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RECEIVED
JUL 25 2005

July 25, 2005

BY HAND DELIVERY
Waste Management Council
Attn: Appeals Clerk
c/o DES Legal Unit
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

05-10 WMC

RE: Notice of Appeal by Resident's Environmental Action Committee for Health In re: Decision on Proposed Revocation of Solid Waste Permit of Regenesis Corp.
Solid Waste Permit No. DES-SW-SP-002

Dear Appeals Clerk:

Enclosed for filing with the Waste Management Council please find an original and twenty (20) copies of a *Notice of Appeal by Resident's Environmental Action Committee for Health In re: Decision on Proposed Revocation of Solid Waste Permit of Regenesis Corp.*

Thank you for your assistance with this matter.

Very truly yours,

COPY

John E. Friberg, Jr.

JEF:ipk
Enclosures
cc: Edward A. Haffer, Esq. (counsel to permittee) (w/ encl)
Office of the Commissioner of DES (w/ encl)
Office of the Director of the Waste Management Division of DES (w/ encl)
Jennifer J. Patterson, Esq. (counsel to DES) (w/ encl)
Barry Needleman, Esq. (counsel to the Town of Hopkinton) (w/ encl)
Jeffrey L. Roelofs, Esq. (counsel to CFNH) (w/ encl)
Ronald J. Lajoie, Esq. (co-counsel to REACH) (w/ encl)

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State of New Hampshire
Department of Environmental Services
Waste Management Council

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Notice of Appeal
by Resident's Environmental Action Committee for Health
In re: Decision on Proposed Revocation of Solid Waste Permit of Regenesis Corp.

Waste Management Council Docket No. _____
DES Office of the Commissioner Docket No. 04-010
Solid Waste Permit No. DES-SW-SP-002

05- 10 WMC

REACH'S NOTICE OF APPEAL

NOW COMES Resident's Environmental Action Committee for Health ("REACH"), through its undersigned counsel, and hereby submits the following Notice of Appeal on the issue of whether the record below regarding Respondent's multiple unlawful acts deemed false, misleading and/or violative of various requirements of RSA 149-M *et seq.* by the Presiding Officer, requires a finding that Respondent (and those agents of Respondent involved in the acts and omissions at issue in the proceedings below), lack the requisite reliability and integrity to operate a solid waste facility, as a matter of law, statute and/or rules.

Appellant

1. Appellant is Residents Environmental Action Committee for Health, Inc. (REACH), c/o Ronald J. Lajoie, Esq., Wadleigh, Starr & Peters, PLLC, 95 Market Street, Manchester, NH 03101. Telephone number: (603) 669-4140. Facsimile number: (603) 669-6018. Email: ronlajoie@comcast.net. Appellant may also be contacted through undersigned counsel, as set forth in Paragraph 2.

Appellant's Counsel

2. Appellant's legal representatives for purposes of this appeal are Attorneys Ronald J. Lajoie, Esq. and John E. Friberg Jr., Esq. Attorney Lajoie's contact information is set forth in Paragraph 1. Attorney Friberg's contact information is as follows: John. E. Friberg, Jr., Esq., Nixon Peabody LLP, 889 Elm Street, Manchester, NH 03101. Telephone number: (603) 628-4085. Facsimile number: (866) 947-0921. Email: jfriberg@nixonpeabody.com.

Statement of Relief Sought and Statutory Provision(s) Supporting Same

3. Appellant seeks an order from the Waste Management Council declaring that, in light of the record below regarding Respondent's multiple unlawful acts deemed false, misleading and/or violative of various requirements of RSA 149-M *et seq.* by the Presiding Officer, the relevant law, statute and rules require a finding that Respondent (and those agents of Respondent involved in the acts and omissions at issue in the proceedings below), lack the requisite reliability and integrity to operate a solid waste facility.

4. The relief sought is premised on, *inter alia*, RSA 149-M:9, RSA 149-M:12, Env-Wm 305.03, Env-Wm 305.06, Env-Wm 306.04, Env-Wm 306.05, Env-Wm 316.01. These statutory and regulatory provisions collectively set forth the various requirements to which solid waste permittees must adhere, as well as the mechanism and standards for revoking a solid waste permit where a permittee has provided DES with false or misleading information, violated any rule, plan, order or permit conditions, and/or has not demonstrated sufficient reliability, expertise, integrity or competence to operate a solid waste facility.

5. Also relevant to the determination of this appeal are the common law standards for intentional and negligent misrepresentation (see, e.g., Basbanes' Case, 141 N.H. 1, 6 (1996); Snierson v. Scruton, 145 N.H. 73, 78 (2000)), and the statutory prohibitions on and penalties for sworn and unsworn false statements to government officials (see, e.g., RSA 641:2; RSA 641:3).

Statement of Facts Upon Which Appeal is Based

6. Attached to this Notice of Appeal, as Exhibit A and in accordance with Env-WMC 204.02(b)(6), is the Decision on Proposed Revocation of Solid Waste Permit of Regenesis Corp. In this Decision, the Presiding Officer ruled, *inter alia*, that Respondent and certain of its agents:

   a. Did not comply with disclosure requirements for permittees disclosing prior felony convictions, despite the importance that the Legislature has ascribed to this issue, the express level of candor and honesty expected of permittees, and the inherent and vital need for permittees to voluntarily provide accurate and complete information in order to maintain the integrity of the permit system (Order at 68-69);

   b. Said certification to the State, made under oath by William Dell'Orfano on behalf of Respondent, was not complete, less than candid, literally false, and misleading (Order at 70);

   c. Said false and misleading sworn certification to the State, by William Dell'Orfano, provides good cause to revoke Respondent's solid waste permit (Order at 70);

d. No circumstances exist by which Respondent can correct or eliminate this violation (Order at 70);

e. Respondent, also through a certification by William Dell'Orfano, provided additional incomplete and misleading information to the State, by means of representations regarding the corporate status and existence of then permittee, Bio Energy Corporation (Order at 71);

f. Respondent and its affiliated entities and predecessor (Bio Energy Corporation, Bio Energy LLC and Regenesis Corporation) failed to obtain timely approval for modifications to the solid waste permit, thereby violating the Solid Waste Rules and providing further good cause to revoke the permit (without any action being taken on this finding, given that it was not allegedly directly set forth in the Amended Notice of Proposed License Action below) (Order at 71);

g. A solid waste permit applicant or holder must expect to, and be expected to, make an honest and complete disclosure of all relevant information, including prior criminal convictions, for the permitting process to protect the public interest (Order at 72).

7. In light of the foregoing findings in the action below, regarding Respondent's multiple unlawful acts deemed false, misleading and/or violative of various requirements of RSA 149-M *et seq.* by the Presiding Officer, the relevant law, statute and rules require a finding that Respondent (and those agents of Respondent involved in the acts and omissions at issue in the proceedings below), lack the requisite reliability and integrity to operate a solid waste facility.

8. This is particularly the case in light of the Presiding Officer's own findings, not only regarding Respondent's unlawful acts and omissions, but also regarding the level of candor and honesty required of solid waste permittees, the Legislature's intent regarding same, and the importance of open and honest disclosures by solid waste permittees in order for the solid waste permit and regulatory system to protect the public.

9. The decision below regarding these multiple unlawful violations and false and misleading acts by Respondent and its agents, on its face, requires a ruling that said entity and individuals lack the requisite reliability and integrity to operate a solid waste facility. Such actions violate various statutory and common law standards of honesty and candor, and are particularly egregious in the context of the heightened disclosure, honesty and candor requirements for solid waste permittees under RSA 149-M *et seq.* It is not relevant to such an analysis under the operative and mandatory law, statute and rules, that these multiple unlawful acts were allegedly part of a larger plan to one day eliminate a felon from the Respondent's business, that the permittee consulted counsel in the course of formulating and executing its multiple unlawful acts, or that it is not logical to assume that Respondent believed that it would necessarily get away with its unlawful deception (Order at 72).

10. The multiple unlawful acts and omissions by Respondent, directed at State regulators and relating to a matter of both Legislatively-mandated importance and fundamental issues of public trust, health, safety and welfare, are precisely the brand of deception and inappropriate conduct which RSA 149-M *et seq.* mandates

must *never* be part of any solid waste facility or the solid waste facility permitting system. The wrongs that Respondent has been found to have committed are *precisely* the brand of bad acts which the Legislature has deemed utterly unacceptable for any solid waste permittee, and squarely relate to and betray its lack of reliability and integrity within the plain meaning of the statute.

11. The law, statute and rules controlling permittees and the permit system under RSA 149-M *et seq.* require a holding that Respondent (and those agents of Respondent involved in the acts and omissions at issue in the proceedings below), lack the requisite reliability and integrity to operate a solid waste facility, in light of Respondent's various acts deemed false, misleading and/or violative of various requirements of RSA 149-M *et seq.* by the Presiding Officer.

12. The Decision on Proposed Revocation of Solid Waste Permit of Regenesis Corp., attached hereto as Exhibit A and incorporated by reference herein, contains a wide variety of bases mandating a declaration that Respondent (and those agents of Respondent involved in the acts and omissions at issue in the proceedings below), lack the requisite reliability and integrity to operate a solid waste facility, in light of Respondent's various unlawful acts deemed false, misleading and/or violative of various requirements of RSA 149-M *et seq.* by the Presiding Officer.

13. The findings of the Presiding Officer in the Analysis section of the Decision, as excerpted in relevant part in Paragraph 4, clearly confirm Respondent's multiple unlawful, deceptive and unlawful acts directed at State regulators, even involving false and misleading sworn certifications under oath.

14. Furthermore, the Presiding Officer's almost unqualified acceptance of the intervenors' Proposed Findings of Fact and Rulings of Law (submitted by REACH and CFNH), as also incorporated in the Decision, confirms that these deceptive and unlawful acts were part of a long-term and elaborate pattern of deception, designed to obfuscate various important facts from State regulators, further highlighting the fact that Respondent and its relevant agents lack the reliability and integrity to operate a solid waste permit under RSA 149-M *et seq.*

Appellant's Standing

15. REACH participated as a full party to the underlying action now being appealed to the Council, having been granted formal intervenor status by the Presiding Officer pursuant to RSA 541-A:32. REACH played a central role in the underlying action, and satisfied the requirements of RSA 541-A:32 for purposes of said action. As such, REACH is and should be a party to any appeal of the Decision below.

16. Acute public concern regarding the current proposal for the Bio Energy facility resulted in the initial formation of REACH, a community organization duly organized, incorporated and existing under the laws of New Hampshire, with over 2,000 members at present.

17. The majority of REACH's members are residents of the communities immediately surrounding the Bio Energy facility, whose health, safety and welfare will be most directly impacted by the facility's emissions and discharges, and who are most concerned regarding whether the facility's owners, operators and related agents possess sufficient reliability, expertise, integrity and

competence to operate a solid waste facility. This facility, as well as its owners and operators, will be entrusted with the transportation, processing, storage and emission/discharge of tons of waste material, containing numerous toxins, within and into said communities.

18. Members of REACH have also developed specialized knowledge and information relating to the Bio Energy facility, with direct relevance to the issues to be adjudicated in this appeal. This knowledge and information has been developed since the formation of REACH, as well as during the pendency of the action below, making REACH an indispensable party to any appeal.

19. The action below, and any appeal of same, directly and significantly affect the "rights, duties, privileges, immunities or other substantial interests" of the residents of the surrounding communities, acting through REACH. RSA 541-A:32, I (b).

Copy of Decision/Order Being Appealed

20. Attached to this Notice of Appeal, as Exhibit A and in accordance with Env-WMC 204.02(b)(6), is the Decision on Proposed Revocation of Solid Waste Permit of Regenesis Corp., which is the subject of this Notice of Appeal, solely to the extent described herein.

WHEREFORE, REACH respectfully requests that the Waste Management Council:

A. Issue a ruling that the record below regarding Respondent's various acts deemed false, misleading and/or violative of various requirements of RSA 149-M *et seq.* by the Presiding Officer, requires a finding that Respondent (and those agents of

Respondent involved in the acts and omissions at issue in the proceedings below), lack the requisite reliability and integrity to operate a solid waste facility, as a matter of law, statute and/or rules;

B. Affirm the remainder of the underlying Decision to the degree it is consistent herewith; and

C. Grant such other and further relief as justice requires.

Respectfully submitted,

RESIDENT'S ENVIRONMENTAL ACTION COMMITTEE FOR HEALTH,

Through its counsel,

COPY

John E. Friberg, Jr., Esq.
NIXON PEABODY LLP
889 Elm Street
Manchester, NH 03101
(603) 628-4000

and

Ronald J. Lajoie, Esq.
WADLEIGH STARR
& PETERS PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Notice of Appeal has been filed with the Appeals Clerk of the Waste Management Council (original and 20 copies) by hand, and delivered by U.S. Mail to the Office of the Commissioner of DES and Office of the Director of the Waste Management Division of DES (pursuant to Env-WMC 204.02(d)), Edward A. Haffer, Esq. (counsel to Respondent permittee, pursuant to Env-WMC 204.02(e)), Jennifer J. Patterson. Esq. (Senior Assistant Attorney General, Attorney General's Office, Environmental Protection Bureau, counsel to DES, a party below), Barry Needleman, Esq. (counsel to the Town of Hopkinton, a party below), and Jeffrey L. Roelofs, Esq. (counsel to Citizens for a Future New Hampshire, a party below).

COPY

John E. Friberg, Jr., Esq.

A

Regenesis Corporation
1994 Maple Street
West Hopkinton, NH 03229

RE: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED LICENSE ACTION
NO. 04-010

JUNE 23, 2005

DECISION ON PROPOSED REVOCATION OF SOLID WASTE PERMIT

I. Introduction

On or about November 22, 2004, the Department of Environmental Services ("DES") Waste Management Division issued a Notice of Proposed License Action ("NPLA") announcing its intent to revoke Solid Waste Permit No. DES-SW-SP-002 (the "Permit"). An Amended Notice of Proposed License Action ("ANPLA") was filed on March 4, 2005. The Permit is currently held by Regenesis Corporation, ("Regenesis"), a successor-in-interest to the original permittee, Bio Energy Corporation. The permit was issued under the provisions of RSA ch. 149-M and NH CODE ADMIN. RULES Env-Wm100-300 and 2100 (the "Solid Waste Rules). It authorizes the storage and use of wood fuel derived from construction and demolition debris (a solid waste) at an electric generating facility (the Facility) in Hopkinton, New Hampshire.

State solid waste laws and rules restrict the granting of a permit to a business entity if any of its officers, directors, partners, key employees or principal equity holders have been convicted of a felony within 5 years of the application date. DES is also authorized to deny or revoke a permit if an applicant or permittee fails to demonstrate sufficient "reliability, expertise, integrity, and competence to operate a solid waste facility."

The ANPLA alleged that William Dell'Orfano, a principal of both Bio Energy Corporation and Regenesis, made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy Corporation's officers or directors had been convicted of a felony in the 5 years prior to the application to transfer the Permit to Regenesis. Another corporate owner of Bio Energy Corporation, Anthony DiNapoli, had been convicted of a felony on March 25, 2002. The ANPLA asserted that Mr. Dell'Orfano's allegedly false or misleading certification, and other false or misleading statements and omissions made to DES during the course of the permit proceedings, demonstrated that Regenesis does not have sufficient reliability and integrity to operate a solid waste facility. The ANPLA contended that these deficiencies could not be corrected and proposed that the Permit be revoked. If the permit was not revoked, the ANPLA alternatively sought that Regenesis show cause why the 2003 permit modification proceeding should not be re-opened to address alleged inadequacies in the notices provided to abutting property owners.

Regenesis objected to the proposed permit revocation and denied that it had wrongfully withheld information about the conviction or that it had in any way violated or failed to comply with the solid waste statutes and rules. In particular, Regenesis asserted that Mr. Dell'Orfano's certification that no corporate principals had been convicted of a felony was true because Mr. DiNapoli sold his interest in Bio Energy Corporation before the December 2002 transfer application that contained the certification.

In addition to DES and Regenesis, the Town of Hopkinton and two citizens' groups, Residents Environmental Action Committee for Health ("REACH") and Citizens for a Future New Hampshire ("CFNH"), participated as intervenors in this matter. The intervenors sought a broad inquiry into the conduct of Bio Energy Corporation, Bio Energy LLC and Regenesis with respect to the Facility. In a Decision on Pending Motions dated February 17, 2005, the scope of this proceeding was limited to matters "relevant and material to the facts summarized in Section III of the NPLA [later to become the ANPLA], and to the violations and proposed actions described in Sections IV and V." The issues to be addressed in this decision were described as follows:

1. Whether William Dell'Orfano made a false or misleading statement when he certified in December of 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 a permit transfer.

2. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the failure to disclose a felony conviction of a corporate principal.

3. Whether Mr. Dell'Orfano provided misleading or incomplete information to DES by failing to disclose that Bio Energy Corporation had been dissolved in the 2002 transfer application.

4. Whether good cause exists as provided in Env-Wm 306.05, to revoke the permit based on the failure to disclose the dissolution of Bio Energy Corporation.

5. Whether the alleged failures to disclose the felony conviction or the dissolution of Regenesis (a mistake-actually, Bio Energy) Corporation demonstrate that Regenesis Corporation lacks the reliability and integrity to operate a solid waste facility.

6. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the permittee's lack of reliability and integrity.

7. Whether the required notices to abutters in the 2002 transfer proceeding and the 2003 permit modification proceeding complied with Env-Wm 303.05 (d), and, if not, whether either of these prior proceedings should be reopened.

An adjudicative hearing was conducted on April 18-20, 2005. The parties and intervenors submitted post-hearing memoranda, and proposed findings of fact and conclusions of law.

Based upon the following findings of fact, analysis, and conclusions of law, there is good cause to revoke the permit.

II. Findings of Fact

The witness testimony and documentary exhibits received at the hearing support affirmative findings of the following facts (those not found to be true or accurate are marked "DENIED"):

A. DES REQUESTS (Numbered as in requesting document)

Amended Notice of Proposed License Action-March 4, 2005

10. On October 9, 2001, Bio Energy Corporation ("Bio Energy") submitted an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. ("Bio Energy Facility").

11. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation's application.

12. Mr. DiNapoli's responses on the form included a sworn statement that he had no criminal convictions (motor vehicle offenses excepted).

13. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony.

14. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The search revealed nothing inconsistent with Mr. DiNapoli's response on the form. There was no indication of the recently filed charges.

15. On January 28, 2002, while the solid waste facility application was pending, the Directors of Bio Energy unanimously approved a plan of liquidation for the company, which stated an effective dissolution date of August 31, 2002.

16. In response to an inquiry from the AGO in early March of 2002, prompted by a March 7, 2002 newspaper article indicating that the Bio Energy facility was closing, Bio Energy confirmed that the article was accurate but stated that the company wished to go forward with the solid waste permit application process and intended eventually to transfer the solid waste permit to another company.

17. On March 20, 2002, the AGO conveyed the results of its Bio Energy background investigation to DES.

18. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in State v. DiNapoli 149 N.H. 514 (2003).

19. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction.

20. On June 12, 2002, Bio Energy executed a Purchase and Sale Agreement conveying the Bio Energy Facility, including the buildings, the underlying property, most of the facility's equipment and machinery, and "to the extent transferable, all permits, licenses, authorizations and approvals issued or granted to Seller by any governmental agency. . ." to a new entity, Bio Energy, LLC. The Permit was specifically listed as one of the transferred assets. The agreement was executed on behalf of both buyer and seller by William Dell'Orfano. Mr. Dell'Orfano was listed as President of Bio Energy Corporation, and Manager of Bio Energy, LLC.

21. In mid-June of 2002 both Mr. Dell'Orfano and Bio Energy/Regenesis official Harry Smith urged Mr. DiNapoli to resign from Bio Energy Corporation due to concerns about how the felony conviction might impact the company's solid waste facility Permit.

22. Mr. DiNapoli did not resign from Bio Energy, LLC. From at least August 30, 2002 to the present, Mr. DiNapoli has been a member and a creditor of Bio Energy, LLC. From July 29, 2003 to the present, Mr. DiNapoli has also been a managing member of Bio Energy, LLC.

23. On or about July 1, 2002, Bio Energy submitted a request to the Air Resources Division ("ARD") of DES to transfer the Title V air permit from Bio Energy Corporation to Bio Energy, LLC. Under the applicable administrative rules, a change in ownership for purposes of a Title V permit is considered an Administrative Permit Amendment, and does not require a background investigation.

24. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State.

25. During the fall of 2002, Bio Energy asked DES to transfer its Hazardous Waste Identification Number, its registration for four aboveground storage tanks, and its certification of waste-derived product from Bio Energy Corporation to Bio Energy, LLC. None of the programs notified of the change required a background investigation in conjunction with a change of ownership. In correspondence associated with the name change, Bio Energy indicated that "September 1, 2002 all of the assets owned by Bio Energy Corporation were transferred to Bio Energy LLC." However, Bio Energy did not apply to the DES solid waste program for permission to transfer the solid waste Permit to Bio Energy, LLC.

26. Bio Energy had originally applied for a solid waste permit in 2001 because it proposed to burn waste wood material classified as solid waste, which made the operation an incineration facility under the solid waste rules. The company did not propose to process wood material into wood fuel chips at the Bio Energy facility, and no permit was issued for that activity.

27. According to the facility's Title V air permit issued by the ARD, the "significant activities" at the facility consist of operation of a wood-fired boiler and circulation water cooling tower.

28. As a practical matter, the activity allowed under the solid waste permit was the same as the activity allowed under the air permit: burning fuel generated from waste wood material to create electricity.

29. On December 2, 2002, Bio Energy Corporation, Bio Energy, LLC and Regenesis Corporation filed with DES an application to transfer the Permit to Regenesis ("the Transfer Application"). All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy, LLC account. Corporate officials represented to DES and the AGO that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the Bio Energy background investigation. With the exception of Mr. DiNapoli, the officers and directors of Regenesis Corporation were the same as the officers and directors of Bio Energy.

30. On the Transfer Application, William Dell'Orfano signed, on behalf of both the existing permittee and the proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy's officers or directors had been convicted of a felony during the five years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached.

31. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy inform the DES solid waste program that the company had been dissolved.

32. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesis inform the DES solid waste program of the purported transfer of the Permit to Bio Energy, LLC.

33. 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 other environmental permits associated with the facility were held not by Regenesis but by Bio Energy, LLC.

34. 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 Mr. DiNapoli had been convicted of a felony, that he had resigned from any company, or that there were any concerns about his continued involvement with the facility.

35. 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.

36. On the Transfer Application, Mr. Dell'Orfano signed the following statement on behalf of both the existing permittee (Bio Energy Corporation) and the proposed new permittee (Regenesis): "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply."

41. 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.

42. 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.

43. 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.

44. 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.

45. The solid waste rules and transfer application form provide an avenue for disclosing information such as environmental violations and criminal convictions, through submission of a Compliance Report. It was reasonable for the DES solid waste program to expect that an applicant with concerns about disqualifying information would bring it to the agency's attention through such a report, as requested on the form.

46. 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.

47. DENIED-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..

50. In a petition filed in the matter of Citizens for a Future New Hampshire v. Bio Energy, LLC, et al (Merrimack County Superior Court No. 04-E-387), a citizens group ("CFNH") whose members allegedly include property owners near the Bio Energy Facility alleges that Bio Energy did not comply with Env-Wm 303.05(d).

51. CFNH alleges that certain companies owning property abutting the Bio Energy facility are under the same or related ownership as Bio Energy, and that the owners of property beyond those parcels should have received notice as abutters. Specifically, CFNH alleges that Bedford Corp., which owned two parcels abutting the Bio Energy parcels in December 2002 when Bio Energy applied to transfer the permit to Regenesis and in February 2003 when Regenesis applied to modify the permit, is affiliated with and receives mail at the same address as Bio Energy and Regenesis. CFNH further alleges that certain residential property owners who own property abutting the Bedford Corp. parcels should have received notice of those applications under Env Wm 303.05(d).

State's Requests for Findings of Fact and Rulings of Law-May 20, 2005

1. (Not included.)

2. Harry Smith is the person responsible for the operation of the Bio Energy Facility on a day-to-day basis, including obtaining all environmental permits. Mr. Smith is the Vice President of Operations for Bio Energy, LLC and Regenesis Corporation, and was formerly the Vice President of Operations for Bio Energy Corporation.

3. William Dell'Orfano directly supervises Mr. Smith and is also very closely involved with operation and permitting of the Bio Energy Facility. Mr.

Dell'Orfano is a Managing Member of Bio Energy, LLC and the President of Regenesis Corporation, and was formerly the President of Bio Energy Corporation.

4. The purpose of the initial standard permit application filed by Bio Energy Corporation on October 9, 2001 with the DES solid waste permitting section ("initial application") was to allow the use of wood chips derived from construction and demolition debris ("C&D derived fuel") in the company's boiler. The company wanted to be able to burn this fuel in the boiler and to store it on site. The initial application did not propose to create the C&D derived fuel at the Bio Energy site.

5. Mr. Smith had extensive contact with the DES solid waste program staff in conjunction with the initial application and subsequent permits.

6. Mr. Smith and Mr. Dell'Orfano are both very familiar with DES rules and permitting procedures.

7. In connection with permitting proceedings, Mr. Smith often had the experience of going to DES with questions about how to fill out a form or interpret a rule.

8. On the solid waste permit, the Bio Energy facility is described as "a 12.5 megawatt wood-fired electric generation facility. The facility's wood fuel mix consists of whole tree chips and processed wood chips."

9. The facility required a solid waste permit because it was burning wood fuel derived from processed construction and demolition debris, a substance defined as solid waste under the solid waste rules.

10. The initial permit granted by DES on May 28, 2002 was consistent with what Bio Energy Corporation had sought in its application. Mr. Smith had no concerns when he reviewed the permit.

11. The Environmental Protection Bureau ("EPB") of the Attorney General's Office has developed Personal History and Business Concern Disclosure Statement forms for use in conjunction with background investigations under RSA 149-M:9.

12. The Personal History Disclosure forms require extensive personal information including name, date of birth, social security number, home address, home phone, physical characteristics, place of birth, citizenship, people residing with them, other legal names, drivers license, motor vehicles registered; marriage and family information including spouses, previous marriages, children, parent, siblings, other relatives in the solid waste industry; residence history

for past 20 years; education, experience, credentials, employment history for past 15 years or to age 18; business interests, equity in business concerns, type of equity and how much, management positions, business interests in family members' names; financial interests such as real estate holdings, debts owed/held, status of tax obligations, tax liens, bankruptcies; licenses, violation notices, civil litigation, and criminal proceedings.

13. The Business Concern Disclosure Statement forms require similarly extensive information about the business entity which is applying to hold a solid waste permit.

14. Martha Nickerson, who has been a paralegal with the EPB since 1992, conducted the two background investigations associated with the Bio Energy facility. Ms. Nickerson has conducted approximately 25 background investigations for the DES Waste Management Division pursuant to RSA 149-M:9, III.

15. When a background investigation is required, the completed forms are submitted directly to the EPB by the applicant or the applicant's attorney. These forms are considered confidential and remain with the Attorney General's Office after the investigation is complete. They are never sent to DES or reviewed directly by the DES staff.

16. Ms. Nickerson begins her review process by reading through all the forms. If the answer to any question is incomplete, she sends a letter requesting the missing information either to the applicant's contact person or, for the personal form, directly to that person.

17. Among other tasks, Ms. Nickerson runs a criminal record check on the State Police On-line Telecommunications System ("SPOTS") terminal for each individual who has filled out a personal history disclosure form. The SPOTS check gives nationwide information on criminal convictions for individuals.

18. Upon completion of her investigation, Ms. Nickerson prepares a background investigation report addressed to the Director of the DES Waste Management Division. The report contains information on the individuals who submitted personal history disclosure forms, and the businesses entity that submitted the business concern disclosure statement.

19. The report does not contain a recommendation, and the ultimate decision whether to grant or deny a permit rests with DES.

20. Ms. Nickerson understands that finding felony convictions is one of the central purposes of the background investigation, and it is her practice to mention in her report to DES any recent information she finds relating to such proceedings.

21. Other than the formal report, communication between the EPB and DES staff during the background investigation is mainly about timing. Ms. Nickerson does not look at the actual solid waste permit application, and does not hear back from DES after the background investigation report is sent to the Division Director.

22. The EPB's background investigation of Bio Energy Corporation started with an October 9, 2001 letter from Attorney Robert Cheney on behalf of the Corporation. The investigation was assigned to Ms. Nickerson

23. In connection with the Bio Energy Corporation background investigation, Anthony DiNapoli submitted a personal history disclosure form executed October 15, 2001, indicating among other responses that he had no criminal convictions (motor vehicle offenses excepted).

24. On November 5, 2001, Ms. Nickerson ran a SPOTS check on Mr. DiNapoli and found nothing inconsistent with his response on the form.

25. In Ms. Nickerson's experience, information is not entered on the SPOTS system until after conviction, so the system would not have contained any information on the DiNapoli indictment as of November 5, 2001.

26. On March 20, 2002, when Ms. Nickerson sent her background investigation report on Bio Energy Corporation to Waste Management Division Director Dr. Philip J. O'Brien, Mr. DiNapoli had not yet been convicted of witness tampering. Ms. Nickerson was not aware of the criminal charge against Mr. DiNapoli and did not convey any information about it to DES.

27. On December 11, 2002, Bio Energy Corporation informed the EPB that it intended to transfer the solid waste permit to Regenesis.

28. From discussions with a Bio Energy Corporation representative in March of 2002, Ms. Nickerson was aware that the company planned eventually to transfer the permit from Bio Energy Corporation to another entity. Thus, the transfer application did not come as a surprise.

29. In his December 11, 2002, cover letter to the EPB, Harry Smith noted that "the Attorney General's Office has recently reviewed Personal History Disclosure Forms for Messes. Dell'Orfano, Smith, O'Neil and Ms. Sheehy . . . The owner and managers of Regenesis Corporation are these same four people that have been reviewed for Bio Energy Corporation."

30. Mr. Smith's cover letter to the EPB did not mention Anthony DiNapoli, and Mr. DiNapoli did not submit a personal history disclosure form to the EPB in conjunction with the Regenesis background investigation.

31. Regenesis was the only company to submit a business disclosure form in conjunction with the second background investigation. Neither Bio Energy Corporation nor Bio Energy LLC submitted business concern disclosure forms in conjunction with the Type IV permit application.

32. In requesting the second background investigation, DES asked the EPB to investigate only Regenesis Corporation, plus the four individuals listed in Harry Smith's December 11, 2002 letter.

33. On the face of the material filed with the EPB in conjunction with the second background investigation, there was nothing to indicate that the transfer was due to anything other than routine plans formulated long before the application was filed.

34. While it was noted in Mr. Dell'Orfano's abbreviated personal history disclosure form that Bio Energy Corporation was "winding up," Ms. Nickerson saw no reason to pass this information on to DES, and did not do so.

35. Nothing Regenesis filed with the EPB mentioned Mr. DiNapoli's criminal conviction.

36. Ms. Nickerson was not aware of Mr. DiNapoli's criminal conviction at the time she completed the Regenesis background investigation, and did not convey any information about the conviction to DES.

37. DES review of solid waste permit applications focuses on the technical details of the facility, not on the background of the applicants.

38. The solid waste program would not typically communicate with other programs within DES about a permit application, instead relying on the statements of the applicant as indicated on the permit application forms.

39. During the solid waste permit application process there is typically ongoing communication between the applicant and the DES staff about the technical details of the application.

40. Standard permit language in solid waste approvals issued by DES indicates that the authorization is based on information and representations provided to the department by the permittee, and that the permit may be revoked or suspended if the information submitted is false, misleading or incomplete.

41. Trey Dykstra, a civil engineer with the DES solid waste program, was assigned to review the Type IV permit modification application filed by Bio Energy Corporation on December 11, 2002 to transfer the solid waste permit to Regenesis Corporation ("transfer application").

42. On the transfer application form, the existing permittee and the proposed new permittee are co-applicants. Both the existing permittee and the proposed new permittee must sign a certificate of compliance indicating, among other things, that no officer, director or holder of 10% or more of the entity's debt or equity has been convicted of a felony during the 5 years before the date of the application.

43. The transfer application form requires the owner of the property where the facility will be located to sign the application. By signing, the property owner affirms that the proposed new permittee has or will have the legal right to occupy and use the property, and that the property owner will grant access for closure and post-closure monitoring.

44. No background investigation or certification of compliance is required for the property owner in conjunction with a transfer application.

45. Neither the transfer application, nor any other document filed by Regenesis or Bio Energy with the DES solid waste program in conjunction with that application indicated that Bio Energy Corporation had been dissolved. Mr. Smith did not personally inform DES of this fact during the permit transfer process.

46. If the DES solid waste program had known that the permit holder had been dissolved, the agency would have had questions about whether the original permit was still valid.

47. Because the DES solid waste program was not informed of the dissolution, the agency did not have the opportunity to ask these questions at the time it was considering the transfer application.

48. In reviewing the solid waste permit transfer application, Mr. Dykstra asked Mr. Smith for information about other permits associated with the facility.

49. In response, Regenesis agent Linda Sheehy submitted a fax to Mr. Dykstra listing 3 permits. The fax did not indicate that all three permits were held by Bio Energy LLC, not Regenesis.

50. Nothing in the transfer application gave the DES solid waste program cause to question the role of Bio Energy, LLC as property owner or to inquire further into whether Bio Energy, LLC was involved in facility operations.

51. In reviewing the transfer permit application, Mr. Dykstra was curious about the fact that all the people involved in Bio Energy Corporation were the same as those involved in Regenesis, with the exception of Mr. DiNapoli.

52. During his review of the transfer application, Mr. Dykstra asked Mr. Smith why Mr. DiNapoli was being left out of the second corporation.

53. Mr. Smith responded to Mr. Dykstra's inquiry by stating that Mr. DiNapoli was in the process of divesting himself from the facility. Mr. Smith did not mention the felony conviction, that others involved in the company had urged Mr. DiNapoli to resign, or that he had any concerns about Mr. DiNapoli whatsoever.

54. Mr. Dykstra later learned of Mr. DiNapoli's felony conviction from the newspaper.

55. The DES solid waste program was not aware of Mr. DiNapoli's conviction at the time it issued any of the three solid waste approvals associated with the Bio Energy facility.

56. Regenesis never informed the DES solid waste program of Mr. DiNapoli's conviction.

57. The solid waste rules, specifically Env-Wm 2404, set design standards for solid waste incinerators. Among those standards is a requirement that the facility also comply with state and federal air emission standards.

58. With respect to solid waste incinerators like the Bio Energy Facility, there is substantial overlap between the requirements under the solid waste permitting program and the air emission program.

59. The Title V air permit issued for the Bio Energy facility authorizes the operation of an electric generating station designed to consume wood fuel consisting of cleaned, processed wood fuel, whole tree wood chips, or wood chips generated from C & D chips, to generate 12.65 megawatts gross of electrical power.

60. The C&D derived fuel described under the air permit is the same material as the solid waste regulated under the solid waste permit.

61. The Title V permit regulates not only the "significant activities" of operating the boiler and cooling tower, but also any "insignificant activities" at the facility which may generate air emissions.

62. The Title V permit contains facility-wide requirements that apply to both significant and insignificant activities at the facility.

63. Among the facility-wide requirements applicable to the facility are controlling fugitive dust emissions.

64. Under Env-A 1002.02, fugitive dust emissions regulated under the air permit include emissions from fuel storage and management activities.

65. The air permit also requires sampling and recordkeeping with respect to the lead content of the C & D derived fuel at the facility.

66. As a practical matter, sampling the fuel as required under the air permit requires that Bio Energy LLC employees physically go to the pile of wood chips every two hours, cut the pile into quadrants, and take samples from each quadrant.

67. Compliance with the air permit requirements requires significant and ongoing interaction with the material being managed as solid waste at the facility.

68. Based on the actual activities involved, as a practical matter, when Bio Energy, LLC "operates" the facility for purposes of the Title V permit solid waste permit, it is also "operating" the facility for purposes of the solid waste permit.

69. Mr. Dell'Orfano first learned of Mr. DiNapoli's witness tampering conviction during a phone conversation with Tim Ferris in June of 2002.

70. Mr. Ferris was a former employee of Bio Development Corporation, a company in which Mr. Dell'Orfano and Mr. DiNapoli were both involved.

71. Mr. Ferris called Mr. Dell'Orfano to verify his previous employment. During their conversation, Mr. Ferris mentioned that he had been a witness at Mr. DiNapoli's witness tampering trial and that Mr. DiNapoli had been convicted.

72. Mr. Dell'Orfano was outraged to learn this information from Mr. Ferris rather than from his business partner Mr. DiNapoli.

73. Mr. Dell'Orfano informed Mr. Smith and Ms. Sheehy of the conviction.

74. Soon thereafter Mr. Smith and Mr. Dell'Orfano became concerned about the impact of Mr. DiNapoli's conviction on the solid waste permit transfer.

75. Neither Mr. Smith nor Mr. Dell'Orfano ever considered bringing their concerns about Mr. DiNapoli's conviction to the attention of DES.

76. Mr. Dell'Orfano's original business plan, as outlined in the June 2002 purchase and sale agreement between Bio Energy Corporation and Bio Energy LLC, called for transferring operation of the facility, including all environmental permits held by Bio Energy Corporation, to Bio Energy LLC.

77. Pursuant to the original plan, the facility's Title V air permit was transferred in the summer of 2002 from Bio Energy Corporation to Bio Energy LLC.

78. No background investigation was required in conjunction with the transfer of the air permit.

79. After learning of Mr. DiNapoli's felony conviction, Mr. Dell'Orfano decided to transfer the solid waste permit to a new company, ultimately named Regenesis, rather than to Bio Energy LLC.

80. Mr. Dell'Orfano reached this decision after reading the solid waste rules very carefully and concluding that he could not truthfully sign the required certification with respect to Bio Energy Corporation.

81. The solid waste facility permit was the only permit originally held by Bio Energy Corporation that required a background investigation, and it was the only permit that was transferred to Regenesis rather than to Bio Energy, LLC.

82. The purchase and sale agreement between Bio Energy Corporation and Bio Energy LLC was not provided to the DES solid waste program during the solid waste permitting process.

83. The DES solid waste program was not aware during the solid waste permitting process that there had ever been any intention of transferring the solid waste permit to Bio Energy LLC, or that there had been a change in the business plan.

84. Informing the solid waste program and the EPB of the lease agreement between Renesis and Bio Energy LLC and of Mr. DiNapoli's ongoing involvement with Bio Energy LLC was meaningless without also informing them of the criminal conviction.

85. Even individuals acting as agents for Bio Energy, LLC, Bio Energy Corporation and Regenesis were at times confused by the interactions between the various corporations and made mistakes such as submitting the permit transfer application on behalf of Bio Energy LLC, and using the wrong company's letterhead.

86. As of July 2002, Mr. DiNapoli was a 50% owner of Bio Energy Corporation. He was not engaged in any managerial or supervisory activity at that time. His only substantial authority was for making financial decisions.

87. At the time he resigned as a stockholder of Bio Energy Corporation, the only assets still held by the company were those permits that had not yet been transferred. All the remaining assets were now held by Bio Energy LLC.

88. Following his resignation from Bio Energy Corporation, Mr. DiNapoli remained a 50% owner of Bio Energy LLC, the entity that held the Title V air permit.

89. The only practical effect of Mr. DiNapoli's resignation from Bio Energy Corporation was to enable Mr. Dell'Orfano to make a certification on behalf of the existing permittee that was, arguably, not literally false. Otherwise, Mr. DiNapoli's involvement with the Bio Energy facility remained the same as it previously had been.

90. Bio Energy LLC paid the $1000 solid waste permit transfer application fee.

91. Regenesis has not transferred any other environmental permits from Bio Energy, LLC to itself.

92. Submission to the DES solid waste program of a request to change the name associated with a particular certified waste derived product did not eliminate the responsibility of Regenesis officials to provide complete information on the subsequent solid waste permit transfer application.

93. In the context of other permit proceedings, particularly the air permit, Bio Energy, LLC repeatedly represented, or did not contradict representations by DES, that it was the operator of the facility, even after the lease with Regenesis had been executed.

94. Discussion with DES regarding transfer of the air permit to Regenesis did not begin until the fall of 2004, significantly after the lease with Regenesis was executed.

95. 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.

96. 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.

97. Both the personal history disclosure forms and the business disclosure forms used by the EPB require an affidavit that the information being provided is true and complete.

98. The instructions for the forms state that it is especially important not to leave out information in a way that might create the impression that you are trying to hide it, and that a minor criminal conviction probably will not disqualify the applicant, but omitting such information from the form may result in the applicant's trustworthiness being questioned.

99. Both Mr. Smith and Mr. Dell'Orfano completed personal history disclosure forms and read the instructions on the forms.

100. Both Mr. Smith and Mr. Dell'Orfano were aware that the state viewed the failure to disclose a criminal conviction as a serious matter that could result in their trustworthiness being questioned.

101. Both Mr. Smith and Mr. Dell'Orfano were aware in December of 2002 that Mr. DiNapoli had been convicted of felony witness tampering, that personal history disclosure forms require disclosure of criminal convictions, that Mr. DiNapoli did not complete a personal history disclosure form in connection with the Type IV (transfer) application, and that no background investigation was required for Bio Energy, LLC as the property owner.

102. At the time he sent the December 2002 letter to the EPB, Mr. Smith expected that the EPB would only look at the four individuals listed in his letter.

103. Mr. Smith had no expectation that the EPB would investigate Mr. DiNapoli in conjunction with the Type IV application.

104. DENIED-In compiling and submitting the transfer application, Mr. Smith and Mr. Dell'Orfano acted with the deliberate intention of preventing DES and the EPB from discovering Mr. DiNapoli's conviction.

105. Even if it is true that Mr. DiNapoli refused to sell his interest in Bio Energy, LLC, nothing prevented Regenesis from disclosing his criminal conviction to DES.

106. Regenesis could have disclosed the conviction in a compliance report, but chose not to do so.

107. Ms. Nickerson did not learn of Mr. DiNapoli's conviction until long after she had completed both background investigations.

108. Ms. Nickerson did not convey to DES any information concerning Mr. DiNapoli's indictment, prosecution or conviction of witness tampering in either her Bio Energy or Regenesis background investigation reports.

109. While the Attorney General's Office handles all criminal appeals filed with the New Hampshire Supreme Court, the EPB is not typically involved with these appeals.

110. In her capacity as EPB paralegal, Ms. Nickerson would not have been aware of the names of defendants involved in pending criminal appeals, absent a specific reason to inquire.

111. Mr. Dell'Orfano's legal counsel had previously served as EPB bureau chief and may presumed to be generally aware of the roles of the AGO and the EPB with respect to criminal appeals.

112. Neither Mr. Smith, Mr. Dell'Orfano nor any other agent of Regenesis indicated to the EPB that they had any concern about Mr. DiNapoli, or that there was any specific reason that he was no longer involved with the company.

113. While Ms. Nickerson noticed that Mr. DiNapoli was absent from the new company, that fact by itself was not enough to trigger further inquiry.

114. Based on her prior experience in conducting background investigations, Ms. Nickerson reasonably assumed that Mr. DiNapoli's interest in the company was being bought out.

115. In view of the fact that she had completed a criminal record check of Mr. DiNapoli only a year before, and that Mr. DiNapoli was not listed as being directly involved with the company applying to be the new permit holder, it was reasonable for Ms. Nickerson not to make inquiries into Mr. DiNapoli's criminal record during the Regenesis background investigation.

116. Ms. Nickerson did make inquiries of the company during the two background investigations into other areas she found confusing, including birth date discrepancies, the relationship between the various companies, and whether the investigation was still necessary given newspaper reports that the company was closing.

117. No Regenesis official had any discussion with Ms. Nickerson about Mr. DiNapoli's criminal conviction during the background investigations.

118. DENIED-Under the circumstances, it was not reasonable for Mr. Dell'Orfano to assume that the solid waste program and the EPB were aware of Mr. DiNapoli's conviction while the transfer application was pending.

119. Ms. Nickerson first learned of Mr. DiNapoli's conviction when the EPB bureau chief received a press call inquiring about the conviction.

120. Upon learning of the conviction from the press inquiry, Ms. Nickerson reviewed her file to see how she had missed the conviction.

121. After looking at the file, Ms. Nickerson concluded that "timing was everything." Specifically, the criminal record check on Mr. DiNapoli predated his conviction, and the EPB was not asked to investigate Mr. DiNapoli in conjunction with the Regenesis background investigation.

122. When performing the Regenesis background investigation, Ms. Nickerson did not review the actual permit transfer application that had been filed with DES.

123. The permit transfer application, and specifically Mr. Dell'Orfano's certification that no officer or director of Bio Energy Corporation had been convicted of a felony, was not contained in Ms. Nickerson's background investigation files.

124. The quoted remarks of the EPB Bureau Chief in October 2003 newspaper articles are consistent with Ms. Nickerson's testimony as to her conclusions upon reviewing the EPB file after first learning of the conviction.

125. Nothing in the fall 2003 newspaper articles demonstrates that there was any agreement or commitment on behalf of the State not to take action against Regenesis based on the DiNapoli conviction. To the contrary, the statements indicate that the situation is an unusual one due to the timing of events, that the decision what to do rests with DES, and that the company would likely contest any revocation proceeding.

126. No evidence was presented that suggests that the EPB Bureau Chief was aware of Mr. Dell'Orfano's certification in the transfer application when she spoke to the press in October 2003 about Mr. DiNapoli's conviction.

127. Anthony Giunta became Waste Management Division Director in December 2003, succeeding Dr. O'Brien.

128. As Director, Mr. Giunta was responsible for making the decision to institute this permit revocation proceeding.

129. In early 2004, soon after Mr. Giunta started as Division Director, he was involved with hearings on proposed legislation aimed at stopping the Bio Energy facility due to neighbors' concerns. Representing DES at the legislative hearings, Mr. Giunta, like Regenesis officials, testified against the legislation.

130. From Mr. Giunta's perspective, it was the CFNH lawsuit that first spelled out the concerns that ultimately led DES to issue the notice of proposed revocation.

131. The CFNH lawsuit alleged, among other things, that in December 2002 Mr. Dell'Orfano certified under oath that the existing permittee, Bio Energy Corp., had not had any member, officer or director convicted of a felony within 5 years when in fact Mr. DiNapoli had been convicted of a felony less than a year before.

132. There was no evidence presented to suggest that CFNH brought the allegations summarized above to the State's attention prior to filing the lawsuit in October 2004.

133. 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.

134. Trust between companies like Regenesis and DES is critically important given the level of public concern about the environmental and public health impacts of such facilities, and the fact that it is impossible for the agency to monitor the facility 24 hours a day.

135. The importance of trust between the agency and the permit holder is the reason RSA chapter 149-M includes language about reliability and integrity.

136. Regenesis concocted an elaborate scheme which was purportedly aimed at removing Mr. DiNapoli from involvement in the operation of the Bio Energy facility.

137. DENIED-Whether Regenesis' scheme for removing Mr. DiNapoli would have satisfied the DES solid waste program is not relevant to this proceeding.

138. The DES solid waste program was never informed of the purpose of the scheme, and therefore had no opportunity to assess whether it complied with the solid waste rules and statute.

139. Regenesis was on notice that DES and the EPB were relying on the truth and accuracy of its representations.

140. Both Mr. Smith and Mr. Dell'Orfano read, signed and understood multiple DES and EPB forms which clearly explained that a lack of candor in the permitting process could lead to denial or revocation of the solid waste permit.

141. There is no evidence that either DES nor the EPB ever made any statement upon which Regenesis could reasonably rely as an indication that state officials fully understood, and approved of, the approach the company had taken to "removing" Mr. DiNapoli from operations at the Bio Energy facility.

142. At most, the DES and EPB press statements indicate a desire to work with the company and treat it fairly, and a defense of the agency's decisions to grant permits as having a sound technical basis.

143. 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.

144. 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.

145. 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.

146. 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.

147. 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.

148. Knowing of the existence of felony convictions during its consideration of solid waste facility is critically important to DES.

149. It was not reasonable for Regenesis to expect DES to piece together all the facts that have now been placed before the hearing officer, simply because various pieces of potentially relevant information were scattered throughout various agency files.

B. REGENESIS REQUESTS (Numbered as in requesting document)

Respondent's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

1. The Bio Energy facility is located in West Hopkinton, New Hampshire.

2. In the past, it has generated electricity by burning wood chips.

3. Currently, it is in an extended period of maintenance. See Day 2 Transcript at II-98.

4. On October 9, 2001, Bio Energy Corporation applied for a Solid Waste Standard Permit to incinerate wood chips derived from waste wood material that has been separated from other demolition debris. See Exhibit 5; Intervernors' Exhibit 7 (Volume 1).

5. It received the Standard Permit on May 28, 2002. See Exhibit 13.

6. Bio Energy Corporation applied to transfer its Standard Permit to Regenesis Corporation on December 11, 2002. See Exhibit 15.

7. That transfer was granted on March 28, 2003. See Exhibit 16.

8. On February 14, 2003 Regenesis applied for a Type IA modification to the Solid Waste Permit. See Intervenors' Exhibit 86 (Volume 4).

9. Prior to August 29, 2002, there were two shareholders of Bio Energy Corporation, William Dell'Orfano and Anthony DiNapoli, who each owned 50% of the shares of Bio Energy Corporation. See Day 3 Transcript at III-33 to -34.

10. Prior to August 29, 2002, William Dell'Orfano was President and Director of Bio Energy Corporation and Anthony DiNapoli was Treasurer and Director. See id.

11. After August 29, 2002, William Dell'Orfano was sole shareholder, director, and officer of Bio Energy Corporation. See id. at III-34 to -35, -38.

12. Bio Energy, LLC was formed in January 2002. See id. at -39; see also Exhibit 19.

13. Since that time Bio Energy, LLC has had two members, Anthony DiNapoli and William Dell'Orfano, who each hold 50% membership interests. See id. at -65; -73.

14. Regenesis Corporation received a certificate of authority to do business in New Hampshire on January 21, 2003, see Day 3 Transcript at III-64; Exhibit 59 (SPBG0568).

15. Pursuant to a December 6, 2002 Operating Lease between Bio Energy, LLC and Regenesis Corporation, see Exhibit 39, once the facility resumed generating electricity Regenesis Corporation would conduct all operations at the facility. See id. at III-51 to -52.

16. At all times relevant to this matter, William Dell'Orfano has been Regenesis Corporation's President, sole shareholder, and sole director. See Exh. 59 (SPBG0569); see also Day 3 Transcript at III-58 to -59.

17. On March 25, 2002, Anthony DiNapoli was convicted of felony witness tampering in Hillsborough County Superior Court. See Exhibit 17.

18. Mr. DiNapoli appealed his conviction. See State v. DiNapoli, 149 N.H. 514 (2003).

19. The Attorney General's office represented the State in that appeal. See id. at 515; see also Day 3 Transcript at III-62.

20. The New Hampshire Supreme Court affirmed the conviction on May 16, 2003. See State v.DiNapoli, 149 N.H. at 514.

21. Mr. Dell'Orfano learned of the conviction sometime in the middle of June 2002. See Day 3 Transcript at III-5 to -6.

22. Upon learning of the conviction, Mr. Dell'Orfano resolved to remove Mr. DiNapoli from Bio Energy Corporation and formally preclude him from any involvement with the facility. See id. at –10 to –11, -45 to -47.

23. Mr. DiNapoli resigned from his positions as treasurer and director of Bio Energy Corporation as of August 29, 2002. See Exhibit 35.

24. Mr. DiNapoli's returned all of his shares in Bio Energy Corporation as of August 29, 2002. See id.

25. DENIED-Mr. DiNapoli had no involvement with facility operations after his resignation. See Day Transcript at I-244 to –245; Day 2 Transcript at II-71, II-79 to -80; Day 3 Transcript at III-47 to -48.

26. Bio Energy Corporation as the existing permittee and Regenesis Corporation as the proposed permittee applied for a Type IV Permit Modification ("Transfer Application") on December 11, 2002. See Exhibit 15 at 15-1.

27. In Attachment IV(2)(f) of the Transfer Application, William Dell'Orfano is listed as a manager and Anthony DiNapoli is listed as a member of Bio Energy, LLC, the property owner. See id. at 15-34.

28. On December 6, 2002, Mr. Dell'Orfano certified in the Transfer Application that none of the following had been convicted of or pleaded guilty or no contest to a felony during the five years before the date of the application (1) the existing permittee, (2) the existing facility owner, (3) the existing facility operator, (4) all individual or entities holding 10% or more of the existing permittee's debt or equity, (5) all of the existing permittee's officers, directors and partners, and (6) all individuals and entities having managerial, supervisory or substantial decision-making authority and responsibility for the management of facility operations. See id. at 15-24 to -25.

29. On December 6, 2002, Mr. Dell'Orfano also certified in the Transfer Application that none of the following had been convicted of or pleaded guilty or no contest to a felony during the five years before the date of the application: (1) the proposed new permittee, (2) the individual or entity who will be the facility owner, (3) the individual or entity who will be the facility operator, (4) all individual or entities holding 10% or more of the proposed new permittee's debt or equity, (5) all of the proposed new permittee's officers, directors and partners, and (6) all individuals and entities having managerial, supervisory or substantial decision-

making authority and responsibility for the management of facility operations following permit transfer. See id. at 15-25 to -26.

30. DENIED-All of those certifications were true. See Day 3 Transcript at III-58 to -59 (testimony of William Dell'Orfano); id. at III-227 to -228 (testimony of Anthony Giunta); id. at III-276 (State's Closing Argument); see also Exhibit 63 (statement by Attorney Patterson that "there was not a misrepresentation of the facts").

31. In connection with the transfer permit application, the Attorney General's Office conducted a background investigation of certain individuals involved with the facility, including William Dell'Orfano. See Day 1 Transcript at I-66.

32. Pursuant to that investigation, Mr. Dell'Orfano submitted an abbreviated personal history disclosure form to the Attorney General's office on February 7, 2003. See id. at -68; see also Exhibit 41.

33. In that form, he disclosed that Bio Energy Corporation was winding up. See Exhibit 41 at "Page 10".

34. In a further submission on March 19, 2003, Mr. Dell'Orfano disclosed that Anthony DiNapoli was a 50% owner of various companies, including Bio Energy, LLC. See Exhibit 59 at SPBG0569.

35. On September 28, 2001, prior to filing its Standard Permit Application, Bio Energy Corporation sent by certified mail a Notice of Intent to File a Standard Permit Application to the following entities: Petrofiber Corp., Papertech,

Inc., and USA- Hopkinton Everett Reservoir. See Exhibits 43-44; Stipulated Facts as to Abutter Notification Issues, ¶ A.2.

36. On September 28, 2001, prior to the filing, Bio Energy Corporation had hand-delivered a Notice of Intent to File a Standard Permit Application to the following entities: Hopkinton-Webster Solid Waste District, Town of Hopkinton Selectmen, Town of Hopkinton (Town Clerk). See Exhibits 43, 45; Stipulated Facts as to Abutter Notification Issues, ¶ A.2.

37. Thus, prior to the filing of the Standard Permit Application, Bio Energy Corporation sent to every abutter to the facility, save CHI Energy, Inc., a Notice of Intent to File. See Transcript Day III at III-234; see also Exhibits 43, 55; Transcript at III-237 (explaining color coding of tax map).

38. Linda Sheehy was an employee of Bio Energy Corporation in 2001. See Day 3 Transcript at III-232.

39. In December 2001, Ms. Sheehy discovered that Bio Energy Corp. had inadvertently failed to provide one abutter, CHI Energy, Inc., with a Notice of Intent to File. See id. at III-234.

40. She called Michael McCluskey, an employee of the Solid Waste Division of DES, on December 4, 2001, and asked what Bio Energy Corporation should do to provide adequate notice under the Solid Waste Rules. See id. at III-235.

41. He instructed her to send by certified mail a Notice of Intent to File to CHI Energy, Inc. See Id.

42. Ms. Sheehy did so. See id.; see also Exhibit 44.

43. In addition, Ms. Sheehy had the Notice of Intent to File hand-delivered to Jim Gagne, an employee of CHI Energy, Inc. See Day 3 Transcript at III-235 to –236; see also Exhibits 45, 62 (Gagne's acknowledgement of receipt).

44. Ms. Sheehy informed Mr. McCluskey by telephone of the hand-delivery and was told Bio Energy Corporation had fulfilled its notice obligations with respect to the Notice of Intent to File the Standard Permit Application. See Day 3 Transcript at III-237.

45. Bio Energy Corporation gave all direct abutters notice of the public hearing relative to the Standard Permit Application. See Exhibits 43, 46-47.

46. Bio Energy Corporation notified all direct abutters of the transfer permit and Type IA modification application. See Exhibits 43, 48-51; Stipulated Facts as to Abutter Notification Issues, ¶¶ B.2, C.2.

47. Neither the facility owner, Bio Energy, LLC, nor the applicants in the transfer and Type IA modification application (Regenesis Corporation and/or Bio Energy Corporation) owned any of the parcels of land abutting the facility. See Transcript Day 3 at III-66 to -68.

48. As early as October 2003, news stories concerning Mr. DiNapoli's conviction surfaced. See Exhibits 61, 63-64.

49. DES officials in the Solid Waste Division became aware that Mr. DiNapoli had been convicted almost immediately thereafter. See Exhibit 61 (newspaper article with distribution list of Solid Waste officials); see also Exhibit 65 (explaining that Exhibit 61 was copied from DES files).

50. The Attorney General's office knew of the conviction months earlier, given its role in representing the State in Mr. DiNapoli's appeal to the New Hampshire Supreme Court. See State v. DiNapoli, 149 N.H. 514, 515 (2003).

51. Notwithstanding its knowledge of Mr. DiNapoli's conviction, DES, as represented by the Attorney General's office, did not commence this revocation proceeding until over a year later. See Notice of Proposed License Action.

C. REACH'S REQUESTS (Numbered as in requesting document)

REACH's Summary of and Proposed Findings of Fact and Conclusions of Law- May 20, 2005

1. Bio Energy Corporation was the owner and operator of a wood-fired co-generation facility located in West Hopkinton, New Hampshire (hereinafter the "Bio Energy Facility"), and held all related environmental permits, from on or around its development and inception in 1982 through June, 2002. (Testimony of H. Smith, Day 1, p. 235); (Testimony of W. Dell'Orfano, Day 3, pp. 31-34).

2. At all times during that 1982 through June, 2002 period, Bio Energy Corporation was owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli, who were officers, directors and shareholders of that corporation. (Testimony of W. Dell'Orfano, Day 2, pp. 208-12; Day 3, pp. 33-35).

3. The Bio Energy Facility was also developed and managed until 2003 by Bio Development Corporation, which at all times was owned on a 50/50 by William Dell'Orfano and Anthony DiNapoli, who were officers, directors and shareholders of that corporation. (Testimony of H. Smith, Day 2, pp. 109-10).

4. Currently, the land on which the Bio Energy Facility is located is owned by Bio Energy LLC, Petrofiber Corporation, and The Bedford Corporation, all of which are owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli, who are the principals (whether officers, directors, shareholders and/or members) of each of those entities respectively. (Testimony of H. Smith, Day 2, pp. 70-71).

5. Petrofiber Corporation also operates a facility in close proximity to the Bio Energy Facility, which previously supplied fuel to the Bio Energy

Facility, and which presently holds a solid waste permit from NHDES. The land on which Petrofiber Corporation operates this solid waste facility is owned by AD&WD Land Corporation, which is owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli, who are officers, directors and shareholder of that corporation. (Testimony of H. Smith, Day 2, pp. 137-39).

6. By a Purchase and Sale Agreement (hereinafter the "P&S Agreement") dated June 12, 2002, William Dell'Orfano and Anthony DiNapoli purported to transfer all of Bio Energy Corporation's assets, including all rights, titles, benefits and interest in its property, equipment and environmental (including solid waste) permits, from the corporation to Bio Energy LLC, with the foregoing ultimately remaining within the care and control of the same two principals. Specified on the schedule of permits to be transferred by the P&S Agreement was Bio Energy Corporation's solid waste permit. (Testimony of H. Smith, Day 1, pp. 211-13, 236-239; Day 2, pp. 36-46, 114-20, 145); (Testimony of W. Dell'Orfano, Day 3, pp. 41-44).

7. Related the June 12, 2002 P&S Agreement, Bio Energy Corporation began the process of transferring all of its environmental and other operating permits and licenses/certification for the Bio Energy Facility from the corporation to the new-formed Bio Energy LLC; specifically a Title V air permit, a NPDES permit, an EPA hazardous waste identification number, software licenses, above ground storage tank permits, a PSNH operating/interconnect agreement, and certified waste derived product certification, given that the intent of William Dell'Orfano and Anthony DiNapoli around that time was to transfer all ownership, control and assets related to the Bio Energy Facility from Bio Energy Corporation to Bio Energy LLC. Bio Energy LLC was, and has been at all times, owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli. (Testimony of H. Smith, Day 1, pp. 229-30; Day 2, pp. 50-57, 89); (Testimony of W. Dell'Orfano, Day 3, pp. 73-80, 86, 114-16); Respondent's Answer at ¶ 20.

8. Despite the foregoing P&S Agreement between, and related transfers from, Bio Energy Corporation to Bio Energy LLC in June, 2002, by a Notice of Filing of Type IV Permit Modification dated July 3, 2002, Bio Energy Corporation was described as the owner and operator of the Bio Energy Facility to NHDES, and the same was represented to the Town of Hopkinton and abutters in December, 2002. (Testimony of H. Smith, Day 2, pp. 164-170).

9. In midst of the aforementioned transfer project from Bio Energy Corporation to Bio Energy LLC, specifically in mid-June, 2002, William Dell'Orfano learned that Anthony DiNapoli had been convicted of felony witness tampering, relating to an underlying civil case in which William

Dell'Orfano was also involved (as a principal of co-defendant Bio Development Corporation, along with Anthony DiNapoli), and in which he sat for a deposition and was defended by the same attorney who represented Anthony DiNapoli. William Dell'Orfano alleges that he was very upset and outraged upon learning of this felony conviction and what he perceived to be deception by Mr. DiNapoli, a business partner. William Dell'Orfano desired to have Anthony DiNapoli removed from any involvement with the Bio Energy Facility after learning that he had been convicted of a felony. (Testimony of H. Smith, Day 1, pp. 245-47; Day 2, pp. 58-60); (Testimony of W. Dell'Orfano, Day 2, pp. 222-27; Day 3, pp. 6-7, 28-30, 46).

10. William Dell'Orfano previously told a reporter that he had learned of Anthony DiNapoli's felony conviction in April, 2002, which was reported in a periodical, but now claims that he misspoke regarding this issue. (Testimony of W. Dell'Orfano, Day 2, pp. 232-43; Day 3, p.80).

11. William Dell'Orfano and his staff realized that the aforementioned felony conviction posed a significant problem, given the pre-existing plan and ongoing effort to transfer the solid waste permit for the Bio Energy Facility from Bio Energy Corporation to Bio Energy LLC, since that process would require the filing of a compliance report to explain the conviction of a principal in that the certification requirements could not be satisfied with Anthony DiNapoli remaining involved in his roll at the facility. Concluding that this was a major problem, Harry Smith consulted the NHDES solid waste regulations, and urged William Dell'Orfano to separate himself and the facility from Mr. DiNapoli. Mr. Smith realized that there were problems with the current state of affairs in light of the requirements of NHDES Regulations Env-Wm 303.14(a)(4),(5)&(6). William Dell'Orfano also studied the relevant regulations and concluded that they had a problem given the felony conviction. They realized that one option was to submit a compliance statement to NHDES given that the certification could not be truthfully made, but the decision regarding how to proceed was left to William Dell'Orfano. William Dell'Orfano knew that Anthony DiNapoli's felony conviction posed serious problems relative to the ongoing licensure of the Bio Energy Facility, and that he had to get Anthony DiNapoli out of involvement with the said Facility. William Dell'Orfano changed his mind about transferring the solid waste permit to Bio Energy LLC, instead devising a plan to transfer the solid waste permit to a new entity, previously unrelated to the Bio Energy Facility, to be called Regenesis Corporation. (Testimony H. Smith, Day 1, pp. 232-33, 241-45; Day 2, pp. 56, 60-61, 65-66, 70-77, 120-134); (Testimony of W. Dell'Orfano, Day 3, pp. 7-10, 17, 44-45, 56, 68, 80-82, 97, 167-68).

12. William Dell'Orfano realized that the felony conviction of his business partner was a relevant issue that had to be dealt with for purposes of complying with the NHDES solid waste regulations. (Testimony of W. Dell'Orfano, Day 3, pp. 82-83).

13. William Dell'Orfano realized that the disclosure of Anthony DiNapoli's conviction might complicate the transfer of the solid waste permit to Bio Energy LLC. (Testimony of W. Dell'Orfano, Day 3, p. 81).

14. William Dell'Orfano believed that "it was the spirit and intent" of the solid waste rules that, because he was convicted of a felony, NHDES would not likely want Anthony DiNapoli involved with the Bio Energy Facility. (Testimony of W. Dell'Orfano, Day 3, p. 81).

15. William Dell'Orfano previously told a reporter that he did not feel that Anthony DiNapoli's conviction was relevant and that is why he did not provide notice to NHDES upon learning about it, which was reported in a periodical. (Testimony of W. Dell'Orfano, Day 3, pp. 83-86).

16. William Dell'Orfano believed that the issues surrounding whether and how Anthony DiNapoli's felony conviction implicated the NHDES solid waste regulations, and the best course of action in response to his notice of the conviction, were complicated and required detailed study and analysis of the regulations and their various legal requirements. William Dell'Orfano spent a significant amount of time studying the NHDES regulations and requirements related to transfer of solid waste permit and related certifications, and believed that he fully understood the language and requirements thereof. (Testimony of H. Smith, Day 2, pp. 54, 62); (Testimony of W. Dell'Orfano, Day 2, pp. 54-57, 62, 217-21; Day 3, pp. 7-9, 14-17, 45, 53).

17. After detailed study, consideration and consultation, William Dell'Orfano decided in the Fall of 2002 that the best course of action was to involve a new corporation (which was a pre-existing, relatively inactive Delaware corporation held by Mr. Dell'Orfano and previously uninvolved with the Bio Energy Facility) to hold the solid waste permit, to be called Regenesis, although it was not registered to do business in New Hampshire until January, 2003. Mr. Smith testified: "In order to avoid the problems that resulted from disclosing Mr. DiNapoli's criminal conviction on the solid waste transfer permit, Mr. Dell'Orfano involved yet another company he owned, leasing the assets to it, and then listing it as the proposed operator." (Testimony of H. Smith, day 1, pp. 248-49; Day 2, pp. 142-44, 173-74); (Testimony of W. Dell'Orfano, Day 3, pp. 97-98).

18. Regenesis Corporation was to be utilized in order to avoid the problems which would result from disclosing Anthony DiNapoli's criminal

conviction to NHDES on the solid waste transfer permit absent involvement of this new entity. (Testimony of W. Dell'Orfano, Day 3, pp. 94-95).

19. As part of the resulting plan, Anthony DiNapoli also turned in his shares of Bio Energy Corporation, resigned as officer and director thereof, and the corporation was immediately dissolved the corporation effective August 31, 2002. These steps were taken even though, at this time, Bio Energy Corporation had sold all of its assets to Bio Energy LLC, was not intended to play any future roll in the Bio Energy Facility, and its shares were effectively worthless. (Testimony of H. Smith, Day 1, pp. 247-48; Day 2, pp. 70-77); (Testimony of W. Dell'Orfano, Day 3, pp. 10, 169-71; Day 3, pp. 34-39, 48, 73).

20. The only significance of this divestiture of Anthony DiNapoli from Bio Energy Corporation was for purposes of the December, 2002 certification to NHDES in conjunction with the Type IV solid waste permit transfer application. (Testimony of W. Dell'Orfano, Day 3, pp. 170-73).

21. Although the Type IV solid waste permit transfer ostensibly transferred the solid waste permit from Bio Energy Corporation to Regenesis Corporation, as of the date of that application, Bio Energy Corporation had dissolved as a corporation and its principals had indicated by corporate resolution that it was to have been wound up (as of August 31, 2002). (Testimony of H. Smith, Day 2, pp. 46-47, 146-49); (Testimony of W. Dell'Orfano, Day 3, pp. 100-03).

22. No agent of any of the entities or individuals associated with the Bio Energy Facility notified NHDES of the dissolution of Bio Energy Corporation, the existence or effects of the P&S Agreement between Bio Energy Corporation and Bio Energy LLC, or the fact that various other permits related to the Bio Energy Facility were now held by a new entity called Bio Energy LLC. (Testimony of Trey Dykstra, Day 2, pp. 192-98); (Testimony of H. Smith, Day 1, p. 227).

23. Another aspect of the resulting plan has involved Bio Energy LLC owning a significant portion of the property for the Bio Energy Facility, which took effect by operation of the P&S Agreement dated June 12, 2002, reaffirmed by the lease dated December 15, 2002, and which remains in effect up to the present. Mr. Dell'Orfano testified that this aspect of the plan entailed that "[s]pecifically the asset [of the Bio Energy Facility] itself would sit in Bio Energy, LLC." (Testimony of W. Dell'Orfano, Day 3, pp. 48, 51).

24. Another aspect of the resulting plan has involved Bio Energy LLC funding all maintenance, improvements, construction and operations for the Bio

Energy Facility, by operation of the lease dated December 15, 2002, and which remains in effect up to the present. It is alleged that although Bio Energy funds these activities, Regenesis implements all such activities. (Testimony of H. Smith, Day 1, pp. 130-41, 250-53; Day 2, pp. 68, 79-86; (Testimony of W. Dell'Orfano, Day 3, pp. 48-49, 197-200).

25. Another aspect of the resulting plan has involved Bio Energy LLC deriving and realizing all profits and proceeds from operations and activities at the Bio Energy Facility (including any value derived from the existence of the solid waste permit for the Facility), by operation of the lease dated December 15, 2002, and which remains in effect up to the present. (Testimony of H. Smith, Day 2, pp. 83-84); (Testimony of W. Dell'Orfano, Day 3, pp. 129-33).

26. William Dell'Orfano allegedly believed that his plan created a state of affairs requiring no disclosure of Anthony DiNapoli's felony conviction to NHDES and allowing him to make the necessary certifications in conjunction with the December, 2002 permit transfer application. Mr. Dell'Orfano testified: "[W]ith *the intent* of removal of Mr. DiNapoli completely with any involvement with this project, the rules were very specific for me." (emphasis added). Mr. Dell'Orfano further testified: "[A]t the conclusion of my realization of Mr. DiNapoli's involvement was a real problem going forward, I had to restructure.... I think the most important piece of this puzzle was Mr. DiNapoli was never to be involved with any operational characteristic of this facility..." (Testimony of W. Dell'Orfano, Day 2, pp. 57, 63-65; Day 3, pp. 15, 47).

27. When he made the December, 2002 certifications to NHDES, William Dell'Orfano knew that Anthony DiNapoli was a convicted felon. (Testimony of W. Dell'Orfano, Day 2, pp. 220-221).

28. William Dell'Orfano alleges that he believed that Anthony DiNapoli would be investigated by state authorities in conjunction with the December, 2002 permit transfer, even though no mention was made of him in any certification or disclosure to NHDES, and correspondence from Harry Smith to NHDES suggested that the individuals to be investigated by the state were the same as those previously disclosed and investigated in conjunction with a prior application. William Dell'Orfano knew that he had not disclosed Anthony DiNapoli on the application and that no personal history statement was being submitted for Mr. DiNapoli. William Dell'Orfano believed, however, that the state authorities knew of Mr. DiNapoli's conviction, given that as of September 17, 2002, he understood that the Attorney General's Office had handled Mr. DiNapoli's criminal appeal case. (Testimony of W. Dell'Orfano, Day 3, pp. 19-21; 62-63; 180-83; 200-01).

29. In the process of examining his options and completing the necessary documentation for submission to NHDES regarding the December, 2002 permit transfer, William Dell'Orfano consulted with legal counsel, Attorney Robert Cheney, former long-time employee of the New Hampshire Department of Justice's Office of the Attorney General, and former Chief of that office's Environmental Protection Bureau, regarding these issues. Attorney Cheney reviewed the permit transfer form prior to William Dell'Orfano signing and submitting it. (Testimony of W. Dell'Orfano, Day 2, p. 218; Day 3, pp. 4, 70-72, 175-76).

30. Neither William Dell'Orfano, nor anyone at his direction, ever contacted or consulted with NHDES in order to disclose, or seek clarification or guidance regarding, the complicated issues associated with Mr. DiNapoli's felony conviction as it related to compliance with NHDES solid waste regulations. (Testimony of H. Smith, Day 1, p. 233); (Testimony of W. Dell'Orfano, Day 2, pp. 221-22; Day 3, pp. 16-17).

31. William Dell'Orfano never even considered disclosing Anthony DiNapoli's felony conviction to NHDES. (Testimony of W. Dell'Orfano, Day 3, p. 173).

32. It had been the practice of those employees and agents affiliated with the Bio Energy Facility with responsibility for compliance with NHDES regulations and law, to regularly consult with the agency on ambiguous areas of the law or with questions regarding how to complete forms and ensure compliance. Mr. Dell'Orfano testified: "...[W]hen we get to those fuzzy areas, we ask the DES what they think about this or that..." For instance, the moment that it was discovered that *one* abutter had not been provided proper notice on one occasion, Linda Sheehy immediately called NHDES to inform the agency of the issue, prior to taking corrective action, in order to provide notice, seek guidance and obtain approval from the NHDES contract person for the applicable regulatory requirements. (Testimony of H. Smith, Day 1, p. 232); (Testimony of W. Dell'Orfano, Day 3, p. 51); (Testimony of L. Sheehy, Day 3, pp. 234-37).

33. William Dell'Orfano believes that he and his staff have had a good relationship with NHDES. (Testimony of W. Dell'Orfano, Day 3, pp. 4-5).

34. In conjunction with the foregoing events, William Dell'Orfano certified on December 2, 2005, under oath, *inter alia*, that no person with managerial responsibility for the solid waste facility or activities had been convicted of a felony for the past five years, and signed for all necessary signatories to the application: Bio Energy Corporation, Bio Energy LLC and Regenesis Corporation. William Dell'Orfano had familiarized himself with the standards and requirements for these certifications and associated

disclosure requirements, and had made such certifications previously for both the Bio Energy Facility and Petrofiber Corporation. (Testimony of W. Dell'Orfano, Day 2, pp. 213-16; 219-20; Day 3, pp. 57-59).

35. Upon receipt and initial review of the December, 2002 permit transfer application, NHDES personnel noticed that the individuals associated with the proposed pre and post-transfer entities were identical but for Anthony Dinapoli who was, apparently, not going to be involved following transfer. A telephone inquiry was made by NHDES, at which time Harry Smith indicated that Anthony Dinapoli was not going to be involved with the Bio Energy Facility any longer. (Testimony of Trey Dykstra, Day 2, pp. 196-97).

36. NHDES personnel did not learn of Anthony Dinapoli's felony conviction until it was reported long after the December, 2002 permit transfer application, in the press and by means of a civil suit filed by Citizens for a Future New Hampshire. (Testimony of Michael Guilfoy, Day 1, pp. 157-58); (Testimony of Trey Dykstra, Day 2, p. 199); (Testimony of Tony Giunta, Day 3, pp. 220-21).

37. William Dell'Orfano claims that he wanted Anthony Dinapoli out of Bio Energy LLC, which is why he chose to take the aforementioned course of action (regarding the transfer of the solid waste permit to Regenesis Corporation, etc.) versus filing a compliance statement with NHDES disclosing the felony conviction. Mr. Dell'Orfano testified: "I think the most distraught part of this whole issue is I was so angry that I just didn't want him involved at all. And I didn't even want to do a compliance report...I think the worst thing that could have happened is that he would have still been a part of this operation. He had breached a trust with me, which was just never going to allow to resurface again. And a compliance report might have possibly allowed him to stay. I didn't want him there. I restructured this operation in such a way that he had to be removed." Mr. Dell'Orfano further testified: "I felt that getting rid of Mr. Dinapoli, removing him completely from this operation, would have satisfied the DES upon an investigation of that issue.... I think what I acted as getting rid of Mr. Dinapoli was the enforcement of that trust [with DES]. That's what I wanted to do, is to protect this whole concept, in making sure that Mr. Dinapoli was not involved at all. That's where I was." Mr. Dell'Orfano further testified: "It was my belief that the structure that I had put in place met all of the requirements of the DES, and that—that everything that took place with my effort to remove Mr. Dinapoli was in the spirit of making sure that he was not involved with this facility." (Testimony of H. Smith, Day 2, p. 185); (Testimony of W. Dell'Orfano, Day 3, pp. 10-12, 56-57, 87-88, 177-79, 184, 203).

38. However, it is uncontroverted that Anthony Dinapoli has, in fact, remained a director, officer and member (indeed subsequently a managing member) of Bio Energy LLC (in addition to Petrofiber Corporation, The Bedford Corporation and AD&WD Land Corporation), along with William Dell'Orfano, as of December 2, 2002, even up to the present. (Testimony of H. Smith, Day 1, p. 234; Day 2, pp. 135-37); (Testimony of W. Dell'Orfano, Day 3, pp. 52-53, 86, 168-69); Respondent's Answer at ¶ 22.

39. Documentation, representations and events since the formation of Bio Energy LLC, up through the present, demonstrate that this entity—of which Anthony Dinapoli has been a principal at all times—has been integrally involved in a wide variety of operational issues relating to the Bio Energy Facility, including many functions and aspects relating to the systems and physical structures for the collection, separation, storage, transfer, processing, treatment, or disposal of solid waste, including:

A. Holding the Title V air permit for the Bio Energy Facility. Additionally, on multiple occasions, representing to regulators and others, including representations under oath, that Bio Energy LLC operates the Title V facility at the Bio Energy Facility (including systems and structures designed to consume wood fuel consisting of cleaned, processed wood fuel, whole tree wood chips, or wood generated from C&D debris, C&D chips, to generate 12.65 megawatts gross of electrical power, and entailing such significant activities as boiler and the cooling tower, and insignificant activities at the facility covered by the permit, to include total facility emissions). This permit also requires specific requirements regarding control of emissions from fugitive dust, performance test results for C&D chips fed into the boiler, annual lead stack test results for C&D chips fed into the boiler, laboratory results for metals testings of monthly composite C&D chips fed into the boiler, monthly C&D chip certifications from each supplier to the Bio Energy Facility, or copies of monthly analysis from Bio Energy LLC of the incoming C&D wood chip composite samples collected by Bio Energy LLC and sent out for analysis, summary of monthly C&D wood chip analysis of chips fed into the boiler, summary of monthly C&D wood chip certifications for C&D chips received at the facility, or summary of monthly C&D chips analysis conducted by Bio Energy LLC for C&D chips received at the facility from each supplier of C&D chips. Bio Energy allegedly performs all Title V-related work "at the direction of" Regenesis Corporation. (Testimony of H. Smith, Day 1, pp. 215-22; Day 2, pp. 92-96).

B. Holding the NPDES permit for the Bio Energy Facility and undertaking to perform a wide variety of related permit

obligations. (Testimony of H. Smith, Day 2, pp. 89-92, 186); (Testimony of W. Dell'Orfano, Day 3, p. 113).

C. Certifying and swearing to the accuracy of a GZA Report for Title V Renewal Operating Application, sworn by Dell'Orfano, indicating that Bio Energy LLC is the operator of the Title V facility at the Bio Energy Facility. (Testimony of H. Smith, Day 2, pp. 151-57); (Testimony of W. Dell'Orfano, Day 3, pp. 120-26).

D. Receiving by transfer the certified solid waste derived product certification. (Testimony of W. Dell'Orfano, Day 3, pp. 114-16).

E. Submitting multiple forms and representations to NHDES, regarding the Title V permit, referencing only Bio Energy LLC operating the Bio Energy Facility without mention of Regenesis Corporation. (Testimony of H. Smith, Day 2, pp. 57-160); (Testimony of W. Dell'Orfano, Day 3, pp. 116-20; Day 3, pp. 147-48).

F. Receiving by transfer PSNH agreements. (Testimony of W. Dell'Orfano, Day 3, pp. 126-29).

G. Referencing in internal corporate governance documentation, between and among William Dell'Orfano and Anthony Dinapoli, the fact that Bio Energy LLC operates the Bio Energy Facility and the conceptualization of the solid waste permit as an asset of the Bio Energy Facility from which Bio Energy LLC derives value and benefit. (Testimony of H. Smith, Day 2, pp. 160-63); (testimony of W. Dell'Orfano, Day 3, pp. 129-33).

H. Representing, through the same legal counsel as retained for environmental compliance and this permit action, in some cases verified under oath, and up through recent times, that Bio Energy LLC operates the Bio Energy Facility. (Testimony of W. Dell'Orfano, Day 3, pp. 142-46).

I. Holding above-ground storage tank permits/registrations. (Testimony of W. Dell'Orfano, Day 3, p. 149).

J. Purchasing capital equipment for solid waste processing systems and structures. (Testimony of W. Dell'Orfano, Day 3, pp. 157-66).

40. The agents and principals of the various entities involved with the Bio Energy Facility (including but not limited to Bio Energy Corporation, Bio Energy LLC, Regenesis Corporation, and XGenesys Development Corporation) have not always maintain clear lines of delineation between their activities and undertakings, and there has been a general disregard of the corporate form in relation to their involvement with the Bio Energy Facility, particularly in relation to the actions of Harry Smith, who is the Vice President of Operations for many of them simultaneously, and claims that the various uses of the various names on different occasions has often times been in error. (Testimony of H. Smith, Day 2, pp. 46-50, 77-79, 86-89, 109-114; Day 2, pp. 171-72); (Testimony of W. Dell'Orfano, Day 3, p. 137).

41. Despite the depth and breadth of Bio Energy LLC's *de facto* involvement in the Bio Energy Facility since its inception through today, William Dell'Orfano claims that Regenesis Corporation has complete control over the Bio Energy Facility pursuant to the December 15, 2002 lease, and that his plan is to transfer all of the permits related to the Facility to Regenesis Corporation, also pursuant to the December 15, 2002 lease, once it is allegedly possible to do so. Regenesis Corporation will allegedly become the operator of the solid waste facility once the lease reaches its "effective date," which has not occurred. Mr. Dell'Orfano does not, however, understand the details of why the permits allegedly cannot be transferred at this time, citing obliquely permit shield concerns without any explanation or understanding. (Testimony of H. Smith, Day 1, pp. 250-51; Day 2, pp. 102-08, 144, 146, 179-82, 186-87); (Testimony of W. Dell'Orfano, Day 3, pp. 22-26, 48-52, 97-98, 153-57, 197-98).

42. While William Dell'Orfano claims that operational control of the Bio Energy Facility has been turned over the Regenesis Corporation, this is inconsistent even with responses to information requests in this very license action, wherein Regenesis Corporation has presented sworn testimony that operational control of the Facility "will" be turned over to Regenesis Corporation in the future. This is explained, again, as an error. (Testimony of W. Dell'Orfano, Day 3, pp. 150-52).

43. In response to the apparent depth and breadth of Bio Energy LLC's *de facto* involvement in the Bio Energy Facility since its inception through today, William Dell'Orfano and Harry Smith claim that all actions undertaken by Bio Energy LLC are done so as Regenesis Corporation's "agent." (Testimony of H. Smith, Day 2, pp. 156, 184); (Testimony of W. Dell'Orfano, Day 3, p. 165).

44. William Dell'Orfano and Harry Smith do not recall when they, or any other agent of Bio Energy LLC or Regenesis Corporation, first informed NHDES that Bio Energy LLC ostensibly plans to transfer the Title V air permit to Regenesis Corporation, but that was likely not conveyed to NHDES until recently, after this license action was initiated. (Testimony of H. Smith, Day 2, pp. 174-75); (Testimony of W. Dell'Orfano, Day 3, p. 26).

45. Internal corporate governance documentation, between and among William Dell'Orfano and Anthony Dinapoli, including minutes of corporate meetings attested to by William Dell'Orfano, indicate that although the two principals of Bio Energy LLC (and other entities associated with the Bio Energy Facility) had a disagreement regarding Anthony Dinapoli's involvement with the Bio Energy Facility going forward, on or around July, 2003, this dispute was related to Mr.

Dinapoli's desire not be involved in the Facility any longer, and his refusal to contribute the level of financial support for the Facility that Mr. Dell'Orfano desired and requested from him. Mr. Dinapoli expressed his desire that his ownership in the Facility be bought out by Mr. Dell'Orfano or by some other means. The source of the principals' disagreement related to the valuation of Mr. Dinapoli's interest in the Facility, and there is no indication in any record that his prior felony conviction, or any other concerns or considerations, played any roll in this dispute. Mr. Dell'Orfano refused to continue any negotiations with Mr. Dinapoli, withdrawing his offer to buy Mr. Dinapoli's interest, and thereafter continuing discussions regarding Mr. Dinapoli's continued involvement and investment in the Bio Energy Facility. Mr. Dinapoli was in favor of letting the Bio Energy Facility's permits lapse, although Mr. Dell'Orfano desired to speed up work at the site in response to concerns among local residents. (Testimony of H. Smith, Day 2, p. 69); (Testimony of W. Dell'Orfano, Day 3, pp. 88-94).

46. Of all the entities owned by William Dell'Orfano and Anthony Dinapoli together, the only one in which Anthony Dinapoli is not an officer, director, shareholder or member, is Regenesis Corporation, which only holds the solid waste permit, the only permit requiring a background check and specific certifications regarding, *inter alia*, criminal history. (Testimony of H. Smith, Day 2, pp. 139-40); (Testimony of W. Dell'Orfano, Day 3, pp. 23, 86-87).

D. CFNH'S REQUESTS (Numbered as in requesting document)

CFNH's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

1. Since 1983, Bio Energy LLC (including its predecessor, Bio Energy Corp. a/k/a Bio Energy Corporation) has operated a wood incinerator facility in West Hopkinton (the "Facility"). The Facility has burned wood chips and produced electricity and steam.

- Transcript I, p. 235, ll. 5-10 (Smith).
- Transcript II, p. 217 (Dell'Orfano).
- Intervenors Ex. 20 (Certificate and Articles of Amendment of Bio Energy Corp., changing name to Bio-Energy Corporation).

2. On October 9, 2001, Bio Energy Corporation submitted *to the New Hampshire Department of Environmental Services ("DES")* an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. ("Bio Energy Facility"). **(Amended Notice, Section III, ¶10 – modified language in italics).**

- Admitted, as to unmodified language (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶10).
- Intervenors' Ex. 7 (2001 Permit Application).

3. The application sought a permit to authorize use of up to 50% processed wood chips, including chips derived from construction and demolition debris treated with paints and other materials that emit lead, mercury, and other harmful or toxic chemicals when burned.

- Intervenors' Ex. 7 (2001 Permit Application).
- Transcript II, p. 36 (Smith: "our permit application in 2001 enabled us to burn clean wood from construction and demolition activities, and also painted wood from construction and demolition activities).
- Transcript III, p. 230, ll. 9-22 (Giunta).

4. At the time of the 2001 solid waste permit application, Bio Energy Corporation owned and operated the Bio Energy Facility. Anthony DiNapoli and William Dell'Orfano were each 50% shareholders of Bio Energy Corporation. In addition, Mr. Dell'Orfano acted as President, Secretary and Director and Mr. DiNapoli acted as Treasurer and Director of Bio Energy Corporation. Harry Smith was the Vice President of Operations.

- Intervenors Ex. 19 (Certificate of Amendment and Articles of Amendment for Bio Energy Corporation).
- Intervenors' Ex. 7, at INT0063-65.
- Intervenors' Ex. 139, at INT1559-62.

- Transcript II, p. 50, ll. 19-22 (Smith).
- Transcript III, p. 68, ll. 15-23 (Dell'Orfano).

5. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation's application. **(Amended Notice, Section III, ¶11).**

- Admitted (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶11).
- Intervenors' Ex. 9.

6. Mr. DiNapoli's responses on the form included a sworn statement that he had no criminal convictions (motor vehicle offenses excepted). **(Amended Notice, Section III, ¶12).**

- Admitted (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶12).

7. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony. **(Amended Notice, Section III, ¶13).**

- Admitted*[1] (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶13).

8. Also October 18, 2001, Bio Energy Corporation's counsel filed a letter with the NH Department of Justice advising that Messrs. Dell'Orfano, DiNapoli and Smith were "the 'key' owners and/or supervisors of Bio Energy."

- Intervenors' Ex. 11.

9. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The search revealed nothing inconsistent with Mr. DiNapoli's response on the form. There was no indication of the recently filed charges. **(Amended Notice, Section III, ¶14).**

[1] The "*" denotes that Respondent provide a further response to the Amended Notice allegation.

- Transcript I, p. 62, ll. 3-11 (Nickerson).

10. On or about January 18, 2002, Messrs. DiNapoli and Dell'Orfano formed a new entity – Bio Energy LLC, a New Hampshire Limited Liability Company, with an address at 749 East Industrial Park Drive, Manchester, NH. Mr. DiNapoli and Mr. Dell'Orfano were each 50% members/owners of Bio Energy LLC and Harry Smith was designated the Vice President of Operations (as they were with Bio Energy Corp.).

- Intervenors Exs. 18 and 20 (Registration with NH Corporation Division and Certificate of Existence).
- Intervenors' Ex. 23 (Redacted Operating Agreement, with Schedule A identifying DiNapoli and Dell'Orfano as Members).
- Intervenors' Ex. 89, at INT1056 (updated Exhibit No. 3 for Regenesis' Business Disclosure Form, showing affiliated entities).
- Transcript II, p. 50, l. 19 – p. 51, l. 12 (Smith).
- Transcript III, p. 73, ll. 13-20 (Dell'Orfano).

11. The purpose of the LLC was to "purchase, develop, own, improve, lease, maintain and operate power generating assets of every kind...."

- Intervenors' Ex. 21 (Operating Agreement, Bio Energy LLC).

12. On January 28, 2002, while the solid waste facility application was pending, the Directors of Bio Energy unanimously approved a plan of liquidation for the company, which stated an effective dissolution date of August 31, 2002. **(Amended Notice, Section III, ¶15).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 5, Section III, ¶15).
- Intervenors' Ex. 24 (Written Consents of Shareholders and Directors and Plan of Liquidation: "Bio-Energy Corporation shall dissolve and liquidate, effective August 31, 2002).

13. In response to an inquiry from the AGO in early March of 2002, prompted by a March 7, 2002 newspaper article indicating that the Bio Energy facility was closing, Bio Energy confirmed that the article was accurate but stated that the company wished to go forward with the solid waste permit application process and intended eventually to transfer the solid waste permit to another company. **(Amended Notice, Section III, ¶16).**

- Admitted (see Respondent's Answer to Amended Notice, Page 5, Section III, ¶16).

14. On March 20, 2002, the AGO conveyed the results of its Bio Energy background investigation to DES. **(Amended Notice, Section III, ¶17).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 5, Section III, ¶17).

15. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in State v. DiNapoli, 149 N.H. 514 (2003). **(Amended Notice, Section III, ¶18).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 6, Section III, ¶18).

16. At the time of the conviction, Mr. DiNapoli was an officer, director and shareholder of Bio Energy Corporation.

- Intervenors' Ex. 40 (Consent Resolutions of the Shareholders and Directors of Bio-Energy Corporation).
- Transcript III, p. 68, ll. 15-23, p. 69, ll. 1-22 (Dell'Orfano).

17. On April 10, 2002, Bio Energy Corporation filed additional information with DES in support of its pending solid waste facility application, including information relating to site layout and traffic, easement rights obtained by Bio Energy Corporation

as owner of the site, revised operating plan provisions, a proposed facility closure plan, and other items requested by DES. However, Bio Energy did not disclose Mr. DiNapoli=s conviction or attach any Compliance Statement warranting a permit notwithstanding that conviction.

- Intervenors' Ex. 32 (April 10, 2002 correspondence, stamped received by DES on April 12, 2002).
-

18. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction. **(Amended Notice, Section III, ¶19).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 6, Section III, ¶19).
- Intervenors' Ex. 37 (2002 Permit).

19. The Permit (also referenced herein as the "2002 Permit") referred to Bio Energy Corp.=s application received on October 9, 2001 and "Standard Permit Application - response to request for additional information, received April 12, 2002." The latter post-dated DiNapoli=s felony conviction and was the effective date of the application, that is, the "complete application" contemplated by the regulations.

- Intervenors' Ex. 37, at INT0605 (2002 Permit, Section II).

20. The Permit regulated both the construction of the incinerator Facility and the post-construction operation of the incinerator Facility.

- Intervenors' Ex. 37, at INT0607 (2002 Permit, ¶ 6).

21. Dell'Orfano and Smith learned of DiNapoli's conviction by at least mid-June, 2002.

- Intervenors' Ex. 1, Respondent's Answer to Amended Notice, Page 7, Section III, ¶21).
- Transcript II, pp. 234-236 (Dell'Orfano).

22. On June 12, 2002, Bio Energy executed a Purchase and Sale Agreement conveying the Bio Energy Facility, including the buildings, the underlying property, most of the facility's equipment and machinery, and "to the extent transferable, all permits, licenses, authorizations and approvals issued or granted to Seller by any governmental agency . . ." to a new entity, Bio Energy, LLC. The Permit was specifically listed as one of the transferred assets. The agreement was executed on behalf of both buyer and seller by William Dell'Orfano. Mr. Dell'Orfano was listed as President of Bio Energy Corporation, and Manager of Bio Energy, LLC. **(Amended Notice, Section III, ¶20).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 6, Section III, ¶20).
- Intervenors' Ex. 41 (Purchase and Sale Agreement).

23. The Consent Resolutions of the Shareholders and Directors of Bio Energy Corporation, relating to the sale of the Facility to Bio Energy LLC, specified as follows:

> That the Corporation be and hereby is authorized, empowered and directed to sell, transfer and convey to Bio Energy LLC, a New Hampshire limited liability company which is also wholly owned by the shareholders of the Corporation, all of the real and personal property assets (whether tangible or intangible) of the Corporation related to or used or useful in the operation of its power plant (with the exception of the CBI crusher)...
>
> - Intervenors Ex. 40.

24. Also on June 12, 2002, Bio Energy Corp. and Bio Energy LLC effected the transfer of the Facility and Permit to Bio Energy LLC by executing a "Bill of Sale, Assignment and Assumption Agreement," evidencing that Bio Energy Corp. "DOES HEREBY IRREVOCABLY SELL, ASSIGN, CONVEY, LICENSE AND OTHERWISE TRANSFER AND DELIVER to [Bio Energy LLC] all of Seller's right, title, benefit and interest in and to the Personal Property, the Intangible Property and the

Permits, as such terms are defined in the Purchase Agreement and specifically including, but not limited to, those items of said Property listed on the attached Exhibit A, TO HAVE AND HOLD the same unto Buyer and the successors, assigns and legal representatives of Buyer forever." Exhibit A thereto listed the transferred assets, including the 2002 Solid Waste Permit. Bio Energy LLC also agreed in the Bill of Sale "to perform and be responsible for, any and all obligations, duties and liabilities related to the said Property...."

- Intervenors' Ex. 42 (Bill of Sale).

25. The principals of Bio Energy Corporation and Bio Energy LLC, Messrs. DiNapoli and Dell'Orfano, transferred Bio Energy Corporation's assets to Bio Energy LLC so that Bio Energy could be dissolved – which enable them to reap certain tax benefits from the sale of its rate order contract with Public Service of New Hampshire; the intent was for Bio Energy LLC to continue the operations of Bio Energy Corporation with the same owners, officers, directors, and employees – the only change being one of corporate form.

- Transcript II, p. 38, line 16 to p. 39, line 9 (Smith: Q: So there weren't any operational or ownership changes contemplated through this sale? A. **No.** Q. Other than the name of the entity going from Bio Energy Corp. to Bio Energy, LLC? A. **Yes. In order to – in order to realize the tax situation, it was told to me that Bio Energy Corp. had to be dissolved, and a new entity would be brought into existence, which was going to be Bio Energy, LLC. And they were going to continue the operations that Bio Energy Corp. had previously operated.**")
- Transcript II, p. 126, ll. 2-13 (Smith: "Q. So that at the point of that transfer in June of 2002, there was no contemplation that the corporation was going to continue in any capacity whatsoever to operate the Bio Energy facility, correct? A. **Right. It was going to be dissolved.** Q. And the whole concept was that Mr. DiNapoli and Mr. Dell'Orfano would continue in the business as equal owners and operators of that facility, correct? A. **That was the plan that was told to me, yes.**")
- Transcript III, p. 39, l. 19 – p. 40, l. 23 (Dell'Orfano).

- Transcript III, p. 78, l. 14 – p. 79, l. 1 (Dell'Orfano: "...it was your intention that the corporation was going to put everything to the LLC, and that you ... and Mr. DiNapoli would be continuing on as the LLC? A. **That's correct.** Q. As 50 percent owners? A. **That's correct.**).

26. On June 14, 2002, Messrs. Dell'Orfano and DiNapoli provided written notice to Bio Energy LLC (i.e., themselves) confirming that "as part of a total liquidation of Bio Energy Corporation the current receivable being held from the sale of the real and personal property assets of Bio Energy Corporation ... has been distributed to Mr. Anthony DiNapoli and William Dell'Orfano." That notice further confirmed that "Anthony DiNapoli and William Dell'Orfano will convert the above referenced receivables into a capital contribution to Bio Energy LLC."

- Intervenors' Ex. 45.

27. At no time before or since this transaction, transferring the Facility to Bio Energy LLC, has DES granted a Permit Modification – or even been asked to grant a Permit Modification – authorizing the transfer of the Facility to Bio Energy LLC 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...." See, for example:

- Transcript I, p. 238, ll. 12-23 and p. 239, ll. 1-20 and p. 246, ll. 4-12 (Smith).
- Transcript II, p. 83, ll. 7-22 (Smith).

28. After the June 2002 sale of the Facility, and consistent with Bio Energy LLC assuming the responsibility for Facility operations, Harry Smith, in his role as Vice President of Operations for Bio Energy LLC, commenced efforts to notify governmental authorities and seek permit amendments/transfers to reflect the transfer of the Facility to Bio Energy LLC, which included permit amendments and transfers

from Bio Energy Corporation to Bio Energy LLC of the Facility's Title V Operating Permit (air), NPDES permit (water discharges), software licenses, certified waste derived product approval, hazardous waste identification number, and above ground storage tank registrations.

- Transcript II, p. 52, line 1 to p. 54, line 17 (Smith: Testifying about his role in these notices and transfers as VP Operations of Bio Energy LLC).
- Intervenors Exs. 47 (request re Title V Operating Permit) and 49 (Administrative Amendment to Title V Operating Permit, certifying that the permit is granted to Bio Energy LLC and identifying Mr. Dell'Orfano, President of Bio Energy LLC, as the "Responsible Official" and Harry Smith, "Plant Manager" of Bio Energy LLC, as the "Technical Contact").
- Intervenors' Ex. 48 (NPDES permit).
- Intervenors' Ex. 54 (software licenses);
- Intervenors' Ex. 61 (hazardous waste identification number).
- Intervenors' Ex. 62 (certified waste-derived product).
- Intervenors' Ex. 63 (aboveground storage tank registrations).

29. On or about July 1, 2002, Bio Energy submitted a request to the Air Resources Division ("ARD") of DES to transfer the Title V air permit from Bio Energy Corporation to Bio Energy, LLC. Under the applicable administrative rules, a change in ownership for purposes of a Title V permit is considered an Administrative Permit Amendment, and does not require a background investigation. **(Amended Notice, Section III, ¶23).**

- Admitted (see Respondent's Answer to Amended Notice, Page 7, Section III, ¶23).

30. None of the programs notified of the change required a background investigation in conjunction with a change of ownership. In correspondence associated with the name change, Bio Energy indicated that "[e]ffective September 1, 2002 all of the assets owned by Bio Energy Corporation were transferred to Bio Energy LLC." However, Bio Energy did not apply to the DES solid waste program for permission to

transfer the solid waste Permit to Bio Energy, LLC. **(Amended Notice, Section III, ¶25, Excerpt Only).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 8, Section III, ¶25).

31. For any permits that could not be effectively transferred to Bio Energy LLC, Bio Energy's officials initially intended that those permits would become void and that Bio Energy LLC would apply for an original permit in its own name; it was never intended that the failure to obtain approval to transfer approval would in any way affect the sale of the Facility to Bio Energy LLC.

- Transcript II, p. 40, line 17 to p. 42, line 7 (Smith: "Q. Do you have any understanding of what the consequences would be if any of these permits could not be transferred to the LLC? A. **Yes. Basically, some of the permits were not transferable, and we would have to start over again and apply for the permits from the beginning rather than transfer them.**").

32. Bio Energy had originally applied for a solid waste permit in 2001 because it proposed to burn waste wood material classified as solid waste, which made the operation an incineration facility under the solid waste rules. The company did not propose to process wood material into wood fuel chips at the Bio Energy facility, and no permit was issued for that activity. **(Amended Notice, Section III, ¶26).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 8, Section III, ¶26).

33. According to the facility's Title V air permit issued by the ARD, the "significant activities" at the facility consist of operation of a wood-fired boiler and circulation water cooling tower. **(Amended Notice, Section III, ¶27).**

- Admitted (see Respondent's Answer to Amended Notice, Page 8, Section III, ¶27).

34. As a practical matter, the activity allowed under the solid waste permit was the same as the activity allowed under the air permit: burning fuel generated from waste wood material to create electricity. **(Amended Notice, Section III, ¶28).**

- Transcript I, p. 175 (Guilfoy: "Q: So given all of that, would it be fair to say that there is substantial overlap between the state solid waste permitting program and the state air permitting program as it regards operation of incinerators? A. **Yes.**)

35. On or about July 5, 2002, Bio Energy Corp. served a notice of filing of a Type IV permit modification application relating to the transfer of the Facility and 2002 Permit from Bio Energy Corp. to Bio Energy LLC. This Notice reflected Bio Energy's initial intent to request that the Department transfer the solid waste permit – through a "Type IV Modification for Standard Permit" – from Bio Energy Corporation to Bio Energy LLC. Indeed, the transfer had already occurred – unlawfully, because it proceeded without the Department's prior approval.

- Intervenors' Ex. 50.
- Transcript I, p. 238, ll. 12-23 and p. 239, ll. 1-20 and p. 246, ll. 4-12 (Smith).
- Transcript II, p. 83, ll. 7-22 (Smith).

36. After circulating this Notice, Bio Energy decided not to file the actual transfer application. This decision was based on the realization that it would have to disclose DiNapoli's conviction in that application and that such disclosure would create problems with the transfer of the waste permit from Bio Energy Corp. to Bio Energy LLC.

- Regenesis' Response to the State's First Set of Request to Dell'Orfano, p. 2, ¶5.

- Regenesis' Response to the State's First Set of Request to Smith, p. 2, ¶5.
- Transcript I, p. 243, ll. 8-22 (Smith).
- Transcript II, at pp. 63-65 (Smith: **"...when we were filling out the – when it became clear that it was an issue, a problem, was when we were preparing the transfer applicaton"**).

37. 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. The scheme 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 and related communications, 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. See, for example, the following:

- Transcript II, at pp. 75-81 (Smith: "...**Mr. Dell'Orfano explained to me, that by Mr. DiNapoli resigning, the LLC entering into a lease with Regenesis Corp., that would take him totally out of the project,and he would nave no involvement.** Q. That would put him

into a position where the compliance certification and the transfer application would not have to pertain to him and would not have to disclose his conviction? A. **That would put him in the position of a property owner only, and he would have no involvement in the facility, and, therefore, Mr. Dell'Orfano could truthfully certify that there were no current members, officers, directors convicted of a felony for the previous permittee and the proposed permittee.")**

- Transcript II, at p. 147, l. 20 – p. 148, l. 1 (Smith: "Q. All of these companies, PetroFiber and their land, and this whole process, the only one in which you got DiNapoli out of it was the one where you had to make the disclosure to the DES, right? A. **Yes.**").
- Transcript II, p. 150, l. 17 – p. 151, l. 2 (Smith: "Q. In order to avoid the problems that resulted from disclosing Mr. DiNapoli's criminal conviction on the solid waste transfer permit, Mr. Dell'Orfano involved yet another company he owned, leasing the assets to it, and then listing it as the proposed operator, true or not? A. **Yes.** Q. That is true, right? A. **Yes.**")
- Transcript II, p. 153, l. 16 – p. 154, l. 3 (Smith).
- Transcript III, p. 94, l. 8 – p. 95, l. 9 (Dell'Orfano: Q. In order to avoid the problems that would result from disclosing Mr. DiNapoli's criminal conviction on the solid waste transfer permit, you involved yet another company you owned, right? **A. Yes.** Q. And that was Regenesis? **A. Yes.")**
- Transcript III, p. 171-173 (Dell'Orfano testimony relating to DiNapoli's resignation from Bio Energy Corporation).
- Intervenors' Ex. 69, at INT0750-753; State Ex. 14 (Notice of Filing sent to public in December, 2002, falsely identifying "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," and also falsely stating that "Bio Energy Corporation owns and operates [the Facility]," and omitting any reference at all to Bio Energy LLC.
- Intervenors' Ex. 68, at INT0716-722 (transmittal letter for Notice of Filing, on Bio Energy Corporation letterhead and falsely stating that the Application related to "Bio Energy Corporation's power generation facility."
- Intervenors' Ex. 68, December, 2002 Application, falsely or misleadingly:
    - identified "Bio Energy Corporation" as the "Facility name" and "existing permittee" (Intervenors' Ex. 68, at INT0731-732);
    - 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;

- failed to note in Section IV(1) of the Application that Bio Energy LLC already owned the property (Intervenors' Ex. 68, at INT0733), although identifying as the post-transfer property owner; and
- otherwise 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.

➢ Intervenors' Ex. 88 (Dell'Orfano response to request for clarification from AG Office regarding the relationship of Xgenesys, Regenesis and Bio Energy LLC. Response 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 did not mention Bio Energy LLC at all).

➢ Transcript I, p. 118-119 (Nickerson: testifying that although DiNapoli's role as a member of Bio Energy LLC was disclosed, the LLC's role in the operation of the Facility operations was not disclosed and it was not characterized as an applicant or proposed permittee).

➢ Transcript II, at 207-208 (Dykstra: testifying that when he 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.)

➢ See other Proposed Findings of Fact herein.

38. Mr. Dell'Orfano purportedly asked Mr. DiNapoli to resign from Bio Energy Corporation and Bio Energy LLC due to concerns about how his felony conviction might impact the company's solid waste facility Permit and the transfer of that Permit to the LLC. Mr. DiNapoli agreed to resign from Bio Energy Corporation, which had already sold the Facility to the LLC and was in the process of being dissolved. He also agreed to sell his interest in the LLC, but Mr. Dell'Orfano was not willing to pay him the asking price.

- Transcript III, p. 88, ll. 2-7 (Dell'Orfano: "Isn't the fact, Mr. Dell'Orfano, that Mr. DiNapoli wanted to sell you his interest, and you refused to pay his price? **A. It was – it was a very, very, very, very outrageous situation. That's correct, I refused to pay what he was looking for.")**

39. Mr. DiNapoli did not resign from Bio Energy, LLC. From at least August 30, 2002 to the present, Mr. DiNapoli has been a member and a creditor of Bio Energy, LLC. From July 29, 2003 to the present, Mr. DiNapoli has also been a managing member of Bio Energy, LLC. **(Amended Notice, Section III, ¶22).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 7, Section III, ¶22).
- Intervenors' Ex. 22 (Amendment, Bio Energy LLC, dated July 29, 2003 with an effective date of the appointment stated as January 21, 2002);
- Transcript III, p. 105, l. 18 – p. 106, l. 18 (Dell'Orfano, confirming retroactive effective date of DiNapoli's appointment to Managing Member as January, 2002).

40. On August 29, 2002, Dell'Orfano obtained a name change for Terramex Corporation to Regenesis Corporation and DiNapoli resigned from and turned in his shares of Bio Energy Corp.

- Intervenors' Ex. 1, Regenesis' Response to the State's First Set of Request to Dell'Orfano, p. 2, ¶4.
- Transcript III, p. 94, l. 8 – p. 95, l. 8 (Dell'Orfano).

41. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State. **(Amended Notice, Section III, ¶24).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 7, Section III, ¶24).
- Intervenors' Ex. 56 (Consent Resolutions of the Shareholders and Directors of Bio-Energy Corporation, resolving, inter alia, "That the Corporation be dissolved and wound up as of August 30, 2002....").

42. As of August 30, 2002, Bio Energy LLC was the sole owner and operator of the Facility. It has remained the owner and operator of the Facility well beyond the date the DES issued the Type IV Modification to the Permit in 2003 – as Bio Energy LLC

has represented to numerous governmental officials on contexts other than the solid waste context.

- See Proposed Finding 55 and supporting citations.
- Transcript II, p. 51, line 8 - p. 52, line 16 (Smith: testifying that his activities at the Facility in August, 2002 were in his role as Vice President of Operations for Bio Energy LLC).

43. On December 11, 2002, Bio Energy Corporation, Bio Energy, LLC and Regenesis Corporation filed with DES an application to transfer the Permit to Regenesis ("the Transfer Application"). All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy, LLC account. Corporate officials represented to DES and the AGO that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the Bio Energy background investigation. With the exception of Mr. DiNapoli, the officers and directors of Regenesis Corporation were the same as the officers and directors of Bio Energy. **(Amended Notice, Section III, ¶29).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 9, Section III, ¶29).

44. On the Transfer Application, William Dell'Orfano signed, on behalf of both *Bio Energy Corp. and Regenesis,* the *purported* existing permittee and the *purported* proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy's officers or directors had been convicted of a felony during the five years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached. **(Amended Notice, Section III, ¶30 – modified language in italics).**

- Admitted, as to unmodified language (see Respondent's Answer to Amended Notice, Page 10, Section III, ¶30).

45. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy Corp., Bio Energy LLC, or Regenesis inform the DES solid waste program that the Facility had already been transferred to Bio Energy LLC and that Bio Energy LLC was the operator of the Facility and had been since June, 2002.

- Intervenors' Ex. 68 (Transfer Application).

46. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy *Corp., Bio Energy LLC, or Regenesis* inform the DES solid waste program that Bio Energy Corp. had been dissolved. **(Amended Notice, Section III, ¶31 – modified language in italics).**

- Intervenors' Ex. 68 (Transfer Application).
- Transcript I, p. 154, l. 17 to p. 155, l. 11 (Guilfoy: testifying that disclosure of Bio Energy Corp.'s dissolution would have raised the question of "do we have a valid permit if there's no permittee.")

47. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesis inform the DES solid waste program of the purported transfer of the Permit to Bio Energy, LLC. **(Amended Notice, Section III, ¶32).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 12, Section III, ¶32).

48. 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 other environmental permits associated with the facility were held not by Regenesis but by Bio Energy, LLC. **(Amended Notice, Section III, ¶33).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 12, Section III, ¶33).

49. 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 Mr. DiNapoli had been convicted of a felony, that he had resigned from any company, or that there were any concerns about his continued involvement with the facility.

(Amended Notice, Section III, ¶34).

- Admitted* (see Respondent's Answer to Amended Notice, Page 13, Section III, ¶34).
- Transcript I, p. 232-233 (Smith: "Q: So you don't remember ever going to the agency with questions about how to fill out a form? A: **Oh, yeah, all the time.** Q: And when you did have those questions, did the agency help clarify those questions? A. **Yes.** Q. But you did not bring your concern about Mr. DiNapoli to the agency's attention? A. **That's correct.**)

50. 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.

(Amended Notice, Section III, ¶35).

- Admitted* (see Respondent's Answer to Amended Notice, Page 14, Section III, ¶35).
- Transcript II, at p. 71, ll. 3-7 (Smith: "I assumed that Mr. Dell'Orfano did not – was not successful in buying out Mr. DiNapoli, because we're still dealing with him. I mean, he's – he's – to my knowledge, he is still a member of Bio Energy, LLC").
- Transcript II, at p. 147, l. 20 – p. 148, l. 1 (Smith: "Q. All of these companies, PetroFiber and their land, and this whole process, the only one in which you got DiNapoli out of it was the one where you had to make the disclosure to the DES, right? A. **Yes.**").

51. On the Transfer Application, Mr. Dell'Orfano signed the following statement on behalf of both the *purported* existing permittee (Bio Energy Corporation) and the

proposed new permittee (Regenesis): "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply." **(Amended Notice, Section III, ¶36 – modified language in italics).**

- Admitted, as to unmodified version (see Respondent's Answer to Amended Notice, Page 14, Section III, ¶36).

52. In a lease executed on December 6, 2002, Bio Energy LLC purported to lease to Regenesis Corporation the land, buildings and equipment at the Facility. Under the lease agreement, the base rent to be paid to the LLC was directly related to Regenesis= net cash flow as defined therein. Accordingly, Bio Energy LLC and its owners, including DiNapoli, stood to profit from the Facility=s operations and in direct relation to Regenesis' profits.

- Intervenors' Ex. 67 (Lease; see Paragraph 3, "Rent").

- Transcript II, pp. 88-89 (Smith: "Q. So the amount that Bio Energy, LLC makes from this lease is dependent upon what Regenesis makes as a result of its operations, correct? A. **Yes.** ... Q. So the LLC's base rent is tied to the profits of Regenesis from these operations, correct? A. **It's tied to the profits of the facility, how much the facility takes in in gross revenues.** Q. And Mr. DiNapoli's own revenue from Bio Energy, LLC, therefore, is dependent upon the profits of Regenesis' operations at this facility? A. **Correct.**").

53. The lease term is 20 years. However, according to Section 2 of the Closure Plans for the Facility, filed with the DES by Bio Energy Corp. (dated October 5, 2001) and later by Regenesis (dated February 12, 2003), AThe anticipated remaining site life of the facility is 30 years,@ and may be extended beyond 30 years by upgrading and maintaining the facility. In addition, under section 3.1.2 of the Lease, Bio Energy LLC

retains responsibility for all capital improvements, facility improvements and environmental law changes requiring facility modifications. Accordingly, Bio Energy LLC retains responsibility for complying with numerous environmental laws governing the Facility during the lease term and all operational responsibility after termination of the Lease, including post-closure obligations.

- Intervenors' Ex. 67 (Lease).
- Intervenors' Ex. 92 (Closure Plans).
- Transcript II, p. 87 (Smith: testifying that life of Facility may be 30 years).
- Transcript II, p. 89, l. 22 – p. 90, l. 16 (Smith: **"It's my understanding that the function of the lessor [Bio Energy LLC] is to pay for the capital improvements needed at the facility. That's my understanding of what the role of the lessor is.** Q. Even after Regenesis takes control, if it ever does, of the operations of the facility? A. **If there are new capital improvements required because of an environmental law change, then the lessor would have to pay for those, yes.**")

54. Although the lease was executed in December, 2002, Regenesis was not licensed to conduct business in New Hampshire until January 21, 2003.

- Transcript II, p. 154, ll. 18-21 (Smith).

55. The lease to Regenesis notwithstanding, Bio Energy LLC's control over the operations of the Facility (including but not limited to maintenance, repair and construction activities) continued well beyond the date the DES issued the Type IV Modification to the Permit in 2003. For example, on January 14, 2003, Bio Energy LLC's consultant, GZA, submitted a Title V Operating Permit Renewal Application for Bio Energy, LLC regarding its proposed operation of the Bio Energy Facility. Section 3.2.1 of the report specifies that "Bio Energy LLC is committed to operate the Bio

Energy facility in compliance with all applicable requirements." Section 3.2.2 of the report specifies that "Bio Energy LLC intends to operate the Bio Energy facility...."

The accuracy of the report is certified by Dell'Orfano. See, for example, the following:

- See CFNH's Proposed Finding 42 and supporting citations.
- Intervenors' Ex. 72 (GZA Report).
- Intervenors' Ex. 99 (Bio Energy LLC Title V permit modification engineering summary, updated May 21, 2003; "Bio Energy owns and operates an electric utility generating station...." (INT1306)).
- Intervenors' Ex. 75 (Bio Energy LLC correspondence to DES ARD, dated January 10, 2003)
- Intervenors' Ex. 129 (June 15, 2004 Agreement between Dell'Orfano and DiNapoli; "Dell'Orfano and DiNapoli are the members and Manager Members of Bio Energy LLC ... engaged in the business of developing and operating an electric power-generating plant at its site in West Hopkinton, New Hampshire.")
- Intervenors' Ex. 35 (correspondence and reports related to Facility's Title V Operating Permit).
- Intervenors' Ex. 107 (Minutes of Bio Energy LLC Management Meeting, July 29, 2003: Discussing nomination of DiNapoli as a Managing Member and ... "the cash that is currently in a separate Bio Energy LLC account that was provide by Tony DiNapoli..." and Dell'Orfano's interest in starting construction of the Facility, etc...) and Transcript III, pp. 129-133 (Dell'Orfano testimony regarding same).
- Intervenors' Ex. 117 (Minutes of Bio Energy LLC Management Meeting, dated September 16, 2003: Discussing Dell'Orfano's proposal "to raise additional capital in furtherance of the business plan of the LLC .... Mr. Dell'Orfano suggested that he would lend up to [redacted] to meet the construction deadline and other operation costs...") and Transcript III, pp. 134-141 (Dell'Orfano testimony regarding same).
- Intervenors' Ex. 237 (Court filing by Bio Energy LLC in litigation with Town, stating on p. 7 that "Bio Energy [LLC} intends to utilize, as it has always intended to utilize, as fuel only those woodchips expressly allowed for under its Title V permit ...") and Transcript III, pp. 142-146 (Dell'Orfano's testimony re same).
- Intervenors' Exs. 127, 128, 129, 50, 30, 63, 68 and Transcript III, at pp. 147-149 (attorney Lajoie's offer of proof regarding same).
- Transcript II, p. 91, l. 18 – p. 92, l. 10 (Smith: "Q. On a day-to-day basis in connection with your activities at the facility, am I correct that there is no distinction made between those activities conducted by you in your role as vice president of the operations for the LLC versus vice

president of the operations for Regenesis, is that correct? A. **At this time while the facility is not physically operating, that's correct.).**

- Transcript II, pp. 97-100 (Smith).

56. Given Bio Energy LLC's responsibilities and authority with respect to the Facility, and, among other facts, Mr. DiNapoli's responsibilities and authority as a 50% owner and Member of Bio Energy LLC, and later as a Managing Member of Bio Energy LLC, and Mr. DiNapoli's direct involvement in the financing of Bio Energy LLC's activities at the Facility, Mr. DiNapoli had managerial, supervisory or substantial decisionmaking authority and responsibility for the management of Facility operations and compliance with the Permit at the time the Type IV Permit Modification Application was filed in December, 2002.

- Transcript I, p. 243, l.23 through p. 245, l. 4 (Smith).
- Transcript II, p. 84 (Smith: "**According to the lease, it's the LLC's responsibility to pay for, to fund all activities until the facility is operational and able to generate power.**").
- Transcript III, pp. 89-94 (Dell'Orfano: Discussing DiNapoli's continued involvement in Bio Energy LLC).

57. On or about February 14, 2003, Regenesis Corporation applied for a Type IA Modification to the Permit ("Type IA Modification Application") seeking authority to burn 100% processed construction and demolition wood, instead of 50%. The Type IA Modification Application contained many of the same false and/or misleading representations and omissions as the Transfer Application and otherwise omitted required information.

- Intervenors' Ex. 84 (Type IA Modification Application).

58. Among other things, it continued to falsely characterize Bio Energy LLC as merely the property owner and Regenesis as the permittee/applicant. It also included a

compliance certification regarding the "applicant" to the same effect as in the Type IV Transfer Application.

- Intervenors' Ex. 84 (Type IA Modification Application).

59. DENIED WITH RESPECT TO "or full notification of all abutters"; OTHERWISE GRANTED-The public hearing on the Type IA Modification Application was held on May 22, 2003, without the benefit of complete applications, accurate information related to, among other things, the roles of the various entities owned by Messrs. DiNapoli and Dell'Orfano, information regarding Mr. DiNapoli=s conviction, a compliance statement, or full notification to all abutters.

- Intervenors' Ex. 95 (hearing notice).
- See CFNH's Proposed Findings 63-78 (related to application and hearing notices).

60. Because Mr. DiNapoli was an officer or director of Bio Energy Corporation when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell'Orfano provided false compliance certifications in the December 2, 2002 Transfer Application and the subsequent Type IA Modification Application. With respect to the 2002 Transfer Application, Bio Energy Corp. was a named applicant and Mr. DiNapoli was an officer, director and more than 10% owner of Bio Energy Corp. at the time of his conviction. Those compliance certifications also extended to Mr. DiNapoli due to his continued involvement with Bio Energy LLC and his and the LLC's involvement with the Facility. The regulatory definition of "applicant" includes a facility owner who has obligations to make facility modifications to comply with environmental rules, such as Bio Energy LLC. Env-Wm 102.07. The certifications were false as to Mr. DiNapoli and Bio Energy LLC due to DiNapoli=s prior conviction.

- Intervenors' Ex. 68 (Transfer Application).
- Intervenors' Ex. 84 (Type IA Modification Application).
- CFNH's Post-Hearing Memorandum (see discussion in "Argument", Section I.A).

61. The solid waste rules and transfer application form provide an avenue for disclosing information such as environmental violations and criminal convictions, through submission of a Compliance Report. It was reasonable for the DES solid waste program to expect that an applicant with concerns about disqualifying information would bring it to the agency's attention through such a report, as requested on the form. **(Amended Notice, Section III, ¶45).**

- Admitted as to the first sentence; Denied as to the second (see Respondent's Answer to Amended Notice, Page 21, Section III, ¶45).

62. 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. **(Amended Notice, Section III, ¶46).**

- Intervenors' Exs. 73, 79 and 80.

63. The Bedford Corporation and PetroFiber Corporation own property abutting the Bio Energy Facility and are under the same or related ownership, management and control as Bio Energy Corporation, Bio Energy LLC and Regenesis Corporation. The

most significant link is that William Dell'Orfano is either President, Managing Member, or Director of all of the above named companies and owns all or part of each company.

- Stipulated Facts as to Abutter Notification Issues, Paragraphs B.3-5 & C.3-5.
- Intervenors' Exs. 89, at INT1056; 140, at INT1588.
- Transcript II, p. 216, ll. 11-15.

64. Additionally, Anthony DiNapoli's is an owner and managing member of Bio Energy LLC, and an owner, officer and director of The Bedford Corporation and PetroFiber Corporation.

- Stipulated Facts as to Abutter Notification Issuess, ¶¶ B.3-4 & C.3-4.
- Intervenors' Exs. 107, (at INT1369-1370); 133, at INT1505.

65. Notices of the application for Bio Energy Corporation's December, 2002, Type IV Solid Waste Permit Modification went to the following as abutters: The Bedford Corporation (owner of Lots 18.01, 19, 19.01, and 25.2), PetroFiber Corporation (owner of Lot 25.1), Papertech Corporation (owner of Lots 18, and 26), CHI Energy, Inc. (owner of Lot 24), and the United States of America-Hopkinton Everett Reservoir (owner of Lots 22 and 23).

- Stipulated Facts as to Abutter Notification Issues, at ¶ B.2.

66. Notices of Regenesis' February, 2003, application for a Type IA Modification to the Solid Waste Permit went to the following as abutters: The Bedford Corporation (owner of Lots 18.01, 19, 19.01, and 25.2), PetroFiber Corporation (owner of Lot 25.1), Papertech Corporation (owner of Lots 18, and 26), CHI Energy, Inc. (owner of Lot 24), and the United States of America-Hopkinton Everett Reservoir (owner of Lots 22 and 23).

- Stipulated Facts as to Abutter Notification Issues, at ¶ C.2.

67. PetroFiber Corporation is a Delaware Corporation located at 749 East Industrial Drive, Manchester, NH 03109. William Dell=Orfano and Anthony DiNapoli are its owners, officers and directors.

- Stipulated Facts as to Abutter Notification Issues, at ¶¶ B.3 & C.3.
- Intervenors' Ex. 89, at INT1056 and Ex. 143, at INT1697-1700.

68. The Bedford Corporation is a Nevada Corporation also located at 749 East Industrial Drive, Manchester, NH 03109. William Dell=Orfano and Anthony DiNapoli are its owners, officers and directors.

- Stipulated Facts as to Abutter Notification Issues, at ¶¶ B.3 & C.3.
- Intervenors' Ex. 89, at INT1056 and Ex. 142, at INT1668-1675.

69. Notices of the Transfer Application to both PetroFiber Corporation and The Bedford Corporation were sent on December 2, 2002 to the same address: Ac/o Bio Development, 749 East Industrial Park Drive, Manchester, NH 03109.@ This was also an address of Bio Energy Corp., Bio Energy LLC and Regenesis Corp.

- Stipulated Facts as to Abutter Notification Issues, at ¶ B.2.
- Regenesis' Exs. 43 & 48.
- Intervenors' Exs. 59, 60, 68 (at INT0731-0734, INT0739 & INT0744), 78, and 140 (at INT1582-1583, INT1585-1589).

70. The Notices of the Transfer Application that were sent to PetroFiber Corporation and The Bedford Corporation were received by the same person.

- Regenesis' Ex. 43.

71. Notices of the Type IA Modification Application to both Petrofiber Corporation and The Bedford Corporation were sent on January 16, 2003 to the same address: Ac/o Xgenesys Development, 749 East Industrial Park Drive, Manchester, NH.@ This was the same address listed for the applicant, Regenesis itself and the owner, Bio Energy, LLC.

- Regenesis' Ex. 50.

- Intervenors' Ex. 59; 60; 78; 84, (at INT0872; 86, at INT0930, INT0936, INT0945, INT0947-0948); and 140, (at INT1582-1583, INT1585-1589).

72. Janice J. Dell'Orfano received the notice of the Type IA Modification Application for both PetroFiber Corporation and The Bedford Corporation.

- Regenesis' Ex. 50.

73. Martin and Donna Grady, III own properties that abut The Bedford Corporation at 1468 Maple Street, Contoocook, New Hampshire, 03229. These properties are located on Map 218, Lots 2, 3 and 60.

- Intervenors' Ex. 146, (at INT1725-1727, INT1754-1755).
- Regenesis' Ex. 42.

74. Stonynook Farm, Inc. owns property that abuts The Bedford Corporation at 47 Emerson Hill Road, Contoocook, New Hampshire, 03229. This property is located on Map 210, Lot 15.

- Intervenors' Ex. 146, (at INT1732 & INT1754).
- Regenesis' Ex. 42.

75. Roger and Norma Andrus own property that abuts The Bedford Corporation at 197 Rolfe Pond Drive, Contoocook, New Hampshire, 03229. This property is located on Map 210, Lot 16.

- Intervenors' Ex. 146, (at INT1733 & INT1754).
- Regenesis' Ex. 42.

76. Notice of the 2002 Type IV Transfer Application was not sent to Martin and Donna Grady, III, Stonynook Farm, Inc., or Roger and Norma Andrus.

- Stipulated Facts as to Abutter Notification Issues, at ¶¶ B.2 & B.6.

77. Notice of the 2003 Type IA Modification Application was not sent to Martin and Donna Grady, III, Stonynook Farm, Inc., or Roger and Norma Andrus.

- Stipulated Facts as to Abutter Notification Issues, at ¶¶ C.2 & C.6.

78. By statute, DES is charged with conducting fair and procedurally proper permit proceedings.

- Admitted (see Respondent's Answer to Amended Notice, Page 26, Section II, ¶ 52).

E. The Town of Hopkinton's Requests for Findings of Fact was provided in memorandum form (dated May 20, 2005) and are granted or denied consistent with the findings of fact in this decision.

III. Analysis

A. Whether William Dell'Orfano made a false or misleading statement when he certified in December of 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 a permit transfer.

At the heart of Regenesis' case is the oft-made assertion that Mr. Dell'Orfano's certification that none of Bio Energy's officers or directors had been convicted of a felony within five years of the application date was "totally" truthful. *See, e.g.,* Memorandum of Law in Support of Regenesis Corporation, p. 1. Regenesis interpreted the applicable rules and disclosure form instructions to apply only to then-current officers, directors and partners of the "existing permittee", inexplicably without verifying with the Department whether it agreed with such a narrow interpretation. In my opinion, Mr. Dell'Orfano's certification did not comply with the requirements for disclosing the prior felony convictions of all of the permittee's officers, directors and partners. His certification that no such person had been convicted was not completely truthful in the way that DES, and most people, would understand and expect from a business filling out a government certification form.

The importance that the Legislature ascribed to preventing organizations associated with convicted felons from obtaining solid waste permits is apparent from the provisions of RSA 149-M:9, which require that a solid waste permit applicant undergo a background investigation by the Attorney General, and authorize DES to deny a solid waste permit to an organization whose principals have been convicted of a felony within five years of seeking a permit. The Department's Solid Waste Rules prohibit the issuance of a permit to an organization associated with a convicted felon, unless a convincing case can be made for granting the permit.

The Attorney General's Office conducts a thorough criminal background check on all applicants for solid waste permits and subsequent transfers and modifications, and reports its findings to DES. The instructions on the Attorney

General's Business Concern Disclosure Form filed by Mr. Dell'Orfano on behalf of Bio Energy Corporation and Regenesis (*See, e.g.*, State's and Respondent's Joint Exhibits, Exhibit 3) describe who must complete the form ("Owners, directors, officers, partners, certain equity and debt holders and key employees"), and state the level of candor and honesty that is expected:

> 3. ANSWER COMPLETELY AND TRUTHFULLY. Failure to answer all questions completely and truthfully may result in ... permit denial or revocation, and in penalties under RSA chapter 641.
>
> ...
>
> Be especially careful not to leave out information in a way that might create an impression that you are trying to hide it. For example, a minor criminal conviction probably would not disqualify the applicant, but attempting to conceal the conviction may lead to a finding of untrustworthiness, and result in disqualification. Omitting such information from this form, even unintentionally, may result in your trustworthiness being questioned.

Solid waste permit applications contain a separate requirement that an applicant certify that no related entity or individual has been convicted of any felony. The Certification of Compliance section of the Type IV Permit Modification application that was signed by Mr. Dell'Orfano certified as true that "No individual or entity listed above has been convicted of or plead (sic) guilty or no contest to a felony in any state or federal court during the 5 years before the date of the application." The individuals or entities "listed above" included "all of the existing permittee's officers, directors and partners; and all individuals and entities having managerial, supervisory or substantial decisionmaking (sic) authority and responsibility for the management of facility operations."

The certification language refers to the "existing" permittee, but it is not limited to "existing" officers, directors or partners of the existing permittee, as Regenesis now argues. To the contrary, the scope of the certification is defined as "all" of the existing permittee's officers, directors and partners. "All" of an applicant's officers, directors and partners necessarily includes present and former holders of those positions. This requirement derives from the wording of the certification itself, in contrast to the interpretation of the wording argued by Regenesis, which is based on words ("existing" or "current") that do not appear in the statute, rules or application forms. It is also 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.

The "existing permittee" in the 2002 transfer application was Bio Energy Corporation. The application was submitted to DES on December 6, 2002. Mr. DiNapoli had been an officer in the corporation, and he had been convicted of a felony on March 25, 2002. Mr. Dell'Orfano's certification that no corporate officer or director had been convicted of a felony within five years of the application date was not rendered true by

the mere device of having Mr. DiNapoli resign from the corporation. The certification was not complete, it was less than candid, and it was literally false.

Because it was false, it was also misleading. Lacking accurate information about Mr. DiNapoli's criminal background, DES approved the transfer of the permit to Regenesis on March 28, 2003 without knowledge that Bio Energy Corporation might not be eligible to hold it or transfer it. The original permit had been issued to Bio Energy on May 28, 2002, *after* Mr. DiNapoli's conviction (he, too, having failed to amend or withdraw a Personal History Disclosure Form that was no longer accurate), a circumstance that made the permit voidable, rather than transferable.

B. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the failure to disclose a felony conviction of a corporate principal.

Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that there are no circumstances by which the permittee can correct or eliminate the underlying problem. Env-Wm-306.05 defines good cause to include: violation of RSA 149-M or the Solid Waste Rules; discovery that a permit was issued based on false or misleading information; or meeting any other criteria for permit denial. Other criteria for permit denial include felony conviction of the applicant or one of its officers, directors or partners during the five years prior to the application, and the applicant's failure to demonstrate sufficient reliability, expertise, integrity and competence to operate a solid waste facility.

The ANPLA alleged that the permit should be revoked based on Mr. Dell'Orfano's false and misleading statement that none of Bio Energy Corporation's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer. 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.

C. Whether Mr. Dell'Orfano provided misleading or incomplete information to DES by failing to disclose that Bio Energy Corporation had been dissolved in the 2002 transfer application.

In an effort to avoid the impact of Mr. DiNapoli's conviction on the continued operation of the Facility, Mr. Dell'Orfano orchestrated a series of organizational changes intended to cure the "problem". For unrelated tax reasons, Bio Energy

Corporation sold the Facility (and all of its permits "to the extent transferable") to Bio Energy LLC on June 12, 2002. Bio Energy Corporation was dissolved on August 30, 2002. Mr. DiNapoli was also a principal in Bio Energy LLC, so a third company was brought in to the mix, the current permit holder and respondent in this proceeding, Regenesis. On December 2, 2002, Bio Energy Corporation, Bio Energy LLC and Regenesis filed an application with DES to transfer the permit to Regenesis that did not disclose that Bio Energy Corporation had been dissolved. On December 6, 2002, Bio Energy LLC leased the Facility to Regenesis.

The Solid Waste Rules require a permittee to obtain a Type IV permit modification before any "change in the: (1) Operational control of a facility; or (2) Ownership of the facility...". *See* Env-Wm 315.02(f) and Env-Wm 315.03(b)(4). No such approval was sought with respect to the dissolution of Bio Energy Corporation and the conveyance of its assets to Bio Energy LLC. 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 operational control and ownership of the facility while it attempted to address the permitting difficulty presented by Mr. DiNapoli's conviction.

On the transfer application, 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 on 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. Lacking accurate information about the legal status of the permit holder, DES approved the transfer of the permit to Regenesis on March 28, 2003 without knowledge that Bio Energy Corporation might not be legally capable of transferring it.

D. Whether good cause exists as provided in Env-Wm 306.05, to revoke the permit based on the failure to disclose the dissolution of Bio Energy Corporation.

The failure of Bio Energy Corporation, Bio Energy LLC and Regenesis to obtain timely approval for modifications to the permit violated the Solid Waste Rules and constitutes good cause to revoke the permit. The failure to disclose the dissolution of Bio Energy Corporation on the 2002 permit transfer application was misleading and also constitutes good cause to revoke the permit.

The ANPLA, however, did not directly allege that the permit should be revoked based on a violation for the failure to disclose the dissolution of Bio Energy Corporation in the transfer application. Accordingly, the permit cannot be revoked on this basis.

E. Whether the alleged failures to disclose the felony conviction or the dissolution of Bio Energy Corporation demonstrate that Regenesis Corporation lacks the reliability and integrity to operate a solid waste facility.

A solid waste permit applicant or permit holder must expect to, and be expected to, make an honest and complete disclosure of all relevant information, including prior criminal convictions, for the permitting process to protect the public interest. Bio Energy Corporation, Bio Energy LLC and Regenesis failed to candidly disclose Mr. DiNapoli's conviction and the dissolution of Bio Energy Corporation, despite the Solid Waste Rule requirements for DES approval of permittee ownership changes and the disclosure of felony convictions for all officers, directors, partners or managers. As described above, the false and misleading nature of the failure to disclose Mr. DiNapoli's conviction warrants a finding of good cause to revoke the permit.

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. As credibly described by Mr. Dell'Orfano, the companies' actions (and inactions) were part of a strategy to isolate Mr. DiNapoli from the core business to bring it into compliance with the regulatory restraints on association with convicted felons. The strategy was based, at least in part, on advice from competent and ethical legal counsel. Mr. DiNapoli's conviction was a matter of public record; there is no rational basis for inferring that Regenesis actually expected or intended to prevent DES from learning of the conviction.

F. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the permittee's lack of reliability and integrity.

Good cause does not exist to revoke the permit based on the permittee's alleged lack of reliability and integrity.

G. Whether the required notices to abutters in the 2002 transfer proceeding and the 2003 permit modification proceeding complied with Env-Wm 303.05 (d), and, if not, whether either of these prior proceedings should be reopened.

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. Env-Wm 303.05(d) provides that if the applicant or the owner of the facility site owns any abutting parcel of land, the notice must be sent to the owner of the next parcel not owned by the applicant or facility site owner. Notices of the 2002 transfer application and the 2003 modification proceeding were mailed to the Bedford Corporation, PetroFiber Corporation, Papertech Corporation and the United States of America-Hopkinton Everett Reservoir as owners of record of parcels abutting the Facility site.

The Bedford Corporation and Papertech Corporation share common ownership, management or control with Bio Energy Corporation, Bio Energy LLC and Regenesis

through the participation of Mr. Dell'Orfano in all of the entities. They are, however, separate legal entities for purposes of property ownership.

The notices provided to the above-named abutters complied with Env-Wm 303.05(d). The Solid Waste Rules do not require that notices be provided to additional unrelated abutting property owners if parcels adjacent to a facility site are owned by persons or entities who are legally distinct from the applicant or permittee but share a commonality of ownership or control .

IV. Conclusions of Law

The following legal conclusions are supported by the facts and law in this case (with unsupported requests marked "DENIED"):

A. DES REQUESTS (Numbered as in requesting document)

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NET CODE ADMIN. RULES Env-Wm 100— 300, 2100 et seq. ("Solid Waste Rules") to implement this program.

2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES. Under RSA 149- M:9, XII, no solid waste permit may be transferred to any other person without prior written approval of DES.

3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant "fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility."

4. Under RSA 149-M:9, IX©, DES may deny a solid waste permit application " 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."

5. Pursuant to RSA 149-M:9, III, upon request of DES "the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its officers and directors, if any, and make a report to the department." DES may also request a background investigation of the applicant in conjunction with an application to transfer a permit. RSA 149-M:9, XII(a).

6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and directs that

these forms be submitted directly to the Attorney General's Office ("AGO"), rather than to DES.

7. Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant's debt or equity, and none of the applicant's officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application.

8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.08, which establishes the existing permittee and the proposed permittee as co applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee.

9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval.

37. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that " are no circumstances by which the permittee can correct or eliminate the underlying problem ...

38. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M: 12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 3 06.05(c)).

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, JX(a).

40. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX©.

48. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested.

49. Env-Wm 303.05(d) requires that, if the applicant or the 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

State's Requests for Findings of Fact and Conclusions of Law-May 20, 2005

150. Regenesis deliberately omitted relevant facts from its permit transfer application.

151. DENIED-Regenesis officials' actions show a lack of integrity and reliability.

152. Unlike a violation of the technical requirements imposed on solid waste facilities, there is no way to remedy a lack of integrity and reliability.

153. The only appropriate remedy is to revoke the permit.

154. DENIED-The solid waste facility permit held by Regenesis is hereby revoked due to the company's lack of reliability and integrity.

B. REGENESIS REQUESTS (Numbered as in requesting document)

Respondent's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

52. Under the Solid Waste Rules, notice of filing a Standard Permit, Type IV modification permit, or Type IA modification permit application, must be given to abutters by certified mail, return receipt requested, or by hand delivery. Env-Wm 303.05(a)-(b); id. 314.08(a) (standard permits); id. 315.05(j) (Type I modifications); id. 315.08(g) (Type IV modifications).

53. In addition, with respect to permits or permit modifications that require a public hearing, the applicant must provide notice of the public hearing to, among others, abutters of the facility. See id. 304.08(i).

54. Env-Wm 303.05(d) provides that "If the applicant or the 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."

55. Env-Wm 304.08(i) contains a similar provision for notices of public hearing.

56. To determine whether these provisions have been complied with, it is necessary to determine if the applicant or the facility owner owned any parcel of land abutting the facility.

57. As found in Finding no. 47, Bio Energy Corporation (the owner of the facility at the time of the standard permit application, the existing permittee and the applicant in the standard permit and transfer permit applications) at no time owned any of the parcels of land abutting the facility.

58. As found in Finding no. 47, Regenesis Corporation (the applicant in the transfer and Type IA modification applications) at no time owned any of the parcels of land abutting the facility.

59. As found in Finding no. 47, Bio Energy, LLC (the owner of the facility site at the time of the transfer and Type IA modification applications) at no time owned any of the parcels of land abutting the facility.

60. Thus, by their terms Env-Wm 303.05(d) and 304.08(i) are inapplicable. The respective companies provided all required notice under the Solid Waste Rules and there exists no reason to reopen the various applications.

61. DENIED-I specifically reject the Intervenors' argument that Env-Wm 303.05(d) and 304.08(i) are implicated merely because the shareholders of companies that owned certain abutting parcels of land were also shareholders in the facility owner, Bio Energy, LLC.

62. The terms of the rule are clear on their face and require notice to distant property owners when the entity that owns the facility or the applicant also owns the abutting parcels of land. That is not the case here.

63. DENIED-Neither the Solid Waste Rules nor RSA 149-M require an applicant to disclose that it has filed articles of dissolution with the Secretary of State.

64. In fact, the business disclosure forms that are part of the Attorney General's background investigation do not contain any questions regarding dissolution. See Day 1 Transcript at I-81.

65. DENIED-Thus, even if Respondent failed to inform DES of Bio Energy Corporation's dissolution, it would not constitute good cause under Env-C 306.05 for permit revocation.

66. DENIED-In any event, Respondent did inform DES of Bio Energy Corporation's dissolution, through disclosure to the Attorney General that Bio Energy Corporation was "winding up," see Exh. 41 at "Page 10," by providing copies of the purchase and sale agreement to DES, see Day 1 Transcript at I-212, which documented that all of Bio Energy Corporation's assets (and permits to the extent transferable) were to be transferred to Bio Energy, LLC, and by providing to the DES a copy of the operating lease between Regenesis and Bio Energy, LLC, see Day 3 Transcript at III-49; Day 1 Transcript at I-171, which also established that Bio Energy, LLC then owned the facility.

67. DENIED-Thus, DES knew or, at the very least, should have known of Bio Energy Corporation's dissolution.

68. DENIED-As found in Finding no. 30, Mr. Dell'Orfano's certifications in the December 2002 transfer applications were true.

69. DENIED-I reject the State's and Intervenors' arguments that Env-Wm 303.14(a) requires disclosure of a felony conviction of an officer, director, or shareholder who was affiliated with the applicant at the time of conviction.

70. DENIED-Env-Wm 303.14(a) does not require disclosure of the felony convictions of "former" officers, shareholders, directors, etc. Rather, as made plain by the language of the Rule and DES' application forms, the individual certifying must identify existing officers, shareholders, directors and then certify that none of those individuals has been convicted of a felony within the preceding five years.

71. Because Anthony DiNapoli resigned from Bio Energy Corporation and returned his shares on August 29, 2002, he was not an existing officer, director, or shareholder on December 6, 2002, the date of Mr. Dell'Orfano's certification.

72. DENIED-Thus, Mr. Dell'Orfano truthfully certified that none of Bio Energy Corporation's officers, directors, or shareholders had been convicted of (or pleaded guilty or no contest to) a felony, within the preceding five years.

73. DENIED-I also reject the State's argument that it was misleading not to disclose Mr. DiNapoli's conviction because of his status as member of Bio Energy, LLC.

74. The Solid Waste Rules do not require disclosure of the conviction of a member, officer, director, or shareholder of the property owner. See Env-Wm 303.14(a)(2) (requiring disclosure of convictions of owner itself). When the Rules require disclosure of the convictions of individual officers, shareholders, or

directors of an entity, the requirement is made express. See Env-Wm 303.14(a)(5) (requiring disclosure of convictions of applicant's officers, directors, and partners).

75. DENIED-Because the Rules do not require the disclosure, it is not misleading to refrain from making the disclosure.

76. DENIED-Furthermore, the facts establish that Anthony DiNapoli had no operational role in the facility. See Finding No. 25 supra. Failure to disclose the conviction of an individual that has no input or responsibility for operations of a solid waste facility is not, as a matter of law, misleading.

77. DENIED-Because William Dell'Orfano's December 2002 certifications were truthful and not misleading, there is not good cause to revoke the permit.

78. DENIED-The State has also contended that, due to the shaking of DES' trust in Regenesis, revocation is proper even if there is no regulatory requirement to disclose Mr. DiNapoli's conviction. I reject the contention.

79. DENIED-First, the length of time between this revocation proceeding and October 2003, when DES officials became aware of the conviction, undercuts any claim that DES officials placed great importance on the failure to disclose. Second, DES may not revoke a permit based on a disclosure requirement not found in the Solid Waste Rules. See Appeal of Nolan, 134 N.H. 723, 727-28 (1991) (prohibiting oral rulemaking); Appeal of Monsier Henri Wines, 128 N.H. 191, 194-96 (1986) (rejecting argument that broad language in enabling regulation allowed Liquor Commission to refuse to list liquor based on grounds not among those enumerated in regulations).

80. DENIED-Accordingly, the proposed license action of revocation is rejected.

C. REACH'S REQUESTS (Numbered as in requesting document)

REACH'S Summary of and Proposed Findings of Fact and Rulings of Law-May 20, 2005

1. Respondent violated RSA 149-M on or around June 12, 2002 and thereafter.

a. The purported transfer of the solid waste permit for the Bio Energy Facility, from Bio Energy Corporation to Bio Energy LLC, by private agreement (a P&S Agreement) on or about June 12, 2002, without notice to and approval from NHDES, constituted a violation of RSA 149-M.
b. Pursuant to Env-Wm 315.02(f) and 315.03(a)-(b), pre-approval for a Type IV modification is required whenever there is a change in operational control or ownership of a facility.
c. If a Type IV modification had been sought, as required prior to this June 12, 2002 transaction, NHDES would have been made aware of Anthony Dinapoli's felony conviction by virtue of disclosure of the information relating to both Bio Energy Corporation and Bio Energy LLC as specified in Env-Wm 315.08 and Env-Wm 316, by operation of Env-Wm 315.03(b)(4).
d. The argument that this private agreement to transfer ownership was not effective as to the solid waste permit (only), because NHDES did not approve it, is circular and illogical, given that this argument could be used to justify any violation of RSA 149-M (or any administrative or criminal standard) by allegedly "excusing" the violative act as unauthorized and therefore a nullity. Simply because an act is claimed to be beyond the scope of legitimate corporate authority, and therefore void and/or *ultra vires* as a matter of contract law, does not mean that it did not occur. Bio Energy Corporation and Bio Energy, LLC cannot validly defend actions that violated legal standards set forth in administrative and/or criminal law by claiming that such activities are not contemplated in the contract between the parties. By Respondent's erroneous logic, no corporation (or similar entity) could ever violate an regulatory or criminal law, so long as such entities lack legitimate corporate or contractual authority to undertake the offending acts. See, e.g., RSA 293-A:3.04 ("No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid because the corporation was without capacity or power to do the act or to make or receive the conveyance or transfer," with certain exceptions for shareholder actions, actions against former officers and directors, and actions by the State to dissolve or prohibit unauthorized business).

e. 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. "An intentional misrepresentation requires a misstatement of fact for the purpose of inducing another to act or to refrain from action in reliance upon it." Basbanes' Case, 141 N.H. 1, 6 (1996); see also Carpenito's Case, 139 N.H. 168, 174 (1994). A negligent misrepresentation requires "a negligent misrepresentation of a material fact by the defendant and justifiable reliance by the plaintiff. It is the duty of one who volunteers information to another not having equal knowledge, with the intention that he [or she] will act upon it, to exercise reasonable care to verify the truth of his [or her] statements before making them." Snierson v. Scruton, 145 N.H. 73, 78 (2000) (quoting Hydraform Prods. Corp. v. American Steel & Alum. Corp., 127 N.H. 187, 200) (1985) and Patch v. Arsenault, 139 N.H. 313, 319 (1995)) (quotations and citations omitted).

2. Respondent violated RSA 149-M on or around June 12, 2002, August 31, 2002 and thereafter.

a. Furthermore, alternatively, if Bio Energy Corporation *was* somehow the permittee as of the December 2002, it was therefore necessarily the permittee up until that time and was required to obtain a Type I-B modification when it changed the facility's name and all of the property and permits (other than the solid waste permit) to Bio Energy LLC, and when Anthony Dinapoli was removed as an officer, director and shareholder from Bio Energy Corporation. These actions violated RSA 149-M.
b. Pursuant to Env-Wm 315.02(e) and 315.03(a)-(b), pre-approval for a Type III modification is required whenever there is a change in name, organizational structure, officers or directors for a facility that does not constitute a Type IV modification. Pursuant to Env-Wm 315.01(c), if the facility is not able to satisfy the requirements of Env-Wm 303.14, a Type I-B modification is required.
c. If a Type I-B modification had been sought, as required prior to the June 12, 2002 and August 31, 2002 transactions, NHDES would have been made aware of Anthony Dinapoli's felony conviction by virtue of disclosure of information relating to Bio Energy Corporation and Bio Energy LLC as specified in Env-Wm 315.07 and Env-Wm 316, by operation of Env-Wm 315.03(b)(1).

3. Respondent violated RSA 149-M on or around June, 2002 and thereafter.

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.
c. This willful course of action was also devised and executed, following careful study and over a protracted period of time, in consultation with sophisticated environmental law counsel.
d. This willful course of action was undertaken despite the fact that Respondent was aware that NHDES would have concerns and questions regarding the subject matter intended to be obfuscated.
e. Although there has allegedly been an *intention* to "remove" Anthony Dinapoli from any involvement with the Bio Energy Facility, he has, in fact, never been removed from his involvement with the ownership and operation of said Facility, and continues to have a substantial ownership, operational, managerial, financial and beneficial relationship with the Facility and the various entities involved therewith, including but not limited to Bio Energy LLC.
f. This willful course of action violated RSA 149-M and was deceptive and misleading.

4. Respondent violated RSA 149-M on or around December 2, 2002 and thereafter.

a. In light of Anthony Dinapoli's ongoing ownership and management of Bio Energy LLC, and Bio Energy LLC's substantial involvement with the management and operation of the Bio Energy Facility, Respondent did not accurately or truthfully certify, under oath, a Compliance Certification dated December 2, 2002, indicating that pursuant to Env-Wm 303.14(a)(6), "[a]ll individuals and entities having managerial or supervisory or substantial decision-making authority and responsibility for the management of facility operations or the activity(s) for which approval is being sought" met the requirements of Env-Wm 303.14(b).
b. Although there was allegedly an *intention* to "remove" Anthony Dinapoli from any involvement with the Bio Energy Facility as of the date of the Compliance Certification, he had not been, in fact, removed from his involvement with the ownership and operation of said Facility, and, in fact, had (and has) managerial and/or supervisory and/or substantial decision-making authority and responsibility for the management of facility operations or the activity(s) for which approval was being sought.

5. Respondent violated RSA 149-M on or around December 15, 2002 and thereafter.

a. The purported assignment of operational responsibility from Bio Energy LLC to Regenesis Corporation, by private agreement (a lease) on or about December 15, 2002, without notice to and approval from NHDES, constituted a violation of RSA 149-M.
b. Pursuant to Env-Wm 315.02(f) and 315.03(a)-(b), pre-approval for a Type IV modification is required whenever there is a change in operational control of a facility.
c. If a Type IV modification had been sought, as required prior to this December 15, 2002 transaction, NHDES would have been made aware of Anthony Dinapoli's felony conviction by virtue of disclosure of the information relating to Bio Energy LLC as specified in Env-Wm 315.08 and Env-Wm 316, by operation of Env-Wm 315.03(b)(4).

6. Bio Energy LLC's past and ongoing activities at the Bio Energy Facility (with Anthony Dinapoli as a owner and manager), violate RSA 149-M.

a. Pursuant to RSA 149-M:4,IX, a solid waste "facility," subject to the various requirements of RSA 149-M *et seq.*, is any "system, or physical structure for the collection, separation, storage, transfer, processing, treatment, or disposal of solid waste."
b. Pursuant to RSA 149-M:6,III, "[t]he [DES] shall have the responsibility and authority to . . . [r]egulate facilities through administration of a permit system." (emphasis added).
c. Pursuant to RSA 149-M:9,I, "[n]o person shall construct, operate, or initiate closure of a public or private facility without first obtaining a permit from the department." (emphasis added); see also RSA 149-M;4,XIV ("permit" defined as "an authorization from the department for the construction and operation of a facility") (emphasis added); North Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 614 (2004) ("[a] State permit is required before one constructs, operates or initiates the closure of a solid waste management facility," and holding "that RSA chapter 149-M a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities") (emphasis added).
d. There is no limitation on these unambiguous requirements of RSA 149-M *et seq.*, in any way supportive of Respondent's linguistic parsing so as to somehow limit clear statutory permit requirements and NHDES's jurisdiction to: (a) only the "operation" of; (b) *certain* conceptually-delineated activities within a facility.
e. Rather, a permit is required for any entity that intends to: (a) design, construct, operate or initiate closure of; (b) a facility which constitutes a

system, or physical structure for the collection, separation, storage, transfer, processing, treatment, or disposal of solid waste.

f. Bio Energy LLC is acting unlawfully relative to the Bio Energy Facility given that it does not hold a solid waste permit, and furthermore due to Anthony Dinapoli's substantial involvement with Bio Energy LLC as an owner and manager.

7. The required remedy for any or all of the foregoing violations of RSA 149-M is license revocation.

a. Pursuant to RSA 149-M:9,XI, "[a]ll permits...may be suspended or revoked for cause as provided in this chapter [RSA 149-M *et seq.*]"
b. "RSA 149-M:7 grants NHDES broad authority to adopt rules necessary to enforce RSA chapter 149-M." North Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 614 (2004).
c. Pursuant to Env-Wm 306.04, "(a) 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."
d. Good cause includes a finding that "[I]ssuance of the permit was based on false or misleading information." Env-Wm 305.06(b).
e. Good cause includes a finding that "[t]he permit holder has committed a violation of [RSA 149-M], or any rule, plan, order, or permit conditions in force under it." Env.-Wm 305.06(a) (referencing standard set forth in RSA 149-M:12, which includes the foregoing language at RSA 149-M:12,II(a)).
f. Good cause includes a finding that a permit was issued based on false or misleading information. Env-Wm 306.05(b).
g. Good cause includes a finding that the permittee or the facility meets any other criteria for initial permit denial, including a failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility. Env-Wm 306.05(c); Env-Wm 305.03(a)(1); RSA 149-M:9, IX(a).
h. Good cause includes a finding that the permittee, "[i]n 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." Env-Wm 306.05(c); Env-Wm 305.03(a)(1); RSA 149-M:9,IX(c).
i. The solid waste rules relating to Performance History Requirements are "intended to provide the [NHDES] with the information necessary to determine, as provided in RSA 149-M:9,III and IX, whether an applicant, owner, facility operator, or any of the applicant's officers, directors, partners, key employees, or major debt or equity holders, has been convicted of or pled guilty or no contest to a felony within 5 years of the

date of the permit application, or has failed to demonstrate sufficient reliability, expertise, integrity and competence to operate a solid waste facility." Env-Wm 316.01

j. 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. This is precisely the type of scenario for which the remedy of license revocation was designed, given that there are no circumstances by which the permittee could correct or eliminate such a violation or breach of the public trust. The Respondent has demonstrated that it lacks sufficient reliability, expertise, integrity and competence to operate a solid waste facility.

k. Permanent revocation of Respondent's solid waste permit is mandated by the evidence and the applicable legal standards.

D. CFNH'S REQUESTS (Numbered as in requesting document)

CFNH's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wm 100 - 300, 2100 *et seq.* ("Solid Waste Rules") to implement this program. **(Amended Notice, Section III, ¶1).**

➢ Admitted (see Respondent's Answer to Amended Notice, Page 1, Section III, ¶1).

2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES. Under RSA 149-M:9, XII, no solid waste permit may be transferred to any other person without prior written approval of DES. **(Amended Notice, Section III, ¶2).**

➢ Admitted* (see Respondent's Answer to Amended Notice, Page 1, Section III, ¶2).

3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant "fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility." **(Amended Notice, Section III, ¶3).**

- Admitted (see Respondent's Answer to Amended Notice, Page 2, Section III, ¶3).

4. Under RSA 149-M:9, IX©, DES may deny a solid waste permit application "[i]n 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." **(Amended Notice, Section III, ¶4).**

- Admitted (see Respondent's Answer to Amended Notice, Page 2, Section III, ¶4).

5. Pursuant to RSA 149-M:9, III, upon request of DES "the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its officers and directors, if any, and make a report to the department." DES may also request a background investigation of the applicant in conjunction with an application to transfer a permit. RSA 149-M:9, XII(a). **(Amended Notice, Section III, ¶5).**

- Admitted (see Respondent's Answer to Amended Notice, Page 2, Section III, ¶5).

6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and

directs that these forms be submitted directly to the Attorney General's Office ("AGO"), rather than to DES. **(Amended Notice, Section III, ¶6).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 2, Section III, ¶6).

7. Env-Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant's debt or equity, and none of the applicant's officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application. **(Amended Notice, Section III, ¶7).** Admitted (see Respondent's Answer to Amended Notice).

- Admitted (see Respondent's Answer to Amended Notice Page 3, Section III, ¶7).

8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.08, which establishes the existing permittee and the proposed permittee as co-applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee. **(Amended Notice, Section III, ¶8).** Admitted*.

- Admitted* (see Respondent's Answer to Amended Notice, Page 3, Section III, ¶8)

9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval. **(Amended Notice, Section III, ¶9).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 3, Section III, ¶9)

10. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that "[t]here are no circumstances by which the permittee can correct or eliminate the underlying problem ... ." **(Amended Notice, Section III, ¶37).**

- Admitted (see Respondent's Answer to Amended Notice, Page 14, Section III, ¶37).

11. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M:12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 306.05(c)). **(Amended Notice, Section III, ¶38).**

- Admitted (see Respondent's Answer to Amended Notice, Page 15, Section III, ¶38).

12. 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). **(Amended Notice, Section III, ¶39).**

- Admitted (see Respondent's Answer to Amended Notice, Page 15, Section III, ¶39).

13. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX(c). **(Amended Notice, Section III, ¶40).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 15, Section III, ¶40).

14. Env-Wm 315.02(e)(6) and 315.02(c) require a permittee to obtain a Type III or Type IB Permit Modification for any "change in organizational structure, officers, directors ... or entities holding 10% or more if the permittee's equity or debt." Applications for such Modifications require compliance certifications. 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).

- See CFNH's Post-Hearing Memorandum.

15. Env-Wm 315.02(f) and Env-Wm 315.03 require a permittee to obtain a Type IV Permit Modification prior to any "change in the: (1) Operational control of a facility; or (2) Ownership of the facility...."

- See CFNH's Post-Hearing Memorandum.

16. RSA 149-M:9, IX(c) and Env-Wm 306.05 provide an affirmative disclosure obligation on a permittee and grounds for denial or revocation of a solid waste permit even if an officer, director or greater than 10% owner of a company holding the permit is convicted of a felony, even if that convicted person later resigns from the company.

- See CFNH's Post-Hearing Memorandum.

17. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested. **(Amended Notice, Section III, ¶48).**

- Admitted (see Respondent's Answer to Amended Notice, Page 25, Section III, ¶48).

18. Env-Wm 303.05(d) requires that, if the applicant or the 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. **(Amended Notice, Section III, ¶49).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 25, Section III, ¶49).

19. DENIED-Under the circumstances presented here, pursuant to Env-Wm 303.05(d), where the applicant or the owner of the facility site – or their subsidiaries or affiliates – own 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, facility site owner, or their subsidiaries or affiliates.

- See CFNH's Post-Hearing Memorandum.

ULTIMATE CONCLUSIONS OF FACT AND LAW

1. Based on the findings of fact proposed by the Attorney General's Office, as supplemented here and as established through the evidence presented in the hearing, the 2002 Permit and subsequent Modifications thereto shall be revoked because good cause as provided in Env-Wm 306.05 exists, and there are no circumstances by which the underlying problems can be corrected or eliminated. Good cause exists because:

a. Issuance of the 2002 Permit and the 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;

b. Mr. DiNapoli was convicted of a felony before the 2002 Permit, or any modifications thereto, were approved;

c. Regenesis and Bio Energy LLC their officials – namely Messrs. DiNapoli, Dell'Orfano, and Smith – violated solid waste laws and regulations in the course of and in connection with the solid waste permit applications;

d. DENIED AS TO MESSRS. DELL'ORFANO AND SMITH-Messrs. Dell'Orfano, DiNapoli and Smith lack sufficient reliability, expertise, integrity and competence to operate a solid waste facility; and

e. DENIED-The applicant(s) failed to provide notice to abutters as required by the solid waste laws and regulations.

2. DENIED-Alternatively, the 2002 Permit and subsequent Modifications thereto are void ab initio because

a. The applications for the 2002 Permit and subsequent Type IV and Type IA Modifications contained false or misleading information, including false compliance certifications, and otherwise omitted required information, rendering those applications incomplete such that the DES had no authority to act on them;

b. In connection with the various applications and proceedings related to those applications, the applicants defeated the rights of the public, including abutters to the Facility and to properties owned by close affiliates of the applicants, to proper notice and to complete and truthful applications.

E. The Town of Hopkinton's Requests for Rulings of Law were provided in memorandum form (dated May 20, 2005 and are granted or denied consistent with the conclusions of law in this decision.

V. Decision

On the basis of the Findings of Fact, Analysis and Conclusions of Law stated above, the Permit is hereby revoked.

Pursuant to RSA 21-O:9, V and 21-O:14, any appeal of this decision shall be filed with the Waste Management Council.

Department of Environmental Services

By: _____
Michael J. Wells, Presiding Officer

COPY

Date: June 23, 2005