COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
West Central Regional Office
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L. Preston Bryant, Jr
Secretary of Natural Resources

David K. Paylor
Director

Steven A. Dietrich
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
MR. LEWIS KENNETT

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d) by the Board to Mr. Lewis Kennett, 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. "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 §§ 62.1-44.7 and 10.1-1184.

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

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

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

6. "Mr. Kennett" means Mr. Lewis Kennett, individual, and the owner of the property located at 786 Paradise Acres Drive, Franklin County, Virginia and identified as tax parcel 0170004800.

7. "Corps" means the U. S. Army Corps of Engineers.

8. "DCR" means the Virginia Department of Conservation and Recreation, a state agency organized under the Secretary of Natural Resources.

9. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia.

10. "Regulation" means the Virginia Water Protection Permit Program Regulation, 9 VAC 25-210-10 *et seq.*

11. "VWP Permit" means a permit issued under the Regulation for wetlands or perennial stream impacts.

12. "Site" means the impoundment and impoundment structure installed on a portion of the property located at 786 Paradise Acres Drive, tax parcel 0170004800. This parcel is owned by Mr. Lewis Kennett and is located in Franklin County, Virginia. The Site contains a perennial stream identified as an un-named tributary of Gills Creek.

SECTION C: Findings of Fact and Conclusions of Law

1. On January 17, 2007, an inspection was conducted by Department compliance staff, Leslie Mozingo, County Planner for Franklin County, Erick Moore, Planning and Zoning Inspector for Franklin County, Thom Leedom, U.S. Army Corps of Engineers, and Tom Roberts P.E. of the Virginia Department of Conservation and Recreation (DCR). Mr. Kennett, property owner was present during the inspection. The purpose of the inspection was to inspect an impoundment structure and associated pond.

2. It was observed that the impoundment structure and pond had been installed on a portion of the property located at 786 Paradise Acres Drive, tax parcel 0170004800. The impounded stream appeared to be a perennial stream identified as an un-named tributary of Gills Creek.

3. During the inspection, Mr. Kennett made the following statements:

    - The impoundment structure was built in April 2003.
    - The impoundment structure is constructed of earthen material obtained on-site.
    - The drainage area of the pond is approximately 900 acres.
    - Minnows were present in the stream at the location of the impoundment structure prior to initiating construction.

4. DCR staff estimated the impoundment structure has a slope, in certain locations, of 45% (1:1).

5. Franklin County staff estimated the surface area of the pond to be seven acres.

6. Code § 62.1-44.5.A states that:
   "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, or for other uses; or 4. On and after October 1, 2001, conduct the following activities 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 function"

7. A review of Department records indicates that Mr. Kennett was not issued a permit for the impoundment or the impoundment structure at the Site.

8. On January 23, 2007, the Department issued Warning Letter WL-07-01-WCRO-002 to Mr. Kennett for the violations listed above. The Warning Letter documented the observations of the January 17, 2007 inspection and requested that a Joint Permit Application ("JPA") for the impacts associated with the impoundment and construction of the impoundment structure be submitted by February 23, 2007.

9. On February 23, 2007, Mr. Kennett submitted a letter to the Department. In the letter, Mr. Kennett stated that he had contracted with Environmental Consultants, Inc. to prepare a number of work products for the project. Mr. Kennett stated that the JPA would be provided to the Department by May 31, 2007. The Department did not receive the JPA.

10. On July 2, 2007, the Department issued Notice of Violation W2007-07-W-002 to Mr. Kennett for impounding state waters without a permit at the Site without a VWP permit in violation of Code § 62.1-44.5.

11. On July 11, 2007, Mr. Kennett responded to the Notice of Violation and scheduled a meeting with Department staff and his consultants for July 17, 2007.

12. On July 17, 2007, Department staff met with Mr. Kennett and his consultants. Information regarding the impoundment was submitted to the Department and a discussion of Mr. Kennett's options was discussed. Mr. Kennett was given until July 31, 2007 to provide the Department with his course of action.

13. On July 30, 2007, Jared A. Webb of Earth Environmental Consultants, Inc. contacted the Department on behalf of Mr. Kennett. Mr. Webb indicated that Mr. Kennett had chosen to remove the impoundment structure after draining the pond. Mr. Webb estimated that the process would take several months to complete. Mr. Webb followed up with a letter on July 31, 2007 reaffirming the conversation and choice of action.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it pursuant to Va. Code §62.1-44.15(8a) and (8d), the Board orders MR. KENNETT and MR. KENNETT agrees, to perform the actions described below and in Appendix A of this Order. In addition, the Board orders MR. KENNETT, and MR. KENNETT voluntarily agrees, to pay a civil charge of One Thousand Eight Hundred Twenty Dollars

($1,820.00) within 30 days of the effective date of this Order in settlement of the violations cited in this Order. Payment shall be by check, certified check, money order, or cashier's check payable to "Treasurer of Virginia" and sent to:

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

The payment shall include MR. KENNETT's Federal Identification Number and shall state that it is being tendered in payment of the civil charges assessed under this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of MR. KENNETT, for good cause shown by MR. KENNETT, 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: (a) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (b) seeking subsequent remediation of the Site as may be authorized by law; or (c) taking subsequent action to enforce this 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, MR KENNETT admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. MR. KENNETT 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. KENNETT declares that 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, Va. Code § 62.1-44.2 *et seq.* and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and agrees to waive any objection to, or appeal from, the entry of this Order. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or judicial review of, any action taken by the Board to enforce this Order.

6. Failure by MR. KENNETT 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. KENNETT 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. MR. KENNETT shall show that such circumstances were beyond his control and not due to a lack of good faith or diligence on his part. MR. KENNETT shall notify the WCRO 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 this 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 WCRO Regional Director within twenty-four hours of learning of any condition above, which MR. KENNETT intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of 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. KENNETT. Notwithstanding the foregoing, MR. KENNETT agrees to be bound by any compliance date in Appendix A of this Order that precedes the effective date of this Order.

11. Any plans, reports, schedules or specifications attached hereto or submitted by MR. KENNETT 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.

12. This Order shall continue in effect until: a) MR. KENNETT petitions the Director or his designee to terminate the Order after he has completed all of the requirements of the Order and the Director or his designee approves the termination of this Order, b) the Director or Board terminates the Order in his or its sole discretion upon 30 days notice to MR. KENNETT, whichever occurs earlier. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve MR. KENNETT from his obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

13. MR. KENNETT certifies that he or she is authorized to enter into the terms and conditions of this Order and to execute and legally bind himself to this document. Any documents to be submitted pursuant to this Order shall also be submitted by MR. KENNETT or an individual

authorized by MR. KENNETT.

14. By his signature below, MR. KENNETT voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 7th day of DECEMBER, 2007.

Steven A. Dietrich

Steven A. Dietrich, Regional Director
West Central Regional Office
Department of Environmental Quality

MR. LEWIS KENNETT voluntarily agrees to the issuance of this Order.

Mr. Lewis Kennett

Commonwealth of Virginia

City/County of Roanoke

The foregoing document was signed and acknowledged before me this 2nd day of October, 2007, by Mr. Lewis Kennett.

Cathy D. Kibler

Notary Public

My commission expires: 8/31/09

CATHY D. KIBLER
NOTARY PUBLIC
REG. #361784
MY COMMISSION EXPIRES 8/31/2009
COMMONWEALTH OF VIRGINIA

APPENDIX A
SCHEDULE OF COMPLIANCE

1. Except in compliance with a VWP individual or general permit issued in accordance with the Code of Virginia, § 62.1-44.15.20, MR. KENNETT shall not dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, excavate in wetlands, or conduct the following activities 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; d) new activities that cause significant alteration or degradation of existing wetland acreage or functions.

2. Not later than October 31, 2007, MR. KENNETT shall submit to DCR for review and approval, with a copy to the Department, a plan for draining the impoundment and removing the impoundment structure located at the Site. The plan shall be developed to minimize impacts to downstream water quality and shall conform to DCR's "Virginia Impounding Structures Regulation (Dam Safety)" 4 VAC 50-20 et seq., including but not limited to 4 VAC 50-20-80 "Alterations Permits. The plan shall contain information listed in DCRs "Design Report for the Construction/Alternation of Impounding Structures" (copy attached) and shall be acceptable to DCR. MR. KENNETT shall provide a copy of DCR's written approval of dam alterations to the Department within 14 days of receiving the written approval from DCR.

3. Not later than December 1, 2007, MR. KENNETT shall submit to the Department for review and approval a plan for the stabilization of the impacted stream and adjacent upland areas to prevent sediment discharges to and erosion of the impacted stream. Stabilization may include installation and maintenance of perimeter erosion and sediment controls until the Site is stable, restoration of the stream and stream bank to its original contours, re-vegetation of disturbed and bare soil with appropriate temporary and permanent vegetation, or other appropriate stabilization measures.

4. Not later than December 1, 2007, MR. KENNETT shall submit to Franklin County for review and approval an Erosion and Sediment Control Plan.

5. Within 90 days of the later of either DCR issuance of the "Alterations Permit" as described in Paragraph 2 above or DEQ approval of the plan required under Paragraph 3 above or approval of the Erosion and Sediment Control plan described in Paragraph 4 above, MR. KENNETT shall have drained the impoundment, removed the impoundment structure, and restored the impacted stream to its natural conditions.

6. MR. KENNETT shall respond to any written comments from DEQ regarding plans submitted under Paragraphs 2 and 3 above within 20 days of receipt of such comments.

7. Documents to be submitted to the Department, other than the civil charge payment described in Section D of the Order, shall be sent to:

Jerry Ford, Jr., Enforcement Specialist-Senior
Department of Environmental Quality
West Central Regional Office
3019 Peters Creek Road
Roanoke, VA 24019