



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
PIEDMONT REGIONAL OFFICE

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Douglas W. Domenech
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Regional Director

**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
BANK OF AMERICA, NATIONAL ASSOCIATION
FOR
BANK OF AMERICA VA GREENFIELD, HENRICO, VIRGINIA
Permit No. WP4-11-0672**

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 Bank of America, National Association, regarding Bank of America VA Greenfield, Henrico, Virginia, 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. "Bank of America VA Greenfield" is a data center owned and operated by Bank of America, National Association.
2. "BOA" means Bank of America, National Association a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries. BOA is a "person" within the meaning of Va. Code § 62.1-44.3.
3. "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.

4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "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.
7. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
8. "E&S" means erosion and sedimentation.
9. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
10. "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.
11. "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.
12. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
13. "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.
14. "Permit" means general permit WP4-11-0672 issued by DEQ to BOA on August 30, 2011 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.
15. "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.
16. "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.

17. "Property" or "Parcel" means the tract of land at 6050 White Oak Creek Drive, Sandston, Virginia in Henrico County, Virginia, Deed Book 4881 page 335, owned and developed by BOA on which Bank of America VA Greenfield is located.
18. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
19. "Regulations" means the VWP Permit Program Regulations, 9 VAC 25-210 *et seq.*
20. "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.
21. "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 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
22. "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.
23. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
24. "USACE" means the United States Army Corps of Engineers.
25. "Va. Code" means the Code of Virginia (1950), as amended.
26. "VAC" means the Virginia Administrative Code.
27. "VWP" means Virginia Water Protection.

28. "VWPP" 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.
29. "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. BOA owns and developed the Property and will operate a data center at the Property in Henrico County, Virginia.
2. On August 18, 2011, BOA purchased 1.68 acres of wetland credits from the James River Mitigation Bank.
3. On August 30, 2011, DEQ issued permit WP4-11-0672 to BOA for wetland impacts associated with the construction of Bank of America VA Greenfield. Authorization also included confirmation of coverage under the USACE State Programmatic General Permit (07-SPGP-01). The Permit authorized permanent impacts of no more than 0.79 acre of forested wetlands, temporary impacts to no more than 0.07 acre of forested wetland, and permanently convert 0.10 acre of forested wetlands to emergent wetlands. The Permit required the purchase of 1.68 acres of wetland mitigation credits. The Permit also required notification of construction to DEQ, submitted prior to commencement of activities in permitted impact areas and construction monitoring reports submitted to DEQ in association with the permitted activities.
4. On September 14, 2011, BOA provided a 10-day notice of construction to DEQ.
5. BOA provided construction monitoring reports to DEQ on September 19, 2011, December 1, 2012 and January 9, 2012.
6. On June 13, 2012, DEQ staff conducted a site inspection of the Property, which revealed that the development of the site was underway and all the permitted impacts had been taken. DEQ staff inspected the Property for compliance with the requirements of the State Water Control Law, the Regulations and compliance with the Permit. The DEQ inspectors observed the following:
 - a) The 0.07 acre of temporary impacts TU1 and TU2 under the Permit had been permanently filled with riprap.

WP4-11-0672 Part I.C.11 states, “[t]emporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing preconstruction contours, and planting or seeding with appropriate wetland vegetation according to cover type (emergent, scrub/shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance...”

WP4-11-0672 Part III.B, states, “[d]uty to mitigate. The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit which may have a reasonable likelihood of adversely affecting human health or the environment.”

- b) The authorized conversion of 0.10 acre of forested wetlands to emergent wetlands (CU1 and CU2) had been permanently impacted by filling with riprap.

WP4-11-0672 Part III.B states, “[d]uty to mitigate. The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit which may have a reasonable likelihood of adversely affecting human health or the environment.”

- c) Approximately 0.30 acre of forested wetland located adjacent to impact areas PG1 and PR2 were impacted without authorization.

Va. Code § 62.1-44.15:20(A) and 9 VAC 25-210-50(A) of the VWPP Permit Regulations state that except in compliance with a permit no person shall dredge, fill or discharge any pollutant into or adjacent to surface waters, excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: filling or dumping.

- d) There was no flagging or marking of nonimpacted surface waters within 50 feet of permitted activity adjacent to impacts PG1 and PR2.

WP4-11-0672 Part I.C.10, states, “[a]ll nonimpacted surface waters and compensatory mitigation areas within 50 feet of permitted activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude unauthorized disturbances to these surface waters and compensatory mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.”

- e) Erosion and sediment controls were not in place in construction areas adjacent to the wetlands near impacts PG1 and PR2, resulting in sediment erosion into the wetland.

WP4-11-0672, Part I.C.5 states, “[e]rosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, or for mining activities covered by this general permit, the standards issued by the Virginia Department of Mines, Minerals and Energy that are effective as those in the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.”

7. DEQ staff subsequently reviewed the file for the Permit and found no record that the construction monitoring report due July 10, 2012 had been submitted.
8. WP4-11-0672, Part II.B.1 states, “[c]onstruction activities authorized by this permit that are within impact areas shall be monitored and documented.” Part II.B.1-3 describes the methods and schedule of photographic monitoring that should be included in the reports.
9. WP4-11-0672, Part II.E.3 states, “Construction monitoring reports shall be submitted to DEQ no later than the 10th day of the month following the month in which the monitoring event specified in Part II B takes place, unless otherwise specified below. . .” and describes the required contents of the reports.
10. Va. Code §62.1-44.15:20(A) states, “A. Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or function; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.
11. 9VAC 25-210-50 (A) states, “Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface water, otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.”

12. 9 VAC 25-690-100 states that "any applicant whose application has been accepted by the Board shall be subject to the following requirements [of the permit]."
13. On July 24, 2012, the construction monitoring report was submitted.
14. In July and August of 2012, BOA restored the 0.30 acre of forested wetland located adjacent to impact areas PG1 and PR2 and reset the silt fencing and flagging.
15. On August 6, 2012, DEQ issued NOV No. 12-07-PRO-700 for the violation of permit WP4-11-0672, Part I.C.10-11, Part I.C.5, Part II.B. 1-3, Part II.E.3, Part III.B, Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50(A).
16. On August 15, 2012, DEQ received a response letter to the NOV from BOA.
17. On September 14, 2012, DEQ staff met with representatives of BOA to discuss the violations and inspect the Property.
18. Based on the results of the site inspection, review of the permit file, and the September 14, 2012 meeting, the Board concludes that BOA has violated the permit conditions of permit WP4-11-0672 listed above, Va. Code § 62.1-44.15:20; and 9 VAC 25-210-50(A) as described in paragraphs C(1) through C(13), above.

SECTION D: Agreement and Order

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

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$27,625.00 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

BOA shall include its Federal Employer Identification Number (FEIN) 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 BOA for good cause shown by BOA, 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, BOA admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. BOA 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. BOA 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 BOA 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. BOA 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 unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. BOA shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. BOA 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 and any 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 BOA. Nevertheless, BOA 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. The Director or his designee terminates the Order after BOA has completed all of the requirements of the Order;
 - b. BOA 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
 - c. The Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to BOA.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve BOA 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 BOA 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 BOA certifies that he or she is a responsible official or officer authorized to enter into the terms and conditions of this Order and to execute and

legally bind BOA to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official or officer of BOA

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, BOA voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 18th day of JUNE, 2013.



Michael P. Murphy, Regional Director
Department of Environmental Quality

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Bank of America, National Association voluntarily agrees to the issuance of this Order.

Date: 2/26/2013 By: Calvin F. Corrie, SENIOR VICE PRESIDENT
(Person) (Title)
Bank of America, National Association

STATE OF TEXAS
~~Commonwealth of Virginia~~
City/County of Collin

The foregoing document was signed and acknowledged before me this 26th day of

February 2013, by Calvin F. Corrie who is

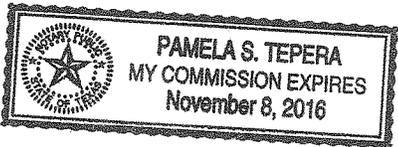
SR Vice President of Bank of America, National Association, on behalf of the company.

Pamela S. Tepera
Notary Public

Registration No.

My commission expires: 11/08/2016

Notary seal:



APPENDIX A SCHEDULE OF COMPLIANCE

BOA agrees to the following:

1. No later than June 1, 2013, BOA shall restore the unpermitted impacts at TUI and TU2 by removing the riprap, grading the areas and seeding with a wetland seed mix in order to comply with Permit WP4-11-0672 Part I.C.11. BOA shall submit photographic evidence of completion within five days for DEQ review and approval of complete restoration. If DEQ determines it to be necessary, BOA shall perform any corrective actions to comply with the Permit and/or Order.
2. No later than March 31, 2013, BOA shall purchase 0.10 acre of mitigation credits from an approved wetland mitigation bank that is in the same or adjacent hydrologic unit code as the impacted wetlands, and meets the requirements found in Va. Code § 62.1-44.15:23 and 9 VAC 25-690-70.
3. Unless otherwise specified in this Order, BOA shall submit all requirements of Appendix A of this Order to:

Gina Pisoni
Enforcement Specialist
VA DEQ – Piedmont Regional Office
4949-A Cox Road
Glen Allen, Virginia 23060
804-527-5156
804-527-5106 (fax)
Gina.Pisoni@deq.virginia.gov