

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

**OFFICE OF COMPLIANCE & INSPECTION**

**IN RE: Nine Howard Development, LLC**

**FILE NO.: SW 2010-15**

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

On 28 March 2008 and 2 June 2010, DEM issued informal written notices to the Respondent for the violations. The Respondent failed to comply with the 28 March 2008 notice and failed to respond to or comply with the 2 June 2010 notice.

C. Facts

- (1) The subject property is located at 9 Howard Avenue in the town of Coventry, Rhode Island, Assessor's Plat 96, Lot 18.001 (the "Property").
- (2) Respondent owns the Property.
- (3) On 29 February 2008, 23 July 2008, 4 May 2010 and 9 December 2010 DEM inspected the Property. The inspections revealed the following:
  - (a) approximately one hundred eighty four (184) cubic yards of solid waste deposited on the ground on 29 February 2008, consisting of construction and demolition ("C & D") debris, large wood beams, tree waste, empty steel drums, steel drums filled with metal debris, used tires, white goods and other mixed solid waste;
  - (b) approximately two hundred eighty five (285) cubic yards of solid waste deposited on the ground on 23 July 2008; consisting of C & D debris, large wood beams, tree waste, empty steel drums, steel drums filled with metal debris, used tires, white goods and other mixed solid waste;

- (c) approximately one hundred (100) cubic yards of solid waste deposited on the ground on 4 May 2010 consisting of C&D debris, used tires, tile, a black 55-gallon steel drum (the “Drum”), wooden pallets, a deteriorated trailer, a computer monitor, a television set and other mixed solid waste;
  - (d) approximately three hundred (300) cubic yards of solid waste deposited on the ground on 9 December 2010 consisting of C&D debris, used tires, Styrofoam insulating panels, asphalt shingles, a computer monitor, a television set, the Drum and other mixed solid waste;
  - (e) the Drum was labeled *Petroleum Derivative (Oil Mist)*;
  - (f) the Drum was upright during the 4 May 2010 inspection and was lying on its side during the 9 December 2010 inspection; and
  - (g) dark soil consistent with oil staining was present around the Drum (the “Contaminated Soil”).
- (4) Respondent failed to notify the DEM of the release of oil to the land.
  - (5) Respondent has neither sought nor obtained an approval, permit or license from the DEM to operate a solid waste management facility or C&D processing facility on the Property.
  - (6) As of the date of this Notice of Violation (“NOV”), the Respondent has failed to comply with Rhode Island’s Refuse Disposal Act, DEM’s Rules and Regulations for Hazardous Waste Management (the “Hazardous Waste Regulations”), and DEM’s Oil Pollution Control Regulations (the “OPC Regulations”).

D. Violation

Based on the foregoing facts, the Director has reasonable grounds to believe that you have violated the following statutes and/or regulations:

- (1) **R.I. Gen. Laws Section 23-18.9-5** – prohibiting the disposal of solid waste at other than a solid waste management facility.
- (2) **DEM’s Hazardous Waste Regulation 5.8 and Title 40 of the Code of Federal Regulations (“40 CFR”) 262.11** – requiring generators to determine if any waste is a hazardous waste.
- (3) **DEM’s OPC Regulation 6(a)** – prohibiting the placement of oil or pollutants into the land of the State.
- (4) **DEM’s OPC Regulation 12(b)** – requiring notification to DEM of a release of oil.

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) **IMMEDIATELY** cease the further discharge of any of the liquid within the Drum to the land.
- (2) **Within thirty (30) days of receipt of this NOV**, either voluntarily declare the liquid in the Drum, the Contaminated Soil, the computer monitor and the television to be hazardous waste **OR** properly characterize the liquid in the Drum, the Contaminated Soil, the computer monitor and the television to determine if it meets the definition of hazardous waste, in accordance with Rule 5.8 of DEM's Hazardous Waste Regulations and 40 CFR 262.11. Testing to determine if the liquid in the Drum, the Contaminated Soil, the computer monitor and the television is hazardous waste must be an approved method set forth in 40 CFR 260.11 or 40 CFR 261, Subpart C.
- (3) **Within ten (10) days of determining the liquid in the Drum, the Contaminated Soil, the computer monitor and the television is hazardous waste**, remove all of the hazardous waste from the Property using a DEM permitted hazardous waste transporter in full compliance with the DEM's Hazardous Waste Regulations. The hazardous waste shall be disposed of at a licensed hazardous waste management facility. Within ten (10) days of the date the hazardous waste is shipped off the Property, submit a copy of the hazardous waste manifest to the DEM.
- (4) **Within sixty (60) days of receipt of the NOV**, remove all solid waste from the Property (including the Drum, the Contaminated Soil, the computer monitor and/or the television, if the Drum, the Contaminated Soil, the computer monitor and/or the television is determined not to be a hazardous waste), and dispose of it at a licensed solid waste management facility.
- (5) **Within ten (10) days of completion of the removal of the solid waste from the Property**, submit to DEM written verification that the solid waste was disposed of at a licensed solid waste management facility.
- (6) **Within thirty (30) days of removal of the Drum and the Contaminated Soil**, collect soil samples from the limits of the excavation around the Drum to verify that the remaining soils meet the soil objectives set forth in Rule 8.02 of the DEM's Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases. Within thirty (30) days of the date the samples are collected, submit a written report detailing all of the release response activities (including written verification of disposal of the Contaminated Soil and copies of any laboratory analytical reports generated as part of the response) to the DEM – Office of Compliance and Inspection.

- (7) The reports and other documents required in Section E above shall be subject to DEM review and approval. Upon review, the DEM shall provide notification to the Respondent either granting formal approval or stating the deficiencies therein. Within fourteen (14) days of a notice of deficiency from the DEM (unless a longer time period is specified), the Respondent shall correct or address each deficiency and provide a response to the DEM.

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:

**Fifteen Thousand Dollars (\$15,000.00)**

- (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 to the DEM within twenty (20) 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 - Environmental Response Fund," 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 (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 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, 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 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 Coventry, Rhode Island 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 Section 23-18.9-13, as is or 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 Tracey D'Amadio Tyrrell of the DEM Office of Compliance and Inspection at (401) 222-1360 ext. 7407.

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

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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:

Nine Howard Development, LLC  
c/o Amy T. M. Oakley, Esq., Registered Agent  
10 Weybosset Street  
Providence, RI 02903

by Certified Mail.

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# ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, SOLID WASTE

File No.: SW 2010 –15

Respondent: Nine Howard Development, 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	
D(1) – Disposal of solid waste at other than a licensed solid waste management facility	Type I (\$ 25,000 Max. Penalty)*	Moderate	\$10,000	1 violation	\$10,000.00
D(2) – Failure to determine if waste is hazardous waste	Type I (\$ 25,000 Max. Penalty)*	Minor	\$2,500	1 violation	\$2,500.00
D(3) and (4) – Release of oil and failure to notify DEM of the release	Type I (\$ 25,000 Max. Penalty)*	Minor	\$2,500	1 violation	\$2,500.00
<b><i>SUB-TOTAL</i></b>					<b>\$15,000.00</b>

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

**TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$ 15,000.00**



**PENALTY MATRIX WORKSHEET**

CITATION: Disposal of solid waste at other than a licensed solid waste management facility  
 VIOLATION NO.: D (1)

<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><u>      </u> <b>TYPE II</b>  <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p><u>      </u> <b>TYPE III</b>  <u>INCIDENTAL</u> to protecting health, safety, welfare or environment.</p>
<b>DEVIATION FROM THE STANDARD</b>		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<p><b>FACTORS CONSIDERED:</b></p> <p>Taken from Section 10 (a) (2) of the DEM <i>Rules and Regulations for Assessment of Administrative Penalties</i></p> <p>(A) <b>The extent to which the act or failure to act was out of compliance:</b> Respondent disposed of or allowed for the disposal of solid waste on the property. Prohibiting the disposal of solid waste at other than a licensed solid waste management facility is of importance to the regulatory program.</p> <p>(B) <b>Environmental conditions:</b> The property is located in a GA groundwater classification zone, which are groundwater resources designated as suitable for drinking water use without treatment. The property is located within the Pawtuxet River watershed and is immediately adjacent to freshwater wetlands and the Pawtuxet River (within 200 feet).</p> <p>(C) <b>Amount of the pollutant:</b> Approximately 300 cubic yards of solid waste (as of 9 December 2010).</p> <p>(D) <b>Toxicity or nature of the pollutant:</b> The solid waste is combustible and presents a fire hazard. The stockpiles of solid waste may provide harborage to rodents or disease vectors. The spilled oil represents a threat to the land and waters of the state.</p> <p>(E) <b>Duration of the violation:</b> DEM first observed solid waste on the property on 29 February 2008.</p> <p>(F) <b>Areal extent of the violation:</b> The solid waste disposal area encompasses approximately several hundred square feet.</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 prevent the non-compliance by prohibiting the disposal of solid waste on the property.
- (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:** Respondent has yet to comply with DEM's regulations despite receiving two written notices from DEM on 28 March 2008 and 2 June 2010, which required that it do so.
- (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 immediately with the requirements set forth in the notices. Respondent, as owner of the property, had complete control over the occurrence of the violation.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** 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		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$12,500 to \$25,000	\$6,250 to \$12,500	\$2,500 to \$6,250
	<b>MODERATE</b>	\$6,250 to \$12,500 <b>\$10,000</b>	\$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 determine if waste is a hazardous waste  
 VIOLATION NO.: D (2)

<b>TYPE</b>		
<u>  X  </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>      </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 *Rules and Regulations for Assessment of Administrative Penalties*

- (A) **The extent to which the act or failure to act was out of compliance:** Respondent failed to determine whether the contents of the Drum, the Contaminated Soil, the television and the computer monitor meet any of the definitions of hazardous waste.
- (B) **Environmental conditions:** The property is located in a GA groundwater classification zone, which are groundwater resources designated as suitable for drinking water use without treatment. The property is located within the Pawtuxet River watershed and is immediately adjacent to freshwater wetlands and the Pawtuxet River (within 200 feet).
- (C) **Amount of the pollutant:** The contents of the Drum, the Contaminated Soil, a computer monitor and one broken television.
- (D) **Toxicity or nature of the pollutant:** Cathode ray tubes typically have hazardous constituents such as toxic heavy metals. The Drum is labeled for a petroleum product that is a potentially hazardous waste.
- (E) **Duration of the violation:** DEM first observed the Drum, the Contaminated Soil, the computer monitor and the broken television on the property on 4 May 2010.
- (F) **Areal extent of the violation:** 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:** Respondent has failed to prevent the non-compliance by determining whether the wastes meet any of the definitions of hazardous waste. Respondent has yet to mitigate the violation despite receiving a written notice from DEM on 2 June 2010, which required that it do so.
- (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:** Negligence is attributable to the Respondent for the failure to determine whether the wastes meet any of the definitions of hazardous waste. Respondent, as owner of the property, had complete control over the occurrence of the violation.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Not utilized for this calculation.

<b>MAJOR</b>	<b>MODERATE</b>	<u><b>X</b></u> <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	\$2,500 to \$6,250	\$1,250 to \$2,500
	<b>MINOR</b>	\$2,500 to \$6,250 <b>\$2,500</b>	\$1,250 to \$2,500	\$250 to \$1,250

**PENALTY MATRIX WORKSHEET**

CITATION: Release of oil and failure to notify DEM of the release

VIOLATION NO.: D (3) and (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>
<b>DEVIATION FROM THE STANDARD</b>		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<p><b><u>FACTORS CONSIDERED:</u></b></p> <p>Taken from Section 10 (a) (2) of the DEM <i>Rules and Regulations for Assessment of Administrative Penalties</i></p> <p>(A) <b>The extent to which the act or failure to act was out of compliance:</b> Respondent released oil onto the land and failed to notify DEM of the release. Violation of these rules results in a direct threat to the protection of the public health, safety, welfare and the environment.</p> <p>(B) <b>Environmental conditions:</b> The property is located in a GA groundwater classification zone, which are groundwater resources designated as suitable for drinking water use without treatment. The property is located within the Pawtuxet River watershed and is immediately adjacent to freshwater wetlands and the Pawtuxet River (within 200 feet).</p> <p>(C) <b>Amount of the pollutant:</b> Unknown. The Drum could have held 55 gallons of oil.</p> <p>(D) <b>Toxicity or nature of the pollutant:</b> The released oil represents a threat to the land and waters of the state.</p> <p>(E) <b>Duration of the violation:</b> DEM first observed the Drum and Contaminated Soil on 4 May 2010.</p> <p>(F) <b>Areal extent of the violation:</b> Approximately 64 square feet of soil around the Drum had dark staining (on the 9 December 2010 inspection).</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:** Respondent failed to prevent the non-compliance by properly storing and/or disposing of the Drum.
- (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:** Respondent, as owner of the property, had complete control over the occurrence of the violation.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Not utilized for this calculation.

<b>MAJOR</b>	<b>MODERATE</b>	<u><b>X</b></u> <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	\$2,500 to \$6,250	\$1,250 to \$2,500
	<b>MINOR</b>	\$2,500 to \$6,250 <b>\$2,500</b>	\$1,250 to \$2,500	\$250 to \$1,250