

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

**RE: LAWRENCE G. & FRANCINE E. CLARK  
NOTICE OF VIOLATION NO. CI94-246**

**AAD NO. 96-003/IE**

**DECISION AND ORDER**

This matter is before the hearing officer for a Recommended Final Decision and Order regarding the Notice of Violation and Order No. CI94-246 ("NOVAO") issued to Lawrence G. and Francine E. Clark ("Respondents") by the Division of Groundwater and ISDS ("Division")<sup>1</sup> on or about September 4, 1996. The Respondents filed a request for hearing on October 7, 1996 with the Administrative Adjudication Division for Environmental Matters ("AAD").

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

The NOVAO alleges that the Respondents violated SD 2.08 of the Rules and Regulations Establishing Minimum Standards Relating to the Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations") in that the Respondents discharged or permitted the overflow or spillage of treated or untreated sanitary

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<sup>1</sup>During the pendency of this matter, the enforcement section of the Division of Groundwater and ISDS became part of the Office of Compliance and Inspection ("OCI").

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sewage on or to the surface of the ground at the property owned by Respondents located at 9 Dawley Street, Coventry, R.I. (otherwise known as Coventry Assessor's Plat 32, Lot 55) on or about May 12, 1994, May 24, 1995, March 22, 1996 and August 29, 1996.

The NOVAO ordered Respondents to take immediate measures to prevent overflowing; and to conduct certain inspection procedures to determine the probable cause of the system's failure, and to submit an application and plans for the repair of said system; and to have said repair work completed and evidenced within specified periods of time. It also assessed an administrative penalty jointly and severally against each Respondent in the amount of Four Thousand Dollars. The Respondents proceeded pro se and were advised at various stages of the proceedings of their option to be represented by counsel.

The administrative record reflects that a status conference was held on January 10, 1997 at which a control date of February 14, 1997 was established to enable the parties to pursue settlement negotiations. The matter not being resolved, it was set down for prehearing and hearing. The Prehearing Conference was held on April 16, 1997 and the Prehearing Conference Record was entered on May 12, 1997. On May 20, 1997, an Order was entered granting the OCI's Motion to Accelerate Hearing. Although this matter had already been scheduled for hearing on May 27 and 28, 1997, the Order was granted to accelerate any continuances or rescheduling. Subsequently, an Order was entered granting OCI's Motion

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for Stay/Continuance because of scheduling conflicts and in order to have the OCI's Motion to Amend the NOVAO addressed. An Order was entered on May 29, 1997 granting OCI's Motion to Amend the NOVAO to include two alleged additional incidents of noncompliance and associated penalties. The Order provided that the OCI shall serve each Respondent with a copy of the Amended NOVAO in conformity with R.I.G.L. §42-17.1-2(u), and that within ten days of receipt of the Amended NOVAO, the Respondents must file a request for hearing with AAD in conformity with R.I.G.L. §42-17.6-4.

The OCI, on July 16, 1997, filed (1) an Errata to Amended NOVAO (in which it stated that revisions were made to the Order section of the proposed amended NOVAO prior to its service on Respondents on June 13, 1997), and (2) a revised Amended NOVAO (which reflected said revisions). However, as of the date of hearing, no proof of service of the Amended NOVAO was filed at the AAD, and no request for a hearing on the Amended NOVAO was filed by Respondents. The OCI did not pursue the amendment at the hearing, and this decision addresses the violations and penalties as set forth in the original NOVAO.

The hearing in this matter was conducted on July 1, 1997. The parties elected to waive post-hearing memoranda, and none was required by the Hearing Officer. Francine E. Clark appeared pro se and for her husband, Lawrence G. Clark. Catherine Robinson Hall, Esq. represented the OCI.

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

1. Lawrence G. and Francine E. Clark are the owners of the real property located at 9 Dawley Street, Assessor's Plat 32, Lot 55 in Coventry, Rhode Island (the "property").
2. On or about May 16, 1994, a Notice of Intent to Enforce was mailed by the Department to Lawrence G. and Francine E. Clark of 9 Dawley Street, Coventry, Rhode Island and was received on May 19, 1994.
3. On or about June 2, 1995, a Notice of Intent to Enforce was mailed by the Department to Lawrence G. and Francine E. Clark of 9 Dawley Street, Coventry, Rhode Island and was received on June 6, 1995.
4. On or about September 4, 1996, a Notice of Violation was mailed by the Department and received by the Respondents on September 29, 1996.
5. The Respondents filed a timely request for an administrative hearing.

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

FROM OCI:

1. Whether Respondents violated ISDS regulations, SD 2.08 by discharging or permitting the overflow or spillage of any treated or untreated sanitary sewage on or to the surface of the ground; and
2. Whether the issuance of the Notice of Violation and Order is proper and should be affirmed.

FROM THE RESPONDENTS:

3. Respondents anticipate that their house may be foreclosed/auctioned on or about June 5, 1997.

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

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- OCI 1 Full Copy of Site Inspection Report dated May 12, 1994 with one photograph attached, 3 pp.
- OCI 2 Full Copy of Notice of Intent to Enforce dated May 16, 1994 with certified mail receipt attached, 2 pp.
- OCI 3 Full Copy of Site Inspection Report dated May 24, 1995 with one photograph attached, 3 pp.
- OCI 4 Full Copy of Notice of Intent to Enforce dated June 2, 1995 with certified mail receipt attached, 2 pp.
- OCI 5 Full Copy of Site Inspection Report dated March 22, 1996 with one photograph attached, 3 pp.
- OCI 6 Full Copy of Site Inspection Report dated August 29, 1996 with two photographs attached, 3 pp.
- OCI 7 Full Copy of Notice of Violation and Order dated September 4, 1996 with Administrative Penalty Worksheet attached, 6 pp.
- OCI 8 Full Certificate of Service dated September 30, 1996, 1 pg.
- OCI 9 Full Request for hearing dated October 4, 1996, 1 p.
- OCI 10 Full Copy of Deed to Property located at 9 Dawley Street, Assessor's Plat 32, Lot 55, Coventry, Rhode Island, Book 223, Page 0491, 2 pp.
- OCI 11 Full Resume of Peter O'Rourke, 1 p.
- OCI 12 Full Resume of Brian Moore, 2 pp.

No exhibits were introduced by Respondents.

The following stipulation was agreed to by the parties and read into the record at the commencement of the hearing;

"On or about May 12, 1994, May 24, 1995, March 22, 1996 and August 29, 1996, sanitary sewage is and/or had been discharged to the surface of the ground at the subject property."

The OCI, during its opening statement, made a Motion for Summary Judgment (on the issue of liability) based on the aforesaid stipulation. The Respondents were then afforded the opportunity to respond to said motion, but did not wish to do so. The Hearing Officer deferred determination of this motion, and this decision shall operate as a determination of same.

The Prehearing Conference Record indicates that the OCI would present two witnesses, but the OCI called only one witness (since the Respondents stipulated at the commencement of the hearing that sanitary sewage had been discharged as alleged in the NOVAO).

Brian Moore, a Supervising Sanitary Engineer with the Office of Water Resources, was the only witness called by the OCI. Mr. Moore was qualified by agreement as an expert in the areas of civil engineering; the design, construction, and operation of ISDS; and sewage disposal system regulations. He testified that he issued the subject NOVAO, which requires that Respondents pay a total administrative penalty of Four Thousand Dollars for the sewage overflows for which they were cited; that each of the four overflows was considered a Type I violation since they pose a threat to the public health; and that the Deviation from Standard was considered Major since sewage on ground is a major deviation from a properly operating system. It was this witness's opinion that the Four Thousand Dollar penalty is appropriate and reasonable in this case.

Respondents did not make an opening statement, and they did not present any witnesses or documentary evidence.

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

The Respondents have stipulated and the uncontradictory evidence of record clearly demonstrates that the Respondents discharged or permitted the overflow or spillage of treated or untreated sanitary sewage on or to the surface of the ground at the subject location on the dates alleged.

Section 2.08 of the ISDS Regulations provides:

Discharge on or to the surface of the ground. "No person shall discharge or permit the overflow or spillage of any treated or untreated sanitary sewage on or to the surface of the ground..."

The documentary exhibits and the stipulations clearly establish that the Respondents violated SD 2.08 as cited in the NOVAO. Based on the foregoing, the OCI has met the burden of proving the violations by a preponderance of the evidence.

The OCI also met its burden of establishing in evidence the penalty

amount proposed in the NOVAO and the manner in which said penalty was calculated. The uncontradicted evidence of record establishes that the penalty was properly calculated as a "Type I" violation and a "Major" Deviation from Standard. The discharges of sewage occurred on numerous occasions, and the Respondents were undoubtedly aware of same. These violations pose a serious threat to public health which cannot be overlooked.

The issue submitted by Respondents in the Prehearing Conference Record suggested that they anticipated foreclosure proceedings of their house; however there was no testimony or evidence introduced at hearing as to Respondents' financial condition or other factors warranting amendment of the administrative penalty. The Respondents did not challenge OCI's evidence and the record is devoid of any evidence that might demonstrate that the administrative penalty was not properly assessed in accordance with the Penalty Regulations. The Respondents did not challenge the evidence introduced by the OCI concerning the penalty assessment.

Based on the evidence presented, a penalty of One Thousand Dollars for each of the four violations, for a total penalty in the amount of Four Thousand Dollars, is appropriate and reasonable in this matter.

#### FINDINGS OF FACT

After review of the stipulations of fact and the testimonial and



documentary evidence of record, I find as a fact the following:

1. Lawrence G. and Francine E. Clark are the owners of the real property located at 9 Dawley Street, Assessor's Plat 32, Lot 55 in Coventry, Rhode Island (the "property").
2. On or about May 16, 1994, a Notice of Intent to Enforce was mailed by the Department to Lawrence G. and Francine E. Clark of 9 Dawley Street, Coventry, Rhode Island and was received on May 19, 1994.
3. On or about June 2, 1995, a Notice of Intent to Enforce was mailed by the Department to Lawrence G. and Francine E. Clark of 9 Dawley Street, Coventry, Rhode Island and was received on June 6, 1995.
4. On or about September 4, 1996, a Notice of Violation was mailed by the Department and received by the Respondents on September 29, 1996.
5. The Respondents filed a timely request for an administrative hearing.
6. The Respondents have stipulated that on May 12, 1994, May 24, 1995, March 22, 1996 and August 29, 1996 sanitary sewage was discharged to the surface of the ground on the Respondents' property in violation of Section SD 2.08 at the ISDS Regulations.
7. Testimony by the OCI established that each of the Respondents' four (4) discharges of sanitary sewage constituted a Type I Major Violation.
8. Each of the four discharges of sanitary sewage was properly assessed a penalty of One Thousand Dollars (\$1,000.00).

#### CONCLUSIONS OF LAW

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

1. The Respondents made a timely request for hearing pursuant to R.I.G.L. §42-17.1-2(u).

2. Respondents have admitted that on May 12, 1994, May 24, 1995, March 26, 1996 and August 29, 1996 they were in violation of Section SD 2.08 of the ISDS Regulations.
3. The OCI has proved by a preponderance of the evidence that the Respondents have violated SD 2.08 of the UST Regulations as alleged in the NOVAO.
4. The discharge of sanitary sewage to the surface of the ground is properly classified as a Type I Major violation.
5. The Respondents have failed to prove by a preponderance of the evidence (as required by Section 12 of the Penalty Regulations) that the penalty was not assessed in accordance with the Penalty Regulations or that the penalty is excessive.
6. The penalty assessment in the total amount of Four Thousand Dollars (\$4,000.00) is reasonable and warranted.

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

**ORDERED**

1. The Notice of Violation and Order No. CI 94-246 issued to Respondents on or about September 4, 1996 is SUSTAINED.
2. Respondents, Lawrence G. Clark and Francine E. Clark, shall jointly and severally comply with the following:

Pursuant to R.I.G.L. 42-17.1-2(u), the named respondents are hereby ORDERED to:

- (a) Immediately take steps to reduce the discharge of sewage to your disposal system through the use of water conservation devices and efforts and arrange to have the system pumped as frequently as it is necessary to prevent the system from overflowing until the system can be permanently repaired.
- (b) Within fifteen (15) days of the date of this Order, have your system inspected by a licensed professional engineer or land surveyor to determine the cause of the system's failure.

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- (c) Within thirty (30) days of the date of this Order, submit to the Division a written system assessment, signed by the engineer or land surveyor who inspected the system. The system assessment must set forth the probable cause(s) for the system's failure and propose a plan for the permanent repair system. If necessary in order to perform repair work proposed by the system assessment, a formal Individual Sewage Disposal System ("ISDS") Application and plans must also be submitted at this time.
  - (d) If the application is returned unacceptable, all noted discrepancies and/or comments by the Department must be addressed by revising and resubmitting the application within twenty (20) days.
  - (e) Within thirty (30) days of the approval of any proposed repair plan, complete the work proposed in accordance with approved plan. Completion of such work shall be evidence in writing by the person performing the work or by the submission of a "Certificate of Construction".
3. Pursuant to R.I.G.L. 42-17.6, the following administrative penalty is hereby ASSESSED, jointly and severally, against each named respondent:
- Four Thousand Dollars (\$4,000.00)
4. The Respondents shall pay to the Department the total sum of Four Thousand Dollars (\$4,000.00) in administrative penalties as set forth herein. Said penalty shall be paid within ten (10) days after the Final Agency Order is signed by the Director and shall be in the form of a certified check made payable to the: General Treasurer, State of Rhode Island and sent to:

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

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Entered as a Recommended Decision and Order this 25<sup>th</sup> day of  
JULY, 1997.

*Joseph F. Baffoni*

Joseph F. Baffoni  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
235 Promenade Street  
Providence, RI 02908

Entered as a Final Agency Order this 31 day  
of July, 1997.

*Frederick Vincent*

Frederick Vincent  
Acting Director  
Department of Environmental Management  
235 Promenade Street  
Providence, RI 02908

#### CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Lawrence G. and Francine E. Clark, 9 Dawley Street, Coventry, RI 02816 and via interoffice mail to Catherine Robinson Hall, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 1st day of July, 1997.

*Boni L. Stewart*

*August*