



COMMONWEALTH of VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY

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Robert G. Burnley
Director

Gerard Seeley, Jr.
Piedmont Regional Director

**STATE WATER CONTROL BOARD ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
BOYD CORPORATION
FORMERLY KNOWN AS
ENCORE HOMES, LLC
VWP PERMIT NO. 97-0958**

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and Boyd Corporation, formerly known as Encore Homes, LLC for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.

5. “Order” means this document, also known as a Consent Special Order.
6. “Boyd Corp.” or the “Permittee” means Boyd Corporation, formerly known as Encore Homes, LLC, certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
7. “Project” means the construction of residential subdivision, which includes roads and infrastructure, known as Five Forks Village located in Chesterfield County, Virginia between Belmont Road and Newby’s Bridge Road.
8. “PRO” means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
9. “Permit” means Virginia Water Protection (VWP) Permit No. 97-0958.

SECTION C: Findings of Fact and Conclusions of Law

1. In June 1999, DEQ issued VWP Permit No. 97-0958 to Wachovia Bank, N.A. to address compensatory mitigation for the permanent impacts to wetlands that will result from the construction of a residential subdivision, Five Forks, in Chesterfield County. The Permit was modified in June 2000 to address a name change to Encore Homes, LLC, and to address additional impacts to wetlands due to a change in a Chesterfield County ordinance. A permit modification has been submitted to DEQ to address a name change to Boyd Corporation, a change in location of wetland impacts, and change in mitigation from creation of forested wetlands on site to the purchase of credits at a wetland mitigation bank. The Permit is due to expire on June 22, 2004.
2. The Permit allows impacts to 1.75 acres of wetlands; and requires the creation of a minimum of 1.4 acres of forested wetlands as compensatory mitigation. The application to modify the Permit is requesting to alter the current compensatory mitigation requirements from creation to the purchase of credits from a wetland mitigation bank.
3. On October 29, 2002, DEQ staff reviewed the file on the Five Forks Village subdivision. The file contained a letter received on November 1, 2002, from Boyd Corp. stating construction of Phase I of Five Forks Village South had begun on February 26, 2002.
4. On November 13, 2002, following the file review of the project, DEQ staff made a site inspection at the Five Forks Village subdivision.
5. The site inspection confirmed that construction was underway in Phase I of Five Forks Village South and DEQ staff observed that the Permittee had failed to flag non-impact wetlands within 50 ft. of any clearing, grading and/or filling activities as the Permit requires. The Permit, Part I.7, requires that the Permittee clearly

flag all non-impacted wetlands within 50 feet of any clearing, grading, and/or filling activities for the life of the construction activity within that area; and requires that the Permittee notify all contractors that these marked areas are wetlands where no excavation or filling is to occur.

6. The confirmation of construction on November 13, 2002, further confirmed that the Permittee had failed to notify DEQ in writing by certified mail at least 10 days prior to the initiation of construction of authorized activities as required by the Permit. The Permit, Part I.38, requires that the Permittee notify DEQ in writing by certified mail at least 10 days prior to the initiation of authorized activities. Construction was reported to have begun on February 26, 2002, and the Permittee failed to submit the 10-day notification letter. (The 10-day notification letter was received late on November 1, 2002.)
7. DEQ staff further reviewed the file and the file review revealed that the Permittee had failed to submit final Plans and Specifications (P&S) for activities authorized by this Permit *prior* to the start of construction. Part I.37 of the Permit requires that the Permittee submit the final plans and specifications for activities authorized by the Permit prior to the start of construction so that DEQ staff can verify that construction impacts to State waters do not exceed the authorized impacts. The final plans and specifications were due prior to the start of construction on February 26, 2002. (They were received late, on November 1, 2002.)
8. The file review revealed that the Permittee failed to submit proof of recordation to DEQ that a preservation instrument be established for the protection of compensatory mitigation areas within 90 days of final Plan approval, or prior to initiation of construction activities in State waters, whichever comes first. Part I.24 of the Permit requires that the Permittee submit the proof of recordation within 90 days of final plan approval or prior to initiation of construction activities in State waters, whichever occurs first. The Final mitigation plan was received in January 2000. The proof of recordation was due in April 2000. (The proof of recordation has not been received. The Permittee is requesting a permit modification to change the compensatory mitigation from creation of wetlands to the purchase of credits from a wetland mitigation bank. Once the permit has been modified requiring the purchase of credits as compensation for impacts to wetlands, the proof of recordation will no longer be required.)
9. A file review revealed that the Permittee failed to submit the annual construction monitoring report that was due on December 10, 2001. Part I.41 of the Permit requires that the Permittee submit by December 10 of each year an annual construction monitoring report to document progress of construction activities authorized by this permit, including representative photographs of pre-construction conditions.

10. On the November 13, 2002, inspection, the DEQ staff also checked the site for a current VPDES Storm Water Construction Permit. Staff had received a report of complaints of sediment washing downstream into Licking Creek from the construction site. Staff observed sediment washing downstream in State waters during that site visit. It was determined that the VPDES Storm Water Construction Permit issued for the project, had expired in June 1999 and the Permittee had failed to renew the permit. Ongoing construction necessitated the renewal of the permit. On April 15, 2003, VPDES Storm Water Construction Permit No. VAR102234 was issued to Boyd Corporation.
11. DEQ issued a Notice of Violation (NOV) to Boyd Corporation (formerly known as Encore Homes, LLC) on January 15, 2003, citing the Permit violations, as listed above.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Boyd Corp., and Boyd Corp. voluntarily agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders Boyd Corp., and Boyd Corp. voluntarily agrees to pay a civil charge of **\$8,800.00** within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note the Federal Identification Number for Boyd Corp. Payment shall be by check, certified check, money order, or cashiers check payable to "Treasurer of Virginia" and sent to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Boyd Corp., for good cause shown by Boyd Corp., or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including, but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; and/or (3) taking subsequent action to enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.

3. For purposes of this Order and subsequent actions with respect to this Order, Boyd Corp. admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
4. Boyd Corp. consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Boyd Corp. declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by Boyd Corp. to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Boyd Corp. shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Boyd Corp. shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Boyd Corp. shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility

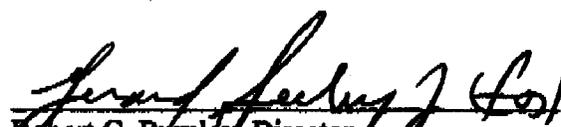
of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Boyd Corp. Notwithstanding the foregoing, Boyd Corp. agrees to be bound by any compliance date which precedes the effective date of this Order.
12. This Order shall continue in effect until:
 - a. Boyd Corp. petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order, or
 - b. The Director or Board terminates the Order in his or its sole discretion upon 30 days notice to Boyd Corp.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Boyd Corp. from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, Boyd Corp. voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of June 25, 2004.


Robert G. Burnley, Director
Department of Environmental Quality

Boyd Corp. voluntarily agrees to the issuance of this Order.

By:  _____ Pres.
Date: 4/5/04

Commonwealth of Virginia

City/County of Virginia Beach

The foregoing document was signed and acknowledged before me this 5th day of April, 2004, by David S. Rudiger, who is President of Boyd Corp., on behalf of Boyd Corp.
(name)
(title)

Stephan White
Notary Public

My commission expires: August 31, 2007

APPENDIX A

To
State Water Control Board Enforcement Action
Special Order by Consent
Issued to
Boyd Corporation
Formerly known as
Encore Homes, LLC
VWP Permit No. 97-0958

Boyd Corp shall pay the civil charge specified in the attached order.