COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
PIEDMONT REGIONAL OFFICE
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Douglas W. Domenech
Secretary of Natural Resources

David K. Paylor
Director

Michael P. Murphy
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
HARVEST GARDEN PRO, LLC
FOR
HARVEST GARDEN PRO, LLC., DOSWELL SITE
Unpermitted Filling of Wetlands and Unpermitted Discharge at 17554 and 17560 Washington Highway, Doswell, Virginia

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 Harvest Garden Pro, LLC, regarding the Harvest Garden Pro, LLC, Doswell Site, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

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. "CSCE" means comprehensive site compliance evaluation.

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, when used with reference to the requirements of the VWPP without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

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. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

9. "Effluent" means wastewater – treated or untreated – that flows out of a treatment plant, sewer, or industrial outfall.

10. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

11. "Facility" means the Harvest Garden Pro, LLC, Doswell Site located at 17554 Washington Highway, Doswell, Virginia, 23047, Parcel ID 7884-35-7072, Deed Book 3008, page 473, from which discharges of industrial wastewater and stormwater associated with industrial activity occur.

12. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

13. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.

14. "Garden Pro" means Harvest Garden Pro, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. Garden Pro is a "person" within the meaning of Va. Code § 62.1-44.3.

15. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

16. "O&M" means operations and maintenance.

17. "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.

18. "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. "Pollutant" also means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.

19. "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; 9 VAC 25-210-10.

20. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.

21. "Property" means the tract of land at 17560 Washington Highway, Doswell, Virginia, owned by Harvest Garden Pro, LLC, Parcel ID 7884-37-3396, Deed Book 3008, page 473.

22. "Registration statement" means a registration statement for coverage under a storm water general permit.

23. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.

24. "Site" means both the Facility and the Property. The Site consists of two parcels, the Facility parcel and the Property parcel totaling 116 acres.

25. "State Water Control Law" means Chapter 3.1(§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.

26. "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 and 9 VAC 25-210-10.

27. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.

28. "SWP3" means Stormwater Pollution Prevention Plan.

29. "USACE" means the United States Army Corps of Engineers.

30. "Va. Code" means the Code of Virginia (1950), as amended.

31. "VAC" means the Virginia Administrative Code.

32. "VPA" means Virginia Pollution Abatement.

33. "VPDES Permit" means a Virginia Pollutant Discharge Elimination System ("VPDES") General or Individual Permit which is issued under the State Water Control Law and the Regulation.

34. "VPDES Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.* and VPDES Permit for Discharges of Storm Water Associated with Industrial Activity, 9 VAC 25-151-10, *et seq.*

35. "VWPP Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.

36. "VWP Regulation" means the Virginia Water Protection ("VWP") Permit Program Regulations, 9 VAC 25-210 *et seq.*

37. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

38. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. Garden Pro owns the Site in Hanover County, Virginia and owns and operates the Facility. The Facility manufactures, dyes, packages, stores and distributes wood mulch for profit as well as manufactures top soil and stores other types of horticultural products. The Facility discharges stormwater associated with industrial activity. The Site contains multiple stormwater management ("SWM") ponds.

2. North Anna River is the receiving body and located in the York River Basin. During the 2010 305(b)/303(d) Water Quality Assessment, the receiving stream was not assessed (Category 3A water). The Site was not addressed in any TMDL. The stream is not proposed for designation as a Tier 3 water.

3. On April 8, 2010, DEQ staff received a report that wetland water located at the Site looked red. On April 12, 2010 DEQ staff inspected the Site and determined the red color was due to emergent wetlands vegetation. While at the Site DEQ staff observed material from the Facility that was discharged into non-tidal palustrine forested wetlands, and determined that the Site did not have a stormwater permit.

4. On March 16, 2011, DEQ staff inspected the Site for compliance with the requirements of the State Water Control Law and the Regulations. The DEQ inspectors observed the following:

    a) Pond 1, an unlined SWM pond, contained red, brown and black dyes that were observed leaching from nearby mulch piles and flowing into Pond 1. Effluent from Pond 1, comprised of industrial wastewater from the mulch dying operation and contaminated storm water, was observed flowing from the discharge pipe south along the Plantation Pipe Line easement approximately 500 feet, then into a drainage feature that flows into a forested wetland/stream system which is an unnamed tributary to Bull Run.

b) Garden Pro failed to notify DEQ of the unpermitted discharge of industrial wastewater and contaminated stormwater.

c) DEQ staff observed, on the northern part of the Site, a product storage area that did not exist at the time of the April 12, 2010 inspection, which showed evidence of a past discharge of fill material to non-tidal palustrine forested wetlands. Garden Pro's staff stated that the storage area was five acres and that the forested area was cleared and graded in the fall of 2010. Garden Pro's staff did not know of any permits issued for construction of the storage area, and DEQ staff found no evidence that permits were issued to authorize wetland impacts during the construction of the product storage area.

5. On March 22, 2011, DEQ staff returned to the Facility to obtain water samples from SWM Pond 1. Water samples were taken at seven locations, and analyzed. The effluent from SWM Pond 1 outfall pipe had dissolved oxygen ("DO") concentrations below Virginia's minimum water quality standard for DO of 4.0 mg/L for non-tidal waters in the Coastal and Piedmont zones. DEQ staff also observed elevated conductivity in SWM Pond 1 from dye contamination.

6. On March 22, 2011, DEQ staff also inspected the product storage area on the Property, to determine the wetland impacts resulting from the creation of the product storage area. The product storage area pad was found to be constructed with sand fill, topped with compacted crushed stone.

7. On April 29, 2011, DEQ staff inspected the Site, and met with Garden Pro and its representatives.

8. On May 9, 2011, Garden Pro submitted a registration statement for industrial activity stormwater discharges.

9. On May 16, 2011, DEQ issued NOV No. 11-04-PRO-701 for the violations described above in C(3) – C(6), citing, Va. Code § 62.1-44.5 (A), Va. Code § 62.1-44.5 (B), Va. Code § 62.1-44.15:20 (A), 9 VAC 25-31-50 (A), 9 VAC 25-31-50 (B) and 9 VAC 25-210-50 (A).

10. Va. Code § 62.1-44.5 (A) states that: "[e]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances . . .."

11. 9 VAC 25-31-50 (A) provides that "[e]xcept in compliance with a VPDES permit, or another permit, issued by the board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances . . .."

12. Va. Code § 62.1-44.5 (B) states that: "[a]ny person in violation of the provisions of subsection A who discharges or causes or allows (i) a discharge of sewage, industrial waste, other wastes or any noxious or deleterious substance into or upon state waters or (ii) a discharge that may reasonably be expected to enter state waters shall, upon learning of the discharge, promptly notify, but in no case later than 24 hours . . . the Director of the Department of Environmental Quality . . .." Written notice to the Director of the Department of Environmental Quality shall follow initial notice . . .."

13. 9 VAC 25-31-50 (B) states that "[a]ny person in violation of 9 VAC 25-31-50 (A), who discharges or causes or allows a discharge of sewage, industrial waste, other wastes or any noxious or deleterious substance into or upon state waters; or who discharges or causes or allows a discharge that may reasonably be expected to enter state waters in violation of subsection A of this section shall notify the department of the discharge, immediately upon discovery of the discharge but in no case later than 24 hours after said discovery. A written report of the unauthorized discharge shall be submitted by the owner, to the department, within five days of discovery of the discharge . . .."

14. Va. Code § 62.1-44.15:20 (A) states that "[e]xcept in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: . . . 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping . . . d. New activities that cause significant alteration or degradation of existing wetland acreage or functions . . .."

15. 9 VAC 25-210-50 (A) states that "[e]xcept in compliance with a VWP permit . . . no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters . . . or on or after October 1, 2001, conduct the following activities in a wetland: . . . 2. Filling or dumping . . .."

16. 9 VAC 25-31-100 (A) provides that "[a]ny person who discharges or proposes to discharge pollutants . . . and who does not have an effective permit . . . shall submit a complete application to the department in accordance with this section."

17. 9 VAC 25-32-60 (A) provides that "[a]ny owner of a pollutant management activity who does not have an effective VPA permit, except persons covered by general VPA permits or excluded under 9 VAC 25-32-40, shall submit a complete application to the department in accordance with this section."

18. By May 26, 2011, DEQ received all the results of the metals testing of the water samples from SWM Pond 1 at the Facility. Four metals, including aluminum, chromium, copper and iron exceeded stormwater benchmarks contained in the appropriate general stormwater permit.

19. On June 14, 2011, Department staff met with representatives of Garden Pro to discuss the violations. Garden Pro agreed to test the dyes used in the dying operation at the Facility

in an effort to determine the source of the four metals that exceeded stormwater benchmarks.

20. On July 25, 2011, DEQ received the analytical results of the dye testing from Garden Pro, which showed many metals exceeding stormwater benchmarks.

21. On August 17, 2011, DEQ staff met again with Garden Pro to discuss permit options for the Site and to address the wetlands violations further.

22. Garden Pro did not have a VWPP Permit for the discharge of fill material into the 0.5 acres of wetlands.

23. On April 17, 2012, Garden Pro purchased 1.0 acres of wetland credits from the Pamunkey Farm Mitigation Bank, LLC.

24. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a "certificate" under the statute.

25. DEQ has not issued any VPDES permits or certificates to Garden Pro.

26. North Anna is a surface water located wholly within the Commonwealth and is a "state water" under State Water Control Law.

27. Based on the results of the above inspections, the June 14, 2011 and August 17, 2011 meeting and the documentation submitted, the Board concludes that Garden Pro has violated Va. Code § 62.1-44.15:20, Va. Code § 62.1-44.5 (A), Va. Code § 62.1-44.5 (B), 9 VAC 25-31-50 (A), 9 VAC 25-31-50 (B), 9 VAC 25-210-50, 9 VAC 25-31-100, 9 VAC 25-32-60 and as described in paragraphs C(1) through C(25), above.

28. In order for Garden Pro to completely return to compliance, DEQ staff and representatives of Garden Pro have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

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

1. Perform the actions described in Appendix A of this Order; and

2. Pay a civil charge of $38,794.00 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

Garden Pro shall include its Federal Employer Identification Number (FEIN) 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).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Garden Pro for good cause shown by Garden Pro, or on their 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, Garden Pro admits to the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law in this Order.

4. Garden Pro 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. Garden Pro declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it 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 Garden Pro 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. Garden Pro 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 its control and not due to a lack of good faith or diligence on its part. Garden Pro shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Garden Pro 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 Garden Pro. Nevertheless, Garden Pro 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 Garden Pro has completed all of the requirements of the Order;

    b. Garden Pro 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 Garden Pro.

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

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 their signature below, Garden Pro voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 6th day of DECEMBER, 2012.

Michael P. Murphy, Regional Director
Department of Environmental Quality

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Harvest Garden Pro, LLC voluntarily agrees to the issuance of this Order.

Date: 10/1/12 By: [signature], Co-President
(Person) (Title)
Harvest Garden Pro, LLC

State of Delaware JAX III
~~Commonwealth of Virginia~~ SFOX
City/County of Kent

The foregoing document was signed and acknowledged before me this 1 day of

October, 2012, by Joseph A. Kollock III who is

Co-President of Harvest Garden Pro, LLC on behalf of the company.

Sharmin Fox
Notary Public

Registration No.

My commission expires: 12-5-2012

Notary seal:

SHARMIN J. FOX
MY COMMISSION
EXPIRES
December 05, 2012
NOTARY PUBLIC
STATE OF DELAWARE

APPENDIX A
SCHEDULE OF COMPLIANCE

1. **Unpermitted Discharge/Spill**

   a. Within 60 days of the effective date of this Order, Garden Pro shall submit to DEQ for review and approval an inspection and sampling ("I&S") plan for the Site. The I&S plan shall include:

      1) surface water sampling, collected at a minimum depth of 4-5 inches, of Pond 1 for dissolved copper, dissolved lead, dissolved chromium, hardness and BOD_5;

      2) surface water sampling, collected at a minimum depth of 4-5 inches, of SWM Pond 2, which is located to the northeast of Pond 1 on the Site, for dissolved copper, dissolved lead, dissolved chromium, hardness and BOD_5;

      3) groundwater sampling near Pond 1 for total recoverable copper, total recoverable lead and total recoverable chromium, which must include at least three groundwater wells, one up gradient well and two down gradient wells; and

      4) a minimum of four sediment samples, at a sediment depth of 0-4 inches, from Pond 1 for total recoverable chromium, total recoverable copper and total recoverable lead based on dry weight.

   The I&S plan shall be detailed and contain sampling protocols and a schedule for completion. Once approved the I&S plan shall be implemented and completed and the results submitted to DEQ no later than five months from the date the I&S plan is approved by DEQ. The purpose of the I&S plan is to determine whether a corrective action plan ("CAP") is necessary and which permit(s) are necessary for the Site.

   b. Garden Pro shall submit a permit application to DEQ for all the necessary and appropriate permits, if required, five months following the submittal of the results of the I&S plan, and shall respond to any additional requests from DEQ to have a complete permit application submitted to DEQ within six months after submission of the results of the I&S plan.

   c. If DEQ, after meeting with Garden Pro, determines it to be necessary under State Water Control Law and regulations and DEQ guidance, Garden Pro shall submit to DEQ for review and approval a CAP for the Site within five months following the submittal of the results of the I&S plan, including, a schedule for completion of the CAP. Once approved the CAP shall be implemented and completed no later than eight months from the date the CAP is submitted to DEQ.

2. **DEQ Contact**

Unless otherwise specified in this Order, Garden Pro shall submit all requirements of Appendix A of this Order to:

Gina Pisoni
Enforcement Specialist
VA DEQ – Piedmont Regional Office
4949-A Cox Road
Glen Allen, Virginia 23060
804-527-5156
804-527-5106 (fax)
Gina.Pisoni@deq.virginia.gov