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

RE: CRISPI, ROBERT & HILDA **AAD No. 01-002/ISA**

DECISION AND ORDER DISMISSING APPEAL

This matter came before Hearing Officer Mary F. McMahon for consideration of two (2) motions to dismiss the appeal of Robert Crispi and Hilda Crispi ("Petitioners"). The Petitioners are adjacent landowners to the property that was subject of an application by Joseph Charette and Brian Monfils Builders, Inc. for an ISDS permit. The Department of Environmental Management, Office of Water Resources ("OWR") granted the permit application. The Petitioners filed a hearing request with the Administrative Adjudication Division for Environmental Matters ("AAD") on July 11, 2001.

On August 28, 2001, the OWR filed its Motion to Dismiss. The motion asserts that the AAD is without jurisdiction to hear Petitioners' appeal because the Crispis are not persons having a right to a hearing under the Administrative Procedures Act, the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("AAD Rules"), and the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations").

On August 29, 2001 Brian Monfils Builders, Inc. (hereinafter "Applicant") also moved for dismissal of Petitioners' appeal. Applicant relied on the same arguments as those set forth in the OWR's Motion to Dismiss.

Petitioners filed an Objection with supporting memorandum. Oral arguments were heard on September 19, 2001.

In oral argument, Applicant cited the provisions of ISDS Rule 21.00, section 42-35-9 of the Administrative Procedures Act, and AAD Rule 13.00 to demonstrate AAD's lack of jurisdiction and the Petitioners' lack of standing before the AAD. The Applicant also directed attention to ISDS Rule 21.02 that specifies that Applicant has the burden of proof at the adjudicatory hearing when, in this instance, Applicant had already been granted the permit and had not requested a hearing.

The OWR concurred in the Applicant's arguments and posited that Petitioners' rights can be protected in their Superior Court action (previously filed).

Petitioners, in their Objection and in argument, assert that they have standing and are parties by virtue of having filed a hearing request. Memorandum in Support of Petitioners' Objection to Motion to Dismiss, at 3-4. They argue that the AAD has jurisdiction over their appeal pursuant to AAD Rule 3.00.

DECISION AND ORDER

In at least two (2) prior AAD matters, the appeals of neighboring landowners in similar circumstances were dismissed for lack of AAD jurisdiction. See Re: William R. Reagan (Appeal filed by Urania, Ltd.), AAD No. 95-004/ISA, "Decision and Order Granting Division's Motion to Dismiss",

entered as a Final Agency Order on April 28, 1995; and Re: Louis G. and Joan R. Roy (Appeal by Jeffrey and Bonnie Glazer), AAD No. 95-002/ISA, "Decision Granting Division's and Applicants' Motions to Dismiss," entered as a Final Agency Order on June 7, 1995. In those matters, the proponents of the motion to dismiss argued that on application matters, only the applicant has a right to a hearing before the AAD. Reagan at 2; Roy at 1.

A fresh analysis of the pertinent statutes, rules, and caselaw achieves the same result as in the Reagan and Roy appeals.

R.I. GEN. LAWS § 42-17.7-2 identifies the jurisdiction of the Division for Administrative Adjudication in the Department of Environmental Management:

> **42-17.7-2. Adjudication of environmental licenses and violations --- Informal resolution. ---** All contested enforcement proceedings, all contested licensing proceedings, and all adjudicatory proceedings under chapter 17.6 of title 42 shall be heard by the division of administrative adjudication pursuant to the regulations promulgated by the director of environmental management. …

The reference to chapter 17.6 of title 42 deals with assessment of administrative penalties and is inapplicable to the present ISDS permit situation. The pertinent regulations would be the AAD Rules and the ISDS Regulations. Both are discussed below.

Other applicable statutory provisions are set forth in R.I. GEN. LAWS § 42-35-1 et seq. --- The Administrative Procedures Act. Among the pertinent statutes:

> **42-35-1.1. Bodies subject to chapter. ---** Notwithstanding any other provision of the general laws or any public law or special act to the contrary, all agencies as defined in § 42-35-1(a) and all agencies,

boards, commissions, departments, and officers authorized by law to make rules or to determine contested cases, and all authorities as defined in § 42-35-1(b) are subject to the provisions of this chapter.

And:

42-35-14. Licenses. --- (a) Whenever the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply. …

R.I. GEN. LAWS § 42-35-9 provides the process required for hearing contested cases:

42-35-9. Contested cases --- Notice --- Hearing --- Records. ---

(a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
(b) The notice shall include:
(1) A statement of the time, place, and nature of the hearing;
(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
(3) A reference to the particular sections of the statutes and rules involved;
(4) A short and plain statement of the matters inserted [sic]. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved and detailed statement shall be furnished.
(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved. …

The Administrative Procedures Act defines many of the terms used in the above statutes. R.I. GEN. LAWS § 42-35-1 provides the following definitions:

42-35-1. Definitions --- As used in this chapter:

(a) "Agency" includes each state board, commission, department, or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases. …
(b) ***
(c) "Contested case" means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing;

(d) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes;
(e) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;
(f) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party. …

According to AAD's jurisdictional statute, the AAD is authorized to hear, inter alia, all contested licensing proceedings. R.I. GEN. LAWS § 42-17.7-2. The Administrative Procedures Act ("APA") governs and supplements what is set forth in AAD's jurisdictional statute. It also provides a definition for what constitutes a contested case and sets forth the general procedure for parties to be heard. Pursuant to the APA, a "contested case" is a proceeding in which the legal rights, duties, or privileges of a specific party are required by law to be determined by the agency after an opportunity for hearing. R.I. GEN. LAWS § 42-35-1(c).

The Rhode Island Supreme Court has addressed the issue of what constitutes a contested case under the provisions of the APA. In Property Advisory Group, Inc. v. Rylant, 636 A2d 317, 318 (R.I. 1994), the court stated that an agency must comply with the procedural requirements of the APA, "only if the matter before the agency involves a contested case." The court concluded that according to APA's definition, a hearing must be required by law in order for an administrative matter to constitute a contested case. [citations omitted] *Id.*

I have reviewed the above statutes as well as the AAD Rules and ISDS Regulations to determine if someone other than the Applicant is entitled as of

right to a hearing. The Petitioners argue that the AAD has jurisdiction pursuant to AAD Rule 3.00 Jurisdiction. Memorandum in Support of Petitioners' Objection to Motion to Dismiss, at 2. They assert that they are a "party" because they requested a hearing; are not "mere disappointed objectors or abutters" but have an injury-in-fact; and could have participated in the hearing if the Applicant had been denied his permit and appealed to the AAD. *Id.* at 3-4.

AAD Rule 3.00 recites the AAD's jurisdiction as it is established in R.I. GEN. LAWS § 42-17.7-2. Petitioners seek to have the language, "over all contested licensing proceedings," interpreted to include their initiation of an appeal. But AAD Rule 2.00(a) specifically provides that the AAD Rules "shall govern the conduct of Adjudicatory Proceedings within the jurisdiction of the Administrative Adjudication Division of the Department of Environmental Management." (emphasis added). Rule 2.00(b) also advises that the rules "shall be construed to further the prompt and just determination of every proceeding and in conformity with the Rhode Island Administrative Procedures Act." (emphasis added).

The AAD cannot interpret its own regulations to broaden the scope of its jurisdiction. The Rhode Island Supreme Court acknowledged in Caithness Rica Ltd. v. Malachowski, 619 A2d 833, 836 (R.I. 1993), that it has "…consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes." I therefore decline to interpret

the AAD Rule beyond the jurisdiction bestowed upon the AAD through the Administrative Procedures Act and AAD's jurisdictional statute.

As for Petitioners' other arguments, one cannot be a "party" under the APA merely because a request for hearing has been filed. If the AAD has no jurisdiction over the matter, it is axiomatic that the matter must be dismissed. Petitioners also assert "injury-in-fact". Injury-in-fact is a factor that must be considered when a matter is properly pending before the AAD and a "person not initially a party" wishes to intervene. AAD Rule 13.00(a) and (b). Petitioners' assertion of a right to participate under AAD Rule 13.00(e) and AAD Rule 14.00 only has a valid status if indeed a matter was properly pending within AAD's jurisdiction. Furthermore, a right to participate under AAD Rule 13.00(e) and AAD Rule 14.00 does not confer party status to that individual.

The ISDS Regulations deliver the sockdolager to Petitioners' arguments that the matter is properly before the AAD. Section 21.00 of the ISDS Regulations addresses the right to appeal:

> Any person whose permit application is denied may appeal to the Director for review of the decision on which the denial is based by filing an appeal with the Administrative Adjudication Division.

Petitioners have not had their permit application denied. There is no regulatory requirement that anyone other than the applicant is entitled to a hearing under the ISDS Regulations.

Subsequent sections of the ISDS Regulations buttress this conclusion. Most specifically, section 21.02 of the ISDS Regulations establishes the burden

of proof for the hearing and that applicant must demonstrate through clear and convincing evidence that a literal enforcement of the regulations will result in unnecessary hardship; that the system will function as proposed; and that the issuance of a permit will not be contrary to the public interest, public health and environment. Since the permit has been issued, presumably Applicant has already satisfied the Department that it has complied with the Regulations.

There is no other burden of proof identified for a hearing on an ISDS permit matter. The promulgators of the recent amendments to the ISDS Regulations (Sept. 1998) presumably were aware of the dismissals of the Reagan and Roy appeals by the AAD (and by Final Agency Order) in 1995. No amendment was enacted that bestowed a right to appeal on any person other than the applicant. No provision was made for any shift in burden of proof if someone other than applicant pursued an AAD appeal.

I conclude that Petitioners have not met the APA requirement that their legal rights, duties, or privileges are "required by law" to be determined by the DEM AAD after an opportunity for hearing. They have therefore failed to meet the definition of a "contested case" under the APA. The AAD has no jurisdiction to hear a matter that is not a "contested case" under the APA.

Wherefore, after considering the undisputed facts as set forth in the memoranda of the OWR, Applicant and Petitioners, I make the following:

FINDINGS OF FACT

1. Joseph Charette and Brian Monfils Builders, Inc. applied for an Individual Sewage Disposal System ("ISDS") permit for property located in Foster, Rhode Island.

2. On June 11, 2001, the ISDS application was approved by the DEM Office of Water Resources.

3. Robert and Hilda Crispi are the owners of property abutting the property that was the subject of the ISDS application.

4. On July 11, 2001 Robert Crispi and Hilda Crispi filed a request for hearing with the DEM Administrative Adjudication Division for Environmental Matters ("AAD").

CONCLUSIONS OF LAW

After due consideration of the above undisputed facts, I conclude the following as a matter of law:

1. Pursuant to R.I. GEN. LAWS § 42-17.7-2, the Department of Environmental Management Administrative Adjudication Division has jurisdiction to hear contested enforcement proceedings and contested licensing proceedings.

2. Pursuant to R.I. GEN. LAWS § 42-35-1.1 the DEM is subject to the provisions of the Administrative Procedures Act.

3. The Administrative Procedures Act requires that in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

4. The AAD has no jurisdiction to hear a matter that is not a contested case under the Administrative Procedures Act.

5. The Administrative Procedures Act defines "contested case" to mean a proceeding in which the legal rights, duties or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing.

6. Pursuant to Section 21.00 of the ISDS Regulations, any person whose permit application has been denied has a right to appeal the decision by filing a request for hearing with the AAD.

7. There is no statutory or regulatory requirement that anyone other than an applicant has the right to administratively appeal a decision on an ISDS permit application.

8. Robert and Hilda Crispi have failed to demonstrate that their legal rights, duties or privileges are required by law to be determined by the DEM after an opportunity for hearing.
9. Robert and Hilda Crispi have failed to meet the requirements of a "contested case" under the Administrative Procedures Act.

10. The AAD has no jurisdiction to hear the appeal filed by Robert and Hilda Crispi in this matter.

Wherefore, it is hereby

ORDERED

1. The Motion to Dismiss filed by the Office of Water Resources is herewith GRANTED.

2. The Motion to Dismiss filed by Brian Monfils Builders, Inc. is herewith GRANTED.

3. The appeal filed by Robert Crispi and Hilda Crispi is DISMISSED.

Entered as an Administrative Order this 27th day of November, 2001

and herewith recommended to the Director for issuance as a Final Agency Order.

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Mary F. McMahon
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 Order this 30th day of November, 2001.

_____
Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Dianne L. Izzo, Esquire, Gorham & Gorham, Inc., P.O. Box 46, North Scituate, RI 02857 and Thomas J. Fay, Esquire, 132 Old River Road, Lincoln Center, Suite 205, Lincoln, RI 02865; and via interoffice mail to Gregory Schultz, Esquire, Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this _____ day of _____, 2001.

_____

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.