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Tidewater Regional Office

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 1105, Richmond, Virginia 23218
www.deq.virginia.gov

Molly Joseph Ward
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4000
1-800-592-5482

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
MARPLE RUN, LLC
FOR
MARPLE RUN SUBDIVISION
VWP GENERAL PERMIT WP4-13-1591

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 Marple Run, LLC, regarding the Marple Run Subdivision, 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. "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. "Marple Run" means Marple Run, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. Marple Run is a "person" within the meaning of Va. Code § 62.1-44.3.

5. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

6. "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.

7. "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).

8. "Property", "Parcel" or "Site" means the Marple Run Subdivision on the south side of Semple Farm Road in Hampton, VA.

9. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.

10. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*

11. "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.

12. "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.

13. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.

14. "Va. Code" means the Code of Virginia (1950), as amended.

15. "VAC" means the Virginia Administrative Code.

16. "VWP" means Virginia Water Protection Permit as defined in 9 VAC 25-210-10.

17. "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. Marple Run owns the Property. The Property contains nontidal forested wetlands which are surface waters of the Commonwealth.

2. On April 25, 2014 DEQ informed Marple Run that their proposed development qualifies for the VWP General Permit Number WP4. The Marple Run Subdivision development was issued VWP General Permit Authorization number WP4-13-1591.

3. In response to a complaint, on August 5, 2015, DEQ staff conducted a review of DEQ records and a site inspection to determine compliance with the permit conditions, State Water Control Law and the Regulations.

4. During this inspection and records review the DEQ inspector observed the following:

    a. DEQ had not received any notification from Marple Run that construction had commenced.
    b. Marple Run impacted ~~0.9~~ .09 acres of wetlands on one separate section on the Property and an adjacent parcel of land that were not authorized by the Permit including:
        i. 0.06 acres of delineated wetlands on the western perimeter of the Property were cleared, and;
        ii. 0.03 acres of wetlands on an adjacent parcel of land were also cleared.
    c. Marple Run failed to submit documentation confirming the purchase of the required mitigation credits prior to the commencement of construction activities.
    d. Marple Run failed to submit Construction Status Updates for this development.

5. 9 VAC 25-690-100, Part II(E)(2), states "the Department of Environmental Quality shall be notified in writing prior to the start of construction activities at the first permitted impact area."

6. 9 VAC 25-690-100, Part I(A)(2), states "any changes to the authorized permanent impacts to surface waters shall require a notice of planned change in accordance with 9 VAC 25-690-80. An application or request for modification to coverage or another VWP permit application may be required."

7. 9 VAC 25-690-100, Part II(A)(4), states "for compensation involving the purchase of mitigation bank credits or the purchase of in-lieu fee program credits, the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase or of the in-lieu fee program credit purchase has been submitted to and received by the Department of Environmental Quality."

8. The Permit, Authorization Note 4(a) of the Cover Page states, "A semi-annual construction status update shall be completed in June and December of every year during the term of this permit."

9. On October 1, 2015, DEQ issued NOV TR15-1001 for the violations in C(4) - (8), above.

10. On November 5, 2015 DEQ staff conducted a follow up site inspection at the Property. It was observed during the site inspection that no additional impacts had been taken by Marple Run. Revegetation was taking place in the unauthorized impact areas and it was determined that no additional restoration work was necessary to restore the ~~0.9~~ .09 acres (0.06 + 0.03 acres) of impacted wetland areas.

11. On January 28, 2016, representatives of Marple Run and DEQ staff met at TRO to discuss the NOV.

12. Based on the results of August 5, 2015 inspection, and January 28, 2016, meeting, the Board concludes that Marple Run has violated 9 VAC 25-690-100, Part II(E)(2), 9 VAC 25-690-100, Part I(A)(2), 9 VAC 25-690-100, Part II(A)(4) and the Permit, Authorization Note 4(a) of the Cover Page, as described in paragraphs C(4) – C(8), above.

13. Based on the November 5, 2016, inspection, and documentation received by Marple Run, the Board concludes that the violations as described in C(4) –C(8), 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 Marple Run, and Marple Run agrees to pay a civil charge of $10,325 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

Marple Run 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, Marple Run shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION D: Agreement and Order

1. The Board may modify, rewrite, or amend this Order with the consent of Marple Run for good cause shown by Marple Run, 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. TR15-1001, dated October 1, 2015. 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, Marple Run admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. Marple Run 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. Marple Run declares he has received fair and due process under the Administrative Process Act and the State Water Control Law and he 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 Marple Run 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. Marple Run 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. Marple Run shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Marple Run 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 Marple Run. Nevertheless, Marple Run 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 Marple Run has completed all of the requirements of the Order;

b. Marple Run 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 Marple Run.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Marple Run from his 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 Marple Run 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 Marple Run or an authorized representative of Marple Run.

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, Marple Run voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 7th day of February, 2017.

Jefferson Reynolds, Director
Division of Enforcement
Department of Environmental Quality

----------(Remainder of Page Intentionally Blank)----------

Marple Run voluntarily agrees to the issuance of this Order.

Date: 11-21-16 By: R L Mallory, Member Manager
(Person) (Title)
Marple Run, LLC

Commonwealth of Virginia
City/~~County~~ of Newport News

The foregoing document was signed and acknowledged before me this 21st day of November, 20 16, by R.L. Mallory in his personal capacity.

Kimberly K. Lunsford
Notary Public

Kimberly K Lunsford
NOTARY PUBLIC
Commonwealth of Virginia
Reg. # 287436
My Commission Expires July 31, 2020

287436
Registration No.

My commission expires: July 31, 2020

Notary seal: