



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

OFFICE OF THE  
SECRETARY

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**CEASE AND DESIST AND SECRETARY'S ORDER**

*Pursuant to 7 Del. C. Chapters 40, 60 & 66*

**Order No. 2011-W-0044**

*Personally Served By an Environmental Protection Officer*

**Riverbend Community, LLC**

Joseph L. Capano, Sr.  
644 Arrowgrass Lane  
New Castle, DE 19702

*By U.S. Mail*

Joseph L. Capano, Sr.  
P.O. Box 4373  
Wilmington, DE 19803

Joseph L. Capano, Sr.  
1442 Bohemia Mill Road  
Middletown, DE 19709

*By First Class U.S. Mail, U.S. Certified Mail, e-mail, and delivery to counsel for Respondents*

Riverbend Community, LLC  
Joseph L. Capano, Sr., Registered Agent  
644 Arrowgrass Lane  
New Castle, DE 19702

Parkway Gravel, Inc.  
4048 New Castle Avenue  
New Castle, DE 19720

Signature Design Homes, LLC  
Ms. Jeanne M. Parrott, Registered Agent  
400 Campbell Road  
Wilmington, DE 19807  
[joeparrott@gmail.com](mailto:joeparrott@gmail.com)

*Delaware's Good Nature depends on you!*

Fox Chase Realty, LLC  
400 Campbell Road  
Wilmington, DE 19807

**Attorneys for Riverbend Community, LLC, and Fox Chase Realty, LLC.**

*By First Class U.S. Mail and e-mail*

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Dear Riverbend Community, LLC; Fox Chase Realty, LLC; Signature Design Homes, LLC; and Parkway Gravel, Inc.:

This is to notify Riverbend Community, LLC (Riverbend); Fox Chase Realty, LLC (Fox Chase); Joseph L. Capano, Sr., as registered agent for and managing member of Riverbend and as an officer of Fox Chase; Signature Design Homes, LLC.; and Parkway Gravel, Inc. (Parkway)—collectively referred to as Respondents—that the Secretary of the Department of Natural Resources and Environmental Control determined that the Respondents are in violation of 7 Del. C. Chapters 40, 60, and 66, 7 Del. Admin. C., § 5101 et seq., (Sediment and Stormwater Regulations), 7 Del. Admin. C., § 7502 et seq., (Wetlands Regulations), and 7 Del. Admin. C., § 7201 et seq., (Water Pollution Regulations). Accordingly, the Department is issuing this Cease and Desist Order.

**LIST OF TERMS**

CCR: Certified Construction Reviewer

DSWC: Division of Watershed Stewardship, formerly Division of Soil and Water Conservation

Department: Department of Natural Resources and Environmental Control

NCCD: New Castle County Conservation District

NOI: Notice of Intent

NOV: Notice of Violation

NPDES: National Pollutant Discharge Elimination System

S&S Regulations: Delaware's *Sediment and Stormwater Regulations*

Water Pollution Regulations: *Delaware Regulations Governing the Control of Water Pollution*

Wetlands Regulations: Delaware Wetlands Regulations

WSLS: Wetlands and Subaqueous Lands Section

## BACKGROUND

Parkway owns or has owned property in New Castle, Delaware, now known as "Riverbend at Old New Castle" (Subdivision). According to the Minor Subdivision plan recorded on November 16, 2006, at Instrument No. 20061116-0108545 (2006 Plan), which was incorporated by reference and filed along with the deed by which Parkway conveyed land to Riverbend, the Subdivision consists of three tax parcels, including Tax Parcels 2101600003, 2101600004, and 2101600005.

All of the developed areas or areas to be developed, including building lots and roads, appear to be located within Tax Parcel 2101600003.

Tax Parcel 2101600003 is comprised of three parcels: parcel numbers 1, 2, and 3. Riverbend owns parcel 3, which is a little more than 55 acres of land and includes a majority of the building lots and roads in the Subdivision.

Parkway owns the remainder of Tax Parcel 2101600003 plus parcels 1 and 2, which consist of 15.5 and 75.6 acres, respectively. Parcel 1 contains approximately 30 building lots and the entrance road from Route 9 to the Subdivision, including what is commonly referred to as the causeway. Parkway granted Riverbend an access easement that allows Riverbend to use the road and causeway for access to parcel 3. Since taking title to its portion of the Subdivision, Riverbend has been acting as the developer of the entire Subdivision pursuant to the 2006 Plan.

Fox Chase has arranged, contracted for, authorized, accepted, directed, and financed some or all of the engineering, planning, and construction-related activities, including land-disturbing activities within the Subdivision since at least June 2005.

Parkway received an approved Sediment and Stormwater Management Plan (Plan) on December 7, 2006, and NPDES General Permit NOI No. 2201 on October 17, 2006. The NOI General Permit coverage was transferred to Riverbend effective November 1, 2007. However, Riverbend failed to submit a revised Plan as required by the S&S Regulations and the Department issued an NOV on December 24, 2008. The NOV was issued in response to a site inspection conducted by the Department and New Castle Conservation District on December 3, 2008.

Additionally, numerous Department site reviews conducted in 2009 found violations that were formally documented to and/or communicated verbally to Riverbend including:

1. Construction in State-regulated wetlands without a permit.
2. Lack of stabilization of construction entrances.
3. Sediment accumulation and lack of vegetative stabilization in bioswales.
4. Inadequate inlet protections.
5. Inadequate or absent vegetative stabilization.
6. Improper maintenance of silt fences.
7. Lack of the required Certified Construction Reviewer (CCR) reports.

Several NOV's were issued by the Department to Riverbend that did not result in the implementation of effective correction of the violations. The following is a list of the items enumerated on the NOV's; items in bold remain currently out of compliance:

1. Placement of approximately 0.37 acres of fill in the form of an earthen causeway in State-regulated wetlands without a permit. Recommendation was made to suspend any further work in State-regulated wetlands. Remediation remedies were discussed with Riverbend's current and former consultants. **The causeway still is present in State-regulated wetlands.**
2. Stabilize all disturbed areas that have not been worked for over 14 calendar days per the temporary and permanent seeding tables in the *Erosion and Sediment Control Handbook*. Stabilization must include the slopes on all the existing sediment traps; erosion matting is required on all slopes 3:1 or greater. **Stabilization has not been achieved.**
3. Stabilize all building lots with temporary vegetation or soil stabilizer. This includes the repair of all gullies and rills associated with the disturbed areas and building lots. **Stabilization has not been achieved.**
4. Install erosion and sediment controls at each active building lot as indicated on the approved Plan.
5. Install a stabilized construction entrance at the edge of the asphalt base by the "bridge."
6. Clean all impervious roadways of sediment.
7. Install silt fence as indicated on the approved plan.
8. Install inlet protection at all inlets Type 1 or Type 2.
9. Perform maintenance on the existing inlet protection. **Inlet protections have not been repaired.**

10. Provide repairs to the steep slopes on the north side of the roadway in Phase 2; the stability of the road base is threatened. **The roadway has not been repaired and continues to erode.**
11. Relocate concrete wash-out area so that washed material does not enter into sediment trap #3.
12. At all areas where sediment exited the site via silt fence failures, clean up the sediment and return it to the site.
13. Provide a revised Plan to the Department with the current conditions of the site on the Plan that will include stormwater management for the two areas being used as “pseudo-sediment traps” in Phase 1. Account for the “bleeder trenches” cut behind building lots 2-6 and 19-21. The site is out-of-phase with the current Plan and a revised sequence of construction is required. Stormwater quality management must be provided for all impervious areas on the site, including areas that have already been developed. **There is no Plan for the site.**
14. Provide the Department with a copy of the Record Plan. **Record Plan has not been received from Riverbend.**

The wetlands violations continue and remediation of the State-regulated wetlands area where fill was placed has not occurred. Riverbend intends to continue encouraging, allowing, and causing land-disturbing activities within the Subdivision despite the lack of an approved Plan and the lack of an NPDES General Construction Permit. Additionally, the non-compliance continues at the site, and there is neither a Plan nor NPDES General Permit coverage.

#### FINDINGS OF FACT

Fox Chase has arranged, contracted for, authorized, accepted, directed, and financed some or all of the engineering, planning, and construction-related activities, including land disturbing activities, within the Subdivision since at least June 2005.

A Notice of Intent (NOI) was received on October 17, 2006, from Parkway.

An approved Plan was issued on December 7, 2006, and construction activities commenced shortly thereafter.

On November 21, 2008, the site was referred to the Department by the NCCD.

On December 17, 2008, the Department received a Transfer of Authorization of the NOI from Parkway to Riverbend for stormwater discharges associated with construction activity under an NPDES General Permit. The Transfer of Authorization was effective on November 1,

2007, when the transfer from Parkway to Riverbend of operational control actually occurred but the required form was not submitted until December 17, 2008.

On December 22, 2008, the Department's WSLs conducted a site review based on information received from the Division of Soil and Water Conservation (now the Division of Watershed Stewardship; see H.B. 480 signed by the Governor on July 23, 2010), stating that it appeared fill had been placed in State-regulated wetlands on the site and that the DSWC discovered approximately 0.40 acres of fill had been placed in the State-regulated wetlands within the subject property without a permit. This fill had occurred during the construction of a causeway that provides access to the Subdivision and while placing fill around a sanitary sewer line. The fill placed around the sewer line was later removed voluntarily. The remaining fill in the State-regulated wetlands consists of the causeway itself, which has a footprint of approximately 0.37 acres.

On December 24, 2008, the DSWC issued an NOV (2008 NOV) to Riverbend via facsimile transmission and certified mail. The 2008 NOV addressed issues concerning sediment and stormwater violations and stated that the site was in violation of 7 *Del. C.* Ch. 60 and the Federal NPDES requirements as well as 7 *Del. C.* Chapter 40 (Delaware's Sediment and Stormwater law), and Delaware's S&S Regulations. The return receipt for the certified mail indicated the item was undeliverable, but the facsimile transmission went through successfully. On June 18, 2009, the 2008 NOV was hand-delivered to Riverbend during a site visit.

On January 2, 2009, an NOV (2009 NOV) was issued from the WSLs to Riverbend. This NOV informed Riverbend that violations occurred during construction of an earthen causeway because a substantial amount of fill material was placed in State-regulated wetlands without a permit to do so. WSLs asked Riverbend to initiate a contact to discuss the issues and strongly recommended that Riverbend suspend any further work in State-regulated wetlands. This letter was returned to the WSLs due to an invalid address. The 2009 NOV was then re-sent via certified mail to a different address. This second letter was returned to the WSLs because it remained unclaimed. This letter was sent a third time on March 11, 2009, to Riverbend's consultant at the time, Ron Sutton, who hand-delivered the letter to Riverbend. Riverbend contacted the WSLs upon the receipt of the letter.

Riverbend received the DSWC Sediment and Stormwater Inspection Report dated January 14, 2009, enumerating the site non-compliances, which included the violation for not having the required weekly CCR reporting as required by 7 *Del. Admin. C.* §7201-9.2.4.2 of the Water Pollution Regulations.

Riverbend submitted revisions to the Plan for approval on February 13, 2009, which the Department rejected due to legal inadequacies. Riverbend was to submit further revisions to the Department by June 26, 2009. However, the Department received no further revisions; and, thus, the previously approved Plan expired on December 6, 2009.

Riverbend received the DSWC Sediment and Stormwater Inspection Report dated March 6, 2009, enumerating the site non-compliances, which included many of the issues from the January 19, 2009, report. The required CCR reporting began on January 23, 2009.

Riverbend received a Sediment and Stormwater Inspection Report dated May 1, 2009, enumerating the site non-compliances, which included many of the outstanding issues from the previous reports.

The final CCR report is dated July 22, 2009, and the required weekly reports were not being submitted and the site is in violation of 7 Del. Admin. C. §7201- 9.2.4.2 of the Water Pollution Regulations.

Riverbend received the DSWC Sediment and Stormwater Inspection Report dated August 14, 2009, enumerating the site non-compliances, which included many of the same issues from the previous reports.

Additionally, Riverbend's NPDES General Construction Permit was terminated on December 11, 2009, because no revised Plan was ever received and approved.

Riverbend admitted that in 2009 a water conveyance pipeline was installed in the causeway by workers employed by Riverbend who excavated a trench to do so. No permit was obtained to construct the pipeline over/in State-regulated wetlands or to conduct excavation in the wetlands.

The Department issued an NOV on January 21, 2010, (2010 NOV) via certified mail and facsimile that stated the following:

- The Plan for the Riverbend at Old New Castle Subdivision expired on December 11, 2009,
- The NPDES General Permit NOI coverage for Construction Activity was terminated, and
- Until completion of State-regulated wetland investigation and remediation there can be no further land disturbing activities.

On March 12 and March 19, 2010, sediment discharge from the Subdivision site was documented.

On March 26, 2010, the Department approved a Plan and an NOI. These documents addressed the following limited activities by Riverbend: (1) remediation of 0.03 acres of the State-regulated wetland violation (0.37 acres of violation remain), (2) partial remediation of certain federal wetlands violations, and (3) installation of water mains for fire suppression.

On April 7, 2010, a letter was hand-delivered to Riverbend identifying unaddressed stabilization issues from the 2008 NOV; and a deadline of April 21, 2010, was set for completion. All areas have not been stabilized.

Riverbend received the DSWC Sediment and Stormwater Inspection Report dated April 27, 2010, enumerating the site non-compliances, which included many of the same issues from the previous reports dating back to May 1, 2009.

On September 20, 2010, the Department issued Administrative Penalty Assessment, Cease and Desist and Secretary's Order (Order) No. 2010-DW-DWS-0027 to Riverbend for violations of 7 Del. C. Chapters 40, 60, and 66, 7 Del. Admin. C. §5101 *et seq.* (*Sediment and Stormwater Regulations*), 7 Del. Admin. C. §7201 *et seq.* (*Water Pollution Regulations*), and 7 Del. Admin. C. §7502 *et seq.* (*Wetlands Regulations*). The Order assessed Riverbend an administrative penalty in the amount of **Fifty Thousand and No/100 Dollars (\$50,000.00)** pursuant to 7 Del. C. §6005 (b)(3), and an additional amount of **Seven Thousand Five Hundred and No/100 Dollars (\$7,500.00)** as estimated costs incurred by the Department in the investigation of the above described violations pursuant to 7 Del. C. §6005 (c). The Department further ordered Riverbend not only to cease and desist from all violations enumerated in the Order pursuant to 7 Del. C. §6018 but also to refrain from any site work activity other than those actions necessary to achieve compliance with the Order pursuant to 7 Del. C. §4012(c)(1).

Additionally, Order No. 2010-DW-DWS -0027 contained the following:

*"Within five (5) days of receipt of this Order, the Respondent shall obtain Department approval of a conceptual plan for the earthen causeway depicting a design that utilizes sound engineering principles and that significantly increases the wetlands continuity from one side of the causeway to the other while minimizing fill in State-regulated wetlands. Respondent may be able to accomplish this by spanning a significant portion of the State-regulated wetlands by the use of bottomless arch or box culverts already discussed with Respondent's consultant. Additionally, within thirty (30) days of receipt of this Order, the Respondent shall obtain Department approval of the engineered plans and specifications for the causeway depicting the approved conceptual plan and an implementation schedule for completion of all work associated with the reconstruction of the causeway."*

No conceptual plan has been submitted to the Department by Riverbend.

On December 29, 2010, it was observed that building construction was occurring on Lot 75 in the Subdivision. County records and other information showed that the lot had been sold by Riverbend to Signature Design Homes, LLC. There was a house foundation, framing, and sheathing built on Lot 75 as of December 29, 2010. Riverbend's attorneys were informed by the Department's counsel that the construction activity on Lot 75 was illegal without the required NPDES General Permit NOI coverage, or an approved Plan.

Secretary's Order No. 2011-WS-0008 was issued to Signature Design Homes due to construction on Lot 75 without the required NPDES General Permit NOI coverage or an approved Plan.

In 2010 and 2011, Riverbend sold lots within the Subdivision to Signature Design Homes, LLC, and Rufus LLC, while the site remained in violation of Delaware law and regulations. Riverbend has continued to market homes to interested parties knowing that Wetlands and Sediment and Stormwater violations were present and continuing. Recently, Riverbend has entered into contracts for the sale of 170 contiguous lots in the Subdivision without notifying the prospective buyers of the ongoing environmental violations and the need to correct them.

In fact, the contracts for the sale of lots obligate Riverbend to obtain any and all permits and approvals that are "necessary to enable [Riverbend] to create, develop and transfer each lot to Buyer as a "buildable lot." Each proposed transaction obligates Riverbend to complete grading, storm drains, streets, street lights, and the installation of water and sewer lines, telephone and other utility lines, and other lot improvements needed to obtain building permits.

Nevertheless, Riverbend contends that no Plan is necessary and that buyers of individual lots will be able to commence land-disturbing activities pursuant to the 2006 Plan without the required permits or environmental protections in place.

#### **STATUTORY, REGULATORY AND PERMIT REQUIREMENTS STATE WETLANDS PROGRAM**

*7 Del. C. § 6602* states:

"[I]t is declared to be the public policy of this State to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands."

*7 Del. C. § 6607(d)(3)* states that the Secretary shall adopt regulations:

"Controlling or prohibiting activities on lands designated or proposed for designation as wetlands, which regulations may vary from area to area according to the ecological value of the subject wetlands and the threat to the health and welfare of the people of this State which their alteration would pose."

Pursuant to this authority, the Secretary of the Department of Natural Resources and Environmental Control adopted the Wetlands Regulations.

A permit is required for the commencement of any activity in the wetlands (*7 Del. C. § 6604* and *7 Del. Admin C. § 7502-6.1.2*) including "any expansion or extension of a preexisting use...." (*7 Del. C. § 6605*).

Activity is defined as “any dredging, draining, filling, bulkheading, construction of any kind...and “excavation.” (7 Del. C. § 6603). Similarly, the Wetlands Regulations, 7 Del. Admin. C. § 7502-5.0 defines “Activity” as “...construction of any kind, including, but not limited to...excavation....”

A “preexisting use” within the meaning of 7 Del. C. § 6603(f) is “any use of land, or water, or subaqueous lands, or a structure or any combination of these which was lawfully in existence prior to and in active use on July 17, 1973....” 7 Del. C. § 6607(e) states: “If an on-site evaluation by the Department establishes that an error exists in a wetlands map that has been adopted by the Department, the wetlands map containing this error may be corrected by the Department after the Department documents, in writing, the results of the on-site evaluation, and the Department gives the public notice of any proposed correction.”

### ***SEDIMENT AND STORMWATER PROGRAM***

7 Del. C. § 4001 states, in relevant part:

“[T]he policy of this chapter [is] to strengthen and extend the present erosion and sediment control activities and programs of this State for both rural and urban lands and to provide for control and management of stormwater runoff consistent with sound water and land use practices.... This policy, to be carried out by establishing and implementing by the Department of Natural Resources and Environmental Control...a statewide comprehensive and coordinated erosion and sediment control and stormwater management program to conserve and protect land, water, air and other resources of the State.”

7 Del. C. § 4006(b)(2) states that one of the Department’s responsibilities is to:

“Develop and publish, as regulation components, minimum standards, guidelines and criteria for delegation of sediment and stormwater program components, and model sediment and stormwater ordinances for use by districts, counties and municipalities.”

Pursuant to this authority, the Secretary of the Department of Natural Resources and Environmental Control adopted the *Sediment & Stormwater Regulations*.

“Sediment and stormwater approvals are required for land changes or construction activities for residential, commercial, industrial, or institutional land use which are not exempted or waived by these Regulations.” 7 Del. Admin. C. § 5101-1.2.

As Riverbend was not exempt, it was required to obtain and remain under an approved Plan during all land disturbing activities pursuant to 7 Del. Admin. C. § 5101-8.1.

The Plan approved on December 7, 2006, naturally expired on December 6, 2009, pursuant to 7 Del. Admin. C. § 5101-8.7 (“approved plans remain valid for 3 years from the date of an approval, unless specifically extended or renewed by the appropriate plan approval agency”). Riverbend submitted no acceptable revised Plan but continued land disturbing activities after the expiration of the December 7, 2006, Plan in violation of 7 Del. Admin. C. § 5101-8.1.

The S&S Regulations require that all erosion and sediment control plans and practices be consistent with the Delaware Erosion and Sediment Control Handbook<sup>1</sup> (Handbook). See the *Sediment and Stormwater Regulations*, 7 Del. Admin. C. §§. 5101-10.2.2 and 15.1. Standards and specifications for such vegetative stabilization are provided in Section 3.4.3 of the Handbook.

7 Del. Admin C. § 5101-10.2.1 of the *S&S* Regulations states:

“[f]ollowing soil disturbance or redisturbance, permanent or temporary stabilization shall be completed within 14 calendar days as to the surface of all perimeter sediment controls, topsoil stockpiles, and all other disturbed or graded areas on the project site.” The Subdivision has at no time during the construction process been in full compliance with this regulation.

#### ***NPDES PERMITTING PROGRAM***

7 Del. C. § 6001(b)(2) states:

“[t]he State, in the exercise of its sovereign power, acting through the Department should control the development and use of the land, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State.”

7 Del. C. § 6003(a)(2) states:

“No person shall, without first having obtained a permit from the Secretary, undertake any activity: In a way which may cause or contribute to discharge of a pollutant into any surface or ground water....”

Pursuant to 7 Del. C. § 6010(a), “[t]he Secretary may adopt, amend, modify or repeal rules or regulations or plans, after public hearing, to effectuate the policy and purposes of this chapter.” Pursuant to this authority, the Water Pollution Regulations were duly promulgated.

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<sup>1</sup> The Handbook is readily available at <http://www.swc.dnrec.delaware.gov/Pages/SedimentStormwater.aspx>. A paper copy can also be requested on the same page.

7 Del. Admin. C. §7201- 6.1.2 of the Water Pollution Regulations requires an NPDES permit for the discharge of a “pollutant” from any “point source” to “State waters.” Although discharges related to construction activities are covered in §7201- 9.2 of the Water Pollution Regulations and fall under the “General Permit Program,” an NOI must be filed with the Department, which will be considered “the equivalent of an NPDES Permit application for a General NPDES Permit.” See §7201- 9.1 of the Water Pollution Regulations.

7 Del. Admin. C. §7201- 6.10.1 of the Water Pollution Regulations requires “[a]ny person who discharges or proposes to discharge pollutants from any point source subject to NPDES program requirements and who does not have an effective permit or equivalent authorization from the Secretary shall submit a complete application to the Department in accordance with this section.” Riverbend is a “person” who participated in “construction activity” that likely resulted in “Discharge of Storm Water Associated with Construction Activity” pursuant to § 7201-9.2 of the Water Pollution Regulations.

7 Del. Admin. C. § 7201-9.2.1.4 of the Water Pollution Regulations states:

“To be authorized to discharge stormwater under this Part, a person planning a construction activity must submit, in accordance with the requirements of §9.1.2.3, an NOI form prior to commencement of any construction activities. Unless notified by the Secretary to the contrary, persons who submit such notification and have either obtained approved Plans or have been deemed exempt in accordance with the Delaware S&S Regulations, are authorized to discharge storm water associated with construction activity under the terms and conditions of this Part.”

7 Del. Admin. C. § 7201- 9.2.2.3. of the Water Pollution Regulations states:

“Any person subject to this Subsection shall at all times properly operate and maintain all facilities, systems and practices of pollution control which are installed, or implemented to achieve compliance with the requirements of this Subsection and with the measures of the Plan.”

7 Del. Admin. C. §7201- 9.2.2.9 of the Water Pollution Regulations states:

“Any person who violates conditions of this Subsection may be subject to penalties in accordance with 7 Del. C. Chapter 60. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.”

7 Del. Admin. C. §7201- 9.2.4.2.2 of the Water Pollution Regulations states:

“For the purposes of monitoring, persons subject to this Part must:

“2. Conduct the following:

- a. weekly maintenance inspections of erosion and sediment controls, and constructed storm water management measures; and
- b. inspections of erosion and sediment controls and storm water management practices the next business day after a rainfall event that results in runoff.”

7 Del. Admin. C. § 7201-9.2.5 of the Water Pollution Regulations states:

“A. Persons covered by this Part shall develop, fully implement, and maintain at the site, the approved Plan and any other records that are required in accordance with 7 Del. C. Chapter 40 and the *Delaware Sediment and Stormwater Regulations*. The Plan shall cover all site activities from the date of initiation of construction activity to the date of project completion. Pollution prevention measures, in accordance with Delaware Erosion and Sediment Control Handbook standard and specification for Construction Site Pollution Prevention, shall be incorporated into the Plan for construction activity.

B. The Plan shall be signed in accordance with this Part and kept at the facility.

C. Persons covered by this Part shall retain records of all information required by the Plan for a minimum of five (5) years.

D. Keeping the Plan Current

1. Persons covered by this Part shall amend the Plan whenever:

- a. There is a change in the design, construction, operation, or maintenance of erosion and sediment controls or storm water management measures on the site; or
- b. The Plan proves to be ineffective in eliminating or significantly minimizing the discharge of pollutants, or in otherwise achieving the general objectives of controlling pollutants in storm water discharges associated with construction activity; or
- c. To address any sources or potential sources of pollution identified as a result of a site inspection pursuant to 7 Del. Admin. C. §7201-9.2.4.2.2.; or
- d. Upon notification by the Department or the appropriate plan approval agency that the Plan does not adequately address the requirements of this Part.

The notification from the Department or the appropriate plan approval agency shall list and describe the deficiencies of the Plan.

2. Persons subject to 7 Del. Admin. C. §7201-9.2.5.4.1.1 shall amend the Plan and submit these amendments to the Department or appropriate plan approval agency and receive approval for the amendments prior to construction or modification of the erosion and sediment controls or storm water management measures on the site.
3. Persons subject to §§7201-9.2.5.4.1.2, 3 and 4 shall amend the Plan and submit these amendments to the Department or appropriate plan approval agency and receive approval for the amendments within 30 days of notification by the persons subject to this Part, inspector, CCR, Department, or appropriate plan approval agency that the current Plan is inadequate. The Department may grant additional time for amending the Plan. A written request for an extension shall be made by the person subject to this Part to the Department.
4. Under the requirements of the Delaware S&S Regulations, the Plan remains valid for three (3) years following the date of approval. If construction continues beyond that three- (3) year time period, an extension or renewal of the Plan may be granted by the Department or the appropriate plan approval agency. Unless the Plan is extended or renewed, the Plan is considered expired and any construction activity that occurs after the expiration date occurs in violation of the S&S Regulations and this Part. For the purposes of this Part, permit coverage is only valid within the three- (3) year period as long as construction activity is taking place.

#### E. Failure to Prepare or Amend Plan

In no event shall failure to complete or update a Plan in accordance with this Part relieve any persons covered under this Part of responsibility to implement actions required to protect the waters of the State, complete any actions that would have been required by such Plan, and to comply with all conditions of this Part.”

### CONCLUSIONS

Based on the foregoing facts, the Department has determined that the Respondents have violated 7 Del. C. Chapters 40, 60, and 66, the *Sediment and Stormwater Regulations*, the *Water Pollution Regulations*, and the *Wetlands Regulations*:

1. Respondents are “persons” as defined in 7 Del. C. §§4002(4), 6002(17), and 6603(e).
2. Respondents Parkway, Riverbend, and Fox Chase violated the Wetlands Act and the Wetlands Regulations, commencing on or before December 22, 2008, in that they

were required to obtain a Wetlands Permit to place fill and perform construction in State-regulated wetlands. Furthermore, as part of the permitting process and prior to construction activities, Respondents Parkway, Riverbend, and Fox Chase should have obtained the Department's prior acknowledgement of the presence of any existing fill in State-regulated wetlands, if that area was mapped in error as "wetlands," by seeking a change in the State Wetland Maps pursuant to 7 Del. C. § 6607(e).

3. The Respondents violated 7 Del. C. § 6003(a)(2) by discharging sediment into waters of the State as witnessed in March 2010. By implication, the absence of vegetative stabilization and poor maintenance of erosion and sediment controls indicates that previous sediment discharges had occurred following rain events.
4. During the construction process, the Respondents have not been in full compliance with 7 Del. Admin C. § 5101-10.2.1. Nor have the Respondents been in compliance with the S&S since December 23, 2008.
5. The Respondents violated 7 Del. Admin C. §7201 - 9.2.1.3 of the Water Pollution Regulations, commencing on or before December 23, 2008, in that it was required to obtain an NPDES permit for stormwater discharges, including submitting an NOI form pursuant to the Water Pollution Regulations §§ 9.2.1.4 prior to the initiation of construction activities. After the 2010 NOV, the Respondents continued construction activities behind the club house in March 2010 without a Plan or an NPDES General Permit NOI.
6. The Respondents violated 7 Del. Admin C. § 7201- 9.2.5 of the Water Pollution Regulations, in that the Respondents continued construction and land-disturbing activities without an approved Plan beginning on December 11, 2009. In addition the Respondents submitted no acceptable revised Plan as required in §§ 7201-9.2.5.1, 9.2.5.4 and 9.2.5.5 of the *Water Pollution Regulations* and 7 Del. C. § 4003(a).
7. The Respondents violated 7 Del. Admin. C. §5101-10.2.1 (*Sediment and Stormwater Regulations*) by not performing the required stabilization as indicated on the 2008 NOV, the April 7, 2010, letter, CCR reports, and Department inspection reports.
8. Under 7 Del. Admin C. §7201- 9.2.2.3 of the Water Pollution Regulations, the Respondents failed to properly operate and maintain all the facilities on site as directed in the formal documentation of inspection reports from the Sediment and Stormwater Program.
9. The Respondents failed to perform the required weekly inspections and the inspections after rainfall events as required by 7 Del. Admin C. §7201- 9.2.4.2 of the *Water Pollution Regulations* and 7 Del. C. § 4013(a)(3)(g).

10. Riverbend, the developer of the Subdivision, has shown itself unwilling or unable to comply with Delaware law. Its declared intention to allow and encourage land-disturbing activity on up to 170 contiguous lots in the Subdivision pursuant to its common plan of development, the 2006 Plan, and without an approved Plan or NOI in place constitutes a threat to Delaware's environment.

### **CEASE AND DESIST ORDERS**

IT IS HEREBY ORDERED, based upon the foregoing findings and conclusions, and pursuant to 7 *Del. C.* § 4012(c)(1), that the Respondents shall immediately cease and desist from performing, causing, or allowing to occur within the Subdivision any site work activity conducted pursuant to the 2006 Minor Subdivision Plan dated September 27, 2006, or pursuant to the Plan recorded on October 29, 2007, other than those actions necessary to achieve compliance with this Order and the violations identified herein. All land-disturbing activity carried out within the Subdivision pursuant to the foregoing subdivision plans shall be aggregated for purposes of determining the total amount of disturbance.

IT IS HEREBY ORDERED, based upon the foregoing findings and conclusions, and pursuant to 7 *Del. C.* § 6018, that the Respondents shall immediately cease and desist from all violations stated in this Order.

### **CONTINUING WETLANDS VIOLATIONS**

The Respondents shall obtain Department approval of a conceptual plan for the earthen causeway depicting a design that utilizes sound engineering principles and that significantly increases the wetlands continuity from one side of the causeway to the other while minimizing fill in State-regulated wetlands. The Respondents may be able to accomplish this by spanning a significant portion of the State-regulated wetlands by the use of bottomless arch or box culverts or by increasing the hydrologic and physical connection by adding smaller culvert(s) in combination with a mitigation project. The Respondents shall also provide the Department with an implementation schedule and a signed agreement to proceed with construction according to the plan and schedule approved by the Department.

Notwithstanding the foregoing paragraph, the Respondents continue daily violations by having placed fill and structure in state-regulated wetlands. The Respondents remain subject to all appropriate enforcement actions for past, future, and on-going violations, including without limitation, pursuant to 7 *Del. C.* § 6617.

### **CONTINUING SEDIMENT AND STORMWATER VIOLATIONS**

1. The Respondents shall obtain Department approval of a Plan and an NPDES General Permit NOI for all work associated with the reconstruction of the causeway.

2. Outstanding items that the Parties of Interest need to bring into compliance:
  - a. Repair the massive gullies and stabilize building lots 32 through 65. This must include the common area contained between building lots 35 through 45;
  - b. Stabilize the conveyance swale between building lots 135 and 134;
  - c. Repair massive gullies, establish slopes, refurbish stone outlet and stabilize sediment trap #2 as per the original design;
  - d. Repair inlet protections located in the common area between building lots 35 through 45;
  - e. Extract eroded sediment from biofiltration swale #3 and install rock check dams as per the original design;
  - f. Extract eroded sediment from biofiltration swale #2 and install rock check dams as per the original design;
  - g. Install the reinforced silt fence between biofiltration swales #3 and #2 and the wetlands.
3. Approval of a Plan for construction of homes will not be issued until all violations of Chapters 40, 60, and 66 of Title 7 of the Delaware Code cease.

Notwithstanding the foregoing three numbered paragraphs, the Respondents continue in daily violations of the S&S Regulations and the Water Pollution Regulations. Respondents remain subject to all appropriate enforcement actions for past, future, and on-going violations, including without limitation, pursuant to 7 *Del. C.* §§ 6005 and 4015.

This action does not preclude the Department from commencing additional enforcement action.

The foregoing is so ordered.

10/27/11  
Date

  
Collin P. O'Mara, Secretary

*CPO:DLO:jmb/50-25.doc*

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