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
WINCHESTER HOMES, INC.
FOR
GLENHAVEN SOUTH SUBDIVISION
VIRGINIA WATER PROTECTION (VWP) GENERAL PERMIT
AUTHORIZATION NO. WP4-05-1068

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 Winchester Homes, Inc., regarding the Glenhaven South 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. "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.

6. "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.

7. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

8. "NRO" means the Northern Regional Office of DEQ, located in Woodbridge, Virginia.

9. "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.

10. "Permit" or "Virginia Water Protection Permit" means General Permit Authorization No. WP4-05-1068 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.

11. "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.

12. "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.

13. "Property" or "Parcel" means Glenhaven South subdivision on 152 acres located in Spotsylvania County, Virginia owned by Winchester Homes, Inc.

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

15. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.

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.

23. "Winchester Homes" means Winchester Homes, Inc., a corporation authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. Winchester Homes is a "person" within the meaning of Va. Code § 62.1-44.3.

SECTION C: Findings of Fact and Conclusions of Law

1. Winchester Homes owns the Glenhaven South subdivision located in Spotsylvania County, Virginia.

2. DEQ issued a VWP General Permit Authorization No. WP4-05-1068 (Permit) on July 21, 2005 to Spotswood LLC. The Permit was transferred from Spotswood, LLC to

Winchester Homes on August 30, 2006. The Permit authorized the impact to 0.048 acre of surface waters, consisting of 0.017 acre palustrine forested wetlands (PFO), 0.029 acre (255 linear feet) perennial stream channel, and 0.002 acre (40 linear feet) of intermittent stream channel associated with construction of the Glenhaven South subdivision. The Permit is a reporting-only general permit that does not require mitigation or compensation for the authorized impacts taken during the construction of the project.

3. On July 17, 2009, DEQ staff reviewed the project file and conducted a site visit of the project site for compliance with the conditions and requirements of the Permit and the State Water Control Law and the Regulations. During the site visit, DEQ staff observed unauthorized impacts to approximately 390 linear feet of an unnamed tributary of Mine Run, a surface water, within the Rappahannock River Watershed arising from, the placement of fill material, due to lot grading and the construction of driveway crossings.

4. On September 1, 2009, as a result of the July 17, 2009 inspection, DEQ issued NOV No. 2009-08-NRO-006 to Winchester Homes for the violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.

5. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit dredging or filling of surface waters without a Permit issued by the Director. Winchester Homes does not have a Permit for the above activities

6. 9 VAC 25-210-50 states that "[e]xcept in compliance with a VWP permit no person shall dredge, fill, discharge any pollutant into, or adjacent to surface waters, or otherwise alter physical, chemical, or biological properties of state waters, excavate in wetlands on or after October 1, 2001, conduct the following activities in a wetland: 1) New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2) Filling or dumping; 3) Permanent flooding or impounding; or 4) new activities that cause significant alteration or degradation of existing wetland acreage or functions.

7. On September 10, 2009, Winchester Homes stated that the additional unauthorized impacts were a result of an error in the aerial-supplied topography and the subsequent excessive amount of cut during the rough grading operations by the site work contractor. This error caused the adjustment of the construction plans resulting in placement of fill material in surface waters during grading, and the taking of additional stream impacts. The letter further stated that the impact areas were inadvertently overlooked during the development and construction process.

8. On October 10, 2009, Winchester Homes submitted a proposed compensation plan to provide compensation for the unauthorized impacts to 390 linear feet of the unnamed tributary of Mine Run.

9. On October 20, 2009, DEQ staff met with Winchester Homes and its consultant to discuss the violations and the proposed compensation plan. DEQ discussed with

Winchester Homes that the General Permit threshold was triggered and therefore compensation for the original permitted impacts is required and the compensation plan was insufficient as proposed.

10. On July 8, 2010, the Final Mitigation Plan was approved by DEQ.

11. Based on the results of the July 17, 2009 inspection, the October 20, 2009 meeting, and the November 17, 2009 inspection, the Board concludes that Winchester Homes has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraph C.3 through C.6 above.

12. In order for Winchester Homes to return to compliance, DEQ staff and Winchester Homes have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Winchester Homes, Inc., and Winchester Homes, Inc. agrees to:

1. Perform the actions described in Appendix A of this Order; and

2. Pay a civil charge of $20,100.00 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

Winchester Homes, Inc. shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and 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 Winchester Homes, Inc. for good cause shown by Winchester Homes, Inc., 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, Winchester Homes admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. Winchester Homes 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. Winchester Homes 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 Winchester Homes 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. Winchester Homes 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. Winchester Homes shall show that such circumstances were beyond his control and not due to a lack of good faith or diligence on its part. Winchester Homes 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 Winchester Homes 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.

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 Winchester Homes. Nevertheless, Winchester Homes 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. Winchester Homes 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 the Order; or

    b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Winchester Homes.

    Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Winchester Homes from his 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 Winchester Homes 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. 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.

14. By its signature below, Winchester Homes voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 9th day of December, 2010.

Thomas A. Faha

Thomas A. Faha, NRO Regional Director
Department of Environmental Quality

Winchester Homes, Inc. voluntarily agrees to the issuance of this Order.

Date: 8/10/2010 By: M.T. Chadwick, V.P. Land Development
(Person) (Title)
Winchester Homes, Inc.

State of Maryland
~~Commonwealth of Virginia~~
~~City~~/County of Montgomery

The foregoing document was signed and acknowledged before me this 10th day of August, 2010, by Marc T Chadwick who is Vice President of Winchester Homes, Inc. on behalf of the corporation.

Margo M Boone
Notary Public

Registration No.

My commission expires: 8/21/2012

Notary seal:

MARGO M. BOONE
NOTARY PUBLIC
MY COMMISSION EXPIRES 8/21/2012
MONTGOMERY COUNTY, MD

APPENDIX A
SCHEDULE OF COMPLIANCE

Winchester Homes, Inc. (Winchester Homes), owner of the Glenhaven South Subdivision shall:

1. Within 30 days of the execution of this Order, submit proof of the purchase of 0.03 PFO credit from the Blackjack Wetland Mitigation Bank.

2. Within 30 days of the execution of this Order, submit proof of recordation of the preservation areas as indicated on the "Glenhaven South Final Mitigation Plan" dated June 21, 2010 and approved by DEQ on July 8, 2010.

3. Unless otherwise specified in this Order, Winchester Homes 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