

**VIRGINIA:**

**BEFORE THE STATE HEALTH DEPARTMENT  
SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD**

**(i) In Re: Appeal of Mr.  
Christopher Farley.**

**ORDER**

**Findings of Fact.**

Based upon the entirety of the record of this matter and the documents, other evidence and argument offered by the parties, the Board makes the following findings of fact:

1. Mr. Farley is the owner of record of property identified as Section 2, Block G, Lot 17, Rock Springs Estates Subdivision. (the "Property").
2. The Property is approximately 2.2 acres in size and there is a 3 bedroom home on the lot. An onsite sewage disposal system was installed on the Property on November 11, 1999, and it failed in 2001. Mr. Farley currently lives in the house located on the Property. The Department believes that the system continues to fail today.

**SYSTEM INSTALLATION**

3. As part of the local subdivision process, Larry Madison, Sr., a private Soil Scientist, submitted a Soil Evaluation Form for Rock Springs Subdivision, Section II, Lot 17, to the Henrico County Health Department dated November 15, 1990. In his report, Mr. Madison described 4 soil profiles and identified an area on lot 17 that he described as suitable for "septic tank drainfield installation." He estimated a percolation rate of 40 minutes per inch, but did not make a recommendation for the installation depth of the drainfield trenches. Mr. Madison did not conduct a percolation test. See **EXHIBIT 1**.
4. On January 11, 1999, and again on January 12<sup>th</sup> and 13<sup>th</sup>, Henrico County Sanitarian Alan Stringer visited Lot 17 and conducted site and soil evaluations.

Mr. Stringer's Soil Evaluation Report contains descriptions of 8 soil profiles. See **EXHIBIT 3**.

5. On May 26, 1999, J.R. Walker & Co. filed an application for a sewage disposal system construction permit for Lot 17. See **EXHIBIT 2**.
6. Mr. Stringer completed his site and soil evaluation on May 28, 1999. Mr. Stringer approved Lot 17 for a drainfield to be placed at a depth of 36 inches. His report generally concurs with Mr. Madison's, except that Mr. Stringer estimated the percolation rate at 55 minutes per inch. See **EXHIBIT 3**.
7. The local health department issued a sewage disposal system construction permit on June 2, 1999. The location of the drainfield shown on the permit appears to match the location identified by Mr. Madison in 1990. See **EXHIBIT 4**.
8. Nuckols Enterprises, Inc. installed the system for J.R. Walker & Co. and filed the Completion Statement on November 10, 1999. Mr. Stringer inspected and approved the system installation the same day, and on February 17, 2000, F. Lewis Walker, Environmental Health Supervisor for Henrico County, issued an Operating Permit for the system. See **EXHIBITS 4 and 5**.

#### **SYSTEM FAILURE AND REPAIR PERMITS**

9. In a March 30, 2004, letter to Mr. Farley, Mr. Walker documented several site visits by the local health department to investigate the apparent failure of the system on Lot 17. See **EXHIBIT 6**. The letter outlines several events:
  - A. Mr. Stringer visited Lot 17 during the summer of 2001. Due to a typographical error, the letter states that the visit occurred in 2002. Mr. Stringer noted that the header lines, distribution box, and speed levelers had been damaged.
  - B. Nuckols Enterprises, Inc. replaced the damaged header lines and repaired the distribution box.
  - C. Mr. Walker and Mr. Stringer visited Lot 17 again in the summer of 2003 and observed that system was failing as evidenced by effluent breaking out on the surface. Mr. Walker and Mr. Stringer recommended that Mr. Farley grade the area to eliminate pooling over the drainfield area.
  - D. In March 2004, Mr. Walker and Mr. Stringer visited the property again and observed effluent on the ground surface over the lowest drainfield trench. Mr. Stringer adjusted the speed levelers in the distribution box, and the two men made several recommendations to Mr. Farley: continue to improve grading, determine if the fence had caused any damage to the drainfield trenches, and

divert the roof drains away from the drainfield area. Finally, Mr. Walker said that he and Mr. Stringer had further evaluated the soil conditions and that the topography and soils were "very good" and that they were "at a loss to understand" why the system was failing. See **EXHIBIT 6**.

#### **EVALUATION BY DEPARTMENT'S CONTRACT SOIL SCIENTIST**

10. Jay Conta, Certified Professional Soil Scientist and Research Associate with Virginia Tech on contract to the Department, evaluated the site and soil conditions on Lot 17 on June 1, 2004. Mr. Conta's notes from that visit are **EXHIBIT 7** and Mr. Conta's resume and experience are at **EXHIBIT 8**.
11. Mr. Conta evaluated two soil profiles from hand auger borings in or near the existing, failing drainfield. Significantly, he noted chroma-two-or-less gray mottles along root channels beginning in the first hole at 37 inches, and beginning at 9 inches in the second hole. In the first profile, Mr. Conta noted, "everything looks good except for grays along root lines."

#### **IV. REQUEST FOR INDEMNIFICATION**

12. Mr. Farley contacted Dwayne Roadcap, Program Manager with the Office of Environmental Health Services, by letter dated June 23, 2004. In his letter Mr. Farley detailed the history of problems with his septic system, beginning in the summer of 2001, and requested that Mr. Roadcap review his case to determine whether funds may be available to assist in correcting the problem. See **EXHIBIT 9**.
13. Mr. Roadcap responded to Mr. Farley in a letter dated June 28, 2004, providing Mr. Farley with information regarding the *Fund*. See **EXHIBIT 10**.
14. Mr. Farley filed an application for indemnification on July 20, 2004, asserting that his septic system failed within one year of the sewage system's construction. See **EXHIBIT 11**.
15. Mr. Farley provided the Department with evidence of the projected cost of a replacement system to be installed on the Property. That evidence indicated that the cost of a replacement system would be approximately \$17,135.00.
16. **EXHIBIT 12** is copy of the Department's policy (Guidance Memoranda and Policies # 123) for administering the *Fund*. **EXHIBIT 13** is a July 30, 2004, letter from Mr. Roadcap to Mr. Farley acknowledging receipt of Mr. Farley's application.

## INDEMNIFICATION DECISION

17. The State Health Commissioner, Robert B. Stroube, M.D., M.P.H., determined that Mr. Farley's system failed as a result of damage to the header lines, distribution box, and speed levelers, and from unsuitable soil conditions. **EXHIBIT 14** is a letter from Mr. Roadcap to Mr. Farley dated December 28, 2004, that details Dr. Stroube's decision.
18. Dr. Stroube found that a private party caused the damage to the header lines, distribution box, and speed levelers and that negligence on the part of the Department was not a factor in that damage. Dr. Stroube found that a private party did not report the gray colors along fine root channels, indicators of unsuitable soil conditions, on Lot 17 in 1990. He also found that the Department did not report the difficult-to-see gray colors in its evaluations of the soils on Lot 17. Because private parties contributed to the causes of the failure, Dr. Stroube, offered to reimburse Mr. Farley \$2207.50, or one-half the estimated cost of the failed system. See **EXHIBIT 14**.

## REQUEST FOR FORMAL HEARING

18. Mr. Farley requested a formal hearing before this Board to challenge the Department's decision. See **EXHIBIT 15**.

## APPLICABLE LAWS AND REGULATIONS

19. *Va. Code* §32.1-164 provides that the Board of Health's regulations "shall govern the collection, conveyance, transportation, treatment and disposal of sewage." The Board of Health lawfully promulgated the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 et seq., as amended July 2000, previously amended 1989, the "Regulations") governing the permitting and operation of onsite sewage systems.
20. The *Regulations* (12 VAC 5-610-350 as amended July 2000) define the failure of a sewage disposal system, stating:

the presence of raw or partially treated sewage on the ground's surface or in adjacent ditches or waterways or exposure to insects, animals or humans is prima facie evidence of such system failure and is deemed a violation of these regulations. Pollution of the groundwater or backup of sewage into plumbing fixtures may also indicate system failure.
21. The *Regulations* (12 VAC 5-610-490.A.2 as amended July 2000, §3.5.A.2 as amended 1989) state that "gray and/or gray mottlings indicate seasonal water tables for at least three weeks duration." The *Regulations* (12 VAC 5-610-120 as amended July 2000, § 1.12 as amended 1989) define "gray color" as chroma-2 or less on the Munsell Color Chart.

22. The *Regulations* (§ 4.30 as amended 1989) established the requirement for the vertical separation between the drainfield trench bottom and seasonal water table based upon percolation rate- two inches for a rate of 5 minutes per inch, 3 inches for a rate of 17, 12 inches for a rate of 46, 18 inches for a rate of 90, and 20 inches for a rate of 120.
23. *Va. Code* §32.1-164.1:01 established the Onsite Sewage Indemnification Fund to receive monies generated by a portion of the fees collected by the Department for onsite sewage system applications. The purpose of the Indemnification Fund is to assist any Virginia real property owner holding a valid septic tank permit when his or her system fails within three years of construction and the failure results from the negligence of the Department. The owner of a septic tank system permitted by the Department may request the Commissioner to review the circumstances of the onsite system failure and grant indemnification from the fund, if the septic system is permitted by the Department and it has failed within three years of construction.

### **Conclusions of Law.**

The Department respectfully asks the Board to uphold its decision for the following reasons:

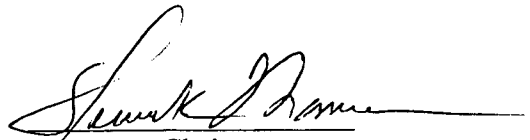
1. The *Code of Virginia* requires the owner of real property to meet the following three criteria for indemnification: (1) the system must be permitted, (2) the system must fail within three years of construction, and (3) the failure must result from the Department's negligence. It is undisputed that Mr. Farley's system was permitted by the Department and that it failed, as described in the *Regulations* (12 VAC 5-610-350, as amended July 2000) within three years of construction.
2. The Board of Health and the Department have not yet promulgated regulations for administering the *Fund*. However, since December, 2003, the Department has decided cases under the *Fund* pursuant to certain guiding principles and procedures contained in a guidance document (See **EXHIBIT 12, GMP #123**). The Department's guidance document contains several important principles relevant to this case:
  - A. "When the conditions for indemnification apply, the *Fund* will reimburse owners for the reasonable costs that the owner previously paid to install the failed system. When the actual costs of the failed system are unknown, the Commissioner shall use Appendix E to reimburse owners for the reasonable costs of the failed system. The Fund indemnifies owners for the cost of the system that failed, not the repair system or other costs." See **EXHIBIT 12, GMP #123, Page 2, Par. 2.**
  - B. "The *Fund* does not pay for or insure the negligent conduct of any private party, including private consultants, soil scientists, engineers, contractors..." See **EXHIBIT 12, GMP #123, Page 2, Par. 3.** The policy

also provides that “[c]ontributory negligence of the owner may compromise or reduce recovery from the *Fund*,” and that “[t]he Commissioner may approve or deny the application...and/or approve a partial award.” See **EXHIBIT 12**, GMP #123, Page 5.

- C. “The Fund does not reimburse owners for consequential damages not directly related to the installation of the sewage system.” See **EXHIBIT 12**, GMP #123, Page 2, Par. 4.
3. With respect to the third requirement of the *Code of Virginia* for indemnification, the Department found that the failure resulted from physical damage to certain components of the system (later corrected), and unsuitable soil conditions. The Department found that the depth to chroma-two-or less gray colors in the soil was insufficient to meet the minimum vertical separation established by the *Regulations* (§ 4.30, as amended 1989). ***Because both the Department and a private party failed to discover the unsuitable soil conditions and because the system was damaged by a private party or parties, Dr. Stroube, in accordance with the Department’s policy, reduced Mr. Farley’s potential recovery from the Fund by one-half.***
  4. Mr. Farley did not provide the Department with evidence of the actual cost of the failed system in his application. Therefore, Dr. Stroube, in accordance with the Department’s policy, estimated the cost at \$4415.00. One-half of the estimated cost is \$2207.50, the amount the Department has offered to reimburse Mr. Farley for the failed system.
  5. Mr. Farley provided the Department with evidence of the projected cost of a replacement system to be installed on the Property. That evidence indicated that the cost of a replacement system would be approximately \$17,135.00.
  6. Upon motion of a Member of the Board, duly seconded, the Board approves payment to Mr. Farley of \$8000.00 – approximately one-half the estimated cost of \$17,135.00 for a replacement system on the Property.

WHEREFORE, the Board concludes that the Commissioner shall pay Mr. Farley from the Fund a total of \$8,000.00. Mr. Farley is not eligible for reimbursement for attorneys’ fees and costs under CODE § 2.2-4030, which permits reimbursement of such moneys from an agency’s operating expenses to a party prevailing upon judicial review of an agency case decision pursuant to CODE § 2.2-4025, *et seq.*, or for certain proceedings otherwise exempted from the Virginia Administrative Process Act. See CODE §§ 2.2-4030(A); 2.2-4002, 2.2-4006, 2.2-4011 and 2.2-4018.

If Mr. Farley wishes to appeal this Order to Circuit Court, he should do so by: (1) filing a notice of appeal with Susan Sherertz, Sewage Handling and Disposal Appeal Review Board, within thirty (30) days of receipt of this Order; and (2) filing a Petition for Appeal with the Circuit Court within thirty (30) days of filing the Notice of Appeal as required by Rule 2A:4 of the Rules of the Supreme Court of Virginia.



Chairman

Dated: June 29, 2005

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