

**DEPARTMENT OF ENVIRONMENTAL QUALITY  
WATER RESOURCES DIVISION**

Mr. Vern Brockway  
6523 Oak Grove  
Howell, Michigan 48843

**File Number: 13-47-0030-V**

**CONSENT AGREEMENT**

This Consent Agreement (Agreement) is entered into by and between Mr. Vern Brockway (Mr. Brockway) and the Water Resources Division (WRD), Michigan Department of Environmental Quality (DEQ) and shall become effective on the date this Agreement is executed by Mr. Brockway and the WRD, whichever is later (Effective Date). All times for performance of activities under this Agreement shall be calculated from the Effective Date.

**RECITALS**

By correspondence dated November 4, 2013, the WRD issued a Violation Notice (Notice) pursuant to Part 303, Wetlands Protection of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, to Mr. Brockway. The WRD alleged within the Notice that Mr. Brockway placed fill material and excavated material within a wetland area (Alleged Unauthorized Activities) regulated under the provisions of Part 303 on property located at 6523 Oak Grove Road in section 35 of Cohoctah Township, Livingston County, (Property).

The WRD requested within the Notice (13-47-0030-V) that Mr. Brockway provide a response to the Notice to the WRD within 30 days of the date of the Notice and further advised that all unauthorized activities occurring within regulated areas on the Property stop.

Mr. Brockway had control of the Property at the time of the Alleged Unauthorized Activities. The WRD alleges that the Alleged Unauthorized Activities occurred without benefit of a permit issued under the authority of Part 303.

The WRD and Mr. Brockway desire to resolve this dispute without the necessity of additional administrative and/or judicial proceedings; and

This Agreement identifies the necessary actions to be taken by Mr. Brockway and the WRD, and imposes certain conditions upon performance of these actions. Successful completion of the terms of this Agreement will, in the opinion of the WRD, meet the statutory provisions of Part 303 and thereby resolve those allegations set forth in the Notice.

**NOW, THEREFORE**, in consideration of the mutual covenants contained herein, the parties agree as follows:

## **COMPLIANCE AND IMPLEMENTATION SCHEDULE**

### **AFTER-THE FACT PERMIT AND WETLAND RESTORATION REQUIREMENTS**

1. Within 15 days of the effective date of this Agreement, Mr. Brockway shall submit to the address identified in Paragraph 10 of this Agreement an additional \$500.00 after-the-fact application permit processing fee to allow for WRD to complete processing of DEQ File: 08-47-0016-P.
2. Within 45 days of the effective date of this Agreement, Mr. Brockway shall submit to the WRD at the address identified in Paragraph 10 of this Agreement wetland restoration plans that clearly identify the area of wetlands on the Property to be restored. The revised plans shall include grading and wetland planting plans and a schedule for completion of restoration activities for the area of wetland to be restored on the Property no later than June 1, 2015. The site plans for the Property shall also include and identify the following: (1) the wetland area that is proposed to be impacted by issuance of a permit for DEQ File: 08-47-0016-P, (2) the 0.2 acre wetland mitigation area, and (3) all areas to be included within the Conservation Easement to be conveyed to the DEQ as required as a condition of issuance of the permit for DEQ File: 08-47-0016-P.
3. Within 15 days of receipt of the wetland restoration and planting plans identified in Paragraph 2, the WRD shall provide to Mr. Brockway and his wetland consultant written approval and/or revisions to the proposed plans and the schedule for completion of the restoration activities.
4. Within 45 days of the effective date of this Agreement, Mr. Brockway shall provide to the WRD at the address identified in Paragraph 10 of this Agreement, as a requirement to ensure completion of the wetland restoration and any wetland mitigation requirements of the permit, a financial assurance in the amount of \$30,000 in a form identical to the financial assurance models on the WRD's Web site available at: [www.michigan.gov/wetlands](http://www.michigan.gov/wetlands).
5. Upon receipt of the additional application processing fee identified in Paragraph 1, the wetland restoration plans and revised wetland mitigation plans identified in Paragraph 2, and the Financial Assurance identified in Paragraph 4 of the Agreement, the WRD shall complete processing of DEQ File 08-47-0016-P. Upon issuance of the ATF permit by the WRD, Mr. Brockway shall comply with the requirements and conditions of the permit and the WRD-approved wetland restoration requirements and work schedule.
6. The Wetland Restoration Areas shall be restored in accordance with the wetland restoration plans and work schedule identified in Paragraph 2 of this agreement and approved by the WRD. Upon completion and WRD approval of the grading and planting activities for the wetland restoration area and the wetland mitigation requirements of the permit the WRD shall release, upon receipt of a written request, one half of the financial assurance identified in Paragraph 4 of this Agreement. The remaining financial assurance shall be released upon completion of all required wetland restoration requirements of Paragraphs 8 and 9 of this Agreement and any additional requirements for wetland mitigation as provided within a permit issued for DEQ File: 08-47-0016-P.

7. If the WRD determines through the ATF application review process that an ATF permit cannot be issued to Mr. Brockway, then this Agreement shall be deemed null and void. In such event, the WRD reserves the right to pursue all available enforcement options as provided by law. Mr. Brockway reserves the right to contest the denial of the ATF application through the DEQ's administrative hearing process or as otherwise provided by law.

#### **WETLAND RESTORATION MONITORING REQUIRMENTS**

8. Mr. Brockway shall be responsible for monitoring the Wetland Restoration Area for a period of three (3) years following completion of the planting work. An experienced wetland consultant shall conduct the monitoring. A complete assessment of the wetland's development shall be made annually, and shall be provided to the WRD with annual reports no later than January 31 of each year. Utilizing recognized and established scientific procedures the annual monitoring report shall be prepared in accordance with the requirements found in Exhibit A.
9. Should the Wetland Restoration Area fail to become established as a wetland community as designed after two (2) complete growing seasons, or should it fail to demonstrate satisfactory progress towards a self-sustaining wetland system as designed, Mr. Brockway shall:
  - A. Assess the problem(s) and identify the probable causes;
  - B. Develop reasonable and necessary corrective measures as a revision to the original plan;
  - C. Reasonable and necessary corrective measures may include, but are not limited to, regrading soils to improve hydrology, reseeding and/or replanting of wetland plants;
  - D. Submit a copy of the proposed corrective measures to the WRD for review;
  - E. Upon WRD approval, immediately implement the corrective measures.
10. All notices, applications, reports, and any other submittals required to be provided by Mr. Brockway to the WRD within the provisions of this Agreement shall be addressed, unless otherwise indicated, to:

Thomas Kolhoff  
Michigan Department of Environmental Quality  
Water Resources Division  
525 West Allegan Street  
P.O. Box 30242  
Lansing, Michigan 48909

### GENERAL PROVISIONS

11. **PROPERTY ACCESS**: WRD staff shall have access to the Property to inspect and determine compliance with this Agreement. The WRD shall provide a minimum of a 24 hour advance notice to Mr. Brockway prior to inspection of the Property.
12. **STIPULATED PENALTIES**: Mr. Brockway shall pay stipulated penalties of One Hundred (\$100.00) Dollars per day for his failure to comply with obligations imposed on him by the provisions of Paragraphs 1 through 9 of this Agreement. Mr. Brockway will be required to pay stipulated penalties under this provision only for his own actions or failures, and not any actions or failures of DEQ or WRD. Mr. Brockway upon receipt of a notice of any violation governed by this provision shall have a ten (10) day right to cure the violation before the imposition of any penalty under this provision.
13. **STIPULATED PENALTY PAYMENT**: To insure timely payments of any stipulated penalties provided in Paragraph 11 of this Agreement, Mr. Brockway shall pay an interest penalty to the State of Michigan for failure to make a timely payment. This interest penalty shall be based upon a rate of 12 percent per year compounded annually, using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally paid in full. All payments associated with this Paragraph 9 shall be paid in the form of a cashiers check payable to the "State of Michigan", and sent to:  
  
Accounting Services Division  
Cashiers Office for DEQ  
P.O. Box 30657  
Lansing, Michigan 48909-8157
14. **PENALTY PAYMENT DISPUTE**: Mr. Brockway agrees not to contest the legal basis for any stipulated fines assessed pursuant to Paragraph 11 of this Agreement, but reserves the right to dispute in a court of competent jurisdiction the factual basis upon which a demand by the WRD of stipulated fines is made. Mr. Brockway and the WRD agree this does not preclude the possibility of informal resolution of disputed issues directly between Mr. Brockway and the WRD.
15. **RESOLUTION OF WRD VIOLATION NOTICE**: As part of the successful completion of the terms of this Agreement, the WRD shall deem resolved the Notice and close WRD complaint number 13-47-0030-V.
16. **OTHER PERMIT REQUIREMENTS**: With respect to the Property, Mr. Brockway shall not conduct any activity within regulated wetlands except as provided by this Agreement, or as authorized by separate permit issued by the WRD. This Agreement does not obviate the need to acquire additional state, local, or federal permits as may be required by law.
17. **FORCE MAJEURE**: Mr. Brockway shall perform the requirements of this Agreement within the time limits established herein, unless performance is prevented or delayed by events, which constitute a "Force Majeure" event. For the purpose of this Agreement, "Force Majeure" means an occurrence or non-occurrence arising from causes not foreseeable, beyond the control of, and without the fault of, Mr. Brockway, such as an "Act of God", untimely review of permit applications or submissions by the WRD or other applicable authority; and acts or omissions of third parties that could not have been avoided or

overcome by Mr. Brockway's due diligence, and that delay the performance of an obligation under this Agreement. "Force Majeure" does not include, among other things, unanticipated or increased costs, failure to secure funding, change in financial circumstances, or failure to obtain a permit or license as a result of Mr. Brockway's actions or omissions.

18. **FORCE MAJEURE NOTICE**: Mr. Brockway shall notify the WRD by telephone within 48 hours of discovering any event, which causes delay in their compliance with any provision of this Agreement. Verbal notice shall be followed by written notice within ten calendar days, and shall describe in detail the anticipated length of delay, the precise cause of the delay, the measures taken by Mr. Brockway to prevent or minimize the delay, and the timetable by which those measures shall be implemented. Failure of Mr. Brockway to comply with the notice requirements above shall render the "Force Majeure" exemption void and of no effect as to the particular incident involved.
19. **ASSIGNMENT OF RIGHTS**: This Agreement shall be binding on the parties, their officers, servants and employees. In the event that Mr. Brockway sells or transfers any interest in this Property, Mr. Brockway shall retain the obligation to perform any uncompleted work required by this Agreement and shall retain a sufficient interest in the Property necessary for Mr. Brockway to complete the work required by this Agreement.
20. **AGREEMENT AMENDMENTS**: This Agreement may be amended or revoked at any time by a written agreement executed by all parties to this Agreement. No change or modification to the Agreement shall be valid unless in writing and signed by all parties to this Agreement.
21. **DISPUTE RESOLUTION**: Both Parties agree to diligently and in good faith pursue informal negotiations to resolve any disputes arising out of this Agreement prior to resorting to judicial enforcement. Such negotiations shall proceed in a timely manner.
22. **DENIAL OF LIABILITY**: Nothing contained in this Consent Agreement shall be construed as an admission of liability or wrong doing by Mr. Brockway. The WRD and Mr. Brockway agree that the signing of this Agreement is for settlement purposes only.
23. **AGREEMENT PROVISIONS**: The invalidity or unenforceability of any particular portion of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if invalid or unenforceable provisions were omitted.
24. **GOVERNING LAW**: This Agreement shall be executed and delivered in the State of Michigan and shall be governed by and construed and enforced in accordance with the laws of the State of Michigan.
25. **TERMINATION OF AGREEMENT**: This Agreement shall remain in full force for a period of at least 3 (three) complete growing seasons following completion of the wetland restoration work for the Wetland Restoration Area as described in Paragraphs 1 through 6 of this Agreement. This Agreement may remain in full force for an unspecified time period contingent upon successful completion of all requirements of this Agreement. This Agreement shall terminate only upon written notice of termination issued by the WRD Chief. Prior to issuance of a written notice of termination, Mr. Brockway shall submit a request consisting of a written certification that Mr. Brockway has fully complied with all

requirements of this Agreement and has made all payments including stipulated penalties required by this Agreement, which certification shall not be unreasonably withheld.

26. **ENTIRE AGREEMENT:** This Agreement constitutes the entire Agreement among the parties hereto and contains all of the agreements among said parties with respect to the subject matter thereof.
27. Mr. Brockway represents and warrants to the DEQ and the DEQ relies upon this representation in entering into this Agreement, that Mr. Brockway has and will continue to have, throughout the period that this Agreement is in effect, the ability to access the Property, to perform the restoration work under this Agreement, and to provide DEQ with access to determine compliance with this Agreement until such time as this Agreement is terminated pursuant to Paragraph 25 herein. Material breach of this representation by Mr. Brockway may invalidate this Agreement and allow the DEQ to proceed with any appropriate enforcement action thereto.

**IN WITNESS WHEREOF**, the parties hereto make and execute this Agreement on the date first above written. The undersigned certify they are fully authorized by the party they represent, to enter into this Agreement and to legally bind that party to this Agreement.

**Vern Brockway**

By: \_\_\_\_\_

Vern Brockway

Date: \_\_\_\_\_

1/30/15

**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY  
WATER RESOURCES DIVISION**

By: \_\_\_\_\_

William Creal, Chief  
Water Resources Division

Date: \_\_\_\_\_

2-9-15

**APPROVED AS TO FORM:**

By: \_\_\_\_\_

Kelly M. Drake  
Assistant Attorney General  
Environment, Natural Resources and  
Agriculture Division  
Department of Attorney General

Date: \_\_\_\_\_

2/4/15

## Exhibit A

### Wetland Restoration Monitoring

Vern Brockway shall monitor the Wetland Restoration Area for a minimum of three (3) years following grading, planting, and introduction of hydrology. A monitoring report, which compiles and summarizes all data collected during the monitoring period, shall be submitted annually by Mr. Brockway. Monitoring reports shall cover the period of January 1 through December 31 and be submitted to the MDEQ prior to January 31 of the following year. An experienced wetland consultant shall conduct the following activities and provide the information collected in the monitoring reports:

- a. Measure inundation and saturation at all staff gauges, monitoring wells, and other stationary points shown in the mitigation plan monthly during the growing season. Hydrology data shall be measured and provided at sufficient sample points to accurately depict the water regime of each wetland type.
- b. Sample vegetation in plots located along transects in the Wetland Restoration Area once between July 15 and August 31. The number of sample plots necessary within each wetland type shall be determined by use of a species-area curve or other approach approved by the MDEQ. The minimum number of sample plots for each wetland type shall be no fewer than five (5). Sample plots shall be located on the sample transect at evenly spaced intervals or by another approach acceptable to the MDEQ. If additional or alternative sample transects are needed to sufficiently evaluate each wetland type, they must be approved in advance in writing by the MDEQ.

The herbaceous layer (all non-woody plants and woody plants less than 3.2 feet in height) shall be sampled using a 3.28 foot by 3.28 foot (one square meter) sample plot. The shrub and tree layer shall be sampled using a 30-foot radius sample plot. The data recorded for each herbaceous layer sample plot shall include a list of all living plant species, and an estimate of percent cover in five (5) percent intervals for each species recorded, bare soil areas, and open water relative to the total area of the plot. The number and species of surviving, established, and free-to-grow trees and surviving, established, and free-to-grow shrubs shall be recorded for each 30-foot radius plot.

Provide plot data and a list of all the plant species identified in the plots and otherwise observed during monitoring. Data for each plant species must include common name, scientific name, wetland indicator category from the U.S. Fish and Wildlife Service's "National List of Plant Species That Occur in Wetlands" for Region 3, and whether the species is considered native according to the Michigan Floristic Quality Assessment (Michigan Department of Natural Resources, 2001). Nomenclature shall follow Voss (1972, 1985, and 1996) or Gleason and Cronquist (1991).

The location of sample transects and plots shall be identified in the monitoring report on a plan view showing the location of wetland types. Each transect shall be permanently staked at a frequency sufficient to locate each transect in the field.

- c. Delineate any extensive (greater than 0.01 acre in size) open water areas, bare soil areas, areas dominated by invasive species, and areas without a predominance of wetland vegetation, and provide their location on a plan view.
- d. Document any sightings or evidence of wading birds, songbirds, waterfowl, amphibians, reptiles, and other animal use (lodges, nests, tracks, scat, etc.) within the wetland noted during monitoring. Note the number, type, date, and hour of the sightings and evidence.
- e. Inspect the site, during all monitoring visits and inspections, for oil, grease, man-made debris, and all other contaminants and report findings. Rate (e.g., poor, fair, good, excellent) and describe the water clarity in the mitigation wetland.
- f. Provide annual photographic documentation of the development of the Wetland Restoration Area during vegetation sampling from permanent photo stations located within the Wetland Restoration Area. At a minimum, photo stations shall be located at both ends of each transect. Photos must be labeled with the location, date photographed, and direction.
- g. Provide the number and type of habitat structures placed and representative photographs of each structure type.
- h. Provide a written summary of data from previous monitoring periods and a discussion of changes or trends based on all monitoring results. This summary shall include a calculation of the acres of each wetland type established, a plan view drawing depicting each ecological type, and identification of all performance standards and whether each standard has been met.
- i. Provide a written summary of all the problem areas that have been identified and potential corrective measures to address them.