

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
RE: RUSTIGIAN, LLOYD A.G.
AAD NO. 06-001/IE
Notice of Violation OC&I/ISDS CI95-17
June, 2007

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 the Department of Environmental Management, Office of Compliance and Inspection (OCI) on December 14, 2005. John A. Langlois, Esq. appeared on behalf of the OCI. Respondent was represented by Donald J. Nasif, Esq..

The hearing was conducted on October 16 and 17, 2006. A site visit was conducted on the premises located at 10 Shady Brook Cove Lane¹, Johnston, Rhode Island on October 30, 2006. The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 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 § 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 May 17, 2006. The parties did not agree to any stipulations of fact. The OCI identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Whether the Respondent was in violation of the *DEM Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems (ISDS Regulations)* on the date alleged in the NOV.
2. Whether the Department calculated the penalty in accordance with statutory and regulatory authority.

On September 7, 2006 Respondent filed a "Pretrial Memorandum of the Defendant" that identified the following issues to be considered by the Hearing Officer at the hearing:

1. Whether the department has jurisdiction over the subject matter.
2. Whether the statute of limitations has run on the plaintiff [sic].
3. Whether or not the department had to seek a search warrant prior to entering upon the real estate of the defendant [sic].

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

HEARING SUMMARY

The OCI called four (4) witnesses: **Peter O'Rourke**, an Environmental Scientist in the Office of Water Resources, Individual Sewage Disposal Systems (ISDS) Program, who was qualified as an expert in ISDS and the ISDS regulatory requirements as they relate to this matter; **Robert S. Fritsche**, an Environmental Scientist in the OCI who was qualified as an expert in inspections of ISDS and the ISDS regulatory requirements as they relate to this matter; **David Chopy**, a

Supervising Sanitary Engineer in the OCI who was qualified as an expert in ISDS and the ISDS regulatory requirements as they relate to this matter; and **Lloyd A. G. Rustigian**, the Respondent. Respondent presented two (2) witnesses: **Lloyd A. G. Rustigian** (Respondent) and **Ronald A. Flamand**, Respondent's contractor. Respondent attempted to present Mr. Flamand as an expert in ISDS but since he had not been previously identified as an expert as required by the Prehearing Order, his qualification as an expert witness was denied.

I. The Notice of Violation

The NOV issued to Respondent on or about December 14, 2005 identifies property located at 10 Shady Brook Cove Road (although Respondent testified that it was properly called Shady Brook Cove Lane) in the Town of Johnston.

The NOV alleges violations of section SD 2.00(a)(2)(A) and section SD 2.00(a)(2)(B) of the *ISDS Regulations*. Section SD 2.00(a)(2)(A) is described as requiring the submittal of an Application for a System Suitability Determination (SSD Application) for proposed building renovation projects that result in an increase in sewage flow into the system. Section SD 2.00(a)(2)(B) is described as requiring the submittal of an SSD Application for proposed building renovation projects that affect fifty (50%) percent or more of the floor space of the existing structure. The OCI seeks an order requiring Respondent to submit the SSD Application; commence work on the project in accordance with the method approved by the Director; and pay an administrative penalty in the sum of Eight Hundred (\$800.00) Dollars.

II. The Renovation/Addition to Structure

OCI's first witness was Peter O'Rourke, an Environmental Scientist in the DEM Office of Water Resources ISDS Program. Over Respondent's objection, and based upon Mr. O'Rourke's education and experience, he was qualified as an expert in ISDS and the ISDS regulatory requirements as they relate to this matter.

On January 12, 1995 Mr. O'Rourke conducted an inspection at 10 Shady Brook Cove, Plat 59, Lot 136 in Johnston, Rhode Island. He noted in the Enforcement Inspection Report: "A large foundation at least 250% bigger than existing foundation is now in place." OCI 2 at 1.

On October 11, 1996, Mr. O'Rourke returned to the site for a follow-up inspection. In the report generated from that visit, he noted the following:

Whole house is completely new construction. It is now completely finished off outside... Whole new second floor added. This should be required to get SSD Approval. OCI 11 at 1.

The witness explained that a System Suitability Determination (SSD) is required under the *ISDS Regulations* when there is major remodeling. He stated that, pursuant to section SD 2.00(a)(2) of the *ISDS Regulations*, three criteria set forth in subsections A, B and C can trigger the requirement for a SSD Application; he considered a SSD Application to be required for this property's renovation because of section SD 2.00(a)(2)(B).

The witness was asked by OCI counsel if the provisions of section SD 2.00(a)(2)(B) were the same in 1995 and 1996 as they are in the current *ISDS Regulations*. Mr. O'Rourke testified that it was the same, that he did not believe that section B had changed. He stated that the building renovation in 1995 affected more than 50% of the existing structure and that a SSD Application was required; and that in October 1996 it was the same: a SSD Application was required.

Under cross examination the witness was questioned about his visit to the site on January 12, 1995 and his conclusion that the foundation was at least 250% larger than the existing foundation. Mr. O'Rourke conceded that he did not know the size of the original house, the original foundation or its original floor space. He had concluded that the foundation was "250% bigger" because the foundation was new. He did not know whether the new foundation was larger than

the original foundation. He explained that it did not matter if it had replaced a previous foundation because it was a “building renovation” under the *ISDS Regulations*. The witness clarified his use of the term “existing foundation”. He described it as what remained from the old foundation. The old foundation was beneath the existing structure; the new foundation did not yet have a structure on it. When he compared the new foundation to the remaining old foundation, he determined it to be 250% bigger than the existing (what was left of the old) foundation. No measurements were taken; Mr. O'Rourke made a visual comparison of the two foundations to arrive at his conclusion.

Respondent's counsel also inquired about Mr. O'Rourke's site visit on October 11, 1996 and the conclusion that the “[w]hole house is completely new construction.” Mr. O'Rourke stated that he had meant that, even if part of the original structure remained, the whole property had been altered. According to the witness, the *ISDS Regulations* consider it to be new construction when the entire property has been affected.

The witness stated that he did not know the number of bedrooms in the original house. He did not know if there had been an increase in sewage flow as a result of the renovation.

Under redirect examination, Mr. O'Rourke testified that the pertinent section of the *ISDS Regulations* refers to “floor space”, not “foundation”. The provisions of section SD 2.00(a)(2)(B) would include the second story of the house. He concluded that the structure he observed on October 11, 1996 was more than 50% larger than the structure he observed in January 1995.

Under further questioning by Respondent's counsel, the witness testified that he did not know the dimensions of the structure from his visits in 1995 and 1996.

OCI's next witness was Robert S. Fritsche, an Environmental Scientist in the DEM Office of Compliance and Inspection. Based upon Mr. Fritsche's experience and training, he was qualified as an expert in inspections of ISDS and the ISDS regulatory requirements as they relate to this matter.

Mr. Fritsche testified that he visited the site on September 28, 2001. He stated that the street directory map had identified the street and that it appeared to be a standard road; there were no signs indicating a private road and no “No Trespassing” signs. He stated that the house could be observed from the street as well as from the Slack Reservoir which abuts the property. The windows still had stickers on them and the exterior light boxes had hanging wires. Mr. Fritsche testified that he knocked on the front door and noticed that there were no curtains on the windows. The house appeared to be unoccupied.

Mr. Fritsche also visited the site on April 6, 2004. He stated that the condition of the house appeared unchanged and remained unoccupied. He concluded that a SSD Application was required pursuant to the provisions of the *ISDS Regulations*.

Under questioning by Respondent's counsel, Mr. Fritsche admitted that he did not know the square footage or floor space of the renovated structure or of the original building. He had relied on Mr. O'Rourke's reports and photographs and his own observations at the site. He stated that he had assumed the street was a public road since it was listed in the street directory.

David Chopy was called as OCI's next witness. Mr. Chopy, a Supervising Sanitary Engineer in the DEM Office of Compliance and Inspection, and a licensed Professional Engineer, supervises a 14 member staff. Based upon Mr. Chopy's education and experience and previous qualification as an expert witness in the same field, he was qualified as an expert in ISDS and the ISDS regulatory requirements as they relate to this matter.

Mr. Chopy testified that he had reviewed the Rustigian file, prepared the NOV and penalty, then forwarded it to Dean Albro, Chief of the Office of Compliance and Inspection, for his signature. He explained that the NOV cited Respondent for two violations. The first, a violation of section SD 2.00(a)(2)(A) that requires the submittal of an SSD Application when a building renovation is proposed that will result in an increase of sewage flow into the system, was based upon the increase in the number of bedrooms to four (4). Relying on the photographs taken by Peter O'Rourke, the 1994 Building Permit Application (OCI 6) and the Town's tax records (OCI 16:

Tax Assessor's Field Card dated September 19, 2005), Mr. Chopy had concluded that the renovation added one bedroom and thus increased the flow into the system.

The second violation, according to the witness, was for noncompliance with section SD 2.00(a)(2)(B) that requires the submittal of an SSD Application when a building renovation affects fifty (50%) percent or more of the floor space of the existing structure. Mr. Chopy had reached the conclusion that there was more than a fifty (50%) percent increase based upon Mr. O'Rourke's photographs and inspection report as well as the inspection made by Mr. Fritsche. The NOV ordered the Respondent to submit the SSD Application and to correct any deficiencies. On cross examination Mr. Chopy was asked about DEM's January 19, 1995 Notice of Intent to Enforce (NIE) that was sent to the Respondent and about Respondent's response. The NIE (OCI 3) quoted Regulation SD 2.00(a):

No person shall begin any building construction, building renovation and/or change of use of any structure from which sewage is being or will have to be disposed of by means of an individual sewage disposal system, including improvements which will result in an increased sewage flow, without first obtaining the Director's written approval in accordance with this section. at 1.

The NIE then advised Mr. Rustigian to submit the SSD Application within fifteen (15) days or be subject to legal action, including the assessment of administrative penalties. The Respondent, in a letter dated January 27, 1995 (OCI 4), countered that the building renovation would not result in increased sewage flow and that the plans provided for the removal of two bedrooms, which he noted had already been accomplished, and the addition of one bedroom. The number of bedrooms, therefore, would be one less than before the renovation. Mr. Rustigian wrote that since there was no violation of Regulation SD 2.00, among other reasons, he would not be submitting the SSD Application.

After being asked about the two exhibits (OCI 3 and OCI 4), Mr. Chopy admitted that he did not know how many bedrooms there were in 1995, nor the number of bedrooms there were originally. Although he stated that the NIE was based on the increase in the size of the structure as well as the increase in sewage flow, the witness conceded that the correspondence fails to mention the increase in the size of the structure as a basis for its issuance.

On June 27, 1995 a second Notice of Intent to Enforce (2nd NIE) was issued to Respondent, citing Respondent's noncompliance with the first NIE and warning of the anticipated issuance of a Notice of Violation. OCI 7. Mr. Rustigian again responded that since the renovations would not result in an increased sewage flow, there would be no reason to file the application with the Department. OCI 8.

OCI's final witness was the Respondent Lloyd A. G. Rustigian. At the OCI's request, Mr. Rustigian was treated as an adverse party. The witness stated that he was the owner of the property in 1995 and is the owner in 2006.

The Respondent then presented his case and began by testifying on his own behalf. Respondent explained each page of the Building Plans for the Addition (Resp 2 for Id) for the property located at 10 Shady Brook Cove Lane. Based upon evidentiary issues with the document itself, Mr. Rustigian's testimony and the later testimony of Mr. Flamand, I concluded that the document lacked sufficient guarantees of trustworthiness to allow its admission into evidence as a full exhibit.

Mr. Rustigian explained that the old structure had been on pilings (a pier-type cement foundation) and contained one 10' x 10' bedroom, two 9' x 12' bedrooms, a 12' x 18' family room, kitchen area and bathroom. He stated that the exterior of the original structure measured 18' x 34', or 612 square feet. The new construction involved demolishing two (2) of the 9' x 12' bedrooms (calculated at 216 square feet), raising what remained of the old structure and replacing the pier foundation with a concrete foundation. He stated that the photograph attached to OCI 2, taken in 1995, shows the house after the two (2) bedrooms have been removed.

Respondent maintained that the Tax Assessor's Field Card (OCI 16), dated September 19, 2005, was incorrect in identifying the structure as an eight (8) room home with four (4) bedrooms².

According to the witness, the building only contains six (6) rooms; the Tax Assessor's Field Card includes two (2) bedrooms that do not exist. Since the original structure had three (3) bedrooms and now there are two (2), the witness argued that there would be a decrease in sewage flow as a result of the construction.

The witness disputed Peter O'Rourke's conclusion, made on January 12, 1995, that the foundation was 250% larger than the existing foundation because Mr. O'Rourke had not taken into consideration that part of the building had been removed. Mr. Rustigian asserted that approximately 40% of the original structure was modified by the new construction.

Mr. Rustigian testified that Shady Brook Cove Lane is a private right of way.

Respondent called Ronald A. Flamand as his final witness. Mr. Flamand testified that he had drawn the construction plans for submission to the Building Inspector. He stated that Mr. Rustigian had signed the Building Permit Application (OCI 6).

During his testimony the parties stipulated that the dimensions of the original structure had been 18' x 34', or 612 square feet. Mr. Flamand confirmed that there had been concrete block piers under the original structure; that he removed two 9' x 12' bedrooms, for a total of 216 square feet, then raised the single story structure, moved it and poured a new foundation. Mr. Flamand identified the photograph attached to OCI 2 as depicting what remained of the original building resting on its new foundation. As construction proceeded, one 10' x 10' bedroom remained on the first floor of the original structure; a new living room and family room were added to the first floor and a master bedroom and bathroom were constructed on the new second floor of the home. He stated that the new structure measured just under 1800 square feet.

During cross examination the witness stated that he had been a licensed ISDS Installer in 1995. Prior to commencing construction he had located the ISDS on the left side of the building. An 800 gallon steel septic tank was situated between the fence and the building, with a leaching field towards the lake. Mr. Flamand testified that he was aware that DEM approval was needed to add a bedroom to a structure but could not recall if there were other reasons to seek DEM approval, "it was too long ago."

Conclusion

The NOV alleges violations of section SD 2.00(a)(2)(A) and section SD 2.00(a)(2)(B) of the *ISDS Regulations*. The pertinent provisions of the *ISDS Regulations* provide as follows:

SD 2.00 Construction, Renovation and/or Change of Use of Structure Using Individual Sewage Disposal Systems

(a) No person shall begin any building construction, building renovation and/or change of use of any structure from which sewage is being or will have to be disposed of by means of an individual sewage disposal system, including improvements which will result in increased sewage flow, without first obtaining the Director's written approval in accordance with this section:

(1) Construction of New Structures - Whenever an applicant proposes to construct a new structure from which sewage will be disposed of by means of an individual sewage disposal system, an application for new system shall be made...

(2) Building Renovations and Changes of Use to Existing Structures - Whenever an applicant proposes any building renovation or change of use (as defined in SD 1.00) of an existing structure from which sewage is disposed of by means of an ISDS, an Application for a System Suitability Determination shall be made. For the purposes of this section, the term "building renovation," shall also be defined as including any addition, replacement, demolition and reconstruction, or modification of an existing structure on the subject property which:

(a) Results in an increase in sewage flow into the system*; or

(b) Affects fifty (50%) percent or more of the floor space of the existing structure; or

(c)...

*NOTE: All sewage flows shall be determined in conformance with SD 3.00.

The Building Permit Application (OCI 6) contains a notation that the type of sewage disposal on the property is a private system, an “existing” ISDS. Mr. Flamand's testimony also established that the construction involved a structure from which sewage was disposed of by means of an ISDS. The provisions of section SD 2.00 of the *ISDS Regulations* therefore apply to this matter. Section SD 2.00(a)(2)(A) requires the submittal of a SSD Application for proposed building renovation projects that result in an increase in sewage flow into the system. As indicated in the “Note”, whether an increase is to be inferred can be determined by reference to the table set forth in section SD 3.00, entitled “Minimum Design Requirements for Sewage Flow”. For a single residence, the table assumes two (2) persons per bedroom and a maximum day's sewage flow of 75 gallons per person per day. Since determining whether there would be an increase in sewage flow to Respondent's ISDS rests on whether there are more bedrooms than prior to the building renovation, the OCI must prove that the construction added one or more bedrooms. OCI's conclusion that a bedroom had been added to the structure was based upon Respondent's Building Permit Application (OCI 6) and the Tax Assessor's Field Card (OCI 16). Mr. O'Rourke testified that he did not know the number of bedrooms in the original house or whether there had been an increase in sewage flow as a result of the construction; Mr. Chopy similarly testified. Mr. Rustigian and Mr. Flamand testified that the original structure contained three (3) bedrooms but that the renovation included demolishing a portion of the structure, resulting in the loss of one (1) bedroom. Mr. Rustigian also stated that the Tax Assessor's Field Card was incorrect in listing four (4) bedrooms and that an appeal regarding the assessment was pending before the Town's Tax Review Board.

I find the testimony provided by Respondent and Mr. Flamand regarding the demolition and construction at the site to be credible and to be supported by one of Mr. O'Rourke's photographs. See OCI 2. The Building Permit Application, with the notation “See Plans”, identified the proposed addition of a family room, living room, bedroom and bathroom; the demolition of two (2) of the three (3) bedrooms in the original structure was not reported on the Application itself but may have been included in the Plans. The individual who created the Field Card may have relied upon Respondent's Building Permit Application and may not have been aware of the partial demolition of the structure.

Based upon the evidence presented at the hearing, I conclude that the OCI has not proved that Respondent increased the number of bedrooms in the structure and, therefore, has not proved that the Respondent violated section SD 2.00(a)(2)(A) of the *ISDS Regulations*.

The OCI also cited Respondent for a violation of section SD 2.00(a)(2)(B) of the *ISDS Regulations*. In order to sustain this violation, the OCI must prove that the building renovation affected fifty (50%) percent or more of the floor space of the existing structure. It was clear from the questioning of the witnesses as well as from the parties' closing arguments, that a determination on this second violation would necessarily involve interpreting the language of the regulation.

Respondent urges a comparison between the original structure and the new construction and contends that approximately forty (40%) percent of the original structure was affected, less than the fifty (50%) percent threshold. The OCI maintains that demolishing a portion of the building (counsel calculated that 35% was demolished), moving the remaining structure to a new foundation and then adding several rooms, are all activities that must be considered in determining whether the fifty (50%) percent threshold has been reached.

The requirements of section SD 2.00(a)(2)(B) can best be understood when the provisions of subsection (a)(2) are read in conjunction with the preceding subsection, (a)(1). Section SD 2.00(a)(1) provides that for any proposed construction of a new structure from which sewage will be disposed of by means of an ISDS, an application for a new system is required. Section SD 2.00(a)(2)(B) provides that if the proposed construction involves an addition, replacement,

demolition and reconstruction, or modification of an existing structure from which sewage is disposed of by means of an ISDS, and the renovation will affect fifty (50%) percent or more of the floor space of the existing structure, then a SSD Application is required. Both sections concern *proposed* construction or renovation. As a result, in determining whether a SSD Application is required by section SD 2.00(a)(2)(B), one needs to consider the structure prior to any work being commenced and calculate the effects of the entire construction process on the floor space of the original structure. The measurement to determine the extent of the impact is not limited to the increase in the size of the structure post-renovation as opposed to pre-renovation. In other words, if fifty (50%) percent of the original building was demolished and then reconstructed to the same size, the regulation would require that a SSD Application be submitted.

I have considered the evidence in light of the above interpretation of section SD 2.00(a)(2)(B). Mr. O'Rourke's testimony regarding the old foundation, the existing foundation and the new foundation demonstrates that extensive renovations were underway at the site. Although he was unaware of the dimensions of the original house or of its floor space, he concluded that considerably more than fifty (50%) percent of the floor space had been affected by the renovations.

Mr. Rustigian and Mr. Flamand provided useful testimony regarding the size of the original structure, the extent of the demolition and the final dimensions of the structure. Based upon this information a more definite calculation can be made to determine whether the construction process affected fifty (50%) percent or more of the floor space of the existing, pre-renovation structure. The single story building, prior to the commencement of the renovation, measured 612 square feet; the OCI therefore must prove that 306 square feet or more was affected by "any addition, replacement, demolition and reconstruction, or modification". The demolition decreased the size of the structure to 396 square feet, a loss of 216 square feet. Ronald Flamand stated that Mr. Rustigian submitted the Building Permit Application (OCI 6) that identifies the "Total Floor Area Sq. Ft. w/o Basement" as 1776; Mr. Flamand also testified that the new structure measured "just under 1800 square feet." The amount of floor space following the building renovation was 1164 square feet larger than the original structure and 1380 square feet larger than the structure after the two bedrooms had been removed.

The OCI has therefore proved that considerably more than fifty (50%) percent of the floor space (or more than 306 square feet) was affected by the renovation and that Respondent should have submitted a SSD Application prior to commencing the building renovation. Based upon the evidence presented at the hearing, I conclude that the OCI has proved that Respondent violated section SD 2.00(a)(2)(B) of the *ISDS Regulations*.

III. Search Warrant Issue

By motion, in his prehearing memorandum and at hearing, Respondent has raised whether DEM was required to obtain a search warrant to enter onto Respondent's property. At the hearing Respondent also testified that Shady Brook Cove Lane is a private right of way.

Whether the road is a private right of way or not, it gave all appearances of being a public road. According to Mr. Fritsche's testimony, there were no signs or other devices signaling restricted access to the roadway. I conclude that a search warrant would not be necessary to enter onto Shady Brook Cove Lane.

From Shady Brook Cove Lane Mr. O'Rourke observed that substantial renovations were underway at the site. The Building Permit Application (OCI 6) and the Tax Assessor's Field Card (OCI 16) corroborate that an extensive addition was being made to the structure, thereby providing sufficient evidence to find a violation of section SD 2.00(a)(2)(B) of the *ISDS Regulations*.

The search warrant issue, therefore, needs not be more fully addressed in this decision.

IV. Respondent's Motion to Dismiss

After the conclusion of OCI's presentation of its case, Respondent made a motion to dismiss, contending that the OCI had not proved violations of sections SD 2.00(a)(2)(A) and SD 2.00(a)(2)(B) of the *ISDS Regulations*. The OCI objected, asserting they had met their burden of proof. A ruling on the motion was reserved for incorporation in this decision.

At the time the motion was made the OCI had presented sufficient evidence, through the introduction of the Building Permit Application (OCI 6) and the Tax Assessor's Field Card (OCI 16) as full exhibits, to prove a violation of section SD 2.00(a)(2)(A) of the *ISDS Regulations*. During Respondent's presentation of his case, his testimony and that of Mr. Flamand persuaded me that those documents may be incomplete or incorrect, resulting in the dismissal of that alleged violation in this decision.

In OCI's direct case sufficient evidence had also been presented to find that Respondent had violated section SD 2.00(a)(2)(B) of the *ISDS Regulations*. Mr. O'Rourke's observations regarding the extent of renovations at the site as well as the proposed work identified in the Building Permit Application could reasonably lead to the conclusion that fifty (50%) percent or more of the floor space of the existing structure had been affected by the renovation. Respondent's testimony and that of Mr. Flamand confirmed that a violation had occurred. Dismissal of that alleged violation is denied.

V. Administrative Penalty

As indicated in the NOV, the OCI seeks the imposition of an administrative penalty for the alleged violations in the amount of Eight Hundred (\$800.00) Dollars. The NOV states that the penalty was assessed against Respondent pursuant to R.I. GEN LAWS § 42-17.6-2 and calculated pursuant to the *Penalty Regulations*. 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.

Mr. Chopy testified that the penalty was calculated in accordance with the *Penalty Regulations*. The penalty had been determined to be a Type II violation, that is, it was indirectly related to protecting health, safety, welfare or environment, and a Major Deviation from the Standard. The penalty matrix for this Type and Deviation provides for a penalty in the range of \$600.00 to \$800.00. Mr. Chopy selected the high end of the range and assessed an administrative penalty in the amount of \$800.00.

On cross examination Mr. Chopy was asked about the delay in the issuance of the NOV, dated December 14, 2005. He stated that although they had sufficient information in 1995 to issue the NOV, the Department had other cases that were "a higher priority." Mr. Chopy testified that in 1995 the violation would have been considered a Type II Minor Deviation from the Standard with a penalty range of \$400.00 to \$600.00, but that when the NOV was finally issued, it was determined to be Type II Major. He explained that the "Major" designation was made in part because of the amount of time that had passed without action by the Respondent to address the violation. In particular, when no action was taken following the January 19, 1995 NIE (OCI 3), the violation then became a Major Deviation from the Standard. When the 2nd NIE (OCI 7), issued on June 27, 1995, was also ignored, Mr. Chopy determined that the violation merited the maximum penalty in the range: \$800.00. The witness also referred to the seven (7) factors, set forth on page 7 of the NOV, that were considered in determining the Deviation from the Standard and the maximum penalty in the range. OCI 17 at 7.

The substance of the Notices of Intent to Enforce and Respondent's responses are set forth in the previous discussion of Mr. Chopy's testimony.

Conclusion

Section 12(c) of the *Penalty Regulations* establishes the process for consideration of the penalty at the adjudicatory hearing:

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, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995.

The penalty amount and its calculation for the failure to submit the application for a SSD Application, was established in evidence through the testimony of David Chopy and the admission into evidence of the Penalty Summary and the Penalty Matrix Worksheet attached to the NOV (OCI 17 at 6-7). Although Respondent was cited for violations of two sections of the *ISDS Regulations*, it was considered a single failure to submit a SSD Application and only one penalty was assessed.

The OCI failed to prove that Respondent added a bedroom to the structure, thereby resulting in an increase in sewage flow into the system and a violation of section SD 2.00 (a)(2)(A) of the *ISDS Regulations*. This allegation had been the subject of the first NIE (OCI 3); the renovation that affected fifty (50%) or more of the floor space of the existing structure was not mentioned. The 2nd NIE (OCI 7), issued on June 27, 1995, cited Respondent's noncompliance with the first NIE; it also did not mention a violation of section SD 2.00(a)(2)(B) of the *ISDS Regulations*.

Respondent responded to both Notices of Intent to Enforce, stating that the number of bedrooms was one less than before the renovation. He denied the only allegation that was made at that time and therefore did not submit a SSD Application.

Since the OCI has not sustained the part of the NOV that was the subject of the two Notices of Intent to Enforce, and Respondent's failure to act in accordance with the two Notices of Intent to Enforce was considered in upgrading the violation to a Major Deviation from the Standard and imposing the maximum penalty in the range, Respondent has proved by a preponderance of the evidence that the assessment of the administrative penalty in the amount of \$800.00 was not in accordance with the *Penalty Regulations*.

Mr. Chopy had testified that if it had not been for Mr. Rustigian's failure to adequately respond to the two Notices of Intent to Enforce, the violations would have been considered a Type II Minor with a penalty range of \$400.00 to \$600.00. It therefore conclude that the administrative penalty should be re-calculated accordingly and Respondent be assessed an administrative penalty in the amount of \$400.00 for the failure to submit an application for a SSD in violation of section SD 2.00(a)(2)(B) of the *ISDS Regulations*.

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

FINDINGS OF FACT

1. In 1995 and in 2006 Lloyd A. G. Rustigian (Respondent) was the owner of the real property located at 10 Shady Brook Cove Lane, Johnston, Rhode Island, the property that is the subject of the Notice of Violation.

2. Prior to the commencement of the building renovation, the single story, three (3) bedroom house measured 18' x 34', or 612 square feet.
3. The Building Permit Application dated June 9, 1994, identifies a proposed addition to the existing house at 10 Shady Brook Cove Lane that includes a family room and living room on the first floor and a bedroom and bathroom on the second floor.
4. The Building Permit Application identifies the type of sewage disposal as an existing ISDS.
5. The Building Permit Application states that the total floor area (without basement) of the proposed structure is 1776 square feet, and contains the notation "See Plans".
6. On January 12, 1995 Peter O'Rourke, an inspector from the DEM conducted an inspection of the property and noted that "A large foundation at least 250% bigger than existing foundation is now in place."
7. On January 19, 1995 a NIE was issued to Respondent citing a violation of section SD 2.00(a) of the *ISDS Regulations* and requiring the submittal of a SSD Application.
8. By correspondence to the DEM inspector dated January 27, 1995, Respondent asserted that "the construction, renovation... will not result in an increased sewerage flow. As I indicated to you in my telephone conversation, the plans which are on file in the Johnston Town Hall indicate the removal of two bedrooms (which has been accomplished) and the addition of one bedroom reducing the number of bedrooms by one."
9. On June 27, 1995 a 2nd NIE was issued to Respondent, stating that the DEM had not received an adequate response from the NIE issued on January 19, 1995.
10. By correspondence to the DEM dated July 5, 1995, Respondent asserted that "On the basis that there would be no increased sewerage flow, I felt that there would be no reason to file an application with your department. I have not received a response indicating anything to the contrary."
11. On October 11, 1996 Mr. O'Rourke again conducted an inspection of the property and noted that "Whole house is completely new construction... Whole new second floor added. This should be required to get SSD Approval."
12. Mr. O'Rourke did not know the number of bedrooms in the original house and did not know if there had been an increase in sewerage flow as a result of the renovation.
13. Mr. O'Rourke did not know the dimensions of the original house, the original foundation or the original floor space.
14. A second DEM inspector, Robert S. Fritsche, conducted inspections of the property on September 28, 2001 and on April 6, 2004.
15. There were no signs or other devices evident to restrict access to Shady Brook Cove Lane, Johnston, Rhode Island.
16. Respondent's contractor Ronald A. Flamand located the septic tank and leach field on the property.
17. The building renovation included demolishing two (2) bedrooms, calculated at 216 square feet, raising what remained of the old structure and replacing the foundation. A new living room and family room were added to the first floor and a master bedroom and bathroom were constructed on the second floor of the house. The new structure measured "just under 1800 square feet".
18. The Tax Assessor's Field Card dated September 19, 2005 lists the structure at 10 Shady Brook Cove Rd [sic] as having four (4) bedrooms and a total of eight (8) rooms, with a living area of 1776 square feet.
19. Respondent has appealed the assessment to the Town's Tax Review Board.
20. Respondent has not filed a SSD Application.
21. The OCI established in evidence that the violation of sections SD 2.00(a)(2)(A) and SD 2.00(a)(2)(B) of the *ISDS Regulations* was determined to be a Type II Major Deviation from the Standard.

22. The OCI established in evidence the amount of the administrative penalty as \$800.00, the maximum in the penalty range for a Type II Major violation.
23. If not for what was considered to be Respondent's inadequate response to the two Notices of Intent to Enforce, the violation would have been determined to be a Type II Minor Deviation from the Standard with a penalty range of \$400.00 to \$600.00.
24. An administrative penalty in the amount of \$400.00 for the failure to submit for a SSD Application 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. The OCI failed to prove by a preponderance of the evidence that the building renovation added one or more bedrooms to the structure, resulting in an increase in sewage flow into the system.
2. The OCI has failed to prove by a preponderance of the evidence that the Respondent violated section SD 2.00(a)(2)(A) of the *ISDS Regulations*.
3. The DEM did not need a search warrant to enter onto Shady Brook Cove Lane, Johnston, Rhode Island.
4. Pursuant to section SD 2.00(a)(2)(B) of the *ISDS Regulations*, a SSD Application must be made when a proposed building renovation of an existing structure, serviced by an ISDS, affects fifty (50%) percent or more of the floor space of the existing structure.
5. Pursuant to section SD 2.00(a)(2)(B) of the *ISDS Regulations*, the term "building renovation" includes any addition, replacement, demolition and reconstruction, or modification of an existing structure.
6. In determining whether a SSD Application is required by section SD 2.00(a)(2)(B) of the *ISDS Regulations*, the effects of the entire construction process on the floor space of the original structure must be considered prior to any work being commenced.
7. The OCI has proved by a preponderance of the evidence that the building renovation affected fifty (50%) percent or more of the floor space of the existing structure.
8. The OCI has proved by a preponderance of the evidence that the Respondent violated section SD 2.00(a)(2)(B) of the *ISDS Regulations*.
9. Respondent has proved by a preponderance of the evidence that the assessment of an administrative penalty in the amount of \$800.00 was not in accordance with the *Penalty Regulations*.
10. Respondent's violation of section SD 2.00(a)(2)(B) of the *ISDS Regulations* is properly calculated to be a Type II Minor Deviation from the Standard with a penalty range of \$400.00 to \$600.00.
11. The assessment of an administrative penalty in the amount of \$400.00 against the Respondent is in accordance with the *Penalty Regulations*.

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

ORDERED

1. Respondent's alleged violation of section SD 2.00(a)(2)(A) of the *ISDS Regulations* is DISMISSED.
2. Respondent's motion to dismiss the violation of section SD 2.00(a)(2)(B) of the *ISDS Regulations* is DENIED.
3. Within thirty (30) days of the receipt of this Final Agency Order, Respondent shall submit a SSD Application in accordance with the *ISDS Regulations* to the DEM Office of Water Resources -- ISDS Permitting.

4. The SSD Application shall be subject to the DEM's review and approval. Upon review, the DEM shall provide written notification to the Respondent either granting formal approval or stating the deficiencies therein. Within fourteen (14) days of receiving a notification of deficiencies (unless a longer time is specified), the Respondent shall submit to the DEM a modified proposal or additional information necessary to correct the deficiencies.
 5. Within twenty (20) days of approval (unless otherwise expressly authorized by the Director in writing to commence work at a later time), Respondent shall commence work on the project in accordance with the method approved by the Director and complete such work within one hundred twenty (120) days of said approval or other date specified by the Director.
 6. An administrative penalty in the amount of Four Hundred (\$400.00) Dollars is hereby ASSESSED against Respondent.
 7. Respondent shall make payment of the administrative penalty within thirty (30) days from the date of entry of the Final Agency Order in this matter. Payment shall be in the form of a certified check or money order made payable to the "General Treasury -- Water & Air Protection Program Account", and shall be forwarded to:
R.I. Department of Environmental Management
Office of Management Services
235 Promenade Street, Room 340
Providence, Rhode Island 02908
Attn: Terrence Maguire
- Entered as an Administrative Order this ____ day of June, 2007 and herewith recommended to the Director for issuance as a Final Agency Order.
Entered as a Final Agency Decision and Order this _____ day of
- Mary F. McMahan
Hearing Officer
W. Michael Sullivan Ph.D.
Director

Footnotes

- 1
Although the NOV described the property's location as "10 Shady Brook Cove Road", I accept Mr. Rustigian's testimony that the road was inaccurately identified in the NOV.
- 2
Mr. Rustigian stated that he has appealed the Town's tax assessments over the past years but had been unaware that the Town of Johnston had assessed and taxed the property as a four (4) bedroom home