

Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

NORTHERN REGIONAL OFFICE
13901 Crown Court, Woodbridge, Virginia 22193
(703)583-3800

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Secretary of Natural Resources

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Regional Director

**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
Mojax, LLC
FOR
Middleburg Preserve I and II (aka Snake Hill Road Complaint)
Unpermitted Activity**

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 Mojax, LLC, regarding Middleburg Preserve I and II, 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. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
6. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
7. "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.
8. "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.
9. "Mojax" means Mojax, LLC, a limited liability company authorized to do business in Virginia. Mojax is a "person" within the meaning of Va. Code § 62.1-44.3.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "NRO" means the Northern Regional Office of DEQ, located in Woodbridge, Virginia.
12. "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.
13. "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.
14. "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.
15. "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.

16. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
17. "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.
18. "Snake Hill Road Complaint" means the "Site" as defined below. This nomenclature was used in some previous DEQ records to refer to the Site because a public complaint is what triggered DEQ's initial inspection of the Site.
19. "Site" or "Property" means the tract of land know as Middleburg Preserve I and II (property Parcel IDs 596365428 and 596376454) located approximately at 39881 Snickersville Turnpike, in Middleburg, Loudoun County, Virginia, owned by Mojax, LLC.
20. "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.
21. "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.
22. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
23. "USACE" means the United States Army Corps of Engineers.
24. "Va. Code" means the Code of Virginia (1950), as amended.
25. "VAC" means the Virginia Administrative Code.
26. "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.

27. “Warning Letter” or “WL” means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

SECTION C: Findings of Fact and Conclusions of Law

1. Mojax owns the Property in Loudoun County, Virginia; the location of a proposed residential housing community.
2. On April 12, 2019, DEQ staff performed an inspection of the Site in response to a public complaint received concerning land clearing activities at the Site. As described in DEQ’s inspection report, it was observed that land clearing and excavating activities at the Site resulted in unauthorized impacts to surface waters. The initial estimate of unauthorized impacts included approximately 1.05 acre of palustrine forested wetland impacts and impacts to 60 linear feet of stream channel that were associated with the drilling of wells to fulfill the requirements of a County subdivision plan submission.
3. 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. Mojax does not have a Permit for the discharge of fill material into surface waters as no Virginia Water Protection Permit has been issued by DEQ for this construction project.
4. On April 26, 2019, DEQ issued NOV No. 1904-001049 to Mojax for the unauthorized fill activity.
5. After receiving the NOV, Mojax immediately ceased further impacting surface waters, and hired a consultant to conduct a wetland delineation at the Site on May 3, 2019, in order to obtain an accurate quantification of surface water impacts. Delineation work was conducted in October 2018 and an original report was issued dated December 17, 2018. A subsequent site visit was made in May 2019 as a result of the NOV.
6. On May 31, 2019, DEQ staff met with representatives of Mojax to discuss the NOV, Mojax’s response and the quantification of surface water impacts, and Mojax’s plan for corrective action.
7. On June 24, 2019, a revised wetland impact map was submitted to DEQ. The revised map, which was accepted by DEQ, presented the quantification of surface water impacts to be 0.45 acre of palustrine forested wetland (0.26 acre primary impacts and 0.19 acre secondary impacts) and 0.12 acre of palustrine emergent wetland (all secondary impacts).
8. Based on the results of the April 12, 2019 inspection, the May 31, 2019 meeting, and related correspondence between DEQ and representatives of Mojax, the Board concludes that Mojax 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(7).

9. On July 2, 2019, DEQ staff conducted a follow-up inspection of the Site and no additional issues of non-compliance were observed.
10. On August 5, 2019, Mojax submitted a corrective action plan (CAP) to DEQ outlining the steps that Mojax intends to take to provide compensation for the unpermitted surface water impacts. DEQ provided comments on the CAP to Mojax on August 7, 2019, and on August 13, 2019, Mojax submitted a revised CAP to DEQ.

On August 14, 2019, DEQ approved Mojax's revised CAP.

11. On September 20, 2019, DEQ staff performed a follow-up inspection of the Site in response to a public complaint received concerning additional land clearing activities at the Site. In review of the *Middleburg Preserve II: Surveyed Wetlands & Waters of the U.S. Map*, dated December 14, 2018, and with latest revision date of May 1, 2019, which delineates the extent and location of onsite surface waters, it was noted that an additional 0.01 acre of palustrine forested wetland impact had occurred due to clearing. The impact was the result of an outdated surface water delineation layer being utilized in the *Grading Permit Plan for Test Well Access: Middleburg Preserve*, dated July 16, 2019, and approved by Loudoun County July 24, 2019.
12. On September 25, 2019, Mojax submitted a revised CAP to DEQ outlining the steps that Mojax intends to take to provide compensation for the unpermitted surface water impacts, including the additional 0.01 acre of palustrine forested wetland noted September 20, 2019.

On October 1, 2019, DEQ approved Mojax's revised CAP.

13. On October 16, 2019, DEQ staff performed a follow-up inspection of the Site in response to a public complaint received concerning additional land clearing activities at the Site. As based on field observations noting clearance activities for hydrologic study well drilling within flagged wetland area, DEQ staff requested field validation of wetland extent and land clearance activities to-date to confirm no additional impacts to surface waters had occurred.

On October 25, 2019, Mojax submitted a revised wetland impact map entitled *Middleburg Preserve II: Observed Impacts to Wetlands*, dated May 16, 2019, with latest revision date of October 25, 2019, which included the extent of recent clearance activities. Field validation confirmed that no additional surface water impacts had occurred due to the well drilling activities in the location in question.

14. In order for Mojax to return to compliance, DEQ staff and representatives of Mojax have agreed to the Schedule of Compliance as presented in Mojax's revised CAP, 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 Mojax, and Mojax agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of **\$27,500** 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

Mojax 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, Mojax 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 Mojax for good cause shown by Mojax, 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. 1904-001049 dated April 26, 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, Mojax admits 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. Mojax 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. Mojax 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 Mojax 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. Mojax 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. Mojax shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Mojax 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 Mojax.

11. This Order shall continue in effect until:

- a. The Director or his designee terminates the Order after Mojax has completed all of the requirements of the Order;
- b. Mojax 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 Mojax.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Mojax 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 Mojax 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 Mojax 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 Mojax to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Mojax.

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, Mojax 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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Mojax, LLC voluntarily agrees to the issuance of this Order.

Date: 1/10/2020 By: [Signature] (Person), MANAGER (Title)
Mojax, LLC

Commonwealth of Virginia
City/County of LOUDOUN

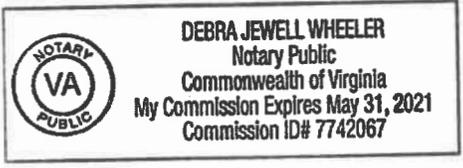
The foregoing document was signed and acknowledged before me this 10 day of January, 2020, by Michael OSMAN who is member of Mojax, LLC, on behalf of the company.

Debra Jewell Wheeler
Notary Public

7742067
Registration No.

My commission expires: MAY 31, 2021

Notary seal:



APPENDIX A SCHEDULE OF COMPLIANCE

Mojax, LLC shall comply with implementation of the revised corrective action plan (CAP) approved by DEQ on October 1, 2019. Pertinent portions of the approved CAP are summarized below.

CAP for Area #2 at Middleburg Preserve II

1. Compensation Credits:

Within 60 days of the effective date of this Order, submit to DEQ a proof of purchase (bill of sale) of 0.96 wetland credit for the 0.24 acre of unpermitted impacts to palustrine forested wetland of Area #3 of Middleburg Preserve II from a DEQ-approved mitigation bank that is authorized and approved by DEQ to sell credits in the area in which the impacts occurred and has 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.

CAP for Area #3 at Middleburg Preserve II

2. Ditch Filling and Stabilization:

Within (a) 60 days of the effective date of this Order, (b) 60 days of the receipt by Mojax of Loudoun County grading permit approval (if necessary), or (c) 60 days of acknowledgement by the appropriate Loudoun County permitting authority that a grading permit is not required, whichever is later, submit to DEQ documentation showing that the ditch near Area #3 of Middleburg Preserve II has been filled, graded, and stabilized to prevent sediment transport to adjacent downstream surface waters.

CAP for Area #1 at Middleburg Preserve I

3. Revegetation Narrative:

The revegetation efforts are to be conducted in one area that was previously affected by vegetation clearing and marked and defined in the map approved as part of the approved CAP. The revegetation efforts shall follow the planting table and seed mix schedule listed below. A total of five overstory trees, ten understory trees, and 15 small shrubs shall be planted within the palustrine forest wetland revegetation area. Planting and seeding efforts shall be conducted by hand and will not utilize mechanized equipment. The installation of woody plant stock shall occur first followed by the seeding of the revegetation area using the specified Ernst seed mix found on this plan set. All disturbed areas shall be mulched to a depth of approximately four inches.

| Common Name | Scientific Name | Size (DBH) | | Quantity |
|-------------------------|------------------------------|------------|------------------------|-----------|
| Overstory Trees | | | | |
| American Sycamore | <i>Platanus occidentalis</i> | Seedling | | 3 |
| Willow Oak | <i>Quercus phellos</i> | Seedling | | 2 |
| | | | Subtotal | 5 |
| Understory Trees | | | | |
| American Hornbeam | <i>Carpinus caroliniana</i> | Seedling | | 5 |
| Silky Dogwood | <i>Cornus amomum</i> | Seedling | | 5 |
| | | | Subtotal | 10 |
| Small Shrubs | | | | |
| Red Chokeberry | <i>Aronia arbutifolia</i> | 1 Gallon | | 8 |
| Common Winterberry | <i>Ilex verticillata</i> | 1 Gallon | | 7 |
| | | | Subtotal | 15 |
| | | | Total Plantings | 30 |

4. Restoration Implementation Timeline:

- a. Tree plantings and seeding will be conducted between late November and December of 2019, or from January to April of 2020.
- b. The monitoring schedule as detailed below will commence the first growing season following tree planting/seeding installation. The monitoring shall be completed for two events post-installation (as such events are defined and described in the approved CAP). If success criteria is not met as outlined below, additional monitoring event(s) will be necessary. Successful completion of the monitoring program shall occur when two consecutive years of successful monitoring of the applicable success criteria have been accomplished.

5. Monitoring Schedule:

Post-revegetation monitoring for the wetland restoration area shall include the following:

- a. Photographic documentation and stem counts shall be recorded at the revegetation area once per year during the growing season (approximately April 1 through November 15) for two years post-installation.
- b. A certified arborist shall conduct the monitoring for the revegetation areas associated with this project.
 - 1) All woody stems (overstory, understory, and shrub-sized plant stock) shall be counted within the revegetation area. Additionally, herbaceous coverage shall be

evaluated using a 3'x3' sampling area (or circular with approximately the same surface area).

- 2) For woody vegetation, identify all live woody species found within the revegetation areas with corresponding indicator status, native status, planted/volunteer category, stem count, extrapolated stems/acre and number of dead stems.
 - 3) Each monitoring year will be considered to be successful if 400 stems per acre of the evaluated woody stems are alive within the revegetation area. Native, non-invasive herbaceous plant coverage shall be at least 80% by the end of the first growing season.
 - 4) No more than 5% aerial cover of each herbaceous sampling plot may be comprised of invasive species such as, but not limited to: *Typha latifolia*, *Phragmites australis*, *Lonicera japonica*, *Pueraria lobata* or *Ailanthus altissima*. A plant is considered invasive when listed on the Virginia Department of Conservation and Recreation's invasive alien plant list found at <http://www.dcr.virginia.gov/natural-heritage/document/nh-invasive-plant-list-2014.pdf>.
 - 5) Should any of the above success criteria not be met, reapplication of seeding or replanting of woody vegetation shall be conducted as necessary in order to achieve those success criteria listed above. Removal of invasive species shall be conducted by a Virginia certified herbicide applicator under the supervision of the project arborist. Deficiencies shall be noted in each year's monitoring report.
- c. The photographic and vegetative documentation shall be submitted to DEQ via an annual monitoring report no later than December 1 of each year for approval.
6. Unless otherwise specified in this Order, Mojax, LLC shall submit all requirements of Appendix A of this Order to:

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