COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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L. Preston Bryant, Jr
Secretary of Natural Resources

David K. Paylor
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Francis L. Daniel
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
AMERICAN TIMBERLAND COMPANY

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §62.1-44.15(8a) and §62.1-44.15(8d), between the State Water Control Board and American Timberland Company, for the purpose of resolving certain violations of environmental law and/or regulations.

SECTION B: Definitions

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

1. "ACOE" means the United States Army Corps of Engineers.

2. "American Timberland" means American Timberland Company, certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.

3. "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.

4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.

5. "Director" means the Director of the Department of Environmental Quality.

6. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

7. "Order" means this document, also known as a Consent Special Order.

8. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.

9. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter. 9 VAC 25-210-10.

10. "Property" means the 60.47 acre tract of land on Corinth Chapel Road (Route 667) in Suffolk, Virginia, owned by American Timberland.

11. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.

12. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. 9 VAC 25-210-10.

13. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.

14. "Va. Code" means the Code of Virginia (1950), as amended.

15. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. American Timberland owns a 60.47 acre tract of land in Suffolk, Virginia. The Property contains wetlands as determined by the ACOE and is considered part of Chapel Swamp located in Suffolk, Virginia.

2. On September 6, 2007, American Timberland submitted to the City of Suffolk ("City") a Minor Subdivision Application ("Application") to subdivide the Property into three lots ("Lot 1," "Lot 2," and "Lot 3"), of 8.20 acres, 11.10 acres, and 12.34 acres, respectively, and a Residue Lot of 28.83 acres. The plat accompanying the Application depicted the presence of wetlands on all four lots.

3. On October 17, 2007, following a site inspection, a representative of the City contacted DEQ about potential unauthorized wetland impacts on the Property.

4. DEQ staff conducted a site visit of the Property on October 22, 2007 and observed the following:

    a. Access roads to the Property from Corinth Chapel Road (Route 667) had been constructed on Lot 1, Lot 2 and Lot 3, each of which crossed areas depicted on the plat as wetlands.

    b. Woody debris, uprooted trees, detritus and soil had been piled adjacent to the access roads.

    c. Construction of the access roads resulted in vegetation removal, grading, soil compaction, and the restriction of hydrology.

    d. A culvert associated with a stream crossing under the access road to Lot 1 narrowed the channel and restricted the flow of an intermittent stream.

    e. With the exception of the culvert associated with the stream crossing under the access road to Lot 1, no other culverts, erosion and sedimentation controls, or stabilization measures were present. Erosion patterns were observed during the October 22, 2007 inspection.

5. Virginia Code §62.1-44.5.A states "Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life or to the uses of such waters for domestic or industrial consumption, or for recreation, of for other uses, or 4. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that

significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions."

6. Virginia Code §62.1-44.15:20.A states "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impoundment; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal, or aquatic life."

7. The Virginia Water Protection ("VWP") Program Regulation at 9 VAC 25-210-50 states "Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface waters, otherwise alter the physical, chemical, or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life; or the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions."

8. American Timberland did not obtain a permit to impact wetlands on the Property.

9. The placement of fill in state waters without a permit constituted the discharge of a pollutant that significantly altered wetlands functions.

10. American Timberland has violated VA Code §§ 62.1-44.5.A and 62.1-44.15:20.A and 9 VAC 25-210-50 by impacting approximately 1.63 acres of wetlands and 48 linear feet of stream. Impacts were determined by DEQ and ACOE field observations.

11. On October 31, 2007, DEQ issued Notice of Violation ("NOV") No. W2008-11-TRO-002 to American Timberland, advising them of the above listed facts and applicable statutory and regulatory citations.

12. On November 1, 2007, a representative of American Timberland contacted DEQ by telephone and stated that American Timberland would be submitting a permit application after-the-fact to impact wetlands on the Property.

13. DEQ forwarded to the ACOE a copy of the October 31, 2007, NOV. ACOE staff conducted a site visit of the Property on November 15, 2007. By letter dated

November 20, 2007, the ACOE confirmed to American Timberland the impacts to non-tidal, forested wetlands on the Property.

14. Based on the ACOE confirmation of November 20, 2007, the construction of the three access roads on the Property and the deposit of fill material adjacent to those access roads occurred, in whole or in part, in wetlands.

15. American Timberland submitted Joint Permit Application ("JPA") No. 07-2561 on November 29, 2007, to impact wetlands on the Property. DEQ responded to American Timberland by letter dated December 13, 2007 advising American Timberland that the JPA was incomplete in a number of respects and requesting the information required by the VWP Program Regulation for a JPA to be considered complete. By letter dated February 21, 2008, American Timberland provided some of the information requested in the December 13, 2007 DEQ letter. DEQ responded to American Timberland by letter dated March 20, 2008, requesting additional information needed for the JPA to be considered complete by DEQ. As of May 22, 2008, the JPA was still incomplete.

16. DEQ and ACOE staff met with American Timberland representatives at the Property on May 8, 2008. The American Timberland representatives stated that they would be submitting a revised JPA to modify the permanent wetland impacts to that necessary to access all four lots (i.e., a portion of the access road constructed on Lot 1 that connects to a road network constructed in uplands that accesses all four lots). American Timberland stated further that it will be submitting a plan to restore the wetlands impacted by the access roads constructed on Lots 2 and 3.

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 American Timberland, and **American Timberland agrees, to perform the actions described in Appendix A of this Order**. In addition, the Board orders American Timberland, and **American Timberland voluntarily agrees, to pay a civil charge of $16,380** within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note that it is being made pursuant to this Order and shall include American Timberland's Federal Identification Number. Payment shall be made by check payable to the "Treasurer of Virginia", delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of American Timberland, for good cause shown by American Timberland, or on its own motion after notice and opportunity to be heard.

2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to American Timberland by DEQ on October 31, 2007. 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; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, American Timberland admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. American Timberland 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. American Timberland 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 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 American Timberland 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. American Timberland 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.

American Timberland shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. American Timberland 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 American Timberland, its 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 American Timberland. Notwithstanding the foregoing, American Timberland agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to American Timberland. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve American Timberland 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, American Timberland voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of July 30, 2008.

Maria R Nold

~~Francis L. Daniel~~
Maria R Nold
Deputy Regional Director

American Timberland Company voluntarily agrees to the issuance of this Order.

By: Michelle V. Mich

Date: 5-29-08

Commonwealth of Virginia

City/County of Brunswick

The foregoing document was signed and acknowledged before me this 29 day of May, 2008, by Michelle V. Michler (name), who is Vice President of operations (title) of American Timberland Company on behalf of American Timberland

Robin B. Neal
Notary Public

My commission expires: 9/30/2011.

ROBIN B. NEAL
Notary Public
Commonwealth of Virginia
Reg. #7119593
My Commission Exps. Sept. 30, 2011

APPENDIX A
SCHEDULE OF COMPLIANCE

1. Within 30 days of the effective date of this order, American Timberland shall complete a wetland delineation of the entire Property. The delineation must be performed in accordance with the United States Army Corps of Engineers ("ACOE") Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report.

2. Within 5 working days of completing Item 1 of this Appendix A, American Timberland shall request a wetland confirmation from the ACOE and provide the confirmation results to DEQ within 5 days of receipt of the ACOE confirmation.

3. Within 60 days of receiving ACOE's delineation confirmation, American Timberland shall:

   a. Re-grade to the original contours of the land all soil and woody debris (including removal as needed to obtain original contours) located within delineated wetlands on the Property and that are piled alongside the three access roads constructed on Lot 1, Lot 2 and Lot 3. Submit a registration statement confirming completion of this work.

   b. Submit a revised Joint Permit Application (JPA) No. 07-2561 that American Timberland submitted on November 29, 2007 requesting authorization for any **proposed permanent impacts** to wetlands on the Property associated with retaining a portion of the access road constructed on Lot 1, and for any additional impacts to wetlands not yet taken. In order to complete the revised JPA, American Timberland shall provide all information requested by the DEQ letter dated March 20, 2008, which is attached hereto as Exhibit 1, and any other requests subsequent to the issuance of this Order necessary for the completion of the revised JPA.

   c. Submit to DEQ for review and approval a restoration plan and schedule that proposes to restore the previously disturbed wetlands and stream channel on the Property that are **not proposed for permanent impact** by the JPA, i.e., the access roads constructed on Lot 2 and Lot 3 and the portion of the access road constructed on Lot 1 not proposed to be retained. The restoration plan and schedule shall include, but not be limited to, those items listed in 9 VAC 25-210-80.B.1(k)(5). American Timberland shall implement the plan and schedule within 30 days of DEQ approval. The restoration plan and schedule submitted pursuant to this Appendix A Item 3.c shall become part of and enforceable under the terms of the VWP permit.

4. In the event American Timberland withdraws JPA No. 07-2561, the ACOE denies the permit, or DEQ either issues a notice to tentatively deny the VWP permit or determines that no VWP permit is required, American Timberland shall, within 60 days of such action, submit to DEQ for review and approval a restoration plan and schedule (or a revision of the restoration plan and schedule previously submitted pursuant to Item 3.c of this Appendix A) that proposes measures to restore **all** of the previously disturbed

wetlands and stream channel on the Property. The restoration plan and schedule shall include, but not be limited to, those items listed in 9 VAC 25-210-80.B.1(k)(5). American Timberland shall implement the plan and schedule within 30 days of DEQ approval. The restoration plan and schedule submitted pursuant to this Appendix A Item 4 shall become part of and enforceable under the terms of this Order as noted in subsection E.6 hereof.

5. American Timberland shall respond to any notices of deficiency regarding submittals to DEQ (required under either Item 3.b, Item 3.c, or Item 4 of this Appendix A) within 30 days of receipt of any such notices. Failure to correct deficiencies after the issuance of three notices of deficiency will be considered a violation of this Order as noted in subsection E.6 of this Order.

6. In the event American Timberland conveys the Property, or any portion thereof on which delineated wetlands are present, while this Order remains in effect, American Timberland shall include with the instrument of conveyance a notification that delineated wetlands are present on the parcel being conveyed and a mechanism for protecting those wetlands in perpetuity to include a statement that no activity may be performed in delineated wetlands without the prior approval of DEQ. Maintenance or corrective action taken pursuant to the restoration plan previously approved by DEQ under Item 3.c or Item 4 of this Appendix A, however, does not require further DEQ approval. The protective instrument shall be recorded in the chain of title to the property being conveyed. Proof of recordation shall be provided to DEQ within 30 days thereof.

7. Mail all submittals and reports required by this Appendix A to:

Francis L. Daniel, Regional Director
DEQ, Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462