COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 1105, Richmond, Virginia 23218
TDD (804) 698-4021
www.deq.virginia.gov

Douglas W. Domenech
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4000
1-800-592-5482

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
BANDY, LLC

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and 8(d), between the State Water Control Board and Bandy, LLC for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Adjacent" means bordering, contiguous, or neighboring; wetlands separated from other surface water by man-made dikes or barriers, natural river berms, sand dunes and the like are adjacent wetlands.

2. "Bandy, LLC" or "Bandy" means a limited-liability company authorized to do business in Virginia and its members, affiliates, partners, subsidiaries, and parents. Bandy, LLC is a "person" within the meaning of Va. Code § 62.1-44.3

3. "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.

4. "Bog Turtle" means *Glyptemys* (formerly, *Clemmys*) *muhlenbergii,* a state endangered species in Virginia (*see*, Virginia Department of Game and Inland Fisheries, 1995, Collections Database). The northern population is a federally listed threatened species, while the southern population is federally listed threatened by similarity of appearance special rule (*see* "U.S. Fish and Wildlife Service. 1997. Final rule to list northern

population of bog turtle as threatened and the southern population as threatened due to similarity of appearance. Federal Register 62(213): 59605-59623.")

5. "Channelization of streams" means alteration of a stream by widening, deepening, straightening, cleaning, or paving.

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

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

8. "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.

9. "Ditch" means a linear feature excavated for the purpose of draining or directing surface or ground water. Ditches may also be constructed to collect groundwater or surface water for the purposes of irrigation.

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

11. "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.

12. "Maintenance" means activities that return a feature to its original design standards. For example, a maintained ditch does not exceed the average dimensions of the original ditch (no change is the cross-sectional dimensions). Culverting a ditch is not considered maintenance. Maintenance generally includes, but is not limited to, activities such as excavation of accumulated sediments, re-shaping of side slopes, stabilization of side slopes, armoring, lining, and/or paving where the ditch was previously armored, lined, or paved.

13. "Normal Agricultural Activities" means those activities defined as an agricultural operation in §3.1-22.29 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation, but shall not include any activity for which a permit would have been required as of January 1, 1997, under USC § 1344 or any regulations promulgated pursuant thereto.

14. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

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

16. "Permit" means United States Army Corps of Engineers, federal section 404 permit and the State of Virginia VWP permit which is the commonly referred to as a State section 401 permit.

17. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution.

18. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

19. "Stream" means a natural body of flowing water, such as a brook or a river. Streams do not always contain flowing water but contain flowing water for a significant amount of time such that the stream has a defined bed and bank and an ordinary high water mark.

20. "Site" means the property located in Floyd County (Tax ID 21-36) bounded by Hummingbird Lane, Deer Run Road, and Jacks Mill Road.

21. "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.

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

23. "USACE" means the United States Army Corps of Engineers.

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

25. "VDGIF" means the Virginia Department of Game and Inland Fisheries.

26. "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.

27. "WCRO" means the West Central Regional Office of DEQ, located in Roanoke, Virginia.

SECTION C: Findings of Fact and Conclusions of Law

1. Bandy, LLC owns the Site which consists of bottomland and floodplain forming a wetland through which flows an unnamed reach of the Little River, a tributary to the New River, all of which are state waters.

2. On April 16, 2008, the DEQ conducted a Virginia Water Protection (VWP) inspection of the Site. During the inspection, DEQ staff observed that state waters, in the form of wetlands, had been excavated resulting in the creation of three separate and distinct linear features and the excavated material was discharged adjacent to the linear features into the same state waters (wetlands). Wetland/stream data was collected by DEQ Staff and a Bog Turtle corpse was discovered at the Site, though cause of death was indeterminate. The species identity was confirmed by the Wildlife Diversity Project Manager in the Wildlife Diversity Division of the VDGIF.

3. During the April 16th inspection, a representative of Bandy, LLC claimed that the excavation activity was excluded from the VWP regulations as normal agricultural activity pursuant to 9 VAC 25-210-60 (7) and in addition was only conducting maintenance on existing ditches in accordance with DEQ Guidance Memorandum No. 08-2004, "Regulation of Ditches under the Virginia Water Protection Permit Program".

4. On April 23, 2008, a meeting was held on Site with staff from DEQ, VDGIF, and Bandy, LLC. VDGIF confirmed there was Bog Turtle habitat throughout the bottomland portion of the Site along Jacks Mill Road. VDGIF staff noted that the vegetation, specifically *Juncus effusus and Scirpus sp.,* present around the excavated features is usually associated with the Bog Turtle in Virginia. VGDIF staff also advised all present that the excavated features would concentrate water flow and drain wetland habitat; discharge of the excavated material into the wetland may have buried Bog Turtles at the Site but burial was not confirmed.

5. On May 9, 2008 an inspection at the Site confirmed observations during the prior inspections as follows:

   - Feature #1, on the western side to Jack's Mill Road, had been excavated in the wetland totaling 435 linear feet, at 4 feet wide, and 2 to 3 feet deep. Excavated material was discharged to the same wetland by side casting in piles from 8 to 14 feet wide and from 1 to 3 feet deep.

   - Feature #2, on the eastern side of the Little River, had been excavated in the wetland totaling 413 linear feet long, 5 feet wide, and 1-3 feet deep. Excavated material was discharged to the same wetland by side casting in piles from 4 to 6 feet wide and from 1 to 4 feet deep.

   - Feature #3 had been excavated in the wetland totaling 25 feet long, 1 to 3 feet wide, and 1 to 2 feet deep, with approximately 10 feet in a wetland and 15 feet through a natural river berm. Excavated material was discharged to the same wetland by side casting in piles from 3 to 5 feet wide and from 1 to 4 feet deep. The excavated area created a surficial connection between the wetland and the Little River, where prior to the activity, the wetland was adjacent to the Little River and lacked a surficial connection.

6. Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50 prohibit excavation of, or the discharge of fill material to, state waters without a Permit issued by the Director unless a qualified

exclusion pursuant to 9 VAC 25-210-60 applies. The DEQ staff determined that no exclusions applied and Bandy, LLC did not have a Permit issued by the Director for the above activities.

7. On May 30, 2008, a Notice of Violation (NOV) 08-05-WCRO-001was issued for excavation of wetlands and the discharge of fill material, a pollutant, into state waters.

8. After Receipt of the NOV Bandy, LLC presented information to support the claims made during the April 16, 2008 inspection that one or more exclusions listed in 9 VAC 25-210-60 applies to the activity concerning Feature #1, Feature #2, and Feature #3.

9. Though there has been no jurisdictional determination of wetlands and/or streams on the Site by the USACE, the DEQ, or any other party of agency, after meeting with Bandy, LLC on numerous occasions, reviewing the available data, and conducting a comprehensive investigation, the DEQ determined the following:

   - Feature #1 on the western side of Jack's Mill Road, measuring 435 liner feet (0.04 acres), is a stream that may have been channelized decades before the April 16, 2008 DEQ inspection and has historically been maintained for the purpose of drainage or irrigation. Though this channelized stream normally would be considered jurisdictional state waters subject to regulation, it has reached a naturalized state in the channelized form. When the specific facts and history involved with this re-channelized stream are combined with the fact that the activity did not result in any modifications that changed the character, scope, or size of the original design, a permit exclusion for maintenance activity was determined to apply. The 0.04 acres of excavated material that was discharged to 0.11 acres of the adjacent wetland, as a result of side casting in piles from 8 to 14 feet wide and from 1 to 3 feet high, is not included in any permit exclusion and was an unauthorized discharge.

   - Feature #2 on the eastern side of the Little River, measuring 413 linear feet (0.05 acres), is a ditch that may have been excavated decades before the April 16, 2008 DEQ inspection and the has historically been maintained for the purpose of drainage or irrigation. Since the excavation did not result in any modifications that change the character, scope, or size of the original design, a permit exclusion for maintenance activity was determined to apply. The 0.05 acres of excavated material that was discharged to 0.05 acres of the adjacent wetland, as a result of side casting in piles 4 to 6 feet wide and from 1 to 4 feet high, is not included in any permit exclusion and was an unauthorized discharge.

   - Feature #3, measuring 25 linear feet, 1 to 3 feet wide, and 1 to 2 feet deep with 10 feet excavated through a wetland and 15 feet excavated through an upland natural river berm along the little river, is a ditch with an indeterminate time of origin. Prior to the excavation, the wetland may have had no direct surficial connection with, but was adjacent to, the Little River. Though this ditch may result in drainage associated with the immediate or the gradual conversion of a wetland to a nonwetland, there is no evidence that conversion is taking place at this time. The discharge of 0.002

acres of excavated material to a nonwetland area is excluded from the VWP requirements.

10. Bandy, LLC believes that the DEQ's characterization of Feature #1 as a stream is incorrect; maintaining its position that Feature #1 is a drainage ditch.

11. Based on the results of the April 16, April 23, and May 30, 2008 inspections, documentation submitted by Bandy, LLC and a comprehensive investigation of available resources, the Board concludes that Bandy, LLC has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraph C9 above for the unauthorized discharge of fill material to 0.16 acres of state waters.

12. The DEQ and Bandy, LLC agree that leaving the discharged fill material in place is preferred to removal in order to minimize any further disruption to the aquatic functions and habitat of the Bog Turtle and that no other restoration on site is required for the unauthorized impacts to 0.16 acres of state waters.

13. In order for Bandy, LLC to return to compliance, DEQ staff and representatives of Bandy, LLC have agreed to the terms stated in Section D of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Bandy, LLC, and Bandy, LLC agrees to:

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

2. Pay a civil charge of $9,750 within 30 days of the effective date of the Order in settlement of the violations cited in this Order; and

3. Purchase 0.16 compensation credits at a 1:1 ratio from an approved wetlands mitigation bank or make an equivalent payment of $9,600 to the Virginia Aquatic Resources Trust Fund for the functional loss at the Site and provide proof of purchase to DEQ within 30 days of the effective date of 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

Bandy, LLC shall include its Federal Employer Identification Number (FEIN) **02-0741991** 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).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Bandy, LLC for good cause shown by Bandy, LLC, 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. 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, Bandy, LLC admits to the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact and conclusions of law in this Order.

4. Bandy, LLC 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. Bandy, LLC 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 Bandy, LLC 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. Bandy, LLC does not waive any rights or objections it may have in any enforcement action by other federal, state, or local authorities arising out of the same or similar facts to those recited in this Order.

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. Bandy, LLC 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. Bandy, LLC shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Bandy, LLC 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 Bandy, LLC 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 Bandy, LLC. Nevertheless, Bandy, LLC 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. Bandy, LLC 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

    b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Bandy, LLC.

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

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, Bandy, LLC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 13th day of December, 2010.

Melanie D. Davenport

Melanie D. Davenport, Director of Enforcement
Department of Environmental Quality

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Bandy, LLC voluntarily agrees to the issuance of this Order.

Date: Oct 4 2010 By: Don Bandy, Manager
(Person) (Title)

Bandy, LLC

Commonwealth of Virginia
~~City~~/County of Roanoke

The foregoing document was signed and acknowledged before me this 4th day of October, 2010, by Don Bandy who is Manager of **Bandy, LLC** on behalf of the company.

MBennett
Notary Public

285106
Registration No.

My commission expires: 10-31-12

Notary seal:

MELISSA M. BENNETT
Notary Public
Commonwealth of Virginia
285106
My Commission Expires Oct 31, 2012

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APPENDIX A
SCHEDULE OF COMPLIANCE

1. Bandy, LLC shall immediately cease impacts to state waters and shall not resume any maintenance or drainage activity on the Site unless prior construction notice and consultation is conducted with DEQ and the VDGIF, and any necessary permits are issued by the USACE and/or DEQ prior to initiating any activities within state waters.

2. Unless otherwise specified in this Order, Bandy, LLC shall submit all requirements of Appendix A of this Order to:

   Lee M. Crowell
   Wetlands Enforcement Manager
   VA DEQ – Central Office
   629 E. Main Street
   804-698-4450
   Lee.Crowell@DEQ.Virgnia.Gov