

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

OFFICE OF COMPLIANCE & INSPECTION

IN RE: Oldcastle Lawn & Garden, Inc.

FILE NO.: AIR 11 – 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 facility is located on Stilson Road in the town of Richmond, Rhode Island (the “Facility”) and is operated by the Respondent.
- (2) The Facility is (and has been) subject to DEM’s Air Pollution Control (“APC”) Regulations, including but not limited to APC Regulation No. 9, entitled “Air Pollution Control Permits”.
- (3) On 1 August 2007, DEM’s Office of Air Resources (“OAR”) issued approval Nos. 1998-1999 to Jolly Gardner Products (the “Permit”) for the installation and operation of a eight hundred horsepower diesel fired engine (the “800 HP Engine”) and a nine hundred horsepower diesel fired engine (the “900 HP Engine”).
- (4) The Permit limits the sulfur content of all diesel fuel burned in the 800 HP Engine and 900 HP Engine to fifteen parts per million (“15 ppm”) or less by weight.
- (5) Jolly Gardener Products merged into Oldcastle Lawn & Garden, Inc.
- (6) On 16 March 2010, the Respondent submitted to OAR a minor source permit application for a one thousand horsepower diesel fired engine (the “1000 HP Engine”) at the Facility. The 1000 HP Engine was installed on 9 October 2009 and began operating on 11 February 2010.
- (7) On 23 August 2010 Mr. McLean submitted a letter to OAR. The letter included a table showing that the Respondent used diesel fuel with a sulfur content greater than 15 ppm by weight to operate the 800 HP Engine and the 900 HP Engine.

- (8) On 4 October 2010 OAR received an electronic document from Carl McLean, the Respondent's General Manager. The electronic document stated that:
 - (a) an eight hundred and sixty horsepower diesel fired engine (the "860 HP Engine") was installed on 27 September 2007 at the Facility to replace the 800 HP Engine;
 - (b) the 860 HP Engine operated at the Facility from 27 September 2007 through 11 February 2010; and
 - (c) the 1000 HP Engine was installed to replace the 860 HP Engine.
- (9) The 860 HP Engine and the 1000 HP Engine have a heat input capacity of greater than five million British thermal units per hour ("5 MM Btu/hr").
- (10) The Respondent did not obtain a minor source permit from OAR for the 860 HP Engine.
- (11) The Respondent has not obtained a minor source permit from OAR for the 1000 HP Engine.

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) **APC Regulation 9.2.1 (a)** – requiring that no person shall install or cause the installation of any stationary source subject to the provisions of the regulation without obtaining a minor source permit
- (2) **APC Regulation 9.3.1 (a)** – requiring a minor source permit for any fuel burning device designed to burn fuels having a heat input capacity of 5 MM Btu/hr.
- (3) **APC Regulation 9.2.2** – requiring that any person that is required to obtain a permit under this regulation not operate the emission units for which the permit is required without obtaining the required permit.
- (4) **APC Regulation 9.6.8** – requiring any person who receives a permit to comply with all conditions in the permit.

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 cease use of the 1,000 HP Engine until a minor source permit is issued by OAR.

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:

Thirteen Thousand Dollars (\$13,000.00)

- (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 Notice of Violation (“NOV”). Payment shall be in the form of a certified 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.
- (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.

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 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, 3RD 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 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, Esquire, 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 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 _____
the within Notice of Violation was forwarded to:

Oldcastle Lawn & Garden, Inc.
c/o CT Corporation System, Registered Agent
155 South Main Street, Suite 301
Providence, RI 02903

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, AIR

File No.: AIR 11 – 03

Respondent: Oldcastle Lawn & Garden, 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 D (2) – Failure to obtain a permit	Type I (\$ <u>10,000</u> Max. Penalty)*	Minor	\$ 2,500 <i>Unreported</i>	2 violations	\$3,500.00
			\$1,000 <i>Self-reported</i>		
C (3) – Operating equipment without a permit	Type I (\$ <u>10,000</u> Max. Penalty)*	Moderate	\$ 2,500	2 violations	\$5,000.00
D(4) – Failure to comply with permit	Type I (\$ <u>10,000</u> Max. Penalty)*	Minor	\$1,500	3 years	\$4,500.00
SUB-TOTAL					\$13,000.00

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

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$ 13,000.00

PENALTY MATRIX WORKSHEET

CITATION: Failure to obtain a permit

VIOLATION NO.: C (1) and (2)

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.		
<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 obtain a permit from DEM for the installation of the 860 HP Engine and the 1000 HP Engine that were subject to air pollution permit requirements. Having regulated facilities adhere to air pollution permit requirements is a matter of importance to DEM's regulatory efforts and is directly related to protecting health, safety, welfare and the environment. The Respondent's violations of APC Regulation No. 9 are violations of a federally enforceable regulation.</p> <p>(B) Environmental conditions: Not relevant.</p> <p>(C) Amount of the pollutant: Not relevant.</p> <p>(D) Toxicity or nature of the pollutant: Not relevant.</p> <p>(E) Duration of the violation: Not relevant.</p> <p>(F) Areal extent of the violation: Not relevant.</p> <p style="text-align: right; margin-top: 20px;">(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 steps to prevent and/or mitigate the noncompliance associated with the 860 HP Engine. The Respondent failed to take reasonable steps to prevent the noncompliance associated with the 1000 HP Engine, however, on 12 March 2010 the Respondent submitted a permit application for the 1000 HP Engine to mitigate the noncompliance.
- (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:** The Respondent was issued a Letter of Noncompliance (LNC) by DEM on 20 October 2009 for alleged solid waste violations. To date, the LNC is still unresolved.
- (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 threshold for permit applicability in the subject regulation has been long-standing and as such, the violation was foreseeable by Respondent.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The Respondent self-reported the permit violation regarding the 1,000 HP Engine. The Respondent failed to submit a permit application for the 860 HP Engine.

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 \$2,500 (Unreported) \$1,000 (Self-reported)	\$500 to \$1,000	\$100 to \$500

PENALTY MATRIX WORKSHEET

CITATION: Operating equipment without a permit
 VIOLATION NO.: C (3)

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		
<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 the 860 HP Engine and the 1000 HP Engine without first having been issued a permit from DEM.</p> <p>(B) Environmental conditions: Not relevant.</p> <p>(C) Amount of the pollutant: Unknown.</p> <p>(D) Toxicity or nature of the pollutant: Not relevant</p> <p>(E) Duration of the violation: The duration of the violation is approximately two years for the 860 HP Engine and less than one year for the 1,000 HP Engine.</p> <p>(F) Areal extent of the violation: Not relevant.</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 steps to prevent the noncompliance associated with the 860 HP Engine. The Respondent failed to take reasonable steps to prevent the noncompliance associated with the 1000 HP Engine, however, on 12 March 2010 the Respondent submitted a permit application for the 1000 HP Engine to mitigate the noncompliance and stopped operating the 1000 HP Engine.
- (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:** The Respondent was issued a Letter of Noncompliance (LNC) by DEM on 20 October 2009 for alleged solid waste violations. To date, the LNC is still unresolved.
- (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 prohibition against operating unpermitted equipment is clearly stated in the cited regulation and section of state law, so the violation was foreseeable.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** Not relevant.

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: Failure to comply with permit
 VIOLATION NO.: C (4)

TYPE		
<u> X </u> TYPE I <u>DIRECTLY</u> related to protecting health, safety, welfare or environment.	<u> </u> TYPE II <u>INDIRECTLY</u> related to protecting health, safety, welfare or environment.	<u> </u> 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.		
<p>FACTORS CONSIDERED:</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: The Respondent burned fuel containing greater than 15 ppm sulfur by weight in the 800 HP Engine and 900 HP Engine in violation of its permit. The Respondent is a stationary source of air pollutants subject to federal and state air pollution control regulations. The use of high sulfur fuel is directly related to the protection of public health, safety, welfare or environment.</p> <p>(B) Environmental conditions: Not relevant.</p> <p>(C) Amount of the pollutant: Unknown.</p> <p>(D) Toxicity or nature of the pollutant: The burning of fuels containing sulfur creates sulfur dioxide, a criteria pollutant. Exposure to sulfur dioxide may cause respiratory distress. Atmospheric sulfur dioxide may combine with water vapor to create acid rain causing structural and plant damage as well as the acidification of water bodies.</p> <p>(E) Duration of the violation: 3 years.</p> <p>(F) Areal extent of the violation: Not relevant.</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 prevent the use of fuel containing greater than 15 ppm sulfur by weight.
- (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:** The Respondent was issued a Letter of Noncompliance (LNC) by DEM on 20 October 2009 for alleged solid waste violations. To date, the LNC is still unresolved.
- (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 facility. The violation was foreseeable by the Respondent.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The Respondent took immediate steps to address the violation.

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 \$1,500	\$500 to \$1,000	\$100 to \$500