COMMONWEALTH of VIRGINIA

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STATE WATER CONTROL BOARD
ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
ARTHUR J. FISHER, III

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 Arthur J. Fisher, III for the purpose of resolving certain alleged 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. "Act" means Va. Code § 62.1-44.15:20, Virginia Water Protection Permit.
2. "Mr. Fisher" means Arthur J. Fisher III.
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. "DCR-DNH" means Department of Conservation and Recreation, Division of Natural Heritage.
5. "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
6. "Director" means the Director of the Department of Environmental Quality.
7. "Drained" means human-induced activities such as ditching, excavation, installation of tile drains, and hydrologic modification by surface water runoff diversion, pumping water from wells, or similar activities such that the activities have the effect of artificially dewatering the wetland or altering its hydroperiod.
8. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
9. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

10. "Order" means this document, also known as a Special Order by Consent.
11. "Property" means 460 Mullins Lane, Stuart Draft VA24477 and contains a surface water of the commonwealth referred to as Quarles Pond and/or Green Pond; a wetland.
12. "Surface water" means all state waters that are not ground waters as defined in § 62.1-255 of the Code of Virginia
13. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed.
14. "USACE" means the United States Army Corps of Engineers.
15. "VWP permit" means an individual or general permit issued by the State Water Control Board under §62.1-44.15:20 of the Code of Virginia that authorizes activities otherwise unlawful under §62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.
16. "Wetland" 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.

SECTION C: Board's Findings of Fact and Conclusions of Law

The Board makes the following findings of fact and conclusions of law:

1. Mr. Fisher, a person pursuant to 9 VAC 25-210-10, is the owner of the Property.
2. The Property contains a surface water of the Commonwealth described by the DCR-DNH as being approximately two hectares (five acres) and believed by the DCR-DNH to be the largest intact Shenandoah Valley Sinkhole Pond in Virginia; commonly referred to as Quarles Pond and/or Green Pond; a wetland. *See*, May 10, 2006 correspondence from DCR-DNH.
3. On September 5, 2003, DEQ and USACE staff met with a representative of Mr. Fisher to discuss a proposed project at Quarles Pond. USACE staff ultimately concluded a federal permit was not required and so informed the representative. Based on a review of DEQ files, it appears DEQ staff informed the representative that a VWP Permit would be required prior to any construction activity being conducted on the Property that would impact Quarles Pond.
4. On February 21, 2006 and March 17, 2006, staff from the National Forest Service, while conducting survey work in the area of the Property, noticed excavation had taken place at Quarles Pond and on March 20, 2006 reported their observation to DEQ. Upon notice by DEQ staff to Mr. Fisher's representative, all excavation activity ceased immediately.
5. On March 24, 2006, staff from DEQ, USACE, and DCR-DNH met with Mr. Fisher's counsel at the Property to conduct an inspection based on the information received from the National Forest Service about unauthorized excavation that may have adversely impacted Quarles Pond.
6. The staff from these agencies observed that portions of Quarles Pond had been excavated and drained. According to DCR-DNH, historical studies conducted in the 1980's showed a rare plant known as Torrey's Bulrush and specimens of five rare dragonflies had been collected at Quarles Pond. Such studies also reported that Quarles Pond supported two

rare natural community types: (1) a semi-aquatic herbaceous community dominated by spatterdock and pondweeds, and (2) a semi-permanently flooded shrub-land dominated by button bush and three-way hedge. *See*, May 10, 2006 correspondence from DCR-DNH. However, no current studies exist to confirm that these community types were present at the time the impacts occurred.

7. Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50 state that except in compliance with a VWP permit, no person shall excavate or discharge a pollutant in to a surface or otherwise alter the physical, chemical, or biological properties of surface waters and make them detrimental to public health or to animal and aquatic life.
8. Mr. Fisher did not have a VWP permit for the excavation activity on the Property as required by Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.
9. On May 22, 2006, DEQ issued a Notice of Violation (W2006-06-04-VRO-001) to Mr. Fisher citing the unpermitted draining and excavation activity that had been previously observed and that was later noted by DEQ during the March 24, 2006 inspection.
10. On June 19, 2006, DEQ and DCR-DNH met with Williamsburg Environmental Group (WEG), a consultant hired by Mr. Fisher, and other representatives of Mr. Fisher to discuss resolution of the violations alleged by DEQ and the restoration of Quarles Pond to the extent practicable.
11. WEG thereafter began collecting data to assist in the preparation of a Conceptual Corrective Action Plan (CAP). Mr. Fisher, his consultants, and his counsel cooperated and worked closely with DEQ to develop the CAP, with the acknowledgement and understanding of the parties that restoration of all wetland functions may not be possible due to the uniqueness of Quarles Pond. A Conceptual CAP was submitted to DEQ on September 5, 2006.
12. Negotiations regarding restoration efforts continued to make progress as more data was collected in order to ensure an equitable restoration of the wetland functions at Quarles Pond. On September 4, 2008, DEQ staff met with WEG staff at Quarles Pond and observed that there had been significant natural regeneration of the plant communities within and around the fringe of Quarles Pond.
13. On December 1, 2008, WEG, after collecting additional hydrologic and ecological site data, submitted a revised CAP to DEQ for restoring the wetlands acreage and function at Quarles Pond. Subsequent revisions to the revised CAP were made at the request of DEQ, and a Final CAP, entitled *Wetland Restoration Plan – Quarles Pond* (revised February 6, 2009), was submitted to and approved by DEQ.
14. Mr. Fisher's unauthorized excavation impacting approximately five acres of wetlands resulted in a violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code §10.1-1455(F), orders Mr. Fisher to perform, and Mr. Fisher voluntarily agrees to perform, the actions described in Appendix A of this Order. In addition, Mr. Fisher voluntarily agrees to pay a civil charge of $145,000 in settlement of the violations alleged by DEQ in this Order, to be paid as follows:

1. Mr. Fisher shall pay $145,000 of the civil charge within 30 days of the effective date of this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and 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 Mr. Fisher or for good cause shown by Mr. Fisher, or on its motion pursuant to the Administrative Process Act after notice and opportunity to be heard.

2. This Order only addresses and resolves those violations specifically alleged herein, including those matters addressed in the Notice of Violations issued to Mr. Fisher by DEQ on May 22, 2006. 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; or (2) taking subsequent action to enforce the Order, including any remedial action required if the performance criteria set forth in the Final CAP are not achieved. 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, Mr. Fisher admits the jurisdictional allegations, but neither admits nor denies the findings of fact and conclusions of law in this Order..

4. Mr. Fisher 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. Mr. Fisher declares he 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 he 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 Mr. Fisher 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

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. Mr. Fisher shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible or impracticable by earthquake, flood, other acts of God, war, strike, or such other occurrence. Mr. Fisher shall show that such circumstances were beyond his control and not due to a lack of good faith or diligence on his part. Mr. Fisher shall notify the DEQ Director of Enforcement verbally within 24 hours and in writing within three business days 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 is expected to be achieved.

   Failure to so notify the Regional Director verbally within 24 hours and in writing within three (3) business days that compliance has been delayed or has been made impossible or impracticable by any condition above which Mr. Fisher intends to assert to delay or excuse 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 Mr. Fisher.

11. This Order shall continue in effect until

(a) Mr. Fisher petitions the Director or his designee to terminate after he has completed all requirements of the Order and the Director or his designee confirms that all provisions of this Order have been met; or

(b) the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Mr. Fisher.

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

12. Any plans, reports, schedules or specifications attached hereto or submitted by Mr. Fisher and approved by the Department pursuant to this Order are incorporated into this Order. Any noncompliance with such approved documents shall be considered a violation of this Order.

13. By his signature below, Mr. Fisher voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 27th day of April 2009.

Melanie D. Davenport

Melanie D. Davenport, Director of Enforcement
Department of Environmental Quality

Mr. Fisher voluntarily agrees to the issuance of this Order.

City/County of Staunton
Commonwealth of Virginia
The foregoing instrument was acknowledged before me
this 10th day of February 2009
by [illegible] #108280
Notary Signature
My commission expires: April 30th 2009

By: [illegible]
Arthur J. Fisher, III

Date: 2-10-09

Commonwealth of Virginia

City/County of _____

The foregoing document was signed and acknowledged before me this _____ day of

_____, 2009, by _____,
(name)

_____
Notary Public

My commission expires: _____.

APPENDIX A

1. Mr. Fisher shall implement the approved Final Corrective Action Plan (Final CAP), entitled *Wetland Restoration Plan – Quarles Pond* (revised February 6, 2009), in accordance with the schedule contained therein. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ.

2. Mr. Fisher shall monitor the restored wetlands and submit monitoring reports, all in accordance with requirements for the same set forth in the Final CAP.

    a. If the performance criteria specified in the Final CAP are not achieved at the end of the applicable monitoring period, then Mr. Fisher shall so advise DEQ in the annual monitoring report for that monitoring period and shall describe why it appears the criteria could not be achieved. If DEQ thereafter so directs, Mr. Fisher shall submit to DEQ for review and approval an alternative CAP within 90 days of DEQ's letter requiring the same. The DEQ-approved alternative CAP shall then be implemented by Mr. Fisher in accordance with the schedule set forth in the alternative CAP.
    b. If the performance criteria specified in the Final CAP or any alternative CAP are not achieved by the end of the last monitoring year and DEQ thereafter determines that additional corrective action cannot sufficiently address the reasons for such failure, then Mr. Fisher shall submit to DEQ for review and approval, within 90 days of such determination, an alternate CAP and schedule to address the performance criteria in the Final CAP or, as applicable, any previously submitted alternate CAP that have not been met.

3. Unless otherwise indicated, all submittal requirements of Appendix A of this Order shall be directed to:

    Dave Davis, Director
    Office of Wetlands & Water Protection
    PO Box 1105
    Richmond VA 23218
    E-mail: DLDavis@DEQ.Virginia.Gov