DEPARTMENT OF THE ARMY
Wilmington District, Corps of Engineers
Post Office Box 1890
Wilmington, North Carolina 28402-1890

Action ID No. 200510898 December 2, 2005

PUBLIC NOTICE

INTERESTED PARTIES: The District Engineer, Wilmington District, proposes to issue an order assessing a Class I Administrative Penalty against Mr. Desmond R. Foster, Jr., for a violation of permits granted under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

PERMITS INVOLVED AND ALLEGED VIOLATION: The Department of the Army issued General Permit No. 197800080 to Mr. Foster on May 14, 2004, through the North Carolina Division of Coastal Management Permit Program pursuant to 15A NCAC 07H.1100, and assigned the project Action ID No. 200510898. This permit authorized the construction of a bulkhead and retaining wall on Mr. Foster's property, located off N.C. Highway 12, adjacent to Slash Creek and the Pamlico Sound, in Hatteras, Dare County, North Carolina.

Permit No. 197800080 was violated as follows:

The permittee discharged unauthorized earthen fill material into approximately 9,900 square feet (0.22-acre) of high quality wetlands subject to Department of the Army Regulatory jurisdiction. Mr. Foster failed to comply with special condition (e) of the permit, which states, "This general permit does not authorize the construction or placement of structures nor the discharge of fill material within Department of the Army jurisdictional wetlands, seagrass or submerged aquatic vegetation."

In response to the enforcement action for Permit No. 197800080, Mr. Foster was required to restore pre-project elevations and contours to the impacted area. The restoration activities were coordinated thorough state and Federal resource management agencies and included the mechanical removal of all unauthorized fill material placed within jurisdictional wetlands. Mr. Foster completed the restoration work to the satisfaction of all involved agencies.

AUTHORITY FOR PROCEEDING: This Administrative Penalty proceeding is initiated under the authority of 33 U.S.C. 1319(g) and 33 CFR Part 326.6. The procedure for assessing civil penalties in cases such as this is set out in the statute and the

regulation. Following the discovery and investigation of a violation of a permit, notice is given to the permittee, the appropriate state agency, and the public. The permittee, the state, or any member of the public may file comments within 30 days. If requested by the permittee, a hearing will be held before a Presiding Officer who will submit a report and recommend a decision to the District Engineer. The District Engineer will issue a Final Order on the case to the permittee. Public participation in the hearing is permitted if a hearing is held.

PENALTY PROPOSED: The amount of the penalty proposed in this case is $5,000. This proposal is subject to revision in the interest of justice after all evidence and comments have been received and reviewed. The amount of the penalty that the District Engineer is authorized to assess as a Class I Penalty is $11,000 per violation and not more than $27,500 total. In a case involving multiple violators, each violator is subject to a separate, not joint, penalty.

REQUEST FOR HEARING: The permittee has 30 days following receipt of this formal notice of proposed penalty to request a hearing. Written request, by the permittee, for a hearing should be directed to the District Engineer within this designated comment period and must state the specific reasons for requesting a public hearing. The request should specify, in summary form, the factual and legal issues in dispute and the specific grounds for defense. The permittee has a right to present evidence at the hearing; however, he may not challenge the permit condition or limitation, which is the subject matter of this order.

COMMENTS/ADMINISTRATIVE RECORD: During the 30 day comment period, any person may submit written comments on the proposed Penalty Order. These comments should be sent to the District Engineer by 4:30 p.m., January 3, 2005. Any submitted comments will be included in the administrative record relating to the Proposed Order. All information submitted by the permittee and persons commenting on the Proposed Order will be placed in the administrative record, which will be available for inspection during regular business hours at the U.S. Army Corps of Engineers, Wilmington District, 69 Darlington Avenue, Wilmington, North Carolina. (The administrative record is subject to the provisions of law restricting the disclosure of confidential information.) Comments should be directed to:

U.S. Army Corps of Engineers
ATTN: Justin McCorcle (CESAW-OC)
PO Box 1890
Wilmington, North Carolina 28402

PUBLIC HEARING: The permittee and all persons who file comments will be given notice of any hearing held on this case. The permittee and all commenters will have a reasonable opportunity to be heard and to present evidence at such hearing, if a hearing is held.

FINAL DECISION: If the permittee does not request a hearing, the District Engineer may issue the Final Order on this violation on or after 30 days following receipt of this formal notice by the permittee.

POST DECISION HEARING/APPEAL: Any Final Order issued under these procedures shall become effective 30 calendar days following its issuance unless (1) a petition to set aside the order and to hold a hearing is filed by any person who commented on the Proposed Order and the petition is granted, or (2) an appeal to the United States District Court is taken under 33 U.S.C. 1319(g)(8).

John E. Pulliam, Jr.
Colonel, U.S. Army
District Engineer