

STATE OF NEW HAMPSHIRE
SUPREME COURT

2006-0703

APPEAL UNDER RSA 541:6 AND RSA 21-O:14, III
FROM THE ORDER OF THE WASTE MANAGEMENT COUNCIL
OF THE DEPARTMENT OF ENVIRONMENTAL SERVICES

BRIEF OF REACH

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Mr. Lajoie will argue.

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QUESTIONS PRESENTED

1. Did the Waste Management Council err in adopting the Hearing Officer's decision that states that Regensis did not lack integrity and reliability when numerous specific findings of fact indicated Regensis' lack of integrity and reliability?
2. Did the Waste Management Council err in determining that the certification requirements of RSA 149-M:9 did not require disclosure of a felony conviction for an officer who left the corporation less than 100 days prior to the certification?

STATEMENT OF THE CASE AND FACTS

This case pertains to the Bio Energy facility which previously generated electricity by burning wood in West Hopkinton, New Hampshire. (Order at 22, BRC 49).¹ From 1985 until 2002, the facility was owned and operated by the Bio Energy Corporation ("BEC"). BEC's sole shareholders were William Dell'Orfano and Anthony DiNapoli, each owning 50% of the corporation. (Order at 23, BRC 50). While an officer and 50% owner of BEC, Mr. DiNapoli was convicted of the felony of witness tampering on March 25, 2002. (Order at 63, BRC 90). His conviction was affirmed by this Court on May 16, 2003. See 149 N.H. 514 (2003). For tax reasons unrelated to Mr. DiNapoli's conviction or the action underlying this present case, BEC had intended to dissolve and have all assets passed on to a successor corporation, Bio Energy LLC, which would also be owned by Mr. Dell'Orfano and Mr. DiNapoli. (Order at 47, BRC 74). Due to Mr. DiNapoli's felony conviction and the requirement to disclose such a conviction when

¹ The complete Decision by Hearing Officer Walls has been attached to the Brief of Regensis Corporation. Rather than file a copy of the same Decision with this Court, REACH will throughout its Brief refer to documents in the Brief of Regensis Corporation as (BRC page #).

transferring a solid waste permit, Bio Energy decided to transfer the solid waste permit to Regenesi Corporation which was only controlled by Mr. Dell'Orfano. Mr. DiNapoli resigned from his position in BEC and BEC was dissolved in late August 2002. (Order at 55, BRC 82). Three months later, in December 2002, Mr. Dell'Orfano signed the certifications for both BEC and Regenesi that no officer or director of BEC or Regenesi had been convicted of a felony during the prior five years. (Order at 56, BRC 83).

After it was later determined that Mr. Dell'Orfano failed to disclose Mr. DiNapoli's felony conviction, the Department of Environmental Services initiated the present administrative action through a Notice of Proposed Licensed Action ("NPLA"). On June 23, 2005, Hearing Officer Michael Walls revoked the solid waste permit in a 92-page long Decision. (Order at 1, BRC 28). Hearing Officer Walls found that Dell'Orfano's certification was false and misleading, both because of the failure to disclose the conviction, as well as failure to disclose the BEC dissolution. (Order at 70, BRC 97). Hearing Officer Walls also found that the certification requirements set forth in RSA 149-M:9, IX, required disclosure on the part of both the present and former officers for the prior five years. (Order at 69, BRC 96). On February 23, 2006, the Waste Management Council upheld the revocation. (BRC 124). The Waste Management Council upheld all of the Hearing Officer's related conclusions, except it rejected the requirement that a corporation disclose whether any present or former officers have been convicted of a felony in the previous five years. (BRC 124). After filing unsuccessful motions for rehearing, Regenesi Corporation filed an Appeal with this Court on September 18, 2006 and the Attorney General's Office, REACH, and Citizens for a Future New Hampshire, all filed Cross-Appeals on September 25, 2006.

SUMMARY OF ARGUMENT

In his decision, Hearing Officer Walls makes extensive finding of fact that Regensis certified the status of Mr. DiNapoli and the dissolution of BEC falsely, deceptively and misleadingly, thereafter contradicting himself by stating that Regensis does not lack reliability and integrity. Given the extensive findings of fact regarding the false, deceptive and misleading statements, Hearing Officer Walls could not have reasonably concluded that Regensis did not lack reliability and integrity, and the Waste Management Council erred in adopting the Hearing Officer's Decision without specifically finding Regensis lacks reliability and integrity.

RSA 149-M:9, IX allows revocation of a permit if any of a corporation's officers, directors, partners, etc. have been convicted of a felony in the prior five years. Contrary to the position adopted by the Waste Management Council, this statute applies to both current and former (within the prior five years) officers, directors, partners, etc. Requiring a corporation to only disclose whether there are any convicted felons at the exact moment of certification is an invitation to evasive corporate shell games which is exactly what occurred in the present case.

ARGUMENT

I. **THE WASTE MANAGEMENT COUNCIL, IN AFFIRMING THE DECISION OF THE HEARING OFFICER, FOUND NUMEROUS SPECIFIC FINDINGS OF FACT THAT THE SUBJECT CERTIFICATION WAS FALSE AND MISLEADING AND SUCH SPECIFIC FINDINGS OF FACT WERE DIRECTLY CONTRARY, TO THE ISOLATED FINDING THAT REGENESIS OFFICIALS DID NOT LACK RELIABILITY AND INTEGRITY.**

The revocation of the solid waste permit at issue in this Appeal was originally decided by Hearing Officer Michael Walls on June 23, 2005. In his 92-page Decision, Hearing Officer Walls made numerous detailed findings of fact. For example, Hearing Officer Walls finds that “During the Transfer Application process, Regenesis corporate officials led the DES solid waste program to believe that Mr. DiNapoli was in the process of divesting himself from involvement with the Bio Energy facility. They did not inform the program when Mr. DiNapoli later became a managing member of Bio Energy, LLC.” (Decision at 6, BRC 33). In addition, the Administrative Decision specifically finds the certification “false or misleading” over fifteen times.

“Because Mr. DiNapoli was an officer or director of Bio Energy when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell’Orfano made a **false or misleading statement** when he certified on December 2, 2002 that none of Bio Energy’s officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.” (Decision at 6, BRC 33).

“In an effort to avoid disclosure of Mr. DiNapoli’s felony conviction, Bio Energy/Regenesis officials applied to transfer the Permit to an entity with which Mr. DiNapoli was not involved, did not inform the agency that Mr. DiNapoli had resigned or that they had concerns about his fitness to participate in management of the company, and misled DES staff about Mr. DiNapoli’s ongoing involvement with the facility. These representations and omissions **were false or misleading.**” (Decision at 6, BRC 33).

“Even if Regenesis can show that Mr. DiNapoli resigned from Bio Energy Corporation prior to Mr. Dell’Orfano’s certification, it was **misleading** for the company not to disclose the conviction in connection with the Transfer Application. Mr. DiNapoli

continued to be involved with the facility through Bio Energy, LLC, to a degree that would have necessitated disclosure had the Permit been transferred to that entity. As a practical matter, a person could not be involved in the “facility” for purposes of the air permit without also being involved in the “facility” for purposes of the solid waste permit.” (Decision at 6, BRC 33).

“Further, it was **misleading** for Regenesis not to inform DES that the company holding the Permit had been dissolved three months prior to the application, that the Permit had purportedly been conveyed without DES approval to Bio Energy LLC in June of 2002, and that other environmental permits for operation of the same facility as the solid waste Permit were held by a different entity.” (Decision at 6, BRC 33).

“In making its decision to transfer the Permit, the DES solid waste program reasonably **relied upon the false or misleading** information supplied by Regenesis officials. Because of this reliance, the DES solid waste program did not ask the AGO to investigate Mr. DiNapoli’s background again in conjunction with the Transfer Application. As a result, the agency continued to be unaware of Mr. DiNapoli’s felony conviction, and had no reason to believe there was any significance to the fact that he was involved with Bio Energy LLC but not with Regenesis.” (Decision at 7, BRC 34).

“Mr. Smith failed to disclose Mr. DiNapoli’s conviction even when he was asked a direct question by the staff person reviewing the transfer application about why Mr. DiNapoli was not involved with the new company. (Decision at 21, BRC 48).

“In light of the fact that the whole purpose of the transfer to Regenesis was to remove Mr. DiNapoli from facility operations, Mr. Smith’s answer to Mr. Dykstra’s question was **evasive, incomplete and misleading.**” (Decision at 21, BRC 48).

“Regenesis officials’ failure to note in response to Mr. Dykstra’s inquiry that the other facility permits were held by a different company, in which Mr. DiNapoli was still involved, **was misleading.**” (Decision at 21, BRC 48).

“Mr. Smith’s submission of a carefully worded letter to the EPB which gave the impression that the officers and key employees for Regenesis were the same as for Bio Energy **was misleading.**” (Decision at 21, BRC 48).

“Mr. Dell’Orfano’s certification of compliance on behalf of Bio Energy Corporation, which he knew was prevented from being an abject falsehood only by the technical fact of Mr. DiNapoli’s resignation, **was highly misleading.**” (Decision at 21, BRC 48).

“The certification was not complete, it was less than candid, and it was **literally false.** Because it was **false, it was also misleading.**” (Decision at 70, BRC 97).

“DES proved by a preponderance of the evidence that the Bio Energy Corporation solid waste permit was transferred to Regenesis based, in part, on the **false and misleading** certification by Mr. Dell’Orfano that no corporate principals had been convicted of a felony within the relevant five year period. The **false** certification by Mr. Dell’Orfano in his role as agent for both Bio Energy Corporation and Regenesis, **misled** DES with respect to whether the existing permittee met an important statutory and regulatory criterion for holding a solid waste permit. Mr. Dell’Orfano’s provision of the **false and misleading** certification that no corporate principal has been convicted of a felony within five years of the transfer application is good cause to revoke the permit.” (Decision at 70, BRC 97).

“Furthermore, the failure to notify NHDES of the dissolution of Bio Energy Corporation, and subsequent representations that Bio Energy Corporation continued to hold and was transferring the solid waste permit for the Bio Energy Facility, despite a prior transfer of said permit, violated RSA 149-M and **was deceptive and misleading.**” (Decision at 81, BRC 108).

“This willful course of action violated RSA 149-M and **was deceptive and misleading.**” (Decision at 82, BRC 109).

“In this case, in light of the record and the foregoing, the nature of Respondent’s multiple violations of RSA 149-M entail and implicate, *inter alia*, **fundamental misrepresentations and misleading acts**, upon which Respondent’s permit and ongoing licensure were premised, and relating to the past and ongoing control, ownership and operation of the subject Facility by those same entities and principals responsible for said **misrepresentations and misleading acts.**” (Decision at 85, BRC 112).

“Issuance of the 2002 Permit and subsequent Type IV and Type IA Modifications was based on **false, misleading** and otherwise incomplete information, including but not limited to **false compliance certifications and other material false or misleading statements and omissions;**” (Decision at 90, BRC 117).

In addition to all of these express findings of false and misleading certification by the principal of Regenesis Corporation, there are numerous implications in the factual findings that conclusively indicate Regenesis lacks reliability and integrity:

“While Regenesis officials testified that their goal was to completely remove Mr. DiNapoli from involvement with the Bio Energy facility, they have not yet been successful in doing so.... Mr. DiNapoli’s level of control over the facility has increased, not decreased, since execution of the lease. In addition to being a 50% owner of Bio Energy, LLC, he is now a managing member when previously he was only a member.”

(Decision at 17, BRC 44).

“The failure of Regenesis officials to disclose Mr. DiNapoli’s conviction directly to the agency **eroded the trust** that had been established between the company and DES.”
(Decision at 20, BRC 47).

“Regenesis concocted an elaborate scheme which was purportedly aimed at removing Mr. DiNapoli from involvement in the operation of the Bio Energy facility.” ” (Decision at 20, BRC 47).

“During the Transfer Application process, Regenesis corporate officials led the DES solid waste program to believe that Mr. DiNapoli was in the process of divesting himself from involvement with the Bio Energy facility. They did not inform the program when Mr. DiNapoli later became a managing member of Bio Energy, LLC. (Decision at 58, BRC 85).

“Regenesis deliberately omitted relevant facts from its permit transfer application.”
(Decision at 75, BRC 102).

- “a. The entire complex corporate and contractual artifice undertaken willfully by Respondent, between June, 2002 and December 2002, and ongoing thereafter, was expressly designed and intended to avoid any disclosure of Anthony Dinapoli’s involvement with multiple entities involved with the Bio Energy Facility and multiple aspects of said Facility.
- b. This willful course of action was also expressly designed and intended to avoid filing a compliance statement with NHDES in conjunction with Env-Wm 303.15.”

(Decision at 82, BRC 109).

Regenesis, in its brief to this Court, cites the isolated sentence where the Hearing Officer states “I do not believe, however, that the evidence relating to these failures supports a finding that the current permit holder, Regenesis, lacks the reliability and integrity to operate a solid waste facility.” (BRC 15). Given the numerous factual findings of the Hearing Officer that Regenesis acted in a false and misleading fashion, that Regenesis was “evasive, incomplete and misleading,” that Regenesis was “deceptive and misleading,” and that Regenesis “deliberately omitted relevant facts,” it is unreasonable for the Hearing Officer and the Council to have held

that Regenesis did not lack reliability and integrity. Hearing Officer Walls' numerous findings of deceit cannot be reconciled with his isolated statement that Regenesis does not lack reliability and integrity. This Court must find that the holding that Regenesis does not lack reliability and integrity is not supported by the facts as found by Hearing Officer Walls. Quite the contrary, the numerous findings of false, misleading and deceitful statements and actions clearly compels the conclusion that Regenesis lacks reliability and integrity under RSA 149-M:9, IX (a).

Regenesis, in its brief, has requested that all factual findings that are "unnecessary" be vacated. Regenesis argues that the factual findings quoted above are not necessary because the Hearing Officer did not find that Regenesis lacks reliability and integrity. Nevertheless, the multitude of findings that Regenesis acted in a false, misleading and deceptive manner are necessary to the ultimate conclusion that Regenesis lacks reliability and integrity under RSA 149-M:9, IX. Therefore, to the extent that statements from the Hearing Officer's Decision should be vacated, it should be the single solitary sentence that is in direct contradiction to the overwhelming, voluminous and compelling factual findings regarding Regenesis' false, misleading and deceptive behavior.

II. RSA 149-M:9 REQUIRES DISCLOSURE OF FELONIES COMMITTED BY PRESENT OR FORMER OFFICERS OF THE CORPORATION.

RSA 149-M:9, IX provides that the department may deny a permit if "any of its officers, directors, partners, key employees or persons or business entities holding ten percent or more of its equity or debt liability has been convicted of, or pled guilty or no contest to, a felony in any state or federal court during the five years before the date of the permit application." The

Hearing Officer determined that this “necessarily includes present or former holders of those positions.” (BRC 96). The Waste Management Council apparently overturned or modified this ruling of the Hearing Officer, finding that “RSA 149-M:9 is limited to existing officers, directors or partners not past officers, directors or partners.” (BRC 124). The court is not required to give any deference to the Waste Management Council’s interpretation of a statute. The court reviews an agency’s interpretation of a statute *de novo*. Appeal of Franklin Lodge of Elks, 151 N.H. 565, 567 (2004).

The statute only requires a corporation to look at its officers’, directors’ or partners’ convictions for the previous five years. The authors of the statute likely understood that requiring a corporation to investigate all of its officers for an unlimited period of time would be unduly time consuming. Likewise, requiring disclosure of felonies committed several decades earlier might not be relevant to the ability of the current officers to act in a trustworthy manner. Therefore, the statute prescribes five years as the period during which a corporation must certify that none of its officers, directors or partners have been convicted of a felony. In the present case, Mr. DiNapoli was convicted of a felony while a fifty percent partner, a director **and** an officer of Bio Energy Corporation. Furthermore, Mr. DiNapoli’s conviction was only six months prior to Mr. Dell’Orfano’s certification that Bio Energy Corporation did not have any convicted felons as officers, directors or partners. Mr. Dell’Orfano shrewdly convinced Mr DiNapoli to resign his position less than one hundred days prior to the certification. If this Court upholds the Waste Management Council’s Decision, RSA 149-M:9, IX will have no force and will be rendered not only entirely ineffectual for purposes of promoting the statute’s policy, but also an effective nullity. Any corporation that includes a convicted felon as an officer, director or partner

need only create a dummy corporation such as Regensis in order to hold a permit while the real control remains with that of the convicted felon.² As the State states in its Notice of Appeal, “The Council’s decision encourages evasive answers to the questions of regulatory officials and, if allowed to stand, would make it more difficult for DES to administer the solid waste program as the legislature intended.” Interpreting the certification requirements of RSA 149-M:9, IX so as to permit such deliberate obfuscation is entirely contrary to the detailed and highly-regulated solid waste regulatory framework applicable to such facilities and permittees. Therefore, this Court should find that the certification requirement in RSA 149-M:9, IX requires the disclosure of former officers, directors or partners who have been convicted of a felony, particularly when that felony conviction is known by the corporation and occurred during that officer’s time as officer of the corporation.

CONCLUSION

REACH respectfully requests that: (1) the revocation of Regensis’s solid waste permit be affirmed; (2) based on the facts as found by Hearing Officer Walls, that Regensis lacks integrity and reliability; and (3) under RSA 149-M:9, IX, a corporation must disclose whether any present or former officer, director or partner has been convicted of felony during the prior five years.

² It is uncontroverted that Mr. DiNapoli has, in fact, remained a director, officer and member (indeed subsequently a managing member) of Bio Energy, LLC as of December 2, 2002 up to, apparently, the present day. (Order at 37, BRC 64)

REQUEST FOR ORAL ARGUMENT

REACH respectfully requests oral argument, to be made by Mr. Lajoie, not to exceed five minutes.

Respectfully submitted

RESIDENT'S ENVIRONMENTAL
ACTION COMMITTEE FOR HEALTH, (REACH)

By its Attorneys,

WADLEIGH, STARR & PETERS, PLLC

Dated: March 5, 2007

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were mailed this date to the attached Service List.

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