



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

PLEASE NOTE: Effective September 1, 2003, the street address is 29 Hazen Drive.



**In re: Torromeo Trucking Co., Inc.**

**33 Old Ferry Road  
PO Box 2308  
Methuen, MA**

**NOTICE OF DECISION ON  
MOTION FOR RECONSIDERATION**

**Administrative Fine No. AF 02-014**

**Background**

On March 27, 2002, the Water Division ("the Division") issued Notice of Proposed Administrative Fine No. AF 02-014 ("the Notice") to Torromeo Trucking Company, Inc. ("Torromeo") for violations relating to RSA 485-A, the state water pollution control statute, and RSA 482-A, the state wetlands statute for work on property located off North Road, Fremont, NH ("the Property"). The Division sought six fines totaling \$12,500.

The hearing was held on January 27, 2003. The Notice of Decision ("the Decision") was issued on March 17, 2003, and imposed the following fines against Torromeo:

- ▶ A fine in the amount of \$1,500 was imposed for significantly altering terrain without a permit from DES.
- ▶ A fine in the amount of \$3,000 was imposed for failing to install or maintain erosion control measures on Karlin Road between stations 10+00 and 11+00, adjacent to the culvert at station 34+00 and between stations 44+00 and 47+00.
- ▶ A fine in the amount of \$1,000 was imposed for failing to stabilize exposed soils.
- ▶ A fine in the amount of \$6,000 was imposed for failing to construct proper headwalls on three culverts on the Property.
- ▶ A fine in the amount of \$500 was imposed for placing fill in wetlands without a permit from DES.
- ▶ A fine in the amount of \$500 was imposed for placing less than 3,000 square feet of fill in wetlands without a permit from DES.

The total fine imposed was \$12,500

The motion for reconsideration ("the Motion") was timely filed by Torromeo on April 3, 2003. The Division filed a response ("the Response") on April 11, 2003. Torromeo filed a rebuttal to the Response ("Torromeo Response") on April 23, 2003.

### **Discussion**

In the Decision, a fine was imposed against Torromeo for violating RSA 485-A:17 and Env-Ws 415.09 (i) and (j) by significantly altering terrain without a permit, and for failing to maintain erosion controls and stabilize exposed soils on the Property; and for violating RSA 482-A:3, I by failing to construct proper headwalls on three culverts on the Property and for placing fill in wetlands on the Property. (*Decision*)

RSA 485-A:17 regulates significant alteration of terrain and erosion control through a permit program. Env-Ws 415.09(i) requires temporary and permanent methods for preventing soil erosion and controlling runoff to be used during earth moving activities. Env-Ws 415.09(j) requires construction phasing and sequencing be implemented during earth moving activities, including methods for limiting the length of time unstabilized soils are exposed. RSA 482-A:3, I states that "[n]o 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]."

On November 7, 2000, DES inspected the Property and discovered culverts not constructed with proper headwalls, inappropriate erosion control measures, unstabilized slopes and swales, and fill in culverts and wetlands. (*Record*)

On December 11, 2000, DES issued Letter of Deficiency WD WQE 00-21 ("the LOD") to Torromeo to address the violations. Torromeo did not comply with the LOD. Subsequently, on March 12, 2002, DES issued Administrative Order No. WD 02-10 ("the Order") to Torromeo requiring it to: (1) immediately stabilize all areas adjacent to the roads located in the Property; (2) within 10 days of the Order, prepare an erosion and sediment control plan ("the Plan") and submit it to DES; (3) implement the Plan; (4) submit a Site Specific Permit application; (5) submit a Wetlands Permit application; (6) submit a wetlands restoration plan to DES; (7) retain a certified wetland scientist to supervise implementation of the restoration plan; and (8) implement the restoration plan. Torromeo failed to comply with the Order or appeal the Order. Thus, the Division issued the Notice and a hearing was held. (*Record*)

The Motion and the Torromeo Response consists of a restatement of evidence and testimony presented at the hearing and does not provide any additional evidence. It appears that Torromeo is again arguing that no fine should be imposed because the work done on the Property in 1997 and 1998 was done according to specifications and erosion control was in place, and that in October 1999, it received a Letter of Compliance from DES for work in wetlands and subsequently did no further work in wetlands. (*Motion, Paragraphs 5 and 6*)

In the Response, the Division argues that the doctrine of collateral estoppel bars Torromeo from disputing the facts in the Order. (*Response, Paragraph 10*) The Division emphasizes that the Notice cites Torromeo for the same violations as determined in the Order. (*Response, Paragraph 6*) The Response references DES's request for Findings of Fact and Rulings of Law. (*Findings*) In the Findings, DES asserts that Torromeo could have appealed the Order to either the Water Council or the Wetlands Council where it had the opportunity for a hearing and to present testimony and evidence. (*Findings, Paragraphs 4 and 5*) The Division emphasizes that Torromeo failed to appeal the Order and maintains that "the Order is, therefore, a final decision and all rights of appeal have expired." (*Findings, Paragraph 6*) The Division

further notes that the Notice cites Torromeo for the same violations as determined in the Order. (*Findings, Paragraph 8*)

The Order was issued on March 12, 2002. Had Torromeo disagreed with the facts stated in the Order, it could have appealed the Order to the Water Council or the Wetlands Council. Torromeo failed to file an appeal or to comply with the Order. Torromeo's failure to appeal the Order operates to legally bar the issues in this case from being reopened. Further, there is no objective reason to challenge the issues because the record established that Torromeo was aware of the Order when it was issued and did not attempt to challenge it at that time.

In addition, the basis of the administrative fine is for violations of RSA 485-A and RSA 482-A. Regardless of whether Torromeo performed the work according to specifications in 1997 and 1998, it is clear from the record that when DES inspected the Property on November 7, 2000, staff observed numerous site specific and wetlands violations that resulted from Torromeo's work on the Property. The evidence is insufficient to support a finding that Torromeo did no further work in wetlands after October 1999.

There is no basis on which to overturn the Decision. The Division proved the violations alleged in the Notice and Torromeo has not presented any additional evidence to refute the findings made in the Decision.

**Decision**

For the reasons discussed above, the Motion is denied. The total fine of \$12,500 shall be paid within 30 days of the date of this Notice of Decision on the Motion for Reconsideration or at the election of Torromeo, in two equal payments of \$6,250 with the first payment due on November 10, 2003 and the second payment due on December 10, 2003. Fine payments shall be by certified check or money order payable to "Treasurer - State of NH" and sent to the attention of the Legal Unit, DES/Office of the Commissioner, 29 Hazen Drive, Concord, NH 03301.

So Ordered,

Date: Oct. 8, 2003

**COPY**  
*Michael P. Nolin, St. Comm.*

for Michael P. Nolin  
Commissioner

cc: Rockingham County Registry of Deeds  
Freemont Planning Board  
Freemont Conservation Commission  
Harry T. Stewart, P.E., Director, Water Division  
Mark R. Harbaugh, DES Legal Unit  
Susan Weiss Alexant, DES Hearings and Rules Attorney  
Ana Ford, DES Site Specific  
Mary Ann Tilton, DES Wetlands