

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

OFFICE OF COMPLIANCE & INSPECTION

IN RE: KSL-SK, Inc.

**FILE Nos.: OWTS-12-53
and CI 12-42**

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. Facts

- (1) The subject property is located at 3033 & 3045 Tower Hill Road in the town of South Kingstown, Assessor's Plat 18-2, Lots 11 & 12 and Plat 18-3, Lots 13 & 14 (the "Property").
- (2) The Respondent owns the Property.
- (3) DEM inspected the Property on March 20, 2012. The inspection revealed that the onsite wastewater treatment system at the Property (the "OWTS") has failed and sewage was discharged from the OWTS to the surface of the ground as evidenced by:
 - (a) Observation of lush green vegetation and breakout of fluids on the surface of the ground in the area around the OWTS.
 - (b) Photographs showing lush green vegetation and breakout of fluids on the surface of the ground in the area around the OWTS.
- (4) The DEM issued a Notice of Intent to Enforce (the "NIE") to the Respondent on April 2, 2012 for the violation. The NIE required that specific actions be taken to correct the violation. The actions included the following:
 - (a) Pumping the OWTS as often as necessary to keep the OWTS from overflowing to the surface of the ground; and
 - (b) Correcting any deficiencies in an application submitted to the DEM to repair the OWTS within fourteen (14) of notification by the DEM of said deficiencies.

- (5) On July 24, 2012, in response to the NIE, the DEM received a system assessment report (the "Assessment") prepared by Commonwealth Engineers & Consultants, Inc. ("Commonwealth") that was submitted on behalf of the Respondent. The Assessment revealed the following:
 - (a) The OWTS was inspected by Commonwealth on April 13, 2012;
 - (b) Trees had rooted within the OWTS with an approximate diameter of four (4) inches; and
 - (c) The sand filter bed was flooded with sewage indicating a hydraulic failure of the OWTS.
- (6) On August 3, 2012, the Respondent submitted application no. 1232-0866 to the DEM to repair the OWTS (the "Repair Application").
- (7) On August 23, 2012, the DEM returned the Repair Application to the Respondent as unacceptable. The DEM cited specific deficiencies in the Repair Application that the Respondent was required to correct (the "Repair Application Deficiencies")
- (8) The Respondent has failed to resubmit the Repair Application to the DEM.
- (9) As of the date of this Notice of Violation ("NOV"), the Respondent has failed to comply with the DEM's *Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems* (the "OWTS Regulations").

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) DEM's OWTS Regulations
 - (a) **Rule 8.5** – prohibiting the use of a failed OWTS except in accordance with the requirements of an enforcement notice or order issued by the Director.
 - (b) **Rule 8.8** – prohibiting the discharge of wastewater to the surface of the ground.
 - (c) **Rule 51.2** – requiring that all OWTSs be maintained in good repair by the owner.
 - (d) **Rule 51.2.5** – requiring that the owner of an OWTS ensure that trees are not growing within the area of the leachfield and within ten (10) feet of the leachfield.

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) **IMMEDIATELY** take steps to have the OWTS pumped by a permitted septage transporter as frequently as necessary to prevent the OWTS from overflowing or breaking out onto the surface of the ground. A list of permitted septage transporters can be obtained by contacting the DEM's Office of Waste Management at 222-4700 or from the DEM's web page at: www.dem.ri.gov/programs/benviron/waste/transport/septage.pdf.
- (2) **Within fourteen (14) days of receipt of this NOV**, resubmit the Repair Application to the DEM in accordance with the DEM's OWTS Regulations that addresses all of the Repair Application Deficiencies (the "Resubmitted Repair Application").
- (3) The Resubmitted Repair Application shall be subject to the DEM's review and approval. Upon review, the DEM shall provide written notification either granting formal approval or stating the deficiencies therein. Within fourteen (14) days (unless a longer time is specified) of receiving a notification of deficiencies in the Resubmitted Repair Application, submit to the DEM a modified proposal or additional information necessary to correct the deficiencies.
- (4) Commence work on the project in accordance with the method approved by the DEM within twenty (20) days of approval (unless otherwise expressly authorized by the DEM in writing to commence work at a later time), and complete such work within one hundred twenty (120) days of said approval or other date specified by 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:

Five Thousand Eight Hundred Dollars (\$5,800.00)

- (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 within thirty (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's 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.
- (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.

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:

Richard M. Bianculli, Jr., 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 South Kingstown wherein the Property is located to be recorded in the land evidence records pursuant to R.I. Gen. Laws Chapter 34-13 and Section 42-17.1-2(13), 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) Richard M. Bianculli, Jr. at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Patrick Hogan of the DEM Office of Compliance and Inspection at (401) 222-1360 ext. 7119.

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:

KSL-SK, Inc.
C/o Carl I. Freedman, Esq., Registered Agent
One Park Row, Suite 300
Providence, RI 02903

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, OWTS
 File No.: OWTS-12-53 and CI 12-42
 Respondent: KSL-SK, Inc.

GRAVITY OF VIOLATION					
SEE ATTACHED "PENALTY MATRIX WORKSHEETS."					
VIOLATION No. & CITATION	APPLICATION OF MATRIX		PENALTY CALCULATION		AMOUNT
	Type	Deviation	Penalty from Matrix	Number or Duration of Violations	
C(1)(a), (c) & (d) – Failure to maintain an OWTS and use of a failed OWTS	Type I (\$1,000 Max. Penalty)*	Major	\$1,000	1 violation	\$1,000
C(1)(b)– Discharge of sewage to the surface of the ground	Type I (\$1,000 Max. Penalty)*	Major	\$1,000	2 violations	\$2,000
<i>SUB-TOTAL</i>					\$3,000

*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:		
<ul style="list-style-type: none"> - THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE; OR - THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED. 		
DESCRIPTION OF BENEFIT	CALCULATION	AMOUNT
Cost of septic system pumping	2 occurrences @ \$1,400 each pumping	\$2,800.00
<i>SUB-TOTAL</i>		\$2,800.00

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$5,800.00

PENALTY MATRIX WORKSHEET

CITATION: Failure to maintain an OWTS and use of a failed OWTS

VIOLATION NO.: C(1)(a), (c) & (d)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare or environment.	___ TYPE II INDIRECTLY related to protecting health, safety, welfare or environment.	___ TYPE III INCIDENTAL 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 <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: The Respondent failed to properly maintain the OWTS and then continued to use the OWTS after failure. Proper maintenance and repair of septic systems are primary objectives of the regulations and major objectives of the regulatory program.</p> <p>(B) Environmental conditions: The property includes an 18,300 square foot commercial strip mall in a moderately populated neighborhood.</p> <p>(C) Amount of the pollutant: Considered, but not utilized for this calculation.</p> <p>(D) Toxicity or nature of the pollutant: Considered, but not utilized for this calculation.</p> <p>(E) Duration of the violation: Unknown, but is at least 10 months and ongoing.</p> <p>(F) Areal extent of the violation: Considered, but not utilized for this calculation.</p> <p>(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance: The Respondent failed to prevent the violation by properly maintaining the OWTS. The Respondent failed to mitigate the violation by re-submitting the repair application and following through with the OWTS repair as required by the Notice of Intent to Enforce the DEM issued to the Respondent on April 2, 2012 (delivered to the Respondent on April 4, 2012).</p> <p>(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.</p> <p>(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 full control over the violation. The Respondent is fully aware of the necessary actions to correct the violation.</p> <p>(J) Any other factor(s) that may be relevant in determining the amount of a penalty: The notice issued on April 2, 2012 stated the penalty could be up to \$1,000.00 per day for each violation.</p>		
<u> X </u> MAJOR	MODERATE	MINOR

Penalty Matrix where the applicable statute provides for a civil penalty up to \$1,000	TYPE I	TYPE II	TYPE III
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DEVIATION FROM STANDARD	MAJOR	\$800 to \$1,000 \$1,000	\$600 to \$800	\$400 to \$600
	MODERATE	\$600 to \$800	\$400 to \$600	\$200 to \$400
	MINOR	\$400 to \$600	\$200 to \$400	\$100 to \$200

PENALTY MATRIX WORKSHEET

CITATION: Discharge of sewage to the surface of the ground

VIOLATION NO.: C(1)(b)

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: Sewage was discharged to the ground surface from a failed OWTS. Preventing the discharge of sewage to the surface of the ground is a primary objective of the regulations and a major objective of the regulatory program.</p> <p>(B) Environmental conditions: The property includes an 18,300 square foot commercial strip mall in a moderately populated neighborhood.</p> <p>(C) Amount of the pollutant: The volume of the sewage overflow is unknown.</p> <p>(D) Toxicity or nature of the pollutant: Sewage contains many kinds of bacteria, viruses, and parasites that can cause serious or fatal diseases in both humans and animals, as well as being the source of extremely objectionable odors.</p> <p>(E) Duration of the violation: Unknown. The violation was observed by DEM on March 20, 2012 and observed by the Respondent's consultant on April 13, 2012.</p> <p>(F) Areal extent of the violation: Unknown.</p> <p>(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance: The Respondent failed to have the system pumped as necessary to prevent discharge to the ground surface. The DEM issued a Notice of Intent to Enforce to the Respondent on April 2, 2012 that required, among other things, that the Respondent pump the OWTS as often as necessary to keep the OWTS from overflowing to the ground surface. The notice was delivered to the Respondent on April 4, 2012.</p> <p>(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.</p> <p>(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 had full control over the violation. The violation was foreseeable.</p> <p>(J) Any other factor(s) that may be relevant in determining the amount of a penalty: The notice issued on April 2, 2012 stated the penalty could be up to \$1,000.00 per violation.</p>		
<p><u> X </u> MAJOR</p>	<p>MODERATE</p>	<p>MINOR</p>

Penalty Matrix where the applicable statute provides for a civil penalty up to \$1,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$800 to \$1,000 \$1,000	\$600 to \$800	\$400 to \$600
	MODERATE	\$600 to \$800	\$400 to \$600	\$200 to \$400
	MINOR	\$400 to \$600	\$200 to \$400	\$100 to \$200