

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

RE: EASY STAY, LLC
NOTICE OF VIOLATION OWTS 15-57

AAD NO. 17-003/IE

DECISION AND ORDER

This matter came on for an Administrative Hearing before Chief Hearing Officer David Kerins on August 21, 2018. The appeal was filed by Respondent, Easy Stay LLC (“Respondent”, “Easy Stay”) on April 24, 2017 from the Notice of Violation (“NOV”) filed by the Department of Environmental Management, Office of Compliance and Inspection (“RIDEM” or “OC&I”) dated April 4, 2017. The Respondent was represented by John Becker, sole stockholder. OC&I was represented by Susan Forcier, Esquire. OC&I and the Respondent filed their Post Hearing Memorandum on December 19, 2018 and December 20, 2018 respectively.

JURISDICTION

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R. I. General Laws §42-17.7-1 et. seq.); the *Administrative Procedures Act* (R. I. General Laws §42-35-1 et. seq.); and the *Administrative Rules of Practice and Procedure for the Department of Environmental Management* (“Rules”) and the *Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems* (the “OWTS Regulations”) and the *Rules and Regulations for the Assessment of Administrative Penalties* (“Penalty Regulations”).

HEARING SUMMARY

The parties at the commencement of the Administrative Hearing stipulated to the following facts: 1. The Respondent, Easy Stay LLC, is a limited liability corporation and John Becker is the sole stockholder; and 2. Easy Stay LLC is the owner of the property which is the subject of this violation.

OC&I called three (3) witnesses: 1. Patrick J. Hogan; 2. Shawna B. Smith; and 3. David E. Chopy. The Respondent called John Becker as its only witness.

Patrick J. Hogan testified that he has been employed by the Rhode Island Department of Environmental Management for twenty-five (25) years and currently holds the title of Principal Sanitary Engineer. His resume was submitted and by agreement placed into evidence as OC&I Exhibit 8 Full. Mr. Hogan testified that at the time of the Notice of Violation in this matter was issued he was the manager of Onsite Wastewater Treatment Systems Enforcement Program ("OWTS") and is very familiar with the OWTS Rules and Regulations. He is familiar with the facts underlying the subject NOV which he said was initiated by an anonymous telephone complaint. He said he identified the owner of the property by the Tax Assessor's database. The property, which is located at 7255 Post Road, North Kingstown, Rhode Island, was reported as belonging to Easy Stay LLC. He next consulted the Secretary of State's office to obtain information for the notification with Easy Stay LLC. The Tax Assessor's printout was entered into evidence as OC&I Exhibit 2 Full. The report from the Secretary of State's office was entered into evidence as OC&I Exhibit 3 Full.

Mr. Becker was allowed to act as a pro se litigant, in spite of the objection of OC&I. He conducted a brief cross examination of Mr. Hogan and it was established that he had never been to

the property in question.

OC&I called as its next witness Shawna B. Smith. Ms. Smith identified herself as an employee of the Rhode Island Department of Environmental Management and has been so employed for fifteen (15) years. She currently holds the position of Senior Environmental Scientist with duties related to septic inspections. She has conducted about two thousand (2,000) inspections for DEM. She is familiar with the OWTS Rules and Regulations. Ms. Smith's resume was introduced into evidence, without objection, as OC&I's Exhibit 9 Full. Ms. Smith was qualified as an expert in the area of inspections of OWTS and related regulations over the Respondent's objection.

Ms. Smith testified that on April 16, 2015 she conducted an inspection of the subject property located at 7255 Post Road, North Kingstown, Rhode Island. She was presented with a document marked OC&I Exhibit 4 for identification which she identified as her report reflecting her inspection. She went through the report in detail and testified with the aid of photos attached to the report. She said her examination of the area of the septic system revealed a "...strong sewage odor. There was lush green vegetation around the covers and the pools of water, black soil, and I documented that with photos" (Tr. p.37). She said that she personally took the photos and that they are a fair and accurate representation of what she saw during her inspection of the site on April 16, 2015.

Ms. Smith testified that the physical evidence, odor of sewage and lush green vegetation are indicators of a failed septic system. She said the fluid flowing from the septic covers was flowing towards Post Road but not all the way. OC&I Exhibit 4, the inspection of April 16, 2015 was admitted, without objection, as a Full Exhibit.

Mr. Becker conducted a brief cross examination of Ms. Smith followed by a brief redirect

examination by Counsel for OC&I.

OC&I called as its next witness David E. Chopy who testified that he has been employed by DEM for over thirty (30) years. He is currently employed by DEM as the Chief of the Office of Compliance and Inspection and has been for about ten (10) years. His responsibilities include supervision of the OWTS program. Mr. Chopy testified in detail regarding his professional qualifications and his resume was admitted into evidence as OC&I Exhibit 7 Full without objection.

Mr. Chopy was presented with a copy of OC&I's Exhibit 1 for identification which he identified as the Notice of Violation ("NOV") issued to Easy Stay LLC for septic system violation. He identified his signature and said that he was responsible for the final draft of the NOV dated April 4, 2017 which was admitted as OC&I Exhibit 1 Full.

Mr. Chopy testified at length regarding the establishment of the Administrative Penalty in the NOV. He went through the Administrative Penalty Matrix explaining the differences between Type I, Type II or Type III violations as well as Minor, Moderate and Major categories of which violations fall into. He testified that he determined the first violation (D(1)(a) listed as "Discharge of wastewater to the surface of the ground" as a Major category for deviation from the standard. The second violation listed D(1)(b) "Failure to submit application for failed OWTS" as a Major deviation from the standard. The last factor considered in the determination of the Administrative Penalty is called "Economic Benefit". This was identified as the amount of money saved by the Respondent due to failure to act which in the case was the cost of a pump out. In conclusion Mr. Chopy testified that the Administrative Penalty in this matter was calculated in accordance with the Rules and Regulations for determining administrative penalties.

Mr. Becker conducted a cross examination of Mr. Chopy. He attempted to question the

witness by use of a report that was not in evidence. OC&I objected to the use of the report because it was not supported by live testimony. The objection was sustained. At the conclusion of the cross examination of Mr. Chopy, OC&I rested.

Mr. Becker testified on behalf of Easy Stay. He was allowed to testify in a narrative manner. He testified that the system was pumped three (3) times in 2015. He said that there is a second system on the property. He said the overflow of the system may be due to rainwater. Mr. Becker attempted to introduce two (2) pictures of the property taken on June 21, 2018. OC&I's objection was sustained due to lack of relevancy.

Mr. Becker testified that he had inspections done after the NOV which he alleged reported that there was no problem with the system. Mr. Becker's proffered exhibits were not admitted because they were not timely. Mr. Becker rested.

OC&I recalled Mr. Hogan for rebuttle. He said the evidence in Ms. Smith's report sows it to be a "failed system" under the OWTS Rules. Mr. Hogan described the procedure to get a system out of a failed state the property owner must hire a licensed designer to assist in the submission of a permit application. When the application is approved then the owner must hire a licensed installer to install or repair the septic system. He testified that Easy Stay has not applied for a repair permit. (Tr. p.105). OC&I rested.

BURDEN OF PROOF

The Department of Environmental Management, Office of Compliance and Inspection ("OC&I") bears the burden of proof in this matter and must prove the allegations in the NOV by a preponderance of the evidence. "The burden of showing something by a preponderance of the evidence... simply requires the trier to believe that the existence of a fact is more probable

than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the facts existence” Metropolitan Stevedore Co. V. Rambo, 521 U.S. 121.

ANALYSIS

OC&I has the burden of proof by a preponderance of the evidence on three (3) issues:

1. The Respondent violated the OWTS Regulations, Rule 8.8 “No person shall discharge any treated or untreated wastewater to the surface of the ground without the approval of the Director.”

The Department presented two witnesses to establish the fact that the Respondent violated the OWTS Regulations, Rule 8.8, Shawna B. Smith and Patrick J. Hogan. The primary factual evidence in support of the allegations against the Respondent was presented through the testimony of Ms. Smith. She testified about her examination of the Respondent’s property on April 16, 2015 which was reflected in her OWTS Inspection Report which was entered into evidence as OC&I Exhibit 4 Full.

Ms. Smith testified that during her inspection of the Respondent’s property she observed a grassy area near the system cover which was muddy and exhibited pools of fluid. She said that she detected a strong sewage odor. The soil was black and there was lush green vegetation in the area around the septic cover. Ms. Smith’s report contained numerous photographs taken by here during her inspection. These photographs supported Ms. Smith’s personal observations.

Ms. Smith testified that based on her experience, education and training the factors observed by her; black muddy soil, lush green vegetation and sewage odor, were factors indicating a septic system failure. Mr. Hogan testified that he had read the report of Ms. Smith and

concluded that the presence of factors observed by Ms. Smith usually means an overflowing system, a failed system.

The evidence presented by the OC&I witnesses establish the fact that at some point the septic system located on property owned by the Respondent failed, causing a discharge in violation of OWTS Regulations, Rule 8.8. Mr. Becker, the Respondent's representative, testified that the system was functioning properly. He said that he had a septic system professional inspect the system. Mr. Becker did not produce the witness and therefore the opinion of this individual could be considered. The fact that the system may have been properly functioning at times does not negate the fact that it had failed at some time.

The Regulations provide that a discharge of wastewater to the surface of the ground is only permitted with the approval of the Director. Mr. Hogan testified that the Respondent did not obtain the permission of the Director to allow the discharge of wastewater onto the subject premises. The Department has sustained its burden of proof that the Respondent has violated the OWTS Regulation Rule 8.8 by discharging untreated wastewater to the surface of the ground at the subject premises without first obtaining the approval of the Director.

2. The Respondent violated the OWTS Regulations, Rule 17.7 "An application for a repair of any OWTS, or any component thereof, shall be made when OWTS or component has failed, as defined by Rule 7."

The second violation against the Respondent alleges that in the event of a system failure, the owner of the property shall file an application with the Department for repair. Rule 17.7 of the Regulations is intended to ensure that a failed system is properly repaired. Mr. Hogan testified in the event of a system failure the property owner must hire a licensed designer to assist them in submitted their permit application. He said that once the repair application has been approved by

the Department, the owner must hire a licensed installer to install or repair the septic system. (Tr. p.104, 105). He went on to testify that the Respondent has not filed an application with the Department for repair of his system as required by Rule 17.7. Mr. Becker during his testimony did not state that he had filed an application for repair of the subject system. He alleged throughout the hearing that the subject system was operating properly, had not failed and that there was no need to file an application for repair with the Department.

The Department has sustained its burden of proof that the Respondent has violated the requirements of Rule 17.7 of the OWTS Regulation due to its failure to file an application for repair of its failed septic system.

3. The Administrative Penalty was properly assessed and calculated in accordance with the Administrative Penalty Regulations.

The Department imposed an Administrative Penalty against the Respondent in the amount of two thousand two hundred (\$2,200.00) dollars. In support of its allegations the Department presented Mr. David Chopy to explain how the Administrative Penalty was calculated. Mr. Chopy testified that he is the Chief of the Office of Compliance and Inspection and that he oversaw the final draft of the NOV in this matter (OC&I Exhibit 1 Full) which included the Administrative Penalty matrix. He was recognized as an expert of the Rules and Regulations for the establishment of Administrative Penalties. Mr. Chopy testified at length regarding the Administrative Penalty Matrix which was included as part of the NOV. He testified that the Administrative Penalty in the matter was calculated in accordance with the Rules and Regulations for calculation of Administrative Penalties. The Respondent did not offer testimony to rebut or contradict the testimony of Mr. Chopy.

OC&I has met its burden of proof that the Administrative Penalties were calculated

correctly and in accordance with the *Rules and Regulations for the Assessment of Administrative Penalties* and satisfies the requirements of the *In Re: Richard Fickett, AAD No. 93-014/GWE*. The Respondent did not present evidence or testimony in contradiction to the method of assessment or correctness of the Administrative Penalty. The penalty of Twenty-Two Hundred (\$2,200.00) Dollars should be confirmed.

CONCLUSION

OC&I has sustained its burden of proof in the presentation of its case. It has proved by a preponderance of the evidence that the Respondent is the owner of a failed septic system which has discharged wastewater to the surface of the ground. It has also proved that the Respondent has not filed an acceptable application for repair. Finally, OC&I has proved that the administrative penalty was properly calculated in accordance with Penalty Regulations. The NOV issued on April 4, 2017 (OC&I Exhibit 1 Full) should be sustained and Respondent's appeal should be dismissed.

FINDINGS OF FACT

Based on the testimonial and documentary evidence I make the following findings of fact:

1. The property which is the subject of the NOV is located at 7255 Post Road, Assessors Plat 136, Lot 11, in the town of North Kingstown (the "Property").
2. Respondent owns the Property.
3. On April 1, 2015 the DEM inspected the Property. The inspection revealed that the onsite wastewater treatment system ("OWTS") was failed and sewage was discharged from the OWTS to the surface of the ground as evidenced by:
 - (a) Observation of black soil, lush green vegetation and the breakout of

fluids on the surface the ground in the area around the OWTS;

- (b) Detection of odors associated with sewage in the area around the OWTS; and
 - (c) Photographs showing black soil, lush green vegetation and the breakout fluids on the surface of the ground in the area around the OWTS.
4. On April 16, 2015 or sometime prior thereto the OWTS on the Property was in a failed state.
 5. The Respondent discharged wastewater to the surface of the ground.
 6. The Respondent did not obtain permission from the Director.
 7. The Respondent failed to submit a repair application for a failed OWTS.
 8. The Administrative Penalty was calculated in accordance with the Administrative Penalty Rules.
 9. The Administrative Penalty is correct and appropriate.

CONCLUSIONS OF LAW

Based on the Findings of Fact I make the following Conclusions of Law:

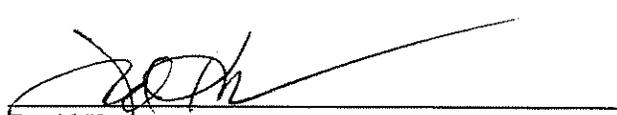
1. Respondent violated the OWTS Regulations, Rule 8.8, which prohibits the discharge of wastewater to the surface of the ground without the permission of the Director.
2. Respondent violated the OWTS Regulations, Rule 17.7, which requires submittal of a repair application for a failed OWTS.
3. The Administrative Penalty was properly calculated.
4. The issuance of the NOV was appropriate and should be affirmed.
5. The Respondent's Appeal should be denied and dismissed.

It is hereby

ORDERED

1. The NOV issued on April 4, 2017 against the Respondent, Easy Stay LLC is hereby **SUSTAINED.**
2. The Appeal filed by the Respondent Easy Stay LLC is hereby **DENIED** and **DISMISSED.**

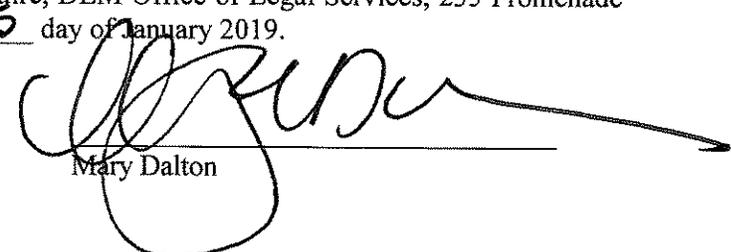
Entered as an Administrative Order this 25th day of January 2019.



David Kerins
Chief Hearing Officer
Administrative Adjudication Division
235 Promenade Street, 3rd Floor, Room 350
Providence, RI 02908
(401) 222-4700 Ext. 4600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail to: John Becker, Manager, Easy Stay LLC, 7255 Post Road, North Kingstown RI 0285; via interoffice mail to; Joseph LoBianco, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 25 day of January 2019.



Mary Dalton

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.