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
ISSUED TO
GRAYCO, INC.
VWP Permit No. 00-0241

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §62.1-44.15(8a) and §62.1-44.15(8d), between the State Water Control Board and Grayco, Inc., 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. "Va. 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 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.

5. "Order" means this document, also known as a Consent Special Order.

6. "Grayco" means Grayco, Inc., certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.

7. "Property" means the Founders Pointe subdivision located in Isle of Wight County, Virginia.

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

9. "Permit" means VWP Permit No. 00-0241, which became effective September 28, 2001 and expires September 28, 2006.

SECTION C: Findings of Fact and Conclusions of Law

1. In 2001, Grayco began constructing a residential subdivision called Founder's Pointe in Isle of Wight County, Virginia. Recently, Grayco sold the Property to East West Partners, the firm that is now undertaking construction activities at Founder's Point. The site contains wetlands adjacent to Ragged Island Creek, a tributary to the James River.

2. The Permit allows 1.19 acres of impacts to non-tidal forested wetlands, and requires Grayco to mitigate for these impacts at a 2:1 ratio. Grayco did not transfer the Permit to East West Partners when it conveyed the Property.

3. Pursuant to the mitigation requirements provided in the Permit, Grayco preserved 6.45 acres of upland forested buffer on the Founder's Pointe property. This area is not included in the Chesapeake Bay Preservation Act (CBPA) Resource Protection Area (RPA) and was to provide for 0.43 acres of the required 2.38 acres of mitigation (at a 15:1 ratio of forested buffer to forested wetland). These buffers, which border a number of separate headwater wetlands, were required to be 30 feet wide, and to be preserved in perpetuity by deed restrictions. The rest of the mitigation was to be conducted offsite in accordance with a DEQ approved restoration plan.

4. Grayco is subject to a consent order effective October 29, 2003. This consent order settled Permit noncompliance involving the following: impacting wetlands prior to providing required compensatory mitigation, failure to provide required flagging of upland buffers, and failure to provide required signage for preserved wetlands and upland buffers. The order requires compliance with all conditions of the Permit.

5. On April 22, 2006 planning staff for Isle of Wight County notified DEQ staff that the County was investigating clearing of CBPA RPA buffers at Founder's Pointe. On May 9, 2006, DEQ staff inspected the Founders Pointe property to assess ompliance with the Permit. DEQ staff observed that significant vegetation removal had taken place in the deed-restricted upland buffers.

6. The DEQ Founder's Pointe site visit report and photographs dated May 9, 2006 document that in some areas, all vegetation in 30-foot buffer was removed with the exception of a few trees. The Permit allows only removal of dead, fallen, or diseased trees, and sound woodlot management within the buffers.

7. By letter dated May 22, 2006, Isle of Wight County notified East West Partners of site visits conducted at Founder's Point. A response letter from East West Partners dated May 8, 2006 confirmed that bush-hogging occurred within the buffers. DEQ staff estimates that approximately 1.3 acres of deed restricted buffer were bush-hogged or excessively thinned.

8. During a May 9, 2006 site visit at Founder's Point DEQ staff observed that flagging of buffers as required in the Permit was absent or insufficient at a number of locations and that soil had started migrating into the buffer and toward the wetlands.

9. Pursuant to the wetland mitigation plan required by the Permit, Grayco must monitor the offsite mitigation areas for six years over a ten year period beginning in 2004 to ensure success of the created wetland. To date, DEQ has not deemed the mitigation adequate and complete. Therefore Permit renewal is a necessary condition for ensuring that the monitoring requirement is fulfilled.

10. Part I.F.4 of the Permit states that wetland buffer boundaries must be clearly flagged and contractors made aware of their existence prior to the start of any land disturbance activities. Opearting under Grayco's Permit, East West Partners violated this Permit condition by failing to clearly and accurately mark the boundaries of the deed restricted 30-foot buffers.

11. Part I.G.1 and 3 of the Permit outline the acceptance of non-RPA buffers as mitigation and require deed restrictions to preserve the buffers in perpetuity. This section of the Permit also prohibits destruction and removal of trees within the buffer unless dead or diseased or where removal is consistent with sound woodlot management. Operating under Grayco's Permit, East West Partners violated this Permit condition by failing to preserve the deed restricted buffers and by removing an excessive amount of vegetation.

12. Part I.E of the Permit states that the permittee shall apply for renewal of the permit no less than 180 days prior to expiration. The permit must be renewed until the mitigation is deemed adequate and complete by DEQ. Grayco violated the Permit by failing to apply for permit renewal no less than 180 days prior to the expiration date.

13. Virginia Code §62.1-44.31 states that it is unlawful to fail to comply with any special order adopted by the Board. Grayco violated §62.1-44.31 by failing to comply with the Permit conditions as required by the October 29, 2003 Consent Special Order.

14. On June 23, 2006 DEQ issued NOV No. W2006-06-T-0001 to Grayco, advising of the above listed facts and applicable regulatory citations.

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 Grayco, and Grayco agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders Grayco, and Grayco voluntarily agrees, to pay a civil charge of $13,500 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note that it is being made pursuant to this Order and shall include Grayco's Federal Identification Number. 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

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Grayco, for good cause shown by Grayco, 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 Grayco by DEQ on June 23, 2006. 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 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, Grayco admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. Grayco 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. Grayco 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 Grayco 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. Grayco 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. Grayco shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Grayco 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 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, 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 Grayco. Notwithstanding the foregoing, Grayco 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 Grayco. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Grayco 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, Grayco voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of _____, 2006.

_____
Francis L. Daniel

Grayco, Inc. voluntarily agrees to the issuance of this Order.

By: ~~9.15.06~~

Date: 9.15.06

Commonwealth of Virginia
~~City/~~County of Henrico

The foregoing document was signed and acknowledged before me this 15th day of September, 2006, by Horace A. Gray, III, who is
(name)

owner of Grayco, Inc., on behalf of the Corporation.
(title)

Debra C. [illegible]
Notary Public

My commission expires: June 30, 2007.

APPENDIX A

Grayco 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. By September 15, 2006, submit to DEQ an application and fee, as appropriate, for Permit renewal or extension. Upon renewal or extension of the Permit, comply with all conditions of the Permit.

3. By September 15, 2006, submit a preliminary implementation schedule and restoration plan for the impacted wetland buffers specified in Sections C.5 and C.6 of this Order.

4. No later than October 31, 2006, conduct a site evaluation with DEQ wetlands program staff to finalize the implementation schedule and restoration plan. All required plantings shall be completed within 90 days of this evaluation, and deed restricted areas shall be clearly marked.

5. Purchase 0.09 acres of mitigation bank credits pursuant to Va Code 62.1-44.15:5.E from an approved wetland mitigation bank servicing the project area.

6. Comply with all conditions of the Permit.