



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



Bayview Construction Corporation  
170 West Road, Suite 110  
Portsmouth, NH 03801

Re: Saco River, Hart's Location

**NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
AND HEARING  
No. AF 01-037**

**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 Bayview Construction Corporation, pursuant to RSA 482-A and Env-C 614. The Division is proposing that fines totaling \$6,000 be imposed against Bayview Construction Corporation 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. Bayview Construction Corporation ("Bayview") is a NH Corporation having a mailing address of 10 West Road, Suite 110, Portsmouth, NH 03801.

### **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. The Town of Hart's Location is the owner of a foot bridge that crosses the Saco River, located off U.S. Route 302, more specifically referenced on Town of Hart's Location tax maps as Tax Map 3, Lot 55 (the Property ).
4. On April 19, 2000, the Department of Environmental Services ( DES ) issued permit number 1999-02576 (the "Permit") to the Town of Hart's Location to dredge and fill 2,570 square feet within the banks and bed of the Saco River impacting approximately 97 linear feet to

construct a new asymmetrical cable stay footbridge that will replace the existing 'Bemis' suspension footbridge.

5. Bayview performed the construction work under the Permit on behalf of Hart's Location.

6. The Permit included the following relevant conditions (numbers below correlate to condition numbers on the Permit):

2. All work within the bed of the Saco River shall be conducted behind a temporary cofferdam and during low flow between the months of May through September.
5. Construction equipment shall not be located within surface waters.
7. Appropriate siltation/erosion/turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized.
9. Work shall be conducted in a manner that avoids excessive discharges of sediments to fish spawning areas.

7. The Permit conditions cited above are based in part on fish reproduction cycles in the Saco River. Cold water fish typically spawn in late October or early November, and eggs hatch in early spring.

8. On January 26, 2001, DES personnel in the area noted the presence of a crane operating in the Saco River and conducted a field inspection to determine compliance with RSA 482-A and NH Code of Admin. Rules Wt 100-700. During the inspection, the following deficiencies were documented:

- a. A Grove Hydraulic All Terrain Crane was observed on the bed of the Saco River on 4'x4' wood pads located under the outriggers. The crane was being used to place components of the footbridge in place during construction of the bridge.
- b. No turbidity curtain or other siltation control measures were in place around equipment placed within the River.

9. On February 1, 2001, DES received correspondence from James W. DeWever, Vice President of Bayview, regarding the construction work performed on the Saco River. In his letter, Mr. DeWever provided the following construction sequence for the bridge work performed by Bayview:

- 1) The crane was driven into the river on the ford at 2:00 PM on 1/24/01.
- 2) Crane was set up on 4'x4' wood pads under the outriggers.
- 3) The erection started at 8:00 AM on 1/25/01.
- 4) Due to a problem with components for the bridge, erection ceased at 11:00 AM on 1/25/01.
- 5) Erection resumes at 8:00 AM on 1/26/01.

- 6) Erection complete at 2:30 PM on 1/26/01. Crane is broken down and is driven out of river on the ford at 3:45 PM.
  
10. RSA 482-A:3, I states in part that no person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES].
  
11. RSA 482-A:14, III states in part that failure, neglect or refusal to comply with this chapter or rules adopted under this chapter, or an order or condition of a permit issued under this chapter, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by this chapter shall be deemed violations of this chapter.
  
12. Env-C 614.05 (h) defines a Class IV Violation in part as [f]ailing to use or maintain appropriate siltation and erosion control devices for any construction project in or adjacent to surface waters or prime wetlands.
  
13. Env-C 614.05(m) defines a Class IV Violation in part as [f]ailing to comply with notification, filing, or other specific permit conditions that do not fall into any of the above-listed criteria.
  
14. Env-C 614.05 authorizes a fine of \$2,000 for Class IV Violations of wetlands rules.

#### **IV. Violations Alleged**

1. Bayview has violated the Permit by performing work within surface waters of the Saco River as prohibited by Condition #5 and contrary to Condition #9 of the Permit.
  
2. Bayview has violated the Permit by performing work within the bed of the Saco River outside of the months of May through September as prohibited by Condition #2 and contrary to Condition #9 of the Permit.
  
3. Bayview has violated the Permit by failing to install a cofferdam or use other appropriate siltation, erosion, or turbidity controls around the crane prior to and during construction as required by Condition #2 and Condition #7 and contrary to Condition #9 of the Permit.

#### **V. Proposed Administrative Fines**

1. For the violation identified in IV.1 above, Env-C 614.05(m) specifies a fine of \$2,000.
  
2. For the violation identified in IV.2 above, Env-C 614.05(m) specifies a fine of \$2,000.
  
3. For the violation identified in IV.3 above, Env-C 614.05(h) and Env-C 614.05(m) specify a fine of \$2,000.

**The total fine being sought is \$ 6,000.**

## **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 30, 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 29, 2001**, using the enclosed colored form as follows:

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

Bayview is not required to be represented by an attorney. If Bayview 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 Bayview wishes to have a hearing but is unable to attend as scheduled,** Bayview must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If Bayview fails to notify Mr. Ballentine in advance and does not have a representative attend the hearing, the hearing will be conducted in Bayview'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 Bayview 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 Bayview 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 Bayview proves, by a preponderance of the evidence,** applies in this case:

1. The violation was a one-time or non-continuing violation, **and** Bayview 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** Bayview did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Bayview was making a good faith effort to comply with the requirement that was violated.
3. Bayview 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 Bayview'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 **Bayview** committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Bayview's opportunity to present testimony and evidence that Bayview 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 Bayview has any evidence, such as photographs, business records or other documents, that Bayview believes show that Bayview did not commit the violation(s) or that otherwise support Bayview's position, Bayview should bring the evidence to the hearing. Bayview may also bring witnesses (other people) to the hearing to testify on Bayview's behalf.

**If Bayview wishes to have an informal meeting to discuss the issues, Bayview 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](http://www.state.nh.us.des)). If Bayview has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

*fas*  **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  
Hart's Location Board of Selectmen  
Marjory Swope, NHACC  
Michael Walls, DOJ/EPB  
James Karmozyn, H.E. Bergeron Engineers  
Richard W. Head, DES (File #99-2576)  
Craig Rennie, DES

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

**APPEARANCE**

\_\_\_\_ On behalf of Bayview I will attend the hearing scheduled for **Monday, July 30, 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 Bayview I understand my right to a hearing regarding the imposition of the proposed administrative fine and that as an authorized representative of Bayview, I hereby waive those rights. The fine payment in the amount of \$6,000 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