COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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L. Preston Bryant, Jr
Secretary of Natural Resources

David K. Paylor
Director

Francis L. Daniel
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
LYON SHIPYARD, INC.
FOR
CLAIBORNE AVENUE FACILITY
VPDES Permit NO. VA0004405

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 62.1-44.15(8a) and (8d), between the State Water Control Board and Lyon Shipyard, Inc., regarding the Claiborne Avenue facility for the purpose of resolving certain violations of environmental law and/or 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. "Brown Avenue facility" means the Lyon ship-repair facility at the Foot of Brown Avenue in Norfolk, Virginia, that is adjacent to and contiguous with the Claiborne Avenue facility.

3. "Crandall MRW" means an MRW in which the ship or vessel to be serviced is mounted on blocks that are positioned on a large submerged platform that is pulled shoreward by mechanical means along rails mounted on an inclined concrete frame situated between two bulkheads that extend into a body of water. When fully deployed, the platform, supported by the concrete frame, is suspended above the surface of the water between the two bulkheads.

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

5. "Director" means the Director of the Department of Environmental Quality.

6. "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.

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

8. "Facility" or "Claiborne Avenue facility" means the Lyon facility at the Foot of Claiborne Avenue in Norfolk, Virginia, at which Lyon provides full-service repair and maintenance of ships and vessels. The Facility was purchased by Lyon on or about May 1, 2007.

9. "Industrial waste" means liquid or other wastes resulting from any process of industry, manufacture, trade, or business or from the development of any natural resources. Va. Code § 62.1-44.3.

10. "Lyon" means Lyon Shipyard, Inc., certified to do business in Virginia, and its affiliates, partners, subsidiaries and parents.

11. "Marine railway" or "MRW" means a mechanical device by which a ship or vessel is removed from the water by means of a frame or platform that retracts shoreward along rails.

12. "Order" means this document, also known as a "Special Order by Consent" or a "Consent Special Order."

13. "Owner" or "operator" means the owner or operator of any facility or activity subject to regulation under the VPDES program.

14. "Person" means one or more individuals, a corporation, a partnership, an association, a governmental body, a municipal corporation, or any other legal entity. Va. Code § 62.1-44.3.

15. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-190-10; 9 VAC 25-210-10.

16. "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 (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) 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; (ii) the discharge of untreated sewage by any owner into state waters; and (iii)

contributing to the contravention of standards of water quality duly established by the Board, are "pollution" for the terms and purposes of this chapter. Va. Code § 62.1-44.3.

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; 9 VAC 25-210-10.

18. "Surface water" means all state waters that are not ground waters as defined in § 62.1-255 of the Code of Virginia.

19. "SWP3" means a storm water pollution prevention plan.

20. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.

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

22. "VAC" means Virginia Administrative Code.

23. "VPDES" means Virginia Pollutant Discharge Elimination System.

24. "VPDES Permit" means VPDES Permit No. VA0004405.

25. "VPDES Regulation" means 9 VAC 25-31-10 *et seq.*- the VPDES Permit Regulation.

26. "VWP" means Virginia Water Protection.

27. "VWP permit" means an individual or general permit issued by the Board under § 62.1-44.15:20 of the Code of Virginia that authorizes activities otherwise unlawful under § 62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.

28. "VWPP Regulation" means 9 VAC 25-210-10 *et seq.* – the Virginia Water Pollution Prevention (VWPP) Permit Regulation.

SECTION C: Finding of Facts and Conclusions of Law

1. Lyon is the owner and operator of the Claiborne Avenue facility in Norfolk, Virginia, where it repairs and maintains ships and other vessels. Lyon is considered a "person" under Va. Code § 62.1-44.3. On or about May 1, 2007, Lyon had purchased the Claiborne Avenue facility from Norfolk Shiprepair & Drydock Company, Inc. ("Norfolk Shiprepair"). Ships and vessels being serviced at the Facility are mounted on one of two MRWs. One of the MRWs is a conventional system that hauls the vessel landward of the high tide line; the other is a Crandall MRW. The Facility is located on the Eastern Branch of the Elizabeth River ("Eastern Branch"). The Eastern Branch is located in the James River Basin and is listed in DEQ's 305(b) report as impaired

2. On February 21, 2008, DEQ compliance staff ("staff") conducted a site inspection of the Facility and observed a long-reach excavator positioned on one of the bulkheads adjacent to the Crandall MRW removing spent abrasive blast material ("ABM") and other

subaqueous material from under the water between the bulkhead and the Crandall MRW frame and placing it in a dump truck.

3. ABM is considered a pollutant pursuant to 9 VAC 25-31-10 of the VPDES Regulation and 9 VAC 25-210-10 of the VWPP Regulation because it may cause or contribute to pollution of State waters.

4. The Eastern Branch and the waters between the bulkheads and the Crandall MRW frame are considered State waters pursuant to 9 VAC 25-210-10 of the VWPP Regulation and § 62.1-44.3 of the Code of Virginia.

5. Va. Code § 62.1-44.15:20.A and 9 VAC 25-210-50 of the VWPP Regulation prohibit dredging, filling, or discharging any pollutant into or adjacent to surface waters without a VWP permit. Lyon had not obtained a VWP permit authorizing the excavating of the subaqeous bottoms between the bulkheads and the Crandall MRW frame or the discharge of excavated material containing ABM on the bulkhead adjacent to State waters.

6. The VPDES Permit for the Claiborne Avenue facility was issued to Norfolk Shiprepair on September 21, 2004; it expires on September 20, 2009. The VPDES Permit was modified on June 1, 2007, to reflect Lyon's acquisition of the Facility. The VPDES Permit authorizes Lyon to discharge wastewater for MRW operations and process wastewater associated with vessel repair and/or maintenance from listed industrial outfalls (Outfalls 001 and 002 corresponding, respectively, to the Crandall and conventional MRWs) and storm water outfalls (Outfalls 003, 901 and 902) to the Eastern Branch. Lyon has submitted a timely application to renew the VPDES Permit.

7. Part I.B.7 of the VPDES Permit requires Lyon to comply with Best Management Practices ("BMPs") according to requirements listed in the VPDES Permit.

8. During the DEQ facility inspection on February 21, 2008, DEQ staff documented VPDES Permit BMP compliance deficiencies including the following:

   a. ABM, welding rods and a zinc anode (anti-corrosive compound) were observed in the water in the vicinity of the conventional MRW. Part I.B.7.a (3) of the VPDES Permit requires that the Facility be cleaned on a regular basis to minimize the possibility that runoff will carry spent abrasives, paints, solvents, cleaners, anti-corrosive compounds, paint chips, scrap metal, trash, garbage, petroleum products or other debris into State water. Part I.B.7.a (30) of the VPDES Permit requires that material (spent abrasives, paint chips, etc.) be cleaned up from the area in the vicinity of MRWs before the incoming tide.

   b. ABM was present throughout the Facility, on the ground, in the water adjacent to both MRWs and on the frame of the Crandall MRW. Lyon asserts that the ABM was an accumulation from historic operations at the Facility. ABM had accumulated in State waters adjacent to the Crandall MRW to the extent that it was above the water line. There were few apparent controls in place to prevent the ABM from entering State waters, other than some intermittently placed hay bales. It was observed in some locations that the ABM had accumulated above the tops of the hay bales. Also, in several areas there were erosion patterns through ABM toward State waters. In addition to the requirements outlined in Part I.B.7.a (3) and Part I.B.7.a (30) cited above, the VPDES Permit, at Part

I.B.7.a (4), provides that MRW carriages shall be cleaned before launching to prevent the discharge of pollutants to the waterway and cleaned on a regular basis so as to prevent rain from washing material into receiving waters.

c. Paint cans were open and exposed to rainfall; one can had tipped over and its contents spilled on the ground. Part I.B.7.a (16) of the VPDES Permit provides that solid chemicals, chemical solutions, paints, oils, solvents, acids, caustic solutions and waste materials, including used batteries, shall be stored in a manner which will prevent the entry of these materials into waters of the State, including ground waters. Part I.B.7.a (20) of the VPDES Permit provides that paint and solvent spills shall be treated as oil spills and shall be prevented from reaching storm drains or deck drains and subsequent discharge into the water. The location and amount of the spilled paint supported the conclusion that the paint materials might reasonably be expected to be washed into State waters by a rainfall event.

d. During the inspection, DEQ collected for review the weekly audit checklists of BMP compliance required by Part I.B.7.b of the VPDES Permit. The review revealed that Lyon had not provided the checklist for the week of October 28, 2007, to November 3, 2007.

9. Lyon violated VPDES Permit conditions Part I.B.7.a (3), (4), (16), (20), and (30) and Part I.B.7.b as noted in paragraph C.8 of this Order.

10. Lyon is required to manage storm water at the Facility according to requirements outlined in Part I.D of the VPDES Permit and, specifically, to develop and implement a Facility SWP3 according to requirements outlined in Part I.D.4 and Part I.D.5.c of the VPDES Permit.

11. Lyon submitted an SWP3 for the Facility on April 20, 2008, which reportedly was the SWP3 for the Brown Avenue facility that had been modified in August 2007 to incorporate the Claiborne Avenue facility.

12. During the Facility inspection on February 21, 2008 DEQ staff documented the following VPDES Permit compliance deficiencies with respect to storm water management conditions:

a. Lyon did not submit by February 10, 2008, the results of an annual toxicity screening of storm water discharged from Outfall 003 as required by Part I.D.2.d of the VPDES Permit.

b. The SWP3 was not signed or certified as required by Part I.D.4.b.(1) and Part II.K of the VPDES Permit.

c. The facility SWP3 site map required by Part I.D.4.d.(2)(a)(i) and Part I.D.5.c.(1) of the VPDES Permit showed only two of the required elements.

d. The weekly facility inspection checklist form contained in the SWP3 did not include information concerning compliance with the SWP3 as required by Part I.D.4.d.(3)(d) and Part I.D.5.c.(3) of the VPDES Permit.

e. The comprehensive site compliance evaluation ("CSCE") for 2007 did not address all areas of the facility that might contribute to storm water contamination, did not record compliance with or needed changes to the SWP3, and was not signed and certified as required by Part I.D.4.d.(4) of the VPDES Permit.

13. Lyon violated VPDES Permit conditions Part I.D.2.d, Part I.D.4.b.(1), Part I.D.4.d (2)(a)(i), Part I.D.4.d.(3)(d), Part I.D.4.d.(4), Part I.D.5.c.(1), Part I.D.5.c.(3), and Part II.K as noted in paragraph C.12 of this Order.

14. Part II.F.1 of the VPDES Permit prohibits Lyon from discharging into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances except in compliance with the VPDES Permit. Part II.G of the VPDES Permit requires Lyon to notify DEQ immediately upon discovery of an unpermitted discharge.

15. Va. Code § 62.1-44.5 states that "[E]xcept in compliance with a certificate issued by the Board, it is unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."

16. Va. Code § 62.1-44.15(5a) states that a VPDES permit and a VWP permit are "certificates" under the statute.

17. The VPDES Regulation at 9 VAC 25-31-50 prohibits discharges to State waters except in compliance with the VPDES Permit. Additionally, the VPDES Regulation requires that, when such discharges occur, they are to be reported to the Department.

18. Va. Code § 62.1-44.14 states that the Board may delegate its authority to issue certificates to the Director. The Board delegated this authority to the Director in 1976.

19. The Department has issued no permits or certificates to Lyon for the Claiborne Avenue facility other than VPDES Permit No. VA0004405.

20. During the Facility inspection on February 21, 2008, DEQ staff observed Lyon employees shoveling spent ABM and other waste material from the Crandall MRW framework into State waters. Lyon did not report this activity to DEQ.

21. During a Facility inspection on February 22, 2008, DEQ staff observed Lyon employees washing spent ABM and other waste material from the Crandall MRW framework into State waters with a hose. Lyon did not report this activity to DEQ.

22. Lyon has violated the VPDES Permit, the VPDES Permit Regulation and the Va. Code by discharging ABM into State waters while concurrently failing to comply with the conditions of the VPDES Permit. Additionally, Lyon has violated the VPDES Permit, the VPDES Permit Regulation, and the Va. Code by failing to report such discharges to DEQ.

23. Lyon responded to the February 21 and 22, 2008 staff inspections by letter dated February 25, 2008. Lyon submitted an additional response dated April 20, 2008, that included an updated SWP3, except for the Facility site map.

24. On April 10, 2008 DEQ issued Notice of Violation ("NOV") W2008-02-T-102 to Lyon. The NOV advised Lyon of the alleged violations of VA Code § 62.1-44.15:20.A; 9 VAC 25-210-50; and VPDES Permit conditions Part I.B.7.a (3), (4), (16), (20), and (30), Part I.B.7.b, Part I.D.2.d, Part I.D.4.b.(1), Part I.D.4.d.(2)(a)(i), Part I.D.4.d.(3)(d), Part I.D.4.d.(4), Part I.D.5.c.(1), Part I.D.5.c.(3), Part II.K, Part II.F.1 and Part II.G revealed during the inspections conducted by DEQ staff on February 21 and February 22, 2008.

25. Lyon's counsel responded to the NOV by letter dated April 25, 2008.

26. DEQ enforcement and compliance staff ("staff") conducted a site visit on July 21, 2008 and met with Lyon's vice president, environmental manager and counsel. The platform of the Crandall MRW had been pulled landward. No spent ABM was apparent on the platform or on the framework that was visible beneath the platform. There also was no ABM piled on the ground at the head of the Crandall MRW. Lyon personnel informed staff that spent ABM removed from the MRW frames is normally placed in large metal bins prior to disposal and that, on the day of the DEQ site inspections on February 21 and 22, 2008, the material that had been removed from the water adjacent to the Crandall MRW was being spread on the ground to dry before being placed in the storage bins. They also reported that only 100-120 cubic yards of spent ABM and other sediment had been removed from the water adjacent to the Crandall MRW.

27. Discussions between Lyon and DEQ to resolve the NOV continued intermittently until June 11, 2009. Lyon enters into this Order to settle a dispute over these alleged violations and to avoid litigation concerning them.

SECTION D: Agreement and Order

Accordingly the State Water Control Board by virtue of the authority granted it by Va. Code §§ 62.1-44.15(8a) and (8d), orders Lyon, and Lyon voluntarily agrees to:

1. Perform the actions described in Appendix A of this Order; and

2. Pay a civil charge of $23,184 within 30 days of the effective date of this 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

Lyon shall include its Federal Identification Number with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Lyon, for good cause shown by Lyon, or on its own motion after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specified 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. 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 only, Lyon admits to the jurisdictional allegations, but neither admits nor denies the findings of fact and conclusions of law in this Order.

4. Lyon 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. Lyon 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 modify, rewrite, amend, or enforce this Order.

6. Failure by Lyon 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. Lyon 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 act of God, war, strike, or such other occurrence. Lyon shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Lyon shall notify the DEQ Regional Director 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 of learning of any condition above, which Lyon 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 Lyon. Nevertheless, Lyon 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. Lyon petitions the Director or his designee to terminate the Order after it has completed all the requirements of the Order and the Director or his designee approves the termination of the Order; or

    b. the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Lyon.

    Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Lyon 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 Lyon 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 Lyon 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 Lyon to this document. Any documents to be submitted pursuant to this Order shall be submitted by a responsible official of Lyon.

14. By its signature below, Lyon voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 27th day of October, 2009.

Francis L. Daniel

Francis L. Daniel, Regional Director
Department of Environmental Quality

Lyon Shipyard, Inc., voluntarily agrees to the issuance of this Order.

Date: 7/2/2009 By: [signature], VICE PRES
(Person) (Title)

Commonwealth of Virginia
City/~~County~~ of NORFOLK

The foregoing document was signed and acknowledged before me this 2ND day of JULY, 2009, by THOMAS L. ACKISS, who is VICE PRESIDENT of Lyon Shipyard, Inc., on behalf of the corporation.

Marlene R. Jones
Notary Public

229968
Registration No.

My commission expires: 02/29/12

APPENDIX A

Lyon shall:

1. By January 1, 2010, submit to DEQ Tidewater Regional Office for review and approval an updated SWP3 that contains all elements required by Parts I.D.4 and I.D.5.c of the VPDES Permit. The updated SWP3 may be a stand-alone document that applies only to the Claiborne Avenue facility or may be incorporated into the SWP3 for the Brown Avenue facility so long as the Facility site-map and other components unique to the Claiborne Avenue facility are specifically addressed therein.

2. Not dredge, fill, or discharge any pollutant into or adjacent to State waters, including waters between the Crandall MRW frame and the adjacent bulkheads, except in compliance with a permit issued by DEQ or the United States Army Corps of Engineers.

3. Comply with all conditions of the VPDES Permit.

4. Mail all submittals and reports required by this Appendix A to:

   Mr. Francis L. Daniel, Regional Director
   DEQ, Tidewater Regional Office
   5636 Southern Boulevard
   Virginia Beach, VA 23462