



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE

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Matthew J. Strickler
Secretary of Natural Resources

David K. Paylor
Director

Craig R. Nicol
Regional Director

**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
COLONIAL HERITAGE LLC
FOR
THE COLONIAL HERITAGE DEVELOPMENT
VWPP INDIVIDUAL PERMIT NUMBER 02-2190**

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 Colonial Heritage LLC, regarding the Colonial Heritage Development, 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. "Colonial Heritage" means Colonial Heritage LLC, a limited liability company authorized to do business in Virginia. Colonial is a "person" within the meaning of Va. Code § 62.1-44.3.
3. "Compensation" or "Compensatory Mitigation" means (i) the restoration (reestablishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources or (ii) in certain circumstances an out-of-kind measure having a water quality, habitat, or other desirable benefit for the purposes of offsetting unavoidable adverse impacts to aquatic resources that remain after all appropriate and practicable avoidance and minimization has been achieved.
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. "Impacts" means results caused by those activities specified in § 62.1-44.15:20A of the Code of Virginia.
7. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
8. "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.
9. "Palustrine" means the palustrine system which includes all nontidal wetlands dominated by trees, shrubs, persistent emergent, emergent mosses or lichens, and all such wetlands that occur in tidal areas where salinity due to ocean-derived salts is below 0.5%.
10. "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).
11. "Property", "Parcel" or "Site" means the Colonial Heritage Development located in James City County, Virginia.
12. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 et seq.
13. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.
14. "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.
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. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
16. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
17. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
18. "Va. Code" means the Code of Virginia (1950), as amended.
19. "VAC" means the Virginia Administrative Code.
20. "VWP" means Virginia Water Protection Permit as defined in 9 VAC 25-210-10.

21. "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. Colonial Heritage is developing land in James City County, Virginia, and the area subject to this enforcement action has been designated as Phase III, that once complete will be a housing development ("Property"). The Property contains nontidal palustrine forested wetlands and intermittent streams, which are surface waters of the Commonwealth.
2. On February 20, 2004, DEQ issued Virginia Water Protection Individual Permit Number 02-2190 ("Permit") to Colonial Heritage. The Permit was modified on February 5, 2007. The Permit authorized permanent impacts at the Colonial Heritage Phase I-IV development in James City County ("Development") to 0.728 acres of forested wetlands, 0.14 acres of scrub shrub wetlands, 0.56 acres of emergent wetlands, 144.96 linear feet of stream, and conversion of 2.56 acres of forested wetlands to emergent wetlands. The Permit was extended to the maximum 15-year term on February 7, 2014, and expired February 19, 2019. All authorized impacts deemed necessary for the development were taken prior to February 19, 2019, however, all of the impacts described below were not authorized by the Permit.
3. On July 9, 2018, the DEQ received notification ("Notification") from Colonial Heritage, indicating that sediment had impacted three areas totaling approximately 0.69 acres of forested wetlands and adjacent stream channels during construction activities in Phase III, Section 2 of the Development. The Notification stated that this discharge was discovered on June 28, 2018, and that sediment was discharged at three separate locations ("Unauthorized Impact Areas") due to properly installed and maintained but overwhelmed erosion and sediment ("E & S") controls from stormwater runoff as well as a slope failure outside the limits of disturbance.
4. On July 20, 2018, DEQ staff conducted a compliance inspection of the Property to determine compliance with the State Water Control Law and the Regulations. During this inspection and subsequent records review DEQ staff observed the following:
 - a. Three areas where sediment was discharged into streams and adjacent palustrine forested wetlands at the Property.
 - b. DEQ files do not indicate that Permit authorized the impacts observed at the Property.
5. 9 VAC 25-210-50(A) states, "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, 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 state waters regulated under this chapter and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, 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.”

6. Va. Code § 62.1-44.5(A) states, “Except in compliance with a certificate or permit issued by the Board or other entity authorized by the Board to issue a certificate or permit pursuant to this chapter, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical or biological properties of state 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; or 4. On and after October 1, 2001, conduct the following activities in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 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...”
7. Va. Code § 62.1-44.15:20(A) states, “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 functions; 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.”
8. On July 27, 2018, Colonial Heritage submitted a post sediment removal report (“Report”). The Report listed, following a survey to confirm the July 9, 2018, notification that the sediment discharges at the three locations impacted and aggregate total of 0.28 acres of palustrine forested wetlands and 956 linear feet of stream. DEQ accepted impacts as listed in the survey.
9. On August 23, 2018, DEQ issued NOV No. 1806-000781 to Colonial Heritage for the unpermitted impacts to 0.28 acres of palustrine forested wetlands and 956 linear feet of streams, as described in C(4) - (7), above.
10. On September 7, 2018, DEQ staff met with representatives of Colonial Heritage. In this meeting Colonial Heritage stated, and DEQ concurred, that removal of sediment from the impacted wetlands and streams was completed, and measures had been taken to reduce the likelihood of future sediment discharges.
11. Based on the results of the July 20, 2018, DEQ inspection and subsequent file review, and the July 27, 2018, Report, the Board concludes that Colonial Heritage has violated 9 VAC 25-210-50(A), Va. Code § 62.1-44.5(A), and Va. Code § 62.1-44.15:20(A), as described in paragraphs C(4) – C(7), above.
12. In order for Colonial Heritage to complete its return to compliance, DEQ staff and representatives of Colonial Heritage have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

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

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$18,200 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

Colonial Heritage 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). If the Department has to refer collection of moneys due under this Order to the Department of Law, Colonial Heritage shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Colonial Heritage for good cause shown by Colonial Heritage, 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 and in NOV No. 1806-000781, dated August 23, 2018. 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 for matters not contemplated in this Order and arising from facts or occurrences after the execution date of this Order; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Colonial Heritage 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. Colonial Heritage 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. Colonial Heritage 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 Colonial Heritage 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. Colonial Heritage 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. Colonial Heritage shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Colonial Heritage 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 Colonial Heritage. Nevertheless, Colonial Heritage 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 Colonial Heritage has completed all of the requirements of the Order; .
- b. Colonial Heritage 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 Colonial Heritage.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Colonial Heritage from his obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any documents to be submitted pursuant to this Order shall be submitted by Colonial Heritage or an authorized representative of Colonial Heritage.
13. 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.
14. By its signature below, Colonial Heritage voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 16 day of October, 2019.



Craig Nicol, Regional Director
Department of Environmental Quality

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Colonial Heritage voluntarily agrees to the issuance of this Order.

Date: 8/8/19 By: [Signature] Vice President
(Person) (Title)
Colonial Heritage LLC

Commonwealth of Virginia
City/County of FAIRFAX

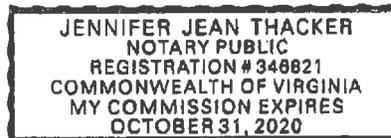
The foregoing document was signed and acknowledged before me this 8 day of AUGUST, 2019, by Timothy M. Bates who is Vice President of Colonial Heritage LLC, on behalf of the company.

[Signature]
Notary Public

346821
Registration No.

My commission expires: October 31, 2020

Notary seal:



APPENDIX A

SCHEDULE OF COMPLIANCE

1. No later than 60 days after the effective date of this Order, Colonial Heritage shall submit an approvable Corrective Action Plan (“CAP”) for the restoration of state waters on the Property that have been impacted without a Permit. 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. Colonial Heritage shall respond to any DEQ Notice of Deficiency regarding the CAP within 14 calendar days.
2. Upon DEQ approval of the CAP, Colonial Heritage shall begin implementation of the Corrective Action Plan in accordance with the schedule contained therein. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Colonial Heritage 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 Colonial Heritage 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, Colonial Heritage 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 Colonial Heritage 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 December 31, 2023, or by the end of the last monitoring period, as specified in the Final CAP or any alternative CAP, and DEQ determines that additional corrective action cannot sufficiently address the reasons for such failures, then Colonial Heritage 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 alternate CAP. Colonial Heritage shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. Colonial Heritage shall purchase mitigation bank credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval.
3. Unless otherwise specified in this Order, Colonial Heritage shall submit all requirements of Appendix A of this Order to:

Enforcement
DEQ – Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462