

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

**OFFICE OF COMPLIANCE & INSPECTION**

**IN RE: DV I, LLC**

**FILE Nos.: WP- 14-115  
X-ref RIPDES RIR100994 and  
FW Permit 07-0236**

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 ("Respondent") has violated certain statutes and/or administrative regulations under the DEM's jurisdiction.

B. Facts

- (1) The property is located about 1,500 feet northeast of Old Louisquisset Pike and about 1,800 feet east of its intersection with Eddie Dowling Highway at the "Dowling Village" commercial retail development, utility pole numbers 354 through 374, in the town of North Smithfield (the "Property").
- (2) On 16 June 2008, the DEM issued a freshwater wetlands permit (application number 07-0236) to the Respondent to alter freshwater wetlands associated with the construction of a commercial and residential development at the Property (the "08 FW Permit").
- (3) The construction activities associated with the 08 FW Permit disturbed greater than 1 acre of the Property.
- (4) On 26 September 2008, the DEM issued a *General Permit for Stormwater Discharge Associated With Construction Activity* (the "CGP"). In accordance with the CGP issued on 26 September 2008 (the "08 CGP"), all construction activities that disturb equal to or greater than 1 acre that obtained a freshwater wetlands permit from the DEM are automatically authorized to discharge under the 08 CGP. The 08 CGP expired on 25 September 2013.
- (5) On 29 October 2009, the DEM issued a revised freshwater wetlands permit to the Respondent (the "09 FW Permit").
- (6) On 26 September 2013, the DEM reissued the CGP (the "13 CGP"). The 13 CGP expires on 26 September 2018.

- (7) The 08 FW Permit, the 09 FW Permit, the 08 CGP and the 13 CGP (collectively, the "Permits") require the Respondent to:
- (a) Inspect all pollution prevention measures at least once every 7 days;
  - (b) Initiate work to correct any deficient pollution prevention measures immediately that do not require significant repair or replacement and complete such work by the close of the next work day [required in the 13 CGP only];
  - (c) Prepare and sign reports that document the results of the inspections;
  - (d) Perform water quality monitoring as specified on Sheet 50 of the approved plans associated with the 09 FW Permit at 6 monitoring locations (the "Water Quality Monitoring"); and
  - (e) Submit the results of the Water Quality Monitoring to the DEM (the "Monitoring Report").
- (8) On 1 October 2012, the DEM inspected the Property. The inspection revealed that no construction site inspection reports were available except for the period between November 2011 and January 2012. The DEM inspector was told at the time of the inspection that construction site inspections were not being documented on a weekly basis since the project began in April 2010.
- (9) On 3 October 2012, as a result of the findings from the 1 October 2012 inspection, the DEM issued a letter of noncompliance ("LNC") to the Respondent. The LNC required the Respondent to take specific actions to address the noncompliance.
- (10) On or about 17 October 2012, the DEM received a letter from the Respondent's consultant, Diprete Engineering, in response to the LNC. The letter stated that the following actions were taken to address the noncompliance:
- (a) The site contractor was reminded of its responsibility to perform and document weekly inspections and to maintain the reports on site; and
  - (b) An agenda item was added to the weekly construction meetings to discuss erosion control monitoring, maintenance and repair as well as the ongoing documentation of these activities.
- (11) On 6 August 2014, the DEM inspected the Property. The inspection revealed the following:
- (a) 4 to 6 inspection reports were available at the time of the inspection (the "On Site Reports"); and
  - (b) Numerous areas were observed that had deficient pollution prevention measures that did not require significant repair or replacement and could have been completed by the close of the next work day.

Robert Quint, the Vice President of CFGS, LLC, informed the DEM inspector at the time of the inspection that he maintains most of his records off-site (the "Off Site Records").

- (12) On 7 August 2014, the Off-Site Records were delivered to the DEM.
- (13) A review of the On-Site Records and Off-Site Records revealed the following:
  - (a) Inspections of all pollution prevention measures were not consistently performed at least once every 7 days from October 2012 through August 2014;
    - (i) October 2012 through June 2013 - no inspections;
    - (ii) July 2013 - 7 inspections;
    - (iii) August 2013 - 4 inspections;
    - (iv) September 2013 - 3 inspections;
    - (v) October 2013 - 1 inspection;
    - (vi) November 2013 - 2 inspections;
    - (vii) December 2013 through February 2014 - no inspections;
    - (viii) March 2014 - 1 inspection;
    - (ix) April 2014 - 6 inspections;
    - (x) May 2014 - 2 inspections;
    - (xi) June 2014 - 2 inspection;
    - (xii) July 2014 - 1 inspection; and
    - (xiii) August 2014 - 1 inspection
  - (b) The inspection reports did not contain information regarding the specific areas that were inspected;
  - (c) Only page 1 of the inspection reports was completed; and
  - (d) Corrective action forms were not completed for each inspection. Correction action log forms were provided for 5 dates: 19 July 2013; 24 July 2013; 31 July 2013; 7 April 2014; and 21 April 2014.

- (14) On 12 September 2014, as a result of the findings from the 6 August 2014 and 18 August 2014 inspections and the DEM's review of the On-Site Records and Off-Site Records, the DEM issued a Letter of Nonconformance ("Nonconformance Letter") to the Respondent. The Nonconformance Letter required the Respondent to take specific actions to address the nonconformance.
- (15) On or about 17 October 2014, the DEM received a letter from the Respondent's consultant, Diprete Engineering, in response to the Nonconformance Letter. The letter stated that the following actions were taken to address the noncompliance:
- (a) Weekly site inspections were being completed with documentation being maintained on site and maintenance activities and corrective actions also being documented; and
  - (b) The areas with deficient pollution prevention measures were repaired or work was ongoing to do so.
- (16) The DEM received a Monitoring Report from Diprete Engineering on behalf of the Respondent on or about 7 July 2011, on 31 December 2012, on 26 September 2014 and on 10 February 2015 (collectively, the "Monitoring Reports"). A review of the Monitoring Reports revealed that the Respondent failed to comply with the requirements for Water Quality Monitoring as evidenced by:
- (a) No analysis of the Trophic Status within Booth Pond was performed on 24 August 2009, 15 December 2009, 3 June 2010, 16 November 2010, 28 March 2011, 10 June 2011, 16 March 2012, 18 May 2012, 15 August 2012, 26 September 2012, 15 April 2013, 24 May 2013, and 16 August 2013;
  - (b) No analysis for Chlorophyll-a within Booth Pond was performed on 24 August 2009, 15 December 2009, 3 June 2010, 16 November 2010, 28 March 2011, 10 June 2011, 16 March 2012, 18 May 2012, 15 August 2012, and 26 September 2012;
  - (c) No analysis for Chloride within Booth Pond was performed on 24 August 2009, 15 December 2009, 3 June 2010, 16 November 2010, 28 March 2011, 10 June 2011, 16 March 2012, 18 May 2012, 15 August 2012, and 26 September 2012;
  - (d) No analysis for Bottom Temperature within Booth Pond was performed on 24 August 2009 and 15 December 2009;
  - (e) No analysis for Hardness, Enterococci, and Turbidity within Booth Pond and the 5 other monitoring locations (the "Other Monitoring Locations") was performed on 24 August 2009 and 15 December 2009;
  - (f) An incorrect detection limit was used to analyze for dissolved metals (Copper, Zinc, Lead and Cadmium) in the samples collected within Booth

Pond and the Other Monitoring Locations on 24 August 2009 and 15 December 2009; and

- (g) An incorrect sample method was used to analyze for fecal coliform bacteria in the samples collected within Booth Pond and the Other Monitoring Locations on 24 August 2009 and 15 December 2009.

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) **Rhode Island's Water Pollution Act, 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.
- (2) **DEM's Water Quality Regulations**
  - (a) **Rule 11(B)** – requiring the discharge of pollutants into the waters of the State comply with the terms and conditions of a permit issued by the DEM.
  - (b) **Rule 16(A)** – mandating compliance with all terms, conditions, management practices and operation and maintenance requirements set forth in a permit.
- (3) **DEM's Regulations for the Rhode Island Pollutant Discharge Elimination System, Rule 14.02(a)** – requiring the permittee to comply with all conditions of a permit issued by the DEM.
- (4) **DEM's Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, Rule 9.04B** – requiring an applicant to comply with all conditions of a permit issued by 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:

**\$56,095**

- (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 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 Respondent in this 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, 2<sup>ND</sup> 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:

Tricia Quest, Esquire  
DEM - Office of Legal Services  
235 Promenade Street, 4<sup>TH</sup> 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 this 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 (v) and 42-17.6-4(b) and (c).

- (5) Failure to comply with this NOV may subject each respondent to additional civil and/or criminal penalties.
- (6) This 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) Tricia Quest at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to David E. Chopy of the DEM 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

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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 to:

DV I, LLC  
c/o Brian Bucci, Registered Agent  
48 Hewett Street  
Warwick, RI 02889

by Certified Mail.

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## ADMINISTRATIVE PENALTY SUMMARY

Programs: OFFICE OF COMPLIANCE AND INSPECTION  
Water Pollution and Freshwater Wetlands

File Nos.: WP-14-115, X-ref RIPDES RIR100994 and FW Permit 07- 0236

Respondent: DV I, LLC

<b>GRAVITY OF VIOLATION</b>					
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), C(2), C(3) & C(4) – Failure to properly operate and maintain pollution prevention measures	Type I (\$25,000 Max. Penalty)*	Moderate	\$6,250	1 violation	\$6,250
C (1), C(2), C(3) & C(4) – Failure to perform inspections and maintain inspection records	Type II (\$12,500 Max. Penalty)*	Major	\$6,250	1 violation	\$6,250
C(4) - Failure to perform water quality monitoring	Type III (\$6,250 Max. Penalty)*	Major	\$6,250	1 violation	\$6,250
<b><i>SUB-TOTAL</i></b>					<b>\$18,750</b>

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

**ECONOMIC BENEFIT FROM NONCOMPLIANCE -  
FAILURE TO PERFORM INSPECTIONS**

**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.

<i>DESCRIPTION OF BENEFIT</i>	<i>CALCULATION</i>		<b>AMOUNT</b>
<p>Economic benefit of noncompliance identified by the DEM for failing to perform weekly inspections and prepare inspection reports. Costs for the Respondent's failure to comply were obtained through general knowledge. The economic benefit gained by the instances of noncompliance was calculated by utilizing an EPA computer model entitled "BEN". The model calculates the economic gain of noncompliance by performing a detailed economic analysis. The dates, dollar amounts and values used in this analysis are as listed in this table.</p>	<ul style="list-style-type: none"> <li>• Profit Status</li> <li>• Filing Status</li> <li>• Initial Capital Investment</li> <li>• One-time Non-depreciable Expense</li> <li>• Annual Expense</li> <li>• First Month of Non-Compliance</li> <li>• Compliance Date</li> <li>• Penalty Due Date</li> <li>• Useful Life of Pollution Control</li> <li>• Equipment Annual Inflation Rate</li> <li>• Discount/Compound Rate</li> </ul>	<p>C-Corporation C-Corporation \$0 \$0 \$6,000 <sup>1</sup> 1 April 2010 31 August 2014 31 October 2015 N/A N/A 6.5%</p>	<p>\$18,957</p>
<p><sup>1</sup> The annual expense was based on a cost of \$150 per inspection (field work and report preparation), and inspections occurring each month except January and February.</p> <p><sup>2</sup> A credit of \$4,350 was given for the 29 inspections that were completed as identified in paragraph B (13)(a).</p>			
<p align="center"><b><i>SUB-TOTAL</i></b></p>			<p>\$14,607 <sup>2</sup></p>

**ECONOMIC BENEFIT FROM NONCOMPLIANCE -  
FAILURE TO PERFORM WATER QUALITY MONITORING**

**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.

<b>DESCRIPTION OF BENEFIT</b>	<b>CALCULATION</b>		<b>AMOUNT</b>
<p>Economic benefit of noncompliance identified by the DEM for failing to perform required water quality monitoring. Costs for the Respondent's failure to comply were obtained through general knowledge. The economic benefit gained by the instances of noncompliance was calculated by utilizing an EPA computer model entitled "BEN". The model calculates the economic gain of noncompliance by performing a detailed economic analysis. The dates, dollar amounts and values used in this analysis are as listed in this table.</p>	<ul style="list-style-type: none"> <li>• Profit Status</li> <li>• Filing Status</li> <li>• Initial Capital Investment</li> <li>• One-time Non-depreciable Expense</li> <li>• Annual Expense</li> <li>• First Month of Non-Compliance</li> <li>• Compliance Date</li> <li>• Penalty Due Date</li> <li>• Useful Life of Pollution Control</li> <li>• Equipment Annual Inflation Rate</li> <li>• Discount/Compound Rate</li> </ul>	<p>C-Corporation C-Corporation \$0 \$28,675 <sup>1</sup> \$0 1 April 2010 31 August 2014 31 October 2015 N/A N/A 6.5%</p>	<p>\$22,738</p>
<p><sup>1</sup> The one-time nondepreciable expense was based on the laboratory cost for 107 missed/incorrect analytes @ \$25 per analyte (\$2,675) plus the consultant cost to compile, analyze and prepare the reports for the missed/incorrect analytes (8 hours per sample date x 13 sampling dates x \$250/hour consultant fee=\$26,000)</p>			
<p align="center"><b>SUB-TOTAL</b></p>			<p>\$22,738</p>

## **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 = \$56,095**

**PENALTY MATRIX WORKSHEET**

CITATION: Failure to properly operate and maintain pollution prevention measures

VIOLATION NO.: C(1) – C(4)

<b>TYPE</b>		
<p><u><b>X</b></u> <b>TYPE I</b>  <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p>____ <b>TYPE II</b>  <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p>____ <b>TYPE III</b>  <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 Respondent failed to comply with the conditions of its permit by properly operating and maintaining pollution prevent measures at the property. Maintaining pollution prevention measures is of major importance to the regulatory program.
- (B) **Environmental conditions:** The DEM inspection on 6 August 2014 revealed 10 separate instances on the property where the Respondent failed to maintain proper pollution prevention measures. The DEM has no evidence that the noncompliance resulted in any actual harm to wetlands.
- (C) **Amount of the pollutant:** Considered, but not utilized for this calculation.
- (D) **Toxicity or nature of the pollutant:** Soil associated with construction activities that is contained in storm water runoff.
- (E) **Duration of the violation:** Full duration unknown - at least 2½ months. The DEM first observed the noncompliance during an inspection on 6 August 2014. The Respondent's consultant, Diprete Engineering, submitted a letter to the DEM on or about 17 October 2014 that stated the pollution prevention measures were repaired or the work was ongoing.
- (F) **Areal extent of the violation:** Considered, but not utilized for this calculation.

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** The Respondent did not take reasonable action to fully comply with the permit. The Respondent failed to maintain proper pollution prevention measures on site.
- (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:** Negligence is attributable to the Respondent for its failure to comply with the requirement set forth in the permit to maintain proper pollution prevention measures. The DEM had previously issued a letter to the Respondent on 3 October 2012 for failing to maintain proper pollution prevention measures. The Respondent's consultant, Diprete Engineering, submitted a letter to the DEM on or about 17 October 2012 that stated an agenda item was added to the weekly construction meetings to discuss erosion control monitoring, maintenance and repair as well as the ongoing documentation of these activities. Despite the DEM's prior letter, the DEM's inspection almost 2 years later again revealed that the Respondent failed to maintain proper pollution prevention measures.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

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

**PENALTY MATRIX WORKSHEET**

CITATION: Failure to perform inspections and maintain inspection records  
 VIOLATION NO.: C(1) – C(4)

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

**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 Respondent failed to comply with the conditions of its permit by performing weekly inspections and properly maintaining inspection records relating to stormwater pollution prevention. Performing required inspections and maintaining inspection records related to stormwater pollution prevention from construction activities is important to the regulatory program.
- (B) **Environmental conditions:** Considered, but not utilized for this calculation.
- (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:** About 4 ½ years - April 2010 through August 2014.
- (F) **Areal extent of the violation:** Considered, but not utilized for this calculation.

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** The Respondent did not take reasonable action to fully comply with the permit. The Respondent failed to perform required weekly inspections and keep proper inspection records (for most of the time period described in Factor E above). The Respondent provided reports of 29 inspections performed from July 2013 through August 2014; however, the reports were incomplete.
- (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:** Negligence is attributable to the Respondent for its failure to comply with the requirement set forth in the permit to perform required inspections and maintain inspection records. The DEM had previously issued a letter to the Respondent on 3 October 2012 for failing to perform weekly inspections and maintain inspection records. The Respondent's consultant, Diprete Engineering, submitted a letter to the DEM on or about 17 October 2012 that stated an agenda item was added to the weekly construction meetings to discuss erosion control monitoring, maintenance and repair as well as the ongoing documentation of these activities. Despite the DEM's prior letter, the DEM's inspection almost 2 years later again revealed that the Respondent failed to perform weekly inspections and maintain inspection records.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

<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	<b>MAJOR</b>	\$12,500 to \$25,000	\$6,250 to \$12,500 <b>\$6,250</b>	\$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



**PENALTY MATRIX WORKSHEET**

CITATION: Failure to perform water quality monitoring  
 VIOLATION NO.: C(4)

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

**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 Respondent failed to comply with the conditions of its permit by performing water quality monitoring. Performing required monitoring is important to the regulatory program.
- (B) **Environmental conditions:** One of the objectives of the water quality monitoring was to measure the effect of the Respondent's development project on Booth Pond and other down gradient wetlands. The Respondent was required to collect and analyze samples for surface temperature, hardness, fecal coliform bacteria, enterococci, copper, zinc, lead, cadmium, turbidity at Booth Pond and 5 other monitoring locations. The Respondent was also required to collect and analyze samples for chlorophyll-a, chloride and trophic status in Booth Pond. The samples were required to be collected prior to construction, during construction and after construction.
- (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:** Considered, but not utilized for this calculation.
- (F) **Areal extent of the violation:** Considered, but not utilized for this calculation.

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** The Respondent did not take reasonable action to fully comply with the permit. The Respondent failed to perform required water quality monitoring for the parameters described in Factor B. The Respondent failed to measure or improperly measured a total of 107 analyses. The data that was reported to the DEM for the 2 sampling dates prior to construction (that was necessary to properly collect to establish a pre-condition baseline) on 24 August 2009 and 15 December 2009 for the parameters described in Factor B is of no value and the DEM is unable to measure the effect of the Respondent's development project on Booth Pond and other down gradient wetlands.
- (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:** Negligence is attributable to the Respondent for its failure to perform the required water quality monitoring as set forth in the permit to perform required inspections and maintain inspection records. The requirement to perform the water quality monitoring is clearly laid out in the permit.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

<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	<b>MAJOR</b>	\$12,500 to \$25,000	\$6,250 to \$12,500	\$2,500 to \$6,250 <b>\$6,250</b>
	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