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

RE: CARDI CORPORATION AND **AAD NO. 08-003/SRE**
RHODE ISLAND DEPARTMENT OF TRANSPORTATION
NOTICE OF VIOLATION OC&I/ 2007 598 SR

DECISION AND ORDER

Background

On January 13, 2005 The Rhode Island Department of Environmental Management ("RIDEM") issued to the Rhode Island Department of Transportation ("RIDOT") a Conditional Approval for Construction Work proposed by RIDOT relating to a plan entitled "Improvements to I–195, Soil Management Plan ("SMP") Contract 9 Area" dated August 31, 2004. The Conditional Approval required RIDOT to give all of the contractors and subcontractors working on the subject property the SMP. The SMP established guidelines that RIDOT and its contractors were required to follow for managing soil excavated during the construction activities in the Contract 9 area. RIDOT incorporated the SMP into Contract 9 by reference and by Addenda (Stipulated Statement of Facts #16).

Cardi Corporation ("Cardi") was hired by RIDOT to work in the Contract 9 area (Stipulated Statement of Facts #14). Pursuant to a Memorandum of Understanding ("MOU") dated October 18, 2000, portions of the relocation project included land that has been historically used for industrial activities and may contain hazardous substances (Stipulated Statement of Facts #5). On April 9, 2007 RIDEM received a complaint alleging that contaminated soil from the ongoing highway project had been transported offsite and disposed of at the Middle School in Glocester located at 7 Rustic Hill Road. After an investigation, RIDEM determined that Cardi was responsible for depositing contaminated soil at the Glocester site. A Notice of Violation ("NOV") was then issued on June 30, 2008 to Cardi and RIDOT. This appeal followed on July 2, 2008.

Stipulated Statement of Facts

Cardi Corporation,the Rhode Island Department of Transportation, and the Rhode Island Department of Environmental Management (collectively, "the Parties") submitted the following joint statement of facts prior to the Hearing:

1. The subject property is located at 7 Rustic Hill Road, Glocester, R.I. (the "Property").

2. Respondent Cardi Corporation was working under contract for the Respondent Rhode Island Department of Transportation at the Route 195 Relocation Project – Contract 9 area on April 9, 2007.

3. Respondent Cardi Corporation is registered with the Rhode Island Office of the Secretary of State to operate a road construction business.

4. On October 18, 2000, the Department and RIDOT entered into a Memorandum of Understanding ("MOU") entitled "Memorandum of Understanding Between the Rhode Island Department of Environmental Management and the Rhode Island Department of Transportation Relative to Land Acquisitions for Relocation of Route I-195 in Providence, R.I."

5. The MOU indicates that portions of the relocation project included land that has been historically used for industrial activities and may contain hazardous substances.

6. The MOU acknowledges that the Department has regulatory authority over any hazardous substance which may exist on the affected relocation project properties as well as the authority to determine the final dispensation of any hazardous substances present in the soils on the affected relocation project properties at concentrations exceeding the residential remediation criteria contained in the Remediation Regulations.

7. The MOU indicates that Remedial Action undertaken to address contaminated soils would include activity such as offsite removal (of contaminated soils) and disposal at a licensed facility, capping in place with an Environmental Land Use Restriction and/or onsite treatment and stabilization.

8. On January 13, 2005, the Department issued to RIDOT a Conditional Approval for construction work proposed by RIDOT relating to a plan entitled "Improvements to I-195, Soil Management Plan Contract 9 Area" dated August 31, 2004.

9. The Conditional Approval required RIDOT to provide copies of the SMP to all of the contractors and subcontractors working on the subject project.

10. The SMP established guidelines that RIDOT and its contractor were required to follow for managing soil excavated during the construction activities in the Contract 9 Area. These guidelines included the segregation of excavated soil into the following categories: Type 1, Type 2 and Type 3.

11. The SMP states that Type 3 soils will be managed as a hazardous waste and sent for proper disposal within ninety (90) days of excavation. The SMP also states that Type 1 and 2 soils shall be stockpiled onsite for potential reuse.

12. The SMP indicates that upon completion of the highway construction project, all remaining stockpiled soils will be managed in accordance with the Remediation Regulations.

13. On May 9, 2007, the Department received a certified copy of the analytical report dated April 26, 2007 from ESS Laboratory for sample numbers GMS-1 and GMS-9 that the Department collected from the Property on April 10, 2007. On May 29, 2007 OEM received a certified copy of an analytical report dated May 16, 2007 from ESS Laboratory for sample numbers GMS-2, GMS-3, GMS-4, GMS-5, GMS-6, GMS-7 AND GMS-8 that the Department collected from the Property on April 10, 2007.

14. RIDOT awarded Contract No. 2005-CH-052: Improvements to Interstate Route 195 Contract 9 to Cardi Corporation.

15. RIDEM issued Conditional Approval by letter dated January 13, 2005 to RIDOT approving the Soil Management Plan (SMP) submitted by Vanasse Hangen Brustlin, Inc. dated August 31, 2004 provided Contract 9 incorporated the SMP into the Contract.

16. RIDOT incorporated the SMP into Contract 9 by reference and by Addenda.

17. The Standard Specifications for Road and Bridge Construction are incorporated into Contract 9.

18. RIDOT is not a party to the Ponaganset Middle School Project.

Cardi and RIDOT's Motion for Judgment as a Matter of Law on Partial Findings

At the close of the Department of Environmental Management's ("RIDEM") case in chief, Cardi Corporation ("Cardi") joined by the Rhode Island Department of Transportation

("RIDOT"), moved on the record and subsequently filed a Motion and Memorandum for Judgment as a Matter of Law on Partial Findings solely with respect to the administrative penalty. Cardi filed its motion without waiving its right to proceed back to Hearing and dispute liability. Rule 52 (c) of the Superior Court Rules of Civil Procedure requires that judgment on partial findings "shall be supported by findings of fact and conclusions of law." In making a determination on a Rule 52 (c) motion; the finder of fact weighs "the credibility of witnesses and determines the weight of the evidence presented by plaintiff." *Broadley v. State* 939 A.2d, 1016, 1020. Pursuant to Rule 12 (c) of the Rules and Regulations for Administrative Penalties once the Office of Compliance and Inspection ("OC&I") established in evidence the penalty amount and its calculation, the burden then shifted to Cardi 1) to produce evidence of record and 2) to bear the burden of persuasion that OC&I failed to assess the penalty or economic benefit portion of the penalty in accordance with the Penalty Regulations. See e.g. In re: Richard Fickett, AAD No. 93-014/GWE. OC&I asserts that it properly established in evidence the penalty amount and its calculation through introduction of sixteen (16) exhibits (most stipulated to by all parties) and the testimony of Mr. Sean Carney and Ms. Tracey Tyrrell of OC&I. Therefore, OC&I argues the burden has shifted to Cardi to prove that the penalty was calculated incorrectly.

Cardi moved for Judgment as a Matter of Law for three separate reasons:

1. Cardi argues that neither the statutes at issue nor RIDEM's "Rules and Regulations for Assessment of Administrative Penalties" (the "Penalty Regulations") provide for or allow RIDEM to use a "per truckload" basis to calculate a penalty. Here, RIDEM multiplied the gravity component of $12, 500 it had calculated under the penalty matrix by "20 truckloads" to

increase the gravity penalty to $250,000. Cardi argues that any penalty amount calculated in this way is, as a matter of law, beyond the scope of RIDEM's authority, not in accordance with law, and arbitrary and capricious. For this reason alone, the penalty should be dismissed per Cardi.

2. Cardi and RIDOT argue that RIDEM has no authority under the Penalty Regulations to assess a penalty "jointly and severally" as it has done here against both Cardi and RIDOT. They argue that Respondents are two separate entities and RIDEM must prove its case against each Respondent individually. They believe RIDEM has the burden to establish the penalty amount of $251,546 and its calculation against each Respondent individually. However, they further argue that it did not do so here and cannot do so where its calculation has not considered the applicable penalty factors against Cardi individually, and then has not calculated an individual penalty amount against Cardi. Thus, as a matter of law, Cardi argues it is yet another reason why RIDEM has not met its burden to establish a penalty amount and its calculation against Cardi.

3. Cardi asserts that RIDEM also failed to meet its burden to establish the penalty amount and its calculation because RIDEM did not establish in any way the basis for RIDEM's determination that the alleged violation was a "Major" deviation under the penalty matrix in the Penalty Regulations. RIDEM's Notice of Violation ("NOV") gravity penalty calculations is bereft of any explanation for how it determined, from the list of factors it "considered," that the circumstances here meant that the "degree" of noncompliance from the standard was "Major," as opposed to "Moderate," or "Minor." Instead, RIDEM merely made some statements to "fill in the blanks" on the penalty sheet without addressing how this is "Major" according to Cardi.

Cardi further avers that there is simply no way for the Respondents, the AAD, or a reviewing court to evaluate RIDEM's calculation when it has completely failed to establish how it "calculated" this violation to be a "Major" deviation in the NOV.

RIDOT concurs with Cardi's position and argues that it bears no responsibility on a joint and several basis as it did not in any way contribute to the soil being moved, which was the basis for the Notice of Violation.

1. Penalty Calculation

The Rhode Island DEM argues that Respondents were cited for violations of the RIDEM's Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (the "Remediation Regulations") as well as the Rhode Island Refuse Disposal Act, RIGL §23-18.9-5. Per RIDEM in its Memorandum in Reply to Cardi, the Respondents were specifically cited for a violation of Rule 4.01 of the Remediation Regulations, which prohibits "the release of a hazardous material which impacts the classification or use of the land, groundwater or surface water of the State." The Respondents were also cited for a violation of the Rhode Island Refuse Disposal Act, which prohibits "the disposal of solid waste at a facility or location that is not licensed by [RIDEM] to manage solid waste." RIGL §23-18.9-5.

The Refuse Disposal Act RIGL §23-18.9-10(b), provides for penalties "of not more than $25,000.00". "In the case of a continuing violation, each day's continuance of the violation is deemed to be a separate and distinct offense" RIGL §23-18.9-10(b). The maximum per day penalty for violation of the Site Regulations at the time of the Notice of Violation in 2008 was One thousand dollars ($1000.00) RIGL §42-17.6-7 (Administrative Penalties for Environmental Violations – Limitation on Amount of Penalty).

RIDEM also determines the "Gravity of Violation" (Rules and Regulations for Assessment of Administrative Penalties) when calculating a penalty. In this case, the violation was categorized as a Type I (directly related to the protecting of the public health, safety, welfare or environment). Section 10 (A)(2) of the Rules and Regulations allows the RIDEM to consider "Factors" in determining the penalty such as "Deviation from the Standard" (the degree to which a particular violation is out of compliance with the requirement violated).

In this instance, a review of the NOV indicates RIDEM took into consideration the following factors when calculating the penalty:

(A) The extent to which the failure to act was out of compliance.

(B) Environmental conditions.

(C) Amount of pollutant.

(D) The toxicity or nature of the pollutant.

(E) Duration of violation.

(F) The areal extent of the violation.

(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance.

(H) Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce.

(I) The degree of willfulness or negligence, including but not limited to, how much control the violator has over the occurrence of the violation and whether the violation was foreseeable.

RIDEM argues that it assessed an appropriate penalty here, based on the fact that Cardi caused twenty (20) separate truckloads of hazardous material to be released and disposed of at the school property located at 7 Rustic Hill Road in Glocester, RI (the "property") in violation

of state law and RIDEM regulations RIGL §42-17.6-7.

RIDEM asserts that Cardi ignores RIGL §42-17.6-7 when arguing that a multiplier penalty based on a per truckload basis is not authorized by Law. That statute, the Administrative Penalties for Environmental Violations Act, states:

> "Limitations on amount of penalty...**Each and every occurrence** and/or day during which the violations or failure to comply is repeated shall constitute a separate and distinct violation." RIGL §42-17.6-7 (emphasis added).

RIDEM also avers that the NOV shows that the authority for using a multiplier exists in both the Remediation Regulations (4.01), which prohibits "The release of a hazardous material which impacts the classification or use of the land groundwater or surface water of the State" and the Rhode Island Refuse Disposal Act (RIGL §23-18.9-5), which prohibits "The disposal of solid waste at a facility or location that is not licensed by [RIDEM] to manage solid waste". OC&I assessed a penalty after 20 truckloads of hazardous material was released and disposed of at the school property. The material was subsequently removed and disposed of properly as evidenced by the soil disposal receipts by the Rhode Island Resource Recovery Corporation. (OC&I Exhibit #16 Full).

OC&I used the truckload multiplier to capture each and every time a "release" and a "disposal" occurred. According to the Remediation Regulations, a "release "is prohibited every time it occurs. The term "release" in the Remediation Regulations includes "dumping", which happened each time Cardi "dumped" a truckload of contaminated soil at the Property. The phrase "dispose of solid waste" included in the Rhode Island Refuse Disposal Act "refers to the depositing, casting, throwing, leaving or abandoning of a quantity greater than three (3) cubic yards of solid waste." RIGL §23-18.9-5 (b). Therefore, Cardi "disposed of solid waste" each

time it deposited a truckload of hazardous material (greater than three cubic yards) on the Property according to RIDEM.

OC&I calculated the penalty of Two Hundred Fifty-one Thousand , Five Hundred and Forty-six Dollars ($251,546.00) according to the statute and regulations cited in the NOV (OC&I Exhibit #13 Full) and (TR. Volume II pg. 19 lines 6-10 and pgs. 21-27).

I believe the testimony of the RIDEM witnesses was credible and that the weight of the evidence demonstrates that RIDEM properly calculated the penalty using a "per truckload" method, which is authorized by the relevant statutes and regulations.

2. Joint and Several Liability

RIDOT is the owner of the subject property and was operating the excavation through Cardi. This work was being done pursuant to a Soil Management Plan which made RIDOT responsible for handling the contaminated soil on the I-195 project according to certain protocols and verifying that the procedures outlined in the SMP and Conditional Approval were strictly followed. (OC&I Exhibit 17 Full pg. 2 and OC&I Exhibit 15 Full pg. 2) In fact, the SMP required RIDOT's resident engineer to work with officials from the engineering firm that prepared the SMP for RIDOT (OC&I Exhibit 15 Full pg. 14) and "communicate with the construction contractor on a daily basis" (OC&I Exhibit 15 Full pg. 14). The SMP also required the contractor to use a daily operating Log to "document observations made during excavation throughout the Contract 9 Area ...including a description of soil movements, the approximate volume of excavated materials not reused and final offsite disposal location and documentation where necessary" (OC&I Exhibit 15 Full pg. 14).

Most importantly, the language in RIGL §23-19.14 Industrial Property

Remediation and Reuse Act as well as Remediation Regulation 4.01 defines the parties which have ***strict, joint and several liability*** "for the actual or threatened release of any hazardous material at a site: (1) The owner or operator of the site; ... (3) Any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous materials owned or possessed by that person, at any site owned or operated by another party or entity and containing hazardous materials; and (4) Any person who accepts or accepted any hazardous materials for transport to disposal or treatment facilities or sites selected by that person, from which there is a release or threatened release of a hazardous material which causes the incurrence of response costs."

Based on the weight of the evidence presented regarding the obligations of Cardi and RIDOT while excavating at Area 9 and the clear language in the statute and regulation, joint and several liability was appropriately imposed by RIDEM.

3. Penalty Calculation – "Major Deviation"

Cardi argues that RIDEM failed to meet its burden to establish the violation as "Major" deviation from the standard. Ms. Tracy Tyrrell, who I found to be credible, went into great detail at the Hearing and explained exactly how she, Mr. Dean Albro and Mr. Sean Carney all from RIDEM discussed the assessment method to be used to calculate the administrative penalty. She explained which statutes and regulations applied (RIGL §23-18.9-5 and Regulation 4.01) (TR. Vol. II pg. 19) as well as the factors analyzed and the reasoning for the Type I penalty "which is black and white defined as directly related to the protection of the public health, safety, welfare or environment" (TR. Vol. II pg. 20). The RIDEM determined

that the "Respondents acted quickly in removing the material from the site... That's one of the reasons that kept the penalty calculation at the $12,500 rather than the $25,000 which we could have assessed on this case" (TR. Vol. II pg. 24 lines 16-23). Yet she also noted that the fact that the Respondents were aware of the regulations and soil conditions and were operating under a Soil Management Plan, they were held to a higher standard that affected the calculation of the penalty. (TR. Vol. II pg. 25 line 12, pg. 26 Lines 1-7).

Thus, I find that the weight of the evidence shows RIDEM thoroughly and properly calculated the penalty and its components, taking into consideration all of the appropriate factors.

Lastly RIDEM argues that it is charged with interpreting RIGL §23-18.9-5, as well as the statute that the Remediation Regulations were promulgated under; namely, in this case, the Industrial Property Remediation and Reuse Act, RIGL §23-19.14-6. RIDEM states:

> The Rhode Island Supreme Court held that "it is also a well-recognized doctrine of administrative law that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency." *Pawtucket Power Associated Ltd. P'ship v. City of Pawtucket,* 622 A.2d 452, 456-57 (R.I. 1993), citing e.g., *Young v. Community Nutrition Institute,* 476 U.S. 974 (1986); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.,* 470 U.S. 116 (1985); *Lawrence County v. Lead-Deadwood School District* No. 40-1, 469 U.S. 256 (1985); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 u.s. 837 (1984); *United States v. Turkette,* 452 U.S. 576 (1981). Further, the Rhode Island Supreme Court held that "[d]eference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied." *Pawtucket Power* at 456-7, citing *Young* at 981.

I agree with the reasoning of these cases.

Findings of Fact

1. The subject property is located at 7 Rustic Hill Road, Glocester, R.I. (the "Property").

2. Respondent Cardi Corporation was working under contract for the Respondent Rhode Island Department of Transportation at the Route 195 Relocation Project – Contract 9 area on April 9, 2007.

3. Respondent Cardi Corporation is registered with the Rhode Island Office of the Secretary of State to operate a road construction business.

4. On October 18, 2000, the Department and RIDOT entered into a Memorandum of Understanding ("MOU") entitled "Memorandum of Understanding Between the Rhode Island Department of Environmental Management and the Rhode Island Department of Transportation Relative to Land Acquisitions for Relocation of Route I-195 in Providence, R.I."

5. The MOU indicates that portions of the relocation project included land that has been historically used for industrial activities and may contain hazardous substances.

6. The MOU acknowledges that the Department has regulatory authority over any hazardous substance which may exist on the affected relocation project properties as well as the authority to determine the final dispensation of any hazardous substances present in the soils on the affected relocation project properties at concentrations exceeding the residential remediation criteria contained in the Remediation Regulations.

7. The MOU indicates that Remedial Action undertaken to address contaminated soils would include activity such as offsite removal (of contaminated soils) and disposal at a licensed facility, capping in place with an Environmental Land Use Restriction and/or onsite treatment and stabilization.

8. On January 13, 2005, the Department issued to RIDOT a Conditional Approval for construction work proposed by RIDOT relating to a plan entitled "Improvements to I-195, Soil Management Plan Contract 9 Area" dated August 31, 2004.

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12. The SMP indicates that upon completion of the highway construction project, all remaining stockpiled soils will be managed in accordance with the Remediation Regulations.

13. On May 9, 2007, the Department received a certified copy of the analytical report dated April 26, 2007 from ESS Laboratory for sample numbers GMS-1 and GMS-9 that the Department collected from the Property on April 10, 2007. On May 29, 2007 OEM received a certified copy of an analytical report dated May 16, 2007 from ESS Laboratory for sample numbers GMS-2, GMS-3, GMS-4, GMS-5, GMS-6, GMS-7 AND GMS-8 that the Department collected from the Property on April 10, 2007.

14. RIDOT awarded Contract No. 2005-CH-052: Improvements to Interstate Route 195 Contract 9 to Cardi Corporation.

15. RIDEM issued Conditional Approval by letter dated January 13, 2005 to RIDOT approving the Soil Management Plan (SMP) submitted by Vanasse Hangen Brustlin, Inc. dated August 31, 2004 provided Contract 9 incorporated the SMP into the Contract.

16. RIDOT incorporated the SMP into Contract 9 by reference and by Addenda.

17. The Standard Specifications for Road and Bridge Construction are incorporated into Contract 9.

18. RIDOT is not a party to the Ponaganset Middle School Project.

19. RIDEM calculated the penalty using a "per truckload" method.

20. The soil was removed from the Glocester site and was disposed of properly at the Rhode Island Resource Recovery Corporation as evidenced by the soil disposal receipts.

21. The SMP required the RIDOT's engineers to work onsite with the engineers who prepared the SMP.

22. The SMP required Cardi to keep a daily lo regarding soil excavation and document their observations in the Contract 9 Area.

23. Twenty (20) truckloads of material were dumped at the Glocester site.

24. RIDEM officials met and discussed the penalty calculation several times taking into consideration the type of violation and gravity of the offense as well as mitigating factors.

Conclusions of Law

1. RIDEM, based on a preponderance of the evidence, properly calculated the penalty in this case.

2. RIDOT and Cardi failed to produce evidence demonstrating that RIDEM failed to assess the penalty in accordance with the Penalty Regulations.

3. RIDEM was authorized to use a "per truckload" method to calculate the penalty based on the Rhode Island Refuse Disposal Act RIGL §23-18.9-5; Industrial Property Remediation and Reuse Act RIGL §23-19.14; Administrative Penalties for Environmental Violations Act RIGL §42-17.6 and RIDEM Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (Rule 4.01) as well as RIDEM's Rules and Regulations for Assessment of Administrative Penalties.

4. RIDEM properly imposed and proved by statute and a preponderance of the evidence joint and several liability against Cardi and RIDOT.

Wherefore, it is hereby **ORDERED** that:

1. Cardi and RIDOT's Motion for Judgment as a Mater of Law on Partial Findings pursuant to Superior Court Rule of Civil Procedure 52 (c) is **Denied**.

Entered as an Administrative Order this 8th day of November, 2012.

David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill 2nd FL
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to Robin Main, Esquire and Alexandra K. Callam, Esquire, Hinckley Allen Snyder, LLC, 50 Kennedy Plaza, Suite 1500, Providence, RI 02903; Annette Jacques, Esquire, Office of Legal Counsel, Two Capitol Hill, Providence, RI 02903 and via interoffice mail to Marisa Desautel, Esq., DEM Office of Legal Services and David Chopy, Chief, DEM Office of Compliance and Inspection, 235 Promenade Street on this 8th day of November, 2012.

Bruce R. Stewart

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.