

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

RE: GREGORY AND KATHLEEN COLETTI                      AAD NO. 92-018/IE  
NOTICE OF VIOLATION CI91-100

DECISION AND ORDER

This matter was heard before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") on February 28, 1994 pursuant to the Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the Division of Groundwater and ISDS ("Division") on November 2, 1992. At hearing, the parties submitted a stipulation, attached hereto as Appendix A, which established Respondents' liability for the Violations set forth in the NOV. The within hearing was therefore limited to the issue of the assessment of an administrative penalty.

The hearing was conducted in accordance with the statutes governing the Administrative Adjudication Division (R.I.G.L. Section 42-17.7-1 et seq), the Administrative Procedures Act (R.I.G.L. Section 42-35-1 et seq), the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules") and the Rules and Regulations for Assessment of Administrative Penalties, May 1992 ("Penalty Regulations").

PREHEARING CONFERENCE

The Prehearing Conference was conducted on October 22, 1993 at which the parties agreed to eight (8) stipulations of

fact. Those stipulations (as they were set forth in the Prehearing Conference Record and Order entered on October 26, 1993) are attached hereto as Appendix B. The exhibits proffered by the parties, marked as they were admitted at hearing, are indicated on Appendix C.

**BACKGROUND**

On November 2, 1992 the Department of Environmental Management issued a Notice of Violation and Order (Div 10 Full) to Gregory L. and Kathleen A. Coletti alleging violations of SD 2.08 "Discharge on or to the surface of the ground" and SD 11.05 "Gravel Base" of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems (1992) ("ISDS Regulations") on property located at 18 MacIntosh Drive, Cranston, Rhode Island, Assessor's Plat 26, Lot 145. Pursuant to the stipulations submitted at the hearing (see Appendix A attached hereto), Respondent has admitted to both violations.

As stipulated by the parties at the prehearing conference (see Appendix B, paragraph 6), the Respondents repaired the system pursuant to Permit No. 9307-895 and a Certificate of Conformance was issued by the Department on August 4, 1993.

The Division continues to seek the assessment of an administrative penalty, jointly and severally, against each named Respondent, in the amount of Two Thousand (\$2000.00)

Dollars. As the violations have been admitted and the repairs to the system approved by the Department, the hearing was conducted for the sole purpose of determining the appropriateness of the administrative penalty.

HEARING SUMMARY

Counsel for the Division, citing Section 12(c) of the Penalty Regulations, presented no witnesses and rested on the record.

Section 12(c) states:

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.

Respondents' counsel argued that assessment of a \$2000.00 penalty was unreasonable and punitive but presented no witnesses. He asserted that Respondents had advised the Department of the problem (no evidence in the record); that Respondents have spent \$16,000.00 to correct the problem (no evidence in the record); that the problem was corrected in a timely fashion; and that they had made efforts to locate the source of the problem as early as September 1989 (Resp 5 Full).

Respondents' exhibits show a fairly long-standing awareness of a problem on site: "Resp. 5 Full" reflects that in 1989 dye tests were conducted by the Department of Health

pursuant to a complaint received on September 11, 1989, from which tests they concluded that "No Further Action At This Time" was warranted; "Resp. 6 Full", a letter from Mr. Coletti to the Building Official, Cranston City Hall, dated March 12, 1990, catalogs Mr. Coletti's belief that the problem arose when his neighbor built a home causing drainage problems in Respondents' backyard, and the difficulties Mr. Coletti faced in trying to get the matter resolved.

The actions set forth in the above documents occurred in 1989 and 1990. Despite Mr. Coletti's concerns as they are indicated by those documents, there is nothing in the record revealing any further attention to the problem from the date of his letter (March 12, 1990) until more than a year later. On April 29, 1991 the Division issued a Notice of Intent to Enforce (Div 4 Full) which cited discharge of sanitary sewage on or to the surface of the ground, and requested that the system be pumped as necessary and that a repair plan application be submitted to the Division within fifteen (15) days or the matter would be forwarded for legal action. In response, Mr. Coletti wrote to the Division (JT 1) on May 14, 1991 expressing his intent to correct the problem. Again, the record shows no follow-up by Respondent and on November 2, 1992, well over a year later, the NOV was issued.

As set forth in the Administrative Penalty Worksheet attached to the NOV (Div 10 Full), the Division calculated the

administrative penalty based upon the violation having been identified as a "Type 1" violation and a "Major" Deviation from Standard. Respondent did not dispute either of these elements of the calculation. The penalty matrix utilized for violations of the ISDS Regulations, located in the Penalty Regulations Appendix at page 4, provides that for each of the two observed violations discovered during field investigation, a \$1000.00 penalty would attach for a total administrative penalty of \$2000.00.

R.I.G.L. §42-17.6-6 sets forth the factors which should be considered in determining administrative penalties and provides in pertinent part:

42-17.6-6. Determination of administrative penalty.--In determining the amount of each administrative penalty, the director shall include, but not be limited to, the following to the extent practicable in his or her considerations:

- (a) The actual and potential impact on public health, safety and welfare and the environment of the failure to comply;
- (b) The actual and potential damages suffered, and actual or potential costs incurred, by the director, or by any other person;
- (c) Whether the person being assessed the administrative penalty took steps to prevent noncompliance, to promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of such noncompliance;
- (d) Whether the person being assessed the administrative penalty has previously failed to comply with any rule, regulation, order, permit, license, or approval issued or adopted by the director, or any law which the director has the authority or responsibility to enforce;
- (e) Making compliance less costly than noncompliance....

Having reviewed the circumstances which existed at the time the NOV was issued, I conclude that at that time, the

penalty calculation was in accordance with the Penalty Regulations and with the above statute. That calculation, however, does not and could not take into account Respondent's efforts to attain compliance with the ISDS Regulations following his receipt of the NOV.

Promptness in achieving compliance with the statutes and regulations is a factor to be considered in determining an administrative penalty under §42-17.6-6(c). Though Respondent's counsel has argued that the problem with the system was corrected in a "timely fashion", the speed with which Respondent acted is unfortunately not reflected in the exhibits or stipulations. While it is known from the record that a Certificate of Conformance was issued by the Department approximately ten months following issuance of the NOV, there is no evidence establishing the "flurry of installations, adjustments and replacements" which merited a reduction of the penalty in Antonelli Plating,<sup>1</sup> NOV No. 89-23-AP, Final Agency Order dated May 20, 1992, at 11-12.

Accordingly, the provisions of §42-17.6-6(c) do not result in a reduction in this instance.

The considerations set forth in paragraph (e), however, do warrant some marginal reduction in the administrative penalty. Respondent did not defer his repair of the system

---

<sup>1</sup> Though Antonelli Plating was decided under the old Penalty Regulations, the application of the provisions of §42-17.6-6(c) remains valid.

until after the hearing process had been concluded and a decision rendered, he achieved compliance with the ISDS Regulations more than seven months ago. Section 42-17.6-6(e), "Making Compliance less costly than noncompliance", recognizes the practical policy concern that a violation, which here may pose a threat to health or the environment, is better to be corrected sooner rather than later.

Notwithstanding the above, I also recognize the provisions of R.I.G.L. Section 42-17.6-3 wherein it states: "After written notice of noncompliance or intent to assess an administrative penalty has been given, each day thereafter during which the noncompliance occurs or continues shall constitute a separate offense and shall be subject to a separate administrative penalty if reasonable efforts have not been made to promptly come into compliance." As a result, it would have been to Respondents' disadvantage not to address and correct the cause of the violation.

In consideration of the above and in conjunction with §42-17.6-6(e), as well as having considered all of the arguments of counsel and all of the elements set forth in §42-17.6-6, I recommend that the administrative penalty be reduced by \$150.00. That is, that Respondents be assessed an administrative penalty in the amount of One Thousand Eight Hundred and Fifty (\$1,850.00) Dollars.

Wherefore, after considering the arguments of counsel, the documentary evidence of record and the stipulations of the parties which are herewith incorporated in this Decision, I make the following:

**FINDINGS OF FACT**

1. Gregory L. and Kathleen A. Coletti ("Respondents") are the owners of real property located at 18 MacIntosh Road, Cranston, Rhode Island.
2. A Notice of Violation and Order was issued by the Department to the Respondents on November 2, 1992.
3. The Respondents filed a timely request for an adjudicatory hearing.
4. The Respondents have stipulated that on February 6, 1992 and March 9, 1992 sanitary sewage was discharged to the surface of the ground on Respondents' property in violation of Section SD 2.08 of the ISDS Regulations.
5. The Respondents have stipulated that the fill material used in their ISDS was not in conformance with the requirements of Section SD 11.05 of the ISDS Regulations.
6. The parties have stipulated that the system was repaired pursuant to Permit No. 9307-895 and a Certificate of Conformance issued by the Department on August 4, 1993.
7. At the time the Notice of Violation was issued, the administrative penalty was not excessive.
8. Respondents' actions to repair the system brought them into compliance with the ISDS Regulations on August 4, 1993, approximately seven months prior to the commencement of the adjudicatory hearing on this matter.
9. A reduction of the administrative penalty by the sum of one hundred fifty (\$150.00) dollars is reasonable and warranted.

Based upon the foregoing facts, the stipulations of the parties, and the documentary evidence of record, I make the following:

CONCLUSIONS OF LAW

1. Respondents made a timely request for hearing in accordance with R.I.G.L. §42-17.1-2(u)(1).
2. Respondents have admitted that on February 6, 1992 and March 9, 1992 they were in violation of Section SD 2.08 of the ISDS Regulations.
3. Respondents have admitted that they were in violation of Section SD 11.05 of the ISDS Regulations.
4. Respondents have been in compliance with the ISDS Regulations at issue herein for over seven months.
5. Pursuant to R.I.G.L. §42-17.6-6, achieving compliance with the Regulations is a factor to be considered in determining the amount of the administrative penalty.
6. Respondents have proved by a preponderance of the evidence that an administrative penalty of \$2000.00 is not assessed in accordance with the Regulations and Statute as the Department could not consider Respondents' later actions achieving compliance.
7. The Department is entitled to an administrative penalty in the amount of One Thousand Eight Hundred and Fifty (\$1850.00) Dollars.

Wherefore, it is hereby

ORDERED

1. The administrative penalty is assessed, jointly and severally, against each named Respondent.
2. Respondents shall, within ten (10) days after the Final Agency Order is signed by the Director, pay the administrative penalty in the sum of One Thousand Eight Hundred and Fifty (\$1850.00) Dollars. Payment of this penalty shall be made by certified check, made payable to the "General Treasurer, State of Rhode Island" and sent to:

GREGORY AND KATHLEEN COLETTI  
AAD NO. 92-018/IE  
PAGE 10

Rhode Island Department of Environmental Management  
Attention: Robert Silvia  
Office of Business Affairs  
22 Hayes Street  
Providence, Rhode Island 02908

Entered as an Administrative Order this 25<sup>th</sup> day of  
March, 1994 and herewith recommended to the Director for  
issuance as a Final Agency Order.

Mary F. McMahon  
Mary F. McMahon  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, Third Floor  
Providence, Rhode Island 02908

Entered as a Final Agency Order this 29<sup>th</sup> day of March  
1994.

Michael Annarummo  
Michael Annarummo  
Director  
Department of Environmental Management  
9 Hayes Street  
Providence, Rhode Island 02908

**CERTIFICATION**

I hereby certify that I caused a true copy of the within  
Decision and Order to be forwarded, via regular mail, postage  
prepaid to Joseph J. Alteiri, Esq., 201 Hillside Drive,  
Cranston, RI 02920 and via interoffice mail to John A.  
Langlois, Esq., Office Legal Services, 9 Hayes Street,  
Providence, RI 02908 on this 4 day of March 1994.

Jaqueline J. Ballant  
APRIL

APPENDIX A

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

IN RE: GREGORY AND KATHLEEN COLETTI  
ISDS File No. CI91-100

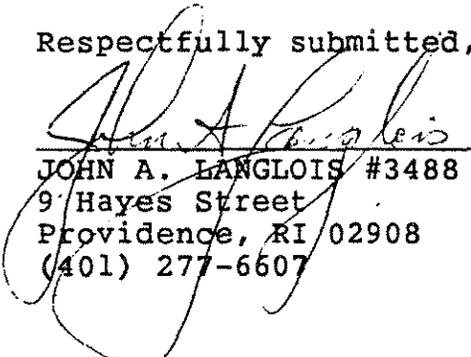
AAD NO. 92-018/IE

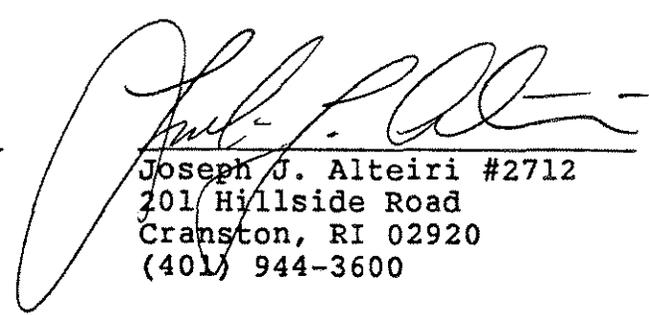
STIPULATION

Now comes the Division of Groundwater and ISDS and the Respondents in the above-captioned cause and hereby stipulate as follows:

- a. On February 6, 1992 and March 9, 1992 sanitary sewage was discharged to the surface of the ground on the Respondents' property located at 18 MacIntosh Drive in Cranston, Rhode Island in violation of SD 2.08; and
- b. The fill material used in Respondents' ISDS was not in conformance with the requirements of SD 11.05; and
- c. These stipuations of fact are offered solely for the purposes of this AAD proceeding and do not constitute an admission, stipulation or waiver in Superior Court action number C.A. 92-7085.

Respectfully submitted,

  
\_\_\_\_\_  
JOHN A. LANGLOIS #3488  
9 Hayes Street  
Providence, RI 02908  
(401) 277-6607

  
\_\_\_\_\_  
Joseph J. Alteiri #2712  
201 Hillside Road  
Cranston, RI 02920  
(401) 944-3600

CERTIFICATION

I hereby certify that I caused a true copy of the within Stipulation was forwarded to Joseph J. Alteiri, Esquire at 201 Hillside Drive in Cranston, RI, by facsimile and by regular mail, postage prepaid this 25th day of February, 1994.

1101J

7:00 PM FEB 25 1994

7:00 PM FEB 25 1994

GREGORY AND KATHLEEN COLETTI  
AAD NO. 92-018/IE

APPENDIX B

STIPULATIONS OF THE PARTIES

Pursuant to the Prehearing Conference conducted on AAD No. 92-018/IE, which is further identified as Notice of Violation and Order No. C191-100, the parties agreed to the following stipulations of fact (as they are set forth in the Prehearing Conference Record and Order entered on October 26, 1993):

1. The Respondents are the owners of real property located at 18 MacIntosh Road in Cranston, Rhode Island which is the subject matter of the hearing.
2. On or about April 29, 1992, a Notice of Intent to Enforce was mailed to Respondents by the Department.
3. The Notice of Violation, number C191-100 and dated November 2, 1992 was issued by the Department; served upon the Respondents; and recorded with the Office of Land Evidence in the City of Cranston in accordance with all statutory and regulatory requirements.
4. The Notice of Violation was received by the Respondents and the Respondents filed a request for an administrative hearing.
5. The Regulations allegedly violated by the Respondents are:
  - (a) SD 2.08, relating to the discharge of sewage to the surface of the ground; and
  - (b) SD 11.05, relating to the gravel base of the ISDS.
6. The Respondents repaired the system pursuant to Permit No. 9307-895 and a Certificate of Conformance was issued by the Department on August 4, 1993.
7. The Division has jurisdiction over the Respondents pursuant to Rhode Island General Laws §42-17.1-2 et seq.
8. On September 19, 1985, Kathleen and Gregory Coletti's application for ISDS was approved by the Department of Environmental Management for 18 MacIntosh Drive, Cranston, Rhode Island.

GREGORY AND KATHLEEN COLETTI  
AAD NO. 92-018/IE

APPENDIX C

LIST OF EXHIBITS

The below-listed documents are marked as they were admitted at hearing.

JOINT EXHIBITS

JT 1 Letter from Gregory L. Coletti to Ms. Fortin at the  
Full Division of Groundwater and Freshwater Wetlands,  
dated May 14, 1991.

DIVISION'S EXHIBITS

Div. 1 Copy of February 6, 1992 inspection report with  
Full attached photos;

Div. 2 Copy of March 9, 1992 inspection report with  
for Id attached photos;

Div. 3 Copy of September 28, 1992 sieve analysis;  
for Id

Div. 4 Copy of the Notice of Intent to Enforce dated  
Full April 29, 1992;

Div. 5 Withdrawn at Prehearing Conference;

Div. 6 Resume of Russell J. Chateauneuf;  
Full

Div. 7 Resume of Nicholas Capezza;  
Full

Div. 8 Resume of Susan Fortin;  
Full

Div. 9 Copy of portion of Cranston Tax Assessor's Plat Map  
Full showing Respondent's property.

Div. 10 Copy of the Notice of Violation and Order from the  
Full Department dated November 24, 1992;

Div. 11 Copy of Respondents' Hearing Request  
Full

GREGORY AND KATHLEEN COLETTI  
AAD NO. 92-018/IE

RESPONDENTS' EXHIBITS

- Resp. 1 Copy of Certificate of Conformance dated February  
Full 27, 1987. (1 p.)
- Resp. 2 Copy of Certificate of Construction dated November  
Full 25, 1986. (1 p.)
- Resp. 3 ISDS design dated July 1985. (5 pp.)  
Full
- Resp. 4 Approved ISDS application dated September 19, 1985.  
Full (1 p.)
- Resp. 5 Copy of dye test results from the Department of  
Full Health dated September 11, 1989. (8 pp.)
- Resp. 6 Copy of letter to Alexander Peligian, Building  
Full Official, Dept. of Inspection, City of Cranston  
dated March 12, 1990. (4 pp.)
- Resp. 7 Copy of Civil Complaint filed in Providence  
for Id Superior Court dated December 17, 1992 (4 pp.)