

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

RE: THE CLAMBAKE CLUB OF NEWPORT AND  
THE FRIENDS OF EASTON'S POINT, INC.  
RIPDES PERMIT RI002385

AAD NO. 09-001/WRA

AMENDED DECISION AND ORDER

TRAVEL

This Appeal was filed by The Clambake Club of Newport on June 18, 2009 after being denied a Rhode Island Pollutant Discharge Elimination System ("RIPDES") permit on May 19, 2009. The decision from the Office of Water Resources ("OWR") of the Department of Environmental Management ("DEM") was rendered after public hearings from August 27, 2008 to October 2, 2008. Friends of Easton's Point Inc,<sup>1</sup> ("FEPI") an organization which participated in the public hearings, also filed an Appeal on June 19, 2009. On July 30, 2009, the Parties were ordered to file memoranda concerning the issue of the RIPDES regulations and the propriety of one or two Appeals being maintained in this action. OWR filed a Motion to Dismiss FEPI's Request for Adjudicatory Hearing or alternatively, Motion to Sever FEPI from the Appeal. The Applicant Clambake Club of Newport ("Applicant") filed a memorandum in support of OWR's Motion. FEPI filed a Memorandum Objecting to OWR's Motion to Dismiss Appeal or in the alternative to Sever Appeal. FEPI also filed a Motion to Intervene. Oral argument was requested by The Clambake Club and heard on September 23, 2009. The parties did not want a stenographer present. FEPI submitted additional materials in support of their position on October 6, 2009.

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<sup>1</sup> Friends of Easton's Point Inc, was not incorporated at the time of the Department's public hearings. It was incorporated on June 18, 2009 according to records at the Rhode Island Secretary of State's office.

**FACTS**

From August 27, 2008 to October 2, 2008, the DEM solicited public comments on a draft RIPDES permit the Applicant sought for its facility at 353 Tuckerman Avenue, Middletown, Rhode Island. During the October 1, 2008 public hearing, the DEM granted a fifteen (15) day extension to the public comment period specifically for counsel for the FEPI and the Applicant. FEPI submitted comments and a seventeen (17) page engineering report from GZA Geoenvironmental, Inc. containing technical comments concerning the engineering and scientific basis for denying the Club's Application to DEM on October 16, 2008. Counsel for the Applicant submitted its comments. Several local residents submitted their concerns which were essentially similar to the comments of FEPI.

On May 19, 2009, the DEM notified the Applicant that their application for a RIPDES permit was denied. The final decision was based on a review and evaluation of the comments submitted during the public comment period. DEM enclosed a synopsis of the significant comments received by the DEM and the DEM's responses to those comments in accordance with Rule 47 of the RIPDES Regulations.

**OFFICE OF WATER RESOURCES MOTION TO DISMISS**

OWR argues that Rule 7.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division ("Administrative Rules") governs procedures and timelines for the filing of an Appeal to the Administrative Adjudication Division of DEM. Additionally, OWR states Rule 49 (a) of the RIPDES Regulations govern the Appeal in this matter. Rule 49 (a) states "any interested person may submit a request to [DEM] . . . for an adjudicatory hearing to reconsider or contest the conditions of [a] permit" (emphasis added). Rule 49 (c) (5) states that

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specific references to the contested permit conditions shall be contained in the requested Appeal. OWR argues that FEPI's Appeal does not contain any reference to a contested permit condition, which, they argue, is an absolute necessity pursuant to RIPDES Regulation Rule 49. I agree. FEPI's Appeal fails to satisfy the requirements of Rule 7 of the Administrative Rules of Practice and Procedure and Rule 49 of the RIPDES Regulations.

**FRIENDS OF EASTON'S POINT, INC. OBJECTION TO MOTION TO DISMISS OR IN  
THE ALTERNATIVE TO SEVER APPEAL**

FEPI acknowledges that DEM followed the RIPDES Regulations in the conduct of the Public Hearings and the publication of its decision but argues that FEPI is entitled to a hearing nevertheless. "In filing this Appeal, FEPI does not seek to overturn or reverse the Department's decision to deny the Club's application for a RIPDES Permit; only to properly preserve and develop the record." (FEPI memorandum, page 1) FEPI alleges that "while OWR's ultimate decision was correct in that it denied the Club's application, OWR had failed to comply with Rule 47 in that it had not provided a response to all significant comments raised during the public comment period" (FEPI Motion page 3).

A review of the record indicates that OWR, on May 19, 2009, provided a synopsis of the significant comments received by the DEM and the DEM's response to these comments. The comments, primarily from FEPI, as well as local residents, were addressed thoroughly in the May 19 correspondence from Mr. Angelo Liberti, P.E., Chief of Surface Water Protection to Mr. Kenneth Lindh, Chairman of the Gun Committee at the Clambake Club.

APPLICANT CLAMBAKE CLUB'S MOTION TO DISMISS

The Applicant Clambake Club of Newport filed a Motion which agreed with the reasoning of the Motion of OWR to Dismiss the request of FEPI to file an Appeal.

ANALYSIS AND CONCLUSION

Rule 49 does not allow an Appeal to "properly preserve and develop the record" as FEPI suggests. The Department and Applicant are correct in their analysis and arguments that FEPI's Notice of Appeal should be dismissed since FEPI, by its own admission, does not and cannot satisfy the requirements of Rule 49 of the RIPDES Regulations. Rule 49 proscribes, very narrowly, that an adjudicatory hearing may be requested [by any interested person] to reconsider or contest the conditions of that permit.

The Administrative Adjudication Division (AAD) cannot interpret its own regulations to broaden the scope of its jurisdiction. The Rhode Island Supreme Court has ruled that it "... has consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes." Caithness RICA Ltd v. Malachowski 619.A2d883 (R.I. 1993).

I find that Rule 49 of the RIPDES Regulations prohibits FEPI's Request for an Adjudicatory Hearing as the Permit requested by the Applicant was denied and there are no conditions that can be contested.

MOTION OF FRIENDS OF EASTON'S POINT, INC. TO INTERVENE

Simultaneously with its Objection to Motion to Dismiss, FEPI filed a Motion to Intervene on August 28, 2009.

Rule 13 of the DEM Rules of Practice and Procedure govern Intervention and Participation. Rule 13 reads, in pertinent part, as follows:

13.00 Intervention and Participation:

- a) Form and Content. The petition shall state the name and address of the person submitting the petition. It shall specifically describe the injury in fact alleged by the petitioner and set forth how the petitioner(s) interests differ from, and are not adequately represented by, existing parties. The petition must identify the areas in dispute, specifically citing each regulation where applicable.
- b) Rights of Intervenors. Intervenors shall be persons who have demonstrated an injury in fact which will result from a challenged action or application and whose interests are not adequately represented by other parties to the hearing.
- c) Rights to Participate. Any person who wishes to participate in a proceeding shall be permitted to participate. Permission to participate shall be limited to the right to file a brief. Permission to participate, unless otherwise stated, shall not be deemed to constitute an expression that the person allowed to participate is a party in interest who may be aggrieved by any final decision. A person who petitioned to intervene and who was allowed to participate may participate without waiving its rights to judicial review of the denial of said petition to intervene.

The rule is written in the conjunctive requiring that the intervenor demonstrate both an alleged injury-in-fact and that petitioner interests are not adequately represented by existing parties.

In its Motion to Intervene, FEPI asserts the following:

"In support of its Motion, FEPI states that it is an incorporated association of Rhode Island property owners, at least one of who, Russel Dulac, is an abutter to the property which is the point source as to which a permit is requested in this case. Mr. Dulac is personally affected by the conduct of a shooting range adjacent to his property. He, his spouse, and their small children suffer, directly and immediately, the impact of the firing of rifles a few yards

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from their home and over their heads while engaging in recreational activities on and in the vicinity of their property. His interest in avoiding the effects of a shooting accident, or the effect of the adjacent shooting range on the value of his residence property, and his interest in having unimpeded access to the shoreline mean high water between the Applicant's property and Narragansett Bay are important and fundamentally different than the interest of the Office of Water Resources in this case."

In view of these assertions, the following facts should be noted:

1. On October 15, 2008, GZA Geoenvironmental, Inc. provided its comments to the proposed draft permit sought by The Clambake Club in a 12-page report to FEPI's counsel. The letter also mentions that in September 2007 GZA prepared an evaluation of the potential environmental impacts associated with skeet shooting conducted at The Clambake Club on behalf of its client Mr. Russell Dulac. (GZA letter of October 15, 2008 to Stephen H. Burke, Esquire, page 1)
2. On October 16, 2008, counsel for FEPI forwarded correspondence to OWR, which states, in part, "In advising our client, we have retained the services of GZA Geoenvironmental, Inc. to prepare technical comments concerning the engineering and scientific basis for denying the Club's Application". (Correspondence from Stephen Burke, Esq., to Joseph Haberek, P.E. (OWR) dated October 16, 2008, page 1).
3. Most importantly, DEM's "Response to Comments" forwarded to The Clambake Club on May 19, 2009 which denied The Clambake Club's Application, is replete with references to the comments made by counsel for FEPI during the public hearings which included the comments and data prepared by GZA Geoenvironmental Inc. on behalf of FEPI and Mr. Dulac as referenced above.

DEM's RIPDES Regulations, especially Rule 41-48, obligate the DEM to carefully establish, weigh and respond to comments, positive and negative, when deciding whether to grant a RIPDES permit. FEPI argues that DEM failed to respond to all the comments it made during the public hearings. Rule 47 only requires the DEM to "briefly describe and respond to all significant comments on the draft permit or raised during the public comment period or during any hearing" Rule 47 (a) (2). The Department followed the mandate of this rule in its correspondence of May 19, 2009 to The Clambake Club.

Therefore, in the instant matter, I find that the issue of adequate representation pursuant to Rule 13 is dispositive.

FEPI's Motion to Intervene is hereby denied as it is clear that it has failed to set forth the manner in which FEPI's or Mr. Dulac's interests differ from and are not adequately represented by the DEM as required by Rule 13.

However, because participation is limited under Rule 13 (e) to the filing of a brief and the briefing schedule has not been set, I will grant FEPI the right to participate in this proceeding.

#### FINDINGS OF FACT

1. From August 27, 2008 to October 2, 2008 the DEM solicited public comments on a draft RIPDES permit the Applicant (Clambake Club) sought for its facility at 353 Tuckerman Avenue, Middletown, Rhode Island.
2. DEM granted a fifteen (15) day extension to the public comment period at the request of counsel for FEPI and Applicant.
3. At the conclusion of the hearings, counsel for the Applicant and FEPI submitted comments to DEM. Several local residents also submitted comments essentially similar to FEPI's.
4. On May 19, 2009 the DEM notified the Applicant that the application for a RIPDES permit was denied and that its final decision was based upon a review of the comments submitted during the public comment period. DEM enclosed a synopsis of the significant comments received by the DEM and the DEM's responses to these comments all in accordance with Rule 47 of the RIPDES Regulations.
5. Applicant Clambake Club, timely filed the instant Appeal.
6. FEPI timely filed its Appeal in this matter.
7. OWR filed a Motion to Dismiss the Appeal of FEPI.

8. Applicant Clambake Club, filed a Motion in Support of OWR's Motion to Dismiss.
9. FEPI filed an Objection to OWR's Motion to Dismiss or Alternately, Motion to Sever Appeal.

**CONCLUSIONS OF LAW**

1. Applicant, Clambake Club, has standing pursuant to Rule 49 of the RIPDES Regulations and Rule 7 of the Practice and Procedure for the Administrative Adjudication Division to file its Appeal as it was denied a requested RIPDES Permit.
2. FEPI does not have standing to file its Appeal pursuant to Rule 49 of the RIPDES Regulations as the RIPDES permit was denied and there were no conditions to the permit to reconsider or contest.
3. FEPI or Mr. Dulac may not intervene in the case as they have failed to demonstrate that their interests differ from and are not adequately represented by the DEM as required by Rule 13.
4. FEPI may participate in this proceeding pursuant to Rule 13.

Wherefore, it is hereby:

**ORDERED**

1. The Motion of Office of Water Resources to Dismiss Friends of Easton's Point, Inc. is **GRANTED**.
2. The Motion of the Office of Water Resources to Sever Appeal is **DENIED**.
3. The Motion of Friends of Easton's Point, Inc. to Intervene is **DENIED**.
4. FEPI may participate in this proceeding as provided by Rule 13.



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Entered as an Administrative Order this 4<sup>th</sup> day of December, 2009 and  
herewith recommended to the Director for issuance as a Final Agency Order.



David M. Spinella  
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 9<sup>th</sup> day of December, 2009.



W. Michael Sullivan, Ph.D., Director  
Department of Environmental Management  
235 Promenade Street, 4<sup>th</sup> Floor  
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: Richard A. Sherman, Esquire, Edwards Angell Palmer & Dodge LLP, 2800 Financial Plaza, Providence, RI 02903; Stephen H. Burke, Esquire, Ratcliffe Harten Burke & Galamaga, LLP, One Financial Plaza, 16<sup>th</sup> Floor, Providence, RI 02903 and via interoffice mail to Marisa Desautel, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 9<sup>th</sup> day of December, 2009.

