



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY VALLEY REGIONAL OFFICE

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Molly Joseph Ward  
Secretary of Natural Resources

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Regional Director

### STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO 5<sup>TH</sup> STREET STATION VENTURES, LLC FOR 5<sup>TH</sup> STREET STATION Permit No. WP4-13-1602

#### **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 5th Street Station Ventures, LLC, regarding 5<sup>th</sup> Street Station for the purpose of resolving certain violations of State Water Control Law, 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. "5<sup>th</sup> Street" means 5th Street Station Ventures, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. 5<sup>th</sup> Street is a "person" within the meaning of Va. Code § 62.1-44.3.
2. "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.

3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "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.
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. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "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.
11. "Permit" 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.
12. "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.
13. "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.

14. "Property" means the tract of land surrounding Fifth Street and Avon Street in Albemarle County, Virginia, owned by 5<sup>th</sup> Street.
15. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
16. "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.
17. "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.
18. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
19. "USACE" means the United States Army Corps of Engineers.
20. "Va. Code" means the Code of Virginia (1950), as amended.
21. "VAC" means the Virginia Administrative Code.
22. "VRO" means the Valley Regional Office of DEQ, located in Harrisonburg, Virginia.
23. "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. 5<sup>th</sup> Street owns and operates a construction/development business at the Property in Albemarle County, Virginia. 5<sup>th</sup> Street is subject to a Permit issued by DEQ on December 11, 2013; Three Notice of Plan Changes (NOPC) were approved on December 23, 2014, May 7, 2015, and March 2, 2016. The Permit authorizes 5<sup>th</sup> Street to permanently impact

to 0.55 acre of palustrine forested wetland (PFO), 0.34 acre of open water, and 258 linear feet of stream channel.

2. On September 28, 2015, Department staff inspected the Property for compliance with the requirements of the State Water Control Law, Regulations, and the Permit. Department staff observed the following:
  - a. Fill material in Moores Creek and an unnamed tributary to Moores Creek, with measurable sediment impacting approximately 2,100 linear feet of stream channel. Sedimentation from the Project in Moores Creek ranged from two inches to six inches; Fill material (riprap) was observed on the stream banks in two locations below construction stormwater outfalls, outside of the impact areas authorized by the Permit;
  - b. Silt fence was down in several places along the construction site and sedimentation was observed below the damaged silt fence and in the stream. Sediment basins had substantial accumulations of sedimentation;
  - c. No flagging was observed along nonimpacted stream and wetland areas;
  - d. Solid waste and trashy debris were observed along Moores Creek and the unnamed tributary to Moores Creek. Partial removal/burial was observed and DEQ does not have record of notification or approval.
3. Va. Code § 62.1-44.15:20(A) states: "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: ... conduct the following in a wetland: New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; Filling or dumping; ... or New activities that cause significant alteration or degradation of existing wetland acreage or functions; or Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."
4. 9 VAC 25-210-50(A) states: "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall...fill or discharge any pollutant into, or adjacent to surface waters,...otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses."
5. Permit Part LC.5 states: "Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, or for mining activities covered by this general permit, the standards issued by the Virginia Department of Mines, Minerals and Energy that are effective as those in the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is

- stabilized and shall then be removed.”
6. Permit Part II.E.7 states: “The permittee shall notify DEQ in writing when unusual or potentially complex conditions are encountered which require debris removal or involve potentially toxic substance. Measures to remove the obstruction, material, or toxic substance or to change the location of a structure are prohibited until approved by DEQ.”
  7. Permit Part III.Q.1-4 states: “Except in compliance with this VWP general permit, it shall be unlawful for the permittee to: Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; Excavate in a wetland; Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; or On and after October 1, 2001, conduct the following activities in a wetland: New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; Filling or dumping; Permanent flooding or impounding; or New activities that cause significant alteration or degradation of existing wetland acreage or functions.”
  8. On October 28, 2015, DEQ issued NOV No. 15-10-VRO-001 for the violations listed in paragraphs C(3) through C(7).
  9. On November 16, 2015, Department staff met with representatives of 5<sup>th</sup> Street to discuss the violations. 5<sup>th</sup> Street agreed to: submit a NOPC to include additional impacts planned as a result of armoring stormwater outfalls, pay for mitigation credits for additional impacts, remove trash and debris from stream banks and floodplain areas, stabilize any exposed areas, repair E&S controls, and flag areas that are to remain undisturbed.
  10. Based on the results of the September 28, 2015 inspection and the November 16, 2015 meeting, the Board concludes that 5<sup>th</sup> Street has violated Permit Part I.C.5, Permit Part II.E.7, Permit Part III.Q.1-4, Va. Code § 62.1-44.15:20(A), and 9 VAC 25-210-50(A) as described in paragraphs C(2) through C(9), above.
  11. 5<sup>th</sup> Street has submitted documentation that verifies that the violations described in paragraphs C(3) through C(7) above, have been corrected.

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

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders 5<sup>th</sup> Street and 5<sup>th</sup> Street agrees to:

1. Pay a civil charge of \$32,987.50 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, 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

5<sup>th</sup> Street 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). If the Department has to refer collection of moneys due under this Order to the Department of Law, 5<sup>th</sup> Street shall be liable for attorneys' fees of 30% of the amount outstanding.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of 5<sup>th</sup> Street for good cause shown by 5<sup>th</sup> Street, 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 and in NOV No. 15-10-VRO-001 dated October 28, 2015. 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, 5<sup>th</sup> Street admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. 5<sup>th</sup> Street 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. 5<sup>th</sup> Street 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 5<sup>th</sup> Street 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. 5<sup>th</sup> Street 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. 5<sup>th</sup> Street shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. 5<sup>th</sup> Street 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 5<sup>th</sup> Street. Nevertheless, 5<sup>th</sup> Street 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 5<sup>th</sup> Street has completed all of the requirements of the Order;
  - b. 5<sup>th</sup> Street 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 5<sup>th</sup> Street.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve 5<sup>th</sup> Street 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 5<sup>th</sup> Street 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 5<sup>th</sup> Street certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind 5<sup>th</sup> Street to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of 5<sup>th</sup> Street.
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, 5<sup>th</sup> Street voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 19<sup>th</sup> day of December, 2016



Amy T. Owens, Regional Director  
Department of Environmental Quality

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5th Street Station Ventures, LLC voluntarily agrees to the issuance of this Order.

Date: 10-26-16 By: [Signature], Manager  
(Person) (Title)  
5th Street Station Ventures, LLC

State of Georgia  
~~Commonwealth of Virginia~~  
City/County of Douglas

The foregoing document was signed and acknowledged before me this 26 day of October, 2016, by Steve Collins who is manager of 5th Street Station Ventures, LLC, on behalf of the company.

[Signature]  
Notary Public

not applicable  
Registration No.

My commission expires: 9-27-2020

Notary seal:

