

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

OFFICE OF COMPLIANCE & INSPECTION

IN RE: Town of Johnston

**FILE NO.: WP 10-092 x-ref
RIPDES NO.: RIR040000**

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 DEM's jurisdiction.

B. Administrative History

DEM issued informal notices to the Respondent on January 26, 2009, April 24, 2009 and April 9, 2010 for the violations. To date, the Respondent has failed to respond or comply with any of the notices.

C. Facts

- (1) On December 19, 2003, the DEM issued Rhode Island Pollutant Elimination System (“RIPDES”) General Permit Number RIR040000 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 small municipal separate storm sewer systems (“MS4s”) that are operated by regulated small MS4s.
- (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 DEM within ninety days of the effective date of the General Permit to obtain coverage under the General Permit.
- (4) On March 18, 2004 the Respondent submitted to DEM a NOI and SWMPP.

- (5) Part I.E of the General Permit requires MS4 operators, in the case of a deficient SWMPP, to make all required changes and resubmit an amended SWMPP to DEM within thirty days of being notified, unless a longer time frame is granted.
- (6) On June 9, 2005 DEM issued a letter to the Respondent requiring changes to the SWMPP (the “Deficient SWMPP Notification”). The Respondent was given forty five days to resubmit the SWMPP to DEM.
- (7) On October 31, 2005 DEM received a letter from the Respondent in response to the Deficient SWMPP Notification. Coverage under the General Permit commenced on that date.
- (8) The General Permit requires the Respondent to:
 - (a) Submit a revised SWMPP and scope of work to DEM to implement non-structural or structural storm water controls in response to Total Daily Maximum Load (“TMDL”) determinations by DEM within one hundred eighty days of notification by DEM
 - (b) Submit an Annual Report (“AR”) to DEM by March 10th of each year
 - (c) Implement a public education program
 - (d) Issue a public notice of the AR and provide an opportunity for public comment
 - (e) Include the date and copy of the public notice of the AR in the AR
 - (f) Implement an illicit discharge detection program
 - (g) Implement a construction site storm water runoff control program
 - (h) Implement a post construction storm water management program for new development and redevelopment projects
 - (i) Implement a pollution prevention and good housekeeping program for municipal operations
 - (j) 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
 - (k) Properly operate and maintain all facilities and systems of treatment and control to achieve compliance with the storm water pollution prevention plans.
- (9) On January 31, 2007 DEM invited all MS4s to participate in a voluntary education outreach program that would satisfy the requirement in the General Permit. The Respondent chose not to participate in this program and was required to implement and meet the goals set forth in the SWMPP.
- (10) On August 29, 2007 DEM advised the Respondent in a letter that a TMDL water quality restoration plan was completed for the Woonasquatucket River (the “TMDL Notification”). The TMDL Notification advised the Respondent that storm water from the Respondent’s MS4 was contributing to bacteria and dissolved metals impairments in the Woonosquatucket River. The TMDL

Notification required the Respondent to submit an amended SWMPP to DEM (by February 29, 2008). The Respondent has failed to submit an amended SWMPP in response to the TMDL Notification.

- (11) The Respondent failed to timely submit ARs in accordance with the General Permit for the reporting years 2005 through 2009 as summarized in the following table:

REPORTING YEAR	DUE DATE	SUBMISSION DATE
2005	March 10,2006	April 27, 2006
2006	March 10,2007	NOT SUBMITTED
2007	March 10,2008	March 13, 2008
2008	March 10,2009	NOT SUBMITTED
2009	March 10, 2010	NOT SUBMITTED

- (12) In 2009, DEM reviewed the status of compliance for each MS4 in the State. The review revealed that the Respondent failed to:
- (a) Implement a public education program as evidenced by:
 - (i) distributing a storm water awareness package and annual flyers to residents in urban areas
 - (ii) annual meetings with local school officials to identify past and upcoming storm water curriculum
 - (iii) making the SWMPP available to the public
 - (iv) establishing a local storm water committee
 - (v) developing a storm drain stenciling program and begin stenciling in 2005
 - (vi) sponsoring and supporting cleanup projects with cleanups to begin by 2005
 - (b) Public notice the AR for reporting years 2006, 2007 and 2008 and provide an opportunity for public comment
 - (c) Implement an illicit discharge detection program as evidenced by:
 - (i) completion of outfall maps showing the location of all outfalls and the names of all waters that receive discharges from those outfalls
 - (ii) submission to DEM of documents indicating outfall locations
 - (iii) submission of a statement or letter from the town solicitor, legal counsel, or an official acting in comparable capacity stating that the Respondent has adopted a regulatory mechanism to effectively prohibit and enforce illicit discharges and that the mechanism provides the authority to adequately carry out the requirements of General Permit
 - (iv) implementation of a catch basin and manhole inspection program for illicit connections and non-stormwater discharges

- (v) completion of two dry weather surveys of the storm water collection system and submission of the results to DEM
 - (d) Implement a construction site storm water runoff program as evidenced by:
 - (i) submission of a statement or letter from the town solicitor, legal counsel, or an official acting in comparable capacity stating that the Respondent has adopted a regulatory mechanism to require erosion and sediment control and control of other wastes at construction sites and that the mechanism provides the authority to adequately carry out the requirements of General Permit
 - (ii) development and implementation of procedures for tracking erosion and sediment control permits including status of reviews and inspections
 - (e) Implement a post construction storm water management program for new development and redevelopment projects as evidenced by:
 - (i) submission of a statement or letter from the town solicitor, legal counsel, or an official acting in comparable capacity stating that the Respondent has adopted a regulatory mechanism to address post-construction runoff from new development and redevelopment and that the mechanism provides the authority to adequately carry out the requirements of General Permit
 - (ii) development and implementation of procedures for tracking post-construction reviews and inspections
 - (f) Implement a pollution prevention and good housekeeping program for municipal operations as evidenced by submission of procedures for identification, listing, and description of all structural best management practices (“BMPs”) in the SWMPP and the AR.
- (13) The Respondent 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 illicit discharge detection program, a construction storm water runoff program, a post construction storm water management program for new development and redevelopment projects, and a pollution prevention and good housekeeping program for municipal operations.
- (14) The Respondent 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 as evidenced by its failure to submit an amended SWMPP to DEM in response to the TMDL Notification.
- (15) As of the date of this Notice of Violation (“NOV”), the Respondent has failed to:
- (a) submit an amended SWMPP in response to the TMDL Notification
 - (b) implement a public education program
 - (c) implement an illicit discharge detection program
 - (d) implement a construction storm water runoff 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 for municipal operations
- (g) submit the AR for reporting years 2006, 2008 and 2009.

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) **The Rhode Island 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 Water Quality Regulations**
 - (a) **Rule 9(A)** – prohibiting the discharge of pollutants into any waters of the State or the performance of any activities alone or in combination which the Director determines will likely result in the violation of any State water quality criterion or interfere with one or more of the existing or designated uses assigned to the receiving waters.
 - (b) **Rule 9(B)** – prohibiting the discharge of pollutants in concentrations that will likely result in the additional degradation of the water quality of an impaired waterbody.
 - (c) **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.
 - (d) **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.
 - (e) **Rule 16(A)** – mandating compliance with all terms, conditions, management practices and operation and maintenance requirements set forth in a permit.
- (3) **DEM RIPDES Regulations**
 - (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 ninety days of receipt of the NOV**, submit to DEM the AR for reporting years 2008 and 2009 in accordance with the General Permit.
- (2) **Within one hundred eighty days of receipt of the NOV**, adopt a regulatory mechanism to:
 - (a) effectively prohibit and enforce illicit discharges and provides the authority to adequately carry out the requirements of Part IV.B.3 of the General Permit.
 - (b) require erosion and sediment control and control of other wastes at construction sites and provides the authority to adequately carry out the requirements of Part IV.B.4 of the General Permit.
 - (c) address post-construction runoff from new development and redevelopment projects and provides the authority to adequately carry out the requirements of Part IV.B.5 of the General Permit.
- (3) **Within one hundred eighty days of receipt of the NOV**, submit to DEM a statement or letter from the town solicitor, legal counsel, or an official acting in comparable capacity stating that the Respondent has adopted a regulatory mechanism to address the items identified in Section E(2)(a) through E(2)(c). The submission shall include a copy of the relevant sections of said mechanisms.
- (4) **Within one hundred eighty days of receipt of the NOV**, identify, locate and list all structural BMPs owned by the Respondent and submit the list to DEM.

- (5) **By June 15, 2012** submit to DEM:
- (a) 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
 - (b) documentation that confirms all catch basins and manholes have been inspected for illicit connections and non-storm water discharges and include a tabular summary that identifies the structures inspected, date of inspection, findings and corrective actions taken and/or required.
- (6) **By June 15, 2012** complete the January-April dry weather survey on all outfalls and submit to 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, fifteen 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.
- (7) **By December 15, 2012** complete the July-October dry weather survey on all outfalls and submit to 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, fifteen 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.
- (8) **By July 1, 2012**, develop and implement a mechanism that provides long term funding to manage the storm water program in compliance with the General Permit. Specifically, the funding must be adequate to:

- (a) address the TMDL Notification and satisfy Part IV.D of the General Permit (the “TMDL requirements”)
 - (b) implement a public education program that satisfies Part IV.B.1 and IV.B.2 of the General Permit (the “public education program”)
 - (c) review all of the plans and storm water pollution prevention plans for construction projects resulting in land disturbance of one to five acres and to inspect all of the construction projects within the urbanized area (the “SWPPP construction program”)
 - (d) review all plans for post-construction BMPs for the control of storm water runoff from new development and redevelopment projects greater than one acre and to inspect all post-construction BMPs within the urbanized area to ensure the BMPs are constructed in accordance with the approved plans (the “SWPPP post-construction program”).
- (9) **By January 1, 2013**, submit to DEM a revised SWMPP that:
- (a) includes an implementation schedule that identifies the steps and milestones necessary to address the TMDL requirements
 - (b) includes an implementation schedule for the public education
 - (c) documents how the SWPPP construction program and SWPPP post-construction programs will be implemented and identifies the data management system that will be used to track the status of all reviews, permit issuance, and inspections.

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:

Twenty Five Thousand Dollars (\$25,000.00)

- (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 Director within twenty days of your receipt of this 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 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.
- (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 Director determines that reasonable efforts have been made to comply promptly with this 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, 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 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 DEM's Administrative Adjudication Division, at the following address, within twenty 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
235 Promenade Street, 3RD 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 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) 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 David 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 G 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:

Honorable Joseph M. Polisena, Mayor
Town of Johnston
1385 Hartford Avenue
Johnston, RI 02919

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, Water Pollution

File No.: WP10 – 092 x-ref RIPDES Permit No. RIR040000

Respondent: Town of Johnston

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 (3) – Failure to comply with storm water permit and water quality regulations	Type I (\$25,000 Max. Penalty)*	Major	\$ 25,000	1 violation	\$25,000.00
<i>SUB-TOTAL</i>					\$25,000.00

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

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$ 25,000.00

PENALTY MATRIX WORKSHEET

CITATION: Failure to comply with storm water permit and water quality regulations
 VIOLATION NO.: D (1) through (3)

TYPE		
<p style="text-align: center;"><u>X</u> TYPE I</p> <p><u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p style="text-align: center;">TYPE II</p> <p><u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p style="text-align: center;">TYPE III</p> <p><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.		
<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: Respondent failed to comply with its MS4 storm water permit and failed to comply with the requirements of a TMDL notification. Compliance with the conditions of a permit and a TMDL notification are primary objectives of the Water Pollution Act, the DEM Water Quality Regulations, and the DEM RIPDES Regulations and are of major importance to the regulatory program.</p> <p>(B) Environmental conditions: The Respondent operates a small municipal separate storm sewer system (MS4) and discharges storm water from the MS4 to numerous waters of the State, including the Woonosquatucket River. The Woonosquatucket River within the town of Johnston is designated as a Class B1 water body of the State. Class B1 water bodies are designated for fish and wildlife habitat, primary and secondary contact recreational activities and fish and wildlife habitat, however, primary contact recreation may be impacted from the Smithfield wastewater treatment facility. The river is not meeting the Class B1 water quality standards for bacteria and dissolved metals within the town of Johnston and is listed as impaired.</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, and petroleum.</p> <p>(E) Duration of the violation: Approximately four and one half years. The Respondent is required to meet numerous conditions of the permit, the first of which was due by March 10, 2006.</p> <p>(F) Areal extent of the violation: Not relevant.</p>		
(continued)		

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to comply with thirteen 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:** Not relevant
- (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 Respondent has complete control over its MS4 and is well aware of the requirements of its permit. In January 2007 DEM held a workshop for all MS4 operators and issued letters in January 2009, April 2009 and April 2010 advising the Respondent of its noncompliance with the permit and the steps necessary to correct the noncompliance. The Respondent did not respond to the letters.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The Respondent was advised in the January 2009 and 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 \$25,000	\$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