



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

W. Tayloe Murphy, Jr.
Secretary of Natural Resources

SOUTH CENTRAL REGIONAL OFFICE
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Robert G. Burnley
Director

Thomas L. Henderson
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

A SPECIAL ORDER BY CONSENT ISSUED TO

RPM & Associates, Inc.
Food Lion Project – Victoria, Virginia
General Permit Registration Number VAR102068

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and RPM & Associates, 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 meanings 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 citizen 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.
5. "Order" means this document, also known as a Consent Special Order.

6. “SCRO” means the South Central Regional Office of the DEQ, located in Lynchburg, Virginia.
7. “Site” means the construction activities of RPM & Associates, Inc. of the Food Lion project in Victoria, Virginia.
8. “RPM” means RPM & Associates, Inc., a corporation certified to do business in Virginia.
9. “VPDES” means the Virginia Pollution Discharge Elimination System.
10. “Permit” means the VPDES General Permit for Storm Water Discharges of Storm Water from Construction Activities, registration number VAR102068, issued to RPM on March 19, 2003, which has an effective date of June 30, 1999, and expiration date of June 30, 2004.
11. “VAC” means the Virginia Administrative Code.
12. “Regulation” means 9 VAC 25-180-10, *et seq.*, the VPDES General Permit Regulation for Discharges of Storm Water from Construction Activities.

SECTION C: Findings of Facts and Conclusions of Law

1. RPM is engaged in construction activities that disturbed approximately 4 acres at the Site. The Site was logged prior to the start of construction. Construction activity began in late February 2003 without a permit. RPM checked with all local permitting authorities and was told the Site did not require a permit. On February 25, 2003, RPM was notified by DEQ that a permit is required for the Site; RPM immediately applied for a permit.
2. The Permit for the Site was issued on March 19, 2003. The general permit registration statement names RPM as the construction activity operator. The Permit allows RPM to discharge storm water into an unnamed tributary of Big Hounds Creek in strict compliance with the terms, limitations, and requirements delineated in the Permit. Big Hounds Creek flows into Lunenburg Lake, which is the Town of Victoria’s secondary drinking water supply.
3. Va. Code § 62.1-44.5 and 9 VAC 25-31-50 provides, *inter alia*, that except in compliance with a permit issued from the Board it is unlawful to

discharge into State waters “sewage, industrial wastes, other wastes, or any noxious or deleterious substances[.]”

4. Section 9 VAC 25-180-10 of the Regulation defines “operator”, as “(i) the person has direct operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications or (ii) the person has day-to-day operational control of those activities which are necessary to ensure compliance with a storm water pollution prevention plan [SWPPP] for the site or other permit conditions[.]”
5. Va. Code § 62.1-44.3 defines “person” as “an individual, corporation, partnership, association, governmental body, municipal corporation or any other legal entity.”
6. RPM is a “person” within the meaning of State Water Control Law, and is an “operator” as defined by the Regulation.
7. Acting on a pollution complaint the DEQ conducted an unannounced Site inspection on April 18, 2003. On the day of the inspection the sediment basin, which is the main erosion and sediment (“E & S”) control measure for the Site, was being installed. The installation of the sediment basin occurred over two months after construction began. During the inspection the DEQ noted and photographed evidence of *significant sediment* transported off Site and deposited in State waters. In addition, DEQ noted that no SWPPP had been prepared for the Site. Section 9 VAC 25-180-70, Part II A 2, of the Regulation requires that a SWPPP be prepared prior to submittal of the registration statement for general permit coverage.
8. Based on the April 18, 2003 Site inspection, the DEQ issued Notice of Violation (“NOV”) number W2003-05-L-0001 on May 8, 2003, for the following violations:
 - a. Failure to develop SWPPP prior to the start of construction in contravention of 9 VAC 25-180-70, Part II;
 - b. Failure to maintain and install E & S controls in contravention of 9 VAC 25-180-70, Part II D;

- c. Unpermitted discharge of sediment to State waters in contravention of Va. Code § 62.1-44.5, and 9 VAC 25-180-70, Part I; and
 - d. Failure to report the unpermitted discharge in contravention of 9 VAC 25-180-70, Part III G.
9. RPM asserts that it understood that the plans for the Site constituted a SWPPP, however, the plans for the Site did not meet all the requirements of the Regulation. The DEQ received a SWPPP for the Site on May 15, 2003, which met the requirements of the Regulation. Further, RPM states that the sediment basin had to be built by bringing in fill material and this was delayed because of continued rainfall.
10. On subsequent unannounced inspections of the Site conducted on July 28 and October 1, 2003, the DEQ noted the following violations:
 - a. Failure to maintain E & S controls as required by 9 VAC 25-180-70, Part II D and the SWPPP;
 - b. Incomplete and inaccurate reports of Site inspections in contravention of 9 VAC 25-180-70, Part II D 4.c and the SWPPP;
 - c. Significant sediment tracked onto the roadway; and
 - d. Failure to remove off Site accumulations of sediment in contravention of 9 VAC 25-180-70, Part II D.2.a(1)(c).
11. On February 3, 2004, DEQ and RPM met to discuss the terms of the proposed Consent Order. RPM presented rain data recorded by the local high school in Victoria, which evidenced a 10-year rain event on March 20, 2003. The rain data coincided with rain data the DEQ obtained from the National Oceanic & Atmospheric Administration (“NOAA”) for the near by Towns of Keysville and Chase City. E & S controls are required to be designed to withstand a 10-year rain event; thus, no act of God argument can be made. Further, the sediment basin was not installed prior to the 10-year rain event.
12. In addition, RPM conducted dredge and fill activities in .46 acres of forested wetlands at the Site without a permit in contravention of Va. Code §§ 62.1-44.15:5.D and 62.1-44.5. The wetlands also fall under the

jurisdiction of the U.S. Army Corps of Engineers (“Corps”) and RPM was so notified by the Corps on or about April 15, 2003. RPM states that no wetlands were noted on the construction plans for the Site.

13. On August 22, 2003, Food Lion via Engineering Consulting Services, LTD, on behalf of RPM, paid \$10,580.00 to the Virginia Wetlands Restoration Trust Fund to satisfy the mitigation of the unpermitted dredge and fill of wetlands.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted in Va. Code § 62.1-44.15(8a) and (8d), orders RPM, and RPM consents, to perform the actions contained in Appendix A of this Order. In addition, the Board orders RPM, and RPM consents, to pay a civil charge of \$14,700.00 within 30 days of the issuance of this Order in settlement of the violations cited herein. The 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 10150
Richmond, Virginia 23240

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

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of RPM, for good cause shown by RPM, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves the matters specifically discussed herein. 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 Site as may be authorized by law; or (3) taking subsequent action to enforce the terms of this Order.

3. For purposes of this Order and subsequent actions with respect to this Order, RPM admits to the jurisdictional allegations, factual findings, and conclusions of law contained herein.
4. RPM 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. RPM declares that it has received fair and due process under the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, and the State Water Control Law, 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 to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by RPM 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. RPM 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. RPM must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. RPM shall notify the DEQ 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 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.

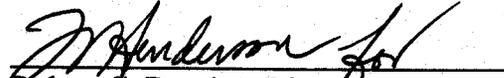
Failure to so notify the Regional Director within 24 hours of learning of any condition listed above, which RPM intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

- 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 RPM. Notwithstanding the foregoing, RPM 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. RPM petitions the Regional Director to terminate the Order after it has completed all requirements of the Order, and the Regional Director determines that RPM has satisfied all requirements of the Order; or
 - b. The Director or the Board terminates this Order in his or its sole discretion upon 30 days written notice to RPM.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve RPM 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, RPM consents to the issuance of this Order.

And it is so ORDERED this 17th day of June, 2004


Robert G. Burnley, Director
Department of Environmental Quality

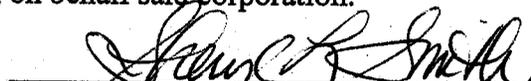
RPM & Associates, Inc. consents to the issuance of this Order.

Date: 3/22/04 By: Michael A. Higginbotham
Michael A. Higginbotham, Vice President, RPM & Associates, Inc.

~~Commonwealth of Virginia~~ STATE OF TENNESSEE
City/County of HAMILTON

The foregoing document was signed and acknowledged before me this 22nd day
of March, 2004, by Michael A. Higginbotham, who is the Vice
Michael A. Higginbotham

President of RPM & Associates, Inc., on behalf said corporation.


Notary Public

My commission expires: 4/25/05

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Appendix A

RPM shall:

1. RPM shall, in accordance with EPA Rapid Bioassessment Protocol (“RBP II”) method, conduct habitat and benthic monitoring of the unnamed tributary to Big Hounds Creek upstream and downstream from the outfall of the Site.
2. RPM shall submit the monitoring protocol for DEQ review and approval by July 1, 2004. Upon DEQ approval of the monitoring protocol, RPM shall conduct the monitoring in October 2004. RPM shall submit the results of the monitoring to DEQ for review and approval by November 30, 2004.
3. If DEQ determines that the monitoring indicates impairment in the unnamed tributary that is the result of the sediment discharged by RPM, RPM shall, within 30 days of such determination, submit a Joint Permit Application (“JPA”) to the Virginia Marine Resources Commission to perform stream restoration of the unnamed tributary to Big Hounds Creek.
4. Immediately comply with all Permit requirements.
5. Unless otherwise specified in the Order, or the Permit, all correspondence related to the Order shall be sent to:

Harry F. Waggoner
Virginia Department of Environmental Quality
7705 Timberlake Road
Lynchburg, Virginia 24502

