

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

**IN RE: WIND ENERGY DEVELOPMENT
HOLDINGS, LLC
d/b/a Wind Energy Development, LLC**

FILE NO.: OCI- FW-15-12

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 the DEM's jurisdiction.

B. Administrative History

On 12 May 2015, the DEM issued a Notice of Intent to Enforce (“NIE”) to Wind Energy Development, LLC (“WED”) for the violations that are the subject of this Notice of Violation (“NOV”). The NIE required specific actions to correct the violations. On 28 May 2015, the DEM received a letter from ESS Group on behalf of WED in response to the NIE. The letter stated that some of the required actions were completed and that a permit application would be filed with the DEM to restore the wetlands to the pre-altered condition. Respondent filed a permit application with the DEM, and the DEM issued a permit on 2 August 2016. The permit required restoration of the wetlands by 15 October 2016. On 2 June 2017, the DEM inspected the property and spoke with Mark DePasquale (“DePasquale”), the president of WED, at the time of the inspection. The inspection revealed that little progress had been made in restoring the wetlands in accordance with the permit. DePasquale informed the DEM agent that due to adverse weather conditions and difficulties with gypsy moth infestation, he was unable to complete the work. DePasquale stated that the work would be completed soon. As of the date of the NOV, Respondent has failed to comply with the permit.

C. Facts

- (1) The property is located on West Log Bridge Road, approximately 2,130 feet southwest of the intersection of Kirvanta Road and Victory Highway (State Route 102), Assessor’s Plat 303, Lot 4 (“Lot 4”) and Plat 304, Lots 2 (“Lot 2”) and 3 (“Lot 3”) in Coventry (the “Property”).
- (2) The Town of Coventry (“Coventry”) owns West Log Bridge Road.
- (3) Kevin A. Breene (“Breene”) owns Lot 4 and Lot 2.
- (4) Dianne Morton and Steven H. Morton (“Morton”) own Lot 3.

- (5) On 2 August 2016, the DEM issued to WED, Coventry, Breene and Morton Insignificant Alteration Permit Number 15-0172 consisting of an approved plan (the “Approved Plan”) and letter of Terms and Conditions (the “Permit”).
- (6) Paragraph 15 of the Permit required, by 15 October 2016, restoration of West Log Bridge Road and the freshwater wetlands adjacent to the road identified as Swamp, Perimeter Wetland and Riverbank Wetland (the “Wetlands”).
- (7) Paragraph 16 of the Permit required, by 15 October 2016, installation of plants within the Wetlands and replacement of any plants that did not survive by 30 April 2017.
- (8) On 24 February 2017 and 2 June 2017, the DEM inspected the Property. The inspections revealed that the work described in Facts C (6) and (7) above was not completed.

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) **DEM’s Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, Rule 9.04B** – requiring an applicant to comply with all conditions of a permit issued by the 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 **by 30 April 2018**, fully comply with Paragraphs 15 and 16 of the Permit in accordance with the Approved Plan.

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:

\$20,000

- (2) The proposed administrative penalty is calculated pursuant to the DEM's *Rules and Regulations for Assessment of Administrative Penalties* and must be paid to the 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 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 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.

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'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 the 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
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 Part 1.7(B) of the DEM's *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters*.

- (2) A copy of each request for hearing must also be forwarded to:

Tricia Quest, 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 the 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 regarding 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 Coventry to be recorded in the Office of Land Evidence Records pursuant to R.I. Gen. Laws Chapter 34-13 and 2-1-24, as amended.
- (7) 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) Tricia Quest of the DEM's Office of Legal Services at (401) 222-6607. All other inquiries should be directed to David Chopy of the DEM's Office of Compliance and Inspection at (401) 222-1360 extension 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

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

Dated: _____

CERTIFICATION

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

WIND ENERGY DEVELOPMENT HOLDINGS, LLC
c/o Orson and Brusini LTD, Resident Agent
144 Wayland Avenue
Providence, RI 02906

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, WETLANDS

File No.: FW-15-12

Respondent: WIND ENERGY DEVELOPMENT HOLDINGS, 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) Failure to Comply With Permit – Fact C (6)	Type I (\$10,000 Max. Penalty) *	Major	\$10,000	1 violation	\$10,000
D (1) Failure to Comply With Permit – Fact C (7)	Type I (\$10,000 Max. Penalty)*	Major	\$10,000	1 violation	\$10,000
SUB-TOTAL					\$20,000

*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 COMPLY. NOTE: ECONOMIC BENEFIT MUST BE INCLUDED IN THE PENALTY UNLESS:

- THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE; OR
- THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED.

A review of the record in this matter has revealed that Respondent has either enjoyed no identifiable benefit from the noncompliance alleged in this enforcement action or that the amount of economic benefit that may have resulted cannot be quantified.

COST RECOVERY

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.

A review of the record in this matter has revealed that the 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.

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$20,000

PENALTY MATRIX WORKSHEET

CITATION: Failure To Comply With Permit – Fact C (6)
 VIOLATION NO.: D (1)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare or environment.	<u> </u> TYPE II INDIRECTLY related to protecting health, safety, welfare or environment.	<u> </u> TYPE III INCIDENTAL to protecting health, safety, welfare or environment.
DEVIATION FROM THE STANDARD		
THE DEGREE TO WHICH A 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's <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 the Permit, which required the reduction of the culvert pipe under West Log Bridge Road, restoration of a stream channel, and removal of fill and boulders from the Wetlands. The severity of the violation was determined to be of major importance to the regulatory program.</p> <p>(B) Environmental conditions: Respondent altered approximately 16,750 square feet of Swamp, 19,500 square feet of Perimeter Wetland, and 20 linear feet of Stream. The Wetlands were undisturbed prior to the alterations. The DEM first documented the alterations during an inspection on 31 March 2015.</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: 11 months. The Permit required restoration of the Wetlands by 15 October 2016.</p> <p>(G) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance: Respondent failed to take reasonable and appropriate steps to prevent and/or mitigate the noncompliance by complying with the Permit.</p>		
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- (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.
- (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 had complete control over the project and had an obligation to comply with the Permit. On 12 May 2015, the DEM issued a Notice of Intent to Enforce (NIE) to WED for alterations to the Wetlands. The NIE required specific actions to restore the Wetlands. The DEM allowed WED the opportunity to restore the Wetlands through the submission of an after the fact permit application. On 2 August 2016, the DEM issued the Permit to Respondent, which required reduction of the culvert pipe under West Log Bridge Road, restoration of a stream channel, and removal of fill and boulders from the Wetlands by 15 October 2016.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** When questioned by a DEM agent at the field meeting on 2 June 2017 why the work was not complete, DePasquale stated that it was because of adverse weather conditions and gypsy moth infestation.

<u> </u> X MAJOR	MODERATE	MINOR
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Penalty Matrix where the applicable statute provides for a civil penalty up to \$10,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$5,000 to \$10,000 \$10,000	\$2,500 to \$5,000	\$1,000 to \$2,500
	MODERATE	\$2,500 to \$5,000	\$1,000 to \$2,500	\$500 to \$1,000
	MINOR	\$1,000 to \$2,500	\$500 to \$1,000	\$100 to \$500

PENALTY MATRIX WORKSHEET

CITATION: Failure To Comply With Permit – Fact C (7)

VIOLATION NO.: D (1)

TYPE		
<p><u> X </u> TYPE I <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p><u> </u> TYPE II <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.</p>	<p><u> </u> TYPE III <u>INCIDENTAL</u> to protecting health, safety, welfare or environment.</p>

DEVIATION FROM THE STANDARD
THE DEGREE TO WHICH A VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.

FACTORS CONSIDERED:

Taken from Section 10 (a) (2) of the DEM's *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 comply with the Permit, which required the planting of trees and shrubs within the Wetlands. The severity of the violation was determined to be of major importance to the regulatory program.
- (B) **Environmental conditions:** Respondent altered approximately 16,750 square feet of Swamp, 19,500 square feet of Perimeter Wetland, and 20 linear feet of Stream. The Wetlands were undisturbed prior to the alterations. The DEM first documented the alterations during an inspection on 31 March 2015.
- (C) **Amount of the pollutant:** Considered, but not utilized for this calculation.
- (D) **Toxicity or nature of the pollutant:** Considered, but not utilized for this calculation.
- (E) **Duration of the violation:** 11 months. The Permit required the planting of trees and shrubs within the Wetlands by 15 October 2016.
- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to take reasonable and appropriate steps to prevent and/or mitigate the noncompliance by complying with the Permit.

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- (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.
- (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 had complete control over the project and had an obligation to comply with the Permit. On 12 May 2015, the DEM issued a Notice of Intent to Enforce (NIE) to WED for alterations to the Wetlands. The NIE required specific actions to restore the Wetlands. The DEM allowed WED the opportunity to restore the Wetlands through the submission of an after the fact permit application. On 2 August 2016, the DEM issued the Permit to Respondent, which required planting of trees and shrubs within the Wetlands by 15 October 2016.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** When questioned by a DEM agent at the field meeting on 2 June 2017 why the work was not complete, DePasquale stated that it was because of adverse weather conditions and gypsy moth infestation.

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	MODERATE	\$2,500 to \$5,000	\$1,000 to \$2,500	\$500 to \$1,000
	MINOR	\$1,000 to \$2,500	\$500 to \$1,000	\$100 to \$500