I have received and reviewed your Recommended Decision and Order and the Administrative Adjudication Division’s administrative file in the above captioned matter. The Recommended Decision and Order and file are attached hereto and are hereby returned to the Administrative Adjudication Division. My review of the Recommended Decision and Order reveals several concerns that obligate me to exercise my discretion pursuant to R.I. Gen. Laws §42-17.7-6(a) and Rule 16.00 (b) of the Administrative Adjudication Division Rules of Practice and Procedure to reject the Recommended Decision and Order as set forth below. In the exercise of this responsibility, I am fully cognizant of the fact that I may reject recommended findings only if there is other competent evidence in the record to support alternative factual conclusions. Environmental Scientific Corporation v. Durfee, 621 A.2d200 (R.I.1993).

This matter being an appeal of the denial by the Office of Water Resources (“OWR”) of the Applicant Bruce Gardner’s request for the issuance of four variances from the minimum standards required in the ISDS Regulations in order to obtain authorization for the residential development of a small lot which measures 116.9 feet by 50 feet located in the vicinity of Green Hill Pond. As such it is the Applicant’s burden of proof, at the time of the application, to demonstrate that the variances at the time of the application, were not contrary to the public health, public interest, or environmental quality. ISDS Regulations, SD 20.02 (a). Pursuant to the ISDS Regulations, requests for variances shall be denied when the evidence presented in support of the variance request fails to demonstrate that the same degree of environmental protection provided under the regulations can be achieved without the strict application of the provisions for which the variance has been requested, or if the evidence demonstrates that the ISDS will not function as proposed in the application, or if the evidence indicates that the approval of the system would otherwise be contrary to the public health, the public interest or environmental quality. ISDS Regulations, SD 20.02 (b).

Specifically, it is the Applicant’s burden of proof to 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 in the application; and
that the issuance of a permit will not be contrary to the protection of public interest,
public health and environmental quality. ISDS Regulations, SD 21.02 (a).

The Applicant failed to supply adequate evidence to support a finding that there
would be no adverse impact to the public health, interest and environmental quality. This
is of critical importance because the lot in question is located only 113.7 feet from Green
Hill Pond, an already significantly compromised water body. The Pond is located in the
Towns of Charlestown and South Kingstown, in the extremely fragile South Shore
Management Area. The testimony presented by OWR’s expert witness, Mohamed Frei,
characterized the health and safety threat to the already heavily impacted Pond. The
Applicant attempts to override Mr. Frei’s testimony by presenting promotional literature
for the proposed ISDS device, the AdvanTex AX20. The presented data should be
characterized as sales and technical support and does not address methods and statistics
comparing this advanced system with others and conventional systems to assess the risk
of threat to the fragile ecosystem. Further, I take issue factually with Dr. Dan Urish’s
testimony that health concerns presented by Mr. Frei can be eliminated by the use of
ultraviolet light protocols which Dr. Urish purports to eliminate all concerns relative to
bacterial contamination of groundwater and nearby Green Hill Pond.

The Applicant also fails to provide reasonable and reliable evidence that the
system will function as proposed in the application. There was no evidence presented as
to how the operation and maintenance required by the proposed systems could reasonably
be sustained at all times so as to prevent further nutrient and microbial contributions to
Green Hill Pond and thus avoid further degradation of this fragile water body. The
reliance again on data from sales and promotional literature does not provide necessary
evidence relating to operational disruption and owner maintenance failure statistics. With
a lack of evidence to the contrary, I am forced to assume that the proposed system would
operate with similar reliability to the global community of advanced systems and thus
while reducing nutrient and microbial levels from so called conventional systems, still
presents unacceptable risk and would increase the nutrient and microbial contributions to
Green Hill Pond.

Further, Applicant has failed to present adequate testimony to overcome
environmental and public health concerns relating to a proposed reduction to the setback
requirements. The Applicant proposes a reduction of the setback requirements from ten
feet to a mere two feet, on this extremely small lot. This two foot setback from the
abutting property, in this fragile coastal pond area, does not provide an adequate buffer,
and presents a serious public health risk due to potential breakouts of effluent release due
to activities occurring on the neighboring property, over which Applicant has no control.

The applicant failed to present convincing evidence that the literal enforcement of
the regulations is an unnecessary hardship. Mr. Frisella’s testimony suggests that the
denial of permission to build a residence represents a lost of all alternative uses ‘except
agricultural’. This highly developed landscape has many seasonal demands for access
portals to the Pond and for recreational uses including but not limited to camping,
vehicular parking and vessel storage sites all of which are at a premium during much of the year. I'd conclude as is suggested by Mr. Freij during his testimony these uses are viable alternatives to residential development.

On the basis of the above, the Applicant's appeal is denied.