

PUBLIC NOTICE
OF PROPOSED ADMINISTRATIVE PENALTY
US ARMY CORPS OF ENGINEERS
WILMINGTON DISTRICT

Issue Date: May 16, 2005
Expiration Date: June 16, 2005
Corps of Engineers Action ID: 200220819

30 Day Notice

1. INTERESTED PARTIES: The District Engineer, Wilmington District, proposes to issue an order assessing a Class I Administrative Penalty against The North Carolina Department of Transportation (NCDOT) for a violation of a permit granted under Section 404 of the Clean Water Act.

2. PERMITS INVOLVED AND ALLEGED VIOLATION: On April 25, 2002, Department of the Army individual permit 200220819 was issued to NCDOT to authorize the discharge of dredged and fill material into waters of the United States, for construction of the US 64 Knightdale Bypass. The permit included authorization to impact wetlands to construct approach fill for bridges over Poplar Creek and Marks Creek, but the NCDOT design submitted with its application did not indicate any additional discharge into wetlands that would be necessary for temporary access to construct the bridges. On October 15, 2003, NCDOT informed the Corps that it had violated its Clean Water Act permit and water quality certification by doing unauthorized mechanized clearing and fill of piedmont bottomland and alluvial forest wetlands for construction access causeways at both Poplar Creek and Marks Creek.

The following sections of Permit No. 200220819 were violated by the clearing and unauthorized fill:

A. Special Condition a., which reads: "all work authorized by this permit must be prepared in strict compliance with the attached plans, which are a part of this permit."

NCDOT did work in jurisdictional wetlands outside of the limits shown on the plans (permit drawings) attached to the permit.

B. Special Condition hh., which reads: "prior to commencing construction within jurisdictional waters of the United States, the permittee shall forward the latest version of project construction drawings to the Corps of Engineers, Raleigh Regulatory Field Office NCDOT Regulatory Project Manager. Half-size drawings are acceptable."

NCDOT did not provide the latest project construction drawings to the Corps.

C. Special Condition jj., which reads: “The permittee and its contractors and/or agents shall not excavate, fill, or perform mechanized landclearing at any time in the construction or maintenance of this project within waters and/or wetlands, except as authorized by this permit, or any modification to this permit. There shall be no excavation from, or waste disposal into, jurisdictional wetlands or waters associated with this permit without appropriate modification of this permit, including appropriate compensatory mitigation. This prohibition applies to all borrow and fill activities connected with this project.”

NCDOT filled and performed mechanized landclearing within wetlands in areas not covered by the subject permit, and did not apply for a modification to the permit before doing the work.

D. Special Condition ll., which reads: “the permittee shall comply with the conditions specified in the water quality certification, No. 3377, issued by the North Carolina Division of Water Quality on April 10, 2002.”

NCDOT did not comply with Conditions 5 and 13 of the water quality certification. Additionally, it exceeded the limits of authorized impacts under the certification.

E. Special Condition rr., which reads: “no excavated or fill material will be placed at any time in waters or wetlands outside the permitted construction areas, nor will it be placed in any location or in any manner so as to impair surface water flow into or out of any wetland area.”

NCDOT did work in jurisdictional wetlands outside of the limits of the permitted construction areas.

3. 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.

4. PENALTY PROPOSED: The amount of the penalty proposed in this case is \$7,250. 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.

5. 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, it may not challenge the permit condition or limitation which is the subject matter of this order.

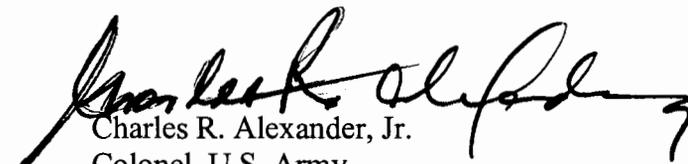
6. COMMENTS/ADMINISTRATIVE RECORD: During the 30 day comment period, any person may submit written comments on the proposed Penalty Order. These comments should be sent to the District Engineer within this designated comment period. Any submitted comments will be included in the administrative record 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

7. 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.

8. 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.

9. 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).



Charles R. Alexander, Jr.
Colonel, U.S. Army
District Engineer