

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

**Rules and Regulations for
Assessment of Administrative Penalties**



May, 2000

AUTHORITY: These regulations are adopted pursuant to Chapters 42-17.1, 42-17.6, and 42-35, of the Rhode Island General Laws of 1956, as amended.

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

Rules and Regulations for Assessment of Administrative Penalties

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RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

Rules and Regulations for Assessment of Administrative Penalties

SECTION 1. AUTHORITY

These regulations are adopted pursuant to Chapters 42-17.1, 42-17.6, and 42-35 of the General Laws of Rhode Island, 1956, as amended.

SECTION 2. PURPOSE AND GOALS

These regulations are intended to:

- (a) assure the protection of public health, safety, and welfare and the environment by promoting compliance and deterring noncompliance with the laws administered by the Director, and the rules, regulations, permits, licenses and orders adopted pursuant to the Director's authority;
- (b) assure that the Department assesses administrative penalties, and otherwise implements its regulations, lawfully, fairly, and consistently;
- (c) clarify the Department's authority to enforce the laws administered by the Director and the rules, regulations, permits, licenses, and orders adopted pursuant to the Director's authority.

SECTION 3. POLICY

These regulations promote a policy of assuring the effective enforcement of all laws administered by the Director and deterring noncompliance with the rules, regulations, permits, licenses and orders adopted pursuant to the Director's authority by:

- (a) seeking any appropriate legal and equitable relief, including:
 - (1) removal of any economic benefit or competitive advantage realized as a direct or indirect result of a violation; and/or
 - (2) restoration of any property or resources damaged as a direct or indirect result of a violation;
- (b) assessing administrative penalties, where appropriate, which:
 - (1) reflect the nature and gravity of the violation and the potential for harm to the public health, safety, or environment caused by said violation;
 - (2) reflect the length of time during which the violation was repeated or continued;
 - (3) will deter future noncompliance by the person in violation; and
 - (4) will encourage continued compliance by persons similarly regulated;

- (c) seeking from any person found to be in violation, those additional or extraordinary costs which are actually expended by the Director during the course of the investigation of noncompliance, subsequent enforcement of the applicable regulation and resolution of an enforcement action for which the State of Rhode Island is not otherwise reimbursed other than non-overtime personnel costs; and
- (d) pursuing any other lawful enforcement option necessary to achieve compliance.

SECTION 4. APPLICATION

- (a) These regulations shall be liberally construed to permit the Department to effectuate the purposes of State law.
- (b) These regulations shall apply to all persons subject to enforcement action by the Department under the laws administered by the Director, and the rules, regulations, permits, licenses, and orders adopted pursuant to the Director's authority.
- (c) These regulations shall be construed in harmony with existing rules and regulations adopted pursuant to the Director's authority wherever possible.
- (d) These regulations shall be applied in a manner that is consistent with any applicable Federal program requirements for delegated programs.

SECTION 5. SEVERABILITY

If any provision of these rules and regulations or the application thereof, to any person or circumstances is held invalid by a court of competent jurisdiction, the remainder of the rules and regulations shall not be affected thereby. The invalidity of any section or sections or parts of any section or sections shall not affect the validity of the remainder of these rules and regulations.

SECTION 6. DEFINITIONS

Whenever used in these regulations, the following terms shall have the following meanings:

"Administrative Penalty" - "Penalty" shall mean a monetary sum assessed by the Director pursuant to these regulations in response to a violation of, or a failure to comply with, any law administered by the Director or any rule, regulation, license, permit or order adopted pursuant to the Director's authority.

"Department" means the Rhode Island Department of Environmental Management (DEM).

"Director" means the Director of the Department of Environmental Management or his/her subordinates to whom the Director has delegated the powers and duties vested in the Director by these regulations. The terms Department and Director may be used interchangeably unless clearly indicated otherwise by the context of the sentence in which it appears.

"License" means the express grant of permission or authority by the Director to carry on an activity or to perform an act which, without such permission or authority, would otherwise be a violation of State

law or of a rule or regulation adopted thereunder.

"Noncompliance" - "Nonconformance" - "Failure to Comply" - "Violation" - each mean any act or failure to act which constitutes or results in or from:

- (a) engaging in any activity prohibited by, or not in compliance with, any law administered by the Director or any rule, regulation, permit, license or order adopted pursuant to the Director's authority;
- (b) engaging in any business or other activity without a necessary permit, license, or approval that is required by law or regulation;
- (c) the failure to perform, or the failure to perform in a timely fashion, anything required by a law administered by the Director or by a rule, regulation, permit, license, or order adopted pursuant to the Director's authority.

"Order" means the whole or a part of a final disposition by the Department, whether affirmative, negative, injunctive or declaratory in form, other than rulemaking but including notices of violation, compliance orders, permits, licenses and approvals issued pursuant to the Director's authority.

"Permit" means an authorization, license or equivalent control document issued by the Department to implement the requirements of any federally-delegated program or State law administered or enforced by the Director.

"Person" means an individual, trust, firm, joint stock company, corporation (including a quasi-governmental corporation), partnership, association, syndicate, municipality, municipal or state agency, fire district, club, non-profit agency or any subdivision, commission, department, bureau, agency, department or political subdivision of State or Federal Government (including quasi-governmental corporation) or of any interstate body and any agent or employee thereof.

"Requirement" means any law administered by the Director, or any rule, regulation, permit, license or order adopted pursuant to the Director's authority.

SECTION 7. ENFORCEMENT OPTIONS

The Director may pursue any combination of the following administrative and judicial enforcement actions depending upon the circumstances and gravity of each case. Any combination of enforcement actions are not mutually exclusive and may be cumulative:

- (a) Letter of Deficiency (LOD), Notice of Noncompliance (NON), Notice of Intent to Enforce (NOI) or Notice of Responsibility (NOR) - written warning or notification concerning a suspected or threatened violation of a legal requirement which, in the Director's judgement, does not justify further enforcement action at that time, but may require the party cited to take such actions necessary to achieve compliance.
- (b) Notice of Violation (NOV) - formal notice of a suspected violation issued in accordance with R.I.G.L. §§ 42-17.1-2(u)(1) and 42-17.6-3, which:
 - (1) cites the law, rule, regulation, license, permit and/or order allegedly violated;

- (2) states the facts which form the basis for the Department's belief that a violation has occurred;
 - (3) states the administrative penalty and other relief deemed appropriate by the Director;
 - (4) specifies a reasonable deadline or deadlines by which the person:
 - (i) shall come into compliance with the requirements described in the NOV, or
 - (ii) shall submit a written proposal setting forth how and when that person proposes to achieve compliance;
 - (5) informs the person
 - (i) of his or her right to file a timely written request for an adjudicatory hearing on either the alleged violation or the penalty or remedy imposed or both,
 - (ii) that said written request for a hearing must be filed with and received by the Administrative Adjudication Division of the Department within ten (10) days after service of the NOV,
 - (iii) that the written request for an adjudicatory hearing shall strictly comply with Section 7.00(b) of the Administrative Rules for Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters,
 - (iv) that said notice shall become a final order of the Director upon the person's election to waive or failure to request an adjudicatory hearing in a timely manner, and,
 - (v) that the penalty continues to accrue from the time the Notice of Violation is issued until compliance is achieved pursuant to R.I.G.L. § 42-17.6-3 if reasonable efforts to promptly come into compliance have not been made;
 - (6) identifies the individual and division to whom correspondence and inquiries regarding the NOV should be directed;
 - (7) states to whom (which entity) and the date by which the administrative penalty must be paid if the person against whom an administrative penalty is assessed elects to waive or fails to request an adjudicatory hearing in a timely manner and elects to pay the penalty;
 - (8) states the Department's authority to pursue further administrative or judicial enforcement action.
- (c) Cease and Desist Order - immediate compliance order issued pursuant to R.I.G.L. § 2-1-24 either upon discovery of a suspected violation of the Fresh Water Wetlands Act or in combination with a notice of violation, which:
- (1) cites the law, rule, regulation, license, permit and/or order allegedly violated;
 - (2) describes the act or course of conduct which is prohibited by the cease and desist order;

- (3) orders the person allegedly in violation of the Fresh Water Wetlands Act to immediately cease the prohibited act or prohibited course of conduct;
 - (4) takes effect immediately upon service or within such time as specified by the Director in said order; and
 - (5) states the remedies and penalties which the Director may lawfully impose for any violation of the order.
- (d) Immediate Compliance Order - emergency order issued in accordance with R.I.G.L. § 42-17.1-2(u)(2), which:
- (1) cites the law, rule, regulation, license, permit and/or order violated;
 - (2) states the facts which form the basis for the Department's belief that an emergency exists;
 - (3) states the remedial action deemed necessary by the Director;
 - (4) takes effect immediately upon service or within such time as specified by the Director in said order;
 - (5) shall remain in effect for no more than forty-five (45) days which may be extended for good cause for one additional forty five (45) day period; and
 - (6) does not entitle the person so served to an administrative adjudication concerning the substance of the alleged violation or concerning any remedial action ordered.
- (e) Recordation in Land Evidence Records - in accordance with R.I.G.L. § 42-17.1-2(m), or any other source of statutory authority, the Director may record any order or notice issued pursuant to the Director's authority in the land evidence records of the city or town wherein the subject property is located. Any subsequent transferee of such property shall be responsible for complying with the requirements of said order or notice so recorded.
- (f) Court Action
- Civil - direct recourse to a court of competent jurisdiction either in addition to or in lieu of administrative action where:
- (1) it is necessary to enforce final administrative orders and seek civil and/or administrative penalties; or
 - (2) an imminent threat to the public health, safety, welfare or environment exists which warrants injunctive or other emergency relief; or
 - (3) a pattern of continuous, significant violations exists such that administrative enforcement action alone is unlikely to achieve compliance; or
 - (4) the court is the most convenient or appropriate forum for resolution of the dispute.

Criminal - referral to the Attorney General's Office for prosecution or criminal investigation where:

- (1) the alleged act or failure to act may be defined as a criminal offense by State law; or
- (2) enforcement is beyond the jurisdiction or investigative capability of the Department; or
- (3) criminal sanctions may be appropriate.

(g) Miscellaneous

Other enforcement options will be pursued, if necessary, to achieve compliance. Additional options include, but are not limited to:

- (1) joint actions with or referrals to other federal, state, or local agencies;
- (2) direct legal or equitable actions in state or federal court;
- (3) denial, suspension or revocation of state grants or required permits or certifications.

SECTION 8. PRECONDITIONS FOR ASSESSMENT OF ADMINISTRATIVE PENALTY

An administrative penalty may be assessed only for a violation or a failure to comply that, at the time it occurred, constituted noncompliance with a legal requirement:

- (a) which was then in effect; and
- (b) to which the person was then subject; and
- (c) to which these regulations apply.

SECTION 9. ASSESSMENT OF ADMINISTRATIVE PENALTY - PENALTY CEILING

No penalty shall exceed the maximum penalty allowed by State law for the violation(s) cited. The maximum administrative penalty which the Director has the authority to impose is determined by reference to the civil penalty provision of the relevant chapter of the General Laws administered and/or enforced by the Director and/or RIGL § 42-17.6 as may be amended.

- (a) Where State law provides that a penalty is to be assessed "per day," multi-day violations are counted from the initial day of noncompliance until compliance is achieved. Violations of weekly compliance requirements may be counted as seven (7) days of noncompliance; violations of monthly compliance requirements may be counted as thirty (30) days of noncompliance.
- (b) Where State law provides that a penalty is to be assessed "per violation", multiple violations of the same law, rule, regulation, license, permit or order are counted as separate violations if any violation:
 - (1) involves a prohibited act which is distinct from any other by the nature of the act itself; or

- (2) involves a prohibited act which is distinct from any other by the time or place of its commission, including acts which involve separately identified lots; or
 - (3) involves a prohibited act which is distinct from any other by definition; or
 - (4) presents a risk of harm to the public health, safety, welfare or environment which is distinct from the risk threatened by any other violation.
- (c) Each day following service of a Notice of Violation, Immediate Compliance Order or Cease and Desist Order to which the Director is a party, during which a violation is repeated, continued or remains in place, constitutes a separate violation. The Director may assess an additional administrative penalty, not to exceed one thousand dollars (\$1,000) for each day the violation or failure to comply is repeated, continued or remains in place, unless a higher amount is authorized by statute as a civil penalty.
- (d) The penalty imposed shall continue to accrue from the day the Notice of Violation, Immediate Compliance Order or Cease and Desist Order is issued until compliance is achieved if reasonable efforts to promptly come into compliance have not been made.

SECTION 10. ASSESSMENT OF ADMINISTRATIVE PENALTY - CALCULATION

The amount of the penalty will be calculated based on the factors enumerated below. The factors set forth in R.I.G.L. § 42-17.6-6 shall be considered when calculating the Type of Violation and Deviation from the Standard as set forth below.

- (a) The penalty may be based on the gravity of the violation. That portion will be calculated according to the applicable "Penalty Matrix" in the Appendix to these regulations. The applicable penalty range is reached by first determining the "Type of Violation" and the "Deviation from the Standard" of the alleged violation.
- (1) "Type of Violation" - refers to the nature of the legal requirement allegedly violated.
- (A) Type I violations - Type I violations include violations of legal requirements identified by the Director as directly related to the protection of the public health, safety, welfare or environment. Such violations include, but are not necessarily limited to, acts which pose an actual or potential for harm to the public health, safety, welfare or the environment; acts or failures to act which are of major importance to the regulatory program; any failure to obtain a required permit, license or approval from the Director; any failure to report an unauthorized activity which actually or potentially threatens the public health, safety, welfare or the environment; any failure to take remedial action to mitigate a known or suspected harm; and/or any failure to comply with an order of the Director which is presently enforceable.
- (B) Type II violations include violations of legal requirements identified by the Director as important but indirectly related to the protection of the public health, safety, welfare or environment. Such violations include, but are not necessarily limited to, acts which pose an indirect actual or potential for harm to the public health, safety, welfare or the environment; acts or failures to act which are of moderate importance to the regulatory program; and/or failure to comply with any procedure required by any law administered

by the Director, or by a rule or regulation adopted pursuant to the Director's authority for the prevention of harm to the public health, safety, welfare or the environment.

- (C) Type III violations include violations of legal requirements identified by the Director as important but incidental to the protection of public health, safety, welfare or the environment. Such violations include, but are not necessarily limited to, acts of noncompliance with routine sampling schedules, reporting requirements or analytical methods which are incidental to the Department's ability and obligation to enforce the laws administered by the Director.
- (2) "Deviation from the Standard" - refers to the degree to which the violation is out of compliance with the legal requirement allegedly violated. The Deviation from the Standard may be determined without consideration of factor (I) enunciated below in cases of strict liability. In all other cases, the Department's assessment of whether a violation is a minor, moderate or major deviation from the standard is based upon an evaluation of one or more of the following factors except to the extent already considered:
- (A) the extent to which the act or failure to act was out of compliance;
 - (B) environmental conditions;
 - (C) the amount of the pollutant;
 - (D) the toxicity or nature of the pollutant
 - (E) the duration of the violation;
 - (F) the areal extent of the violation;
 - (G) whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance;
 - (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;
 - (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;
 - (J) any other factor(s) that may be relevant in determining the amount of a penalty, provided that said other factor(s) shall be set forth in the Notice of Violation or other written notice of the assessment of a penalty.
- (b) In lieu of calculating the gravity portion of the penalty according to the method in section (a) above, the gravity portion of the penalty may be an amount specified by federal statute for a similar violation.
- (c) The Economic Benefit from Non-Compliance. The penalty shall include an amount intended to offset the economic benefit of non-compliance.

- (1) Such an amount may include, but not be limited to:
 - (A) the cost of complying;
 - (B) the cost of equipment needed to comply;
 - (C) any associated operation and maintenance costs;
 - (D) the costs of studies needed to achieve compliance;
 - (E) any other delayed or avoided costs including, interest, market or competitive advantage over other regulated entities which are in compliance.
 - (2) The economic benefit portion may not be included in the penalty only if:
 - (A) there is no identifiable benefit from non-compliance; or
 - (B) the amount of economic benefit cannot be quantified.
- (d) The penalty shall include additional or extraordinary costs which are incurred by the Director during the course of the investigation, enforcement of noncompliance and resolution of an enforcement action for which the State of Rhode Island is not otherwise reimbursed other than non-overtime personnel costs.

Section 11. ASSESSMENT OF ADMINISTRATIVE PENALTY - RESOLUTION PRIOR TO HEARING

- (a) After assessing the administrative penalty, the Director may recalculate the penalty assessed based on written information provided by the alleged violator or on any other information concerning the alleged violation. The decision to recalculate must be supported by written documentation.
- (b) If the Director decides to recalculate and the penalty issue can not be informally resolved, the Director may then issue an amended Notice of Violation which reflects the additional information and appropriate penalty. Such an amended NOV will state that a hearing request submitted in response to a prior NOV will not preserve the alleged violator's rights to a hearing under the amended NOV.
- (c) The Director, through a consent agreement, may offset portions of the penalty in the amount of expenditures which provide additional assurance of protection of public health, safety, welfare or the environment. Such expenditures must exceed the requirements of the regulations. In any case, the penalty must be greater than the costs incurred by the department in the investigation of the noncompliance, subsequent enforcement of the regulations and any settlement negotiations. The decision to make such an allowance must be supported by written documentation.
- (d) The penalty shall not be reduced below the amount identified as the economic benefit of non-compliance.

- (e) The Director may consider the following factors in negotiating a final resolution of the penalty, prior to hearing, with the exception of (d) above:
 - (1) litigation practicalities;
 - (2) legal precedent;
 - (3) the Departmental resources;
 - (4) the public interest;
 - (5) the difference between the amount offered by the alleged violator and the penalty imposed in the notice of violation or amended notice of violation if the penalty was recalculated as result of (a) and/or (b) above; and
 - (6) the financial condition of the person being assessed the administrative penalty.
- (f) Nothing herein shall preclude the Director from resolving the outstanding penalty through a Consent Agreement at any time he or she deems appropriate.

SECTION 12. ASSESSMENT OF ADMINISTRATIVE PENALTY - HEARING AND BURDEN OF PROOF

- (a) Any person against whom the Director seeks to assess an administrative penalty for a violation of a law, rule, regulation, permit, license or order which is within the Director's authority and responsibility to enforce, has the right to request a hearing thereon. The request for a hearing must be filed with the Administrative Adjudication Division within ten (10) days after service of the notice assessing said penalty.
- (b) If a timely request for a hearing is filed, a hearing shall be conducted in accordance with Section 42-35-9 and 42-17.7 of the General Laws of Rhode Island, 1956, as amended.
- (c) In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.
- (d) Judicial review of any final decision of the Director shall be available in accordance with Section 42-35-15 of the General Laws of Rhode Island, 1956, as amended.

SECTION 13. ASSESSMENT OF ADMINISTRATIVE PENALTY - ENFORCEMENT

The Department's assessment of an administrative penalty shall become a final order of the Director upon the person's election to waive, or failure to timely request, an administrative hearing on the violation and/or the penalty. Each day during which the person fails to pay said penalty or otherwise fails to comply with a final order of the Director constitutes a separate and distinct violation. An additional administrative penalty, not to exceed one thousand dollars (\$1,000) for each such violation of a final order, may be assessed by the Director unless a different amount is authorized by statute as a civil penalty.

The Director may also, by summons and complaint, seek to enforce said final order in a court of competent jurisdiction.

SECTION 14. EFFECTIVE DATE

On the effective date of these Rules and Regulations, all previous rules and regulations and any policies regarding the assessment of administrative penalties by the Department shall be superseded. However, any enforcement action taken and any administrative penalty assessed by the Department prior to the effective date of these rules and regulations shall be governed by the rules and regulations in effect at the time the enforcement action was taken or the penalty was assessed.

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

**Rules and Regulations for Assessment of Administrative Penalties
APPENDIX**

Penalty Matrix for Violations of Rhode Island General Laws as amended and Rules, Regulations, Permits, Licenses, and Orders adopted thereunder where the applicable statute provides for a civil penalty up to **\$25,000.00**.

		TYPE OF VIOLATION		
		I	II	III
DEVIATION FROM THE STANDARD	MAJOR	\$25,000 to \$12,500	\$12,500 to \$6,250	\$6,250 to \$2,500
	MODERATE	\$12,500 to \$6,250	\$6,250 to \$2,500	\$2,500 to \$1,250
	MINOR	\$6,250 to \$2,500	\$2,500 to \$1,250	\$1,250 to \$250

Penalty Matrix for Violations of Rhode Island General Laws as amended and Rules, Regulations, Permits, Licenses, and Orders adopted thereunder where the applicable statute provides for a civil penalty up to **\$10,000.00**.

		TYPE OF VIOLATION		
		I	II	III
DEVIATION FROM THE STANDARD	MAJOR	\$10,000 to \$5,000	\$5,000 to \$2,500	\$2,500 to \$1,000
	MODERATE	\$5,000 to \$2,500	\$2,500 to \$1,000	\$1,000 to \$500
	MINOR	\$2,500 to \$1,000	\$1,000 to \$500	\$500 to \$100

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**Rules and Regulations for Assessment of Administrative Penalties
APPENDIX**

Penalty Matrix for Violations of Rhode Island General Laws as amended and Rules, Regulations, Permits, Licenses, and Orders adopted thereunder where the applicable statute provides for a civil penalty up to **\$5,000.00**.

		TYPE OF VIOLATION		
		I	II	III
DEVIATION FROM THE STANDARD	MAJOR	\$5,000 to \$2,500	\$2,500 to \$1,250	\$1,250 to \$500
	MODERATE	\$2,500 to \$1,250	\$1,250 to \$500	\$500 to \$250
	MINOR	\$1,250 to \$500	\$500 to \$250	\$250 to \$100

Penalty Matrix for Violations of Rhode Island General Laws as amended and Rules, Regulations, Permits, Licenses, and Orders adopted thereunder where the applicable statute provides for a civil penalty up to **\$1,000.00**.

		TYPE OF VIOLATION		
		I	II	III
DEVIATION FROM THE STANDARD	MAJOR	\$1,000 to \$800	\$800 to \$600	\$600 to \$400
	MODERATE	\$800 to \$600	\$600 to \$400	\$400 to \$200
	MINOR	\$600 to \$400	\$400 to \$200	\$200 to \$100

The foregoing "Rules and Regulations for Assessment of Administrative Penalties", after due notice, are hereby adopted and filed with the Secretary of State this 27 day of April, 2000, to become effective twenty (20) days thereafter, in accordance with the provisions of Chapters 42-17.1, 42-17.6, and 42-35 of the General Laws of Rhode Island, 1956, as amended.

Jan Reitsma, Director
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Notice given on March 15, 2000

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