

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

OFFICE OF COMPLIANCE & INSPECTION

IN RE: Town of Cumberland

FILE NO.: OCI-WP 17-56

X-ref RIPDES NO.: RIR040035

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 party (“Cumberland”) has violated certain statutes and/or administrative regulations under the DEM's jurisdiction.

B. Administrative History

The DEM issued informal notices to Cumberland on 17 February 2009, 24 April 2009, 7 May 2009 and 9 April 2010 for the failure to comply with its storm water permit. The notices identified the actions required to correct the violations. To date, Cumberland has failed to comply with its storm water permit.

C. Facts

- (1) On 19 December 2003, the DEM issued Rhode Island Pollutant Elimination System General Permit Number RIR040031 entitled “Storm Water Discharge from Small Municipal Separate Storm Sewer Systems and from Industrial Activity at Eligible Facilities Operated by Regulated Small MS4s” (the “General Permit”).
- (2) The General Permit authorizes the discharge of storm water from a small municipal separate storm sewer system (“MS4”) that is operated by a municipality.
- (3) Part I.C.2 of the General Permit required the MS4 operators to submit a completed Notice of Intent (the “NOI”) and Storm Water Management Program Plan (the “SWMPP”) to the DEM within 90 days of the effective date of the General Permit to obtain coverage under the General Permit.
- (4) On 18 February 2004, Cumberland submitted to the DEM a NOI and SWMPP.

- (5) The General Permit requires Cumberland to:
 - (a) Submit an amended SWMPP to the DEM within 30 days of notification by the DEM, unless a longer time is granted;
 - (b) Submit an Annual Report (“AR”) to the DEM by March 10th of each year;
 - (c) Implement an illicit discharge detection and elimination (“IDDE”) program;
 - (d) Implement a construction site storm water runoff control program;
 - (e) Implement a post construction storm water management program for new development and redevelopment projects;
 - (f) Implement a pollution prevention and good housekeeping program;
 - (g) Take all reasonable steps to minimize or prevent any discharge in violation of the permit which has a reasonable likelihood of adversely affecting human health or the environment; and
 - (h) Properly operate and maintain all facilities and systems of treatment and control to achieve compliance with the storm water pollution prevention plans.
- (6) On 24 June 2005, the DEM issued a letter to Cumberland requiring amendments to the SWMPP (the “Deficient SWMPP Notification”). Cumberland was required to submit an amended SWMPP to the DEM by 11 August 2005 to address the Deficient SWMPP Notification.
- (7) On or about 24 June 2005, as a result of Cumberland's failure to respond to the Deficient SWMPP Notification, coverage under the General Permit ceased.
- (8) As of the date of the NOV, Cumberland has failed to:
 - (a) Submit an amended SWMPP that adequately addresses the Deficient SWMPP Notification;
 - (b) Implement an IDDE program;
 - (c) Implement a construction site storm water runoff control program;
 - (d) Implement a post construction storm water management program for new development and redevelopment projects;
 - (e) Implement a pollution prevention and good housekeeping program; and
 - (f) Submit an AR that meets the requirements of the General Permit for any of the calendar years from 2005 through 2016.
- (9) As of the date of the NOV, Cumberland has failed to properly operate and maintain all facilities and systems of treatment and control to achieve compliance with the General Permit as evidenced by its failure to implement the following programs: an IDDE program; a pollution prevention and good housekeeping program; a construction site storm water runoff control program; and a post construction storm water management program for new development and redevelopment projects.

- (10) As of the date of the NOV, Cumberland has failed to take all reasonable steps to minimize or prevent any discharge in violation of the General Permit which has a reasonable likelihood of adversely affecting human health or the environment by submitting an amended SWMPP to the DEM that adequately addresses the Deficient SWMPP Notification.

D. 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 46-12-5(a)** – prohibiting the placement of any pollutant in a location where it is likely to enter the waters of the State.
- (2) **R.I. Gen. Laws Section 46-12-5(b)** – requiring the discharge of any pollutant into waters of the State comply with the terms and conditions of a permit and applicable regulations.
- (3) **DEM's *Water Quality Regulations***
 - (a) **Rule 11(B)** – requiring the discharge of pollutants into the waters of the State that comply with the terms and conditions of a permit issued by DEM.
 - (b) **Rule 13(A)** – prohibiting the discharge of any pollutant into or conducting any activity which will likely cause or contribute pollution to the waters of the State.
 - (c) **Rule 16(A)** – mandating compliance with all terms, conditions, management practices and operation and maintenance requirements set forth in a permit.
- (4) **DEM's *Regulations for the Rhode Island Pollutant Discharge Elimination System ("RIPDES")***
 - (a) **Rule 14.02(a)** – requiring the permittee to comply with all conditions of the permit.
 - (b) **Rule 14.05** – requiring the permittee to take all reasonable steps to minimize or prevent a discharge in violation of the permit.
 - (c) **Rule 14.06** – requiring the permittee to maintain in good working order and operate as efficiently as possible all treatment works to achieve compliance with the permit.
 - (d) **Rule 14.17(d)** – requiring the permittee to report monitoring results at the intervals specified in the permit.

E. Order

Based upon the violations alleged above and pursuant to R.I. Gen. Laws Section 42-17.1-2(21), you are hereby ORDERED to:

- (1) **Within 90 days of receipt of the NOV,**
 - (a) Submit to the DEM a revised SWMPP that addresses the Deficient SWMPP Notification;
 - (b) Develop and implement an IDDE program;
 - (c) Submit to the DEM a complete outfall map showing the location of all outfalls and names and locations of all receiving waters, as well as a tabular listing of all outfalls with latitudes and longitudes and receiving waters for each outfall;
 - (d) Adopt an IDDE ordinance that prohibits illicit connections and non-stormwater discharges to the MS4 and has an adequate mechanism to ensure compliance, and submit to the DEM the ordinance and a letter from the Town Solicitor certifying that the ordinance was duly adopted and provides the authority for Cumberland to carry out the requirements of the General Permit;
 - (e) Develop and implement a construction site storm water runoff program for tracking erosion and sediment control permits including status of reviews and inspections;
 - (f) Develop and implement a post construction storm water management program for new development and redevelopment projects for tracking post-construction reviews and inspections;
 - (g) Develop and implement a pollution prevention and good housekeeping program; and
 - (h) Establish and maintain an inventory of all MS4 owned structural Best Management Practices and submit that list to the DEM;
- (2) **By December 15, 2017,** complete the July-October dry weather survey on all outfalls and submit to the DEM a report in the form of a tabular summary that includes at a minimum: outfall identification, date, time, location (latitude/longitude), size and type of outfall (for example, 15 inch diameter concrete pipe), flow (indicate if flowing or not, include flow rate if determined), samples collected (indicate what type of sample), sample results, results of other parameters measured, and sample analysis method (for example, *Standard Methods for the Examination of Water and Wastewater*). Visual observations must include, but are not limited to, odors, sheen, stressed vegetation, coloration/staining, algae growth, sedimentation, scouring and land use in the

vicinity of the outfalls. Samples of all dry weather flows from the outfalls must be collected and analyzed for temperature, conductivity, pH, and bacteria;

- (3) **By 10 March 2018 and annually thereafter**, submit the AR to the DEM. The AR shall be developed in a manner that fulfills the General Permit; and
- (4) **By June 15, 2018**, complete the January-April dry weather survey on all outfalls and submit to the DEM a report in the form of a tabular summary that includes at a minimum: outfall identification, date, time, location (latitude/longitude), size and type of outfall (for example, 15 inch diameter concrete pipe), flow (indicate if flowing or not, include flow rate if determined), samples collected (indicate what type of sample), sample results, results of other parameters measured, and sample analysis method (for example, *Standard Methods for the Examination of Water and Wastewater*). Visual observations must include, but are not limited to, odors, sheen, stressed vegetation, coloration/staining, algae growth, sedimentation, scouring and land use in the vicinity of the outfalls. Samples of all dry weather flows from outfalls must be collected and analyzed for temperature, conductivity, pH, and bacteria.

F. 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:

\$87,500

- (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 the NOV. Payment shall be in the form of a check 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 Cumberland 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.
- (4) If any violation alleged herein shall continue, then each day during which the violation occurs or continues shall constitute a separate offense and the penalties and/or costs for that violation shall continue to accrue in the manner set forth in the attached penalty summary and worksheets. The accrual of additional penalties and costs shall be suspended if the DEM determines that reasonable efforts have been made to comply promptly with the NOV.

G. Right to Administrative Hearing

- (1) Pursuant to R.I. Gen. Laws Chapters 42-17.1, 42-17.6, 42-17.7 and 42-35, Cumberland 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 F 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 the NOV. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.7-9:

Administrative Clerk
DEM - Administrative Adjudication Division
235 Promenade Street, 4TH Floor
Providence, RI 02908-5767

- (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:

Mary Kay, Executive Counsel
DEM - Office of Legal Services
235 Promenade Street, 4TH Floor
Providence, RI 02908-5767

- (3) Cumberland has the right to be represented by legal counsel at all administrative proceedings relating to this matter.
- (4) If Cumberland 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 Cumberland and/or violation and any associated administrative penalty proposed in the NOV shall be final. 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 Cumberland to additional civil and/or criminal penalties.

- (6) The NOV does not preclude the DEM 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) Mary Kay at the DEM's 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 G above.

FOR THE DIRECTOR

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

Dated: _____



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, Water Pollution
 File No.: WP17-56 X-ref Permit No. RIR040035
 Respondent: Town of Cumberland

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	
D (1) through D (4) – Failure to Comply with Storm Water Permit and Water Quality Regulations	Type I (\$25,000 Max. Penalty)*	Major	\$ 12,500	7 years	\$87,500
SUB-TOTAL					\$87,500

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

ECONOMIC BENEFIT FROM NONCOMPLIANCE

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:

- THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE; OR
- THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED.

A review of the record in this matter has revealed that Cumberland has 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.

COST RECOVERY

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.

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.

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$ 87,500

PENALTY MATRIX WORKSHEET

CITATION: Failure to Comply with Storm Water Permit and Water Quality Regulations
 VIOLATION NO.: D (1) through (3)

TYPE		
<u> X </u> TYPE I <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.	<u> </u> TYPE II <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.	<u> </u> TYPE III <u>INCIDENTAL</u> to protecting health, safety, welfare or environment.
DEVIATION FROM THE STANDARD		
THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.		
<p>FACTORS CONSIDERED:</p> <p>Taken from Section 10 (a) (2) of the DEM's <i>Rules and Regulations for Assessment of Administrative Penalties</i></p> <p>(A) The extent to which the act or failure to act was out of compliance: Cumberland failed to comply with numerous requirements of its MS4 storm water permit. Compliance with the conditions of a permit is a primary objective of the Water Pollution Act, the DEM's Water Quality Regulations, and the DEM's RIPDES Regulations and is of major importance to the regulatory program.</p> <p>(B) Environmental conditions: Cumberland operates a small municipal separate storm sewer system (MS4) and discharges storm water from the MS4 to numerous waters of the State. These waters are designated as Class A or B water bodies of the State. Class A and B water bodies are designated for drinking, primary and secondary contact recreational activities and fish and wildlife habitat.</p> <p>(C) Amount of the pollutant: Unknown. Varies with rainfall.</p> <p>(D) Toxicity or nature of the pollutant: Storm water contains a multitude of pollutants, including bacteria, metals, phosphorus, nitrogen and petroleum.</p> <p>(E) Duration of the violation: About 11 years. Cumberland was required to meet numerous conditions of the permit, the first of which was due about 24 June 2005. The DEM only assessed a penalty from 1 January 2010 to present.</p> <p>(F) Areal extent of the violation: Considered, but not utilized for this calculation.</p>		
(continued)		

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Cumberland failed to comply with numerous provisions of its permit.
- (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:** Cumberland has complete control over its MS4 and is well aware of the requirements of its permit. In January 2007 the DEM held a workshop for all MS4 operators and issued letters on 17 February 2009, 24 April 2009, 7 May 2009 and 9 April 2010 advising Cumberland of its noncompliance with the permit and the steps necessary to correct the noncompliance. Cumberland failed to comply with the letters.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Cumberland was advised in the 17 February 2009 and 24 April 2009 letters that failure to comply may result in issuance of a formal enforcement action.

<u> X </u> MAJOR	MODERATE	MINOR
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Penalty Matrix where the applicable statute provides for a civil penalty up to \$25,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$12,500 to \$25,000 \$12,500	\$6,250 to \$12,500	\$2,500 to \$6,250
	MODERATE	\$6,250 to \$12,500	\$2,500 to \$6,250	\$1,250 to \$2,500
	MINOR	\$2,500 to \$6,250	\$1,250 to \$2,500	\$250 to \$1,250