COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
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Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
THE MCGURN COMPANY, INC.
FOR
GREEN TOP CENTER DRIVE DEVELOPMENT, HANOVER, VIRGINIA
Permit No. WP4-07-0451

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and The McGurn Company, Inc., regarding Green Top Center Drive Development, Hanover County, Virginia, for the purpose of resolving certain violations of State Water Control Law and the applicable permit and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the

contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

5. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

6. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

7. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

8. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.

9. "McGurn" means The McGurn Company, Inc., a corporation authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. McGurn is a "person" within the meaning of Va. Code § 62.1-44.3.

10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

11. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.

12. "Permit" means general permit WP4-07-0451 issued by DEQ to The McGurn Company, Inc., on April 13, 2007, under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344. The Permit expires on April 12, 2014.

13. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.

14. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner

which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

15. "Property" or "Parcel" means the tract of land at Green Top Center Drive Development, 10225 Washington Highway, Hanover County, Virginia, comprised of 2.437 acres and recorded in the Hanover County Circuit Court Clerk's Office in Deed Book 1524 at page 301, owned and developed by McGurn.

16. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.

17. "Regulations" means the VWP Permit Program Regulations, 9 VAC 25-210 *et seq.*

18. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.

19. "State Water Control Law" means Chapter 3.1(§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.

20. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

21. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.

22. "USACE" means the United States Army Corps of Engineers.

23. "Va. Code" means the Code of Virginia (1950), as amended.

24. "VAC" means the Virginia Administrative Code.

25. "VWP" means Virginia Water Protection.

26. "VWPP or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.

27. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. McGurn owns and developed the Property in Hanover County, Virginia.

2. On April 13, 2007, DEQ issued Permit WP4-07-0451 to McGurn for wetland impacts associated with the construction of Green Top Center Drive Development in Hanover County, Virginia. The Permit authorized impacts to 0.28 acres of emergent wetland and 0.12 acres of open water and required the purchase of 0.28 acres of wetland credits from the Chickahominy Environmental Bank located in Charles City County, Virginia. The Permit also required notification of construction to DEQ, submitted prior to commencement of activities in permitted impact areas and construction monitoring reports submitted to DEQ in association with the permitted activities.

3. On February 4, 2011, DEQ staff performed an inspection of the Property and observed that the authorized impacts had been completed. DEQ staff reviewed the file for the Permit and found no record of documentation that mitigation bank credits were purchased; no record of a notification of construction submitted prior to commencement of activities in permitted impact areas; and no record of construction monitoring reports submitted in association with the permitted activities.

4. VWP general permit WP4-07-0451, Part II.A.4 states, "the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase or usage or of the fund contribution has been submitted to and received by DEQ."

5. VWP general permit WP4-07-0451, Part II.E.2 states "DEQ shall be notified in writing at least 10 days prior to the start of construction activities at the first permitted site authorized by this VWP general permit authorization so that inspections of the project can be planned, if deemed necessary by DEQ. The notification shall include a projected schedule for initiation and completion of work at each permitted impact area."

6. VWP general permit WP4-07-0451, Part II.B.1 states, "[c]onstruction activities authorized by this permit that are within impact areas shall be monitored and documented." Part II.B. 1-3 describes the methods and schedule of photographic monitoring that should be included in the reports.

7. VWP general permit WP4-07-0451, Part II.E.3, states "[c]onstruction monitoring reports shall be submitted to DEQ no later than the 10th day of the month following the month in

which the monitoring event specified in Part II.B takes place. . .," and describes the required contents of the reports.

8. Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50(A) of the VWP Permit Regulations state that except in compliance with a permit no person shall dredge, fill or discharge any pollutant into or adjacent to surface waters, excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: filling or dumping.

9. 9 VAC 25-210-90(A) of the VWP Permit Regulations states "[d]uty to comply. The permittee shall comply with all conditions of the VWP permit. Nothing in this chapter shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations and prohibitions. Any VWP permit violation is a violation of the law, and is grounds for enforcement action, VWP permit termination, revocation, modification, or denial of an application for a VWP permit extension or reissuance."

10. 9 VAC 25-690-100 states that "any applicant whose application has been accepted by the Board shall be subject to the following requirements [of the permit]."

11. On March 15, 2011, DEQ issued NOV No. 11-03-PRO-701 for the violation of Permit WP4-06-1557, Part II.A.4, Part II.B 1-3; Part II.E.2; Part II.E.3; 12, Va. Code § 62.1-44.15:20 ; 9 VAC 25-210-50(A) and 9 VAC 25-690-100.

12. On March 24, 2011, McGurn responded to the NOV and indicated it had submitted the construction notice and monitoring reports to DEQ as required by the Permit.

13. On April 26, 2011, McGurn provided DEQ with copies of the construction notice with photographs, the construction monitoring reports it had sent to DEQ during construction and the notification of completion of the project sent to DEQ.

14. On March 23, 2012, DEQ staff received an affidavit from Arthur McGurn, President of McGurn, affirming that the construction notice, construction monitoring reports and notification of completion were sent to DEQ on the dates indicated in the affidavit and as required by the Permit.

15. On June 21, 2012, DEQ received confirmation that McGurn had purchased 0.28 acres of wetland credits from the Chickahominy Environmental Bank.

16. Based on the results of the site inspection, review of the Permit file, and review of the documents submitted by McGurn, the Board concludes that McGurn has violated Permit WP4-07-0451 Permit conditions Part II.A.4, Va. Code § 62.1-44.15:20, 9 VAC 25-210-50(A), 9 VAC 25-210-90(A) and 9 VAC 25-690-100 as described above.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders McGurn and McGurn agrees to:

1. Pay a civil charge of $19,880.00 in settlement of the violations cited in this Order. The civil charge shall be paid in accordance with the following schedule:

Due Date	Amount
February 1, 2013	$2,485.00 or balance
May 1, 2013	$2,485.00 or balance
August 1, 2013	$2,485.00 or balance
November 1, 2013	$2,485.00 or balance
February 1, 2014	$2,485.00 or balance
May 1, 2014	$2,485.00 or balance
August 1, 2014	$2,485.00 or balance
November 1, 2014	$2,485.00 or balance

2. If the Department fails to receive a civil charge payment pursuant to the schedule described above, the payment shall be deemed late. If any payment is late by 30 days or more, the entire remaining balance of the civil charge shall become immediately due and owing under this Order, and the Department may demand in writing full payment by McGurn. Within 15 days of receipt of such letter, McGurn shall pay the remaining balance of the civil charge. Any acceptance by the Department of a late payment or of any payment of less than the remaining balance shall not act as a waiver of the acceleration of the remaining balance under this Order.

3. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

   Receipts Control
   Department of Environmental Quality
   Post Office Box 1104
   Richmond, Virginia 23218

4. McGurn shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of McGurn for good cause shown by McGurn, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, McGurn admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. McGurn consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. McGurn declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.

6. Failure by McGurn to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. McGurn shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. McGurn shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. McGurn shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

a. the reasons for the delay or noncompliance;

b. the projected duration of any such delay or noncompliance;

c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and McGurn. Nevertheless, McGurn agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

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

b. McGurn petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

c. The Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to McGurn.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve McGurn from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by McGurn and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of McGurn certifies that he or she is a responsible official or officer authorized to enter into the terms and conditions of this Order and to execute and

legally bind McGurn to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official or officer of McGurn

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, McGurn voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 6th day of DECEMBER, 2012.

Michael P. Murphy, Regional Director
Department of Environmental Quality

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The McGurn Company, Inc. voluntarily agrees to the issuance of this Order.

Date: 9-26-12 By: Arthur S. McGurn, President
(Person) (Title)
The McGurn Company, Inc.

Commonwealth of Virginia

City/County of Henrico

The foregoing document was signed and acknowledged before me this 26th day of

September, 2012, by Arthur S. McGurn who is

President of The McGurn Company, Inc., on behalf of the company.

Melissa W. Lynch
Notary Public

7051959
Registration No.

My commission expires: 6/30/2014

Notary seal:

MELISSA W. LYNCH
COMMONWEALTH OF VIRGINIA
REGISTRATION NO. 7051959
MY COMM. EXPIRES: 06/30/2014
NOTARY PUBLIC