STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 15, 2014]

ROLLINGWOOD ACRES, INC.,	**:**	
SMITHFIELD PEAT CO., INC.,	**:**	
SMITHFIELD CRUSHING CO., LLC	**:**	
Appellants,	**:**	
	:	
v.	**:**	**C.A. No. PC-2014-1339**
	:	
RHODE ISLAND DEPARTMENT OF	**:**	
ENVIRONMENTAL MANAGEMENT, et al.	**:**	
Appellees.	**:**	

DECISION

VOGEL, J. Rollingwood Acres, Inc. (Rollingwood Acres), Smithfield Peat Co., Inc. (Smithfield Peat), and Smithfield Crushing Co., LLC (Smithfield Crushing) (collectively, Appellants) bring this appeal from a decision of the Administrative Adjudication Division of the Rhode Island Department of Environmental Management (AAD). In its decision, AAD denied Appellants' request for recovery of reasonable litigation expenses under the Rhode Island Equal Access to Justice for Small Businesses and Individuals Act (EAJA), G.L. 1956 §§ 42-92-1 through 42-92-8. The Rhode Island Department of Environmental Management's Office of Compliance and Inspection (DEM or, specifically, OC&I) previously charged Appellants with violating various water quality and oil control statutes and regulations. Appellants successfully defended most of those charges and then brought the subject claim to recover litigation expenses they incurred in connection with responding to the allegations asserted against them. This Court exercises jurisdiction over this matter pursuant to §§ 42-35-15, 42-92-5**.** For the reasons set forth herein,

the Court affirms the decision of the AAD hearing officer denying recovery of reasonable litigation expenses.

I

Facts and Travel

This Court previously has detailed the facts of this case in two prior decisions. Rollingwood Acres, Inc. v. Rhode Island Dep't of Envtl. Mgmt., No. PC-2012-3876, 2013 WL 4662844 (R.I. Super. Ct. Aug. 26, 2013); Rollingwood Acres, Inc. v. Rhode Island Dep't of Envtl. Mgmt., No. PC-2012-6341, 2013 WL 4662845 (R.I. Super. Ct. Aug. 26, 2013). The Court limits the recitation of facts here to those relevant to the limited issue before the Court.

Rollingwood Acres is the record owner of property located at 961 Douglas Pike, Smithfield, Rhode Island, identified as Town Assessor's Plat 46, Lots 71 and 76 (the Property). (Appellants' Ex. B, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, Rhode Island Department of Environmental Management Administrative Adjudication Division Decision, June 27, 2012, hereinafter NOV AAD Decision, at 2 ¶ 2.) Smithfield Peat is a corporation that operates a registered hazardous waste generator as well as a leaf and yard waste composting facility at the Property. (NOV AAD Decision, at 2 ¶¶ 3-5.) Smithfield Crushing is a corporation that operates a rock crushing facility at the Property. (NOV AAD Decision, at 2 ¶¶ 6, 7.)

In May 1982, DEM issued a freshwater wetlands permit to Smithfield Peat, authorizing the corporation to excavate, fill, and grade some of the Property for the purposes of installing two storm water detention basins, which were required to have fifteen-inch diameter discharge pipes. (NOV AAD Decision, at 2 ¶ 8; 40 ¶ 13.) Appellants constructed the structure in

conformance with the permit obtained, at an expense of over $100,000. (NOV AAD Decision, at 40 ¶ 14.)

A

1996 Alteration to Drainage System

In 1996 and 1997, the Rhode Island Department of Transportation (DOT) conducted a project to improve Route 7, including a portion adjacent to Appellants' Property. (NOV AAD Decision, at 40 ¶ 11.) Although DOT's written plan did not include alterations to Appellants' drainage structure, DOT altered the structure, including replacing the existing fifteen-inch diameter pipe with an eighteen-inch diameter pipe. (NOV AAD Decision, at 40 ¶¶ 16, 20.) DOT took this action without Appellants' knowledge or permission. (NOV AAD Decision, at 40 ¶¶ 18, 21.) The alteration to a larger diameter pipe increased the discharge of sediment from the pipe, resulting in the discharge water having higher turbidity.[1] (NOV AAD Decision, at 40 ¶ 23.)

In December 1996, Bill Riccio, a DOT employee, filed a complaint with DEM that Appellants' drainage structure was discharging sediment-laden water into an unnamed stream. (NOV AAD Decision, at 41 ¶ 24.) In January 1997, OC&I followed up on the complaint with two site inspections of the Property. (NOV AAD Decision, at 41 ¶ 25.) The site inspector, Sean Carney, observed turbid water being discharged into the stream. (NOV AAD Decision, at 41 ¶ 26.) On June 3, 1997, OC&I issued a Notice of Intent to Enforce (NOIE) against Rollingwood Acres because of sediment-laden water discharged to an unnamed stream. (NOV AAD

[1] Turbidity is "a measure of water clarity[;] how much the material suspended in water decreases the passage of light through the water." United States Environmental Protection Agency, Turbidity, http://water.epa.gov/type/rsl/monitoring/vms55.cfm (last accessed Nov. 6, 2014).

Decision, at 2 ¶ 9.) The NOIE included an order to remedy the unpermitted discharge. (NOV AAD Decision, at 29.)

B

2005 and 2006 Follow-up Inspections

OC&I inspectors did not visit the Property again until February 9, 2005. A site inspector, Peter Naumann, returned to the Property for a follow-up inspection because he was in the area investigating an unrelated complaint. (Appellants' Ex. E.) During the February 9, 2005 site inspection, Naumann observed the appearance of oil at the site. (Appellants' Ex. E.) He traced the source of the oil onto Appellants' Property and then traced the flow from the drainage basin until it eventually reached a tributary stream of Stillwater Pond. (Appellants' Ex. E.) Naumann contacted Thomas Campbell, an employee with DEM Emergency Response. (Appellants' Ex. E.)[2] Campbell responded to the site, and he instructed Keith Lewis, a Smithfield Peat equipment operator who was the first employee to arrive, to engage an oil spill remediation contractor. (Appellants' Ex. E.) Smithfield Peat engaged Lincoln Environmental—with whom Smithfield Peat had an environmental response agreement. (NOV AAD Decision, at 3 ¶¶ 10, 21.) Lincoln Environmental arrived at the Property and began responding to the spill in less than three hours.[3] (Appellants' Ex. E.)

In the presence of Campbell, Lewis, and a representative of the Smithfield Fire Department, Naumann further traced the oil source on Appellants' Property. Naumann determined that it originated from a pile of stone and waste rock that Smithfield Peat obtained

[2] Campbell also instructed Naumann to contact the Smithfield Fire Department. (Appellants' Ex. E.)

[3] The exact response time is not provided, but the site inspector arrived at the site at 1120 hours and departed at 1400 hours. He stated that Lincoln Environmental was on site and responding before he departed. (Appellants' Ex. E.)

from the Narragansett Bay Commission Combined Sewer Overflow Tunnel project. (Appellants' Ex. E.)

The next day, Naumann returned to the Property to take samples of the runoff water. (Appellants' Ex. F.) He collected five samples for multiple tests, including samples to test for turbidity and the presence of hydrocarbons. (Appellants' Ex. F.) All of the water samples were collected from the Property or downstream of the Property, except for one "background sample" that was collected from a nearby stream that was not part of the runoff stream system. (Appellants' Ex. F.) The samples did reveal the presence of hydrocarbons, indicating that a petroleum product was released on the Property. (NOV AAD Decision, at 42 ¶¶ 47, 48.) Upon investigation, Appellants learned that the oil in question had originated from a leak at the Narragansett Bay Commission property that had contaminated some of the stone waste brought to Appellants' Property. (NOV AAD Decision, at 22.)

Another OC&I site inspector, Patrick Hogan, returned to the Property on April 4, 2006. (Appellants' Ex. G.) Hogan testified that he returned specifically to take water samples. (Tr. 51-52, Sept. 28, 2011.) David Chopy, Chief of OC&I,[4] ordered the additional sampling inasmuch as the samples collected in 2005 could not be used to assess turbidity because the background sample had been collected from an unconnected stream. (NOV AAD Decision, at 18.) While at the Property, Hogan observed that the discharge water was the color of light coffee. (Appellants' Ex. G.) Hogan collected six water samples, although he "was not able to find a suitable upstream location for the stream to take a background water sample." (Appellants' Ex. G.) Hogan later testified that he could not find an upstream location for sampling because "[t]here is no upstream with this location . . . [t]he water seems to begin right

[4] David Chopy was the Chief of OC&I at the time of his testimony. However, prior to 2008, he was a supervising sanitary engineer with OC&I. (Tr. 84, Sept. 28, 2011.)

there." (Tr. 65, Sept. 28, 2011.)[5] Instead, Hogan collected a sample approximately 1500 feet downstream from the discharge for use as the background sample. (Appellants' Ex. G.)

On November 6, 2006, OC&I issued a Notice of Violation (NOV) against Appellants. (Compl. ¶ 9.) The NOV alleged violations of the Rhode Island Water Pollution Act,[6] DEM's Water Quality Regulations,[7] the Rhode Island Oil Pollution Control Act,[8] DEM's Oil Pollution Control Regulations,[9] and DEM's Regulations for The Rhode Island Pollution Discharge Elimination System.[10] The NOV included an administrative penalty of $31,470. (NOV AAD Decision, at 2 ¶ 1.)

C

Administrative Adjudication Division and Superior Court

The Appellants appealed the NOV to DEM's AAD. (Compl. ¶ 10.) The AAD conducted a hearing on the matter and issued a decision on June 27, 2012. The hearing officer dismissed all allegations based on violations of the Water Pollution Act because he found that DEM had not met its burden of proof by a preponderance of evidence that Appellants had caused discharge of

[5] Hogan testified that he drove around the area to see if he could find a stream that likely was the upstream location but was unable to find anything suitable. He testified that he did not actually enter Appellants' Property because he was not sure he had the right to do so, and he qualified his testimony that he was not stating that there is definitely no upstream but that he could not locate an upstream location. (Tr. 65-66, 77, Sept. 28, 2011.)

[6] The Water Pollution Act prohibits the "placement of any pollutant in a location where it is likely to enter the waters of the State" or to discharge any pollutant into the waters of the State without a permit. G.L. 1956 § 46-12-5(a)(b).

[7] DEM Water Quality Regulations Rules 9(A), 11(B), and 13(A) prohibit various discharges of pollutants into state waters.

[8] The Oil Pollution Control Act prohibits discharge of oil upon the land of the State without a permit. Sec. 46-12.5.1-3.

[9] These regulations prohibit discharge of oil onto land in a location where it is likely to enter the waters of the State, require that release of oil be immediately stopped and removed, and require that DEM be notified immediately of any release. DEM Oil Pollution Control Regulations §§ 6(a), 12(b)(2), 12(b)(3).

[10] Rule 31(a)(1)(vii) of these regulations requires a permit to discharge any storm water that violates a water quality standard.

turbid water into the waters of the State. (NOV AAD Decision, at 41 ¶ 34.) This finding was based on the lack of adequate water samples because no upstream sample was collected as a background. (NOV AAD Decision, at 41 ¶¶ 32, 33.)

The hearing officer dismissed two of the three allegations of the violation of the Rhode Island Oil Pollution Control Act and Regulations. The hearing officer concluded that Appellants received product contaminated with oil and therefore were responsible for discharge of petroleum in the State. (NOV AAD Decision, at 43 ¶ 60.) However, the hearing officer found that Appellants were not aware of the presence of the oil and therefore were not liable for failure to immediately notify DEM of the release. (NOV AAD Decision, at 43 ¶¶ 58, 61.) Additionally, the hearing officer found that Appellants timely contacted an environmental cleanup responder and began remediation on the site. (NOV AAD Decision, at 43 ¶¶ 64, 65.) Therefore, the hearing officer concluded that Appellants did not violate oil pollution laws for failure to immediately cleanup the release of oil. (NOV AAD Decision, at 43 ¶ 63.) The hearing officer reduced the administrative penalty to $2615, approximately eight percent of the original penalty. (NOV AAD Decision, at 45.)

On July 27, 2012, after receipt of the NOV AAD Decision, Appellants filed a request for attorney's fees and costs under the EAJA and Rule 20.00 of the AAD Rules of Practice and Procedure. (Compl. ¶ 12.) On September 18, 2012, the hearing officer denied Appellants' request, finding that Appellants were not "parties" under the EAJA. (Appellants' Ex. A.)

Appellants appealed that determination to the Superior Court. A justice of this Court rendered a decision on August 26, 2013, granting the appeal and finding that Appellants had standing to pursue litigation expenses under the EAJA. See Rollingwood Acres, Inc., 2013 WL

4662845 at *5. The Court remanded the case to the AAD to consider Appellants' claim for litigation expenses consistent with the Court's ruling. Id.

Upon reconsideration, the hearing officer again denied Appellants' request for attorney's fees and costs. (Compl. ¶ 19.) The hearing officer first observed that this Court established that Appellants were parties under the EAJA. (In re Rollingwood Acres, Inc./Smithfield Peat Co./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, Rhode Island Department of Environmental Management Administrative Adjudication Division Decision, Feb. 28, 2014, hereinafter 2014 AAD Decision, at 4-5.) Assuming standing, he then proceeded to consider the claim on its merits.

In rendering his decision, the hearing officer noted that the only outstanding charge against Appellants was for discharge of oil. He found that Appellants were prevailing parties on the other charges which had been dismissed. (2014 AAD Decision, at 5-6.)

However, the hearing officer determined that DEM was substantially justified in initiating the investigation because the investigation was based on a complaint of potential violations. (2014 AAD Decision, at 7-8.) The hearing officer also found that DEM remained substantially justified in pursuing the charges. (2014 AAD Decision, at 10-11.) Therefore, the hearing officer concluded that because DEM had been substantially justified in proceeding against Appellants throughout the investigation, Appellants were not entitled to recover their reasonable litigation expenses. (2014 AAD Decision, at 16 ¶ 20; 17 ¶ 20.) It is from this decision that Appellants take their appeal.

II

Standard of Review

This Court exercises Jurisdiction over an appeal from an agency decision denying litigation expenses under the EAJA pursuant to § 42-92-5 and the Administrative Procedures Act (APA) § 42-35-15. The EAJA provides this Court with the authority to "modify the fee determination if it finds that the failure to make an award, or the calculation of the amount of the award, was not substantially justified based upon a de novo review of the record." Sec. 42-92-5.

Although the EAJA specifically provides this Court with authority to review the agency decision de novo, this Court's review is also guided by the APA, which grants this Court with the authority to review any final agency determination.[11] Under the APA,

> "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

These two prisms of review create an apparent conflict in that this Court conducts a de novo review and yet defers to the agency's factual findings.

[11] Section 42-35-15(a) provides, in pertinent part, that "[a]ny person, including any small business, who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter."

Our Supreme Court's analysis in Envtl. Scientific Corp. v. Durfee, 621 A.2d 200 (R.I. 1993), reconciles this conflict. In that case, the Court held that, although a court has statutory authority to review DEM decisions de novo, a court must give deference to the agency adjudicator's decision if that decision is based on credibility determinations. Id. at 206. In so holding, the Supreme Court recognized that appellate review may consist of reviewing a silent record whereas a trial justice, or agency adjudicator, hears live testimony and can make credibility determinations from the witnesses that testify before him or her. Id. If the agency conducted hearings and heard "conflicting live testimony," then the court should defer to the hearing officer's findings of fact because those findings will have been made in light of the hearing officer's assessment of credibility of the live witnesses' testimonies. Id. at 207. However, a reviewing court may reject a hearing officer's credibility determinations if the court finds that those determinations were clearly wrong, based on the record. Id. at 206. In this case, the hearing officer heard testimony from both sides, agency employees and Appellants' witnesses. He made credibility determinations as to these witnesses, and accordingly, this Court will apply the deferential standard of review in this case.

This Court will therefore defer to the hearing officer's factual determinations if those determinations are supported by legally competent evidence.[12] Arnold v. R.I. Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003); see also Pierce v. Underwood, 487 U.S. 552, 560 (1988) (holding that a reviewing court should give discretion to a lower court when reviewing a decision under the federal equivalent of the EAJA because that lower court "may have insights not conveyed by the record"). As long as this Court can find legally competent

[12] Legally competent evidence "is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Environmental Scientific Corp., 621 A.2d at 208 (citing Sartor v. Coastal Resources Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988)).

evidence to support the hearing officer's factual findings, it must defer to the hearing officer "even . . . [if] the court might be inclined to view the evidence differently and draw inferences different from those of the agency . . . ." R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994) (citing Barrington School Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). However, this Court will review questions of law de novo. Auto Body Ass'n of R.I. v. State Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (citing Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 437 (R.I. 2010)).

III

Analysis

The EAJA "was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988). The EAJA allows a prevailing party in an administrative adjudication to recover reasonable litigation expenses unless the hearing officer determines that the agency was substantially justified in its actions during the proceeding. Sec. 42-92-3.[13] DEM has promulgated regulations relating to awards under the EAJA, and a hearing officer must find by a preponderance of the evidence that the record reflects:

> "(a) That the Petitioner is a Party as defined in the R.I.G.L. § 42-92-2(a);

[13] Section 42-92-3 provides, in relevant part:

> "Whenever the agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself."

> "(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.G.L. § 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." DEM Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters, Rule 20.00(f)(1) (2012).

Additionally, Rule 20.00 requires that the hearing officer deny reasonable litigation expenses if:

> "(i) The Petitioner failed to meet the burden of proof established in Section 20.00 (f)(1);
> "(ii) The Division was substantially justified in the actions leading to the proceedings and in the proceeding itself; or
> "(iii) The Division was charged by statute with investigating a complaint, which led to the Adjudicatory Proceeding." Rule 20.00(f)(2)(a).

On appeal, Appellants contend that they qualify to recover their reasonable litigation expenses under the EAJA because they were prevailing parties in the underlying AAD proceeding. Additionally, Appellants assert that DEM was not substantially justified throughout the adjudicatory proceeding because (1) the 2005 and 2006 inspections were not the result of a complaint received by DEM; (2) DEM's position regarding turbidity did not have a reasonable basis in fact and law because DEM knew of DOT's responsibility for the altered pipe and DEM failed to take proper samples; and (3) DEM's charges against Appellants for failure to report and remedy the oil discharge did not have a reasonable basis in fact because DEM knew that Appellants were not aware of the oil until the 2005 DEM inspection. Therefore, Appellants argue that the hearing officer erred in finding that DEM was substantially justified in its investigation and that therefore, the hearing officer erred in denying Appellants' recovery of their reasonable litigation expenses.

DEM counters that it was substantially justified in initiating the investigation as well as continuing the investigation throughout the adjudicatory proceeding. First, DEM argues that it was per se substantially justified because its investigation was based on a complaint from DOT that Appellants were discharging turbid water, and the EAJA provides for a finding of per se substantial justification when an agency was acting on a statutory charge to investigate complaints. Sec. 42-92-2(2). DEM additionally avers that, even if it was not per se substantially justified, its investigation was reasonably based in law and fact and was, therefore, substantially justified. DEM counters Appellants' specific claims of error stating that (1) DEM was not aware that DOT was the sole responsible party for the pipe alteration; (2) the water samples taken were selected by the site inspectors within their discretion as the best samples available; and (3) DEM had reason to believe that Appellants were aware of the oil spill prior to the 2005 site inspection. For these reasons, DEM contends that the hearing officer did not err in denying Appellants' recovery of litigation expenses because DEM was substantially justified in its investigation.

A

Prevailing Party

Under both the EAJA and DEM's Administrative Rules of Practice and Procedure, the Appellants' initial burden is to establish that they were prevailing parties in the underlying adjudicatory proceeding. Sec. 42-92-3; R. 20.00(c)(1), (2). This Court previously ruled that Appellants do qualify as parties. Rollingwood Acres, Inc., 2013 WL 4662845 at *5; see Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 677 (R.I. 2004) (citations omitted) (referencing the "law of the case doctrine," which "holds that, 'after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling'"). Additionally, the hearing

officer found that DEM met its burden of proof on only one of the various charges brought against Appellants. (NOV AAD Decision, at 44-45 ¶¶ 4-10.) DEM does not dispute Appellants' contention that they were the prevailing parties on the remaining charges. Therefore, this Court finds that Appellants were prevailing parties in the adjudicatory proceeding on all charges except the charge for violation of the Oil Pollution Control Act and associated regulations for discharge of oil without a permit.

B

Substantial Justification

An agency is not responsible for reimbursement of a party's litigation expenses if the hearing officer "finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself." Sec. 42-92-3. The statute defines "substantial justification" to mean that "the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Sec. 42-92-2(7). Our Supreme Court has further expounded on substantial justification to include agency decisions that "are clearly reasonable, well founded in law and fact, solid though not necessarily correct." Krikorian v. D.H.S., 606 A.2d 671, 675 (R.I. 1993). Additionally, Rule 20.00(f)(2)(iii) provides the basis for a per se finding of substantial justification if the agency "was charged by statute with investigating a complaint, which led to the Adjudicatory Proceeding." Therefore, if this Court finds that DEM meets either the per se substantial justification provision or that its actions had a reasonable basis in law and fact, it must uphold the hearing officer's denial of Appellants' request for recovery of reasonable litigation expenses.

1

Per Se Justification

In regards to substantial justification, DEM first asserts that it was substantially justified, per se, in its investigation of the Property because the investigation was initiated in response to a complaint against Appellants. DEM asserts that upon investigating in response to the complaint, it observed violations of the Rhode Island Water Pollution Act and the Rhode Island Oil Pollution Control Act. Upon finding these violations, DEM was statutorily obligated to enforce the statutory provisions against Appellants. Therefore, DEM avers that it was per se substantially justified because it was acting in response to a complaint and under a statutory mandate.

The Appellants counter that, although DEM's initial investigation was in response to a complaint, DEM took no action against Appellants from the time it issued the NOIE in 1997 until the follow-up site inspection nearly eight years later in 2005. Appellants assert that the 2005 and 2006 inspections that led to issuance of the instant NOV were not based on the stale 1997 complaint. Therefore, Appellants conclude, DEM may not rest on the per se substantial justification exception because the investigation was not based on a complaint. DEM counters that the follow-up investigations were based on the initial complaint because the file was never closed. DEM asserts that it was attempting to resolve the matter informally during the intervening eight years, but the follow-up investigations were still based on the initial DOT complaint.

Both the EAJA and the associated DEM regulations provide for a presumption of substantial justification when the agency is following a statutory mandate to investigate complaints. The EAJA provides that "[a]ny agency charged by statute with investigating

complaints shall be deemed to have substantial justification for the investigation and for the proceedings subsequent to the investigation." Sec. 42-92-2(2). Additionally, the DEM AAD Regulations provide that the hearing officer "shall deny an award of litigation expenses to the Petitioner if . . . [t]he Division was charged by statute with investigating a complaint, which led to the Adjudicatory Proceeding." Rule 20.00(f)(2)(a)(iii). These provisions create a presumption of substantial justification when an agency investigation is initiated in response to a complaint relating to the agency's statutory obligations. See State ex rel. Thompson v. DeNardo, 448 A.2d 739, 741 (R.I. 1982) (citing In re Vincent, 122 R.I. 848, 851, 413 A.2d 78, 79-80 (R.I. 1980)) (observing that presumptions may be legislatively authorized). DEM is granted the power and duty under the Rhode Island General Laws to "conduct such investigations and hearings . . . as may be necessary to enforce" any agency rules and regulations. Sec. 42-17.1-2(19).

Here, the AAD hearing officer found that DEM's investigation of Appellants' Property was initiated in response to a complaint filed by an employee of DOT. (2014 AAD Decision, at 7.) The hearing officer found that DEM initiated site inspections in response to that complaint, and those inspections resulted in findings of violations for discharge of oil and turbid water. (2014 AAD Decision, at 7-8.) The hearing officer concluded that the initial investigation remained open during the intervening years between the 1997 inspection and the 2005 inspection such that the later inspections and resulting NOV remained based on the initial complaint and therefore, could take advantage of a per se finding of substantial justification. (2014 AAD Decision, at 8.)

This Court holds that DEM was per se substantially justified in initiating its investigation against Appellants because both parties agree that the initial investigation was in response to a

complaint filed with the agency that led to discovery of potential water quality violations. (NOV AAD Decision, at 28-29.) Therefore, DEM's initiation of the investigation qualifies as per se substantially justified. See Rule 20.00(f)(2)(a)(iii).

DEM additionally asserts that this presumption of substantial justification carries throughout the life of the investigation. The hearing officer agreed, noting that the file initiated in response to the DOT complaint never closed and the follow-up inspections were a continuation of the complaint-based investigation. (2014 AAD Decision, at 8.) The statutory language of the EAJA provides that the per se substantial justification exception applies to "the investigation and for the proceedings subsequent to the investigation." Sec. 42-92-2(2). Although the Appellants assert that the large passage of time[14] undercuts a finding that the 2005 and 2006 investigations were based on the DOT complaint, neither the EAJA nor the associated DEM regulations include such a temporal restriction.[15]

The hearing officer's determination that the investigative file remained open during the intervening years constitutes a finding of fact he made after considering the credibility of the evidence presented before him. (NOV AAD Decision, at 30). Therefore, this Court will defer to the hearing officer's finding on that fact. However, whether the per se substantial justification exception applies based on those facts is a question of law, which we review de novo. This

[14] DEM additionally asserts that it was attempting to resolve the matter informally during the intervening years, although this Court observes that DEM points to no evidence in the record to support that assertion. See Defs.' Mem. at 11.

[15] Federal courts have rejected the notion that agency success early in an investigation can lead to a de facto finding of substantial justification for the remainder of the agency proceeding. The First Circuit Court of Appeals held that "[t]o suggest that early foot ipso facto carries the 'substantial justification' day, notwithstanding that the case proves dreadfully deficient in the long haul, would be paralogical." Sierra Club v. Sec'y of Army, 820 F.2d 513, 519 (1st Cir. 1987) (refusing to apply a presumption of substantial justification based on agency victory in the lower court after the holding was reversed on appeal). However, the federal equivalent of the EAJA, 28 U.S.C. § 2412, does not include language similar to that found in the Rhode Island EAJA providing for the per se finding of substantial justification.

Court agrees with the hearing officer that DEM initiated its investigation of Appellants' Property in response to a complaint of violations of statutes and regulations that DEM is charged with enforcing. The record indicates that the initial 1997 inspections of the Property were prompted by a complaint made by DOT, which was never resolved. (NOV AAD Decision, at 5, 30.) Additionally, the record is devoid of evidence that the file ever closed. Because there is no evidence that the file closed, this Court defers to the hearing officer's finding that the file remained open during the intervening years. (2014 AAD Decision, at 8.)

Appellants' argument against application of the presumption of substantial justification is functionally equivalent to a laches argument. Laches is "an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant." O'Reilly v. Town of Glocester, 621 A.2d 697, 702 (R.I. 1993). However, courts are generally reluctant to apply laches in cases implicating public interest concerns. Id. at 703; see also Parkhurst v. DEM, No. 94-0371, 1997 WL 839872 *5 (R.I. Super. Ct. Jan. 10, 1997) (relying on O'Reilly in refusing to apply laches to overturn a DEM order for restoration of wetlands issued four months after receipt of a complaint).

Our Supreme Court has held that "the doctrine of laches generally does not apply when the government sues a private party to assert a public right." O'Reilly, 621 A.2d at 703 (referencing a federal case from the District of Rhode Island that refused to allow a laches defense against the Rhode Island Attorney General in a suit brought against a hazardous waste generator under the Comprehensive Environmental Response, Compensation, and Liability Act). The Court explained that "laches does not operate as a defense in cases of public interest for two basic reasons: (1) the importance of rights at stake when the interests of the public are asserted; and (2) the determination that those rights cannot be compromised or forfeited by the negligent

or illegal acts of public officials who fail to carry out their government obligations." Id. (citing Student Pub. Interest Research Grp. of N.J. v. P.D. Oil & Chem. Storage, Inc., 627 F. Supp. 1074, 1085 (D.N.J. 1986)).

Although the Court is mindful of DEM's delay in pursuing its investigation, such delay would not undermine its ability to so investigate where the agency is asserting a public right—here, protection against water quality degradation. By precluding a private party from relying on the doctrine of laches in cases involving public interest, the Court recognizes situations where governmental agencies sit on their rights to the detriment of a private party. In these situations, the Court rejects such prejudicial delay as a defense to government action. See O'Reilly, 621 A.2d at 703. It follows that the Court does not limit the rights of the governmental agency to rely on available presumptions, regardless of unexplained delay in pursuing the investigation.

This Court therefore affirms the hearing officer's finding that the initial file based on the DOT complaint never closed, giving deference to this factual finding of the hearing officer who heard live testimony. See Pierce, 487 U.S. at 560. This Court concludes that DEM is entitled to a finding of per se substantial justification for its proceedings against Appellants because it was acting in response to a complaint and under its statutory authority to enforce environmental statutes and regulations. See § 42-92-2(2); Rule 20.00(f)(2)(a)(iii).

2

Knowledge of DOT Violations

Even if this Court had found that the presumption of substantial justification did not apply in this case, this Court finds that DEM's investigation against Appellants was substantially justified based on the facts and applicable law. The EAJA defines substantial justification to mean "that the initial position of the agency, as well as the agency's position in the proceedings,

has a reasonable basis in law and fact." Sec. 42-92-2(7). Although DEM asserts that its position was reasonably based in law and fact throughout the proceeding, Appellants assert three specific grounds to challenge such a finding.

First, Appellants assert that DEM had knowledge that DOT was, in fact, responsible for the alteration of the drainage structure that resulted in the turbidity at issue. Appellants assert that the cause of the increased turbidity in the discharge from the drainage structure was the removal of the original fifteen-inch diameter pipe and replacement with an eighteen-inch diameter pipe, a change which was made by DOT without Appellants' knowledge or consent. The Appellants argue that DEM was aware that the responsible party was DOT and yet proceeded against Appellants even though the agency knew that Appellants had not authorized the drainage alteration. DEM counters that there is evidence on the record to indicate that (1) DEM employees were unaware of who installed the eighteen-inch pipe, and (2) DEM cited Appellants because Rollingwood Acres was the owner of the Property and Smithfield Peat and Smithfield Crushing operated businesses on the Property[16] and therefore, all parties were responsible for the activities on the Property, even if the activities were initiated by a third party.[17] The hearing officer heard extensive testimony from both sides on whether OC&I staff were aware of DOT's involvement. (NOV AAD Decision, at 5, 6, 11, 12, 13, 25, 26.) Applying

[16] David Chopy, the Chief of OC&I, testified at the hearing that because Smithfield Peat and Smithfield Crushing operate composting and rock crushing operations, respectively, their operations could have been the source of the sediment and oil that resulted in the NOV. (Tr. 148-49, Sept. 28, 2011; NOV AAD Decision, at 16.)

[17] DEM additionally argues that Appellants cannot rely on the hearing officer's findings that DOT was solely responsible for the alterations to the drainage structure to justify its argument that DEM was not substantially justified in proceeding against Appellants. DEM points out that such hindsight does not speak to DEM's knowledge of the facts during the course of the investigation and proceeding. See Sierra Club, 820 F.2d at 517 (cautioning that courts "must carefully refrain from treating every reversal of agency action as the functional equivalent of an 'unreasonable' position").

the aforementioned deferential standard, this Court will defer to the hearing officer's factual determinations. The Court will uphold his findings so long as the record includes legally competent evidence to support his conclusions.

The hearing officer found that DOT was the party solely responsible for the alteration of the discharge pipe that resulted in the discharge of turbid water from the Property. (NOV AAD Decision, at 40 ¶¶ 18-21, 23.) However, during the hearing, multiple DEM employees testified that when they were conducting their investigation, they were unaware of this fact and did not then know who had replaced the fifteen-inch pipe (NOV AAD Decision, at 5, 11, 12.) DEM did have reason to believe that DOT had partial, but not sole involvement, in the replacement of the pipe. They contend that the information available to them suggested DOT involvement only up to Appellants' Property line. (NOV AAD Decision, at 6.) David Chopy testified that DOT's admission of partial involvement indicated that another party was involved as well. (Tr. 153-54, Sept. 28, 2011.)

The hearing officer acknowledged the possibility ". . . that Chopy did not see all the evidence pointing to RIDOT's involvement in this matter" given the span of time between DOT's construction project and issuance of the NOV. (NOV AAD Decision, at 33.) Such speculation on the part of the hearing officer did not rise to the level of reasonable inference that Chopy's review of the file was lacking.[18] Certainly, if he had made such factual finding, then Appellants might have a stronger argument that they would be entitled to recover any and all reasonable litigation expenses incurred after Chopy reviewed the file in 2005 because his

[18] In fact, Chopy testified that before drafting the NOV, "I would have reviewed the whole file." (Tr. 93, Sept. 28, 2011.) When Chopy could not recall viewing certain documents related to DOT's involvement, he stated that "I'm not saying I didn't see them. I just don't remember seeing them." (Tr. 118, Sept. 28, 2011.) The hearing officer made no finding rejecting this testimony.

continued investigation was not substantially justified in fact. See § 42-92-2(7); Krikorian, 606 A.2d at 675. The Court, therefore, accepts the hearing officer's finding that DEM had reason to believe that Appellants were at least partially involved in the alteration of the drainage structure. Taft, 536 A.2d at 893.

Absent information to the contrary, DEM would have acted reasonably in determining that the owners of the Property were the responsible parties for altering the drainage. Chopy testified that DEM cited the Respondents because they are the Property owners "[s]o it's reasonable to conclude that the landowner knew of or consented to the pipe going in." (Tr. 131, Sept. 28, 2011.) Additionally, the NOIE against Rollingwood Acres from 1997 required that Rollingwood Acres remedy the unauthorized changes to the drainage structure. (NOV AAD Decision, at 29.) In spite of such mandate, it is undisputed that they failed to restore the pipe to the appropriate diameter.

Under the Water Pollution Act, a violation occurs as soon as turbid water enters a drainage pipe that discharges into a water of the State.[19] The hearing officer recognized that "[i]t has always been RIDEM's position, throughout the hearing process, that regardless of the Petitioners' defense, the Petitioners are solely responsible for the turbid water coming from their property" because they are the parties discharging turbid water. (2014 AAD Decision, at 10.) Based on the language of the Water Pollution Act, this Court finds that DEM's position was well

[19] The Water Pollution Act makes it "unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit." Sec. 46-12-5(b). Discharge is further defined as "the addition of any pollutant to the waters from any point source." Sec. 46-12-1(4). A point source is defined as "any discernible, confined, and discrete conveyance, including, but not limited to, any pipe . . . ." Sec. 46-12-1(14). Therefore, given that the drainage pipe in question is on Appellants' Property, they are responsible for the discharge from that defined point source.

founded in law and fact when the agency held Appellants responsible for the water discharged from the pipe on their Property. See Taft, 536 A.2d at 893.

The hearing officer disagreed with DEM's contention that Appellants' obligations with respect to the turbid water remained the same regardless of whether DOT or the Property owners had modified the drainage structure. He found that DOT's sole involvement rendered the agency responsible for correcting the drainage problem. However, he did not consider that finding determinative of the issue of whether Appellants were entitled to recover legal fees. He observed that "even though this hearing officer disagreed with the case presented by OC&I, that disagreement does not rise to the level of 'arbitrary and capricious'" and therefore not substantially justified under the EAJA. (2014 AAD Decision, at 10-11.)

This Court cannot conclude that DEM acted unreasonably in proceeding against Appellants. Appellants' ownership of the Property provided DEM with a factual and legal basis for proceeding with the investigation in spite of information that DOT had partial involvement with the modifications. See Sierra Club, 820 F.2d at 517 (citing U.S. v. Yoffee, 775 F.2d 447, 449 (1st Cir. 1985)) (holding that substantial justification requires a showing that the agency "had a reasonable basis for the facts alleged, that it had a reasonable basis in law for the theories it advanced, and that the former supported the latter").

3

Lack of Background Samples

The Appellants next contend that DEM's position was not substantially justified because DEM failed to comply with its own regulations in collecting the water samples used for the allegations of water quality violations. The Appellants assert that turbidity requirements are based on reference to a background sample, which requires an upstream sample. Appellants

argue that DEM did not take any upstream samples and, therefore, did not follow its own regulations in proceeding against Appellants for violations of water quality regulations based on turbidity. DEM counters this assertion by noting that the unusual nature of the water system in question—in which there "was no 'upstream' area" to sample—dictated judgment calls by DEM inspectors. Therefore, even though DEM did not collect an upstream sample, it argues that it remained substantially justified in proceeding against Appellants.

The water quality regulations promulgated by DEM dictate that turbidity in water discharge is "not to exceed 10 NTU[20] over natural background."[21] DEM, Water Quality Regulations, Table 1.8.D.(2) (2010). The regulations define "background" as "the water quality upstream of all point and nonpoint sources of pollution." DEM, Water Quality Regulations, App. C, Definitions.[22] Therefore, turbidity is a relative measurement that requires comparison of water quality prior to and immediately after the alleged point source.

The hearing officer reasonably concluded that the samples collected by DEM site inspectors in 2005 and 2006 are "meaningless" because there is no valid upstream sample to serve as a background. (NOV AAD Decision, at 34.) In 2005, the site inspector collected a "background" sample from a nearby stream with no evidence that it was hydrologically connected to the stream into which the Appellants' drainage system discharged. (Appellants' Ex. F.) DEM attempted to remedy this problem with additional samples in 2006. (Tr. 51-52, Sept. 28, 2011; NOV AAD Decision, at 18.) However, again, the site inspector was unable to collect an upstream sample. The inspector, Patrick Hogan, testified that he was unable to collect

[20] NTU stands for Nephelometric Unit. (NOV AAD Decision, at 18.)
[21] This value is specifically for discharge into Class B waters, and the receiving waters from the Property are so classified.
[22] "Natural background conditions" are defined as "all prevailing dynamic environmental conditions in a water body or segment thereof, other than those human-made or human-induced." DEM, Water Quality Regulations, Rule 7.

an upstream sample because "[t]here is no upstream . . . [t]he water seems to begin right there." (Tr. 65, Sept. 28, 2011.) Hogan did testify that the water was coming from Appellants' Property, but he did not enter the Property to seek out a potential upstream source because he did not believe that he had the authority to enter the Property. (Tr. 65, 77, Sept. 28, 2011.) Instead, Hogan collected a sample from approximately 1500 feet downstream. (Appellants' Ex. G.) The hearing officer concluded that without an upstream sample, DEM's samples were "meaningless" because there is no turbidity measure before the discharge to serve as a reference and determine whether a water quality regulation has been violated. See NOV AAD Decision, at 33-34.

Although the hearing officer's determination that the water samples were insufficient is reasonable, that determination does not mandate a finding that DEM was not substantially justified in pursuing the alleged violation. As our Supreme Court has held, "[i]n meeting the substantial-justification test, the [agency] must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct." Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 675 (R.I. 1992) (quoting Taft, 536 A.2d at 893) (internal quotations omitted).

This Court finds that DEM's investigation was not rendered unreasonable by the lack of adequate background samples. The hearing officer heard testimony from the site inspector on his reasoning in collecting a downstream sample. (Tr. 64-66, Sept. 28, 2011.) DEM attempted to obtain background samples, and the hearing officer noted that DEM based its NOV partially on "water quality samples taken by trained OC&I staff and analyzed by a laboratory; all procedures that are regularly employed by the agency" in investigations. (2014 AAD Decision, at 10.) Additionally, the site inspectors utilized their judgment as professional environmental

engineers in selecting locations for sampling, including the background samples.[23] Hogan testified that he attempted to collect an upstream sample but "[t]here is no upstream." (Tr. 65, Sept. 28, 2011.) Although the hearing officer found that Hogan's failure to enter Appellants' Property to seek out an upstream source cannot justify upholding a turbidity violation charge, DEM's reliance on an alternative sample when it believed an upstream sample was unavailable constitutes competent evidence that the agency's proceeding against Appellants was "well founded in law and fact, solid though not necessarily correct." Krikorian, 606 A.2d at 675.

Courts generally should accord deference to an agency's "informed discretion . . . [particularly] where, as here, the agency's decision involves a high level of technical expertise." Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 798 (9th Cir. 2005); see also R.I. Higher Educ. Assistance Auth. v. Sec'y, U.S. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991) (holding that courts should defer to an agency decision "when that decision involves a technical question within the field of the agency's expertise"). The decision on where to collect water samples is such a technical matter within DEM's expertise. Therefore, this Court finds that DEM's decision to proceed when it held only a downstream sample for use as background was reasonable, given that its site inspector made the judgment call to collect the downstream sample when he could not locate an upstream source.

[23] The Court recognizes that a field agent unable to collect an upstream sample could view a downstream sample as a logical alternative. The background sample serves the purpose of a reference point, and a violation exists if the discharge sample is at least 10 NTUs above that background reference. DEM, Water Quality Regulations, Table 1.8.D.(2). If Appellants were discharging sediment-laden water, the turbidity downstream would have been higher than the turbidity upstream. Therefore, the difference in turbidity levels should be greater when compared to an upstream rather than a downstream sample. By this logic, a site inspector could reasonably conclude that if a downstream sample indicated a water quality violation, an upstream background sample would as well.

4

Appellants' Awareness of and Response to Oil Violations

The Appellants' final contention that DEM's position was not substantially justified relates to the alleged violations of the Oil Pollution Control Act. DEM cited Appellants for (1) discharge of oil without a permit, (2) failure to immediately report the discharge of oil, and (3) failure to immediately remedy the discharge of oil. The hearing officer concluded that DEM did meet its burden in relation to the discharge of oil, but the hearing officer concluded that DEM did not meet its burden in proving that Appellants failed to report or remedy said discharge immediately. (NOV AAD Decision, at 44 ¶¶ 4-7.)

The Appellants allege that DEM knew throughout the entire course of the investigation and proceedings that Appellants were not aware of the oil discharge until the February 9, 2005 DEM site inspection. Additionally, Appellants point out that upon learning of the discharge, Appellants immediately contacted an environmental clean-up company to begin remediation of the oil discharge, and DEM was aware of this response, given that it was reported by DEM's own site inspector.

While it seems clear from the record that Appellants did respond to DEM's notice of the oil spill in a proper and timely manner, that response does not preclude a DEM investigation as to whether Appellants were aware of the spill prior to the arrival of the DEM site inspector. Although Chopy admitted in his testimony that there was no evidence that Appellants were already aware of the oil discharge, he expressed an opinion that Appellants should have been able to recognize the appearance of oil in light of the fact that Smithfield Peat is a registered small quantity generator of oil with the U.S. Environmental Protection Agency. (NOV AAD

Decision, at 13, 15.) DEM suggests that further investigation was required before it could determine whether Appellants had prior knowledge of the presence of oil on their Property.

Given the importance of preventing oil discharge into the waters of the State, DEM employees must utilize their discretion and special knowledge in carefully investigating any potential violations. See Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Mgmt., 273 F.3d 1229, 1236 (9th Cir. 2001) (holding that courts should defer to agency expertise, including investigations to determine issues of fact); see also R.I. Higher Educ. Assistance Auth., 929 F.2d at 857. Therefore, this Court again concludes that the hearing officer's finding of substantial justification is supported by legally competent evidence because DEM had a valid reason to believe that Appellants may have been aware of the oil release before DEM alerted them to the problem.

5

Conclusion on Substantial Justification

Under the EAJA, an agency's position in an adjudicative proceeding is substantially justified if it "has a reasonable basis in law and fact." Sec. 42-92-2(7). The agency position must be "not merely . . . marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct." Taft, 536 A.2d at 889, 893 (holding that the government's reason for denying petitioner a hearing prior to license suspension was not substantially justified because it had "no reasonable basis in law" given that a hearing was legally required). On the federal level, the Courts of Appeals are divided on whether substantial justification requires merely a reasonable basis in law and fact or something more. Taylor v. Heckler, 835 F.2d 1037, 1040 (3d Cir. 1987). The First Circuit has adopted a "test of reasonableness" and has cautioned that courts "must carefully refrain from treating every

reversal of agency action as the functional equivalent of an 'unreasonable' [agency] position . . . ." Sierra Club, 820 F.2d at 517.

Unlike the petitioner in Taft, who was denied a legally required hearing prior to a deprivation, Appellants were afforded a full opportunity to be heard on their case. See Taft, 536 A.2d at 889. In fact, the hearing officer found in Appellants' favor on the majority of DEM's allegations. However, as the hearing officer himself observed, "even though [he] disagreed with the case presented by OC&I, that disagreement does not rise to the level of 'arbitrary and capricious' as the Taft Court described." (2014 AAD Decision, at 10-11.) Based on the record before this Court, as discussed above, DEM acted reasonably in proceeding with its duty to investigate and enforce environmental violations. See Sierra Club, 820 F.2d at 519-20 (finding that the agency lacked substantial justification because the agency ignored factors required to be considered by law in holding that an environmental impact statement was not necessary).

DEM initiated the investigation in response to a complaint by another state agency. That initial investigation resulted in a finding of potential water quality violations in the discharge of turbid water. DEM then notified the suspected violator—Rollingwood Acres—of the alleged violation via a NOIE and ordered remediation of the problem. DEM followed up on the violation. The follow-up resulted in a finding of a continuing violation via discharge of turbid water and a new violation of discharge of oil. DEM again pressed these environmental violations, eventually issuing a NOV and defending its actions in an appeal. As the hearing officer observed, DEM utilized "all procedures that are regularly employed by the agency to carry out RIDEM's obligations under state law." (NOV AAD Decision, at 10.) As detailed above, this Court finds legally competent evidence in the record to support the hearing officer's conclusions that DEM was substantially justified in its investigation and proceeding against

Appellants. See Taft, 536 A.2d at 893. Therefore, this Court affirms the hearing officer's decision to deny Appellants' recovery of reasonable litigation expenses.

IV

Conclusion

This Court finds that DEM's position in investigating and proceeding against Appellants was reasonably well founded in law and fact and was therefore substantially justified. For the reasons set forth above, this Court affirms the AAD hearing officer's denial of Appellants' request for litigation expenses. Counsel for DEM shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Rollingwood Acres, Inc., et al. v. Rhode Island Department of Environmental Management, et al.
CASE NO:	PC 2014-1339
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 15, 2014
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
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