



PUBLIC NOTICE

**US Army Corps
of Engineers**

Omaha District

Issue Date: March 24, 2005

Expiration Date: April 23, 2005

30 DAY NOTICE

Reply To:

**REGULATORY BRANCH, U.S. ARMY CORPS OF ENGINEERS
106 SOUTH 15TH STREET, OMAHA, NEBRASKA 68102-1618**

SPECIAL PUBLIC NOTICE

ADMINISTRATIVE COMPLAINT

and

PROPOSED PENALTY

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 Hiatt Construction, Inc. of North Platte, Nebraska. This proposed remedial action and penalty is the result of an investigation of an alleged violation of permit conditions regarding Department of the Army permit #NE 98-50038.

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

Hiatt Construction, Inc. is a for-profit organization which owns and controls property within the state of Nebraska, including properties within Lincoln County, Nebraska.

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. The permit was approved by the Omaha

District on January 26, 2000.

Hiatt Construction, Inc. was notified on January 11, 2005 of the conditions found to be out of compliance. A follow up meeting was held on February 3, 2005 in North Platte. The items of concern involved the following:

- a. General condition 2: The permit was not maintained in compliance with the terms and conditions.
- b. General condition 4: The permit must be transferred upon sale of the property subject to the permit.
- c. General Condition 5: Water quality certification from the State of Nebraska specifically identified the areas to be impacted. The area of impact was exceeded as the result of the mining operation.
- d. Special condition 1: This condition of the permit identifies the extent of impacts as well as the required mitigation for the project. The impact area was exceeded and the mitigation is inadequate.

The conditions listed above (2, 5 and special condition 1) were found to have taken place after the ownership of the property was transferred to Western Engineering, Inc. A separate enforcement action is directed to Western Engineering regarding these issues. The condition violation for Hiatt Construction, Inc. is general condition 4, the failure to properly transfer the permit.

Laws and Regulations

The materials used for fill in these waters of the United States constitute a ‘pollutant’ 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 material, 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 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.”

Hiatt Construction, Inc. is a ‘Person’ within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. 1362(5).

The wetlands adjacent to the Platte River are waters of the United States within the meaning

of 33 CFR Part 328.3(a) and therefore, 'navigable 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 Hiatt Construction, Inc. assessing a Class I civil penalty of \$2,500 for the failure to carry out general condition 4, transfer of the permit.

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 Kearney Regulatory Office of the Corps of Engineers from 9:00 AM to 3:00 PM Monday through Friday effective March 25, 2005 throughout the comment period of this notice. The Kearney Regulatory Office is located at 1430 Central Avenue, Kearney, Nebraska 68847.

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 68102-1618. Please direct all questions regarding this penalty to **Mr. Martin Keller at the above address or at telephone 352-751-6277.**

Public Hearing and Final Order

During the public interest review period, Hiatt Construction, Inc. 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 Hiatt Construction, 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).

REQUEST TO POSTMASTERS: Please post this notice conspicuously and continuously until the expiration date specified at the top of page one.

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