



# COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY  
TIDEWATER REGIONAL OFFICE  
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Molly Joseph Ward  
Secretary of Natural Resources

David K. Paylor  
Director

Maria R. Nold  
Regional Director

**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
ELIZABETH RIVER CROSSINGS OPCO, LLC  
FOR  
MIDTOWN ELIZABETH RIVER TUNNEL  
VPDES Permit No. VA0005860**

## **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 ELIZABETH RIVER CROSSINGS OPCO, LLC, regarding the Midtown Elizabeth River Tunnel, for the purpose of resolving certain violations of the State Water Control Law and the applicable permit and regulation.

## **SECTION B: Definitions**

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

1. “305(b) report” means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
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 discharge of a pollutant. 9 VAC 25-31-10.
6. “Discharge of a pollutant” when used with reference to the requirements of the VPDES permit program means:
  - (a) Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
  - (b) Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft that is being used as a means of transportation.
7. “DMR” means Discharge Monitoring Report.
8. “Effluent” means wastewater – treated or untreated – that flows out of a treatment plant, sewer, or industrial outfall.
9. “Elizabeth River Crossings” means ELIZABETH RIVER CROSSINGS OPCO, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. Elizabeth River Crossings is a “person” within the meaning of Va. Code § 62.1-44.3.
10. “Facility” means the Midtown Elizabeth River Tunnel located on Route 58 under the Mainstem Branch of the Elizabeth River between Norfolk and Portsmouth, which discharges storm and wash water to the Southern Branch of the Elizabeth River.
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” means VPDES Permit No. VA0005860, which was issued under the State Water Control Law and the Regulation to ELIZABETH RIVER CROSSINGS OPCO, LLC on August 1, 2015 and which expires on July 31, 2020.
14. “Pollutant” means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.

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 (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) 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; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.
16. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
17. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
18. "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.
19. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
20. "Va. Code" means the Code of Virginia (1950), as amended.
21. "VAC" means the Virginia Administrative Code.
22. "VPDES" means Virginia Pollutant Discharge Elimination System.
23. "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. Elizabeth River Crossings operates the Facility. The Facility is a vehicular tunnel on Route 58 under the Mainstem Branch of the Elizabeth River between Norfolk and Portsmouth. This originally was a Virginia Department of Transportation (VDOT) facility first permitted in 1995. In 2012, VDOT transferred its operation to a private entity (Elizabeth River Crossings).

2. The Permit allows Elizabeth River Crossings to discharge treated storm and wash water from the Facility, to the Southern Branch of the Elizabeth River, in strict compliance with the terms and conditions of the Permit.
3. The Southern Branch of the Elizabeth River is located in the James River Basin. The Southern Branch of the Elizabeth River is listed in DEQ's 305(b) report as impaired because of polychlorinated biphenyl in fish tissue, estuarine bioassessments, and low dissolved oxygen. Industrial point source discharges from the Facility are listed among the potential sources of the dissolved oxygen impairment.
4. In submitting its DMRs, as required by the Permit, Elizabeth River Crossings has listed that it exceeded discharge limitations contained in Part I.A.1 of the Permit, for Total Suspended Solids (TSS), for the months of June 2015, September 2015, October 2015, January 2016, and February 2016. Elizabeth River Crossings indicated that at least some of the exceedances were due to intense rain that flooded the existing storm sewer system, flowed towards the tunnel drainage system, and carried sediment from surrounding construction. In addition, Elizabeth River Crossings submitted to DEQ a DMR for the August 2015 reporting period with no principal executive officer signature, telephone number, and date provided on page two of the DMR, in violation of the reporting requirements of Part II.C of the Permit. Lastly, DEQ staff has noted that the November 2015 water quality sampling report, required by Part II.C of the Permit to be submitted by Elizabeth River Crossings on or before December 10, 2015, was not received by the Department until December 17, 2015.
5. TRO issued Warning Letters and a Notice of Violation for the TSS exceedances as follows: WL No. W2015-11-T-1010, issued November 6, 2015; WL No. W2015-12-T-1005, issued December 4, 2015; WL No. W2016-03-T-1010, issued March 4, 2016; and NOV No. W2016-03-T-0003, issued April 1, 2016. The July and September 2015 effluent limit violations and the failure to submit the August 2015 water quality sampling report were cited in WL No. W2015-11-T-1010. The October 2015 effluent limit violations were cited in WL No. W2015-12-T-1005. The January 2016 effluent violations were cited in WL No. W2016-03-T-1010.
6. Elizabeth River Crossings responded to the Warning Letters and Notice of Violation by informing DEQ that it had swept the tunnel and cleaned the grit chamber in response to WL No. 2015-11-T-1010 citing the July and September 2015 effluent limit violations. Elizabeth River Crossings also maintained that the October 2015 effluent limit exceedances resulted from intense rain that flooded the existing storm sewer system, flowed towards the tunnel drainage system, and carried sediment from surrounding construction. Elizabeth River Crossings responded by sweeping the tunnel and cleaning the wet well. Lastly, in response to WL2016-03-T-1010 citing the January 2016 effluent limit violations, Elizabeth River Crossings informed DEQ that it had worked diligently to mitigate increased TSS and hired a consultant to evaluate its existing storm sewer system. Elizabeth River Crossings maintains that plans for lining the storm sewer system with a

slip liner to mitigate infiltration from surrounding soils are in the process of being submitted to DEQ.

7. Va. Code § 62.1-44.5 states that: “[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.”
8. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.
9. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a “certificate” under the statute.
10. The Department has not issued any permits or certificates to Elizabeth River Crossings other than VPDES Permit No. VA0005860.
11. The Southern Branch of the Elizabeth River is a surface water located wholly within the Commonwealth and is a “state water” under State Water Control Law.
12. Based on the results of the DMRs and accompanying documentation submitted during the months of June 2015 through February 2016, the Board concludes that Elizabeth River Crossings has violated VPDES Permit No. VA0005860 Part I.A.1, Part II.C, Va. Code 62.1-44.5, and 9 VAC 25-31-50, by discharging treated storm and wash water from the Facility while concurrently failing to comply with the conditions of the Permit, as described in paragraph C(4), above.
13. Elizabeth River Crossings has submitted documentation that it is taking actions to correct the violations as described in paragraphs C(4) above.
14. In order for Elizabeth River Crossings to return to compliance, DEQ staff and representatives of Elizabeth River Crossings 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 Elizabeth River Crossings, and Elizabeth River Crossings agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$8,125 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

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

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

And it is so ORDERED this 17 day of November, 2016.

  
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Maria Nold, Regional Director  
Department of Environmental Quality

ELIZABETH RIVER CROSSINGS OPCO, LLC voluntarily agrees to the issuance of this Order.

Date: 9/22/16 By: Greg Woodhouse CEO  
(Person) (Title)  
ELIZABETH RIVER CROSSINGS OPCO, LLC

Commonwealth of Virginia

City/County of Portsmouth

The foregoing document was signed and acknowledged before me this 22 day of September, 2016, by Lily S Traficante who is the Accountant of ELIZABETH RIVER CROSSINGS OPCO, LLC, on behalf of the Limited Liability Company.

A. Traficante  
\_\_\_\_\_  
Notary Public  
7550494  
\_\_\_\_\_  
Registration No.

My commission expires: Feb 28, 2017

Notary seal:



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## APPENDIX A SCHEDULE OF COMPLIANCE

ELIZABETH RIVER CROSSINGS OPCO, LLC shall:

- a. By December 31, 2016, submit to DEQ for review and approval a corrective action plan (CAP) and schedule that fully examine the cause(s) of TSS limit exceedances discharged from the Facility to the Southern Branch of the Elizabeth River and describe actions Elizabeth River Crossings has taken or plans to take to comply consistently with the discharge limits established in the Permit
- b. Upon DEQ's approval, begin implementation of the approved CAP no later than July 1, 2017. Upon its approval, the CAP and schedule shall become a part of and enforceable under the terms of this Order.
- c. Within 30 days of completion of the approved CAP, submit to DEQ for its review a final report documenting completion of the project.
- d. Submit all requirements of Appendix A of this Order to DEQ at:

Regional Director  
VA DEQ – Tidewater Regional Office  
5636 Southern Boulevard  
Virginia Beach, VA 23462