COMMONWEALTH of VIRGINIA

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STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
SUMMIT DEVELOPMENT COMPANY, LLC
FOR
TALL OAKS CROSSING PARCEL

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 Summit Development Company, LLC, regarding the Tall Oaks Crossing parcel, for the purpose of resolving certain violations of State Water Control Law and the applicable 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 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. "Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of mitigation banks, and is operating under a signed banking agreement.

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. "Parcel" means the tract of land at the intersection of Tyler Avenue and Rock Road East, in Radford, Virginia, owned by Summit and identified as Tax Parcel 27-(2)-54.

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

18. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.

19. "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.

20. "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.

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

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

23. "USACE" or "Corps" means the United States Army Corps of Engineers.

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

25. "VAC" means the Virginia Administrative Code.

26. "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.

27. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

SECTION C: Findings of Fact and Conclusions of Law

1. On July 6, 2009, Department staff inspected the Parcel for compliance with the requirements of the State Water Control Law and the Regulations. Department staff observed that approximately 750 linear feet of a channel had been filled with earth and rock, a pollutant. After the inspection, Department staff requested that the U.S. Army Corps of Engineers verify the jurisdictional status of the impacted channel.

2. On July 28, 2009, Department staff conducted an announced site inspection in coordination with staff from the U.S. Army Corps of Engineers. Based upon the site inspection, the Corps indicated the channel is a jurisdictional stream, and a surface water, under state and federal law. The DEQ received correspondence from the Corps dated August 4, 2009 confirming that conclusion.

3. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit dredging or filling of surface waters without a Permit issued by the Director. Summit does not have a Permit for the above activities.

4. On August 19, 2009, DEQ issued NOV No. NOV-09-08-BRRO-R-007 to Summit for the violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.

5. On September 23, 2009, Department enforcement staff met with representatives of Summit and Summit's consultant to discuss the violations. At the conclusion of the meeting, Summit agreed to submit a written response to the August 2009 NOV and include proposals for a Corrective Action Plan (CAP).

6. On October 13, 2009, Summit submitted the formal response to the NOV which included proposals for a CAP.

7. The unpermitted discharge of fill material to the jurisdictional stream without a Permit is a violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.

8. Based on the results of the July 6, 2009 and the July 28, 2009 inspections, and the Corps August 4, 2009 letter confirming that the channel is a surface water under state and

federal law, the Board concludes that Summit has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraphs C1 through C3, above.

9. In order for Summit to return to compliance, DEQ staff and representatives of Summit have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order. The Compensation Requirement for the un-permitted impact to state waters, calculated using the Unified Stream Methodology, is 563 credits.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Summit, and Summit agrees to:

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

2. Pay a civil charge of $22,750 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

Summit shall include its Federal Employer Identification Number (FEIN) [54-1438051] 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 this Order with the consent of Summit for good cause shown by Summit, 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. 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, Summit 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. Summit 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. Summit 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 Summit 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. Summit 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. Summit shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Summit 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 Summit 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 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 Summit. Nevertheless, Summit 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. Summit 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 Summit.

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

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, Summit voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2010.

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

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

Date: 1/26/10 By: _____, Managing Member

Mark Williams
Summit Development Company, LLC

Commonwealth of Virginia
City/County of Radford

The foregoing document was signed and acknowledged before me this 26 day of January, 2010, by Mark Williams who is Managing Member of Summit Development Company, LLC, on behalf of the company.

_____
Notary Public

256117
Registration No.

My commission expires: December 31, 2010

Notary seal:

APPENDIX A

SCHEDULE OF COMPLIANCE

1. No later than March 1, 2010, Summit shall obtain an irrevocable standby letter of credit for $150,000 and submit the original letter to the Director no later than March 15, 2010. The issuing institution shall be a bank or other financial institution that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by the Commonwealth of Virginia, by a federal agency, or by an agency of another state. The letter of credit shall be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for the purchase of 400 credits from a mitigation bank. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year. If the issuing institution decides not to extend the letter of credit beyond the current expiration date it shall, at least 120 days before the date, notify both Summit and the Director by certified mail of that decision. The 120-day period will begin on the date of receipt by the Director as shown on the signed return receipt. Expiration cannot occur, while an enforcement action is pending. Within 60 days of receipt of notice from the issuing institution that it does not intend to extend the letter of credit, Summit shall obtain alternate financial assurance and submit it to the Director.

   (a) Every year, beginning April 1, 2011 until DEQ determines financial assurance is no longer necessary, Summit shall submit an updated cost estimate for the remaining credits from a mitigation bank. Whenever the cost of the credits from a mitigation bank increases such that the letter of credit covers less than 50% of the cost estimate, Summit shall, within 60 days of the increase, cause the amount of credit to be increased to an amount at least equal to 50% of the new cost or obtain other financial assurance approved by DEQ to cover the increase. Whenever the cost estimate decreases, the letter of credit may be reduced to the amount of 50% of the new cost following written approval by the Director. The issuing institution shall send the notice of an increase or decrease in the amount of the credit to the Director by certified mail within 60 days of the change.

   (b) If the DEQ determines that Summit has not met its obligations under the CSO, the Director of DEQ or his designee, shall give written notice to Summit, specifying the deficiency. Any notice required hereunder shall be deemed effective if given by registered mail, return receipt requested.

   (c) In the event of unsatisfactory performance or deficiency by Summit in fulfilling its obligations under the CSO (as determined by DEQ), the Director may cash the letter of credit.

(d) Summit may cancel the letter of credit only if alternate financial assurance acceptable to the Director is substituted as specified in this article or if Summit is released by the Director from the requirements of Appendix A.

(e) The Director shall return the original letter of credit to the issuing institution for termination when:

i. Summit substitutes acceptable alternate financial assurance for the mitigation bank credits or
ii. The Director notifies Summit that it is no longer required to maintain financial assurance for the purchase of credits from a mitigation bank.

2. No later than April 1, 2010, Summit shall purchase 163 credits from a mitigation bank (purchased from an approved bank that services the impact area). Summit shall provide the Department with documentation of the purchase no later than April 30, 2010.

3. No later than April 1, 2011, Summit shall purchase 100 credits from a mitigation bank (purchased from an approved bank that services the impact area). Summit shall provide the Department with documentation of the purchase no later than April 30, 2011.

4. No later than April 1, 2012, Summit shall purchase 100 credits from a mitigation bank (purchased from an approved bank that services the impact area). Summit shall provide the Department with documentation of the purchase no later than April 30, 2012.

5. No later than April 1, 2013, Summit shall purchase 100 credits from a mitigation bank (purchased from an approved bank that services the impact area). Summit shall provide the Department with documentation of the purchase no later than April 30, 2013.

6. No later than April 1, 2014, Summit shall purchase 100 credits from a mitigation bank (purchased from an approved bank that services the impact area). Summit shall provide the Department with documentation of the purchase no later than April 30, 2014.

7. If at any time prior to termination of this Order Summit completes a sale of the Parcel or sale of a portion of the Parcel, Summit shall purchase the remaining balance of the credits from a mitigation bank required to be purchased in paragraphs 2 through 6 of this Appendix. This purchase shall be made no later than 30 days after the date of the real estate closing. Summit shall provide the Department with documentation of the purchase no later than 30 days after the purchase of the credits.

8. Summit shall submit all requirements of Appendix A of this Order to:

Jerry Ford, Jr.
VA DEQ - Blue Ridge Regional Office
3019 Peters Creek Road

Roanoke, VA 24019
Phone: (540) 562-6817
e-mail: Jerry.Ford@deq.virginia.gov