

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

IN RE: Bettez Construction Company, Inc.
Bettez Recycling, Inc.
Notice of Violation No. SW 90-11

DECISION AND ORDER

This matter is before this Hearing Officer pursuant to R.I.G.L. § 23-18.9 entitled "Refuse Disposal", specifically § 23-18.9-5 as amended, and R.I.G.L. § 42-17.1-2, and Rule 5.01 of the Rules and Regulations for Solid Waste Management Facilities adopted pursuant thereto. The hearing was held in accordance with the Administrative Procedures Act (Chapter 42-35 of the Rhode Island General Laws) as amended, and the Administrative Rules of Practice and Procedure of the Department of Environmental Management.

The Division of Air and Hazardous Materials ("DAHM") of the Department of Environmental Management ("DEM") issued a Notice of Violation and Order and Penalty (NOVAP) on March 20, 1990 to the Respondent Bettez Construction Company, Inc.

The NOVAP alleged violations of (1) R.I. General Law § 23-18.9-5 (a) in that Respondent did dispose of solid waste at other than a solid waste management facility licensed by the Director and (2) Rule 5.01 of Rules and Regulations for Solid Waste Management Facilities (December 1, 1982) in that Respondent did construct, develop, establish, manage, own, or maintain a solid waste management facility, without first having obtained a license to operate from the licensing agency.

Respondent thereupon requested a hearing on the NOVAP.

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The requisite Notice of Administrative Hearing and Pre-Hearing Conference was sent to Respondent informing it of the time, date and place of the hearing, at which hearing an opportunity would be afforded Respondent to respond, cross-examine witnesses, present evidence and testimony on all issues involved, and to be represented by counsel.

Pre-Hearing Conferences were held on August 8 and 14, 1990 and the requisite Pre-Hearing Conference Record was prepared by the Hearing Officer. No requests to intervene were presented.

By agreement of the parties, an Order was entered on August 16, 1990 joining Bettez Recycling, Inc. (the successor in interest to Bettez Construction Co., Inc.) as an additional party respondent. (Both respondents are hereinafter referred to collectively as "Respondent").

DAHM bore the burden of proving that Bettez violated the aforementioned law and regulations.

The parties entered a joint statement dated August 16, 1990 wherein they stipulated that the following issues were to be considered by the Hearing Officer:

1. Do the activities of Bettez Construction Company, Inc. and Bettez Recycling, Inc. (together, "Bettez Recycling") in accepting demolition debris and other similar materials constitute part of a recycling operation which does not constitute a solid waste management facility and therefore is not subject to the jurisdiction of the Rhode Island Department of Environmental Management ("DEM").

2. Are the materials accepted by Bettez Recycling within the

exclusion from the definition of solid waste set forth in R.I.G.L. § 23-18.9-5 (b) as constituting used asphalt, concrete, Portland concrete, cement and tree stumps.

3. Are the operations of Bettez Recycling exempt from DEM regulation because the materials accepted by Bettez constitute segregated solid waste not subject to regulation under R.I.G.L. § 23-18.9-7.

The Hearing Officer found that there was no genuine additional issue of constitutionality raised by the Respondent as R.I.G.L. § 23-18-9.5 (b) was not constitutionally defective for excluding tree stumps rather than wood beams generally from the definition of solid waste.

A view was taken at the site on August 22, 1990.

The following documents were jointly admitted into evidence were marked numerically as follows:

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
1.	NOVAP, March 20, 1990.
2.	Letter from Attorney Donald E. Miller to Thomas D. Getz requesting Hearing re: NOVAP, April 2, 1990.
3.	"Site plan for storage and recycling of construction debris", Bettez Recycling, Inc., June 1990, submitted to DEM on August 18, 1989.
4.	Oversized plan sheets submitted along with Exhibit 3 (4 sheets).
5.	Letter to Respondent from Ronald Gagnon, Division of Air and Hazardous Materials re: landfilling, June 21, 1990.
6.	File memo re: site inspection by Stephen Coutu, Division of Air and Hazardous Materials, December 7, 1989.

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7. File memo re: site inspection by Ronald Gagnon and Stephen Coutu, Division of Air and Hazardous Materials, January 19, 1990.
8. File memo re: site inspection by Ronald Gagnon and Stephen Coutu, Division of Air and Hazardous Materials, June 15, 1990.
9. Site proposal, Broder Services Ltd., September 8, 1990.
10. Conditions of Sale, Broder Services Ltd., (undated).
11. Letter from Attorney Donald Miller to Thomas Epstein, Division of Air and Hazardous Materials, August 22, 1989.
12. Letter from Thomas Epstein, Division of Air and Hazardous Materials, to Attorney Donald Miller, August 23, 1989.
13. Thomas Epstein - Curriculum vitae.
14. Ronald Gagnon - Curriculum vitae.
15. Stephen Coutu - Curriculum vitae.
16. Department's photographs of site (17 photographs).
17. Bettez Recycling, Inc., Articles of Incorporation.
18. Bettez Construction, Inc., Articles of Incorporation.
19. Bettez Recycling Site Procedures.
20. Financial Projection for funding of recycling operation.
21. Respondent's photographs of site (2 photographs)
22. Richard J. Cohen - Curriculum vitae.
23. Joseph Russolino - Curriculum vitae
24. Laurie Ludwig - Curriculum vitae.
25. Robert S. Bleakney - Curriculum vitae.
26. (A-D) Four photographs of area.
27. Affidavit of John P. Leo dated December 18, 1990.

The Division's Exhibits No. 1 for Identification and No. 2 for

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Identification were not admitted as Full Exhibits.

The parties agreed to the following stipulations of fact:

1. Bettez represents that it intends to locate a rubble-processing plant on property owned by Tri-County Sand and Gravel, off Colvintown Road in Coventry.
2. The rubble-processing plant is proposed to recycle wood products, concrete, asphalt, brick, and similar demolition materials into reusable and marketable products.
3. On August 18, 1989, Bettez submitted to the Department a site plan showing the location of the proposed plant, a plan of the plant, and a flow diagram depicting its operation.
4. Bettez has been accepting and stockpiling significant quantities of demolition materials on a daily basis for several months.
6. On 30 November 1989 and 18 January 1990, Department personnel conducted inspections of the site and noted a large pile of demolition and construction debris, despite the absence of rubble-processing equipment on site.
7. As of March 20, 1990, Bettez has not submitted the required schedule, and no processing of demolition materials has taken place on the site as of March 20, 1990.

Ronald Gagnon was the first witness called by the Division. He has a Bachelor of Science Degree in Civil Engineering and is a solid waste supervisor at DEM. He testified that the Division first inspected the site on November 30, 1989 and estimated that the stockpile of materials at the site was about 75 paces by about 32 paces wide and 30 to 40 feet high. The stockpile included wood waste pallets, buildings that were torn down, doors, construction demo debris and small amounts of metal; same are considered solid waste under the regulations of the Division.

Mr. Gagnon stated that the next inspection by the Division occurred on January 18, 1990 and the pile had increased in size from the November

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visit. Mr. William Bettez (Principal) indicated to the Division that they were accepting between 100 to 200 tons of material per day at the site.

The Division later observed a bulldozer driving over the stockpile, pushing it up into a pile and grading the pile so it would be compacted and sloped. At that visit, the pile was approximately 140 paces by 75 paces in width. On May 7, 1990 the bulldozer operator (William Bettez's brother) estimated there were approximately 10,000 tons of material on the site.

The stockpile included items such as a metal tank, asphalt shingles, cardboard, bed mattress, carpet remnants and other such items that do not fall within the exclusions from solid waste set forth in the Statute (R.I.G.L. 23-18.9-5). The Division visited the site four times and also took aerial photographs of the site and no recycling equipment was present. The Division was told by the Respondent on November 30, 1989 that it expected to have a rubble pressing plant up within six to eight months. This timetable was later revised and Respondent stated that the recycling operation was to start on January 1, 1991.

The Division was told by Mr. Bettez that tree stumps, portland cement and other items of non-solid waste under the regulations and statutes were being treated differently and some of that material would be used to create a path for an additional stockpile location. Although Respondent stated that its intention was to stockpile and compact materials to determine the economic feasibility of processing same, no authorization

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to stockpile such material nor any permission for market testing or operation of the facility as being conducted was ever given by the Division.

It was brought out in redirect examination of Mr. Gagnon that the subsequent inspections (after the initial visit on November 30, 1989 and prior to the issuance of the NOVAP on March 20, 1990) revealed that the character of the pile changed in that other materials were mixed in with the pile which were not considered recyclable and were not segregated.

Thomas Epstein was called as the next witness for the Division. He is the associate supervising sanitary engineer of the waste management branch of DEM and has a Bachelor of Science Degree from Brown University in Civil/Environmental Engineering.

Mr. Epstein explained his duties and the procedures involved in the issuance of an NOVAP. His first involvement in this matter was his attendance at a meeting of the Division and the Respondent in August of 1989, wherein Respondent expressed interest in building a demolition debris recycling plant. Thereafter letters were sent explaining some of the Division's policies regarding recycling and "when a license would be required and when it wouldn't".

This witness testified that to his knowledge no recycling has been accomplished on the site and no recycling equipment has been moved onto the site in anticipation of recycling. He stated that the key factor that led the Department to issue the notice of violation was that the pile at the site had grown very large, no equipment had been installed

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and the Division had no firm ideas as to when, if ever, equipment would be installed.

Mr. Epstein stated that the Division felt that in order to prevent harm, they had to issue the NOVAP. This harm that the Division was concerned about was that an uncontrolled pile would catch on fire, and would harbor vectors, rats and insects; or if not eventually recycled, problems with disposal of same, could arise. These dangers of such a fire were worsened by the nature of this type of fire, the risks in fighting same and its possible harmful effects. The possibility of fire and the other problems associated with the pile increased as the pile was left standing.

William A. Bettez was the first witness called by Respondent. He testified that he is the President of Bettez Construction Company, Inc, which was the company used to start the acceptance of material at the site. Bettez Recycling, Inc, was incorporated on April 2, 1990 and is the company that took over the stockpiling of the debris at the site.

Mr. Bettez explained the procedures for accepting debris which he alleged were followed by Respondent. Certain types of materials were rejected, such as debris having a lot of plastic, cardboard, paper, car or truck tires, stoves, appliances, air conditioners or anything of that nature.

This witness testified that Respondent segregates the recycling and other materials on the site; it intends to recycle as many products as possible; non-recyclable products that slip into the debris are removed

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(if picked up and noticeable) as "whoever brings them in takes them". Respondent attempted to primary shred some of the materials and a machine was brought onto the site to try to screen the material to see how much material, dirt and hard materials were "actually in there". It was acknowledged by Mr. Bettez that this process was the only procedure accomplished, and that there has been no recycling according to DEM's definition.

It was this witness's testimony that the difference in types of debris accepted (from what was anticipated) resulted in modifications of the recycling plant that Respondent anticipates ordering. The proposed plant is supposed to segregate all the debris on the site, however, Mr. Bettez admitted that "it would be difficult now to determine if it will because it's not running". He described how the proposed plant will function, the procedures for screening of debris, and the disposition of the finished or recycled products.

Mr. Bettez stated that the demolition debris on site was necessary to keep the plant running at full capacity once the plant is cleaned up and operating.

It was elicited in cross examination of Mr. Bettez that Respondent had received approximately 10,000 tons of material at the site, for which Respondent received between \$12.50 to \$28.50 per ton depending on the type of material. Also, that none of Respondent's staff working at the site have received any hazardous material training and Respondent has done no sampling of the water quality of the pond located at the site.

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Richard J. Cohen, a civil environmental engineer, was called as Respondent's next witness. He is a professional engineer in the States of Rhode Island, Massachusetts and Colorado. He prepared the site plan between April and the end of June, 1990 for the proposed recycling facility for Respondent. This is a conceptual, preliminary plan that was given to DEM based on the NOV from March, 1991. Previous studies of the subsurface conditions at the site indicated that the ledge or bedrock foundation is favorable for purposes of having a recycling plant on the facility. Also, the site is outside of the 500 year flood plain so there should be no flooding problem. This witness described the various measures that could be taken to control the flow of surface water to be used in the recycling plant, and to prevent any groundwater contamination.

Mr. Cohen estimated that according to the plans for the recycling facility which Respondent "proposes to put up", it would take one working week to recycle the approximately 9,542 tons of debris currently on the site. His opinion was that a recycling plant would be feasible at the subject site.

Cross examination of Mr. Cohen revealed that the stockpile consisted of flammable material which was piled in one mound with no fire lanes provided nor any division of the mound. This, plus the severity of the slope of the mound, presented potential fire problems and serious safety hazards.

Mr. Cohen explained the measures already provided for in the site plans and those that could be taken to accommodate water flow that might

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migrate from the site. He felt reasonably satisfied that any contaminants could be contained on site and that hazardous wastes would not create a problem towards bedrock migration. He opined that the general flow of the underground water (on the subject property) is towards the east. He felt that the test pits already dug on the subject property, with possible modifications, should be adequate to monitor the ground water flow, and measures could be taken to prevent groundwater contamination problems.

Laurie Ludwig testified next for Respondent. She has a Master's Degree in Environmental Science from McNeese State University. She was hired in July of 1990 as the environmental and technical coordinator for Bettez Recycling and explained her duties and functions concerning the establishment of a recycling facility.

Robert S. Bleakney, President of Keep Financial Services, was called next by Respondent. He testified that he was asked in June, 1990 to look at potential financing for Bettez Recycling. They put together a small business plan and this witness felt that the figures for projection and cash flow showed a very viable company. He contacted numerous potential lenders, some of whom expressed an interest in financing this venture, but they had not as yet obtained a loan commitment.

It was stipulated by both parties that the nature of violation in the instant case, the additional notice of violation issued on August 3, 1990 and the Criminal Complaint issued July 31, 1990 would add to the difficulties of Respondent in obtaining a loan.

Joseph Russolino, a certified public accountant was the final witness

called by Respondent. He has a Bachelor of Science Degree in Business Administration and a Master Degree in Business Administration, both from Bryant College. He was contacted by Mr. William Bettez to prepare a set of projected financial statements for Bettez Recycling, Inc. They prepared a report for Respondent dated July 16, 1990 and it was this witness's opinion that once the recycling facility is put on site, it will be a profitable enterprise.

It was brought out in cross-examination of this witness that he relied heavily on the information and figures supplied to him by Respondent in order to arrive at his projections, which were to be utilized for financing purposes.

Division made a Motion for a Directed Verdict at the conclusion of Respondent's testimony (after Respondent rested its case). Thereafter, by agreement of the parties a stipulation was entered wherein the Division withdrew its Motion for Directed Verdict.

Thereafter a number of continuances were granted at the joint request of both parties. On December 20, 1990 pursuant to the joint request of the parties, the record was opened to allow the affidavit of John P. Leo of December 18, 1990 (concerning the fire which occurred at the site on November 8, 1990) to be admitted into evidence as a full exhibit. This affidavit later was identified correctly as Exhibit 27.

Mr. Leo's affidavit stated that on November 8, 1990 a fire erupted in the pile of debris which is the subject of this hearing. Extensive efforts by various parties and much equipment were needed to bring the

fire under control. Essentially this was eventually accomplished by separating the existing stockpile into 2 piles, one pile (of unburning debris) was moved to remote areas of the site, and the second remaining pile (which was for a time allowed and assisted in its burning) was spread out and eventually extinguished on November 20, 1990. Respondent's personnel and equipment were utilized in combating said fire.

Division, in its Post Hearing Memorandum, mentioned that it wished to renew its Motion for a Directed Verdict. This does not comply with the Rules and therefore will not be addressed in this Decision other than to state (for whatever extent necessary) that said Motion is Denied.

The Respondent's witnesses testified at great length about Respondent's plans, hopes and expectations but little or nothing was done prior to the issuance of the NOVAP on March 20, 1990. Much of Respondent's testimony of what transpired after the NOVAP was allowed by the Hearing Officer to afford Respondent every opportunity to present any evidence that might be relevant to the issues stated. The bulk of Respondent's testimony centered around the viability of plans and prospects for a recycling plant that were formulated long after Respondent had accepted the solid waste at the site.

It was admitted by the Respondent that it accepted and stockpiled said materials at the site for a protracted period of time prior to the issuance of the NOVAP on March 20, 1990. Respondent was paid varying rates for the truck loads of material dumped at the site in this profitable venture and Respondent amassed a vast stockpile of apparent

solid waste materials, well before Respondent could possibly even hope to accomplish any processing or recycling of said materials.

Although Respondent presented many witnesses to demonstrate the suitability of the location as a recycling site, the soundness of its plans being formulated, and the excellent expectations for profitability and prospective financing, this did nothing other than to reflect its hopes and future expectations. However, it is important to note that Respondent stipulated that no recycling was accomplished prior to the NOVAP.

The evidence clearly established that Respondent was not in fact recycling nor was it even potentially capable of operating a Recycling Facility at the time of the NOVAP, but rather that Respondent accepted and disposed of solid waste and was operating and maintaining a solid waste management facility at the site.

The activities of Respondent in accepting said demolition debris and other similar materials did not constitute part of a "recycling operation" but undeniably constitute a solid waste management facility and therefore is subject to the jurisdiction of DEM.

The stockpile of materials accepted by Respondent at the site consisted of various solid wastes not within the exclusion granted by R.I.G.L. § 23-18.9-5(b) as the evidence conclusively established it was not "used asphalt, concrete, Portland concrete cement and tree stumps".

The solid waste accepted by Respondent at the site was heaped into one enormous pile and could in no way be considered material separated

from other solid waste for reuse. The operations of Respondent were not exempt from DEM regulation since the materials accepted by Respondent did not constitute "segregated solid waste" pursuant to R.I.G.L. § 23-18.9-7 and said operations were definitely subject to DEM regulations.

Respondent now argues that the Division's failure to take immediate responsive action tends to prove that the Division had in fact accepted Respondent's operations as a Recycling Facility. However, the Division's delay in taking action sooner can in no way be considered as a possible defense to the NOVAP. It is apparent that the subsequent visit by the Division to the site (prior to the NOVAP) convinced them that the changes in types of material, the growing increase in the size of the stockpile (to almost 10,000 tons) and the manner in which it was accumulating warranted action.

The evidence introduced at the Hearing conclusively establishes the need to have Respondent cease accepting solid waste materials at the site and to compel Respondent to remove the existing solid waste at the site to a licensed landfill facility.

After a thorough review of the allegations contained in the NOVAP and review of the Statutes and Regulations this Hearing Officer is satisfied that the evidence presented was relevant and material to the issues under consideration and that the Division has satisfied its burden of proof.

FINDINGS OF FACT

After reviewing the documentary and testimonial evidence of record, I find as a fact the following:

1. The Division inspected the property located off Colvintown Road in Coventry, Rhode Island further described as Coventry Tax Assessor's Plat 30, Lot 136 on November 30, 1989 and observed a stockpile of debris and materials at the site.

2. The Division next inspected the site on January 18, 1990 and witnessed that the stockpile had increased in size to almost 10,000 tons of material and determined that the Respondent was accumulating between 100 to 200 tons of debris per day at the site.

3. The Division issued an NOVAP to Respondent on March 20, 1990 alleging (1) that Respondent was disposing of solid waste at other than a solid waste management facility licensed by the Director, and (2) that Respondent did construct, develop, establish, manage, own, or maintain a solid waste management facility, without first having obtained a license to operate from the licensing agency.

4. A Pre-Hearing Conference was held on August 14, 1990 and the requisite Pre-Hearing Conference Record was made by this Hearing Officer.

5. Respondent is the lessee of the property and the operator of the facilities at the site and does not have a license to operate a solid waste management facility.

6. Respondent submitted to the Department on August 18, 1989 a site plan showing the location of a proposed rubble-processing plant to

recycle demolition materials into reusable and marketable products.

7. Respondent failed to submit to the Department a schedule providing for the acquisition and installation of appropriate rubble-processing equipment pursuant to the Department's request of January 18, 1990.

8. Respondent received a total of approximately 9,542 tons of solid waste materials, which it pushed and graded into one giant pile at the site at the time of issuance of the NOVAP.

9. Respondent was paid between \$12.50 and \$28.50 per ton for the solid waste materials deposited at the site.

10. Said stockpile consisted of a quantity greater than three (3) cubic yards of such items as a metal tank, asphalt shingles, cardboard, bed mattress, carpet remnants, demolition and construction material that are considered solid waste under the Statutes and Regulations of the Division (and do not fall within the exclusions of R.I.G.L. 23-18.9-5 (b)).

11. Respondent failed to process any of the demolition materials or separate any "recycling materials" from solid waste for re-use.

12. Respondent was not operating nor capable of operating a Recycling Facility at the site at the time of issuance of the NOVAP..

13. Respondent disposed of the solid wastes noted above at other than a solid waste management facility licensed by the Director.

14. Respondent managed, owned, maintained and operated a Solid Waste Management Facility on its premises without first having obtained a license to operate from the licensing agency.

CONCLUSIONS OF LAW

Based upon the foregoing facts and testimonial and documentary evidence of record, I conclude as a matter of law that:

1. Respondent caused to be deposited or left on its premises approximately 9,542 tons of solid waste materials on its premises: metal tank, asphalt shingles, cardboard, bed mattress, carpet remnants, demolition and construction material and debris.

2. "Solid Waste" means garbage, refuse, and other discarded solid materials generated by residential, institutional, commercial, industrial and agricultural sources as defined by R.I.G.L. 23-18.9-7(1) and Rule 3.50 of the Rules and Regulations for Solid Waste Management Facilities.

3. A "solid waste management facility" means any plant, structure equipment, real or personal property operated for the purpose of processing, treating or disposing of solid waste... (R.I.G.L. 23-18.9-7 (3) and Rule 3.51 of the Rules and Regulations for Solid Waste Management Facilities.

4. Respondent disposed of solid waste at other than a solid waste management facility licensed by the Department in violation of R.I.G.L. 23-18.9-5 (a).

5. Respondent managed, owned, maintained and operated a solid waste management facility without first having obtained a license therefore from the licensing agency in violation of R.I.G.L. 23-18.9-5 (a) and Rule 5.01 of the Rules and Regulations for Solid Waste Management Facilities.

THEREFORE, IT IS

ORDERED

1. That Respondents, Bettez Construction Company, Inc. and Bettez Recycling, Inc. cease accepting any solid waste material forthwith.

2. That said Respondents remove all solid waste materials from the site to a properly licensed solid waste facility pursuant to a removal plan to be submitted to DEM for its approval within thirty (30) days of the date of the Final Decision and Order.

3. This Hearing Officer concluded that the Respondent violated both R.I.G.L. 23-18.9-5 (a) and Rule 5.01 of the Rules and Regulations for Solid Waste Management Facilities which in this instance are considered to have a major potential for serious harm to public health. In light of these considerations, the total penalty of Five Thousand Dollars (\$5,000.00) imposed by the Department is hereby AFFIRMED and the Respondents shall pay an administrative penalty in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable forthwith by certified check to the order of the General Treasurer, State of Rhode Island, who shall deposit said monies in the Environmental Response Fund, established pursuant to Rhode Island General Law §23-19.1-23.

4. No evidence establishing staff time devoted to the prosecution of the instant matter was presented at the hearing and the Division's request for an additional administrative penalty is therefore denied.

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I hereby recommend the foregoing Decision and Order to the Director
for issuance as a final Order.

FEBRUARY 17, 1991
Date

Joseph F. Baffoni
Joseph F. Baffoni
Hearing Officer

The within Decision and Order is hereby adopted as a final Decision
and Order.

March 5, 1991
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be
forwarded, regular mail, postage prepaid to Robert S. Parker, Esq.,
Temkin & Miller, Ltd., 1400 Turks Head Place, Providence, Rhode Island
02903; Gary E. Powers, Esq., 371 Broadway, Providence, Rhode Island
02909; and via inter-office mail to Mark Siegars, Esq., 291 Promenade
Street, Providence, Rhode Island 02908 on this 11th day of March, 1991.

Jacqueline A. Ballard