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
ROUND HILL INVESTORS, LLC
FOR THE
ROUND HILL SUBDIVISION
VWP PERMIT NO. 02-0333

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 Round Hill Investors, LLC, regarding the Round Hill Subdivision, 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. "USACE" means U.S. Army Corps of Engineers.

2. "BMP" means Best Management Practices.

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. "CAP" means corrective action plan.

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

6. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

7. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

8. "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.

9. "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.

10. "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.

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

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

13. "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.

14. "PEM" means palustrine emergent wetlands.

15. "Permit" or "Virginia Water Protection Permit" means, VWP Individual Permit 04-0271 issued on December 9, 2002, and expires on December 8, 2017, 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.

16. "PFO" means palustrine forested wetlands.

17. "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.

18. "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.

19. "Project Site" or "Property" means the Round Hill Subdivision project owned by Round Hill Investors, LLC (Permittee) consists of a 814-acre residential development involving the construction of road infrastructure, utilities and single family dwellings throughout six (6) parcels: Mountain Valley, Greenwood Commons, Lake Point, West Lake, Fields and Upper Lakes located north and south of Route 7, approximately 1,500 feet east and west of Route 719 in Round Hill, Virginia, (Loudoun County).

20. "PSS" means palustrine scrub-shrub wetlands.

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

22. "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.

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

24. "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.

25. "Stantec" means the Stantec environmental consulting firm.

26. "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.

27. "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.

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

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

30. "VAC" means the Virginia Administrative Code.

31. "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.

32. "Woodgrove Property" means the Woodgrove Property Wetland Compensation Site, located south of Allder School Road and adjacent to Ketoctin Church.

SECTION C: Findings of Fact and Conclusions of Law

1. The Permittee owns the Project Site in Round Hill, Virginia.

2. The Permit currently issued to Round Hill authorized the total impact of 6.21 acres of surface waters, consisting of permanent impacts to 5.92 acres, including 4.19 acres of PFO wetlands, 0.49 acre of PSS wetlands, 0.73 acre of PEM wetlands, and 1,864.43 linear feet (0.51 acre) of unnamed intermittent streams to North Fork Goose Creek and Sleeter Lake. Temporary impacts total 0.29 acre, including 0.17 acre of PFO wetlands, 0.05 acre of PSS wetlands, 0.07 acre of PEM wetlands, and 22.87 linear feet (0.001 acre) of unnamed intermittent streams to North Fork Goose Creek and Sleeter Lake. In accordance with the Permit the permanent PFO, PSS and PEM wetland impacts will be compensated onsite through the creation of wetlands at the Woodgrove Property.

3. On April 23, 2014, DEQ inspected the construction impact locations, and on June 30, 2014, DEQ inspected the Woodgrove Property. On July 1, 2014, a compliance file review was conducted.

4. Based on a review of DEQ files and observations made during the site visits conducted on April 23, 2014, and June 30, 2014, DEQ observed the following:

    a. The unauthorized permanent impacts to approximately 1.72 acre of wetlands and approximately 439 linear feet of stream channel was observed, including 75 linear feet of stream channel identified as additional temporary impacts. Based on the inspection conducted this 75 linear feet had not been restored.

    On April 29, 2015, Stantec provided additional documentation that demonstrated that the unauthorized permanent stream channel impacts was approximately 382 linear feet (excluding the now restored 75 linear feet of termporary impacts) and the unauthorized permanent wetlands impacts was approximately 1.53 acres. After review of the April 29, 2015, submittal, DEQ accepted the revised unauthorized impact numbers.

    b. Round Hill failed to flag wetlands at the entrance feature for identification on the Upper Lakes parcel, in order to prevent disturbances/impacts.

c. Round Hill failed to plant the woody plant materials in Woodgrove Property prior to the 2012 growing season for the areas designated PFO and PSS.

d. Round Hill failed to propose required corrective action in the 2013 Mitigation monitoring report, (MMR) to address the unsuccessful survival of the woody materials in the Woodgrove Property upland buffer portion of the compensation site.

e. Round Hill failed to propose the required corrective action in the 2013 MMR to address the presence of invasive or noxious species in 13.4% of aerial cover in the Woodgrove Property wetland compensation. In addition, based on the DEQ inspection, there were several developing breeches located along the dikes constructed to manage the adequate hydrology of the cells. These breeches were not identified in the mitigation monitoring reports.

5. Part I.A.3 of the Permit states that "[a]ny additional impacts to surface waters, including wetlands, or any change to the type of wetland impacts, shall be subject to individual permit review or modification of this permit, and compensation may be required."

6. 9 VAC 25-210-50 A states that "[e]xcept in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface 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. Va. Code § 62.1-44.15:20.A states that "[e]xcept 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 the 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."

8. Part I.A.8 of the Permit states that "[a]ll non-impacted surface waters within the project or right-of-way limits that are within fifty feet of any project activities shall be clearly flagged or demarcated for the life of the construction activity within that area. The permittee shall notify all contractors and subcontractors that these marked areas are surface waters where no activities are to occur."

9. Part I.G.13 of the Permit states that "[t]he wetland plant community shall be considered established according to the performance criteria specified in the final compensation plan and approved by DEQ. Species composition shall reflect the desired plant community types stated in the final compensation plan by the end of the first growing season and shall be maintained through the last monitoring year. Species composition shall consist of greater than 50% facultative (FAC) or wetter (FACW or OBL) vegetation, as expressed by plant stem density for woody species and/or areal percent cover for herbaceous species."

10. Part I.G.15. of the Permit states that "[c]ompensation site monitoring for hydrology, soils, and hydrophytic vegetation shall begin at the first complete growing season (monitoring year one) following compensation site construction. Monitoring shall be required for monitoring years 1, 2, 3, 5, and 7."

11. Part I.G.9. of the Permit states that "[i]f the compensation area fails to be established as per the specified performance criteria, the reasons for this failure shall be determined and a corrective action plan, schedule, and monitoring plan shall be submitted to DEQ for approval prior to or with the next required monitoring report. All problems shall be corrected by the permittee. Shall significant changes be necessary to ensure success, the monitoring plan shall begin again, with monitoring year one being the year changes are complete."

12. As a result of the observations made during the site visit and file review, on July 30, 2014, DEQ issued NOV No. W2014-07-N-0007 for the violations of the Permit Parts: I.A.3; I.A.8; I.G.9; I.G.13; and I.G.15, 9 VAC 25-210-50.A, and Va. Code § 62.1-44.15:20.A.

13. On September 8, 2014, Stantec Consulting Services Inc. (Stantec), Round Hill's consultant, responded to the NOV on behalf of Round Hill.

14. The response letter stated that unpermitted wetlands impacts were caused by plan changes, erosion/sedimentation concerns, and/or at the request of Loudoun County inspectors. According to Stantec, the majority of these unpermitted wetland impacts were taken prior to 2007.

15. The response letter stated, that the mitigation areas and the buffer areas with woody vegetation, were planted, yet heavy browsing by deer had negated any planting efforts.

16. On September 10, 2014, Department staff met with representatives of Round Hill and Stantec to discuss the violations and the NOV response letter. At the meeting, Stantec discussed the NOV, the September 8, 2014, NOV response letter, and the proposed CAP.

17. Based on the results of the April 23, 2014, and June 30, 2014, site visits, the September 10, 2014, meeting, and the documentation submitted by representatives of Round Hill, the Board concludes that Round Hill has violated Permit Parts: I.A.3; I.A.8; I.G.9; I.G.13; and I.G.15, 9 VAC 25-210-50.A, and Va. Code § 62.1-44.15:20.A, as described in paragraphs C(4) through C(11), above.

18. In order for Round Hill to complete its return to compliance, DEQ staff and representatives of Round Hill 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 Round Hill, and Round Hill agrees to:

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

2. Pay a civil charge of $92,937.50 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

Round Hill 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, Round Hill 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 Round Hill for good cause shown by Round Hill, 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. W2014-07-N-0007, dated July 30, 2014. 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, Round Hill admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

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

    b. Round Hill 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 Round Hill.

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

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, Round Hill voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2016.

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

Round Hill Investors, LLC voluntarily agrees to the issuance of this Order.

Date: 5/24/16 By: Kevin B Rogers
KEVIN B ROGERS AUTHORIZED AGENT
Round Hill Investors, LLC

Commonwealth of Virginia
City/County of Loudoun

The foregoing document was signed and acknowledged before me this 24th day of May, 2016, by Kevin B. Rogers who is an Authorized agent of Round Hill Investors, LLC, on behalf of the company.

Amie Gene Root
Notary Public

7533521
Registration No.

My commission expires: May 31, 2016

Notary seal:

Amie Gene Root
Notary Public
Reg #7533521
Commonwealth of Virginia
My Commission Expires May 31, 2016

APPENDIX A

SCHEDULE OF COMPLIANCE

A. Corrective Action:

1. No later than 60 days from the execution of this Order, Round Hill shall submit to DEQ proof of the completion of the following Corrective Action Plan (CAP):

    a. Providing preservation documents sufficient to meet the requirements of the regulations, including:

        i. Exhibit attachments and survey information, including deeds/plats for DB 1509/PG 811, DB 1655/PG 1151, and other parcels as applicable, and language assuring there is access from a State right-of-way to all areas covered by a protective instrument.

    b. Stabilization of the mitigation site to address erosion of outlets by placement of rip rap.

    c. Provide mitigation for unauthorized impacts to 382 LF of stream channel and 1.53 acre of wetland through the following:

        i. Purchase of 382 Stream Compensation Credits (CCs) or 812 Stream Condition Units (SCUs) from a bank authorized to supply credits in this HUC code;

        ii. Purchase of 1.53 wetland credits from a bank authorized to supply credits in this HUC code; and,

        iii. Purchase of 0.83 wetland credits from a bank authorized to supply credits in this HUC code.

    d. Fulfill the compensation requirement for the Woodgrove site deficiency through the following:

        i. Purchase of 4.44 wetland credits from a bank authorized to supply credits in this HUC code; and,

        ii. Allow the existing Woodgrove site to remain "as is"—i.e., an emergent wetland with no further monitoring and reporting.

2. Round Hill shall respond to any DEQ Notice of Deficiency regarding the CAP within 14 calendar days.

3. Any changes to the CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Round Hill shall complete the CAP in accordance with its terms.

a. If the performance criteria specified in the CAP are not achieved at the end of the applicable monitoring period, then Round Hill shall so advise DEQ in the applicable monitoring report for that monitoring period and shall describe why it appears the criteria could not be achieved. If DEQ thereafter so directs, Round Hill shall submit to DEQ for review and approval an alternative CAP within 60 days of DEQ's letter requiring the same. The DEQ-approved alternative CAPs shall then be implemented by Round Hill in accordance with the schedule set forth in the alternative CAPs.

b. If the performance criteria specified in the CAP or any alternative CAP are not achieved by the end of the last monitoring period and DEQ determines that additional corrective action cannot sufficiently address the reasons for such failures, then Round Hill shall submit to DEQ for review and approval, within 30 days of such determination, a proposal to purchase mitigation bank credits or contributions to an in-lieu fee fund to address any remaining corrective action required in the CAP or, as applicable, any previously submitted alternate CAPs. Round Hill shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. Round Hill shall purchase mitigation back credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval.

B. Submissions:

Unless otherwise specified in this Order, Round Hill 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