

From: [Clark, Charity](#)
To: [Audette, Bob](#)
Subject: Cherryrail
Date: Wednesday, October 6, 2021 2:51:11 PM
Attachments: [Cherryrail Stipulation signed.pdf](#)
[20210113 Complaint State v Westbrook and CherryRail Farm \(002\).pdf](#)
[Cherryrail Consent Order - Judge signed 9-22-21.pdf](#)

Hi, Bob,

Attached are the requested documents:

- Complaint;
- Stipulated settlement agreement; and
- Consent Order.

Please let me know if you have any questions.

Charity R. Clark
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Pronouns: she/her/hers

STATE OF VERMONT

SUPERIOR COURT

CIVIL DIVISION

WINDHAM UNIT

Docket No. 20-CV-_____

STATE OF VERMONT,)
AGENCY OF NATURAL)
RESOURCES and AGENCY)
OF AGRICULTURE, FOOD)
and MARKETS,)
Plaintiff,)
)
v.)
)
JAMES WESTBROOK and)
CHERRYRAIL FARM, LLC,)
Defendants.)

COMPLAINT

NOW COMES the State of Vermont, Agency of Natural Resources and Agency of Agriculture, Food and Markets, by and through Vermont Attorney General Thomas J. Donovan, Jr., and pursuant to 6 V.S.A. § 4995 and 10 V.S.A. § 8221, and the general equitable jurisdiction of the Court, hereby makes the following complaint against Defendants, James Westbrook and CherryRail Farm, LLC:

THE STATE’S ALLEGATIONS

The Parties

1. The Agency of Natural Resources (ANR) and the Agency of Agriculture, Food and Markets (AAFM) are agencies of the State of Vermont created through 3 V.S.A. § 2802 and 3 V.S.A. § 2350, respectively.

2. Defendant CherryRail Farm, LLC (CherryRail Farm) is a domestic limited liability company registered with the Vermont Secretary of State, with a principal place of business at 416 Meadowbrook Road in Brattleboro, Vermont. Defendant James Westbrook is the manager and registered agent of CherryRail Farm.

3. At the time of the events described below, CherryRail Farm was engaged in agricultural operations, i.e., the operation of a pig farm at 416 Meadowbrook Road in Brattleboro, Vermont.

4. Upon information and belief, Defendant James Westbrook is the operator of CherryRail Farm and the owner of the land at 416 Meadowbrook Road.

Statutory and Regulatory Structure

5. ANR regulates the protection of Vermont's waters, the permitting and management of discharges, maintenance of water quality, and control of water pollution pursuant to 10 V.S.A., Chapter 47.

6. In addition, AAFM regulates agricultural water quality pursuant to 6 V.S.A., Chapter 215.

7. ANR and AAFM cooperate and coordinate their respective efforts relating to agricultural water quality pursuant to 10 V.S.A. § 1259(i) and 6 V.S.A. § 4810(d).

Title 10, Chapter 47

8. Title 10 section 1259(a) provides, in part, that “[n]o person shall discharge any waste, substance or material into waters of the state ... without first obtaining a permit for that discharge from the Secretary [of ANR].”

9. Title 10 section 1251(3) defines “discharge” as “the placing, depositing or emission of any wastes, directly or indirectly, into . . . waters of the State.”

10. Title 10 section 1251(12) defines “waste” as “effluent, sewage or any substance or material, liquid, gaseous, solid or radioactive, including heated liquids, whether or not harmful or deleterious to waters.”

11. Title 10 section 1251(13) defines “waters” as including “all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs, and all bodies of surface waters, artificial or natural, which are confined within, flow through or border upon the State or any portion of it.”

Title 6 and Vermont’s Required Agricultural Practices

12. The purpose of Title 6, Chapter 215 is “to ensure that agricultural animal wastes do not enter the waters of this State.” 6 V.S.A. § 4801.

13. Pursuant to Title 6, the Secretary of AAFM adopted Required Agricultural Practices (RAPs) to “address activities which have a potential for

causing agricultural pollutants to enter the groundwater and waters of this State, including dairy and other livestock operations” 6 V.S.A. § 4810(b); RAPs § 1.2.

14. Title 6, Section 4810(b) provides, in part, that the RAPs “shall be management standards to be followed by all persons engaged in farming in this State.”

15. Section 6.01(b) of Vermont’s RAPs requires “production areas, barnyards, animal holding or feedlot areas, manure storage areas, and feed storage areas shall utilize runoff and leachate collection systems, diversion, or other management strategies in order to prevent the discharge of agricultural wastes to surface water or groundwater.”

16. Section 6.02(a) of the RAPs provides that “[a]ll agricultural wastes shall be managed in a manner to prevent runoff or leaching of wastes to waters of the State or across property boundaries.”

17. Section 7 of the RAPs (“Exclusion of Livestock from the Waters of the State”) provides, in relevant part, that:

- a. “Adequate vegetative cover shall be maintained on banks of surface waters by limiting livestock trampling and equipment damage to protect banks of surface waters to minimize erosion.”

RAPs Section 7(a);

- b. “Crossings and watering areas need to be maintained so as to minimize erosion and be adequately protective of surface waters.” RAPs Section 7(b);
 - c. “Livestock shall not have access to surface water in production areas or immediately adjacent to production areas, except” at “livestock crossings or watering areas,” in “areas prescribed by a rotational grazing plan,” or in “areas approved by the Secretary.” RAPs Section 7(c)(1) – (3); and
 - d. “Livestock shall not have access to surface water in areas outside of production areas that . . . contain unstable banks or where erosion is present.” RAPs Section 7(d)(1).
18. Section 2.12 of the RAPs defines “discharge” as “the placing, depositing, or emission of any wastes, directly or indirectly . . . into waters.”
19. Section 2.24 of the RAPs defines “livestock” to include “cattle . . . swine, sheep, goats, [and] horses”
20. Section 2.30 of the RAPs defines “production area” as “those areas of a farm where animals, or raw agricultural products are confined, housed, stored, or prepared whether within or without structures, including barnyards . . . heavy use areas . . . and waste storage and containment areas.”
21. Section 2.36 of the RAPs defines “surface water or waters” as “all rivers, streams, brooks, reservoirs, ponds, lakes, springs, and all bodies of

surface waters, artificial or natural, which are contained within, flow through or border the state or any portion of it.”

22. Section 2.39 of the RAPs defines “waste or agricultural waste” as “material originating or emanating from a farm that is determined by the Secretary or the Secretary of Natural Resources to be harmful to the waters of the State, including: sediments; minerals, including heavy metals; plant nutrients; pesticides; organic wastes, including livestock waste, animal mortalities, compost, feed and crop debris; waste oils; pathogenic bacteria and viruses; thermal pollution; silage runoff; untreated milkhouse waste; and any other farm waste as the term ‘waste’ is defined in 10 V.S.A. Section 1251(12).”

23. Section 2.42 of the RAPs defines “waters of the state” to include “surface waters and groundwater as applied.”

Civil Enforcement

24. Pursuant to Title 10 section 8221, the State may bring an action in Superior Court to enforce Vermont’s environmental laws, including violations of Chapter 47. Among other things, the court may grant injunctive relief, order compliance activities, and assess civil penalties up to \$85,000 per violation or, for continuing violations, up to \$42,500 for each day the violation continues.

25. Pursuant to Title 6 section 4995, the State may bring an action in Superior Court to enforce Vermont's agricultural water quality law, including violations of Chapter 215 and the rules adopted thereunder. Among other things, the court may grant injunctive relief, order corrective actions, and assess civil penalties up to \$85,000 per violation or, for continuing violations, up to \$42,500 for each day the violation continues.

Facts Relating to Defendants

26. CherryRail Farm is located at 416 Meadowbrook Road in Brattleboro. The farm property consists of a narrow strip of land running north to south. The barnyard area of the farm property is approximately 7 to 9 acres total. The overall barnyard area contains several small structures and is bisected by a road into two sections (hereinafter Barnyard 1 and Barnyard 2) on either side of the road.

27. The more easterly barnyard (Barnyard 1) is the larger of the two, with the smaller barnyard (Barnyard 2) on the western side of the barnyard area. Some of the farm's pigs are contained in the small barns, but most pigs are free to roam within the electric fenced areas in the two barnyards. Various farming structures, including a feeder barn are located on the farm property.

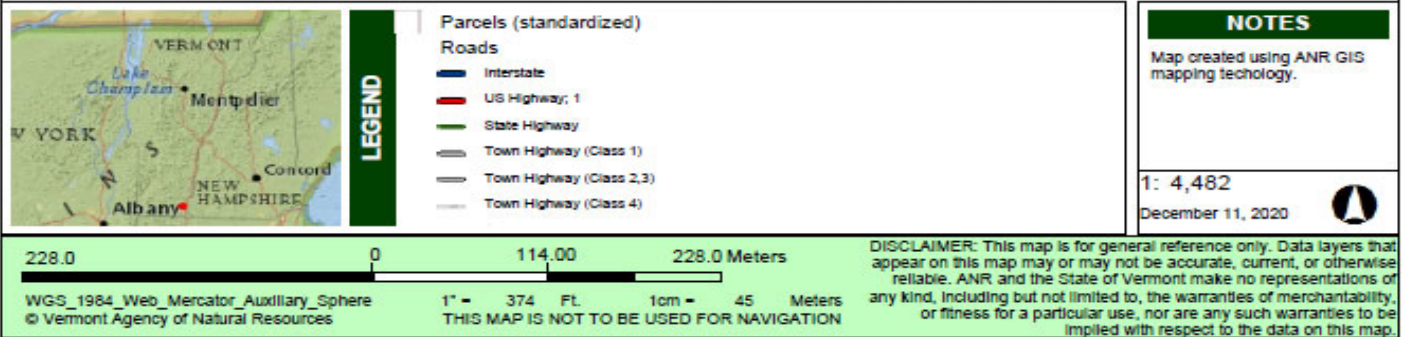
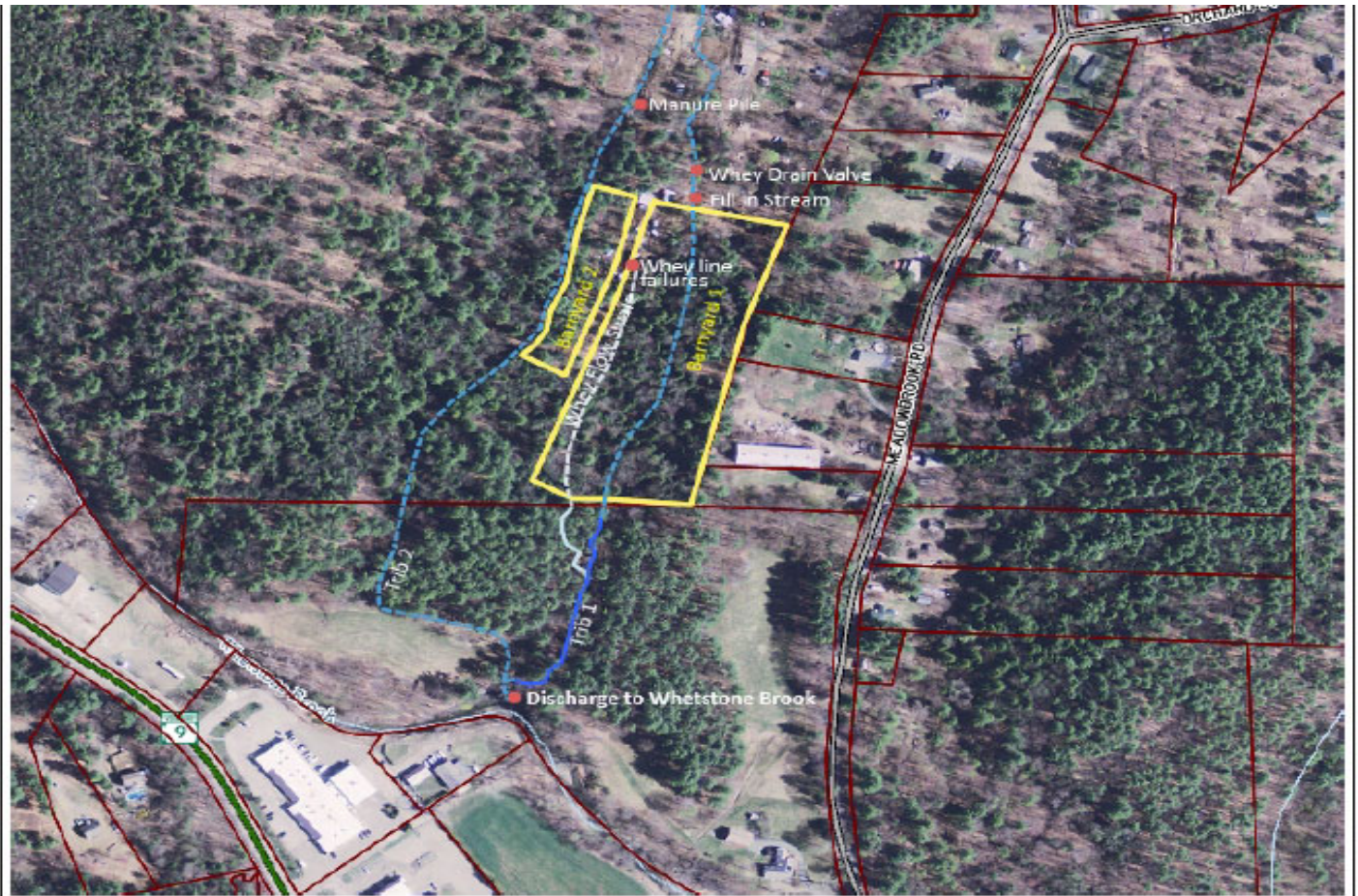
28. From the bisecting road, the land in each barnyard slopes downhill toward two small streams. The two streams (Tributary 1 and

Tributary 2) are both unnamed tributaries of the Whetstone Brook. Barnyard 1 slopes to Tributary 1, while Barnyard 2 slopes to Tributary 2. Tributary 1 runs through Barnyard 1, and Tributary 2 borders Barnyard 2 on its western boundary.

29. Both tributaries flow into Whetstone Brook and both are waters of the state.

30. Defendants do not have a permit from the Secretary of ANR to discharge to any of the waters nearby the farm (Tributary 1, Tributary 2, and the Whetstone Brook).

31. For illustrative purposes, a map approximating the layout of CherryRail Farm and the location of the barnyards and tributaries is below:



32. In late May and early June of 2018, ANR’s Department of Environmental Conservation (DEC) received complaints of possible sewer or agricultural odor and a possible visible discharge into an unnamed tributary (Tributary 1) and the Whetstone Brook in Brattleboro.

June 1, 2018

33. On June 1, 2018, a DEC Environmental Enforcement Officer (EEO) responded to the complaints and visited the area just south of the farm property, around the confluence of Tributary 1 and the Whetstone Brook.

34. Tributary 1 was running very turbid and murky. There was a strong sour smell in the area caused, at least in part, from manure. Closer to the water, the smell became stronger.

35. The water in the Whetstone Brook was cloudy where Tributary 1 entered it. Whetstone Brook was clear upstream from the point of Tributary 1's entry. Downstream from that point was murky.

June 11, 2018

36. On June 11, 2018, the same EEO returned to the confluence of Tributary 1 and Whetstone Brook with an AAFM inspector.

37. Tributary 1 was clearer than it was on June 1st, but it contained a great deal of sediment. In a few other places, a white and brown slimy substance was in the water. As was the case on June 1st, Tributary 1 smelled of manure and the smell was stronger closer to the water.

38. Along Tributary 1, in some places, the land just outside the stream banks had been scoured of the normal forest litter. This sort of scouring commonly occurs following heavy rain events, but there had been no such event recently.

39. At approximately 150 feet south of the farm's property line, a swale entered Tributary 1. Just as along the tributary's banks, there was evidence of a large-scale washing event in the swale. The swale smelled of manure and the smell was stronger closer to the swale.

40. Later that day, the EEO and AAFM inspector visited CherryRail Farm.

41. The upper reach of Tributary 1 flows through the farm property. Dirt, boulders, and tree stumps had been recently pushed into Tributary 1. The water in the tributary above and below the fill was murky and turbid. White and green material was in the water. Defendant James Westbrook explained that he was planning to make a crossing with the fill.

42. Just downstream from the fill, electric fencing was running across the stream, marking where the barnyard began. Pigs were running through Tributary 1. The barnyard area, including the area around the tributary's banks, was completely devoid of vegetation. Pigs were running across Tributary 1 and had access to the stream for approximately 750 feet, *i.e.*, the entire length of the fenced in Barnyard 1.

43. During this June 11, 2018 inspection, Defendant Westbrook said that the Brattleboro Town Health Officer (THO) had recently e-mailed Defendant Westbrook concerning a complaint about a discharge downstream from the farm. The THO wanted to know if the farm was the source.

Defendant Westbrook said he checked and found that a whey line on the farm had broken, sending about 200 gallons of whey down the hill into the woods.

44. Defendant Westbrook explained that he feeds the pigs brewer's grain and whey, and that a whey truck makes a delivery on Tuesdays and Thursdays to a 700-foot line that Defendant Westbrook installed, mostly underground, which goes to several holding tanks he has in the barnyard area. The whey supply line is 2 inches in diameter. Defendant Westbrook later estimated that he has about 7,000 gallons of whey storage across the tanks, which are piped together.

45. There were approximately ten 50-gallon feed troughs outside in the barnyard, each containing whey.

46. Defendant Westbrook showed the whey line to the State inspectors. He explained that a pig had dug up the line and broken it. Defendant Westbrook pointed out the exact spot in Barnyard 1 where the whey line had broken. Based on the capacity of the tank, Defendant Westbrook estimated that 200 gallons of whey had been discharged.

47. There was a visible path that the whey leak discharge had followed. There was a recently disturbed swale in a normally dry area of the woods south of Barnyard 1, which appeared to be churned up by a concentrated and sudden flow of a large volume of liquid. Defendant Westbrook explained that the swale was exactly where the release flowed. The swale enters Tributary 1.

48. Approximately 75 feet directly east of the southwest corner of Barnyard 1, along the apparent southern property line/southern edge of Barnyard 1, the water in Tributary 1 was murky and oddly discolored. The ground in Barnyard 1 and the stream banks in Tributary 1 were completely devoid of vegetation.

49. In addition, there were a few distinct deposits of pig manure next to Tributary 1. The water in the stream contained floating particulate matter with white/yellow foam visible in the water.

50. At an outbuilding in Barnyard 1, the whey line ran from the building toward Tributary 1. At the Tributary, the whey line terminated in a valve suspended just a few inches above the water and rocks of Tributary 1. The water in the stream was discolored and contained lumpy white chunks that appeared to be residual whey. Algae or fungus was growing in the water.

51. Defendant Westbrook indicated that he drains the whey line twice a week when he gets deliveries. He estimated that 20-30 gallons of whey is released each time he drains the line and that it all goes into Tributary 1 beneath the valve. Defendant Westbrook estimated that he was doing this regularly, twice a week, for the last six years. He agreed that the algae growth beneath the valve and downstream had been created by the whey line releases.

52. Along the western edge of the farm property, there were two piles of manure and old hay bedding on the edge of an embankment. There

was an estimated 50 cubic yards of material in these two piles. Water flowed through the embankment as a part of Tributary 2.

June 12, 2018

53. On June 12, 2018, the same EEO returned to Tributary 1 and the Whetstone Brook.

54. Approximately 150 feet south of the farm's southern property boundary at Tributary 1's confluence with the swale from which the whey release flowed, the water in Tributary 1 was black with bubbles or clumps in it. It smelled strongly of pig manure and the smell was more intense closer to the water.

55. Barnyard 1 was completely denuded of vegetation. Several pigs were running through the swale and through Tributary 1.

56. In addition, manure had been washed directly into the swale and from there to Tributary 1. The swale smelled strongly of manure and was wet with liquid to its confluence with Tributary 1.

June 19, 2018

57. On June 14, 2018, AAFM received a complaint concerning pigs having access to surface waters at CherryRail Farm.

58. On June 19, 2018, the EEO returned to the farm with representatives of AAFM and the DEC aquatic biologist. They conducted a

stream bed assessment of Tributary 1 and of the Whetstone Brook, which showed that Tributary 1 has been heavily impacted by the pig farm.

59. Tributary 1 was flowing through Barnyard 1 in a denuded area containing 180 – 190 pigs with unrestricted access to the surface water.

60. During the site visit, Defendant Westbrook explained that he receives between 8,000 and 10,000 pounds of brewery waste per week, which he typically piled in Barnyard 1 for feeding pigs in the feeder barn. He also explained that he receives approximately 7,200 gallons of liquid whey every week from a local creamery, which he feeds to the pigs in Barnyard 1.

61. There was a 2-inch black plastic pipe with a valve running northeast to southwest, suspended over Tributary 1. This is the same whey line and valve system as that in place on June 11, 2018 (see paragraphs 49-51, above). Defendant Westbrook explained that he uses this pipe to transfer whey to a farrowing barn on the property, and that the whey in the low point in the line can freeze in the winter. This valve in the pipe can be opened to release the whey that is trapped in the low point of the line. At the time of the site visit, this valve was closed, but AAFM staff observed whey in the surface water underneath the line.

62. Defendant Westbrook explained that he planned to fix the whey transfer line to remove the sag in the line that resulted in whey being trapped at the low point and thus eliminate the need for a valve to clean the line out.

Notice of Alleged Violation Issued – June 20, 2018

63. On June 20, 2018, the Agency of Natural Resources Department of Environmental Conservation issued a Notice of Alleged Violation (NOAV) to Defendants CherryRail Farm, Inc., and James Westbrook.¹

64. The NOAV required the immediate cessation of the whey discharge practice, removal of the Tributary 1 whey drain, removal of the fill from Tributary 1, and restriction of livestock from streams in accordance with the AAFM RAPs.

November 7, 2018

65. On November 7, 2018, the EEO and a Water Quality Specialist from AAFM returned to the farm.

66. The whey line was still located where it had been in June, suspended above Tributary 1 and crossing over it (see paragraphs 49 and 59, above). A valve and the T-shaped fitting that allows the line to be drained using a valve at ground level had been relocated on the whey line and were on the east bank of Tributary 1 approximately 25 feet uphill from Tributary 1. The whey line was leaking underground and discharging into the ground.

67. The release valve on the east stream bank had liquid whey effluent inside the valve, indicating that it had been recently used or

¹ The NOAV was also issued to the prior landowners of the property.

was possibly leaking. On the ground around the valve and immediately downhill from it, whey was on the ground in puddles and on leaves.

68. A cut-off 5-gallon plastic drum was on the ground near the valve and was nearly full of whey.

69. Additional whey was plainly visible a few feet north and uphill from the valve. The ground was saturated and liquid whey had pooled in the footprints in the mud.

70. Pooled whey was less than 2 feet from the bank of Tributary 1. There was whey and white fungus in the tributary, which smelled of putrid whey.

71. In Barnyard 1, pigs were roaming freely and crossing the stream. There was no new fencing, nor were there any other improvements since the June inspections.

72. Manure was accumulated at places on the banks of Tributary 1, and there was no collection system, diversion, or other management strategy to prevent the discharge of agricultural waste into surface water from Barnyard 1 or Barnyard 2.

73. There were also signs of agricultural waste running off from Barnyard 2 to Tributary 2.

74. Defendant Westbrook advised that he was not able to construct fencing in some of the area in Barnyard 1 because he was cutting trees and

they would fall on any new fencing, however there was no evidence of tree cutting in progress.

75. Barnyard 1 was covered with pig manure and mud in the area leading to the stream. The only notable change on this visit was the presence of more leaf litter.

76. Tributary 1 was extremely turbid and dozens of pigs had unrestricted access to the tributary.

77. Numerous troughs filled with whey were in Barnyard 1. There was nothing to keep the troughs from overflowing into the ground due to precipitation. All of the ground in Barnyard 1 slopes toward Tributary 1, and all of the whey troughs are within 30 yards of the stream, with many closer.

78. One whey trough which was within 10 yards of Tributary 1 had a fitting that was dripping whey onto the ground.

79. Further south from Barnyard 1, in the area where the whey line had previously broken and released hundreds of gallons of whey into the woods and Tributary 1 (NOAV, 6/20/18), the same whey line had another breach, spraying whey in a small jet up approximately 10 feet into the air. The whey was landing on the mud and manure-laden ground. The ground here slopes downhill toward Tributary 1 in the same swale where the whey had flowed during the June (2018) pipe rupture.

80. There was no fencing to restrict the pigs' access to Tributary 1 anywhere in Barnyard 1. Numerous pigs were in and around the swale.

81. Turbid water with white foam was in the swale, flowing slowly through and exiting Barnyard 1 and headed toward Tributary 1.

82. In Tributary 1 from Barnyard 1 to the swale, the water was visibly turbid, with a strong odor of manure.

83. At the Whetstone Brook, where Tributary 1 enters the brook, the water was turbid and murky with the same manure odor.

84. In Barnyard 2, an overland flow of manure was running into Tributary 2. There was also a swale in Barnyard 2 where water was flowing rapidly, diffusing across a short area of leaf litter and then entering Tributary 2. The water in Tributary 2 was murky and foamy in this area.

85. Also, in Barnyard 2 manure was accumulating against a fence, pushing up against the fence to a depth of over one foot in places.

86. Most of the fill, i.e., dirt, boulders, and tree stumps placed in the stream, and initially observed on June 11, 2018 (see paragraph 36 above) had been removed.

May 18, 2020

87. On May 18, 2020, and EEO accessed the property to the south of CherryRail Farm in order to examine a portion of the farm and the woods and tributary downhill of the farm.

88. The EEO observed a considerable amount of sediment at the Tributary 1 culvert outflow into Whetstone Brook, and then walked uphill along Tributary 1, observing that the water in this stream was somewhat

turbid. There was a great deal of sediment and/or manure in the stream bed of Tributary 1, and the stream smelled of manure.

89. At the confluence of the drainage swale that runs from Barnyard 1 into Tributary 1, the water in Tributary 1 was murky with a white scum on its surface. The swale was full of sediment and/or other material and had a green slimy substance that appeared to be algae.

90. From the confluence of the swale and Tributary 1, the EEO followed the swale up to the farm property line and electric fencing of Barnyard 1, noting the heavy odor of manure and/or other putrid material in the swale. The material embedded in the swale became thicker as the EEO neared the barnyard and in flatter areas.

91. From the fence line, the EEO was able to view both the swale and Tributary 1 for a few hundred feet into Barnyard 1. As with prior visits, the EEO observed that Barnyard 1 was essentially denuded of ground vegetation. A pig was also observed in a mud pit within the swale at the southern edge of the farm property line.

July 16, 2020

92. On July 16, 2020, a Concentrated Animal Feeding Operation (CAFO) Program Manager from ANR and a Water Quality Specialist from AAFM visited CherryRail Farm.

93. Defendant Westbrook stated that approximately 5,000 lbs. of brewer's grain and a quantity of whey are delivered each week. The whey transfer line was in use at the time of the visit.

94. At the time of this visit, the whey transfer line was an overland hose, suspended in the air by fastening it to nearby trees. There was a low point in the whey transfer line, where there was another pipe connected using the T-shaped fitting that runs perpendicular to the line.

95. The whey valve had been moved uphill from its previous location, but the valve was leaking with potential for whey to travel downhill and into the same ditch that was previously impacted.

96. A plastic barrel was in place to collect the whey that drains from the low point in the whey transfer line. Defendant Westbrook explained that he removes the whey from the barrel with a scoop and feeds it to the pigs. Whey had spilled on the ground near the barrel, which was approximately 30-feet up-gradient of surface water.

97. While no whey was observed discharging to surface waters on the July 16, 2020 inspection, the risk of discharge was present.

98. Barnyard 1 contained approximately 120 pigs at the time of the July 16, 2020 inspection.

99. A pig was seen in the surface water of Tributary 1 in Barnyard 1.

100. Agricultural waste was running off to the south from Barnyard 1 to surface water. Barnyard 1 was almost completely devoid of vegetation and topsoil. Nearby Tributary 1, the soil was eroded at least 2-3 ft. in places, with tree roots and mineral soil exposed.

101. Defendants had installed bales of dry hay in multiple locations around the barnyard.

102. There was evidence of past discharge of agricultural waste from Barnyard 1 to Tributary 1. There were numerous drainages that funneled runoff and waste to the property line and eventually into Tributaries 1 and 2.

103. The pigs in the Barnyard 2 had access to Tributary 2 from a production area. Animals had direct access to surface water (in Tributary 2) and the bank of Tributary 2 was trampled, eroded, and did not contain adequate vegetative cover.

104. Barnyard 2 was devoid of vegetation and there were no systems to collect waste from the animals in Barnyard 2.

105. While no agricultural waste was found to be discharging from Barnyard 2 to surface water at the time of the July 16, 2020 visit, there was evidence that agricultural waste had previously run off from Barnyard 2 to Tributary 2.

VIOLATIONS

Based upon the above facts, the State of Vermont alleges the following violations of Vermont's environmental and agricultural laws and regulations by Defendants:

COUNT ONE – Unpermitted Discharge to Waters of the State – June 11, 2018

106. Paragraphs 1-105 are incorporated by reference and realleged.

107. By discharging waste into Tributary 1 via pushing dirt, boulders, and tree stumps from the farm into the stream, as observed on June 11, 2018, without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT TWO – Unpermitted Discharge to Waters of the State – June 11, 2018

108. Paragraphs 1-107 are incorporated by reference and realleged.

109. By discharging approximately 200 gallons of whey into Tributary 1 on or about June 11, 2018 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT THREE – Unpermitted Discharge to Waters of the State – November 7, 2018

110. Paragraphs 1-109 are incorporated by reference and realleged.

111. By discharging whey from the whey line valve into Tributary 1 on or about November 7, 2018 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT FOUR – Unpermitted Discharge to Waters of the State – November 11, 2018

112. Paragraphs 1-111 are incorporated by reference and realleged.

113. By discharging manure and other agricultural wastes from the farm's Barnyard 1 into Tributary 1 on or about November 11, 2018 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT FIVE – Unpermitted Discharge to Waters of the State – November 11, 2018

114. Paragraphs 1-113 are incorporated by reference and realleged.

115. By discharging manure and other agricultural wastes from the farm's Barnyard 2 into Tributary 2 on or about November 11, 2018 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT SIX - Unpermitted Discharge to Waters of the State – July 16, 2020

116. Paragraphs 1-115 are incorporated by reference and realleged.

117. By discharging manure and other agricultural wastes from Barnyards 1 and 2 into Tributaries 1 and 2 on or about July 16, 2020 without a permit from the Secretary of ANR, Defendants violated 10 V.S.A. § 1259(a).

COUNT SEVEN – Violation of Vermont's Required Agricultural Practices – Failure to Manage Livestock Access to Surface Waters to Prevent Discharge

118. Paragraphs 1-117 are incorporated by reference and realleged.

119. By failing to maintain adequate vegetative cover and limit livestock trampling on the banks of Tributary 1, failing to maintain crossings and watering areas on Tributary 1 to minimize erosion and be adequately protective of Tributary 1, failing to limit livestock access to surface waters to minimize erosion and protect surface waters, from at least June 1, 2018 to the present date, Defendants violated Sections 7(a), 7(b), 7(c), and 7(d) of the RAPs.

COUNT EIGHT – Violation of Vermont’s Required Agricultural Practices – Failure to Use Management Strategies to Prevent Discharge

120. Paragraphs 1-119 are incorporated by reference and realleged.

121. By failing to manage the farm’s production areas, barnyards, animal holding, and manure storage areas to prevent the discharge of agricultural wastes to surface water, Defendants violated 6.01(b) of the RAPs.

COUNT NINE – Violation of Vermont’s Required Agricultural Practices – Failure to Manage Agricultural Waste to Prevent Runoff

122. Paragraphs 1-121 are incorporated by reference and realleged.

123. By failing to manage manure and whey in a manner to prevent runoff of these agricultural wastes to waters of the State, and by failing to use other management strategies to prevent the discharge of manure and whey into Tributary 1, Defendants violated 6.02(a) of the RAPs, from June 1, 2018 to the present date.

RELIEF SOUGHT

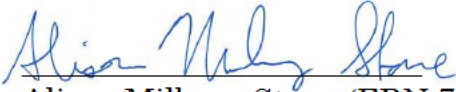
WHEREFORE, based on the allegations set forth above, the State of Vermont respectfully requests that the Court award the following relief:

1. An Order adjudicating Defendants liable for the violations of Vermont statutes and regulations set forth above in counts one through nine;
2. An Order enjoining Defendants from discharging any agricultural wastes from their agricultural operation at 416 Meadowbrook Road, Brattleboro to waters of the State;
3. An Order enjoining Defendants from any further violations of the Vermont RAPs;
4. An Order requiring Defendants to bring the farm into compliance with Title 10 Chapter 47 and all Required Agricultural Practices through a compliance plan developed by Defendants and approved by AAFM and ANR and, if no such plan is feasible, to cease any agricultural operations at the farm that cannot be conducted in compliance with Title 10 Chapter 47 and the Required Agricultural Practices;
5. An Order levying civil penalties against Defendants in accordance with 10 V.S.A. § 8221(b)(6) and 6 V.S.A. § 4995(b)(7);
6. An Order requiring Defendants to reimburse the State for its costs and expenses in investigating and prosecuting this action; and
7. Such other relief as the Court may deem just and appropriate.

DATED at Burlington, Vermont this 13th day of January 2021.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: 
Alison Milbury Stone (ERN 7087)
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STATE OF VERMONT

**SUPERIOR COURT
WINDHAM UNIT**

**CIVIL DIVISION
DOCKET NO. 21-CV-00063**

STATE OF VERMONT,)
)
Plaintiff,)
)
v.)
)
CHERRYRAIL FARM, LLC, and)
JAMES WESTBROOK,)
)
Defendants.)

CONSENT AGREEMENT AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties' filing of a Stipulation for the Entry of Consent Order and Final Judgment Order. Based upon that Stipulation, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

RESOLUTION OF VIOLATIONS

1. Without formally admitting or denying wrongdoing or liability, Defendants agree to this settlement of the alleged violations in order to resolve all outstanding disputes.
2. Defendants agree that the violations alleged in the Complaint are deemed proved and established as a "prior violation" in any future state proceeding that requires consideration of a past record of compliance, such as permit

review proceedings and calculating civil penalties under Title 10, section 8010.

RELIEF

3. For the violations described above, a penalty of \$70,000 is assessed as follows:
 - a. Defendants shall pay \$10,000 within 30 days of this Order, via check payable to the “State of Vermont” and sent to: Justin E. Kolber, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. In the event that payment is received by the State before the Court has approved the Consent Order, the State shall hold the check(s) in trust until approval. Should the Court reject the Consent Order, the State will return the check(s) to Defendants; and
 - b. The remainder of the penalty (\$60,000) shall be waived due to Defendants’ demonstrated inability to pay.
4. For each year through 2022, no later than May 15th of each year, Defendants shall submit tax returns, including all schedules, to the State of Vermont at: Justin E. Kolber, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. If these documents or other information show a change in economic circumstances such that the State believes Defendants’ ability to pay the remaining

\$60,000 penalty has increased, the State may petition the Court and the Court may require such increased payment.

5. If Defendants fail to pay the \$10,000 amount described in ¶ 4(a), such failure shall constitute a breach of this Consent Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. Defendants shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.
6. Defendant Cherryrail Farm, LLC shall cease all agricultural operations by December 8, 2021. This shall include: removal of all live animals (such as pigs); removal of all manure and other agricultural waste; and the adequate composting or burying of all mortalities pursuant to the Required Agricultural Practices Rule, Section 6.08; all completed by December 8, 2021. Defendant Westbrook shall be able to maintain personal gardens and grow crops for personal use on the property.
7. If Defendant Cherryrail Farm, LLC continues any agricultural operations (including housing live animals such as pigs, or maintaining waste that is not properly managed or disposed), beyond December 8, 2021, then it shall pay a civil penalty of \$3,000 per month for each month that such conduct continues. This provision shall not limit the State's ability to seek additional remedies, including further penalties and injunctive relief.
8. Defendants shall hire a professional engineer or other qualified professional acceptable to the Agency of Natural Resources (ANR) to

prepare an erosion prevention and sediment control plan (“EPSC Plan”), to be submitted to Chris Gianfagna at ANR (via email to: chris.gianfagna@vermont.gov) by October 15, 2021 for review and approval. The EPSC Plan shall address erosion and sediment control during manure removal and following animal removal to address long-term erosion prevention and sediment control at the site. In the event that ANR requests information or rejects the proposed EPSC Plan, Defendant shall revise and resubmit the EPSC Plan to ANR no later than ten (10) consecutive calendar days following any request or rejection, repeating the process as needed until an EPSC Plan is approved.

9. The approved EPSC Plan shall be implemented during manure removal and any long-term measures shall be completed no later than December 1, 2021.

OTHER PROVISIONS

10. Defendants waive all rights to contest or appeal this Consent Order.;
11. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendants’ obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendants.
12. This Consent Order is binding upon Defendants and all their successors and assigns. Any change in Defendants’ ownership or corporate or legal status, including but not limited to any

transfer of assets or real or personal property, shall not alter Defendants', or Defendants' successors and assigns', responsibilities under this Consent Order.

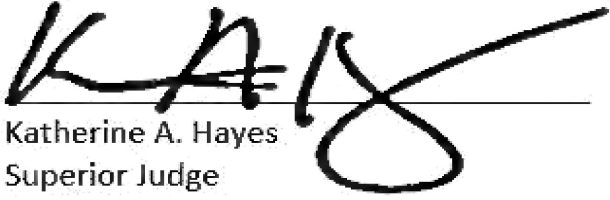
13. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, the Consent Order shall be final.

14. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

15. This Consent Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this Court. Any representations not set forth in this Consent Order and Final Judgment Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

16. The Windham Civil Division of the Vermont Superior Court shall have jurisdiction over this Consent Order and the Parties for the purpose of enabling any of the Parties to apply to this Court at any time for orders and directions as may be necessary or appropriate to carry out or construe the Consent Order, to modify or terminate any of its

provisions, to enforce compliance, and to punish violations of its provisions. The laws of the State of Vermont shall govern the Orders.


Katherine A. Hayes
Superior Judge

September 21, 2021

DATED at Montpelier, Vermont this 23 day of August, 2021.

STATE OF VERMONT
THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL



By: _____

Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

Aug 17, 2021

DATED at _____, Vermont this ____ day of August 2021.

CHERRYRAIL FARM, LLC

By: _____



James Westbrook (Aug 17, 2021 17:42 EDT)

James Westbrook, Member/Manager

Aug 17, 2021

DATED at _____, Vermont this ____ day of August 2021.

JAMES WESTBROOK

By: _____



James Westbrook (Aug 17, 2021 17:42 EDT)

James Westbrook

ORDER AND FINAL JUDGMENT

Based on the Pleadings by Agreement and the terms of the Consent Agreement of the Parties, the Court enters this ORDER and FINAL JUDGMENT.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this ___ day of ____, 2021.

Hon. _____
Windham Superior Court Judge

WHEREAS, pursuant to 3 V.S.A., Chapter 5, the Attorney General has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

WHEREAS, under 10 V.S.A. § 8221, Defendants are potentially liable for civil penalties of up to \$85,000.00 for each violation and \$42,500.00 per violation for each day the violation continued;

WHEREAS, the State has considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violations, the length of time the violations existed and that Defendants knew or had reason to know the violations existed;

WHEREAS, the Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Titles 6 and 10 of the Vermont Statutes Annotated in which the violations occurred; and

WHEREAS, the Stipulation and Consent Order have been negotiated by and among the State and Defendants in good faith.

NOW, THEREFORE, the State and Defendants hereby stipulate and agree as follows:

1. Without formally admitting or denying wrongdoing or liability, Defendants agree to this settlement of the violations alleged above in order to resolve this dispute;

2. Defendants agree that the violations alleged are deemed proved and established as a "prior violation" in any future state proceeding that requires consideration of Defendant's past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010;
3. The attached Consent Order may be entered as a final judgment in this matter by the Court.
4. The State and Defendants hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and
5. This Stipulation and the Consent Order sets forth the complete agreement of the parties, and they may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and incorporated in an order issued by the Court.
6. The Court should hold this Stipulation and the Consent Order for twenty-one (21) calendar days following their submission to the Court for the State to post them on its website to facilitate possible public participation in consideration of this settlement; and
7. Following expiration of the twenty-one (21) day period, the attached Consent Order may be entered as a final Judgment in this matter by the Court.

DATED at Montpelier, Vermont this ____ day of August 2021.

STATE OF VERMONT

THOMAS J. DONOVAN
ATTORNEY GENERAL



By: _____

Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

Aug 20, 2021

DATED at _____, Vermont this ____ day of August 2021.

CHERRYRAIL FARM, LLC



By: _____

[Jim Westbrook \(Aug 20, 2021 22:20 EDT\)](#)

James Westbrook, Member/Manager

Aug 20, 2021

DATED at _____, Vermont this ____ day of July 2021.

JAMES WESTBROOK



By: _____

[Jim Westbrook \(Aug 20, 2021 22:20 EDT\)](#)

James Westbrook

APPROVED AS TO FORM:



Justin E. Kolber



Alexander J. LaRosa, Esq.

Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609

MSK Attorneys
275 College Street, P.O. Box 4485
Burlington, VT 05406-4485
(802) 861-7000






Additional Document to Sign - Stipulation

Final Audit Report

2021-08-21

Created:	2021-08-19
By:	Alexander LaRosa (ajlarosa@mskvt.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAbFbxFG4LX9KIvEqgyAEWyl4SciOoJUI2

"Additional Document to Sign - Stipulation" History

-  Document created by Alexander LaRosa (ajlarosa@mskvt.com)
2021-08-19 - 1:25:08 PM GMT- IP address: 204.13.41.148
-  Document emailed to Jim Westbrook (cherryrailfarm@gmail.com) for signature
2021-08-19 - 1:25:39 PM GMT
-  Email viewed by Jim Westbrook (cherryrailfarm@gmail.com)
2021-08-21 - 2:20:06 AM GMT- IP address: 66.102.8.11
-  Document e-signed by Jim Westbrook (cherryrailfarm@gmail.com)
Signature Date: 2021-08-21 - 2:20:44 AM GMT - Time Source: server- IP address: 71.234.161.180
-  Agreement completed.
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