

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

**RE: JAMES & PAMELA MEYER
NOTICE OF VIOLATION NO. CI 1300**

AAD NO. 97-006/IE

DECISION AND ORDER

This matter is before the hearing officer for a Recommended Final Decision and Order regarding the Notice of Violation and Order No. CI 1300 ("NOVAO") issued to James and Pamela Meyer ("Respondents") by the Office of Compliance and Inspection ("OCI") of the Department of Environmental Management ("DEM" or "Department") dated July 22, 1997. The Respondents filed a request for hearing on August 4, 1997 with the Administrative Adjudication Division for Environmental Matters ("AAD").

The hearing was conducted in accordance with the statutes governing the AAD (R.I.G.L. Section 42-17.7-1 et seq), the Administrative Procedures Act (R.I.G.L. Section 42-35-1 et seq), the Administrative Rules of Practice and Procedure for the AAD, and the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations").

The NOVAO cited the Respondents for violation of: (1) Section 46-12-5(a) of the Rhode Island General Laws, as amended; (2) Section 10.2 of the Water Quality Regulations for Water Pollution Control ("Water Quality Regulations"); (3) Section 2.07 of the Rules and Regulations Establishing Minimum Standards Relating to the Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations"); and Section 2.08 of the ISDS Regulations. The NOVAO alleges that on or about February 9, 1995, May 17, 1995, September 21, 1995, July 9, 1996,

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December 27, 1996, March 11, 1997 and July 14, 1997, the Respondents discharged sanitary sewage to the surface of the ground at the property owned by Respondents located at 30 Tower Street, Bristol, Rhode Island otherwise known as Bristol Assessor's Plat 135, Lot 12 (the "Property"), in a location where it was likely to enter the waters of the State.

The NOVAO essentially ordered Respondents to: (1) take immediate temporary action to cease said discharge of sewage; (2) submit an application and plans for a permanent solution; (3) if said plan was not approved or if found deficient, submit a modified plan/or additional information; and (4) commence and complete said work within specified periods of time.¹ It also assessed an administrative penalty jointly and severally against each Respondent in the amount of Six Thousand Five Hundred Dollars.

The administration record reflects that a status conference was held on September 12, 1997 at which a control date of October 17, 1997 was established to enable the parties to pursue settlement negotiations. The matter not being resolved, it was set down for prehearing and hearing. The Prehearing Conference was held on April 8, 1998 and the Prehearing Conference Record was entered on May 22, 1998. The hearing on the merits was conducted on June 23, 1998. The OCI filed its Post-

¹ It was adduced at the hearing that a fully operational system was installed by the Respondents after the NOVAO was issued; and the OCI did not pursue the requests for Respondents to take the measures requested in the Order portion of the NOVAO.

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Hearing Memorandum on July 7, 1998. As of the date of this Recommended Decision, no Post-Hearing Memorandum was filed by Respondents. The Respondents were advised at various stages of the proceedings of their right to be represented by counsel; however, they represented themselves. Gary Powers, Esq., represented the OCI.

The following stipulations of fact were agreed to by the parties in the Prehearing Conference Record:

1. That the Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondents;
2. That the Respondents have owned the subject property continuously at least for the period from February 9, 1995 up to and including July 14, 1997 inclusive (the "subject period"); and
3. That the Respondents discharged untreated sewage from the subject property where it was likely to enter into the waters of the State; i.e. Mt. Hope Bay.

The following were submitted as issues in the Prehearing Conference Record:

1. Have Respondents failed to install a conformed ISDS system on the property? ²
2. Is the proposed administrative penalty excessive and/or did the Director fail to assess the penalty in accordance with the Rules and Regulations for the Assessment of Administrative Penalties?

The following documents were introduced into evidence by OCI and admitted as full exhibits:

² It was adduced at the hearing that a fully operational system was installed by the Respondents after the NOVAO was issued; consequently, this issue need not be addressed herein.

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- OCI 1 Full A copy of the Notice of Violation and Order and Penalty issued to the Respondents by the Division on July 23, 1997 with attachments. 9 pgs.
- OCI 2 Full A copy of Respondents' request for hearing dated August 1, 1997. 2 pgs.
- OCI 3 Full A copy of investigative reports by R. Brown concerning inspections of the subject property for the period February 9, 1995 through July 9, 1996 including one (1) photograph taken during the February 9, 1995 inspection and one (1) photograph taken during the May 17, 1995 inspection. 4 pgs.
- OCI 4 Full A copy of the results of laboratory analysis of samples taken at the subject property on May 17, 1995. 2 pgs.
- OCI 5 Full A copy of a street map depicting the vicinity of the subject property. 1 pg.
- OCI 6 Full A copy of a Notice of Deficiency from the Department addressed to Respondents dated February 17, 1995 with return receipt. 2 pgs.
- OCI 7 Full A copy of an investigative report by R. Brown concerning an inspection of the subject property conducted on December 27, 1996. 1 pg.
- OCI 8 Full A copy of an investigative report by R. Brown concerning an inspection of the subject property conducted on March 11, 1997. 1 pg.
- OCI 9 Full A copy of an investigative report by R. Brown concerning an inspection of the subject property conducted on July 14, 1997 including five (5) photographs of the site taken during the inspection. 4 pgs.
- OCI 10 Full A copy of the curriculum vitae of Patricia A. McNulty. 1 pg.
- OCI 11 Full A copy of the curriculum vitae of David Chopy. 1 pg.
- OCI 12 Full A copy of the curriculum vitae of Russell Brown. 1 pg.

The following documents were introduced into evidence by Respondents and admitted as full exhibits.

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| Resp. 1A Full | Copy of Joint 1994 Federal Income Tax Return of John and Pamela Meyer, prepared by Accounting Offices of Bigney & Bigney. |
| Resp. 1B Full | Copy of Joint 1995 Federal Income Tax Return of John and Pamela Meyer, prepared by Accounting Offices of Bigney & Bigney. |
| Resp. 1C Full | Copy of Joint 1996 Federal Income Tax Return of John and Pamela Meyer, prepared by Accounting Offices of Bigney & Bigney. |
| Resp. 2 Full | Copy of letter from Gerhard Oswald, Bristol Community Development Director to Pamela Meyer dated January 5, 1998. |

Russell Brown, currently an Engineer T3 with the DEM, was the first witness called by the OCI. He testified that as an Inspector for the Division of Water Resources he conducted an inspection of the subject property and surrounding area on February 9, 1995 concerning an alleged sewage discharge to State waters. He found raw sewage discharge in a wooded area approximately one hundred feet west of Mount Hope Bay. The frozen liquid and solids of said sewage discharge continued on the ground surface to the high water mark of the Bay. He then conducted a Dye Test of the Respondents' house (with their permission), which test produced positive results. He explained that the sewage discharges occurred from the Respondents' property and passed across neighboring property into an area where it was likely to enter into the waters of the State. On February 9, 1995, he informed Mrs. Meyer of the results of said

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Dye Test and his observations; and notified her that an official Notice of Violation would be issued.

Mr. Brown further testified that he conducted additional inspections on May 17, 1995, September 21, 1995, July 9, 1996, December 27, 1996, March 11, 1997 and July 14, 1997; that similar discharges of sewage from Respondents' property had occurred on each of the dates alleged in the NOVAO; and that he sought to obtain Respondents' compliance on each of said dates. The OCI issued the Notice of Intent ("NOI") on February 17, 1995 informing Respondents of the sewage discharge from the subject property to the waters of the State, and that such discharges are prohibited by statute. The NOI specified the various corrective actions that could be taken to eliminate the sewage discharges; that the Department was to be notified within ten days of the corrective action to be taken; and that the Department be kept informed of any progress in correcting said problem until it was completely resolved. Despite said Notice and the efforts of Mr. Brown to obtain Respondents' compliance, the remediation of the violation was not accomplished until after the issuance of the NOVAO on July 23, 1997.

David E. Chopy, a Supervising Sanitary Engineer in the Office of Compliance and Inspection, also testified for the OCI. He was qualified by agreement as an expert in the field of environmental engineering and the application of departmental regulations including regulations governing the calculation of penalties. It was Mr. Chopy's testimony that he

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calculated the penalty assessed in the NOVAO; that the procedures established by the Penalty Regulations were followed in the instant matter; and that the proposed administrative penalty in the amount of Six Thousand Five Hundred Dollars was assessed in accordance with said Penalty Regulations.

It was explained by Mr. Chopy that pursuant to the Penalty Regulations, Type I violations are directly related to public health, safety, welfare or environment. That by applying the Penalty Regulations to the instant violations, they are considered Type I violations since the discharge of raw sewage to the waters of the State poses an actual or potential threat. Since said discharges could affect the health of those persons who come in contact with it, they are not considered Type II or Type III violations.

Mr. Chopy further explained the requisite factors considered by him to determine the Deviation from Standard in accordance with the Water Pollution Penalty Matrix of the Penalty Regulations. He testified that the laboratory analysis performed on the sewage water discharged by the Respondents demonstrated a concentration of fecal bacteria of 4,300,000 per 100 milliliters of water, which is extremely high. However, despite said high concentrations of fecal bacteria, Mr. Chopy determined that the Deviation from Standard was "Minor", (which is the lowest Deviation from Standard possible). The penalty for Type I Minor violations ranges from \$1000.00 to \$5000.00; however, Mr. Chopy selected \$1000.00, which is the

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lowest amount for Type I Minor Violations. The penalty assessed was computed as six instances of \$1000.00 which amounts to \$6000.00,³ and by adding the \$500.00 economic benefit, the total assessed penalty is properly \$6,500.00.

Mr. Chopy also testified that the OCI is satisfied that a fully operational system was installed by the Respondents after the NOVAO was issued.

Pamela J. Meyer was the only witness called by Respondents. She testified that the Respondents had intended to comply, but that financially they had no idea what expense was involved.

The OCI has the burden of proving the alleged violations by a preponderance of the evidence. Once a violation is established and the OCI has discharged its initial duty of establishing in evidence the penalty amount and its calculation, Respondents then bear the burden of proving by a preponderance of the evidence that the OCI failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with the Penalty Regulations.

Section 46-12-5(a) of R.I.G.L. prohibits placing of a pollutant⁴ in a location where it is likely to enter the waters of the State.

³ The OCI noted in its Post-Hearing Memorandum (page 3) that "No penalty was assessed for the violation of July 14, 1997".

⁴"Pollutant" is defined by R.I.G.L. §46-12-1(15) to include sewage.

Section 10.2 of the Water Quality Regulations for Water Pollution Control prohibits the placing or discharging of pollutants⁵ into any waters of the State except in compliance with Chapter 46-12, and pursuant to a permit or approval by DEM.

Section 2.07 of the ISDS Regulations prohibits discharging or permitting the entrance of sanitary sewage into any watercourse or any open or covered drain tributary to such waters without an order from the Director approving same.

Section 2.08 of the ISDS Regulations prohibits any person from discharging or permitting the overflow or spillage of any treated or untreated sanitary sewage on or to the surface of the ground.

The Respondents have stipulated that they have owned the subject property continuously at least during the "subject period" and that they have discharged untreated sewage from the subject property where it was likely to enter the waters of the state, i.e. Mount Hope Bay. The uncontradicted evidence introduced by OCI clearly demonstrates that on the dates alleged in the NOVAO, Respondents discharged said untreated sanitary sewage to the surface of the ground in a location where it was likely to enter the waters of the State. The discharges of sewage were observed on the ground surface on each of the aforesaid inspections, and there were odors associated with sewage on each of the dates alleged in

⁵"Pollutant" by definition in Section 5 of the Water Quality Regulations includes sewage.

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the NOVAO. Also, the discharge of sewage from Respondents' home was confirmed by dye test results on February 9, 1995 and the lab results of effluent samples taken on May 17, 1995, demonstrated an extremely high concentration of fecal bacteria. Based on the evidence presented, the OCI has met its burden of proving the instant violations by a preponderance of the evidence.

The OCI also met its burden of establishing in evidence the penalty amount proposed in the NOVAO and the manner in which said penalty was calculated. The uncontradicted evidence of record establishes that the penalty was properly calculated as a "Type 1" violation and a "Minor" Deviation from Standard. The discharges of sewage occurred on numerous occasions; the Respondents repeatedly were made aware of same by the Department; the fecal bacteria in the sewage water discharged by Respondents was "extremely high"; and the remediation was not accomplished for approximately two and one-half years. These violations continued unabated for a long time and posed a serious threat to the waters of the State and the public health.

The Respondents did not refute OCI's evidence and the record is devoid of any evidence that might demonstrate that the OCI failed to assess the penalty and/or the economic portion of the penalty in accordance with the Penalty Regulations. The Respondents submitted Income Tax records indicating their income was low during the pertinent years; however, they submitted no evidence to demonstrate that the

Department failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with the Penalty Regulations. The uncontradicted testimony of OCI's witness and the exhibits introduced by OCI clearly demonstrate that the proposed penalty is not excessive; that it was assessed properly in accordance with the Penalty Regulations; and that the proposed penalty is warranted under the circumstances.

Based on the evidence presented, a penalty of One Thousand Dollars for each of the six violations and of Five Hundred Dollars for the economic benefit realized by Respondents for not timely complying with remediation, for a total penalty in the amount of Six Thousand Five Hundred Dollars, is appropriate and reasonable in this matter.

FINDINGS OF FACT

After review of the stipulations of fact and the testimonial and documentary evidence of record, I find as a fact the following:

1. James and Pamela Meyer ("Respondents") are the owners of the real property located at 30 Tower Street, Assessor's Plat 135, Lot 12, in Bristol, Rhode Island (the "property").
2. The Respondents have owned the subject property continuously at least for the period from February 9, 1995 up to and including July 14, 1997 inclusive ("the subject period").
3. The Administrative Adjudication Division has subject matter jurisdiction over the action and personal jurisdiction over the Respondents.
4. The Respondents have stipulated that they discharged untreated sewage from the subject property where it was likely to enter into the waters of the State, i.e. Mt. Hope Bay.

5. An inspector from the DEM conducted an inspection of the subject property on or about February 9, 1995, May 17, 1995, September 21, 1995, July 9, 1996, December 27, 1996, March 11, 1997 and July 14, 1997 and found that on each of said dates sanitary sewage was discharged to the surface of the ground of the subject property in a location where it was likely to enter the waters of the State.
6. On or about February 17, 1995, a Notice of Deficiency ("NOD") from the Department was sent by certified mail to Respondents informing them that the Department had conducted an inspection of their property on February 9, 1995 which determined that a sewage discharge from their property was entering the waters of the State of Rhode Island; that Respondents were required to take certain specified measures to eliminate said sewage discharge; and that Respondents were required to notify the Department of the corrective action which they would be taking within ten days of receipt of said NOD.
7. On or about July 23, 1997, a Notice of Violation and Order ("NOVAO") dated July 22, 1997 was mailed by the Department to the Respondents.
8. The Respondents filed a timely request for an administrative hearing.
9. On February 9, 1995, May 17, 1995, September 21, 1995, July 9, 1996, December 27, 1996, March 11, 1997 and July 14, 1997 sanitary sewage was discharged to the surface of the ground on the Respondents' property in violation of R.I.G.L. §46-12-5(a), Section 10.2 of the Water Quality Regulations, and Sections 2.07 and 2.08 of the ISDS Regulations.
10. The problem concerning Respondents' discharge of raw sewage to the surface of the ground continued unabated from the date of the initial inspection on February 9, 1995 until after the NOVAO was issued on July 23, 1997.
11. The Division agreed at the hearing that after issuance of the NOVAO, the Respondents complied with the remediation requirements set forth in the Order portion of the NOVAO.
12. Testimony by the OCI established that each of the Respondents' six (6) discharges of sanitary sewage constituted a Type I Minor Violation.

13. Each of the six discharges of sanitary sewage was properly assessed a penalty on One Thousand Dollars (\$1,000.00).
14. Respondents realized an economic benefit of Five Hundred Dollars (\$500.00) based on five percent (5%) annual interest calculated on the estimated cost of Five Thousand Dollars (\$5,000.00) for their failure to remediate the problem from the date of the initial inspection (February 9, 1995) to the date of the NOVAO (July 22, 1997), (viz. $\$5000.00 \times .05 \times 2 \text{ years} = \500.00).

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Respondents made a timely request for hearing pursuant to R.I.G.L. §42-17.1-2(u).
2. Respondents have admitted that they discharged untreated sewage from the subject property where it was likely to enter into the waters of the State, i.e. Mt. Hope Bay.
3. The OCI has proved by a preponderance of the evidence that the Respondents have violated R.I.G.L. Section 46-12.5(a), Section 10.2 of the Water Quality Regulations, and Sections 2.07 and 2.08 of the ISDS Regulations on the dates alleged in the NOVAO.
4. The discharge of sanitary sewage to the surface of the ground is properly classified as a Type I Minor violation.
5. The Respondents have failed to prove by a preponderance of the evidence (as required by Section 12 of the Penalty Regulations) that the penalty was not assessed in accordance with the Penalty Regulations or that the penalty is excessive.
6. The penalty assessment in the total amount of Six Thousand Five Hundred Dollars (\$6,500.00) is reasonable and warranted.
7. The Order portion of the NOVAO relating to remediation was withdrawn by the OCI at the hearing.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. The penalty portion of the Notice of Violation and Order No. CI 1300 issued to Respondents on or about July 23, 1997 is SUSTAINED.
2. The portion of the Notice of Violation and Order No. CI1300 issued to Respondents on or about July 23, 1997 relating to remediation having been withdrawn by the OCI at the hearing, the remediation Order is DELETED.
3. Pursuant to R.I.G.L. §42-17.6, the following administrative penalty is hereby ASSESSED jointly and severally, against each named Respondent:

Six Thousand Five Hundred Dollars (\$6,500.00)

4. The Respondents shall pay to the Department the total sum of Six Thousand Five Hundred Dollars (\$6,500.00) in administrative penalties as set forth herein. Said penalty shall be paid within ten (10) days after the Final Agency Order is signed by the Director and shall be in the form of a certified check made payable to the: General Treasurer, State of Rhode Island, and sent to:

Glenn Miller
Director of Management Services
Department of Environmental Management
235 Promenade Street
Providence, Rhode Island 02908

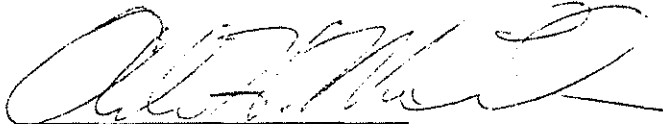
Entered as an Administrative Order this 7th day of OCTOBER, 1998.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Room 310
Providence, Rhode Island 02908
401-222-1357

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Entered as a Final Agency Order this 23rd day of
November, 1998.



Andrew H. McLeod
Director
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

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 James Meyer, King Philip House, Tower Road, Bristol, RI 02809 and Pamela Meyer, King Philip House, Tower Road, Bristol, RI 02809 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 24th day of November, 1998.

