COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

VALLEY REGIONAL OFFICE
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L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Amy Thatcher Owens
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - SPECIAL ORDER BY CONSENT
ISSUED TO
W. BOUTROS AND COMPANY
FOR
ANA MARIE ESTATES
Permit No. WP4-05-1080

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 W. Boutros and Company, regarding the Ana Marie Estates, for the purpose of resolving certain violations of State Water Control Law and the applicable permit and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Administrative Process Act" or "APA" means Chapter 40 (§ 2.2-4000 *et seq.*) of Title 2.2 of the Va. Code.

2. "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.

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

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

10. "Permit" means Virginia Water Protection Permit No. WP4-05-1080, which became effective August 12, 2005 and expires August 11, 2010

11. "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.

12. "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.

13. "Property" means the tract of land at State Route 254 west of the City of Waynesboro and Hopeman Parkway, owned by W. Boutros.

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

15. "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.

16. "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.

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

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

19. "VAC" means the Virginia Administrative Code.

20. "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.

21. "VRO" means the Valley Regional Office of DEQ, located in Harrisonburg, Virginia.

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

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

24. "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. W. Boutros owns a 254 acre site, of which 166 acres are a housing development consisting of single family home and townhouse at the Property in the City of Waynesboro, Augusta County, Virginia.

2. On May 10, 2005, DEQ received an application for a Virginia Water Protection Permit to allow for potential wetland impacts at the Property. The application identified Boutros' environmental consulting firm, Balzer and Associates, 1557 Commerce Road, Verona, Virginia as its authorized agent on the project.

3. On August 12, 2005, DEQ issued Virginia Water Protection Permit No. WP4-05-1080 to W. Boutros for the Property with an expiration date of August 11, 2010. The Permit authorized permanent impacts to approximately 0.51 acre of palustrine, emergent wetlands and temporary impact of 0.11 acre of palustrine, emergent wetlands, each of which are considered State waters.

4. The Permit requires compensatory mitigation at a ratio 1:1 through the construction of 0.51 acre of wetland onsite.

5. On May 30, 2006, the consulting firm, on behalf of W. Boutros, submitted a Final Compensatory Mitigation Plan (Plan) to DEQ.

6. On June 29, 2006, DEQ notified the consulting firm that the Plan was incomplete in a number of respects and did not meet regulatory requirements. The letter specifically identified eight deficiencies and requested information required by the Permit and Regulations to make the Plan complete.

7. In June 2006, W. Boutros completed construction in the permitted impact area.

8. On July 19, 2006 and November 2, 2006, the consulting firm responded to DEQ's June 29, 2006 deficiency letter, but DEQ did not receive a revised Plan that completely addressed the outstanding deficiencies.

9. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit dredging or filling of surface waters except in compliance with a VWP permit issued by the Director.

10. 9 VAC 25-210-90 requires permittees to comply with all conditions of the VWP permit.

11. On October 17, 2008, DEQ issued Warning Letter No. WL-08-10-VRO-001 to W. Boutros in care of the consulting firm (received October 29, 2008) for the alleged violations of the Permit, and State Water Control Law and Regulations as cited in (C9) and (C10) above: in pertinent part, the Warning Letter cited failure to complete the final the compensatory mitigation.

12. By letter dated November 14, 2008, the consulting firm responded to the WL and clarified to DEQ that all permitted impacts had been taken and that no mitigation had taken place. The letter did not address all of the outstanding issues with the Plan as outlined in the WL.

13. On February 9, 2009, DEQ issued NOV No. NOV-09-02-VRO-001 to W. Boutros in care of the consulting firm reiterating the alleged violations cited in (C11) above.

14. On March 5, 2009, Department staff met with representatives of W. Boutros and the consulting firm to discuss the alleged violations and corrective actions necessary for W. Boutros to return to compliance. W. Boutros agreed to submit a corrective action plan and to address the outstanding deficiencies with the Plan.

15. On March 30, 2009, the consulting firm on behalf of W. Boutros submitted a written response to the NOV and information to update the Plan.

16. Based on the March 5, 2009 meeting, and the documentation submitted on November 14, 2008 and March 30, 2009, the Board concludes that W. Boutros has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50. and 9 VAC 25-210-90 and the Permit as described in paragraph (C11) above.

17. On May 12, 2009, DEQ approved W. Boutros' Final Compensatory Mitigation Plan.

18. In order for W. Boutros to return to compliance, DEQ staff and representatives of W. Boutros have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

19. W. Boutros represents that at all times it intended to maintain compliance with the Permit and the State Water Control Law and Regulations, and was unaware of any deficiencies until the consulting firm share the contents of DEQ's October 17, 2008 Warning Letter. W. Boutros further represents that at all times, it relied n the expertise and advice of its agent consulting firm.

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 W. Boutros, and W. Boutros agrees to:

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

2. Pay a civil charge of **$8,919** 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

W. Boutros shall include its Federal Employer Identification Number (FEIN) **[54-1492201]** 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 W. Boutros for good cause shown by W. Boutros, 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, W. Boutros admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. W. Boutros 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. W. Boutros declares it has received fair and due process under the Administrative Process Act and the Virginia Air Pollution 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 W. Boutros 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. W. Boutros 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. W. Boutros shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. W. Boutros 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 W. Boutros 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 W. Boutros. Nevertheless, W. Boutros 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) W. Boutros 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 W. Boutros.

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

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, W. Boutros voluntarily agrees to the issuance of this Order.

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

_____
Amy T. Owens, Regional Director
Department of Environmental Quality

W. Boutros and Company voluntarily agrees to the issuance of this Order.

Date: 10-20-09 By: W R Boutros, President
(Person) (Title)
W. Boutros and Company

Commonwealth of Virginia
City/County of Augusta

The foregoing document was signed and acknowledged before me this 20th day of

Oct, 2009, by WR Boutros who is

President of W. Boutros and Company on behalf of the corporation.

Lisa H Sterrett
Notary Public

Registration No: LISA HARRIS STERRETT Notary Public Commonwealth of Virginia 242595 My Commission Expires Dec 31, 2012

My commission expires: _____

Notary seal:

APPENDIX A
SCHEDULE OF COMPLIANCE

1. **On or before December 31, 2009,** W. Boutros shall have in place an approved mechanism for protection in perpetuity of the compensation site in accordance with the Permit's requirements.

2. **Not later than June 12, 2010,** W. Boutros shall apply for and obtain a continuation of coverage of the VWP General Permit in order to proceed with the success monitoring of the mitigation work.

3. W. Boutros shall continue to comply with the Permit's requirements; including the requirements for conducting the wetland compensation site monitoring and reporting following completion of the construction of the compensatory mitigation project.

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

   Steve Hetrick
   Enforcement Specialist Sr.
   VA DEQ-Valley Regional Office
   P.O. Box 3000
   4411 Early Road
   Harrisonburg, VA 2801
   (540) 574-7833
   Steven.Hetrick@deq.virginia.gov