

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

OFFICE OF COMPLIANCE & INSPECTION

IN RE: Michael Vayl

FILE NO.: OCI-SR-16-6

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 21 May 2014, the DEM issued a Notice of Responsibility ("NOR") to Respondent for the violations that are the subject of this Notice of Violation ("NOV"). The NOR required specific actions to correct the violations. On 17 November 2014, the DEM received a report from Respondent's consultant on the actions taken to address the violations. On 18 November 2014, the DEM sent electronic correspondence to Respondent and his attorney on additional actions that were required to address the violations. On 11 February 2015, the DEM spoke with Respondent's attorney. The attorney stated that Respondent was planning on razing the building and was awaiting bids and better weather. On 7 April 2016, the DEM sent electronic correspondence to Respondent and his attorney and consultant. The correspondence requested a plan and schedule. As of the date of the NOV, the DEM has received no response.

C. Facts

- (1) The property is located at 82 Nautilus Street, Assessor's Plat 5, Lot 327, in the town of Jamestown (the “Property”). The Property includes a residential dwelling (the "Dwelling").
- (2) Respondent owns the Property, taking title on 22 November 2013.
- (3) The Property is located in a GA groundwater classification zone. Groundwater in this zone is suitable for public and private drinking water use without treatment.
- (4) On 7 May 2014 and 15 May 2014, the DEM inspected the Property. The inspections revealed the following:
 - (a) A 275 gallon above ground storage tank ("AST") that is used to hold No. 2 heating oil was present on the Property;

- (b) Oil was evident around the filter for the AST on 7 May 2014;
 - (c) Oil stained soils on the ground surface and dead grass below the AST was evident on 7 May 2014; and
 - (d) The AST was disconnected and placed on a tarpaulin on 15 May 2014; and
 - (e) Soil contamination associated with oil was evident near the AST on 15 May 2014.
- (5) On 17 November 2014, the DEM received a report dated 14 November 2014 that was prepared by Green Environmental, Inc. on behalf of Respondent. The report included the following:
- (a) Total volatile organic compounds of 215 parts per million ("ppm") were detected in the soil 5 feet below ground adjacent to the former AST;
 - (b) Visual and olfactory evidence of petroleum in the soil and field screening results of the soil resulted in the transport of approximately 150 cubic yards of soil to the Central Landfill in Johnston, Rhode Island between 18 June 2014 and 20 June 2014;
 - (c) Laboratory analysis of a groundwater sample collected on 16 May 2014 from a monitoring well on the Property located west of the AST revealed concentrations of benzene and naphthalene of 0.014 ppm and 0.255 ppm, respectively, which exceed the GA Groundwater Quality Standards set forth in the DEM's *Groundwater Quality Rules* (the "Groundwater Regulations") of 0.005 ppm for benzene and 0.1 ppm for naphthalene;
 - (d) Laboratory analysis of soil samples collected on the Property that revealed the following concentrations of total petroleum hydrocarbons ("TPH"):
 - (i) On 6 May 2014, 1,600 ppm east of the AST;
 - (ii) On 28 May 2014, 10,300 ppm and 3,990 ppm below the AST along the foundation;
 - (iii) On 29 May 2014, 537 ppm along the west side of the excavation sidewall; and
 - (iv) On 3 June 2014, 677 ppm in the basement of the Dwelling adjacent to the sump;
 - (e) Laboratory analysis of a water sample collected on 30 June 2014 from the private drinking water well installed on the Property revealed a concentration of TPH at 0.59 ppm; and
 - (f) The sampling completed as of that date indicated that oil contaminated soil remained in place beneath the Dwelling and along the western foundation wall of the Dwelling.

- (6) The full nature and extent of the oil release has yet to be determined.
- (7) As of the date of the NOV, Respondent has failed to investigate and remediate the oil release in accordance with Section 12(e) of the DEM's *Oil Pollution Control Regulations* (the "OPC 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. Gen. Laws, Section 46-12-5(a)** – prohibiting the placement of any pollutant in a location where it is likely to enter the waters of the State.
- (2) **R.I. Gen. Laws, Section 46-12.5.1-3 (a)** – prohibiting the discharge of oil into or upon the waters or land of the State.
- (3) **DEM's *Water Quality Regulations*, Rule 11.E** – prohibiting the discharge of oil into the waters of the State.
- (4) **DEM's *Groundwater Quality Rules*, Rule 8.2** – prohibiting the discharge of any pollutant to groundwater without approval of the DEM.
- (5) **DEM's OPC Regulations, Rule 6(a)** – prohibiting the placement of oil into the waters or land of the State.
- (6) **DEM's OPC Regulations, Section 12(e)** – requiring all actions necessary to remediate a release of oil as determined 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:

- (1) **Within 7 days of receipt of the NOV**, procure the services of a qualified environmental consultant to prepare a status report (the "Report") and a remedial action plan (the "Plan") for the Property in accordance with Rule 12(e) of the DEM's OPC Regulations. The Plan must include a schedule to complete all proposed work.
- (2) **Within 60 days of receipt of the NOV**, submit the Report and Plan to the DEM.
- (3) The Report and Plan shall be subject to the DEM's review and approval. Upon review, the DEM shall provide written notification to you either granting formal approval or stating the deficiencies therein. Within 14 days (unless a longer time is specified) of receiving a notification of deficiencies in the Report or the Plan, you must submit to the DEM a modified proposal or additional information necessary to correct the deficiencies.

- (4) The investigation, remedial action and clean-up shall continue until the release has been mitigated to the satisfaction of the DEM.

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:

\$2,500

- (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 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 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.
- (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 DEM determines that reasonable efforts have been made to comply promptly with the 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'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, 4TH 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, Esquire
DEM - Office of Legal Services
235 Promenade Street, Suite 425
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 with regard to 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 the town of Jamestown, wherein the Property is located, to be recorded in the Office of Land Evidence Records pursuant to R.I. Gen. Laws Chapter 34-13 and Section 46-12-9(c), 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) Joseph J. LoBianco at the DEM's Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Tracey Tyrrell of the DEM's Office of Compliance and Inspection at (401) 222-1360 ext. 7407.

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
DEM Office of Compliance and Inspection

Date: _____

CERTIFICATION

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

Michael Vayl
168 Beach Avenue
Jamestown, RI 02835

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION - Oil Pollution Control
 File No.: OCI-SR-16-6
 Respondent: Michael Vayl

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 (6) – Failure to Remediate Release of Oil	Type I (\$25,000 Max. Penalty)*	Minor	\$2,500	1 violation	\$2,500
SUB-TOTAL					\$2,500

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

ECONOMIC BENEFIT FROM NON-COMPLIANCE

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 NON-COMPLIANCE; OR
- THE AMOUNT OF ECONOMIC BENEFIT CANNOT BE QUANTIFIED.

A review of the record in this matter has revealed that Respondent has either enjoyed no identifiable benefit from the non-compliance 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 = \$2,500

PENALTY MATRIX WORKSHEET

CITATION: Failure to Remediate Release of Oil
 VIOLATION NO: D (6)

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		
<small>THE DEGREE TO WHICH A PARTICULAR VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.</small>		
<p>FACTORS CONSIDERED:</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 fully remediate a release of oil at the Property. The investigation and remediation of oil and hazardous material releases is of primary importance to the regulatory program, especially when drinking water supplies are effected.</p> <p>(B) Environmental conditions: The Property is located in a GA Groundwater Classification Zone, which are groundwater resources considered to be suitable for drinking water use without treatment. Other residences proximate to the Property rely on private drinking water supply wells. The Property is located within 75 feet of freshwater wetlands and within the watershed of the Lower West Passage of Narragansett Bay.</p> <p>(C) Amount of the pollutant: Full amount unknown - approximately 150 cubic yards (221.74 tons) of oil contaminated soil has been removed from the Property as of November 2014. An unknown quantity of impacted soil remains in place adjacent to and below the dwelling. The extent of groundwater contamination has yet to be fully delineated.</p> <p>(D) Toxicity or nature of the pollutant: No. 2 heating oil is capable of causing significant impacts to subsurface soils and groundwater if released to the environment. Benzene is a known carcinogen.</p> <p>(E) Duration of the violation: Full duration unknown - at least 21/2 years. The DEM was first notified of the release on 6 May 2014.</p> <p>(F) Areal extent of the violation: Full extent unknown - an area of approximately 1,200 square feet was excavated in May/June 2014. The full extent of the subsurface contamination has yet to be delineated.</p>		
(continued)		

(continued from the previous page)

- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondent failed to mitigate the non-compliance when he ceased the required remedial and investigatory activities. The DEM notified Respondent and/or his agents on numerous occasions that the remedial actions completed thus far were inadequate and that further investigation and remediation was required. As of the date of the NOV, Respondent had yet to comply with the DEM's requirements. Oil-contaminated subsurface soils and groundwater remain on the Property.
- (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:** As the Property owner, Respondent had full control over the occurrence of the violation. Negligence is attributable to Respondent for the failure to continue compliance with the remedial action requirements set forth in the DEM's OPC Regulations.
- (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
--------------	-----------------	----------------------------------

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
	MODERATE	\$6,250 to \$12,500	\$2,500 to \$6,250	\$1,250 to \$2,500
	MINOR	\$2,500 to \$6,250 \$2,500	\$1,250 to \$2,500	\$250 to \$1,250