COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - SPECIAL ORDER BY CONSENT
ISSUED TO
Glenwood South, L.L.C.
FOR
Indian River Road Subdivision
Permit No. WP4-03-1081

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 Glenwood South, L.L.C. 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. "Compensation" or "Compensatory Mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource.

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. "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.

7. "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.

8. "Glenwood South" means Glenwood South, L.L.C.., a company authorized to do business in Virginia, and its affiliates, partners, subsidiaries, and parents. Glenwood South, L.L.C. is a "person" within the meaning of Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

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 VWP General Permit Authorization No. WP4-03-1081, which was issued to Glenwood South, L.L.C. on August 15, 2003, and expired on August 14, 2008.

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

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

14. "Property" means the parcel owned by Glenwood South, L.L.C., and developed as Indian River Road Subdivision consisting of 19 lots, located along Flyfisher Court, near the intersection of Indian River Road and Stumpy Lake Lane in Virginia Beach, Virginia.

15. "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.

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

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

18. "VAC" means the Virginia Administrative Code.

19. "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).

20. "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. Glenwood South owned and developed the Property. The Property contains uplands and state waters consisting of nontidal wetlands and an unnamed tributary of Stumpy Lake.

2. The Permit authorized impacts to 0.39 acres of nontidal wetlands and required compensatory mitigation at a 2:1 ratio through the purchase of 0.78 credits from the Lower James River Mitigation Bank. The Permit also required an approximately 0.35 acre "Open Space" area of scrub-shrub wetlands to remain undisturbed to allow for natural regeneration to a forested wetland.

3. Prior to visiting the Property, a file review indicated that DEQ staff had not received proof of purchase of the 0.78 credits from the Lower James River Mitigation Bank (or any other mitigation bank), 10-day pre-construction notification, pre-construction monitoring photographs, construction monitoring reports and photographs, and notice of termination for completion of all permitted impacts.

4. On September 14, 2007 DEQ staff inspected the Property. The residential development appeared complete and all permitted impacts had been taken. However, additional unauthorized impacts appeared to have occurred. Significant alteration and degradation of wetlands and discharge of fill material impacted portions of the wetland areas within Lots 10 and 12 and the entire 0.35 acres of scrub-shrub wetland depicted as Open Space in the Permit.

5. After the September 14, 2007 inspection, a review of aerial photographs indicated that significant alteration and degradation of wetlands and discharge of fill material occurred in three additional wetland areas of the Property not authorized by the Permit. These three wetland areas are located in the Glenwood North Phase B1 development, east of Flyfisher Court and continuous with Adair Drive.

According to a letter dated January 12, 2009 from MSA, P.C., consultants for Glenwood South, the three additional wetland areas totaled approximately 0.06 acres.

6. In total, the significant alteration and degradation of wetlands and discharge of fill material resulted in 0.41 acres of unauthorized impacts to nontidal wetlands on the Property.

7. DEQ issued Notice of Violation No. W2007-10-T-1007 dated October 2, 2007 to Glenwood South for the significant alteration and degradation of and discharge of fill material to nontidal wetlands, and failure to submit proof of mitigation bank credit purchase, pre-construction notice, construction monitoring reports, and notice of termination for completion of all permitted impacts.

8. On November 27, 2007 DEQ staff met with Glenwood South to discuss the alleged violations.

9. DEQ staff re-visited the Property on October 19, 2007 and November 29, 2007, confirming the unauthorized significant alternation and degradation of and discharge of fill material to 0.41 acres of nontidal wetlands.

10. 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.

11. Based on the results of file reviews and the September 14, 2007 inspection, the Board concludes that Glenwood South has violated the Permit, 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, and failure to provide required notice prior to commencing construction.

12. On August 14, 2009 DEQ received confirmation that Glenwood has purchased the 0.78 wetlands bank mitigation credits required by the Permit.

13. On September 30, 2009 DEQ received confirmation that Glenwood purchased 0.18 compensation credits for the unauthorized impacts to 0.06 acres of nontidal

wetlands from an approved wetlands mitigation bank in order to achieve no net loss of existing wetland acreage and functions in accordance with 9 VAC 25-210-116.

14. In order for Glenwood South to return to compliance, Glenwood South will purchase 1.05 compensation credits for the unauthorized impacts to 0.35 acres of nontidal wetlands from an approved wetlands mitigation bank in order to achieve no net loss of existing wetland acreage and functions in accordance with 9 VAC 25-210-116.

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 Glenwood South, and Glenwood South agrees to:

1. Purchase 1.05 compensation credits from an approved wetlands mitigation bank; and

2. Provide proof of compensation credit purchase to DEQ within 30 days of the effective date of the Order; and

3. Pay a civil charge of $24,852.00 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

Glenwood South shall include its Federal Employer Identification Number [75-3023636] 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 Glenwood South for good cause shown by Glenwood South, 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, Glenwood South admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. Glenwood South 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. Glenwood South 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 Glenwood South 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. Glenwood South 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. Glenwood South shall show that such circumstances were beyond their control and not due to a lack of good faith or diligence on their part. Glenwood South 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 Glenwood South. Notwithstanding the foregoing, Glenwood South 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) Glenwood South 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 Glenwood South.

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

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, Glenwood South voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 27 day of Jan, 20 10.

Francis L. Daniel, Regional Director
Department of Environmental Quality

Glenwood South, L.L.C. voluntarily agrees to the issuance of this Order.

Date: 1/27/10 By: Michael Paul Warn, PARTNER
(Person) (Title)
Glenwood South, L.L.C.

Commonwealth of Virginia
City/County of Virginia Beach

The foregoing document was signed and acknowledged before me this 27th day of January, 20 10, by MICHAEL PAUL WARNER who is A PARTNER of Glenwood South, L.L.C. on behalf of the company.

Jacqueline Rumberger
Notary Public

7032116
Registration No.

My commission expires: February 28, 2010

Notary seal:

JACQUELINE C. RUMBERGER
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA