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

RE: NO LNG IN PVD **AAD NO. 17-001/SRA**

DECISION AND ORDER

This matter came on before Chief Hearing Officer David Kerins on the Motion to Dismiss filed by National Grid LNG, L.L.C. ("National Grid"), the Motion to Dismiss filed by the Department of Environmental Management (the "Department") as well as the Objection that was filed by the Appellant, No LNG in PVD ("No LNG"). National Grid filed a Motion for Accelerated Hearing and Oral Argument on April 2, 2018.

The Oral Argument was held on April 12, 2018. National Grid was represented by Attorney Robin Main. The Department was represented by Attorney Susan Forcier and No LNG was represented by Attorney James G. Rhodes.

FACTS AND TRAVEL

This matter stems from the Department's issuance of a Short Term Response Action Plan ("STRAP") approval to National Grid on October 27, 2017 for National Grid's facility located at 642 Allens Avenue in Providence (the "Site"). This STRAP approval was issued as part of a larger, on-going site remediation taking place at the Site, and was one in a series of STRAP approvals that have been issued for the Site over the twenty-year history of the Site in the Department's site remediation program. This STRAP approval, like the previous STRAP approvals that the Department has issued for other projects at the Site, was necessitated by the fact that proposed construction at this active industrial property would disturb the contaminated soil, therefore, a work plan and approval from the Department were required to ensure that the

disturbed contaminated soil is managed in a manner that is protective of human health and the environment.

This STRAP approval is governed by the Department's Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (the "Remediation Regulations"), and also a Public Involvement Plan ("PIP") that is in place for the Site in accordance with those Remediation Regulations. Prior to issuance of the STRAP approval, the proposed STRAP was noticed and open for public comment, and two public comment meetings were held to solicit comments from the affected public regarding the proposal, which included plans to remediate contaminated soil and groundwater at the Site as required by the Remediation Regulations. Following the close of the public comment period, the Department worked with National Grid to prepare and issue a written response to all substantive comments received. On October 27, 2017 RIDEM issued a STRAP approval for the Site.

On November 22, 2017, No LNG in PVD ("Petitioner") submitted a letter to AAD requesting an appeal of the STRAP approval issued by the Department, and citing only Rule 7.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("AAD Rules") as the basis for its appeal.
National Grid moved to intervene in this matter, and its intervention was allowed by the Hearing Officer. National Grid and the Department then filed Motions to Dismiss the Petitioner's request for an appeal.

ARGUMENTS

PROPONENTS' ARGUMENTS

The Proponents of the Motions to Dismiss makes two arguments: 1, That the AAD is without jurisdiction to consider the appeal of No LNG and; 2, that No LNG is not a proper party

to bring the instant appeal due to lack of standing.

LACK OF JURISDICTION

The Proponents argue that the Remediation Regulations permit an appeal only by an aggrieved applicant RIDEM has rejected. They assert that a party appealing a decision under the Remediation Regulations "bears the burden of proving that they comply with the requirements of the rules and regulations herein and that the denial by the Department was arbitrary and capricious or characterized by an abuse of discretion." Remediation Regulations at § 14.2. Thus, the Remediation Regulations permit an appeal only by a party that claims it complies with the regulations, but whose application RIDEM has denied in an arbitrary and capricious manner.

They argue further that the Administrative Adjudication Rules ("AAD Rules") support this position. Section 1.19 (a) of the AAD Rules states: "Persons denied a license or permit from the Division may request an adjudicatory hearing as provided for by statute." They assert that the AAD Rules do not establish a mechanism by which an entity that was not denied a license or permit may request an adjudicatory proceeding.

The proponents point to the language of R.I. General Law § 42-17.7-2 which states: "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."

They assert that the definition of a contested case is defined by the Administrative Procedures Act ("APA") as "a proceeding including 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." The Proponents cite several state and federal cases in support of their position.

LACK OF STANDING

The Proponents argue that No LNG is ineligible to bring the instant appeal due to lack of standing. They cite the Rhode Island Supreme Court decision of *Watson v. Fox,* 44 A.3d 130, 136 (R.I. 2012) in which the court said that in order to establish standing, "A plaintiff's injury must be 'particularized' [and he] must demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the general public." The "standard for establishing standing requires that a plaintiff alleges that the challenged act or action has caused him or her injury in fact, economic or otherwise." *Moreau v. Flanders,* 15 A.3d 565, 574 (R.I. 2011). Such an injury must be concrete and particularized, and actual or imminent, and not merely conjectural or hypothetical, *see also Gray,* 2006 WL 216053, at *4-6 (dismissing case brought by environmental group for lack of standing).

OPPONENT'S POSITION

JURISDICTION

No LNG takes the position that participation in a Public Involvement Plan ("PIP") creates a right of appeal. They point to section 1.04 of the Rules and Regulations for the investigation and Remediation of Hazardous Material Releases ("Remediation Regulations"). They argue that in order to achieve the policy outcomes, participation in the PIP must have a meaningful way to hold RIDEM to a process by which this policy is realized. Opponents assert that a right to appeal to the AAD is implied if not expressly stated by the spirit of the Remedial Regulations.

The opponents argue that they have a right to request an administrative hearing. Rule 14.02 of the Remediation Regulations states that "[a]ny person affected by a decision of the Director pursuant to these regulations may…file a claim for an adjudicatory hearing to review the decision." No LNG asserts that through its participation in the PIP, which they allege was not conducted in a

manner consistent with RIDEM regulations, places them in a class of persons who were "affected by a decision of the Director." No LNG argues that this gives rise to a right to claim for an adjudicatory hearing to review the decision to approve the STRAP on the grounds that the decision was arbitrary and capricious and an abuse of discretion on the grounds that it failed to safeguard the right of community to be an equal participant in the PIP.

STANDING

No LNG argues that it has standing because its members have standing, citing *East Greenwich Yacht Club v. CRMC*, 118 R.I. 559. No LNG has submitted the affidavits of Monica Huerta and Megan Sanderson in support of its position on standing (Attachments A + B).

Ms. Huerta's affidavit states that she lives a quarter of a mile from the remediation site, she is concerned about the effect of the remediation on her two (2) children who have asthma. She said "The amount of polluted soil that will be released into the air is extremely dangerous to the health of the elderly and children in our neighborhood. Extensive research shows the long, polluted history of the Site. This is how I know we will sufferer serious health consequences."

Ms. Sanderson in her affidavit stated that she lives .5 miles from the remediation site. She stated that she had "grave concerns about the remediation plan as well as the proposed facility being built". She expressed her criticism of the PIP process, which she felt stifled comment and intimidated citizens from participating.

No LNG argues that the injury is not speculative and fit into two classes. The first injury in fact is that the members of No LNG were not able to participate adequately in the PIP process. "They have not been heard when they have a right to be".

The second injury in fact is that they "are concerned now about the construction activities taking place on contaminated soil in their community".

ANALYSIS

JURISDICTION

According to the Administrative Adjudication Division's ("AAD") 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 it 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 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 provision 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.

I have reviewed the above statutes as well as the AAD Rules to determine if someone other than the Applicant is entitled as a right to a hearing. No LNG argues that because the Remedial Regulations establish a PIP process that it logically infers the right of the public, or at least those who participated in the PIP, to appeal.

AAD Rule 1.3 recites the AAD's jurisdiction as it is established in R.I. GEN. LAWS § 42-17.7-2. AAD Rule 1.2 (a) specifically provides that the AAD Rules "shall govern the conduct of Adjudicatory Proceeding within the jurisdiction of the Administrative Adjudication Division of the Department of Environmental Management. Rule 1.2 (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.

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 is 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.

STANDING

The Rhode Island Supreme Court has made it clear that to establish standing "a plaintiff's injury must be 'particularized' [and He] must demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the general public." *Watson v. Fox,* 44 A.3d 130, 136 (R.I. 2012); *see also Bowen v. Mollis,* 945 A.2d 314, 317 (R.I. 2008) ("plaintiff's injury must be 'particularized' and he must 'demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the public at large'"). The "standard for establishing standing requires that a plaintiff alleges that the challenged act or action has caused him or her injury in fact, economic or otherwise." *Moreau v. Flanders*, 15 A.3d 565, 574 (R.I. 2011). Such an injury must be concrete and particularized, and actual or imminent, and not merely conjectural or hypothetical. (internal citations omitted); *see also Conservation Law Foundation v. Gray*, 2006 WL 216053, at *4-6 (R.I. Super. Jan. 27, 2006) (dismissing case brought by environmental group for lack of standing). With respect to an organization, conclusory allegations of harm are insufficient to confer standing and "interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem is not sufficient by itself to render the

organization 'adversely affected' or 'aggrieved'. "In this jurisdiction, generalized claims alleging purely public harm are an insufficient basis for sustaining a private lawsuit." *Watson*, 44 A.3d at 136.

A Rhode Island Supreme Court opinion issued in March of this year illustrates this point. In *Warfel v. Town of New Shoreham*, 178 A.3d 988, 991 (R.I 2018), the plaintiff complained of a "potential" "extraordinary" injury. Yet, the Rhode Island Supreme Court held that "[w]hen analyzing standing, we deal with the concrete and will not engage in speculation. Unfounded anxiety or a vague fear based on utterly speculative hypotheses is simply not enough." The Court further noted that the plaintiffs – residents, taxpayers and ratepayers – failed to articulate a "concrete wrong beyond a general grievance common to all taxpayers."

No LNG's affidavits contain conclusory allegations of hypothetical harms that are indistinct from the public at large. For instance, the Affidavit of Monica Huertas states broadly that "polluted soil" will be released in the air and will be "extremely dangerous" to people in her neighborhood, Similarly, the Affidavit of Megan Sanderson expresses fears about remediation at the Site and indicates that she believes digging at the Site is inappropriate. Upon examination, both affidavits articulate concerns about potential injury, such as the alleged, potential injury recently found lacking to confer standing. Therefore, No LNG lacks standing to bring the instant proceeding.

CONCLUSION

I conclude that the Appellant has not met the AAD and APA rule that allow appeals from only a "contested case" unless expressly provided for by statute. The AAD has no jurisdiction to hear a matter that is not a "contested case" under the APA. I also conclude that the Appellant and its members lacks standing in that they have failed to establish that they suffer from an injury in fact

that is particularized and not speculative.

Wherefore based on the above I make the following:

FINDINGS OF FACTS

1. On October 27, 2017 the Rhode Island Department of Environmental Management (The "Department" or "RIDEM") issued to National Grid LNG, LLC ("National Grid") approval for a Short Term Response Action Plan ("STRAP") for its facility located at 642 Allens Avenue in Providence, Rhode Island.
2. On November 22, 2017 a request for hearing was filed by No LNG in PVD ("No LNG") with the Administrative Adjudication Division of RIDEM. (the "AAD")
3. No LNG was not a party to the STRAP application filed by National Grid.
4. Members of No LNG participated in a Public Involvement Plan ("PIP") as part of the Remedial Regulations.
5. An affidavit from Monica Huertas, a member of No LNG, was filed as part of its case as Attachment A of its Memorandum in opposition to National Grid's Motion to Dismiss No LNG's appeal.
6. In her affidavit Monica Huertas expressed concern that the proposed remedial activity would have impact on her and her children who have asthma.
7. In her affidavit Monica Huertas expressed criticism of how the PIP was carried out.
8. An affidavit from Megan Sanderson, a member of No LNG, was filed as part of its case as Attachment B of the Memorandum in opposition to National Grid's Motion to Dismiss No LNG's appeal.
9. In her affidavit Megan Sanderson express concern for her children about exposure to carcinogens in the air, water and soil as well as criticism for the method which the PIP

was carried out.

10. The concerns expressed in the affidavits referred to above do not establish injury in fact but are speculative in nature.
11. No LNG lacks standing to bring its appeal.
12. There is no statutory or regulatory authority for the AAD to consider No LNG's appeal.
13. The AAD is without authority to hear the instant appeal and has no jurisdiction in this matter.

CONCLUSION OF LAW

After due consideration of the above 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 RIDEM 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 § 14.2 of the Remediation Regulations only a person who has been denied a

permit can file an appeal.

7. There is no statutory or regulatory requirement that anyone other than an applicant has the right to administratively appeal a decision on an STRAP permit application.
8. No LNG has failed to demonstrate that its legal rights, duties or privileges are required by law to be determined by the RIDEM after an opportunity for hearing.
9. No LNG has failed to meet the requirements of a "contested case" under Administrative Procedures Act.
10. The AAD has no jurisdiction to hear the appeal filed by No LNG in this matter.
11. Speculative and generalized statements do not establish injury in fact so as to establish standing.
12. No LNG failed to prove that it is entitled to standing in this matter.
13. No LNG's appeal should be dismissed.

Wherefore, it is hereby:

ORDERED

1. The Motions to Dismiss filed by National Grid and RIDEM are herewith **GRANTED.**
2. The appeal filed by No LNG in PVD is **DISMISSED.**

Entered as an Administrative Order this 18th day of May 2018.

David Kerins
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 Order to be forwarded, via regular mail, postage prepaid to: James G. Rhodes, Esquire, Rhodes Consulting, 860 West Shore Road, Warwick, RI 02889: Robin Main, Esquire and Rhiannon A Campbell, Esquire, Hinckley, Allen & Snyder, LLP, 100 Westminster Street, Providence, RI 02903-2319 and via interoffice mail to Susan Forcier, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 18th day of May 2018.

Michelle Janvrin

Michelle Janvrin

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.