



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY* *PIEDMONT REGIONAL OFFICE*

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### **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO CRISS CROSS PROPERTIES, LLC FOR NEW KENT COUNTY PROPERTY TAX MAP 22-65 Unpermitted Activity**

#### **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 Criss Cross Properties, LLC, regarding the New Kent County Property (TM# 22-65), 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. “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. “CAP” means corrective action plan.
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. "CCP" means Criss Cross Properties, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. CCP is a "person" within the meaning of Va. Code § 62.1-44.3
8. "Impacts" means results caused by those activities specified in § 62.1-44.15:20 A of the Code of Virginia.
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 Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "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.
12. "PFO" means palustrine forested wetland.
13. "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.
14. "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.
15. "Property" or "Parcel" means the tract of land at New Kent Highway Tax Map # 22-65, New Kent County, Virginia, recorded in the New Kent County Circuit Court Clerk's Office in Deed Book 659 at page 1320 owned by CCP.
16. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.

17. "Regulations" means the VWP Permit Program Regulations, 9 VAC 25-210 *et seq.*
18. "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.
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 62.1-44.15:23) 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. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
22. "Va. Code" means the Code of Virginia (1950), as amended.
23. "VAC" means the Virginia Administrative Code.
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. CCP owns and developed the Property in New Kent County, Virginia.
2. On March 27, 2018, DEQ staff inspected the Property and observed unauthorized discharge of sediment to a total of 2.1 acres of palustrine forested wetlands (PFO) and 2,037 linear feet of stream bed at the Site. Sediment erosion and deposition into the wetlands and an unnamed tributary of Pelham Swamp resulted from the lack of appropriately installed and maintained erosion and sediment controls and other best management practices during land clearing activities. DEQ has not issued a permit authorizing these impacts to surface waters. DEQ requested in the report that a Corrective Action Plan (CAP) be submitted by June 15, 2018.
3. On May 8, 2018, The Department issued NOV No. 1804-000709 to CCP for the unauthorized impacts to surface waters observed by DEQ staff on March 27, 2018.

4. 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.”
5. 9VAC 25-210-50 (A) states that “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.”
6. On May 29, 2018, the Department held an enforcement conference with CCP to discuss the NOV and the issuance of a Consent Order. A site visit was conducted afterward and DEQ and CCP staff walked the section of impacted stream to determine which sections needed to be remediated and which sections should be left alone.
7. On June 27, 2018, the E&S Plan was suitable for approval and awaiting signature, however the plan just addressed site stabilization and not remediation of wetland impacts.
8. On July 25, 2018, in a follow-up e-mail concerning the CAP, the Department extended the due date to August 3, 2018.
9. On July 31, 2018, CCP requested an extension to the CAP submittal date.
10. On August 1, 2018, DEQ staff requested CCP to initiate restoration efforts by no later than August 10. Also discussed in the e-mail was the extension to the CAP’s August 3, 2018 due date, a draft of which was to be submitted on August 11, 2018.
11. On August 13, 2018, New Kent County Erosion & Sediment inspectors informed the Department that additional impacts were observed to sediment control structures leading to wetland impacts.
12. On August 30, 2018, DEQ staff conducted a site visit to the Property to assess restoration efforts on the 2,037 linear feet of stream channel and 2.1 acres of palustrine forested wetlands impacted by sediment deposition.

13. On September 7, 2018, a CAP had not been received and DEQ staff sent an e-mail to CCP requesting an update.
14. On September 10, 2018, CCP responded stating that the August 11 and 12<sup>th</sup> rain events caused further impacts that required CAP adjustments. CCP stated they were delaying wetland restoration until the upland rills and gullies were in a more stable state.
15. On September 26, 2018, CCP provided an update of the ongoing restoration. The update noted that an adjacent property owner informed CCP that they did not want sediment removed from the stream segment on his property. The Department authorized the work to begin on stream segments on CCP's Property.
16. On October 1, 2018, DEQ staff requested that CCP submit a progress report on the restoration efforts by October 5, 2018.
17. On October 2, 2018, CCP responded stating that the cumulative effect of numerous rain events have altered the stream channel and degraded natural function and they could not begin restoration while the source of degradation persists. An on-site meeting was requested by CCP.
18. On November 16, 2018, the Department received the CAP from CCP. The Department provided comments on the CAP on November 29, 2018.
19. On January 29, 2019, DEQ staff sent an e-mail to CCP requesting the continued removal of sediment deposited in all areas where the deposit is greater than 2 inches. In addition, to resolve the 1.1 acre of PFO wetland impacts (Area 1 and Area 2) located on the Townsend property to the west of Cedar Lane, the Department requested the purchase of 0.55 acre wetland mitigation credits (1:0.5 ratio) from an appropriate mitigation bank. For the impacts to stream channels, the Department requested that CCP provide Uniform Stream Methodology (USM) forms for each reach within Area 1 and Area 2 to determine the quality of the stream reach impacted. DEQ asked that documentation of this purchase be submitted within 30 days.
20. On March 28, 2019, the Department received USM forms and stream assessment forms for Areas 1 and 2 from CCP. The correspondence stated that CCP was in the process of obtaining the 0.55 wetland credits and that they calculated 57 stream credits will be needed for stream bank compensation.
21. On April 17, 2019, the Department informed CCP that 117 stream credits will be required, not 57. The Department requested that CCP proceed with the purchase of mitigation bank credits from a bank within the Lower James River watershed (HUC 02080206) that meets the requirements of Va. Code § 62.1-44.15:23 and 9 VAC25-210-116. That same day, CCP responded stating they have engaged with a consultant to broker the purchase of the necessary credits.
22. On April 26, 2019, CCP informed the Department of the sediment removal activities conducted on April 12<sup>th</sup> and that the silt fence in the ephemeral channel north of Area 3

was removed. Additional stabilization of the berm and outfall for the retention basin at the north end of Area 4 has also been completed. CCP also stated that there is a shortage of available wetland credits in HUC 02080206, and CCP had decided to approach the adjacent property owner to see if he will allow sediment removal from his property. CCP also requested permission to restore the ephemeral channel on the adjacent owner's property.

23. On May 6, 2019, CCP provided updates and informed the Department that the adjacent property owner agreed to allow sediment removal from the property. Remediation efforts on that segment of stream bank were in progress. On May 8, 2019, the Department requested that once restoration is complete, the area should be seeded with a wetland seed mix and the Department contacted for re-inspection.
24. On June 12, 2019, CCP asked the Department for a re-inspection as the restoration was complete. On June 14, 2019, the Department declared that no further action is required with respect to sediment removal on the two properties. The Department requested a final quarterly report on the corrective action on or before September 30, 2019.
25. On October 22, 2019, the Department inquired in an email to CCP about the quarterly report due September 30, 2019. CCP responded that day stating that the monitoring was completed in early September, but the report was not completed. On November 27, 2019, the Department received the report.
26. Based on the results of the March 27, 2018 site inspection, review of the permit file, and the May 29, 2018 meeting, the Board concludes that CCP has violated Va. Code § 62.1-44.15:20(A), and 9 VAC 25-210-50(A), as described above.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders CCP and CCP agrees to pay a civil charge of \$22,500 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

CCP 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, CCP 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 CCP for good cause shown by CCP, 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, CCP admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. CCP 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. CCP 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 CCP 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. CCP 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. CCP shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. CCP 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 CCP. Nevertheless, CCP 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 CCP has completed all of the requirements of the Order;
  - b. CCP 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 CCP.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve CCP 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 CCP 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 CCP 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 CCP to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official or officer of CCP
- 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, CCP voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 2<sup>nd</sup> day of October, 2020.

  
\_\_\_\_\_  
James J. Golden  
Department of Environmental Quality  
Piedmont Regional Director

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Criss Cross Properties, LLC voluntarily agrees to the issuance of this Order.

Date: 7/30/20 By: [Signature], VP  
(Person) (Title)  
Henry B. Thompson

~~Commonwealth of Virginia~~

City/County of HARRIS

The foregoing document was signed and acknowledged before me this 30<sup>TH</sup> day of

July, 2020, by HENRY B. THOMPSON who is  
Vice President of Criss Cross Properties, LLC, on behalf of the company.

[Signature]  
Notary Public

128215082  
Registration No.

My commission expires: MARCH 22, 2022

Notary seal:

