The State of New Hampshire

Department of Environmental Services

Michael P. Nolin
Commissioner

Town of Durham
Attn: Public Works Department
100 Stone Quarry Drive
Durham, NH 03824

Re: UST ID # 0113144 at the Wastewater Treatment Plant on Route 4 in Durham

NOTICE OF PROPOSED ADMINISTRATIVE FINE AND LICENSE ACTION
NO. AF 06-020

June 7, 2006

I. INTRODUCTION

This Notice of Proposed Administrative Fine and License Action is issued by the Department of Environmental Services, Waste Management Division to the Town of Durham. Pursuant to RSA 146-C:10-a and NH Admin. Rule Env-C 600, the Division is proposing that fines totaling **$1,000** be imposed against the Town of Durham for the violation alleged below. Also, pursuant to RSA 541-A:30, RSA 146-C:4, and Env-Wm 1401.09, the Division is proposing that DES suspend the permit to operate an underground storage facility held by Town of Durham, based on 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 ("the Division"), is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.

2. The Town of Durham ("Durham") is a duly-constituted municipality of the state of New Hampshire whose Public Works Department has a mailing address of 100 Stone Quarry Drive, Durham, NH 03824.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. RSA 146-C authorizes the Department of Environmental Services ("DES") to regulate the installation, maintenance, operation, licensing and closure of underground storage facilities. Pursuant to RSA 146-C:9, the Commissioner of DES has adopted N.H. Admin. 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 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. RSA 146-C:4 prohibits the operation of an underground storage facility in New Hampshire without a permit. The permit to operate is issued by, and may be revoked by DES in accordance with RSA 541-A:30 for just cause, including, but not limited to, the operation or ownership of an underground storage facility in violation of DES's rules. Pursuant to RSA 146-C:9, the Commissioner has adopted Env-Wm 1401 regarding the ownership, registration and operation of underground storage tanks and facilities including criteria for issuing, renewing and revoking a permit to operate an underground storage tank or facility in New Hampshire.

4. Durham is the registered facility owner of one underground storage tank ("UST") at the Wastewater Treatment Plant facility ("the Facility"), further identified as UST #0113144, located on real property on Route 4, Durham, NH ("the Property"). DES issued permit to operate No. 0113144 dated October 1, 2000 ("the Permit") to the Town of Durham/Public Works, to allow the operation of the UST at the Facility.

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

6. On March 4, 2004, 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.

7. 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. Acknowledgement of receipt of the Report was signed by Duane L. Walker on behalf of the Facility.

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

a. The piping for the 2,000-gallon diesel UST (Tank 2) is not corrosion protected.

9. A waiver requesting the rules to be waived to allow Durham sufficient time to budget fiscal 2005 money to permanently close Tank 2 and replace it with an approved aboveground system was granted on April 20, 2005 with the condition that Tank 2 be permanently closed by August 31, 2005.

10. DES has not received notification that Tank 2 has been permanently closed.

11. Env-Wm 1401.33 requires corrosion protection be installed on regulated piping prior to December 22, 1998.

IV. VIOLATIONS ALLEGED, PROPOSED LICENSE ACTION, AND ADMINISTRATIVE FINE(S)

1. Durham has violated Env-Wm 1401.33 by failing to install corrosion protection for the piping system of Tank 2. For this violation Env-C 607.03(f) specifies a fine of $1,000 per requirement not met.

2. Based on the violation identified above, the Division proposes that DES revoke the permit to operate.

The total fine being sought is $1,000.

V. Required Response, Opportunity for Hearing

Pursuant to Env-C 601.06, Durham is required to respond to this notice. Please respond no later than July 12, 2006 using the enclosed colored form.

Durham has the right to a hearing to contest these allegations before the proposed license action is taken or any administrative fine is imposed. The hearing would be a formal adjudicative proceeding pursuant to RSA 541-A:31, at which Durham and any witnesses Durham may call would have the opportunity to present testimony and evidence as to why the proposed action should not be taken. All testimony at the hearing would be under oath and would be subject to cross examination. If Durham wishes to have a hearing, one will be scheduled promptly.

RSA 541-A:31, III(e) provides that Durham has the right to have an attorney present to represent Durham at Durham's expense. Durham is not required to be represented by an attorney. If Durham chooses to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

1. If Durham would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.

2. If Durham wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance form, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.

3. If Durham chooses to waive the hearing, relinquish the permit to operate and/or pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

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 Durham 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 Durham 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 Durham proves, by a preponderance of the evidence,** applies in this case:

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

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

3. Durham 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 Durham's case which was not known to the Division at the time the fine was proposed.

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

An administrative hearing is a formal hearing. All hearings will be 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 Durham committed the violation(s) alleged above, that the proposed license action be taken and proposed fine(s) be imposed. **The hearing is Durham's opportunity to present testimony and evidence that Durham did not commit the violation(s), that the proposed license action should not be taken and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Durham has any evidence, such as photographs, business records or other documents, that Durham believes show that Durham did not commit the violation(s) or that otherwise support Durham's position, then Durham should bring the evidence to the hearing. Durham may also bring witnesses (other people) to the hearing to testify on Durham's behalf.

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Information regarding this proposed administrative fine and license action may be made available to the public via the DES Web page (*www.des.nh.gov*). If Durham has any questions about this matter, please contact the DES Legal Unit at (603) 271-7509.

COPY

Anthony P. Gianta, P.G., Director
DES Waste Management Division

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

ec: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
James Martin, DES Public Information Officer
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Lynn A. Woodard, P.E., WMD UST Supervisor
Thomas R. Beaulieu, WMD UST Chief
Administrator, Town of Durham, Town Hall, 15 Newmarket Road, Durham, NH 03824

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

TOWN OF DURHAM IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN July 12, 2006

Please check the appropriate line and fill in the requested information below.
APPEARANCE On behalf of the Town of Durham:

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

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

WAIVER OF HEARING On behalf of the Town of Durham:

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine(s) 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.*

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed license action and that I hereby waive those rights and relinquish UST permit to operate No. 0113144.

* *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 AND ANY PAYMENT TO:
DES Legal Unit
Attn: Michael Sclafani, Legal Assistant
P.O. Box 95
Concord, NH 03302-0095

ENVIRONMENTAL
Fact Sheet

NEW HAMPSHIRE DEPARTMENT OF Environmental Services

29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

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.