. The OCI established in evidence that Respondent's violation of R.I. GEN. LAWS § 23-18.9-8(a) and Rule 1.4.01 of the Solid Waste Regulations was determined to be a Type I Major Deviation from Standard.

10. The OCI established in evidence the amount of the penalty for operating a solid waste management facility without a license was $33,000.00.

11. The OCI established in evidence that the economic benefit portion of the penalty was calculated to be $40,000.00.

12. The OCI established in evidence that DEM had incurred costs in the investigation in the amount of $2,216.45.

13. The NOV served notice of the intent to assess an administrative penalty in the amount of $75,160.45.

14. An administrative penalty in the amount of $75,160.45 for operating a solid waste management facility without a license is not excessive.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The OCI has proved by a preponderance of the evidence that the processed C & D material on the Property was not "segregated solid waste" as defined in R.I. GEN. LAWS § 23-18.9-7 and in section 1.3.162 of the Solid Waste Regulations.

2. The OCI has proved by a preponderance of the evidence that the processed C & D material on the Property is "solid waste" as defined in R.I. GEN. LAWS § 23-18.9-7 and in section 1.3.169 of the Solid Waste Regulations.

3. The OCI has proved by a preponderance of the evidence that an amount of solid waste greater than three (3) cubic yards existed on the Property.

4. The OCI has proved by a preponderance of the evidence that Respondent was operating a solid waste management facility without a license in violation of R.I. GEN. LAWS § 23-18.9-8(a) and Rule 1.4.01 of the Solid Waste Regulations.

5. The OCI established in evidence the penalty amount and its calculation.

6. Respondent has failed to prove by a preponderance of the evidence that OCI's determination of the violation as a Type I Major Deviation from Standard was not in accordance with the Penalty Regulations.

7. Pursuant to the requirements of R.I. GEN. LAWS § 42-17.6-3, the NOV served notice of the intent to assess an administrative penalty against Respondent in the amount of $75,160.45.

8. Respondent has failed to prove by a preponderance of the evidence that the assessment of an administrative penalty in the amount of $75,160.45 is not in accordance with the Penalty Regulations.

9. The assessment of an administrative penalty against Respondent in the amount of $75,160.45 is in accordance with the Penalty Regulations.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Respondent shall immediately cease the disposal of solid waste on the Property.

2. Within ninety (90) days of the receipt of this Final Agency Order, Respondent shall remove the solid waste from the Property and dispose of said waste at a licensed solid waste management facility.

3. Within ten (10) days of completion of the solid waste removal, documentation of disposal (receipts, bills, weight slips, etc.) at a licensed solid waste management facility shall be submitted to the RIDEM Office of Compliance and Inspection.

4. An administrative penalty in the amount of Seventy-five Thousand One Hundred Sixty Dollars and Forty-five cents ($75,160.45) is hereby ASSESSED against Respondent.

5. Respondent shall make payment of the administrative penalty within thirty (30) days from the date of entry of the Final Agency Order in this matter. Payment shall be in the form of a certified check or money order made payable to the "General Treasury -- Environmental Response Fund Account," and shall be forwarded to:

R.I. Department of Environmental Management
Office of Management Services
235 Promenade Street, Room 340
Providence, RI 02908
Attn: Glenn Miller

Entered as an Administrative Order this 7th day of February, 2003 and herewith recommended to the Director for issuance as a Final Agency Order.

_____
Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
401-222-1357

Entered as a Final Agency Order this 10th day of February 2003.

_____
Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 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: Barbara E. Grady, Esquire, 170 Westminster Street, Suite 601, Providence, RI 02903; via interoffice mail to John Langlois, Esquire, Office of Legal Services, and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _____ day of February, 2003.

_____

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.

APPENDIX A

LIST OF EXHIBITS

OCI'S EXHIBITS

OCI 1 Full	Copy of Site Inspection Report - by Michael Gray dated February 11, 1999 (three pages)
OCI 2 Full	Inter-Office Memorandum - by James Ashton dated February 23, 1999 (two pages) with seven (7) photographs attached;
OCI 3 Full	Inter-Office Memorandum - by James Ashton dated April 29, 1999 (three pages) with eleven (11) photographs, A - K, attached;
OCI 4 Full	Copy of Emergency Response Report - by John Leo dated April 14, 1999 (seven pages);
OCI 5 for Id	Copy of Thielsch Engineering, Inc. Laboratory Report - dated April 28, 1999 (six pages);
OCI 6 for Id	Copy of ESS Laboratory Certificate of Analysis - dated April 30, 1999 (thirty-three pages);
OCI 7 Full	Resume of James Ashton;
OCI 8 for Id	Resume of John Leo;
OCI 9 Full	Copy of Notice of Violation.

RESPONDENT'S EXHIBITS

Resp 1 for Id	Joint Development Agreement between NEED and FERCO.
Resp 2 for Id	Memorandum from Boralex and Stratton Energy, Stratton, ME., regarding purchase of NEED material.
Resp 3 for Id	Shipping invoices and receipts for hauling of NEED material to Boralex Energy Plants.