



**US Army Corps
of Engineers**

Omaha District

SPECIAL PUBLIC NOTICE

Subject: Boyne U.S.A. Administrative Penalties

Waterway: Various

Issue Date: May 23, 2003

Expiration Date: June 22, 2003

30 DAY NOTICE

Helena Regulatory Office 10 West 15th Street, Suite 2200 Helena, Montana 59626

SPECIAL PUBLIC NOTICE ADMINISTRATIVE COMPLAINT AND PROPOSED PENALTIES BOYNE U.S.A., BIG SKY, MONTANA

This document constitutes notice to the public that the U.S. Army Corps of Engineers District, Omaha, is proposing the following civil penalties to be assessed against **Boyne U.S.A., Big Sky, Montana**. This proposed remedial action and penalties is the result of an investigation of the alleged violations of permit conditions associated with three separate permits held by Boyne U.S.A. These permits are Department of the Army Nationwide Permit No. 14 verification No. 199790247 and two Nationwide Permit No. 5 permits (water measurement structures).

These proposed administrative penalty assessments have been developed in compliance with Section 309(g) of the Clean Water Act (CWA) (33 U.S.C. 1319(g)) and the procedures outlined for Class I Civil Penalties as provided in 33 CFR 326 dated December 8, 1989.

Findings of Fact

Boyne U.S.A. is a for-profit organization which owns and controls property in Big Sky, Montana, including the properties associated with the three permits referenced above.

The U.S. Army Corps of Engineers, under the authority of Section 404 of the Clean Water Act, determined that the areas associated with these permits are waters of the United States and that the Corps of Engineers had regulatory jurisdiction over these waters.

The Montana Regulatory Field Office, in association with Omaha District Regulatory staff, conducted a routine compliance inspection regarding several permits throughout the Big Sky area on July 22-23, 2002. All three of the permits involving the non-compliance issues identified above were observed at that time and coordination was initiated with representatives of Boyne. As a result of that site visit, a letter of notification was provided to Boyne (August 14, 2002) regarding the three permits and a follow-up

meeting was held in February 2003 to identify the non-compliance process and to assist Boyne in understanding the issues with resolving such an action.

The Permits

1. **DA Permit 199790247** involves several separate actions associated with a ski resort and related development in the Big Sky area. The specific activities found to be in non-compliance are as follows:

- a. The filling of a small wetland area (NW 14 Condition a): This location shown as site # 3 on the Location Map on page 6, was included in the permit description as a remnant site that was to remain undisturbed. The filling was not necessary for the road crossing.
- b. Lack of erosion control (NW 14 Condition # 3): Erosion control issues were identified at site location # 1. The problem remains unresolved. This non-compliance is associated with the parking lot snow and salt being dumped at the edge (top of the slope) at site location #1. As a result, no vegetation has been established at the site.
- c. Failure to submit a Compliance Certification Form (NW #14 Condition #14). This requirement was a condition of the permit and was also specified in the letter of verification dated June 20, 1997.

2. **Nationwide permit No. 5, Location 1:** This is a location for a water measurement device.

- a. Failure to maintain (NW 5 permit condition #2): The water flow measurement structure is not functional. Sediment from failure of the dike structures during spring snow melt resulted in an increase in sediment in the creek downstream.
- b. Stream degradation (NW 5 permit condition #3): The location has undergone channel degradation due to the location and condition of the structure.
- c. Impact on endemic aquatic habitat (NW 5 permit condition #4): Stream degradation due to flow alteration and erosion can be expected to adversely impact the aquatic site at and immediately below the structure.
- d. Failure to notify (NW 5 permit condition #13): The two dikes and weir structure exceed 10 cubic yards of fill below the ordinary high water and therefore required notification to the Corps prior to construction.

3. Nationwide Permit No. 5, Location 5: This is also a water measurement device similar to No. 2 above.

- a. Failure to maintain (NW 5 condition #2): The water measurement structure is not functional. Sediment from failure of the structure during spring snowmelt resulted in an increase in sediment in the creek downstream.
- b. Stream degradation (NW 5 condition #3): The location has undergone channel degradation at this location. Efforts to control channel shifting and bed movement have included the use of sandbags.
- c. Impact on endemic aquatic species (NW 5 condition #4): Stream degradation due to flow alteration and erosion due to channel shifting can be expected to impact aquatic species both at the site and immediately downstream

Laws and Regulations

The materials used for fill in the wetland associated with Department of the Army permit 1999790247, the fill material placed during construction of two dikes and the materials placed during construction of the two water measurement devices referenced under Nationwide permit #5 above constitute "pollutants" within the meaning of Section 502(6), 33 U.S.C. 1362.6 of the Clean Water Act, and herein after referred to as the "discharge" as defined in the CWA §502(16), 33 U.S.C. §1362(16). Examples of a pollutant include, but are not limited to, dredged spoil, solid waste, earthen materials, incinerator residue, discarded equipment, concrete, brick, 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 all three permits 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".

Boyne U.S.A. is a "person" within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. 1362(5).

The wetland identified in Department of the Army permit 199790247 and the streams impacted by the two dikes and the water measurement structures 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. 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 regarding each separate and individual permit, as referenced above, is authorized under 33 CFR, Part 326, dated December 8, 1989.

Assessment of the Civil Penalties

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 Boyne U.S.A. assessing a Class I civil penalty of \$25,000 for each separate permit as described in this special public notice. Should Boyne cooperate with the Omaha District Regulatory Office in resolving these permit conditions identified as being in non-compliance, consideration will be given to reducing the penalties on an individual basis.

The proposed penalties were 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 these permits and correspondence associated with this proposed order may be viewed at the Montana Regulatory Field Office of the Corps of Engineers from 9:00 a.m. to 3:00 p.m., Monday through Friday, effective (date) throughout the comment period of this notice. The Montana Regulatory Office is located at 10 West 15th Street, Suite 2200, Helena, Montana 59626.

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 penalties and any information that might be material to the proposed resolution of the matters 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 S. 15th**

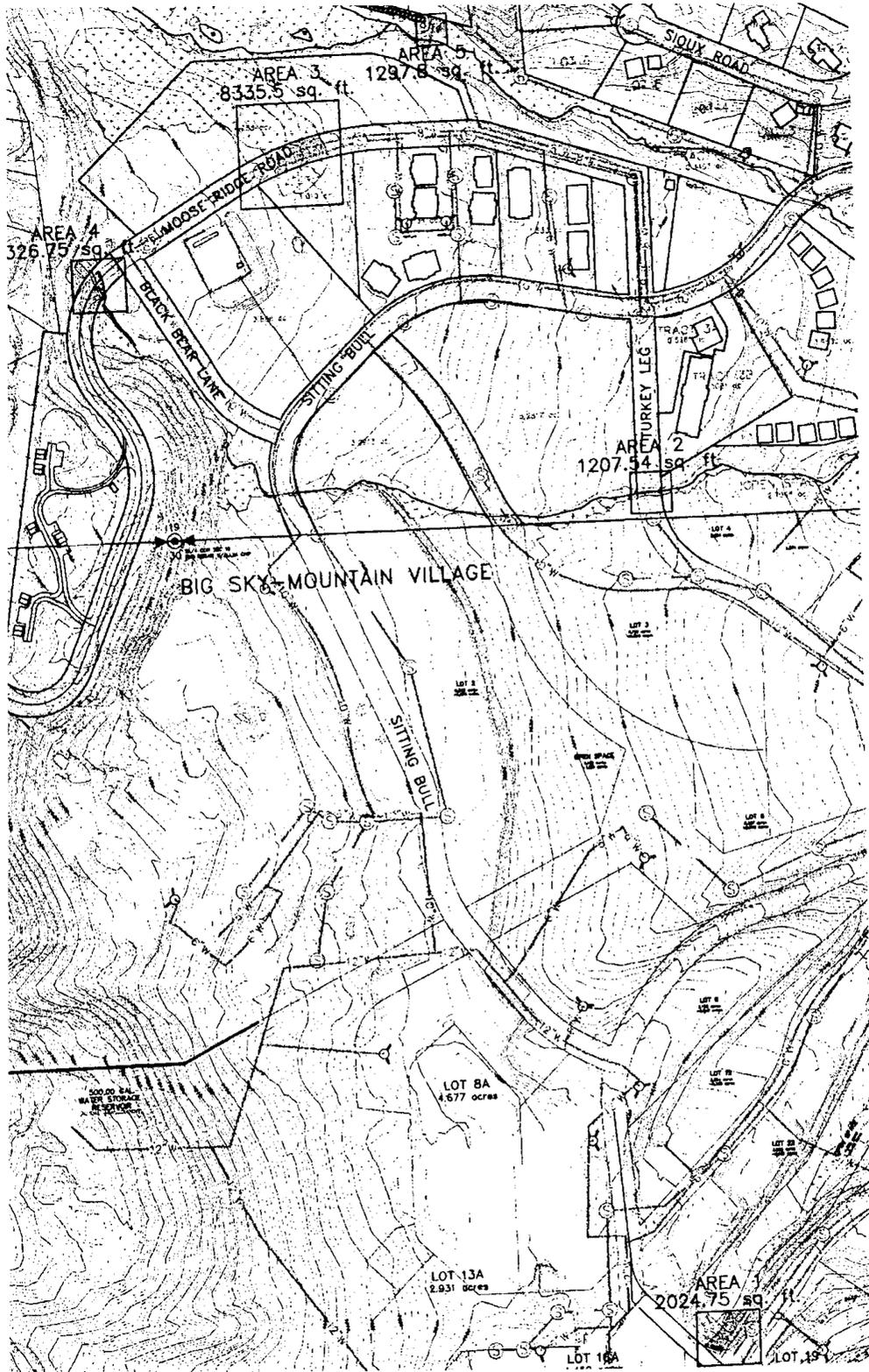
Street, Omaha, Nebraska 68102. Please direct all questions regarding this penalty to **Mr. Martin Keller at the above address or call (479) 855-3968.**

Public Hearing and Final Order

During the public interest review period, Boyne U.S.A. may request a hearing regarding the proposed penalties, either separately or together. Should a hearing be requested and scheduled, any party submitting comments on the proposed penalties will be afforded the opportunity to present material evidence at the hearing.

In the event that Boyne U.S.A. 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).



Location Map