

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

**RE: THE CLAMBAKE CLUB OF NEWPORT  
RIPDES PERMIT RI002385**

**AAD NO. 09-001/WRA**

**DECISION AND ORDER**

**I. FACTS AND TRAVEL**

On August 25, 2006 the Rhode Island Department of Environmental Management (“RIDEM”) issued to The Clambake Club of Newport (“Club”/ “Applicant”) a Notice of Intent to Enforce (Applicant’s Exhibit 1 Full) which demanded the immediate cessation of the operation of a trap shooting range at the Club’s property located at Easton’s Point in Middletown, Rhode Island. RIDEM advised the Club that it could apply for a Rhode Island Pollutant Discharge Elimination System (“RIPDES”) Permit to allow the resumption of trap shooting. On March 28, 2007 the Applicant filed the subject RIPDES permit in order to discharge clay targets, steel shot and plastic wadding from its skeet and trap shooting range into Sachuest Bay. A copy of the entire RIPDES Application was admitted as a Full Exhibit at the Hearing. (Applicant’s Exhibit 2 Full). Following review of the Application, the Office of Water Resources (“OWR”) at RIDEM issued a draft RIPDES permit and issued a Public Notice of the draft RIPDES permit on August 27, 2008. (Applicant’s Exhibit 6 Full). The draft RIPDES permit proposed an activity where “shooting targets are propelled towards Sachuest Bay and are then shot, resulting in shooting targets and steel shotgun shot being deposited into Sachuest Bay...” (Applicant’s Exhibit 6 Full).

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

On May 19, 2009, the RIDEM notified the Club that their application for a RIPDES permit was denied. (Applicant's Exhibit 8 Full). The final decision was based on a review and evaluation of the comments submitted during the public comment period. RIDEM enclosed a synopsis of the significant comments received by the RIDEM and the RIDEM's responses to those comments in accordance with Rule 47 of the RIPDES Regulations.

The Response to Comments (Applicant's Exhibit 8 Full) stated that "[b]ased upon comments received during the public comment period, the RIDEM re-evaluated whether a mixing zone can be used to meet the ... narrative requirements of the Water Quality Regulations". The decision to deny the Application rested on the conclusion that "it is not appropriate to assign a mixing zone to the discharge of the target and shot" because the target and shot constitute "solid refuse," and Table 2.8D(3) of the Water Quality Regulations Rhode Island. During the October 1, 2008 public hearing, the RIDEM granted a fifteen (15) day extension to the public comment period at the request of counsel for the Friends of Easton's Point, Inc. ("FEPI")<sup>1</sup> and the Club. On October 16, 2008, FEPI submitted comments and a seventeen (17) page engineering report from GZA GeoEnvironmental, Inc. to RIDEM containing technical comments concerning the engineering and scientific basis for denying the Club's Application. Counsel for the Club submitted its comments. Several local residents submitted their concerns which were essentially similar to the comments of the FEPI.

On June 18, 2009, the Club filed an administrative appeal of that decision to this Tribunal.

**Jurisdiction**

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. General Laws §43-17.7-1 et. seq.); the *Administrative Procedures Act* (R.I. General Laws §42-35-1 et. seq.); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* (AAD Rules); and R.I. General Laws §4-19-1 et. seq.

**Burden of Proof/ Standard of Review**

Rule 15(d) of the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters* (AAD Rules) provides that in matters in which a permit or application denial is at issue, “the burden shall rest with the Applicant”. At the outset of the Hearing, “it was agreed by counsel that the burden will be carried by the applicant, Clambake Club of Newport, to demonstrate by a preponderance of the evidence that they were improperly denied their Final RIPDES Permit.” (Hearing Transcript, pg. 7).

The case of *Edward A. Kent v. Rhode Island Department of Environmental Management* C.A. NO. PC 10-0026 (Rhode Island Superior Court July 20, 2011) outlines the limits of review this Tribunal and Hearing Officer has when hearing a case on appeal from an Application that has been denied. “The Hearing officer’s review is confined to information

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Witnesses

The Club presented three witnesses at the Hearing. Mr. Pierre Irving, the Club's President, Mr. Eric Beck, Supervisor of the RIPDES Program in the OWR and Mr. Angelo Liberti, Chief of Surface Water Protection in the OWR. Mr. Pierre Irving, President of the Clambake Club of Newport and a member since 1998, testified that the Club is a social club with dining facilities out on Easton's Point in Middletown, Rhode Island. The Club originally was formed in 1895 on Easton's Point by a group of friends who "wanted to go out and shoot clay pigeons and have clambakes, and that evolved into a formal club that had trap and skeet shooting and had clambakes and then subsequently they put some docks out, some plank docks out into the waters from the cliffs there and then fished as well". (TR. pg. 26-27). "Over the years the dining became a more integral part of the Club, a building was built and so forth, and now it has very nice dining facilities" (TR. pg. 27).

With respect to the shooting activities, Mr. Irving said the Club always has employed an experienced range master to conduct the skeet shooting over the bay. Flags were posted over the bay when shooting and safety was of paramount concern. (TR. pg. 31-32). The guns initially fired shots with lead pellets but then switched to steel per RIDEM regulations. The clay pigeons that were shot at were also changed to a biodegradable type and the Club switched from plastic to fiber wadding which has less environmental impact. (TR. pg. 35). The Club had a policy of policing the rocks and grass area once a week to pick up all the debris it could find (TR. pg. 35). On or about August 25, 2006, the Club received a Notice of President, Mr. Eric Beck, Supervisor of the RIPDES Program in the OWR and Mr. Angelo Liberti, Chief of Surface Water Protection in the OWR. Mr. Pierre Irving, President of the Clambake Club of Newport and a member since 1998, testified that the Club is a social club with dining facilities out on Easton's Point in Middletown, Rhode Island. The Club originally was formed in 1895 on Easton's Point by a group of friends who "wanted to go out and shoot clay pigeons and have clambakes, and that evolved into a formal club that had trap and skeet shooting and had clambakes and then subsequently they put some docks out, some plank

Mr. Eric Beck, Supervisor of the RIPDES program at the Office of Water Resources testified next. Mr. Beck has been the Supervisor of the RIPDES program since 1999. The RIPDES program is a federally delegated program to implement the Clean Water Act in Rhode Island and regulates and permits all point source discharges to surface waters (TR. pg. 44). Mr. Joseph Haberek was the RIDEM staff person responsible for reviewing the Club's permit. Mr. Beck stated that the individual components deposited into the bay from the Club's shooting activities, namely, calcium carbonate, pigeon targets or steel shot were not analyzed by RIDEM with respect to the extent or rate of their dissolution into the bay *vis a vis* the Water Quality Regulations. (TR. pg. 71-73). Mr. Beck did recall a study that was submitted to RIDEM by the Club that was prepared by Applied Science Associates or ASA (Applicant's Exhibit 7 Full). This study was reviewed by RIDEM prior to denying the Final RIPDES Permit. When asked what caused the RIPDES program to decide against applying a mixing zone to this application Mr. Beck stated:

There were several documents submitted during the public comment period by both the proponent and the opponents and some local neighborhood residents as well as testimony, but I would say one of the more pertinent documents related to that decision would be comments submitted on behalf of the Friends of Easton's Point, several arguments related to the Clean Water Act, the interpretation of the Clean Water Act, the definition of solid waste and the appropriateness of mixing in a mixing zone and the establishment of a mixing zone were made in the public comment period and then considered internally and debated. (TR. pg. 101).

Mr. Angelo Liberti, Supervisor of OWR testified next. He participated in the RIDEM's decision regarding the Club's RIPDES application. He did not personally review the entire RIPDES program is a federally delegated program to implement the Clean Water Act in Rhode Island and regulates and permits all point source discharges to surface waters (TR. pg. 44). Mr. Joseph Haberek was the RIDEM staff person responsible for reviewing the Club's permit. Mr. Beck stated that the individual components deposited into the bay from the Club's shooting activities, namely, calcium carbonate, pigeon targets or steel shot were not analyzed by RIDEM with respect to the extent or rate of their dissolution into the bay *vis a vis* the Water Quality Regulations. (TR. pg. 71-73) Mr. Beck did recall a study that was

among the staff concerning the chemistry of the materials being discharged by the Club, photographs were examined, literature, comments and data were reviewed as well. (TR. pg. 125-127) Ultimately it was determined by RIDEM not to apply a mixing zone for this application (TR. pg.127). This was a case of first impression for OWR. Mr. Liberti succinctly stated the challenges and difficulties the OWR encountered with this permit as it was not strictly an issue involving the dissolution of solids in the water as the Club suggests. As Mr. Liberti said:

Every instance in all guidance of mixing that I've been involved in my 25-year career had been a water discharge mixing into a receiving water, and this was the first instance that we had ever contemplated whether it was possible to allow a mixing zone for solids. This was a great deal of internal debate and discussion on whether to deny this permit application because we could not find a way to authorize it, or whether or not the definition of a mixing zone could be adequately applied. So, when we drafted the permit we went forward to the public and said, we think we can establish a mixing zone in this case, so mixing is more or less instantaneous in all the guidance that's available out there, and I've never seen it applied. We were breaking new ground, attempting to apply it to dissolving a solid. You could discharge a piano and say that the wood is going to decay and dissolve into the water column, but I don't think we want to start stretching the regulations here to allow sewage sludge and pianos and all kinds of solid waste because the rate at which it's going to be able to dissolve is the key question as to whether it's appropriate to discharge. (TR. pg. 133-134).

Argument

The Club argued the following points in its Post Hearing Memorandum:

1. The Administrative Record provides no basis for RIDEM's Denial of the Club's RIPDES Permit Application.
2. RIDEM violated the RIPDES Regulations in processing the Club's Application.

125-127) Ultimately it was determined by RIDEM not to apply a mixing zone for this application (TR. pg.127). This was a case of first impression for OWR. Mr. Liberti succinctly stated the challenges and difficulties the OWR encountered with this permit as it was not strictly an issue involving the dissolution of solids in the water as the Club suggests. As Mr. Liberti said:

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1. The Administrative Record Provides No Basis for RIDEM's Denial of the Club's RIPDES Permit Application.

The Club states in its Post Hearing Memorandum that Rhode Island's Water Pollution Statute is intended to protect the waters of the State from pollution and that the Water Quality Regulations set forth the standards by which the chemical, physical, biological and radiological integrity of the water is to be measured.

The Club argues that neither of the two substances that would be introduced into the water by the Club's trap shooting, steel shot (iron) and calcium carbonate targets is listed in Table 1 of the Water Quality Regulations.

FEPI argues, as does RIDEM in their Post Hearing Memoranda that despite the Club's assertion that iron and calcium carbonate are not 'pollutants' as that term is defined in the law, RIGL 46-12 Water Pollution, specifically RIGL 46-12-1 "Definitions" (15) clearly lists the subject discharges, "solid waste" and "munitions" as "pollutants". The Office of Water Resources argues that it never held the opinion that the discharge in this case contained hazardous waste, only that it constituted solid waste/ solid refuse. It should also be noted that FEPI made this comment during the public hearing phase of the permit process on October 1, 2008. The public comment period was then extended to permit FEPI and the Club to submit additional written comments.

2. RIDEM Violated the RIDPES Regulations in Processing the Club's Application.  
RIPDES Permit Application.

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The Club argues that neither of the two substances that would be introduced into the water by the Club's trap shooting, steel shot (iron) and calcium carbonate targets is

argues that the issuance of a final decision denying the permit is not an option available to it under the RIPDES Regulations.

RIPDES Rule 46 states “After the close of the public comment period under Rule 41 on a draft permit, the Department shall issue a final permit. The Department shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. For purposes of this section, a final permit decision means a final decision to issue, *deny*, modify, revoke and reissue or terminate a permit.” (emphasis added)

The Club argued the same point in a Pre Hearing Motion. This Hearing Officer, in an Order entered on August 23, 2013, ruled that the Club was not entitled to have its application granted as a matter of law since Rule 46 clearly states that the RIDEM can deny a permit after issuing a draft permit.

After reviewing the evidence presented at the Hearing, the reason RIDEM denied this permit is clear. The OWR staff initially believed a “mixing zone”<sup>2</sup> might be permissible in this situation. After the comment period closed, the OWR staff weighed and considered all of the comments and documentation from neighbors, the FEPI and its GZA GeoEnvironmental Report. The OWR reversed course and decided a mixing zone would not be appropriate and therefore denied the permit.

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<sup>2</sup> The Water Quality Regulations promulgated by the OWR at RIDEM, define a mixing zone as “a limited area or volume in the immediate vicinity of a discharge where mixing occurs and the receiving surface water quality is not required to meet applicable standards or criteria, provided

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At page 139 of the Transcript from the Hearing, the following exchange occurred between Counsel for the Club and Mr. Angelo Liberti, Chief of Surface Water Protection at RIDEM:

Q. (Mr. Prentiss) What's the reason for denying a permit

A. (Mr. Liberti) It's clearly stated in the response to comments that the reason is that this material does not mix, and in order to allow a permit, the only way we could allow a permit to be issued was to decide that it was appropriate to issue a mixing zone, we thought that it was. The point of a public comment period is to say, here is our technical and legal and regulatory analysis of this application. We tentatively think we know what -- we think we know that it's appropriate to issue it, we would like to see what information the public legally, factually, scientifically has to offer. The public came back and said, step one, your regs require that mixing occur in order to have a mixing zone. Does this solid material, is it appropriate to say that it mixes, so that you can get off the dime and establish a mixing zone. In the response to comments we said, upon further consideration, you're right, it doesn't mix, we shouldn't have issued a mixing zone, and we denied it.

3. RIDEM's Denial of the Club's Permit Application Was Arbitrary and Capricious.

The Club argues that the RIDEM found as of August 25, 2008 that the Club's permit application met the applicable regulations and should be granted. It asserts that RIDEM's witnesses, Eric Beck and Angelo Liberti acknowledged that no additional facts were adduced during the public comment period. As a matter of law, public comments do not constitute actionable evidence per Newbay Corp. v. Annarumo, 587 A. 2d 63 (R.I. 1991) according to the Club. Therefore, the final permit should have been granted. The OWR points out that the Water Quality Regulations of July 2006 as amended December 2009 do not apply to the discharge here as the Regulations prohibit it as "none allowable"

at RIDEM:

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in Class SA waters<sup>1</sup> Water Quality Regulations, Table 2.8 (D)(3) (Applicant's Exhibit 49 Full).

As a result, the narrative criteria (such as a "mixing zone") were never invoked (OWR Post Hearing Memorandum pg. 9). So even though the draft permit contemplated allowing the subject discharge to occur, the final decision was to deny the application.

When questioned as to why the Application was denied, Mr. Liberti further testified that:

"As I mentioned, when we went out to public notice the primary comment was that the fundamental premise of the draft permit was the use of a mixing zone and that steel shot and targets don't mix when we evaluated that, that was the primary reason. We said, yes, we agree, they don't mix, thereafter, a mixing zone is not allowable, and without a mixing zone it would violate water quality regulations." Transcript, pg. 149-150.

Further, Mr. Beck stated that

"comments submitted...on behalf of the friends of Easton's Point, several arguments related to the Clean Water Act, the interpretation of the Clean Water Act, the definition of solid waste and the appropriateness of mixing in a mixing zone and the establishment of a mixing zone were made in the public comment period and then considered internally and debated." (TR. pg.101).

These comments gave rise to the OWR'S conclusion that a mixing zone was not appropriate because the Water Quality Regulations prohibit the introduction of any "solid refuse" in the subject waterbody. The Club was made aware of this in the Denial Letter.

4. Spent Steel Shot and Targets are not solid refuse.

The Club asserts "the linch pin" for RIDEM's denial of the Club's application is the contention that the spent steel shot and biodegradable targets constitute "solid waste" As a result, the narrative criteria (such as a "mixing zone") were never invoked (OWR Post Hearing Memorandum pg. 9). So even though the draft permit contemplated allowing the subject discharge to occur, the final decision was to deny the application.

When questioned as to why the Application was denied, Mr. Liberti further testified that:

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or "solid refuse" within the meaning of those terms in Table 2 of Rule 8 of the Water Quality Regulations. The Club further argues that neither the RIPDES Regulations nor the Water Quality Regulations contain a definition of solid waste but rather it is defined in the Solid Waste Management statute R.I.G.L. §23-18.9-7(12). In that section solid waste is defined as:

Garbage, refuse and other discarded solid material generated by residential, institutional, commercial, industrial and agricultural sources, but does not include solids or dissolved material in domestic sewage sludge or dredge material as defined in Chapter 6.1 of Title 46, nor does it include hazardous waste as defined in Chapter 19.1 of this title, nor does it include used asphalt, concrete, Portland cement or tree stumps.

A review of R.I.G.L. §23-18.9-7(12) read in the context of the entire Chapter clearly demonstrates that the solid waste referred to therein is being deposited onto land, not into the bay. The statute references landfills, refuse disposal by municipalities around the State of Rhode Island, governs the licensing of facilities, public and private, and specifically references refuse disposal of solid waste over drinking water sources (R.I.G.L. 23-18.9-9.1).

The OWR denied the final permit, in part, because Rhode Island's Water Pollution Act and Refuse Disposal Act were invoked because the discharge from the Club's shooting activities constitutes a solid waste when it enters the waters of the State. (R.I.G.L. §46-12-5 and §23-18.9-5). The OWR also points out that the materials are not hazardous waste nor did the OWR ever consider the Club's discharges from shooting activities hazardous waste, only that it constituted solid waste/ solid refuse. The FEPI the Water Quality Regulations contain a definition of solid waste but rather it is defined in the Solid Waste Management statute R.I.G.L. §23-18.9-7(12). In that section solid waste is defined as:

Garbage, refuse and other discarded solid material generated by residential, institutional, commercial, industrial and agricultural sources, but does not include solids or dissolved material in domestic sewage sludge or dredge material as defined in Chapter 6.1 of Title 46, nor does it include hazardous waste as defined in Chapter 19.1 of this title, nor does it include used asphalt, concrete, Portland cement or tree stumps.

construction by OWR of "solid waste" in the context of this case is appropriate and shall be upheld as correct.

### DISCUSSION

This matter came before this Tribunal for Hearing on the appeal filed by the Club after it was ultimately denied a RIPDES permit to continue trap and skeet shooting activities it had conducted since 1895. The Club argued various legal and technical points throughout the course of the permit process, the public comment period, issuance of its draft permit and the denial of a RIPDES permit, all militating in favor of allowing the activity to continue over Sachuest Bay. The OWR has, in simple terms, admitted that this was a case of first impression for them and were presented facts and circumstances which, at first glance, caused OWR to issue a draft permit for the activity to continue. The OWR reversed their decision after the public comments were received and OWR reviewed various data and debated the "mixing zone" and whether it was allowable. The OWR ultimately concluded it was not allowable and denied the permit. A complex maze of Statutes and Regulations were intertwined with the RIPDES permit process and the substantive issues at hand. Rule 1 "Purpose" of the RIPDES Regulations states "it is the purpose of these regulations to restore, preserve and enhance the quality of surface waters and to protect the waters from discharges of pollutants so that the waters shall be available for all beneficial uses and thus protect the public health, welfare and the environment. RIPDES Rule 5 "Application of these Regulations" (a) states "these regulations shall be liberally constructed to permit the Department (RIDEM) to effectuate the purpose of state law". I will discuss the

### DISCUSSION

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C.A. No. P. C. 10-00026 (Rhode Island Superior Court July 20, 2011).

With respect the Club's first argument I believe the RIDEM had an adequate basis to ultimately deny the RIPDES permit. While I can understand the Club's reliance on the draft permit and subsequent dismay when the denial letter of May 19, 2009, issued, the fact is that RIPDES Rule 46 provides for denial of a draft permit after public comment. The OWR freely admits this was a case of first impression. The OWR first considered a mixing zone to allow the continuation of the Club's shooting activities and then decided, after digesting the comments made, data, reports, etc. that a mixing zone could not be used in this application. The OWR was performing its function prescribed by Rule 1 of the RIPDES Regulations. It was attempting to protect the waters from discharges of pollutants so that the waters shall be available for all beneficial uses and thus protect the public health, welfare, and the environment. I agree with the decision of the OWR to deny the permit and I conclude the OWR properly exercised their discretion in doing so.

With respect to the Club's second argument, I do not believe the OWR violated the RIDPES Regulations in processing the Club's application. The Club's argument that the OWR cannot deny a permit after issuing a draft permit is wrong. Clearly, RIPDES Rule 46(a) states a final permit decision means a "final decision to issue, **deny** (emphasis added), modify, revoke and reissue or terminate a permit". This language is clear and unambiguous.

I have considered the Club's third argument and conclude that RIDEM's decision was not arbitrary or capricious. OWR debated this issue, considered the comments, extended the ultimately deny the RIPDES permit. While I can understand the Club's reliance on the draft permit and subsequent dismay when the denial letter of May 19, 2009, issued, the fact is that RIPDES Rule 46 provides for denial of a draft permit after public comment. The OWR freely admits this was a case of first impression. The OWR first considered a mixing zone to allow the continuation of the Club's shooting activities and then decided, after digesting the comments made, data, reports, etc. that a mixing zone could not be used in this application. The OWR was performing its function prescribed by Rule 1 of the RIPDES Regulations. It was attempting to

the public comment period, debated this matter internally and decided against a mixing zone and the issuance of the final permit.

With respect to the Club's last argument that spent steel shot and targets are not solid refuse, the Rhode Island Clean Water Act RIGL §46-12-1 et. seq. specifically prohibits the discharge of solid waste into Rhode Island waters and makes no provision authorizing RIDEM to issue permits to discharge solid waste.

#### Findings of Fact

1. The Clambake Club of Newport is a private social and dining club that was founded in 1895. It is located on land and buildings on Easton's Point in Middletown, Rhode Island. From its founding, it operated, as an integral part of its program, a trap shooting range from its property over the adjacent Atlantic Ocean. (TR. pg. 26-28).
2. Trap shooting activities were conducted under the supervision of a certified and experienced range master and subject to Safety Regulations. (TR. pg. 26).
3. Historically, the Club used shotgun ammunition with lead pellets. The Club changed to steel shot in approximately 2003 or 2004 to avoid environmental impacts of lead in the water. About the same time it converted to biodegradable targets rather than clay. (TR. pg. 34).
4. On August 25, 2006 RIDEM issued a Notice of Intent to Enforce which demanded the immediate cessation of the operation of a trap shooting range at the Club's property.

With respect to the Club's last argument that spent steel shot and targets are not solid refuse, the Rhode Island Clean Water Act RIGL §46-12-1 et. seq. specifically prohibits the discharge of solid waste into Rhode Island waters and makes no provision authorizing RIDEM to issue permits to discharge solid waste.

#### Findings of Fact

1. The Clambake Club of Newport is a private social and dining club that was founded in

6. The Club's application was reviewed by the OWR which issued a draft RIPDES permit to the Club and a Public Notice of the draft RIPDES permit on August 27, 2008. (Applicant's Exhibit 6 Full).
7. The Club's application reflected the fact that only steel shot would be used with biodegradable targets.
8. The Club submitted a study to RIDEM by Applied Science Associates dated December 18, 2008 (Applicant's Exhibit 7 Full) which was considered by the OWR in the processing of the RIPDES application.
9. The study discussed the impact of steel shot introduced into the waters of the State by the Club. (Applicant's Exhibit 7 Full).
10. The Statement of Basis, which is a part of the Draft RIPDES Permit, indicated that the RIDEM determined that it would be appropriate to consider a mixing zone for the deposition of steel shot and biodegradable targets into Sachuest Bay under the RIPDES Regulations. (Applicant's Exhibit 6 Full).
11. From August 27, 2008 to October 2, 2008, RIDEM solicited public comments on the Draft RIPDES permit.
12. During the October 1, 2008 Public Hearing, the RIDEM granted a fifteen (15) day extension to the public comment period at the request of counsel for the Club and the FEPI.
13. On October 16, 2008 the FEPI submitted comments and a seventeen (17) page (Applicant's Exhibit 6 Full).<sup>24</sup> Correspondence from the FEPI to RIDEM containing technical
7. The Club's application reflected the fact that only steel shot would be used with biodegradable targets.
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9. The study discussed the impact of steel shot introduced into the waters of the State by the

15. On May 19, 2009 the RIDEM notified the Club that application RI0023825 for a RIPDES permit was denied. (Applicant's Exhibit 8 Full).
16. The RIDEM's final decision was based on a review and evaluation of the comments during the public comment period. (Applicant's Exhibit 8 Full).
17. The RIDEM enclosed a synopsis of the significant comments received by the RIDEM and the RIDEM's responses in accordance with Rule 47 of the RIPDES Regulations.
18. The Response to Comments stated that based upon comments received during the public comment period, RIDEM re-evaluated whether a mixing zone can be used to meet the narrative requirements of the Water Quality Regulations. (Applicant's Exhibit 8 Full).
19. The decision to deny the Application rested on the conclusion that "it is not appropriate to assign a mixing zone to the discharge of the target and shot" because the target and shot constitute "solid refuse" and Table 2.8 D(3) of the Water Quality Regulations specifically prohibit any discharge of "Solid Refuse". (Applicant's Exhibit 8 Full).
20. On June 18, 2009 the Club filed an Administrative Appeal of the decision to the Administrative Adjudication Division for Environmental Matters.

#### Conclusions of Law

1. The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. General Laws §43-67) and the Administrative Procedure Act (R.I. General Laws §42-25.1 et seq.).
16. The RIDEM's final decision was based on a review and evaluation of the comments during the public comment period. (Applicant's Exhibit 8 Full).
17. The RIDEM enclosed a synopsis of the significant comments received by the RIDEM and the RIDEM's responses in accordance with Rule 47 of the RIPDES Regulations.
18. The Response to Comments stated that based upon comments received during the public comment period, RIDEM re-evaluated whether a mixing zone can be used to meet the

2. Rule 15(d) of the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters* (AAD Rules) provides that in matters in which a permit or application denial is at issue, "the burden shall rest with the Applicant". At the outset of the Hearing, "it was agreed by counsel that the burden will be carried by the applicant, Clambake Club of Newport, to demonstrate by a preponderance of the evidence that the Club was improperly denied their final RIPDES permit." (Hearing Transcript, pg. 7).
3. The case of *Edward A. Kent v. Rhode Island Department of Environmental Management* C.A. NO. PC 10-0026 (Rhode Island Superior Court July 20, 2011) outlines the limits of review this Tribunal and Hearing Officer has when hearing a case. "The Hearing officer's review is confined to information the RIDEM was presented with when making its initial determination" **Kent**, pg. 9. Counsel in this case were reminded of this standard of review in several Prehearing Orders and at the outset of the Hearing.
4. On August 25, 2006 the RIDEM issued a Notice of Intent to Enforce to the Club, which lawfully ordered the immediate cessation of the operation of a trap shooting range at the Club's property at Easton's Point, Middletown, Rhode Island.
5. Prior to the issuance of the Notice of Intent on August 25, 2006 by the RIDEM, the Club was lawfully allowed to conduct a trap shooting range at the Club's property.
6. On March 28, 2007 the Club duly complied with the Notice of Intent to Enforce and filed a RIPDES permit in order to conduct trap shooting activities at the Club's property.
7. The burden of proof in a permit or application denial case is on the Applicant. At the outset of the Hearing, "it was agreed by counsel that the burden will be carried by the applicant, Clambake Club of Newport, to demonstrate by a preponderance of the evidence that the Club was improperly denied their final RIPDES permit." (Hearing Transcript, pg. 7).
3. The case of *Edward A. Kent v. Rhode Island Department of Environmental Management* C.A. NO. PC 10-0026 (Rhode Island Superior Court July 20, 2011) outlines the limits of

9. Pursuant to RIPDES Rule 43, the OWR duly held Public Hearings from August 27, 2008 to October 2, 2008 and granted a fifteen day extension to the Public Comment period.
10. Pursuant to RIPDES Rule 46, on May 19, 2009 the OWR duly notified the Club that their application for a RIPDES permit was denied.
11. Pursuant to RIPDES Rule 47, on May 19, 2009 the OWR duly enclosed a synopsis of the significant comments received by the RIDEM and the RIDEM's Responses to those comments.
12. I sustain and uphold the decision by RIDEM to deny the Club's Application as stated in the Response to Comments which was based on the conclusion that "upon further review, DEM has determined that it is not appropriate to assign a mixing zone to the discharge of the target and shot (i.e. "solid refuse") in SA waters". Additionally, I sustain and uphold the decision and conclusion by RIDEM that shot does not "mix" with the receiving surface water as required by the definition of a mixing zone and the determination that it cannot utilize a mixing zone to support issuance of a discharge permit for the Clambake Club's proposed activities. (Applicant's Exhibit 8 Full).
13. I sustain and uphold all of the Response to Comments made by the RIDEM. (Applicant's Exhibit 8 Full).
14. I uphold and sustain RIDEM's denial of the Club's permit application based upon the documentary and testimonial evidence presented.
15. The RIDEM did not violate the RIPDES Regulations in processing the Club's
10. Pursuant to RIPDES Rule 46, on May 19, 2009 the OWR duly notified the Club that their application for a RIPDES permit was denied.
11. Pursuant to RIPDES Rule 47, on May 19, 2009 the OWR duly enclosed a synopsis of the significant comments received by the RIDEM and the RIDEM's Responses to those comments.
12. I sustain and uphold the decision by RIDEM to deny the Club's Application as stated in the Response to Comments which was based on the conclusion that "upon further review,

18. The RIDEM's Final decision to deny the Club's RIPDES permit is permissible pursuant to RIPDES Rule 46.
19. The Clambake Club of Newport failed to sustain its Burden of Proof in demonstrating, by a preponderance of the evidence that the Club was improperly denied their Final RIPDES Permit.
20. The Clambake Club of Newport's appeal to this Tribunal dated June 18, 2009 is hereby **DENIED and DISMISSED.**

Entered as an Administrative Order this 10<sup>th</sup> day of June, 2014.



David M. Spinella  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill 2<sup>nd</sup> FL  
Providence, RI 02906  
(401) 574-8600

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: R. Daniel Prentiss, Esquire, One Turks Head Place, Suite 380, Providence, RI 02903; Stephen H. Burke, Esquire, Ratcliffe Harten Burke & Galamaga, LLP, 40 Westminster Street, Suite 700, Providence, RI 02903, and via interoffice mail to Marisa Desautel, Esquire,

a preponderance of the evidence that the Club was improperly denied their Final RIPDES Permit.

20. The Clambake Club of Newport's appeal to this Tribunal dated June 18, 2009 is hereby **DENIED and DISMISSED.**