



ORIGINAL
ORDER

EA # VR41-1109

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
VALLEY REGIONAL OFFICE

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO KERR'S CREEK, LLC FOR KERR'S CREEK, STP VPDES Permit No. VA0088960

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 the Kerr's Creek, LLC, regarding the Facility, for the purpose of resolving certain violations of the State Water Control Law and the Permit and the Regulation.

SECTION B: Definitions

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

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
2. "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.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

5. "Discharge" means discharge of a pollutant. 9 VAC 25-31-10
6. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
 - a. Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
 - b. Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
7. "DMR" means Discharge Monitoring Report.
8. "Facility" or "Plant" means the Kerr's Creek Sewage Treatment Plant owned and operated by Kerr's Creek, LLC which is located 0.2 mile northwest of the intersection of State Routes 850 and 635, in Rockbridge County, Virginia, which treats and discharges treated sewage for residential users.
9. "Kerr's Creek" means the Kerr's Creek, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. Kerr's Creek is a "person" within the meaning of Va. Code § 62.1-44.3.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "O&M" means operations and maintenance.
12. "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.
13. "Permit" means VPDES Permit No. VA0088960, which was issued under the State Water Control Law and the Regulation to Kerr's Creek on August 10, 2006 and which expired on July 31, 2011.
14. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.
15. "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 (a) harmful

or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) 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; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.

16. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
17. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
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.
19. "STP" means sewage treatment plant.
20. "Va. Code" means the Code of Virginia (1950), as amended.
21. "VAC" means the Virginia Administrative Code.
22. "VPDES" means the Virginia Pollutant Discharge Elimination System.
23. "VRO" means the Valley Regional Office of DEQ, located in Harrisonburg, Virginia.

SECTION C: The Board's Findings of Facts and Conclusions of Law

1. Kerr's Creek owns and operates the Facility, which serves the site of a mobile home park that presently has one active connection in Rockbridge County, Virginia. The Permit authorizes Kerr's Creek to discharge treated wastewater from the Facility to Linkswiler Branch from Outfall 001 or Kerrs Creek from Outfall 002, in strict compliance with the terms and conditions of the Permit.
2. Linkswiler Branch and Kerrs Creek are located in the James (Upper) River Basin. Linkswiler Branch and Kerrs Creek are not listed in DEQ's 305(b) report as impaired.
3. The design flow of the Facility has been rated and approved as 0.006 MGD, measured as a monthly average flow. The permit contains an expansion flow tier for 0.02 MGD.

4. In submitting reports and DMRs, as required by the Permit, Kerr's Creek has reported that it had effluent discharges during the months of September and October 2011.
5. On February 10, 2010, December 1, 2010, and January 1, 2011 DEQ notified Kerr's Creek of outstanding payments of the annual permit maintenance fees for 2009 and 2010.
6. The VPDES Permit Regulation and Part II.M. of the Permit require Kerr's Creek to submit to DEQ a VPDES permit reissuance application at least 180 days before the expiration of the Permit. The application was due February 2, 2011.
7. The Permit reissuance application for the Kerr's Creek Facility discharge was received on March 14, 2011 and was deemed complete on March 30, 2011.
8. On May 10, 2011, DEQ notified Kerr's Creek that DEQ was considering the reissuance of the Permit and provided Kerr's Creek with the public notice and draft Permit package. DEQ also indicated that there were outstanding annual permit maintenance fees associated with the Facility and that the Permit could not be reissued until the outstanding annual permit maintenance fees were paid in full.
9. On June 1, 2011, DEQ forwarded to Kerr's Creek invoices for 2009 and 2010 for payments of past due annual permit maintenance fees.
10. On June 15, 2011, notice of Kerr's Creek's draft permit was published. Public notice of the draft permit was completed on July 15, 2011.
11. On July 31, 2011, Kerr's Creek Permit expired because Kerr's Creek had not paid the annual permit maintenance fees for the 2009 and 2010 billing years.
12. On September 1, 2011, VRO issued Warning Letter No. W2011-09-V-1001 to Kerr's Creek for operating a privately owned treatment works without obtaining a VPDES Permit in violation of VA Code § 62.1-44.18:3.
13. On November 14, 2011, VRO issued NOV No. W2011-11-V-0001 to Kerr's Creek for discharging treated wastewater without authorization of a VPDES permit in violation of VA Code § 62.1-44.5 and 9 VAC 25-31-50 of the Regulation.
14. On December 2, 2011, Kerr's Creek responded to the November 14, 2011 NOV. During discussions with DEQ staff, it asserted that financial difficulties had prevented timely fee payment; it also confirmed its commitment to follow a proposed plan and schedule to pay the outstanding annual permit maintenance fees. Portions of this plan and schedule are incorporated into Appendix A of this Order.
15. Kerr's Creek's DMRs indicate that it discharged treated wastewater from the Plant during the months of September and October 2011 during the period after the expiration of the Permit.

16. Va. Code § 62.1-44.5 states that: “[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.”
17. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.
18. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a “certificate” under the statute.
19. The Department has issued no permits or certificates to Kerr’s Creek authorizing the discharge of wastewater from the Facility other than VPDES Permit No. VA0088960.
20. Linkswiler Branch and Kerrs Creek are surface waters located wholly within the Commonwealth and are “state waters” under State Water Control Law.
21. Based on Kerr’s Creek’s DMRs, Kerr’s Creek’s letters to DEQ, the NOV, and file reviews, the Board concludes that Kerr’s Creek has violated the Permit, Va. Code § 62.1-44.5, 9 VAC 25-31-100 and 9 VAC 9 VAC 25-31-50, as described in section C.
22. In order for Kerr’s Creek to return to compliance, DEQ staff and representatives of the Kerr’s Creek have agreed to the schedule of payment, which are incorporated in Section D of this Order. DEQ anticipates that the Permit will be reissued contemporaneously with the issuance of the Order, addressing the unpermitted discharge referenced above.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it pursuant to Va. Code § 62.1-44.15, the Board orders Kerr’s Creek, and Kerr’s Creek agrees to:

1. **By February 1, 2012**, Kerr’s Creek shall make a payment of **\$1320.00** for the past due annual permit maintenance fee for 2009.
2. **By March 1, 2012**, and monthly thereafter by the first of the month, Kerr’s Creek shall make payments of \$347.38 towards the payment of past due permit maintenance fees for the years 2010 and 2011 totaling \$4168.53.
3. **By October 10, 2012**, Kerr’s Creek shall pay in full the permit maintenance fee for the year 2012. The fee is expected to be approximately \$2000.
4. If the Department fails to receive a payment pursuant to the schedule described above in paragraph 2, the payment shall be deemed late. If any payment is late by 30 days or more, the entire remaining balance of annual maintenance fees for 2010 and 2011 shall become immediately due and the owing under this Order, and the Department may demand in

writing full payment by Kerr's Creek. Within 15 days of receipt of such letter, Kerr's Creek shall pay the remaining balance of the past due maintenance fees. Any acceptance by the Department of a late payment or of any payment of less than the remaining balance shall not act as waiver of the acceleration of the remaining balance under this Order.

5. All payments 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

6. Kerr's Creek shall include its Federal Employer Identification Number (FEIN) (20-2119504) with each payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Department's operating account(s) for annual permit fees.

SECTION E: Administrative Provisions

2. The Board may modify, rewrite, or amend this Order with the consent of Kerr's Creek for good cause shown by Kerr's Creek, 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.
3. 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.
4. For purposes of this Order and subsequent actions with respect to this Order only, Kerr's Creek admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
5. Kerr's Creek consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
6. Kerr's Creek 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.

7. Failure by Kerr's Creek 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
8. 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.
9. Kerr's Creek 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. Kerr's Creek shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Kerr's Creek 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 Kerr's Creek intends 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.

10. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
11. This Order shall become effective upon execution by both the Director or his designee and Kerr's Creek. Nevertheless, Kerr's Creek agrees to be bound by any compliance date which precedes the effective date of this Order.
12. This Order shall continue in effect until:

- a. Kerr's Creek petition 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
- b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Kerr's Creek.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Kerr's Creek from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

13. Any plans, reports, schedules or specifications attached hereto or submitted by Kerr's Creek 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.
14. The undersigned representative of Kerr's Creek certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Kerr's Creek to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Kerr's Creek.
15. 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.
16. By its signature below, Kerr's Creek, LLC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 6th day of April, 2012.



Amy T. Owens, Regional Director
Department of Environmental Quality

Kerr's Creek, LLC voluntarily agrees to the issuance of this Order.

Date: 1/25/2012 By: A E Sharp - member
(Person) (Title)
Kerr's Creek, LLC

Commonwealth of Virginia
City/County of Fredericksburg

The foregoing document was signed and acknowledged before me this 25th day of
January, 2012, by Alfred E. Sharp who is
Partner - Member of Kerr's Creek, LLC on behalf of Kerr's Creek, LLC.

Tammy L Breen
Notary Public

355496
Registration No.

My commission expires: 1/31/13

Notary seal:

