

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:)	ADMINISTRATIVE CONSENT ORDER
)	AND NOTICE OF NONCOMPLIANCE
The Feoffees of the Grammar School)	
)	ACO-NE-99-1017
)	

I. The Parties

1. The Department of Environmental Protection ("the Department") is a duly constituted agency of the Commonwealth of Massachusetts. The Department maintains offices at One Winter Street, Boston, Massachusetts 02108 and maintains a regional office at 205A Lowell Street, Wilmington, Massachusetts 01887.

2. The Feoffees of the Grammar School (the "Respondents") own the property located at Little Neck in Ipswich (the "Site") and shown on the plan prepared by H. L. Graham Associates in Preliminary Report No. P-1, prepared by H. L. Graham Associates, Inc. dated June 23, 1999 (the "Preliminary Report"). Respondents are the Trustees of a Massachusetts Trust and are comprised of Donald Whiston, Chairman Peter A. Foote, James W. Foley and Alexander C. Mulholland. Respondents have a mailing address at 2 Jeffrey's Neck Road, Ipswich, MA 01938.

II. Statement of Facts and Law

3. Pursuant to the Clean Waters Act, G.L. c. 21, §§ 26-53, and the Groundwater Discharge Regulations, 314 CMR 5.00 et. seq., the Department has the authority to regulate subsurface sewage disposal systems that manage greater than 15,000 gallons per day ("gpd").

4. There are 167 dwellings on the Site. 24 of the dwellings are used year round, and the remaining 143 are seasonal. These dwellings contain approximately 462 bedrooms. The sewage disposal systems on the Site include direct discharges, conventional Title 5 systems, and cesspools. Using Title 5 flows, the sewage disposal systems serving the dwellings on the Site discharge greater than 50,000 gpd of effluent to the groundwater. To date, the Respondents have not applied for or obtained a groundwater discharge permit for the sewage disposal systems on the Site.

EXHIBIT

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5. The Clean Waters Act, at §43(2) provides:

No person shall discharge pollutants into waters of the commonwealth, nor construct, install, modify, operate or maintain an outlet for discharge of any treatment works without a currently valid permit issued by the director. No person shall engage in any activity that may reasonably be expected to result directly or indirectly in discharge of pollutants into waters of the commonwealth, nor construct, effect, maintain, modify or use any sewer extension or connection without a currently valid permit issued by the director, unless exempted by regulation of the director.

6. Groundwaters are waters of the Commonwealth as defined by the Clean Waters Act, G.L. c. 21, § 26(2).

7. The effluent from the sewage disposal systems on the Site are pollutants as defined by the Clean Waters Act, G.L. c. 21, § 26(2).

8. By allowing the discharge to the groundwater of the effluent from the sewage disposal systems on the Site, systems with a total design flow of greater than 50,000 gpd, without a permit, the Department alleges that the Respondents have violated and are continuing to violate the Clean Waters Act, G.L. c. 21, § 43(2).

9. Pursuant to the Clean Waters Act, G.L. c. 21, § 43, the Department has promulgated the Groundwater Discharge Permit Regulations, 314 CMR 5.00.

10. The Groundwater Discharge Permit Regulations, 314 CMR 5.03(1), provide in part:

No person shall discharge pollutants to groundwaters of the Commonwealth without a currently valid permit from the Director, pursuant to M.G.L. c. 21, § 43 and 314 CMR 5.00. No person shall construct, install, modify, operate or maintain an outlet for such discharge or any treatment works required to treat such discharge without having first obtained a discharge permit on accordance with 314 CMR 5.03(1) and written approval from the Director for such activity.

11. The Groundwater Discharge Permit Regulations, 314 CMR 5.04(1), provide in part:

No person shall engage in any activity other than those described in 314 CMR 5.03, which may reasonably result, directly or indirectly in the discharge of pollutants into groundwaters of the Commonwealth, without a currently valid permit from the Department pursuant to 314 CMR 5.00 and 2.00, unless exempted in 314 CMR 5.00.

12. The Groundwater Discharge Permit Regulations, 314 CMR 5.05, exempt from the requirement to obtain a groundwater discharge permit certain subsurface sewage

disposal systems that discharge less than 10,000 gpd.

13. According to the design flows established by Title 5, the 462 bedrooms will generate in excess of 50,000 gpd, which the Department alleges is in violation of the Groundwater Discharge Permit Regulations, 314 CMR 5.03 and 314 CMR 5.04.

14. The Clean Waters Act, G.L. c. 21, § 44, provides in part as follows:

Whenever it appears to the director that there are discharges of pollutants without a required permit or that such discharges are in violation of a permit issued under this chapter, or in contravention of any regulation, standard, or plan adopted by the division, the director may order the discharger to apply forthwith for a permit or take other appropriate action under rules and regulations adopted by the director.

III. Disposition and Order

15. For the reasons set forth above, and pursuant to the authority granted to the Department under G.L. c. 21, § 26-53, G.L. c. 21A, § 16, and the regulations promulgated thereunder, the Department hereby issues and enters this Administrative Consent Order. The Respondents hereby consent to the issuance of this Administrative Consent Order. Respondents understand and hereby waive their right to an administrative hearing, a tentative decision, rehearing, re-argument, reconsideration and judicial review of this Administrative Consent Order and to notice of any such rights of review. The parties hereto agree that the Department has the authority to enter into this Administrative Consent Order.

16. The Respondents have informed the Department that they have identified and removed four pipes that allowed the direct discharge of pollutants to waters of the Commonwealth. The Respondents stated these discharge pipes were in areas occupied by seasonal residents at 2 River Road and 2 Cliff Road, 30 Bay Crest and 4 Plum Sound. The direct discharges at 2 River Road and 2 Cliff Road were identified on Page 11 of the Preliminary Report. On or about October 10, 1999, the Respondents removed the direct discharge pipe located at the seasonal residence found at 15 River Road. From the effective date of this Administrative Consent Order and thereafter, the Respondents shall eliminate all direct discharges discovered on the Site and shall notify the Department in writing of the work they have done to eliminate the direct discharge within thirty days of Respondents' discovery of the discharge.

17. On or about September 30, 1999, the Respondents completed the evaluation of the system identified as RAC 2 in the Preliminary Report and submitted to the Department for its review and approval a report (the Phase II Report) documenting this evaluation.

18. On October 29, 1999, the Respondents completed the evaluation of the remaining sewage disposal systems on the Site and submitted to the Department for its review and approval a report (the Phase III Report) documenting this evaluation.

19. After completing the evaluation of the sewage disposal system on the Site, the Respondents determined that systems using drip irrigation ("SDI systems") may provide a potential solution for at least some of the failing sewage disposal systems on the Site. To determine whether such systems can provide a solution that meets the requirements of the Groundwater Discharge Permitting Program, the Respondents have agreed to install two such systems on a trial basis, as follows. On August 4, 2000, the Respondents submitted to the Department plans and specifications for two SDI systems and a scope of work for an evaluation of these systems. These systems shall serve at least two year round dwellings. On or before November 30, 2001, the Respondent shall complete the installation of the SDI systems in accordance with the plans and specifications approved by the Department and shall notify the Department in writing that the installation is complete. On or before May 31, 2003, the Respondents shall submit to the Department for its review and approval as-built plans and request certificates of compliance for the SDI systems. On or before May 31, 2003, the Respondents shall submit to the Department for its review and approval a report evaluating the operation of the SDI systems in accordance with the scope of work approved by the Department (the "SDI Report") and recommending whether additional SDI systems should be installed on the Site and the reasons for this recommendation. In the event that the SDI Report recommends the installation of additional SDI systems, the SDI Report shall include a plan and schedule for their installation on or before November 30, 2004. The schedule shall provide for some of the SDI systems to be installed, at a minimum, on or before November 30, 2003.

20. After completing the evaluation of the disposal systems on the Site, the Respondents determined that it is not feasible to install a SDI system to serve every dwelling on the Site. To serve dwellings that may not feasibly be served by a SDI system, the Respondents have agreed to install tight tanks as follows. On or before August 4, 2000, the Respondents shall submit to the Department plans and specification for tight tanks to serve 20 dwellings that have systems classified as RAC 1B and some dwellings with systems classified as RAC 2. On or before November 30, 2001, the Respondents shall complete the installation of 50 tight tanks in accordance with the plan and specifications approved by the Department and shall notify the Department in writing that the installations are complete. On or before May 31, 2002, the Respondents shall submit to the Department for its review and approval as-built plans and request certificates of compliance for these tight tanks. On or before January 31, 2003, the Respondents shall submit to the Department for its review and approval a list of the remaining dwellings that because of location cannot be feasibly served by SDI systems and a schedule for their installation by November 30, 2003 (The "tight tank plan and schedule"). The tight tank plan and schedule shall provide for approximately half of the remaining tight tanks to be installed on or before November 30, 2003.

21. On or before September 1, 2000, the Respondents shall provide the Department with a list of the residential structures that are in use at any time during the calendar year. The Respondents shall at the same time identify any residential structures that are abandoned. Notwithstanding anything to the contrary in this Administrative Consent Order, the Respondents shall not be required to inspect or upgrade any systems serving dwellings that have been abandoned. Prior to any future occupation of an abandoned structure, the Respondents shall inspect the sewage disposal system serving that dwelling and upgrade the system, if it is failing, in accordance with this Administrative Consent Order and the Groundwater Discharge Permit within two years of the inspection. Notwithstanding the foregoing, the Department may require the Respondents to upgrade a system within ninety (90) days of it is determined by the Department that the system poses an imminent threat to public health or the environment.

22. On or before August 1, 2002, the Respondents shall submit to the Department for its review and approval plans and specifications for the tight tanks that were scheduled in the tight tank plan and schedule as approved by the Department for installation on or before November 30, 2002 (the "2002 tight tanks").

23. On or before November 30, 2002, the Respondents shall complete the installation of the 2002 tight tanks and shall notify the Department in writing that the installation is complete.

24. On or before May 31, 2004, the Respondents shall submit to the Department for its review and approval an application for a groundwater discharge permit. Thereafter, the Respondents shall operate the SDI systems and tight tanks on the Site in accordance with the groundwater discharge permit and the plan approvals issued by the Department.

25. On or before May 31, 2003, the Respondents shall submit to the Department for its review and approval a report (the "SDI Report") evaluating the SDI systems installed on the Site in accordance with the scope of work approved by the Department and determining whether additional SDI systems should be installed on the Site and the reasons for this recommendation. In the event that the SDI Report recommends the installation of additional SDI systems and/or tight tanks, the SDI Report shall include a plan and schedule for their installation on or before November 30, 2004. The schedule shall provide for some of the SDI systems to be installed on or before November 30, 2003.

26. On or before August 1, 2003, the Respondents shall submit to the Department for its review and approval plans and specifications for the SDI systems recommended in the SDI Report as approved by the Department for installation by November 30, 2003 (the "2003 systems").

27. On or before August 1, 2003, the Respondents shall submit to the Department for its review and approval plans and specifications for the remaining tight tanks recommended in the tight tank plan and schedule or SDI Report as approved by the Department for installation by November 30, 2003 (the "2003 tight tanks").

28. On or before November 30, 2003, the Respondents shall complete the installation of the 2003 SDI systems and shall notify the Department in writing that the installation is complete.

29. On or before May 31, 2004, the Respondents shall submit to the Department for its review and approval as-built plans and request certificates of compliance for the 2003 SDI systems and the 2003 tight tanks.

30. On or before August 1, 2004, the Respondents shall submit to the Department for its review and approval plans and specifications for the SDI systems recommended in the SDI Report as approved by the Department for installation by November 30, 2004 (the "2004 SDI systems").

31. On or before August 1, 2004, the Respondent shall submit to the Department for its review and approval plans and specifications for any remaining tight tanks recommended in the SDI Report or for tanks which for any reason were not designed or installed in accordance with the schedule set forth in paragraphs 19-30 above as approved by the Department for installation by November 30, 2004 (the "2004 tight tanks").

32. On or before November 30, 2004, the Respondents shall complete the installation of the 2004 SDI systems and the 2004 tight tanks in accordance with the plans and specifications approved by the Department and shall notify the Department in writing that the installation is complete.

33. On or before December 31, 2004, the Respondents shall submit to the Department for its review and approval as-built plans and request certificates of compliance for the 2004 SDI systems and the 2004 tight tanks.

34. As of the effective date of this Administrative Consent Order, the parties acknowledge that the Town of Ipswich is considering a feasibility study to extend the municipal sewer system to the Great Neck section of the Town. Such a study may result in an extension of the municipal sewer system that would make connection to the municipal system a feasible remedy for the failing sewage disposal systems on the Site. In light of this study, the parties agree that if the Town of Ipswich appropriates the funds for an extension of the sewer system that makes it feasible to connect the dwellings on the Site to the municipal system, the Respondents can request to be excused from the obligation to design and install SDI systems and tight tanks on the Site provided the Respondents enter into an enforceable commitment acceptable to the Department to connect all failing systems to the municipal sewer system within five years and to

perform interim measures to mitigate the threat to public health and the environment posed by these systems until all the failing systems are connected to the municipal sewer system. The Department shall not unreasonably deny such a request provided it is accompanied by an acceptable, enforceable commitment as outlined herein.

35. This Administrative Consent Order does not constitute a permit. This Administrative Consent Order does not relieve the Respondents of their obligation to obtain all necessary permits and to comply with all relevant federal, state, and local statutes, ordinances, by-laws or regulations.

36. Each submission required by this Administrative Consent Order shall be submitted to:

David Ferris
Division of Wastewater Management
Department of Environmental Protection
Northeast Regional Office
205A Lowell Street
Wilmington, Massachusetts 01887

37. On January 2, April 1, July 1, and October 1 of each year, October 1, 2000, the Respondents shall submit to the Department a quarterly report detailing the actions it has taken to comply with this Administrative Consent Order during the previous three months and the actions it intends to take within the next three months.

38. The Respondents shall pay to the Commonwealth stipulated penalties for each day of each violation of a provision of this Administrative Consent Order, as follows: 1st day through 30th day of violation, \$250.00 per day for each violation; 31st day through 60th day of violation, \$500.00 per day for each violation; and 61st day and each day thereafter, \$1,000.00 per day for each violation. Stipulated penalties shall begin to accrue on the day a violation occurs and shall continue to accrue, until the Respondents correct the violation or complete performance, whichever is applicable. Even if violations are simultaneous, separate penalties shall accrue for each violation of each provision of the Administrative Consent Order. The payment of stipulated penalties shall not alter in any way the obligation of the Respondents to complete performance as required by the Administrative Consent Order.

39. All stipulated penalties shall be paid upon written demand within ten (10) days of the demand. The stipulated penalties set forth herein shall not preclude the Department from electing to pursue alternative remedies or alternative civil or criminal penalties which may be available by reason of the Respondents' failure to comply with the requirements of this Administrative Consent Order. In the event that the Department collects alternative penalties, the Respondents shall not be required to pay stipulated penalties pursuant to this Administrative Consent Order.

40. Payment of all penalties due under this Administrative Consent Order is necessary for the Respondents to come into compliance. In the event that the Respondents fail to pay in full any penalty on or before the date due under the Administrative Consent Order, the Respondents shall pay to the Commonwealth three times the amount of the penalty with costs plus interest in the balance due from the date of nonpayment. The rate of interest shall be the rate set forth in G.L. c. 231, § 6C. If a court judgment is necessary to execute a claim for penalties under this Administrative Consent Order, the Respondents shall consent to the entry of such judgment.

41. The Respondents shall pay all penalties due under this Administrative Consent Order by certified check, cashier's check, or money order payable to the Commonwealth. The Respondents shall print "ACO-NE-99-1017" on the face of the payment and mail to:

Commonwealth of Massachusetts
Department of Environmental Protection
Commonwealth Master Lockbox
P.O. Box 3584
Boston, MA 02241-3584

And shall deliver a copy of the payment to:

Madelyn Morris, Deputy Regional Director
Bureau of Resource Protection
Department of Environmental Protection
205A Lowell Street
Wilmington, MA 01887

42. In addition to being an Administrative Consent Order, this is also a Notice of Noncompliance pursuant to G.L. c. 21A, § 16 and 310 CMR 5.00. The Department and the Respondents agree that the deadlines set forth herein are reasonable. In the event that the Respondents fail to comply with any provision of this Administrative Consent Order, the Department shall have the right to seek further relief pursuant to G.L. c. 21, § 26-53, G.L. c. 21A, § 16 and 310 CMR 5.00 and 314 CMR 5.00.

43. Nothing in this Administrative Consent Order shall be construed or operate as barring, diminishing, or in any way affecting any legal or equitable right of the Department to issue any further order with respect to the subject matter covered by this Administrative Consent Order or in any way affecting any other claim, action, suit, cause of action or that the Department may have with respect thereto. Nothing in this Administrative Consent Order shall affect any legal or equitable right of the Department to take action in response to events of noncompliance not enumerated in this Administrative Consent Order.

44. This Administrative Consent Order shall apply to and be binding upon the Respondents, their employees, agents, consultants, contractors, successors, and assigns. The Respondents shall not violate this Administrative Consent Order and shall not allow their employees, agents, consultants, contractors, successors, or assigns to violate this Administrative Consent Order. A violation of this Administrative Consent Order by any of the foregoing shall constitute a violation of this Administrative Consent Order by the Respondents.

45. Failure on the part of the Department to complain of an action or inaction on the part of the Respondents shall not constitute a waiver by the Department of any provision of this Administrative Consent Order, nor shall a waiver by the Department of any provision of this Administrative Consent Order be construed as a waiver of any other provision. This Administrative Consent Order may be modified only by the written agreement of the parties. The Respondents may not assign their obligations under this Administrative Consent Order.

46. If, at any time, there is break out or backup from the existing sewage disposal systems on the Site, the Respondents shall notify the Department and the Ipswich Board of Health within 24 hours of such break out or backup by telephone or facsimile. Such notice shall be followed by formal written notice by mail within seven days of said breakout or backup.

47. If, at any time, the Department determines that the existing sewage disposal systems on the Site are operating in a manner which threatens the public health, safety, or the environment or threatens to cause damage to property, or creates a nuisance, the Department may require the Respondents to repair the affected system(s). The Respondents shall repair the affected system(s) as required by the Department pursuant to this paragraph.

48. The Respondents shall allow Department personnel to enter and inspect the Site at reasonable times without notice for the purpose of assessing compliance with this Administrative Consent Order and all applicable laws and regulations.

49. If any term or provision of this Administrative Consent Order or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Administrative Consent Order shall not be affected thereby, and each remaining term and provision shall be valid and enforceable to the fullest extent permitted by law, provided, however, that the Department may, in its sole discretion, elect to void the entire Administrative Consent Order in the event of such invalidity or unenforceability.

50. If any event occurs which causes or contributes or has the potential to cause or contribute to a delay in achieving compliance with a requirement of this Administrative Consent Order, the Respondents shall immediately notify the Department by contacting

David Ferris at the Northeast Regional Office by telephone and following such oral notice, by written notice, no later than seven days after learning of such event. Notice of such an event shall include the anticipated length and cause of the delay, the measures taken or to be taken to minimize the delay and the timetable for implementing the required measures. The Respondents shall adopt all reasonable measures to avoid and minimize any noncompliance. Failure of the Respondents to comply with the notice requirements of this paragraph shall render paragraph 51 void and of no effect as to the particular incident involved and shall constitute a waiver of the Respondents' right to request an extension of time for their obligations based on the incident.

51. If the Department determines that a delay has been caused by an event beyond the reasonable control of the Respondents, the Department may extend the performance date in question for a period of time equal to the delay caused or contributed to by the event. Events for which the Department may extend performance deadlines include (i) acts of God; (ii) acts of war; (iii) unanticipated delays due to accidents, strikes, freight embargoes, or other work stoppages; (iv) flood, fire, extreme weather conditions, or other natural disasters; and (v) delay in the obtaining permits and/or approvals from state, local, or federal authorities required to comply with the terms and conditions of this Administrative Consent Order, provided, however, that Respondents demonstrate to the satisfaction of the Department that best efforts were used to obtain such permits. Actions of the Respondents' officers, employees, agents, consultants, or contractors shall not be acts beyond the control of the Respondents. Unanticipated or increased costs or expenses associated with the implementation of the actions required under this Administrative Consent Order or changed financial circumstances shall under no circumstances serve as the basis for changes in this Administrative Consent Order or extension of time for the performance of the actions required under this Administrative Consent Order, and shall not constitute force majeure events.

52. This Administrative Consent Order constitutes the entire agreement between the Department and the Respondents with regard to the subject matter of this Administrative Consent Order. This Administrative Consent Order shall be effective on the date it is signed by the Department.

53. Each undersigned representative hereby certifies that he/she is fully authorized to enter into the terms and conditions of and to execute and legally bind the parties to this Administrative Consent Order.

54. No inspection of an individual septic system shall be required prior to a conveyance of property pursuant to 310 CMR 15.301 while this Administrative Consent Order or the Groundwater Discharge Permit is in effect.

55. Systems identified as RAC 4 do not need to be upgraded.

Issued on behalf of the Department of Environmental Protection,

By Madelyn Miano

Title DRD

Date 9/7/00

Consented to on behalf of the Feoffees of the Grammar School

By Donald F. Whiston

Title Chairman & Treasurer

Date 9/5/00