COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
5636 Southern Boulevard, Virginia Beach, Virginia 23462
(757) 518-2000 Fax (757) 518-2009
www.deq.virginia.gov

L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Francis L. Daniel
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - SPECIAL ORDER BY CONSENT
ISSUED TO
West Neck Properties, Inc.
Mr. Robert Zirpoli, President
FOR
Eagles Nest Subdivision
Permit No. WP4-03-2331

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and § 62.1-44.15(8d), between the State Water Control Board and West Neck Properties, Inc. for the purpose of resolving certain violations of environmental law and/or 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. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.

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

4. "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.

5. "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.

6. "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.

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

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

9. "Permit" means VWP General Permit Authorization No. WP4-03-2331, which was issued to West Neck Properties, Inc. attn: Mr. Robert Zirpoli on February 27, 2004, approved for continuation of coverage on February 26, 2009, and expires on February 26, 2013.

10. "Pollutant" means any substance, radioactive material, or heat which cause or contributes to, or may cause or contribute to pollution.

11. "Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.

12. "Property" means the parcel owned by West Neck Properties, Inc., and developed as Eagles Nest Subdivision, located northeast of the intersection of Indian River Road and West Neck Road in Virginia Beach, Virginia.

13. "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.

14. "Surface water" means all state waters that are not ground waters as defined in § 62.1-255 of the Code of Virginia.

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

16. "VAC" means the Virginia Administrative Code.

17. "Virginia Water Protection permit" or "VWP permit" means an individual or general permit issued by authority of the Board 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).

18. "West Neck Properties" means West Neck Properties, Inc., a corporation authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. West Neck Properties, Inc. is a "person" within the meaning of Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

19. "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. West Neck Properties owns the Property. The Property contains jurisdictional, non-tidal, forested and emergent wetlands connected with West Neck Creek, and the North Landing River. West Neck Creek is impaired for *E. coli* and fecal coliform from unknown sources, and chloride and dissolved oxygen from natural conditions.

2. The Permit authorized the development of the Eagles Nest Subdivision and the associated permanent impacts to 0.227 acres of palustrine forested wetlands, 0.245 acres of palustrine emergent wetlands, and 0.295 acres of open water in the West Neck watershed. In addition, the Permit stated that 0.024 acres of forested wetlands would be converted to emergent wetlands, and two areas totaling 0.07 acres of forested wetlands temporarily impacted during construction would be restored to their pre-construction condition. Mitigation for the associated impacts was to come through the purchase of 0.723 credits from Davis Wetland Bank prior to any construction activity in the permitted impact areas.

3. On September 14, 2007 DEQ staff conducted a file review and compliance site inspection of the Eagles Nest Subdivision. Upon completion of the file review, DEQ staff found no record of confirmation of the purchase of the required 0.723 credits from the Davis Wetland bank. In addition, DEQ staff found no record of a notification of construction submitted prior to commencement of activities in permitted impact areas, no record of construction monitoring reports, no photo documentation of construction within permitted impact areas, and no record of a notice of termination. A site inspection revealed that the two temporary impact areas totaling 0.07 acres of forested wetlands had not been restored to pre-construction condition, as required by the Permit.

4. On October 1, 2007 DEQ sent Warning Letter No. W2007-09-T-1017 to West Neck Properties, Inc. because the DEQ had not received the notification and monitoring documentation required by the Permit.

5. Multiple inquires into DEQ records and with Mr. Zirpoli and his consultant revealed that Mr. Zirpoli and West Neck Properties had not submitted proof of mitigation banks credit purchase and construction monitoring reports.

6. On January 23, 2008 DEQ issued Notice of Violation No. W2007-12-T-0002 ("NOV") to West Neck Properties, Inc., attn: Mr. Robert Zirpoli for no proof of credit purchase, pre-construction notice, construction monitoring, or notice of project termination.

7. On March 9, 2008 DEQ received a faxed copy of a letter from The Great Dismal Swamp Restoration Bank, LLC confirming the purchase on March 3, 2008 of 0.723 credits from the Edge Farm mitigation bank by West Neck Properties, Inc.

8. On June 13, 2008 DEQ staff visited the Property. It was observed that the two temporary impact areas had still not been restored to pre-construction condition. Also, staff observed that a forested wetland area between Lots 37 and 38 appeared to have been cleared, grubbed, and graded, but was not authorized under the Permit.

9. On October 21, 2008 DEQ staff inspected the Property and confirmed that approximately 0.115 acres of unauthorized impacts had been taken to a forested wetland area between Lots 37 and 38 on the Property. The forested wetland area had been cleared, the stumps grubbed, and the area graded to the level of the adjacent Lots. The unauthorized impacts to the 0.115 acres of forested wetland included the placement of fill material and discharge of a pollutant. In addition, one of the two temporary impact areas had not been restored, and the second had been replanted with loblolly pine, a non-wetland species. Staff contacted Mr. Zirpoli providing the findings of the site inspection and a list of appropriate wetlands species plants and guidelines for restoring the temporary impact areas to pre-construction forested wetland condition.

10. On November 21, 2008 DEQ issued NOV No. W2008-11T-0001 to West Neck Properties, Inc. and Mr. Zirpoli for the unauthorized impacts to approximately 0.115 acres of wetlands on the Property, and for not restoring the two temporary wetland impact areas to pre-construction conditions.

11. On December 10, 2008 DEQ staff met with Mr. Zirpoli to discuss the most recent NOV. Mr. Zirpoli denied clearing the 0.115 acres of forested wetlands. Mr. Zirpoli continued to assert that notices and monitoring reports were submitted to the DEQ.

12. On December 22, 2008 DEQ staff met with Mr. Zirpoli's attorney and consultant, Carl Eason and Bob Simon, respectively. Mr. Eason and Mr. Simon acknowledged the unauthorized impacts to 0.115 acres forested wetlands and the total 0.07 acres of un-restored forested wetland temporary impacts. They noted they would work expeditiously to restore the temporary impacts and would generate a restoration plan for the unauthorized impact area.

13. Va. Code § 62.1-44.15:20 states that except in compliance with VWP permit, it is unlawful to excavate in a wetland, or conduct the following activities in a wetland: (b) filling or dumping...(d) new activities that cause significant alteration or degradation of existing wetland acreage or functions. Similarly, 9 VAC 25-210-50 (A) states that except in compliance with a 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, including wetlands.

14. West Neck Properties is in violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50(A) for exceeding permitted impacts, filling wetlands, the unauthorized discharge of pollutants, failure to complete compensatory mitigation, failure to conduct and submit reports for required construction monitoring, failure to provide required notice prior to commencing construction, and failure to restore temporary impacts.

15. In order for West Neck Properties to return to compliance, DEQ staff and representatives of West Neck Properties have agreed to the Schedule of Compliance, which is incorporated as the Appendix of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15(8a) and (8d), the Board orders West Neck Properties, and West Neck Properties agrees to:

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

2. Pay a civil charge of $32,291.00 within 90 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

West Neck Properties shall include its Federal Employer Identification Number 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).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of West Neck Properties for good cause shown by West Neck Properties, or on its own motion 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, West Neck Properties admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. West Neck Properties 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. West Neck Properties 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 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 enforce this Order.

6. Failure by West Neck Properties 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. West Neck Properties 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. West Neck Properties shall show that such circumstances were beyond their control and not due to a lack of good faith or diligence on their part. West Neck Properties 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 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, 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 West Neck Properties. Notwithstanding the foregoing, West Neck Properties agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until in effect until:

(a) West Neck Properties 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

(b) the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to West Neck Properties.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve West Neck Properties 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 West Neck Properties 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 West Neck Properties 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 West Neck Properties to this document.

Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of West Neck Properties.

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, West Neck Properties voluntarily agrees to the issuance of this Order.

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

_____
Frank Daniel, Regional Director
Department of Environmental Quality

West Neck Properties, Inc. voluntarily agrees to the issuance of this Order.

Date: 8-25-09 By: Robert D Zirpoli, PRESIDENT
(Person) (Title)
West Neck Properties, Inc.

Commonwealth of Virginia
City/County of Virginia Beach

The foregoing document was signed and acknowledged before me this 25th day of August, 2009 by Robert D. Zirpoli who is President of West Neck Properties, Inc. on behalf of the corporation.

Debra J. Huella
Notary Public

302956
Registration No.

My commission expires: 5-31-13

Notary seal:

APPENDIX

West Neck Properties shall:

1. Within 30 days of the effective date of this Order, submit an approvable Corrective Action Plan (CAP) and implementation schedule for the restoration of state waters on the Property as described in section C of this Order. The CAP must meet the requirements to achieve no net loss of existing wetland acreage and functions. West Neck Properties shall respond to any DEQ Notice of Deficiency regarding the CAP within 30 calendar days. The CAP will include:

    a. A list of plant species and quantity, and a map depicting planting location.
    b. Stated success criteria (300 stems per acre for 3 gallon plants) and annual replanting schedule if success criteria not achieved.
    c. A monitoring schedule to including photographic and written monitoring reports submitted at planting and year one, and then annually for five years or until stated success criteria are met and approved by DEQ. If success criteria are not met within five years from initial planting, West Neck Properties will submit a new revised Corrective Action Plan to DEQ for approval.
    d. Physical preservation of the 0.115 acres of unauthorized impacts through construction of a fence around its border. Proof of physical preservation will be provided within 60 days of the effective date of this Order.
    e. Purchase of mitigation bank credits for the 0.115 acres of unauthorized impacts at a 2:1 ratio (0.23 credits) from a wetland bank located within hydrologic unit code 03010205. Proof of mitigation bank credit purchase will be provided within 60 days of the effective date of this Order.
    f. An implementation schedule to include the date of planting, monitoring and monitoring report submittal, preservation, proof of preservation submittal, and replanting, if necessary.

2. Upon DEQ approval, implement the CAP according to schedule contained therein. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ.

3. Comply with the CAP and implementation schedule required by this Appendix, and the Permit.

4. Mail all submittals and reports required by this Appendix to:

    Francis L. Daniel, Regional Director
    DEQ, Tidewater Regional Office
    5636 Southern Boulevard
    Virginia Beach, VA 23462