STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 12, 2017)

THE CLAMBAKE CLUB OF NEWPORT	:	
V.	:	**C.A. No. PC-2014-3111**
JANET COIT, in her capacity as DIRECTOR of the DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	:	

DECISION

MCGUIRL, J. Before this Court is the appeal of the Clambake Club of Newport (the Club or Appellant) from a final decision of the Department of Environmental Management (DEM) denying the Club's application for a Rhode Island Pollutant Discharge Elimination System permit (RIPDES).[1] DEM denied the permit on the basis that it was inappropriate to establish a mixing zone for the discharge of spent steel shot and limestone target fragments into the Sachuest Bay (the Bay) because the discharge constituted a release of solid waste into Class SA waters, which is strictly prohibited under DEM Water Quality Regulations (WQR). Jurisdiction is pursuant to G.L. 1956 §§ 42-35-1, et seq. of the Administrative Procedures Act (APA).

I

Facts and Travel

In 1895, a group of friends formed the Club on Easton's Point in Newport, Rhode Island. Since the Club's founding, patrons have enjoyed trapshooting on a range located on the eastern side of the Club, which extends over the Bay. Trapshooting is a sport whereby hunters shoot at

[1] On November 19, 2014, Russell Dulac submitted an amicus brief in support of DEM.

targets, called "pigeons," which are launched from a stationary spring trap. Pigeons are clay discs measuring four to five inches in diameter, which are made to shatter easily. At the Club, spring traps launch the pigeons over the Atlantic Ocean causing debris from the shattered targets and spent shot to fall into the Bay. Historically, the Club used lead shot and clay pigeons. However, around 2004, the Club switched to steel shot and biodegradable crushed limestone pigeons. Over time, the Club has evolved into a rod and game club with formal dining facilities and fishing docks. Nevertheless, until 2006, a portion of the Club's patrons continued to use the trapshooting range seasonally.

In 2006, DEM determined that the Club's release of targets and shot constituted a point source discharge of pollutants to the Bay and issued a Notice of Intent to Enforce (NOI), in which it ordered the Club to immediately cease all trapshooting activities. (NOI, Aug. 25, 2006.) The NOI alleged violations of the Rhode Island Water Pollution Act for the Club's unauthorized discharge of spent shot and targets into the Bay. Id. The Club complied with the NOI and immediately brought an end to its trapshooting activities. (DEM Draft Permit, Aug. 25, 2008; Release of NOI, Aug. 11, 2009.) On March 28, 2007, the Club submitted an application to DEM for a RIPDES permit. (Club Appl., Mar. 28, 2007.) In the application, the Club requested permission to resume discharging trapshooting debris into the Bay. Id. The application specified that the Club only would use steel shot and biodegradable targets in its trapshooting operation. Id.

As part of its application, DEM required that the Club undertake an environmental study to assess the impacts of the Club's prior discharges of lead shot and clay targets on the Bay. (DEM Draft Permit, Aug. 25, 2008.) In July 2008, DEM approved the Club's commissioning of Doctors Deborah French McCay and John W. King from Applied Sciences Associates (ASA) to

lead the study. (ASA Report, Dec. 18, 2008.) The study was conducted almost two years after the Club ceased its trapshooting activities. Id. The study revealed the presence of steel and lead shot, as well as clay targets, within a ten meter area on the floor of the Bay located southeast of the shooting range. Id. Ultimately, the study found that no cleanup measures were necessary to remove the debris. Id. at 37-38. In an August 2009 letter to the Club, DEM adopted the ASA Report and likewise concluded that no cleanup measures were necessary to remove the lead shot and clay targets from the Bay. (Release of NOI, Aug. 11, 2009.)

After reviewing the Club's application, DEM issued a draft permit pursuant to RIPDES Rules 34(b) and 37(d) that tentatively granted the application. (DEM Draft Permit, Aug. 25, 2008.) Although DEM's WQR prohibit solid refuse discharges into the Bay,[2] DEM "determined that it would be appropriate to consider a mixing zone for the deposition of steel shot and biodegradable targets into Sachuest Bay . . . provided that a mixing zone is established." Id. (emphasis added). The WQR 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 . . ." Id. (quoting WQR 7).

In the past, DEM only had established mixing zones in instances where liquid discharges—rather than solid discharges—entered receiving water. (Tr. 280, Sept. 10, 2014 (Tr. II).) DEM had never before considered establishing a mixing zone purely for solids that react with saltwater over time, such as steel shot and limestone targets. Id. Nevertheless, the draft permit tentatively authorized the Club's discharge of steel shot and biodegradable targets and

[2] Under the WQR standards, the Bay is considered class SA waters. See DEM Draft Permit, Aug. 25, 2008. Class SA waters are defined as salt water "designated for shellfish harvesting for direct human consumption, primary and secondary contact recreational activities, and fish and wildlife habitat . . . suitable for aquacultural uses, navigation and industrial cooling. These waters shall have good aesthetic value." WQR 8(B)(2). Table 2.8(D)(3) of the WQR expressly prohibits discharging "solid refuse" into class SA waters.

required that the Club submit a Best Management Practices (BMP) Plan to minimize the discharge of pollutants and to provide for the storage and disposal of refuse. (DEM Draft Permit, Aug. 25, 2008.)

Pursuant to RIPDES Rule 37(f), the draft permit announced a comment period running from August 27, 2008 through October 2, 2008, with a public hearing scheduled for October 1, 2008. At the scheduled hearing, DEM heard from Stephen Burke (Mr. Burke), who represented Friends of Easton's Point, Inc. (FEPI), a neighborhood organization concerned about the Club's trapshooting operation. (Tr. 9, Oct. 1, 2008 (Tr. I).) In his comments, Mr. Burke cited the RIPDES Rules, as well as the WQR, and questioned whether the establishment of a mixing zone was appropriate due to the fact that the Club was discharging solids, rather than liquids. Id. at 17-18.

At the conclusion of the October 1, 2008 hearing, DEM extended the comment period for an additional fifteen days. Id. at 27:3-11. The DEM explicitly stated that both FEPI and the Club could utilize the extended comment period to submit additional written comments to DEM. Id. at 27:21-25.

On October 16, 2008—the last day of the extended public comment period—FEPI submitted written comments and an engineering report from GZA GeoEnvironmental, Inc. (GZA Report) in support of its position that the RIPDES permit should be denied. (Decision and Order, June 10, 2014.) There is no evidence in the record to suggest that the Club responded to FEPI's submissions by requesting a further extension or reopening of the public comment period. On May 19, 2009, DEM issued a decision denying the Club's RIPDES permit application. (DEM Final Decision, May 19, 2009.)

In its decision, DEM explained that it had reviewed information received during the public comment period and determined that the establishment of a mixing zone in the Bay was not appropriate because solid refuse (i.e. target and shot) "does not 'mix' with the receiving surface water as required by the definition of a mixing zone." Id. DEM concluded that because a mixing zone was not appropriate and the debris constitutes a solid waste—which the WQR specifically prohibits from entering the Bay—it could not issue the Club a RIPDES permit. Id.

On June 15, 2009, the Club filed an administrative appeal of DEM's decision. As grounds for its appeal, the Club asserted that 1) DEM violated RIPDES regulations in processing the Club's application; 2) trapshooting debris does not qualify as solid refuse; and 3) the denial was not supported by legally competent evidence in the record.

Prior to the hearing on the appeal, the Club filed a Motion to Clarify and Determine Scope of Administrative Hearing. (Motion to Clarify and Determine Scope of Administrative Hearing, dated July 26, 2013.) According to the Club, the public comment hearing did not constitute an evidentiary hearing on a contested case under the APA because the hearing officer did not take any sworn testimony or enter any exhibits into evidence. Id.[3] Consequently, the Club contended that it was entitled to a full evidentiary hearing during its appeal at which to present evidence and introduce expert testimony. Id. On August 27, 2013, the Hearing Officer issued an Order stating that the appellate hearing would be confined to a review of the already-established Administrative Record in this matter. (Order, dated Aug. 27, 2013.)

[3] The Club also contended that its permit application should have been granted as a matter of law because DEM did not have the authority to deny the tentative permit decision. (Motion to Clarify and Determine Scope of Administrative Hearing, dated July 26, 2013.) Instead, the Club maintained that DEM was required to grant the permit, "subject only to certain specified actions that can be taken in response to public comment received pursuant to the notice of preparation of the draft permit." Id.

The Adjudicatory Hearing on the appeal took place on September 10, 2013. At the hearing, the following individuals testified: Pierre Irving (Mr. Irving), the Club's President; Erick Beck (Mr. Beck), the supervisor of the RIPDES program in the Office of Water Resources; and Angelo Liberti (Mr. Liberti), the Chief of Surface Water Protection in the Office of Water Resources.

At the Adjudicatory Hearing, Mr. Irving testified regarding the Club's history and its trapshooting rules and practices. (Tr. II at 173-76.) Mr. Beck testified regarding the role of the RIPDES program and explained that a mixing zone is established on a case-by-case basis, looking at specific site factors. Id. at 260. Mr. Beck also testified that several comments and documents submitted by both the proponents as well as the opponents of the trapshooting operation were helpful to DEM in reaching its final determination that a mixing zone was not appropriate. Id. at 248. However, Mr. Beck stated that "one of the more pertinent documents related to that decision was comments submitted by [FEPI]," particularly comments regarding the appropriateness of establishing a mixing zone for the discharge of solid waste. Id.

Mr. Liberti testified that he had been involved in the decision to issue a tentative permit approval, as well as the eventual decision to deny the permit. Id. at 267. Mr. Liberti explained that in determining whether it should establish a mixing zone, DEM "considered the degree to which and . . . the rate at which [the steel shot and limestone targets] were dissolving and whether we felt that was appropriately categorized as mixing." Id. at 275. Mr. Liberti stated that in making its determination that the shot and targets would not break down quickly enough to qualify as mixing, DEM relied on a memorandum from the manufacturer of the targets to determine the rate at which the targets dissolved, as well as pictures from the site showing an accumulation of shot on the floor of the Bay. Id. at 276-77. Mr. Liberti further testified that

"mixing is more or less instantaneous in all the guidance that's available" and that he was wary of "stretching the regulations" to allow for mixing zones to encompass solid discharges depending on their rate of decay. Id. at 280-81.

Toward the end of the Adjudicatory Hearing, the Club made an offer of proof regarding the proposed testimony from its experts, Dr. McCay, one of the authors of the ASA report, and Matthew G.S. Horn, Ph.D. Id. at 156-60. The Hearing Officer permitted the offer of proof, but explained that he was not going to allow the Club to call its expert witnesses to testify about matters that the Club had not presented at the public hearing on October 1, 2008 or during the public comment period. Id. at 154-55. As to its offer of proof, counsel for the Club stated that Dr. Horn would have testified that steel shot disappears in saltwater within one year and clay pigeons dissolve within two to three years, and that Dr. McCay would have testified that the environmental impact of the Club's shooting activities was not measurable. Id. at 157-59.

The DEM issued a final decision on June 10, 2014, upholding the denial of the Club's RIPDES permit application. (Decision and Order, June 10, 2004.) In that decision, the Hearing Officer found that there was an adequate basis in the administrative record to support the denial of the permit due to the comments submitted to DEM, coupled with the fact that the matter was one of first impression for DEM and that DEM was acting to protect the Bay. Id. The Hearing Officer determined that the Club's argument—that the Office of Water Resources cannot deny a permit after issuing a draft permit—failed under RIPDES Rule 46(a). Id. The Hearing Officer further determined that DEM had not acted arbitrarily or capriciously as DEM had debated the issue, followed the procedural requirements, extended the comment period, and considered the comments in making its final decision. Id. Finally, the Hearing Officer stated that under Rhode Island law, discharge of solid waste into Rhode Island waters is strictly prohibited, and DEM

was not authorized to issue permits to discharge solid waste into SA Class state waters. Id. In rendering his decision, the Hearing Officer specifically found credible the testimony of Mr. Beck and Mr. Liberti. Id.

Following the final decision, on June 20, 2014, the Club timely filed an appeal to this Court.

II

Standard of Review

This Court's review of DEM's decision is governed by the APA. See Vito v. Dep't of Envtl. Mgmt., 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15 provides, in pertinent part:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> "(1) In violation of constitutional or statutory provisions;
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> "(2) In excess of the statutory authority of the agency;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error or law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
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> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

When reviewing a decision under the APA, this Court may not substitute its judgment for that of the agency on questions of fact. Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). Accordingly, the Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is "relevant evidence that a

reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981).

Even though this Court reviews questions of law de novo, "it is also true that [the Court] give[s] deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's construction is neither clearly erroneous nor unauthorized." Town of Burrillville v. Pascoag Apartment Assocs., 950 A.2d 435, 445 (R.I. 2008) (internal citation and quotation marks omitted). Thus, while not controlling, an agency's interpretation of its own rules or regulations is entitled to substantial deference. Id.; see also State v. Cluley, 808 A.2d 1098, 1104 (R.I. 2002) (finding that deference to an agency's interpretation of its own regulations required the court "to presume the validity and reasonableness of that construction until and unless the party challenging its interpretation proved otherwise").

Further, "where the agency's specialized knowledge is involved . . . the court should grant broader deference and uphold the agency's conclusion if the conclusion is rationally based." R.I. Higher Educ. Assistance Auth. v. Sec'y, U.S. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991) (quoting Bldg. & Constr. Trades Dep't, AFL–CIO v. Brock, 838 F.2d 1258, 1266 (D.C. Cir. 1988)). Such deference is accorded even if an alternative, equally reasonable interpretation exists. Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993).

However, a court "will not apply a statute in a manner that will defeat its underlying purpose." Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 169 (R.I. 2003). Ultimately, a court's deference to an agency's interpretation depends on the

'"persuasiveness of the interpretation, given all the attendant circumstances."' Town of Burrillville, 950 A.2d at 446 (quoting Unistrut Corp. v. State Dep't of Labor & Training, 922 A.2d 93, 101 (R.I. 2007)).

III

Analysis

On appeal, the Club asserts that DEM's decision was made upon unlawful procedure, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary and capricious. Specifically, the Club contends that 1) it was prejudiced by DEM's unlawful procedure; 2) spent steel shot and targets do not qualify as solid waste; 3) there is no evidence in the record to support denial of the Club's application; and 4) the Hearing Officer improperly excluded the testimony of its two expert witnesses at the Adjudicatory Hearing.

A

Procedural Challenges

The Club avers that DEM failed to follow proper procedure under the RIPDES Rules when it issued a tentative draft permit and then ultimately decided—after a public hearing and comment period—to deny the permit. Specifically, the Club argues that (1) there is no authority for DEM to deny an RIPDES permit application after issuing a draft permit, and that, even if such authority exists, DEM must (a) give the Club notification of its intention to deny the permit pursuant to RIPDES Rule 37(c); and (b) must follow the procedures set forth in RIPDES Rule 45(a) when substantial new information is presented during the public comment period; (2) the Hearing Officer failed to separately address and rule upon each of the Club's findings of fact in violation of § 42-35-12; (3) DEM engaged in ex parte communications in making its decision in

violation of § 42-35-13; and (4) DEM improperly excluded the Club's expert witnesses at the Adjudicatory Hearing.

1

Draft Permits

The Club contends that the "overall flow" of the RIPDES Rules suggests that the Rules do not contemplate a scenario in which DEM may deny an application for an RIPDES permit after issuing a draft permit. Alternatively, the Club contends that even if the Rules allow DEM to deny a permit after first issuing a draft permit, DEM (a) is required to provide notice of its intent to deny pursuant to RIPDES Rule 37(c); and (b) is required to follow the procedures outlined in RIPDES Rule 45(a) rather than RIPDES Rule 46(a) when new information is presented to DEM during the public comment period that raises substantial new questions concerning a permit.

In response, DEM maintains that under the Club's reading of the RIPDES Rules, DEM would be subjected to a "circular maze of permit review . . . [and] would forever be issuing new draft permits while not being able to make a decision to deny one." DEM further alleges that once it has written a draft permit and opened a public comment period pursuant to RIPDES Rule 37, it issues a final decision on the permit pursuant to RIPDES Rule 46, and that it need not provide any additional notice to do so.

Although this Court gives deference to an agency's interpretation of its own regulations, Cluley, 808 A.2d at 1104 (presuming "validity and reasonableness of [an agency's] construction until and unless the party challenging its interpretation proved otherwise"), when the agency's interpretation is challenged, "[t]he construction of a regulation is a question of law to be determined by the court." Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 541

(R.I. 2008) (quoting 2 Am. Jur. 2d. Administrative Law § 245 at 221 (2004)). In making any such determination, "[t]he principles or rules of statutory construction apply to administrative regulations." Id.

The ultimate goal of the Court in construing a statute "is to give effect to the purpose of the act as intended by the Legislature." McAninch v. State of R.I. Dep't of Labor & Training, 64 A.3d 84, 86 (R.I. 2013) (internal citations and quotation marks omitted). In determining and effectuating intent, the Court must

> "attribut[e] to the enactment the most consistent meaning. When the language of the statute is clear and unambiguous, it is [the Court's] responsibility to give the words of the enactment their plain and ordinary meaning. The plain meaning approach, however, is not the equivalent of myopic literalism, and it is entirely proper for [the Court] to look to the sense and meaning fairly deducible from the context. Therefore, [the Court] must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections. Finally, under no circumstances will this Court construe a statute to reach an absurd result." Mendes v. Factor, 41 A.3d 994, 1002 (R.I. 2012) (internal citations and quotations omitted).

Under RIPDES Rules, there are several procedural stages in the permit issuance process. See RIPDES Rule 34. The first stage involves the submission of an application "in proper form." RIPDES Rule 34(a). Thereafter, "[t]he Department prepares a tentative decision to issue or deny a draft RIPDES permit. This decision shall be made available for public comment." RIPDES Rule 34(b); see also RIPDES Rule 37(b) ("Once an application is complete the [DEM] shall tentatively decide whether to prepare a draft permit, or deny the application.").

Pursuant to RIPDES Rule 37,

> "(c) If the Department tentatively decides to deny a permit application, a notice of intent to deny shall be issued. Notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under

> this section. If the Department's final decision is that the tentative decision to deny the permit application was incorrect, the notice of intent to deny shall be withdrawn and the Department shall proceed to prepare a draft permit under paragraph (e) of this section.
> "(d) If the Department tentatively decides to issue a general permit, the Department shall prepare a draft general permit under paragraph (e) of this section.
> "(e) If the Department decides to prepare a draft permit, the permit shall contain the following information:
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> "(1) All conditions under 40 CFR 122.41-122.43.
> "(2) All conditions under Rules 14, 15 and 16.
> "(3) All monitoring requirements under Rules 14 and 15.
> "(4) All variances under Rules 56 through 59.
> "(5) All effluent limitations, standards, prohibitions and conditions under 40 CFR and 122.44 and the Rhode Island Pretreatment Regulations.
>
> "(f) All draft permits prepared under this section shall be accompanied by a statement of basis or fact sheet and shall be based on the administrative record publicly noticed and made available for public comment. The Department shall give notice of opportunity for a public hearing, issue a final decision and respond to comments. For RIPDES permits, an appeal may be taken under Rule 49." RIPDES Rule 37.

It is clear from the foregoing that regardless of whether DEM tentatively decides to issue or to deny a permit, it must give notice of an opportunity for a public hearing and comment period. Id.

Under RIPDES Rule 34, "[w]here the Department issues a draft RIPDES permit after consideration of any comments received during the public comment period the Department shall issue a final permit." RIPDES Rule 34(c). Thus, "[a]fter the close of the public comment period . . . on a draft permit, the Department shall issue a final permit." RIPDES Rule 46(a). A final permit decision is defined as "a final decision to issue, deny, modify, revoke and reissue, or terminate a permit." Id. (emphasis added).

Thus, according to the clear and unambiguous language of RIPDES Rule 46(a), DEM may issue a final decision to deny an RIPDES permit application after the close of the comment

period. Considering that RIPDES Rule 46(a) states that a final permit decision includes a decision to deny a permit, and considering that there is nothing in the RIPDES Rules that prohibits DEM from issuing a final decision denying a permit after issuing a draft permit, this Court finds that DEM has the authority to deny a permit application after first issuing a draft permit pursuant to RIPDES Rule 46(a).

The Club nevertheless maintains that even if DEM has the authority to deny a permit after first issuing a draft permit, in situations where information is presented to DEM during the public comment period that raises substantial new questions concerning the permit, DEM is required to follow the procedures set forth in RIPDES Rule 45(a) before it may deny said permit. According to the Club, because substantial new questions were raised during the public comment period in this case, DEM should have followed the procedures set forth in RIPDES Rule 45(a) and reopened the public comment period.

RIPDES Rule 45(a), entitled "Reopening of the Public Comment Period," states that:

> "If any data, information or arguments submitted during the public comment period . . . appear to raise substantial new questions concerning a permit, the Department may take one or more of the following actions:
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> "1. Prepare a new draft permit appropriately modified under Rule 36;
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> "2. Prepare a revised statement of basis under Rule 38, a fact sheet or revised fact sheet under Rule 39 and reopen the comment period; or
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> "3. Reopen or extend the comment period under Rule 41 to give interested persons an opportunity to comment on the information or arguments submitted." RIPDES Rule 45(a) (emphases added).

According to the clear language of RIPDES Rule 45(a), if substantial new questions are raised during the public comment period, DEM has three options, one of which is to reopen or extend the comment period. Id. The Club maintains that DEM was required to reopen the

comment period because substantial new questions arose during the original comment period; however, there is nothing in the language of RIPDES Rule 45(a) that would suggest any such mandatory requirement.

In Rhode Island, "[i]t is an axiomatic principle of statutory construction that the use of the term 'may' denotes a permissive, rather than an imperative, condition." Downey v. Carcieri, 996 A.2d 1144, 1151 (R.I. 2010); see also Quality Court Condo. Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 751 (R.I. 1994) ("[T]he use of the word 'may' rather than the word 'shall' indicates a discretionary rather than a mandatory provision."); Andrade v. Perry, 863 A.2d 1272, 1277 (R.I. 2004) (determining that in the context of statutory construction, "'[m]ay' is not synonymous with 'must.' It is precatory, not mandatory, language"). Indeed, the discretionary connotation of the term "may"—as opposed to the mandatory nature of the term "shall"—is particularly apparent when both terms are used in the same section of a statute. Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 346 (2005) (stating that "[t]he word 'may' customarily connotes discretion" and that such "connotation is particularly apt where . . . 'may' is used in contraposition to the word 'shall'").

RIPDES Rule 45(a) states that DEM "may take one or more of the following actions[,]" one of which is the reopening of the comment period. RIPDES Rule 45(a) (emphasis added). However, as the term "may" is a discretionary provision, DEM was not obligated to reopen the comment period, as posited by the Club. This conclusion is buttressed by the General Assembly's contraposition of the term "shall" in the same rule. See RIPDES Rule 45(b) (stating "[c]omments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening" and the accompanying public notice "shall define the scope of the reopening") (emphases added).

It is clear that the General Assembly's deliberate use of the term "may" in contraposition to the word "shall" in RIPDES Rule 45 evidences its intent to allow DEM to choose how it should handle substantial new questions that may arise during the public comment period. See Jama, 543 U.S. at 346. Consequently, the Court concludes that RIPDES Rule 45(a) does not require DEM to reopen a new comment period even if substantial new questions are raised during the original comment period. In light of the fact that RIPDES Rule 45(a) is discretionary rather than mandatory, the Court concludes that DEM did not err in deciding not to reopen the public comment period, even if, as the Club contends, substantial new questions were raised during the regular public comment period.

Considering that DEM has authority under RIPDES Rule 46(a) to deny a permit application after first issuing a draft permit, and considering that it is not required to reopen the comment period after substantial new questions are raised under RIPDES Rule 45(a), the Club's contention that RIPDES Rule 37(c) required DEM to provide it with notice of its intention to act adversely on the permit application necessarily must fail. RIPDES Rule 37 provides, in pertinent part:

> "(c) If the Department tentatively decides to deny a permit application, a notice of intent to deny shall be issued. Notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under this section.
> . . .
> "(f) All draft permits prepared under this section shall be accompanied by a statement of basis or fact sheet and shall be based on the administrative record publicly noticed and made available for public comment." RIPDES Rule 37.

As previously stated, pursuant to RIPDES Rule 37, DEM is required to give notice of an opportunity for a public hearing and comment period when it tentatively decides to issue or deny a permit. According to the Club, where DEM tentatively decides to issue a permit and then

decides not to issue the permit after affording the applicant a hearing and public comment period, it is required to provide notice of its intent to deny the permit under RIPDES Rule 37(c).

However, such interpretation would lead to an absurd result because, under the Club's interpretation, DEM would have to afford the Club a second opportunity for a public hearing and comment period under RIPDES Rule 37(c) even though it has authority under RIPDES Rule 46(a) to deny a permit application after first issuing a draft permit and is not required to reopen the comment period after substantial new questions are raised under RIPDES Rule 45(a). See Mendes, 41 A.3d at 1002 (declaring "under no circumstances will this Court construe a statute to reach an absurd result") (internal citation and quotation marks omitted); see also 2A Norman J. Singer & J.D. Shambie Singer Sutherland Statutes and Statutory Construction § 45:12103-05 (7th ed. 2014) (stating "a golden rule of statutory interpretation instructs that, when one of several possible interpretations of an ambiguous statute provides an unreasonable result, that interpretation should be rejected in favor of another which produces a reasonable result").

Accordingly, the Court finds that the notification requirements of RIPDES Rule 37(c) apply only to DEM's initial tentative decision to either issue or deny a permit application. The Court further finds that DEM was not required to give the Club notice under that provision before denying the application in its final decision under RIPDES Rule 46(a). In light of these findings, the Court concludes that DEM did not err in failing to give notice to the Club before it denied the permit application.

2

Separate Findings

The Club next contends that the Hearing Officer violated § 42-35-12 in his final Decision and Order when he failed to separately address and rule on each of the Club's fifty-five proposed

findings of fact contained in the Club's Post Hearing Memorandum. DEM asserts that the Hearing Officer's decision satisfied § 42-35-12.

Section 42-35-12 of the Rhode Island General Laws provides, in pertinent part, that "[a]ny final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order shall include findings of fact and conclusions of law, separately stated." Sec. 42-35-12. However, our Rhode Island Supreme Court succinctly has stated that neither § 42-35-12 nor its Federal counterpart "requir[es] a separate, express ruling on each proposed finding of a party, provided the agency's decision on such proposed findings are clear from the record." G.H. Waterman & Co., Inc. v. Norberg, 122 R.I. 825, 832, 412 A.2d 1132, 1136 (1980).

In the instant matter, the Hearing Officer issued a twenty-page Final Decision and Order in which he made twenty findings of fact and twenty conclusions of law. The Court finds that the Hearing Officer's findings of fact essentially incorporated the proposed findings of fact that the Club set forth in its Memorandum. Thus, the Court concludes that the Hearing Officer complied with the statutory mandate of § 42-35-12.

3

Ex Parte Consultations

The Club contends that DEM relied on a memorandum from legal counsel that was not part of the administrative record in making its decision that steel constitutes solid refuse. According to the Club, this action constituted a violation of § 42-35-13, which prohibits ex parte consultations

Section 42-35-13 of the Rhode Island General Laws provides, in pertinent part:

> "[u]nless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with

> any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate; but any agency member:
>
> "(1) May communicate with other members of the agency, and
>
> "(2) May have the aid and advice of one or more personal assistants." Sec. 42-35-13.

In Arnold v. Lebel, 941 A.2d 813 (R.I. 2007), our Supreme Court had occasion "to make clear precisely what the APA allows and prohibits in terms of ex parte communications during the administrative adjudication of [a] contested case[,]" where a contested case is defined as "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." Id. at 820. To begin with, the Court declared that § 42-35-13 "prohibits ex parte communication with anyone about contested or material adjudicatory facts or opinions concerning the merits of an applicant's pending appeal" in order "to prevent litigious facts from reaching the decision-maker off the record in an administrative hearing." Id. Notwithstanding this prohibition, however, the Court stated that "§ 42-35-13 authorizes hearing officers to engage in ex parte communication with agency staff members about general matters pertaining to the discharge of his or her duties." Id.

Nevertheless, in the event that a hearing officer "intends to consult any documentary source or person concerning facts or opinions about the merits of an appeal[,]" the hearing officer is required to "provide notice to the parties before [the] hearing" and afford them "an opportunity to contest any such evidence and to cross-examine any people consulted." Id. In addition, "all evidence that is received or considered must be on the record." Id. Thus, "[i]n short, no litigious facts should reach the decision-maker off the record in an administrative hearing." Id.

During the Adjudicatory Hearing, Mr. Liberti testified that the RIPDES program

> "was a new department, it had a lot of new issues that the department hadn't dealt with before, so along the way in the drafting of the permit Eric[k] [Beck] and his staff would meet with me, I would bring in other staff with expertise in the office as appropriate, met with legal counsel along the way. So my role, I see it as to make sure that we're consistently applying the water quality regs and getting the expertise that I needed to bring to bear on the program." (Tr. II at 119-20.)

From the foregoing, it appears that in the very early stage of the application process, while drafting the permit, Mr. Liberti sought expert advice from various members of the agency to ensure consistent application of WQR.

Later in his testimony, Mr. Liberti was questioned about artificial reefs. Id. at 136. Mr. Liberti responded that with respect to the old Jamestown Bridge, DEM determined that certain portions of the bridge were appropriate for use as an artificial reef, but that said determination did not involve the issuance of an RIPDES permit. Id. Thereafter, the following colloquy took place:

> "Q. Is [sic] the steel members of the Jamestown Bridge that dumped into the water to create an artificial reef, is that solid refuse?
>
> "MS. DESAUTEL: Objection, relevance
>
> "HEARING OFFICER: Overruled.
>
> "A. We relied on legal counsel to help us out with the definition of solid refuse, and based on that input, I would say, no, it's not solid waste.
>
> "Q. What's the difference between steel shot and steel members of an abandoned and dismantled bridge in terms of solid refuse?
>
> "MS. DESAUTEL: Objection.
>
> "HEARING OFFICER: Overruled.
>
> "A. As I said, I relied on advice from legal counsel, so there's probably a memo from legal counsel that's not part of the public record . . .
>
> . . .
>
> "Q. You've testified that part of your decision making regarding this RIPDES permit application was consultations with counsel?
>
> "A. Yes.
>
> "Q. And those consultations do not appear in the record, is that correct?

"A. I would suspect that they do not." Id. at 137-38.

The Club essentially contends that the foregoing statements demonstrate that the Hearing Officer improperly engaged in ex parte consultations in violation of § 42-35-13. However, it is not clear from these statements whether any such violation occurred.

The Hearing Officer clearly testified that when his department was faced with "new issues[,]" he would consult with expert members of staff, including legal counsel, to ensure that DEM was consistent in its application of WQR. Id. at 119-20. However, in the instant matter, such consultations took place during the time that the draft permit was being drafted; thus, the matter had not yet ripened into a contested case for purposes of § 42-35-13, see Arnold, 941 A.2d at 820 (defining a contested case as "a proceeding * * * in which the legal rights, duties, or privileges of a specific party [were] required by law to be determined by an agency after an opportunity for hearing"), and such consultations did not constitute prohibited ex parte communications. Arnold, 941 A.2d at 820.

When the Hearing Officer later testified that "[w]e relied on legal counsel to help us out with the definition of solid refuse . . ." and referred to a memorandum on the subject, it is entirely possible that he was referring to the pre-draft permit phase of the application. Nevertheless, there is nothing in the Hearing Officer's testimony to suggest that he ever had any ex parte discussions about "litigious facts"; rather, it appears that the Hearing Officer merely sought a legal definition for the term solid refuse from legal counsel in order to facilitate a consistent application of WQR. See Arnold, 941 A.2d at 821 (stating "no litigious facts should reach the decision-maker off the record in an administrative hearing").

Considering that there is no evidence that there were any prohibited communications of "contested or material adjudicatory facts or opinions" between the Hearing Officer and legal

counsel, the Court cannot find that DEM relied on prohibited ex parte consultations when it determined that steel shot constitutes solid waste. Id. at 820. Accordingly, the Court cannot conclude that DEM violated § 42-35-13.

B

Whether Steel Shot and Biodegradable Targets Constitute Solid Waste

The Club maintains that DEM erred in determining that steel shot and biodegradable targets are solid waste requiring an RIPDES permit. It further asserts that since the Refuse Disposal Act does not specifically include spent steel shot and biodegradable targets under its definition of solid waste, DEM's determination that the shot and target debris qualify as solid waste is erroneous. Instead, it contends that DEM should be bound by the definition of "solid waste" from the Rhode Island Refuse Disposal Act, G.L. 1956 § 23-18.9-7(12). In response, DEM points out that chapter 12 of title 46, the Rhode Island Water Pollution Act (RIWPA), is the applicable statute in this case, rather than the Refuse Disposal Act.

The Rhode Island Refuse Disposal Act governs refuse disposal on land. It defines "solid waste" as:

> "[G]arbage, refuse, tree waste as defined by subsection 14 of this section, and other discarded solid materials generated by residential, institutional, commercial, industrial, and agricultural sources, but does not include solids or dissolved material in domestic sewage or 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, or Portland concrete cement." Sec. 23-18.9-7(12).

However, under RIWPA, it is "unlawful for any person to place any pollutant in a location where it is likely to enter the waters or to place or cause to be placed any solid waste materials, junk, or debris of any kind whatsoever, organic or non organic, in any waters." Sec.

46-12-5(a). A pollutant may not be discharged without a permit granted by DEM. Id. at (b) ("It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.") Under RIWPA, a pollutant is broadly defined as "any material or effluent which may alter the chemical, physical, biological, or radiological characteristics and/or integrity of water, including but not limited to . . . solid waste . . . garbage . . . [and] munitions . . ." Sec. 46-12-1(15). Here, DEM has determined that steel shot and biodegradable targets are solid waste—and are therefore pollutants— requiring an RIPDES permit under RIWPA.

DEM is the agency charged with administering RIPDES permits as well as enforcing the RIWPA. See § 46-12-2(a) ("It shall be the responsibility of the director of the department of environmental management to administer this chapter."). This Court will afford DEM substantial deference, as the agency charged with administering the statutes at issue here, as long as its interpretation is not clearly erroneous or unauthorized. See Town of Burrillville, 950 A.2d at 446. Under RIWPA's expansive definition of "pollutants," the spent shot and target debris could qualify as "solid waste materials, junk, [] debris of any kind whatsoever" (§ 46-12-5(a)) or "munitions." Sec. 46-12-1(15).

The Court finds that DEM's interpretation that spent steel shot and biodegradable targets constitute solid waste pollutants, which the Club may not discharge into state waters in the absence of a discharge permit, is not clearly erroneous or unauthorized. See Town of Burrillville, 950 A.2d at 446. Accordingly, the Court concludes that DEM did not err in determining that spent steel shot and biodegradable targets constitute solid waste requiring an RIPDES permit.

C

Legally Competent Evidence

The Club next alleges that there is insufficient evidence in the record to support DEM's decision that the establishment of a mixing zone was inappropriate in the instant case. The Club argues that the "rate at which steel shot would 'disappear' was the sole basis for DEM's determination" that a mixing zone was inappropriate and since there was no evidence in the record regarding the rate at which steel shot dissolves in salt water, DEM's decision was not based on legally competent evidence. (Tr. II at 132-33.)

In response, DEM argues that the Club misconstrued DEM's reasoning for deciding against establishing a mixing zone. DEM contends that it determined a mixing zone was inappropriate in this case because, in the past, it had only established mixing zones in instances where liquid pollutants entered receiving waters, rather than solids.[4] In reaching its decision,

[4] This Court notes that there is no Rhode Island case law specifically addressing whether a mixing zone may be established for the discharge of solid waste. However, under the Environmental Protection Agency's (EPA) guidelines, "a mixing zone is an area where an effluent discharge undergoes initial dilution and is extended to cover the secondary mixing in the ambient waterbody." Envtl. Prot. Agency, Compilation of Mixing Zone Documents, (2006) https://nepis.epa.gov/Exe/ZyNET.exe/P1004SMI.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2006+Thru+2010&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C06thru10%5CTxt%5C00000009%5CP1004SMI.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL (last updated Dec. 12, 2016). Black's Law Dictionary defines "effluent" as "[l]iquid waste that is discharged into a river, lake, or other body of water." Black's Law Dictionary 629 (10th ed. 2014). Thus, as the DEM contends, mixing zones are appropriate for the discharge of concentrated liquid pollutants, not solid pollutants. See also Marathon Oil Co. v. E.P.A., 830 F.2d 1346, 1349 (5th Cir. 1987) (defining "mixing zone" as "the area of dispersal in the receiving waters where the pollutants in the effluent are not sufficiently diluted to meet water quality standards").

DEM states that it relied upon comments submitted by FEPI, photographs of the site, past DEM decisions and "guidance" regarding the appropriateness of establishing mixing zones.

In determining whether competent evidence exists in the record to support DEM's decision that establishing a mixing zone was not appropriate in this case, the Court cannot substitute its judgment for that of DEM concerning questions of fact. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). Rather, this Court must determine whether the agency relied on legally competent evidence to support its findings. Id. "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Id. The Court is required to uphold the agency's conclusions if, considering the record as whole, competent evidence exists. Id.

Here, considering the record as a whole, this Court finds that DEM's decision that a mixing zone was inappropriate is supported by competent evidence in the record and, thus, was not clearly wrong. The facts indicate that, in the past, DEM only has established mixing zones for the discharge of liquids, which instantaneously mix with surface water. This policy is at odds with the Club's proposal to discharge solids, which accumulate on the seafloor. Therefore, establishing a mixing zone to allow the Club to discharge solids into Class SA waters would constitute a departure from prior DEM policy. See id. at 209-10 ("An adequate rationale is one that relies on a previously articulated standard and is supported by substantial evidence in the record.").

Further, DEM's expert, Mr. Liberti, testified that mixing zones are established on a case-by-case basis by looking at specific site factors. Here, in making its decision that a mixing zone was inappropriate, DEM relied on comments submitted during the public hearings, evidence submitted by the manufacturer of the limestone targets, as well as photographs of the site that

showed an accumulation of debris from the Club's shooting activities on the floor of the Bay. Ultimately, DEM determined that stretching the definition of a mixing zone to encompass solid discharges was inappropriate given the weight of prior decisions, as well as site specific factors. See R.I. Higher Educ. Assistance Auth., 929 F.2d at 857 (holding "where the agency's specialized knowledge is involved . . . the court should grant broader deference and uphold the agency's conclusion if the conclusion is rationally based").

In addition, the Hearing Officer found credible the expert testimony offered by DEM's experts regarding the inappropriateness of establishing a mixing zone in this case. See Decision and Order; see also Liberty Mut. Ins. Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991) ("[T]his court . . . is not privileged to assess the credibility of witnesses and may not substitute its judgment for that of the director concerning the weight of the evidence on questions of fact."). Consequently, the Court cannot conclude that there was insufficient evidence in the record to support DEM's decision that the establishment of a mixing zone was inappropriate in the instant case.

D

Exclusion of Expert Witnesses

Lastly, the Club alleges DEM improperly excluded the testimony of its two expert witnesses, Doctors McCay and Horn, at the Adjudicatory Hearing. The Club maintains that these experts would have demonstrated with reliable and probative evidence that (1) steel shot disappears in saltwater within one year; (2) biodegradable clay pigeons dissolve within two to three years; and (3) the environmental impact from both materials is so small as to be not measurable. According to the Club, it should have been permitted to present its experts at the Adjudicatory Hearing pursuant to DEM's regulations and administrative rules. DEM counters

that the Club had the opportunity to present this evidence to DEM during the extended comment period and, by neglecting to do so, it had slept on its rights.

As previously stated, when DEM issues a draft permit, it must give notice of an opportunity for a public hearing and comment period. See RIPDES Rule 37(f) (referring to draft permits, RIPDES Rule 37(f) states that "[t]he Department shall give notice of opportunity for a public hearing, issue a final decision and respond to comments"). Final draft permits and final permit decisions issued under RIPDES Rule 48 must be based upon the administrative record. See RIPDES Rule 48(a) ("The Department shall base final draft permit and final permit decisions under Rule 46 on the administrative record defined in this section.").

Subsection (b) of RIPDES Rule 48 provides:

> "The administrative record for any final draft permit and final permit shall consist of the administrative record for the draft and:
>
> "(1) All comments received during the public comment period provided under Rule 41 (including any extension or reopening under Rule 45);
>
> "(2) The tape or transcript of any hearing(s) held under Rule 43;
>
> "(3) Any written materials submitted at such hearing;
>
> "(4) The response to comments under Rule 47 and any new material placed in the record under that section;
>
> "(5) Other documents contained in the supporting file for the permit; and
>
> "(6) The final permit." RIPDES Rule 48(b).

In addition, "[t]he record shall be complete on the date the final draft permit or final permit is issued." RIPDES Rule 48(c). Thus, in the instant matter, when DEM issued its final permit decision on June 10, 2014, the administrative record became complete.

RIPDES Rule 46(b) provides that duly noticed final draft permit and final permit decisions become effective after thirty days, unless one of the following occurs: "(1) A later effective date is specified in the decision; or (2) An adjudicatory hearing is requested under Rule

49; or (3) No comments requested a change in the draft permit, in which case the final permit shall become effective immediately upon issuance." RIPDES Rule 46(b).

In requesting an adjudicatory hearing under RIPDES Rule 49, the following requirements must be met:

> "(a) Within 30 calendar days following the service of notice of the Department's issuance of a final draft permit or final permit (where a final draft permit does not precede the final permit) under Rule 46, any interested person may submit a request to the Department under paragraph (b) of this Rule for an adjudicatory hearing to reconsider or contest the conditions of that permit. If such a request is submitted by a person other than the permittee, that person shall simultaneously serve a copy of the request on the permittee.
> "(b) Such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for that adjudication. Information supporting the request or other written documents relied upon to support the request shall be submitted unless it is already in the administrative record." RIPDES Rule 49.[5]

It is undisputed that in this case the Club requested an Adjudicatory Hearing pursuant to RIPDES Rule 49. At that point, DEM was required to

> "(a) . . . decide the extent to which the request shall be granted. The Department shall grant a request either in whole or in part ordinarily only when the request conforms to the requirements of Rule 49 and sets forth material issues of fact relevant to the issuance of the permit.
> . . .
> "(d) If a request for a hearing is denied in whole or part, the Department shall briefly state the reasons. Such denial

[5] The Administrative Rules of Practice and procedure for the Administrative Adjudication Division for Environmental Matters (AAD Rules), which "govern the conduct of Adjudicatory Proceedings within the jurisdiction of the Administrative Adjudication Division of the Department of Environmental Management[,]" AAD Rule 2.00(a), define an "Adjudicatory Proceeding" as "[a] proceeding before the Administrative Adjudication Division for Environmental Matters in which the legal rights, duties or privileges of specifically named persons are determined after opportunity for an agency hearing." AAD Rule 2.00(c)(1).

> shall be considered the final action of the Department." RIPDES Rule 51.

It is clear from the foregoing that DEM has the discretion to grant or deny, in whole or in part, any requests for an adjudicatory hearing. See id. Furthermore, if a request is denied in whole or in part, DEM is required to briefly state the reasons for any such denial. See id.

Rule 5 of RIPDES states that "[t]hese regulations and the State continuing planning process, as approved by the EPA under 40 CFR 35.1500, shall at all times be construed so as to assure consistency with the [federal] Clean Water Act." RIPDES Rule 5(d). Furthermore, our Supreme Court has declared '"that where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule."' Lennon v. Dacomed Corp., 901 A.2d 582, 588 (R.I. 2006) (quoting Crowe Countryside Realty Assocs., Co. v. Novare Eng'rs, Inc., 891 A.2d 838, 840 (R.I. 2006)).

In Costle v. Pac. Legal Found., 445 U.S. 198 (1980), the United States Supreme Court had occasion to interpret the regulatory scheme promulgated by the EPA regarding the National Pollutant Discharge Elimination System (NPDES) permit process. Similar to RIPDES Rules, the NPDES regulations require "[p]ublic notice of the proposed issuance, denial or modification of every [NPDES] permit . . . ." Id. at 203. Interested parties may then submit written comments or request a public hearing and, if there is significant public interest in the proposed permit, the EPA's Regional Administrator "is directed to hold a public hearing . . . at which interested parties may submit oral or written statements and data." Id. at 204. The Regional Administrator's subsequent determination "constitutes the final action of the EPA unless a timely request for an adjudicatory hearing is granted." Id.

The Regional Administrator grants the request for an adjudicatory hearing "if the request sets forth material issues of fact relevant to the questions of whether a permit should be issued,

denied, or modified." Id. However, "[i]ssues of law . . . are not to be considered at an adjudicatory hearing." Id. Furthermore, "[i]f a request for an adjudicatory hearing raises only legal issues, a hearing will not be granted . . . ." Id.

In Costle, the Regional Administrator determined that there was insufficient public interest in a proposed extension of a permit expiration date and did not hold a public hearing prior to the EPA's final determination on the matter. Id. at 208. Recognizing that "an essential element of the NPDES program is public participation[,]" the Supreme Court "conclud[ed] that the regulations the EPA has promulgated to implement this congressional policy are fully consistent with the legislative purpose, and are valid." Id. at 216. The Court further concluded that the EPA did not err in failing to hold an adjudicatory hearing where the "request raised legal, rather than factual, issues[.]" Id. at 219-20. Interestingly, the Court noted:

> "Even in their arguments before this Court, respondents have continued to raise factual issues that are relevant only to their contention that greater adverse effects on both the marine and land environment will result from the Interim Sludge Disposal Project than from the continued discharge of sludge into the ocean. If such issues had been raised in a timely request for an adjudicatory hearing, we agree with petitioner that the EPA could have taken the position that such issues, regardless of their merits, were not pertinent to a determination to extend the Hyperion permit's expiration date. That determination had no impact on the compliance schedule for 'sludge-out' that already had long been in effect." Id. at 220.

In the instant matter, the Club filed a prehearing motion seeking to introduce the expert testimony of Doctors McCay and Horn regarding the dissolution rates of steel shot and clay pigeons in saltwater, as well as the environmental impact of same. The Hearing Officer rejected the request as an attempt "to impermissibly expand the scope of review of the Hearing at the Administrative Adjudication Division beyond what the Rules allow." (Order, dated August 27, 2013.) According to the Hearing Officer, his review was limited to the information presented to

DEM when it made its initial determination. Id. The Hearing Officer later explained at the Adjudicatory Hearing that he would not allow the experts because the Club had failed to present evidence on these matters either at the public hearing or during the public comment period; consequently, the evidence would impermissibly expand the scope of the evidence presented prior to DEM's final permit decision. (Tr. II at 155.)

A hearing officer presiding over an appeal ultimately has the discretion to determine whether evidence, which was not presented in a proceeding below, should be admitted. See § 42-35-10; see also 2 Am. Jur. 2d Administrative Law § 350 (2015) (noting "a reviewing agency has the power to review matters not raised below though the agency may choose to exercise such power sparingly"); State v. Director, U.S. Fish & Wildlife Serv., 262 F.3d 13, 20 (1st Cir. 2001) (finding that review of administrative actions usually is confined to the record that was before the agency); MaineGeneral Med. Ctr. v. Shalala, 205 F.3d 493, 500 (1st Cir. 2000) (holding that an agency's decision to hear evidence not raised in the proceedings below is a power that it can elect to use sparingly). Here, the Club did not submit the evidence at issue to DEM before it issued its final permit decision; thus, under the RIPDES Rules, it did not become part of the administrative record.

However, RIPDES Rule 49 specifically states that requests for an adjudicatory hearing "shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated . . . ." RIPDES Rule 49. Nowhere in this language is there a prohibition on raising new and relevant material issues of fact at the adjudicatory hearing level. In Costle, the United States Supreme Court declared an adjudicatory hearing must be granted when the request sets forth material issues of fact relevant to a permit dispute; however, it did not state that such relevant facts

necessarily had to have been raised before the Regional Administrator's final permit decision. See Costle, 445 U.S. at 204. Indeed, it implied, in dicta, that new facts could be raised in an adjudicatory hearing request. See id. at 220 (suggesting that if alleged factual issues had been timely raised in the appeal, the EPA, nevertheless, could have found them to be not pertinent to the issue at hand).

Considering that there is no prohibition on raising new factual questions that are relevant to a final permit decision, the Court finds that the Hearing Officer erred in concluding that the Adjudicatory Hearing was confined only to issues raised during the public comment period. Rather, the Hearing Officer should have determined whether the proposed expert testimony raised material issues of fact that would have been relevant to DEM's final permit decision.

IV

Conclusion

After a review of the entire record, this Court finds DEM's stated reasons for excluding the Club's proposed expert testimony was made upon unlawful procedure and was arbitrary or capricious. Substantial rights of the Appellant have been prejudiced. Accordingly, the Court remands the case to the Hearing Officer to determine the relevancy, if any, of the proposed expert testimony to DEM's final permit decision. If the Hearing Officer determines that the proposed expert evidence raises material issues of fact relevant to the final permit decision, then the Court orders him to reopen the Adjudicative Hearing for the purpose of admitting such evidence.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**The Clambake Club of Newport v. Janet Coit**
CASE NO:	**PC-2014-3111**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 12, 2017**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**R. Daniel Prentiss, Esq.**
For Defendant:	**Susan Forcier, Esq.** **Stephen H. Burke, Esq.**