The State of New Hampshire

Department of Environmental Services

Michael P. Nolin
Commissioner

Brian Datson
d/b/a Spaulding Variety Store
3406 White Mountain Highway
Sanbornville, NH 03872

Re: Spaulding Variety Store, Wakefield, NH
UST ID # 0-115539

NOTICE OF PROPOSED ADMINISTRATIVE FINE
NO. AF 04-081

September 17, 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 Brian Datson d/b/a Spaulding Variety Store, pursuant to RSA 146-C and Env-C 607. The Division is proposing that fines totaling $4,500 be imposed against Brian Datson d/b/a Spaulding Variety Store 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. Brian Datson is an individual doing business as Spaulding Variety Store ("Spaulding") having a mailing address of 3406 White Mountain Highway, Sanbornville, NH 03872.

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. Spaulding is the registered facility owner of one underground storage tank ("UST") at the Spaulding Variety Store facility ("the Facility"), further identified as UST #0-115539, located on real property at 3406 White Mountain Highway in Wakefield, NH ("the Property").

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

5. On August 28, 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.

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

a. The UST certificate was not posted;

b. The overfill protection devices for the 20,000-gallon compartment UST (split 13,000/7,000) were not properly installed;

c. The line leak detectors were not properly installed and the annual line leak detector tests had not been conducted; and

d. The leak monitoring equipment was not continuously performing their original design function and the leak monitor's annual test had not been performed.

8. Env-Wm 1401.21(l) requires a certificate which shows all of the information in Env-Wm 1401.21(k), the date of installation, and the regulated substances and percentages by volume of any additives to be displayed so it is visible and permanently affixed on the facility premises.

9. Env-Wm 1401.25(d) defines the manner in which the overfill protection devices shall be installed.

10. Env-Wm 1401.30(b) requires automatic line leak detectors to be tested annually to confirm that they are operating according to manufacturer's recommendations.

11. 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. Spaulding has violated Env-Wm 1401.21(l) by failing to display and permanently affix a certificate bearing the Facility's tank information. For this violation, Env-C 607.02(b) specifies a fine of $100.

2. Spaulding has violated Env-Wm 1401.25 (d) by failing to properly install and maintain overfill protection equipment on both compartments of the UST system. For this violation, Env-C 607.05(j) specifies a fine of $200 per requirement not met or $400 for the Facility.

3. Spaulding has violated Env-Wm 1401.30(b) by failing to conduct the annual test for the two line leak detectors at the Facility. For this violation, Env-C 607.03)(j) specifies a fine of $1,000 per system per requirement not met or $2,000 for the Facility.

4. Spaulding has violated Env-Wm 1401.31(a) by failing to maintain leak monitoring equipment in good working order at all times to continuously perform their original design function for the compartment 20,000-gallon UST and by failing to perform the annual test for proper operation. For this violation, Env-C 607.05(d) specifies a fine of $1,000 per requirement not met or $2,000 for the Facility.

The total fine being sought is $4,500.

V. Required Response, Opportunity for Hearing

Pursuant to Env-C 601.06, Spaulding is required to respond to this notice. Please respond no later than <u>October 18, 2004</u>, using the enclosed colored form.

1. If Spaulding 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 Spaulding 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 Spaulding 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 Spaulding's interest in settling.

Spaulding is not required to be represented by an attorney. If Spaulding 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 Spaulding 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 Spaulding 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 Spaulding proves, by a preponderance of the evidence,** applies in this case:

1. The violation was a one-time or non-continuing violation, **and Spaulding** 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** Spaulding did not benefit financially, whether directly or indirectly, from the violation.

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

3. Spaulding 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 Spaulding's 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 Spaulding committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Spaulding's opportunity to present testimony and evidence that Spaulding 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 Spaulding has any evidence, such as photographs, business records or other documents that believe show that Spaulding did not commit the violation or that otherwise support Spaulding's position, Spaulding should bring the evidence to the hearing. Spaulding may also bring witnesses (other people) to the hearing to testify on Spaulding's behalf.

If Spaulding wishes to have an informal meeting to discuss the issues, Spaulding 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.des.state.nh.us). If Spaulding has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY

Anthony P. Giunta, P.G., 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
Public Information Officer, DES PIP Office
Lynn A. Woodard, P.E., WMD UST Supervisor
Thomas R. Beaulieu, WMD UST Chief
Mark Antonia, WMD

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

SPAULDING VARIETY STORE IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN October 18, 2004

Please check the appropriate line and fill in the requested information below.
APPEARANCE On behalf of Brian Datson, d/b/a Spaulding Variety Store

_____ 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 Brian Datson, d/b/a Spaulding Variety Store

_____ 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 $4,500 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.