COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
NORTHERN REGIONAL OFFICE
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Molly Joseph Ward
Secretary of Natural Resources

David K. Paylor
Director

Thomas A. Faha
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
CELEBRATE VIRGINIA SOUTH, LLC
FOR THE
CELEBRATE VIRGINIA! SOUTH PROJECT
VWP Permit No. 07-0245

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 Celebrate Virginia South, LLC, regarding the Celebrate Virginia! South Project, for the purpose of resolving certain violations of State Water Control Law and the applicable permit and 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. "CAP" means corrective action plan.

3. "Celebrate Virginia" or "Celebrate Virginia South" means Celebrate Virginia South, LLC, a limited liability company authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. Celebrate Virginia South, LLC is a "person" within the meaning of Va. Code § 62.1-44.3.

4. "Compensation" or "compensatory mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource.

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, as described in Va. Code § 10.1-1185.

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. "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.

9. "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.

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

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

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" or "Virginia Water Protection Permit" means, VWP Individual Permit 07-0245 issued on October 16, 2007, and modified on June 25, 2009, 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.

14. "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.

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: (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.

16. "Project Site" or "Property" means the Celebrate Virginia! South project, a development of a mix use commercial and residential development with associated infrastructure, located west of Interstate 95, north of Fall Hill Avenue and River Road, and south and east of the Rappahannock River in the City of Fredericksburg, Virginia, owned by Celebrate Virginia South, LLC.

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

18. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

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

24. "VAC" means the Virginia Administrative Code.

25. "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.

26. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

SECTION C: Findings of Fact and Conclusions of Law

1. Celebrate Virginia owns the Property in the City of Fredericksburg, Virginia.

2. Compensatory mitigation activities based on *Final Compensatory Mitigation Plan, Celebrate Virginia South* dated August 6, 2008; received by DEQ on July 7, 2010, with latest revision date of March 19, 2010, were initiated by Celebrate Virginia in July 2009. Mitigation construction activities included work in Area 1 Tributaries 1 and 2, Area 2 Mainstem, and Area 3.

3. DEQ conducted site inspections on March 28, 2008, October 1, 2009, October 28, 2009, and November 17, 2009.

4. As a result of the site inspections, DEQ detailed in a Stream Mitigation Compliance Letter, dated December 3, 2009, that the work conducted in Areas 1 and 2 was deficient due to structure failure, degradation, and the failure to implement the buffer planting plan, and a failure to begin mitigation activities in Area 3.

5. On January 20, 2010, Celebrate Virginia submitted a CAP and initiated the approved corrective actions on July 7, 2010.

6. Between January 6, 2010, and January 30, 2013, DEQ staff conducted several mitigation site visits and conducted a compliance review of the permit file on February 12, 2013.

7. Based on a review of DEQ files and observations made during the site visit conducted January 30, 2013, DEQ determined that Celebrate Virginia, failed to complete on-site stream compensatory mitigation activities, including approximately 6.17 acres of riparian buffer planting in Areas 1 and 2 and approximately 561 linear feet of stream restoration and 817 linear feet of stream enhancement activities in Area 3.

8. Part I.K.4 of the Permit requires that "[i]f compensation site construction has not commenced within 180 calendar days of beginning a construction activity in *any* permitted impact area, work in the permitted impact areas shall cease, unless otherwise authorized by DEQ. All compensation activities shall be constructed within 3 years of the permit effective date [October 16, 2010]"

9. 9 VAC 25-210-116 requires that the Permittee ensures 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.

10. 9 VAC 25-210-90.A requires that the Permittee comply with all conditions of the VWP permit.

11. Based on a review of DEQ files, Celebrate Virginia has failed to submit the 2011 and 2012 mitigation monitoring reports documenting the approximately 1,321 linear feet of restoration and 955 linear feet of enhancement in Areas 1 and 2 completed in August 2011.

12. Part I.L.5 of the Permit requires that "[s]uccess monitoring of the stream compensation site shall begin once stream compensation construction activities have been completed."

13. Part I.L.6 of the Permit requires that "[s]tream compensation site monitoring reports shall be submitted by December 31st of the years in which monitoring report is required, including the final monitoring year, as identified in the approved final compensation plan."

14. Based on a review of DEQ files and observations made during a site visit conducted January 30, 2013, Celebrate Virginia failed to submit an as-built survey of the compensatory stream channel enhancement and restoration activities completed in Areas 1 and 2.

15. Part I.L.4 of the Permit requires the "permittee shall submit an As-Built survey, including at least two surveyed cross-sections in each Stream Mitigation Area, longitudinal profile, surveyed locations and elevations of overall stabilization structures, of the stream compensation site within 60 calendar days of compensation site completion."

16. On March 21, 2013, in response to the site visits and file review, DEQ issued a WL No. W2013-03-N-1011 to Celebrate Virginia. The WL requested a CAP for the site.

17. On April 22, 2013, DEQ received a written response to WL but did not receive the required CAP addressing the observations outlined in the WL.

18. As a result of the WL and failure to submit a CAP, on May 30, 2013, DEQ issued NOV No. W2013- 05-N-0007 for the violations of the Permit, Conditions: I.K.4; I.L.4; I.L.5; and I.L.6.

19. On June 5, 2013, representatives of Celebrate Virginia submitted a response to the WL and NOV. The response included a corrective action plan and schedule.

20. On June 17, 2013, DEQ requested a more detailed list/description as to what restoration/corrective actions are proposed onsite.

21. On June 19, 2013, WEG submitted a revised summary of corrective actions and their location relative to the compensation plan set construction stations.

22. On August 8, 2013, Department staff met with representatives of Celebrate Virginia to discuss the violations, including Celebrate Virginia's NOV response and proposed CAP, dated June 5, 2013.

23. On October 15, 2013, Department staff met with a representative of Celebrate Virginia and WEG to discuss the stream restoration as-built drawings, remaining compensatory mitigation, and the Consent Order process.

24. On October 31, 2013, WEG submitted a follow-up letter to DEQ proposing that the mitigation of Area 3 impacts be satisfied through a combination of preservation and purchase of stream credits.

25. On November 27, 2013, WEG submitted the final as-built survey of the compensatory stream channel enhancement and restoration activities completed in Areas 1 and 2.

26. Based on the results of the inspections, the August 8, 2013 and October 15, 2013 meetings, and the documentation submitted by representatives of Celebrate Virginia, the Board concludes that Celebrate Virginia has violated Permit Conditions I.K.4; I.L.4; I.L.5; and I.L.6, and 9 VAC 25-210.A and 9 VAC 25-210-116, as described in paragraphs C(7) through C(15), above.

27. In order for Celebrate Virginia to complete its return to compliance, DEQ staff and representatives of Celebrate Virginia 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 Celebrate Virginia, and Celebrate Virginia agrees to:

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

2. Pay a civil charge of $45,000.00 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

Celebrate Virginia 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). If the Department has to refer collection of moneys due under this Order to the Department of Law, Celebrate Virginia shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Celebrate Virginia for good cause shown by Celebrate Virginia, 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 and in NOV No. W2013- 05-N-0007, dated May 30, 2013 and Warning Letter No. W2013-03-N-1011, dated March 21, 2013. 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, Celebrate Virginia admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. Celebrate Virginia 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. Celebrate Virginia 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 Celebrate Virginia 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. Celebrate Virginia 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. Celebrate Virginia shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Celebrate Virginia 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 parties intend 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 and any 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 Celebrate Virginia. Nevertheless, Celebrate Virginia 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 Celebrate Virginia has completed all of the requirements of the Order;

    b. Celebrate Virginia 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 Celebrate Virginia.

    Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Celebrate Virginia 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 Celebrate Virginia 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 Celebrate Virginia 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 Celebrate Virginia to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Celebrate Virginia.

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, Celebrate Virginia voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2014.

_____

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

Celebrate Virginia South LLC voluntarily agrees to the issuance of this Order.

Celebrate Virginia South L.L.C., a Virginia limited liability company

By: Silver CP II, LLC, a Virginia limited liability company, its Manager

By: _____
B. Judson Honaker, Jr., Manager

Commonwealth of Virginia

City of Fredericksburg

The foregoing document was signed and acknowledged before me this 4 day of February, 2014, by B. Judson Honaker, Jr., Manager of Silver CP II, LLC, a Virginia limited liability company, Manager of Celebrate Virginia South L.L.C., a Virginia limited liability company, on behalf of the company.

_____
Notary Public

7578530
Registration No.

My commission expires: 11/30/2016

Notary seal:

RACHEL L. LOWMAN
NOTARY PUBLIC
REG # 7528530
MY COMMISSION EXPIRES 11/30/2016
COMMONWEALTH OF VIRGINIA

APPENDIX A
SCHEDULE OF COMPLIANCE

Celebrate South shall:

1. **Corrective Action Plan (CAP) Schedule:**

   A. Areas 1 and 2:

   I. No later than January 15, 2014: Begin planting buffers for Areas 1 & 2, including the 6.17 acres as shown on the corrective action plan submitted to DEQ on June 5, 2013 and revised on June 19, 2013.

   B. Area 3

   I. Credits:

   a. Within 30 days of the execution of this Order, submit proof of purchase of 678 stream compensation credits. Documentation that this specific amount of stream credits have been debited from the ledger of a DEQ approved stream mitigation bank authorized through a mitigation banking instrument to sell stream credits to this project. The ledger shall indicate that the purchase of stream credits is being made in accordance with the requirements of this Order.

   II. Preservation:

   a. Within 30 days of the execution of this Order, submit to DEQ for review and approval a preservation plan. The plan will satisfy a burden of 117 credits. Within 30 days of DEQ approval of the plan, submit proof of recordation.

2. **Submissions:**

   Unless otherwise specified in this Order, Celebrate Virginia shall submit all requirements of Appendix A of this Order to:

   Enforcement
   Virginia Department of Environmental Quality
   Northern Regional Office
   13901 Crown Court
   Woodbridge, VA 22193