

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT

ISSUED TO

HAROLD L. BARE

and

LAILA B. BARE

D/B/A

**THE HANDL REAL ESTATE TRUST /
GODALMING SUBDIVISION**

SECTION A: Purpose

This is a Special Order by consent issued under the authority of Va. Code §§ 62.1-44.15(8a) and 8(d) between the State Water Control Board, Harold L. Bare and Laila B. Bare, doing business as the Handl Real Estate Trust, to resolve certain violations of environmental laws and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meanings 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 §§ 62.1-44.7 and 10.1-1184.
3. "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 DEQ.
5. "DEQ-VRO" means the Valley Regional Office of the DEQ.
6. "The Owners" or "the Bares" means Harold L. Bare and Laila B. Bare (husband & wife), owners of the Handl Real Estate Trust.
7. "The Facility" or "the Site" means the Handl Real Estate Trust Subdivision also referred to as the Godalming Subdivision.
8. "VPDES Regulation" means the Virginia Pollutant Discharge Elimination System.
9. "VWP" means the Virginia Water Protection regulation, 9 VAC 25-210-10 *et seq.*
10. "Order" means this document, also known as a Consent Special Order.
11. "ACOE" means the United States Army Corps of Engineers, Norfolk District, Western Virginia Regulatory Section.

SECTION C: Findings of Fact and Conclusions of Law

1. The Bares are presently developing the Godalming Subdivision, a single family housing subdivision. The Site is located on the north side of Route 33 between Route 29 and Route 610 east of Ruckersville in Greene County, Virginia. Construction at the Site, which will disturb approximately 12 acres in area, commenced in June 2002.
2. On September 16, 2002 and September 25, 2002, staff of DEQ-VRO inspected the Site. Staff of the ACOE accompanied DEQ-VRO staff on the September 25, 2002, inspection of the Site. These inspections were conducted in response to information received by DEQ-VRO alleging that the Owners had filled and modified unnamed tributaries to Rippin Run and adjacent wetlands.
3. During the referenced inspections of the Site, staff of DEQ-VRO observed that approximately 1,400 linear feet of streambed had been impacted by development activities including: the

placement of upland fill and culverts in the stream channel; the cutting of stream banks below the ordinary high water mark; and, the construction of an in-stream sedimentation basin. Staff of DEQ-VRO also observed that wetlands have been impacted by development activities (e.g. clearing, excavating and filling of low-lying areas) at the Site.

4. During the September 16, 2002 and September 25, 2002, inspections, DEQ-VRO staff also observed that the construction site was configured to discharge stormwater from the site into the unnamed tributaries of Rippin Run. Greene County's erosion and sedimentation control officials had indicated to DEQ-VRO staff that the plans for the subdivision identify that at least 12 acres of land would be disturbed by site development activities. Construction activities like those occurring at the Godalming Subdivision construction site which result in the disturbance of five or more acres total land area are subject to regulation under the VPDES Regulation. The VPDES regulations are codified in the Virginia Administrative Code ("VAC"). Specifically, 9 VAC 25-180-70 provides that operators of such construction sites whose registration statement has been submitted pursuant to 9 VAC 25-180-60 and accepted by DEQ-VRO may be covered by a General VPDES Permit authorizing discharge of stormwater from construction activities into waters of the Commonwealth. As of the September 26, 2002, inspection, a registration statement for the Site had not been submitted in accordance with 9 VAC 25-180-60 and authorization had not been granted under the Virginia Administrative Code to discharge stormwater from the Site into waters of the Commonwealth.

5. On October 7, 2002, DEQ-VRO issued Notice of Violation No. W2002-10-V-9001 ("NOV") to Mr. Harold L. Bare citing the following violations of State Water Control Law, the VWP Regulation and the VPDES Regulation:
 - a. Unpermitted discharge into state waters of sewage, industrial wastes, other wastes or noxious or deleterious substances in apparent violation of Va. Code § 62.1-44.5.A(i);

 - b. Dredging, filling or discharging of pollutants into, or adjacent to surface waters; otherwise altering the physical, chemical or biological properties of surface waters; excavating in wetlands; conducting the following activities in a wetland: (1) activities to cause draining that significantly alters or degrades existing wetland acreage or functions; (2) filling or dumping; and (3) activities that cause significant alteration or degradation of existing wetland acreage or functions in apparent violation of 9 VAC 25-210-50.A of the VWP Regulation;

 - c. Altering the physical, chemical or biological properties of state waters making them detrimental to the public health, or to the animal or aquatic life without a permit in apparent violation of Va. Code § 62.1-44.5.A(ii);

 - d. Failure to notify DEQ within 24 hours of violating Va. Code § 62.1-44.5.A in apparent violation of Va. Code § 62.1-44.5.B; and,

- e. Failure to submit a registration statement to receive authorization to discharge stormwater from a construction site into waters of the state in apparent violation of 9 VAC 25-180-60 of the VPDES Stormwater Regulations.

The October 7, 2002, NOV enclosed the materials necessary for the Owners to apply for authorization to discharge stormwater from the Site into waters of the State.

6. The Order requires the Owners to obtain VWP and VPDES Permits for the Site. The Order includes provisions for mitigation of the stream channel and wetland impacts described above and for the establishment of riparian buffers. The Order also provides for the assessment of a civil charge in settlement of the violations noted in the NOV.

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 Bares, and the Bares agree, to perform the actions described in Appendix A of this Order. In addition, the Board orders the Bares, and the Bares voluntarily agree, to pay a civil charge of \$ **5,600** within 30 days of the effective date of the Order in settlement of the violations cited in this Order. 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

The Owners shall include their Social Security Numbers with the civil charge payment and shall note on the check that payment is being made pursuant to this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of the Bares, for good cause shown by the Bares, 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 NOV No. W2002-10-V-9001. 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 only, the Bares admit the jurisdictional allegations in the Order. By entering into this Order, the Bares do not admit the factual allegations or legal conclusions contained herein for this or any subsequent proceeding.
4. The Bares consent 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 Bares declare they have received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the State Water Control Law and waive their 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 by the Bares 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 Bares 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 Bares 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 Bares shall show that such circumstances were beyond their control and not due to a lack of good faith or diligence on their part. The Bares shall notify the Regional Director of the VRO 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 of the VRO within 24 hours of learning of any condition above, which the Bares 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 the Bares. Notwithstanding the foregoing, the Bares agree 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 Bares. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the Bares from their obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. By their signatures below, the Bares voluntarily agree to the issuance of this Order.

And it is so ORDERED this ____ day of _____, 2003.

Robert G. Burnley, Director
Department of Environmental Quality

The Bares voluntarily agree to the issuance of this Order.

By: _____
Harold L. Bare

Date: _____

and

By: _____
Laila B. Bare

Date: _____

Commonwealth of Virginia

City/County of _____

The foregoing document was signed and acknowledged before me this _____ day of 2003, by

Harold L. Bare and by Laila B. Bare

Notary Public

My commission expires: _____.

**APPENDIX A
SCHEDULE OF COMPLIANCE**

**HAROLD L. BARE & LAILA B. BARE
d/b/a/
THE HANDL REAL ESTATE TRUST /
GODALMING SUBDIVISION**

Permit Requirements

1. Pursuant to 9 VAC 25-210-80 of the VWP Regulation, the Owners shall, **by May 31, 2003**, submit a complete VWP permit application to DEQ-VRO through the Virginia Marine Resources Commission, consisting of a Joint Permit Application ("JPA") with the DEQ VWP Addendum.
2. **By May 31, 2003**, the Owners shall submit to DEQ-VRO, a registration statement pursuant to 9 VAC 25-180-60 for coverage under the General VPDES Permit for discharges of stormwater from the Handl Real Estate Trust / Godalming Subdivision to waters of the State.

Impact Mitigation

3. The Owners shall mitigate unauthorized impacts to approximately 1,000 linear feet of the unnamed tributaries to Rippin Run and to adjacent wetlands by regrading certain areas to the pre-existing topographic contours (as depicted on the topographic map prepared by William Gimbel, dated September 16, 2002), restoring and preserving impacted stream bed, and by the creation and preservation of riparian buffers.
4. **By May 31, 2003**, the Owners shall submit to DEQ-VRO for review and approval, a mitigation plan (the "Plan"). The Plan shall specify the location of riparian buffer mitigation sites

("mitigation sites"); the combined total area of the mitigation sites; plan and cross section views of mitigation sites with a scale of detail no less than 1 inch = 50 feet with two-foot contour intervals; a map of photographic monitoring station locations; a list of vegetative species to be planted, percentage of each species to be planted, species spacing, and planting schedule; soil preparation and amendments to be used; a plan to control noxious weeds and invasive plant species; and a plan to control browsing, culling or foraging by wildlife. The Owners shall respond to any comments regarding the Plan **within 30 days** of receipt of such comments.

The Plan shall be developed in accordance with the success criteria and monitoring requirements as described under Items 7 and 9 of this schedule. Vegetation to be planted at the mitigation sites should consist of native species common to the area. Rooted seedlings or cuttings should originate from local nurseries (within approximately 200 miles from the project site) and be adapted to local conditions. Mitigation sites shall be planted with a mix of overstory (large canopy) trees, understory (small canopy) trees and shrubs, and ground cover. Overstory trees shall be spaced at 20-foot centers on average, understory trees and shrubs shall be spaced at 10-foot centers on average, and ground cover shall be seeded in areas of exposed ground. An aggregate planting density of at least 200 tree stems/acre shall be maintained until the survival thresholds or original stocking densities as specified under Item 7 of this Appendix are attained.

5. **Within 60 days** of the Plan approval, the Owners shall submit a survey or plat of the regraded mitigation sites as performed and certified by a licensed land surveyor or professional engineer. Surveys or plats of the mitigation sites shall be recorded with a preservation instrument as specified under Item 8 of this Appendix. **Within 60 days** of the Plan approval, the Owners shall plant the regraded mitigation sites with a temporary seed mix.
6. Following DEQ-VRO's approval of the preservation instrument and surveys or plats, the Owners shall complete the planting (trees and shrubs) of the mitigation sites. Should the approval of the Plan encroach on the March 20, 2003, date for suspension of plantings (see Paragraph 19), the plantings shall be conducted after November 10, 2003, but in no case later than December 31, 2003.
7. The success of the mitigation sites shall be based on establishing and maintaining a survival rate of 80 percent of planted vegetation. In the event that desirable, volunteer overstory and/or understory species also become established, survival rates of less than 80 percent for planted species may be accepted, provided the cumulative numbers of surviving planted and volunteer species is greater than or equal to the original stocking densities. If the mitigation sites fail to maintain an 80 percent survival rate of planted vegetation and an insufficient number of desirable volunteer species become established to meet or exceed the original stocking densities, annual maintenance plantings shall be made to attain the original stocking densities. Monitoring and maintenance of the mitigation sites shall continue until: (a) an 80 percent survival rate of the planted trees (both understory and overstory) is achieved for three consecutive years; or, (b)

the combined total of planted trees and desirable volunteer tree species equals or exceeds original stocking densities of both understory and overstory trees, for three consecutive years.

8. The Owners shall provide written protection of the mitigation sites, to preclude any future impacts to such areas, in perpetuity. The wording for any restrictions, protections, or preservations of mitigation sites, or any similar instrument, shall state that no activity will be performed on the property in an area designated as "created forested riparian buffer" on a survey or plat that would involve construction of man-made structures, changes in contours through addition or removal of earthen or other materials, cultivation, mowing, pruning, tree harvesting, mining, road building, etc. Exceptions may be provided for the construction and maintenance of nonstructural paths or trails, wildlife management features and observation areas, including benches, subject to the prior written approval of DEQ-VRO. The form of the real estate instrument shall be recorded in the chain of title to the property or properties where the mitigation will occur, as identified in the Plan. The instrument must be approved by DEQ-VRO and proof of recordation submitted **within 60 days** of approval with the surveys or plats of the mitigation sites.

Monitoring

9. A Mitigation Monitoring Report ("Mitigation Report") shall be submitted according to the reporting schedule indicated under Item 11 to document progress of mitigation activities in accordance with the approved Plan and this Order. Mitigation Reports shall include, at a minimum, the following:
 - a. A description of permanent photographic monitoring station locations. These stations shall be located in order to achieve the purpose of documenting successful establishment and maintenance of the mitigation sites. The stations shall be located within the mitigation sites at a density of one per site or where a mitigation site is greater than one acre in size, one station per each acre of mitigation. Dated pictures of the mitigation sites and adjacent stream bank shall be taken in August each year following planting of the mitigation sites.
 - b. Mitigation success monitoring and field observations as follows:
 - (i) Percent survival of planted trees and shrubs shall be estimated by counting surviving stems within a 30-foot radius circle or a 20 by 20 foot square. A minimum of five (5) sample plots per acre shall be randomly selected per acre of mitigation site, and each mitigation site shall contain at least two randomly located sample plots.
 - (ii) The total number of living woody species shall be expressed in both the aggregate number per plot, per mitigation site, and per acre. The species

composition on a percentage basis shall also be determined and reported on a per plot, per area, and per acre basis. Any desirable volunteer species shall be identified and enumerated as a separate group, but included in the total population count.

- (iii) Presence of noxious weeds and invasive plant species shall be noted, measures taken to control noxious weeds and invasive plant species shall be described, and the success of control measures shall be evaluated and described.
 - (iv) Destruction of planted vegetation by animals (i.e., deer or beaver), insects, disease or other causes shall be noted and reported; measures taken to avoid continued destruction by such causes; and success of control measures shall also be evaluated and/or noted and reported.
10. Replacement of dead planted vegetation shall occur annually, with replacement achieved in kind, as needed to maintain the planting density of 200 stems/acre until compliance with success criteria under Item 7 of this Appendix is achieved. Compliance with the success criteria may also be achieved if it is demonstrated that the combined totals of surviving planted vegetation and desirable, overstory and understory volunteer tree species within the mitigation sites meet or exceed the original planting densities.

Reporting

11. The Owners shall submit a Mitigation Monitoring Report to DEQ-VRO **by the 10th of October each year** following planting of the mitigation sites, including the year the sites are planted. In addition to the information required under Item 9 of this Appendix, the Mitigation Monitoring Report shall contain information regarding any alterations and maintenance conducted at the mitigation sites during the preceding year.
12. Written communications and reports required by this Appendix shall be submitted to the Department of Environmental Quality, Valley Regional Office, P.O. Box 3000, Harrisonburg, Virginia 22801-3000, or such other address as may be requested in writing by DEQ-VRO.

Other Conditions

13. Mitigation site monitoring and reporting is required annually until mitigation is successfully established according to the criteria as specified in Item 7 of this Appendix and as determined by DEQ.
14. DEQ-VRO shall be notified in writing **ten days prior to the start of construction** at each authorized mitigation site. Written notice shall include identification of the mitigation activity,

where the work will occur, and a projected schedule for completing work.

15. The Owners shall ensure that erosion and sedimentation ("E&S") controls are in place prior to any necessary clearing and grading of the mitigation sites. These E&S controls shall be constructed and installed in accordance with the State Minimum Standards and Specifications contained in the Virginia Erosion and Sedimentation Handbook (LQ92) (E&S Handbook) and maintained in good working order to minimize impacts to State waters. Any deposition or stockpiling of excavated materials in or near the mitigation sites shall be performed in such a manner as to prevent the erosion of these materials and preclude their entry into State waters. Soil stabilization practices shall be applied to all denuded areas of the mitigation sites within seven days of achieving final grade. E&S controls shall remain in place until the mitigation sites are stabilized and/or established.
16. The Owners shall report to DEQ-VRO any fish kills or oil spills at the Site immediately upon discovery. The Owners and their contractors shall employ all necessary measures to prevent spills of fuels, lubricants or other noxious substances into State waters. DEQ-VRO shall be notified (at 540-574-7800) if oil spills or fish kills occur Monday through Friday between the hours of 8:00 a.m. to 5:00 p.m., otherwise oil spills or fish kills shall be reported to the Virginia Department of Emergency Services (at 1-800-468-8892).
17. All construction and/or grading activities associated with the project shall be accomplished in such a manner that construction waste material, sediment or other noxious or deleterious substance is not discharged to State waters in violation of applicable laws and regulations.
18. The Owners shall notify DEQ-VRO in writing when unusual or potentially complex conditions are encountered which require debris removal or involve potentially toxic pollutants, and shall not take measures to remove the obstruction, material, or toxic pollutant, or change the location of any structure associated with the material or pollutant until approval to do so is received from DEQ-VRO.
19. Mitigation site plantings shall not occur during the growing season (March 20 - November 10) or when the soil is frozen.