



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

VALLEY REGIONAL OFFICE

P.O. Box 3000, Harrisonburg, Virginia 22801

(540) 574-7800 Fax (540) 574-7878

Physical Address: 4411 Early Road, Harrisonburg, VA

www.deq.virginia.gov

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
PIEDMONT NEIGHBORHOODS, LP
FOR
WHITTINGTON PHASES B AND C
Permit No. WP4-14-1750**

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 Piedmont Neighborhoods LP, a Virginia limited partnership, regarding a portion of the Whittington residential development located in Albemarle County, Virginia, consisting of Phase B and Phase C, 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 used herein 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. "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, as described in 9 VAC 25-210-10.
6. "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, as described in 9 VAC 25-210-10.
7. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
8. "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.
9. "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.
10. "Piedmont" means Piedmont Neighborhoods LP, a Virginia limited partnership. Piedmont is a "person" within the meaning of Va. Code § 62.1-44.3.
11. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution, as described in 9 VAC 25-210-10.
12. "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", all as set forth in Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

13. "Regulations" means the Virginia Water Protection Permit Program Regulations, under 9 VAC 25-210 *et seq.*
14. "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.
15. "Site" means a portion the Whittington residential subdivision, consisting of Phases B and C, in Albemarle County, VA.
16. "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.
17. "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 under, Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
18. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
19. "Va. Code" means the Code of Virginia (1950), as amended.
20. "VAC" means the Virginia Administrative Code.
21. "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, under 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. Piedmont is the owner of the Site. DEQ issued Virginia Water Protection Permit No. WP4-14-1750 to Piedmont on January 15, 2015. Notices of Planned Change were approved on March 17, 2016 and June 28, 2018, for designated impacts to streams and wetlands at the Site.
2. The unnamed tributaries to Biscuit Run, which flow through the Site, are considered surface waters located wholly within the Commonwealth and are defined as a "state water" under State Water Control Law. The unnamed tributaries to Biscuit Run are in the

James River Basin.

3. On March 17, 2017, DEQ staff performed an inspection of the Site. DEQ staff observed:
 - a. 2,450 linear feet of stream channel impacts to the unnamed tributaries to Biscuit Run and 0.10 acre of palustrine emergent (PEM) wetland impacts associated with sedimentation from the Site. These impacts were observed below Impact Areas 1, 3, 4 (offsite), and 5. An additional 20 linear feet of stream channel impacts from the installation of culvert crossings were observed downstream of Impact Areas 3 and 5. An additional 44 linear feet of stream channel impacts from the installation of a culvert crossing and rip rap inlet protection were observed at Impact Area 2. The observed impacts were outside of the approved Permit impact areas.
 - b. Rip rap outlet protection at Impact Area 2 substantially disrupted the movement of aquatic life;
 - c. Impacts to stream channels that were permitted as temporary impacts were not restored to pre-existing conditions impacts (Impact Areas 5, 6 and 8); and
 - d. Flagging or marking around nonimpacted surface waters were not observed at the Site.
4. On March 31, 2017, DEQ issued NOV No. 1703-000285 to Piedmont for violations of 9 VAC 25-210-50(A), 62.1-44.15:20(A), and Permit Parts I.C.2, I.C.10, and I.C.11.
5. 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."
6. 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..."
7. Permit Part I.C.2 states: "No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. Culverts

placed in streams must be installed to maintain low flow conditions.”

8. Permit Part I.C.10 states: “All nonimpacted surface waters and compensatory mitigation areas within 50 feet of permitted activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude unauthorized disturbances to these surface waters and compensatory mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.”
9. Permit Part I.C.11 states: “Temporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing preconstruction contours, and planting or seeding with appropriate wetland vegetation according to cover type (emergent, scrub/shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance. All temporarily impacted streams and streambanks shall be restored to their original contours within 30 days following the construction at that stream segment, and the banks seeded or planted with the same vegetation cover type originally present along the streams banks, including supplemental erosion control grasses if necessary, except for invasive species identified on DCR's Invasive Alien Plant Species of Virginia list.”
10. On April 13, 2017, DEQ staff met with Piedmont representatives and its consultant to discuss the NOV. Piedmont and its consultant agreed to submit a Corrective Action Plan (CAP) as part of their ongoing effort towards compliance.
11. On April 21, 2017, Piedmont’s consultant submitted the CAP, which detailed the actions proposed to address the sedimentation removal, the temporary culvert removal, reduction of the outlet protection, installation of the flagging, and restoration plans for the temporary impact area. All actions proposed in the CAP were to be completed by June 30, 2017. The CAP was revised on May 3, 2017, in response to DEQ staff comments. On May 9, 2017, a revised CAP was reviewed and approved by DEQ staff.
12. Piedmont submitted bi-weekly inspection reports for the Site on May 11, 2017, May 25, 2017, June 6, 2017, and June 20, 2017, demonstrating incremental progress with the CAP.
13. On April 5, 2018, DEQ staff inspected the Site for compliance with the Permit and submitted CAP. DEQ staff observed approximately 1,500 linear feet of new, unpermitted stream channel impacts to the unnamed tributaries to Biscuit Run, associated with sedimentation from the Site. These impacts were observed below Impact Areas 1 and 4. Additionally, the CAP indicated that the stream channel impact at Impact Area 2 was 124 linear feet. The permitted stream channel impact for Impact Area 2 is 76 linear feet. Piedmont did not submit Notice of Planned Change (NOPC) for the additional,

permanent stream impacts. At the time of the Site inspection, DEQ had not received the NOPC for this activity.

14. On April 19, 2018, Piedmont's consultant provided a site inspection report, noting areas of hand removal of sedimentation, repair of E&S controls, and removal of temporary crossings.
15. On May 23, 2018, DEQ issued NOV No. 1805-000737 to Piedmont for the violations of 9 VAC 25-210-50(A), 62.1-44.15:20(A), and Permit Part A.2 that were observed on April 5, 2018.
16. Permit Part A.2 states: "Any changes to the authorized permanent impacts to surface waters associated with this project shall require either a notice of planned change in accordance with 9 VAC 25-690-80, or another VWP permit application".
17. On June 4, 2018, Piedmont's consultant submitted a response to the NOV stating that Piedmont removed the sediment noted in the NOV by hand.
18. On June 16, 2018, Piedmont's consultant submitted a NOPC to extend coverage for the additional, permanent impacts at Impact Area 2.
19. Based on the results of the March 17, 2017 and April 5, 2018 inspections, the April 13, 2017 meeting, and the documentation submitted on April 21, 2017, the Board concludes that Piedmont has violated 9 VAC 25-210-50(A), 62.1-44.15:20(A), and Permit Conditions Part I.C.2, I.C.10, I.C.11, and I.A.2 as described in paragraphs C(3) through C(16), above.
20. Piedmont has submitted documentation on April 5, 2018 and June 16, 2018 to demonstrate its return to compliance. In addition to the documentation, DEQ staff verified that the violations described in paragraphs C(3) through C(16), 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 Piedmont, and Piedmont agrees to:

1. Pay a civil charge of \$61,285 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

Piedmont 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, Piedmont 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 Piedmont for good cause shown by Piedmont, 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, in NOV No. 1703-000285, dated March 31, 2017, and in NOV No.1805-00737 dated May 23, 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 or (2) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Piedmont admits to the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law in this Order.
4. Piedmont 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. Piedmont 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 Piedmont 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. Piedmont 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. Piedmont shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Piedmont 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 Piedmont. Nevertheless, Piedmont 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 Piedmont has completed all of the requirements of the Order;
 - b. Piedmont 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 Piedmont.

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

And it is so ORDERED this _____ day of _____, 2018.

Amy T. Owens, Regional Director
Department of Environmental Quality

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Piedmont Neighborhoods, LP voluntarily agrees to the issuance of this Order.

Date: August 14, 2018 By: [Signature], Partner
Andrew C. Holzwarth
President-Southern Region, Piedmont Neighborhoods LP

Commonwealth of Virginia
City/County of Albemarle

The foregoing document was signed and acknowledged before me this 14th day of
August, 2018, by Andrew C. Holzwarth, President-Southern Region, on behalf of
Piedmont Neighborhoods LP, a Virginia limited partnership

[Signature]
Notary Public

7773760
Registration No.

My commission expires: 3/31/2022

Notary seal:

