

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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**IN THE MATTER OF:**

**OAK RIDGE LAND COMPANY, LLC,  
RARITY COMMUNITIES, INC., AND  
GARY CONSORTO**

**RESPONDENTS**

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**DIVISION OF WATER  
POLLUTION CONTROL**

**CASE NUMBER WPC-07-083**

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**COMMISSIONER'S ORDER AND ASSESSMENT**

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

**PARTIES**

**I.**

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Commissioner" and the "Department" respectively).

**II.**

Oak Ridge Land Company LLC, is an active limited liability company licensed to conduct business in the state of Tennessee (hereinafter "Respondent Oak Ridge"), and is the owner and developer of Rarity Oaks Subdivision, a residential subdivision located along Highway 95 (Oak Ridge Turnpike) and southwest of Oak Ridge in Roane County, Tennessee (hereinafter "the site"). Service of process may be made on Respondent Oak Ridge through, Michael L. Ross, Registered Agent, at 2624 Carpenters Grade Road, Maryville, Tennessee 37803.

### III.

Rarity Communities, Inc., is an active corporation licensed to conduct business in the state of Tennessee (hereinafter "Respondent Rarity Communities"), and is contracted by Respondent Oak Ridge to conduct construction activities at the site. Service of process may be made on Respondent Rarity Communities through, Michael L. Ross, Registered Agent, at 2624 Carpenters Grade Road, Maryville, Tennessee 37803.

### IV.

Gary Consorto (hereinafter "Respondent Consorto") is a resident of the state of Tennessee and is the signatory authority for Respondent Oak Ridge and Respondent Rarity Communities and is listed as Vice President, Construction for those Respondents. Service of process may be made on Respondent Consorto at 335 Rarity Bay Parkway, Vonore, Tennessee, 37885.

## JURISDICTION

### V.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the "Act"), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the "Rule"). Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the Director any of the powers, duties, and responsibilities of the commissioner under the Act. Paul E. Davis is duly

appointed by the Commissioner as Director (hereinafter the "Director") of the Division of Water Pollution Control (hereinafter the "Division").

## VI.

The Respondents are "persons" as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

## VII.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

## VIII.

East Fork Poplar Creek and Pinhook Branch are "waters of the state", as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee*.

*Department of Environment and Conservation Division of Water Pollution Control Amendments.*

Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife. Additionally, East Fork Poplar Creek is listed as being impaired due to siltation.

## **FACTS**

### **IX.**

On April 6, 2006, Respondent Oak Ridge submitted an application package requesting written ARAP authorization to construct a minor road crossing over East Fork Poplar Creek. The Division issued written authorization for this activity on May 2, 2006. This application was subsequently revised based on the presence of contaminated soils in the area of the proposed minor road crossing. On May 24, 2006, the Division received an NOI and Storm Water Pollution Prevention Plan (SWPPP) requesting a Notice of Coverage (NOC) be issued under the TNCGP for construction activities at the site. Respondent Consorto is the signatory authority on this NOI for site owner/developer Respondent Oak Ridge.

### **X.**

On June 28, 2006, Division personnel conducted a site investigation to identify any potential waters of the state prior to NOC issuance, and noted that extensive land disturbance activities were underway with no Erosion Prevention and Sediment Control measures (EPSC) in place. Additionally, Division personnel noted that a spring-fed stream had been partially excavated. Division personnel met with representatives of Respondent Rarity Communities and representatives of Sterling Engineering, Inc., pointed out the spring at Lat. N 35°58'05"/Long W

84°20'28.1", and suggested corrective actions to address the excavated stream and the areas surrounding it.

#### **XI.**

On July 12, 2006, the Division issued a Notice of Violation (NOV) to Respondents Oak Ridge and Consorto for the violations observed during the June 28, 2006, site investigation. The NOV reiterated the requirement of obtaining TNCGP and ARAP coverage prior to engaging in the types of activities observed during the June 28, 2006, site investigation, and instructed Respondents Oak Ridge and Consorto to restore the affected stream and spring. The NOV further instructed the Respondents to discuss these issues with equipment operators and other personnel.

#### **XII.**

On July 31, 2006, the Division issued a NOC for construction activities at the site. On August 4, 2006, Respondent Rarity Communities submitted an amended NOI as primary contractor for the site. Respondent Consorto signed the amended NOI as the representative of Respondent Rarity Communities.

#### **XIII.**

On March 1, 2007, Division personnel inspected the site during a rain event and noted plumes of sediment-laden water for several hundred yards downstream of the site in both Pinhook Branch and East Fork Poplar Creek. These plumes originated at various storm water outfall points of the site. Division personnel noted that inadequate EPSC measures were allowing

sediment deposition into Pinhook Branch and East Fork Poplar Creek from these outfall points as well as at other locations within the site. Inadequate EPSC measures at the minor road crossings of Pinhook Branch and East Fork Poplar Creek were allowing eroded material to migrate directly into the streams at those locations. The NOC, SWPPP and EPSC inspection reports were not available on site as required by the TNCGP. Division personnel met with a representative of Respondent Oak Ridge and pointed out the violations. Photographs of some of the relevant areas were taken and copies were later forwarded as attachments to the March 20, 2007 NOV.

#### XIV.

On March 20, 2007, the Division issued an NOV to the Respondents for the violations observed during the March 1, 2007, site inspection. The NOV advised the Respondents that the site would be re-inspected during April of 2007 to determine if the violations of March 1, 2007, had been corrected.

#### XV.

On April 10, 2007, Division personnel conducted an inspection at the site and noted little improvement in the EPSC measures. Division personnel pointed out the continuing deficiencies to representatives of the Respondents and left a copy of the division inspection report detailing these deficiencies with the site supervisor for the Respondents.

#### XVI.

During the course of investigating the activities of the Respondents, the Division incurred damages in the amount of FOUR HUNDRED EIGHTY SIX DOLLARS AND TWENTY CENTS (\$486.20).

## VIOLATIONS

### XVII.

By altering waters of the state without coverage under an ARAP and by conducting land disturbance activities without coverage under the TNCGP, the Respondents have violated T.C.A.

§§ 69-3-108(a)-(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

**XVIII.**

By failing to properly install and maintain erosion prevention and sediment control measures prior to land disturbance, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, the Respondents have violated T.C.A. Sections 69-3-108(b) and 69-3-114(b) as referenced above.

**XIX.**

By discharging materials or wastewater without coverage under a permit, the Respondents have violated T.C.A. Sections 69-3-108(a) and (b) and 69-3-114(b) as referenced above.

**XX.**

By altering waters of the state without authorization under an ARAP, the Respondents have violated T.C.A. Sections 69-3-108(a) and (b) and 69-3-114(b) as referenced above.

**XXI.**

By causing a condition of pollution to Pinhook Branch and East Fork Poplar Creek, the Respondents have violated T. C. A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an

unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

## **ORDER AND ASSESSMENT**

### **XXII.**

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 30 days of receipt of this ORDER, submit an updated SWPPP, showing the methods proposed to establish effective EPSC measures on-site and to implement Best Management Practices as outlined in Tennessee Erosion and Sediment Control Handbook such that sediment is not allowed to leave the site or enter waters of the state. These measures shall consist of, but not be limited to, establishing vegetative cover, redesign of basins and basin outfalls, and the installation of rock check dams and silt fences. These EPSC measures shall be designed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, shall be approved by the Water Pollution Control Manager in the Knoxville Environmental Field Office (hereinafter K-EFO) and shall be maintained until all land disturbances at the site are complete and erosion-preventive permanent cover is established. The Respondents shall submit this updated SWPPP to the Water Pollution Control Manager in the K-EFO at 3711 Middlebrook Pike, Suite 220, State Plaza, Knoxville, Tennessee 37921, and shall submit a copy to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6<sup>th</sup> Floor L&C Annex, Nashville, Tennessee 37243-1534.

2. The Respondents shall, within 60 days of approval of the activities outlined in item 1 above, complete those activities and submit photographic and written documentation of the completion of those activities to the Water Pollution Control Manager in the K-EFO and shall submit a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.
3. The Respondents shall, within 30 days of submission of the updated SWPPP as outlined in item 1 above, submit a Corrective Action Plan (CAP) to the Division. This plan shall be developed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, or other professional with experience in the design and implementation of such activities and shall;
  - a. Detail the manual methods to be used for the removal of the accumulated sediment from Pinhook Branch and East Fork Poplar Creek.
  - b. Detail the proposed restoration of the excavated section of the spring fed tributary.

The CAP shall be submitted to the Water Pollution Control Manager in the K-EFO and a copy to the E&C Section at the respective addresses shown in item 1, above. Any deficiencies shall be corrected by the Respondents with 30 days of notification of those deficiencies and the revised CAP resubmitted to the Water Pollution Control Manager in the K-EFO and a copy resubmitted to the E&C Section, at the respective addresses shown in item 1, above.

4. The Respondents shall, within 90 days of written approval from the Water Pollution Control Manager in the K-EFO, complete all activities outlined in the CAP and submit photographic and written documentation of completion of those activities to the Water

Pollution Control Manager in the K-EFO and a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.

5. The Respondents shall commence no other land disturbance activities at the site except those activities that are required in order to achieve compliance with the requirements of the TNCGP. Once compliance has been achieved and the site is stabilized, additional land disturbance activities may resume following written approval by the Water Pollution Control Manager in the K-EFO.
6. The Respondents shall, within six months of receipt of this Order and Assessment, provide documentation of attendance and successful completion of the department's Erosion Prevention and Sediment Control Workshop, for all employees who manage or oversee construction projects to the K-EFO and a copy to the E&C Section at the respective addresses shown in item 1, above. Information may be found on the program website at <http://www.tnepsc.org/>.
7. The Respondents shall pay DAMAGES to the division in the amount of FOUR HUNDRED EIGHTY SIX DOLLARS AND TWENTY CENTS (\$486.20).
8. The Respondents shall pay a CIVIL PENALTY of ONE HUNDRED EIGHT THOUSAND DOLLARS (\$108,000.00) to the division, hereby ASSESSED to be paid as follows:

- a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of THIRTY THREE THOUSAND DOLLARS (\$33,000.00).
- b. If the Respondents fail to comply with Part XXII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
- c. If the Respondents fail to comply with Part XXII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00), payable within 30 days of default.
- d. If the Respondents fail to comply with Part XXII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
- e. If the Respondents fail to comply with Part XXII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00), payable within 30 days of default.
- f. If the Respondents fail to comply with Part XXII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XXII, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SIX THOUSAND DOLLARS (\$6,000.00), payable within 30 days of default.

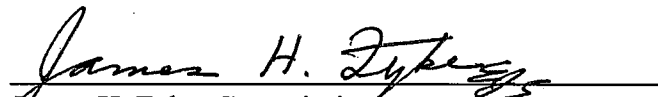
The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. The grant of any such extension by the Director will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to Sam Wallace, Assistant General Counsel, Tennessee Department of Environment and Conservation, 20<sup>th</sup> Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 12<sup>th</sup> day of June, 2007.

  
James H. Fyke, Commissioner  
Tennessee Department of Environment and  
Conservation

### NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109 and 69-3-115, allow any Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the director at the address below a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal

proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the state of Tennessee.

At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to \$10,000.00 per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should also be sent to Sam Wallace, Assistant General Counsel at the above listed address. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6<sup>th</sup> Floor L & C Annex, 401 Church Street, Nashville, TN 37243.



Assistant General Counsel  
Tennessee Department of  
Environment & Conservation  
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Nashville, Tennessee 37243-1548