The State of New Hampshire

Department of Environmental Services

Michael P. Nolin
Commissioner

Cumberland Farms, Inc.
Attn: Richard Etzold
777 Dedham Street
Canton, MA 02021

Re: Cumberland Farms 2825
202 Highland Avenue, Rochester, NH
UST ID # 0-111495

NOTICE OF PROPOSED ADMINISTRATIVE FINE
NO. AF 04-016

August 16, 2004

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("the Division") to Cumberland Farms, Inc., pursuant to RSA 146-C and Env-C 601.05. The Division is proposing that fines totaling $1,000 be imposed against Cumberland Farms, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division, is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03302.

2. Cumberland Farms, Inc. is a Corporation registered to do business in New Hampshire having a mailing address of 777 Dedham Street, Canton, MA 02021.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. RSA 146-C authorizes DES to regulate the installation, maintenance, operation, and closure of underground storage facilities. Pursuant to RSA 146-C:9, the Commissioner of DES has adopted New Hampshire Administrative Rules Env-Wm 1401 to set forth the requirements for underground storage facilities by "establishing criteria for registration and permitting, and standards for design, installation, operation, maintenance, and monitoring of such facilities."

2. RSA 146-C:10-a authorizes the Commissioner of the Department of Environmental Services ("DES") to impose administrative fines of up to $2,000 per offense upon any person who violates any provision of RSA 146-C or any rule adopted under the provisions of this chapter. Pursuant to RSA 146-C:10-a, the Commissioner has adopted Env-C 607 to establish the schedule of fines for such violations.

3. Cumberland Farms, Inc. ("CFI") is the registered facility owner of three underground storage tanks ("UST") at the Cumberland Farms 2825 facility ("the Facility"), further identified as UST #0-111495 located on real property at 202 Highland Avenue in Rochester, NH ("the Property").

4. The UST systems are subject to the requirements of RSA 146-C and Env-Wm 1401.

5. On September 24, 2003, a Division inspector conducted a compliance inspection at the Facility and noted compliance deficiencies which were identified in a report (the "Report") issued to the Facility representative at the time of the inspection.

6. The Report notified the Facility that compliance was to be achieved within 30 days of the date of the inspection and verification of compliance submitted to the Division within 45 days of the date of the inspection. The Report was signed by Howard George on behalf of the Facility.

7. The Report also included a UST Facility Summary of Deficiencies identified at the time of the inspection. Among those deficiencies identified, the following was not corrected within 45 days after the inspection was performed:

a. The leak monitor was not tested annually.

8. Env-Wm 1401.31(a) requires leak monitoring equipment and devices to be maintained in good working order at all times to continuously perform their original design function and shall be tested annually for proper operation in accordance with the manufacturer's requirements.

IV. Violations Alleged and Proposed Administrative Fines

1. CFI has violated Env-Wm 1401.31(a) by failing to conduct the leak monitor's annual test for proper operation. For this violation, Env-C 607.05(d) specifies a fine of $1,000 per requirement not met.

The total fine being sought is $1,000.

V. Required Response, Opportunity for Hearing

Pursuant to Env-C 601.06, Cumberland Farms is required to respond to this notice. Please respond no later than <u>September 16, 2004</u>, using the enclosed colored form.

1. If Cumberland Farms would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.

2. If Cumberland Farms chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

3. If Cumberland Farms wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Cumberland Farms' interest in settling.

Cumberland Farms is not required to be represented by an attorney. If Cumberland Farms chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Cumberland Farms committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Cumberland Farms committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Cumberland Farms proves, by a preponderance of the evidence,** applies in this case:

1. The violation was a one-time or non-continuing violation, **and** Cumberland Farms did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Cumberland Farms did not benefit financially, whether directly or indirectly, from the violation.

2. At the time the violation was committed, Cumberland Farms was making a good faith effort to comply with the requirement that was violated.

3. Cumberland Farms has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.

4. Other information exists which is favorable to Cumberland Farms' case which was not known to the Division at the time the fine was proposed.

*****IMPORTANT NOTICE*****

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Cumberland Farms committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Cumberland Farms' opportunity to present testimony and evidence that Cumberland Farms did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Cumberland Farms has any evidence, such as photographs, business records or other documents, that believes show that Cumberland Farms did not commit the violation(s) or that otherwise support Cumberland Farms' position, Cumberland Farms should bring the evidence to the hearing. Cumberland Farms may also bring witnesses (other people) to the hearing to testify on Cumberland Farms' behalf.

If Cumberland Farms wishes to have an informal meeting to discuss the issues, Cumberland Farms must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

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Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If Cumberland Farms has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY

For Anthony P. Giunta, P.E., Director
DES Waste Management Division

Enclosure *(NHDES Fact Sheet #CO-2002)*

cc: Gretchen R. Hamel, Administrator, DES Legal Unit
Michael J. Walls, Assistant Commissioner DES
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Lynn A. Woodard, P.E., WMD UST Supervisor
Thomas R. Beaulieu, WMD UST Chief
Mark Antonia, WMD

***** RETURN THIS PAGE ONLY *****

CUMBERLAND FARMS, INC. IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN September 16, 2004

Please check the appropriate line and fill in the requested information below.
APPEARANCE On behalf of Cumberland Farms, Inc.

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I request to have a **prehearing conference** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Cumberland Farms, Inc.

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of $1,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

* *If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or $25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

_____ _____
Signature Date

Name (please print or type):_____

Title:_____

Phone:_____

RETURN THIS PAGE ONLY TO:
Department of Environmental Services ~ Legal Unit
Attn: Michael Sclafani, Legal Assistant
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

ENVIRONMENTAL
Fact Sheet

NEW HAMPSHIRE DEPARTMENT OF Environmental Services

6 Hazen Drive, Concord, New Hampshire 03301 · (603) 271-3503 · www.des.state.nh.us

CO-2 2002

Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. YOU MUST COMPLETE AND RETURN THIS FORM. The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.