



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

VALLEY REGIONAL OFFICE

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO LANE-CORMAN CONSTRUCTION JOINT VENTURE FOR BERKMAR DRIVE EXTENSION Permit No. 15-1268

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 Lane-Corman Construction Joint Venture regarding the Berkmar Drive Extension for the purpose of resolving certain violations of State Water Control Law, 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. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "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.
5. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
6. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
7. "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.
8. "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.
9. "LCVJ" means Lane-Corman Construction Joint Venture, a joint venture company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. LCVJ is a "person" within the meaning of Va. Code § 62.1-44.3.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "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.
12. "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.
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. "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.
17. "Site" means an extension of the existing Berkmar Drive on a new alignment paralleling the existing US Route 29 to the west known as "Berkmar Drive Extension". The length of the project is approximately 2.46 miles and extends between Hilton Heights Road and Towncenter Drive.
18. "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.
19. "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.
20. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
21. "Va. Code" means the Code of Virginia (1950), as amended.
22. "VAC" means the Virginia Administrative Code.
23. "VRO" means the Valley Regional Office of DEQ, located in Harrisonburg, Virginia.
24. "VWP" means the Virginia Water Protection Permit Program.
25. "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. DEQ issued Virginia Water Protection Permit No. 15-1268 (Permit) to Lane-Corman Joint Venture (LCJV) on February 1, 2016, with subsequent minor modifications on April 6, 2016 and May 18, 2016, for permanent impacts to 0.16 acre of palustrine forested wetland (PFO) and 1989 linear feet of stream channel, and temporary impacts to 0.02 acres of surface waters along the Berkmar Drive Extension (Site). There are no other VWP permits issued for impacts to State waters at the Site.
2. On August 11, 2016, DEQ was notified by RK&K, the agent for the permittee, of unpermitted impacts that were observed on July 30-31, 2016.
3. On August 22, 2016, DEQ staff performed a site visit in response to a notification of unpermitted impacts reported by the permittee's agent, RK&K, on August 11, 2016. DEQ staff observed a total impact of 2,230 linear feet of fill material in State waters, on and/or adjacent to the Site, that were not authorized by the Permit, as a result of sedimentation from inadequate Erosion & Sediment controls. Additionally, DEQ staff observed five culverts that were not countersunk to the appropriate depth as a result of the phase of construction that was underway at the time of inspection.
4. Part I.G.5. of the Permit states: "The permittee shall notify DEQ within 24 hours of discovering impacts to surface waters including wetlands, stream channels, and open water that are not authorized by this permit. The notification shall include photographs, estimated acreage and/or linear footage of impacts, and a description of the impacts."
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 ... fill or discharge any pollutant into, or adjacent to surface waters, ... 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...."
6. 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: ... conduct the following in a wetland: New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; Filling or dumping; ... or New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 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."
7. Part I.C.2. of the Permit states: "No activity shall substantially disrupt the movement of aquatic life indigenous to the water body, including those species that normally migrate

through the area, unless the primary purpose of the activity is to impound water.”

8. Part I.E.5. of the Permit states: “For Impact Numbers 3, 4, 5, 6, 7, and 8 at crossings of streams, pipes and culverts less than 24 inches in diameter shall be countersunk a minimum of three inches, and pipes and culverts greater than 24 inches in diameter shall be countersunk a minimum of six inches to provide for the reestablishment of a natural stream bottom and to maintain a low flow channel. For multiple-celled culverts, only the bottoms of those cells situated below the limits of ordinary highwater shall be countersunk. To the greatest extent practicable, other cells, pipes, or culverts shall be elevated to provide a natural distribution of flood flows. The requirement to countersink shall not apply to extensions or maintenance of existing culverts that are not countersunk, to floodplain culverts being placed above ordinary high water, to culverts being placed on bedrock, or to culverts required to be placed on slopes 5% or greater.”
9. On September 29, 2016, DEQ issued NOV No. 1609-000005 to LCJV for violations of the Permit, State Water Control Law, and Regulations. On October 18, 2016, LCJV representatives submitted a response to the NOV, including specific actions, with photographs, taken to address the noncompliance.
10. On October 18, 2016, DEQ staff performed an inspection at the Site. DEQ observed a small section of accumulated sediment in Impact Area #8, an improperly countersunk culvert in Impact Area #7, unstabilized areas in Impact Area #6, and an area of stream where the channel profile needed to be reshaped.
11. On October 21, 2016, DEQ staff met with representatives of LCJV to discuss the violations, including LCJV’s response dated October 18, 2016. LCJV reviewed the clean-up actions taken since the NOV. Additionally, LCJV stated that they would increase inspections of the Site, including after every rain event.
12. On October 28, 2016, LCJV representatives submitted additional information as requested by DEQ staff to address the noncompliance.
13. Based on the results of the August 22 and October 18, 2016 inspections and the October 28, 2016 meeting, the Board concludes that LCJV has violated Permit conditions Part I.C.2, Part I.C.12, Part I.E.5., and Part I.G.5 and Va. Code § 62.1-44.15:20.A and 9 VAC 25-210-50.A, as described in paragraphs C(2) through C(10), above.
14. On October 28, 2016, LCJV submitted documentation demonstrating the removal of the sedimentation from state waters and stabilization measures taken in order to address the NOV. The violations described in paragraph C(2) through C(10) above, have been corrected.

SECTION D: Agreement and Order

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

1. Pay a civil charge of \$30,712.50 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

LCJV 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, LCJV 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 LCJV for good cause shown by LCJV, 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. 1609-000005, dated September 26, 2016. 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, LCJV admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. LCJV 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. LCJV 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 LCJV 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. LCJV 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. LCJV shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. LCJV 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 LCJV. Nevertheless, LCJV agrees to be bound by any compliance date which precedes the effective date of this Order.

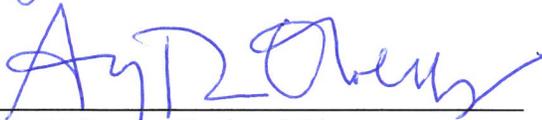
11. This Order shall continue in effect until:

- a. The Director or his designee terminates the Order after LCJV has completed all of the requirements of the Order;
- b. LCJV 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 LCJV.

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

And it is so ORDERED this 29th day of January, 2018.



Amy T. Owens, Regional Director
Department of Environmental Quality

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Lane-Corman Joint Venture voluntarily agrees to the issuance of this Order.

Date: 11/22/17 By: Jason Tracy, Partner
(Person)
Lane-Corman Joint Venture

Commonwealth of Virginia

City/County of Fairfax

The foregoing document was signed and acknowledged before me this 22nd day of Nov, 2017, by Jason Tracy, Partner, on behalf of Lane-Corman Joint Venture, a Joint Venture.

[Signature]
Notary Public

7713198
Registration No.

My commission expires: March 31, 2021

Notary seal:



SAMUEL NATHANIEL GLASFORD
NOTARY PUBLIC 7713198
COMMONWEALTH OF VIRGINIA

MY COMMISSION EXPIRES MARCH 31, 2021