



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

Blue Ridge Regional Office

www.deq.virginia.gov

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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
ESF, LLC
FOR
COTTAGES OF STEEPLECHASE**

RECEIVED
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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 ESF, LLC, regarding the Cottages of Steeplechase subdivision in Botetourt County, 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. "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. "BRRO-R" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.
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. "ESF" means ESF, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, subsidiaries, and parents. ESF is a "person" within the meaning of Va. Code § 10.1-1400.
8. "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.
9. "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.
10. "Mr. Overbay" means Mr. Ardith R. Overbay, currently a resident of Botetourt County, Virginia. Mr. Overbay is a "person" within the meaning of Va. Code § 62.1-44.3.
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. "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. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
16. "Site" means the Cottages of Steeplechase, Phase 1 subdivision, located at Read Mountain Road in Botetourt County, Virginia. The Site is listed in Botetourt County GIS records as Parcel 107-234C and is currently owned by ESF, LLC.
17. "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.
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 and 9 VAC 25-210-10.
19. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
20. "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).
21. "USACE" means the United States Army Corps of Engineers.
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.
25. "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. Mr. Overbay owned and operated the Site in Botetourt County, Virginia until May 2, 2016, when Mr. Overbay sold the Site to ESF. The Botetourt County Real Estate

- Property Card lists that date of transfer of ownership from Mr. Overbay to ESF as May 6, 2016. A Virginia Water Protection Permit has not been issued for the Site.
2. On August 20, 2014, Department staff inspected the Site for compliance with the requirements of the State Water Control Law and the Regulations. The DEQ inspector observed that grading activities and construction of culverts and addition of riprap to stream channels resulted in a discharge of fill material into two stream beds that permanently impacted a total of 587 linear feet of streams.
 3. On August 28, 2014, the Department sent Mr. Overbay an inspection report summarizing the results of the August 20, 2014 inspection.
 4. On September 18, 2014, Brent Wills of Wills Soil & Stream (“WSS”), a consultant for Mr. Overbay, sent an email to DEQ staff indicating that a delineation of the Site had been performed.
 5. On October 21, 2014, DEQ and USACE staff met with WSS for further evaluation of the Site and verify the delineation provided by WSS.
 6. On January 22, 2015, DEQ issued a Warning Letter to Mr. Overbay regarding unpermitted stream impacts.
 7. On February 27, 2015, WSS submitted a Jurisdictional Delineation Packet for the Site.
 8. On April 28, 2015, DEQ staff performed a follow-up inspection of the Site and observed a total of 676 linear feet of permanent impact to two unnamed stream channels (designated “S1” and “S2”). These impacts were not authorized by a VWP Permit.
 9. On May 15, 2015, the Department issued NOV No. 15-05-BRRO-001 to Mr. Overbay for the unpermitted stream impacts observed during the April 28, 2015 inspection.
 10. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit dredging or filling of surface waters without a Virginia Water Protection Permit issued by the Director.
 11. On June 15, 2015, DEQ and USACE staff met at the Site with WSS for further evaluation of the Site and to discuss the May 15, 2015 NOV.
 12. On November 5, 2015, WSS and DEQ staff met to prepare a Unified Stream Methodology and Stream Evaluation Report (“Evaluation Report”). The Evaluation Report included a proposal for mitigation (“Compensation Plan”) that called for compensation for 465 stream credits.
 13. Based on the results of the August 20, 2014, April 28, 2015, and June 15, 2015 inspections and the November 5, 2015 meeting, the Board concludes that Mr. Overbay

has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraphs C(3) through C(8), above.

14. On May 2, 2016, Mr. Overbay sold the Site to ESF. As a part of the sales agreement between Mr. Overbay and ESF, ESF agreed to assume all liability for Site regarding the violations specified in this order, including both civil charges and mitigation.
15. On July 25, 2016, ESF submitted checks to two mitigation banks, the Blue Ridge Land Preservation Group (288 credits) and the Graham and David Mitigation Bank, LLC (177 credits), for the purchase of a total of 465 stream credits. Proof of purchase for 288 credits from the Blue Ridge Land Preservation Group was received by DEQ on September 27, 2016. Proof of purchase for 177 credits from the Graham and David Mitigation Bank, LLC was received by DEQ on September 19, 2016. Accordingly, all mitigation required for the unpermitted stream impacts taken at the Site has been completed.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders ESF, LLC, and ESF, LLC agrees to pay a civil charge of \$15,600.00 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

ESF shall include its Federal Employer Identification Number (FEIN) (81-372 9419) 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, ESF 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 ESF for good cause shown by ESF, 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, ESF admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. ESF 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. ESF 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 ESF 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. ESF 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. ESF shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. ESF 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.

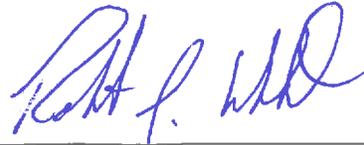
Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which ESF intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on ESF 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 ESF.
11. This Order shall continue in effect until:
 - a. The Director or his designee terminates the Order after ESF has completed all of the requirements of the Order;
 - b. ESF 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 ESF.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve ESF 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 ESF 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. Any documents to be submitted pursuant to this Order shall be submitted by ESF or an authorized representative of ESF.
14. This Order constitutes the entire agreement and understanding of ESF 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, ESF voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 23rd day of February.



Robert J. Weld, Regional Director
Department of Environmental Quality

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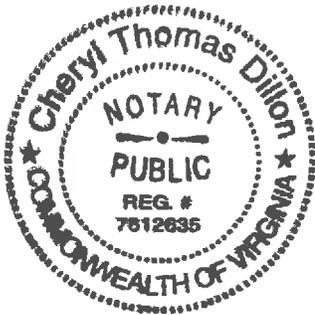
ESF, LLC voluntarily agrees to the issuance of this Order.

Date: 12/19/16 By: 

Commonwealth of Virginia
City/County of VA

The foregoing document was signed and acknowledged before me this 19 day of

December, 2016, by Peter Sackett.




Notary Public

7612635
Registration No.

My commission expires: 1/31/18

Notary seal:

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