



west virginia department of environmental protection

Division of Water and Waste Management
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Charleston, WV 25304
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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Burns Motor Freight, Inc.
Fred C. Burns Jr.
P.O. Box 149
Marlinton, WV 24954-0149

DATE: February 21, 2013

ORDER NO.: 7721

INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management (hereinafter "Director"), under the authority of West Virginia Code, Chapter 22, Article 11, Section 1 et seq. to Burns Motor Freight, Inc. (hereinafter "Burns").

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. Burns operates a tractor trailer fueling facility and maintenance garage located near Beverly, Randolph County, West Virginia. Burns was issued WV/NPDES Water Pollution Control Permit No. WV0111457, Registration No. WVG610596, on April 1, 2009.
2. On May 28, 2012, Randolph County 911 reported a spill of diesel fuel from the Burns facility into the Tygart Valley River, which resulted in strong odors and an oily sheen on the River.
3. On May 31, 2012, in response to the report, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an investigation at the Burns facility. During the investigation, the following deficiencies were observed:
 - a. Burns created conditions not allowable in waters of the State by causing oily slicks in an unnamed tributary of the Tygart Valley River, a violation of WV Legislative Rule 47CSR2 Section 3.2.a. As a result of the aforementioned violation, Notice of Violation (NOV) No. W12-42-075-2135 was issued to Burns.

Promoting a healthy environment.

- b. Burns failed to immediately take any and all measures necessary to contain the spill, a violation of WV Legislative Rule 47CSR11 Section 2.5. As a result of the aforementioned violation, NOV No. W12-42-078-2135 was issued to Burns.
 - c. Burns failed to take any and all measures necessary to clean up, remove and otherwise render the spill harmless to waters of the State, a violation of WV Legislative Rule 47CSR11 Section 2.5.a. As a result of the aforementioned violation, NOV No. W12-42-078-2135 was issued to Burns.
4. From June 6 through July 18, 2012, WVDEP personnel observed an oily slick on the unnamed tributary of the Tygart Valley River, a violation of WV Legislative Rule 47CSR2 Section 3.2.a.
 5. A meeting between WVDEP and Burns was held on November 26, 2012 to discuss the terms and conditions of this Order. During the meeting Burns provided documentation indicating that remediation of the spill had begun. Burns agreed with WVDEP that further delineation of the spill was necessary to determine the extent of contamination.
 6. On January 31, 2013, Burns provided documentation which demonstrated that it has taken measures to prevent accidental releases at its facilities in Beverly and Marlinton, by the installation of solenoid valves and fiberglass double wall piping for its Aboveground Storage Tank systems. The correspondence also stated that similar fuel system upgrades at the Sam Black facility were pending.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with Chapter 22, Article 11, Section 1 et seq. of the West Virginia Code, it is hereby agreed between the parties, and ORDERED by the Director:

1. Burns shall immediately take all measures to initiate compliance with all pertinent laws and rules.
2. Within thirty (30) days of the effective date of this Order, Burns shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Burns will achieve compliance with all pertinent laws and rules. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor
NE Regional Environmental Enforcement Office
HC 63 Box 2575
Romney, WV 26757**

A copy of this plan shall be submitted to:

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WVDEP
601 57th Street SE
Charleston, WV 25304**

Upon approval, the plan of corrective action and schedule shall be incorporated into and become part of this Order, as if fully set forth herein. Failure to submit an approvable plan of corrective action and schedule or failure to adhere to the approved schedule is a violation of this Order.

3. Within thirty (30) days of the effective date of this Order, Burns shall provide all current WV/NPDES permit information and modifications. The documents shall be submitted to:

**Yogesh Patel
WV-DEP DWWM
601 57th Street SE
Charleston, WV 25304**

A copy of the submittal cover letter shall be mailed to:

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WVDEP
601 57th Street SE
Charleston, WV 25304**

4. On or before July 31, 2013, Burns shall complete corrective actions on the fuel system at its Sam Black facility, as described in the aforementioned January 31, 2013 correspondence to WVDEP personnel.
5. Because of Burns' West Virginia Code and Legislative Rule violations, Burns shall be assessed a civil administrative penalty of eight thousand eight hundred thirty (\$8,830) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund in accordance with the following schedule:

Payment 1 in the amount of \$735.83 due on or before May 1, 2013.
Payment 2 in the amount of \$735.83 due on or before June 1, 2013.
Payment 3 in the amount of \$735.83 due on or before July 1, 2013.
Payment 4 in the amount of \$735.83 due on or before August 1, 2013.
Payment 5 in the amount of \$735.83 due on or before September 1, 2013.
Payment 6 in the amount of \$735.83 due on or before October 1, 2013.
Payment 7 in the amount of \$735.83 due on or before November 1, 2013.
Payment 8 in the amount of \$735.83 due on or before December 1, 2013.
Payment 9 in the amount of \$735.83 due on or before January 1, 2014.
Payment 10 in the amount of \$735.83 due on or before February 1, 2014.
Payment 11 in the amount of \$735.83 due on or before March 1, 2014.
Payment 12 in the amount of \$735.87 due on or before April 1, 2014.

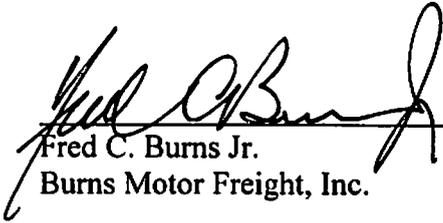
Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall be mailed to:**

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304**

OTHER PROVISIONS

1. Burns hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia. Under this Order, Burns agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, Burns does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding Burns other than proceedings, administrative or civil, to enforce this Order.
2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.
3. If any event occurs which causes delay in the achievement of the requirements of this Order, Burns shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after Burns becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Burns intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of Burns (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.
4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving Burns of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject Burns to additional penalties and injunctive relief in accordance with the applicable law.
5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.

6. This Order is binding on Burns, its successors and assigns.
7. This Order shall terminate upon Burns' notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Fred C. Burns Jr.
Burns Motor Freight, Inc.

3-4-13

Date

Public Notice begin:

Date

Public Notice end:

Date

Scott G. Mandirola, Director
Division of Water and Waste Management

Date

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Burns Motor Freight, Inc. **Receiving Stream:** Unnamed Trib. To Tygart Valley

Treatment System Design Maximum Flow: N/A **MGD**

Treatment System Actual Average Flow: N/A **MGD** (if known)

Enter FOF# and rate each finding as to Potential and Extent.

1)	Potential for Harm Factor	Factor Range	FOF#											
			3.a.	3.b.	3.c.	4								
a)	Amount of Pollutant Released	1 to 3	2	2	2	2								
b)	Toxicity of Pollutant	0 to 3	2	2	2	2								
c)	Sensitivity of the Environment	0 to 3	1	1	1	1								
d)	Length of Time	1 to 3	1	1	1	3								
e)	Actual Exposure and Effects thereon	0 to 3	2	2	2	2								
Average Potential for Harm Factor			1.6	1.6	1.6	2	No							
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	3	3	3	3								

Potential for Harm Factors:

- 1)c - Sensitivity of the Environment Potentially Affected (0 for "dead" stream)
- 1)d - Length of Time of Violation
- 1)e - Actual Human/Environmental Exposure and Resulting Effects thereon

Examples/Guidance:

Note: Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Minor = exceedance of permit limit by <=40% for Avg. Monthly or <=100% for Daily Max., exceed numeric WQ standard by <= 100%, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by >= 41% and <= 300% for Avg. Monthly , >= 101% and <= 600% for Daily Max., exceed numeric WQ standard by >= 101% and <= of 600% or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by >= 301% for Avg. Monthly, >= 601% for Daily Max., exceed numeric WQ standard by >= 601%, failure to submit a report, failure to obtain a permit, failure to report a spill, etc. Note that a facility in SNC should be rated as major for length of time and degree of non-compliance.

Narrative WQ standard violations - case-by-case.

Penalty Adjustment Factors

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor

6.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase

6.2.b.4 - Previous compliance/noncompliance history - 0% to 100% increase - based upon review of last three (3) years - Warning = maximum of 5% each, N.O.V. = maximum of 10% each, previous Order = maximum of 25% each - Consistent DMR violations for <1 year = 10% maximum, for >1 year but <2 years = 20% maximum, for >2 years but <3 years = 30% maximum, for >3 years = 40 % maximum

6.2.b.6 - Economic benefits derived by the responsible party (increase to be determined)

6.2.b.7 - Public Interest (increase to be determined)

6.2.b.8 - Loss of enjoyment of the environment (increase to be determined)

6.2.b.9 - Staff investigative costs (increase to be determined)

6.2.b.10 - Other factors

Size of Violator: 0 - 50% decrease

NOTE: This factor is not available to discharges that are causing a water quality violation. This factor does not apply to a commercial or industrial facility that employees or is part of a corporation that employees more than 100 individuals.

Avg. Daily WW Discharge Flow (gpd)	% Reduction Factor
< 5,000	50
5,000 to 9,999	40
10,000 to 19,999	30
20,000 to 29,999	20
30,000 to 39,999	10
40,000 to 99,999	5
> 100,000	0

Additional Other factors to be determined for increases or decreases on a case-by-case basis.

Public Notice Costs (cost for newspaper advertisement)

6.2.b.2 - Good Faith - 10% decrease to 10% increase

6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease

6.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease

Base Penalty Adjustments

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
6.2.b.1 - Willfulness and/or negligence -	10		\$1,880
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)			\$0
6.2.b.7 - Public Interest - (flat monetary increase)			\$0
6.2.b.8 - Loss of enjoyment - (flat monetary increase)			\$0
6.2.b.9 - Investigative costs - (flat monetary increase)			\$0
6.2.b.10 - Other factors (size of violator)			\$0
6.2.b.10 - Additional Other Factors - Increase (flat monetary increase)			\$0
6.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease)		\$10,000	(\$10,000)
Public Notice Costs (flat monetary increase)	\$30		\$30
6.2.b.2 - Good Faith - Increase			\$0
6.2.b.2 - Good Faith - Decrease			\$0
6.2.b.3 - Cooperation with the Secretary		10	(\$1,880)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			(\$9,970)
Penalty =			\$8,830

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	\$0
Comments:	