



**US Army Corps
of Engineers**



PUBLIC NOTICE

Issue Date: July 25, 2003
Expiration Date: August 24, 2003

Helena Regulatory Office

10 West 15th Street, Suite 2200

Helena, Montana 59626

**SPECIAL PUBLIC NOTICE
ADMINISTRATIVE COMPLAINT
and
PROPOSED PENALTY
DAWSON COUNTY, MONTANA**

This document constitutes notice to the public that the U. S. Army Corps of Engineer District, Omaha, is proposing the following civil penalty to be assessed against **Dawson County, Montana**. This proposed penalty is the result of an investigation of an alleged violation of permit conditions regarding Department of the Army permit #199990740.

This proposed administrative penalty assessment has been developed in compliance with Section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)) and the procedures outlined for Class I Civil Penalties as provided in 33 CFR Part 326 dated December 8, 1989.

Findings of Fact

Dawson County is a non-profit governmental entity who owns and controls property within the state of Montana, including properties associated with the permit referenced above.

The U. S. Army Corps of Engineers, under the authority of Section 404 of the Clean Water Act, determined that portions of this area were waters of the United States and that the Corps of Engineers had regulatory jurisdiction over these waters.

Dawson County was formally advised on June 25, 2003 that the permit was not in compliance. The item of concern involved the use of unacceptable fill materials being placed in waters of the United States associated with bank stabilization along the right descending bank of the Yellowstone River. These fill materials included the following:

- 1) Broken concrete with exposed rebar: Several locations at the site include exposed rebar. This material creates a source of pollution and a safety hazard.

- 2) Asphalt and loose brick: Construction debris including asphalt and loose brick were found at the ordinary high water mark. Asphalt is a pollutant and, in small pieces, neither asphalt nor brick will provide effective bank protection.
- 3) Broken concrete: Numerous pieces of thin broken concrete were identified on site. These materials are subject to "lift" during periods of high water. Broken concrete shall be no longer than 3.5 times the minimum thickness of the piece.

Laws and Regulations

The materials used for fill in these waters of the United States constitute Apollutants≡ within the meaning of Section 502(6), 33 U.S.C. 1362.6 of the Clean Water Act. Examples of a Apollutant≡ include, but are not limited to, dredged material, solid waste, earthen materials, incinerator residue, discarded equipment, concrete, rock, and sand. The discharge of such Apollutants≡ is defined as Aany addition of any pollutant to navigable waters from any point source≡ [Section 502(14) of the Clean Water Act, 33 U.S.C. Section 1362914)].

The equipment discharging this material is a Apoint source≡ within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. Section 1362(14). A Apoint source≡ is defined as Aany discernable, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged.≡

Dawson County is a Aperson≡ within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. 1362(5).

The Yellowstone River is a water of the United States within the meaning of 33 CFR Part 328.3(a) and therefore, Anavigable waters≡ within the meaning of the Clean Water Act, Section 502(7), 33 U.S.C. 1362(7).

The Clean Water Act, Section 301, U.S.C. Section 1311, prohibits the discharge of dredged or fill material by a person from a point source into a water of the United States without a permit from the Corps of Engineers in accordance with the Clean Water Act, Section 404, 33 U.S.C. 1344.

The assessment of a Class I civil penalty by the Omaha District, Corps of Engineers is authorized under 33 CFR Part 326 and dated December 8, 1989.

Assessment of the Civil Penalty

Based upon the foregoing facts and pursuant to Section 309(g) of the Clean Water Act, the Omaha District, Corps of Engineers, proposes to issue a Final Order to Dawson County assessing a Class I civil penalty of \$10,000. Should Dawson County propose and complete an acceptable cleanup of the site, the penalty may be waived.

The proposed penalty was determined after taking into account all of the factors identified in Section 309(g)(3) of the Clean Water Act. These factors include, but are not limited to, the

importance of the area affected, cumulative environmental impacts, size of the area affected, the existence of contaminated dredged material, the relationship to program and statutory goals, knowledge and intent of the violator, economic benefits to the violator, the ability of the violator to pay, and the deterrence value regarding future violations in the area by others.

Notice of Availability of the Public Record

The record of this permit action and correspondence associated with this proposed order may be viewed at the Montana Regulatory Office of the Corps of Engineers from 9:00 AM to 3:00 PM Monday through Friday effective July 23, 2003 throughout the comment period of this notice. The Montana Regulatory Office is located at 10 West 15th Street, Suite, 2200, Helena, Montana 59626.

Public Comments

The Corps of Engineers is soliciting comments from the public; federal, state, and local agencies; Indian Tribes; and all other interested parties regarding the application of the Class I civil penalties in this matter, the appropriateness of the proposed penalty and any information that might be material to the proposed resolution of the matter of permit non-compliance.

Any interested party is encouraged to provide comments, both favorable and unfavorable. These comments will be made a part of the administrative record. No comments will be accepted after the conclusion of the 30-day review period. All replies to the public notice should be sent to the **Regulatory Branch, U.S. Army Corps of Engineers, 106 South 15th Street, Omaha, Nebraska 68102.** Please reference Permit Number 199990740 in any correspondence. You may also submit comments by fax to 406-441-1380, or by e-mail to martin.w.keller@usace.army.mil. Please direct all questions regarding this penalty to **Mr. Martin Keller at the above address or at telephone (479) 876-1386.**

Public Hearing and Final Order

During the public interest review period, Dawson County may request a hearing regarding the proposed penalty. Should a hearing be requested and scheduled, any party submitting comments on the proposed penalty will be afforded the opportunity to present material evidence at the hearing.

In the event that Dawson County does not request a public hearing, the Corps of Engineers will issue the Final Order. Persons or entities who commented on the public notice will be allowed an additional thirty days to request that the Omaha District set aside the Final Order and hold a hearing under the authority of Section 309(g)(8) of the Clean Water Act. Such a hearing request shall be granted only if, in the opinion of the District Engineer, the evidence to be presented is material and was not considered in the preparation of the Final Order.

Any hearing will be held and conducted in accordance with the provisions of the guidance provided on the Class I Clean Water Act Civil Penalty Procedures (33 CFR Part 326, December 8, 1989).