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STATE OF RHODE ISLAND

PROVIDENCE, SC **SUPERIOR COURT**

STATE OF RHODE ISLAND	:	
	:	
v.	:	**C.A. No. P2-2023-0050A&B**
	:	
BARLETTA HEAVY DIVISION, INC.	:	
DENNIS FERREIRA	:	

STATE'S MEMORANDUM IN SUPPORT OF ITS OBJECTION TO DEFENDANTS' MOTION TO DISMISS

On January 18, 2023, the State filed a Criminal Information charging the defendants with two counts of unlawfully disposing solid waste at an unlicensed facility, one count of operating a solid waste disposal facility without a license, and one count of filing a false document. Defendant Barletta Heavy Division, Inc. ("BHD") subsequently moved to dismiss Counts 1 through 3 of the Criminal Information pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure and R.I. Gen. Laws § 12-12-1.7 challenging the existence of probable cause. Defendant Dennis Ferreira ("Ferreira") has joined in Defendant BHD's Motion to Dismiss. For the reasons set forth below, the defendants' motion should be denied.

When considering a Rule 9.1 motion, the court must examine the Criminal Information and the attached exhibits to determine whether there is probable cause to establish that the charged offenses were committed and then that defendants committed those offenses. *State v. Aponte*, 649 A.2d 219, 222 (R.I. 1994). The Court, in making that determination, is limited to the four corners of the information package and must allow the State the benefit of every reasonable inference. *State v. Ceppi*, 91 A.3d 320, 329 (R.I.

2014). The probable cause standard to be applied is the same one used to determine the propriety of an arrest; that is, probable cause exists when the facts and circumstances within a police officer's knowledge at the time of arrest and of which the officer has reasonably trustworthy information are sufficient to lead a reasonable person to conclude that a crime has been committed and the person to be arrested committed it. *State v. Reed*, 764 A.2d 144, 146 (R.I. 2001). Probable cause is not a high bar, requiring only the kind of fair probability on which reasonable and prudent people, not legal technicians, act. *Kaley v. United States*, 571 U.U. 320, 338 (2014).

I. Probable Cause for Counts 1 and 2

Regarding the first two counts, each of which charges the defendant with the unlawful disposal of solid waste in violation of R.I. Gen. Laws §§ 23-18.9-5 and 23-18.9-10(a)(2) ("Refuse Disposal Act"), there is little dispute that the defendants disposed of more than three cubic yards of material at the 6/10 construction site. For the MBTA site (Count 1), the evidence shows that the defendants brought a total of approximately 93 truckloads of ballast stone to the 6/10 site. *See* Exhibit 2, Police Narrative, at p. 5; Exhibit 53.[1] The stone totaled approximately 3,460[2] tons (approximately 2,604 cubic yards). Ferreira essentially admitted to RIDOT at the time he was caught that he had changed the source of the ballast stone from a local quarry to old ballast stone from a MBTA site. *See* Exhibit 2, p. 7; Exhibit 15, ¶ 9.

For the Pawtucket/Central Falls Commuter Rail Station and Bus Terminal ("Pawtucket site") (Count 2), the defendants brought approximately 52 loads, or

[1] The State's reference to exhibits in this memorandum are those exhibits that were attached to the Criminal Information.
[2] BHD provided the amount of 3,460 tons and 2,604 cubic yards of MBTA B&C Greenline ballast stone to the MBTA as the amount of material moved to the 6/10 site (Exhibit 54)

approximately 1,144 tons of soil (860 cubic yards) from the Pawtucket site to the 6/10 construction site. *See* Exhibit 2, p. 8. This is established by the GPS records of the trucks that imported the Pawtucket material and RIDOT video footage. *See* Exhibits 15, ¶12; 84; 85; and 86).

The Criminal Information and the exhibits establish probable cause that the materials disposed by the defendants at 6/10 site constituted solid waste. The statute defines "solid waste" in pertinent part as "as garbage, refuse, tree waste as defined by subsection (14) of this section, and other discarded solid materials generated by residential, institutional, commercial, industrial, and agricultural sources." RIGL § 23-18.9-7(12). As to the disposed MBTA material (Count 1), the fact that the imported Massachusetts ballast stone contained debris consisting of railroad spikes, railroad plates, rings, and links supports the classification of the material as solid waste. *See* Exhibit 2, p. 6.; Exhibit 4, Narrative of Sgt. Paquette, p. 24; Exhibit 15, ¶'s 7&8. The classification of the disposed material from the MBTA site (Count 1) as solid waste based also on its chemical composition is supported by the expert report authored by Sean Carney (Exhibit 6) and the statement from Leo Hellested (Exhibit 94).

As to the disposed material from the Pawtucket site (Count 2), the Criminal Information package includes descriptions of discernable contamination in the Pawtucket material. For example, one witness described the material as "pretty gross…it was railroad ties in it, there was railroad spikes, plates, it was topsoil and ballast stone." It had a "sour pungent creosote smell" (Exhibit 4, p. 18; Exhibits 29, 32 & 33). Mr. Carney came to the determination that the disposed Pawtucket material constituted solid waste based on its chemical composition (Exhibit 6), as did Mr. Hellested (Exhibit 94).

The Criminal Information package contains probable cause that the defendants disposed of solid waste as prohibited by the statute. It is important to note that the disposed material from both the MBTA site and the Pawtucket site was regulated material that could only be disposed at a licensed facility. For the MBTA material, BHD was required to first test materials which were to be disposed of offsite. Depending on the level of contamination of the material, a determination then had to be made as to which regulated disposal site the material would be brought (Exhibit 100). The same was true for the Pawtucket site. As Mr. Carney's report (Exhibit 6, p. 4) reflects, the Remedial Approval Letter for the Pawtucket site "clearly and specifically limits the off-site transportation of contaminated soil from the Pawtucket site to a licensed disposal facility based on the nature of the contaminates present." As such, the defendants with their two additional job sites (Pawtucket and MBTA) were prohibited at all from using the materials off-site at the 6/10 construction site. Their criminal liability under RIGL § 23-18.9-5(a) flows from their conduct of transporting these contaminated materials to the 6/10 construction site.

As to the element of "disposing" of solid waste, the statute defines "dispose of solid waste" as "depositing, casting, throwing, leaving or abandoning of a quantity greater than three (3) cubic yards of solid waste." RIGL § 23-18.9-5(b). Clearly, there is probable cause to believe that the defendants' conduct fulfilled this element in that they deposited or left over three cubic yards of solid waste from each source site at the 6/10 construction site. Through some tortured logic, the defendants somehow claim that they lawfully re-used it and did not "discard" or deposit it. Defendant BHD's Motion to Dismiss, at pp. 25-26. This argument wholly lacks merit. It was unlawful for the defendants to "re-use" contaminated material from wherever they wanted. BHD's argument in no way

undermines the probable cause the materials constituted solid waste when they were disposed of at the 6/10 construction site. As discussed further below, BHD fails to recognize that a purpose of the State's environmental statutes is to limit the disposal of particular waste to an appropriate facility.

The Criminal Information package contains probable cause of the last element of unlawful disposal of solid waste offense. The 6/10 construction site was not licensed by the Director of RIDEM as a solid waste management facility. This fact is established by the letter from Mark Dennen (Exhibit 104). Thus, the Criminal Information package establishes probable cause that defendants committed the offenses in Counts 1 and 2.

II. Probable Cause for Count 3

The third count alleges that the defendants operated an unlicensed solid waste management facility at the 6/10 site in violation of R.I. Gen. Laws §§ 23-18.9-9(a)(1) and 23-18.9-10(a)(1). The statute broadly defines "Solid Waste Management Facility" in pertinent part as "any plant, structure, equipment, real and personal property, . . . operated for the purpose of processing, treating, or disposing of solid waste but not segregated solid waste." RIGL § 23-18.9-7(13). Based on the evidence gathered and including in the information package, there is probable cause to believe that BHD's Plainfield Street stockpile at the 6/10 construction site was such a facility. *See* Exhibits 25 and 38. BHD transported the solid waste from the Pawtucket site and the MBTA site to this stockpile area.

BHD then operated this facility "for the purpose of processing, treating, or disposing of solid waste." BHD used equipment to process the solid waste by sifting it and mixing it with other material at the site. Exhibit 2, p. 10. For example, one-part MBTA

ballast stone was mixed with two-parts other soil at the Plainfield Street stockpile. *See* Exhibit 2, p. 6; Exhibit 4, pp.16-17; Exhibits 30 and 31. BHD distributed the mixture to multiple locations throughout the 6/10 construction site. *See* Exhibit 4, p. 34; Exhibit 102. As to the last element of this offense, the letter from Mark Dennen (Exhibit 104) establishes that BHD did not have a license to operate this facility. Thus, based on the plain language of the statute, there is probable cause to believe that the defendants committed the offense of operating an unlicensed solid waste management facility.

III. Probable Cause for Count 4

The fourth count charges the defendants with filing a false document in violation of R.I. Gen. Laws § 11-18-1.[3] On July 21, 2020, through July 23, 2020, complaints came in about the imported, contaminated materials at issue in this case. By July 28, 2020, Jay Silva from RIDOT requested environmental paperwork from Ferreira for the MBTA material. For 15 days preceding this request, Ferreira and BHD employees at the MBTA site knew that the untested ballast stone had been leaving their MBTA site. Once RIDOT's request came in, the evidence shows a flurry of communication within BHD on the same day. *See* Exhibit 15, ¶'s 6 and 10. In the midst of these communications, Ferreira asked the Superintendent of the MBTA site for test results, and the Superintendent responded, "You know we don't have test results." This culminated in Ferreira having Project Manager Dan Deacon send an environmental report (Mabbett Report) for a different site than the actual source of the ballast. Exhibit 2, pp. 5-8. In short, knowing that the MBTA material had not been tested, the defendants sent the Mabbett Report to RIDOT as cover

[3] Defendant BHD is not moving to dismiss to the fourth count at this point. *See* Defendant BHD's Motion to Dismiss, p. 2, fn. 2.

for untested materials that they imported to the 6/10 construction site. Therefore, the Criminal Information contains ample probable cause that the defendants committed this offense.

IV. BHD's Corporate Criminal Liability

BHD alleges that the State "cannot meets its burden of proving facts required to hold a company responsible an employee's conduct." BHD's Motion to Dismiss, p.2, fn. 2. Through the State's brief analysis below, BHD's corporate criminal liability is readily apparent. A corporation is criminally liable for criminal offenses: (a) committed by the Corporation's officers, employees, or agents; (b) within the scope of the employee's employment; and (c) which are done at least in part for the benefit of the corporation. *See US v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (quoting *US v. Cincotta*, 689 F.2d 238, 241 (1st Cir. 1982). At the time Ferreira committed the offenses alleged in the Criminal Information, BHD employed Ferreira in a high-ranking Superintendent position.

In terms of whether Ferreira's criminal conduct fell within the scope of his employment, the test for this prong of corporate criminal liability is whether the employee was "performing acts of the kind which he is authorized to perform." *Id*. The apportionment of responsibilities on a particular project between a BHD Superintendent and Project Manager informs this part of the analysis. The Superintendent was the manager of daily field operations and responsible for executing the work plan on the project. The Project Manager ran administrative aspects of the project from the office. The responsibilities of the Project Manager included cost management, budget forecasting, scheduling, and subcontract and purchase order negotiations.

In his role as an experienced Superintendent, BHD bestowed upon Ferreira broad authority. He committed these offenses within the scope of this broad authority. Ferreira was the highest ranking employee at the 6/10 site, who had decision making authority on acquisition of building materials. Ferreira decided specifications for the materials and where they were obtained. For instance, Ferreira made the decision to switch the source of ballast stone from the PJ Keating quarry to the MBTA site. In other words, this decision fell within Ferreira's general line of work. *See US v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010).

Ferreira determined where and how material would be used. Notably, at the time BHD excavated the contaminated soil from the Pawtucket site, Ferreira was the highest ranking employee overseeing that work. *See* Exhibit 4, p. 31; Exhibit 15, ¶14. As to the Pawtucket contaminated soil, it was Ferreira's decision to transport and dispose of the material at two initial locations at the 6/10 site. He had it directly dumped in the 72" drainage pipe underneath Tobey Bridge Overpass. He also had it dumped at the Plainfield St. stockpile. Once it was at the stockpile, Ferreira instructed a union worker on how to mix materials which would later be distributed to different sections of the project. It was within his authority to make these decisions regarding materials on the 6/10 project. The acts of depositing, processing, and distribution of these contaminated materials were clearly within the scope of Ferreira's managerial responsibilities as Superintendent for the 6/10 Project.

The disposal and distribution of contaminated material from the Pawtucket and the MBTA sites benefited BHD in many ways in terms of their projects. They needed fill for the ditch containing the drainage pipe at the 6/10 site, and approximately 16 loads of raw

Pawtucket soil were dumped into it. They needed ballast stone to make gravel, and approximately 93 truckloads were brought to the Plainfield St. stockpile and then distributed throughout the site. BHD also saved money on not having to pay for clean materials. BHD saved on disposal costs of contaminated material from the source sites of Pawtucket and MBTA. In short, Ferreira's broad authority and his knowing conduct at his high level in the corporate structure is sufficient in itself to bind the company. Hence, the elements of corporate criminal liability for BHD have been met.

V. Other BHD Employees' Knowledge and Participation

In an attempt to escape its own criminal liability, BHD tries to refer to co-defendant Ferreira as a "rogue employee." BHD's Motion to Dismiss, p. 3. Nothing could be further from the truth. The evidence will show that several of BHD's employees through the course of their duties had knowledge directly and circumstantially of BHD's importation of materials from both the Pawtucket site and the MBTA site.

Ferreira was not the only BHD employee with knowledge of the unlawful movement of contaminated material as it occurred. The knowledge of BHD's employees should be imputed to BHD. The knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. *See US v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987). For purposes of probable cause, the knowledge of additional BHD employees provides important evidence against BHD, rather than solely the supposed rogue co-defendant Ferreira, for these offenses.

For example, the Superintendent for the MBTA site (Count 1), Michael DiBlasi, agreed to have the ballast stone removed from his site. *See* Exhibit 15, ¶ 6. On July 7, 2020, the first day material moved from the MBTA site to 6/10 site, DiBlasi knew that the

ballast stone arrived at the 6/10 site from the MBTA site in Jamaica Plain, Massachusetts. *See* Exhibit 2, p. 5. DiBlasi knew from the beginning that the material had not been tested. Equipment Manager Dallas Babineau had knowledge of the movement because he arranged for the trucks to haul the ballast stone to the 6/10 site. On or around July 4, 2020, Ferreira told Quality Control Manager William Kearns that material was coming from a MBTA site for use on the 6/10 project. *See* Exhibit 2, p. 5; Exhibit 15, ¶ 7. By at least July 20, 2020, Project Manager Dan Deacon knew that there was material coming in from a MBTA site. BHD continued to dump the MBTA ballast stone at the Plainfield St. stockpile for six more days. Deacon and Kearns were both aware of BHD's requirement to provide environmental paperwork to RIDOT prior to using it on the 6/10 project site.

Project Manager for the MBTA site, Mark Shamp, became aware, on July 28, 2020, that the ballast stone which had been deposited at the 6/10 site had not been tested. *See* Exhibit 15, ¶ 10. This was the last day that BHD hauled the MBTA ballast stone to the 6/10 site. Shamp told Vice President Michael Foley this fact.[4] The evidence indicates Ferreira and BHD employees assigned to the MBTA site knew that the imported ballast stone had not been tested. For any business with environmental compliance requirements, it was a glaring problem that untested material from old MBTA tracks left the site in Massachusetts.

Other than process and distribute the MBTA material at the 6/10 site, BHD did nothing to address the issue for months. Despite receiving test results on August 3, 2020, indicating that the material exceeded RIDEM's criteria, BHD did nothing to notify regulators. It was not until October 2, 2020, through counsel, that BHD conveyed accurate

[4] In the supervisory structure at BHD, Foley had authority over the superintendents of the company but served under President Vincent Barletta.

information to RIDOT or RIDEM about the imported material. In short, BHD's attempt to isolate the conduct of one employee, co-defendant Ferreira, misses the mark. BHD's conduct during and after the disposal of the solid waste at the 6/10 site strongly underscores their corporate criminal liability.

VI. The Defendants' Willful Acts to Deceive

The defendants endeavored to deceive the regulators (RIDOT and RIDEM) once BHD and Ferreira were caught unlawfully disposing of solid waste at the 6/10 construction site. As discussed above regarding Count 4, the defendants tried to deceive RIDOT by presenting an environmental report for ballast stone from a site other than the actual source site. In making an assessment of what transpired, the regulators detrimentally relied on inaccurate and incomplete information from the defendants.

As to the disposed Pawtucket materials, the defendants committed pervasive acts of deception that thwarted any meaningful assessment by the regulators on whether to pursue administrative enforcement. Exhibit 2, p. 9; Exhibit 4, pp. 3, 31-32. Shortly after the receipt of the complaint on July 21, 2020, regarding the importation of the Pawtucket material, the defendants conveyed scant and inaccurate information to regulators about what it had done. BHD falsely informed RIDOT that BHD only removed topsoil and that only a limited amount had been transported to the 6/10 site to be screened (Exhibits 75 & 76). In light of the evidence of the disposal of the Pawtucket material, this was clearly not true in terms of the extent of Pawtucket material that BHD had disposed. On August 3, 2020, RIDOT requested material shipping records and manifests for the exact number of truckloads that were removed from the Pawtucket site (Exhibit 2, p. 9). BHD never provided a meaningful response to RIDOT regarding the quantity of Pawtucket material

that it disposed. For instance, it provided slips for six truckloads of soil that were removed from the 6/10 site as representative of the full amount of Pawtucket material that had been disposed. See Exhibit 15, ¶15. The evidence in the case shows that BHD brought a total 52 truckloads of material from the Pawtucket site, not 6.

It was also discovered through the course of the criminal investigation that BHD had 16 (of the 52) loads of Pawtucket soil directly dumped in the area below the Tobey Bridge Overpass on the 6/10 site. As late as September 9, 2020, BHD stayed the course of misrepresenting its actions to RIDOT when it claimed that none of the material was used on the 6/10 construction site. Again, in light of the evidence outlined above, this was a clear misrepresentation by BHD about its disposal of the Pawtucket contaminated material at the 6/10 construction site.

The defendants' deception may have been an attempt to avoid criminal prosecution for its conduct, but it also impeded any administrative enforcement. Given RIDEM's objective as an agency to protect human health and the environment, it was extremely difficult for them to fulfill that mission when BHD failed to provide full and accurate information concerning BHD's importation of contaminated material. The same can be said of DOH's health consultation. In short, without accurate information about the nature and extent of BHD's disposal of solid waste, these government agencies could not make a meaningful assessment of health and safety risks to the workers and the public at the time the defendants committed these offenses.

VII. The Harmonization of State Environmental Statutes

Defendants argue that, because DEM administered a "Soil and Materials Management Plan" through its power pursuant to the Industrial Property Remediation and Reuse Act, RIGL § 23-19.14-18(c) ("Remediation statute"), that any other state laws possibly related to the matter are preempted. In their opinion, this pre-emption means the criminally enforceable Refuse Disposal Act, cannot also apply. To simply frame the issue, defendants are asserting that one Rhode Island state statute is preempted by a different Rhode Island state statute. To shore up their argument, defendants cite three cases – none of which address the state law versus state law issue or are supportive of their assertion.

Defendants first rely on the case of *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999). This case is an example of a municipal ordinance being preempted by a state statute, not one state statute preempting another. The language of the decision speaks only to the municipal/state law relationship, stating: "Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." *Town of Warren* at 1261.

Next, defendants cite the case of *Brindle v. Rhode Island Department of Labor and Training*, 211 A.3d 930 (R.I. 2019) in support of their contention that a statute's preemption can be explicit in the statute, or implicit. The problem with this case is that it is discussing federal preemption of a state law, a concept well established under the Supremacy Clause of the United States Constitution. The decision speaks to whether Congress was acting to preempt implicitly (which they were not) rather than a state statute preempting a second state statute.

Finally, the defendants rely on *Corvello v. New England Gas Co., Inc.*, 552 F. Supp.2d 396 (D.R.I. 2008). In *Corvello*, the Court declared that a state law did not preempt a Common Law right of action. Furthermore, and contrary to defendants' argument, it was an example where the Remediation statute did not preempt. The Court stated: "Here, the fact that the General Assembly enacted legislation regulating hazardous wastes and giving RIDEM authority to enforce the legislation does not demonstrate and intent to extinguish the common law right of a landowner to seek abatement or other injunctive relief in an action against the party allegedly responsible for contaminating the landowner's property." *Corvello* at 401.

None of the cases referenced by defendants support the proposition that a state civil statute can preempt a state criminal statute of the same state. In fact, DEM's enabling statute, R.I. Gen. Laws § 42-17.1-2, directly contradicts defendant's preemption argument and supports the harmonization of the two statutes. When describing the powers and duties of the Director of DEM, the statute explicitly states: "Nothing in this chapter shall limit the authority of the attorney general to prosecute offenders as required by law." R.I. Gen. Laws § 42-17.1-2.

In the case of *United States v. MacDonald & Watson Waste Oil*, 933 F.2d 35 (1st Cir. 1991), the First Circuit Court of Appeals rejected an argument like the one made by the defendants here. The defendants in *MacDonald* argued that the First Circuit should reverse their convictions for knowingly transporting, or causing the transportation of hazardous waste, i.e., toluene-contaminated soil, to a facility which does not have a permit, under 42 U.S.C. § 6928(d)(1), and knowingly treating, storing and disposing of a hazardous waste without a permit, under § 6928(d)(2)(A), because one of the defendants, Narragansett

Improvement Company, had a Rhode Island RCRA permit, albeit one that did not allow disposal into its facility of toluene-contaminated soil. The First Circuit rejected this argument, stating that it ignored the central object of the permit program, that is to limit the disposal of any particular waste to an appropriate facility. *MacDonald & Watson Waste Oil Co*. at 46. The Court also noted "criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose." *Id*.

Since this circumstance is not "preemption" because it involves two statutes made at the same level of authority (i.e., two state statutes), we must then look to how the courts should review and analyze two potentially conflicting state statutes. When interpreting a statute, the court should not merely focus on a particular clause in which general words may be used but should consider it in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will execute the will of the legislature. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). The court's role is "to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." *Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987).

When the statutory language is clear and unambiguous, the court must interpret the statute literally and give the words of the statute their plain and ordinary meanings. *Moore v. Ballard*, 914 A.2d 487, 490 (R.I.2007) (quoting *Accent Store Design, Inc. v. Marathon House, Inc*., 674 A.2d 1223, 1226 (R.I.1996)). Statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent

with their general objective scope. *State ex rel. Webb v. Cianci*, 591 A.2d 1193, 1203 (R.I.1991). The Court should consider such statutes to be in pari materia, meaning that statutes on the same subject and enacted by the same jurisdiction are to be read in relation to each other. *Horn v. Southern Union Co*., 927 A.2d 292, 294 n. 5 (R.I. 2007).

When construing and applying apparently inconsistent statutory provisions, the court should do so in a manner that avoids the inconsistency." *Kells v. Town of Lincoln*, 874 A.2d 204, 212 (R.I.2005). In such cases, "courts should attempt to construe two statutes that are in apparent conflict so that, if at all reasonably possible, both statutes may stand and be operative." *Shelter Harbor Fire District v. Vacca*, 835 A.2d 446, 449 (R.I. 2003). Repeals by implication are not favored by the law, and only when the two statutory provisions are irreconcilably repugnant will repeal be implied and the last-enacted statute be preferred. *Such v. State*, 950 A.2d 1150, 1155–56 (R.I. 2008); *McKenna v. Williams*, 874 A.2d 217, 241 (R.I.2005).

Here, the two statutes are not irreconcilable. As BHD points out in its motion, the Remediation statute establishes a detailed regulatory program to remediate contaminated properties in order to make them available for development. Remediation, however, has the obvious purpose of remediating a particular property or site. In committing these offenses, the defendants added hazardous materials to the waste stream and ultimately various parts of the 6/10 construction site. While BHD repeatedly tries to portray their illegal conduct as a violation of the collection of documents it refers to as the "Soil Management Plan" for the 6/10 site (Exhibits 14 and 91), the Soil Management Plan documents only account for what contamination was located at the 6/10 site and not contaminated material that the defendants decided to transport from two distinct source

sites. Therefore, the defendants' conduct of importing this material from other sources is not even encompassed within the site-specific objectives of the Remediation statute.

An analysis of both statutes reveals no explicit pre-emption by the Remediation statute. RIGL § 23-19.14-18(c) of the Remediation statute provides for administrative or civil enforcement in that the "director may institute administrative or civil proceedings, or may request the attorney general to do the same, to enforce any provision of this chapter or any rule, regulation or order issued pursuant to this chapter." However, it contains no exclusion of criminal enforcement. In RIGL § 23-19.14-5.2, the Remediation statute actually contemplates criminal enforcement in the context of the results of an engineer's environmental site assessment or investigation of a specific property. It states that such a site assessment "under this section shall be conducted in accordance with and shall be subject to the same guidelines and limitations provided for an administrative inspection or, where appropriate, a *criminal* investigation, pursuant to the provisions of § 42-17.1-2(20)." (emphasis added). Thus, there is no basis to find explicit pre-emption of criminal enforcement under the Refuse Disposal Act.

The language of the Refuse Disposal Act supports the pursuit of potential parallel prosecutions under the two statutes. RIGL 23-18.9-11(a) provides:

> All prosecutions for the criminal violation of any provision of this chapter, or any rule or regulation made by the director in conformance with this chapter, shall be by indictment or information. The director, without being required to enter into any recognizance or to give surety for cost, or the attorney general of his or her own motion, may institute the proceedings in the name of the state. It shall be the duty of the attorney general to conduct the criminal prosecution of all the proceedings brought pursuant to this chapter.

RIGL 23-18.9-11(b) continues that "Proceedings provided for in this section shall be in addition to other administrative or judicial proceedings authorized by this chapter or pursuant to any other provision of the general laws or common law." With this language, the Refuse Disposal Act contemplates criminal enforcement in addition to "administrative or judicial proceedings" under "any other provision of the general laws." Another provision of the general laws would include the Remediation statute. Therefore, based on the language of the Refuse Disposal Act, there is no conflict between the two statutes.

The facts supporting the offenses committed by the defendants strongly militate against any finding of implicit pre-emption by the Remediation statute. An application of the facts of the case also indicates that there is no conflict between the statutes. Indeed, administrative action by RIDEM would have been a viable and parallel path for RIDEM had the defendants not impeded RIDEM through their deception. In situations like this one where the wrongdoer obfuscates the true nature and extent of its conduct to the regulator, it is fortunate for public health and the environment that the Legislature enacted the equally applicable criminal statute of the Refuse Disposal Act. Thus, for all the foregoing reasons, the Court should reject the defendants' pre-emption argument.

VII. Conclusion

The Criminal Information package provides substantial probable cause that both defendants committed the four counts charged. The defendants are properly charged under the Refuse Disposal Act, and the Remediation statute does not preempt the criminal prosecution of the defendants. Thus, the Court should deny the defendants' motion to dismiss.

STATE OF RHODE ISLAND

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CERTIFICATION

I hereby certify that a true copy of the within State's Memorandum in Support of it's Objection to Defendant's Motion to Dismiss has been e-filed through the ECF filing system and is available for viewing and downloading and was mailed, postage prepaid, to Robin L. Main, Hinckley Allen & Snyder, LLP, 100 Westminster Street, Suite 1500, Providence, RI 02903; Michelle R. Peirce, Hinckley Allen & Snyder, LLP, 28 State Street, Boston, MA 02109; Albert E. Medici, Jr., 1312 Atwood Avenue, Johnston, RI 02919 and Kevin J. Bristow Esq., 128 Dorrance Street, Suite 550, Providence, RI 02903 on this 27th day of November, 2023.

Victoria Cabral