

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

OFFICE OF COMPLIANCE & INSPECTION

IN RE: M & S PROPERTY MANAGEMENT
ASSOCIATES, LLC

FILE NOs.: OCI-UST-19-51
and LS 3205

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 19 August 2019, DEM issued a *Notice of Intent to Enforce* (“NIE”) to Respondent by certified mail for the violations that are the subject of this *Notice of Violation* (“NOV”). The NIE required Respondent to take specific actions to correct the alleged violations. The NIE was delivered to Respondent on 23 August 2019. As of the date of the NOV, Respondent has failed to comply with the NIE.

C. Facts

- (1) The property is located at 491 Main Street, Plat 56-3, Lot 210 in South Kingstown, Rhode Island (the “Property”).
- (2) M & S PROPERTY MANAGEMENT ASSOCIATES, LLC (“M&S”) owns the Property. M&S acquired the Property on 17 December 1997.
- (3) Underground storage tanks (“USTs” or “tanks”) were formerly located on the Property, which tanks were used for storage of petroleum products and which were subject to the *Rules and Regulations for Underground Storage Facilities Used for Regulated Substances and Hazardous Materials (250-RICR-140-25-1)* (the “UST Regulations”).
- (4) In May 1988, DEM received a copy of a site investigation report for the Property, which was prepared by Corporate Environmental Advisors, Inc. (“CEA”) on behalf of the former UST system owner/operator (“Sunoco”). CEA reported that:
 - (a) A release of petroleum product (the “Release”) was discovered on the Property;

- (b) Elevated levels of benzene, toluene, ethylbenzene and total xylenes (“BTEX”) were present in groundwater samples taken from 4 groundwater monitoring wells (“GMW”); and
 - (c) Non-aqueous phase liquid (“NAPL”) was also discovered in 1 well.
- (5) Sunoco procured the services of Handex of New England, Inc. (“Handex”) to further investigate the Release and installed and operated a groundwater treatment system that was approved by DEM.
- (6) In 2001, Respondent destroyed several GMWs (the “Destroyed GMWs”) during a re-paving project. At that time, 5 of those wells had elevated levels of BTEX compounds and methyl tertiary butyl ether (“MTBE”).
- (7) On 17 March 2006, DEM received from CEA a *Site Status Report*. The report included the following information:
- (a) Laboratory analysis of groundwater samples collected from 7 GMWs on the Property did not identify any analyte concentrations above the *Method One GA Groundwater Objectives* set forth in the *Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases* (the “Remediation Regulations”);
 - (b) Additional data was required to confirm the seasonal groundwater quality trends in the area of the Destroyed GMWs; and
 - (c) Sunoco planned to discontinue the site monitoring activities if Respondent failed to grant access for the installation of the necessary replacement GMWs.
- (8) By letter dated 27 September 2018, DEM notified Respondent by certified mail that it was required to procure the services of a qualified environmental consultant to perform a site investigation of the Property in accordance with the UST Regulations and submit a *Site Investigation Report* to DEM within 60 days. The notice was delivered to Respondent’s registered agent on 4 October 2018. Respondent failed to comply with the letter.
- (9) As of the date of the NOV, Respondent has failed to comply with any of the investigatory and remedial requirements set forth by DEM to address the Release.

D. Violation

Based on the foregoing facts, the Director has reasonable grounds to believe that you are in violation of the following statutes and/or regulations:

- (1) **R.I. Gen. Laws, Section 46-12-5(a)** – prohibiting the placement of pollutants where it is likely to enter the waters of the State.
- (2) **R.I. Gen. Laws, Section 46-12-5(b)** – prohibiting the discharge of pollutants into the waters of the State without a permit from DEM.
- (3) **R.I. Gen. Laws, Section 46.12.5.1-3** – prohibiting the discharge of oil to the waters of the State.
- (4) ***Oil Pollution Control Regulations (250-RICR-140-25-2) [effective 2 May 2018 to Current] (the “OPC Regulations”), Part 2.6(A)*** – prohibiting the placement of oil or pollutants into the waters or land of the State or in a location where they are likely to enter the waters of the State.
- (5) **OPC Regulations, Part 2.12(B)** – pertaining to oil and waste release response requirements.
- (6) ***Groundwater Quality Rules (250-RICR-150-05-3) [effective 9 January 2019 to Current] (the “Groundwater Rules”), Part 3.8(A)*** – prohibiting any person from taking actions that violate the groundwater standards.
- (7) **Groundwater Rules, Part 3.8(B)** – prohibiting the discharge of pollutants to the groundwater without the approval of DEM.
- (8) **Groundwater Rules, Part 3.8(C)** – prohibiting the operation or maintenance of a facility in a manner that may result in the discharge of pollutants to the groundwater without the approval of DEM.
- (9) **UST Regulations, Part 1.14(B)** – requiring UST owners/operators to investigate and clean up any spills, leaks or releases in accordance with the UST Regulations and any other applicable local, state and federal statutes, rules and regulations.
- (10) **UST Regulations, Part 1.14(I)(2)** – requiring owners/operators to submit Corrective Action Plans to DEM within 90 days of receiving notice from DEM.

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 complete the following remedial actions:

- (1) **Within 7 days of receipt of the NOV**, submit to DEM's Office of Compliance and Inspection ("OC&I") written verification that you have procured the services of a qualified environmental consultant to investigate and develop remedial options for the soil and groundwater contamination on and off the Property in accordance with Part 1.14 of the UST Regulations.
- (2) **Within 60 days of receipt of the NOV**, the consultant shall complete an investigation of the Property and submit a *Site Investigation Report* ("SIR") to DEM's – Office of Land Revitalization and Sustainable Materials Management ("LRSMM") Leaking Underground Storage Tank Program Project Manager, Michael Cote ("Project Manager"), in full compliance with Part 1.14(H) of the UST Regulations, and a copy shall be submitted to OC&I. The Project Manager will review the SIR and provide direction on how to proceed with the investigation of the Property.
- (3) If required by LRSMM, develop a *Corrective Action Plan* ("CAP"), which shall be prepared by the consultant in accordance with Part 1.14(I)(3) and Part 1.14(I)(4) of the UST Regulations, and submitted in accordance with a schedule established by LRSMM.
- (4) If required by LRSMM, implement the CAP in accordance with an approved schedule and an *Order of Approval* issued by LRSMM.
- (5) Notify the Project Manager at least 48 hours prior to any excavation, well installation, repair or replacement of equipment at the Property so that a representative of LRSMM may be present.
- (6) Submit quarterly status reports of all investigatory, sampling, and remedial activities that take place at the Property to the Project Manager.
- (7) Continue the site investigation, operation of all remediation procedures specified in the CAP and submission of required status reports until LRSMM determines that the soils and/or groundwater located on and around the Property have been adequately investigated and/or treated. LRSMM may require a period of monitoring to ensure that standards have been met. Continue submission of required quarterly status reports until such time that LRSMM issues written approval for termination of remedial activities at the Property.

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:

\$18,750

- (2) The proposed administrative penalty is calculated pursuant to the *Rules and Regulations for Assessment of Administrative Penalties (250-RICR-130-00-1)* [effective 19 March 2021 to Current] (the “Penalty Regulations”) and must be paid to DEM within 30 days of your receipt of the NOV. Payment shall be in the form of a certified check, cashier’s check or money order made payable to the “General Treasury - Water & Air Protection Program” and shall be forwarded to DEM’s Office of Compliance and Inspection, 235 Promenade Street, Suite 220, Providence, Rhode Island 02908-5767.
- (3) Penalties assessed against Respondent in the 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 the 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 DEM's 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 20 days of your receipt of the 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, Room 350
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 Part 1.7(B) of the *Rules and Regulations for the Administrative Adjudication Division (250-RICR-10-00-1)* [effective 27 November 2014 to Current].
- (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, Suite 425
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 the 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 (vi) and 42-17.6-4(b) and (c).
- (5) Failure to comply with the NOV may subject each respondent to additional civil and/or criminal penalties.
- (6) An original signed copy of the NOV is being forwarded to the Town of South Kingstown, 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 42-17.1-2 (31), as amended.
- (7) The 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 of DEM's Office of Legal Services at (401) 222-6607 or at joseph.lobianco@dem.ri.gov. All other inquiries should be directed to Tracey Tyrrell of DEM's Office of Compliance and Inspection at (401) 222-1360 ext. 77407 or at tracey.tyrrell@dem.ri.gov.

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

By: _____
David E. Chopy, Administrator
DEM Office of Compliance and Inspection

Date: _____

CERTIFICATION

I hereby certify that on the _____ day of _____
the within Notice of Violation was forwarded to:

M & S PROPERTY MANAGEMENT ASSOCIATES, LLC
c/o Martha Day, Resident Agent
27 Oak Street
Wakefield, RI 02879

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY	
Program:	OFFICE OF COMPLIANCE AND INSPECTION, UST and LUST
File Nos.:	OCI-UST-19-51 and LS 3205
Respondent:	M & S PROPERTY MANAGEMENT ASSOCIATES, LLC

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), (2), (3), (5), (6), and (7) – Release of pollutants to the land and waters of the State	Type I <i>(\$25,000 Max. Penalty) *</i>	Moderate	\$6,250	1 violation	\$6,250
D (4), (8) and (9) – Failure to investigate the release and take remedial action	Type I <i>(\$25,000 Max. Penalty) *</i>	Major	\$12,500	1 violation	\$12,500
SUB-TOTAL					\$18,750

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

ECONOMIC BENEFIT FROM NON-COMPLIANCE
<p>COSTS OF COMPLIANCE, EQUIPMENT, O&M, STUDIES OR OTHER DELAYED OR AVOIDED COSTS, INCLUDING INTEREST AND/OR ANY COMPETITIVE ADVANTAGE DERIVED OVER ENTITIES THAT COMPLY. NOTE: ECONOMIC BENEFIT MUST BE INCLUDED IN THE PENALTY UNLESS:</p> <ul style="list-style-type: none"> - THERE IS NO IDENTIFIABLE BENEFIT FROM NON-COMPLIANCE; OR - THE AMOUNT OF ECONOMIC BENEFIT CANNOT BE QUANTIFIED.
<p>A review of the record in this matter has revealed that Respondent has either enjoyed no identifiable benefit from the non-compliance alleged in this enforcement action or that the amount of economic benefit that may have resulted cannot be quantified.</p>

COST RECOVERY
<p>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.</p>
<p>A review of the record in this matter has revealed that 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.</p>

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$18,750

PENALTY MATRIX WORKSHEET

CITATION:	Release of pollutants to the land and waters of the State
VIOLATION NOS.:	D (1), (2), (3), (5), (6) and (7)

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.

FACTORS CONSIDERED:

Taken from Part 1.10(A)(1)(b) of the Penalty Regulations

- (1) **The extent to which the act or failure to act was out of compliance:** Benzene, ethylbenzene, toluene and total xylenes have been detected at concentrations that exceeded the *Method One GA Groundwater Objectives* set forth in the Remediation Regulations. The detected analytes are typically associated with gasoline. The R.I. Gen. Laws, OPC Regulations and Groundwater Rules prohibit the release of pollutants and petroleum products to the waters of the State and require that groundwater be maintained consistent with its classification.

- (2) **Environmental conditions:** The Property is in a densely developed area with numerous potential vapor receptors including commercial structures, residential structures and underground utilities. The Property is in a GA groundwater classification zone, which are groundwater resources presumed to be suitable for drinking water use without treatment. Upon information and belief, there are no drinking water supply wells proximate to the Property. The Property is located within 385 feet of the Saugatucket River and within its watershed.

- (3) **Amount of the pollutant:** Laboratory analysis of groundwater samples obtained from GMWs installed on and around the Property revealed concentrations of benzene, ethylbenzene and toluene at concentrations that exceeded the *Method One GA Groundwater Objectives* set forth in the Remediation Regulations. As of 2001, ethylbenzene was present in MW-6 at 1,070 micrograms per liter ("ug/L"), benzene was present in VE-5 at 181 ug/L and toluene was present in VE-5 at 1,320 ug/L, all of which exceeded the Method One GA Groundwater Objectives. NAPL was also present in wells installed on the Property in amounts that required pumping or bailing of the wells. The concentrations of any remaining pollutants are unknown at this time.

- (4) **Toxicity or nature of the pollutant:** The volatile nature of gasoline presents both a potential public health hazard (due to potential inhalation of benzene) and a potential public safety hazard (due to the potential for explosion). Gasoline can cause significant soil and groundwater contamination if released to the environment. Benzene is a known human carcinogen.

- (5) **Duration of the violation:** Unknown. Sunoco first reported the petroleum contamination to DEM in 1988, and the contamination had persisted through 2001, when Respondent destroyed several required GMWs.

- (6) **Areal extent of the violation:** Unknown.

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- (7) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance:** Respondent took title to the Property after the contamination had already been discovered. Respondent has made no apparent attempt to mitigate the non-compliance despite receiving the NIE from DEM, which required that it do so.
- (8) **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.
- (9) **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:** Upon information and belief, Respondent knowingly took title to the Property after the contamination had already been discovered.
- (10) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but 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 \$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
	MODERATE	\$6,250 to \$12,500 \$6,250	\$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 investigate the release and take remedial action	
VIOLATION NOs.:	D	(4), (8) and (9)

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
THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.

FACTORS CONSIDERED:

Taken from Part 1.10(A)(1)(b) of the Penalty Regulations

- (1) **The extent to which the act or failure to act was out of compliance:** Respondent failed to allow Sunoco to replace the groundwater monitoring wells needed to complete the investigation of the Release and then failed to take on the investigatory and remedial requirements set forth by DEM to address the Release. Responsible parties are required to investigate and take remedial action in response to a release of hazardous materials to the land and/or waters of the State. Failure to comply may result in threats to public health, public safety and the environment.
- (2) **Environmental conditions:** The Property is in a densely developed area with numerous potential vapor receptors including commercial structures, residential structures and underground utilities. The Property is in a GA groundwater classification zone, which are groundwater resources presumed to be suitable for drinking water use without treatment. Upon information and belief, there are no drinking water supply wells proximate to the Property. The Property is located within 385 feet of the Saugatucket River and within its watershed.
- (3) **Amount of the pollutant:** Considered, but not utilized for this calculation.
- (4) **Toxicity or nature of the pollutant:** The volatile nature of gasoline presents both a potential public health hazard (due to potential inhalation of benzene) and a potential public safety hazard (due to the potential for explosion). Gasoline can cause significant soil and groundwater contamination if released to the environment.
- (5) **Duration of the violation:** Approximately 19 years – Respondent destroyed the required GMWs in 2001 and has been uncooperative since that time.
- (6) **Areal extent of the violation:** Unknown.

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- (7) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance:** Respondent failed to prevent the non-compliance by allowing Sunoco to reinstall the necessary GMWs after they were destroyed in 2001 and by procuring the services of a qualified environmental consultant to perform an investigation when required to do so by DEM. Respondent has yet to take any actions to mitigate the non-compliance despite receiving the NIE from DEM, which required that it do so.
- (8) **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.
- (9) **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 Respondent for the failure to comply with the UST Regulations and the OPC Regulations. As owner and of the Property, Respondent had full control over the occurrence of the violation. The release response requirements are clearly established in the UST Regulations and the OPC Regulations.
- (10) **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	MAJOR	\$12,500 to \$25,000 \$12,500	\$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