COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
NORTHERN REGIONAL OFFICE
13901 Crown Court, Woodbridge, Virginia 22193
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Douglas W. Domenech
Secretary of Natural Resources

David K. Paylor
Director

Thomas A. Faha
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
ACACIA CREDIT FUND 10-A, LLC
FOR
OAKLEY FARM

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 Acacia Credit Fund 10-A, LLC, regarding Oakley Farm 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. "Acacia" means Acacia Credit Fund 10-A, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, subsidiaries, and parents. Acacia is a "person" within the meaning of Va. Code § 62.1-44.3.

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, 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.

6. "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.

7. "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.

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

9. "NRO" means the Northern Regional office of DEQ, located in Woodbridge, Virginia.

10. "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.

11. "PEM" means palustrine emergent wetlands.

12. "Permit" or "Virginia Water Protection Permit" means an individual or general permit 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.

13. "Permittee" means Acacia Credit Fund 10-A, LLC.

14. "PFO" means palustrine forested wetlands.

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." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

17. "Property" means the Oakley Farm, a residential development with associated infrastructure located along Poplar Road (Route 616) and Shackelford Well Road (Route 754), in Stafford County, Virginia, owned by Acacia.

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

19. "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.

20. "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.

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. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

22. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.

23. "USACE" means the United States Army Corps of Engineers.

24. "USM" means Unified Stream Method.

25. "Va. Code" means the Code of Virginia (1950), as amended.

26. "VAC" means the Virginia Administrative Code.

27. "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.

SECTION C: Findings of Fact and Conclusions of Law

1. The Property consists of a proposed residential community with associated infrastructure on an approximately 449 acre parcel.

2. Acacia was issued Permit No. WP4-03-2012 which authorized the permanent impact to 0.912 acre of surface waters, consisting of 0.863 acre of PFO, 0.045 acre (290 linear feet) of perennial stream channel, and 0.004 acre (93 linear feet) of intermittent stream channel associated with the Long Branch Watershed.

3. On August 13, 2007, 1.81 mitigation credits were purchased for the Property.

4. On March 12, 2010, DEQ staff conducted an inspection of the Property and a file review in order to determine compliance with the requirements of the State Water Control Law and the Regulations. The DEQ made the following observations:

   a. development and construction activities had significantly altered and degraded approximately 0.72 acre of PFO and the discharge of pollutants into 1,265 linear feet of stream channels, each of which are considered surface waters. At the time, DEQ believed that these impacts were not authorized by Permit No. WP4-03-2012 or any other Permit.

      Va. Code § 62.1-44.15:20, and the Regulations at 9 VAC 25-210-50 prohibit the discharge of any pollutant into or adjacent to surface waters and prohibits the significant alteration or degradation of existing wetland acreage and function without a Permit issued by the Director.

   b. that encroachments into approximately 1.7 acres of riparian buffer and wetland preservation had occurred. These areas had been identified and incorporated into the compensation plan approved by DEQ as part of the permitting process.

      Permit No. WP4-03-2012 Part II.A.7 requires in relevant part, that the final compensation plan as approved by the Board shall be an enforceable requirement of the VWP general permit authorization. Any deviations from the approved plan must be submitted and approved in advance by the board. Acacia did not have authorization for the above activities.

      9 VAC 25-210-116.A requires that compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters.

c. Photographs depicting the permitted impact areas prior to construction or construction monitoring reports documenting the construction activities in the permitted impact areas were not received.

Permit No. WP4-03-2012 Part II.D.1 requires that construction activities authorized by the Permit, which are within impact areas, be monitored and documented.

Permit No. WP4-03-2012 Part II.E.3 requires that construction monitoring reports be submitted to DEQ no later than the 10th day of the month following the month in which the monitoring event in Part II.D takes place.

d. Flagging of surface waters, which were to remain undisturbed, was not present.

VWP General Permit Authorization No. WP4-03-2012 Part I.C.10. requires that all non-impacted surface waters within 50 feet of any permitted activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude any unauthorized disturbances to these surface waters during construction. The permittee shall notify all contractors that these marked areas are surface waters where no activities are to occur.

e. DEQ had not received documentation that payment to the Virginia Aquatic Resources Fund has been submitted.

VWP General Permit Authorization No. WP4-03-2012 Part II.A.6. states that for projects proposing contribution to an in-lieu fee fund, the permittee shall not initiate work in permitted impact areas until documentation of the in-lieu fee fund contribution has been submitted and received by DEQ.

f. DEQ had not received documentation that the non-impact surface waters had been surveyed or platted and recorded within 120 days of approval.

Permit No. WP4-03-2012 Part II.11 requires that proof of recordation be submitted within 120 days of plat approval. The plat was approved and recorded in 2006.

5. On March 22, 2010, DEQ issued NOV No. W2010-03-N-0008 for the violations observed in C(4) above.

6. On May 24, 2010, DEQ met with Acacia representatives and their consultant to discuss the aforementioned violations.

7. On July 22, 2010, a response to the Notice of Violation was received by DEQ which demonstrated that the compensatory preservation of surface waters and upland buffers was not in accordance with the Permit. The Permittee asserts that it was their belief that the preservation had been carried out in accordance with the Permit. In addition, this response noted that the required payment to the Virginia Aquatic Resources Trust Fund, to compensate for permitted stream impacts, had not been made.

   Permit No. WP4-03-2012 Part II.A.6 states that for projects proposing a contribution to an in-lieu fee fund, the permittee shall not initiate work in permitted impact areas until documentation of the in-lieu fee fund contribution has been submitted and received by DEQ.

   Permit No. WP4-03-2012 Part II.A.1 states that the permittee shall provide appropriate and practicable compensation for all impacts meeting the conditions outlined in this VWP general permit.

   9 VAC 25-210-116.A requires that compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters.

8. On November 2, 2011, DEQ met with representatives from Acacia, as well as Acacia's new consultant. At this meeting, the consultant expressed their concern regarding the accuracy of the nature and extent of the impacts. DEQ agreed to meet with the consultant onsite to reevaluate the nature and extent of the impacts.

9. On December 19, 2011, DEQ and the USACE met with the Permittee's consultant onsite to reevaluate the nature and extent of the impacts.

10. On January 19, 2012, the Permittee's consultant submitted documentation to show that impacts to a total of 0.531 acre of PFO and 1,041 linear feet of stream channel had occurred. Of this total, 0.270 acre of PFO and 898 linear feet of stream channel impacts were unauthorized. Based upon what was observed during the December 19, 2011 inspection, these totals appear to be accurate.

11. Based on the results of the March 12, 2010, and December 19, 2011 inspections, the May 24, 2010 and November 2, 2010 meetings, and various communications with the Permittee, the Board concludes that Acacia has violated Va. Code §62.1-44.15:20 and; VWP Permit Regulations 9 VAC 25-210-50 and 9 VAC 25-210-116.A; and VWP General Permit Authorization No. WP4-03-2012 Special Conditions Part II.A.1, Part II.A.6, Part II.A.7, Part II.A.11, Part II.D.1, Part II.E.3, and Part I.C.10.

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

SECTION D: Agreement and Order

By virtue of the authority granted it pursuant to Va. Code § 62.1-44.15 and upon consideration of Va. Code § 10.1-1186.2, the Board orders Acacia and Acacia agrees:

1. To perform the actions described in Appendices A and B of this Order; and

2. To a civil charge of $163,592.00 in settlement of the violations cited in this Order, to be paid as follows:

   a. Acacia shall pay $99,836.00 of the civil charge within 30 days of the effective date of this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," delivered to:

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

      Acacia 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).

   b. Acacia shall satisfy $63,756.00 of the civil charge by satisfactorily completing the Supplemental Environmental Project (SEP) described in Appendix B of this Order.

   c. The net project costs of the SEP to Acacia shall not be less than the amount set forth in Paragraph D.2.b. If it is, Acacia shall pay the remaining amount in accordance with Paragraph D.2.a of this Order, unless otherwise agreed to by the Department. "Net project cost" means the net present after-tax cost of the SEP, including tax savings, grants, and first-year cost reductions and other efficiencies realized by virtue of project implementation. If the proposed SEP is for a project for which the party will receive an identifiable tax savings (e.g., tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the net project cost shall be reduced by those amounts. The costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts, or grants shall be deducted.

   d. By signing this Order Acacia certifies that it has not commenced performance of the SEP.

e. Acacia acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by Acacia to a third party, shall not relieve Acacia of its responsibility to complete the SEP as described in this Order.

f. In the event it publicizes the SEP or the SEP results, Acacia shall state in a prominent manner that the project is part of a settlement of an enforcement action.

g. The Department has the sole discretion to:

   i. Authorize any alternate, equivalent SEP proposed by the Facility; and

   ii. Determine whether the SEP, or alternate SEP, has been completed in a satisfactory manner.

h. Should the Department determine that Acacia has not completed the SEP, or alternate SEP, in a satisfactory manner, the Department shall so notify Acacia in writing. Within 30 days of being notified, Acacia shall pay the amount specified in Paragraph D.2.b, above, as provided in Paragraph D.2.a, above.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Acacia for good cause shown by Acacia, 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, Acacia admits the jurisdictional allegations, and agrees not to contest, but neither admits nor denies the findings of fact, and conclusions of law in this Order.

4. Acacia 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. Acacia 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.

6. Failure by Acacia 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. Acacia 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 unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Acacia shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Acacia 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 Acacia 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 Acacia. Nevertheless, Acacia 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. The Director or his designee terminates the Order after Acacia has completed all of the requirements of the Order;

b. Acacia petitions 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

c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Acacia.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Acacia from its 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 Acacia 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. The undersigned representative of Acacia 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 Acacia to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Acacia or its representative.

14. 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.

15. By its signature below, Acacia voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2013.

_____
Thomas A. Faha Regional Director
Department of Environmental Quality

Acacia Credit Fund 10-A L.L.C. voluntarily agrees to the issuance of this Order.

Dated: 1-3-2013

BY FUND 10-A MANAGEMENT COMPANY L.L.C., a Delaware limited liability company, its Managing Member

By Acacia Capital Corporation, a California corporation, its Managing Member

By _____
F. Wesley Clelland, III
Its President

State of Arizona)
) ss
County of Maricopa)

The foregoing document was signed and acknowledged before me this 3rd day of January, 2012, by F. Wesley Clelland, III.

_____
Notary Public

Commission # 129161
Registration No.

My Commission expires: March 9, 2013

Notary seal:

OFFICIAL SEAL
CAROLYN F. HOUSE
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires March 9, 2013

APPENDIX A
SCHEDULE OF COMPLIANCE

Acacia Credit Fund 10-A, LLC shall:

1. Immediately cease any activities that impact surface waters that require authorization from the VWP Permit Program and do not resume such impacts unless authorization from DEQ is granted.

2. Within 30 days of the execution of this Order, provide proof of compensation for unauthorized impacts to 0.270 acre of PFO.

3. Within 30 days of the execution of this Order, submit a Compensation Plan (Plan), approvable by DEQ, for the compensation of 1,041 linear feet of stream that have been impacted that meets the requirements of 9 VAC 25-210-116. The Plan must be sufficient to achieve no net loss of surface waters in accordance with 9 VAC 25-210-116. . If the proposed Plan includes the preservation required in accordance with Permit No. WP4-03-2012, Acacia shall include the revised preservation plan that includes a revised preservation map and draft plats and deed restrictions, with the Plan, and a document requesting the vacation of the existing easement.

4. Acacia shall respond to any DEQ Notice of Deficiency regarding the Compensation Plan, including the deed restrictions referenced in Paragraph 3, within 14 calendar days. DEQ will notify Acacia of its approval of the Compensation Plan concurrently with notification of its approval of the draft declaration of restrictions of Appendix B, Paragraph 2, of this Order. Proof of recordation of the DEQ approved restrictions in the chain of title with the Stafford County Clerk of Court shall be submitted to DEQ within 30 days of DEQ providing notification to Acacia of its approval of said restrictions.

5. Upon DEQ approval of the Plan, Acacia shall begin implementation of the Plan in accordance with the schedule contained therein. Any changes to the approved Plan, including the schedule, shall not be initiated without advance notice to and approval by DEQ. Acacia shall complete the Plan in accordance with its terms.

6. In the event that Acacia is unable to fulfill the compensation requirements as set forth in the DEQ approved Plan, Acacia shall notify DEQ within 45 days of the execution of this Order, and no later than 60 days after the execution of this Order shall submit a Plan, approvable by DEQ, detailing how it will provide compensation for surface waters on the Property that have been impacted without a Permit that meets the requirements of 9 VAC 25-210-116. The Plan must be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters in accordance with 9 VAC 25-210-116. Acacia shall respond to any DEQ Notice of Deficiency regarding the Plan within 14 calendar days.

7. Unless otherwise specified in this Order, Acacia, 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

APPENDIX B
ACACIA CREDIT FUND 10-A, LLC
SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP)

In accordance with Va. Code § 10.1-1186.2, Acacia shall perform the Supplemental Environmental Project (SEP) identified below in the manner specified in this Appendix. As used in this Order and Appendix, SEP means an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law.

1. The SEP to be performed by Acacia is the preservation in perpetuity of 38.41 acres of mature forest that otherwise would be developed as real estate on the Oakley Farms project site, and that has been valued at approximately 1.344 million dollars.

2. A draft declaration of restrictions for the aforementioned acreage shall be submitted to DEQ for review and approval within 30 days of execution of this Order. Acacia shall respond to any DEQ Notice of Deficiency regarding the draft language within 14 calendar days. DEQ will notify Acacia of its approval of the draft declaration of restrictions concurrently with notification of DEQ's approval of the Compensation Plan of Appendix A of this Order. Proof of recordation of the DEQ approved restrictions in the chain of title with the Stafford County Clerk of Court shall be submitted concurrently with the recordation proof required by Appendix A, Paragraph 4 of this Order.

3. Acacia shall submit a written final report on the SEP, verifying that the SEP has been completed in accordance with the terms of this Order, and certified either by a Certified Public Accountant or by a responsible corporate officer or owner. Acacia shall submit the final report and certification to the Department concurrently with proof of recordation required in Appendix B, Paragraph 2 of this Order.

4. If the SEP has not or cannot be completed as described in the Order, Acacia shall notify DEQ in writing no later than 30 days from approval of the Plan required in Appendix A, Paragraph 3 of this Order. Such notification shall include:

    a. an alternate SEP proposal, or
    b. payment of the amount specified in Paragraph D.2.b as described in Paragraph D.2.a.

5. Acacia hereby consents to reasonable access by DEQ or its staff to property or documents under the party's control, for verifying progress or completion of the SEP.

6. Acacia shall submit to the Department written verification of the final overall and net project cost of the SEP in the form of a certified statement concurrently with proof of recordation required in Appendix B, Paragraph 2 of this Order. For the purposes of this submittal, net project costs can be either the actual, final net project costs or the projected net project costs if such projected net project costs statement is accompanied by a CPA certification or certification from Acacia's Chief Financial Officer concerning the projected tax savings, grants or first-year operation cost reductions or other efficiencies.

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 the contact identified in Appendix A of this Order.