STATE OF RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: TOWN OF EAST GREENWICH AAD NO. 20-002/ARE
APPEAL OF MINOR SOURCE PERMIT NO. 2454-2457

DECISION AND ORDER

The Rhode Island Department of Environmental Management ("RIDEM"), Office of Air Resources, ("OAR") filed a Motion to Dismiss and Memorandum in Support Thereof. MedRecycler-RI, Inc. ("MRI") also filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction with a supporting Memorandum. The Town of East Greenwich ("Town") filed an Objection to both Motions to Dismiss along with a Memorandum in support thereof. The RIDEM then filed a Reply Memorandum to the Town's Objection to the RIDEM's Motion to Dismiss. The Town then filed a Memorandum in Response to the Reply Memorandum of the RIDEM. MedRecycler-RI, Inc. then filed a Reply to the Town of East Greenwich's Objection to its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

FACTS AND TRAVEL

On or about May 7, 2020, the RIDEM's OAR issued a minor source permit to MRI, pursuant to 250-RICR-120-05-9, Air Pollution Control Permits (the "Air Permitting Regulations") for a proposed medical waste facility. The facility would be located at 1600 Division Road in West Warwick, near the border between the towns of West Warwick and East Greenwich. A minor source permit is required prior to commencing construction or operation of a stationary source of air pollution which does not qualify under the definitions of a Major Stationary Source as set out in the Regulations. The RIDEM alleges that based on the materials submitted to the Department by MRI, it was determined that the facility would require a minor source permit, as opposed to a major source permit. The distinctions between the two, the application procedure and the rights that are associated with challenging and or appealing the issuance of a minor or

major source permit and requirements of each are relevant to this proceeding and will be discussed hereinafter.

The RIDEM also noted that the proposed facility, prior to commencing construction or operation, is also subject to permitting through the Department's Office of Land Revitalization and Sustainable Materials Management, and that permitting process is on-going and proceeding along a separate track.

According to the RIDEM, at no point during the review process did any third party entity and/or individual contest and/or object to the issuance of the minor source permit by the RIDEM's OAR to MRI. The Town in no way contested and/or objected to the issuance of the minor source permit until the filing of the instant appeal according to the RIDEM.

I. MOTIONS TO DISMISS - RULE 12 (b) (1)

The RIDEM and MRI's Motions to Dismiss were filed pursuant to the Administrative Adjudication Division's ("AAD") Rules of Practice. According to Rule 8.0 (a) (1), the types of motions made shall be those which are permissible under these Rules and the R.I. Superior Court Civil Rules of Procedure ("RIRCP").

> Section 8.0 (a) (1) of the AAD Rules states:
>
> A Party may request of the AAD or AHO (Administrative Hearing Officer) any order or action not inconsistent with law or these regulations. Such a request shall be called a motion. The types of motions shall be those, which are permissible under these Rules and the R.I. Superior Court Civil Rules of Procedure.

Rule 12 (b) (1) of the R.I. Superior Court Rules of Civil Procedure allows for the filing of a motion to dismiss for "lack of jurisdiction over the subject matter." Any court or quasi judicial body must have subject matter jurisdiction over any matter before it. "Subject matter jurisdiction,

an indispensable ingredient of any judicial proceeding, can be raised by the court *sua sponte* at any time and can be neither waived nor conferred by consent of the parties." State v. Kenney, 523 A.2d 853, 855 (R.I. 1987). When a court renders a decisions and it is later determined that the court did not have subject matter jurisdiction, that decision lacks validity. Petition of Loudin, 219 A.2d 915 (R.I. 1966).

II. RIDEM AND MRI'S MOTIONS TO DISMISS

Both the RIDEM and MRI assert that there is no statutory or regulatory basis for an appeal of the issuance of a minor source permit. Therefore, they argue that the "appeal" filed by the Town must fail because this Tribunal lacks the jurisdiction to hear the appeal and the Town lacks the standing to prosecute the appeal.

The RIDEM argues that the relevant Air Permitting Regulations (RICR 250-120-05-09) outlines the requirements and procedures for air pollution permitting applications, including both minor source and major source permits. A minor source permit is defined as "an approval or permit issued by the Office of Air Resources for…a stationary source that is neither a major source nor a major modification," including any general permit issued pursuant to the Air Permitting Regulations. *250-RICR-120-05-9.5(A)(22).* A major source or major modification is defined by the volume and rate of release of certain emissions, and/or by the type of facility at issue. *See 250-RICR-120-05-9, Sections 9.5(A)(19), 9.5(B)(1), and 9.5(C)(6).* For the permit at issue in this matter, it was determined, based on discussions between the applicant and the OAR and on materials submitted to the Department by MRI, that a minor source permit was required.

Section 9.7 of the Air Permitting Regulations outlines in detail the requirements for minor

source permits, while Sections 9.8 and 9.9 outline the detailed requirements for major source permits. A review of these sections reveals a significantly more involved process for a major source permit as opposed to a minor source permit because a major source will cause significantly more air pollution to enter the environment than a minor source and is therefore more closely regulated according to the OAR.

The Air Permitting Regulations go on to provide for "Administrative Actions" in Section 9.10. This section is again divided between requirements for minor source permits and major source permits. Section 9.10(A) requires the RIDEM to notify an applicant of any action taken on a permit application, including requirements for each of the two types of permits, as follows:

> A. The Director shall act on a completed application for any permit required in this regulation and shall notify the applicant in writing of any action taken, including:
>
> 1. For minor source permits, except the construction or reconstruction of a 42 U.S.C. § 7412 (g) (2018), (CAA §112(g)) source:
>
> a. Issuing the permit and notifying the applicant of the applicable sections of this regulation and any permit conditions with which the applicant must comply; or
>
> b. Denying the application and notifying the applicant as to why the application has been denied.
>
> 2. For major source permits and the construction or reconstruction of a 42 U.S.C. § 7412 (g) (2018), (CAA § 112(g)) source:
>
> a. Notifying the applicant that the application is complete.
>
> b. Issuing a draft permit subject to public participation procedures in §9.16 of this Part.
>
> c. Issuing a final permit after public participation procedures are completed and notifying the applicant of any subsequent changes to the permit.

d. Denying the application and notifying the applicant as to why a draft permit or final permit will not be issued.

250-RICR-120-05-9.10(A).. The RIDEM notes that minor source permits are not subject to public participation requirements as set out in Section 9.16 of these regulations prior to issuance, while major source permits clearly are. The public participation requirements apply only to major source permits, and include public notice and comment and a public hearing if requested and deemed necessary by the OAR. The RIDEM also points out that Section 9.16 also provides for an appeal of the permit to the AAD by parties who provided substantive comment during the public comment period and to issues raised in those comments, *250-RICR-120—05-9.16(A)(4) & (5).* This is the only appeal provision in the Air Permitting Regulations, and it is strictly limited to major source permits. The RIDEM argues that there is no provision for anyone to appeal the issuance of a minor source permit, and clearly not a third party who did not comment on the permit while it was pending before the Department.

III. TOWN OF EAST GREENWICH'S OBJECTION TO THE RIDEM AND MRI'S MOTIONS TO DISMISS

The Town is contesting the licensing process used by OAR. The Town contends that OAR deprived it of the right to notice and a hearing by misclassifying the permit as a minor source permit when it should have been viewed as a major source permit. Therefore, the Town argues that the AAD has jurisdiction to review this case pursuant to R.I.G.L. 1956 § 42-17.7-2, as a "contested licensing proceeding".

According to the Town, the RIDEM and MRI's argument for interpreting RIDEM's regulations as precluding AAD review of a minor source permit is that the regulation delineates an

appeal process for a major source permit and is silent as to any appeal process in connection with a minor source permit. The Town argues that this demonstrates that RIDEM "tactically chose" to promulgate these regulations in a manner that would implicitly limit the extent that RIDEM's actions could be reviewed.

The Town contends that under established case law, the separation of powers doctrine allows for review of actions by the executive branch of government. The Town cites various authority for its proposition. For example, in Advisory Opinion to Governor, 856 A.2d 320, 326, fn. 2 (R.I. 2004), the Rhode Island Supreme Court considered language in a statute enacted by the General Assembly regarding the Lottery Commission's award of a casino license. The statute provided that the Commission's decision to grant such license "shall be final and binding and shall not be reviewable in any court on any grounds except corruption or fraud." Id. (quoting R.I.G.L. 1956 § 41-9.1-9(f)). The Court concluded that to read this language as precluding judicial review "impermissibly usurps the judicial power." Id. The Court cited a U.S. Supreme Court case, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986), for the proposition that courts should go "to great lengths to give a narrow construction to statutes" to avoid the separation of powers problem. Id.

According to the Town, the U.S. Supreme Court, in Bowen, engaged in an extended discussion of the presumption in favor of review of administrative actions on the federal level, in light of the presumption's extensive constitutional roots and historical pedigree. The Court in Bowen traced this presumption back to Chief Justice Marshall's decision in Marbury v. Madison, 5 U.S. 137 (1803), where the Court held that it had the power to review the actions of certain executive branch officials. The Court found that it had such power because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."

See Bowen, 476 U.S. at 670 (quoting Marbury, 5 U.S. at 163). In short, the Town contends that the RIDEM has insulated itself from review by the Administrative Adjudication Division and Judiciary by promulgating a "regulatory bubble' where no review is allowed in this instance because the label "minor source permit" was invoked by the RIDEM. (Town's Memorandum in Support of Its Objection to RIDEM and MRI's Motion to Dismiss, p. 8)

The Town also argues under the definition of "contested case" per the Administrative Procedures Act ("APA"), the statute requires that, in any "contested case", all parties shall be afforded an opportunity for a hearing after reasonable notice (R.I.G.L. 42-35-9(a)). The Town further submits that, pursuant to the language in § 42-35-1(5) a matter is a "contested case" when "the legal rights, duties or privileges" of a party are "determined" by an agency. When such rights, duties or privileges are being determined, the matter is a "contested case" and the requirements of § 42-35-9(A) are triggered according to the Town.

The RIDEM, in its Reply Memorandum to the Town's Objection to Its Motion to Dismiss argues that the Town mis-quoted and mis-characterized the statutory definition of a "contested case." It notes that the RI Administrative Procedures Act defines a "contested case" as follows:

> (5) "Contested case" means a proceeding, including, but no 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.** *R.I.G.L. 42-35-1 (5) (emphasis added).*

The RIDEM noted that the Town ignored and left out the emphasized portion in the above quote ("after an opportunity for a hearing") which is relevant to this proceeding because there is no regulatory or statutory requirement for a hearing for a minor source permit required by law. The RIDEM also argued that there is ample Rhode Island case law on the question of the "hearing" requirement being integral to the definition of a contested case, and none of it agrees with the

Town's interpretation. The RIDEM argues that when there is no opportunity for hearing required by law prior to an agency rendering a determination, a matter is not a contested case for purposes of the APA. Therefore when no appeal is provided for by statute or regulation, and a matter is not a contested case, this tribunal is without subject matter jurisdiction to hear an appeal according to the RIDEM.

Similarly, MRI, in its Reply to the Town's Objection to its Motion to Dismiss argues that the plain, clear and unambiguous language of the statute makes it evident that the AAD only has jurisdiction to hear appeals related to (1) contested enforcement proceedings; (2) contested licensing proceedings and (3) all adjudicatory proceedings. *See* R.I.G.L. § 42-17.7-2; 250 R.I. Code R. 10-00-1.3. MRI contends the application and issuance of the minor source permit was not a "contested enforcement proceeding" nor was it an "adjudicatory proceeding." MRI argues that this matter was not a "contested licensing proceeding" until the Town filed this appeal with the AAD after the issuance of the minor source permit by the OAR. MRI contends that because the Town did not challenge the issuance of the permit with the OAR, it cannot claim a right of appeal now.

IV. ANALYSIS

The issue in this case is whether the Administrative Adjudication Division has subject matter jurisdiction over a matter when there is no appeal procedure set forth in a statute or regulation? In order to address this relatively simple question, the RIDEM, MRI and the Town set forth multifaceted legal answers to this question in their memoranda. The RIDEM points to Mosby v. Devine, 851 A.2d 1031, 1049 (R.I. 2004) (citing Bradford Associates v. R.I. Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) for the proposition that a failure to provide for a hearing by statute renders a case "uncontested" for purposes of the Administrative Procedures Act.

In addition to the above case law, the RIDEM argues there is a strong precedent from this very tribunal which makes it clear that dismissal is required in this case. The RIDEM cites the case of *Karleetor, LLC* (AAD No. 007-004/FWA 2009) which was before the AAD on a Motion to Dismiss filed by third parties who disagreed with a permit to alter freshwater wetlands that was issued by the Department to Karleetor, LLC. In that case, the permit at issue was an insignificant alteration permit, for which the applicable regulations included no provision for a non-applicant appeal, just as the Air Permitting Regulations in the present case do not provide for any appeal of a minor source permit. The Hearing Officer in that case applied the definition of a "contested case" from the APA, as the Department contends above, in finding that "the AAD cannot grant an opportunity for hearing where one has not been required by law." *Karleetor at 10.* The decision went on to hold that

> Since there is no right to a hearing for any of the Appellants in this matter (or for that matter even for Karleetor), the matter before me does not constitute a "contested case" under AAD's jurisdictional statute or under the Administrative Procedures Act. As a result, the AAD lacks subject matter jurisdiction to proceed on either of the appeals. *Id.*

In addition to *Karleetor,* the case of *Tiverton Four Corners Properties, Inc.* (AAD No. 16-001/ISA 2016) dealt with a Rule 12 (b) (1) Motion to Dismiss as well. In that case, Rule 49 of the Onsite Wastewater Treatment Rules limits the right to a hearing (at AAD) to those who file an application. Rule 49 reads as follows:

> Rule 49 APPEALS
>
> > 49.1 Right to Appeal – Any person whose permit application is denied may appeal to the Director for review of the decision which the denial is based by filing an appeal with the Administrative Adjudication Division.

In that case, Tiverton Four Corners Properties, Inc. applied for a System Suitability Determination

Application – Commercial, with the RIDEM's Office of Water Resources (OWR). The application was approved by OWR. The Town of Tiverton then filed a "Request for Hearing" with the AAD after the issuance of its OWTS compliance certificate. The Town did not specify any statute or regulation upon which it had any right to a hearing based on the approval of the OWR. The OWR and Tiverton Four Corners Properties, Inc. filed Motions to Dismiss pursuant to Superior Court Rules of Civil Procedure 12 (b) (6) and 12 (b) (1) arguing that the AAD lacked subject matter jurisdiction to hear the Town's request for a hearing and that the Town had failed to state upon which relief could be granted. The Motions were granted pursuant to Rule 12 (b) (1) and 12 (b) (6) by the AAD.

The important takeaway from that case as it relates to the instant matter is that Rule 49 in the OWTS Rules and Regulations specifically provided for a hearing at the AAD to the person seeking a system suitability determination if the application was denied. In the instant case, the RIDEM and MRI, have essentially argued the same point. The Town in not entitled to "appeal" the decision of the OAR because there is no specific statutory or regulatory basis that allows for an appeal of a minor source permit. Therefore, the RIDEM and MRI argue that the AAD does not have subject matter jurisdiction over this matter and this matter should be dismissed. They also claim the Town's failure to contest the issuance of the minor source permit at OAR precludes an appeal now.

I agree with the reasoning of MRI and the RIDEM OAR as the weight of authority cited herein supports their argument for dismissal of this matter pursuant to Rule 12 (b) (1).

FINDINGS OF FACT

1. On or about May 7, 2020 the RIDEM's Office of Air Resources issued a Minor Source Permit to Med-Recycler, Inc. pursuant to 250 RICR-120-05-9.

2. On or about June 3, 2020 the Town of East Greenwich filed an administrative appeal with the AAD.

3. On or about July 1, 2020 MRI filed a Motion to Dismiss the Town's administrative appeal with the AAD.

4. On or about July 8, 2020 the OAR filed a Motion to Dismiss the Town's administrative appeal with the AAD.

5. On or about July 8, 2020 the Town filed an Objection to the Motions to Dismiss with the AAD.

6. On or about July 13, 2020 the Town filed a Memorandum in Support of its Motion to Dismiss with the AAD.

7. On or about July 22, 2020 the RIDEM filed a Response to the Town's Objection with the AAD.

8. On or about July 23, 2020 the Town filed a Memorandum in response to the RIDEM and MRI's reply Memorandum with the AAD.

9. On or about July 17, 2020 MRI filed a Reply to the Town's Objection to its Motion to Dismiss with the AAD.

10. The Administrative Adjudication Division does not have subject matter jurisdiction over this action.

CONCLUSIONS OF LAW

1. The within proceeding was conducted in accordance with the Statutes governing the Administrative Adjudication Division for Environmental Matters (R.I.G.L. § 42-35-1 et. seq.), the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters and the Rhode Island Superior Court Rules of Civil Procedure.

2. The weight of authority, cited herein, appropriately holds that the Town cannot file an appeal of this matter as the pertinent regulations and statutes do not provide the right to an appeal for a minor source permit (250 R.I.C.R. 120-05-9.7).

3. This matter is not a "contested enforcement proceeding", "contested licensing proceeding", or "adjudicatory proceeding" pursuant to the Administrative Adjudication Division jurisdictional statute R.I.G.L. § 42-17.7-2 or 250 R.I.C.R. 10-00-1.3 nor a "contested case" under the Administrative Procedures Act R.I.G.L. § 42-35-1 (5).

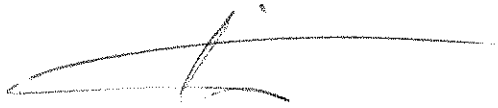
4. The Town of East Greenwich's Appeal must be dismissed as the Administrative Adjudication Division lacks the subject matter jurisdiction pursuant to Rule 12 (b) (1) to hear the Town of East Greenwich's appeal.

5. The Town of East Greenwich has failed to demonstrate that the Administrative Adjudication Division has subject matter jurisdiction over this matter pursuant to Rule 12 (b) (1).

Wherefore, it is hereby ORDERED that:

1. The RIDEM and Med-Recycler's Motions to Dismiss pursuant to SECTION 8.0(a)(1) of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters and Rhode Island Rules of Civil Procedure 12 (b) (1) are hereby **GRANTED.**

Entered as an Administrative Order this 9th day of September 2020.



David M. Spinella
Chief Hearing Officer
Administrative Adjudication Division
235 Promenade Street, 3rd Floor, Rm 350
Providence, RI 02908
(401) 222-4700 Ext 4600

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by first-class mail to: Town of East Greenwich c/o Andrew M. Teitz, Esq. and Peter Skwirz, Esq., Ursillo, Teitz & Ritch, Ltd, Two Williams Street, Providence, RI 02903; Michael A. Kelly,

Esq., Nicholas Vaz, Esq., and Michael Resnick, Esq., Kelly, Souza, Rocha & Parmenter, P.C., 128 Dorrance Street, Suite 300, Providence, RI 02903; via interoffice mail to Susan Forcier, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 9 day of September 2020.

Mary Dalton