

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

**OFFICE OF COMPLIANCE & INSPECTION**

**IN RE: Town of Johnston**

**FILE NO.: WP06-071**

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

DEM issued informal notices to town officials on May 5, 2008, May 18, 2009 and August 31, 2009. The notices required that the town take certain actions to correct the violations. The town has not complied with the notices.

C. Facts

- (1) The subject property is located at 1260 Central Pike, Johnston, Rhode Island (the “Property”). The Property includes a single family residential dwelling and a freshwater pond.
- (2) The Property is owned by Stella Luchka.
- (3) Central Pike is owned by the Respondent, the Town of Johnston.
- (4) The freshwater pond is a freshwater wetland and is classified as a Class A water pursuant to the DEM Water Quality Regulations.
- (5) On May 15, 2006 DEM inspected the Property in the area of the freshwater pond and determined the following:
  - (a) storm water runoff from the storm drainage system on Central Pike discharges into the pond;
  - (b) the storm drain system is not functioning properly due to a broken, clogged or undersized pipe located along the northern shoulder of Central Pike causing storm water to flow across the road and discharge directly to the pond; and

- (c) pollutants (in the form of road sand) from the storm water runoff have discharged into the pond resulting in the filling of approximately 1,100 square feet of the pond.
- (6) The Respondent did not receive approval from DEM to discharge pollutants to the freshwater pond or alter the freshwater pond.
- (7) As of the date of this Notice of Violation (“NOV”), the Respondent has failed to comply with the DEM 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.G.L. 46-12-5 (b)** – prohibiting the discharge of any pollutant to the waters of the State except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.
- (2) **DEM Water Quality Regulations**
  - (a) **Rule 9(A)** – prohibiting the discharge of pollutants into any waters of the State which the Director determines will likely result in the violation of any State water quality criterion or interfere with one or more of the existing or designated uses assigned to the receiving waters
  - (b) **Rule 13(A)** – prohibiting the discharge of any pollutant into or conducting any activity which will likely cause or contribute pollution to the waters of the State without having obtained all required approvals from the Director.
- (3) **R.I.G.L. §2-1-21 Freshwater Wetlands Act** – prohibiting any activity that alters the character of any fresh water wetland without first obtaining the approval of DEM.
- (4) **DEM Freshwater Wetlands Regulations Rule 5.01(B)(1)** – prohibiting any activity that alters the natural character of a freshwater wetland without having first obtained a permit from the Director.

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) **Within thirty (30) days of receipt of the NOV**, repair the storm water drainage system such that water from the northern side of Central Pike flows under Central Pike and into the freshwater pond.
- (2) **Within ninety (90) days of receipt of the NOV**, retain a qualified environmental

consultant to delineate the extent of the road sand within the freshwater pond and submit a proposed plan and project schedule to remove the road sand from the freshwater pond (the “restoration plan”).

- (3) The restoration plan shall be subject to DEM review and approval. Upon review, the DEM shall provide written notification to the Respondent either granting formal approval or stating the deficiencies therein. Within fourteen (14) days (unless a longer time is specified) of receiving a notification of deficiencies, submit to DEM any additional information necessary to correct the deficiencies.
- (4) Upon approval of the restoration plan by DEM, restore the freshwater pond in accordance with the approved project schedule.

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:

**Six Thousand Two Hundred Fifty Dollars (\$6,250.00)**

- (2) The proposed administrative penalty is calculated pursuant to the DEM Rules and Regulations for Assessment of Administrative Penalties, as amended, and must be paid to the Director within twenty (20) days of your receipt of this NOV. Payment shall be in the form of a check 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.
- (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  
235 Promenade Street, 3<sup>RD</sup> Floor  
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 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 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) 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 LoBianco at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Patrick Hogan of the DEM Office of Compliance and Inspection at (401) 222-1360 ext. 7119.

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:

The Honorable Joseph M. Polisena, Mayor  
Town of Johnston  
1385 Hartford Avenue  
Johnston, RI 02919

by Certified Mail.

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## ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, Water Pollution

File No.: WP06-071

Respondent: Town of Johnston

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) – D(2) Discharge of pollutant (road sand) to waters of the State	Type (\$25,000 Max. Penalty)*	Moderate	\$6,250	1 violation	\$6,250
<b>SUB-TOTAL</b>					<b>\$6,250</b>

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

**TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$6,250.00**

**PENALTY MATRIX WORKSHEET**

CITATION: *Discharge of pollutant (road sand) to waters of the State*  
 VIOLATION NO.: D(1) – D(2)

<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> The Respondent discharged a pollutant (road sand) to a freshwater pond without approval by DEM.</p> <p>(B) <b>Environmental conditions:</b> Road sand was discharged to the freshwater pond, a class A water of the State. Class A waters are designated for primary and secondary contact recreation and fish and wildlife habitat. These waters shall have excellent aesthetic value.</p> <p>(C) <b>Amount of the pollutant:</b> Unknown.</p> <p>(D) <b>Toxicity or nature of the pollutant:</b> Inorganic sand. High concentrations can be acutely toxic to fish and other aquatic organisms and vegetation.</p> <p>(E) <b>Duration of the violation:</b> Full duration unknown but at least four years.</p> <p>(F) <b>Areal extent of the violation:</b> Approximately 1,100 square feet of pond area filled with road sand.</p> <p style="text-align: right;">(continued)</p>		

(continued from the previous page)

- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to maintain or upgrade the storm drainage system as necessary to prevent or mitigate the violation and failed to restore the freshwater pond.
- (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 relevant.
- (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 violation is willful. The Respondent is fully aware of the action necessary to correct the violation but has been unwilling to do so.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The Respondent has failed to comply with three informal notices issued by DEM.

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
	<b>MODERATE</b>	\$6,250 to \$12,500 <b>\$6,250</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