



**US Army Corps
of Engineers**

Omaha District

PUBLIC NOTICE

Subject: Administrative Complaint and Proposed Penalty
Permittee: Castle Creek Development LLC
Waterway: unnamed tributary of Standing Bear Lake
Issue Date: January 4, 2006
Expiration Date: February 2, 2006

30 DAY NOTICE

Nebraska Regulatory Office

8901 S. 154 Street

Omaha, NE 68138-3621

SPECIAL PUBLIC NOTICE

ADMINISTRATIVE COMPLAINT and PROPOSED ORDER DEPARTMENT OF ARMY PERMIT NE 2004-10763 ISSUED TO Castle Creek Development LLC

This document includes the complaint and proposed administrative penalty 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

Castle Creek Development LLC is a for-profit organization that owns and/or controls property subject to the Department of the Army Permit No. NE 2004-10763. The permit authorized the filling of 0.48 acres of Palustrine Emergent Semi permanently Flooded (PEMC) and two road crossings over an unnamed tributary of Standing Bear Lake in the SW 1/4 of Section 35, Township 16 North, Range 11 East, Douglas County, Nebraska. The Nationwide 39 permit verification contained nine special conditions. A notice of permit noncompliance was sent to Castle Creek Development LLC on May 4, 2005.

The specific activities (conditions) determined to be in noncompliance with Department of the Army Permit No. NE 2004-10763 and that are part of this administrative process are as follows:

- 1) Special Condition 1- commencement notification,
- 2) Special Condition 2 - seed mixture approval,
- 3) Special Condition 3- sediment and erosion control employment documentation,
- 4) Special Condition 4 - mitigation site completion documentation by May 1, 2005
- 5) Special Condition 5 - buffer strip construction and seeding verification by May 1, 2005
- 6) Special Condition 8 - completion and submittal of the final mitigation plan within 30-days of starting work.

The Corps received a letter from E&A Consulting explaining why the noncompliance had occurred and requested an extension until July 1, 2005 to allow for completion. The Corps was

informed by email June 9, 2005 that Hayes Environmental would be completing the final mitigation plan and that it would be provided the next week. The Corps Nebraska Office waited for the final mitigation plan. The Corps was assured verbally that the permit would be in compliance by July 1, 2005. Compliance was not achieved until November 2005.

Laws and Regulations

The unnamed tributary of Standing Bear Lake is a water of the United States within the meaning of 33 CFR Part 328.3(a) and a "navigable water" within the meaning of Section 502(7), 33 U.S.C. 1362(7) of the Clean Water Act.

The materials used for fill in the jurisdictional tributary associated with the filling of the tributary constitute "pollutants" within the meaning of Section 502(6), 33 U.S.C. 1362.6 of the Clean Water Act. Examples of a pollutant include, but are not limited to, dredged spoil, solid waste, earthen materials, incinerator residue, discarded equipment, concrete, rock, and sand. The discharge of such pollutants is defined as "any addition of any pollutant to navigable waters from any point source" [Section 502(14) of the Clean Water Act, 33 U.S.C. Section 1362(14)].

The equipment discharging this material under all three permits is a "point source" within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. Section 1362(14). A point source is defined as "any 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."

Castle Creek Development LLC is a "person" within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. 1362(5).

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. Work that is carried out that does not conform to the authorization as granted may be subject to suspension and revocation as well as legal action (33 CFR Part 326).

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

Assessment of the Civil Penalty

The success of the Corps of Engineers' Regulatory program relies heavily on the compliance of the Permittee. Proper notification and self-verification are essential in the efficient use of manpower for the regulatory program. Failure to comply with notification requirements results in unnecessary manpower being diverted to compliance.

In addition, our records indicate that the primary principles and agents associated with the work in noncompliance at Castle Creek Development were previously involved in an

enforcement action conducted in 2004 concerning a different LLC. Further, even after the noncompliance was issued the parties have failed to follow through in achieving compliance by the deadline they provided.

Based upon the foregoing facts and pursuant to Section 309(g) of the Clean Water Act, the Omaha District, Corps of Engineers is issuing a Proposed Order to Castle Creek Development LLC recommending the assessment of a Class I civil penalty of \$20,000 for the following permit noncompliance.

- 1) A penalty of \$2,000 is proposed for the failure of Castle Creek Development LLC to commencement notification.
- 2) A penalty of \$2,000 is proposed for the failure of Castle Creek Development LLC to obtain the seed mixture approval.
- 3) A penalty of \$2,000 is proposed for the failure of Castle Creek Development LLC to complete sediment and erosion control documentation.
- 4) A penalty of \$2,000 is proposed for the failure of Castle Creek Development LLC to submit mitigation site completion documentation by May 1, 2005 and/or ask for an extension.
- 5) A penalty of \$2,000 is proposed for the failure of Castle Creek Development LLC to complete the buffer strip construction and seeding verification by May 1, 2005 and/or ask for an extension.
- 6) A penalty of \$10,000 is proposed for the failure of Castle Creek Development LLC to prepare and submit the final mitigation plan within 30-days of starting work.

The penalties for the permit were determined after taking into account all of the factors identified in Section 309(g) of the Clean Water Act. These factors include, but are not limited to, the importance of the area affected, cumulative environmental impacts, size of 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. This violation was determined to have a moderate impact on the environment and a potentially significant impact on the program due to the on going level of development in the area.

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 Nebraska Regulatory Office of the Corps of Engineers from 9:00 AM to 3:00 PM Monday through Friday throughout the comment period of this notice. The Nebraska Regulatory Office is located in the Papio NRD Building at 8901 S. 154 Street Omaha, NE 68138-3621

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 should be sent to the Corps Of Engineers, Omaha District, Nebraska Regulatory Office – Wehrspann, 8901 South 154th Street, Suite 1, Omaha, Nebraska 68138-3621. Please direct all questions regarding this public notice to Matt Wray at the above address or at telephone (402) 896-0896.

Public Hearing and Final Order

As provided in Section 309(g)(2), Castle Creek Development LLC has the right to request a hearing regarding the proposed penalties for each permit. Hearings may be requested for any or all of the conditions identified in this proposed order. 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 Castle Creek Development LLC 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 only be granted 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).