



# *COMMONWEALTH of VIRGINIA*

*DEPARTMENT OF ENVIRONMENTAL QUALITY*

VALLEY REGIONAL OFFICE

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L. Preston Bryant, Jr.  
Secretary of Natural Resources

David K. Paylor  
Director

Amy Thatcher Owens  
Valley Regional Director

**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
MR. WARREN E. BEERY  
FOR  
DRY RIVER IMPACTS  
Unpermitted Activity**

**SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Mr. Warren E. Beery, regarding the Dry River Impacts, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

**SECTION B: Definitions**

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

1. "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.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

3. "DGIF" means the Department of Game and Inland Fisheries.
4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
6. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
7. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
8. "Mr. Beery" means Mr. Warren E. Beery, currently a resident of Rockingham County, Virginia. Mr. Beery is a "person" within the meaning of Va. Code § 62.1-44.3. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
12. "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.
13. "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." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

14. "Property" or "Site" means the tract of land bounding approximately 0.63 miles (3,326 linear feet) of Dry River, from the Route 752/Route 737 bridge to the confluence with Muddy Creek located near the Town of Dayton in Rockingham County, Virginia.
15. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
16. "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. Stream restoration means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.
17. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.14:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
18. "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. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
19. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
20. "USACE" means the United States Army Corps of Engineers.
21. "Va. Code" means the Code of Virginia (1950), as amended.
22. "VAC" means the Virginia Administrative Code.
23. "VRO" means the Valley Regional Office of DEQ, located in Harrisonburg, Virginia.
24. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

### **SECTION C: Findings of Fact and Conclusions of Law**

1. Mr. Beery is a land owner along the Site and represents several other landowners along Dry River, a surface water, that have experienced a past history of flooding problems.

2. Mr. Beery had inquired with the USACE about obtaining a Permit in 2004 and 2006 to perform excavation of Dry River to deepen and stabilize the stream channel to prevent flooding during high water events. On both occasions, the USACE and DGIF met with Mr. Beery to discuss his concerns. Both USACE and DGIF advised him that they would work with him to issue a Permit to perform some excavation of Dry River. Mr. Beery agreed to provide more details on the proposed scope of excavation, including marking the sections of Dry River that he wanted to excavate.
3. In both 2004 and 2006, Mr. Beery contacted his legislative representatives in an attempt to expedite approval of a Permit. DEQ responded to these legislators' inquiries and indicated that State and Federal laws did not allow DEQ to issue a Permit for the work Mr. Beery described. DEQ also indicated that once more details on the proposed scope of work were provided; DEQ would work closely with Mr. Beery to see what else may be required. After this communication, DEQ did not receive a permit application or further communication from Mr. Beery.
4. On May 7, 2009, DEQ received a report of potential unauthorized excavation that occurred at the Site.
5. On May 12, 2009, Department staff and USACE investigated the report and met with Mr. Beery. During the site inspections, the following was observed:
  - a. Approximately 0.63 miles (3,326 linear feet) of Dry River, from the Route 752/Route 737 bridge to the confluence with Muddy Creek, had been physically altered by being channelized and widened; and
  - b. Accumulated fine sediment and cobble had been pushed against the river banks;
  - c. The construction activity spanned through several adjacent properties, however Mr. Beery indicated that he did the work.
6. Va. Code § 62.1-44.15:20 states that except in compliance with a VWP permit, it is unlawful to alter the physical, chemical, or biological properties of state waters.
7. The Regulations at 9 VAC 25-210-50 A. states that except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to public health. Mr. Beery does not have a Permit for the above activities.
8. On May 27, 2009, DEQ issued NOV No. NOV-09-05-VRO-001 for the violations cited in (C6) and (C7) above.
9. On June 19, 2009, Department staff met with Mr. Beery and his representatives to discuss the violations in the NOV and a Corrective Action Plan ("CAP") that would address restoration of the Site. DEQ requested Mr. Beery submit a plan and schedule of corrective actions to address the apparent outstanding violations.

10. On September 15, 2009, DEQ staff met with representatives of Mr. Beery who presented a proposed CAP for stabilizing and restoring the bed and banks of Dry River to preexisting conditions. DEQ requested additional information to address certain questions regarding the CAP.
11. DEQ did not receive an updated CAP for review and approval.
12. On April 15, 2010, DEQ staff and USACE, VMRC and VDGIF met with Mr. Beery to observe an altered portion of Dry River to determine what if any changes in the stream course or character had taken place since the May 7, 2009 complaint investigation and to discuss restoration. During the April 15, 2010 meeting, Mr. Beery presented documents for review that were represented as showing he had a "King's Grant" authority to conduct the alterations of the Site.
13. The "King's Grant" documents were incomplete, preventing a determination as to the validity of a claim of "King's Grant".
14. On November 7 and November 17, 2011, DEQ staff conducted site visits/inspection of the Site to determine what, if any, changes had taken place since the last inspection of April 15, 2010 and examine what restoration may be necessary. DEQ staff noted that the high cobble piles in the lower section of the Dry River, that were created during the excavation, had undergone considerable erosion, resulting in a discharge of sediment, a pollutant downstream, with little remaining of those original cobble piles.
15. The unpermitted excavation of the Dry River without a Permit is a violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.
16. Based on the results of May 12, 2009, April 15, 2010, November 7 and 17, 2011 inspections, the June 19, 2009 meeting, and the file review, the Board concludes that Mr. Beery has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraphs above.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Warren E. Beery, and Warren E. Beery agrees to:

1. Immediately cease impacts to state waters and shall not resume such impacts unless authorization from DEQ is granted via a Permit; and
2. Pay a civil charge of \$8,036 within 30 days of the effective date of the Order in settlement of the violations cited in 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

Warren E. Beery shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF).

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Mr. Beery for good cause shown by Mr. Beery, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. 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; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Mr. Beery admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Mr. Beery consents to venue in the Circuit Court of Rockingham County for any civil action taken to enforce the terms of this Order.
5. Mr. Beery declares he has received fair and due process under the Administrative Process Act 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 modify, rewrite, amend, or enforce this Order.
6. Failure by Mr. Beery 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. Mr. Beery 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 unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Mr. Beery shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Mr. Beery shall notify the DEQ Regional Director 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 will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, 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 and any 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. Beery. Nevertheless, Mr. Beery agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after Mr. Beery has completed all of the requirements of the Order;
  - b. Mr. Beery 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
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Mr. Beery.

Mr. Warren E. Beery voluntarily agrees to the issuance of this Order.

Date: 3-15-2012 By: Warren Beery  
(Person)  
Mr. Warren E. Beery

Commonwealth of Virginia  
City/County of Rockingham

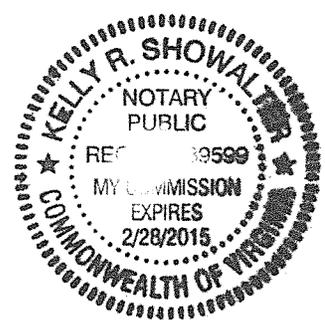
The foregoing document was signed and acknowledged before me this 15 day of  
MARCH, 2012, by WARREN E BEERY.

Kelly Showalter  
Notary Public

# 7139599  
Registration No.

My commission expires: 2/28/2015

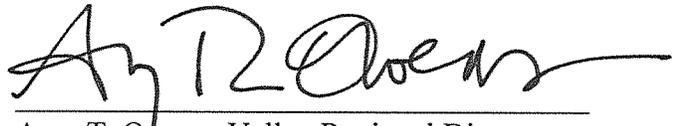
Notary seal:



Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Mr. Beery from its 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. Beery and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. Any documents to be submitted pursuant to this Order shall be submitted by Mr. Beery or an authorized representative of Mr. Beery.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Warren E. Beery voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 25<sup>th</sup> day of June, 2012.



Amy T. Owens, Valley Regional Director  
Department of Environmental Quality

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