



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY*

VALLEY REGIONAL OFFICE

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Matthew J. Strickler  
Secretary of Natural Resources

David K. Paylor  
Director

Amy Thatcher Owens  
Regional Director

### **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT**

**ISSUED TO**

**NIELSEN BUILDERS, INC.**

**FOR**

**KENDAL AT LEXINGTON RENOVATIONS AND EXPANSION**

**Virginia Pollutant Discharge Elimination System Permit**

**Registration No. VAR10K933 and**

**Unpermitted Activity**

#### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code §§ 62.1-44.15, 62.1-44.15:25, and 62.1-44.15:48, between the State Water Control Board and Nielsen Builders, Inc. regarding Kendal at Lexington Renovations and Expansion, for the purpose of resolving certain violations of the State Water Control Law, Regulations, and the applicable Permit.

#### **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. "2014 Permit" means the General VPDES Permit for Discharges of Stormwater from Construction Activities, No. VAR10, promulgated at 9 VAC 25-880-70, which was issued under the State Water Control Law, the VSMP Regulations, and the General Permit Regulation on July 1, 2014 and which expires on June 30, 2019.

3. "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.
4. "Construction activity" means any clearing, grading or excavation resulting in land disturbance of equal to or greater than one acre, or disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.
5. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
6. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
7. "Discharge" means the discharge of a pollutant.
8. "Discharge of a pollutant" 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 which is being used as a means of transportation.
9. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
10. "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.
11. "General Permit Regulation" means the General VPDES Permit Discharges of Stormwater from Construction Activities, 9 VAC 25-880-1 et seq.
12. "Land disturbance" or "land-disturbing activity" means a man-made change to the land surface that potentially changes its runoff characteristics including clearing, grading, or excavation, except that the term shall not include those exemptions specified in Va. Code § 62.1-44.15:34.
13. "Nielsen" means Nielsen Builders, Inc., a corporation authorized to do business in Virginia, and its affiliates, partners, and subsidiaries. Nielsen is a "person" within the meaning of Va. Code § 62.1-44.3.

14. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
15. "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.
16. "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 U.S.C. § 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." 9 VAC 25-870-10; means any substance, radioactive material, or heat that causes or contributes to or may cause or contribute to pollutions." 9 VAC25-210-10.
17. "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; 9 VAC 25-210-10.
18. "Registration Statement" means a registration statement for coverage under the 2014 Permit.
19. "Site" means the Kendal at Lexington Renovations and Expansion construction activity located at 160 Kendal Lane in Lexington, Virginia, from which discharges of stormwater associated with construction activity occur.
20. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1 of the Va. Code.
21. "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.
22. "Stormwater" means precipitation that is discharged across the land surface or through conveyances to one or more waterways and that may include stormwater runoff, snow melt runoff, and surface runoff and drainage. Va. Code § 62.1-44.15:24.

23. "Stormwater management plan" means a document or series of documents containing material describing methods for complying with the requirements of a VSMP or the VSMP Regulations. 9 VAC 25-870-10.
24. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
25. "SWPPP" means Stormwater Pollution Prevention Plan, which is a document that is prepared in accordance with good engineering practices and that identifies potential sources of pollutants that may reasonably be expected to affect the quality of stormwater discharges. A SWPPP required under a VSMP for construction activities shall identify and require the implementation of control measures, and shall include, but not be limited to the inclusion of, or the incorporation by reference of an approved erosion and sediment control plan, an approved stormwater management plan, and a pollution prevention plan. 9 VAC 25-870-10.
26. "USACE" means the United States Army Corps of Engineers.
27. "Va. Code" means the Code of Virginia (1950), as amended.
28. "VAC" means the Virginia Administrative Code.
29. "Virginia Stormwater Management Act" means Article 2.3 (§ 62.1-44.15:24 et seq.) of Chapter 3.1 of Title 62.1 of the Va. Code.
30. "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.
31. "VPDES" means Virginia Pollutant Discharge Elimination System.
32. "VSMP" means the Virginia Stormwater Management Program, which is a program approved by the Soil and Water Conservation Board after September 13, 2011, and until June 30, 2013, or the State Water Control Board on and after June 30, 2013, that has been established by a VSMP authority to manage the quality and quantity of runoff resulting from land-disturbing activities and shall include such items as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement, where authorized in this article, and evaluation consistent with the requirements of this article and associated regulations. Va. Code § 62.1-44.15:24.
33. "VSMP authority" means an authority approved by the Board after September 13, 2011, to operate a VSMP or, until such approval is given, the Department. An authority may

include a locality; state entity, including the Department; federal entity; or for linear projects subject annual standards and specifications in accordance with subsection B of § 62.1-44.15-31, electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies, or authorities created pursuant to § 15.2-5102. Va. Code § 62.1-44.15:24.

34. “VSMP authority permit” means an approval to conduct a land-disturbing activity issued by the VSMP authority for the initiation of a land-disturbing activity after evidence of State Permit coverage has been provided where applicable. Va. Code § 62.1-44.15:24.
35. “VSMP Regulations” means the Virginia Stormwater Management Program (VSMP) Regulations, 9 VAC 25-870-10 et seq.
36. “VWP Regulations” means the Virginia Water Protection (VWP) Permit Program Regulations, 9 VAC 25-210-10 et seq.
37. “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. Nielsen is the operator and permittee of the Site, from which stormwater associated with construction activity is discharged.
2. DEQ is the VSMP authority for the Site.
3. On April 6, 2018, DEQ granted Nielsen coverage under the 2014 Permit for construction activities at the Site. Nielsen was assigned registration number VAR10K933. The 2014 Permit allows Nielsen to discharge stormwater associated with construction activities from the Site to Woods Creek via a tributary to Woods Creek, in compliance with the terms and conditions of the 2014 Permit.
4. Woods Creek and the tributary to Woods Creek are surface waters located wholly within the Commonwealth and are “state waters” under the State Water Control Law. Woods Creek is listed as impaired in DEQ’s 2016 305(b)/303(d) report for Recreation due to E. coli and for Aquatic Life. Sources for both impairments are Municipal (Urbanized High Density Area) and Non-point sources. The tributary to Woods Creek was not assessed for water quality during the 2016 assessment period.
5. On June 14, 2018, DEQ staff documented during a Site inspection, that Nielsen failed to completely and properly install the following sediment trapping controls required by the approved stormwater management and erosion and sediment control plans:

- a. A sediment basin was not completely installed and functional prior to upslope disturbance, and visible sediment was observed in a stream channel downstream of the sediment basin's designed location.

9 VAC 25-840-40(4) states that: "Sediment basins and traps, perimeter dikes, sediment barriers, and other measures intended to trap sediment shall be constructed as a first step in any land-disturbing activity and shall be made functional before upslope disturbance takes place."

- b. Inlet protection was not observed on operable stormwater inlets.

9 VAC 25-840-40(10) states that "All storm sewer inlets that are made operable during construction shall be protected so that sediment-laden water cannot enter the conveyance system without first being filtered or otherwise treated to remove sediment."

- c. A construction entrance was not observed and sediment tracking was observed on the paved public road.

9 VAC 25-840-40(17) states in part that: "Where construction vehicle access routes intersect with paved or public roads, provisions shall be made to minimize the transport of sediment by vehicular tracking onto the paved surface."

- d. The erosion and sediment control plan was not implemented as approved.

9 VAC 25-870-54(B) states in part that: "An erosion and sediment control plan consistent with the requirements of the Virginia Erosion and Sediment Control Law and regulations must be designed and implemented during construction activities."

6. On June 18, 2018, DEQ staff and USACE staff conducted a Virginia Water Protection Permit (VWP) construction inspection of the Site and observed a fine layer of sediment measuring up to 1 inch in depth within the tributary to Woods Creek for approximately 2,000 linear feet downstream.

Va. Code § 62.1-44.15:20(A) states in part that: "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: . 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.

9 VAC 25-210-50(A) states in part that: "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall... fill or discharge any pollution 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...”

2014 Permit Part III.G. states in part that: “Any operator who discharges or causes or allows a discharge of sewage, industrial waste, or other wastes or any noxious or deleterious substance...into or upon surface waters or who discharges or causes or allows a discharge sewage, industrial waste, or other wastes or any noxious or deleterious substance...into or upon surface waters or who discharges or causes or allows a discharge that may reasonably be expected to enter surface waters, shall notify the Department of Environmental Quality of the discharge immediately upon discovery of the discharge, but in no case later than 24 hours after said discovery. A written report of the unauthorized discharge shall be submitted to the department and the VSMP authority within 5 days discovery of the discharge.”

7. The Department has not issued coverage under any permit or certificate to Nielsen other than under the 2014 Permit.
8. On June 28, 2018, DEQ issued NOV No. 2018-VRO-0012 to Nielsen for violations of the State Water Control Law, Regulations, and for violations of the Permit.
9. Based on the results of the June 14, 2018 and June 18, 2018 inspections, the Board concludes that Nielsen violated 9 VAC 25-840-40(4), 9 VAC 25-840-40(10), 9 VAC 25-840-40(17), 9 VAC 25-870-54(B), Va. Code § 62.1-44.15:20(A), 9 VAC 25-210-50(A), and 2014 Permit Part III(G) condition, as described in paragraphs C(5) through C(7) of this Order.
10. On July 3, 2018 DEQ staff inspected the Site and verified that the violations as described in paragraph C(6) above have been corrected.
11. On July 11, 2018, DEQ staff met with representatives of Nielsen and advised that removal of the sediment within the unnamed tributary to Woods Creek was not recommended by DEQ or USACE staff due to the potential for additional harm to the stream channel from manual excavation activities.

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

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, 62.1-44.15:25, and 62.1-44.15:48, the Board orders Nielsen, and Nielsen agrees to:

Pay a civil charge of \$20,475 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

- a. Construction General Permit Penalty: \$6,825

b. Virginia Watershed Protection Penalty: \$13,650

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

Nielsen 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 Stormwater Management Fund for the Construction General Permit Penalty set forth in Section (D)(2)(a) above and the Virginia Environmental Emergency Response Fund (VEERF) for the Virginia Watershed Protection Penalty set forth in Section (D)(2)(b) above. If the Department has to refer collection of moneys due under this Order to the Department of Law, Nielsen 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 Nielsen for good cause shown by Nielsen, 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. 2018-VRO-0012 dated June 28, 2018. 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, Nielsen admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Nielsen 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. Nielsen 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 Nielsen 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. Nielsen 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. Nielsen shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Nielsen 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 Nielsen. Nevertheless, Nielsen 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 Nielsen has completed all of the requirements of the Order;
- b. Nielsen 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 Nielsen.

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

And it is so ORDERED this 3<sup>rd</sup> day of December, 2018.



Amy T. Owens, Regional Director  
Department of Environmental Quality

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Nielsen Builders, Inc. voluntarily agrees to the issuance of this Order.

Date: 10/9/18 By: Josh R Miller, V.P. of OPERATIONS  
(Person) (Title)  
Nielsen Builders, Inc.

Commonwealth of Virginia  
~~City~~ County of Rockingham

The foregoing document was signed and acknowledged before me this 9<sup>th</sup> day of  
October, 2018, by Joseph Miller who is  
V.P. of Operations of Nielsen Builders, Inc., on behalf of the corporation.

[Signature]  
Notary Public

324331  
Registration No.

My commission expires: 3/31/19

Notary seal:

