



*Commonwealth of Virginia*

**VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY**

**SOUTHWEST REGIONAL OFFICE**

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**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
RANDALL ELLER  
FOR  
An Unpermitted Discharge  
AT  
2435 WESENDONCK ROAD, BLAND, VIRGINIA  
Incident Report ("IR") No. 291578**

**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 Randall Eller, regarding an unpermitted discharge to state waters at 2435 Wesendonck Road, Bland, Virginia which resulted in a fish kill, for the purpose of resolving certain violations of the State Water Control Law and the Regulations.

**SECTION B: Definitions**

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

1. "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.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "Discharge" means discharge of a pollutant. 9 VAC 25-31-10.
5. "IR" means Incident Report.
6. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
7. "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.
8. "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.
9. "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 (i) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (a) 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; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.
10. "Property", "Parcel" or "Site" means the property located at 2435 Wesendonck Road, Bland, Virginia that is owned by Randall Eller.
11. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
12. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
13. "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.
14. "SWRO" means the Southwest Regional Office of DEQ, located in Abingdon, Virginia.
15. "Va. Code" means the Code of Virginia (1950), as amended.

16. "VAC" means the Virginia Administrative Code.

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

1. Randall Eller owns and operates a farm located at 2435 Wesendonck Road, in Bland County, Virginia.
2. Nobusiness Creek and Kimberling Creek are both located in the New River Basin. Nobusiness Creek is a tributary to Kimberling Creek and is classified as Section 1; Class VI; Special Standard: u. Kimberling Creek is classified as Section 1; Class IV; Special Standard: u. Both creeks are listed as impaired for failure to support the recreational use, due to exceedances of the water quality standard for bacteria. Also, both creeks are included in the *Bacteria TMDL Development for East Wilderness Creek, Kimberling Creek, Nobusiness Creek, Town Creek and Walker Creek in Bland and Giles Counties Virginia*. The TMDL was approved by the SWCB on December 21, 2015 and by EPA on July 27, 2016.
3. On Sunday, July 21, 2019, at approximately 7:31 PM, the Virginia DEQ received a report of dead fish in Nobusiness and Kimberling Creeks in Bland County. In the overnight and early morning hours of July 21-22, 2019, DEQ staff responded to the reported fish kill on Nobusiness and Kimberling Creeks.
4. Upon arrival on July 21, 2019, DEQ staff observed that both creeks were dark in color, with foam on the surface and numerous dead fish. Staff recorded ambient water quality parameters at multiple locations. Very low dissolved oxygen levels were observed in Nobusiness Creek at the Rt. 606 Bridge, and on Kimberling Creek at the Rt. 608 and 607 bridges. Normal dissolved oxygen levels were observed upstream from the 2435 Wesendonck Road facility.
5. On July 22, 2019, DEQ staff returned to conduct a count of the dead fish, with the assistance of Virginia Department of Game and Inland Fisheries (VDGIF) staff. DEQ and VDGIF staff identified and counted dead fish in Nobusiness Creek and Kimberling Creek using American Fisheries Society methods. It was determined that the upstream extent of the fish kill was at 2435 Wesendonck Road [N37.2135, W80.9671 (37°12'48.58"N, 80°58'1.57"W)], where leachate from a silage bunker was observed flowing through a ditch approximately 50 meters before discharging into Nobusiness Creek. Staff observed live minnows upstream of this discharge point, and a significant number of dead fish downstream of this discharge point. It was determined that the downstream extent of the fish kill was at the Dismal Creek confluence with Kimberling Creek. Live minnows and smallmouth bass were observed in Kimberling Creek downstream from the Dismal Creek confluence. The total length of the fish kill was approximately 13,140 meters, or 8.2 miles, from the silage leachate discharge into Nobusiness Creek, downstream and into Kimberling Creek, to the point of confluence of Dismal Creek with Kimberling Creek. IR No. 291578 was assigned to this fish kill.

6. Water samples were collected and analyzed for 5-day Biochemical Oxygen Demand (BOD5) at three locations along Nobusiness Creek. Ambient water quality parameter readings were recorded at the Rt. 608 Bridge and the Rt. 606 Bridge at the same time. At the Rt. 608 Bridge upstream of the fish kill origin, BOD5 was undetectably low and dissolved oxygen was 8.14 mg/L. The silage leachate had a BOD5 of 49,600 mg/L. At the Rt. 606 Bridge downstream from the fish kill origin, BOD5 was 18.4 mg/L and dissolved oxygen was 2.48 mg/L.
7. The silage leachate discharge was diverted into what was formerly a milking parlor washout pond, to the north of the silage bunker, beginning about 12:30 p.m. on July 22, 2019. Follow-up site visits conducted on July 23, 2019 and on July 24, 2019 confirmed that silage leachate was no longer entering Nobusiness Creek. Subsequent instream ambient water quality parameters were again measured on July 23<sup>rd</sup> and 24<sup>th</sup>. These results indicated that dissolved oxygen levels had returned to normal.
8. No permit had been issued for the discharge of silage leachate to Nobusiness Creek or Kimberling Creek.
9. Va. Code § 62.1-44.5 prohibits waste discharges or other quality alterations of state waters except as authorized by permit.
10. Regulation 9 VAC 25-31-50 provides that “except in compliance with a VPDES permit, or another permit, 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.”
11. Regulation 9 VAC 25-260-20 requires that all state water shall be free from substances attributable to sewage, industrial waste, and other material in concentrations which interfere with designated uses of such water or is harmful to human, animal, plant or aquatic life.
12. From counts taken during field investigation, an estimated total of 51,412 fish were killed in Nobusiness Creek and Kimberling Creek due to the unpermitted discharge of silage leachate. The kill zone extended from the point of discharge into Nobusiness Creek to the Dismal Creek confluence with Kimberling Creek.
13. On September 20, 2019, DEQ issued NOV No. NOV-009-0919-WA to Randall Eller for violation of Va. Code § 62.1-44.5 and Regulations 9 VAC 25-31-50 and 9 VAC 25-260-20.
14. On September 27, 2019, DEQ staff received a telephone call from a representative of Randall Eller in response to the NOV.
15. On October 4, 2019, DEQ staff met with Randall Eller and discussed the September 20, 2019 NOV. Mr. Eller submitted both written documentation and pictures of corrective actions taken at the Property.

16. On November 4, 2019, DEQ received both written and electronic correspondence from Randall Eller outlining actions taken and detailing expenses incurred (\$85,455.00) from redirection of the flow of the leachate from the silage bunker to a diversion box and collection pond, thus preventing a leachate discharge to Nobusiness Creek.
17. Replacement cost of the fish, as determined by the VDGIF, is \$30,540.20 and the cost of DEQ investigation is \$4,599.23. These costs will be recovered by separate demand letter from DEQ to Mr. Eller.
18. Nobusiness Creek and Kimberling Creek are both located wholly within the Commonwealth and are "state waters" under State Water Control Law.
19. Based on the results of the field investigations conducted on July 21-24, 2019, the October 4, 2019 meeting, and documentation received on both October 4, 2019 and November 4, 2019, the Board concludes that Randall Eller has violated Va. Code § 62.1-44.5 and Regulations 9 VAC 25-31-50 and 9 VAC 25-260-20 as described in paragraphs C(3) through C(8), above.
20. Randall Eller has submitted documentation that verifies that the violations described in paragraphs C(3) through C(8), above have been corrected.

#### **SECTION D: Agreement and Order**

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

1. Pay a civil charge of \$11,375.00 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, 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

Randall Eller shall include his Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If DEQ has to refer collection of moneys due under this Order to the Department of Law, Randall Eller shall be liable for attorneys' fees of 30% of the amount outstanding.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Randall Eller for good cause shown by Randall Eller, 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 and in NOV No. NOV-009-0919-WA, dated September 20, 2019. 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, Randall Eller admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Randall Eller 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. Randall Eller declares that he 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 Randall Eller 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. Randall Eller 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. Randall Eller shall demonstrate that such circumstances were beyond his control and not due to a lack of good faith or diligence on his part. Randall Eller 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.

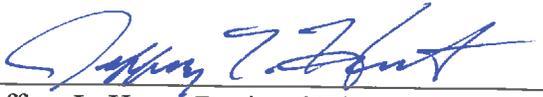
9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Randall Eller. Nevertheless, Randall Eller agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after Randall Eller has completed all of the requirements of the Order;
  - b. Randall Eller petitions the Director or his designee to terminate the Order after he 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 Randall Eller.

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

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 his signature below, Randall Eller voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 2<sup>nd</sup> day of April, 2020.

  
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Jeffrey L. Hurst, Regional Director  
Department of Environmental Quality

Randall Eller voluntarily agrees to the issuance of this Order.

Date: 2-10-2020 By: *J. Randall Eller*  
Randall Eller

Commonwealth of Virginia

City/County of Grayson

The foregoing document was signed and acknowledged before me this 10th day of

February, 2020, by J. Randall Eller.

*Charles M. Bolling*  
Notary Public

7274605  
Registration No.

My commission expires: 8/31/2021

Notary seal:

