

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

**IN RE: Allen P. Durand**

**FILE NOs: FW C14-0055  
and FW-13-40**

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. Facts

- (1) The property is located within the Pawtuxet River (the "River") and on land directly southwest of 12 Jackson Flat Road, Assessor's Plat 1, Lot 21 in the town of Scituate, Rhode Island (the "Property").
- (2) The Respondent, David J. Durand and James J. Durand own the Property.
- (3) DEM inspected the Property and the River on 1 May 2013 and 3 April 2014. The inspections revealed the following:
  - (a) Clearing (tree saplings, shrubs, and herbaceous vegetation), excavating, and creating soil disturbance within the River (including Flood Plain). These activities resulted in the unauthorized alteration of approximately 600 square feet of freshwater wetland.
  - (b) Clearing (trees, shrubs, and herbaceous vegetation), excavation, and creating soil disturbance within Riverbank Wetland (including Flood Plain). These activities resulted in the unauthorized alteration of approximately 700 square feet of freshwater wetland.
- (4) The Respondent spoke with the DEM inspector shortly after the 1 May 2013 inspection. The Respondent stated that his purpose for working in the wetland was to try to rebuild the stone wall along the slope.
- (5) The Respondent did not receive approval from the DEM to alter the freshwater wetlands.

C. Violation

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

- (1) **R.I. General Laws Section 2-1-21** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
- (2) **DEM's Rules and Regulations for Governing the Administration and Enforcement of the Freshwater Wetlands Act, Rule 5.01** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.

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) Cease and desist **IMMEDIATELY** from any further alteration of the above described freshwater wetlands, and
- (2) Restore all freshwater wetlands in accordance with the restoration requirements set forth below.
  - (a) Plant a 5 foot wide zone of trees and shrubs along all cleared areas at the top of the slope of the River as follows:

Balled and burlapped or transplanted tree species must be planted in an interspersed fashion, 10 feet on center, 4 feet tall after planting in the area specified above. Tree species must include an equal distribution of at least 2 of the following selections:

Red maple, *Acer rubrum*  
White pine, *Pinus strobus*  
White oak, *Quercus alba*  
Swamp White oak, *Quercus bicolor*

Balled and burlapped or transplanted shrub species must be planted in an interspersed fashion, 5 feet on center, 2 feet tall after planting in the area specified above. Shrub species must include an equal distribution of at least 3 of the following selections:

Red osier dogwood, *Cornus stolonifera*  
Arrowwood, *Viburnum dentatum*  
Purple osier willow, *Salix purpurea*  
Wild raisin, *Viburnum cassinoides*  
Sweet pepperbush, *Clethra alnifolia*  
Winterberry, *Ilex verticillata*

Inkberry, *Ilex glabra*  
Highbush blueberry, *Vaccinium corymbosum*  
Lowbush blueberry, *Vaccinium angustifolium*  
Witchhazel, *Hamamelis virginiana*

- (b) If any or all of the required plantings fail to survive at least 1 year from the time planting has been verified by the DEM, the same plant species shall be replanted and maintained until such time that survival occurs for at least 1 year.
  - (c) All restored freshwater wetland areas, including replanted areas, must be allowed to revert to a natural wild condition. No future clearing, mowing, cutting, trimming, or other alterations are authorized in any wetland area on the Property or the River without first obtaining a valid permit from the DEM.
  - (d) The above restoration work must be completed by **1 October 2014**.
- (3) Contact Ms. Shawna Smith of the DEM at (401) 222-1360 ext. 7427 prior to the commencement of restoration to ensure proper supervision and to obtain required restoration details. No work shall commence until such time that you have met in the field with 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:

**Three Thousand Five Hundred Dollars (\$3,500)**

- (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 20 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 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.

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 the DEM's Administrative Adjudication Division, at the following address, within 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'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:

Joseph J. LoBianco, Esq.  
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 the DEM's Administrative Adjudication Division as to each violation alleged in the 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 Scituate wherein the Property is located to be recorded in the Land Evidence Records pursuant to R.I. Gen. Laws Chapter 34-13 and 2-1-24, 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 David E. Chopy of the DEM Office of Compliance and Inspection at (401) 222-1360 ext. 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 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 \_\_\_\_\_, 2014 of the within Notice of Violation was forwarded to:

Allen P. Durand  
12 Jackson Flat Road  
P.O. Box 135  
Fiskeville, RI 02823

by Certified Mail.

\_\_\_\_\_



# ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, WETLANDS

File No.: FW C14-0055 and FW-13-40

Respondent: Allen Durand

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 (2) – Alteration of a River and Floodplain	Type I (\$5,000 Max. Penalty)*	Major	\$2,500	1 violation	\$2,500
C(1) and (2) – Alteration of a Riverbank Wetland and Floodplain	Type I (\$5,000 Max. Penalty)*	Minor	\$1,000	1 violation	\$1,000
<b>SUB-TOTAL</b>					<b>\$3,500</b>

\*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:

- 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 the 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 can not 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 = \$3,500.00**

# PENALTY MATRIX WORKSHEET

CITATION: Alteration of a River and Floodplain

VIOLATION NOS: C (1) and C (2)

<b>TYPE</b>		
<u>X</u> <b>TYPE I</b> <i>DIRECTLY</i> related to protecting health, safety, welfare or environment.	<u>      </u> <b>TYPE II</b> <i>INDIRECTLY</i> related to protecting health, safety, welfare or environment.	<u>      </u> <b>TYPE III</b> <i>INCIDENTAL</i> to protecting health, safety, welfare or environment.
<b>DEVIATION FROM THE STANDARD</b>		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<b><u>FACTORS CONSIDERED:</u></b>		
Taken from Section 10 (a) (2) of the DEM's <i>Rules and Regulations for Assessment of Administrative Penalties</i>		
<p>(A) <b>The extent to which the act or failure to act is out of compliance:</b> The Respondent altered freshwater wetlands by clearing (tree saplings, shrubs, and herbaceous vegetation), excavating, and creating soil disturbance within the Pawtuxet River (including Flood Plain). The severity of the alteration to the wetland environment was determined to be of major significance to the regulatory program.</p> <p>(B) <b>Environmental conditions:</b> A small natural undisturbed vegetated island previously existed within the River prior to the unauthorized alterations. The excavation eliminated most of the island from the River.</p> <p>(C) <b>Amount of the pollutant:</b> Considered, but not utilized for this calculation.</p> <p>(D) <b>Toxicity or nature of the pollutant:</b> Considered, but not utilized for this calculation.</p> <p>(E) <b>The duration of the violation:</b> Unknown. The violation was first observed by the DEM on 1 May 2013.</p> <p>(F) <b>The areal extent of the violation:</b> The areal extent of the violation is approximately 600 square feet.</p> <p>(G) <b>Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:</b> The Respondent failed to apply for a permit from the DEM requesting approval to alter the freshwater wetlands.</p> <p>(H) <b>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:</b> Considered, but not utilized for this calculation.</p> <p>(I) <b>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:</b> The Respondent had complete control over the occurrence of the violation and had an obligation to protect the wetlands.</p> <p>(J) <b>Any other factor(s) that may be relevant in determining the amount of a penalty:</b> Considered, but not utilized for this calculation.</p>		
<u>X</u> <b>MAJOR</b>	<b>MODERATE</b>	<b>MINOR</b>

Penalty Matrix where the applicable statute provides for a civil penalty up to \$5,000		<b>TYPE I</b>	TYPE II	TYPE III
DEVIATION FROM STANDARD	<b>MAJOR</b>	\$2,500 to \$5,000 <b>\$2,500</b>	\$1,250 to \$2,500	\$500 to \$1,250
	MODERATE	\$1,250 to \$2,500	\$500 to \$1,250	\$250 to \$500
	MINOR	\$500 to \$1,250	\$250 to \$500	\$100 to \$250

**PENALTY MATRIX WORKSHEET**

CITATION: Alteration of a Riverbank Wetland and Floodplain

VIOLATION NOS: C (1) and C (2)

<b>TYPE</b>				
<u>X</u> <b>TYPE I</b> <i>DIRECTLY</i> related to protecting health, safety, welfare or environment.		<u>      </u> <b>TYPE II</b> <i>INDIRECTLY</i> related to protecting health, safety, welfare or environment.		<u>      </u> <b>TYPE III</b> <i>INCIDENTAL</i> to protecting health, safety, welfare or environment.
<b>DEVIATION FROM THE STANDARD</b>				
THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.				
<b>FACTORS CONSIDERED:</b>				
Taken from Section 10 (a) (2) of the DEM's <i>Rules and Regulations for Assessment of Administrative Penalties</i>				
(A) <b>The extent to which the act or failure to act is out of compliance:</b> The Respondent altered freshwater wetlands by clearing (trees, shrubs, and herbaceous vegetation), excavating, and creating soil disturbance within Riverbank Wetland (including Flood Plain). The severity of the alteration to the wetland environment was determined to be of importance to the regulatory program.				
(B) <b>Environmental conditions:</b> The edge of the Riverbank Wetland was previously vegetated with trees and shrubs prior to the unauthorized work.				
(C) <b>Amount of the pollutant:</b> Considered, but not utilized for this calculation.				
(D) <b>Toxicity or nature of the pollutant:</b> Considered, but not utilized for this calculation.				
(E) <b>The duration of the violation:</b> Unknown. The DEM first documented the violation on 1 May 2013.				
(F) <b>The areal extent of the violation:</b> The aerial extent of the violation is approximately 700 ft <sup>2</sup> .				
(G) <b>Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance:</b> The Respondent failed to apply for a permit from the DEM requesting approval to alter the freshwater wetlands.				
(H) <b>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:</b> On 13 April 1995 the DEM issued a warning letter to the Respondent for work within the same wetland that is the subject of this NOV.				
(I) <b>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:</b> The Respondent had complete control over the occurrence of the violation and had an obligation to protect the wetlands.				
(J) <b>Any other factor(s) that may be relevant in determining the amount of a penalty:</b> Considered, but not utilized for this calculation.				
<b>MAJOR</b>		<b>MODERATE</b>		<u>X</u> <b>MINOR</b>
<b>Penalty Matrix where the applicable statute provides for a civil penalty up to \$5,000</b>		<b>TYPE I</b>	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$2,500 to \$5,000	\$1,250 to \$2,500	\$500 to \$1,250
	MODERATE	\$1,250 to \$2,500	\$500 to \$1,250	\$250 to \$500
	<b>MINOR</b>	\$500 to \$1,250 <b>\$1,000</b>	\$250 to \$500	\$100 to \$250