

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: ARPAD MERVA

DECISION AND ORDER DENYING PETITIONER'S
REQUEST FOR DECLARATORY RULING

This matter is before the hearing officer on the Petition for Declaratory Ruling filed with the Director on behalf of Arpad Merva ("Merva" or "Petitioner" or "Respondent"). The Petition was referred to the Administrative Adjudication Division for Environmental Matters ("AAD") by the Director for a Recommended Decision and Order. The Division of Groundwater and ISDS/Site Remediation ("Division") filed an objection to the Petition and a memorandum of law in support of its objection. The petitioner, Arpad Merva, filed a reply and memorandum in response to Division's objection.

The Petitioner seeks a ruling which declares that the Rhode Island Department of Environmental Management ("DEM") cannot apply the Water Pollution Act, R.I. Gen. Laws §§46-12-5 (a), (b), the Oil Pollution Act §§46-12.5-1 et seq., the Oil Pollution Control Regulations § 6(a), and the Groundwater Quality Regulations §§8.01, 8.02, and 8.04, promulgated pursuant thereto (at times collectively referred to herein as the "Acts and Regulations"), to Merva under a strict liability scheme based solely on his status as the current owner of allegedly contaminated property.

The Petition contains a prayer that the Director grant the following relief:

(a) A ruling which declares that the Water Pollution Act,

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R.I. Gen. Laws §§446-12-1 et seq. and the Oil Pollution Control Act, R.I. Gen. Laws §46-12.5-3 et seq. do not apply strict liability to the current owner of property when such owner has not caused contamination;

- (b) A ruling which declares that the Groundwater Regulations and/or Oil Pollution Control Regulations do not apply strict liability to the current owner of property when such owner has not caused, in any way, the contamination of the property;
- (c) Relief regarding invalidity of Rules if they impose strict liability.
- (d) A dismissal of the charges against Merva.

A statement of the uncontested facts upon which the petitioner bases his request for a declaratory ruling has been included in the Petition. The facts requisite for a determination of the petition are not in dispute and may be summarized as follows:

Division issued a Notice of Violation ("NOV") to Arpad Merva on or about March 12, 1993. The NOV cited Respondent for violations of the Statutes and Rules (which are the subject of the Petition) concerning alleged contamination on Respondent's property located at Dexter Road, East Providence, Rhode Island. The NOV seeks to have Merva prepare a plan for, and implement, the remediation and removal of all petroleum products from the waters and land of the State which may exist at the property. Merva denies Division's claims and has appealed the NOV. An administrative adjudicative hearing involving said NOV is currently pending before the AAD. Merva has brought a third-party action in the AAD proceedings in

which Merva alleges that each of said third parties is or may be liable to Merva for all or part of Division's claim. Merva maintains that said third parties are responsible for any environmental contamination of the property and/or waters, and Merva also alleges that he has not placed, discharged or caused to be discharged any pollutants or oil onto the property or nearby waters.

It is essentially Petitioner's position that he is not responsible for the contamination on his property and that he is not the proper party to carry out the remediation plan on his property. Petitioner contends that Division's issuance of the NOV is contrary to the Acts and Regulations since said NOV was issued to Respondent solely on the basis of his status as the current owner of the property, without regard to whether Respondent contaminated the property or nearby waters of the State.

Petitioner claims that Division has misapplied the Acts and Regulations by alleging that Respondent is strictly liable for the contamination. It is Petitioner's contention that a controversy exists as to the applicability of the Acts and Regulations, since Petition maintains that the Acts and Regulations do not contain language establishing strict liability on the current owner of property when such owner has not taken affirmative action to place, discharge or cause to be placed pollutants in a location where the pollutants would

likely enter the waters of the State.

It is Division's position that the Petition should be denied for the following reasons:

- (1) The Petition is based upon untimely procedure having been filed in the middle of an ongoing administrative action, and
- (2) The statutes and regulations are applicable to petitioner under a reasonable interpretation of the language contained therein.

Division contends that Petitioner's attempt to obtain a declaratory ruling during an ongoing administrative enforcement action is procedurally improper. Division maintains that an action for declaratory relief is, in effect, a preemptive procedure to fend off or foreclose future agency action; and that once an adversary administrative proceeding has been commenced, the time for seeking declaratory relief on the issues raised in that administrative action should be closed.

The Petitioner's interpretation of the Acts and Regulations is disputed by Division, and it is argued by Division that these legal requirements do not require "affirmative conduct" for a violation to occur. Division maintains that the petroleum contaminants on Respondent's property are continuing to migrate from and impact adjacent properties, surface water bodies and groundwaters, and are a continuing threat to the public health and environment; and that Petitioner's "negative" conduct in refusing to clean-up

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known contamination that is having continuous on and off-site impacts, also constitutes a violation of the Acts and Regulations. It is urged by Division that the Petition be denied, and that the matter be initially heard and decided by the administrative hearing process that is presently underway at the AAD.

The Administrative Procedures Act ("APA") R.I. General Laws §42-35-8 requires that agencies shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. This Section further provides that rulings disposing of petitions have the same status as agency orders in contested cases.

Section 42-3509 of the APA mandates that in any contested case, all parties shall be afforded an opportunity for hearing. The remedy provided by this section governs contested hearings (such as that currently pending before the AAD), and supplies the mechanisms for deciding the legal and factual issues raised at such administrative hearings.

Chapter 17.7 of Title 42 entitled "Administrative Adjudication for Environmental Matters" provides that all contested enforcement proceedings shall be heard by the AAD, and that written proposed findings of fact and proposed conclusions of law shall be submitted to the Director for review.

The Administrative Rules of Practice and Procedure for the Department of Environmental Management ("DEM Rules") are the rules that implement the APA requirement and govern requests for declaratory rulings by DEM. Section 6(a) of the DEM Rules provides that any person who alleges that a rule, statute or order, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights of the petitioner, may in accordance with R.I. General Laws §42-35-8 and these regulations, petition the director for a declaratory ruling as to the applicability of any statute, any provision or rule or order of the agency.

Section 42-35-8 is an administrative counterpart of the Uniform Declaratory Judgments Act, (Chapter 30 of Title 9 of the R.I. General Law ()). Liquori v. Aetna Cas. & Sur. Co., 119 R.I. 875, 384 A.2d 308 (1978). As such, a review of the cases involving the Uniform Declaratory Judgments Act provides guidance in the determination of the Petitioner's requests in the instant matter.

The Rhode Island Supreme Court has determined that the grant of declaratory relief under the Uniform Declaratory Judgments Act and under R.I.G.L. §42-35-7 is discretionary. Lombardi v. Goodyear Loan Co., 549 A.2d 1025 (R.I. 1988). The grant of declaratory relief at the agency level, by analogy, is also discretionary.

In the determination of whether declaratory relief should

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be granted the following are some of the factors to be considered, namely, the existence of another remedy, the availability of other relief, the fact that a question may readily be presented in an actual hearing, and the fact that there is pending, at the time of the commencement of the declaratory action, another action or proceeding which involves the same parties and in which may be adjudicated the same identical issues that are involved in the declaratory action. Berberian v. Travisano, 114 R.I. 269, 332 A.2d 121, (1975).

The Regulations applicable to obtaining a declaratory ruling from the Director do not contain an express time limitation; however, once the administrative hearing procedure is in progress, attempts by a party to utilize declaratory ruling requests, should be carefully scrutinized to determine if the same issues are involved and whether such requests are to be permitted.

Petitioner acknowledged that the request for declaratory ruling was filed while another proceeding is pending which involves the same parties, and that the same identical issues are involved and will be adjudicated in the pending administrative action. Such issues will appropriately be adjudicated at the ongoing administrative hearing, and the request for declaratory rulings should not be entertained.

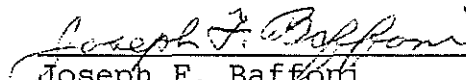
It is argued by Petitioner that declaratory judgment

After consideration of the facts and circumstances, and the arguments presented, it is hereby

ORDERED


1. That the Petition for Declaratory Ruling is DENIED.

The foregoing recommended Decision and Order Denying Petitioner's Request for Declaratory Rulings is entered this 9th day of September, 1995.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

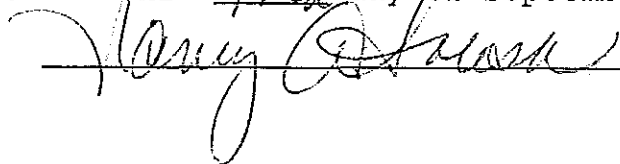
Entered as a Final Agency Order this 13th day of September, 1995



Timothy R. E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Gregory L. Benik, Esq., Robin L. Main, Esq., Michael P. Donegan, Esq., McGovern, Noel & Benik, 321 South Main St., Providence, RI 02903; Ralph T. Lepore, III, Esq., Deborah E. Barnard, Esq., James J. Arguin, Esq., Warner & Stackpole, 75 State St., Boston, MA 02109; Gerald J. Petros, Esq., Beth Carlson, Esq., Hinckley, Allen & Snyder, 1500 Fleet Center, Providence, RI 02903 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 14th day of September, 1995.



Nancy A. Adams