

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

RE: ANMAR HOLDING, LLC
APPLICATION NO. 0536-0947

AAD NO. 12-002/ISA

DECISION AND ORDER

This matter came on before Hearing Officer David M. Spinella on a Joint Motion to Submit Case Upon the Record in Lieu of Hearing. Anmar Holdings, LLC ("Anmar") and the Department of Environmental Management, Office of Water Resources ("OWR") have jointly moved pursuant to Rule 16.00 (a) of the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters* to waive the hearing and submit this matter for consideration upon the record, as set forth below.

"Any Party may elect to waive a hearing and to submit its case upon the record. Submission of a case upon the record, without a hearing, does not relieve the parties from the necessity of providing the facts supporting their burdens, allegations or defenses." Rule 16.00 (a).

Undisputed Facts

1. On December 8, 2011, Anmar submitted application #0536-0947 (the "Application") to the OWR. See Application #0536-0947, attached hereto as Exhibit 1 and made a part hereof.
2. The Application proposed the installation of an Onsite Wastewater Treatment System ("OWTS") on property owned by Anmar, and identified at Plot 165, Lot 91A in the Town of Westerly, Rhode Island (the "Property"). See Exhibit 1.
3. The Application was reviewed by the OWR pursuant to the *Rules Establishing Minimum Standards Relating To Location, Design, Construction, and Maintenance of Onsite Wastewater Treatment Systems*, as amended June 30, 2011 (the "OWTS Rules").
4. The Application sought a variance from the minimum standard set forth in Rule 22 (Table 22.1), which requires that a system be located a minimum of 50 feet from a storm drain.
5. Pursuant to the Application, the proposed leachfield is 27.5 feet from a storm drain. See Exhibit 1.

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6. The Application sought a variance from the minimum standard set forth in Rule 32.4, which requires that a system be located a minimum of 150 feet from a storm drain connected to a critical area.
7. Pursuant to the Application, the proposed leachfield is 27 feet from a storm drain connected to a critical area. See Exhibit 1.
8. The Application sought a variance from the minimum standard set forth in Rule 22 (Table 22.3), which requires a minimum 24" depth to ground water table from the original ground surface.
9. Pursuant to the Application, the ground water table on the Property is 0 inches. See Exhibit 1.
10. Pursuant to the Application, there is approximately 24 inches of fill in the form of either storm deposited material or human transport material above the groundwater table.
11. Pursuant to the OWTS Rules, "original groundwater surface" does not include storm deposited sand.
12. By and through a letter dated December 22, 2011, the OWR denied Anmar's application. See Denial Letter, attached hereto as Exhibit 2.
13. The Application was denied, in part, pursuant to Rule 48.2 of the OWTS Rules because the OWR determined that the evidence presented failed to demonstrate that the same degree of environmental protection provided under the regulations can be achieved and maintained with having a BSF leaching field at 27 feet from a tributary storm drain that discharges into a Critical Salt Pond compared to the minimum requirement of 150 feet set forth in Rule 32.4. See Exhibit 2.
14. The Application was denied, in part, pursuant to Rule 48.2.2-E (ix) of the OWTS Rules, which requires that an application for a variance with a depth to groundwater from the original surface of less than 12" shall be denied by Rule without further evaluation. See Exhibit 2.
15. Because Rule 48.2.2-E (ix) mandates that OWR must deny an application where the variance request is for a depth to groundwater from original ground surface of less than twelve (12) inches, if this matter were to proceed to hearing, the hearing officer would have no alternative under the regulations but to affirm the denial of the application.
16. The parties have requested a ruling on the record consistent with these stipulated facts, without the need for a hearing.

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In addition to these undisputed facts, the OWTS evaluated the criteria as outlined in Exhibit 2 regarding each variance on the public interest and the public health. (See Exhibit 2 attached hereto and made a part hereof.)

Rule 48.2 of the *Variance Review Standards*, reads as follows:

48.2.2 Denial – A variance request from the minimum standards set forth in these Rules shall be denied when:

(E). The variance request is for one of the following:

- (ix) The variance request is for a depth to groundwater from original ground surface of less than twelve (12) inches or for a depth to a restrictive layer or bedrock of less than thirty-six (36) inches.

Burden of Proof

Rule 49.6 of the *Rules of Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Onsite Wastewater Treatment Systems*, as amended June 30, 2011, reads as follows:

49.6 Burden of Proof – At the adjudicatory hearing, the applicant shall have the burden of proof to demonstrate through clear and convincing evidence that:

49.6.1 A literal enforcement of the Rules will result in unnecessary hardship;

49.6.2 That the OWTS will function as proposed in the application; and

49.6.3 That the issuance of a permit will not be contrary to the public interest, public health and the environment. In order to demonstrate that the proposed OWTS will not be contrary to the public interest, public health and the environment, the applicant must introduce clear and convincing evidence to the satisfaction of the Director that:

(A) The waste from the proposed OWTS will not be a danger to public health;

(B) The OWTS to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply or tributary thereto;

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- (C) The waste from the proposed OWTS will not pollute any body of water or wetland;
- (D) The waste from the proposed OWTS will not interfere with the public use and enjoyment of any recreational resource; and
- (E) The waste from the proposed OWTS will not create a public or private nuisance.

Findings of Fact

Undisputed facts 1 – 16 are hereby incorporated by reference herein and repeated as if fully set forth herein.

Conclusions of Law

Based on a review of the undisputed facts and Exhibits, I find as follows:

1. The Application was denied, in part, pursuant to Rule 48.2 of the OWTS Rules because the OWR determined that the evidence presented failed to demonstrate that the same degree of environmental protection provided under the regulations can be achieved and maintained with having a BSF leaching field at 27 feet from a tributary storm drain that discharges into a Critical Salt Pond compared to the minimum requirement of 150 feet set forth in Rule 32.4. See Exhibit 2.
2. The Application was denied, in part, pursuant to Rule 48.2.2-E (ix) of the OWTS Rules, which requires that an application for a variance with a depth to groundwater from the original surface of less than 12” shall be denied by Rule without further evaluation. See Exhibit 2.
3. Because Rule 48.2.2-E (ix) mandates that OWR must deny an application where the variance request is for a depth to groundwater from original ground surface of less than twelve (12) inches, if this matter were to proceed to hearing, the hearing officer would have no alternative under the regulations but to affirm the denial of the application.
4. Based on conclusions of Law 1-3 the Applicant failed to demonstrate through clear and convincing evidence, the criteria in Rule 49.6 of the *Rules of Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems*, as amended June 30, 2011.

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5. The Applicants have not met their Burden by clear and convincing evidence in demonstrating that the denial of their Application (#0536-0947) to install an onsite wastewater treatment system was improper.
6. The Findings and Conclusions of Law contained in the Letter of December 22, 2011 from the Office of Water Resources to Applicant regarding APP # 0536-0947, Plat 165, Lot 91A attached hereto and made a part hereof are sustained.

It is therefore

ORDERED

1. The Joint Motion to Submit Case Upon the Record in Lieu of Hearing is **GRANTED**.
2. The Applicant's Appeal is hereby **DENIED** and **DISMISSED**.

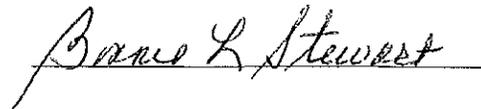
Entered as an Administrative Order this 8th day of January, 2013.



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

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Robert E. Craven, Esquire, 7405 Post Road, North Kingstown, RI 02852 and via interoffice mail to Joseph LoBianco, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 8th day of January, 2013.



Bruce R. Stewart