



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

NORTHERN REGIONAL OFFICE

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Douglas W. Domenech  
Secretary of Natural Resources

David K. Paylor  
Director

### STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO E&A CALL, INC. FOR THE MANCHESTER SUBDIVISION

#### **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 E&A Call, Inc., regarding Manchester Subdivision 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. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "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.
5. "E&A Call" means E&A Call, Inc., a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries, E&A Call is a "person" within the meaning of Va. Code §62.1-44.3.
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. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "NRO" means the Northern Regional office of DEQ, located in Woodbridge, Virginia.
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" means the Manchester Subdivision located west of Chapel Road and north of Holly Grove Drive, in Louisa County, Virginia, owned by Mr. Call.
15. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
16. "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.
17. "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.
18. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
19. "USACE" means the United States Army Corps of Engineers.
20. "Va. Code" means the Code of Virginia (1950), as amended.
21. "VAC" means the Virginia Administrative Code.
22. "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. On January 25, 2010, DEQ Staff received a report of potential unauthorized clearing and filling of surface waters at the Property.
2. On January 28, 2010, and March 9, 2010, a DEQ VWPP Compliance Inspector inspected the Property for compliance with the requirements of the State Water Control Law and the Regulations. The DEQ VWPP Compliance Inspector observed that new activities had significantly altered and degraded approximately 0.70 acres of Palustrine Forested Wetlands (PFO) and 567 linear feet of stream due to the discharge of fill material, a pollutant, as a result of clearing and grubbing, grading, and piping at seven locations connected to or within the Property.

3. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit the discharge of any pollutant into or adjacent to surface waters and prohibits the significant alteration or degradation of existing wetland acreage and function without a Permit issued by the Director. E&A Call did not have a Permit for the above activities.
4. On March 29, 2010, DEQ issued NOV No. W2010-03-N-001 for the violation of Va. Code §62.1-44.15:20 and 9 VAC 25-210-50.
5. DEQ VWPP Compliance Inspector and a representative from the USACE conducted an additional site visit on June 16, 2010, to confirm the nature and refine the extent of the unauthorized impacts at the Property. During this site visit, USACE and DEQ staff concluded that impacts were less than the earlier estimate. This estimate was confirmed by a survey conducted by E&A Call's consultant, and therefore the estimated impacts have been reduced to approximately 0.14 acre of PFO and 528 linear feet of stream.
6. Based on the results of January 28, 2010, March 9, 2010, May, 25, 2010, and the June 16, 2010, inspections, the Board concludes that E&A Call has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.A as described in paragraphs C3 through C7 above.
7. In order for E&A Call to return to compliance, DEQ staff and E&A Call have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

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

E&A Call and DEQ agree that a civil charge was assessed, however, an ability to pay analysis performed by DEQ supports a finding that E&A Call cannot afford to pay the assessed civil charge.

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders E&A Call, and E&A Call agrees to perform the actions described in Appendix A of this Order.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of E&A Call for good cause shown by E&A Call, 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, E&A Call admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. E&A Call 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. E&A Call declares it has received fair and due process under the Administrative Process Act 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 modify, rewrite, amend, or enforce this Order.
6. Failure by E&A Call 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. E&A Call 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. E&A Call demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. E&A Call 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 intent 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 E&A Call. Nevertheless, E&A Call 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 E&A Call has completed all of the requirements of the Order;
  - b. E&A Call 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 E&A Call.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve E&A Call 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 E&A Call 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. The undersigned representative of E&A Call certifies that he or she is a responsible officer authorized to enter into the terms and conditions of this Order and to execute and legally bind E&A Call to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of E&A Call.
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, E&A Call voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 5<sup>th</sup> day of April, 2012.

Thomas A. Faha

Thomas A. Faha Regional Director  
Department of Environmental Quality

E&A Call, Inc. voluntarily agrees to the issuance of this Order.

Date: Jan 31 2012 By: [Signature], Pres  
(Person) (Title)  
E&A Call, Inc.

Commonwealth of Virginia

City/County of Henrico

The foregoing document was signed and acknowledged before me this 31<sup>st</sup> day of January, 2012, by Ethan Allen Call who is President of E&A Call, Inc. on behalf of the corporation.

Frances W Moran

Notary Public

145012

Registration No.

My commission expires: 5/31/12

Notary seal:



## APPENDIX A SCHEDULE OF COMPLIANCE

E&A Call, Inc. shall:

1. Immediately cease any activities that impact surface waters that require authorization from the VWP Permit Program and shall not resume such impacts unless authorization from DEQ is granted via a Permit.
2. Provide compensation for unauthorized impacts to approximately 0.14 acre of palustrine forested wetland by purchasing 0.28 credit from a DEQ approved wetland mitigation bank located within the same U.S. Geologic Survey Hydrologic Unit Code (HUC) as the project site or an adjacent HUC located within the South Anna River watershed and authorized through a mitigation banking instrument to sell compensation credits to this project, or from the Virginia Aquatic Resources Trust Fund. Proof of said purchase shall be submitted to DEQ within 30 days of the execution of this Order.
3. Provide compensation for unauthorized impacts to approximately 528 linear feet of stream channel by completing the following:
  - a. The purchase of 57 stream credits from a DEQ approved stream mitigation bank located within the same HUC as the project site or an adjacent HUC located within the South Anna River watershed and authorized through a mitigation banking instrument to sell compensation credits to this project, or from the Virginia Aquatic Resources Trust Fund. Proof of said purchase shall be submitted to DEQ within 30 days of the execution of this Order.
  - b. The off-site preservation of 2,970 linear feet of stream channel with 25.5 acres of associated riparian buffer, equivalent to 505 stream credits, in accordance with the "Stream & Buffer Preservation Map – Call Property" dated February 21, 2011, received March 11, 2011 and approved March 18, 2011 and the draft Declarations of Restrictions received March 22, 2011. Proof of recordation shall be submitted to DEQ within 30 days of the execution of this Order.
  - c. The removal and restoration of Impact PR5 in accordance with the "Proposed Culvert Removal and Stream Stabilization Plan, Manchester Subdivision" dated March 23, 2011 and revised and received on April 5, 2011. Removal activities shall be initiated within 30 days of the execution of this Order.
4. If the compensatory mitigation is not implemented in accordance with the applicable schedule, then E&A Call, Inc. shall so advise DEQ. If DEQ thereafter so directs, E&A Call, Inc. shall submit to DEQ for review and approval an alternative Compensatory Mitigation Plan within 60 days of DEQ's letter requiring the same. The DEQ-approved alternative Plan shall then be implemented by E&A Call, Inc. in accordance with the schedule set forth in the alternative Plan.

5. Unless otherwise specified in this Order, E&A Call, Inc. shall submit all requirements of Appendix A of this Order to:

Department of Environmental Quality  
Northern Regional Office  
Attn: Enforcement  
13901 Crown Court  
Woodbridge, VA 22193