

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

**IN RE: Brian A. Fielding
 Corinne T. Fielding**

FILE NO.: C09-115

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 parties (“Respondents”) have violated certain statutes and/or administrative regulations under the jurisdiction of DEM.

B. Administrative History

DEM issued an informal notice to the Respondents on January 14, 2010 for the violations. The notice required restoration of the altered wetlands. DEM received a letter from the Respondents’ attorney on February 5, 2010 requesting that DEM revise its conclusion as to the existence of any violations. DEM attempted through a letter to the attorney on March 1, 2010 and by telephone to the Respondents to obtain permission to conduct a thorough inspection of the Property. DEM has not been given permission to inspect the Property.

C. Facts

- (1) The subject property is located immediately east of Ministerial Road (Route. 110), adjacent to house number 2541, approximately 1,100 feet southeast of the intersection of Ministerial Road and Larkin Pond Road South, Assessor's Plat 38, Lot 9 in the Town of South Kingstown, Rhode Island (the “Property”).
- (2) The Respondents own the Property.
- (3) DEM inspected the Property on November 12, 2009. The inspection revealed clearing and filling (in the form of at least wood chips) within Swamp, fifty foot Perimeter Wetland and two hundred foot Riverbank Wetland. This activity has resulted in the unauthorized alteration of at least ten thousand square feet of freshwater wetland.
- (4) The Respondents did not receive approval from the DEM to alter freshwater wetlands on the Property in the areas specified above.

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) RI General Laws Section 2-1-21 – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
- (2) DEM Rules and Regulations 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.

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) 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) Prior to the commencement of restoration, install a continuous uninterrupted line of staked haybales or silt fence between those portions of the wetlands that have been altered without authorization and the undisturbed freshwater wetlands. These soil erosion and sediment controls must be regularly inspected and properly and continually maintained (and replaced, if necessary) during and following the completion of the required wetland restoration, and until such time that all surrounding areas are properly stabilized. At the discretion and direction of DEM, additional soil erosion and sediment controls must be installed on-site, as deemed necessary, to protect any and all freshwater wetlands.
 - (b) Remove all unauthorized fill material from any and all freshwater wetlands on the Property. All fill material that is removed must be deposited in an appropriate upland location, outside of any and all wetlands.
 - (c) Plant all unauthorized cleared and altered areas within the two hundred foot Riverbank Wetland and fifty foot Perimeter Wetland outside of the Swamp with trees and shrubs as follows:

Balled and burlapped or transplanted tree species must be planted in a straight line, eight feet on center, six feet tall after planting, along the outer edge of the limit of unauthorized clearing. Tree species must include an equal distribution of at least two of the following selections:

White pine, *Pinus strobus*
Red cedar, *Juniperus virginiana*
Colorado blue spruce, *Picea pungens*
Norway spruce, *Picea abies*

Balled and burlapped or transplanted tree species must be planted in an interspersed fashion, ten feet on center, four feet tall after planting, throughout the altered portion of the Riverbank Wetland and Perimeter Wetland. Tree species must include an equal distribution of at least three of the following selections:

White pine, *Pinus strobus*
Red spruce, *Picea rubens*
Red cedar, *Juniperus virginiana*
Red maple, *Acer rubrum*
Northern red oak, *Quercus rubra*
White oak, *Quercus alba*
Pin oak, *Quercus palustris*
Gray birch, *Betula populifolia*

Balled and burlapped or transplanted shrub species must be planted in an interspersed fashion, fifteen feet on center, three feet tall after planting, throughout the altered portion of the Riverbank Wetland and Perimeter Wetland. Shrub species must include an equal distribution of at least three of the following selections:

Mountain laurel, *Kalmia latifolia*
Giant rhododendron, *Rhododendron maximum*
Arrowwood, *Viburnum dentatum*
Wild raisin, *Viburnum cassinoides*
Winterberry, *Ilex verticillata*
Inkberry, *Ilex glabra*
Highbush blueberry, *Vaccinium corymbosum*
Lowbush blueberry, *Vaccinium angustifolium*
Witchhazel, *Hamamelis virginiana*

- (d) If any or all of the required plantings fail to survive at least one year from the time planting has been verified by DEM, the same plant species shall be replanted and maintained until such time that survival occurs for at least one year.
- (e) All disturbed surfaces outside of the Swamp must be seeded with a wildlife conservation grass seed mixture, and stabilized with a mat of loose hay mulch.
- (f) Upon stabilization of all disturbed areas, erosion and sedimentation controls must be removed from the freshwater wetland. Prior to the removal of the controls, all accumulated sediment must be removed to a suitable upland area, outside of any and all freshwater wetlands.
- (g) 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 subject property without first obtaining a valid permit from DEM.

(h) The above restoration work must be completed prior to **September 30, 2010**.

- (3) Contact Mr. Howard Cook of DEM (401) 222-4700 ext. 7161 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 a representative of 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:

Five Thousand Dollars and no cents (\$5,000.00)

- (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 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 the respondents 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.

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, 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) An original signed copy of this NOV is being forwarded to the Town of South Kingstown 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, please contact Joseph J. LoBianco at the DEM Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Mr. Howard Cook or Mr. Stephen Tyrrell of the Office of Compliance and Inspection at (401) 222-4700 exts. 7161 and 7406, respectively.

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

David E. Chopy, Chief
DEM Office of Compliance and Inspection

Date: _____

CERTIFICATION

I hereby certify that on the _____ day of _____ 2010
the within Notice of Violation was forwarded to:

**Brian A. Fielding
Corinne T. Fielding
2541 Ministerial Road
South Kingstown, RI 02892**

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, WETLANDS

File No.: FW C09-115

Respondents: Brian and Corrine Fielding

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) and (2) – Unauthorized alteration of wetlands	Type I (\$ <u>5,000.00</u> Max. Penalty)*	Major	\$ 5,000	1	\$5,000.00
<i>SUB-TOTAL</i>					\$5,000.00

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

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$5,000.00

PENALTY MATRIX WORKSHEET

CITATION: Unauthorized alteration of wetlands
 VIOLATION NO.: D (1) and (2)

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.

FACTORS CONSIDERED:

Taken from Section 10 (a) (2) of the DEM *Rules and Regulations for Assessment of Administrative Penalties*

- (A) **The extent to which the act or failure to act was out of compliance:** Respondents altered freshwater wetlands by clearing and filling (in the form of at least wood chips). The severity of the alteration to the wetland environment was determined to be of major importance to the regulatory program.
- (B) **Environmental conditions:** The Swamp, Riverbank Wetland, and Perimeter Wetland were in a natural wild condition (i.e., vegetated with trees and shrubs) prior to the alteration.
- (C) **Amount of the pollutant:** Not relevant
- (D) **Toxicity or nature of the pollutant:** Not relevant
- (E) **Duration of the violation:** Full duration unknown. The unauthorized alterations were first documented by DEM on November 12, 2009.
- (F) **Areal extent of the violation:** The aerial extent of the violation is at least 10,000 square feet.

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- (G) **Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance:** Respondents failed to obtain the appropriate permit from DEM. Respondents were issued a Notice of Intent to Enforce (NIE) by DEM on January 14, 2010 and were required to restore the wetlands by May 30, 2010. Upon information and belief the Respondents have failed to comply with the NIE.
- (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 Respondents had complete control over the occurrence of the violation and had an obligation to protect the wetlands on the Property.
- (J) **Any other factor(s) that may be relevant in determining the amount of a penalty:** The NIE stated that the penalty could be up to \$5,000 for each violation. The Respondents have not given DEM permission to inspect the property despite issuance of a letter by DEM on March 1, 2010 to the Respondents' attorney and at least two telephone calls requesting that they do so.

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