

**BEFORE THE**  
**OHIO ENVIRONMENTAL PROTECTION AGENCY**

**In the Matter of:**

**SHIRLEY MASSARELLI, Owner,  
(The Red Onion Bar/The Red  
Onion Party Center)**

**Case No. 09-DW-028  
Hearing Officer Wilson**

**REPORT AND RECOMMENDATION**

**Applicant.**

Attached hereto is a copy of the Hearing Officer's Report and Recommendation in this matter. Pursuant to Ohio Revised Code Section 119.09 and Ohio Administrative Code Rule 3745-47-24, any party to this matter may file written objections to the Report and Recommendation. Such objections must be filed with the Director of Environmental Protection within ten (10) days of the receipt of the Report and Recommendation. Written objections should be filed with:

Ohio Environmental Protection Agency  
Hearing Clerk - Fifth Floor Legal Section  
50 West Town Street, Suite 700  
P. O. Box 1049  
Columbus, Ohio 43216-1049

If objections are filed, an original plus two (2) copies are required.

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**Applicant.**

**OVERVIEW**

Applicant Shirley Massarelli is the owner and operator of the Red Onion Bar ("Bar") located at 2352 State Route 39 NE, New Philadelphia, Ohio, and the Red Onion Party Center ("Party Center") located at 2397 State Route 39 NE, New Philadelphia, Ohio. (Massarelli, Hearing Transcript (hereinafter "Tr."), pgs. 24-25.) Both the Bar and the Party Center are commercial establishments that operate separate "public water systems" ("PWS") providing "water for human consumption" as those terms are defined by Ohio law. (See Ohio Revised Code Section ("R.C.") 6109.01(A); Ohio Administrative Code Section ("O.A.C.") 3745-81-01(FFF); O.A.C. 3745-81-01(OO); and Massarelli, Tr. pgs. 25-26.) The PWS ID No. for the Bar is OH7936112. The PWS ID No. for the Party Center is OH7937812. (The Red Onion Party Center was previously known as The Place on 39.)

Both the Bar and the Party Center regularly served in excess of 25 people at least 60 days of the year. In fact the Bar had a capacity of 35-40 people, and served a capacity crowd on weekends and 25-35 people during the week. (Massarelli, Tr. pgs. 37-38.) The Party Center was both a restaurant and catering operation, which served large crowds throughout the year, including as many as 1,800 people in a single day. (Massarelli, Tr. pgs. 38-39.) Accordingly, Ms. Massarelli is a "supplier of water" as defined by O.A.C. 3745-81-01(TTT), and each of her PWS's is a "transient non-community water system" that receives water from "ground water". (See O.A.C. 3745-81-01(FFF)(2)(b) and O.A.C. 3745-81-01(JJ).)

As statutorily defined public water systems, both the Bar and the Party Center are required to obtain licenses to operate ("LTO") from the Ohio Environmental Protection Agency ("Ohio EPA"). (See R.C. 6109.21; O.A.C. 3745-84-02(A).) Pursuant to O.A.C. 3745-84-03(A), a PWS license to operate shall expire on the thirtieth (30th) of January in the year following its issuance. A complete application and fee for a LTO renewal is required to be submitted to the Director not less than thirty days before the expiration of the license, i.e., by December 30. (See O.A.C. 3745-84-03(D).) Ms. Massarelli submitted applications and fees to renew the 2009 LTO's for the Bar and for the Party Center in August of 2009. (Massarelli, Tr. pg. 40.)

On September 18, 2009, pursuant to R.C. 6109.21, the Director of the Ohio EPA proposed to deny both the Bar's 2009 LTO and the Party Center's 2009 LTO based upon the belief that the PWS's were not operated in substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder. The Director's proposed denial listed the failure to monitor for total coliform bacteria, nitrate, and nitrite, and the failure to comply with a September 29, 1999 Bilateral Compliance Agreement and an August 7, 2001 Director's Final Findings and Orders as the reasons for the denials.<sup>1</sup> (See the Director's September 18, 2009 Proposed Denial.) On October 16, 2009, Applicant Shirley Massarelli, by and through her attorney, filed a request for an adjudication hearing.

## **DISCUSSION**

### **A. Were the PWS's Operated in Substantial Compliance with R.C. Chapter 6109 and the Rules Adopted Thereunder?**

O.A.C. 3745-81-21 requires the PWS's at the Red Onion Bar and the Red Onion Party Center to sample for total coliform with one routine sample per quarter. Ms. Shirley Massarelli, owner of the Bar and the Party Center, failed to sample the drinking water at the Bar for total coliform during the following quarters:

April through June, 2000; July through September, 2000; April through June, 2003; October through December 2003; January through March, 2004, April through June, 2004; January through March, 2005, July through September, 2005, October through December, 2005; January through March, 2006; April through June, 2006; July through September, 2006; January through March, 2007, April through June, 2007; July through September, 2007; January through March, 2008; April through June, 2008; July through September, 2008; January through March, 2009; April through June, 2009; January through March, 2010; and April through June, 2010.

(See Staff's Exhibits P-24 through P-29; and Staff's Exhibits P-33 through P-51.)

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<sup>1</sup>While the Ohio EPA Staff has argued that one of the reasons that the LTO for the Red Onion Bar should be denied is because it was operated in violation of the September 29, 1999 Bilateral Compliance Agreement and the August 7, 2001 Director's Final Findings and Orders, this Report and Recommendation will be based solely upon whether Ms. Massarelli's monitoring at the Bar and the Party Center for total coliform, nitrates, and nitrites was sufficient to constitute substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder. It should be noted that Applicant's counsel has argued that Ms Massarelli has been deprived of her due process rights because the Staff of the Ohio EPA has submitted evidence of other violations beyond those listed in the Director's September 18, 2009 Proposed Denial. Because this Report and Recommendation is based solely upon whether Ms. Massarelli's sampling and monitoring at the Bar and the Party Center for total coliform, nitrates, and nitrites was sufficient to constitute substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder, this Report and Recommendation need not and does not address the Applicant's due process arguments.

Shirley Massarelli became the owner of the Red Onion Party Center in 2002. (Massarelli, Tr. pg. 25; Staff's Exhibit Q-1.) As stated above, O.A.C. 3745-81-21 also requires the public water system at the Party Center to sample for total coliform with one routine sample per quarter. Ms. Massarelli failed to sample for total coliform at the Party Center during the following quarters:

October through December, 2002; April through June, 2003; October through December, 2003; January through March, 2004; April through June, 2004; January through March, 2005; July through September, 2005; October through December, 2005; January through March, 2006; April through June, 2006; July through September, 2006; January through March, 2007; April through June, 2007; July through September, 2007; January through March, 2008; April through June, 2008; July through September, 2008; January through March, 2009; April through June, 2009; and January through March, 2010.

(See Staff's Exhibits Q-1 through Q-20.)

Pursuant to O.A.C. 3745-81-23, both the Bar and the Party Center PWS's are required to be sampled for nitrate once per year and nitrite once every nine years. Ms. Massarelli failed to complete the required yearly sampling for nitrate at the Bar in at least 2001, 2003, 2004, and 2005. (See Staff's Exhibits O-3 through O-7.) Ms. Massarelli also failed to complete the required sampling at the Bar for nitrite in 2005. (See Staff's Exhibit O-7.) Ms. Massarelli failed to complete the required yearly sampling for nitrate at the Party Center in 2002, 2003, 2004, 2005, 2006, and 2007. (See Staff's Exhibits N-1 through N-6.) Ms. Massarelli also failed to complete the required sampling at the Party Center for nitrite in 2005. (See Staff's Exhibit N-4.)

In light of the above-listed violations of sampling and monitoring requirements, the question is whether the Bar and/or the Party Center's PWS's were operated in substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder. The Ohio Tenth District Court of Appeals discussed what it meant to be in substantial compliance with a statute or rule in Fairfield Sanitary Landfill, Inc. v. Fairfield County District Board of Health (1990), 68 Ohio App.3d 761, 773-774, 589 N.E.2d 1334, 1342. The Court stated that substantial compliance exists when there is an absence of a material or significant deviation from a statute, rule, or other legal requirement. The Court of Appeals stated that "a deviation from a requirement is not substantial unless it defeats or undermines some purpose for which the requirement is imposed." *Id.* at 773-774.

The purpose of the federal Safe Drinking Water Act and Ohio's statutes and rules governing public water systems is to ensure that the public is protected from contaminants in the water they consume. (Courlas, Tr. pgs. 69-70.) Missing numerous quarterly samples for total coliform (often missing two consecutive samples) and/or missing yearly samples for nitrate and/or missing the sample for nitrite (only required once every nine years) at both the Bar and the Party Center constitutes a failure to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder. These

numerous deviations from law over the past 7-10 years at both the Red Onion Bar and the Red Onion Party Center are substantial and constitute a failure to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder because the failure to consistently and timely monitor for total coliform, nitrates, and nitrites defeats or undermines the purpose of the law to protect the public from consuming contaminated water. (See Fairfield Sanitary Landfill, Inc. v. Fairfield County District Board of Health (1990), 68 Ohio App.3d 761, 773-774, 589 N.E.2d 1334, 1342.)

**B. If the PWS's Were Not Operated in Substantial Compliance with R.C. Chapter 6109 and the Rules Adopted Thereunder, What Action Should the Director Take?**

The Ohio EPA Staff argues that because Ms. Massarelli has failed to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder, the Director should not only deny both the Red Onion Bar's and the Red Onion Party Center's 2009 renewal applications pursuant to R.C. 6109.21(B), but the Director should also prohibit Ms. Massarelli from filing another application for a LTO for either the Bar or the Party Center for a period of five years thereafter. The Ohio EPA Staff relies on O.A.C. 3745-84-06(C) to make its argument that the Director should prohibit Ms. Massarelli from submitting another application for five years. The problem with the Ohio EPA Staff's reliance on O.A.C. 3745-84-06(C) is that O.A.C. 3745-84-06(C) is not authorized by R.C. 6109.21 and that O.A.C. 3745-84-06(C) is in conflict with R.C. 6109.21(B).

R.C. 6109.21(A) states in pertinent part as follows:

"The director shall adopt, and may amend and rescind, rules in accordance with Chapter 119. of the Revised Code establishing procedures governing and information to be included on applications for licenses and license renewals under this section."

R.C. 6109.21(B) states in pertinent part as follows:

"Not later than thirty days after receiving a completed application and the appropriate license fee for a license renewal under division (A) of this section, the director shall do one of the following: (1) Issue the license renewal for the public water system; (2) Issue the license renewal subject to terms and conditions that the director determines are necessary to ensure compliance with this chapter and rules adopted under it; (3) Deny the license renewal if the director finds that the public water system was not operated in substantial compliance with this chapter and rules adopted under it."

R.C. 6109.21(C) states in pertinent part as follows:

"The director may suspend or revoke a license or license renewal issued under this section if the director finds that the public water system was not operated in

substantial compliance with this chapter and rules adopted under it. The director shall adopt, and may amend and rescind, rules in accordance with Chapter 119. of the Revised Code governing such suspensions and revocations.”

O.A.C. 3745-84-06(C) states in pertinent part as follows:

“Revocation or denial of renewal of a license to operate shall be for a time period specified by the director, but no less than one year and no more than five years. A public water system which has had a license revoked or denied renewal may, after the period of revocation or denial has expired, submit an application for renewal of the license to operate and the appropriate fee in accordance with rule 3745-84-03 of the Administrative Code. ...”

While R.C. 6109.21(A) specifically requires the Director to adopt, and allows the Director to amend and rescind, rules regarding procedures governing and information to be included on applications, and while R.C. 6109.21(C) specifically requires the Director to adopt, and allows the Director to amend and rescind, rules governing the suspension and revocation of licenses and license renewals, R.C. 6109.21 does not authorize the Director to adopt, amend, or rescind rules governing the denial of license renewals.

While R.C. 6109.21(C) requires the Director to adopt rules regarding suspension and revocation and while it would be reasonable to adopt a rule such as O.A.C. 3745-84-06(C) to put a minimum and maximum length of time on a suspension or revocation, it does not make sense to adopt a rule putting a minimum and a maximum length of time on a denial. A denial is a one-time event. How can a denial last for a length of time between one and five years? Essentially, what O.A.C. 3745-84-06(C) has done is use the term “denial”, instead of the term “suspension”, so that a denial of a license renewal becomes the legal equivalent of a suspension. Such is not authorized by R.C. 6109.21.

Besides not being authorized by R.C. 6109.21, O.A.C. 3745-84-06(C) is actually in conflict with R.C. 6109.21(B). Because R.C. 6109.21(B) specifically lists the only three options the Director has regarding the issuance or denial of a license renewal, and because R.C. 6109.21(B) does not contain the option of denying a renewal application and also prohibiting a licensee from filing another application for a period of one to five years, O.A.C. 3745-84-06(C) is in conflict with R.C. 6109.21(B). Whenever a rule and a statute are in conflict, the statute supersedes the rule on substantive issues. State v. Heyden (1992), 81 Ohio App.3d 27, 610 N.E.2d 1067. Therefore, the Director’s action with regard to Ms. Massarelli’s license renewals should be governed by R.C. 6109.21(B).<sup>2</sup> The Director can issue the license, issue the license subject to terms and

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<sup>2</sup> To be perfectly clear, I am not concluding that O.A.C. 3745-84-06(C) is invalid. As the Hearing Officer in this case, my function is not to decide the validity of the Ohio EPA’s rules. My function is to make a report and recommendation to the Director based upon the facts and law applicable to a particular case. I am simply recommending that the Director follow R.C. 6109.21(B) and not feel that his final action must be guided by O.A.C. 3745-84-06(C) or that he is compelled by O.A.C. 3745-84-06(C) to deny the LTO’s and also prohibit Ms. Massarelli from applying for a LTO for 1 to 5 years after the denial. Given the circumstances of this case, I believe that


conditions, or deny the license. R.C. 6109.21(B) does not grant the Director authority to deny the license renewal and in addition prohibit the Applicant from submitting another application for a period of one to five years. If the Director finds that Ms. Massarelli has not operated the subject public water systems in substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder, then the Director should follow the clear language in R.C. 6109.21(B) and simply deny the license renewal.<sup>3</sup>

## **CONCLUSION**

Because of the significant and substantial deviations from the law regarding sampling and monitoring for total coliform, nitrates, and nitrites at both the PWS's at the Red Onion Bar and the Red Onion Party Center, and because these significant and substantial deviations constitute a failure to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder, the Director is required by R.C. 6109.21(B)(3) to deny the Applicant's license to operate renewal applications for the PWS's at both the Bar and the Party Center. Because R.C. 6109.21(B) only allows the Director to "deny the license renewal" and does not authorize the Director to prohibit an applicant from applying for a license for one to five years after such a denial; because R.C. 6109.21(B) does not authorize the Ohio EPA to promulgate rules regarding his issuance or denial of license renewals; and because O.A.C. 3745-84-06(C) is in conflict with R.C. 6109.21(B), the Director should follow R.C. 6109.21(B) and simply deny the license renewal applications and not prohibit the applicant from applying for a license to operate for a period of one to five years thereafter.

**BASED UPON THE FOREGOING**, the Director should issue a final action denying Shirley Massarelli's applications for the 2009 renewal LTO's for the Red Onion Bar and for the Red Onion Party Center.

The attached Findings of Fact, Conclusions of Law, and Recommendations are hereby submitted to the Director for his consideration.

  
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W. SAMUEL WILSON, Esq.  
Presiding Hearing Officer

12-16-10  
Date

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3745-84-06(C)'s attempt to regulate license renewal denials is not authorized by R.C. 6109.21 and is in conflict with R.C. 6109.21(B).

<sup>3</sup> While it is not a legally significant argument, I will note that counsel for the Applicant has argued that denying the license renewal and prohibiting Applicant from filing another application for five years would be a deathblow to Applicant's businesses.

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**Case No. 09-DW-028**

**SHIRLEY MASSARELLI, Owner,  
(The Red Onion Bar/The Red  
Onion Party Center)**

**REPORT AND RECOMMENDATION**

**Applicant.**

**FINDINGS OF FACT**

1. Applicant Shirley Massarelli is the owner and operator of the Red Onion Bar ("Bar") located at 2352 State Route 39 NE, New Philadelphia, Ohio. (Massarelli, Hearing Transcript (hereinafter "Tr."), pgs. 24-25.)
2. Applicant Shirley Massarelli is also the owner and operator of the Red Onion Party Center ("Party Center") located at 2397 State Route 39 NE, New Philadelphia, Ohio. (Massarelli, Tr, pgs. 24-25.)
3. The Public Water System ("PWS") ID No. for the Bar is OH7936112.
4. The PWS ID No. for the Party Center is OH7937812. (The Red Onion Party Center was previously known as The Place on 39.)
5. The Bar is a commercial establishment that provides "water for human consumption" as that term is defined by Ohio law. (See Ohio Administrative Code Section ("O.A.C.") 3745-81-01(OO); and Massarelli, Tr. pgs. 25-26.)
6. The Party Center is a commercial establishment that provides "water for human consumption" as that term is defined by Ohio law. (See O.A.C 3745-81-01(OO); and Massarelli, Tr. pgs. 25-26.)
7. The Bar regularly served in excess of 25 people at least 60 days of the year.
8. In fact the Bar had a capacity of 35-40 people, and served a capacity crowd on weekends and 25-35 people during the week. (Massarelli, Tr. pgs. 37-38.)
9. The Party Center regularly served in excess of 25 people at least 60 days of the year.
10. The Party Center was both a restaurant and catering operation, which served large crowds throughout the year, including as many as 1,800 people in a single day. (Massarelli, Tr. pgs. 38-39.)



11. Ms. Massarelli submitted applications and fees to renew the 2009 licenses to operate ("LTO") for the Bar and for the Party Center in August of 2009. (Massarelli, Tr. pg. 40.)
12. On September 18, 2009, the Director of the Ohio Environmental Protection Agency ("Director") issued a proposed action denying both the Bar's 2009 LTO and the Party Center's 2009 LTO.
13. The Director's September 18, 2009 proposed denial listed the failure to monitor for total coliform bacteria, nitrate, and nitrite, and the failure to comply with a September 29, 1999 Bilateral Compliance Agreement and an August 7, 2001 Director's Final Findings and Orders as the reasons for the denials.
14. On October 16, 2009, Applicant Shirley Massarelli, by and through her attorney, filed a request for an adjudication hearing.
15. Ms. Shirley Massarelli, owner of the Bar failed to sample the drinking water at the Bar for total coliform during the following quarters:

April through June, 2000; July through September, 2000; April through June, 2003; October through December 2003; January through March, 2004, April through June, 2004; January through March, 2005, July through September, 2005, October through December, 2005; January through March, 2006; April through June, 2006; July through September, 2006; January through March, 2007, April through June, 2007; July through September, 2007; January through March, 2008; April through June, 2008; July through September, 2008; January through March, 2009; April through June, 2009; January through March, 2010; and April through June, 2010.

(See Staff's Exhibits P-24 through P-29; and Staff's Exhibits P-33 through P-51.)

16. Ms. Massarelli failed to complete yearly sampling for nitrate at the Bar in at least 2001, 2003, 2004, and 2005. (See Staff's Exhibits O-3 through O-7.)
17. Ms. Massarelli also failed to complete the sampling at the Bar for nitrite in 2005. (See Staff's Exhibit O-7.)
18. Shirley Massarelli became the owner of the Red Onion Party Center in 2002. (Massarelli, Tr. pg. 25; Staff's Exhibit Q-1.)
19. Ms. Massarelli failed to sample for total coliform at the Party Center during the following quarters:

October through December, 2002; April through June, 2003; October through December, 2003; January through March, 2004; April through June, 2004;

January through March, 2005; July through September, 2005; October through December, 2005; January through March, 2006; April through June, 2006; July through September, 2006; January through March, 2007, April through June, 2007; July through September, 2007; January through March, 2008, April through June, 2008; July through September, 2008; January through March, 2009; April through June, 2009; and January through March, 2010.

(See Staff's Exhibits Q-1 through Q-20.)

20. Ms. Massarelli failed to complete the yearly sampling for nitrate at the Party Center in 2002, 2003, 2004, 2005, 2006, and 2007. (See Staff's Exhibits N-1 through N-6.)

21. Ms. Massarelli also failed to complete the sampling at the Party Center for nitrite in 2005. (See Staff's Exhibit N-4.)

22. The Ohio EPA Staff argues that because of the sampling failures listed in the preceding seven paragraphs and because of a number of other violations, the Director should not only deny both the Red Onion Bar's and the Red Onion Party Center's renewal applications, but the Director should also prohibit Ms. Massarelli from filing another application for a LTO for either the Bar or the Party Center for a period of five years thereafter.

23. The legal basis for the Ohio EPA Staff's argument that the Director should prohibit Ms. Massarelli from submitting another application for five years is O.A.C. 3745-84-06(C).

24. Ohio Revised Code Section ("R.C.") 6109.21(B) states in pertinent part as follows:

"Not later than thirty days after receiving a completed application and the appropriate license fee for a license renewal under division (A) of this section, the director shall do one of the following: (1) Issue the license renewal for the public water system; (2) Issue the license renewal subject to terms and conditions that the director determines are necessary to ensure compliance with this chapter and rules adopted under it; (3) Deny the license renewal if the director finds that the public water system was not operated in substantial compliance with this chapter and rules adopted under it."

25. Counsel for the Applicant argues that the issuance of a final action denying Ms. Massarelli's LTO's and prohibiting Ms. Massarelli from filing another application for a LTO for a period of five years thereafter would deal a deathblow to Ms. Massarelli's businesses.

26. Counsel for the Applicant argues that Ms. Massarelli has been deprived of her due process rights because the Staff of the Ohio EPA has submitted evidence of other violations beyond those listed in the Director's September 18, 2009 Proposed Denial.

27. This Report and Recommendation is based solely upon the allegations listed in the Director's September 18, 2009 Proposed Denial and, therefore, this Report and Recommendation need not and does not address the Applicant's due process arguments.

### **CONCLUSIONS OF LAW**

1. Both the Bar and the Party Center are commercial establishments that operate separate "public water systems" providing "water for human consumption" as those terms are defined by Ohio law. (See R.C. 6109.01(A); O.A.C. 3745-81-01(FFF); O.A.C. 3745-81-01(OO); and Massarelli, Tr. pgs. 25-26.)

2. Ms. Massarelli is a "supplier of water" as defined by O.A.C. 3745-81-01(TTT).

3. Each of Ms. Massarelli's PWS's is a "transient non-community water system" that receives water from "ground water". (See O.A.C. 3745-81-01(FFF)(2)(b) and O.A.C. 3745-81-01(JJ).)

4. As statutorily defined PWS's, both the Bar and the Party Center are required to obtain annual LTO's from the Ohio Environmental Protection Agency ("Ohio EPA"). (See R.C. 6109.21; O.A.C.3745-84-02(A).)

5. This case involves the Director's September 18, 2009 Proposed Denial of Shirley Massarelli's 2009 LTO's and whether the Director is authorized by R.C. 6109.21( B ) to deny the LTO's and, if so, whether the Director is authorized to prohibit Ms. Massarelli from applying for a LTO for five years after the denial.

6. O.A.C. 3745-81-21 requires the PWS's at the Red Onion Bar and the Red Onion Party Center to sample for total coliform with one routine sample per quarter.

7. Pursuant to O.A.C. 3745-81-23, both the Bar and the Party Center PWS's are required to be sampled for nitrate once per year and nitrite once every nine years.

8. In light of the sampling violations listed in Paragraphs 15 through 21 of the Findings of Fact, the Director must determine whether the PWS's at the Bar and the Party Center were operated in substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder.

9. In Fairfield Sanitary Landfill, Inc.v.Fairfield County District Board of Health (1990), 68 Ohio App.3d 761, 773-774, 589 N.E.2d 1334, 1342, the Ohio Tenth District Court of Appeals discussed what it meant to be in substantial compliance with a statute or rule. The Court stated that a person is in substantial compliance when there is an

absence of a material or significant deviation from a statute, rule, or other legal requirement. The Court of Appeals stated that "a deviation from a requirement is not substantial unless it defeats or undermines some purpose for which the requirement is imposed." *Id* at 773-774.

10. The purpose of the federal Safe Drinking Water Act and Ohio's statutes and rules governing public water systems is to ensure that the public is protected from contaminants in the water they consume.

11. Ms. Masserelli's failure to take numerous quarterly samples for total coliform (often missing two consecutive samples) and/or failure to take numerous yearly samples for nitrate and/or failure to take the samples for nitrite (only required once every nine years) at both the Bar and the Party Center constitutes a failure to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder.

12. These numerous deviations from law over the past 7-10 years at both the Red Onion Bar and the Red Onion Party Center are substantial because the Applicant's failure to consistently and timely monitor for total coliform, nitrates, and nitrites defeats or undermines the purpose of the law to protect the public from consuming contaminated water. (See Fairfield Sanitary Landfill, Inc. v. Fairfield County District Board of Health (1990), 68 Ohio App.3d 761, 773-774, 589 N.E.2d 1334, 1342.)

13. Because of the significant and substantial deviations from the law regarding sampling and monitoring total coliform, nitrates, and nitrites at both the PWS's at the Red Onion Bar and the Red Onion Party Center, and because these significant and substantial deviations constitute a failure to substantially comply with R.C. Chapter 6109 and the rules thereunder, the Director is required by R.C. 6109.21(B)(3) to deny the Applicant's license to operate renewal applications for the PWS's at both the Bar and the Party Center.

14. While R.C. 6109.21(A) specifically requires the Director to adopt, and allows the Director to amend and rescind, rules regarding procedures governing and information to be included on applications, and while R.C. 6109.21(C) specifically requires the Director to adopt, and allows the Director to amend and rescind, rules governing the suspension and revocation of licenses and license renewals, R.C. 6109.21 does not authorize the Director to adopt, amend, or rescind rules governing the denial of license renewals.

15. While R.C. 6109.21(C) requires the Director to adopt rules regarding suspension and revocation and while it would be reasonable to adopt a rule such as O.A.C. 3745-84-06(C) to put a minimum and maximum length of time on a suspension or revocation, a rule putting a minimum and a maximum length of time on a denial is not authorized by R.C. 6109.21.

16. R.C. 6109.21(B) specifically addresses the denial of license renewals. According to R.C. 6109.21(B), the Director can issue the license, issue the license subject to terms and conditions, or deny the license.

17. Because R.C. 6109.21(B) specifically lists the only three options the Director has regarding the issuance or denial of a license renewal, and because R.C. 6109.21(B) does not contain an option allowing the director to deny a renewal application and also prohibit a licensee from filing another application for a period of one to five years, O.A.C. 3745-84-06(C) is in conflict with R.C. 6109.21(B).

18. When a rule and a statute are in conflict, the statute supersedes the rule on substantive issues. State v. Heyden (1992), 81 Ohio App.3d 27, 610 N.E.2d 1067.

19. The Director's action with regard to the issuance or denial of Ms. Massarelli's license renewals should be governed by R.C. 6109.21(B).

20. Because R.C. 6109.21(B) only allows the Director to "deny the license renewal" and does not authorize the Director to prohibit an applicant from applying for a license for one to five years after such a denial; because R.C. 6109.21(B) does not authorize the Director to promulgate any rules regarding his issuance or denial of license renewals; and because O.A.C. 3745-84-06(C) is in conflict with R.C. 6109.21(B), the Director should follow R.C. 6109.21(B) and simply deny the license renewal applications and not prohibit the applicant from applying for a license to operate for a period of one to five years thereafter.

21. The Director should issue a final action denying Shirley Massarelli's applications for the 2009 renewal LTO's for the Red Onion Bar and for the Red Onion Party Center.

### **RECOMMENDATIONS**

1. The Director should dismiss Ohio EPA Case No. 09-DW-028.

2. The Director should issue a final action denying Shirley Massarelli's application for a 2009 license to operate the public water system at The Red Onion Bar (PWS ID. #OH7936112), located at 2352 State Route 39 NE, New Philadelphia, Ohio. (The Director should merely deny the 2009 license to operate and not prohibit Ms. Massarelli from submitting another application for a period of five years.)

3. The Director should issue a final action denying Shirley Massarelli's application for a 2009 license to operate the public water system at The Red Onion Party Center (PWS ID. #OH7937812), located at 2397 State Route 39 NE, New Philadelphia, Ohio. (The Director should merely deny the 2009 license to operate and not prohibit Ms. Massarelli from submitting another application for a period of five years.)

Sam Wilson  
W. SAMUEL WILSON, Esq.  
Presiding Hearing Officer

12-16-10  
Date

SHIRLEY MASSARELLI, OWNER  
(The Red Onion/The Red Onion Party Center)  
Case No. 09-DW-28

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