



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

NORTHERN REGIONAL OFFICE

13901 Crown Court, Woodbridge, Virginia 22193

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Douglas W. Domenech
Secretary of Natural Resources

David K. Paylor
Director

**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
R. INCOME PROPERTIES, LLC
FOR
I-95 INDUSTRIAL PARK PROJECT
VIRGINIA WATER PROTECTION (VWP)
GENERAL PERMIT AUTHORIZATION NO. WP4-08-0190**

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 R. Income Properties, LLC, regarding the I-95 Industrial Park project located in Stafford County, Virginia, 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. "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. 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. 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. "NRO" means the Northern Regional Office of DEQ, located in Woodbridge, Virginia.
9. "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.
10. "PEM" means palustrine emergent wetland.
11. "Permit" or "Virginia Water Protection Permit" means General Permit Authorization No. WP4-08-0190 issued on May 29, 2008, 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.
12. "PFO" means palustrine forested wetland.
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. "Project Site" or "Property" means the I-95 Industrial Park project, an industrial park consisting of building pads, access roads, utilities and stormwater management facilities, located at the terminus of Wyche Road, approximately 1,400 feet northeast of its intersection State Route 630 (Courthouse Road) in Stafford County, Virginia, owned by R. Income Properties, LLC.
16. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
17. "R. Income Properties" or "R. Income" means R. Income Properties, LLC, a limited liability company authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. R. Income Properties, LLC is a "person" within the meaning of Va. Code § 62.1-44.3.
18. "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.
19. "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 62.1-44.14:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
20. "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.
21. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
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.

SECTION C: Findings of Fact and Conclusions of Law

1. On May 29, 2008, DEQ issued a Permit for the development of the Property. The Permit authorized the total impact of 0.53 acre of surface waters, including the permanent impact of 0.24 acre of PFO, the permanent conversion of 0.28 acre of PFO to PEM, and

the temporary impact of 0.01 acre (86 linear feet) of stream channel. Compensation for the permitted impacts was to be provided through the on-site preservation of 0.54 acre of PFO wetlands and 2.25 acres of upland buffer and the purchase of 0.60 wetland mitigation credit from the Northern Virginia Regional Environmental Bank – Miller Farm Site, in Fauquier County.

2. On February 9, 2011, DEQ inspected the Project Site and observed that utility construction activities had significantly altered approximately 126 linear feet of an unnamed tributary to Accokeek Creek, located within the Potomac River Basin and 0.312 acres of PFO, both of which are surface waters, in excess of the Permit authorization. These significant alterations resulted from the conversion of PFO to PEM through excavation and filling; the discharge of fill material to PEM; and the discharge of fill material to the unnamed tributary.
3. In addition to the impacts, DEQ observed that R. Income Properties had failed to flag the surface waters that were to remain undisturbed.
4. Permit Condition Part I.A.2 requires that “[a]ny changes to the authorized permanent impacts to surface waters associated with this project shall require either a notice of planned change in accordance with 9VAC25-690-80, or another VWP permit application.”
5. Permit Condition Part I. C.10 requires that “[a]ll non-impacted surface waters within 50 feet of any 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 any unauthorized disturbances to these surface waters during construction. The permittee shall notify all contractors that these marked areas are surface waters where no activities are to occur.”
6. 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 Permit issued by the Director. R. Income Properties does not have a Permit for the additional permanent impacts to approximately 126 linear feet of stream and 0.312 acres of PFO.
7. On March 8, 2011, as a result of the February 9, 2011, compliance inspection, DEQ issued NOV No. W2011-03-N-0003, for the violation of Va. Code § 62.1-44.15:20, Regulation 9 VAC 25-210-50, and Permit Conditions Part I.A.2 and I.C.10.
8. On March 12, 2013 and March 26, 2013, R. Income Properties’ consultant sent a response letter and site maps to DEQ updating the proposed mitigation and corrective measures to offset the unauthorized impacts on the site. The letter and subsequent information provided requested DEQ to consider survey information of the wetland impact areas demonstrating 0.16 acres of unauthorized wetland impact and proposed to use restoration of a portion of the impact areas to address some of the compensation requirements.

9. The survey information and proposed restoration component was evaluated and approved by DEQ on April 5, 2013.
10. Based on the results of the February 9, 2011, compliance inspection, and the documentation submitted on March 12, 2013 and March 26, 2013, the Board concludes that R. Income Properties has violated Va. Code § 62.1-44.15:20, 9 VAC 25-210-50, and Permit Condition Conditions Part I.A.2 and I.C.10.as described in paragraph C.4 through C.8 above.
11. In order for R. Income Properties to return to compliance, DEQ staff and R. Income Properties have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

R. Income Properties, LLC and the Department agree that a civil charge was assessed, however, an ability to pay analysis performed by the Department supports a finding that R. Income Properties, LLC cannot afford to pay the assessed civil charge.

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders R. Income Properties, LLC, and R. Income Properties, LLC agrees to perform the actions described in Appendix A of this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of R. Income Properties, LLC for good cause shown by R. Income Properties, LLC, 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, R. Income Properties, LLC admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. R. Income Properties, LLC 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. R. Income Properties, LLC 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 R. Income Properties, LLC 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. R. Income Properties, LLC 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. R. Income Properties, LLC shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. R. Income Properties, LLC 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 R. Income Properties, LLC 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 the parties hereto, their 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 R. Income Properties, LLC. Nevertheless, R. Income Properties, LLC 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 R. Income Properties, LLC has completed all of the requirements of the Order;
 - b. R. Income Properties, LLC 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 R. Income Properties, LLC.

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

And it is so ORDERED this 17th day of June, 2013.



Thomas A. Faha, NRO Regional Director
Department of Environmental Quality

R. Income Properties, LLC voluntarily agrees to the issuance of this Order.

Date: 4.15.13 By: Edgar S. Wilbourn III Manager
(Person) (Title)
R. Income Properties, LLC

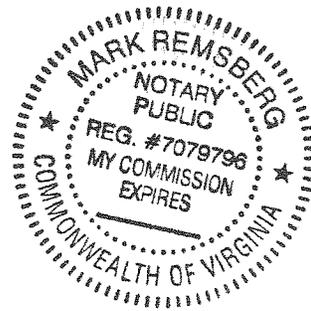
Commonwealth of Virginia
City/County of Prince William

The foregoing document was signed and acknowledged before me this 15th day of April, 2013, by Edgar Sherman Wilbourn III 35th who is Manager of R. Income Properties, LLC on behalf of the corporation.

Mark Remsberg
Notary Public
7079794
Registration No.

My commission expires: 7/31/15

Notary seal:



**APPENDIX A
SCHEDULE OF COMPLIANCE**

R. Income Properties, LLC shall:

1. Within 30 days of the execution of this Order, submit proof of restoration/reestablishment of 96 linear feet of stream channel to pre-construction contours and stabilize the impacted stream bed and banks.
2. Within 30 days of the execution of this Order, submit proof of purchase of 17 stream compensation credits to compensate for impacts to 30 linear feet of ephemeral stream, from a mitigation bank that has released credits and is authorized by DEQ to sell credits in the area in which the impacts occurred.
3. Within 30 days of the execution of this Order, submit proof of purchase of 0.16 wetland mitigation credits to compensate for 0.16 acre of PFO to PEM conversion, from a wetland mitigation bank that has released credits and is authorized by DEQ to sell credits in the area in which the impacts occurred.
4. Unless otherwise specified in this Order, R. Income Properties, LLC shall submit all requirements of Appendix A of this Order to:

Department of Environmental Quality
Northern Regional Office
Attn: Enforcement
13901 Crown Court
Woodbridge, VA 22193