



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE

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Molly Joseph Ward
Secretary of Natural Resources

David K. Paylor
Director

Craig R. Nicol
Regional Director

**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
WHITTAKER'S MILL ASSOCIATES, LLC
FOR
WHITTAKER'S MILL DEVELOPMENT
VWP GENERAL PERMIT WP4-15-0155**

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 Whittaker's Mill Associates, LLC, regarding the Whittaker's Mill 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. "Compensation" or "Compensatory Mitigation" means (i) the restoration (reestablishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources or (ii) in certain circumstances an out-of-kind measure having a water quality, habitat, or other desirable benefit for the purposes of offsetting unavoidable adverse impacts to aquatic resources that remain after all appropriate and practicable avoidance and minimization has been achieved.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
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 Whittaker's Mill Development located at 1500 Penniman Road, York County, Virginia.
9. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 et seq.
10. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.
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. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
15. "Va. Code" means the Code of Virginia (1950), as amended.
16. "VAC" means the Virginia Administrative Code.
17. "VWP" means Virginia Water Protection Permit as defined in 9 VAC 25-210-10.

18. "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.
19. "Whittaker's Mill" means Whittaker's Mill Associates, LLC, a limited liability company authorized to do business in Virginia. Whittaker's Mill is a "person" within the meaning of Va. Code § 62.1-44.3.

SECTION C: Findings of Fact and Conclusions of Law

1. Whittaker's Mill owns the Property. The Property contains nontidal forested wetlands and intermittent streams, which are surface waters of the Commonwealth.
2. On May 20, 2015, DEQ informed Whittaker's Mill that their proposed development qualifies for the VWP General Permit Number WP4. The Whittaker's Mill development was issued VWP General Permit Authorization number WP4-1-0155.
3. On October 6, 2016, in response to a complaint, DEQ staff conducted a compliance inspection of the Property 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. A failure in the erosion and sediment controls on an upland denuded slope resulted in the release of sediments which impacted 2,500 linear feet of intermittent and perennial stream channels, and 0.92 acres of forested wetlands adjacent to the stream channel. No impacts to these areas were authorized by the Permit.
 - b. On September 28, 2016, DEQ received notification from an adjacent property owner that sediment releases from the Property had crossed the property line downstream to Jones Pond. Neither the Permittee nor persons acting on their behalf provided notification of unauthorized impacts occurring at the Property to DEQ.
5. 9 VAC 25-690-100, Part I(A)(2) states: "Any additional 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."
6. 9 VAC 25-690-100, Part I(C)(1) states: "The construction or work authorized by this VWP general permit shall be executed in a manner so as to minimize any adverse impact on instream beneficial uses as defined in § 62.1-10 (b) of the Code of Virginia."

7. 9 VAC 25-690-100, Part III(A) states: "The permittee shall comply with all conditions of the VWP general permit. Nothing in the VWP general permit shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations, and toxic standards and prohibitions. VWP general permit noncompliance is a violation of the Clean Water Act and State Water Control Law, and is grounds for enforcement action, VWP general permit authorization termination for cause, VWP general permit authorization revocation, or denial of a continuation of coverage request.
8. 9 VAC 25-690-100, Part III(B) states: "The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit which may have a reasonable likelihood of adversely affecting human health or the environment."
9. Va. Code § 62.1-44.15:20 and 9 VAC 25-690-100, Part III(Q) states: "Except in compliance with this VWP general permit, it shall be unlawful for the permittee to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substance; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; or 4. On and after October 1, 2001, conduct the following activities in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alternation or degradation of existing wetland acreage or functions."
10. The Permit, Authorization Notes: 2.b. states: "The permittee shall notify DEQ within 24 hours of discovering impacts to surface waters (including wetlands) that are not authorized by this permit. The notification shall include photographs, estimated acreage and/or linear footage of impacts, and a narrative description of the impacts."
11. On October 26, 2016, DEQ issued NOV No. TR16-1024 for the violations in C(4) - (10), above.
12. On November 22, 2016, representatives of DEQ and Whittaker's Mill met at the Property to conduct a site visit and discuss the NOV. During this site visit, representatives of Whittaker's Mill provided a document to DEQ summarizing the conditions that led to the impacts and what steps were being made to decrease the likelihood of future impacts. Revegetation is taking place in the unauthorized impact areas, and although the sediments have remained in place since the time of the release, it was determined that no compensatory mitigation was necessary to restore the 2,500 linear feet of intermittent and perennial stream channels and 0.92 acres of impacted forested wetland areas.
13. Based on the results of October 6, 2016 inspection, and November 22, 2016, Site visit, the Board concludes that Whittaker's Mill has violated 9 VAC 25-690-100, Part I(A)(2); Part I(C)(1); Part I(C)(2); Part III(A); Part III(B); Part III(Q); and The Permit, Authorization Notes: 2(b) as described in paragraphs C(4) – C(10), above.

14. Based on the November 22, 2016, Property visit, and documentation received from Whittaker's Mill, the Board concludes that the violations as described in C(4)–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 Whittaker's Mill, and Whittaker's Mill agrees to:

1. Pay a civil charge of \$38,675 in settlement of the violations cited in this Order. The civil charge shall be paid in accordance with the following schedule:

Due Date	Amount
Within 30 day of execution of Order	\$14,675 or balance
April 1, 2018	\$8,000 or balance
July 1, 2018	\$8,000 or balance
October 1, 2018	\$8,000

2. If the Department fails to receive a civil charge payment pursuant to the schedule described above, the payment shall be deemed late. If any payment is late by 30 days or more, the entire remaining balance of the civil charge shall become immediately due and owing under this Order, and the Department may demand in writing full payment by Whittaker's Mill. Within 15 days of receipt of such letter, Whittaker's Mill shall pay the remaining balance of the civil charge. Any acceptance by the Department of a late payment or of any payment of less than the remaining balance shall not act as a waiver of the acceleration of the remaining balance under 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

Whittaker's Mill 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, Whittaker's Mill 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 Whittaker's Mill for good cause shown by Whittaker's Mill, 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. TR16-1024, dated October 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 for matters not contemplated in this Order and arising from facts or occurrences after the execution date of this Order; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Whittaker's Mill 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. Whittaker's Mill 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. Whittaker's Mill 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 Whittaker's Mill 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. Whittaker's Mill 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. Whittaker's Mill shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Whittaker's Mill 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 Whittaker's Mill. Nevertheless, Whittaker's Mill 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 Whittaker's Mill has completed all of the requirements of the Order;
 - b. Whittaker's Mill 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 Whittaker's Mill.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Whittaker's Mill from his obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any documents to be submitted pursuant to this Order shall be submitted by Whittaker's Mill or an authorized representative of Whittaker's Mill.

13. 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.

14. By its signature below, Whittaker's Mill voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 16th day of JANUARY, 201~~8~~



Craig Nicol, Regional Director
Department of Environmental Quality

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Whittaker's Mill voluntarily agrees to the issuance of this Order.

Date: 11/27/17 By: Lamont D. Myers, MANAGER
(Person) (Title)
Whittaker's Mill Associates, LLC.

Commonwealth of Virginia
City/County of York County

The foregoing document was signed and acknowledged before me this 27th day of November, 2017, by Lamont D. Myers in his capacity as Manager of Whittaker's Mill Associates, LLC.

Dawn M. Stephens
Notary Public

319307

Registration No.

My commission expires: 11/30/2018

Notary seal:

