# COMMONWEALTH of VIRGINIA

*DEPARTMENT OF ENVIRONMENTAL QUALITY*
*Street address:* 629 East Main Street, Richmond, Virginia 23219
*Mailing address:* P.O. Box 1105, Richmond, Virginia 23218
www.deq.virginia.gov

Molly Joseph Ward
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4000
1-800-592-5482


# STATE WATER CONTROL BOARD
# ENFORCEMENT ACTION - ORDER BY CONSENT
# ISSUED TO
# WINDSWEPT DEVELOPMENT, LLC
# FOR
# ASTON PHASE II
**Permit# WP4-06-0734**
**AND**
**WESTERLEIGH**
**Permit# WP4-05-1577**

## 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 Windswept Development, LLC regarding Aston Phase II and Westerleigh, for the purpose of resolving certain violations of State Water Control Law, the applicable regulations, and permit WP4-06-0734 and WP4-05-1577.

## SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Aston Phase II" means the tract of land south of the James River, east of Maidens Road (Route 522, south and west Old River Trail (Route 617), and north of Huguenot Trail (Route 711) in Powhatan County. Aston Phase II is an 85-lot subdivision consisting of single family homes with supporting infrastructure owned by Windswept Development, LLC.

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. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

7. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

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. "Impacts" means results caused by human-induced activities conducted in surface waters, as specified in §62.1-44.15:20 A of the Code of Virginia.

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

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 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.

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

17. "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 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.

18. "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.

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

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

21. "VAC" means the Virginia Administrative Code.

22. "Westerleigh" means a residential subdivision in Chesterfield County, VA.

23. "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.

24. "Windswept Development, LLC" means a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. Windswept Development, LLC is a "person" within the meaning of Va. Code § 62.1-44.3

**Aston Phase II**

1. On January 17, 2007, DEQ issued Permit WP4-06-0734, and a Notice of Planned Change was processed on September 24, 2014 to authorize a change in construction monitoring. Impacts are cumulative with Aston Phase I and totaled no more than 0.004 acres of palustrine forested wetlands and 735 linear feet of stream channel. The Permit required that these impacts be compensated through the preservation of 11,236 linear feet of on-site stream channel and purchase of 0.008 wetland credits from the James River Mitigation Land Bank.
2. On December 11, 2014 DEQ staff conducted a site inspection and file review and observed the following violations:
    a. Improper/missing erosion & sentiment control measures resulted in the discharge of sediment to the stream channel. The installation of a temporary sediment trap resulted in the clearing, excavation and discharge of fill material to approximately 0.054 acres of palustrine forested wetlands. Channelization and clearing near Kool Lane resulted in the impact of 0.004 acres of palustrine forested wetlands.
        i. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 states that, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters except in compliance with a VWP permit.
    b. All nonimpact areas within 50 feet of any activity and within the project right-of-way were not flagged.
        i. WP4-06-0734, Part I(C)(10) states that, "[a]ll nonimpacted 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."
    c. Failure to submit and receive approval on a final compensation plan prior to initiating construction activity in permitted impact areas.
        i. WP4-06-0734, Part II(A)(7) states that "All aspects of the compensation plan shall be finalized, submitted and approved by the board prior to any construction activity in the permitted impact areas."
3. On January 12, 2015, DEQ issued NOV No. 2015-01-PRO-700 for violations of Va. Code § 62.1-44.15:20, 9 VAC 25-210-50, and the Permit.
4. On February 5, 2015, DEQ staff met with representatives of Windswept Development, LLC to discuss the violations and a corrective action plan.
5. On March 4, 2015, DEQ staff conducted another site inspection and observed the following violations:

a. Improper/missing erosion & sentiment control measures resulted in the discharge of sediment to approximately 75 linear feet of stream channel.
    i. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 states that, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters except in compliance with a VWP permit.

b. Culverts at impact area 3 and impact area 4 had not been countersunk.

    i. WP4-06-0734, Part I(C)(2) states that, "No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions."

6. On March 18, 2015, DEQ staff issued NOV No. 15-02-PRO-700 to Windswept Development, LLC for violations of Va. Code § 62.1-44.15:20, 9 VAC 25-210-50, and the Permit.

**Westerleigh Subdivision**

7. On June 19, 2006, DEQ issued Permit WP4-05-1577 for discharges to states waters associated with construction activities at Westerleigh. On August 29, 2013, DEQ issued a Notice of Planned Change to authorize a change in the monitoring requirement, and on April 17, 2015 DEQ issued a continuation of coverage to extend the authorization expiration date.
8. On April 8, 2015 and April 10, 2015, DEQ staff conducted a site inspection and file review and observed the following violations:
    a. The discharge of fill material during the construction of a pool and clubhouse, improper maintenance of erosion and sediment controls, and failure to restore temporary impacts resulted in impacts to 0.13 acres of palustrine forested wetlands and 128 linear feet of stream channel beyond what was authorized in the Permit.
        i. VWP Permit WP4-05-1577 states that, "the proposed activity results in the permanent impact of no more than 0.72 acre of palustrine forested wetlands and no more than 425 linear feet of intermittent stream channel. Temporary impacts include no more than 306 linear feet of intermittent stream channel.
        ii. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 states that, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters except in compliance with a VWP permit.

9. Based on the results of inspections that occurred on December 11, 2014, March 4, 2015, April 8, 2015, and April 10, 2015 the Board concludes that Windswept Development, LLC has violated Va. Code §62.1-44.15:20 and the Regulations at 9 VAC 25-210-50,

Permit WP4-06-0734 and Permit WP4-05-1577, as described in paragraphs C(2) through C(8) above.

10. In order for Windswept Development, LLC to complete to compliance, DEQ staff and representatives of Windswept Development, LLC 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 Windswept Development, LLC, and Windswept Development, LLC agrees to:

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

2. Pay a civil charge of $29,250 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

Windswept Development, LLC shall include its Federal Employer Identification Number (FEIN) (59-3788667) 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, Windswept Development, LLC 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 Windswept Development, LLC for good cause shown by Windswept Development, LLC, 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. 2015-01-PRO-700 dated January 12, 2015, NOV No. 2015-02-PRO-700 dated March 18, 2015, and NOV 2015-04-PRO-700 dated April 27, 2015. 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, Windswept Development, LLC admits to the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact and conclusions of law in this Order.

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

    b. Windswept Development, LLC 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 Windswept Development, LLC.

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

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, Windswept Development, LLC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, **2015.**

_____
Jefferson Reynolds
Director of Enforcement
Department of Environmental Quality

----------(Remainder of Page Intentionally Blank)----------

Windswept Development, LLC voluntarily agrees to the issuance of this Order.

Date: 5/26/15 By: _____, Manager.
(Person) (Title)
Windswept Development, LLC

Commonwealth of Virginia
City/County of Chesterfield

The foregoing document was signed and acknowledged before me this 26 day of May, 2015, by W. Vernon McClure who is Manager of Windswept Development, LLC on behalf of the company.

Paula Maria Carlin
Notary Public

7503188
Registration No.

My commission expires: June 30, 2016

Notary seal:

PAULA MARIA CARLIN
NOTARY PUBLIC
REG #7503188
COMMONWEALTH OF VIRGINIA

# APPENDIX A
# SCHEDULE OF COMPLIANCE

1. No later than 30 days from the execution of any consent order, Windswept Development, LLC shall submit the final protective instrument, including incorporated exhibits, to preserve 11,236 linear feet of stream in perpetuity, to DEQ for review and approval. Windswept Development, LLC shall respond to any DEQ Notice of Deficiency regarding the protective instrument within 14 calendar days. Within 15 calendar days of DEQ approval of the instrument, Windswept Development, LLC shall record the instrument in the Clerk's Office of the Circuit Court of Powhatan County.
    a. Windswept Development, LLC shall immediately cease impacts to state waters and shall not resume construction activity authorized pursuant to Permit WP4-06-0734 until the protective instrument has been recorded in the Clerk's Office of the Circuit Court of Powhatan County.

2. No later than 30 days from the execution of any consent order, Windswept Development, LLC shall submit documentation of the purchase of 0.116 wetland credits for the Aston Phase II project and 0.08 wetland credits and 100 linear feet of equivalent stream credits as calculated by the uniform stream methodology for the Westerleigh project from a DEQ-approved mitigation bank that is authorized and approved by DEQ to sell credits in the area in which the impacts occurred and has credits available (as released by DEQ) to achieve no-net-loss of existing wetland acreage and no-net-loss of function in all surface waters in accordance with Va. Code § 62.1-44.15:23 and 9 VAC25-690-70; multiple banks may be used to fulfill compensation requirements.

3. No later than 30 days from the execution of any consent order, Windswept Development, LLC shall submit an approvable Corrective Action Plan (CAP) for the restoration of unpermitted impacts to state waters at the Aston Phase II and Westerleigh properties and to correct countersinking of the culverts at Aston Phase II, in accordance with Part I(C)(2) of Permit WP4-06-0734. The CAP 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 and shall define the success criteria to be achieved. Windswept Development, LLC shall respond to any DEQ Notice of Deficiency regarding the CAP within 14 calendar days.
    a. Upon DEQ approval of the CAP, Windswept Development, LLC shall begin implementation of the Corrective Action Plan in accordance with the schedule contained therein. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Windswept Development, LLC shall complete the CAP, including monitoring and reporting, in accordance with its terms.
    b. DEQ, at its sole discretion, shall determine the success, as defined by the CAP, of the corrective action. Windswept Development, LLC shall have 30 days from the date of notification to address any deficiencies in a manner approved by DEQ.
        i. In the event the deficiencies are not corrected within 30 days of the original notification, Windswept Development, LLC shall provide

documentation to DEQ of the purchase of the mitigation bank credits required to compensate for remaining impacts as approved by DEQ.

1. The amount of required wetland mitigation bank credits shall be calculated using a 2:1 credit to impact ratio, and the amount of required stream mitigation bank credits shall be calculated using the Unified Stream Methodology, but shall not exceed 30 stream credits. Mitigation bank credits shall be purchased from a mitigation bank which meets the requirements of Va. Code § 62.1-44.15:23 and 9 VAC25-690-70; multiple banks may be used to fulfill compensation requirements.

4. Unless otherwise specified in this Order, Windswept Development, LLC shall submit all requirements of Appendix A of this Order to:

   Virginia Department of Environmental Quality
   Water Protection Permit Program
   4949-A Cox Road
   Glen Allen, VA 23060