



*COMMONWEALTH of VIRGINIA*

DEPARTMENT OF ENVIRONMENTAL QUALITY

Blue Ridge Regional Office

[www.deq.virginia.gov](http://www.deq.virginia.gov)

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**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
BURNT CHIMNEY DAIRY LLC  
FOR THE  
GREEN VALLEY FARM  
Virginia Pollution Abatement General Permit  
Registration No. VPG100161  
Unpermitted Discharge**

**SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Burnt Chimney Dairy LLC, regarding the Green Valley Farm, for the purpose of resolving certain violations of the State Water Control Law and the applicable regulation.

**SECTION B: Definitions**

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

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
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. "BRRO" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.

4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "Discharge" means discharge of a pollutant. 9 VAC 25-31-10
7. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
  - (a) Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
  - (b) Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
8. "Facility" means the Green Valley Farm located at 9600 Booker T. Washington Highway, Wirtz, Virginia 24184, which is a dairy farm and owned and operated by Burnt Chimney Dairy LLC.
9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "Owner" means Burnt Chimney Dairy LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. The Owner is a "person" within the meaning of Va. Code § 62.1-44.3.
12. "Permit" means VPA General Permit, Registration No. VPG100161; coverage was issued under the State Water Control Law and the Regulation to Burnt Chimney Dairy LLC on 11/16/2014 and expires on 11/15/2024.
13. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.
14. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of

animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.

15. "Regulation" means the Virginia Pollution Abatement Permit Regulation, 9 VAC 25-32-192.
16. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
17. "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. Va. Code § 62.1-44.3.
18. "Va. Code" means the Code of Virginia (1950), as amended.
19. "VAC" means the Virginia Administrative Code.
20. "VPA" means Virginia Pollution Abatement.

### **SECTION C: Findings of Fact and Conclusions of Law**

1. The Owner owns and operates the Facility, a dairy farm in Franklin County, Virginia.
2. The Permit allows the Owner to manage animal wastes in compliance with the terms of the permit.
3. Gills Creek is located in the Roanoke River Basin. The aforementioned receiving water is listed in DEQ's *Final 2014 305(b)/303(d) Water Quality Assessment Integrated Report* as impaired for *Escherichia coli*. The sources of the impairment are listed as livestock (grazing or feeding operations), on-site treatment systems (septic systems and similar decentralized systems), unspecified domestic waste, and wildlife (other than waterfowl). The impairment effects recreation use of the state water.
4. On March 29, 2016, Department staff was notified and responded to a report of a manure spill into Gills Creek near the Facility. Department staff confirmed the source of the manure discharge as a failure of a junction/union of the manure irrigation pipe located at the Facility. This equipment failure resulted in an initial estimate of 13,500 gallons of manure being

released to the ground and impacting an unnamed tributary (“UT”) of Gills Creek. Department staff observed impacts from the discharge of manure to the UT of Gills Creek.

5. On March 31, 2016, Department staff conducted a fish kill investigation and observed impacts to Gills Creek from the discharge of manure. Department staff conducted water quality monitoring and identifying deceased species. Department staff observed six dead suckers in the lower section of an approximately 800’ section of Gills Creek downstream of the confluence of the UT of Gills Creek and Gills Creek. The manure spill that occurred on March 29, 2016 had impacted the UT of Gills Creek but the manure captured two days previously in some hastily dug depressions had been spread in the fields and there was no evidence of any continuing release of manure.
6. Va. Code § 62.1-44.5 states that: “[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances, or otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses.”
7. The Permit, Part I.B.1 prohibits discharges except during a 24-hour, 25 year storm event. At the time of the discharge, there was no storm event occurring
8. The Department has issued no permits or certificates to the Owner that would authorize the discharge of manure into state waters.
9. Gills Creek is a surface water located wholly within the Commonwealth and is a “state water” under State Water Control Law.
10. On May 2, 2016, Department staff conducted an inspection of Facility for compliance with the Permit. No deficiencies were identified during the inspection.
11. On June 2, 2016, the Department issued Notice of Violation (“NOV”) No. 2016-05-W-0003 to the Owner for the unpermitted discharge of manure into state waters.
12. Based on the results of the site visits on March 29, 2016 and March 31, 2016, the Board concludes that the Owner has violated Va. Code § 62.1-44.5 and Part I.B.1 of the Permit, by discharging manure into state waters without authorization under a permit or certificate issued by the Board, which resulted in a fish kill, as described in paragraphs C(4) through C(5), above.
13. The Owner verifies that the violations as described in paragraphs C(4) through C(5), above, have been corrected.

**SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15 and upon consideration of Va. Code § 10.1-1186.2, the Board orders the Owner, and the Owner agrees:

1. To perform the actions described in Appendix A of this Order; and
2. To a civil charge of **\$4,550** in settlement of the violations cited in this Order, to be paid as follows:
  - a. The Owner shall pay **\$1,365** of the civil charge 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," delivered to:

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

The Owner shall include its Federal Employer Identification Number (FEIN) 20-3542919 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). If the Department has to refer collection of moneys due under this Order to the Department of Law, the Owner shall be liable for attorneys' fees of 30% of the amount outstanding.

- b. The Owner shall satisfy **\$3,185** of the civil charge by satisfactorily completing the Supplemental Environmental Project (SEP) described in Appendix A of this Order.
  - c. The net project costs of the SEP to the Owner shall not be less than the amount set forth in Paragraph D.2.b. If it is, the Owner shall pay the remaining amount in accordance with Paragraph D.2.a of this Order, unless otherwise agreed to by the Department. "Net project cost" means the net present after-tax cost of the SEP, including tax savings, grants, and first-year cost reductions and other efficiencies realized by virtue of project implementation. If the proposed SEP is for a project for which the party will receive an identifiable tax savings (e.g., tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the net project cost shall be reduced by those amounts. The costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts, or grants shall be deducted.
  - d. By signing this Order the Owner certifies that it has not commenced performance of the SEP.
  - e. The Owner acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by the Owner to a third party, shall not relieve the Owner of its responsibility to complete the SEP as described in this Order.

- f. In the event it publicizes the SEP or the SEP results, the Owner shall state in a prominent manner that the project is part of a settlement of an enforcement action.
- g. The Department has the sole discretion to:
  - i. Authorize any alternate, equivalent SEP proposed by the Owner; and
  - ii. Determine whether the SEP, or alternate SEP, has been completed in a satisfactory manner.

Should the Department determine that the Owner has not completed the SEP, or alternate SEP, in a satisfactory manner; the Department shall so notify the Owner in writing. Within 30 days of being notified, the Owner shall pay the amount specified in Paragraph D.2.b, above, as provided in Paragraph D.2.a, above.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of the Owner for good cause shown by the Owner, 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, the Owner 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. The Owner 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 Owner declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and he 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 the Owner 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 Owner 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 unforeseeable circumstances beyond his control and not due to a lack of good faith or diligence on his part. The Owner shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on his part. The Owner 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 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.

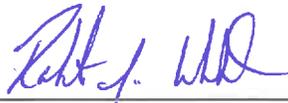
9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and the Owner.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after the Owner has completed all of the requirements of the Order;
  - b. the Owner 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

- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to the Owner.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the Owner 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 the Owner 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 the Owner 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 the Owner to this document. Any documents to be submitted pursuant to this Order shall be submitted by the Owner or an authorized representative of the Owner.
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, Burnt Chimney Dairy LLC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 28<sup>th</sup> day of July, 2017.



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Robert J. Weld, Regional Director  
Department of Environmental Quality

Burnt Chimney Dairy LLC voluntarily agrees to the issuance of this Order.

Date: 5/25/17 By: *Hatcher Ferguson*, Member  
Hatcher Ferguson  
Burnt Chimney Dairy LLC

Commonwealth of Virginia

City/County of Franklin

The foregoing document was signed and acknowledged before me this 25<sup>th</sup> day of  
May, 2017, by Hatcher Ferguson, on behalf of the company.

*[Signature]*  
Notary Public

364846

Registration No.

My commission expires:

3/31/2021

Notary seal:



**APPENDIX A**  
**BURNT CHIMNEY DAIRY LLC**  
**SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP)**

In accordance with Va. Code § 10.1-1186.2, the Owner shall perform the Supplemental Environmental Project (SEP) identified below in the manner specified in this Appendix. As used in this Order and Appendix, SEP means an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law.

1. The SEP to be performed by the Owner is to provide the Franklin County Department of Public Safety monies for the purchase of hazardous materials emergency response spill containment and clean up materials.
2. The SEP shall be completed by December 31, 2017.
3. The Owner shall submit invoices and payment documentation to the Department for verification, for the equipment purchased within 30 days of payment.
4. The Owner shall submit to the Department written verification of the final overall and net project cost of the SEP in the form of a certified statement itemizing costs, invoices and proof of payment within 30 days of the project completion date. For purposes of this submittal, net project costs can be either the actual, final net project costs or the projected net project costs if such projected net project costs statement is accompanied by a CPA certification or certification from the Owner's Chief Financial Officer concerning the projected tax savings, grants or first-year operation cost reductions or other efficiencies.
5. If the SEP has not or cannot be completed as described in the Order, the Owner shall notify DEQ in writing no later than 30 days after the determination. Such notification shall include:
  - a. an alternative SEP proposal, or
  - b. payment of the amount specified in Paragraph D.2.b as described in Paragraph D.2.a.
1. Documents to be submitted to the Department, other than the civil charge payment described in Section D of the Order, shall be sent to:

**Jerry Ford, Jr.**  
**VA DEQ - Blue Ridge Regional Office**  
**3019 Peters Creek Road**  
**Roanoke, VA 24019**  
**Phone: (540) 562-6817**  
**e-mail: [Jerry.Ford@deq.virginia.gov](mailto:Jerry.Ford@deq.virginia.gov)**