

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
Philadelphia, Pennsylvania 19103-2852**

In the Matter of:	:	
	:	
Panhandle Homes of Berkeley County, Inc.	:	U.S. EPA Docket No. CWA-03-2023-0051DW
222 Langston Boulevard	:	
Martinsburg, WV 25404	:	ADMINISTRATIVE ORDER
	:	ON CONSENT PURSUANT TO
Respondent.	:	SECTION 309(a) of the Clean Water Act,
	:	33 U.S.C. § 1319(a)
Bridle Creek Residential Development	:	
Near Barrel Race Road and Quinella	:	
Court	:	
Martinsburg, WV 25404	:	
Parcel ID: 02-08-0010-0020-0001	:	

I. STATUTORY AUTHORITY

1. This Administrative Order on Consent (“Order”) is issued under the authority vested in the United States Environmental Protection Agency (“EPA”) by Section 309(a) of the Clean Water Act, 33 U.S.C. 33 U.S.C. § 1319(a) (“CWA” or “Act”). The Administrator has delegated this authority to the Regional Administrator of EPA Region III who in turn has re-delegated it to the Director of the Enforcement & Compliance Assurance Division.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. Panhandle Homes of Berkeley County, Inc. (“Panhandle Homes” or “Respondent”) is a land development company incorporated on February 14, 1997 in the State of West Virginia that engages in the construction of residential homes.
3. Panhandle Homes is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
4. Panhandle Homes owns and operates a property located near Barrel Race Road and Quinella Court in Martinsburg, WV, 39.48166667 °N, 77.93083333 °W, Berkeley County, Parcel ID: 02-08-0010-0020-0001 (“Site”), identified in Exhibit A, attached herein.
5. The Site contains both streams and abutting wetlands which have a continuous surface connection to Opequon Creek, a tributary of the Potomac River, a Traditional Navigable Water, which flows to the Chesapeake Bay. The tributaries and wetlands on Site, which

- contribute relatively permanent flow to a downstream water in a typical year, are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
6. Panhandle Homes has been building a multi-phase residential community of single-family homes and townhouses on the Site called the Bridle Creek Subdivision since 2005.
 7. The West Virginia Department of Environmental Protection (“WVDEP”) issued West Virginia National Pollutant Discharge Elimination System (“WV NPDES”) permits to Panhandle Homes for different phases of construction for discharges of stormwater associated with construction activities pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26(a),(c); 40 C.F.R. § 122.21.
 - a. On June 26, 2019, WVDEP authorized Panhandle Homes to operate under General Permit No. WV0115924 for Phase 6 of its construction.
 - b. On February 9, 2022, WVDEP authorized Panhandle Homes to operate under General Permit No. WV0115924 for Phase 8 of its construction.
 - c. On May 5, 2022, WVDEP authorized Panhandle Homes to operate under General Permit No. WV0115924 for Phases 9-10 of its construction.
 8. During Phase 3 of construction, on February 5, 2016, Panhandle Homes applied to the U.S. Army Corps of Engineers for authorization under Nationwide Permit #29 to construct Stormwater Management Facility #3 for the subdivision. The U.S. Army Corps of Engineers authorized this work on April 29, 2016, under the file number LRP-2006-0917. This work consisted of constructing the stormwater management structure, embankment construction and installation of sections of 8” PVC sanitary sewer and 6” PVC sanitary sewer forcemain resulting in 265 linear feet of permanent impact to an unnamed tributary to Opequon Creek. Work also included a temporary stream crossing to facilitate construction. This work took place between May 2016 and September 2016.
 9. Beginning in November 2018 through 2022, Respondent, or persons acting on behalf of Respondent, operated equipment which discharged dredged and/or fill material to waters of the United States at the Site, without authorization from the U.S. Army Corps of Engineers. Respondent has impacted approximately 1,024 linear feet of stream and 0.2 acres of wetlands with a continuous surface connection at this time. The final configuration at the Site, including an appropriate permanent road crossing at impact area “b” will have impacts to approximately 1,049 linear feet of stream and .34 acres of wetlands, depicted in Exhibit B, attached herein. Impacts to two major areas of the Site and one temporary impact include:
 - a. Earthmoving, clearing, regrading and burying an unnamed tributary to Opequon Creek, and then placing several rock check dams on top of the fill where the stream is buried during Phase 6 of construction (1,024 linear feet of stream impacted);

- b. Earthmoving for development and construction of a crossing impacted 0.20 acres of emergent wetlands between Phases 6 and 9 in the northern part of the parcel where a permanent road crossing is proposed. Construction of the permanent road crossing will cause 0.14 acre of additional wetland impacts and 25 linear feet of intermittent stream impacts (25 linear feet of stream and 0.34 acres of emergent wetlands impacted); and
 - c. Construction activity resulting in a temporary stream crossing placed in an unnamed tributary to Opequon Creek.
- 10. On August 30, 2022, the U.S. Army Corps of Engineers sent a letter to Respondent, under file number LRP-2006-0917, advising that, any placement of fill into stream and wetlands beyond the limits of the Nationwide Permit authorization would constitute unauthorized activity and a violation of Section 301 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311, 1344. The letter stated that “[r]ecent aerial photography of the site appears to show that fill has been placed into streams and wetlands beyond the limits of the Nationwide Permit authorization,” and that “[n]o further work can be performed at this location after receipt of this Order.”
- 11. The term “fill material” within the meaning of 40 C.F.R. § 232.2 includes any pollutant which replaces portions of “waters of the United States” with dry land or which changes the bottom elevation of a water body for any purpose. The term “discharge of fill material” includes “placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States.”
- 12. The equipment referenced above, from which the dredged and/or fill material was discharged to “waters of the United States,” constitutes a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
- 13. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits any person from discharging dredged and/or fill material from a point source to “waters of the United States” except in compliance with a permit issued by the U.S. Army Corps of Engineers under Section 404 of the Act, 33 U.S.C. § 1344.
- 14. At no time during the discharge of dredged and/or fill material into waters of the United States at the Site did the Respondent have a permit from the U.S. Army Corps of Engineers as required by Section 404 of the Act, 33 U.S.C. § 1344, other than for the work performed between May 2016 and September 2016 pursuant to the Nationwide Permit #29 authorization described in Paragraph 8.
- 15. Respondent, by discharging dredged and/or fill material to the “waters of the United States” without authorization as described above in Paragraph 9, has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

III. ORDER FOR COMPLIANCE

Therefore, the Respondent is hereby ORDERED, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), to do the following:

16. Cease and desist all unpermitted discharges to waters of the United States at the Site, including filling, clearing and grading except in compliance with a CWA 404 permit or in accordance with the plans submitted and approved pursuant to this Order.

17. Complete the following restoration and mitigation activities:

a. **Restoration and Mitigation Plan:** Within forty-five (45) days of the effective date of this Order, Respondent shall submit electronically to EPA a detailed Restoration and Mitigation Plan developed by a professional engineer or other qualified professional trained in wetland and stream restoration work to return the Site to compliance with the CWA. The Restoration and Mitigation Plan must include the following elements:

1. Be designed to restore waters of the United States on the Site, including the unnamed tributaries and abutting wetlands referenced in this Order and depicted in Exhibit A, to approximate pre-disturbance original conditions consistent with the definition of restoration found in 40 C.F.R. § 230.92, or where restoration in full to approximate pre-disturbance original condition is not practicable, provide a written justification why such restoration in full cannot practicably be achieved.

i. Where it is not practicable to achieve such restoration in full, the plan must describe all steps taken to minimize the amount of fill left in place and to achieve restoration to the maximum extent practicable.

ii. Where Respondent proposes to leave fill in place, Respondent shall seek appropriate authorization from the U.S. Army Corps of Engineers and comply with any permit issued by the Corps. Respondent shall submit to EPA copies of all communications with the Corps to obtain appropriate authorization.

2. Include a schedule for implementation (that may be conditioned upon receipt of any required approvals or certifications for such work under West Virginia Law, for which the Respondent shall make timely application and diligently pursue);

3. Include compensation for impacts to streams and wetlands using the West Virginia Stream and Wetland Valuation Metric (“WVSWVM”) to determine the appropriate amount of mitigation needed to offset permanent and temporal losses to aquatic resources based on the pre-disturbance condition of the aquatic resources. Such compensation shall be consistent with 40 C.F.R. §§ 230.91-98;

4. Utilize only native West Virginia species for planting;
 5. Achieve final site stabilization;
 6. Incorporate measurable, quantitative performance criteria consistent with pre-disturbance conditions utilizing an appropriate reference water; and
 7. Include a post-restoration monitoring plan for five (5) years following the completion of the restoration and mitigation on-Site.
- b. After review of the Restoration and Mitigation Plan, EPA will: 1) approve the plan, in whole or in part; 2) approve the plan upon specified conditions; 3) modify the plan to cure any deficiencies; 4) disapprove the plan, in whole or in part; or 5) any combination of the above.
 - c. If EPA disapproves all or part of the Restoration and Mitigation Plan, Respondent shall, within thirty (30) days of receipt of EPA's disapproval, correct the deficiencies and resubmit the plan for approval. EPA retains the right, if the plan is not approved as provided in this Order, to order restoration in accordance with a plan developed by EPA.
 - d. Upon approval of the Restoration and Mitigation Plan (either with or without conditions or modifications by EPA), Respondent shall implement the plan as provided below. All restoration work shall be completed within the schedule of work in the Restoration and Mitigation Plan to be approved by EPA.

18. Complete the following post-restoration and mitigation activities:

- a. **Certification of Completion:** No later than twenty (20) days after completion of the restoration activities, Respondent shall submit a certification to EPA as set forth in Paragraph 23, certifying that the work described in the approved Restoration and Mitigation Plan has been completed.
- b. **As-Built Report:** Within thirty (30) days of completing restoration activities, Respondent shall submit to EPA electronically an as-built report with photographs documenting the as-built condition of the restoration activities at the Site.
- c. **Monitoring:** Respondent shall monitor the restored area at the Site for a period of no less than five (5) years to ensure the objective of restoration activities are achieved for impacted aquatic resources. Respondent shall conduct a monitoring event at the Site twice per year for the first three (3) years and once per year for the following two (2) years. Respondent shall submit an annual monitoring report to EPA with the results of the monitoring events by December 31st for each year of monitoring. Each monitoring report shall be certified consistent with Paragraph 25 and will contain the following information:

1. A description of the vegetation at the Site, including an assessment of whether or not planting undertaken pursuant to the Restoration and Mitigation Plan appears to be successful and an estimate of the percent of the restored area surface that is covered with vegetation;
 2. A description of the streams at the Site and any areas of exposed or eroded bank;
 3. Photographs of the Site; and
 4. A description of the progress made toward meeting the performance criteria and identification of any adaptive management that has been implemented to correct deficiencies in attainment of the performance criteria.
19. **Termination:** EPA will review each monitoring report to determine whether the restoration efforts undertaken by Respondent have been successful. Once Respondent has met all conditions in the approved Restoration and Mitigation Plan, Respondent shall submit a written verification to EPA. Upon review and confirmation of the written verification, EPA will terminate the Order.
- a. Respondent shall retain the right to enter the Site until this Order is terminated by EPA, including the entire period of restoration and mitigation, and during the full length of the post-restoration monitoring period.
20. Respondent's failure to complete the above-described compliance activities in a manner consistent with this Order shall be deemed a violation of this Order.
21. Respondent shall send all correspondence related to this Order electronically to:

Katelyn Almeter
Enforcement and Compliance Assurance Division
United States Environmental Protection Agency, Region III
almeter.katelyn@epa.gov

and

R3_ORC_mailbox@epa.gov
[sent with subject line attn: Aviva Reinfeld, Dkt. No. CWA-03-2023-0051DW]

IV. GENERAL PROVISIONS

22. The intent of this Order is to address the violations described herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment.

23. The following certification must accompany each submission by Respondent pursuant to this Order and must be signed by a Representative of Respondent authorized to sign on behalf of the Respondent:

“I certify that the information contained in or accompanying this submission is true, accurate, and complete. As to the identified portion(s) of this submission for which I cannot personally verify its truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.”

24. Respondent’s compliance with the terms of this Order shall not relieve Respondent of any obligation to comply with all applicable provisions of the Clean Water Act or any other Federal, State or local law or regulation. Issuance of this Order is not an election by EPA to forego any civil or criminal action otherwise authorized by the Clean Water Act. EPA reserves the right to seek any remedy available under the law that it deems appropriate to the violations described herein. Compliance with this Order shall not be a defense to any action commenced pursuant to such authorities.
25. Respondent will permit EPA personnel on the Site for the purpose of inspecting work performed pursuant to this Order upon reasonable notice. EPA reserves all existing inspection authority otherwise available to EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.
26. The provisions of this Order shall apply to and be binding upon the Respondent and its officers, directors, employees, contractors, agents, trustees, successors and assigns of Respondent.
27. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
28. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of the tasks set forth in Section III (Order for Compliance) of this Order, above, is deemed restitution, remediation, or required to come into compliance with the law.

V. EFFECTIVE DATE

29. The effective date of this Order shall be the date of Respondent’s receipt of the executed document.

FOR THE RESPONDENT:

Date: 4-3-2023



Lester Allen Henry, President
Panhandle Homes of Berkeley County, Inc.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

[Digital Signature and Date]

Karen Melvin, Director

Enforcement and Compliance Assurance Division

U.S. EPA, Region III

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
Philadelphia, Pennsylvania 19103-2852**

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	:	SECTION 309(a) of the Clean Water Act,
Respondent.	:	33 U.S.C. § 1319(a)
	:	
Bridle Creek Residential Development	:	
Near Barrel Race Road and Quinella Court	:	
Martinsburg, WV 25404	:	
Parcel ID: 02-08-0010-0020-0001	:	

CERTIFICATE OF SERVICE

I certify that the foregoing Administrative Order on Consent was filed with the EPA Region III Regional Hearing Clerk on the date that has been electronically stamped on the Administrative Order on Consent. I further certify that on the date set forth below, I caused to be served a true and correct copy of the foregoing Administrative Order on Consent to each of the following persons, in the manner specified below, at the following addresses:

Copies served via UPS and email to:

Mr. Lester Allen Henry
Panhandle Homes of Berkeley County, Inc.
222 Langston Boulevard
Martinsburg, WV 25404
lah@panhandlebuilders.com

Copies served via email to:

Aviva H. Reinfeld
Assistant Regional Counsel
U.S. EPA, Region III
reinfeld.aviva@epa.gov

Katelyn Almeter
Monica Crosby
U.S. EPA, Region III
Enforcement & Compliance Assurance Division
almeter.katelyn@epa.gov
crosby.monica@epa.gov

[Digital Signature and Date]

[Name]

[Title]

U.S. Environmental Protection Agency,
Region III

Exhibit A
Located near Barrel Race Road and Quinella Court
Martinsburg, Berkeley County, West Virginia

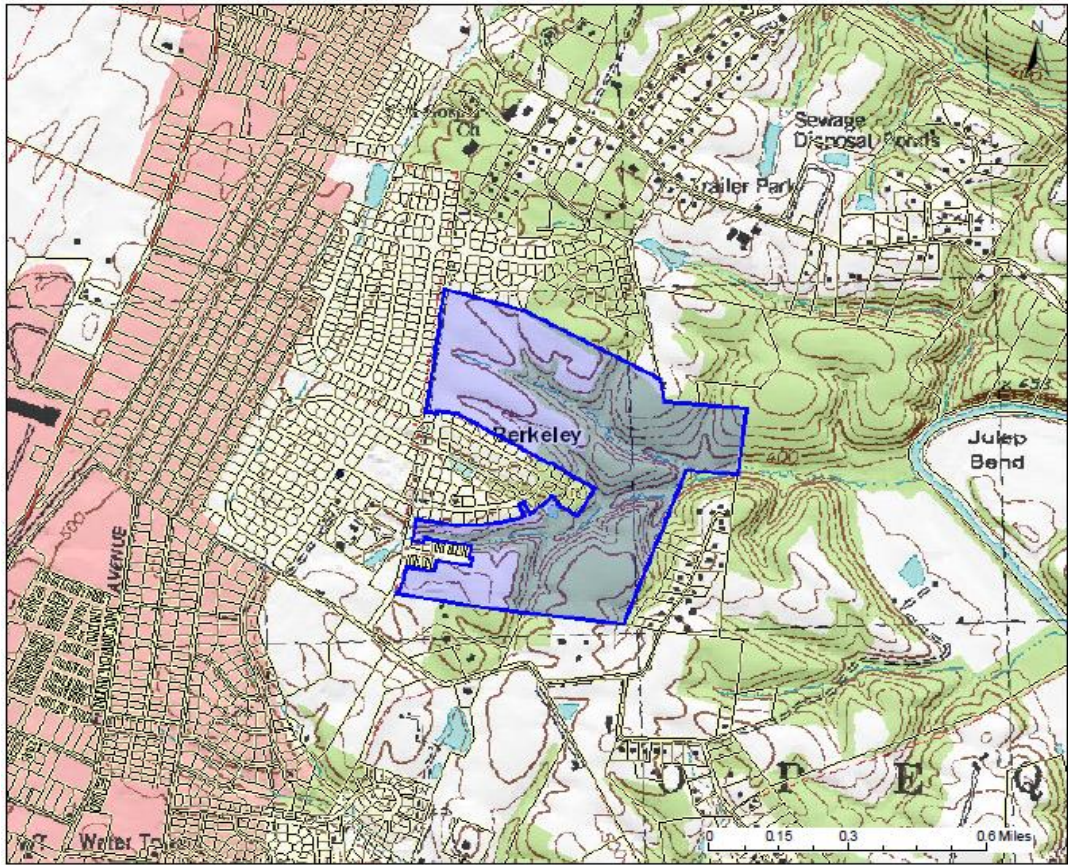


Exhibit B
Impact Areas

