# *COMMONWEALTH of VIRGINIA*

*DEPARTMENT OF ENVIRONMENTAL QUALITY*

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# STATE WATER CONTROL BOARD
# ENFORCEMENT ACTION - SPECIAL ORDER BY CONSENT
# ISSUED TO
# FOUNTAINHEAD LAND COMPANY, LLC
# FOR
# BALLYHACK GOLF CLUB
# WP4-07-2708

## SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d), between the State Water Control Board and Fountainhead Land Company, LLC, (Fountainhead) regarding the Ballyhack Golf Club, for the purpose of resolving certain violations of State Water Control Law, the permit WP4-07-2708, 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. "BRRO" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.

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 any 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. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of a surface water for any purpose, by placing of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

7. "Fountainhead" means Fountainhead Land Company, LLC, a limited liability company authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. Fountainhead is a "person" within the meaning of Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

8. "Impacts" means results caused by human-induced activities conducted in surface waters, as specified in § 62.1-44.15.5(D) of the Code of Virginia. 9 VAC 25-690-100.

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

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

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

12. "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

13. "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" for the terms and purposes of this chapter. 9 VAC 25-210-10.

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

15. "Site" means the Ballyhack Golf Course property located off Pitzer Road in Roanoke County.

16. "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.

17. "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.

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

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

20. "VAC" means the Virginia Administrative Code.

## SECTION C: Findings of Fact and Conclusions of Law

1. Fountainhead Land Company, LLC, a person pursuant to 9 VAC 25-210-10, owns and operates the Site.

2. Fountainhead was issued a Virginia Water Protection Permit (WP4-07-2708) on January 29, 2008, and it expires on January 28, 2015.

3. On April 8, 2008, DEQ received a citizen complaint regarding a loss of a beneficial use a second order unnamed tributary of Back Creek (2nd OUTBK), a state water, as a result of a sediment discharge.

4. On April 10, 2008, DEQ inspectors conducted a Virginia Water Protection Permit (VWPP) inspection of the Site. The inspectors observed a pumping operation of sediment laden water from an upland pond to a 1st order unnamed tributary to Back Creek (1st OUTBK), a state water, which resulted in a discharge of sediment, a pollutant, impacting upwards of 1700 linear feet. DEQ inspectors requested that the contractor discontinue the pond pumping until he had contacted the project engineer to come up with an appropriate filtering method. The contractor complied with the request. DEQ also suggested that pumping practices be submitted to Roanoke County for review and approval as an E&S plan revision.

5. On April 11, 2008, Fountainhead sent a dewatering plan to the County of Roanoke which was approved on April 29, 2008.

6. Pursuant to 9 VAC 25-690-100 all activity conducted under the authority of permit number WP4-07-2708 must be conducted in accordance with the terms of the permit, protect instream beneficial uses, not violate water quality standards, and not cause or contribute to a significant impairment of state waters and fish and wildlife resources.

7. On April 22, 2008, DEQ issued a Notice of Violation (NOV) 08-04-WCRO-003 to Fountainhead for unpermitted activities that resulted in the alteration of the physical, chemical and biological properties of state waters upwards of 1700 linear feet making them detrimental to animal and aquatic life in violation of Virginia Code §62.1-44.15:20 and VWP regulation 9 VAC 25-690-100, *et seq*.

8. On May 19, 2008 and May 20, 2008, DEQ staff conducted a site visit and performed habitat survey using United States Environmental Protection Agency's Rapid Bioassessment Protocols II (EPA RBA II) habitat method, measuring sediment depths and photo-documenting the source and impacts of the unauthorized discharge. DEQ staff concludes that there was a significant alteration to state waters.

9. On July 18, 2008, DEQ staff reinspected the Site. DEQ staff observed additional sediment discharges to state waters on the Site.

10. On July 16, 2008 and 25, 2008, DEQ staff conducted a third Virginia Water Protection Permit compliance inspection of the Site. DEQ staff noted a number of violations had still not been corrected as requested and an additional unauthorized impact of 50 linear feet of stream SAR #17 had been filled in order to create golf hole #13's green.

11. On August 20, 2008, DEQ issued a Notice of Violation (NOV-08-08-WCRO-001) to Fountainhead addressing the violations observed during the July 18th and 25th inspections.

12. On August 26, 2008, DEQ received confirmation from representatives of Fountainhead that the stream designated as SAR #17 had an additional 50 linear feet permanently impacted by construction activities.

13. On October 17, 2008, representatives of Fountainhead requested the Process for Early Dispute Resolution (PEDR) to address the alleged violations. The PEDR resulted in Fountainhead being required to perform compensation on a 1:1 basis for the 50 linear feet of the golf green #13, pursuant to 9 VAC 25-210-116. Furthermore, the PEDR concluded that dewatering of a permanent irrigation pond resulted in an unauthorized discharge of sediment, a pollutant, to state waters which requires corrective action to remove accumulated sediment.

14. On October 15, 2009 Fountainhead submitted an updated EPA RBA II habitat assessment that indicated the detrimental effects from the unauthorized activity referenced above were no longer present in the majority of the state waters on Site and that there had been no additional sediment discharges related to the Ballyhack Golf Club Project.

15. On October 28, 2009 DEQ staff visited the Site to determine any final corrective action that may be required. While on Site DEQ staff agreed that the detrimental effects had been remedied at most areas and noted where additional corrective action was necessary to be included in a corrective action plan as part of this Order. DEQ staff also observed failed erosion and sediment control measures put in place after road construction which resulted in new unauthorized discharges of sediment to 120 linear feet of Horseshoe Branch, a tributary to Back Creek, a state water.

16. Based on the results of above referenced inspections, the PEDR, and documentation submitted by Fountainhead, the Board concludes that Fountainhead has violated Virginia Water Protection Permit (WP4-07-2708), Va. Code §62.1-44.15:20, and 9 VAC 25-210-50 as described above, through the unlawful discharge of sediment, a pollutant, which altered the physical, chemical and biological properties of state waters making them detrimental to animal or aquatic life, failing to follow permit conditions, and exceeding permitted impacts.

17. In order for Fountainhead to return to compliance, DEQ staff and representatives of Fountainhead have agreed to the Schedule of Compliance incorporated as Appendix A and B of this Order.

## SECTION D: Agreement and Order

By virtue of the authority granted it pursuant to Va. Code § 62.1-44.15 and upon consideration of Va. Code § 10.1-1186.2, the Board orders Fountainhead, and Fountainhead agrees:

1. To perform the actions described in Appendices A and B of this Order; and

2. To a civil charge of $44,600 in settlement of the violations cited in this Order, to be paid as follows:

   a. Fountainhead shall pay $28,275 of the civil charge within 30 days of the effective date of this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," delivered to:

      Receipts Control
      Department of Environmental Quality
      Post Office Box 1104
      Richmond, Virginia 23218

      Fountainhead shall include its Federal Employer Identification Number (FEIN) 20-3202052 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).

b. Fountainhead shall satisfy $16,325 of the civil charge by satisfactorily completing the Supplemental Environmental Project (SEP) described in Appendix B of this Order.

c. The net project costs of the SEP to Fountainhead shall not be less than the amount set forth in Paragraph D.2.b. If it is, Fountainhead shall pay the remaining amount in accordance with Paragraph D.2.a of this Order, unless otherwise agreed to by the Department. "Net project cost" means the net present after-tax cost of the SEP, including tax savings, grants, and first-year cost reductions and other efficiencies realized by virtue of project implementation. If the proposed SEP is for a project for which the party will receive an identifiable tax savings (e.g., tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the net project cost shall be reduced by those amounts. The costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts, or grants shall be deducted.

d. By signing this Order Fountainhead certifies that it has not commenced performance of the SEP.

e. Fountainhead acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by Fountainhead to a third party, shall not relieve Fountainhead of its responsibility to complete the SEP as described in this Order.

f. In the event it publicizes the SEP or the SEP results, Fountainhead shall state in a prominent manner that the project is part of a settlement of an enforcement action.

g. The Department has the sole discretion to:

   i. Authorize any alternate, equivalent SEP proposed by the Fountainhead; and

   ii. Determine whether the SEP, or alternate SEP, has been completed in a satisfactory manner.

h. Should the Department determine that Fountainhead has not completed the SEP, or alternate SEP, in a satisfactory manner, the Department shall so notify Fountainhead in writing. Within 30 days of being notified, Fountainhead shall pay the amount specified in Paragraph D.2.b, above, as provided in Paragraph D.2.a, above.

## SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Fountainhead for good cause shown by Fountainhead, or on its own motion pursuant to the Administrative Process Act 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 only, Fountainhead admits to the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law in this Order.

4. Fountainhead 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. Fountainhead 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 modify, rewrite, amend, or enforce this Order.

6. Failure by Fountainhead 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. Fountainhead 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. Fountainhead shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Fountainhead 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, 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 Fountainhead. Nevertheless, Fountainhead 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) Fountainhead 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 Fountainhead.

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

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.

And it is so ORDERED this_____ day of _____, 20010.

_____

Melanie D. Davenport, Director of Enforcement

Department of Environmental Quality

By its signature below, Fountainhead Land Company, LLC voluntarily agrees to the issuance of this Order.

Date: 12/15/2009 By: _____, _____
Jim McAden — President of Fountainhead Land Company, LLC

Commonwealth of Virginia
City/County of Roanoke

The foregoing document was signed and acknowledged before me this 15th day of December, 2009, by James W McAden who is member of Fountainhead Land Company, LLC, on behalf of the company.

_____
Notary Public

254274
Registration No.

My commission expires: May 31 2013

Notary seal:

BETTIGENE MARIE PROMEN
NOTARY PUBLIC
REG. #254274
MY COMMISSION EXPIRES
5/31/13
COMMONWEALTH OF VIRGINIA

## Appendix A

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

1. Fountainhead shall immediately cease impacts to state waters and shall not resume such impacts unless authorization from DEQ is granted via a Permit.

2. By **January 1, 2010**, submit to the Virginia Aquatic Resources Trust Fund, c/o The Nature Conservancy of Virginia, Ms. Linda Crowe, 490 Westfield Road, Charlottesville, VA 22901, the Voucher and $20,000 for compensation (1:1 replacement basis) of the 50 linear feet of additional stream impact at golf green #13.

3. No later than **January 15, 2010**, Fountainhead shall submit an approvable Corrective Action Plan (CAP) for the restoration of state waters on the Property that have been impacted without a Permit that meets the requirements of 9 VAC 25-210-116. 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 Fountainhead shall respond to any DEQ Notice of Deficiency regarding the CAP within 14 calendar days.

4. Upon DEQ approval of the CAP, Fountainhead shall begin implementation of the CAP in accordance with the schedule contained therein with completion to be by **February 1, 2010**. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Fountainhead shall complete the CAP in accordance with its terms.

    a. If the performance criteria specified in the Final CAP are not achieved at the end of the applicable monitoring period, then Fountainhead 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, Fountainhead 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 Fountainhead 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 Fountainhead 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 Alternative CAP. Fountainhead shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. Fountainhead 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.

5. Unless otherwise specified in this Order, Fountainhead shall submit all requirements of Appendix A of this Order to:

   Lee M. Crowell
   Wetlands Enforcement Manager
   Virginia Department of Environmental Quality
   PO Box 1105
   Richmond VA 23218
   804-698-4450 (Office)
   804-698-4277 (Fax)
   Lee.Crowell@DEQ.Virginia.gov

# APPENDIX B
# SUPPLEMENTAL ENVIRONMENTAL PROJECT

In accordance with Va. Code § 10.1-1186.2, Fountainhead shall perform the Supplemental Environmental Project (SEP) identified below in the manner specified in this Appendix.

1. The SEP to be performed by Fountainhead will constitute bank stabilization to reduce sediment discharge caused by stream bank erosion and the removal of accumulated natural material (logs and limbs) to enhance stream flow.

2. The SEP shall be completed by **February 1, 2010**.

3. Fountainhead shall submit progress reports on the SEP on a quarterly basis, due the 10th day of each January, April, July, and October.

4. Fountainhead shall submit a written final report on the SEP, verifying that the SEP has been completed in accordance with the terms of this Order, and certified either by a Certified Public Accountant or by a responsible corporate officer or owner. Fountainhead shall submit the final report and certification to the Department within one year from the effective date of the Order.

5. If the SEP has not or cannot be completed as described in the Order, Fountainhead shall notify DEQ in writing no later than **January 15, 2010**. Such notification shall include:
   a. an alternate SEP proposal, or
   b. payment of the amount specified in Paragraph D.2.b as described in Paragraph D.2.a.

6. Fountainhead hereby consents to reasonable access by DEQ or its staff to property or documents under the party's control, for verifying progress or completion of the SEP.

7. Fountainhead shall submit to the Department written verification of the final overall and net project cost of the SEP in the form of a certified statement itemizing costs, invoices and proof of payment, or similar documentation within 30 days of the project completion date (**March 1, 2010**). For the purposes of this submittal, net project costs can be either the actual, final net project costs or the projected net project costs if such projected net project costs statement is accompanied by a CPA certification or certification from Fountainhead's Chief Financial Officer concerning the projected tax savings, grants or first-year operation cost reductions or other efficiencies.

Documents to be submitted to the Department, other than the civil charge payment described in Section D of the Order, shall be sent to the contact identified in Appendix A of this Order.