



**US Army Corps
of Engineers**

Omaha District

PUBLIC NOTICE

Subject: Administrative Complaint and Proposed Penalty
Permittee: Cottonwood Creek Inc
Waterway: unnamed tributary to South Papillion Creek
Issue Date: September 10, 2005
Expiration Date: October 10, 2005

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 No. NE 2003-11433 ISSUED TO COTTONWOOD CREEK, INC.

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

Cottonwood Creek Inc. is a for-profit organization that owns and/or controls property subject the Department of the Army permit number NE 2003-11433. The permit authorized moving 830 feet of creek channel and impacting 0.09 acres of PEMA wetlands adjacent to an unnamed tributary to South Papillion Creek in the NW 1/4 Section 8, Township 14 North, Range 11 East, Douglas County, Nebraska.

There are eight specific Special Conditions determined to be in non-compliance with Department of the Army Permit No. NE 2003-11433 and that are a part of this administrative process. They are as follows:

1. Special Condition #2- commencement notification,
2. Special Condition #3 - seed mixture approval,
3. Special Condition #4 - sediment and erosion control employment documentation,
4. Special Condition #5 - channel mitigation site completion documentation,
5. Special Condition #6 - grade control structure plan submittal,
6. Special Condition #7 - wetland mitigation site completion documentation,
7. Special Condition #8 - buffer strip seeding verification and
8. Special Condition #11 - final mitigation plan submittal.

Laws and Regulations

The unnamed tributary of the South Papillion Creek 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 this permit 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."

Cottonwood Creek, Inc. 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

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 Cottonwood Creek, Inc. recommending the assessment of a Class I civil penalty for the following permit non-compliance. The success of the Corps of Engineers' Regulatory program relies heavily on the voluntary 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. We, therefore, must address this failure to comply by administering the penalties specified below.

- 1) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #2- commencement notification,

- 2) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #3 - seed mixture approval,
- 3) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #4 - sediment and erosion control employment documentation,
- 4) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #5 - channel mitigation site completion documentation
- 5) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #6 - grade control structure plan submittal
- 6) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #7 - wetland mitigation site completion documentation,
- 7) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #8 - buffer strip seeding verification and
- 8) A penalty of \$1,000 is proposed for the failure of Cottonwood Creek, Inc. to comply with Special Condition #11 - final mitigation plan submittal.

The total of \$8,000 in penalties for the permit non-compliance 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 ongoing 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 effective November 19, 2003 throughout the comment period of this notice. The Nebraska Regulatory Office is located in the Pappas 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 Regulatory Branch, U.S. Army Corps of Engineers, 106 South 15th Street, Omaha, Nebraska 68102. Please direct all questions regarding this penalty to Mr. David LaGrone at the above address or at telephone (402) 221-4320.

Public Hearing and Final Order

During the public interest review period, Cottonwood Creek, Inc. 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 Cottonwood Creek, Inc 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).