

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

Action ID No. 200610657

June 12, 2006

PUBLIC NOTICE

INTERESTED PARTIES: The District Engineer, Wilmington District, proposes to issue an order assessing a Class I Administrative Penalty against Sunset Bay, LLC, for a violation of permits granted under Section 404 of the Clean Water Act.

PERMITS INVOLVED AND ALLEGED VIOLATION: The Department of the Army issued Nationwide Permit Nos. 200411323 and 200411324 to Sunset Bay, LLC, on April 20, 2004. These permits authorized the development of a residential/condominium complex on property at the Bermuda Bay Development, located off the south side of Ocean Bay Boulevard, adjacent to Colington Creek, in Kill Devil Hills, Dare County, North Carolina.

Permit Nos. 200411323 and 200411324 were violated as follows:

Sunset Bay, LLC, failed to comply with special condition b. of each of the subject permits, which state that, "The Permittee shall preserve and maintain 3.0 acres of DA jurisdictional wetlands identified on the applicant's property plat submitted with the application (plat number P01077, dated 2-26-04, titled Sunset Bay, LLC). The Permittee is prohibited from performing any of the following activities on the property: Filling; grading; excavating; earth movement of any kind; construction of roads, buildings, signs, or any other structure; any activity that may alter the drainage patterns on the property; the destruction, mowing, or other alteration of vegetation on the property; disposal or storage of any garbage, trash, or other waste material; or any other activity which would result in the wetlands being adversely impacted or destroyed. Conservation area boundary shall be clearly marked to prevent future inadvertent impacts."

Sunset Bay, LLC, failed to comply with special condition c. of each of the subject permits, which state that, "Prior to beginning work authorized by this permit, the Permittee shall execute and cause to be recorded a conservation easement prohibiting those activities listed in condition b. above. The holder of this easement shall be approved by the Corps of Engineers prior to recordation of the easement. The Permittee shall provide the Corps of Engineers, a copy of the recorded easement within 60 days of the recordation of the easement. The Permittee shall take no action inconsistent with the terms and purpose of the conservation easement on the property described therein."

Sunset Bay, LLC, failed to comply with special condition d. of each of the subject permits, which state that, "Condition c. above runs with the land. The Permittee shall not sell, lease, or otherwise convey any interest in the property without first providing sixty (60) days written notice to the Corps of Engineers of the proposed conveyance. The instrument affecting such conveyance shall include legally binding restrictions on the use of the mitigation property as described in condition b. above, to be enforceable by the Permittee as well as the U.S. Army Corps of Engineers, Wilmington District. The instrument establishing such restrictions shall be subject to the approval of the Corps of Engineers. The Permittee shall enforce the terms of the required restrictions."

As of March, 2006, Sunset Bay, LLC, had begun construction of the residential/condominium complex without preserving the land as required in special condition b. of each of its permits. Sunset Bay, LLC did not record or execute a conservation easement prior to beginning work authorized by the permits, as required by special condition c. of each of its permits. Sunset Bay, LLC sold its interest in the subject property without accomplishing the required preservation, as required by special condition d. of each of its permits. Sunset Bay, LLC, only recently completed the requirements for the conservation easement. As such, Sunset Bay, LLC, has violated three separate conditions of two separate Department of the Army permits, for a total of six individual violations of Section 301 of the Clean Water Act.

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 \$22,000. 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., July 13, 2006. 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).