

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

OFFICE OF COMPLIANCE & INSPECTION

IN RE: Cherenzia Excavation, Inc.

FILE NO.: AIR 13 – 03

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 facilities are located at 64 Old Hopkinton Road (the “Old Hopkinton Road Facility”) and 109 White Rock Road (the “White Rock Road Facility”), both located in the town of Westerly, Rhode Island (collectively, the “Facilities”).
- (2) The Facilities are (and have been) subject to DEM’s Air Pollution Control (“APC”) Regulations, including but not limited to, DEM’s APC Regulation No. 9, entitled *Air Pollution Control Permits*.
- (3) On 19 March 2013, DEM received minor source permit applications and associated permit fees from the Respondent for the Facilities. The applications included the following information:
 - (a) A diesel-fired engine/generator set with a maximum heat input capacity of 6,750,000 British thermal units per hour (“Btu/hr”) was installed and began operation in 1998 at the Old Hopkinton Road Facility;
 - (b) A diesel-fired engine/generator set with a maximum heat input capacity of 7,960,000 Btu/hr was installed and began operation in 2006 at the Old Hopkinton Road Facility; and
 - (c) A diesel-fired engine/generator set with a maximum heat input capacity of 5,480,000 Btu/hr was installed and began operation in 2002 at the White Rock Road Facility.

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 APC Regulation 9.2.1(a)** – prohibiting the installation of any stationary source without obtaining a minor source permit from DEM for each installation described in DEM's APC Regulation 9.3.1.
- (2) **DEM's APC Regulation 9.3.1 (a)** – requiring a minor source permit for any fuel burning device designed to burn residual oil or solid fossil fuels having a heat input capacity of one million Btu or more per hour; or all other liquid fuels having a heat input capacity of five million Btu or more per hour; or gaseous fuel having a heat input capacity of ten million Btu or more per hour; or alternative fuels, including but not limited to, wood chips, hazardous wastes or waste oil having a heat input capacity of one million Btu or more per hour.
- (3) **DEM's APC Regulation 9.2.2** – prohibiting the operation of an emission unit for which a permit is required without obtaining the required permit.

D. 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:

Thirteen Thousand One Hundred Forty-Four Dollars (\$ 13,144.00)

- (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 thirty (30) days of your receipt of this Notice of Violation ("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 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.

E. 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 D 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:

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 Martha Mulcahey of DEM's Office of Compliance and Inspection at (401) 222-1360 ext. 7032.

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 E 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:

Cherenzia Excavation, Inc.
c/o Salvatore D. Cherenzia, Registered Agent
41 Ledward Avenue
Westerly, RI 02891

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, AIR

File No.: AIR 13 – 03

Respondent: Cherenzia Excavation, 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) and C (2) – Failure to obtain a permit	Type I (\$ <u>10,000</u> Max. Penalty)*	Moderate	\$ 2,500	3 violations	\$7,500.00
C (3) – Operating equipment without a permit	Type I (\$ <u>10,000</u> Max. Penalty)*	Minor	\$ 1,000	3 violations	\$3,000.00
<i>SUB-TOTAL</i>					\$10,500.00

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

ADMINISTRATIVE PENALTY SUMMARY (continued)

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: - THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE; OR - THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED.		
DESCRIPTION OF BENEFIT	CALCULATION	AMOUNT
Economic benefit of noncompliance realized by the Respondent for failing to apply for an air pollution permit for equipment subject to permitting requirements was calculated using an EPA Program called "BEN". BEN calculated the economic benefit of noncompliance based upon a detailed economic analysis. Dates, dollar amounts, and values utilized in the BEN Program are as listed.	Minor Source Permit fee \$ 1,271	
	Due: 1 December 1997¹	\$ 1,460.00
	Due: 1 October 2001²	\$ 780.00
	Due: 1 March 2006³	\$ 404.00
	Receipt of application fee by OAR (economic benefit compliance date): <div style="text-align: right;">Estimated as 19 March 2013</div>	
SUB-TOTAL		\$ 2,644.00

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.
<p>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.</p>

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$ 13,144.00

¹ For failing to submit an application for a preconstruction permit for a 6,750,000 Btu/hr engine/generator set that commenced approximately in March 1998.

² For failing to submit an application for a preconstruction permit for a 5,480,000 Btu/hr engine/generator set that commenced approximately in January 2002.

³ For failing to submit an application for a preconstruction permit for a 7,960,000 Btu/hr engine/generator set that commenced approximately in May 2006.

PENALTY MATRIX WORKSHEET

CITATION: Failure to obtain a permit
 VIOLATION NO.: C (1) and (2)

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		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<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 apply for and obtain minor source permits from DEM prior to its installation of engine/generator sets at facilities subject to State air pollution control regulations. Compliance with permitting and operating requirements is of importance to the regulatory program.</p> <p>(B) Environmental conditions: Considered, but not utilized for this calculation.</p> <p>(C) Amount of the pollutant: The amount of the pollutants is unknown.</p> <p>(D) Toxicity or nature of the pollutant: Considered, but not utilized for this calculation.</p> <p>(E) Duration of the violation: Respondent was required to submit complete preconstruction applications and processing fees for the subject fuel burning equipment in 1997, 2001 and 2006.</p> <p>(F) Areal extent of the violation: Considered, but not utilized for this calculation.</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:** The Respondent failed to take reasonable and appropriate steps to obtain the required permits. The Respondent mitigated the violation by submitting the required permit applications and processing fees after issuance of a Notice of Alleged Violations by DEM on 25 February 2013. DEM received the minor source permit applications from the Respondent on 19 March 2013.
- (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:** The Respondent had complete control over the violation since the Respondent is the operator of the facilities. The threshold for permit applicability in the subject regulation has been long-standing, and, as such, the violation was foreseeable by the Respondent.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** DEM discovered that the Respondent failed to apply for and obtain a minor source permit prior to the installation of three engine/generator sets with a maximum heat input greater than the 5,000,000 Btu/hr threshold.

MAJOR	<u> X </u> 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	\$2,500 to \$5,000	\$1,000 to \$2,500
	MODERATE	\$2,500 to \$5,000 \$2,500	\$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: Operating equipment without a permit
 VIOLATION NO.: C (3)

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		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<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 operated equipment, which is subject to permit requirements, without first having been issued a permit from DEM. Compliance with permitting and operating requirements is of importance to the regulatory program.</p> <p>(B) Environmental conditions: Considered, but not utilized for this calculation.</p> <p>(C) Amount of the pollutant: The amount of the pollutants is unknown.</p> <p>(D) Toxicity or nature of the pollutant: Combustion pollutants, including nitrogen oxides and fine particulate matter, can impact human health and the environment.</p> <p>(E) Duration of the violation: 6 to 15 years – Respondent operated the equipment subsequent to each installation, which happened in 1998, 2002 and 2006.</p> <p>(F) Areal extent of the violation: Considered, but not utilized for this calculation.</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:** The Respondent failed to take reasonable and appropriate steps to obtain the required permits. The Respondent mitigated the violation by submitting the required permit applications and processing fees after issuance of a Notice of Alleged Violations by DEM on 25 February 2013. DEM received the minor source permit applications from the Respondent on 19 March 2013.
- (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:** The Respondent had complete control over the violation since the Respondent is the operator of the facilities. The prohibition against operating unpermitted equipment is clearly stated in the cited regulation, so the violation was foreseeable by the Respondent.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Considered, but not utilized for this calculation.

MAJOR	MODERATE	<u> X </u> 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	\$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 \$1,000	\$500 to \$1,000	\$100 to \$500