

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

IN RE: GERALD WARREN

AAD No. 98-001/IE

Notice of Violation and Revocation of License No. P98-0169

September 9, 1999

**DECISION AND ORDER**

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Respondent's request for hearing on the Notice of Violation and Revocation of License ("NOV") issued by the Department of Environmental Management ("DEM") on February 9, 1998. The hearing was conducted on September 8 and October 20, 1998.

Following the hearing, both the DEM Office of Compliance and Inspection ("OCI") and the Respondent filed post-hearing memoranda; upon the filing of the final memorandum on February 12, 1999, the hearing was considered closed.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN LAWS Section 42-17.7-1 et seq.); Chapter 17.6 of Title 42 entitled "Administrative Penalties for Environmental Violations"; the Administrative Procedures Act (R.I. GEN LAWS Section 42-35-1 et seq.); the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules"); and the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations").

**PREHEARING CONFERENCE**

A prehearing conference was conducted on July 30, 1998. At the conference, the parties agreed to the following stipulations of fact:

1. On August 20, 1996, the Respondent submitted a repair application (application number 9633-2535) to the DEM for the individual sewage disposal system ("ISDS") located at 225 Brayton Road, in the Town of Tiverton, RI otherwise identified as Tiverton Assessor's Plat 3-9, Block 116, Parcel 17 (the "Property").
2. The ISDS repair application was approved by the DEM on September 30, 1996.
3. DEM physically inspected the ISDS construction on November 7, 1996, November 13, 1996 and November 14, 1996.
4. By Certificate dated December 13, 1996, Respondent notified DEM that the system had been installed in conformance with the permit and the plan.

5. The DEM issued a Certificate of Conformance for the ISDS on the Property on December 18, 1996.
6. On December 17, 1997, the DEM issued to the Respondent a Notice of Intent to Revoke the Respondent's license.
7. The Respondent received said Notice on December 19, 1997 according to the certified mail receipt.
8. On February 9, 1998, the DEM issued to the Respondent a Notice of Violation and Revocation of License.
9. The Respondent filed a request for hearing on February 12, 1998.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

### **HEARING SUMMARY**

At the hearing, the OCI called five (5) witnesses: **Brian Sullivan**, who was qualified as an expert soil scientist and environmental scientist; **Blake Henderson**, who was qualified as an expert Professional Engineer; **David Chopy**, who was qualified as an expert Professional Engineer and Supervising Sanitary Engineer; **Jean Lambert**, who was qualified as an expert in civil engineering and as a Principal Sanitary Engineer; and **Gerald R. Warren**, the Respondent. For purposes of presenting rebuttal testimony, the OCI recalled **Brian Sullivan** and also called **Melvin Hall**.

Respondent presented three (3) witnesses: **Gerald Warren** (Respondent); **John Viveiros**; and **Michael T. Atkinson**. Respondent also called **Brian Sullivan** as a surrebuttal witness to the testimony of Melvin Hall.

#### **I. The Notice of Violation**

The NOV issued to Respondent on or about February 9, 1998 identifies property located at 225 Brayton Road in the Town of Tiverton. Respondent had received approval on September 30, 1996 for a repair application for the installation of a new sewage disposal system on the site. (OCI 8 Full). Following the installation, Respondent submitted to the Department an Installer's Certificate of Construction for ISDS System dated December 13, 1996 (OCI 14 Full), certifying that the system, as shown in the plans for the permit, was installed in conformance with the permit and approved plans. (See Stipulation # 4 above).

The NOV states that in inspections of the property which occurred on or about June 17, 1997, June 23, 1997 and September 8, 1997, it was determined that backfill placed within the leach field contained dredged material, brick, concrete, cinder blocks, asphalt, and boulders greater than six (6) inches in diameter.

The OCI contends that the Respondent has violated Section SD 11.07 and Section SD 2.05(a) of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems, June 1992, as amended ("ISDS Regulations").

Section SD 11.07, amended in June 1996 to specify that the requirements on the backfill applied to

the leach field area and not just over the leaching system and that the stones could not be greater than six inches (instead of the earlier requirement that the backfill be “free of large stones”), provides as follows:

Backfill - All backfill placed within the leach field area shall be free of boulders and stones greater than six (6) inches in diameter, frozen clumps of earth, rubbish, masonry, stumps or waste construction materials...

A prior amendment, effective October 23, 1994, defined “Leach Field Area” to mean the Leach Field and the Leach Field Perimeter. The term “Leach Field” under the 1994 amendments, means the group of disposal chambers, trenches or beds and the field’s dimensions “shall be the horizontal and vertical lines circumscribing the outermost edges including the area between the chambers or trenches and the depth to the bottom of stone.” “Leach Field Perimeter” was defined to mean “the twenty-five foot area surrounding the leach field.”

Section SD 2.05 provides as follows:

#### Certificate of Construction

(a) The construction, alteration, or reconstruction of any individual sewage disposal system shall be performed by an installer licensed under Chapter 5-56 of the General Laws of Rhode Island, as amended, or a master plumber licensed under Chapter 5-20 of the General Laws of Rhode Island, as amended. The installer of the system shall certify that the system was installed in conformance with the permit and plans for such system approved by the Director and any terms stipulated by the Director as part of the approval...

The OCI also contends that Respondent has violated R.I. GEN Laws Section 5-56-7, which is set forth below.

**5-56-7. Responsibilities, performance and conduct.** -- A duly licensed installer shall adhere to the following:

- (1) To perform all work in compliance with approved plans and specifications only.
- (2) To report any discrepancies on an approved plan which he or she may note during construction to the director.
- (3) To utilize only quality grade construction materials approved by the director.
- (4) To use only the best construction techniques to provide for the best possible installations.
- (5) To work only under valid plans approved by the director with the approval stamp clearly indicated, and to commence work only after completely reviewing the entire approval including the application, the layout plans, all typical specification sheets, and other attachments.
- (6) To adhere to each and every term of approval as stipulated by the director in his or her approval of the particular plan.

As a consequence of the above alleged violations, the OCI seeks the imposition of a Two Thousand (\$2,000.00) Dollar administrative penalty and, pursuant to R.I. GEN Laws § 5-56-5, the revocation of Gerald R. Warren’s Installer’s License. Section 5-56-5 provides as follows:

**5-56-5. Denial, suspension and revocation of licenses.** -- (a) An application for a license may be denied, or a license may be suspended or revoked when the director has determined that the operation is not being and/or will not be conducted in manner as prescribed in these regulations...

## **II. The Backfill Material**

OCI's first witness, Brian Sullivan, an environmental scientist in the DEM Office of Water Resources, ISDS Section, testified that in this matter, he had approved the repair application (OCI 8 Full); conducted the bottom bed inspection (OCI 9 Full); conducted the cover inspection on November 13, 1996 (OCI 10 Full); and returned for a third inspection to confirm that the two remaining trailers had been connected to the system and to check that the 25 foot fill perimeter (the leach field perimeter) had been completed.(OCI 11 Full). In this last inspection on November 14, 1996, Mr. Sullivan stated that he had expected to see the 25 foot perimeter completed from the excavated materials he had observed at the site on the previous day but that it had not been installed. Tr. September 8, 1998, pp. 34-38. He called for a further inspection upon the completion of the perimeter. Tr. September 8, 1998, p. 15; OCI 11 Full.

Mr. Sullivan stated that he received a telephone call on November 28, 1996 for the perimeter inspection. On the following day, he waived the inspection because the office was understaffed. Tr. September 8, 1998, pp. 38-39. Subsequently the Respondent sent in the Certificate of Construction (OCI 14 Full) and the designing engineer filed his statement of supervision (OCI 13 Full). Upon receipt of these documents, the Department's ISDS Section issued the Certificate of Conformance (OCI 15 Full).

Several months later, Brian Sullivan was informed by another DEM employee that there had been a sewage overflow at the trailer park. Tr. September 8, 1998, p. 16.

On June 17, 1997, Mr. Sullivan met with Gerald Warren at the site. Tr. September 8, 1998, pp. 44-45. Four test holes were dug in order to determine whether the material used in the backfill and in the 25 foot perimeter met the requirements of the ISDS Regulations. Tr. September 8, 1998, p. 19; OCI 17 Full. Test Hole # 1, located in the southwestern corner of the field, contained 10-20% rocks that were up to basketball size, and approximately 20% standard masonry bricks. Tr. September 8, 1998, pp. 51-55, 57. Test Hole # 2, located in the perimeter near the leak in the system, contained 10-20% seashells. Tr. September 8, 1998, pp. 53-54, 57. Test Hole # 3, in the perimeter on the edge of the eastern end of the field, contained 20-40% asphalt. Tr. September 8, 1998, pp. 55, 57. Mr. Sullivan's Inspection Report identifies the asphalt pieces as being 2' x 3' x 3" in size. OCI 17 Full, p. 3. Test Hole # 4, located in the perimeter on the south side of the field, contained 10-20% bricks, and broken up cinder blocks. Tr. September 8, 1998, pp. 56-58.

Mr. Sullivan also testified that the backfill material from all four test holes appeared to come from a marine environment and that the texture of the backfill material was very silty. Tr. September 8, 1998, p. 21.

The witness stated that it was common practice for installers to take the excavated fill from the field (removed in order to place sand and gravel as bottom material, with the system on top) and to pile it around the sides for later use on the 25' perimeter. Indeed, he had anticipated that the excavated fill would be used around the system but that additional material would need to be brought in because of the layout of an Eljen system. Tr. September 8, 1998, pp. 44, 59. From his previous inspections of the site, he had not noted any deficiencies in the fill piled on the site. Tr. September 8, 1998, p. 60.

Blake Henderson, the engineer who designed the Eljen system for this site, was also called as an OCI witness. He was present for the bottom inspection and also was present after the system had been constructed. He had observed that the cover material was grayish in color, typical of the indigenous materials. He did not observe any marine environment material at the cover inspection. Mr. Henderson stated that he had seen the final system completed, including the perimeter, and concluded as he indicated in his statement of supervision (OCI 13 Full) that everything was in accordance with the plans, the application, and the ISDS Regulations. He testified that the first time he noted the construction debris or cinder blocks, bricks and asphalt was on his site visit after the system had failed. Tr. September 8, 1998, pp. 66-68, 73.

Gerald Warren was called both as a witness for the OCI and to testify on his own behalf. Respondent agreed that he was the installer of record on the application and was responsible for the system's installation.<sup>1</sup>Tr. September 8, 1998, pp. 104-105. He stated that when the excavation was done to put in the system, the fill "was wet, and when things are wet and muddy, you can't tell what's in them, you can't tell if it's bricks, rocks, other than like a tree stump or something like that, the stuff was all mud." Tr. September 8, 1998, p. 116. Mr. Warren agreed that it was his responsibility to ensure appropriate material was used for the backfill and that under the regulations, material in the leach field area is supposed to be free of materials like basketball-sized rocks, cinder blocks and bricks. Tr. September 8, 1998, pp. 117-118.

He stated that he oversaw the installation except for the cover. He was present for the bottom inspection, the cover inspection, and for the re-inspection when Mr. Sullivan returned to check on the connection of the two trailers. Tr. September 8, 1998, pp. 104-105, 111, 113-114. He also stated that he didn't know what went on during the backfill; that he may have pulled into the site, briefly conversed, and left. He again agreed that it had been his responsibility to oversee the backfill but that he had not done so. Tr. September 8, 1998, p. 117-118.

When questioned by his own counsel, Respondent testified that he had been present for the initial push of the backfill dug from the site, onto the system. Although there had been some excavated material remaining after the system itself was covered, and which was used in part for the perimeter, additional fill was brought to the site in trucks hired by his son's construction company. He relied on his crew, which had worked with him for years, to put the additional fill around the perimeter. Tr. September 8, 1998, pp. 111-112, 120.

Mr. Warren had an explanation for the marine material and seashells located at the site. He stated that he was constructing a site subdivision nearby that had excess fill he was using for the perimeter on this septic system; the same trucks were also hauling the dredged spoil from Common Fence Point to the Tiverton Landfill. According to Mr. Warren, the dredged spoil was "like soup" and it "stuck" in the trucks. He stated, "If there was some in the truck, there was some in the truck, I don't know, but I didn't purposely haul the stuff there." Tr. September 8, 1998, pp. 125-126.

Mr. Warren also presented two witnesses who testified about the work they had done for Respondent at the site. John Viveiros, a machine operator of heavy equipment, testified that he was on the job the entire time the system was being constructed. He had not noticed anything unusual about the material excavated for the system and nothing unusual about the trucked-in material. He stated that he would have recognized dredged spoil and he never saw it. If it had been there, he would have pushed it to one side with the bulldozer and not used it. Tr. September 8, 1998, pp. 139-142.

According to this witness, the cinder blocks were in small pieces in the excavated material and he did not see any asphalt. He would not have allowed the rock shown in photograph # 1 of OCI 18 Full, nor the asphalt shown in photographs # 7 and # 8 of that exhibit. He stated that there were no large rocks or boulders in the material excavated from the site. He considered that the seashells must have been stuck in the trucks. Tr. September 8, 1998, pp. 139-142, 145.

The witness provided no explanation for how the debris came to be located on the surface or in the Test Holes.

Michael T. Atkinson, another heavy equipment operator, testified that he saw all the fill dumped by the trucks and moved it. He said that there might have been "a little bit" of dredged spoil stuck in the trucks. Tr. October 20, 1998, pp. 197, 200, 203.

The following occurred during Mr. Atkinson's cross-examination:

Q. So, Mr. Warren never instructed you that the material that you were using was improper then?

A. Mr. Warren was never there. I was in charge of the job, because of one of his sons being in the hospital, and he left it up to me.

Q. So, you're a non-licensed person in charge of installing a septic system job?

A. It was under his license. I do that everywhere...

Q. But in this particular instance, the licensed person wasn't even around to supervise the job?

A. There never is anyway. Tr. October 20, 1998, p. 211.

He stated that it was a common occurrence for a licensed installer not to be present on the job and that he was only an operator, not an installer. He stated that he uses the material the installer tells him to use unless it had boulders or concrete in it. It was his opinion that the State required clean material on top of the leach field but that there were no requirements for the kind of fill in the 25 foot perimeter. Tr. October 20, 1998, pp. 210-211, 215-216.

This view was consistent with Mr. Warren's earlier testimony when questioned by OCI counsel:

Q. You would agree with me that the perimeter or field, it doesn't really matter in terms of SD 11.07 --

A. No.

Q. They are one and the same?

A. No, I don't agree with you.

Q. Are you familiar with ISDS regulations?

A. Yes.

Q. In your opinion, what kind of material needs to be put in the leach field perimeter?

A. The leach perimeter, fill.

Q. What kind of fill?

A. Anything but big boulders. That's what we've always put for twenty years, nobody ever complained. If you people go look at them, you'll find I'm 100 percent right.

Q. Have you read the 1996 amendment to the regulations?

A. No.

Q. But as an installer you're governed under those regulations; aren't you?

A. Yes.

Q. I'm going to hand you a copy of SD 11.07, ask you to read that to yourself, please.

A. (The witness complies.) Okay.

Q. You would agree that you are governed by this regulation, correct?

A. Yes.

Q. And that the leach field area has to be free of boulders, stones, et cetera, correct?

A. I interpret that as the leach field.

Q. I hand you a copy of the 1994 regulations, amendments as of September 1994, which specifically defines what a leach field area is, and I ask you to review that.

A. I see it, I see where it says perimeter, but I never read that.

Q. But you operate in this field?

A. Yes.

Q. It's your responsibility to abide by these regulations?

A. If I get them, no one ever told me that I had to come up and get new regulations. Tr. September 8, 1998, pp. 136-138.

Although the testimony of OCI's witnesses Jean Lambert and Melvin Hall, a resident of the trailer park, is relevant to whether there was a violation of SD 11.07, and has been fully considered in this Decision, for the sake of brevity it is not discussed herein.

### **Analysis**

In the Post-Hearing Memorandum of Gerald R. Warren ("**Respondent's Memorandum**") Respondent asserts that the alleged violations of the ISDS Regulations cannot be acted upon without proof that Warren was a licensed installer at the times the alleged violations were committed. He contends that there is no evidence in the record to suggest that Gerald Warren had an installer's license at any of the times at issue and, therefore, the violations should be denied and dismissed. at 4, 20.

Section SD 2.01 (a) of the ISDS Regulations provides that "No person shall install, construct, alter or repair or cause to be installed, constructed, altered or repaired any individual sewage disposal system without first obtaining the Director's written approval of the plans and specifications for

such work.” “Person” is defined under the Regulations to include any individual, group of individuals, firm, corporation, association, partnership or any federal, state or municipal government entity. Section SD 2.01 (b) (3) (D) provides that:

Applicants shall meet the requirements of these Regulations to the greatest extent possible. If necessary, certain requirements under these Regulations may be relaxed at the discretion of the Director...

Having considered the above two sections, I conclude that ISDS Regulation SD 11.07, concerning backfill requirements, is not limited to systems installed by licensed individuals. The requirements apply to all systems. See Reply Memorandum of the Department of Environmental Management, Office of Compliance and Inspection (“**OCI’s Memorandum**”), p. 3.

Respondent admits that he was unaware of the June 1996 amendment to SD 11.07, specifying that the requirements on backfill not only applied to the leaching system, but to the whole leach field area (which includes the perimeter) and that the fill should not only be free of large stones, but that they could not be greater than six inches in diameter. He contends that this failure does not rise to the level of a violation because he had not received notice of the change and the change had only been in effect for less than six months when construction commenced. **Respondent’s Memorandum**, p. 5.

I note that Respondent does not contend that the 1996 amendment to the ISDS Regulations was improperly noticed under the Administrative Procedures Act. Actual notice of the regulatory requirement is neither required to prove a violation, nor is proof of Respondent’s intent required to prove a violation of SD 11.07. See **OCI’s Memorandum** p. 4.

Respondent’s argument that the 1996 amendment had been in effect for “only” six months, and presumably therefore, the violation should be forgiven, is unpersuasive both legally and factually. It is clear from the testimony of Gerald Warren, quoted above, that whether the new regulation had been adopted in June 1996, or whether it was an amendment two (or even four) years on the books, would not have made a difference. In his testimony in 1998 he was as unfamiliar with the 1996 amendment as he was with the 1994 amendment.

Respondent also argues that the NOV was issued because “somebody had to be blamed” when the system failed. **Respondent’s Memorandum**, p. 22. Although there was testimony from several witnesses (Sullivan, Henderson, Warren) as to whether or not the inappropriate backfill material was responsible for the system’s failure, the cause of the system’s failure is irrelevant. The Regulations specify the material to be used and the only relevant issue is whether the appropriate material was placed on the leach field and in its perimeter. Whether the system failed or not, and its cause, is irrelevant.

Respondent states in his memorandum’s Conclusion that “If Warren unknowingly committed a technical violation of SD 11.07 as amended, it had to be with the material brought in from offsite.” He concludes that it did not make sense that the suspect material was dredge spoil because the material from the dredging operation was destined for the Tiverton Landfill and the needed additional fill for the perimeter was to come from another site on Brayton Road. “Assuming, without conceding,” he argues, that some of the material in the perimeter was improper, “this is certainly no reason to fine Warren and revoke his license.” **Respondent’s Memorandum**, pp. 22-23.



It is unnecessary for me to determine whether the marine environment material, the cinder blocks, asphalt, bricks and concrete originated in the excavated material or were trucked in from off-site. As is pointed out in **OCI's Memorandum**, "even if the excavated material was used as backfill, it would have to properly conform to the requirements of the ISDS regulations." at 7.

I have reviewed the documentary and testimonial evidence of record and considered the legal arguments of the parties and conclude as a matter of law that the material used in the backfill in the leach field area did not meet the requirements of SD 11.07. Based on the above conclusion of law and in consideration of the evidence of record, I find that the OCI has met its burden to prove that Respondent violated Section SD 11.07 of the ISDS Regulations as alleged in the NOV.

### **III. The Certificate of Construction**

According to the exhibit marked "OCI 14 Full", on December 13, 1996 Gerald R. Warren certified that the ISDS system located at 225 Brayton Road in Tiverton was installed in conformance with the permit and plans as approved by the Director. The form contains his signature as Installer and identifies his license number, 0169.

As evidenced by the testimony and photographs, the backfill material in the leach field area contained marine environment material, cinder blocks, asphalt, bricks and concrete.

Brian Sullivan testified that this backfill material was not in accordance with the approved plan. Mr. Sullivan specifically cited Note number 7 on page two of the approved plans. Tr. September 8, 1998, pp. 30-31. Note 7 provides that the system

shall be constructed in accordance with the latest requirements of the State of Rhode Island, Department of Environmental Management, "Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems" (SD 1.00 through SD 21.03). (OCI 8 Full).

Mr. Warren testified that he viewed the cover before he signed the Certificate of Construction and that it was appropriate material and looked "fine" to him. Tr. September 8, 1998, p. 115.

### **Analysis**

Respondent argues that his affirmative answer to the question, "And as the license [sic] installer, were you responsible for the installation of the system?" notwithstanding, there is "not one shred of evidence" in the record that Gerald Warren was a duly licensed installer at the time the system in question was installed. He points to Respondent's testimony that he did not know whether or not he had an installer's license when the system was installed. **Respondent's Memorandum**, pp. 3-4; Tr. September 8, 1998, p. 105, and p. 119. Respondent asserts that the alleged violations of the ISDS Regulations cannot be acted upon without proof that Warren was a licensed installer at the times the alleged violations were committed and that there is no evidence in the record that Gerald Warren had an installer's license at any of the times at issue.

The OCI argues that it has presented sufficient evidence that Respondent was a licensed installer at the pertinent times in issue here; that Respondent is not credible in his forgetfulness and therefore his testimony should not be considered to support the contention that the OCI has failed to prove he was a licensed installer at the pertinent times; and that, in any case, the ISDS Regulations do not apply only to licensed installers. **OCI's Memorandum**, pp. 2-3.

Section SD 2.05 (a) requires that the construction of an ISDS system be performed by a licensed installer or by a licensed master plumber. The regulation states:

“The installer of the system shall certify that the system was installed in conformance with the permit and plans for such system approved by the Director and any terms stipulated by the Director as part of the approval...

Clearly Respondent’s Certificate of Construction, which he signed as installer and affixed an installer’s license number (which is the same number of the license sought to be revoked in the NOV) was filed with the Department in an effort to be in compliance with this requirement. He answered “Yes” when questioned by OCI counsel whether he was the installer of record; the licensed installer responsible for the installation of the system; responsible for ensuring that appropriate material was used for the backfill; and whether as an installer he was governed by the regulations. The weight of this evidence preponderates in favor of the OCI having proved that Respondent was “duly licensed” as an installer at the time of this system’s installation. An “I don’t know” answer, when considered in conjunction with Respondent’s other testimony and the Certificate itself, appears disingenuous and lacks credibility.

Based upon my review of the documentary and testimonial evidence of record, I find as fact that Respondent was the licensed installer of this system. He was responsible for the system’s installation and for ensuring that the appropriate material was used in the leach field area. Despite being infrequently at the site and unaware of regulatory requirements, Mr. Warren certified that the system was installed in conformance with the approved permit and plans, and as indicated in Note 7, in accordance with the latest requirements of the ISDS Regulations. As determined above, the backfill material in the leach field area did not meet the requirements of SD 11.07 and, consequently, the system was not installed in conformance with Note 7 of the approved plans. I therefore conclude as a matter of law that the OCI has met its burden to prove that Respondent violated Section SD 2.05 (a) of the ISDS Regulations as alleged in the NOV.

#### **IV. Administrative Penalty**

As indicated in the NOV, the OCI seeks an administrative penalty of One Thousand (\$1,000.00) Dollars for each instance wherein Respondent violated the ISDS Regulations, for a total penalty of Two Thousand (\$2,000.00) Dollars. The NOV states that the penalty was assessed against Respondent pursuant to R.I. GEN LAWS § 42-17.6-2 and was calculated pursuant to the Penalty Regulations. As stated previously, the hearing in this matter was conducted in accordance with the Penalty Regulations.

Section 12(c) of the Penalty Regulations provides the following:

In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The Department’s interpretation of this provision requires the OCI to prove the alleged violation by a preponderance of the evidence and “includes establishing, in evidence, the penalty amount and its calculation.” The violator then bears the burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. In Re: Richard Fickett, Administrative Adjudication Division No. 93-014/OWE, Final

Decision and Order issued by the Director on December 9, 1995.

Section 10 of the Penalty Regulations provides for the calculation of the penalty through the determination of whether a violation is a Type I, Type II or Type III violation and whether the Deviation from Standard is Minor, Moderate or Major. Once the Type and Deviation from Standard are known, a penalty range for the violation can be determined by reference to the appropriate penalty matrix (it appears here that the Miscellaneous matrix was used).

The penalty amount and its calculation were established in evidence through the testimony of David E. Chopy, a supervising sanitary engineer in the DEM Office of Compliance and Inspection ("OCI") who drafted the NOV and recommended that Respondent's installer's license be revoked and the maximum penalty be imposed. He testified that he had considered the improper use of backfill material to be a Type I violation because the use of appropriate backfill material is a

necessary component to ensure that the septic system will function properly. It's directly related to protecting public health, safety, welfare, and environment. Failure to use proper backfill material can lead to the system to either fail by having sewage appear on the surface of the ground or contaminating groundwater by not treating it properly before it reaches the groundwater. Tr. September 8, 1998, p. 91.

According to Chopy, the whole purpose of the ISDS Regulations and the regulatory program is to protect the public health and environment. Tr. September 8, 1998, pp. 93-94.

Mr. Chopy testified that he also had found the submission of the false Certificate of Construction to be a Type I violation because Respondent knew the proper material that was supposed to be used and submitted the certificate stating that all the proper procedures were followed when the system was designed and installed. Tr. September 8, 1998, pp. 91-92.

Mr. Chopy also testified regarding his determination of the Deviation from Standard for the violation involving inappropriate backfill material. He considered the amount of the material placed on the site; the nature of the material; whether the person took reasonable and appropriate steps in mitigating the noncompliance; and how much control the person had over the occurrence of the particular violation. Tr. September 8, 1998, pp. 92-93. He concluded, as is set forth in the NOV Penalty Worksheet (OCI 21 Full, p. 8), that the violation was a Major Deviation from Standard. He considered that an installer's use of inappropriate material "with full knowledge" that the material that is being used may result in failure of the system or improper treatment of sewage warranted the full penalty that could be assessed under the regulations. Tr. September 8, 1998, pp. 93-94.

As for the submission of the false Certificate of Construction, Mr. Chopy considered the extent of control that Respondent had in controlling the violation and Respondent's "personal knowledge" as a licensed installer as to the proper material he was supposed to use and the procedures he is supposed to follow before he certifies that the septic system has been installed properly. Tr. September 8, 1998, p. 93. He spoke of the reliance of the Department

on the integrity of the septic system installers and the honesty of the septic system installers to submit information to us to ensure that they are putting the septic system in appropriately.... When they submit false certifications saying that work was done that turns out it was not done, that can cause serious implications to protect the public health and environment. Tr. September 8, 1998, p. 94.

He concluded, as is set forth in the NOV Penalty Worksheet (OCI 21 Full, p. 9), that the violation was a Major Deviation from Standard and that the maximum penalty of \$1,000.00 was warranted for this violation also.

Based upon the testimony and evidence in the record, I find that the OCI has established in evidence the penalty amount and its calculation for each of the two violations. Pursuant to Section 12(c) of the Penalty Regulations, once the violations have been proven and the penalty amount and its calculation have been established in evidence, the Respondent then bears the burden of proving that the penalty and/or the economic benefit portion of the penalty (there was none assessed here) was not assessed in accordance with the Penalty Regulations.

In Respondent's cross examination of Mr. Chopy, the witness conceded that Respondent had called the Department to have someone check the perimeter and therefore he was not trying to hide that improper material was used. Tr. September 8, 1998, pp. 96-97. Other evidence offered by Respondent that may be considered in this Decision as to whether the penalty was properly calculated besides the above-suggested lack of intent are the following: that the improper material came from off-site and only came to the site because it was stuck in the trucks; that the quantity of improper material was less than that asserted by Mr. Sullivan; that his workers carefully sorted through the backfill material to prevent improper material from being used; that the cause of the system's failure may not have been the improper material; that the reason for Respondent's failure to provide more supervision at the site was due to his care and concern for his gravely ill son; and that Respondent had offered to attempt to find corrective measures and install them on the system.

I have reviewed the testimonial and documentary evidence of record to determine whether the OCI properly classified the two violations as Type I. Pursuant to Section 10 of the Penalty Regulations, Type I violations include violations of legal requirements directly related to the protection of the public health, safety, welfare or environment and include acts which pose an actual or potential for harm to the public health, safety, welfare or environment. Acts or failures to act which are of major importance to the regulatory program are also Type I violations under this Section. I conclude that the Type I designation for both violations is consistent with the pertinent provisions of the Penalty Regulations and with the evidence presented in this case.

I have also reviewed the testimonial and documentary evidence of record to determine whether the OCI properly classified each of the violations as a Major Deviation From the Standard. Pursuant to Section 10 of the Penalty Regulations, "Deviation from Standard" refers to the degree to which the violation is out of compliance with the legal requirement allegedly violated. Whether the violation is a minor, moderate or major deviation from the standard is based upon an evaluation of one or more of the factors listed in the Regulations. They include: the extent to which the act or failure to act was out of compliance; the amount of the pollutant; the nature of the pollutant; whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance; and the degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable.

Although Respondent may not have had the "full knowledge" or "personal knowledge" that the improper materials were present and that they were not allowed in the perimeter, I conclude that the OCI was justified in determining that the two violations merited the designation as a Major Deviation From the Standard and the assessment of the maximum penalty allowed under the Regulations. I reach this conclusion based upon the degree of negligence in not providing proper

supervision at the site, the degree of negligence in not keeping abreast of changes in the regulatory requirements, and the imprudent and reckless attitude of signing a Certificate of Construction without adequate knowledge of the condition of the site or of important regulatory changes.

I therefore find that Respondent has not met his burden to prove that the Two Thousand (\$2,000.00) Dollars administrative penalty was not assessed in accordance with the Penalty Regulations.

## **V. Revocation of License**

As indicated in the NOV, the OCI not only has alleged the above-determined violations of the ISDS Regulations, it cites Respondent for violation of R.I. GEN LAWS § 5-56-7 relating to the responsibilities, performance and conduct of duly licensed installers and seeks the revocation of Respondent's installer's license pursuant to. R.I. GEN LAWS Section 5-56-5. Section 5-56-5 provides that an installer's license may be suspended or revoked if it has been determined that the operation is not being and/or will not be conducted in a manner as prescribed in these regulations.

The OCI has proven by a preponderance of the evidence that Respondent violated the ISDS Regulations. Respondent's own testimony suggests he would continue to operate as he has done for over twenty years, installing systems but not necessarily providing adequate supervision or informed supervision (of the regulatory requirements), yet certifying that he has done so.

The work on site was not performed in compliance with the approved plan. Respondent did not utilize the quality grade construction materials required by the ISDS Regulations. Respondent did not use the best construction techniques to provide for the best possible installation. He did not work only under the approved plans since he was not in compliance with Note 7 on the plans. He did not adhere to each and every term of approval in the plan. I therefore find that Respondent's conduct and performance was not in accordance with the requirements of R.I. GEN LAWS Section 5-56-7.

I conclude as a matter of law that Respondent's installation of septic systems is not being and/or will not be conducted in a manner as prescribed in the ISDS Regulations and as set forth in R.I. GEN LAWS Section 5-56-7. Accordingly, pursuant to R.I. GEN LAWS Section 5-56-5, it is appropriate that Respondent's installer's license be revoked.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

### **FINDINGS OF FACT**

1. On February 9, 1998, the DEM issued to Gerald Warren ("Respondent") a Notice of Violation and Revocation of License.
2. The Respondent filed a request for hearing on February 12, 1998.
3. On August 20, 1996, Respondent submitted a repair application (application number 9633-2535) to the DEM for the individual sewage disposal system ("ISDS") located at 225 Brayton Road, in the Town of Tiverton, RI.

4. The ISDS repair application was approved by the DEM on September 30, 1996.
5. Respondent was the licensed installer of the system.
6. By Certificate dated December 13, 1996, Respondent notified DEM that the system had been installed in conformance with the permit and the plan.
7. Backfill in the leach field area contained marine environment material, brick, concrete, cinder blocks, asphalt and rocks greater than six (6) inches in diameter.
8. The system was not installed in conformance with the approved ISDS permit and plans.
9. Respondent failed to use the best construction techniques to provide for the best possible installation of the system.
10. The OCI established in evidence that both instances of violation of the ISDS Regulations were determined to be Type I Major violations for which Respondent was assessed a \$1,000.00 administrative penalty for each violation, for a total administrative penalty of Two Thousand (\$2,000.00) Dollars.
11. The Two Thousand (\$2,000.00) Dollar administrative penalty assessed against Respondent is not excessive.

#### **CONCLUSIONS OF LAW**

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

1. Respondent made a timely request for hearing in accordance with R.I. GEN LAWS section 42-17.1-2 (u)(1).
2. Respondent was an installer licensed under Chapter 5-56 of the General Laws of Rhode Island, as amended, when the system was installed and when he submitted the Certificate of Construction to the Department.
3. The Department has proved by a preponderance of the evidence that the backfill material placed in the leach field area violated Section SD 11.07 of the ISDS Regulations.
4. The Department has proved by a preponderance of the evidence that the system was not installed in conformance with the approved permit and plans.
5. The Department has proved by a preponderance of the evidence that Respondent submitted to the Department false certification that the system was installed in conformance with the approved permit and plans in violation of Section SD 2.05 (a) of the ISDS Regulations.
6. The Department has proved by a preponderance of the evidence that Respondent's conduct and performance in the installation of the septic system was in violation of R.I. GEN LAWS Section 5-56-7.
7. The Department has proved by a preponderance of the evidence that Respondent's installation of septic systems is not being and/or will not be conducted in a manner as prescribed in the ISDS Regulations and as set forth in R.I. GEN LAWS Section 5-56-7.

8. Respondent has failed to prove by a preponderance of the evidence that the administrative penalty for the violations was not assessed in accordance with the Penalty Regulations.

9. The Department is entitled to the assessment of an administrative penalty against Respondent in the sum of Two Thousand (\$2,000.00) Dollars as set forth in the NOV.

Wherefore based upon the above Findings of Fact and Conclusions of Law, it is hereby

**ORDERED**

1. The Installer’s License issued to Respondent Gerald R. Warren is hereby revoked.

2. Respondent shall, within twenty (20) days after the Final Agency Order is signed by the Director, pay a total administrative penalty of Two Thousand (\$2,000.00) Dollars. Payment shall be in the form of a certified check made payable to the “General Treasurer -- Water and Air Protection Program Account”, and shall be forwarded to:

R.I. Department of Environmental Management  
Office of Management Services  
235 Promenade Street, Rm. 340  
Providence, RI 02908  
Attn: Glenn Miller

Entered as an Administrative Order this 17th day of August, 1999 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon  
Hearing Officer

Entered as a Final Agency Order this 9th day of September, 1999.

Jan H. Reitsma  
Director

**APPENDIX A**

**LIST OF EXHIBITS**

**OCI’S EXHIBITS:**

OCI 1 for ID

Copy of Notice of Suspension dated July 7, 1987 (2 pgs.).

OCI 2 for ID

Copy of Notice of Violation and Suspension with certified mail receipt dated January 25, 1993 (6 pgs.).

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OCI 3 for ID Copy of Consent Agreement and DEM correspondence dated December 13, 1993 (7 pgs.).

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OCI 4 for ID Copy of Notice of Intent to Suspend ISDS Installers License with certified mail receipt dated May 30, 1995 (3 pgs.).

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OCI 5 for ID Copy of Notice of Intent to Suspend ISDS Installers License dated March 14, 1996 (2 pgs.).

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OCI 6 for ID Copy of Notice of Intent to Enforce with certified mail receipt dated March 22, 1996 (2 pgs.).

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OCI 7 for ID Copy of Correspondence from Blake Henderson to the Department regarding Notice of Intent to Enforce dated April 24, 1996 (1 pgs.).

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OCI 8 Full Copy of DEM repair approval for site application No 9633-2535 dated August 20, 1996 (5 pgs.) with approved plans dated September 30, 1996.

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OCI 9 Full Copy of Inspection report dated November 7, 1996 (1 pg.).

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OCI 10 Full Copy of Inspection report dated November 13, 1996 (1 pg.).

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OCI 11 Full Copy of Inspection report dated November 14, 1996 (1



pg.).

OCI 12 Full

Copy of Inspection report dated November 29, 1996 (1 pg.).

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OCI 13 Full

Copy of Correspondence from Blake Henderson to Brian Sullivan concerning subject site dated December 12, 1996 (1 pg.).

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OCI 14 Full

Copy of ISDS Installers Certificate of Construction dated December 13, 1996 (1 pg.).

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OCI 15 Full

Copy of ISDS Certificate of Conformance dated December 18, 1996. (1 pg.).

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OCI 16 for ID

Copy of Inspection report dated February 25, 1997, laboratory results and two photographs (4 pgs.).

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OCI 17 Full

Copy of Inspection report dated June 17, 1997 and diagram (4 pgs.).

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OCI 18 Full

Copy of Inspection report and eight photographs dated June 23, 1997 (5 pgs.).

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OCI 19 Full

Copy of Field Report, six photographs, laboratory results, diagrams and notes dated July 2, 1997. (9pgs.)

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OCI 20 Full

Copy of Notice of Intent to Revoke ISDS Installers License with certified mail receipt dated December 17,

