

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

In The Matter of:

J. Denbigh Associates, Inc.
Jerry Bowman, Esquire
1435 Crossways Blvd.
Chesapeake, VA 23323-2840

and

Howard B. Hankins, Inc.
739 Thimble Shoals Blvd.
Suite 704
Newport News, VA 23606
Respondents

Property located
northeast of Jefferson Avenue, south of
Industrial Park Drive, and north of Kings
Ridge Drive, Newport News, Virginia

Proceeding Under Section 309(a)
of the Clean Water Act,
33 U.S.C. § 1319(a)

Docket No. III-2005-0009 DW, DN

**ADMINISTRATIVE ORDER
FOR COMPLIANCE ON CONSENT**

I. STATUTORY AUTHORITY

1. This Administrative Order for Compliance on Consent (AO) is issued under the authority vested in the United States Environmental Protection Agency (EPA) by Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a) ("CWA" or "Act"). The Administrator has delegated this authority to the Regional Administrator of EPA Region III who in turn has re delegated it to the Director of the Environmental Assessment and Innovation Division, formerly the Environmental Services Division, and the Director of the Water Protection Division pursuant to delegation No. 2-22 (6/19/93). This AO supercedes Administrative Order, EPA Docket No. III-2000-023 DW, DN.

II. FINDINGS

2. Respondents neither admit nor deny the findings set forth herein.
3. Respondents, J. Denbigh Associates, Inc. ("Denbigh") and Howard B. Hankins, Inc.

("Hankins"), (collectively "Respondents") are "persons" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. Respondent Hankins is the operator, to the extent he performed or directed land clearing and ditching activities at the Site, and Respondent Denbigh is the owner of property identified as the J. Denbigh Site ("Site") located northeast of Jefferson Avenue, south of Industrial Park Drive, and north of Kings Ridge Drive, Newport News, Virginia, and further identified on the map attached hereto as Exhibit "A."
5. The Site contains wetlands which constitute "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. §1362(7), and 33 C.F.R. § 323.2(a); 40 C.F.R. § 232.2, and 40 C.F.R. § 122.2 which Respondents neither admit nor deny.

WETLANDS ALLEGATIONS

6. Commencing in or about the summer of 1999 and continuing periodically until at least February 2000, Respondents or persons acting on behalf of Respondents operated equipment which discharged fill material into wetlands on the Site. Such operation includes, but is not limited to, the ditching of various wetland areas on Site which resulted in the discharge of the removed fill into the area alongside the ditch. Respondents neither admit nor deny this allegation.
7. The term "fill material" within the meaning of 40 C.F.R. § 232.2, includes any pollutant which replaces portions of "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.
8. The equipment referenced in paragraph II.6, above, which has discharged fill material to "waters of the United States" constitutes a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, which includes fill material, from point sources to "waters of the United States" unless authorized by, among other things, a permit issued by the Secretary of the Army under Section 404 of the Act, 33 U.S.C. § 1344.
10. At no time during the discharge of fill material to the "waters of the United States" located on the Site did the Respondents have a permit from the Secretary of the Army as required by Section 404 of the Act, 33 U.S.C. § 1344. Respondents neither admit nor deny for the purposes of this AO that such permit was required.
11. Respondents neither admit nor deny that by discharging fill material to the "waters of the United States" without authorization they have violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

STORM WATER ALLEGATIONS

12. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source to waters of the United States except in compliance with, among other things, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.
13. Section 402(p) of the Act and 40 C.F.R. §§ 122.1(b)(2)(iv) and 122.26 provide that facilities with storm water discharges associated with industrial activity are “point sources” subject to NPDES permitting requirements under § 402(a) of the Act, 33 U.S.C. § 1342(a).
14. At the time of EPA’s inspection in February 2000, “industrial activity” included “[c]onstruction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale.” 40 C.F.R. § 122.26(b)(14)(x).
15. Currently, under 40 C.F.R. § 122.26(b)(14), the following category of facilities are among those considered to be engaging in "industrial activity" for purposes of § 402(p) of the Act and 40 C.F.R. §§ 122.1(b)(2)(iv) and 122.26(b)(14):
 - (x) Construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than one acre of total land area which are not part of a larger common plan of development or sale.
16. Respondents’ activity is Construction Activity classified as SIC code number 1542, (Standard Industrial Classification Manual, Revised 1987 edition by the Executive Office of the President, Office of Management and Budget).
17. The activity at the Site is “industrial activity” within the meaning of § 402(p) of the Act and 40 C.F.R. §§ 122.1 and 122.26(b)(14).
18. Respondents’ construction activities at the Site have resulted in five or more acres of land disturbance.
19. EPA has determined that storm water discharges from construction activity contain a number of pollutants. See, e.g., Final Rule, NPDES Regulations Addressing Storm Water Discharges, 64 Fed. Reg. 68728.
20. Respondents’ construction activities resulted in the discharge of pollutants to ditches which discharge into Stony Run, a tributary to the James River, a “water of the United States” within the meaning of 40 C.F.R. § 122.2 which Respondents neither admit

nor deny.

21. Respondents own and/or operate a Site engaged in industrial activity that required an NPDES permit for its storm water discharge. Respondents neither admit nor deny that such permit was required.
22. EPA inspected the Site on February 17, 2000. Based upon this inspection and followup investigations, EPA has determined that the Site did not have an NPDES Storm Water permit. Respondents neither admit nor deny that such permit was required.
23. Respondent's discharge of pollutants without an NPDES permit violates Section 301 of the Act, 33 U.S.C. § 1311 which Respondents neither admit nor deny.

III. ORDER FOR COMPLIANCE

Therefore, this _____ day of _____, 2004, Respondents are hereby ORDERED, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), to conduct the following activities:

A. WETLANDS VIOLATION

24. Within thirty (30) days of the effective date of this AO, Respondents shall submit to EPA for approval deed restriction language. EPA will have the opportunity to review and approve this language prior to Respondents filing the deed restriction with the Clerk of the Circuit Court, City of Newport News (or appropriate recording office) which deed restriction shall set aside in perpetuity the wetlands currently existing on site which includes all land on the 37-acre Site not addressed by issuance of permits by the U.S. Army Corps of Engineers ("Corps") and DEQ for five (5) acres of wetlands impacts in connection with the proposed Kings Ridge Shopping Center as indicated on the map (hereinafter "the "Map") attached hereto as Exhibit "A". The remaining acreage will comprise a total of approximately 25 acres ("Deed Restriction") and is further identified on the Map and by the metes and bounds description to be provided to EPA for review prior to filing.
25. If EPA requests changes to the language, Respondents shall make such changes and resubmit the proposed Deed Restriction within fifteen (15) days after such changes are requested.
26. Respondents shall file the Deed Restriction within fifteen (15) days of approval of the Deed Restriction language by EPA.
27. Respondents shall purchase one acre of wetlands credits at the Lower James River Mitigation Bank, also known as Beamon Farm Mitigation Bank Site located off

Namsemond Parkway, Suffolk, Virginia, HUC Code 02080208.

28. Respondents shall purchase 5.0 acres of wetlands credits at the Hampton Roads Airport Mitigation Bank located off U.S. Route 460 in Suffolk, Virginia, HUC Code 02080208.
29. Respondents shall purchase a conservation easement over the entire 4.1 acre of Grafton Pond complex known as the Cook Road mitigation Site, located off Cook Road and northeast of the existing baseball diamonds in York County, Virginia.
30. Respondents shall apply to the Army Corps of Engineers for a permit for the proposed development of the Kings Ridge Shopping Center which will impact five acres of wetlands under an Individual Permit issued by the Corps. Should the permit fail to issue, the requirements under this AO will be null and void and EPA may institute an action against Respondents to collect an additional \$2,444 in administrative penalties. In addition, in the event that the permit is not issued, Respondents will be required to restore the Site by plugging the ditches.
31. All notices and submissions required under Section III.A of this AO shall be sent to:

Jeffrey D. Lapp
Regional Wetlands Enforcement Coordinator (3ES30)
United States Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

B. STORM WATER VIOLATION

32. No less than forty-five (45) days prior to initiation of any further construction activity on the Site, Respondents shall submit an NPDES permit application to the Virginia Department of Environmental Quality (VADEQ) at the address listed below. A copy of the application shall be sent to EPA. The original permit application should be sent to:

Frank Daniel
Regional Director, Tidewater Office
Virginia Department of Environmental Quality
5636 Southern Boulevard
Virginia Beach, VA 23462
(757) 518-2171

33. Within ten (10) days of submission of an application for an NPDES permit, Respondent shall develop and implement a Storm Water Pollution Prevention Plan ("SWPPP") in accordance with the Respondents' permit requirements. The SWPPP shall comply with

the requirements of *Virginia Erosion & Sediment Control Handbook* (3rd Ed. 1992) and ensure that discharges of pollutants in storm water associated with construction activity at the Site, including discharges into wetlands, comply with the applicable Virginia Water Quality Standards. A copy of the SWPPP, including a complete copy of the approved erosion and sedimentation (“E&S”) plan, and evidence that the SWPPP is being implemented shall be submitted to Chad Harsh, at the address listed in Paragraph 35, below.

34. All notices and submissions required under Section III.B of this AO shall be sent to:

Chad Harsch, Enforcement Officer (3WP31)
US EPA Region III
1650 Arch Street
Philadelphia, PA 19103
(215) 814-5724

IV. GENERAL PROVISIONS

35. All submissions provided pursuant to this AO shall be signed by Respondents and shall include the following certification:

“I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

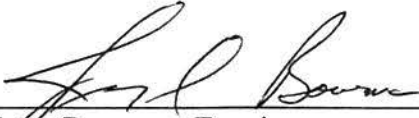
36. Issuance of this Order shall not be deemed an election by EPA to forego any administrative, civil, or criminal action to seek penalties, fines, or any other appropriate relief under the Act for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited.
37. If a criminal judicial action is initiated by the U.S. Department of Justice, and Respondents are convicted of a criminal offense under Section 309(c) of the Act, Respondents may be subject to a monetary fine and/or imprisonment, and may become ineligible for certain contracts, grants, or loans under Section 508 of the Act.
38. Respondents’ compliance with the terms of this Order shall not constitute compliance with the Clean Water Act or any other Federal, State or local law or regulation. Nor does this Order constitute a waiver or modification of the terms or conditions of any issued permit.
39. Violation of the terms of this Order may result in further EPA enforcement action including, but not limited to, initiation of judicial proceedings that allow for civil penalties of up to \$27,500 per day, 33 U.S.C. §§ 1319(b) and (d), for each day of

violation that occurred prior to January 31, 1997, and in accordance with 40 C.F.R. Part 19, up to \$32,500 for each day of violation which occurred or occurs after January 31, 1997, and/or for the criminal sanctions of imprisonment and fines of up to \$50,000 per day, 33 U.S.C. § 1319(c).

V. EFFECTIVE DATE

40. The effective date of this Order shall be the date it is received by Respondents.

FOR RESPONDENTS:



Jerry Bowman, Esquire
J. Denbigh Associates, Inc.

Date 12/7/04

Name:
Title:
Howard B. Hankins, Inc.

Date:

FOR RESPONDENTS:

Jerry Bowman, Esquire
J. Denbigh Associates, Inc.

Date




Name:
Title: President
Howard B. Hankins, Inc.


Date: 12/8/04

FOR COMPLAINANT, ENVIRONMENTAL PROTECTION AGENCY:

Date: 12/8/04


John R. Pomponio, Director
Environmental Assessment and Innovation Division

Date: 12/8/04


John M. Capacasa, Director
Water Protection Division



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NO.	DESCRIPTION	DATE
1	10/20/04	10/20/04
2	10/20/04	10/20/04
3	10/20/04	10/20/04
4	10/20/04	10/20/04
5	10/20/04	10/20/04
6	10/20/04	10/20/04
7	10/20/04	10/20/04
8	10/20/04	10/20/04
9	10/20/04	10/20/04
10	10/20/04	10/20/04

DRAWN BY: SDC
 DESIGNED BY: LMK
 UVA 200 004 204-151
 DATE: 07/11/04
 SCALE: AS SHOWN
 PLOT SCALE: 1" = 11'

JOHNENICH ASSOCIATES, INC.
 PARCEL 112

KINGS RIDGE ASSOC.

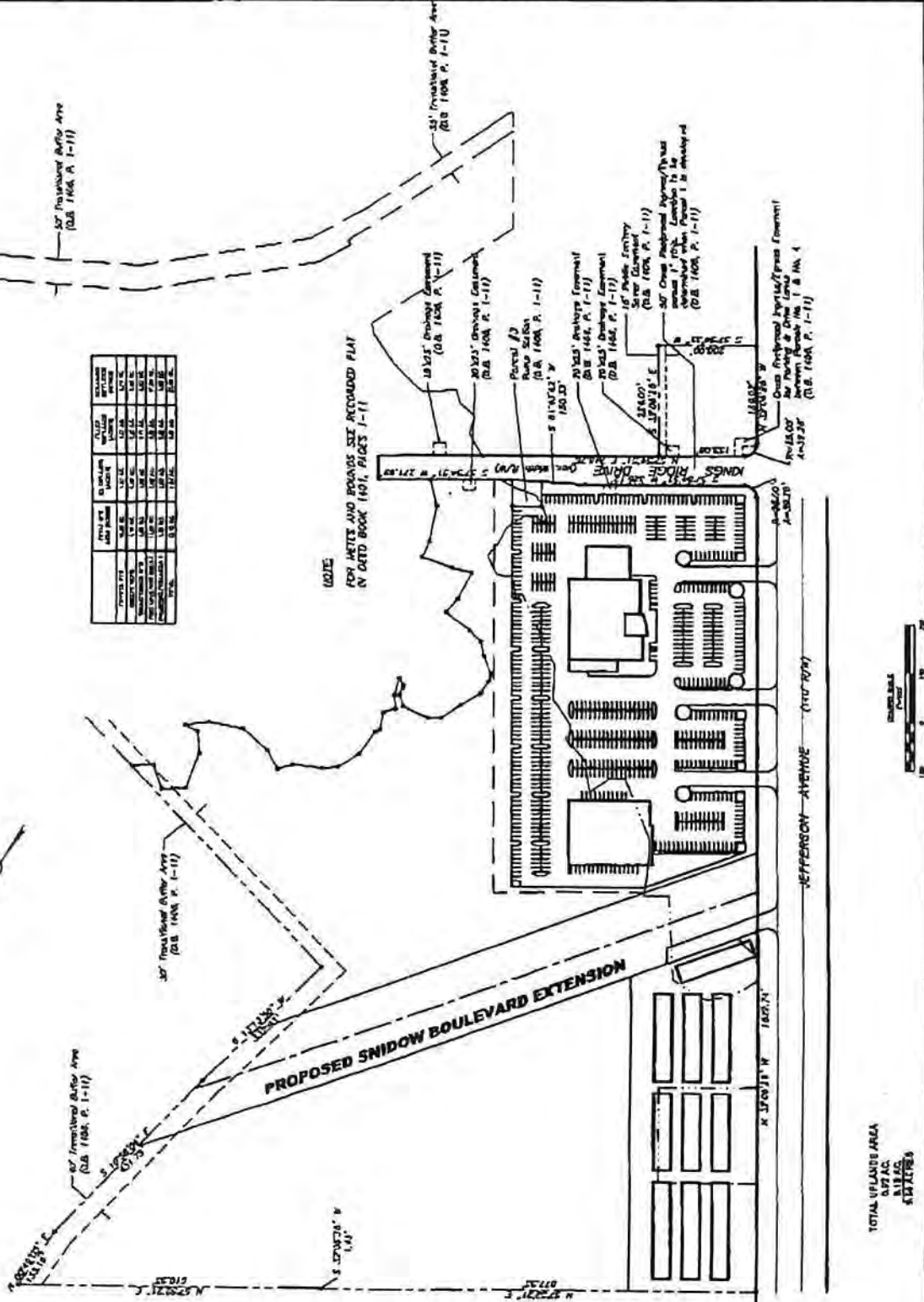
11976 JEFFERSON AVE
 NEWPORT NEWS, VA

COMPOSITE PLAT
 UPLANDS UNITS

1 of 1
 JOB NO. 04-111

AREA	AREA (AC)	PERCENT
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91	1.22	1.22
92	1.22	1.22
93	1.22	1.22
94	1.22	1.22
95	1.22	1.22
96	1.22	1.22
97	1.22	1.22
98	1.22	1.22
99	1.22	1.22
100	1.22	1.22

NOTE:
 FOR NOTES AND BOUNDS SEE RECORDED PLAT
 IN CADD BOOK 1491, PAGES 1-11



TOTAL UPLANDS AREA
 0.17 AC
 11,760 SQ FT
 0.27 ACRES

CERTIFICATE OF SERVICE

I certify that on this date I caused to be sent the enclosed Administrative Order to the following:

By Hand Delivery to the:

Regional Hearing Clerk (3RC00)
USEPA
1650 Arch Street
Philadelphia, PA 19103

and with copies to the following at the address listed below via regular, First Class mail:

Marina Liacouras Phillips, Esquire
Kaufman & Canoles
P.O. Box 3037
Norfolk, VA 23514

and

John Cope, Esquire
Cope, Olson & McKinnon, P.L.C.
Suite 201
11048 Warwick Boulevard
P.O. Box 1037
Newport News, VA 23601-0037

Date: _____

12/8/04

Pamela J. Lazos
US EPA Region III