

NOTICE OF HEARING: July 19, 2019 at 9:30 a.m.

**STATE OF RHODE ISLAND
PROVIDENCE, SC.**

SUPERIOR COURT

Alexandra Duryea; Carmen Boyan, a minor :
child by next best friend Justin Boyan; :
Neelam Ahmed; Stephan Follett; Victoria :
Huertas a minor child by next best friend :
Monica Huertas; Jeremi Huertas by next best :
friend Monica Huertas; Meghan Janicki, :
a minor child by next best friend Scott Janicki :
Eve Kelley;0 Chloe Moers, a minor child :
by best friend Ewa Roselli; Greg (Chip) :
Slaybaugh; Philip Tierney, a minor child :
by next best friend Jenn Tierney; Catherine :
Scott; Jamiel Conlon; :
Nature's Trust Rhode Island; Sisters of Mercy :
Ecology; and Mercy Ecology, Inc. :
Plaintiffs :

vs. :

C.A. NO. PC-2018-7920

Rhode Island Department of Environmental :
Management; Janet Coit, in her capacity as :
Director of the Rhode Island Department of :
Environmental Management :
Defendants :

**PLAINTIFFS' REQUEST TO ENLARGE THE OFFICAL
RECORD AND MOTION TO COMPEL DISCOVERY**

NOW COME the Plaintiffs and hereby request that this Honorable Court give leave to enlarge the record pursuant to R.I.G.L. § 42-35-15(e) and order that the Defendant respond to Plaintiffs' Discovery Request. The Plaintiffs assert that their Requests for Discovery are appropriate pursuant to the Declaratory Judgment Act and R.I. Super. R. Civ. P. 57.

Brief History

Original Petition

Petitioners are a group of youth and young adults, who live in Rhode Island, and are familiar with the extensive scientific evidence that we are out of time to tackle climate change. Due to their age now, and the number of years to which they will be exposed to new climate conditions, their health is particularly at risk. So too is the environment in which they live, from the seas in which they fish, the sea level rise, the flood from more rain, the impact on food and water supply, and the increased potential for mass migration and threats to national security. The Federal government has not addressed these problems, however, and the Rhode Island General Assembly last did so more than 5 years ago before the science community stressed the need for urgent action. Other States are stepping up to this challenge, or are themselves facing legal actions.

The DEM, as lead administrative agency on climate change in Rhode Island, has yet to propose a plan to use its powers to address this problem. It has the power and duty to do so. Moreover, it was created as an expert administrative agency to address such highly technical matters rather than leaving them for the legislature or the courts who are less equipped to deal with the scientific and technical questions involved. Accordingly, Petitioners submitted a petition to DEM to publish a rule, and solicit public comments thereon, in order to address this existential threat.

Denial of a rulemaking petition.

Plaintiffs originally requested, by Petition, that the Department of Environmental

Management (DEM) propose a rule to govern climate change mitigation, consistent with the latest scientific findings.¹ The agency's responsibilities with respect to such a Petition are determined by various provisions of the APA.² The DEM denied the request for a proposed rule on October 5, 2018. It is this denial by DEM that Plaintiffs are challenging in the underlying case.

The first count of Plaintiffs' complaint is that the denial of Plaintiffs' request did not meet the requirements of the APA.³ The second count of Plaintiffs' complaint is a request for declaratory judgment finding that the cursory denial of Plaintiffs' request was harmful to the Plaintiffs, and interferes with their rights and privileges, particularly their health.⁴

Defendants has to date not raised specific legal arguments supporting its case that denial of the Petition was appropriate. It has, however, asserted that a series of prior agency actions make in unnecessary to issue further rulemaking at this time. In Plaintiffs view, these factual assertions do not, by themselves, address the question of whether new scientific information warrants further agency action at this time – the specific request in Plaintiffs' Petition.

Moreover, the assertions by Defendants appear, in part, to contradict with materials published by

1 Petition to DEM, September 5, 2018, "To undertake an emergency rule making action, to initiate a formal rule making process using Petitioners draft as a proposed rule, and to complete in a timely fashion a final rule to ensure that Rhode Island does its fair share to reduce greenhouse gas emissions, and to reduce existing atmospheric concentrations of such gases, based on the best available science in order to protect the health of Petitioners, other groups at special health risk, and the Public Trust.", hereinafter "the Petition".

2 These include, but are not limited to, R.I.G.L. §§ 42-35-6 and 42-35-2.10.

3 Amended Complaint of Plaintiffs, November 15, 2018, specification 25 *et seq.*

4 *Id.*, specification 30 and 31.

the agency itself, or other State agencies. Accordingly, Plaintiffs sought discovery to clarify the accuracy and relevance of these assertions.

Discovery Requested

Pursuant to the Super.R.Civ.P. R. 26(a), discovery requests in this matter were filed on February 27, 2019. *See attached* Discovery Requests Propounded upon the Defendant. The Plaintiffs have requested Interrogatories and Admissions. The Plaintiffs assert that the DEM's response to their petition was cursory and not reviewed/investigated properly. Accordingly, the Plaintiffs have requested Interrogatories and Admissions in order to determine the process utilized by the DEM in denying the Plaintiffs' petition.

Defendants' Supplementation of Record Dated June 12, 2019

On June 12, 2019 and June 13, 2019, the Defendants supplemented the official record to include forty-one (41) additional documents. After a careful review of these documents, Plaintiffs assert that they do not add materials that will substantially aid this Court in resolving the issues before it. The documents themselves were created before the current scientific conclusions were published. The Plaintiffs assert that the Defendants failed to consider current science and evidence presented to them by Plaintiffs when they denied Plaintiffs' proposal without any hearing or proper review. Accordingly, the Plaintiffs have requested the Defendants respond to their Request for Interrogatories and Admissions in order to establish a sufficient record of the DEM denial utilized for this Court to review.

Discussion

I. Plaintiffs were denied an adequate record for APA Appeal.

DEM asserts that the Plaintiffs' petition should be reviewed by this court in a manner consistent with the requirements of R.I.G.L. § 42-35-15, and thus this court is confined in its review to the record from that process. Such an assertion, however, effectively denies this court any record to review. According to a certification of DEM filed with the court on December 21, 2018, the “record” in this case consists of only two documents: the petition for rule making, and the DEM response thereto. Therefore, in this case, absent an administrative hearing, there is effectively no record to review to determine if the agency has violated any of the factors listed in R.I.G.L. § 42-35-15(g).

R.I.G.L. § 42-35-15 (d), (c) and (f) allow for an expansion of the record and additional evidence to be submitted. The statute states the following:

(d) Within thirty (30) days after the service of the complaint, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. ***The court may require or permit subsequent corrections or additions to the record.***

(e) If, before the date set for the hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. ***In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.*** The court, upon request, shall hear oral argument and receive written briefs.

R.I.G.L. § 42-35-15 (d), (c) and (f) (*emphasis added*).

The Plaintiffs provided the DEM more than a hundred pages of highly technical evidence in support of their Petition. The DEM responded in five short pages. The Plaintiffs have had no opportunity to review or inspect the process followed by the DEM in its denial.

Accordingly, the Plaintiffs respectfully request that this Court give leave to conduct limited discovery in this matter pursuant to R.I.G.L. § 42-35-15 (d), (c) and (f).

II. Plaintiffs were denied a hearing and therefore, an opportunity for administrative review.

The APA provides that: “In any contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.” R.I.G.L. § 42-35-9(a). The Defendants have asserted that this is a contested case. However, no notification to Petitioners of their right to an administrative review was made and no hearing conducted. A hearing may have allowed a sufficient development of the record for appeal. In order to allow a substantive review by this Court of the Plaintiffs’ appeal, additional discovery should be provided. Accordingly, the Plaintiffs’ request that this Honorable Court grant their Motion to Compel Answers to Interrogatories and Request for Admissions.

III. Plaintiffs’ Declaratory Judgment request provides an independent basis for discovery.

Plaintiffs are entitled to discovery pursuant their request for relief under the Declaratory Judgment Act. Pursuant to R.I. Super. R. Civ. P. R. 57, declaratory judgment actions are to be

treated in the same manner as any civil complaint. The Rhode Island Supreme Court has indicated that validity of agency rules or practice may be decided in an action for declaratory judgment.⁵ *Town of Richmond v. RIDEM et. al.*, 941 A.2d 151, 156 (R.I. 2008). The Court in *Richmond v. RIDEM*, found that review of the Plaintiff's appeal/request was not limited to the provisions of R.I.G.L. § 42-35-15 where there is no record to review. *Id.* The Court further noted that § 42-35-15(a) specifically provides that "utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law is not precluded by its provisions." *Id.*

Moreover, it is well established, since *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), at 420, that in circumstances where there is insufficient evidence in the record of an administrative proceeding of the basis of an agency's decision, a court may reopen the record and order a full range of discovery.

The Plaintiffs have requested relief pursuant to the Declaratory Judgment Act and are therefore entitled to discovery. Said discovery requests will help the parties and this Court reviewing the procedures followed by the DEM and help to determine legal questions regarding the harm to Plaintiffs caused by Defendants' action.

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court give leave

⁵ The Rhode Island Supreme Court in *Nickerson et. al. v. Reitsma*, held that the State's civil action to enforce a Notice of Violation and the alleged violators Agency Appeal could not be consolidated as it allowed for an unlawful expansion of the administrative record. 853 A.2d 1202, 1205-6 (R.I. 2004). The Plaintiffs assert that this case is distinct from this instant action and not controlling in this Court's decision to allow for an expansion of the record.

to enlarge the record pursuant to R.I.G.L. § 42-35-15(e) and order that the Defendant respond to Plaintiffs' Discovery Requests.

Respectfully submitted,
Plaintiffs

By their Attorney,

/s/ Peter D. Galvin

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NOTICE OF HEARING

PLEASE TAKE NOTICE, that the within motion will be called for a hearing on the 22nd day of August, 2019 or as soon

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2019, a true and original copy of this document was served through the electronic filing system on the following:

Susan B. Forcier, Esq., #7278
Rhode Island Department of
Environmental Management
Office of Legal Services
235 Promenade Street, 4th Floor
Providence, RI 02908

/s/ Allyson M. Quay