COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
BLUE RIDGE REGIONAL OFFICE
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L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Steven A. Dietrich
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
AL M. COOPER CONSTRUCTION, INCORPORATED

WP4-07-2019

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and 8(d), between the State Water Control Board and Al M. Cooper Construction, Incorporated, for the purpose of resolving certain violations of environmental law 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. "Cooper" means Al M. Cooper Construction, Incorporated the owner of the site.

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

4. "Director" means the Director of the Department of Environmental Quality.

5. "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.

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

7. "Order" means this document, also known as a Consent Special Order.

8. "Permit" means United States Army Corps of Engineers State Programmatic General Permit which is commonly referred to as a federal 404 permit and the State of Virginia VWP permit which is the commonly referred to as a state 401 permit.

9. "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.

10. "Site" means the Berkeley Manor & Bellview Garden, a residential subdivision (Roanoke County Tax Parcel ID: 087.20-01-09.00-0000).

11. "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. 9 VAC 25-210-10.

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

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

14. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia. In November of 2008 WCRO combined Regional offices with the DEQ South Central Regional Office in Lynchburg to begin the transition to a combined DEQ Blue Ridge Regional Office (BRRO).

SECTION C: Findings of Fact and Conclusions of Law

1. Cooper, a person pursuant to 9 VAC 25-690-10, is preparing the Site, which it owns, located north of Buck Mountain Road in Roanoke County.

2. On August 17, 2007, an inspection was conducted to verify that the Site, based on Incident Report 2008-W-0057, had construction activities taking place that were affecting State waters on an unnamed tributary of Back Creek (UT Back Creek) without a Permit. In several spots there was an unauthorized discharge of fill material, a pollutant.

3. Va. Code § 62.1-44.15:20 prohibits the discharge of fill material or activities that alter the physical, chemical, or biological properties of State waters except in compliance with a Permit.

4. On August 24, 2007, a Warning Letter (WL-07-08-WCRO-015) was sent requesting that Cooper discontinue working in the stream and that it obtain the necessary Permits prior to initiating any additional work in State waters.

5. On September 4, 2007, in response to the Warning Letter of August 24, 2007, a Corrective Action Plan (CAP) was submitted. On that same day the CAP was approved by DEQ. The approval stated the installation of the temporary stream crossing was to be delayed until the Joint Permit Application (JPA) was submitted.

6. On September 11, 2007, during the re-inspection, a 125.5 linear foot long reinforced concrete culvert pipe described in the JPA as permanent Impact #1 had been observed as having been installed. Considering outlet and inlet protection grading the length of this unauthorized impact was estimated as 150 linear feet.

7. The culvert installation by Cooper was conducted without a Permit and resulted in the unauthorized discharge of fill material, a pollutant, and permanent impacts to 150 linear feet of State waters which resulted in alteration and degradation of the physical, chemical, and biological functions and properties of State waters in violation of Va. Code § 62.1-44.15:20 and the Virginia Water Protection (VWP) Permit Regulation 9 VAC 25-210-10 *et seq*.

8. On September 18, 2007, a Notice of Violation (NOV) (07-09-WCRO-002) was issued for the unauthorized discharge of a pollutant into State waters.

9. On October 2, 2007, the USACE determined the State waters of interest on the Site, UT Back Creek, to be jurisdictional waters of the United States.

10. On October 18, 2007, a VWP General Permit (WP4-07-2019 and 401 Permit) and USACE 404 Permit for the Site became effective and expire on October 18, 2014 and June 1, 2012 respectively.

11. On September 15, 2008, the site was inspected to evaluate the status of construction and compliance with Permit conditions. Al M. Cooper (President of Cooper Construction) and his son Travis Cooper were present during the inspection. DEQ staff did not observe any stream bed or channel features of any kind immediately downstream of the check dam. Staff did not observe any evidence of a stream bed, differences in substrate size, and other physical evidence of a stream bed that typically differentiates a stream bed from an adjacent upland area. Staff concluded that approximately 175 linear feet of stream was impacted and completely removed by construction activities.

12. Part I.A.1 of the Permit authorizes permanent and temporary stream and wetlands impact of up to two acres of nontidal wetlands or open water and up to 1,500 linear feet

of nontidal stream bed. No stream impacts of any kind were proposed to occur in the original permit application in the area where the 175 linear feet of stream was removed.

13. Part I.A.3 of the Permit requires that any changes to temporary impacts to surface water associated with the project shall require prior written notification to DEQ. Cooper did not submit any written notification to DEQ of its intent to physically alter approximately 175 linear feet of stream on a temporary basis.

14. Va. Code § 62.1-44.15:20 prohibits the discharge of fill material or activities that alter the physical, chemical, or biological properties of State waters except in compliance with a Permit.

15. On September 23, 2008, a second NOV was issued for the violations referenced in section C 10 and C 12.

16. The unauthorized activity altered the physical, chemical, or biological properties when approximately 175 linear feet of stream was removed. Cooper failed to provide written notification of impacts to surface waters associated with the project. The unauthorized activity and the failure to notify are violations of Va. Code § 62.1-44.15:20, the Virginia Water Protection (VWP) Permit Regulation 9 VAC 25-210-10 *et seq.*, and the VWP General Permit WP4-07-2019.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it pursuant to Va. Code §§62.1-44.15(8a) and (8d) and upon consideration of Va. Code § 10.1-1186.2, the Board orders Cooper, and Cooper voluntarily agrees to:

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

2. Pay a civil charge of $50,750 in settlement of the violations cited in this Order. Payments are due as provided in the following table:

Installment #	Amount Due	Due Date
1	$1,409.80	January 1, 2010
2	$1,409.72	February 1, 2010
3	$1,409.72	March 1, 2010
4	$1,409.72	April 1, 2010
5	$1,409.72	May 1, 2010
6	$1,409.72	June 1, 2010
7	$1,409.72	July 1, 2010
8	$1,409.72	August 1, 2010
9	$1,409.72	September 1, 2010
10	$1,409.72	October 1, 2010
11	$1,409.72	November 1, 2010
12	$1,409.72	December 1, 2010

13	$1,409.72	January 1, 2011
14	$1,409.72	February 1, 2011
15	$1,409.72	March 1, 2011
16	$1,409.72	April 1, 2011
17	$1,409.72	May 1, 2011
18	$1,409.72	June 1, 2011
19	$1,409.72	July 1, 2011
20	$1,409.72	August 1, 2011
21	$1,409.72	September 1, 2011
22	$1,409.72	October 1, 2011
23	$1,409.72	November 1, 2011
24	$1,409.72	December 1, 2011
25	$1,409.72	January 1, 2012
26	$1,409.72	February 1, 2012
27	$1,409.72	March 1, 2012
28	$1,409.72	April 1, 2012
29	$1,409.72	May 1, 2012
30	$1,409.72	June 1, 2012
31	$1,409.72	July 1, 2012
32	$1,409.72	August 1, 2012
33	$1,409.72	September 1, 2012
34	$1,409.72	October 1, 2012
35	$1,409.72	November 1, 2012
36	$1,409.72	December 1, 2012
37	$1,409.72	January 1, 2013

3. 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

The payments shall include Cooper's Federal Identification Number (FIN), 54-1837331, and shall state either on a transmittal letter or as a notation on the check or money order that the payment is submitted pursuant to this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Cooper, for good cause shown by Cooper, or on its own motion after notice and opportunity to be heard.

2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to Cooper by DEQ on September 18, 2007and September 23, 2008. 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 as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, Cooper admits the jurisdictional allegations, but neither admits nor denies factual findings and conclusions of law contained herein.

4. Cooper 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. Cooper declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the State Water Control Law and he 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 enforce this Order.

6. Failure by Cooper 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. Cooper shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Cooper shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Cooper shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

    a. the reasons for the delay or noncompliance;

    b. the projected duration of any such delay or noncompliance;

c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which Cooper 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 Cooper hereto, its 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 Cooper. Notwithstanding the foregoing, Cooper 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. Cooper petitions the Regional Director to terminate the Order after it has completed all requirements of the Order. The Director's determination that Cooper has satisfied all the requirements of the Order is a "case decision" within the meaning of the Virginia Administrative Process Act; or

    b. The Director or the Board may terminate this Order in his or its whole discretion upon 30 days' written notice to Cooper.

    Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve Cooper from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. The undersigned representative of Cooper 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 Cooper to this document. Any documents to be submitted pursuant to this Order shall be submitted by a responsible official of Cooper.

13. By the signature of an authorized official below, Cooper voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____day of _____, 2009.

_____
Steven A. Dietrich, Regional Director
Blue Ridge Regional Office
Department of Environmental Quality

Al M. Cooper Construction, Incorporated, voluntarily agrees to the issuance of this Order.

By: _____

Date: Oct 5, 2009

Commonwealth of Virginia
~~City/~~County of Roanoke

The foregoing document was signed and acknowledged before me this 5th day of October, 2009 by Al M. Cooper (name), who is President (title) of Al M. Cooper Construction, Incorporated, a Virginia corporation, on behalf of the Corporation.

_____
Notary Public

My commission expires: 6/3/2010.

NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
David B. Bullington
My Commission Expires
June 30, 2010
Notary #363265

Appendix A

In addition to the foregoing, the Board orders, and Cooper agrees to implement, the following terms and conditions of this Appendix:

1. **By April 14, 2009,** the Corrective Action Plan CAP submitted by Cooper and approved by DEQ (revision date 12/18/08) shall be completed. All work shall be conducted and completed pursuant to the approved CAP. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ.

    a. If the performance criteria specified in the Final CAP are not achieved at the end of the applicable monitoring period, then Cooper 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, Cooper 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 CAP shall then be implemented by Cooper in accordance with the schedule set forth in the alternative CAP.

    b. If the performance criteria specified in the Final 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 Cooper 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 Final CAP or, as applicable, any previously submitted alternate CAP. Cooper shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. Cooper shall purchase mitigation bank credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval.

2. Cooper shall monitor the success of the work until the site is stabilized in accordance with the terms of the general permit to ensure project stability.

3. Cooper shall comply with all requirements of Virginia Water Protection General Permit WP4-07-2019 (Permit). Violations of the Permit will be deemed a violation of this Order.

4. Cooper shall submit all requirements of Appendix A of this Order to:

    Steven B. Wright
    VA DEQ –Blue Ridge Regional Office
    3019 Peters Creek Road
    Roanoke, VA 24019