



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### Blue Ridge Regional Office

www.deq.virginia.gov

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### STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO R & K FOUNDATIONS, INC.

#### SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d), between the State Water Control Board and R & K Foundations, Inc., for the purpose of resolving certain violations of State Water Control Law and 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. "APA" means the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*
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. "BRRO" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.
5. "Department" or "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. "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.

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. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water from 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.
11. "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.
12. "Musgroves" means James and Rosie B. Musgrove.
13. "Order" means this document, also known as a Consent Order.
14. "Person" means one or more individuals, a corporation, a partnership, an association, a governmental body, a municipal corporation, or any other legal entity.
15. "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.
16. "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" for the terms and purposes of this chapter. 9 VAC 25-210-10.
17. "Pond Site" means an impoundment structure and pond constructed on property owned by the R & K Foundations, Inc. on Lost Mountain Road in Franklin County, Virginia, on contiguous Franklin County tax parcels 0290004100, 0290004101, and 0290004102.
18. "Property" means the tract of land on Lost Mountain Road in Franklin County, Virginia, on contiguous Franklin County tax parcels 0290004100, 0290004101, and 0290004102, owned by R & K Foundations, Inc.

19. "R&K" means R & K Foundations, Inc., a Virginia Corporation operating under Virginia Corporate I.D. No. 0432944-7, and its affiliates, partners, subsidiaries, and parents.
20. "Regulation" means the Virginia Water Protection Permit Program Regulation, 9 VAC 25-210-10 *et seq.*
21. "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. 9 VAC 25-210-10.
22. "Surface water" means all state waters that are not ground waters as defined in § 62.1-255 of the Code of Virginia.
23. "Va. Code" means the Code of Virginia (1950), as amended.
24. "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.

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

1. R&K is considered a person pursuant to 9 VAC 25-210-50.
2. On February 1, 2006, DEQ-Roanoke staff inspected the Property and the Pond Site and observed that an unnamed perennial stream, a surface water, had been impounded by an earthen dam constructed in 2005 by a contractor hired by R&K to perform that work. Construction of the impoundment involved discharging fill material, including earthen material, into the unnamed perennial stream. Subsequent investigation indicated that over 500 linear feet of that stream had been impacted by the impoundment. R&K constructed the impoundment for recreational purposes.
3. The Board has not issued a VWP Permit to R&K for authorization of construction activities or discharge of dredged or fill materials to state waters at the Pond Site. DEQ records indicate that R&K had not submitted an application for a VWP Permit for that purpose as of the time they had the impoundment constructed at the Pond Site.
4. Va. Code § 62.1-44.15:20(A) states that

Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to:

1. Excavate in a wetland;
2. On or after October 1, 2001, conduct that following 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 functions; or
3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for

domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.

5. DEQ issued Warning Letters to R&K dated October 27, 2006 and January 10, 2007 for the impacts caused by construction of the impoundment at the Pond Site without a VWP permit in violation of Va. Code § 62.1-44.5, Va. Code § 62.1-44.15:20, and 9 VAC 25-210-50. The Warning Letters requested that R&K submit a Joint Permit Application ("JPA") for the impacts. A consultant for R&K submitted a draft JPA on January 29, 2007. The JPA was not complete and a VWP permit has not been issued to R&K.
6. DEQ issued a Notice of Violation to R&K dated July 2, 2007 for alleged violation of Va. Code § 62.1-44.15:20, and 9 VAC 25-210-50.
7. R&K met with DEQ staff on July 25, 2007 to discuss options for coming into compliance with the Regulation and the Act.
8. The discharge of fill material by R&K at the Pond Site resulted in the pollution of a perennial stream with the effect of altering the physical, chemical, and biological properties of state waters in violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.

**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 R&K and R&K voluntarily agrees to:

1. Perform the actions described below and in Appendix A of this Order; and
2. Pay a civil charge of \$19,880.00 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

R&K shall include the Federal Identification Number for R&K with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of R&K, for good cause shown by R&K, or on its own motion after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to R&K by DEQ on July 2, 2007. 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 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, R&K admits the jurisdictional allegations, factual finding, and conclusions of law contained herein.
4. R&K 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. R&K declares that it has received fair and due process under the APA 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 to 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 judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by R&K 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. R&K 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. R&K shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on their part. R&K shall notify the BRRO 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 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 BRRO Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which R&K 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 R&K. Nevertheless, R&K agrees to be bound by any compliance date which precedes the effective date of this Order.
- 11. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days notice to R&K. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve R&K from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
- 12. By its signature below, R&K voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 20<sup>th</sup> day of APRIL, 2009.

Steven A. Dietrich

Steven A. Dietrich, Regional Director  
Blue Ridge Regional Office  
Department of Environmental Quality

R&K voluntarily agrees to the issuance of this Order.

By: Rosie B. Musgrove

R & K Foundations, Inc.  
Rosie B. Musgrove, President

Date: 2/24/2009

Commonwealth of Virginia; City/County of Franklin

The foregoing document was signed and acknowledged before me this 24 day of February, 2009, by Ms. Rosie B. Musgrove, President of R & K Foundations, Inc.

Jeanne M. Martin  
Notary Public

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| JEANNE M. MARTIN<br>NOTARY PUBLIC<br>Commonwealth of Virginia<br>Reg. #342755<br>My Commission Expires Dec. 31, 20 <u>12</u> |
|--|

My commission expires: 12/31/2012

**APPENDIX A  
SCHEDULE OF COMPLIANCE**

1. Except in compliance with an individual or general Virginia Water Protection Permit, R&K shall not: 1. Excavate in a wetland; 2. Conduct that following 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 functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.
2. Not later than thirty days after the effective date of this Order, R&K shall submit to the Virginia Department of Conservation and Recreation ("DCR") for review and approval, with a copy to the DEQ, a plan for draining the impoundment and removing the impoundment structure located at the Pond Site. The plan shall be developed to minimize impacts to downstream water quality and shall conform to DCR's *Impounding Structure Regulations*, 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 DCR's "Design Report for the Construction/Alternation of Impounding Structures" and shall be acceptable to DCR. R&K 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 thirty days after the effective date of this Order, R&K shall submit to DEQ 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 Pond 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 180 days after the later of: a) DCR issuance of the "Alterations Permit" as described in Paragraph 2 above, and b) DEQ approval of the plan required under Paragraph 3 above, R&K shall have drained the impoundment, removed the impoundment structure, and restored the impacted stream to its natural conditions. R&K shall have complied with all applicable local requirements for submittal and approval of an erosion and sediment control plan before commencing dam removal activities.
5. R&K 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. Failure to submit a complete, approvable plan after two prior deficient submittals of that plan shall constitute a violation of the plan submittal deadline.

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

Robert Steele  
Department of Environmental Quality  
Blue Ridge Regional Office  
3019 Peters Creek Road  
Roanoke, VA 24019