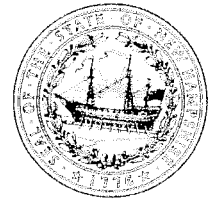




The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

New England Central Railroad, Inc.
2 Federal Street, Suite 201
St. Albans, VT 05478

Atlas Railroad Construction, LLC
13901 Sutton Park Drive South, Suite 330
Jacksonville, FL 32224

Re: Little Sugar River, Charlestown, NH
LRM File Nos. 2011-02878, 2012-00770
& 2012-02603

**ADMINISTRATIVE FINE
BY CONSENT**

No. AF 16-008

I. INTRODUCTION

This Administrative Fine by Consent is entered into by and between the Department of Environmental Services, Water Division, New England Central Railroad, Inc. and Atlas Railroad Construction, LLC, pursuant to RSA 482-A:13 and RSA 483-B:18. This Administrative Fine by Consent is effective upon signature by all parties.

II. PARTIES

1. The Department of Environmental Services, Water Division (“DES”), is a duly-constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive in Concord, New Hampshire.
2. New England Central Railroad, Inc. (“New England Central”) is a Delaware corporation registered to do business in New Hampshire having a mailing address of 2 Federal Street, Suite 201, St. Albans, VT 05478.
3. Atlas Railroad Construction, LLC (“Atlas Railroad Construction”) is a Florida limited liability company registered to do business in New Hampshire having a mailing address of 13901 Sutton Park Drive South, Suite 330, Jacksonville, FL 32224.
4. New England Central and Atlas Railroad Construction are collectively referred to, at times, hereinafter as “the Responsible Parties.”

III. BACKGROUND

1. Pursuant to RSA 482-A, DES regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wt 100 *et seq.* to implement this program.

DES Web site: www.des.nh.gov

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095

Telephone: (603) 271-3503 • Fax: (603) 271-2867 • TDD Access: Relay NH 1-800-735-2964

2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$5,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute.¹
3. Pursuant to RSA 483-B, the Surface Water Quality Protection Act (SWQPA), DES regulates development activities in the protected shoreland zone established under the SWQPA. Pursuant to RSA 483-B:17, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wq 1400 *et seq.* to implement this program.
4. Pursuant to RSA 483-B:18, the Commissioner of DES is authorized to impose fines of up to \$5,000 per violation for violations of the SWQPA. The administrative fine for each repeat violation of RSA 483-B may be multiplied by a factor of two for every previous violation committed by the person or entity.
5. The Little Sugar River, a fourth order stream and public water as defined in RSA 483-B:4, flows under a railroad embankment through an historic stone arch culvert north of the junctions of Route 12 and 12A in Charlestown, New Hampshire (the "Site"). The stone arch culvert, constructed in 1848, is approximately 27 to 28 feet wide and 22 feet high at the peak of the arch.
6. The New England Central Railroad rail line passes over the stone arch culvert at the Site. New England Central owns a Right of Way over the rail line that passes over the stone arch culvert at the Site.
7. On February 16, 2011, the monthly New Hampshire Department of Transportation ("DOT") Natural Resource Agency Coordination Meeting was held. Meeting attendees included representatives from DES, DOT, the Responsible Parties, and McFarland Johnson, Inc., their consultant. The Responsible Parties attended the meeting to discuss concerns about the stone arch culvert. The meeting attendees discussed a proposal by the Responsible Parties to replace a timber crib floor of the stone arch culvert in the bed of the Little Sugar River at the Site. It was reported that the floor of the stone arch culvert is made of timbers laid perpendicular to the river channel, extending under the walls of the stone arch on each side. In the downstream portion of the channel within the arch, the timbers were broken off and a large scour hole had developed. The scour hole extended under the stone wall on one side, undercut the wall and caused some stones to settle or crack. The scour hole continued downstream of the channel, beyond the face of the stone arch culvert. The Responsible Parties asserted that the scour hole needed to be stabilized to preserve the integrity of the stone arch culvert. According to the meeting minutes, a DES representative "expressed concern about the potential for scour at the interface of the new concrete with the existing timbers, and suggested a cutoff wall at the joint. The construction sequence, including stream diversion, should be included with the [state wetland] permit application."
8. 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 and adjacent to any waters of the state without a permit from [DES]."
9. On July 26, 2011, McFarland Johnson notified DES that it had been retained by Atlas Railroad Construction to "create wetland impact plans for submission with our permit application."

¹ The Commissioner's administrative fine authority for violations of RSA 482-A increased from \$2,000 to \$5,000 per violation on September 11, 2010.

10. On August 22, 2011, McFarland Johnson notified DES via e-mail that “the work has been done – the contractor went ahead and repaired the culvert in advance of the permit. They report that there was a fresh crack on the culvert face that needed immediate attention, so they went ahead and did the work, without consulting us. I informed them that the work was in violation of the wetland laws.”

11. On November 14, 2011, DES received an after-the-fact standard dredge and fill application prepared by McFarland Johnson for the work done at the Site. The consultants stated in the after-the-fact application that 1,368 square feet of stream bed under the culvert floor had been impacted at the Site.

12. On December 22, 2011, DES inspected the Site, and observed and documented the following conditions:

- a. the concrete footing poured within the stone arch culvert measured 73 linear feet;
- b. a gravel pad was observed within the Little Sugar River at the arch outlet; and
- c. a construction access path measuring approximately 450 feet long and 14 feet wide was observed leading to, and within, 250 feet of the reference line of Little Sugar River near the Site.

13. Pursuant to RSA 483-B:5-b, “[n]o person shall commence construction, excavation, or filling activities within the protected shoreland without obtaining a permit from [DES] ...”

14. Pursuant to RSA 483-B:4, XV. "Protected shoreland" means, for natural, fresh water bodies without artificial impoundments, for artificially impounded fresh water bodies, except private garden water features and ponds of less than 10 acres, and for coastal waters and rivers, all land located within 250 feet of the reference line of public waters.

15. RSA 483-B:9, V(a)(2)(D)(viii) states, “When necessary for the completion of construction activities permitted in accordance with RSA 483-B:6, a temporary 12-foot wide access path shall be allowed.”

16. At the time of the inspection, DES had no record of a shoreland permit for the 14’ wide construction access path observed within the protected shoreland near the Site.

17. On September 25, 2012, DES received a Shoreland Permit Application from Atlas Railroad Construction for the 14’ wide construction access path observed within the protected shoreland near the Site.

18. On November 27, 2012, the DES issued Shoreland Impact Permit No. 2012-2603 to New England Central, as property owner, “to impact 6,430 square feet in order to construct an access road to railroad in order to complete repairs to track and associated structures.”

19. Pursuant to RSA 482-A:3, XIV(g), DES may suspend review of an application for a proposed project on a property with respect to which DES has commenced an enforcement action against the applicant for any violation of this chapter, RSA 483-B, RSA 485-A:17, or RSA 485-A:29-44, or of any rule adopted or permit or approval issued pursuant to RSA 482-A,

RSA 483-B, RSA 485-A:17, or RSA 485-A:29-44. Any such suspension shall expire upon conclusion of the enforcement action and completion of any remedial actions DES may require to address the violation(s); provided, however, that DES may resume its review of the application sooner if doing so will facilitate resolution of the violation(s). DES shall resume its review of the application at the point the review was suspended, except that DES may extend any of the time limits under this paragraph and its rules up to a total of 30 days for all such extensions.

20. On December 26, 2014, DES issued Administrative Order No. 14-039 WD to the Responsible Parties pursuant to RSA 483-B:5 and RSA 482-A:6 (the "Order"). In the Order, DES determined that the Responsible Parties violated:

- a. RSA 483-B:5-b by constructing a construction access road exceeding twelve feet in width within the protected shoreland of the Little Sugar River near the Site without a permit from DES;
- b. RSA 482-A:3, by constructing and installing two concrete footings measuring 73 feet long each, totaling 146 linear feet, within the bed of the Little Sugar River at the Site without a permit from DES; and
- c. RSA 482-A:3, I, by dredging and filling the bed of the Little Sugar River at the Site without a permit from DES.

The Order was not appealed.

21. Based on its findings and determinations in the Order, DES ordered the Responsible Parties to:

- a. retain a professional engineer licensed in New Hampshire who is experienced in stream restoration and stream geomorphology; and to notify DES, in writing, of the name, address, and telephone number of the professional engineer retained, within 45 days of the date of the Order;
- b. submit a restoration plan to DES for review by March 31, 2015; and,
- c. implement the restoration plan only after receiving approval from, and as conditioned by, DES in accordance with the approved schedule.

22. Consistent with RSA 482-A:3, XIV(g), the review of the after-the-fact standard dredge and fill application for the work done at the Site was suspended until a Notice of Compliance for the Order is issued by DES.

23. On January 6, 2015, DES received an e-mail from New England Central Railroad, Inc., stating that Sean Sweeney, a professional engineer from Headwaters Hydrology, had been retained to prepare a restoration plan.

24. On April 2, 2015, DES received the restoration plan dated March 31, 2015, prepared by Sean Sweeney, P.E.

25. On June 8, 2015, DES issued a Restoration Plan Approval ("RPA") to the Responsible

Parties.

26. Pursuant to Condition #1 of the RPA, the deadline for completion of the restoration was October 1, 2015. An initial monitoring report was to be submitted to DES within 30 days of completion of the restoration.

27. On August 7, 2015, DES received a request to extend the deadline to complete the restoration by two weeks because of lack of contractor availability. DES agreed to extend the deadline to October 16, 2015.

28. On October 9, 2015, a representative from Atlas Railroad Construction notified DES that negotiations with a private landowner to access the Little Sugar River, through his property, to perform the restoration had broken down. Atlas Railroad Construction asserted that its contractors were mobilized and ready to begin work.

29. On October 12, 2015, Atlas Railroad Construction notified DES that the access disagreement had been resolved, and that work was scheduled to be conducted from October 19, 2015, through November 6, 2015.

30. On November 5, 2015, Atlas Railroad Construction notified DES that heavy rains had caused the project to be delayed by one week, estimating a new project end date of November 14, 2015.

31. On November 25, 2015, DES received an initial monitoring report dated November 25, 2015. In the monitoring report, the consultant stated that the project was completed on November 13, 2015.

IV. ALLEGATIONS

1. The Responsible Parties violated RSA 483-B:5-b by constructing a construction access road exceeding twelve feet in width within the protected shoreland of Little Sugar River near the Site without a permit from DES, as noted in the Order.
2. The Responsible Parties violated RSA 482-A:3, I, by constructing and installing two concrete footings measuring 73 feet long each, totaling 146 linear feet, within the bed of the Little Sugar River at the Site without a permit from DES, as noted in the Order.
3. The Responsible Parties violated RSA 482-A:3, I, by dredging and filling the bed of the Little Sugar River at the Site without a permit from DES, as noted in the Order.


V. ADMINISTRATIVE FINES, PAYMENT, WAIVER OF HEARING

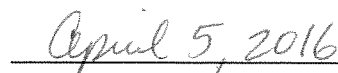
1. For violating RSA 483-B:5-b, RSA 483-B:18 authorizes a fine of \$5,000. For violating RSA 482-A:3, RSA 482-A:13 authorizes a fine of \$5,000 per violation. For the three violations set out in the Order, DES proposes a fine of \$5,000 for each violation.
2. The Responsible Parties agree to pay the proposed fine of \$15,000, subject to the following terms:

- a. Of the total administrative fine in the amount of \$15,000, the amount of \$6,000 (40%) will be suspended, provided that the Responsible Parties remain in compliance with this Agreement, RSA 482-A, the Wetland Rules, and the terms of any orders or permits issued by DES for a period of two years from the effective date of this Agreement. If either of the Responsible Parties fail to maintain compliance during the two-year period, or fail to fully comply with the terms of this Agreement the amount suspended, \$6,000, and any other amounts remaining due pursuant to the terms of this Agreement, shall become immediately due and payable in full. If the Responsible Parties maintain compliance with the terms of this Agreement, RSA 482-A, the Wetland Rules, and the terms of any orders or permits issued by DES for the prescribed two-year period, the suspended portion of the fine shall be waived.
 - b. The Responsible Parties agree to pay the remaining portion of the fine, in the amount of \$9,000 (60%), in a lump sum payment, due upon the execution of this Agreement by an authorized representative of each of the Responsible Parties.
3. All payments due, or that come due, under the preceding paragraph shall be paid by certified check made payable to *Treasurer, State of New Hampshire* and mailed to: DES Legal Unit, Attn: Compliance Attorney, P.O. Box 95, Concord, NH 03302-0095.
 4. If any payment is made by check or money order that is returned 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 check or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to the amount of the check or money order, to cover the costs of collection.
 5. By executing this Administrative Fine by Consent, each of the Responsible Parties waives its right to a hearing on or any appeal of the administrative fines identified in this Administrative Fine by Consent, and agrees that this Administrative Fine by Consent may be entered into and enforced by a court of competent jurisdiction.
 6. The effective date of this Administrative Fine by Consent will be the date on which it is signed by an authorized representative of each of the Responsible Parties, the Director of the Water Division, and the Commissioner of DES.
 7. No failure by DES to enforce any provision of this Administrative Fine by Consent after any breach or default will be deemed as a waiver of its rights with regard to that breach or default, nor will such failures be construed as a waiver of the right to enforce each and all provisions of this agreement on any further breach or default.

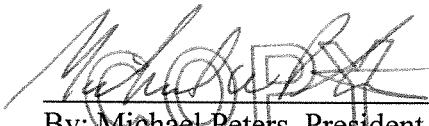
WHEREFORE, the parties voluntarily accept the terms of this Agreement.

New England Central Railroad, Inc.

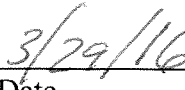

By: David Ebbrecht, President
Duly Authorized


Date

Atlas Railroad Construction, LLC



By: Michael Peters, President
Duly Authorized



Date

Department of Environmental Services



Eugene J. Forbes, P.E., Director
Water Division



Date



Thomas S. Burack, Commissioner



Date

cc: DES Legal Unit

ec: Public Information Officer, DES PIP Office
K. Allen Brooks, Chief, AGO-Environmental Protection Bureau
Charlestown Select Board and Conservation Commission
New Hampshire Department of Fish & Game