

State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES
6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Moulton Construction, Inc.
1 Plaza Heights
West Lebanon, NH 03874

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-030**

April 25, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the Division) to Moulton Construction, Inc., pursuant to RSA 485-A:17 and Env-C 603.02. The Division is proposing that fines totaling \$39,500 be imposed against Moulton Construction, 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, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Moulton Construction, Inc.(MCI) is a NH corporation having a mailing address of 1 Plaza Heights, West Lebanon, NH 03874.

III. Summary of Facts and Law Supporting Claims

1. Pursuant to RSA 485-A:17, the Department of Environmental Services (DES) regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner of DES has adopted Env-Ws 415 to implement this program.
2. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of, *inter alia*, RSA 485-A:17, Env- Ws 415, or any permit issued pursuant thereto. Pursuant to RSA 485-A:22, V, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.
3. Moulton Construction, Inc. (MCI) is the owner of property in Lebanon, NH identified as Lot 11 on Map 130 of the Lebanon Tax records (the Property).
4. On February 28, 2000, the Division received a complaint of sedimentation in a small unnamed tributary of the Connecticut River (the Tributary) as a result of soil erosion caused by excavation activity on the Property.
5. On March 2, 2000, Division personnel inspected the Property, and noticed a large unstabilized

slope on the Property that was eroding into the Tributary. Silt fences that had been installed had failed.

6. On March 23, 2000, the Division issued Letter of Deficiency No. WD WQE 00-04 (LOD) to MCI. The LOD identified the following deficiency:

Soil from a very large unstable slope behind Moulton Construction was beginning to erode into an unnamed stream at the bottom of the bank.

The LOD further stated:

DES believes the deficiency can be corrected within 30 days by contracting an engineer to develop a permanent stabilization plan for this area. DES also believes that within 7 days the sediment near the stream bank can be removed by hand and temporary erosion controls such as silt fences, hay mulch, and stone check dams can be installed. The fences that were installed have since failed. Finally, DES recommends ceasing any construction activities that may contribute to the amount of material washing down the bank, such as not storing stockpiles near the top of the bank or not pushing material down the bank.

7. On April 3, 2000, the LOD was received by MCI as evidenced by a signed postal receipt.

8. On April 25, 2000, Division personnel re-inspected the Property as a follow-up to the LOD. Continuing soil erosion from the slope and a further build up of sediment in the Tributary was observed. Silt fences were not properly installed and had failed due to the sediment load.

9. On June 20, 2000, Division personnel re-inspected the Property and identified the following deficiencies:

- a) The slope was not stabilized.
- b) Silt fences were not properly installed and were in disrepair.
- c) Hay mulch needed to be re-applied.
- d) Hay bales were covered in mud.
- e) There was sediment in the flowing portion of the Tributary along the Property.

10. A copy of the June 20, 2000 inspection report was sent to MCI.

11. On September 12, 2000, Division personnel re-inspected the Property. The inspection revealed the following:

- a) Earth material had been pushed to within a few feet of the brook for about 150 linear feet.
- b) The slope to the brook had been heavily mulched.
- c) A 3- to 4-foot berm had been constructed above this slope to contain water. The berm

did not appear to have sufficient capacity. In case of failure, substantial erosion of the slope and sedimentation of the brook will result.

- d) As much as 6,500 square feet of wetland area may have been filled by placing the earth material along the brook.
- e) Ongoing erosion is evident above the bermed area.

12. Per RSA 485-A:2, XIV, the unnamed tributaries to the Connecticut River and the associated wetlands are surface waters of the state.

13. Per RSA 485-A:2, VII and XVI, sediment is a waste.

14. Per Env-Ws 415.09(i) temporary and permanent methods of preventing soil erosion must be employed on sites under the jurisdiction of site specific rules.

15. Per RSA 485-A:13, I (a), it is unlawful for anyone to discharge waste into surface waters of the state without first obtaining a permit from DES.

16. MCI has not applied for or obtained a permit from DES to discharge waste into state surface waters. In addition, this activity would not qualify for a permit under DES rules.

17. On September 19, 2000, DES issued Administrative Order No. WD 00-24 (AO) to MCI citing the above violations and ordering MCI to:

- a) Seed and hay/straw mulch all eroding soils within 10 days.
- b) Install sufficient sediment controls to prohibit sediment from entering state surface waters and wetland areas within 10 days.
- c) Hire an environmental consultant with expertise in erosion and sediment control to prepare an erosion and sediment control plan for the Property, including an implementation schedule, within 10 days.
- d) Submit the required erosion and sediment control plan to DES for review and approval within 25 days.
- e) Implement the erosion and sediment control plan as approved by DES in accordance with the approved schedule.

18. On October 12, 2000 and November 17, 2000, Division personnel inspected the Property. The following were noted:

- a) Although some of the slopes had been mulched, the steepest of the slopes had not been mulched.
- b) Deep gullies and erosion were evident on the steep slope above the bermed area constructed adjacent to the bank of the brook.
- c) The wetland area adjacent to a stream and the banks of the stream had been disturbed and there was sediment and solid waste in jurisdictional surface waters and wetlands.
- d) There were no erosion or sediment control measures in place near the stream or wetlands.

19. As of November 17, 2000, MCI had not seeded or mulched all eroding soils as required by

the AO.

20. As of November 17, 2000, MCI had not installed sufficient sediment controls to prohibit sediment from entering state surface waters and wetland areas as required by the AO.

21. As of the date of this Notice, MCI had not submitted an erosion and sediment control plan prepared by an environmental consultant with expertise in erosion and sediment control, for review and approval by DES, as required by the AO.

22. As of the date of this Notice, MCI has not implemented an approved erosion and sediment control plan as required by the AO.

IV. Violations Alleged

1. Moulton Construction, Inc. has violated NH RSA 485-A:17 and Env-Ws 415.09(i) by not installing temporary and permanent methods of preventing soil erosion.

2. Moulton Construction, Inc. has violated NH RSA 485-A:13 by discharging waste into surface waters of the state without obtaining a permit from DES.

3. Moulton Construction, Inc. has failed to comply with items E.1, E.2, and E.4 of Administrative Order No. WD 00-24.

V. Proposed Administrative Fines

1. For the violation identified in IV.1 above, Env-C 603.02(i)(2) specifies a fine of \$1,500.

2. For the violation identified in IV.2 above, Env-C 603.08(c) specifies a fine of \$2,000.

3. For the violation identified in IV.3 above, Env-C 603.08(a) specifies a fine of \$2,000 per calendar month or portion thereof that compliance is not achieved after the deadline specified in the order for each provision of the order not complied with. The Division is seeking a fine for each of the three items not complied with for the months of October, November, and December 2000 and January, February, and March 2001, for a total fine of \$36,000.

The total fine being sought is \$39,500.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, July 16, 2001 at 10:30 a.m.** in **Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, you are required to respond to this notice.** Please respond **no later than June 1, 2001**, using the enclosed colored form as follows:

1. If MCI plans to attend the hearing, please have an authorized representative sign the

appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.

2. If MCI 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 Mr. Ballentine.

3. If MCI wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate MCI's interest in settling.

MCI is not required to be represented by an attorney. If MCI 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.

If MCI wishes to have a hearing but is unable to attend as scheduled, MCI must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If MCI fails to notify Mr. Ballentine in advance and does not have a representative attend the hearing, the hearing will be conducted in MCI's absence in accordance with Env-C 204.09.

VII. 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 MCI 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 MCI 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 MCI proves, by a preponderance of the evidence**, applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** MCI 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** MCI did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, MCI was making a good faith effort to comply with the requirement that was violated.
 3. MCI 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 MCI's case which was not known to the Division at the time the fine was proposed.

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

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

If MCI wishes to have an informal meeting to discuss the issues, MCI must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

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

COPY
fas 
Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2000)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Hearings and Rules Attorney
Robert Kline, P.E., City of Lebanon
Lebanon Conservation Commission
Mary Ann Tilton, DES Wetlands
Ana Ford, DES Site Specific

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

APPEARANCE

____ On behalf of MCI I will attend the hearing scheduled for **Monday, July 16, 2001 at 10:30 a.m.** in **Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH.

Signature

Date

Name (please print or type): _____

Title: _____

WAIVER OF HEARING

____ I certify that on behalf of MCI I understand my right to a hearing regarding the imposition of the proposed administrative fine and that as an authorized representative of MCI, I hereby waive those rights. The fine payment in the amount of \$13,500 paid to Treasurer, State of New Hampshire is enclosed.*

** If any portion of the payment is made by a check, draft, or money order which is returned or dishonored 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.*

Signature

Date

Name (please print or type): _____

Title: _____

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095