

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF COMPLIANCE & INSPECTION**

**IN RE: David A. Harlow
Stephanie M. Harlow**

FILE NO.: FW C11-0141

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 (“Respondents”) have violated certain statutes and/or administrative regulations under DEM's jurisdiction.

B. Facts

- (1) The property is located approximately 100 feet west of Patchet Brook Road, adjacent to house number 35, approximately 150 northwest of the intersection of Patchet Brook Road and Oak Forest Drive, Assessor's Plat 25, Lot 24-5, in the town of Little Compton, Rhode Island (the “Property”).
- (2) On July 18, 2003 the DEM issued an approval to the former owner of the Property (the “Former Owner”) to alter freshwater wetlands on the Property associated with the construction of a house (the “Permit”).
- (3) On August 20, 2003 the Respondents acquired the Property.
- (4) On September 23, 2003 the DEM received an application from David A. Harlow to transfer the Permit from the Former Owner to Mr. Harlow.
- (5) On September 24, 2003 the DEM transferred the Permit to Mr. Harlow.
- (6) On September 28, 2011, the DEM inspected the Property. The inspection revealed the following:
 - (a) Clearing, filling (in the form of at least soil material, woodchips, and stones), paving, and landscaping within Swamp in noncompliance with the Permit. This activity has resulted in the unauthorized alteration of approximately 7,500 square feet of freshwater wetland.
 - (b) Clearing, filling (in the form of at least soil material, woodchips, and stones), paving, landscaping, and wall construction within Perimeter Wetland in noncompliance with the Permit. This activity has resulted in

the unauthorized alteration of approximately 2,500 square feet of freshwater wetland.

- (7) The Respondents did not receive approval from the DEM to alter the freshwater wetlands on the Property in the areas specified above.

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** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
- (2) **DEM's Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (effective April 23, 1998), Rule 7.01** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
- (3) **DEM's Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (effective April 23, 1998), Rule 9.05A** – requiring an applicant or subsequent transferee 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 (effective June 1, 2007), Rule 5.01** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
- (5) **DEM's Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (effective June 1, 2007), Rule 10.08** – requiring an applicant or subsequent transferee to comply with all conditions of a permit issued by the DEM.

D. 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) Cease and desist **IMMEDIATELY** from any further alteration of the above described freshwater wetlands, and
- (2) Restore all freshwater wetlands in accordance with the restoration requirements set forth below.

RESTORATION REQUIREMENTS

- (a) Prior to the commencement of restoration, install a continuous uninterrupted line of staked haybales or silt fence between all areas to be restored and the adjacent undisturbed freshwater wetlands. These soil erosion and sediment controls must be regularly inspected and properly and continually maintained (and replaced) during and following the completion of the required wetland restoration activities, and until such time that all surrounding areas are properly stabilized. At the discretion and direction of the DEM, additional soil erosion and sediment controls must be installed on-site, as deemed necessary, to protect any and all freshwater wetlands.
- (b) Remove all unauthorized fill material (including, but not limited to soil material, lawn, woodchips, stones, walls, landscaping, paving) from the Swamp and Perimeter Wetland. A wetland seed mix shall be applied to the surface areas of the restored Swamp. All fill material that is removed shall be deposited in an appropriate upland location, outside of any and all wetlands.
- (c) Re-grade all slopes resulting from fill removal, as well as all areas encompassing the required wetland restoration work, to match existing undisturbed surrounding grades.
- (d) Stabilize all disturbed surfaces within the Perimeter Wetland by covering with a wildlife conservation seed mixture, and a thick mat of loose hay mulch.
- (e) Plant trees and shrubs in all unauthorized cleared/altered portions of the Perimeter Wetland as follows:

Balled and burlapped or transplanted tree species shall be planted in an interspersed fashion, ten (10) feet on center, four (4) feet tall after planting, throughout the areas defined above. Tree species shall include an equal distribution of at least three (3) of the following selections:

White pine, *Pinus strobus*
Red maple, *Acer rubrum*
White ash, *Fraxinus americana*
White oak, *Quercus alba*
Northern red oak, *Quercus rubra*
Gray birch, *Betula populifolia*
Black birch, *Betula lenta*
American beech, *Fagus grandifolia*

Balled and burlapped or transplanted shrub species shall be planted in an interspersed fashion five (5) feet on center, three (3) feet tall after planting, throughout the area defined above. Shrub species shall include an equal distribution of at least five (5) of the following selections:

Mountain laurel, *Kalmia latifolia*
Red osier dogwood, *Cornus stolonifera*
Giant rhododendron, *Rhododendron maximum* (shaded areas only)
Gray (stiff, red panicle) dogwood, *Cornus foemina racemosa*
Silky dogwood, *Cornus amomum*
Arrowwood (southern), *Viburnum dentatum*
American cranberrybush, *Viburnum trilobum*
Mapleleaf viburnum, *Viburnum acerifolium*
Winterberry, *Ilex verticillata*
Inkberry, *Ilex glabra*
American Holly, *Ilex opaca*
Highbush blueberry, *Vaccinium corymbosum*
Lowbush blueberry, *Vaccinium angustifolium*
Spice bush, *Lindera benzoin*
Sweet pepperbush, *Clethra alnifolia*
Swamp azalea, *Rhododendron viscosum*

- (f) Plant an alternating row of American Holly (*Ilex opaca*) and White Pine (*Pinus strobus*) along the edge of the Limit of Disturbance shown on the Permit. Plantings must be at least four (4) to five (5) feet in height after planting and spaced ten (10) feet on-center.
 - (g) If any or all of the required plantings fail to survive at least one (1) full year from the time the plantings have been verified by the DEM, the same plant species shall be replanted and maintained until such time that survival occurs over one (1) full year.
 - (h) All restored wetland areas, including replanted areas, shall be allowed to revegetate naturally and revert to a natural wild state. No future clearing, mowing, cutting, trimming, or other alterations are allowed in the restored wetland areas, or within other freshwater wetlands on the Property, without first obtaining a permit from the DEM.
 - (i) Upon stabilization of all disturbed areas all artificial erosion and sedimentation controls (e.g., silt fences and silt curtains) shall be removed from the freshwater wetland. Staked haybales, spread hay mulch, and other naturally-based/bio-degradable erosion control measures may remain in place to decompose naturally. Prior to the removal of the controls all accumulated sediment shall be removed to a suitable upland area and all disturbed surfaces shall be stabilized as described above.
 - (j) The above restoration work shall be completed prior to **April 30, 2012**.
- (3) Contact Mr. Howard Cook at (401) 222-1360 ext. 7161 prior to the commencement of restoration to ensure proper supervision and to obtain required

restoration details. No work shall commence until such time that you have met in the field with the DEM.

E. 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:

Six-Thousand Dollars (\$6,000.00)

- (2) The proposed administrative penalty is calculated pursuant to the DEM Rules and Regulations for Assessment of Administrative Penalties, as amended, and must be paid to the DEM within twenty (20) 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 Respondents 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.

F. 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 Administrative Adjudication Division regarding the allegations, orders and/or penalties set forth in Sections B through E 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 DEM's Administrative Adjudication Division, at the following address, within twenty (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 Administrative Rules of Practice and Procedure for the Administrative Adjudication Division of Environmental Matters.
- (2) A copy of each request for hearing must also be forwarded to:
- Joseph J. LoBianco, Esquire
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 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) An original signed copy of this NOV is being forwarded to the town of Little Compton wherein the Property is located to be recorded in the Office of Land Evidence Records pursuant to R.I. Gen. Laws Chapter 34-13 and 2-1-24, as amended.
 - (7) This 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) Joseph J. LoBianco at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Mr. Howard Cook or Mr. Harold Ellis of the DEM Office of Compliance and Inspection at (401) 222-1360 extensions 7161 and 7401, respectively.

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 F above.

FOR THE DIRECTOR

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:

David A. Harlow
35 Patchet Brook Road
Little Compton, RI 02837

Stephanie M. Harlow
35 Patchet Brook Road
Little Compton, RI 02837

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, WETLANDS

File No.: FW C11-0141

Respondents: David and Stephanie Harlow

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) - C (5) – Alteration of a Swamp	Type I (\$ <u>10,000</u> Max. Penalty)*	Moderate	\$4,000	1 violation	\$4,000.00
C (1) - C (5) – Alteration of a Perimeter Wetland	Type I (\$ <u>10,000</u> Max. Penalty)*	Minor	\$2,000	1 violation	\$2,000.00
<i>SUB-TOTAL</i>					\$6,000.00

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

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$6,000.00

PENALTY MATRIX WORKSHEET

CITATION: *Alteration of a Swamp*
 VIOLATION NO.: C (1) – (5)

TYPE		
<u>X</u> TYPE I <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.	_____ TYPE II <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.	_____ TYPE III <u>INCIDENTAL</u> to protecting health, safety, welfare or environment.
DEVIATION FROM THE STANDARD		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<p><u>FACTORS CONSIDERED:</u></p> <p>Taken from Section 10 (a) (2) of the DEM <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: Respondents altered freshwater wetlands by clearing, filling (in the form of at least soil material, woodchips, and stones), paving, and landscaping within Swamp in non-compliance with a permit that was issued by DEM. The severity of the alteration to the wetland environment was determined to be of importance to the regulatory program.</p> <p>(B) Environmental conditions: The freshwater wetland was an undisturbed Swamp prior to the unauthorized alteration.</p> <p>(C) Amount of the pollutant: Not utilized for this calculation.</p> <p>(D) Toxicity or nature of the pollutant: Not utilized for this calculation.</p> <p>(E) Duration of the violation: Unknown. The unauthorized alterations were first documented by DEM on September 13, 2011.</p> <p>(F) Areal extent of the violation: The aerial extent of the violation is approximately 7,500 square feet.</p> <p style="text-align: right;">(continued)</p>		

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** David Harlow obtained the transferred permit on September 24, 2003. The plans approved with the permit clearly show the limit of disturbance (LOD). Despite the LOD, the Respondents failed to protect the wetland.
- (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:** 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:** 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 \$4,000	\$1,000 to \$2,500	\$500 to \$1,000
	MINOR	\$1,000 to \$2,500	\$500 to \$1,000	\$100 to \$500

PENALTY MATRIX WORKSHEET

CITATION: *Alteration of a Perimeter Wetland*
 VIOLATION NO.: C (1) – (5)

TYPE		
<p><u>X</u> TYPE I <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p>TYPE II <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p>TYPE III <u>INCIDENTAL</u> to protecting health, safety, welfare or environment.</p>
DEVIATION FROM THE STANDARD		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<p><u>FACTORS CONSIDERED:</u></p> <p>Taken from Section 10 (a) (2) of the DEM <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: Respondents altered freshwater wetlands by clearing, filling (in the form of at least soil material, woodchips, and stones), paving, landscaping, and wall construction within Perimeter Wetland. The severity of the alteration to the wetland environment was determined to be of importance to the regulatory program.</p> <p>(B) Environmental conditions: The Perimeter Wetland was an undisturbed forested area prior to the unauthorized alteration.</p> <p>(C) Amount of the pollutant: Not utilized for this calculation.</p> <p>(D) Toxicity or nature of the pollutant: Not utilized for this calculation.</p> <p>(E) Duration of the violation: Unknown. The unauthorized alterations were first documented by DEM on September 13, 2011.</p> <p>(F) Areal extent of the violation: The aerial extent of the violation is approximately 2,500 square feet.</p> <p style="text-align: right;">(continued)</p>		

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** David Harlow obtained the transferred Permit on September 24, 2003. The plans approved with the permit clearly show the limit of disturbance (LOD). Despite the LOD, the Respondents failed to protect the wetland.
- (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:** 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:** Not utilized for this calculation.

MAJOR	MODERATE	<u>X</u> 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	\$1,000 to \$2,500	\$500 to \$1,000
	MINOR	\$1,000 to \$2,500 \$2,000	\$500 to \$1,000	\$100 to \$500