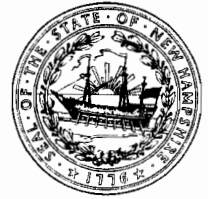




The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

January 14, 2009

Kerry D. Barnsley, Esq.
Compliance Attorney
New Hampshire Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

Shaun Hathaway, Owner and Registered Agent
Lost Cloud Forest Management, L.L.C.
585 Gilman Pond Road
Newport, NH 03773

Re: Administrative Fine No. AF 06-038

Dear Attorney Barnsley and Mr. Hathaway:

Enclosed, please find the Decision of the Department of Environmental Services in the above referenced matter. As indicated therein, any party aggrieved by this Decision may file a motion for reconsideration within 30 days of the date thereof in accordance with NH RSA 541-A and Env-C 206. I have enclosed a copy of Env-C 206 for your convenience.

COPY
Peter Demas, Legal Coordinator
Legal Unit

Encl.

ec: Thomas S. Burack, Commissioner
Michael J. Walls, Assistant Commissioner
Gretchen R. Hamel, Administrator, Legal Unit
DES Public Information Office

IN THE MATTER OF LOST CLOUD FOREST
MANAGEMENT, LLC

Respondent

NEW HAMPSHIRE DEPARTMENT OF
ENVIRONMENTAL SERVICES

ADMINISTRATIVE FINE:
DOCKET No.: 06-038

DECISION

Presiding Officer: Peter Demas, Commissioner's Designee

Appearances: Kerry D. Barnsley, Compliance Attorney, appearing on behalf of the New Hampshire Department of Environmental Services, Water Division

Shaun Hathaway, owner and registered agent of Respondent, appearing
pro se

I. INTRODUCTION

By Notice of Proposed Administrative Fine No. AF 06-038, issued on August 30, 2006, ("NPF") the New Hampshire Department of Environmental Services, Water Division ("Division"), sought to impose administrative fines against Lost Cloud Forest Management, LLC ("Lost Cloud") in the amount of \$20,000 for alleged violations of RSA 485-A:17, RSA 485-A:13, RSA 482-A:3, and various administrative rules adopted by the Department to implement these statutory provisions. Specifically, the Division alleges that Lost Cloud violated the above statutes and rules in connection with logging operations it conducted in May and June of 2006 on a parcel owned by Barton and Elizabeth Green and located at 140 Maple Street, Andover, NH, ("the Property").

Lost Cloud entered an appearance on August 19, 2006. The Division entered an appearance on July 11, 2007. In accordance with the New Hampshire Administrative Procedures Act, RSA 541-A, a formal adjudicatory hearing was held on Monday, October 6, 2008.

Based on my review of the evidence and testimony presented at the hearing, I have concluded that a fine of \$20,200 is justified for the reasons set forth below:

II. STATUTES AND RULES AT ISSUE

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 administrative fines of up to \$2,000 per offense for violations of RSA 485-A:17, rules adopted under RSA 485-A:17, and permits issued under RSA 485-A:17. Pursuant to RSA 485-A:22, the Commissioner has adopted Env-C 603.02 to establish a schedule of fines for such violations.

3. Pursuant to RSA 482-A, DES regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* (currently Env-Wt 100-800) to implement this program.
4. 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.
5. Pursuant to RSA 485-A:13 and related sections, DES regulates the discharge of pollutants to surface waters under a permit system. As part of this program, the Commissioner of DES has adopted Env-Ws 401 relating to permits and has adopted Env-Ws 1700 (currently Env-Wq 1700) to establish water quality standards for the state's waters.
6. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations relating to this program. Pursuant to this section, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

III. BACKGROUND AND FACTUAL ALLEGATIONS

At the hearing, held on October 6, 2008, Mr. Hathaway, on behalf of Lost Cloud, stipulated that the following factual allegations, as asserted by the Division in the NPF, are true:

1. Barton and Elizabeth Green are the owners of land located on 140 Maple Street, more particularly described on Town of Andover Tax Map 17 as Lot 120 ("the Property").
2. On April 18, 2006, the Town of Andover signed the New Hampshire Department of Revenue *Notice of Intent to Cut Wood or Timber* for the Property. The Notice lists Lost Cloud Forest Management, LLC as the logger/forester responsible for cutting and for following applicable timber harvest laws. The Notice of Intent was signed by Shaun Hathaway on behalf of Lost Cloud.

May 2006:

3. On May 4, 2006, the Division received a report that brown, turbid water was flowing into Highland Lake from a tributary running under Maple Street in Andover, New Hampshire.
4. On May 4, 2006, Division personnel responded to the report by making an immediate site visit. DES personnel followed the source of the turbidity upstream and found that it originated from an on-going logging operation on the Property.
5. On May 4, 2006, Division personnel collected turbidity samples from the stream that is the tributary to Highland Lake. A background turbidity sample collected measured 20.8 nephelometric turbidity units ("NTUs"). A turbidity sample collected downstream of the Lost Cloud logging operation on the Property measured 272 NTUs.

6. On May 4, 2006, the New Hampshire Department of Resources and Economic Development, Division of Forests and Lands, (“DRED”) issued an Official Notice to Lost Cloud. The DRED Notice required Lost Cloud to immediately cease and desist operations for a “...non-permitted stream crossing. Failure to comply with BMPs [best management practices] for soil erosion resulting in siltation entering a tributary to Highland Lake. Cease and desist use of crossing until it is permitted by DES and brought into compliance with BMPs.”

7. On May 5, 2006, Shaun Hathaway left a voice mail message for Division personnel. The message from Mr. Hathaway stated that hay bales and silt fence had been installed within the intermittent stream in an attempt to control the turbidity. He further stated that his “subcontractors never should have been in that section,” and that he was “horrified by what he saw.” He also stated in the recorded message that this “was his job and his responsibility.”

8. On May 8, 2006, Division personnel conducted an inspection of the property and observed or found the following:

a. A poled ford had been installed within an intermittent stream channel. The logs were sunk in mud and silt. Standing water, mud and silt extended for at least 50 feet in both directions, rendering the crossing useless and ineffective. A row of hay bales had been staked downstream of the crossing within the stream channel;

b. Upstream of the first crossing, the skid trail was in the stream itself for a distance of at least 300 feet. Water was flowing down the skid trail until it was diverted into the original stream channel by some felled hemlocks;

c. Further upstream, the skid trail eventually left the stream channel and rutted a forested wetland for at least 100 feet with ruts measuring 12 inches deep;

d. DES personnel walked downstream from the poled ford to Highland Lake, a distance of approximately 1,600 feet. Water was flowing clear at the time of the inspection; however, sediment measuring 6 inches deep was observed within the stream channel; and

e. No permits were observed posted at the landing. Division has no record that a wetlands permit was requested or approved for the Property.

9. On May 9, 2006, the Division received a *Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact* for the Property (“**Notification**”). The Notification listed Lost Cloud as the logger/forester responsible for the cutting and was signed by Elizabeth Green.

June 2006:

10. On June 13, 2006, the Division received a report that brown, turbid water was flowing into Highland Lake from Tilton Brook. DES personnel responded to the report and found that it originated from the same Lost Cloud logging operation, but in a different area of the Property.

11. On June 13, 2006, Division personnel collected turbidity samples from upstream from the Lost Cloud logging operation on the Property and at the point where Tilton Brook flows into Highland Lake. A background turbidity sample collected upstream of the logging operation measured .31 NTUs. The turbidity sample collected at the point where Tilton Brook flows into Highland Lake was measured to be 19.5 NTUs. The distance from the June logging impacts to Highland Lake is approximately one mile.

12. On June 13, 2006, DRED issued an Official Notice to Shaun Hathaway. This 2nd DRED Notice required Mr. Hathaway to “cease and desist for failure to comply with BMPs [best management practices] resulting in siltation leaving skid trails and entering Tilton Brook. Cease and desist use of skid trail on western property line until it is brought into compliance with BMPs.”

13. On June 14, 2006, Division personnel conducted an inspection of the Property and observed or found the following:

a. Three poled fords had been installed within intermittent stream channels. The poled fords had been overtopped with sediment and water. Sediment and water flowed out of the skid trails and into Tilton Brook;

b. Water and sediment was observed running off the skid trails in three other locations. The sediment and water was observed flowing directly into two beaver ponds and associated scrub-shrub wetlands; and

c. No erosion controls were observed on site.

14. On June 19, 2006, the Division received a preliminary sediment and erosion control plan from Mr. Hathaway, which DES approved on or about June 22, 2006.

15. On July 6, 2006, Division staff received a telephone call from Mr. Hathaway who stated that the skid trail had been stabilized and that the restoration should be complete on July 11, 2006.

July 2006:

16. On July 11, 2006, the Division again received several complaints that brown, turbid water was flowing into Highland Lake from the stream that was the subject of the May inspection.

17. On July 13, 2006, Division personnel collected turbidity samples from the stream just upstream of where it discharges into Highland Lake. The result was 39.4 NTUs.

18. On July 18, 2006, DES issued Administrative Order No. WD 06-033 (“**Order**”) to Lost Cloud. The Order required, among other things, that Lost Cloud retain a Certified Professional in Erosion and Sediment Control to prepare an erosion and sediment control plan for DES review and approval; and to implement the plan upon approval.

19. DES records indicate that Lost Cloud and/or Shaun Hathaway have committed previous, similar violations of timber harvesting best management practices. On July 8, 1998, the Division issued Notice of Proposed Fine and Hearing No. AF 98-34 seeking an administrative fine of \$9,500 for violations relating to improper best management practices (“BMPs”). Subsequently, on August 23, 1998, the Division issued Notice of Proposed Administrative Fine and Hearing No. AF 98-70 to Lost Cloud seeking an administrative fine of \$4,000 for failure to following appropriate timber harvesting BMPs. These two Administrative Fine cases were settled by one agreement calling for payment of \$9,000 in 12 equal installments in the amount of \$750 each. According to records maintained by DES, only one payment of \$750 was received. Notice of Proposed Fine and Hearing No. AF 99-028 was issued regarding violations set out in Wetlands File No. 1998-02396, although the proposed administrative fine was ultimately withdrawn.

20. The Division has received three separate complaints in 2006 concerning Lost Cloud’s failure to follow timber harvesting best management practices and has issued Letters of Deficiency Nos. WET 06-014 and WET 06-033 to Lost Cloud and Shaun Hathaway citing wetlands violations.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing facts are not in dispute and have been stipulated to by Lost Cloud. In addition, the Division filed a Motion *In Limine* requesting that any evidence offered by Lost Cloud for the purpose of contradicting the facts or requirements set forth in Administrative Order No. 06-033 be excluded. Lost Cloud did not oppose the motion, which was granted at the hearing, and did not attempt to introduce evidence to contradict the facts set forth in the Order or in the NPF. Accordingly, I find that the Division has met its burden of proving, by a preponderance of the evidence, that Lost Cloud committed the violations for which the Division now seeks to impose fines. The only issue in dispute, therefore, is the amount of the fines that should be imposed. The Division seeks to impose the following fines:

For the violations committed by Lost Cloud on the Property in May 2006:

1. Pursuant to Env-C 603.08 (c), **\$2,000** for violation of RSA 485-A:13 and Env-Ws 1703.11 by causing turbidity to exceed the naturally occurring conditions of a Class B surface water by more than 10 NTUs.
2. Pursuant to Env-C 614.05 (c), **\$2,000** for violation of RSA 482-A:3 by dredging approximately 300 linear feet of intermittent stream channel.
3. Pursuant to Env-C 614.04(c), **\$1,500** for violation of RSA 482-A:3 by dredging an additional 100 linear feet of intermittent stream channel by failing to properly install and maintain a poled ford.
4. Pursuant to Env-C 614.05(c), **\$2,000** for violation of RSA 482-A:3 by disturbing a minimum of 200 linear feet of intermittent stream channel downstream of the poled ford by allowing sediment to be deposited into the stream.
5. Pursuant to Env-C 614.02(a)(1), **\$500** for violation of RSA 482-A:3 by dredging or

cutting approximately 1,500 square feet of wetland without a permit.

6. Pursuant to Env-C 614.06(f), a total of **\$6,000** for violations of Wt 304.05 by failing to comply with *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire*, specifically by:

- a. Failing to plan, locate and flag skid trails, surface water and wetland crossings in advance, thereby minimizing crossings to wetlands and surface waters;
- b. Failing to install a crossing device such as a corduroy or geotextile while crossing a forested wetland; and
- c. Use of poled ford during periods of high flow.

For the violations committed by Lost Cloud on the Property in June 2006:

7. Pursuant to Env-C 603.08(c), **\$2,000** for violation of RSA 485-A:13 and Env-Ws 1703.11 by causing turbidity to exceed the naturally occurring conditions of a Class B surface water by more than 10 NTUs.

8. Pursuant to Env-C 614.06(f), **\$2,000** for violation of Wt 304.05 by failing to comply with *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire*, specifically by use of poled ford during periods of high flow and failure to maintain poled fords after becoming overtopped with water.

9. Pursuant to Env-C 614.06(b), **\$2,000** for repeated violations of best management practices on the Property and on other properties.

The total fine sought by the Division in its proposed AF No. 06-38 is **\$20,000**. In addition, however, the Division requests a post-hearing increase of the proposed fines, pursuant to Env-C 601.11(a), because of alleged aggravating factors. In making this request, the Division acknowledges that, pursuant to Env-C 601.11(b), the fines cannot be increased beyond the statutory maximums. Therefore, only two of the proposed fines, (items no. 3 and 5 above) are subject to increase. Env-C 601.11(a) provides:

(a) Subject to (b), below, the amount of fine imposed for a specific violation shall be increased by 10% for each of the following that apply to that specific violation:

(1) The division proves, by a preponderance of the evidence, that the respondent was aware of the requirements applicable to the activity(ies) that formed the basis for the division's allegations as of the time of the violation;

(2) The division proves, by a preponderance of the evidence, that any environmental threat or harm caused by the offense has not been alleviated as of the date of the hearing;

(3) The division proves, by a preponderance of the evidence, that the respondent derived some direct or indirect economic benefit from the offense;

(4) The division proves, by a preponderance of the evidence, that the respondent did not act in good faith to remedy the violation(s) for which the fine is sought;

(5) The division proves, by a preponderance of the evidence, that the respondent has a history of non-compliance with the statute(s), rule(s), or permit(s) of the department; or

(6) The division proves, by a preponderance of the evidence, other factors, not specifically identified above, that cause the violation to be more serious, for instance because a large area of land was impacted by the violation or an ecosystem was destroyed by the violation.

The Division argues that, because of previous violations that are alleged to have occurred in 1998 and 2006, Lost Cloud knew that its conduct constituted violations, justifying an increase under Env-C 601.11(a)(1). The Division also asserts that the alleged prior violations demonstrate a history of non-compliance and requests a fine increase pursuant to Env-C 601.11(a)(5). The Division also argues that a fine increase is justified under Env-C 601.11(a)(4) because Lost Cloud failed to retain a certified erosion and sediment control professional to prepare an erosion and sediment control plan for Division review and approval, and to implement the plan upon approval, as required by the July 18, 2006, Administrative Order No. 06-033. Finally, the Division asserts that the proposed fines should be increased pursuant to Env-C 601.11(a)(3) because Lost Cloud derived an economic benefit by failing to cease operations and implement appropriate best management practices during periods of high water flow.

In response, and in support of its position that the fines should be reduced, Lost Cloud invokes (albeit without expressly articulating it as such) the provisions of Env-C 601.10, which allows for a post-hearing *reduction* of fines if there are certain *mitigating* factors present. These mitigating factors are, for the most part, the converse of the aggravating factors set forth above. Env-C 601.10 provides:

The amount of fine imposed for a specific violation shall be reduced by 10% for each of the following that apply to that specific violation:

(a) In the case of a non-continuing or one-time offense, where all of the following are true:

(1) The respondent proves, by a preponderance of the evidence, his/her ignorance, as of the time of the violation, of the statute(s), rule(s), or permit(s) which were violated;

(2) The violation has not continued or recurred as of the time of the hearing;

(3) Any environmental threat or harm caused by the offense has been alleviated; and

(4) The respondent did not derive any direct or indirect economic benefit from the offense;

(b) The respondent proves, by a preponderance of the evidence, that s/he made a good faith effort to comply with the statute(s), rule(s), or permit(s) involved and that the violation occurred despite those efforts;

(c) The respondent proves, by a preponderance of the evidence, that s/he has no history of non-compliance with the statute(s), rule(s), or permit(s) of the department; or

(d) The respondent proves, by a preponderance of the evidence, information favorable to his/her case which was not known to the division at the time the fine was proposed.

Lost Cloud concedes that it was fully aware of the requirements applicable to its operations at the time of the violation. Lost Cloud argues, however, that the fines should be reduced because:

- a) The 2006 violations occurred as a result of flood conditions (Env-C 601.10(b) and (c));
- b) Lost Cloud has no history of non-compliance. In support of this position, Lost Cloud asserts that it has been in business in New Hampshire for 30 years, in which time it has completed 900 logging operations and has no violations other than those alleged in the proposed AF. (Env-C 601.10(c));
- c) The work conducted at the Property was actually performed by a subcontractor and, although Lost Cloud acknowledges itself as the responsible party, it ceased doing business with that particular subcontractor when the subcontractor refused to implement additional protective measures requested by Lost Cloud (Env-C 601.10(b));
- d) Lost Cloud derived no direct or indirect economic benefit from working through periods of high water flow or failing to implement appropriate best management practices during such times because any such benefit would be realized only by the subcontractor (Env-C 610.10(a)(4); and
- e) Although it has not complied with the Order requiring it to retain an erosion professional and to implement a sediment control plan, the violations have been remedied and the site secured with no additional violations occurring thereon (Env-C 610.10(a)(2) and (3)).

I begin by noting that both Env-C 601.10 and Env-C 601.11 are mandatory, not permissive. Therefore, provided the statutory maximums are not exceeded, I have no discretion to disregard any pertinent aggravating or mitigating factors that are proven by a preponderance of the evidence. Turning to the arguments raised, I will address the mitigating and aggravating factors simultaneously in the order of their listing in Env-C 601.10.

Knowledge or Ignorance of Requirements at Time of Violation – Env-C 601.10(a)(1)/Env-C 601.11(a)(1): Lost Cloud has stipulated that it had full knowledge of all statutory, regulatory and permit requirements at the time of the violations. Accordingly, the fine for violation 3 must be increased by **\$150** and the fine for violation 5 must be increased by **\$50**.

Continuance or Recurrence of Violation – Env-C 601.10(a)(2)/No corresponding provision in Env-C 601.10: There is no evidence in the record that any of the violations have recurred as of the time of the hearing. However, pursuant to Env-C 601.10(a), I am only authorized to reduce the fine if all of the mitigating factors listed therein are present. Because Lost Cloud has stipulated that it had knowledge of the applicable requirements, the first mitigating factor under Env-C 601.10(a) cannot be proven, therefore, no reduction of any of the fines can be granted under this section.

Alleviation of Environmental Threat or Harm – Env-C 601.10(a)(3)/Env-C 601.11(a)(2): Lost Cloud asserts, without further corroboration, that the Property has been secured. The Division appears to rely upon Lost Cloud's failure to comply with Administrative Order No. 06-033 as evidence of a continued threat or harm. Neither party has proffered sufficient probative evidence regarding the current condition of the Property to support its position. Based only upon these unsupported assertions, I cannot make a finding as to whether there is any ongoing environmental threat or harm. Lost Cloud's failure to comply with the Order, does not *necessarily* demonstrate that an environmental threat or harm still exists. It is possible, although certainly not proven, that Lost Cloud could have alleviated any potential harm without complying with the Order. Therefore, no increase or decrease is warranted. I also note that, even if Lost Cloud could meet its burden of proving that any harm or threat had been eliminated, no reduction to any of the fines could be given under Env-C 601.10(a) for the reasons set forth in the preceding paragraph.

Economic Benefit – Env-C 601.10(a)(4)/Env-C 601.11(a)(3): Neither party has presented any credible evidence as to whether Lost Cloud did or did not derive any economic benefit from the actions that give rise to any of the violations. Therefore, neither party has met its burden of proof and no increase or decrease is warranted.

Good Faith Effort to Comply/Remedy – Env-C 601.10(b)/Env-C 601.11(a)(4): In this instance, the mitigating factor set forth in Env-C 601.10(b) not identical to the corresponding aggravating factor set forth in Enc-C 601.11(a)(4). In order to justify a reduction, Lost Cloud must establish that it made a good faith effort to comply with the applicable *statutes, rules or permits*. An increase, on the other hand, is justified if the Division proves that Lost Cloud failed to make a good faith effort to *remedy the violation*.

Lost Cloud concedes that it was aware of all applicable statutory and regulatory requirements at the time of the violations, but argues that the violations were caused, despite its good faith efforts, by high water flow during periods of flooding. There is nothing in the record, however, to prove or disprove that flood conditions caused the violations or that appropriate best management practices were applied in an attempt to prevent the violations. Accordingly, I find that Lost Cloud has not met its burden of proof and there is no basis under Env-C 601.10(b) for a reduction of any of the fines.

The Division seeks an increase, arguing that Lost Cloud failed to remedy the violations after the fact. As evidence, the Division relies on Lost Cloud's non-compliance with Administrative Order No. 06-033. Specifically, Lost Cloud did not comply with the Order by failing to retain a certified erosion and sediment control professional to prepare an erosion and sediment control plan for Division review and approval, and to implement the plan upon approval. Because Lost Cloud has not complied with the Order, the Division has, as of the date of the hearing, not issued a Notice of Compliance for the Property. There is no dispute that Lost Cloud has not satisfied this requirement of the Order. However, as noted above, failure to comply with this provision of the order does not necessarily demonstrate that Lost Cloud failed to remedy the actual violations upon the Property. Therefore, the Division has not proven, by a preponderance of the evidence, that the violations have not been remedied. For the foregoing reasons, no increase or decrease is

warranted.

History or Lack of History of Non-Compliance with Statutes, Rules, or Permits of the Department – Env-C 601.10(c)/Env-C 601.11(a)(5): The Division raises alleged violations occurring in 1998 and 2006, as well as Lost Cloud's failure to comply with Administrative Order No. 06-033 as evidence of Lost Cloud's history of non-compliance. As previously noted, two of the proposed administrative fines issued in 1998 were the subject of a consolidated settlement and another was withdrawn. The Division also relies upon two Letters of Deficiency issued in 2006 as evidence of a history of non-compliance. In response to the Division, Shaun Hathaway testified that Lost Cloud has been operating in New Hampshire for over 30 years, has completed approximately 900 jobs, and has not been cited for any other violations.

I find, based on the existence of these prior incidents, that Lost Cloud cannot meet its burden of proving that it has *no* history of non-compliance, therefore, there is no basis to reduce the amount of the fines. Furthermore, because Lost Cloud has failed to adhere to the terms of the 1999 settlement agreement and those of Administrative Order No. 06-033, a reduction would be inappropriate. Nonetheless, in light of the length of time that Lost Cloud has been conducting business in New Hampshire and the number of jobs performed, I am not convinced that the violations alleged to have occurred in 1998 and 2006 constitute a "history" of non-compliance within the meaning of the rule. While I have no way of determining whether Lost Cloud has been fully compliant in all of its other undertakings, the evidence *suggests* that Lost Cloud may have been compliant in up to 99.93% of its jobs over the past 30 years. Therefore, while Lost Cloud's history is fatal to its request for a reduction, I find that the Division has not proven, by a preponderance of the evidence, that Lost Cloud has a history of non-compliance sufficient to justify a fine increase under Env-C 601.11(a)(5)

For the foregoing reasons, the total fine shall be increased by \$200 to **\$20,200**, which is hereby assessed against Lost Cloud. The total assessed fine shall be paid within 60 days of the date of this decision. Fine payments shall be made 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, P.O. Box 95, Concord , NH 03302-0095.

Any party aggrieved by this decision may file a motion for reconsideration within 30 days of the date of this decision, in accordance with NH RSA 541-A and Env-C 206.

Date: January 14, 2009

By:

COMMISSIONER OF
ENVIRONMENTAL SERVICES
COPY
Peter Demas, Legal Coordinator
Presiding Officer

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

(d) The presiding officer shall terminate any comments, questions, or discussions that are not relevant to the subject of the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.08 Closing the Hearing and the Record.

(a) The presiding officer shall close the oral public hearing when s/he determines that no one has further questions or comments that are relevant to the subject of the hearing.

(b) At an oral public hearing other than a rulemaking hearing, if additional time is requested to submit written testimony as specified in Env-C 205.07(b) or supplemental information which the presiding officer determines to be relevant to the subject of the hearing, the presiding officer shall designate a specific time period for the record to remain open to receive such information.

(c) For rulemaking hearings, the record shall remain open until the date specified in the notice published pursuant to Env-C 205.04(a).

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.09 Continuances.

(a) Hearings on proposed rules shall be continued only in accordance with RSA 541-A.

(b) At any oral public hearing other than a hearing on proposed rules, if anyone requests a continuance and the presiding officer determines that the public will be best served by continuing the hearing and that any prejudice caused to any person as a result of the continuance is outweighed by the benefit to the public of granting the continuance, the presiding officer shall order that the hearing be continued to a later date, time, and place.

(c) If such later date, time, and place are known at the time of the hearing that is being continued, the presiding officer shall state the date, time, and place on the record.

(d) If such later date, time, and place are not known at the time of the hearing that is being continued, the presiding officer shall state how notice will be given of the date, time, and place of the continued hearing.

Source. #8851-A, eff 3-25-07

PART Env-C 206 MOTIONS FOR RECONSIDERATION

Env-C 206.01 Purpose. The rules in this part are intended to supplement any statutory provisions, such as RSA 541, that require or allow a person to request reconsideration of a decision of the department prior to appealing the decision. These rules do not create the right to request reconsideration of a decision where it does not otherwise exist under law.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.02 Applicability. The rules in this part shall apply whenever any person has a right under applicable law to request a reconsideration of a decision prior to filing an appeal of the decision with the applicable court or council having appellate jurisdiction.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Env-C 206.03 Time for Filing. Any motion for reconsideration shall be filed no later than 30 days after the date the decision that is the subject of the motion was issued.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.04 Filing.

(a) Any person wishing to request reconsideration of a department decision shall file the original and 2 copies of a motion for reconsideration at the following address:

Office of the Commissioner, Legal Unit
Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

(b) For purposes of this section, a "department decision" means a decision that is signed by the commissioner, by the assistant commissioner on behalf of the commissioner, or by a division director, alone or in any combination.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.05 Format and Content of Motion. The person filing a motion for reconsideration shall provide the following information:

(a) The exact legal name of each person requesting reconsideration and the mailing address of the person and, if available, a fax number and e-mail address for the person;

(b) If the person making the request is other than an individual, the name and daytime telephone number of the individual who can be contacted regarding the motion and, if available, a fax number and e-mail address for that individual;

(c) A clear and concise statement of the reason(s) why the person believes the decision to be in error;

(d) A clear and concise statement of the facts upon which the department is expected to rely in granting relief;

(e) A clear and concise statement of the specific relief or ruling requested;

(f) A copy of the decision that is the subject of the motion; and

(g) Such other information as the party filing the motion deems pertinent and relevant, including sworn written testimony and other evidence that was not available for the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

PART Env-C 207 RULEMAKING PETITIONS

Env-C 207.01 Applicability. The rules in this part shall apply to any petition submitted to the department pursuant to RSA 541-A:4.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07