

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

OFFICE OF COMPLIANCE & INSPECTION

**IN RE: J. ALBANESE CONSTRUCTION COMPANY, INC. FILE NO.: FW 14-14
NORTH-EASTERN TREE SERVICE, INC.**

NOTICE OF VIOLATION

A. Introduction

Pursuant to Sections 42-17.1-2(21) and 42-17.6-3 of the Rhode Island General Laws, as amended, ("R.I. Gen. Laws") you are hereby notified that the Director of the Department of Environmental Management (the "Director" of "DEM") has reasonable grounds to believe that the above-named parties (the "Respondents") have violated certain statutes and/or administrative regulations under the DEM's jurisdiction.

B. Facts

- (1) The property is located west of Old Pocasset Road, near the intersection of Old Pocasset Road and Woodlake Drive in the town of Johnston, Rhode Island (the "Property").
- (2) On 1 March 2013, J. Albanese Construction Company, Inc. ("Albanese") entered into a contract with Briarcliffe Gardens Realty, LLC ("Briarcliffe") to construct a private sewerage system from the Briarcliffe facility located on Old Pocasset Road to the town of Johnston sewerage system (the "Project").
- (3) On 24 May 2013, the DEM issued a letter of approval to Briarcliffe on behalf of Medical Homes of Rhode Island, Inc. ("MHRI") for the Project (the "Approval"). The Approval was issued in response to an application and supporting Engineering Study that included a set of construction plans for the Project (the "Approved Plans") that was submitted to the DEM.
- (4) The Approval limited the work for the Project to only the area shown on the Approved Plans.
- (5) On 31 December 2013, the DEM received a complaint concerning the cutting of trees and excavation within freshwater wetlands on the Property.

- (6) On 31 December 2013, the DEM contacted Albanese and spoke with Ray Albanese regarding the complaint. Mr. Albanese stated that:
 - (a) He had a set of the Approved Plans in front of him;
 - (b) He could see where the freshwater wetland edge was located; and
 - (c) He is working well outside of this edge near the road.
- (7) On 17 January 2014, the DEM received a second complaint concerning the cutting of trees within freshwater wetlands on the Property.
- (8) On 21 January 2014, the DEM inspected the Property. The inspection revealed the clearing and grubbing of wetlands on the Property north and south of Dry Brook within Swamp, Perimeter Wetland associated with the Swamp, and Riverbank Wetland associated with the Brook in noncompliance with the Approval. This activity resulted in the unauthorized alteration of approximately 6,500 square feet of freshwater wetlands (the "Altered Wetlands").
- (9) On 27 January 2014, the DEM received a freshwater wetlands application from MHRI (application number 14-0017) for the Project (the "Application"). The plans submitted with the Application proposed restoration of the Altered Wetlands.
- (10) On 14 March 2014, the DEM approved the Application (the "Wetland Approval").
- (11) On 18 June 2014 and 3 December 2014, the DEM inspected the Property. The inspections revealed that the freshwater wetlands were restored in accordance with the Wetland Approval.
- (12) On 9 April 2015, the DEM received an affidavit signed by Kyle Naylor, the Vice President of Operations for MHRI. Mr. Naylor included the following statements in his affidavit:
 - (a) As part of the Project, some trees and other vegetation were supposed to be cleared and some were designated to remain;
 - (b) On the first day of work, one crew from NORTH-EASTERN TREE SERVICE, INC. ("NE Tree") respected the trees that were designated to remain;
 - (c) On the second day of work, a second crew from NE Tree improperly cut down trees that had been designated to remain;
 - (d) Upon observing this activity, the affiant contacted Albanese; and

- (e) He requested a copy of the subcontract between Albanese and NE Tree, but was advised that there was no formal contract between the two companies.
- (13) On 15 May 2015, the DEM received an affidavit signed by Akshay K. Talwar, the CEO and sole owner of Briarcliffe and MHRI. Mr. Talwar included the following statements in his affidavit:
- (a) He was with Mr. Naylor at several meetings with town officials, Diprete Engineering, Albanese and others;
 - (b) He understood that several trees along the town's right of way ("ROW") along Old Pocasset Road were to be cut down, but that several trees and bushes closer to the unnamed stream along the ROW were not to be disturbed;
 - (c) This understanding was reinforced after NE Tree completed its work and felled trees along the ROW but had conspicuously left untouched a series of trees and bushes adjacent to the stream near the bridge. When the affiant inquired of Mr. Naylor as to the reason for this, he was told that it was at the direction of the engineers that these trees and plantings be left untouched. He was also further informed that a second crew would come and remove the trees that had previously been cut from the ROW;
 - (d) He had a clear recollection of leaving the site the following day with the trees and bushes near the bridge adjacent to the stream intact and of returning to the site and being startled at seeing those trees and bushes removed; and
 - (e) He brought this to Mr. Naylor's attention who, after speaking with Ray Albanese, informed Mr. Talwar that the second NE Tree crew that had come to merely remove the trees assumed incorrectly that the prior crew had simply run out of time to cut down the remaining trees near the stream and that in addition to removing the trees that had been previously cut down proceeded to cut down and remove the trees near the stream that had been left standing.

C. Violation

Based on the foregoing facts, the Director has reasonable grounds to believe that you have violated the following statutes and/or regulations:

- (1) **R.I. Gen. Laws Section 2-1-21** – which prohibits activities which may alter freshwater wetlands without a permit from the DEM.
- (2) **DEM's Freshwater Wetland Regulations, Rule 5.01** – which prohibits activities which may alter freshwater wetlands without a permit from the DEM.

D. Penalty

- (1) Pursuant to R.I. Gen. Laws Section 42-17.6-2, the following administrative penalty, as more specifically described in the attached penalty summary and worksheets, is hereby ASSESSED, jointly and severally, against each named respondent:

\$5,000

- (2) The proposed administrative penalty is calculated pursuant to the DEM's *Rules and Regulations for Assessment of Administrative Penalties*, as amended, and must be paid to the DEM within 30 days of your receipt of this Notice of Violation ("NOV"). Payment shall be in the form of a certified check, cashiers check or money order made payable to the "General Treasury - Water & Air Protection Program Account" and shall be forwarded to the DEM Office of Compliance and Inspection, 235 Promenade Street, Suite 220, Providence, Rhode Island 02908-5767.
- (3) Penalties assessed against the Respondents in the NOV are penalties payable to and for the benefit of the State of Rhode Island and are not compensation for actual pecuniary loss.

E. Right to Administrative Hearing

- (1) Pursuant to R.I. Gen. Laws Chapters 42-17.1, 42-17.6, 42-17.7 and 42-35, each named respondent is entitled to request a hearing before the DEM's Administrative Adjudication Division regarding the allegations, orders and/or penalties set forth in Sections B through D above. All requests for hearing MUST:
- (a) Be in writing. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.6-4(b);
- (b) Be **RECEIVED** by the DEM's Administrative Adjudication Division, at the following address, within 20 days of your receipt of this NOV. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.7-9:

Administrative Clerk
DEM - Administrative Adjudication Division
One Capitol Hill, 2ND Floor
Providence, RI 02903

- (c) Indicate whether you deny the alleged violations and/or whether you believe that the administrative penalty is excessive. See R.I. Gen. Laws Section 42-17.6-4(b); **AND**

- (d) State clearly and concisely the specific issues which are in dispute, the facts in support thereof and the relief sought or involved, if any. See Rule 7.00(b) of the DEM's *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters*.
- (2) A copy of each request for hearing must also be forwarded to:
- Gary Powers, Esq.
DEM - Office of Legal Services
235 Promenade Street, 4TH Floor
Providence, RI 02908-5767
- (3) Each named respondent has the right to be represented by legal counsel at all administrative proceedings relating to this matter.
- (4) Each respondent must file a separate and timely request for an administrative hearing before the DEM's Administrative Adjudication Division as to each violation alleged in the written NOV. If any respondent fails to request a hearing in the above-described time or manner with regard to any violation set forth herein, then the NOV shall automatically become a Final Compliance Order enforceable in Superior Court as to that respondent and/or violation and any associated administrative penalty proposed in the NOV shall be final as to that respondent. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and (vi) and 42-17.6-4(b) and (c).
- (5) Failure to comply with the NOV may subject each respondent to additional civil and/or criminal penalties.
- (6) The NOV does not preclude the Director from taking any additional enforcement action nor does it preclude any other local, state, or federal governmental entities from initiating enforcement actions based on the acts or omissions described herein.

If you have any legal questions, you may contact (or if you are represented by an attorney, please have your attorney contact) Gary Powers, Esq. at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to David E. Chopy of the DEM's Office of Compliance and Inspection at (401) 222-1360 ext. 7400.

Please be advised that any such inquiries do not postpone, eliminate, or otherwise extend the need for a timely submittal of a written request for a hearing, as described in Section E above.

FOR THE DIRECTOR

By: _____
David E. Chopy, Chief
DEM Office of Compliance and Inspection

Date: _____

CERTIFICATION

I hereby certify that on the _____ day of _____
the within Notice of Violation was forwarded by Certified Mail to each of the following:

J. Albanese Construction Company, Inc.
c/o June M. Albanese, Registered Agent
18 Mountain Laurel Lane
Scituate, RI 02857

NORTH-EASTERN TREE SERVICE, INC.
c/o Michael Sepe, Registered Agent
1000 Pontiac Avenue
Cranston, RI 02920



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, WETLANDS
 File No.: FW 14-14
 Respondents: J. Albanese Construction Company, Inc. and NORTH-EASTERN TREE SERVICE, INC.

GRAVITY OF VIOLATION					
SEE ATTACHED "PENALTY MATRIX WORKSHEETS."					
VIOLATION No. & CITATION	APPLICATION OF MATRIX		PENALTY CALCULATION		AMOUNT
	Type	Deviation	Penalty from Matrix	Number or Duration of Violations	
C (1) and (2) – Alteration of Swamp, Perimeter Wetland, and Riverbank Wetland	Type (\$10,000 Max. Penalty)*	Moderate	\$5,000	1 violation	\$5,000
SUB-TOTAL					\$5,000

*Maximum Penalties represent the maximum penalty amounts per day, per violation.

ECONOMIC BENEFIT FROM NONCOMPLIANCE
<p>COSTS OF COMPLIANCE, EQUIPMENT, O&M, STUDIES OR OTHER DELAYED OR AVOIDED COSTS, INCLUDING INTEREST AND/OR ANY COMPETITIVE ADVANTAGE DERIVED OVER ENTITIES THAT ARE IN COMPLIANCE. NOTE: ECONOMIC BENEFIT MUST BE INCLUDED IN THE PENALTY UNLESS:</p> <ul style="list-style-type: none"> - THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE; OR - THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED.
<p>A review of the record in this matter has revealed that the Respondents have either enjoyed no identifiable benefit from the noncompliance alleged in this enforcement action or that the amount of economic benefit that may have resulted cannot be quantified.</p>

COST RECOVERY
<p>ADDITIONAL OR EXTRAORDINARY COSTS INCURRED BY THE DIRECTOR DURING THE INVESTIGATION, ENFORCEMENT AND RESOLUTION OF AN ENFORCEMENT ACTION (EXCLUDING NON-OVERTIME PERSONNEL COSTS), FOR WHICH THE STATE IS NOT OTHERWISE REIMBURSED.</p>
<p>A review of the record in this matter has revealed that the DEM has not incurred any additional or extraordinary costs during the investigation, enforcement and resolution of this enforcement action (excluding non-overtime personnel costs), for which the State is not otherwise reimbursed.</p>

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$5,000

PENALTY MATRIX WORKSHEET

CITATION: *Alteration of Swamp, Perimeter Wetland and Riverbank Wetland*
 VIOLATION NO: *C (1) and (2)*
 RESPONDENTS: *J. Albanese Construction Company Inc. and NORTH-EASTERN TREE SERVICE, INC.*

TYPE		
<p><u>X</u> TYPE I <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p><u> </u> TYPE II <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p><u> </u> TYPE III <u>INCIDENTAL</u> to protecting health, safety, welfare or environment.</p>

DEVIATION FROM THE STANDARD
 THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.

FACTORS CONSIDERED:

Taken from Section 10 (a) (2) of the DEM's *Rules and Regulations for Assessment of Administrative Penalties*

- (A) **The extent to which the act or failure to act was out of compliance:** The Respondents altered freshwater wetlands north and south of Dry Brook by clearing and grubbing within Swamp, Perimeter Wetland associated with the Swamp, and Riverbank Wetland associated with the Brook in non-compliance with the approval that was issued by the DEM. The severity of the alteration to the wetland environment was determined to be of importance to the regulatory program.
- (B) **Environmental conditions:** Prior to the alterations the freshwater wetlands were heavily vegetated with a mature stand of deciduous trees and understory. The mature trees provided shading to Dry Brook and were a food source for fish and wildlife species. The absence of mature trees will cause an increase in the temperature of the Brook and will decrease the food source for fish and wildlife species.
- (C) **Amount of the pollutant:** Considered, but not utilized for this calculation.
- (D) **Toxicity or nature of the pollutant:** Considered, but not utilized for this calculation.
- (E) **Duration of the violation:** The unauthorized alteration occurred on or about the first or second week of January 2014. The Perimeter Wetland and Riverbank Wetland were planted with trees and shrubs; however, the alteration will affect the habitat for decades due to the absence of the mature trees.
- (F) **Areal extent of the violation:** The aerial extent of the violation is approximately 6,500 square feet.

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** The Respondents failed to take reasonable and appropriate steps to prevent the noncompliance. The DEM issued an approval to Briarcliffe for the project. The construction plans associated with the approval clearly showed the limit of disturbance (LOD) for the project. After receiving a complaint on 31 December 2013 concerning cutting of trees the DEM spoke with Ray Albanese. Mr. Albanese stated that he was aware of the location of the Riverbank Wetland and that he was working well away from it along the road. Despite the permit, the LOD and the telephone conversation with the DEM, the Respondents failed to protect the wetland. To mitigate the noncompliance, the Riverbank Wetland and Perimeter Wetland were planted with 9 trees and 41 shrubs, which was completed as of 3 December 2014.
- (H) **Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce:** Considered, but not utilized for this calculation.
- (I) **The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable:** The Respondents had complete control over the project, were aware of the LOD, and had an obligation to protect the wetlands on the property.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

MAJOR	<u> X </u> MODERATE	MINOR
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Penalty Matrix where the applicable statute provides for a civil penalty up to \$10,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$5,000 to \$10,000	\$2,500 to \$5,000	\$1,000 to \$2,500
	MODERATE	\$2,500 to \$5,000 \$5,000	\$1,000 to \$2,500	\$500 to \$1,000
	MINOR	\$1,000 to \$2,500	\$500 to \$1,000	\$100 to \$500