



COMMONWEALTH of VIRGINIA  
DEPARTMENT OF CONSERVATION AND RECREATION

203 Governor Street  
Richmond, Virginia 23219-2010  
(804) 786-6124

**CONSENT SPECIAL ORDER**

**SOIL AND WATER CONSERVATION BOARD ENFORCEMENT ACTION**

**SPECIAL ORDER BY CONSENT**

**ISSUED TO**

**FOXCREST DEVELOPERS, INC.**

**FOR**

**STOKES IVY CREEK FARM DEVELOPMENT**

*(PERMIT NO. DCR01-08-102175)*

*(PERMIT NO. VAR10-10-100943)*

**SECTION A: Purpose**

This is a Consent Special Order issued under the authority of Va. Code § 10.1-603.2:1.1, -603.2:1.3, and -603.2:1.7 by the Soil and Water Conservation Board to Foxcrest Developers, Inc., regarding the Stokes Ivy Creek Farm Development construction site for the purpose of resolving certain alleged violations of the Virginia Stormwater Management Act and 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 Soil and Water Conservation Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-104.1, -503, and -603.2:1.
3. "Department" or "DCR" means the Department of Conservation and Recreation, an agency of the Commonwealth of Virginia as described in Va. Code §§ 10.1-101 and -104.1.

*State Parks • Soil and Water Conservation • Natural Heritage • Outdoor  
Recreation Planning  
Chesapeake Bay Local Assistance • Dam Safety and Floodplain Management • Land  
Conservation*

4. "Director" means the Director of the Department of Conservation and Recreation.
5. "Order" means this document, also known as a Consent Special Order.
6. "Foxcrest" means Foxcrest Developers, Inc., a Virginia corporation listed in active status by the Virginia State Corporation Commission.
7. "Ivy Creek Farm" or "The Project" means the Stokes Ivy Creek Farm Development.
8. "VSMP" means the Virginia Stormwater Management Program.
9. "Regulations" means the VSMP Regulations.
10. "General Permit" means the VSMP General Permit for Discharges of Stormwater from Construction Activities.
11. "SWPPP" means Stormwater Pollution Prevention Plan.
12. "Lynchburg ESCP" means the City of Lynchburg Erosion and Sediment Control Program.

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

1. Foxcrest owns and is developing Ivy Creek Farm, a subdivision consisting of 11 single-family home sites and associated infrastructure. Ivy Creek Farm is situated on an 8.0-acre parcel of land located within the City of Lynchburg.
2. On June 9, 2008, DCR issued coverage under VSMP Permit No. DCR01-08-102175 ("the Permit") to Foxcrest for Ivy Creek Farm. Prior to that date, Foxcrest had received approval of an erosion and sediment control plan for the Project from the Lynchburg ESCP. The approved erosion and sediment control plan is incorporated into the SWPPP for the Project and is enforceable pursuant to Section II of the Permit.
3. Stormwater from Ivy Creek Park is discharged to an unnamed tributary of Ivy Creek in the James River basin. At a point approximately 650 linear feet downstream of the principal Ivy Creek Farm stormwater outfall, the unnamed tributary is impounded by a private dam. The impoundment formed by the dam is approximately 0.7 acre in area. Outflow from the dam continues in the unnamed tributary until its confluence with Ivy Creek. Portions of the riparian area along the unnamed tributary between Ivy Creek Farm and the impoundment as well as the impoundment are not owned by Foxcrest.
4. On January 28, 2009, February 12, 2009 and March 19, 2009, DCR staff inspected Ivy Creek Farm and documented the following conditions:

- a. Improper erosion and sediment control and stabilization practices resulting in the unauthorized discharge of stormwater from the site;
- b. Inspections of the construction site not done at the required frequency;
- c. Incomplete SWPPP;
- d. SWPPP not retained on-site (applies only to 3/19/09 inspection); and,
- e. Inadequate site stabilization measures.

DCR provided a report of each referenced inspection to Foxcrest following the inspection. In each of these three inspections, DCR staff observed that Foxcrest had made unsatisfactory progress toward returning the Project to compliance with the Permit.

5. On March 24, 2009, DCR issued a Notice of Corrective Action (“NOCA”) to Foxcrest citing the following alleged violations of the Virginia Stormwater Management Act, the Regulations and the Permit:
  - a. Failure to ensure implementation of practices, including erosion and sediment controls and stabilization practices, to reduce pollutants in stormwater discharges from the construction site and to assure compliance with the terms and conditions of the General Permit resulting in the unauthorized discharge of stormwater from the site pursuant to 4 VAC 50-60-1130, Section A.4; 4 VAC 50-60-1170, Section II.; and, 4 VAC 50-60-1170, Section III.F of the Regulations;
  - b. Failure to conduct inspections of the construction site at the required frequency pursuant to 4 VAC 50-60-1170, Section II.D.4.a of the Regulations;
  - c. Failure to maintain a complete SWPPP and to include in the SWPPP a description of, and all necessary calculations supporting, all post-construction stormwater management measures that will be installed during the construction process to control pollutants in stormwater discharges after construction operations have been completed pursuant to 4 VAC 50-60-1170, Section II.D of the Regulations;
  - d. Failure to retain the SWPPP, along with a copy of the VSMP permit, at the construction site from the date of commencement of construction activity to the date of final stabilization. Failure to make the SWPPP available, in its entirety, to the Department for review at the time of an on-site inspection pursuant to 4 VAC 50-60-1170, Section II.B.2 of the Regulations;
  - e. Failure to initiate stabilization measures as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than seven days after the construction activity in that portion of the site has temporarily or permanently ceased pursuant to 4 VAC 50-60-1170, Section II.D.2.a.(1)(b) of the Regulations; and,
  - f. Failure to report unauthorized discharges of stormwater pursuant to 4 VAC 50-60-1170, Section III.G of the Regulation.

6. On April 2, 2009, an informal enforcement conference/review of Ivy Creek Farm was conducted at the Project to discuss the March 24, 2009 NOCA, the existing conditions at the Project and necessary corrective actions. DCR staff, Lynchburg ESCP staff, Department of Environmental Quality ("DEQ") staff and the President of Foxcrest were in attendance for the meeting. At the conclusion of the meeting, the President of Foxcrest agreed that within 14 days following the meeting, Foxcrest would implement a set of actions intended to return the Project to substantial compliance with the Regulations and Permit.
7. On April 23, 2009, DCR staff inspected Ivy Creek Farm and documented the same conditions as listed above under Paragraph 4.a, 4.b, 4.c and 4.e, indicating that Foxcrest had not satisfactorily implemented the set of corrective measures agreed upon by the parties during the April 2, 2009 meeting. DCR staff and Lynchburg ESCP staff were present for the inspection. Foxcrest representatives were unable to attend the inspection. DCR staff and Lynchburg ESCP staff also documented that Foxcrest had made numerous modifications to the erosion and sediment controls on the Project without first having obtained approval from the Lynchburg ESCP and that the unapproved modifications had failed following recent storm events. DCR staff documented additional releases of sediment to the unnamed tributary which receives stormwater flows from the Project.
8. On April 24, 2009, the Lynchburg ESCP, pursuant to Section 10.1-566 of Virginia's Erosion and Sediment Control Law and Section 16.1 of Lynchburg's ESC Code, issued a Stop Work Order ("SWO") to Foxcrest for violation of the City's ESC Code. In the SWO, the Lynchburg ESCP noted that "[t]he violation is grossly affecting or presents imminent and substantial danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth." In the letter transmitting the SWO, the Lynchburg ESCP identified that two sediment traps on the Project had failed and that significant new sediment deposition downstream of the Project was observed, including new deposition in the off-site impoundment referenced above under Paragraph 3. In addition to specific erosion and sediment control-related corrective measures, the Lynchburg ESCP identified in the SWO that Foxcrest had not followed the approved erosion and sediment control plan for the Project and that Foxcrest would be required to either: (1) develop, submit and receive approval of a new erosion and sediment control plan; or, (2) reconfigure to the Project to be consistent with the erosion and sediment control plan previously approved by the Lynchburg ESCP.
9. By letter dated April 30, 2009, the Lynchburg ESCP lifted the SWO and converted the SWO to a Notice to Comply ("NTC"). The NTC directed Foxcrest to complete additional stabilization measures by May 18, 2009.
10. On May 14, 2009, DCR staff inspected Ivy Creek Farm accompanied by Lynchburg ESCP staff and the President of Foxcrest. DCR staff observed that Foxcrest had begun the reconfiguration of the Project per the approved erosion

and sediment control plan as directed by the Lynchburg ESCP in its April 24, 2009 SWO; however, DCR documented the same conditions as listed above under Paragraph 4.a, 4.c and 4.e, indicating that Foxcrest had not fully addressed the deficiencies documented by DCR in the report of its April 23, 2009 inspection of the Project. Furthermore, DCR staff observed that the slope along the northern edge of the Project was deeply incised and was a source of the ongoing sediment contribution to the unnamed receiving stream. During the inspection, DCR staff commented to Foxcrest that the approved erosion and sediment control plan for the project indicated that sheet flow conditions should be present along this slope and that the deep erosion observed indicated that additional controls were necessary in this area. Lynchburg ESCP staff concurred with DCR's assessment on this issue and, along with DCR staff, instructed Foxcrest to engage an engineer by May 21, 2009 for the purpose of developing an amendment to the erosion and sediment control plan to address the northern slope erosion problem. DCR staff also instructed the President of Foxcrest to begin the process of developing a plan and schedule of corrective action to address the releases of sediment to the unnamed tributary and to the off-site impoundment.

11. On June 4, 2009, DCR staff inspected Ivy Creek Farm accompanied by Lynchburg ESCP staff, the President of Foxcrest and a consulting engineer for Foxcrest. During the meeting, Foxcrest's engineer presented a proposal for revision of the erosion and sediment control plan for the project, dated May 20, 2009 ("Revised Plan"), to address the northern slope erosion problem. The engineer also presented revised calculations, as previously requested by DCR, demonstrating channel adequacy under Minimum Standard No. 19. DCR staff observed that Foxcrest had made numerous improvements to the erosion and sediment controls on the Project, including significant site stabilization, but that deficiencies still existed. During the inspection, the President of Foxcrest indicated that he had not begun the process of developing a plan to address the impacts from releases of sediment from the Project. The remediation of sediment impacts is addressed in the Order.
12. By e-mail message dated June 15, 2009, the Lynchburg ESCP advised DCR that the Revised Plan for Ivy Creek Farm had been approved for implementation.
13. By submittal dated July 31, 2009, Foxcrest provided documentation to DCR indicating that the items of work identified under the May 20, 2009 Revised Plan have been completed in accordance with the Revised Plan.
14. By submittal dated August 25, 2009, Foxcrest provided to DCR a Restoration and Monitoring Plan ("Phase I RMP") to address the sediment impacts to the unnamed tributary of Ivy Creek which serves as the receiving stream for stormwater discharged from Ivy Creek Farm and the impacts to the impoundment located on the unnamed tributary approximately 650 linear feet downstream of the Ivy Creek Farm principal stormwater/detention basin outfall. The Phase I RMP is hereby incorporated into and becomes enforceable under the Order.

15. Item No. 3 of the Phase I RMP requires Foxcrest to apply a forested wetland seed mix along the stream banks and any areas that currently have sediment buildup outside the limits of the floodway in order to assist with the stream restoration and to reduce the amount of potential sediment load in the stream. Item No. 3 was completed by Foxcrest on October 13, 2009.
16. DCR has re-issued coverage under VSMP Permit No. VAR10-10-100943 to Foxcrest for Ivy Creek Farm based on a Registration Statement signed by Foxcrest on May 27, 2009.

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

Accordingly the Board, by virtue of the authority granted in Va. Code §10.1-603.2:1.7 orders Foxcrest, and Foxcrest agrees, to perform the actions described in Appendix A of this Order. Foxcrest also agrees to pay a civil charge in the amount of **\$8,000** in four equal installment payments according to the following schedule:

- The first installment payment of **\$2,000** shall be made on or before **August 15, 2010**;
- The second installment payment of **\$2,000** shall be made on or before **February 15, 2011**;
- The third installment payment of **\$2,000** shall be made on or before **August 15, 2011**; and
- The fourth installment payment of **\$2,000** shall be made on or before **February 15, 2012**.

Payment shall be made by check, money order, or cashier's check payable to "Treasurer of Virginia" and sent to:

Department of Conservation and Recreation  
Division of Finance, Accounts Payable  
203 Governor Street  
Richmond, Virginia 23219

Either on a transmittal letter or as a notation on the check or money order, Foxcrest shall indicate that this payment is submitted pursuant to this Order.

#### **SECTION E: Administrative Provisions**

1. For purposes of this Order and subsequent actions with respect to this Order, Foxcrest admits the jurisdictional allegations in the Order, but does not admit the factual allegations or legal conclusions contained herein.
2. The Board may modify, rewrite, or amend the Order with the consent of Foxcrest for good cause shown by Foxcrest or on its own motion after notice and

opportunity to be heard.

3. This Order addresses and resolves those violations specifically alleged herein. 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 as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
4. Foxcrest declares it has received fair and due process under the Administrative Process Act, Va. Code § 2.2 - 4000 *et seq.*, and the Virginia Stormwater Management Act, 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 enforce this Order.
5. Failure by Foxcrest 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. Foxcrest 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. Foxcrest shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Foxcrest shall notify the 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 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 Director within 48 hours of learning of any condition above, which Foxcrest intends 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.

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 Foxcrest. Notwithstanding the foregoing, Foxcrest agrees to be bound by any compliance date, which precedes the effective date of this Order.
10. This Order shall continue in effect until the Director or the Board terminates the Order in his or its sole discretion upon 30 days written notice to Foxcrest. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Foxcrest from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
11. By its signature below, Foxcrest voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Director, Department of  
Conservation and Recreation

Foxcrest voluntarily agrees to the issuance of this Order.

By: St Harold Behke

Date: 2-16-10

Commonwealth of Virginia  
City/County of Lynchburg

The foregoing document was signed and acknowledged before me this 16<sup>th</sup> day of

February, 2010 by Steven Harold Behke who is  
(name)

President  
(title) of Foxcrest Developers, Inc., on behalf of the Corporation.

Cynthia M. McCann Harvey  
Notary Public



My 10/31/13 commission expires:

**APPENDIX A**  
**FOXCREST DEVELOPERS, INC.**  
**STOKES IVY CREEK FARM DEVELOPMENT**  
*(PERMIT NO. DCR01-08-102175)*  
*(PERMIT NO. VAR10-10-100943)*

1. Pursuant to the provisions of Item No. 1 of the Phase I RMP, **not later than April 15, 2010**, Foxcrest shall submit to DCR a Phase II RMP for Ivy Creek Farm. The Phase II RMP shall, at a minimum, include the following elements:
  - a. A plan for removal of sediment from the unnamed tributary and the impoundment. The plan, where practicable, shall limit removal to non-mechanized methods;
  - b. A plan for proper management of the removed sediment;
  - c. A plan for revegetation of all areas disturbed by the sediment removal process;
  - d. A plan for monitoring the areas where the Phase II RMP will be implemented covering both pre and post Phase II RMP implementation;
  - e. Criteria for measuring the success of the sediment removal and revegetation processes; and,
  - f. A schedule for completion of all items under the Phase II RMP.

Foxcrest shall respond in writing **within 30 days** of receiving any comments from DCR on the Phase II RMP until such time DCR approves the Phase II RMP. The Phase II RMP, as well as any amendments to the Phase II RMP, shall be incorporated into and become enforceable under the Order upon approval by DCR.

2. Prior to performing any actions under the RMP(s) (Phase I or subsequent phases) involving work in jurisdictional waters or wetlands, Foxcrest shall consult with staff of DEQ's Southcentral Regional Office in Lynchburg to review the scope of work under the RMP(s). Should this review indicate that additional permitting is required for implementation of the RMP(s), Foxcrest shall apply for and obtain any such permit(s) prior to performing any actions under the RMP(s) involving work in jurisdictional waters or wetlands. The RMP schedule(s) may be amended to reflect the time associated with normal application and issuance procedures for any additional permit(s) required.
3. Regarding off-site implementation of the RMP(s):
  - a. Foxcrest shall work diligently to secure written access agreements from the owners of all off-site properties where implementation of the RMP(s) will take place and from the owner(s) of any off-site properties where access will be required for its implementation even if no RMP(s)-related work is to be completed thereon;
  - b. Copies of all written access agreements shall be provided to DCR;
  - c. No off-site work may be performed under the RMP(s) until all necessary access agreements have been secured; and,

- d. Any denial of access must be documented or communicated to the satisfaction of DCR and shall constitute cause for amendment of the RMP(s) and, if necessary, the Order.