

**250-RICR-10-00-1**

## **TITLE 250– DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

### **CHAPTER 10 – ADMINISTRATIVE ADJUDICATION DIVISION**

#### **SUBCHAPTER 00 - N/A**

PART 1-Rules and Regulations for the Administration Adjudication Division

#### **1.1 Introduction**

These rules are adopted pursuant to Chapters 42-35, 42-92 and 42-17.7 of the R.I. Gen. Laws, specifically §§ 42-35-2(a)(2), 42-35-3 and 42-17.7-3(2) for the purpose of assisting the carrying out of the functions, powers and duties assigned to the Department of Environmental Management and the Administrative Adjudication Division of the Department of Environmental Management in Chapters 42-17.7 and 42-17.1 of the R.I. Gen. Laws and any other provisions of the General Laws conferring jurisdiction upon the Director of the Department and/or the Administrative Adjudication Division. These rules shall become effective twenty (20) days after filing and will govern only Adjudicatory Proceedings Commenced after the effective date.

#### **1.2 Formal Rules**

- A. Scope of rules. These rules shall govern the conduct of adjudicatory proceedings within the jurisdiction of the Administrative Adjudication Division of the Department of Environmental Management.
- B. Construction of rules. These rules shall be construed to further the prompt and just determination of every proceeding and in conformity with the Rhode Island Administrative Procedures Act.
- C. Definitions. The following words when used in the rules, except as otherwise required by the context, shall have the following meaning:
  - 1. "AAD" means the Department of Environmental Management Administrative Adjudication Division.
  - 2. "Administrative Hearing Officer" or "AHO" means the individual(s) authorized by law or duly designated by the Chief Hearing Officer to conduct adjudicatory proceedings.
  - 3. "Adjudicatory proceeding" means an adjudicatory proceeding before the Department of Environmental Management Administrative Adjudication Division in which the legal rights, duties or privileges of specifically named Persons are determined after an opportunity for an Agency hearing.

4. "Agency" means any Department (including the Department of Environmental Management), board, commission, council, division or authority within the executive branch of state government.
5. "Appearance" means an appearance is defined as notice of participation in an adjudicatory proceeding which may be accomplished either by the filing of a pleading or an entry of Appearance with the administrative Clerk of the Department of Environmental Management Division of Administrative Adjudication.
6. "Certification" means a statement wherein a party attests that they have performed the requirements of § 1.6(F) of this Part.
7. "Clerk" means the administrative Clerk of the Department of Environmental Management Division of Administrative Adjudication for Environmental Matters appointed by the Governor with the advice and consent of the senate.
8. "Commenced" means an administrative hearing has commenced upon conclusion of the pre-hearing conference.
9. "Department" means the Department of Environmental Management as created in § 42-17.1 of the R.I. Gen. Laws.
10. "Division" means a subsection of the Department with authority to carry out statutorily designated Departmental functions including Divisions, Offices and Programs.
11. "Director" means the Director of the Department of Environmental Management or his/her designee.
12. "Papers" means all written communications submitted to the Administrative Adjudication Division in an adjudicatory proceeding, including but not limited to, motions, pleadings, documents and all other correspondence.
13. "Party" means the specifically named person(s) whose legal rights, duties or privileges are being determined in an adjudicatory proceeding; the Division and any other person who has been granted the right to intervene.
14. "Person" means any individual, partnership, corporation, limited liability company, association, governmental subdivision, or public or private organization.
15. "Petitioner" means person who initiates an adjudicatory proceeding.

16. "Regular business hours" means papers will be deemed filed during regular business hours if received during the hours of 8:30 a.m. to 4:00 p.m. Monday through Friday on days other than state holidays. The Department's physical, facsimile, or electronic mail date stamp shall be presumptive of the actual date and the time of filing. Filing by electronic transmittal is permitted, provided, however, an original copy of said filing shall be delivered to the AAD within five (5) days of electronic transmittal. Upon electronic filing, opposing counsel shall also be transmitted a copy of the pleading
17. "Respondent" means the party who challenges an order of the Department, or any other parties not bearing the burden of proof.

### **1.3 Jurisdiction**

Pursuant to Chapter 42-17.7 of the Administrative Adjudication Division for Environmental Matters has jurisdiction pursuant to R.I. Gen. Laws § 42-17.7-2 overall contested enforcement proceedings, all contested licensing proceedings and all adjudicatory proceedings of the Department of Environmental Management.

### **1.4 Representation**

- A. Appearance. The Division and the AHO shall inform an individual of his/her right to be represented by legal counsel in an adjudicatory proceeding.
  1. All parties including intervenors, organizations or those designated as public participants to an administrative hearing shall designate a spokesperson to participate on their behalf in the hearing.
  2. Parties shall enter an appearance with the clerk of the AAD prior to making a request for continuance or extension of time.
- B. Continuances
  1. The AHO at his/her sole discretion shall determine when a valid scheduling conflict exists which requires a continuance of the hearing.
  2. Any request for a continuance by a party shall be submitted, in writing, to the AHO at least 24 hours prior to the scheduled proceeding. An AHO may waive this requirement upon the showing of good cause.
  3. A scheduled proceeding shall be continued upon presentation of a signed court excuse by an attorney of record covering the date in question.
  4. A scheduled proceeding may be continued upon notification to the AHO that an attorney of record is otherwise engaged on the date of the hearing in a state or federal court, or for other good cause shown. The AHO shall

be informed of the nature of the conflicting action, the case name and the court in which the attorney's presence is mandated.

5. Should the AHO grant a continuance, it shall be the responsibility of the party requesting the continuance to immediately notify all other parties of record and their representatives and pay any costs that may be associated with the cancellation of the hearing.
- C. Extension of Time. It shall be within the discretion of the AHO, for good cause shown, to extend any time limit contained in these rules, unless precluded by statute. All requests for extensions of time shall be made by motion before the expiration of the original or previously extended time period.
- D. "Ex Parte Communications"
1. Except as provided below, no person who is a party to, or a participant in, any proceeding in the AAD, including his counsel, employee, agent or any other person acting on his behalf, shall submit ex parte, off the record communications to the AHO of the AAD regarding or in any way related to the proceeding.
  2. The above prohibition does not apply to a communication from a party or participant or his counsel, agent or other person acting on his behalf, if the communication relates solely to general matters of procedure or scheduling.

## **1.5 Time**

- A. Timely filing. Papers required or permitted to be filed under these regulations, or any provision of the applicable law must be filed with the clerk at the AAD office within the time limits for such filing as are set by Department regulation, or the AHO, or other provision of law.

Papers filed in the following manner shall be deemed filed as set forth herein:

1. Hand-delivery. Papers hand delivered during regular business hours shall be deemed filed on the date of hand-delivery. Papers delivered by hand at times other than during regular business hours shall be deemed filed on the next regular business day when stamped by the clerk of the AAD.
2. Mailing. Papers deposited in the U.S. Mail shall be deemed filed on the date the papers are postmarked. In the event that no date stamp by the clerk appears, papers shall be deemed filed on the date so postmarked. All papers shall show the date received by AAD.
3. Electronic transmittal. Papers transmitted by electronic mail or facsimile shall be accepted for filing so long as the original copy is received by the AAD within five (5) days of electronic transmittal and opposing counsel is

also transmitted a copy of the pleading by facsimile or electronic transmittal simultaneously as well as provided with a hard copy of the pleading within five (5) days of electronic transmittal.

- B. Computation of time. Unless otherwise specifically provided by law or these rules, computation of any time period referred to in these rules shall begin with the first day following the act which initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, or legal holiday or any other day on which the AAD is closed, in which event the period shall run until the end of the regular business hours of the next following business day. When the time period is less than seven (7) days, intervening days when the AAD is closed shall be excluded in the computation.

## **1.6 Filings Generally**

- A. Title. Papers filed with the AAD shall state the Division and the file number, if any, the title of the proceeding, and the name of the person on whose behalf the filing is made.
- B. Signatures. Papers filed with the AAD shall be signed and dated by the party on whose behalf the filing is made. This signature constitutes a certification that: the individual has read the document; knows the content thereof, and to the best of his/her knowledge, that such statements are true; that it is not interposed for delay; and that if the document has been signed by an authorized representative he/she has full power and authority to do so.
- C. Designation of Divisions. Any Division as a party to an adjudicatory proceeding shall be designated by its name and not by the name(s) of particular individual(s) holding office, and if while the adjudicatory proceeding is pending, a change occurs in an individual(s) holding office, the proceeding shall not abate, and no substitution of parties shall be necessary.
- D. Form
  - 1. Size and printing requirements. All papers, except those submittals and documents which are kept in a larger or smaller format during the ordinary course of a party's business shall be submitted on a 8 1/2" x 11" inch paper. All papers shall be hand printed or typewritten.
  - 2. Format. The clerk of the AAD may provide forms to be used by the parties.
- E. Copies. The original of all papers shall be filed with the clerk together with such number of additional copies as the AAD or AHO may require.
- F. Service. Simultaneously with the filing of any and all papers with the AAD, the party filing such papers shall send a copy with certification thereof to all other parties, or their authorized representative to the proceedings, by delivery in hand,

or by U.S. mail, postage prepaid, properly addressed and consistent with § 1.2(C)(16) of this Part, thereof.

## **1.7 Commencement of Formal Adjudicatory Proceedings**

- A. Request for hearing. Any person having a right to request an administrative hearing shall follow the procedures and timelines set forth in R.I. Gen. Laws § 42-17.7-9 and other applicable statutes and regulations. Such requests shall be filed directly with the AAD for Environmental Matters.
- B. Content of hearing request. The request for a hearing shall state clearly and concisely the specific issues which are in dispute, and the facts in support thereof, the relief sought, if any, the license or permit sought or involved, and any additional information required by applicable statutes and regulations.
- C. Amendments and withdrawal of pleadings. The AHO *sua sponte* or upon the motion of any party may, in his/her discretion, order any party to file an answer or other pleading, or to reply to any pleading and further permit either party to amend its pleadings upon a condition just to all parties.

## **1.8 Motions**

- A. General Requirements
  - 1. Motion practice. A party may request of the AAD or AHO any order or action not inconsistent with law or these regulations. Such a request shall be called a motion. The types of motions made shall be those, which are permissible under these Rules and the R.I. Superior Court Civil Rules of Procedure.
  - 2. Presentation/objection to motions. Motions may be made in writing at any time, or they may be made orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether oral argument is requested. Within seven (7) days after a written motion is filed with AAD, a party opposing said motion must file a written objection to the allowance of the motion and shall, if desired, request oral argument and allow three (3) extra days if the motion is sent by mail. All motions and objections shall be accompanied by a written memorandum, specifying the legal basis and support of the party's position. Failure to file a written objection within the prescribed time period, will be deemed a waiver of the objection, although an AHO, within his or her discretion, may grant additional time to a party in order to respond to a motion.
  - 3. Action on motion. The AHO shall, if he/she determines oral argument on the motion is warranted, give at least three (3) days' notice of the time and place for such argument. The AHO may act on a motion when all parties

have responded thereto, or the deadline for response has passed, whichever comes first.

- B. Withdrawals. A petitioner at any time may withdraw his request for hearing, but the withdrawal must be submitted in writing signed by the petitioner or his authorized representative, or by written stipulation signed by the parties. All withdrawals must be submitted to the AAD.
- C. Emergency scheduling. Any party may on motion, or the AHO *sua sponte*, may, for good cause order an accelerated hearing.

## **1.9 Powers and Duties of Clerk**

The clerk shall have general charge of the administration of the AAD, keep a full record of proceedings, file and preserve all documents and papers entrusted to his or her care, prepare such papers and notices as may be required by the AHO, and perform such other duties as may be proscribed. Such clerk shall have the power to issue subpoenas for witnesses and documents and to administer oaths in all cases before any AHO or pertaining to the duties of his or her office.

## **1.10 Permits/License**

- A. It shall be the applicant's responsibility to notify the AAD and AHO of all permits required for the construction and/or operation of the facility or project, and the status of each required permit.
- B. When more than one permit from DEM is required for a particular project/facility to proceed, the AHO, *sua sponte* or by motion of a party may, in his or her discretion, consolidate the adjudicatory proceedings.
- C. After hearings have been consolidated, by motion or order of the AHO, the matter may not be noticed or heard until all applications are deemed complete by the Division(s) responsible for the review.
- D. Amendments
  - 1. Amendments initiated by applicant. Once a draft permit or application has gone out to public notice, and the hearing has commenced as provided for in these Rules, if the applicant seeks to amend such draft permit or application, it must make such a motion before the AHO. If such a motion is granted, the AHO in his/her discretion, may suspend the hearings for a period of time sufficient to allow the other parties adequate time to review and prepare their case in response to the amendments.
  - 2. Recommended conditions of approval. Notwithstanding the foregoing, if the amendment is a recommended condition of approval of the permit/license made by the Division and has been clearly set forth in the notice of hearing then the applicant may amend its application to adopt the

condition without permission of the AHO and without suspension of the proceedings.

3. If the facts upon which an application or draft permit was approved or denied are materially and substantially modified, after it has gone out to public notice, the AHO in his/her discretion, may elect to treat the modified permit or application as a new application.

### **1.11 Discovery**

- A. General. Parties to an adjudicatory proceeding are encouraged to engage in voluntary discovery as parties follow the rules of Civil Procedure of the Superior Courts of this State.
- B. Time for filing. In accordance with Superior Court Rules of Civil Procedure, request for discovery may be made any time after a request for a hearing has been filed and shall be made in accordance with § 1.6 of this Part of these rules. The AHO, in his/her discretion may establish limits on such discovery, including, but not limited to, when discovery shall commence and close.
- C. Review of Division's files. The Division must make all discoverable records available for review by the parties at a specified time and provide the parties with an opportunity to copy any discoverable records. However, the Divisions are not required to send copies of their records and documents to the parties upon their request.
- D. Departmental costs. A Division shall be entitled to a fee per page for copies, and such other costs as set forth in R.I. Gen. Laws § 38-2-1, *et seq.*

### **1.12 Intervention**

- A. Initiation. Except as otherwise specifically provided by these Rules, any person not initially a party who wishes to intervene in, or participate in, an adjudicatory proceeding shall file a written petition to intervene with the AHO.
- B. Form and content. The petition shall state the name and address of the person submitting the petition. It shall specifically describe the injury in fact alleged by the petitioner and set forth how the petitioner(s) interests differ from, and are not adequately represented by, existing parties. The petition must identify the areas in dispute, specifically citing each regulation where applicable.
- C. Filing the petition. Except as otherwise specifically provided by these Rules or unless an applicable statute requires otherwise, the petition shall be filed with the AHO not later than seven (7) days prior to the date set for the initial prehearing conference. Petitions filed may be granted at the discretion of the AHO, provided that the parties are given notice and opportunity to object.

- D. Rights of intervenors. Intervenors shall be persons who have demonstrated an injury in fact which will result from a challenged action or application and whose interests are not adequately represented by other parties to the hearing. Any person permitted to intervene shall be a full party to the hearing. Every petition to intervene shall be treated in the alternative as a petition to participate.

### **1.13 Public Participation**

- A. Rights to participate. In general, any person who is not a party or intervenor to the proceeding may, in the discretion of the AHO, participate in the hearing by filing a motion with the AHO. The AHO shall set such limits on public participation as he/she deems necessary to ensure that the hearing is held in an orderly and expeditious fashion. Permission to participate shall be limited to the right to file a brief. Permission to participate, unless otherwise stated, shall not be deemed to constitute an expression that the person allowed to participate is a party in interest who may be aggrieved by any final decision. A person who petitioned to intervene and who was allowed to participate, may participate without waiving its rights to judicial review of the denial of said petition to intervene.
- B. Hearing hours. Whenever possible hearings shall be held during regular business hours. The AHO may, in his/her discretion, schedule an evening hearing if he/she deems it necessary to provide adequate opportunity for public comment, public questioning of witnesses or to expedite the case.

### **1.14 Status Conference**

- A. Status Conference.
1. The AHO may require the parties to appear for a status conference within thirty to forty-five (30-45) days of a request for hearing to consider:
    - a. The general overview of the appeal; and,
    - b. The possibility of settlement in lieu of a hearing.
  2. Counsel are required to file an appearance with the AAD.
  3. Parties interested in exploring settlement options may request a control date within 30 to 60 days from the date of the request. Approval of a control date shall be issued by order of the AHO. The control date serves as a stay of further proceedings before the AAD. Unless the parties file a consent agreement, withdraw the request for hearing before the expiration of the control date, request an extension of the control date, or advise the AHO in writing of the status of the matter, the AAD will automatically place the matter back on prehearing and hearing schedule. Upon expiration of the control date, if the parties have not entered into a consent agreement

or withdrawn the appeal, the matter shall proceed to a prehearing conference.

### **1.15 Prehearing Conference**

- A. The AHO shall require the parties to appear for a prehearing conference at least seven (7) days prior to the scheduled commencement of the hearing to consider:
  - 1. The simplification or clarification of the issues;
  - 2. The possibility of obtaining stipulations, admissions, agreements on documents, understanding on matters already of record, or similar agreement which will avoid unnecessary proof;
  - 3. The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;
  - 4. The possibility of agreement disposing of all or any of the issues in dispute; and,
  - 5. Such other matters as may aid in the disposition of the adjudicatory proceeding.
  
- B. The parties may meet prior to the initial prehearing conference to exchange and consider all documentary exhibits. As to those admissible without objection, counsel shall affix sequential numbers and shall prepare a descriptive list in numerical order of all such exhibits. The parties may also consider the qualification of expert witnesses and as to those who may be qualified without objection, counsel shall prepare a list of such qualified persons and the precise area of agreed qualification.
  
- C. The parties shall submit the following to the AHO at the commencement of the prehearing conference:
  - 1. A typed or printed list of each party's proposed witnesses and their addresses with a brief statement of each witness' anticipated testimony; specialization areas for proposed expert witnesses; and the precise area of qualification for agreed experts.
  - 2. A typed or printed list of each party's proposed exhibits which provides the following information:
    - a. A description of each document.
    - b. Identification of the document by reference to the offering party and assignment of a number in sequential order.

- c. Indication whether the document has been agreed to be admitted as a full exhibit or is to be marked for identification.
  3. The actual exhibits identified and marked as indicated above.
  4. A typed or printed statement of proposed stipulated facts and agreed issues to be considered at the hearing signed by the parties.
  5. A typed or printed statement of any additional issues which a party determines should be considered at the hearing.
- D. At the prehearing conference, the AHO and parties shall specify the burden of proof for the hearing and that standard shall be announced on the record. In matters in which a violation is alleged the burden of proof shall be on the Division. In matters in which a permit or application denial is at issue the burden shall rest with the applicant.
- E. All preliminary motions (including but not limited to Motions for Summary Judgment, Motions to Dismiss, Motions to Suppress or Exclude Evidence, Motions for Protective Orders and Motions in Limine) must be in writing and received by the AHO by the date of the prehearing conference.
- F. A party shall not be permitted to introduce into evidence in said party's direct case exhibits which are not filed with the party's prehearing memorandum.
- G. Upon the conclusion of the prehearing conference, the AHO may in his or her discretion, enter an order reciting the concessions and agreements made by the parties and summarizing the status of exhibits and witnesses.

## **1.16 Hearings**

- A. Submission without a hearing. Any party may elect to waive a hearing and to submit its case upon the record. Submission of a case upon the record, without a hearing, does not relieve the parties from the necessity of providing the facts supporting their burdens, allegations or defenses.
- B. Hearings, when and where held. Hearings will be held at the location designated by the AHO. Any party may, by motion, request that a hearing be held at some place other than that designated, due to disability or infirmity of any party or witness, or where justice and equity would be best served. Upon motion of any party and upon good cause shown, the AHO may in his/her discretion schedule a case for hearing.
- C. Notice of hearings. The notice of hearing must include the date, time and place of the hearing and prehearing conference and a statement of the petitioner's right to have counsel present. The notice shall provide sufficient notice of the issues involved so that the parties may have a reasonable opportunity to prepare and

present evidence and argument. The notice of hearing must set forth the requirements for intervention as outlined in § 1.12 of this Part.

The notice of hearing shall set forth the burden of proof. In an enforcement hearing, the burden of proof shall be set forth in accordance with § 1.12(C) of this Part of the Rules and Regulations for the Assessment of Administrative Penalties. In a hearing regarding the denial of a permit or variance application by the Department, the burden of proof shall be on the applicant.

If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed at the discretion of the AHO after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

D. Conduct of Hearing

1. General. Hearings shall be as formal as may be reasonable and appropriate under the circumstances.
2. Decorum. All parties, authorized representatives, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the AHO may take appropriate action including adjournment, if necessary.
3. Duties of hearing officer. The AHO shall conduct the hearing, make all decisions regarding admission or exclusion of evidence or any other procedural matters, and administer an oath or affirmation to all witnesses.

E. Opening. Except as otherwise required by law, it shall be the usual practice that in proceedings initiated by an application for a license or permit, the party bearing the burden of proof shall open. In hearings resulting from Notices of Violations the Division conducting the investigation or issuing the notice shall open.

F. Rights of parties. All parties shall have the right to present evidence, cross-examine witnesses, make objections, bring motions and make oral arguments.

G. Witnesses and Evidence

1. Oath. A witness' testimony shall be under oath or affirmation.
2. Rules of evidence. Pursuant to R.I. Gen. Laws § 42-35-10, the Rules of Evidence shall apply to evidence introduced during public participation to the same extent the rules apply to evidence admitted by other parties. Testimony and Papers submitted by members of the public which do not comport with the evidentiary requirements of R.I. Gen Laws § 42-35-10

may be accepted as public comment, shall not be accepted as evidence, and if made part of the administration record shall be marked as public comment. Rule 408 of the Rhode Island Rules of Evidence shall govern all communications including communications occurring prior to a Notice of Intent to Enforce or a Notice of Violation being issued.

3. Offer of proof. An offer of proof may be made in connection with an objection in response to a ruling of the AHO rejecting or excluding proffered testimony. The offer of proof shall consist of a statement and substance of the evidence which the party contends would be adduced by such testimony, and if the excluded evidence consists of evidence in documentary or written form, or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.
  4. Written testimony. The AHO may order the parties to file, prior to the commencement of any hearing, the testimony of any or all of their respective witnesses and to submit such testimony to the AHO and the opposing party or the opposing counsel by such date as the AHO shall determine. The witness shall testify under oath, and all of such testimony shall be in a question and answer format. Save for good cause shown, said testimony shall be the direct examination of said witness, provided, however, that said witness shall be available at the hearing for cross-examination by the opposing party or opposing counsel.
- H. Documentary evidence included. Documentary evidence may be received in evidence in the form of copies or excerpts.
- I. Administrative notice. Per R.I. Gen Laws § 42-35-10(4), the AHO may take notice of any judicially cognizable facts which may be judicially noticed by the courts of this State, or of generally recognized technical or scientific facts within the Agency's specialized knowledge, only if the parties are notified of the material so noticed and are given an opportunity to contest the facts so noticed. Notice may also be taken of properly adopted rules and regulations adopted by the agencies of this State or Federal agencies.
- J. Subpoenas. In all cases of every nature before the AAD, the clerk and/or AHOs may issue, and the AHOs may vacate, and modify subpoenas requiring the attendance and testimony of witnesses and to compel the production and examination of papers, books, accounts, documents, records, certificates and other legal evidence that may be necessary or proper for the determination and decision of any question before or the discharge of any duty required by law of the said AHO.
1. All subpoenas and subpoenas *duces tecum* shall be signed by an AHO or the clerk and shall be served as subpoenas are served in civil cases in the Superior Court.

2. Motion to vacate or modify. Any person to whom a subpoena is directed may, within a five (5) day period, file in writing a motion that the subpoena be vacated or modified. The AHO may grant such motion in whole, or in part, upon a finding that the testimony, or the evidence whose production is requested, does not relate with reasonable directness to any matter in question, or upon a finding that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested or for other good and sufficient cause.
  3. Costs. Witnesses subpoenaed under these Rules shall be entitled to the same fees for attendance and travel as are provided for witnesses in civil cases in the Superior Court.
  4. Contumacy. In cases of contumacy or refusal to obey the command of the subpoena so issued, the Superior Court shall have jurisdiction in accordance with R.I. Gen. Laws § 42-17.7-8.
- K. Recording and transcripts. Testimony and argument at the hearing shall be recorded electronically or stenographically. Transcripts of the proceedings shall be supplied to any party at his/her own expense upon request to the stenographer. The AHO, within his or her discretion and in order to ensure an accurate record, is authorized to require the appellant to record the hearing stenographically in application matters and the Division in enforcement matters and a certified copy of the transcript shall be provided to the clerk of the AAD.
- L. Correction of transcript. Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing. Transcript corrections, agreed to by opposing parties, may be incorporated into the record, if and when approved by the AHO, at any time during the hearing, or after the close of evidence. The AHO may call for the submission of proposed corrections and may make disposition thereof at appropriate times during the course of the proceeding.
- M. Contents of records. The record shall, at all reasonable times, be available for inspection by the parties.
- N. Evidence after completion. No evidence shall be admitted after completion of a hearing or after a case submitted on the record, unless otherwise ordered by the AHO.
- O. Weight of evidence. The weight to be attached to any evidence in the record will rest within the sound discretion of the AHO in accordance with the Rules of Evidence. The AHO may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the administrative hearing.

- P. Exceptions. Formal exceptions to rulings on evidence and procedure are unnecessary. It is sufficient that a Party, at the time that a ruling is made or sought, makes known his or her objection to such action and his or her grounds therefore.

## **1.17 Decisions**

- A. Decisions. All decisions rendered by an AHO at the conclusion of a hearing shall be in writing and shall comply with the requirements of R.I. Gen. Laws § 42-17.7-6 and § 42-35-12. Parties shall be notified either in person, or by mail, or electronic transmittal of any order. Included in the final order shall be a separate notice advising the parties of the availability of judicial review, the appeal period and the procedure for filing an appeal, and providing a reference to the statutory authority.
- B. Withdrawal of exhibits. After a decision has become final and all appeal periods have lapsed the AHO may in his/her discretion, upon motion, permit the withdrawal of original exhibits or any part thereof by the party or person entitled thereto.
- C. Presiding officer unavailable. When an AHO becomes incapacitated or unavailable to complete a hearing and/or render proposed findings of fact and conclusions of law, the hearings may be completed and/or a decision may be rendered by a substitute AHO appointed by the Chief Hearing Officer upon the record as defined, provided however the substitute AHO may within his or her discretion, and after an examination of all the evidence, determine that a ruling is necessary in the interest of justice.

## **1.18 Consent Order or Withdrawal**

- A. Negotiations. At any time prior to rendering a final decision, parties to a hearing may attempt to dispose of a matter by entering into a consent order. A joint request for a stay of a hearing for this purpose shall be forwarded to the AHO and shall indicate the present status of negotiations. If an agreement is not reached within the time period for which the stay was approved, a hearing shall be promptly rescheduled by the AHO.
- B. Contents of agreement. Every agreement shall contain, in addition to an appropriate order, an admission of all jurisdictional facts and express waivers of further procedural steps before the AHO and of the right to appeal and shall also state that such agreement is enforceable as an order of the Director in accordance with procedures prescribed by law. In addition, the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law or regulations have been violated as alleged in the Notice of Violations.

- C. Disposition of proposed agreement. Upon receiving such agreement, the AHO may:
1. Accept it and issue the order agreed upon; except that no agreement shall be accepted unless consistent with the provisions of R.I. Gen. Laws § 42-17.1-2(s)(1),
  2. Reject it and reschedule a hearing or;
  3. Take such other action as he or she deems appropriate.

The provision of this Rule shall not preclude settlement of the proceedings in any other manner.

- D. Withdrawal of an NOV by the Division shall terminate the matter before AAD.
- E. Withdrawal of a Request for Hearing by the appellant/respondent shall terminate the matter before the AAD.

### **1.19 Licensing or Permitting Procedures**

- A. Persons denied a license or permit from the Division may request an administrative hearing as provided for by statute.
- B. Solid Waste Management Facilities
1. Appeals of issuance of a license or final denial of a solid waste management facility license must be filed in writing within thirty (30) days of issuance with the AAD for Environmental Matters.
  2. Appeals shall be limited to the applicant; any person who provided substantive comment during the public comment period as indicated by the Director in his/her decision; and any person who shall demonstrate good cause for failure to participate and who demonstrates that his or her interest shall be substantially impacted if prohibited from appearance in the appeal.
  3. Appeals shall be in writing and shall contain precise statements of the issues presented on appeal including statutory and regulatory citations and shall indicate the specific parts of the decision of the Director which are challenged.
  4. Appeals shall be limited to those issues raised by the parties in the written appeal filed with the AAD provided however, that upon good cause shown, the AHO shall allow additional issues to be raised.
  5. Hearings on appeals to the AAD are evidentiary hearings only.

6. The AHO shall determine and apportion to the applicant the actual costs of the appeal process exclusive of attorneys' fees.
- C. Notice of Administrative hearing shall not issue until a denial or partial denial by the Division has been issued and an administrative hearing has been requested of the AAD.
- D. Hazardous Waste Management Act Permits
1. Appeals of issuance of a permit or final denial of a Hazardous Waste Management Act permit must be filed in writing within thirty (30) days of issuance with the AAD for Environmental Matters. Petitions to intervene must likewise be filed within thirty (30) days of issuance.
  2. Appeals/petitions to intervene shall be limited to the applicant and any person/entity who demonstrates an injury in fact which will result from the challenged action or application and whose interests are not adequately represented by existing parties to the hearing.
  3. Appeals/petitions to intervene shall be in writing and shall contain precise statements of the issues presented on appeal including statutory and regulatory citations and shall indicate the specific parts of the decision of the Director which are challenged.
  4. Appeals/petitions to intervene shall be limited to those issues raised by the parties in the written appeal/petition, filed with the AAD provided however, that upon good cause shown, the AHO shall allow additional issues to be raised.

## **1.20 Filing for Recovery of Litigation Expenses**

- A. Purpose. The purpose of this rule is to carry out the statutory requirements contained in the Equal Access to Justice Act, Chapter 42-92 of the R.I. Gen. Laws which provides for the award of reasonable litigation expenses to prevailing parties in certain adjudicatory proceedings conducted by state agencies.
- B. Filing procedure. Within thirty (30) days of the conclusion of an adjudicatory proceeding of the Department relating to an enforcement action or order, or to the revocation or suspension of a license or permit, or to any other adjudicatory proceeding as defined in R.I. Gen. Laws § 42-92-2, a respondent may submit a claim to the AHO in the proceeding for litigation expenses pursuant to Chapter 42-92 of the R.I. Gen. Laws. For purposes of this section, the adjudicatory proceedings are deemed to be concluded on the date a final decision is issued pursuant to §1.17 of this Part or on the date that a Consent Order is accepted by the AHO pursuant to § 1.18 of this Part. The claim for litigation expenses shall conform to the general filing requirements of § 1.6 of this Part and shall contain a summary of the legal and factual basis for filing the claim.

- C. Supporting affidavits and documentary evidence. The petitioner may submit with his or her claim for litigation expenses, affidavits and documentary evidence presenting the legal and factual basis by which the petitioner claims he or she is entitled to an award of litigation expenses, including facts establishing:
1. That the petitioner is a party as defined in R.I. Gen. Laws § 42-92-2(a).
  2. That the petitioner has prevailed against the Department in the underlying adjudicatory proceeding.
  3. That the Department was not charged by statute with investigating a complaint which led to the underlying adjudicatory proceeding.
  4. The amount of reasonable litigation expenses as defined in R.I. Gen. Laws § 42-92-2(c).
  5. That the Department instituted the underlying adjudicatory proceeding without substantial justification.
- D. Department's answer. The Division shall provide a written answer to the claim for litigation expenses to the AHO within twenty (20) days of receipt of the claim. Such answer may include affidavits and documentary evidence supporting its position and other evidence in support of the position that the Department was substantially justified in its actions.
- E. Evidentiary hearing. Within ten (10) days of the filing of the Division's answer with the AHO, either party may move for an evidentiary hearing on the issue of the awarding of litigation expenses. The motion shall be granted only if the moving party satisfies the AHO that affidavits are an inadequate method of presenting new evidence relevant to the awarding of litigation expenses.
- F. Decision
1. Except as provided in § 1.20(F)(2) of this Part, the AHO shall award reasonable litigation expenses to the petitioner if he or she finds that the record in the case establishes by a preponderance of the evidence:
    - a. That the petitioner is a party as defined in the R.I. Gen. Laws § 42-92-2(a);
    - b. That the respondent has prevailed against the Division in the underlying adjudicatory proceeding;
    - c. That the Department instituted the underlying adjudicatory proceeding without substantial justification; and,
    - d. The amount of reasonable litigation expenses as defined in R.I. Gen. Laws § 42-92-2(c) which may include a recalculation of the

expenses and a finding that some or all of the litigation expenses qualify as reasonable litigation expenses under the statute.

2. The AHO shall deny an award of litigation expenses to the petitioner if:
  - a. The petitioner failed to meet the burden of proof established in § 1.20(F)(1) of this Part;
  - b. The Division was substantially justified in the actions leading to the proceedings and in the proceeding itself; or,
  - c. The Division was charged by statute with investigating a complaint, which led to the adjudicatory proceeding.
  - d. The AHO may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust.

The foregoing Rules and Regulations, after due notice, are hereby adopted and filed with the Secretary of State to become effective 20 days after filing, in accordance with the provisions of Chapters 42-17.7, and 42-35 of the R.I. Gen. Laws.