

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



ESA Realty Trust
Attn: Edward Shaughnessy, Trustee
PO Box 1402
Meredith, NH 03253-1402

Re: Meredith Tax Map S19, Lot 55

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-035**

May 16, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the Division) to ESA Realty Trust, pursuant to RSA 482-A and Env-C 614. The Division is proposing that fines totaling \$7,000 be imposed against ESA Realty Trust 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. ESA Realty Trust is a legal Trust having a mailing address of PO Box 1402, Meredith, NH 03253-1402.

III. Summary of Facts and Law Supporting Claims

1. Pursuant to RSA 482-A, the Department of Environmental Services (DES) regulates dredging, filling, and construction in wetlands. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. ESA Realty Trust (ESA) is the owner of record of certain property located on Route 3 in the Town of Meredith, Belknap County, State of New Hampshire. The property is more particularly described on the Meredith tax maps as Map S19, Lot 55 and in a deed recorded at the Belknap County Registry of Deeds at Book 1379, Page 143 (the Property).
4. Edward A. Shaughnessy is a Trustee of ESA.

5. On October 8, 1996, the Division received a wetlands application from ESA to fill approximately 7,464 sq. ft. of wetlands to accommodate construction of a small commercial operation with associated parking and driveway.
6. On March 5, 1997, the Division requested more information from ESA regarding the application. Specifically, DES requested clarification of the mitigation plan.
7. On March 6, 1997, ESA responded by requesting additional time to make necessary revisions.
8. On April 2, 1998, the Division denied ESA's application to fill 7,464 sq. ft. of wetlands, as the additional information requested had not been submitted.
9. On March 30, 2000, the Town of Meredith Code Enforcement Officer issued a letter to ESA notifying ESA that according to previous plans, it appeared that ESA had disturbed some wetlands and that silt was making its way into the buffer areas. The letter also stated To prevent any further violations, the following steps must be taken upon receipt of this notice:
 1. Cease all activities;
 2. Have all wetlands delineated and flagged;
 3. Obtain restoration plans for all disturbed wetlands or obtain appropriate permits to fill them;
 4. Have an engineered Erosion & Sedimentation Control Plan prepared, approved and all features installed before any further activities take place...
10. On May 9, 2000, Division personnel inspected the Property and found approximately 5,000 sq. ft. of wetlands were impacted through deposition of wood chips, rutting and grubbing.
11. During the May 9, 2000 inspection, Mr. Shaughnessy arrived at the Property. When asked, Mr. Shaughnessy stated that he had the wetlands delineated by Gove Environmental Services, Inc. and that he had a wetlands permit for the recent impact to wetlands. When asked if DES personnel could continue the inspection, Mr. Shaughnessy told the Division personnel to contact his attorney, Stephan Nix.
12. Following the inspection, Division personnel contacted Attorney Stephan Nix, who stated that he was not retained by ESA or Mr. Shaughnessy. Division personnel also reviewed DES records and found File 96-1969, the wetlands delineation, and the denial.
13. On August 1, 2000, the Division issued a Notice of Findings to ESA summarizing the findings and requesting that ESA retain a certified wetland scientist or certified soil scientist to submit a restoration plan to restore the wetlands on the Property within 45 days.
14. On November 15, 2000, DES issued administrative order WD 00-76 to ESA, requiring ESA to: 1) retain a certified wetland scientist or certified soil scientist to prepare a wetland restoration plan and to supervise the implementation of the restoration plan, 2) submit restoration plans

within 30 days, and 3) implement the removal and restoration upon approval as conditioned by DES.

15. On December 20, 2000, Town of Meredith Code Enforcement Officer, John Dever, Jr. served administrative order WD 00-76 in hand to Edward Shaughnessy, Trustee of ESA.

16. To date the Division has not received a letter or call from a certified wetland scientist indicating that s/he has been retained by ESA. The Division has not received a restoration plan from a certified wetland scientist or certified soil scientist, and the Property has not been restored in accordance with a DES approval.

17. RSA 482-A:3, I states that No person shall excavate, remove, fill, dredge, or construct any structures in or on any bank, flat, marsh, or swamp in or adjacent to the waters of the state without a permit from [DES].

IV. Violations Alleged

1. ESA has violated RSA 482-A:3, I by impacting approximately 5,000 sq. ft. of wetlands through deposition of wood chips (fill), rutting (dredge) and grubbing.
2. ESA has violated RSA 482-A:14, III by failing to comply with items E.1, E.3, and E.4, of administrative order WD 00-76, by not retaining a certified wetland scientist or certified soil scientist, by failing to submit a restoration plan, and by failing to implement the restoration plan in accordance with a DES restoration approval letter.

V. Proposed Administrative Fines

1. For the violation identified in IV.1, above, Env-C 614.03(b)(1) specifies a fine of \$1,000.
2. For the violation identified in IV.2, above, Env-C 614.06(e) specifies a fine of \$2,000. For the 3 violations noted above, the Division is seeking a total fine of \$6,000.

The total fine being sought is \$7,000.

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 23, 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 15, 2001**, using the enclosed colored form as follows:

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

ESA is not required to be represented by an attorney. If ESA 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 ESA wishes to have a hearing but is unable to attend as scheduled, must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If ESA fails to notify Mr. Ballentine in advance and does not have a representative attend the hearing, the hearing will be conducted in ESA'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 ESA 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 ESA 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 ESA proves, by a preponderance of the evidence**, applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** ESA 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** ESA did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, ESA was making a good faith effort to comply with the requirement that was violated.
 3. ESA 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 ESA'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 ESA committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is ESA's opportunity to present testimony and evidence that ESA 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 ESA has any evidence, such as photographs, business records or other documents, that ESA believes show that ESA did not commit the violation(s) or that otherwise support ESA's position, ESA should bring the evidence to the hearing. ESA may also bring witnesses (other people) to the hearing to testify on ESA's behalf.

If ESA wishes to have an informal meeting to discuss the issues, ESA 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 ESA has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

 **COPY**
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
John Dever, Jr. Meredith Code Enforcement Officer
Meredith Conservation Commission
Stephan Nix, Esq.
Gove Environmental Services

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

APPEARANCE

____ On behalf of ESA I will attend the hearing scheduled for **Monday, July 23, 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 ESA I understand my right to a hearing regarding the imposition of the proposed administrative fine and that as an authorized representative of ESA, I hereby waive those rights. The fine payment in the amount of \$7,000 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