

Board of Registration of
Hazardous Waste Site Cleanup Professionals

Please complete this complaint form as fully as possible.
Please type or print legibly.

ONLY

Complaint No. 08C-06

Date Received 8/6/08

Date mailed to 8/8/08

COMPLAINT MADE BY:

Dame Timothy C
Last Name First Name M.I.

MassDEP Boston - ESF
Business Name

1 Winter st 617-292-5540
Number Street Daytime Phone

Boston MA 02108
City State Zip Code

LSP OR OTHER PERSON WHO IS THE SUBJECT OF THE COMPLAINT:

Cushing Richard
Last Name First Name M.I.

Cushing, Jamallo, & Wheeler, Inc.
Business Name

180 Stone St (they also have a listing in Danvers, MA) 978-774-7224
Number Street Daytime Phone

Clinton MA 01510 3063
City State Zip Code LSP License Number
(if applicable)

SITE OR LOCATION:

If the conduct that is the subject of your Complaint took place at or in connection with a particular property or site, please identify that property/site by either providing its address (street address and city/town) or by otherwise identifying its location.

Former Empire cleaners site, 211 West Main street, Ayer, MA. Site has a one story commercial building with a basement.

It was also the location of a video rental store called Video Star when the violations occurred. Property is owned by Le-mac realty trust as identified on town of Ayer's assessor's map #32 Parcel #13

UTM coordinates are 4714453 meters north, 286042 east

If the property or site has a Release Tracking Number ("RTN") assigned by the Massachusetts Department of Environmental Protection, please provide this number if you know it.

RTN No. 2-14537

Allegations:

Describe the incidents that led to your Complaint and note the times and dates that events occurred. List the names of all individuals involved.

The site is a former dry cleaners originally listed as a site in November 2002 resulting from a DPS submitted by Shell Oil at their former gas station site at 215 West Main street. Ducharme & Wheeler and LSP Richard Cushing were retained at that time by Stanley Meniff, agent for Le-Mac Realty trust. On March 8, 2004, DEP CERO BWSC issued an imminent hazard notification to Ducharme & Wheeler and subsequently an evacuation of the building (the video store) was ordered. Lead DEP contact in Worcester office is Nick Child.

In September 2003, Cushing conducted a soil gas survey at the site that showed PCE at 2,400,000 ug/m3 close to the occupied building. Cushing concluded that an imminent hazard did not exist at that time. Indoor air sampling via SUMMA canister was ordered by DEP on February 3, 2004. On February 23, 2004 the risk assessment firm retained by Cushing again concluded that an imminent hazard did not exist at the site. Based on the results the site was scored as a Tier IB site by Cushing. On April 9, 2004 a revised classification was sent to DEP changing the site to a Tier 1A site.

An NON was issued by DEP to Cushing (NON-CE-04-3076) on August 2, 2004. Cushing submitted a response to the NON on August 31, 2004 in which he acknowledged that the IH condition could have been detected earlier with the appropriate interpretation of the soil gas results in September 2003.

Attached is copy of the ESF case file which includes a timeline of events, MCP filings, BWSC correspondence, notes from meetings with the LSP and others, the RFI, NON, and property-related documents.



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Central Regional Office, 627 Main Street, Worcester, MA 01608

MITT ROMNEY
Governor

KERRY HEALEY
Lieutenant Governor

ELLEN ROY HERZFELDER
Secretary

ROBERT W. GOLLEDGE, Jr.
Commissioner

Richard Cushing, LSP #3063
C/o Ducharme & Wheeler, Inc.
1092 Main Street
Bolton, MA 01740

RE: CRWSC -Ayer
211 West Main Street
Former Empire Cleaners

Release Tracking #2-0014537
Tier IA Permit #W045319
File No. NON-CE-04-3076

NOTICE OF NONCOMPLIANCE

THIS IS AN IMPORTANT NOTICE. FAILURE TO TAKE ADEQUATE ACTION IN RESPONSE TO THIS NOTICE COULD RESULT IN SERIOUS LEGAL CONSEQUENCES.

Dear Mr. Cushing:

Department personnel have reason to believe that you are in noncompliance with M.G.L. c. 21E, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, and 310 CMR 40.0000, the Massachusetts Contingency Plan ("MCP").

Attached hereto is a written description of (1) each activity referred to above; (2) the requirement violated; (3) the action the Department now wants you to take, and (4) the deadline for taking such action.

If you fail to take any action the Department now wants you to take by the prescribed deadline, or if it otherwise fail to comply in the future with requirements applicable to you, you could be subject to legal action. Such action could include criminal prosecution, court-imposed civil penalties, or civil administrative penalties assessed by the Department. A civil administrative penalty may be assessed for every day from now on that you are in noncompliance with the requirements referred to above.



If you have any questions about this matter, please contact Branch Chief Denise Child at (508) 767-2846 or at the address that appears on the letterhead above. If you decide to respond in writing to this Notice of Noncompliance, please reference Release Tracking No. 2-0014537 and File No. NON-CE-04-3076 on your correspondence.

Sincerely,

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

August 02, 2004
Date

Mary Gardner
Deputy Regional Director
Bureau of Waste Site Cleanup

Enc.: Noncompliance Summary

cc: Le-Mac Realty Trust, C/o Robert D. Cox, Jr., Esquire, Bowditch & Dewey, LLP
311 Main Street, Post Office Box 15156, Worcester, MA 01615-0156
Office of Enforcement, DEP Boston
Massachusetts Board of Registration of Hazardous Waste Site Cleanup Professionals
Database [C&E/NON]

**NOTICE OF NONCOMPLIANCE
NONCOMPLIANCE SUMMARY**

FILE NO.: NON-CE-04-3076

ENTITY IN NONCOMPLIANCE:

Richard Cushing, LSP #3063
C/o Ducharme & Wheeler, Inc.
1092 Main Street
Bolton, MA 01740

LOCATION WHERE NONCOMPLIANCE OCCURRED OR WAS OBSERVED:

Former Empire Dry Cleaners
211 West Main Street
Ayer, MA

Release Tracking #2-0014537
Tier IA Permit #W045319

DATE WHEN NONCOMPLIANCE OCCURRED OR WAS OBSERVED:

September 23, 2003 through April 9, 2004

DESCRIPTION OF NONCOMPLIANCE:

Groundwater samples collected from monitoring wells at the site in January, 2003 contained concentrations of tetrachloroethene (PCE) in groundwater at up to 17,500 parts per billion (ppb). The highest concentration was detected in a monitoring well 30 feet from the foundation of the occupied video store building, where groundwater was measured at eighteen feet below grade. On September 10, 2003, samples of soil gas were collected from points at five feet below grade immediately abutting the foundation of the occupied video store building. On September 23, 2003, a laboratory report was released to Ducharme & Wheeler, Inc., documenting that these samples contained PCE at concentrations up to 2,400,000 micrograms per cubic meter (ug/m3). Though these groundwater and soil data clearly indicate a threat to indoor air, no indoor air samples were collected. These data were not provided to the Department until a Phase I Initial Site Investigation Report and Tier IB Permit Application, including an LSP Opinion you provided, were submitted on January 25, 2004. The Numerical Ranking System Scoresheet you prepared to support this submittal did not score the full 200 points for likely indoor air impacts in Section II.D. The site should have scored 200 points in this section because it meets the criteria in 310 CMR 40.1512(4): "a reasonable likelihood exists that OHM likely attributable to the disposal site is affecting air quality in an occupied building." If the site had been scored correctly based on available information at that time, it would have been Tier Classified as Tier IA rather than Tier IB.

Upon receipt of this report, the Department immediately contacted you to require indoor air sampling and an Imminent Hazard Evaluation. The sampling was not conducted until February 20, 2004. Laboratory analysis showed the presence of PCE in the occupied video store building at concentrations which pose an Imminent Hazard pursuant to 310 CMR 40.0950. Specifically, PCE was detected at 4,840 ug/m3 in the air in the basement, and at 714 ug/m3 in the first floor video store. You first submitted a letter concluding that there was no Imminent Hazard. The Department then contacted you to inform you of errors in the risk calculations. Subsequently you contacted the Department to notify of the Imminent Hazard Condition and to propose an Immediate Response Action (IRA), which was approved by the Department and included evacuation of the building. On April 9 2004, you submitted a revised Tier Classification, correctly scoring the site as Tier IA.

DESCRIPTION OF THE REQUIREMENTS NOT COMPLIED WITH:

310 CMR 40.0169: The Role of Licensed Site Professionals

- (3) LSPs shall render Opinions only in accordance with M.G.L. c. 21A, §§ 19 through 19J, 309 CMR 4.00 and 6.00, M.G.L. c. 21E, 310 CMR 40.0000 and other applicable laws.

310 CMR 40.1503: General Instructions

- (2) An LSP shall be engaged or employed for purposes of rendering an LSP Tier Classification Opinion regarding the NRS scoring of a disposal site. In rendering such Opinion, the LSP shall consider the data, facts and other information known about a disposal site, including, but not limited to, the data, facts and other information obtained during Phase I and, if applicable, during Phase II.

310 CMR 40.0191: Response Action Performance Standard (RAPS)

- (1) The Response Action Performance Standard (RAPS) is the level of diligence reasonably necessary to obtain the quantity and quality of information adequate to assess a site and evaluate remedial action alternatives, and to design and implement specific remedial actions at a disposal site to achieve a level of No Significant Risk for any foreseeable period of time and, where feasible, to reduce to the extent possible the level of oil and/or hazardous materials in the environment to background levels.

- (2) RAPS shall be employed during the performance of all response actions conducted pursuant to 310 CMR 40.0000, and shall include, without limitation, the following:

- (a) consideration of relevant policies and guidelines issued by the Department and EPA;
- (b) use of accurate and up-to-date methods, standards and practices, equipment and technologies which are appropriate, available and generally accepted by the professional and trade communities conducting response actions in accordance with M.G.L. c. 21E and 310 CMR 40.0000 under similar circumstances; and
- (c) investigative practices which are scientifically defensible, and of a level of precision and accuracy commensurate with the intended use of the results of such investigations.

The groundwater and soil vapor data collected at the site clearly indicated that indoor air impacts at high concentrations were very likely to be present. In order to collect the appropriate data to identify exposure pathways, determine what response actions were required, and to correctly Tier Classify the site, indoor air sampling should have been conducted. By preparing the Tier Classification submittal without this necessary information you failed to employ RAPS as required by 310 CMR 40.0191.

In addition, you rendered an LSP Opinion in support of the Tier IB Classification which was not in accordance with 310 CMR 40.0000. You did not consider data which would have required you to score the site as Tier IA, including acknowledgement of the likely indoor air contamination. Therefore you violated 310 CMR 40.0169 and 310 CMR 1503.

ACTION TO BE TAKEN AND THE DEADLINES FOR TAKING SUCH ACTION:

In order to return to compliance with 310 CMR 40.0000, you must complete the following:

1. By September 1, 2004, submit to the Department a written statement in which you:
 - a. Describe the events and conditions which led to the submittal of the subject LSP Opinion;
 - b. Explain the implications of the noncompliance herein. In doing so, explain how public health, safety, welfare, or the environment may have been impacted as a result of the noncompliance; and
 - c. Explain the steps you will take to prevent such noncompliance in the future.
2. Conduct all future response actions subject to M.G.L. c.21E and the MCP in accordance with the applicable provisions of M.G.L c.21E and the MCP; and
3. Render all future LSP Opinions in compliance with all applicable provisions of M.G.L. c.21E and the MCP.

In responding to this NON, please reference the NON number found on the first page of the NON to ensure proper acknowledgement of your response