



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

W. Tayloe Murphy, Jr.
Secretary of Natural Resources

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Robert G. Burnley
Director

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Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO FERGUSON LAND AND LUMBER CO., INC

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §62.1-44.15(8a) and 8(d), between the State Water Control Board and Ferguson Land And Lumber Co., Inc. for the purpose of resolving certain violations of environmental law 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.
4. "Ferguson" means Ferguson Land And Lumber Co., Inc. certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
5. "JPA" means the Joint Permit Application Number 05-0883 applied for by Ferguson.
6. "Order" means this document, also known as a Consent Special Order, including Appendix A to this document.

7. "Site" refers to the 10.363 acre parcel of land in Franklin County, Virginia, and recorded in deed book 780, on page 1261, and identified as tract G-2, parcel ID: 2040039005 (Central lat/long point: N37° 00' 37" W79° 53' 16"). The parcel is roughly identified with a northern border close to Weaver Street, bordered on the East by State Street, a southern border close to Industrial Avenue, and bordered on the West by the current Ferguson Land & Lumber Company.
8. "Va. Code" means the Code of Virginia (1950), as amended.
9. "VWP or VWPP" means the Virginia Water Protection or Virginia Water Protection Permit.
10. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia.

SECTION C: Findings of Fact and Conclusions of Law

1. Ferguson owns the site which has a Wetland and other waters of the State on it.
2. During a site inspection conducted by DEQ staff on August 3, 2004, it was observed that Wetland filling and excavation activities were occurring at the Ferguson site. A copy of the DEQ inspection report (8/4/04) identifying the potential for Wetland impacts at the site was provided to Ferguson. Information gathered in follow-up inspections on August 25, 2004, September 3, 2004, and September 27, 2004, resulted in DEQ issuing a Warning Letter on October 4, 2004, stating that Ferguson had to submit a Joint Permit Application to obtain a Virginia Water Protection (VWP) Permit for all impacts to the Wetland as of that date, as well as for any additional impacts to the Wetland or stream impacts at the site that Ferguson proposed to take. It was noted that any Wetland impacts not authorized by VWP Permit would need to be reversed to restore Wetland acreage and function.
3. DEQ staff conducted a joint site inspection with the U.S. Army Corps of Engineers and the United States Department of Agriculture, Natural Resources Conservation Service, on November 22, 2004, to review the Wetland delineation for the site prepared by Ferguson's consultant, Hayes, Seay, Mattern, and Mattern (HSMM). HSMM's Wetland report, dated January 12, 2005, was confirmed by the U.S. Army Corps of Engineers by letter dated February 11, 2005. The confirmation verified unauthorized impacts to 0.22 acres of emergent Wetlands. Prior to the filling of the confirmed impacted 0.22 acres Ferguson put in a subsurface drain in the Wetland area. The draining activity has impacted additional Wetland acres.
4. DEQ staff met with Mr. Hatcher Ferguson and his consultant on January 20, 2005, and February 14, 2005, to discuss JPA and VWP Permit processing requirements, including mitigation requirements. DEQ staff received verbal assurances from the consultant in January, February, March, and April, 2005, that the submittal of a JPA was imminent.

Ferguson submitted a JPA on April 13, 2005, but thus far that application has been deemed incomplete by DEQ for various reasons.

5. DEQ conducted an unannounced site inspection on April 13, 2005. The inspection report dated April 15, 2005, noted that additional Wetland impacts had occurred since Warning Letter WL-04-10-WCRO-001 was issued on October 4, 2004. Fill activities appeared to be from a combination of direct fill in association with site grading activities, or indirect fill due to inadequate implementation of erosion and sediment controls. A copy of this inspection was provided to Ferguson.
6. No regional, general, or nationwide permit has been issued by U.S. Army Corps of Engineers for the Wetland project, and no VWP Permit application was submitted to DEQ prior to initiating work at the site and in the State waters.
7. DEQ noted the violations referenced in paragraphs 2, 5, and 6 above in a Notice of Violation, NOV No.05-04-WCRO-002, issued to Ferguson on April 25, 2005.
8. Ferguson has operated without a VWP permit and caused an unlawful discharge into state waters of wastes, noxious or deleterious substances; altered the physical properties of state waters to the detriment of animal or aquatic life, or detrimental to the uses of such waters for other uses. Ferguson also undertook the following specific activities in the Wetland: Undertook a new activity to cause draining that significantly altered or degraded existing acreage and functions; Filled or dumped that caused significant alteration of or degradation of the existing Wetland acreage or function; Excavated in the Wetland; all in violation of Virginia Code § 62.1-44.15:5 and State Regulation 9 VAC 25-210-50.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Ferguson, and Ferguson agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders and Ferguson agrees to pay a civil charge of \$8,000 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. Payment shall be made by check payable to the "Treasurer of Virginia", delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

The payment check must include the Federal Identification Number for Ferguson and a notation that it is tendered for payment of a civil charge pursuant to this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Ferguson, for good cause shown by Ferguson, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to Ferguson by DEQ on April 25, 2005. 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 Wetland 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.
3. For purposes of this Order and subsequent actions with respect to this Order, Ferguson admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
4. Ferguson 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. Ferguson declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, 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 enforce this Order.
6. Failure by Ferguson 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. Ferguson 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. Ferguson shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Ferguson shall notify the DEQ Regional 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 Regional Director within 24 hours of learning of any condition above, which Ferguson 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.

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

And it is so ORDERED this 8th day of DECEMBER, 2005.

Steven A. Dietrich
FOR Robert G Burnley, Director
Department of Environmental Quality

Ferguson voluntarily agrees to the issuance of this Order.

By: J. Holden Ferguson

Date:

10/7/05

Commonwealth of Virginia

City/County of Roanoke

The foregoing document was signed and acknowledged before me this 7th day of October, 2005, by J. Hatcher Ferguson III, who is
(names)

Vice President of Ferguson on behalf of the Corporation.
(title)

Mary A. Monroe
Notary Public

My commission expires: June 30, 2007



Appendix A

In addition to the foregoing, the Board orders, and Ferguson agrees to implement, the following terms and conditions of this Appendix:

1. Within ^{12/21/05}60 days of issuance of a VWP permit, Ferguson shall finalize and submit (original and one copy) an approvable compensation plan (CP) to DEQ for review and approval. Upon the CP approval by DEQ, the terms of the CP shall become incorporated into and enforceable under this Order. The CP shall include all of the information required by the regulation entitled "Virginia Water Protection General Permit for Impacts from Development and Certain Mining Activities", Section 9 VAC 25-690-100, Part II.A.8 and 9. Ferguson shall respond to DEQ's written comments on the CP within 30 days of receiving such comments. The CP shall be approved by DEQ prior to any additional construction activities occurring in the State waters present on the project site.
2. Wetland compensation site construction shall be completed in accordance with the schedule provided in the approved CP, but not later than May 31, 2006.