

**STATE WATER CONTROL BOARD ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
THE COUNTY OF PATRICK
FOR
ARARAT RIVER WATERSHED PROJECT
VIRGINIA WATER PROTECTION PERMIT NO. 93-1011**

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d) by the Board to the County of Patrick, Virginia, for the purpose of resolving certain violations of environmental law and/or regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 62.1-44.7 and 10.1-1184.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Order.
6. "The County" means the County of Patrick, Virginia.
7. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia.
8. "Permit" means Virginia Water Protection Permit No. 93-1011, issued by the Board to the County of Patrick on August 11, 1994.
9. "Regulation" means the Virginia Water Protection Permit Program Regulation, 9 VAC 25-210-10 *et seq.*

SECTION C: Findings of Fact and Conclusions of Law

1. The Board issued Virginia Water Protection Permit No. 93-1011 to the County on August 11, 1994 for Ararat River Watershed Project. This project involves construction of up to 52 dams to protect agricultural lands from adverse effects of flooding, including crop field inundation, scouring, erosion, and sediment deposition in the Ararat River Watershed in

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Patrick County.

2. The County constructed two dams, designated as Sites #2 and #63, in the Ararat River watershed. This construction resulted in impacts to 0.33 acres of emergent wetlands and an undermined amount of stream channel. Mitigation for stream and wetland impacts specified in the permit application was creation of 1.01 acres of emergent wetlands within the Site #2 pond. The County constructed a wetlands mitigation area within pond #2. Part I.A.10 of the 1994 Permit required the County to submit documentation of the recordation of easements for mitigation prior to construction of the dams. The County has not submitted documentation of recordation of these easements to DEQ.
3. The Permit was reissued on August 30, 1999 and will expire on August 30, 2004. The reissued Permit authorized construction of 25 of the original 52 dams, resulting in potential cumulative impacts on 0.477 acres of wetlands and 17,500 linear feet of stream channel. Dams were constructed at Sites #28, #64, and #69 in 2000 and 2001. The construction resulted in no impacts to wetlands, but approximately 720, 1,080, and 1,180 (total 2980) linear feet of stream channel impact occurred at the sites, respectively. Permit Part I.C.1 requires the County to undertake stream mitigation in the form of riparian plantings along 2980 linear feet at an approved mitigation site in accordance with the USDA Conservation Reserve Enhancement Program guidelines. The County has not undertaken or completed stream mitigation and riparian planting in accordance with Permit Part I.C.1, nor has it recorded easements for the mitigation site in accordance with Permit Part I.E.3.
4. Permit Part I.E.2 requires the County to submit complete Annual Project Monitoring ("APM") Reports. The County submitted incomplete APM Reports for 2001 and 2002. The County did not submit APM Reports for either 2000 or 2003.
5. Code § 62.1-44.5.A states that

Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 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, 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; 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 caused significant alteration or degradation of existing wetland acreage or functions.
6. 9 VAC 25-210-90 requires the permittee to comply with all conditions of its VWP Permit.
7. On January 8, 2002, the Department issued Warning Letter ("WL") No. W2002-01-W-001 to the County. On December 3, 2002, the Department issued WL No. WL-02-12-WCRO-001 to the County. The Warning Letters alleged violations of Part I.E.2 (submit annual reports)

and I.E.3 (easement recordation) of the Permit.

8. On May 30, 2003, the Department issued Notice of Violation ("NOV") No. W2003-05-W-0003 to the County. On March 17, 2004, the Department issued NOV No. W2004-03-W-0015 to the County. Both NOVs alleged the violations of Parts I.C.1, I.E.2, and I.E.3 of the Permit discussed in Sections C.2, C.3, and C.4 above.
9. On August 11, 2003, DEQ sent the County a Letter of Agreement ("LOA") requiring the County to: a) obtain and record all necessary easements and notify DEQ of recordation by November 1, 2003; and b) complete the riparian plantings by May 15, 2004. On November 18, 2003, DEQ sent the County an amended LOA that extended the deadline for easement recordation until February 1, 2004. As of April 8, 2004, the County had not recorded the easements. The County signed the amended LOA on December 10, 2003.
10. On April 8, 2004, DEQ and County staff met to discuss the NOVs and compliance with the Permit. The County indicated that it has found a landowner who is willing to record the easements required by Permit Part I.E.3.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code §62.1-44.15(8a) and (8d), orders the County, and the County agrees, to perform the actions described below and in Appendix A of this Order. In addition, the Board orders the County, and the County voluntarily agrees, to pay a civil charge of \$4,000 within 30 days of the effective date of this 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". Payment shall be sent to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, VA 23240

Payment shall include the County's Federal Identification Number and shall state that it is being tendered in payment of the civil charges assessed under this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of the County, for good cause shown by the County, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (a) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (b) seeking subsequent remediation of the facility as may be authorized by law; or (c) taking subsequent action to enforce this Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local

regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, the County admits the jurisdictional allegations contained herein.
4. The County declares that it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.* and the State Water Control Law, Va. Code § 62.1-44.2 *et seq.* and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and agrees to waive any objection to, or appeal from, the entry of this Order. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or judicial review of, any action taken by the Board to enforce this Order.
5. Failure by the County 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.
6. 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.
7. The County 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 occurrence. The County shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. The County shall notify the WCRO Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this 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 WCRO Regional Director within twenty-four hours of learning of any condition above, which the County intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order.
8. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
9. This Order shall become effective upon execution by both the Director or his designee and the County. Notwithstanding the foregoing, the County agrees to be bound by any compliance date that precedes the effective date of this Order.
10. This Order shall continue in effect until: a) the County petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the

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Director or his designee approves the termination of this Order, b) the Director or Board terminates the Order in his or its sole discretion upon 30 days notice to the County, whichever occurs earlier. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the County from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

11. By the signature of an authorized official below, the County voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 6th day of DECEMBER, 2004.

Steven A. Dietrich
for Robert G. Burnley, Director
Department of Environmental Quality

The County of Patrick voluntarily agrees to the issuance of this Order.

By: Eric H. Monday
County Attorney

Commonwealth of Virginia

City/County of Patrick

The foregoing document was signed and acknowledged before me this 13th day of

October, 2004, by Eric H. Monday, who is Attorney of the County of Patrick, Virginia.

Karen S. Walker
Notary Public

My commission expires: 5-31-07

**APPENDIX A
SCHEDULE OF COMPLIANCE**

1. The County shall not perform any additional construction in the Ararat River Watershed Project under the Permit. After the Permit expires on August 30, 2004, the County may apply for a new VWP permit if it wishes to continue with the Ararat River Watershed Project.
2. By **December 31, 2004**, the County shall submit for review and approval a complete corrective action plan and schedule for completing stream impact mitigation for 2,980 linear feet of stream channel in accordance with Part I.C.1 of the Permit. The plan shall include the proposed location of each mitigation site including locator maps; proposed restoration activities, including species, number, and dimensions of the planting areas; dates of planting; impact area(s) addressed by the mitigation activity; site access plan; the proposed location of photo stations and vegetation sampling points; proposed vegetative success criteria; and livestock access limiting measures. The plan shall include wording for restrictions, protections, or preservations of stream and wetland compensatory mitigation areas in accordance with Part I.C.6 of the Permit. Written restrictions, protections, or preservations compensatory mitigation areas must be recorded for all stream and wetland mitigation areas, **within 30 days** of DEQ's approval of the corrective action plan. Notification of recordation must be received by DEQ within **30 days** of recordation. The County shall comply with the corrective action plan and schedule as approved by DEQ.
3. By **October 30, 2005**, the County shall submit to DEQ:
 - a. Written verification that 1.01 acres of wetland mitigation complying with success criteria in Part I.C.4 of the Permit has been created at pond site #2. Monitoring protocols specified in Part I.D.1 and I.D.2 of the Permit shall be followed in assessing the success of wetland compensation sites.
 - b. Proof of recordation of conservation easements for pond site #2 in accordance with Part I.E.3 of the Permit.
4. By **December 31, 2004**, the County shall submit an Annual Project Monitoring Report for the year 2003 to DEQ in accordance with Part I.E.1 of the Permit. The County shall continue submitting Annual Monitoring Reports containing information required by Part I.E.1 of the Permit on **October 30** each year until wetland and stream success criteria are met.
5. All reports required by this Order shall be signed by an authorized representative of the County. All submittals required by this Order shall contain the following signed certification statement:

I certify under penalty of law that this document and all attachments were

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prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation.

6. Written communications and reports required by this Order shall be submitted to the Department of Environmental Quality, West Central Regional Office, 3019 Peters Creek Road, Roanoke, Virginia 24019.