



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

SPECIAL ORDER BY CONSENT WITH THE CITY OF NEWPORT NEWS

SECTION A: Purpose

This is a Consent Special Order issued under the authority of §62.1-44.15(8a) and §62.1-44.15(8d) of the Code of Virginia, between the State Water Control Board and the City of Newport News, 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. "Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in 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 Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Special Order.
6. "VAC" means Virginia Administrative Code.
7. "Regulation" means 9 VAC 25-210-10 *et seq.* - the Virginia Water Protection (VWP) Permit Regulation.

8. "City" means the City of Newport News, owner of the property located at 513 Oyster Point Road in the City of Newport News, Virginia.
9. "Property" means the tract approximately 48 acres in size located at 513 Oyster Point Road in the City of Newport News, Virginia.

SECTION C: Findings of Fact and Conclusions of Law

1. The City of Newport News is the owner of the property approximately 48 acres in size located at 513 Oyster Point Road within the City.
2. On January 8, 2007, DEQ staff observed the Property with apparent unpermitted impacts to non-tidal wetlands. Upon further inspection of the Property, DEQ staff observed one apparent widened pre-existing path, approximately 15 feet wide, through apparent wetlands on the Property. Additionally, DEQ staff observed broken, crushed, and uprooted herbaceous, scrub-shrub and forested wetland vegetation, woody debris piles several feet high, piles of soil ranging from several inches high to approximately three feet high in several locations, and apparent machine-made ruts ranging from several inches deep to approximately up to two feet deep in wetlands on the Property. The City later informed DEQ (see paragraph 4 below) that the impacts were related to widening the pre-existing path. DEQ staff estimated the total area of impacts to be approximately 0.5 acres.
3. On March 9, 2007, DEQ staff performed a follow-up inspection of the Property with representatives from the City and a representative from the US Army Corps of Engineers ("USACOE"). DEQ staff observed the same apparent unpermitted impacts to wetlands on the Property as were observed during the January 8, 2007 site visit.
4. During the March 9, 2007 inspection of the Property, USACOE staff conducted a wetland delineation per the USACOE 1987 Wetland Delineation Manual. USACOE staff subsequently confirmed to DEQ that approximately 0.5 acres of wetlands had been impacted on the Property as observed by DEQ staff on January 8, 2007 and March 9, 2007. City staff reported that impacts to wetlands on the Property occurred when a path was widened from a City-owned maintenance yard on the Property to Deep Creek on December 29, 2006 and used to allow mechanized equipment to remove downed trees from the creek.
5. Code §62.1-44.15:20 states that without a permit it is unlawful to conduct the following activities in a wetland: filling or dumping and, activities that cause significant alteration or degradation of existing wetland acreage or functions. 9 VAC 25-210-50 (A) states that except in compliance with a permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical, or biological properties of surface waters (including wetlands). DEQ alleges that the City violated §62.1-44.15:20 and 9 VAC 25-210-50 (A) by clearing and excavating in wetlands without a permit.
6. DEQ has not issued the City a Virginia Water Protection permit for the impacts observed in its January and March inspections.

7. On March 23, 2007, DEQ issued NOV No. 2007-03-TRO-102 to the City, advising the City of the observations made by DEQ staff during the January 8, 2007 and March 9, 2007 site visits as well as applicable statutory citations relating to the apparent unpermitted impacts to wetlands on the Property.

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 the City, and the City voluntarily agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders the City, and the City voluntarily agrees, to pay a civil charge of \$7,000.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall reference that it is being made as a requirement of this Order. Payment shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer, Commonwealth of Virginia," delivered to:

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

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of the City, for good cause shown by the City, 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 the City by DEQ on March 23, 2007. 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 Property 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. This Order is made by agreement and with the consent of the parties, and does not constitute a finding, adjudication or admission of violation of any federal, state or local law, rule, or regulation or any allegations contained herein.
4. The City 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. The City 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 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 the City 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. The City 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. The City shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. The City 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 it 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 City, its 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 the City. Notwithstanding the foregoing, the City agrees to be bound by any compliance date, which precedes the effective date of this Order.
11. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to the City. Termination of this Order, or any obligation imposed in this Order, shall not

operate to relieve the City 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, the City voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 10/17/08 day of October, 2008.

Francis L. Daniel
Francis L. Daniel

The City of Newport News voluntarily agrees to the issuance of this Order.

By: [Signature]

Date: 8/21/08

Commonwealth of Virginia

City/County of Newport News

The foregoing document was signed and acknowledged before me this 21st day of August, 2008, by Neil A. Morgan, who is

Assistant City Manager of the City of Newport News, on behalf of the City.
(title)

Kathryn D. Knight
Notary Public

My commission expires: 11-30-08

My registration # is 207439.



APPROVED AS TO
FORM
[Signature]
CITY ATTORNEY

APPENDIX A

The City shall:

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

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

2. Within 60 business days of the effective date of the Consent Order, submit to DEQ an approvable restoration and monitoring plan and schedule for the 0.5 acres of impacted wetlands on the Property.
3. Within 30 days of DEQ approval of the restoration and monitoring plan and schedule, implement the approved restoration and monitoring plan and schedule for the 0.5 acres of impacted wetlands on the Property. Upon its approval said plan and schedule shall become a requirement of and enforceable under the terms of this Order.