



*Commonwealth of Virginia*

***VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY***

NORTHERN REGIONAL OFFICE  
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**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
SDC XIII Sudley, LLC  
FOR  
Brookfield Braemar Commercial Development  
Unpermitted Activity  
VWP Non-Permit No. 19-000770**

**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 SDC XIII Sudley, LLC, regarding the Brookfield Braemar Commercial Development, 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. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
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. "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.
11. "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.
12. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
13. "SDC XIII Sudley" means SDC XIII Sudley, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. SDC XIII Sudley is a "person" within the meaning of Va. Code § 62.1-44.3.
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" or "Property" means the 8-acre commercial development known as the Brookfield Braemar Commercial Development project located at 10215 Carnoch Way, on the north side of Vint Hill Road, at its intersection with Sudley Manor Road, in Prince William County, Virginia, owned by SDC XIII Sudley.

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. 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. 9 VAC 25-210-10.

### **SECTION C: Findings of Fact and Conclusions of Law**

1. SDC XIII Sudley owns and manages development of the Brookfield Braemar Commercial Development Property located in Prince William County, Virginia. Work projects at the Site consist of the construction of an access road to a convenience store on an approximately 8-acre parcel with other planned future development. A predevelopment survey of jurisdictional wetlands and stream segments at the Site area to be developed served as the basis for the preliminary jurisdictional determination issued on October 16, 2015. According to this survey, there were a total of 0.105 acres of palustrine forested wetlands (PFO) (wetland "A" consisting of 0.047 acres and wetland "B" consisting of 0.058 acres) and 295 linear feet of a mix of perennial and ephemeral drainage stream channels.
2. Virginia Water Protection (VWP) General Permit WP4-15-1718 was issued on February 9, 2016, and modified on May 15, 2017, for the impact of 0.03 acre of PFO and 0.01 acre (159 linear feet) of stream channel at the Site. Compensation was not required as the total permanent impacts were less than 0.10 acre of wetland or open water and less than 300 linear feet of stream channel. The permittee for the Brookfield Braemar Commercial Development project was Mid Atlantic Commercial Properties, a manager of SDC XIII Sudley.
3. On June 11, 2018, DEQ staff conducted an inspection in response to a permit termination request, and it was determined that additional impacts to 0.02 acre of PFO and 78 linear

feet of stream channel had occurred. The total impact to surface waters remained within the reporting only threshold of permanent impacts less than or equal to 0.10 acre wetland or open water and/or less than or equal to 300 linear feet of stream channel, and so no further compliance/enforcement action was taken by DEQ at that time.

4. DEQ terminated Permit authorization WP4-15-1718 on August 22, 2018.
5. On September 27, 2019, DEQ conducted a Site visit and observed surface water impacts in addition to those authorized by WP4-15-1718, and those impacts observed on June 11, 2018.
  - a. The additional impacts consisted of 0.055 acre of PFO and 58 linear feet of stream channel. Based on the June 2018 and September 2019 Site inspections, unauthorized impacts at the Site total 0.075 acre of PFO and 136 linear feet of stream channel.
  - b. Adding the unauthorized impacts observed on June 11, 2018 and September 27, 2019 to the impacts originally authorized under WP4-15-1718 of 0.03 acre of PFO and 159 linear feet of stream channel, total impacts at the Site are now 0.105 acre of PFO and 295 linear feet of stream channel, and exceed the threshold for reporting only.
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. VWP General Permit WP4-15-1718 did not authorize the additional activities described above in paragraphs C(3) and C(5).
7. On November 18, 2019, DEQ issued an NOV to SDC XIII Sudley for the noncompliance described above.
8. On January 8, 2020, SDC XIII Sudley submitted a written response to the NOV, and on January 15, 2020, DEQ staff met with representatives of SDC XIII Sudley to discuss the NOV, SDC XIII Sudley's response, and enforcement proceedings.
9. SDC XIII Sudley has explained that internal miscommunications and misunderstandings with respect to what was authorized under the Permit led to the violations when development extended over two different phases of site work by different contractors. SDC XIII Sudley and DEQ agreed that SDC XIII Sudley would submit a corrective action plan (CAP) to resolve the violations, for DEQ's review, comment, and approval.
10. On January 19, 2020, SDC XIII Sudley submitted a Unified Stream Methodology (USM) Form with background documentation to DEQ. On January 27, 2020, SDC XIII Sudley submitted via email to DEQ a concept for a CAP.
11. DEQ VWP staff sent an email response on February 18, 2020, explaining that Regulations at 9VAC25-210-116 have deemed the purchase of mitigation bank credits and in-lieu fee program credits the ecologically and environmentally preferable form of

compensation for project impacts and therefore, the proposal for permittee responsible mitigation does not conform with the Regulations.

12. On February 21, 2020, a revised USM Form was submitted via to DEQ by SDC XIII Sudley's representative. The USM indicated the compensation for perennial stream channel impacts to be 175 credits, and 60 credits for ephemeral stream channel impacts.
13. DEQ staff and representatives of SDC XIII Sudley had conference calls on April 17 and May 14, 2020 to further discuss SDC XIII Sudley's CAP. SDC XIII Sudley has also noted that the cost of purchasing the mitigation credits is much more expensive than the previously proposed permittee responsible on-site mitigation, creating an additional and substantial financial burden on the project economic viability.
14. Based on the results of the June 11, 2018 and September 27, 2019 Site inspections, associated review of files, SDC XIII Sudley's January 8, 2020 NOV reply, the January 15, 2020 meeting, and related correspondence and document submissions between DEQ and representatives of SDC XIII Sudley, the Board concludes that SDC XIII Sudley has violated Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 for unauthorized impacts to surface waters as described above in paragraphs C(1) through C(6).
15. In order for SDC XIII Sudley to complete its return to compliance, DEQ staff and representatives of SDC XIII Sudley have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

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

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders SDC XIII Sudley, and SDC XIII Sudley agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of **\$16,650** 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

SDC XIII Sudley 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, SDC XIII Sudley 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 SDC XIII Sudley for good cause shown by SDC XIII Sudley, 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. 1911-001213 dated November 18, 2019. 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, SDC XIII Sudley admits to the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact and conclusions of law in this Order.
4. SDC XIII Sudley 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. SDC XIII Sudley 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 SDC XIII Sudley 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. SDC XIII Sudley 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. SDC XIII Sudley shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. SDC XIII Sudley 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 SDC XIII Sudley.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after SDC XIII Sudley has completed all of the requirements of the Order;
  - b. SDC XIII Sudley 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 SDC XIII Sudley.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve SDC XIII Sudley 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 SDC XIII Sudley 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 SDC XIII Sudley certifies that he or she is a responsible official or officer authorized to enter into the terms and conditions of this Order and to execute and legally bind SDC XIII Sudley to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of SDC XIII Sudley.
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, SDC XIII Sudley voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
Thomas A. Faha, Regional Director  
Department of Environmental Quality

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SDC XIII Sudley, LLC voluntarily agrees to the issuance of this Order.

Date: 10-5-2020 By: [Signature], Manager  
(Person) (Title)  
SDC XIII Sudley, LLC

~~Commonwealth of Virginia~~ State of North Carolina  
City/County of Mecklenburg

The foregoing document was signed and acknowledged before me this 5<sup>th</sup> day of October, 2020, by George A. Morgan III who is manager of SDC XIII Sudley, LLC, on behalf of the company.

[Signature]  
Notary Public

#202004500012  
Registration No.

My commission expires: 2/9/25

Notary seal:



## APPENDIX A SCHEDULE OF COMPLIANCE

SDC XIII Sudley, LLC shall:

1. Within 45 days of the effective date of this Order, submit to DEQ documentation of the purchase of mitigation credits for the cumulative permanent impacts of 0.075 acre of palustrine forested wetland and 136 linear feet of ephemeral stream channel at the Site. Such mitigation credits shall be purchased subject to the requirements set forth in paragraph 3 below and at the following ratios:

Impact Type	Impact Amount	Compensation Requirement
PFO wetland	0.075 acre	0.15 wetland credit
Ephemeral channel	136 linear feet	58 stream credits

2. Within 3 years of the effective date of this Order, submit to DEQ documentation of the purchase of mitigation credits for the cumulative permanent impacts of 0.03 acre of palustrine forested wetland and 159 linear feet of perennial stream channel at the Site. Such mitigation credits shall be purchased subject to the requirements set forth in paragraph 3 below and at the following ratios:

Impact Type	Impact Amount	Compensation Requirement
PFO wetland	0.03 acre	0.06 wetland credit
Perennial channel	159 linear feet	175 stream credits

3. Purchase all compensatory mitigation credits from a DEQ-approved mitigation bank, an approved in lieu fee (ILF) program, or a combination thereof, as specified below. The bank or program must be authorized and approved by DEQ to sell credits in the area in which the impacts occurred and have credits available (as released by DEQ) to achieve no-net-loss of existing wetland acreage and no-net-loss of function in all surface waters in accordance with 9 VAC 25-210-116. In addition, SDC XIII Sudley shall purchase mitigation credits from and in the following order of preferred sources based on availability until its credit purchase obligation is completed:
  - a. Available mitigation bank released credits; then
  - b. Available released mitigation credits from an ILF program; and then
  - c. Available advance mitigation credits from an ILF program.
4. Unless otherwise specified in this Order, submit documentation demonstrating compliance with the requirements of Appendix A of this Order to:

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