

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

**RE: JOHNSTON CORPORATION
VARIANCE APPLICATION NO. 0115-1180**

AAD NO. 02-012/ISA

DECISION AND ORDER

This matter came before the Administrative Adjudication Division (“AAD”) on a request for an adjudicatory hearing filed by Johnston Corporation (“Applicant”) following the denial by the Department of Environmental Management (“DEM” or “Department”), Office of Water Resources (“OWR” or “Office”) of the Applicant’s application and request for variances to install an individual sewage disposal system “ISDS” on real property located on Mast Street in Jamestown, Rhode Island, identified as Lot 251 on Jamestown Tax Assessor’s Plat 14 (“site”).

On or about February 11, 2002, the Applicant filed an application with OWR requesting a permit to install an ISDS to service a single family residence to be constructed on the site. Accordingly, the Applicant requested variances from the following Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems, (“ISDS Regulations”):

1. SD 3.05(1) Location - requiring a minimum distance of one hundred feet (100’) from a private well and the disposal trench, bed, or chambers of an ISDS. See Minimum Distances Table, 1. Private well; and
2. SD 2.14 Construction in Area Served by Private Wells – Before an approval can be granted to construct an individual sewage disposal system for a building being served by a private well, sufficient additional area must be available for the replacement of the disposal field, in case of failure. This area must be on the property of the individual seeking approval and meet all the minimum distance requirements set forth in these regulations.

The application and requested variances were denied by the OWR on October 4, 2002. The denial letter stated that the Department evaluated the effect of each variance

on the public interest and public health, and determined that the Applicant did not provide convincing evidence to demonstrate that the degree of environmental protection provided under the ISDS Regulations could be achieved without strict application of the particular provisions from which the variance was requested. The denial letter specified that In particular, the Department considered:

1. The effect of the proposed system on any drinking water supply or tributary thereto;
2. The effect of the proposed system as a potential cause of any public or private nuisance;
3. The effect of the proposed system on the public health.

A timely appeal and request for hearing and the requisite list of abutters within 200 feet were filed by the Applicant.

A prehearing conference was held on August 22, 2003, and the Prehearing Conference Record was entered on September 4, 2003. The Hearing was conducted on September 8, 9, and 22, 2003. Following the hearing, post-hearing memoranda were filed by the Applicant and OWR. Applicant and OWR filed responses to post-hearing memoranda on November 28, 2003 and the hearing was deemed closed on that date.

The Applicant at the adjudicatory hearing bears the burden of proof to demonstrate through clear and convincing evidence that: (1) A literal enforcement of the Regulations will result in unnecessary hardship to the Applicant; (2) That the system will function as proposed in the application; and (3) That the issuance of a permit will not be contrary to the public interest, public health and the environment. In order to demonstrate that the proposed ISDS will not be contrary to the public interest, public health and the environment, the Applicant must introduce clear and convincing evidence that:

1. The waste from the proposed system will not be a danger to public health;
2. The disposal system to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply or tributary thereto;
3. The waste from the proposed system will not pollute any body of water or wetland;
4. The waste from the proposed system will not interfere with the public use and enjoyment of any recreational resource; and
5. The waste from the proposed system will not create a public or private nuisance.

The following stipulations of fact were agreed upon by the parties pursuant to the Prehearing Conference Record:

1. Johnston Corporation filed ISDS Application No. 0115-1180 on February 11, 2002 requesting the approval for the installation of an ISDS on real property located in Jamestown, Rhode Island, on Tax Assessor's Plat 14, Lot 251 (the "Property"). Said application requested variances of Rules SD 2.14 and SD 3.05 of the *Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems* ("ISDS Regulations").
2. On October 4, 2002, the Office denied Application No. 0115-1180.
3. Johnston Corporation's application to the OWR dated February 7, 2002, sought variance relief from Rules SD 2.14 Construction In Area Served by Private Wells and SD 3.05 Location.
4. Johnston Corporation timely appealed the denial of Application No. 0115-1180 to the DEM Administrative Adjudication Division.

A list of Exhibits introduced at hearing is attached as Appendix A.

Applicant proposes to build a single family home on a 7800 sq. ft. lot in the Town of Jamestown. The occupants would obtain water from a proposed well on the site. Because of the nonconforming lot, Applicant requests variances that, inter alia, lessen the required distances from the sewage disposal system to its own proposed well and wells on adjacent properties.

The first witness who testified for Applicant was Thomas J. Dolce, P.E.. He was qualified as an expert concerning the basis used to support certain R.I. DEM, OWR Rules concerning ISDS design and horizontal separation distance from private wells. Mr. Dolce testified that there was no scientific basis for the one hundred foot horizontal separation distance required between private wells and septic systems, that the one hundred foot separation was a sort of arbitrary figure; and that considerably less distance could be safe in some areas.

Scott F. Moorehead, P.E., who was qualified as an expert in the field of civil engineering, ISDS and private well design and regulatory compliance, testified next for Applicant. Mr. Moorehead testified that he designed the ISDS system and prepared the variance application; that the site is a non-conforming lot of record and there is no way to meet the ISDS requirements, and that he minimized the variances requested.

Mr. Moorehead stated that he conducted a review of the ground water elevations, pertinent data, and other information concerning the subject area; that he recommended to the Applicant that a well be installed to alleviate any staff objections that the well could become polluted; and that the well was then installed. He explained that there are only two ISDS systems within the 100 foot minimum distance from the well: (1) the system on the lot to the East that is seventy-six feet away; and (2) the system on the lot to the North that is ninety-eight feet away. It was Mr. Moorehead's opinion that, if the request for a variance under SD 3.05 was approved, the geology and test results would demonstrate that the well would provide a suitable source of potable water supply at the site.

Mr. Moorehead testified that the variance of five feet requested under SD 2.14 for an alternate system was minor and insignificant and that in the unlikely event the alternate area had to be used, a system could be designed that would have no adverse

effect on the public health or welfare. He concluded that a denial of this application based on the minor variance of five feet would render the subject lot unbuildable and therefore result in an unnecessary hardship to the property owner.

Alexander Rothchild, M.S., who was qualified as an expert in the field of groundwater hydrology, was the next witness called by Applicant. Mr. Rothchild testified that he reviewed the site evaluation form, dated May 29, 2001 (Applicant 9 Full), the Plan of Proposed Sewage Disposal System for the subject property (OWR 4 Full), and the so-called Rothchild Report (Applicant 1 Full), as well as a host of other site specific information and tables/data available from DEM and other public agencies.

He stated that although SD 3.05 requires a 100-foot separation of wells from septic systems and that the 100 feet can be reduced to 80 feet by variances, he could find no scientific data supporting these distances. It was Mr. Rothchild's opinion that the distances, as applied by OWR, have no scientific basis; and that each site must be individually analyzed to determine what should be the appropriate separation distance, taking into account the unique characteristics of each site.

Mr. Rothchild opined that the existing well is suitable for long term potable water for the site; that there is no reasonable chance of pollution of this well from the nearby systems or the proposed system; that the approval of this application would not be contrary to public health, and that insistence on the one hundred foot minimum separation would result in unnecessary hardship to Applicant.

At the conclusion of Applicant's presentation of its case, OWR made an oral motion that this matter be dismissed. OWR argued that Applicant had not met the applicable burden of proof under the ISDS Regulations, and that the Hearing Officer should not consider the material that was submitted by Applicant after OWR's denial of the application. The Hearing Officer declined to render a decision on said motion until

the close of the evidence. The issues raised by said motion are fully addressed elsewhere herein, and render any separate determination of said motion unnecessary.

The OWR called Mohammed J. Freij, P.E. as its first witness. He is employed as a Principal Sanitary Engineer with the ISDS Section of DEM. It was stipulated that Mr. Freij is qualified as an expert in the field of sanitary engineering and in the application of and compliance with ISDS Regulations. Mr. Freij testified that as part of his job he reviewed the subject application in order to make a recommendation to his superior whether to approve, deny, or send back the application as unacceptable. He determined that it should be denied, and made said recommendation to his supervisor, Brian Moore, P.E. Mr. Moore then consulted with Russell J. Chateauneuf, P.E., Chief, Groundwater and Wetland Protection, and the recommendation to deny the application was adopted and the denial letter was signed by Mr. Chateauneuf.

Mr. Freij testified that he had extensive experience reviewing applications and making recommendations to his superior and that he has reviewed approximately three hundred ISDS applications in Jamestown, Rhode Island, as well as other ISDS variance applications in the same general area as the subject application. It was Mr. Freij's testimony that the site conditions in the general area of the subject application were not uniform and that even if the water table in the immediate area was uniform, it could vary a short distance away. He explained that the distances to ledge varied in the area, and that there could also be a variability of soil types in the area.

It was Mr. Freij's expert opinion that it was possible to change the ISDS variance design to make the lot conform to the minimum requirements by utilizing a water holding tank instead of a private well. He testified that OWR had approved at least ten applications with holding tanks in Rhode Island, and that this type of design conforms with the Rhode Island Building Code.

Mr. Freij further testified that the Applicant could have provided additional information in support of its application; that Applicant could have dug three test holes to determine the direction of ground water flow; that travel time calculations would have been a better measure of the specific time of travel of the effluent from the septic system on lot 217 to the well on lot 251; that on-site hydraulic permeability testing was needed to show that there was sufficient effluent travel time to allow the harmful bacteria to die before reaching the well, and that this determination should not be based on average conditions some five to ten miles distant.

Mr. Freij stated that in addition to the foregoing, there is an additional concern for the water quality of the well if the ISDS is built as proposed. The water quality of the well could change once the well is in full operation. Draw down from the well at 450 gallons per day from the well could expand the cone of influence more than 76 feet away, and therefore the water quality could differ after operation of the system.

It was Mr. Freij's opinion that the addition of a new system to the area could cause an increase in the nitrate levels for that area, and that the water quality could differ after the operation of the proposed system. This witness opined that, based on his review of the documents and material submitted by Applicant prior to the denial of the subject application, as well as the additional reports submitted subsequently, approval of the application was not warranted.

Applicant argues the following:

1. that the variance of five feet requested under SD 2.14 for alternate system should have been approved under SD 20.02 of the ISDS Regulations;
2. that the 100-foot minimum distance requirement of SD 3.05 is not based on substantive scientific evidence to justify the design standard, and that there are no rules governing a variance from the 100-foot minimum distance; and
3. that the OWR improperly applied SD 3.05 based on the circumstances presented in this application and that the application as proposed will attain the

same degree of environmental protection as provided under Rule SD 3.05 without strict application of that Rule.

Applicant maintains that as to the variance from SD 2.14 "alternate area", it has met or exceeded its burden of proof as described under SD 21.02, and that the denial of the variance requested was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Applicant also maintains that as to the variance from SD 3.05 "minimum distance requirement," it has proved by clear and convincing evidence that the variance would attain the same degree of environmental protection as provided under Rule SD 3.05 regarding the public health and public interest objectives of the Rules concerning the design, installation and operation of an ISDS and private well. Applicant submits that for all of the above reasons the AAD should reverse the denial and grant the permit.

It is argued by Applicant that the rules, as they are now implemented, are beyond constitutional authority and are in violation of its constitutional rights. Applicant contends that the decision of OWR is arbitrary and capricious and characterized by an abuse of discretion in violation of the Administrative Procedures Act (R.I.G.L. 42-35-15) and the 14th Amendment of the United States Constitution. Wherefore it is urged by Applicant that, based on the foregoing, the AAD should reverse the denial of its application.

OWR counters that:

1. the Applicant has failed to show by clear and convincing evidence that the proposed ISDS would function as proposed and would not be contrary to the public interest and the public health;
2. the Applicant has failed to show by clear and convincing evidence that a literal enforcement of the regulations will result in unnecessary hardship; and
3. the OWR's denial of the Applicant's variance application is fully supported by probative, reliable, and substantial evidence on the whole record originally submitted, is in accordance with controlling regulations, and therefore should be affirmed.

OWR posits that since they denied the variance in consideration of the data originally submitted by the Applicant in the variance request, the Hearing Officer should limit his focus to only those materials submitted in the original application. OWR suggests that if the Applicant would prefer that the OWR use the additional data and materials submitted by the Applicant subsequent to the original submission of the ISDS application, Applicant submit these materials in a new application.

OWR further maintains that Applicant is required to sustain its burden on both variance requests supporting the contention that the proposed ISDS would function as proposed and would not be contrary to the public interest and the public health. Specifically, OWR avers that in light of the lack of substantial evidence presented on the entire record, Applicant has failed to provide clear and convincing evidence in support of the two variance requests.

By way of background, it is essentially undisputed that subsequent to the October 17, 2002 filing of Applicant's request for Administrative Adjudicatory Hearing, the Applicant met with members of the Variance Review Board and the attorney for OWR to determine if Applicant could make possible changes to the plan or present additional data that might change OWR's position as to the variance requests. On or about December 26, 2002, a well was installed on the subject premises, and a water quality test was performed on the installed well on January 6, 2003. On or about January 10, 2003 the well installer filed the required well completion report with the Groundwater Section of DEM, and these reports were forwarded to OWR. For various reasons, additional water quality tests were performed on the installed well, and the results thereof were submitted to OWR. The fourth and final well test was done on August 28, 2003, and the results thereof were submitted to OWR shortly thereafter.

A review of the AAD file in this matter serves to explain the lapse of time between

the filing of the Request for Hearing and the adjudicatory hearing. The file demonstrates that there were numerous continuances and extension of time that were granted pursuant to the requests of the parties. It is interesting to note that the Order Extending Control Date entered April 3, 2003 recited that the extension was granted so that the results of the water testing could be forwarded to the OWR and that the OWR had no objection to said extension of time. The results of the water testing and additional data and materials were presented to the OWR in ample time for OWR's review.

I am initially addressing the question of whether (as suggested by OWR) the Hearing Officer should limit his focus to only those materials submitted in the original application. The OWR postures that since its denial of the application was based on the materials originally submitted, an evaluation of its decision should not be based on the additional data and materials submitted by the Applicant subsequent to the original submission of the ISDS application. However, OCI has submitted no cases or other authority in support of its position. Nor has OWR cited any statutory or regulatory requirement which mandates that the Hearing Officer limit his consideration to only the data and materials submitted to OWR prior to its denial. A review of the travel of this case, the events that occurred after the denial, and the attendant circumstances fail to support OWR's position in this regard. It would appear manifestly unjust and unfair to the Applicant for the Hearing Officer to limit his consideration to only the material and data submitted prior to OWR's denial.

OWR objected at the hearing to the introduction by Applicant of the data and material submitted after OWR's denial. The Hearing Officer ruled that this data and material was admissible; however, the on-going hearing was continued from September 9, 2003 to September 22, 2003 in order to afford OWR's expert witnesses additional time to review said data and material before continuing with the hearing. Accordingly, the

decision in this matter is based on all of the evidence and testimony presented at the hearing.

With regard to the constitutional issues raised by Applicant, the AAD has consistently held that constitutional issues are not properly before this tribunal. As pointed out by the U.S. District Court for the District of Rhode Island in Bowen v. Hackett, 361 F. Supp. 854,860 (D.R.I. 1973) the “expertise of state administrative agencies does not extend to issues of constitutional law.” Applicant’s constitutional arguments are preserved for the record but will not be addressed further in this decision.

The burden of proof at this adjudicatory hearing has been previously addressed herein; however, a review of the ISDS Regulations clearly establishes the correct burden of proof that must be met by the Applicant in the instant matter. The ISDS Regulations contain specific provisions which govern the Conduct of Hearing and the Burden of Proof and Standard of Review at adjudicatory hearings. The following are the pertinent provisions of the ISDS Regulations that govern hearings at the AAD:

SD 21.01(d) Conduct of Hearing – The notice and conduct of hearing by the Department of Environmental Management, Administrative Adjudication Division, shall comply in all respects with the provisions of the Administrative Procedures Act, R.I. General Laws Chapter 42-35, and the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.

SD 21.02 Burden of Proof and Standard of Review

- (a) At the adjudicatory hearing, the applicant shall have the burden of proof to demonstrate through clear and convincing evidence that:
- (1) A literal enforcement of the regulations will result in unnecessary hardship;
 - (2) That the system will function as proposed in the application; and
 - (3) That the issuance of a permit will not be contrary to the public interest,

public health and the environment.

- (b) In order to demonstrate that the proposed Individual Sewage Disposal System will not be contrary to the public interest, public health and the environment, the applicant must introduce clear and convincing evidence to the satisfaction of the Director that:
- (1) The waste from the proposed system will not be a danger to public health;
 - (2) The disposal system to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply or tributary thereto;
 - (3) The waste from the proposed system will not pollute any body of water or wetland;
 - (4) The waste from the proposed system will not interfere with the public use and enjoyment of any recreational resource; and
 - (5) The waste from the proposed system will not create a public or private nuisance.
- (c) The Director, or his/her designee, may approve a permit or grant a variance from any provision of these rules and regulations where he/she finds that:
- (1) A literal enforcement of such provisions will result in unnecessary hardship to the applicant;
 - (2) That the system will function as proposed in the application; and
 - (3) That the permit or variance sought will not be contrary to the public interest, public health and the environment.
- (d) The decision of the Director, or his/her designee, may contain such terms and conditions as he/she deems necessary to protect the public interest, public health and the environment.

Based on the foregoing, the Applicant clearly has the burden of making the requisite proof through clear and convincing evidence; and as previously stated, this determination should be made based on all of the competent evidence and testimony that was introduced at the hearing. Contrary to the Applicant's arguments, the 100-foot

minimum distance requirement of SD 3.05 is based on substantive scientific evidence and data, and there are indeed rules governing a variance from the 100-foot minimum distance. Although the setback requirement provision in SD 3.05 does not explicitly consider site specific geologic factors, such site specific factors are considered by OWR when submitted in an applicant's variance request.

OWR's witness Mr. Freij, provided credible testimony concerning the justification for the 100-foot setback requirement. This witness testified that the 100-foot setback is a conservative number established by the EPA in order to ensure safety, and that the EPA came up with 100 feet based on the studies that show that the average travel time for liquid or sewage in soil is three feet per day, and the average die-off time for bacteria and fecal coliform is thirty days, plus or minus. Therefore the EPA came up with 100 feet to, basically, be protective and reasonable, since sewage traveling three feet per day, will travel ninety feet in thirty days.

Mr. Freij further testified that he was genuinely concerned about the adverse effect the subject well might incur because of its proximity to the proposed ISDS, and that this adverse impact would be the result of high nitrate levels and presence of coliform bacteria in the groundwater, in addition to the existing hydrogeological circumstances in the area. It was Mr. Freij's opinion that although particular soil conditions may allow for variance from this setback requirement, the Applicant did not provide any relevant information concerning percolation rates and soil characteristics that would justify the issuance of a variance. It was Mr. Freij's opinion that in the instant matter, site-specific geologic factors weighed on the side of denying Applicant's request.

A review of the evidence and testimony demonstrates that the OWR properly applied SD 3.05 in this matter. SD 3.05 requires a minimum distance of one hundred feet from a private well and the disposal trench, bed, or chambers of an ISDS. The Variance

Review Standards contained in SD 20.02 are clearly applicable in this matter; and contrary to Applicant's argument, SD 21.02 specifies the burden of proof and standard of Review at adjudicatory hearings.

The Applicant argues that the variance of five feet requested under SD 2.14 for an alternate system should have been approved under SD 20.02 of the ISDS Regulations. SD 2.14 requires that an alternate area be available for the replacement of the disposal field, in case of failure of the primary system, and that this area must be on the property of the individual seeking approval and meet all the minimum distance requirements. The minimum distance for an alternate area is ten (10) feet from a property line, however, because of the site constrictions, the variance requested was for a separation of five (5) feet.

The request for a variance from SD 2.14 would pose little or no problem if this were the only variance requested by Applicant. The Applicant, however, seeks multiple variance requests which increase the concern for public health, public interest, and environmental concern under SD 20.02 of the ISDS Regulations. The standards established by SD 20.02 exist to ensure the safety of the drinking water of the applicant and the public, and multiple variance requests should not be considered separately in order to determine if the approval of Applicant's multiple variance requests will not be contrary to the public health, the public interest, or environmental quality. A review of the evidence demonstrates that the variance of five feet requested under SD 2.14 for alternate system should be denied under SD 20.02(b) in order to ensure the safety of the drinking water of the Applicant and the public.

It is unfortunate that the size of the lot presents obstacles to the approvals sought by Applicant, however this does not justify ignoring the minimum standards imposed by the ISDS Regulations. Any relief via variances should only be granted upon a

satisfactory showing that Applicant has sustained its burden of proof as established by the ISDS Regulations.

In its response to OWR's post-hearing memorandum, the Applicant argues extensively that the "variance for the well" should be granted pursuant to Chapter 13.2 of TITLE 46 of the R.I. Gen. Laws. Applicant points out that R.I. Gen. Laws § 46-13.2-8 authorizes the Director to grant a exemption from the minimum standards where he finds "that compliance *** would result in undue hardships." Applicant further argues that the regulations adopted pursuant to said chapter provide that "if unusual circumstances exist," the director may issue a variance "reducing the set minimum standards for the location *** of non-public water wells;" that in order to obtain a variance, the "well owner must demonstrate the variance will not cause undo harm to the well"; and that the "burden of proof will be on the well owner." Applicant contends that based upon the foregoing, the issue is whether the variance will cause "undue harm to the well"; and that since there is no definition of the burden of proof, it should be construed as the standard (default) civil burden of proof by a preponderance of the evidence.

The Applicant's argument in this regard is predicated on the language contained in Chapter 13.2 and the regulations adopted pursuant thereto. Chapter 13.2 is entitled "Drilling of Drinking Water Wells". This Chapter provides for the creation of a Rhode Island well drilling board, the adoption of pertinent regulations, and the granting of exemptions from the requirements of said chapter. A review of Chapter 13.2 in its entirety clearly demonstrates that this chapter is not applicable to the instant matter. The Applicant herein has filed its application and variance requests pursuant to the ISDS Regulations and not pursuant to the "Drilling of Drinking Water Wells" statute or the regulations adopted thereunder. Consequently, neither Chapter 13.2 or the regulations adopted thereunder govern the burden of proof in this matter. Although the burden of

proof by a preponderance of the evidence may well apply in other concepts, the ISDS Regulations specifically provide otherwise and they are controlling in this matter. SD 21.02 of the ISDS Regulations specifically provides that at adjudicatory hearings, the Applicant has the burden to provide the requisite proof by clear and convincing evidence.

There is no doubt that all of the witnesses who testified as experts were duly qualified to render their expert opinions. However, I found the testimony of Mr. Freij to be the most persuasive. Mr. Freij has extensive experience with waste water disposal systems generally, as well as in the immediate area. Mr. Freij's testimony is most credible and clearly demonstrates that more site specific data and information is needed, and that the determination whether there was sufficient effluent travel time in the immediate area of the well should not be based on average conditions some five to ten miles distant.

The experts for both parties essentially agreed that the ground water flowed in an east-to-west direction from the proposed ISDS toward the direction of the nearest drinking well. The Applicant's experts concluded that no effluent from the proposed system would travel into the nearby private wells because the hardpan located at eight (8) feet below the topsoil would prevent percolation of the effluent into the private well located about seventy-six (76) feet down gradient from the proposed ISDS. However, I find that Mr. Freij's testimony rejecting the conclusion of Applicant's witnesses concerning the hardpan to be most credible, and that Mr. Freij's testimony clearly establishes that more on-site hydraulic permeability testing and information is needed in order to confirm the depth to hardpan and the condition of the hardpan in the immediate area.

The Applicant presented a significant amount of evidence and testimony in support of its Application; however, after an extensive review of same, I am compelled to find that the Applicant failed to provide adequate test results, data and/or information as

to the type of soil on the subject lot. The soil description in Appl. 1, Appendix B, entitled "Well completion Report" is based on the observations of the well driller, who is not a scientist. In any event, the results provided do not provide an accurate description of the types of soil present at different locations on the subject lot, and despite the small size of the lot there could be variations of soil types at different locations on the subject lot.

Based on the foregoing, I find that Applicant has failed to prove by clear and convincing evidence that the application as proposed will attain the same degree of environmental protection as provided under SD 3.05 regarding the public health and public interest objectives of the Rules concerning design, installation and operation of an ISDS and private well.

After due and careful consideration of all credible evidence and testimony, I find that the Applicant has failed to show by clear and convincing evidence supporting the two (2) variance requests that the proposed ISDS would function as proposed and would not be contrary to the public interest and the public health. Consequently, it should not be necessary to consider the issue of unnecessary hardship. Assuming arguendo, unnecessary hardship is at issue in the instant matter, the Applicant has nevertheless failed to prove through clear and convincing evidence that a literal enforcement of the ISDS Regulations will result in unnecessary hardship. OWR's expert witness, Mr. Freij, and Applicant's expert witness, Mr. Moorehead, both testified that the Applicant could eliminate the ISDS variance regarding SD 3.05 and still be able to build the house and ISDS proposed in the subject application. These witnesses both testified that the Rhode Island State Building Code would allow a water holding tank to be used as the water supply source for the proposed project, and that there were houses in Rhode Island that had been built with water holding tanks as the sole water supply source. Alternatives exist which would allow Applicant to use its property in a beneficial manner.

The Rhode Island Supreme Court has consistently held that in requests for variances in similar matters, the burden is on the party seeking the variance to show by probative evidence that being restricted to the permitted uses will result in a deprivation of all beneficial use of the property. OK Properties v. Zoning Bd. Of Review, 601 A. 2d 953 (R.I. 1992). Although the subject lot does not contain sufficient area to meet the pertinent requirements of the ISDS Regulations, the Applicant could build the proposed house and ISDS by using a water holding tank to be used as the sole water supply source. In any event, the Applicant has failed to introduce the requisite evidence to prove that the denial will deprive Applicant of all beneficial uses of the property.

FINDINGS OF FACT

After review of all documentary and testimonial evidence of record, I make the following findings of fact:

1. Johnston Corporation filed ISDS Application No. 0115-1180 on February 11, 2002 requesting the approval for the installation of an ISDS on real property located in Jamestown, Rhode Island, on Tax Assessor's Plat 14, Lot 251 (the "Property"). Said application requested variances of Rules SD 2.14 and SD 3.05 (1) of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations").
2. On October 4, 2002, the Office of Water Resources denied Application No. 0115-1180.
3. The Applicant filed a "Request for Administrative Adjudicatory Hearing" on October 17, 2002.
4. Applicant paid all necessary fees and filed all necessary documents required to confer jurisdiction over this matter upon the Administrative Adjudication Division of the Department of Environmental Management.
5. Subsequent to the filing of Applicant's request for hearing, the proceedings in this matter were postponed or continued in order to enable Applicant to install a well on the subject property and present additional data obtained from the testing of said well to OWR for OWR's consideration.
6. On or about December 26, 2002, the Applicant installed a well on the subject property, and thereafter four water tests were performed on said well, and the

results thereof were submitted to OWR.

7. The Prehearing Conference was held on August 22, 2003 and the Prehearing Conference Record was entered by this Hearing Officer on September 4, 2003.
8. The administrative hearing was held on September 8, 9, and 22, 2003, and both Responses to post-hearing memoranda were filed on November 28, 2003.
9. All hearings were conducted in accordance with the provisions of the "Administrative Procedures Act" (Chapter 42-35 of the Rhode Island General Laws), the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Design Systems, and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.
10. The Applicant proposed to install an individual sewage disposal system to service a single-family residence to be constructed on the site.
11. The subject area is not serviced by a municipal water supply, and there are no municipal sewers available at the present time.
12. The subject lot contains 7800 square feet in area.
13. The proposed ISDS requires two variances.
14. The proposed well that was installed is located within one hundred feet (100') of existing septic systems, in particular the system located about seventy-six feet (76') to the East on lot 217 and the system located about ninety-eight feet (98') to the North on lot 216.
15. The flow of groundwater travels in an east-to-west direction from the proposed ISDS toward the nearest drinking well.
16. The proposed additional area to be available for the replacement of the disposal field in case of failure will be located five feet (5') from the property line of the subject property.
17. The Application proposes that the house will be serviced by a private well and there is insufficient additional area available for the replacement of the disposal field on the subject property in case of failure.
18. The geographic features and specific soil conditions in the immediate area of the proposed system directly affect the system's ability to function properly.
19. Depth to hardpan, specific soil characteristics, percolation rates and geographic features vary significantly in the general area of the proposed ISDS.
20. The data submitted by Applicant does not establish the depth to hardpan, the condition of the hardpan, specific soil characteristics and percolation rates in the

immediate area of the proposed system.

21. The area involved is densely populated and many of the homes therein are closely located.
22. The proposed ISDS will cause an increase in the nitrate level of the groundwater, which may impact the nearby wells and cause the drinking water to be contaminated.
23. Excessive nitrate levels in the groundwater will contaminate nearby wells.
24. The contaminants contained in the wastewater from the ISDS will prove hazardous to the health of those consuming the water from said wells.
25. Applicant has not explored all alternatives to the subject application in order to reduce environmental impact, and at the same time, derive a beneficial use of the property.
26. The Applicant may utilize a water holding tank to be used as the sole water supply source for the proposed project.
27. Alternatives exist for Applicant to build a house serviced by an ISDS on the site.
28. The Applicant has failed to show by clear and convincing evidence that the ISDS will function properly and that the granting of the permit and variances requested would not be contrary to the public interest and public health.

CONCLUSIONS OF LAW

Based upon all of the documentary and testimonial evidence of record, I conclude as a matter of law:

1. All hearings were conducted in accordance with the Rhode Island General Laws, the Rules and Regulations of DEM for ISDS and the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.
2. Individual Sewage Disposal System Regulation SD 2.01 (a) requires the Applicant to obtain a permit to install, construct, alter or repair an Individual Sewage Disposal System. The variances from SD 2.14 and SD 3.05 (1), which Applicant seeks will be contrary to the purposes and policies set forth in the Administrative Findings and Policy of the Individual Sewage Disposal System Rules and Regulations.
3. Applicant has not met the burden of proving by clear and convincing evidence that the disposal system to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply or tributary thereto; and that the waste from the disposal system will not create a danger to

the public health.

4. Applicant has failed to demonstrate through clear and convincing evidence that the system will function as proposed in the application, and that the issuance of a permit will not be contrary to the public interest, public health and the environment.
5. Denial of the variances requested will not result in a denial of all beneficial use of the property; therefore, a literal enforcement of the provisions of the Individual Sewage Disposal System Regulations will not result in any unnecessary hardship to the Applicant.
6. Application No. 0115-1180 does not conform to the requirements of the ISDS Regulations.

Therefore, it is hereby

ORDERED

1. Application No. 0115-1180 and the request for variances from ISDS Regulations submitted by Applicant be and they are hereby **DENIED**.

Entered as an Administrative Order and herewith recommended to the Director for the issuance as a Final Agency Decision and Order this 2nd day of April, 2004.

Joseph F. Baffoni
Hearing Officer
Department Of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 28th day of April, 2004

Frederick J. Vincent
Acting Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Richard L. Johnston, Esquire, 2363 Post Road, Warwick, RI 02886 and Paul S. Ryan, Esquire, 670 Willet Avenue, East Providence, RI 02915; via interoffice mail to Gregory Schultz, Esquire, Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 29 day of April, 2004.

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.

FOR APPLICANT:

- | | |
|-------------------------|---|
| APPL. 1
Full | Rothchild Report |
| APPL. 2
Full | Moorehead Resume |
| APPL. 3
Full | Rothchild Resume |
| APPL. 4
Full | Dolce Resume |
| APPL. 5
Full | Copy of OWR File Notes, dated November 14, 2002 |
| APPL. 6
Full | Copy of OWR Denial Letter, dated October 4, 2002 (Same as OWR 1 Full) |
| APPL. 7
Full | Copy of OWR Variance Review Sheet, dated September 27, 2002 |
| APPL. 8
Full | Copy of Anthony Letter, dated June 21, 2002 |
| APPL. 9
Full | Copy of OWR Site Eval. Form, dated May 29, 2001 |
| APPL. 10
Full | Copy of OWR App. Review Check List, dated February 11, 2002 |
| APPL. 11
Full | Copy of OWR Inspection Report, dated May 29, 2001 |
| APPL. 12
Full | Copy of OWR Draft Letter to Applicant, undated |
| APPL. 13
Full | Copy of OWR Site Eval. Form, dated May 29, 2001 |
| APPL. 14
Full | Copy of ISDS Plan, dated September 20, 2001 |
| APPL. 15
Full | Copy of Public Records Access Request, dated March 7, 2003 |
| APPL. 16
Full | Copy of ISDS Application, dated February 11, 2002 |

- APPL. 17** Copy of Private Well Application, dated February 12, 2002
Full
- APPL. 18** Copy of ISDS Design Report, dated December 6, 2001
Full
- APPL. 19** Copy of Radius Map, dated January 24, 2002
Full
- APPL. 20** Copy of OWR Variance Application, dated February 7, 2002
Full
- APPL. 21** Copy of Notice List, dated January 24, 2002
Full
- APPL. 22** Copy of Scituate Survey Letter, dated August 7, 2002
Full
- APPL. 23** Copy of Jamestown Assessor's Map, undated
Full
- APPL. 24** Copy of Flanagan Letter, dated June 17, 2002
Full
- APPL. 25** Copy of Bergersen Letter, dated June 3, 2002
Full
- APPL. 26** Copy of Edgar Letter, dated June 14, 2002
Full
- APPL. 27** Copy of Brothers Letter, dated June 11, 2002
Full
- APPL. 28** Copy of Bruno Letter, dated June 5, 2002
Full
- APPL. 29** Copy of Scituate Survey Letter, dated May 30, 2002
Full
- APPL. 30** Copy of OWR Letter, dated May 24, 2002
Full
- APPL. 31** Copy of Dry Season App., dated May 4, 2001
Full
- APPL. 32** Copy of Groundwater Table Verification, dated June 15, 2001
Full

- APPL. 33** Copy of ISDS App., dated June 26, 1998
Full
- APPL. 34** Copy of Plan, dated June 15, 2001
Full
- APPL. 35** Copy of Plan, dated June 15, 2001
Full
- APPL. 36** Copy of Plan, dated June 15, 2001
Full
- APPL. 37** Copy of ISDS App., dated June 15, 2001
Full
- APPL. 38** Copy of ISDS App., dated February 9, 1998
Full
- APPL. 39** Copy of ISDS App., undated
Full
- APPL. 40** Copy of Johnston Corp. Letter, dated March 22, 2003
for ID
- APPL. 41** Copy of Lorensen Invoice, dated January 10, 2003
for ID
- APPL. 42** Copy of Johnston Corp. Letter, dated April 1, 2003
Full
- APPL. 43** Copy of Well Test of R.I. Analytical dated reported
Full August 29, 2003
- APPL. 44** Assessors Map 14 for Town of Jamestown
Full

FOR OWR:

- OWR 1** ISDS Variance Application No. 0115-1180 denial letter; four
Full pages
- OWR 2** "Plan of Proposed Sewage Disposal System, Assessor's Plat 14,
Full Lot 251, Mast Street, Jamestown, RI, Prepared for Johnston Corp.,
Scale 1"=20', Date: September 20, 2001".
- OWR 3** ISDS Variance Review Sheet for Application 0115-1180; one
Full page.

- OWR 4** ISDS Calculations Mast Street, Assessor's Plat 14, Lot 251,
Full Jamestown, RI, Prepared for Johnston Corp., Date: December 6, 2001;
six pages.
- OWR 5** Water sample analysis date; seven pages
Full
- OWR 6** Site Evaluation Form, Application No. 0115-1180, Richard
Full Johnston, Mast Street, Assessor's Plat 14, Lot 251, Jamestown, RI; two
pages.
- OWR 7** Letter from Quentin Anthony to RIDEM Office of Water
Full Resources regarding ISDS Application 0115-1180, with attachments,
dated June 21, 2002; five pages.
- OWR 8** Letter from Robert D. and Dianne M. Edgar to RIDEM Division
Full of Groundwater and ISDS regarding application 0115-1180, dated June
14, 2002; one page
- OWR 9** Letter from Audrey C. Flanagan to RIDEM Division of
Full Groundwater and ISDS regarding application 0115-1180, dated June
14, 2002; two pages.
- OWR 10** Resume of Russell J. Chateaufneuf, P.E.; one page
Full
- OWR 11** Resume of Brian M. Moore, P.E.; two pages
Full
- OWR 12** Resume of Mohammed J. Freij, P.E.; two pages
Full