THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WASTE MANAGEMENT COUNCIL

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| REGENESIS CORPORATION<br><br>1994 Maple Street<br>West Hopkinton, NH 03229<br><br>Re: Solid Waste Permit No. DES-SW-SP-002<br>Regenesis Corporation<br>West Hopkinton | WMC NO.: 05-09-WMC<br>consolidated with<br>05-10-WMC<br>05-11-WMC<br><br>APPEAL OF LICENSE REVOCATION<br><br>DES DOCKET NO. 04-010 |

# MOTION FOR REHEARING OF CITIZENS FOR A FUTURE NEW HAMPSHIRE

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Respectfully submitted,

Citizens for a Future New Hampshire,
By its attorneys

COPY

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Pursuant to RSA § 541:3-4 and Env-WMC 205.16(e), Intervenor Citizens for a Future New Hampshire ("CFNH"), by and through its attorneys, Anderson & Kreiger, LLP, submits this Motion for Rehearing of the Waste Management Council's ("Council") decision dated May 30, 2006 (the "Decision").

## STATEMENT OF AGGRIEVEMENT

CFNH's rights are directly and adversely affected by the Council's Decision for, among other reasons, the following:

1. CFNH filed an appeal to the Waste Management Council that the Council denied through its Decision.
2. CFNH actively participated in the underlying hearing proceedings before Presiding Officer Walls and the appeal proceedings before the Council. See New Hampshire Practice, Vol. 4, pp. 132-133, § 6.23 (1997) ("Once a person has been allowed to intervene, as a party, he has all the rights of a party in the case as it then exists and thereafter develops." (Emphasis added)).
3. CFNH has approximately 25 members, including many Hopkinton residents living in close proximity to the Bio Energy/Regenesis solid waste facility at 1994 Maple Street, Hopkinton ("the Facility"). CFNH's members – and, in particular, those who live in close proximity to the Facility – will suffer direct and adverse effects as a result of the Council's decision to deny its appeal in a way that is more than any impact of the decision on the general public.[1]

1 CFNH did not obtain the order that it sought from Presiding Officer Walls. CFNH did not only seek revocation of Regenesis' solid waste permit on a basis that arguably may be cured; it sought a ruling that the Applicant lacked the reliability and integrity to operate a solid waste facility – a ruling that would have disqualified Regensis and its principals from future licensure, because the Applicant's reliability and integrity are prerequisites for issuance of any permit. See RSA 149-M:9, IX(a); 149-M:12, III; Env-Wm

4. CFNH is the plaintiff in Citizens for a Future New Hampshire v. Bio Energy, LLC, Merrimack County Superior Court No. 04-E-387. See Decision, p. 7, finding 50-51. After institution of the lawsuit, DES filed the Notice of Proposed License Action ("NPLA") that gave rise to this proceeding. DES and Regenesis then moved to stay the Court action while DES adjudicated the issues arising under the NPLA (as later amended). CFNH's rights to litigate in Court are therefore inextricably bound up in this administrative proceeding.

5. CFNH is further aggrieved and has standing to file this Motion for the reasons set forth in the Memorandum of Appellant/Intervenor CFNH In Support of Its Standing and In Support of the Council's Juridiction, filed with the Council on October 31, 2005 – which is incorporated herein by reference.

## SUMMARY OF ARGUMENT

The grounds for CFNH's Motion for Rehearing are as follows:

1. The Council overlooked the reliability and integrity issues raised by CFNH, including the Hearing Officer's speculative reliance upon advice of counsel when no such advice was in evidence before him;

2. The Council overlooked Regenesis' officials' larger pattern of misconduct and many other "false and misleading statements and omissions to DES in the course of the permit proceedings," as established by the evidence and found by Presiding Officer Walls, which demonstrate that Regenesis' officials lack the requisite reliability and integrity;

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306.04(a), 306.05(a). CFNH thus sought a decision that would revoke the license with prejudice to future applications by the parties involved in the Regenesis operation (and that of related corporations), not one that was essentially "without prejudice."

3. The Council overlooked Presiding Officer Walls' erroneous exclusion from discovery and presentation in the underlying proceedings facts that further demonstrate Regenesis' lack of reliability and integrity;

4. The Council erred in ruling that Env-Wm 303.05(d) allows a permittee to notify its own affiliates, in common ownership, rather than members of the public abutting the land owned by the commonly-owned corporations; and

5. The Council erred in ruling that there is no duty to disclose convictions of officers, directors and 10% owners who (1) were convicted while serving in office and (2) remain listed as such on current DES records (though having resigned as a matter of corporate law).

Because the Council did not address the first three of these issues in its decision and generally did not analyze them during deliberations, what follows is in large part a restatement of CFNH's previous arguments on these issues. It bears note that addressing these issues is all the more appropriate because the Council addressed Regenesis' issue (the so-called "former employee" issue) even though it made no difference to the end result.

## ARGUMENT

## I. THE COUNCIL ERRED BY DENYING, WITHOUT APPROPRIATE CONSIDERATION, CFNH'S REQUESTS RELATED TO THE RELIABILITY AND INTEGRITY ISSUE

In the Decision, the Council properly upheld Presiding Officer Walls' revocation of Solid Waste Permit No. DES-SW-SP-002 (the "Permit"). However, the Council failed to consider and rule upon the more serious ground – Bio Energy/Regenesis' lack of reliability and integrity. It should have found that Regenesis' officials lack sufficient reliability and integrity to operate a solid waste facility, pursuant to RSA 149-M:9, IX(a) – constituting an additional, independent ground for revocation of the Permit with preclusive effect on future applications.

Presiding Officer Walls erred in his conclusion and analysis regarding this reliability and integrity issue because:

1. He speculated that counsel had blessed the Regenesis' officials' conduct, although the record contains no evidence as to the substance of counsel's advice and Presiding Officer Walls had precluded discovery and cross-examination as to such matters;
2. He focused his reliability and integrity analysis too narrowly on two discrete acts of misconduct – ignoring the larger pattern of misconduct alleged in DES's Amended Notice of Proposed License Action ("ANPLA");2

2 Regenesis officials' false and misleading compliance certification, failure to disclose the dissolution of Bio Energy Corporation and other misleading statements and omissions to DES during the Permit application processes are sufficiently egregious acts of misconduct to demonstrate the permittee's lack of the requisite reliability and integrity to operate a solid waste facility, particularly if speculation regarding counsel's advice is disregarded.

3. If more was needed, he erroneously excluded from discovery and presentation in the underlying proceedings additional evidence demonstrating Regenesis' lack of reliability and integrity.

The Council, in turn, overlooked these three points – discussed in turn below.

## A. Presiding Officer Walls Erred By Speculating That Regenesis' Acts Were Consistent with Advice of Counsel

In his decision, Presiding Officer Walls speculated that the company's "strategy . . . was based, at least in part, on advice from competent and ethical legal counsel." Walls' Decision, p. 72.[3] At least one Council member also speculated that "I'm sure there was advice of counsel involved there." Transcript of February 23, 2006 deliberations, p.49. Yet the record contained no evidence of any advice that Regenesis' counsel may have provided.[4]

Quite properly, Regenesis never raised an advice of counsel defense, or advanced testimony that its counsel blessed the actions taken. Indeed, it makes no sense to assume that, *if* their clients made them aware of all the facts, counsel would have given wholly favorable advice, rather than a strong cautionary warning regarding Regenesis' scheme – a scheme that the Hearing Officer, as affirmed by the Council, found misleading and false. If speculation were justified, the more likely possibility is that counsel warned their clients correctly that the applicants' proposed actions were actually or potentially,

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3 These findings are directly contrary to the preponderance of evidence and the Presiding Officer's own findings establishing that the companies' actions were aimed at avoiding disclosure of DiNapoli's conviction and that Mr. DiNapoli's involvement in Bio Energy LLC and the Facility has continued and even intensified. For example, he found that the scheme "was expressly designed and intended to avoid any disclosure of Anthony DiNapoli's ... to avoid filing a compliance statement with NHDES ... [and] was deceptive and misleading." Walls' Decision, p. 82, ¶3(a)-(f).

4 Regenesis permitted testimony that its witnesses had consulted counsel, but they did not elicit or allow testimony regarding the substance of counsel's advice. See, Hearing Transcript, April 19-20, at pp. II-229 to II-230, III-13 to III-17. Cross-examination into the substance of the advice was blocked upon Regenesis' successful evidentiary objections. Hearing Transcript, April 20 at pp. III-70 to III-72.

questionable, or illegal. Because speculation is not allowed, neither the Presiding Officer nor the Council or Regenesis could rely upon the advice of counsel defense. Nadeau v. Stevens, 79 N.H. 502 (1920) (speculation, "surmises and conjectures" are not evidence).

If one removes the benefit of any unsubstantiated assumption that Regenesis' officials "strategy" was blessed by counsel, the only rational conclusion is that Regenesis' officials intentionally withheld material information, deliberately misled the Department and knowingly made false statements of material fact. They therefore lack sufficient reliability and integrity to operate a solid waste facility.

If the Waste Management Council believes that advice of counsel should be considered, then it should have allowed full discovery and questioning into the substance of any attorney-client advice regarding this matter. Aranson v. Schroeder, 140 N.H. 359, 370 (1995), quoting Remington Arms Co. v. Liberty Mutual Ins. Co., 142 F.R.D. 408, 415 (D.Del. 1992)("When the party asserting the privilege has injected privileged material into the case, such that the information is actually required for resolution of the issue, the privilege-holder 'must either waive the attorney-client privilege as to that information or . . . be prevented from using the privileged information to establish the elements of the case"). The Hearing Officer's reliance upon speculation about advice of counsel, and the Council's apparent reliance on such speculation, without evidence of any such advice and after sustaining objections into the nature of that advice, constituted an error of law and was arbitrary and capricious.

## B. Presiding Officer Walls Focused His Reliability and Integrity Analysis Too Narrowly on Two Discrete Acts of Misconduct – Ignoring the Larger Pattern of Misconduct Alleged in the ANPLA

Presiding Officer Walls focused his reliability and integrity analysis too narrowly on two discrete acts of misconduct by Regenesis' officials: (1) their failure to provide truthful and complete compliance certifications, and (2) their failure to disclose that Bio Energy Corporation had already been dissolved. He then concluded: "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," then going on to cite his advice of counsel assumption as discussed above. Walls' Decision, p. 72 (emphasis added). He made numerous other findings bearing more generally upon reliability and integrity, but appears not to have integrated those findings into his conclusions regarding reliability and integrity[5] under the ANPLA.

The ANPLA asserted a broad set of facts, bringing within its scope issues that were ruled beyond the scope of the original NPLA and specifically invoking a broader "reliability and integrity" test. For example, see the following ANPLA sections:

> III, ¶¶ 10-19: Discussing Respondent's conduct in applying for the Solid Waste Permit ultimately issued on May 28, 2002 – going beyond merely the Type IV modification requested in December, 2002 (¶ 29), which the Respondent claimed was the sole focus of the original notice.
>
> III, ¶¶ 11- 36, 41-47: Discussing pattern of misrepresentations, omissions and misleading statements in the course of applying for both the initial Solid Waste Permit and the subsequent Type IV Modification applied for in December, 2002.
>
> III, ¶ 39: "Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a)."

5 Obviously, he did incorporate these findings into his conclusion that there were false and misleading certifications and statements.

III, ¶ 47: "The fact that Regenesis officials supplied DES with false or misleading information, as alleged more specifically in paragraphs 1-46 above, calls into question whether the company has sufficient reliability and integrity to operate a solid waste facility."

IV, ¶ 2 (p. 7): "Regenesis officials' false or misleading statements to DES in the course of the permit proceedings call into question whether Regenesis has the reliability and integrity to operate a solid waste facility."[6]

The evidence presented in the underlying proceedings – particularly as related to the larger pattern of conduct described in the ANPLA – demonstrates that Regenesis' officials lack the requisite reliability and integrity statutorily to operate a solid waste facility. Presiding Officer Walls' own findings, confirmed that Regenesis' officials' specific intent was to circumvent or defeat the solid waste regulations:

- "Regenesis concocted an elaborate scheme which was purportedly aimed at removing Mr. DiNapoli from involvement in the operation of the Bio Energy facility." Walls Decision, p. 20, ¶ 136.

- "Rather than seeking DES' approval of the transfer from Bio Energy Corp. to Bio Energy LLC as required, or even discussing the situation with DES, Dell'Orfano and Smith instead devised a corporate shell game and otherwise elaborate scheme aimed at circumventing the disclosure requirements. Walls Decision, p. 52, ¶ 37.

- "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... (c) This willful course of action violated RSA 149-M and was deceptive and misleading." Walls Decision, p. 82, ¶ 3.

6 In the initial NPLA, this "Violations Alleged" paragraph read more narrowly: "William Dell'Orfano's false or misleading statement to DES in the course of the permit proceedings calls into question whether Regenesis has the reliability and integrity to operate a solid waste facility." (NPLA, Ex. G to CFNH Notice of Appeal, p. 4, ¶ IV.2).

These findings show that Regenesis' officials are unreliable; DES and the public cannot trust them to provide information or to comply with regulations.[7] They also prove Regenesis' officials' intentional evasion of known disclosure requirements – the antithesis of integrity.[8]

Presiding Officer Walls' conclusion that the evidence did not establish lack of reliability and integrity cannot be reconciled with these findings or the more detailed findings discussed in CFNH's appeal. Since the specifics of these findings have already been discussed, CFNH reproduces them in Exhibit B to this motion, rather than repeating them in detail here. The hearing officer's conclusion can be explained only by his erroneous assumption that their conduct was in conformance with advice from counsel and/or an erroneously narrow interpretation of the ANPLA and, therefore, should be reversed as an error of law and abuse of discretion.

Given the plain meaning of the terms "reliability" and "integrity," and the spirit of New Hampshire's solid waste laws, the only rational conclusion that can be drawn from this pattern of conduct (including the details set forth on Exhibit B hereto, incorporated herein), the many false and misleading statements and material omissions, and the numerous violations of the solid waste laws, is that Regenesis' officials lack the reliability and integrity required of them to operate a solid waste facility. The Permit

7 Reliable is defined as "a person or thing with such trustworthy qualities" (THE NEW OXFORD AMERICAN DICTIONARY, (Jewell, E.J. Abate, F. eds., Oxford University Press) (2001)) or "Dependable. To be trusted to do what is expected or has been promised" (ENCARTA WORLD ENGLISH DICTIONARY, (St. Martin's Press, New York) (1999)).

8 Integrity is defined as "the quality of being honest and having strong moral principles; moral uprightness" (THE NEW OXFORD AMERICAN DICTIONARY, (Jewell, E.J. Abate, F. eds., Oxford University Press) (2001) or "steadfast adherence to a strict ethical code" (The American Heritage College Dictionary (3d Ed. 1997)).

should be revoked upon this additional ground, with preclusive effect on future applications.

### C. Additional Evidence Improperly Precluded in the Underlying Proceedings Also Establishes That Regenesis' Officials Lack Sufficient Reliability and Integrity to Operate a Solid Waste Facility

Presiding Officer Walls' decision on the reliability and integrity issue also failed to consider additional relevant facts that he excluded during discovery and presentation of evidence during the hearing. These evidentiary rulings also stemmed from his overly narrow interpretation of the ANPLA and related administrative proceedings – as discussed above.

As discussed in greater detail in CFNH's Notice of Appeal (at pp. 21-25), documents produced in the underlying proceedings show that the misrepresentations alleged in the ANPLA are part of a larger context in which Bio Energy and its principals (also principals in Regenesis) misrepresented or omitted material information in requesting the initial Solid Waste Permit and the Type IV Modification. For convenience, specific facts supporting this contention are set forth in Exhibit C hereto and incorporated by reference.

This evidence demonstrates that Bio Energy's pattern of providing DES and the public with false and misleading information goes back to its initial 2001 Permit Application, and earlier. Yet, despite the highly relevant nature of these materials to the reliability and integrity of the company's officials and their continued pattern of conduct as alleged in the ANPLA, Presiding Officer Walls prevented the parties from conducting meaningful discovery of such information and also precluded the historical documents

from being admitted into the record as evidence. See Hearing Transcript, April 19, at pp. II-17 to II-20.

The Waste Management Council should reopen discovery in this matter and allow evidentiary presentation of this additional, highly relevant information to Presiding Officer Walls, or other person designated by the Council.

## II. THE COUNCIL ERRED IN ITS INTERPRETATION OF PUBLIC NOTICE PURSUANT TO ENV-WM 303.05(D)

The Solid Waste Rules require that notice of filing of a solid waste permit or modification application be provided to owners of property abutting the facility site. Decision, p. 72, ¶ G; pp. 89-90, ¶ 17. DES's regulations at Env-Wm 303.05(d) provide:

> If the applicant or owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner.

Regenesis claims that it satisfied the notification requirements by notifying PetroFiber and Bedford Corporation, which are subsidiaries and/or close affiliates of Bio Energy LLC, Bio Energy Corp., and Regenesis – controlled by the same owners and management as the applicant and site owner. The applicant effectively notified itself of the applications to modify the permit.

Neither the statute nor regulation define "owns".[9] "Ownership" is a flexible term that addresses substantive realities rather than fine legal distinctions based upon who holds technical title; it easily encompasses situations involving common control of property through common corporate ownership of adjoining parcels. See generally Hope

9 The regulations define "owner" as "a person who owns a facility or part of a facility" (Env-Wm 102-116), but that somewhat circular definition does not further define the word "owns" and cannot sensibly apply to the question of whether that entity owns abutting parcels.

v. Cavallo, 316 A.2d 407, 409-410, 163 Conn. 576, 581-2 (1972); Animal Rescue League of Boston v. Assessors of Bourne, 310 Mass. 330, 332-3, 37 N.E.2d 1019, 1021 (1941).

> The term "owner" is one of general application and includes one having an interest other than the full legal and beneficial title [citation omitted]. The word owner is one of flexible meaning, and it varies from an absolute proprietary interest to a mere possessory right. [citation omitted]. It is not a technical term and, thus, is not confined to a person who has the absolute right in a chattel, but also applies to a person who has possession and control thereof.

Hope, 163 Conn. at 580-581, 316 A.2d at 409.

Applying Env-Wm 303.05(d) correctly, to require notice to the next parcel not "owned" by the applicant or facility site owner, the applicants were required to notify all abutters to the parcels listed as owned by Bedford or PetroFiber. There is no purpose to the notice provisions if a company can satisfy the notice requirements by sending notice to its corporate affiliates and not to the members of the public who abut those affiliated properties.

Presiding Officer Walls erred in ruling that Bio Energy/Regenesis provided proper notice pursuant to Env-Wm 303.05(d), and the Council erred in affirming that ruling.

## III. THE COUNCIL ERRED IN FINDING THAT THE CERTIFICATION REQUIREMENT OF RSA 149-M:9 APPLIES ONLY TO "EXISTING" OFFICERS AND DIRECTORS – AND SHOULD REVOKE OR CLARIFY THAT FINDING

Regenesis urged a per se rule that the certification requirement never applies to "former" officers or directors (Regenesis Brief, p. 14). The Council has found (at p. 5 of its Decision) (emphasis added) "that the certification language for 'existing' permittee per RSA 149-M:9 is limited to existing officers, directors or partners not past officers, directors or partners." The Council's interpretation – which inserts the word "existing"

into the statute before "officer..."[10] – is erroneous and should be revoked. If not revoked, the Council should at least clarify that an applicant cannot claim the benefit of a former officer's resignation under the solid waste rules without filing the mandatory modification applications for resignation.

Neither Regenesis nor the Council addresses how or when an officer becomes a "former" officer – or, in other words, is no longer an "existing" officer. Regenesis assumes that this is decided exclusively under corporate law, without regard to the context of the DES regulations and the solid waste law that require disclosure before resignation. This is unsupported and would do great harm to the solid waste regulatory scheme.

The statutory phrase "any of its officers, directors ..." should be construed in light of the context and policy of the solid waste rules and program:

> When regulatory language contains a word that is susceptible to multiple constructions, we adopt the meaning which best harmonizes with the context and with the apparent policy of the agency.

In re St. Joseph Hosp., 152 N.H. 741; 886 A.2d 1005, 1010 (2005), citing Appeal of Hoyt Rental & Leasing Co., 130 N.H. 130, 132-33, 536 A.2d 172 (1987).[11] Presiding Officer Walls did this. He held that his construction of the disclosure requirement is

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10 RSA 149-M:9(IX) provides for permit denial (or revocation) "In the case of a corporation or business entity, if any of its officers, directors ... has been convicted of ... a felony ... during the 5 years before the date of the permit application." (Emphasis added).

11 As stated in State v. Boulais, 150 N.H. 216, 218; 834 A.2d 380, 381 (2003), the construction of a statute requires the following analysis:

> When construing a statute, we first examine its language, ascribing the plain and ordinary meaning to the words used by the legislature. Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 585, 825 A.2d 480 (2003). We do not consider words and phrases in isolation, however, but within the context of the statute as a whole. Id. This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. Id. Indeed, it is especially appropriate to consider the evil or mischief the statute was designed to remedy. Id.

"consistent with fulfilling the legislative intent underlying the statutory and regulatory schemes for issuing solid waste permits, which, like all governmental processes, are dependent upon the provision of accurate and complete information by the applicants." Walls Decision, p. 69. He also correctly relied upon the facts of this particular case in holding that Regenesis must disclose the felony conviction imposed upon DiNapoli while serving as a corporate director, officer, and owner. Walls Decision, p. 69. As he noted, the certification applies broadly to "all" of the permittee's officers, directors and partners – refusing to insert the word "existing" as pressed by Regenesis and done by the Council. This necessarily requires disclosure of felony convictions of present and former office holders that occur during their tenure in office, during the pendency of a license application, and in the absence of any prior disclosure despite an obligation to make such disclosure (as argued below).

The Council's statement threatens to create a huge loophole in the solid waste rules' comprehensive set of disclosure requirements, designed to reveal felony convictions by officers, directors, 10% owners and other listed persons/entities. Env-Wm 316.01, et seq. These disclosure requirements operate whenever an approval (or even a permit-by-notification) is required – either an initial permit or any of four categories of permit modifications. Env-Wm 303.13(c); Env-Wm 303.14; Env-Wm 311.03(h)(4); Env-Wm 315.03(a). To trigger the disclosures, the regulations require approvals at various key stages, including certain modifications of operations (Env-Wm 315.02(e) and Env-Wm 315.04(c)(1)(c)), changes in directorship or management including resignation of an officer or director (Env-Wm 315.02(c), 315.02(e)(6) and 315.07(f)), corporate dissolution (see id. and 315.02(c)), and transfers of the permit or ownership or

operational control of the solid waste facility. Env-Wm 315.02(f). DES relies upon permittees to keep their records current and in compliance with filing obligations. Walls Decision, p. 20, ¶¶ 134-135. DES was entitled to rely upon compliance with mandatory disclosure obligations and therefore was misled to believe that DiNapoli was not a felon. See Walls Decision, p. 19, ¶ 119; p. 22, ¶ 149.

As long as necessary approvals are sought, the required disclosures occur. Yet, the Council's statement threatens to create an avenue for companies to evade their disclosure obligations by doing what BioEnergy did: fail to apply for the required DES approvals associated with DiNapoli's resignation, for dissolution of the licensee (Bio Energy Corp.), and for the sale of the facility (to Bio Energy LLC) – and, of course, fail to make the associated mandatory disclosures of DiNapoli's felony conviction – and then argue that it was entitled to treat DiNapoli as no longer being a director, officer or >10% owner of any entity involved in the permit. This would reward licensees for violation of the mandatory approval requirements for corporate dissolution and changes in ownership and control of permittees and permitted facilities.

The Council should reverse its statement and uphold the Presiding Officer's ruling (Walls Decision, p. 70), that the broad language "all officers and directors" encompasses DiNapoli on the facts of this case and required disclosure of his felony conviction, notwithstanding Regenesis' "elaborate scheme."[12]

If the Council does not revoke its finding altogether, it should at least clarify that an applicant cannot claim the benefit of a former officer's resignation under the solid waste rules without filing the mandatory modification applications for resignation. Env-

12 Env-Wm 315.03(a) provides that "Before making a modification to the design, construction, operation or closure of a facility as permitted by the department, the permittee shall obtain written approval for such modification in accordance with this subpart." (Emphasis added).

Wm 315.02(c), 315.02(e)(6) and 315.07(f) (all relating to changes in directorship or management including resignation of an officer or director). Those applications require disclosure of felony convictions. Env-Wm 303.13(c), 303.14, 315.01(c), 315.02(e), 315.04(c)(1)(c) and 316.01, et seq. See Env-Wm 303.13(c) (providing that applicants for a Type I permit modification must submit either a compliance certification or a compliance report as specified in Env-Wm 303.14). At least until the required modification application is filed – with required disclosures – the officer qualifies under the regulatory language, which refers to "all" of the applicant's officers, directors and partners. See Env-Wm 303.14(a)(4) and (5) and Env-Wm 303.14(b)(1).

## CONCLUSION

For the foregoing reasons, CFNH respectfully requests a rehearing and, upon rehearing, that the Waste Management Council issue an Order:

1. Declaring that Regenesis' officials lack sufficient reliability and integrity to operate a solid waste facility, pursuant to RSA 149-M:9, IX(a) – constituting an additional, independent ground for revocation of the Permit pursuant to Env-Wm 306.05(c) with preclusive effect upon future applications, based on the evidence presented in the underlying proceedings or, if more is needed, on additional relevant evidence (after any necessary discovery) that Presiding Officer Walls erroneously precluded CFNH from discovering and presenting in the underlying proceedings;
2. Declaring that Bio Energy and/or Regenesis did not provide proper public notice pursuant to Env-Wm 303.05(d) in connection with their solid waste

permit applications when they sent notices to close corporate affiliates and not to abutters to such corporate affiliates;

3. Amending the Decision in accordance with the above-referenced declarations and revoking the Permit upon the additional ground that Regenesis' officials lacks sufficient reliability and integrity to operate a solid waste facility; and

4. Amending the Decision to clarify or rescind its finding that the certification requirement under RSA 149-M:9 only applies to "existing" officers, at least on the facts of this case.

Respectfully submitted,

Citizens for a Better New Hampshire,
By its attorneys

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Date: June 19, 2006

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion (with Exhibits A-C) has on this 19th day of June, 2006 been forwarded, via first class mail, postage prepaid, to:

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# A

# EXHIBIT A

## OVERVIEW OF APPLICABLE REVOCATION CRITERIA

Env-Wm 306.04(a) provides as follows (emphasis added):

> A permit shall be revoked if the department determines ... that: (1) Good cause as provided in Env-Wm 306.05 exists; and (2) There are no circumstances by which the permittee can correct or eliminate the underlying problem.

Env-Wm 306.05 defines "good cause" to include one or more of the following: (a) any criteria identified in RSA 149-M:12, which in turn provides for revocation in the event "the permit holder has committed a violation of this chapter, or any rule, plan, order, or permit conditions in force under it," (b) "issuance of the permit was based on false or misleading information," and/or (c) "The permittee or the facility meets any other criteria for permit denial as specified in Env-Wm 305.

With respect to the third "good cause" criterion, Env-Wm 305.03 provides that a permit "shall be denied if one or more of certain conditions apply," including, among others, that the applicant meets the criteria for denial pursuant to RSA 149-M:9, IX. RSA 149-M:9, IX in turn provides for permit denial if any of certain conditions apply, including, among others, the following:

> (a) The person fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility.
>
> * * *
>
> (c) In the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of ... a felony in any state

or federal court during the 5 years before the date of the permit application."

Although meeting any one of the three "good cause" criteria would require revocation, here, all of these criteria have been met and there are no circumstances by which the underlying problem can be corrected.

# B

# EXHIBIT B

## SPECIFIC FINDINGS AND EVIDENCE ON RELIABILITY AND INTEGRITY WITHIN THE SCOPE OF THE ANPLA

The evidence demonstrated, and Presiding Officer Walls found, that after learning of DiNapoli's conviction in June, 2002 and realizing that the Permit transfer application would require disclosure of DiNapoli's conviction (a fact they wanted to keep from DES **and the public**), Regenesis' officials devised a corporate shell game and circumvention scheme that included (1) not filing the Type IV Permit Modification application required in connection with the sale of the Facility to Bio Energy LLC, (2) removing DiNapoli from Bio Energy Corp. (which had already sold all of its assets to Bio Energy LLC and was being dissolved) – without filing a Type IB Permit Modification application required for such changes in a permittee's organizational structure, (3) executing a lease between Bio Energy LLC and yet another company owned by Dell'Orfano, Regenesis Corporation, which purported to provide Regenesis with some limited, future operational control over the Facility, and (4) by then submitting a Type IV Permit Modification application seeking to transfer the Permit from the defunct Bio Energy Corp. to Regenesis and, in that application, mischaracterizing the roles of the various affiliated entities and individuals and otherwise misrepresenting and/or omitting material information to avoid disclosure or scrutiny of DiNapoli's conviction. Walls Decision, pp. 52-53, ¶ 37.

The evidence demonstrated, and Presiding Officer Walls found, that in carrying out this scheme, Regenesis' officials provided materially false, misleading and

incomplete information to the DES, the Attorney General's ("AG") office and the public in and in connection with the Transfer Application. For example, in the 2002 Transfer Application, Regenesis' officials

- Falsely certified that none of the applicants' officers, directors or 10% owners had been convicted of a felony. Walls Decision, pp. 68-70.

- Falsely or misleadingly identified "Bio Energy Corporation" as the "Facility name" and "existing permittee," although the Facility had been transferred to Bio Energy LLC and Bio Energy Corporation had already been dissolved. Walls Decision, p. 30 ¶¶ 6-8; pp. 46-47, ¶¶ 22-24; pp. 52-54, ¶ 37, pp. 70-71, ¶¶ C-D; p. 81 ¶ 1(e).

- Falsely or misleadingly identified Regenesis Corporation as the "proposed new permittee" and "facility operator following transfer of the permit" – although in fact Bio Energy LLC was and continued to be the owner and operator of the Facility for many months after the requested permit transfer modification was issued. Walls Decision, p. 16, ¶ 93; pp. 37-38, ¶ 39; pp. 52-54, ¶ 37; pp. 62-63, ¶¶ 57-58.

- Misleadingly failed to note in Section IV(1) of the Application that Bio Energy LLC already owned the property, instead identifying it as the post-transfer property owner. Walls Decision, pp. 52-54, ¶ 37.

- Created the false impression that Bio Energy Corporation owned and operated the Facility at the time the application was filed, that Regenesis would be the sole operator of the Facility after issuance of the requested Permit Modification, and that Bio Energy LLC was nothing more than the future owner of the underlying property with no current or future role in Facility operations or responsibility for compliance with the Solid Waste Permit (despite the fact that by December, 2002, the Facility had been transferred to Bio Energy LLC, Bio Energy Corp. had dissolved, all other environmental permits had been transferred to Bio Energy LLC, and Bio Energy LLC had represented to numerous governmental officials in different contexts that Bio Energy LLC was the current owner and operator of the Facility).[13] Walls Decision, p. 30, ¶¶ 6-8; p. 33, ¶¶ 19 & 21; p. 51, ¶ 35; pp. 52-54, ¶ 37; p. 81, ¶ 1(e).

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13 Similarly, the Notice of Filing that was sent to various members of the public in December, 2002 also falsely identified "Bio Energy Corporation" as the "Existing Facility Identification," as the "Existing Name and Mailing Address of the Applicant, Facility Owner and Facility Operator," and as the "Existing Name and Mailing Address of Property Owner." Intervenors' Ex. 69, at INT0750-753; State Ex. 14. It also falsely stated that "Bio Energy Corporation owns and operates [the Facility]," and omitted any reference at all to Bio Energy LLC. Similarly, the letter utilized to send that Notice to various members of the public was on Bio Energy Corporation letterhead and falsely stated that the Application related to "Bio Energy Corporation's power generation facility." Intervenors' Ex. 68, at INT0716-722.

The evidence demonstrated, and Presiding Officer Walls found, that Regenesis' officials also concealed and/or omitted material information in connection with the Permit and related application proceedings. For example, nowhere on the Transfer Application and at no point during that application process, did Bio Energy or Regenesis inform the DES solid waste program that

- the ownership and operational control of the Facility had already been transferred to Bio Energy LLC – unlawfully, because it was done without having obtained a Type IV Permit Modification as required by Env-Wm 315.02(f) and 315.03 prior to any "change in the: (1) Operational control of a facility; or (2) Ownership of the facility....". Walls Decision, p. 51, ¶ 35; pp. 52-54, ¶ 37; p. 57, ¶ 45, p. 71.

- The Permit had already purportedly been transferred to the LLC – unlawfully, for the same reasons. Walls Decision, p. 51, ¶ 35; p. 57, ¶ 47.

- Mr. DiNapoli had resigned from Bio Energy Corp. and Bio Energy Corp. had dissolved in August, 2002 – unlawfully to the extent Bio Energy Corp. still held the Solid Waste Permit (as alleged by Regenesis), because it was done without having obtained a Type IB Permit Modification as required by Env-Wm 315.02(e)(6), 315.02(c) and 315.03. Walls Decision, p. 57, ¶ 46; p. 89, ¶ 14.

- All other environmental permits associated with the Facility were held by or in the process of being transferred to or obtained in the name of the LLC. Walls Decision, p. 57, ¶ 48.

- Regenesis was not licensed to conduct business in New Hampshire until January 21, 2003. Walls Decision, p. 60, ¶ 54.

- The LLC had operational control over the Facility at the time the Transfer Application was filed and for at least many months beyond that time. Walls Decision, pp. 60-62, ¶ 55.

- Mr. DiNapoli was a member of the LLC, had been convicted of a felony, remained involved in Facility operations (at least through financing), and, under the lease agreement between the LLC and Regenesis and due to his being a 50% member of the LLC, retained significant authority over the operations, including matters of environmental compliance. Walls Decision, p. 58, ¶ 49; pp. 59-62, ¶¶ 53 & 55-56.

- Mr. DiNapoli and Bio Energy LLC stood to reap most of the net profits generated from the Facility operations pursuant to the Lease with Regenesis. Walls Decision, pp. 59-60, ¶¶ 52-53.

Similarly, in correspondence to the AG's office dated December 11, 2002, Mr. Smith made several misleading statements, including but not limited to those in the second to last paragraph stating, in effect, that the only individuals required to submit Personal History Disclosure Forms were Messrs. Dell'Orfano, Smith, O'Neil and Ms. Sheehy because they were the officers and key employees of Regenesis. Intervenors' Ex. 69; State Ex. 14.

On March 3, 2003, Ms. Nickerson of the AG's office wrote a letter to Mr. Dell'Orfano seeking clarification of, among other things, the relationship between Xgenesys, Regenesis **and Bio Energy LLC** (the confusion stemming from inconsistent information provided in the disclosure forms). Intervenors' Ex. 87. In his response to that request, Mr. Dell'Orfano acknowledged the significant officer/employee overlap between Xgenesys and Regenesis, reiterated falsely or misleadingly that the "key employees that will be involved in the project" would be himself, Smith, Sheehy and O'Neil, and, significantly, did not mention Bio Energy LLC at all – ignoring entirely Ms. Nickerson's request for clarification as to its involvement with the Facility and other Bio Energy entities. Intervenors' Ex. 88.

When DES employee Mr. Dykstra asked Mr. Smith directly about Mr. DiNapoli's involvement with the Facility in connection with the December, 2002 Transfer Application, Mr. Smith stated falsely that Mr. DiNapoli was in the process of divesting himself from the Facility and mentioned nothing about the company's concerns with respect to Mr. DiNapoli. Transcript II, at 207-208. In fact, Mr. DiNapoli was not divesting himself from the Facility. Indeed, he was made a Managing Member of Bio

Energy LLC in July, 2003 (retroactively effective to January, 2003) and under the Lease with Regenesis stood to reap profits generated from the Facility operations.

The evidence demonstrated, and Presiding Officer Walls found, that in addition to violating the Solid Waste Rules by providing false, misleading and materially incomplete information,[14] Regenesis' officials also violated RSA 149-M and the Solid Waste Rules during the course of their corporate shell game by, among other things,

- Failing to apply for Permit modifications required by Env-Wm 315.02(f) and Env-Wm 315.03(b)(4) before the Bio Energy Corporation transferred ownership and operational control of the Facility to Bio Energy LLC.[15]

- Failing to apply for Permit modifications required by Env-Wm 315.02(e)(6) and 315.02(c) prior to the "change in organizational structure, officers, directors ... or entities holding 10% or more if the permittee's equity or debt" that occurred in August, 2002 when DiNapoli resigned from Bio Energy Corp. and when Bio Energy Corp. dissolved. Walls Decision, p. 57, ¶ 46; p. 89, ¶ 14.[16]

- Designing a "complex corporate and contractual artifice undertaken willfully by Respondent .. expressly designed and intended to avoid any disclosure of Anthony DiNapoli's involvement with multiple entities involved with the Bio Energy Facility and multiple aspect of said Facility," which "willful course of conduct violated RSA 149-M and was deceptive and misleading." Walls Decision, p. 81-82, ¶ 3.

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14 As noted by Presiding Officer Walls, on the Transfer Application (Walls Decision, p. 71):

> Mr. Dell'Orfano signed a statement representing on behalf of Bio Energy Corporation and Regenesis that "the information and material submitted herewith is correct and complete." This statement is not accurate. The unapproved transfer of Bio Energy Corporation's assets and its subsequent dissolution were not disclosed in the application. The transfer application was incomplete and misleading with respect to important and material information – the current corporate existence of the permittee, Bio Energy Corporation and an explanation how its responsibilities under the permit had been extinguished without approval by DES.

15 Decision, p. 71 ("It was a violation of the Solid Waste Rules for Bio Energy Corporation to delay seeking DES approval for the dissolution of the corporation and the transfer of the operational control of the facility while it attempted to address the permitting difficulty presented by Mr. DiNapoli's conviction.").

16 Env-Wm 315.03(a) provides that "Before making a modification to the design, construction, operation or closure of a facility as permitted by the department, the permittee shall obtain written approval for such modification in accordance with this subpart." (Emphasis added).

- Purporting to assign operational control of the Facility from Bio Energy LLC to Regenesis pursuant to a lease without prior approval from the DES. Walls Decision, p. 83, ¶ 5.

- Actively proceeding with Bio Energy LLC's past and ongoing construction and operation of the Facility without the required solid waste permit, particularly with Mr. DiNapoli's substantial involvement with Bio Energy LLC as an owner and manager." Walls Decision, pp. 83-84, ¶ 6.

C

# EXHIBIT C

## EVIDENCE ON RELIABILITY AND INTEGRITY EXCLUDED FROM DISCOVERY AND THE HEARING

Bio Energy's permit prior to May, 2002 specifically did not allow it to burn construction and demolition debris. See Ex. E to Intervenor Ex. 132, INT1503 ("prior to May 28, 2002, BioEnergy was operating as a biomass facility" and had only permission to store and burn "clean untreated wood"). Yet, Bio Energy's practices led, in at least a period in 1995, to "high total lead concentrations in ash due to burning fuel containing painted demolition debris." See Intervenor Ex. 154 - Summary of meeting between DES and Bio Energy's agent. Bio Energy has also represented in Court that, since the 1980s "Bio Energy was burning woodchips derived from a range of fuel sources, including woodchips derived from C & D wood." See Intervenor Ex. 132 at INT1485, ¶ 28-29 -Verified Petition, Bio Energy LLC v. Selectmen of the Town of Hopkinton, Merrimack Superior Court No. 03-E-0446. The same document reports that Bio Energy's ash contained lead from "demolition woodwaste" as of October, 1989. Id., ¶ 29.

Despite the evidence of burning demolition wood without a solid waste permit, and of being party to contracts for delivery of construction and demolition wood from Massachusetts and elsewhere, Bio Energy's representations in the recent Permit proceedings indicated that it had done nothing wrong. The Notice of Filing circulated by Harry Smith on Bio Energy Corporation stationery, dated September 28, 2001, disclosed no prior violations of the limitations upon its operations as a biomass facility. Intervenor Ex. 7. The Notice specifically stated that "Bio Energy is requesting NHDES approval to expand its wood fuel mixture to include waste wood material from construction

demolition sites that has been separated from other demolition debris." Intervenor Ex.7 at INT0064.