



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

VALLEY REGIONAL OFFICE

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STATE WATER CONTROL BOARD & VIRGINIA WASTE MANAGEMENT BOARD

ENFORCEMENT ACTION - ORDER BY CONSENT

ISSUED TO

FITZGERALD'S ORCHARDS, LLC

FOR

FITZGERALD'S ORCHARD

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15 and Va. Code § 10.1-1455, between the State Water Control Board, the Virginia Waste Management Board, and Fitzgerald's Orchards, LLC, regarding Fitzgerald's Orchard for the purpose of resolving certain violations of the State Water Control Law and Regulations, and the Waste Management Act and Regulations.

SECTION B: Definitions

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

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

4. "Fitzgerald's" means Fitzgerald's Orchards, LLC, a limited liability company authorized to do business in Virginia, and its members, affiliates, partners, and subsidiaries. Fitzgerald's is a "person" within the meaning of Va. Code § 62.1-44.3 and Va. Code § 10.1-1400.
5. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15 and Va. Code § 10.1-1455.
6. "Order" means this document, also known as a "Consent Order" or "Order by Consent."
7. "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.
8. "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. "Site" means Fitzgerald's Orchard, a commercial apple orchard located at 728 Harpers Creek Lane, Tyro, Virginia in Nelson County.
10. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
11. "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.
12. "Va. Code" means the Code of Virginia (1950), as amended.
13. "VAC" means the Virginia Administrative Code.
14. "VDGIF" means the Virginia Department of Game and Inland Fisheries.

15. "Virginia Waste Management Act" means Chapter 14 (§ 10.1-1400 *et seq.*) of Title 10.1 of the Va. Code. Article 2 (Va. Code §§ 10.1-1408.1 through -1413.1) of the Virginia Waste Management Act addresses Solid Waste Management.
16. "VPDES" means Virginia Pollutant Discharge Elimination System.
17. "VSWMR" means the Virginia Solid Waste Management Regulations, 9 VAC 20-81-10 *et seq.*
18. "Waste Board" means the Virginia Waste Management Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and -1401.
19. "Water 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.

SECTION C: Findings of Fact and Conclusions of Law

1. Fitzgerald's owns and operates the Site. Harpers Creek and unnamed tributaries to Harpers Creek flow through the Site.
2. On July 14, 2017, DEQ staff received notification from VDGIF that a citizen reported a fish kill in Harpers Creek near Tyro, Virginia.
3. Between July 14, 2017 and July 16, 2017, DEQ staff investigated the complaint through multiple Site visits and observed approximately 200 dead fish, approximately 50 dead salamanders, and one dead great blue heron in Harpers Creek. DEQ staff followed the fish kill upstream to an area at the Site and observed an open chemical shed, numerous empty or partially empty agricultural chemical containers on the ground, including labelled containers for the fungicide Flutriafol, and the insecticides Diazinon and Phosmet, a burn pile with partially burned chemical containers, a chemical mixing area, and a holding tank intercepting a flowing spring water source. Spillage from chemical mixing activities at the spring discharged into Harpers Creek.
4. On July 15, 2017, Virginia State Police Criminal Investigations staff collected soil samples at the Site from the chemical mixing area; the samples were submitted to Virginia's Division of Consolidated Laboratory Services (DCLS).
5. On July 17, 2017, DEQ staff collected dead fish, salamanders, and crane fly larvae from within Harpers Creek downstream from the Site. These samples were submitted to DCLS.
6. On July 25, 2017, DEQ and Virginia State Police Criminal Investigation staff met with Fitzgerald's representatives at the Site to discuss the complaint and DEQ observations. A Fitzgerald's representative advised DEQ that they have a certified pesticide applicator

license. The Fitzgerald's representative told DEQ staff that on the day before the fish kill, a hose on the sprayer had broken while Fitzgerald's employees were mixing agricultural chemicals and the contents of the sprayer were discharged onto the ground. The Fitzgerald's representative advised that the chemical shed and chemical containers had been moved from the spring area. DEQ staff verified that the chemical shed and chemical containers had been removed from the spring area, and were located in an upland location at the Site.

7. On October 25, 2017, DEQ received a Certificate of Analysis from DCLS indicating that Flutriafol, Diazinon, and Phosmet were confirmed in the fish, salamander, crane fly larvae and soil samples. According to the respective chemical Safety Data Sheets, Flutriafol, Phosmet, and Diazinon are each toxic to fish and aquatic invertebrates.
8. On November 6, 2017, DEQ issued NOV No. 2017-VRO-0012 to Fitzgerald's for alleged violations of the State Water Control Law and Regulations.
9. On November 9, 2017, DEQ issued NOV No. 2017-VRO-0013 to Fitzgerald's for alleged violations of the Virginia Waste Management Act and the Virginia Solid Waste Management Regulations.
10. Va. Code § 62.1-44.5.A states in part: "Except in compliance with a certificate or permit issued by the Board or other entity authorized by the Board [Virginia State Water Control Board] to issue a certificate or permit pursuant to this chapter, it shall be unlawful for any person to: Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses..."
11. 9 VAC 25-31-50.A. also states that: "Except in compliance with a VPDES permit, or another permit, issued by the board [Virginia State Water Control Board] or other entity authorized 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; 2. Otherwise alter the physical, chemical, or biological properties of such state waters and make them detrimental to the public health, or to animal or aquatic life, or to the use of such waters for domestic or industrial consumption, or for recreation, or for other uses..."

Va. Code § 62.1-44.5.B states: Any 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 Board [Virginia State Water Control Board], the Director of the Department of Environmental Quality, or the coordinator of emergency services appointed pursuant to § 44-146.19 for the political subdivision reasonably expected to be affected by the discharge. Written notice to the

Director of the Department of Environmental Quality shall follow initial notice within the time frame specified by the federal Clean Water Act.”

12. 9 VAC 25-260-140(A) states in part: “Instream water quality conditions shall not be acutely or chronically toxic except as allowed in 9VAC25-260-20B (mixing zones). The following are definitions of acute and chronic toxicity conditions:

"Acute toxicity" means an adverse effect that usually occurs shortly after exposure to a pollutant. Lethality to an organism is the usual measure of acute toxicity. Where death is not easily detected, immobilization is considered equivalent to death.”

13. Va. Code § 10.1-1408.1.A. states that: “No person shall operate any sanitary landfill or other facility for the disposal, treatment or storage of nonhazardous solid waste without a permit from the Director.”
14. 9 VAC 20-81-40(A-C) also states that: “No person shall operate any sanitary landfill or other facility for the disposal, treatment, or storage of solid waste without a permit from the Director. No person shall allow waste to be disposed of or otherwise managed on his property except in accordance with this chapter. It shall be the duty of all persons to dispose of or otherwise manage their solid waste in a legal manner.”
15. On December 17, 2017, at DEQ’s request, the Environmental Protection Agency (EPA) conducted a sampling event as part of an evaluation of the extent of pesticide release and contamination, and to determine if removal action is necessary at the Site.
16. On February 13, 2018, DEQ received the Data Validation Report from EPA, which indicated that pesticides are present in the soil at the Site, but the levels of contaminants did not exceed regulated maximum allowable concentrations and EPA did not recommend any further action or remediation.
17. Based on the results of the DEQ field investigations from July 14, 2017 to July 16, 2017, the DEQ meeting on July 25, 2017, the DCLS results received October 25, 2017, indicating the presence of pesticides in soil samples from the Site and in fish, salamander and crane fly larvae samples from Harpers Creek, and the EPA results indicating the presence of pesticides in the soil at the Site, the Waste Board and Water Board conclude that Fitzgerald’s Orchards has violated Va. Code § 10.1-1408.1.A., 9 VAC 20-81-40(A-D), Va. Code § 62.1-44.5, 9 VAC 25-260-140(a), and 9 VAC 25-31-50.A., as noted in paragraphs C(3) and C(16) of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code § 62.1-44.15 and § 10.1-1455, the Boards order Fitzgerald’s, and Fitzgerald’s agrees to:

1. Pay a civil charge of \$52,000 within 30 days of the effective date of the Order in settlement of the violations cited in this Order;
2. Reimburse DEQ \$5,506.71 for DEQ fish kill investigative costs within 30 days of the effective date of the Order;
3. Reimburse VDGIF \$32.26 for VDGIF fish replacement costs within 30 days of the effective date of the Order.

Payment shall be made by separate checks, certified checks, money orders or cashier's checks payable to:

1. the "Treasurer of Virginia" for the civil charge and for the DEQ fish kill investigative costs totaling \$57,506.71 (one check);
2. the "Virginia Department of Game and Inland Fisheries" for the VDGIF fish replacement costs totaling \$32.26 (one check);

and delivered to:

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

Fitzgerald's shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Fitzgerald's shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Boards may modify, rewrite, or amend this Order with the consent of Fitzgerald's for good cause shown by Fitzgerald's, 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. 2017-VRO-0012, issued November 6, 2017 and NOV No. 2017-VRO-0013, issued November 9, 2017. This Order shall not preclude the Boards 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, Fitzgerald's admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. Fitzgerald's 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. Fitzgerald's 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 Fitzgerald's 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. Fitzgerald's 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. Fitzgerald's shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Fitzgerald's 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 Fitzgerald's. Nevertheless, Fitzgerald's 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 Fitzgerald's has completed all of the requirements of the Order;
 - b. Fitzgerald's 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 Fitzgerald's.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Fitzgerald's 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 Fitzgerald's 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. Any documents to be submitted pursuant to this Order shall be submitted by Fitzgerald's or an authorized representative of Fitzgerald's.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Fitzgerald's voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 24th day of January, 2018.



Amy T. Owens, Regional Director
Department of Environmental Quality

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Fitzgerald's Orchards, LLC voluntarily agrees to the issuance of this Order.

Date: Nov. 6, 2018 By: Thomas H. Fitzgerald Manager
(Person) (Title)
Fitzgerald's Orchards, LLC

Commonwealth of Virginia
City/County of Nelson

The foregoing document was signed and acknowledged before me this 6 day of
Nov, 2018, by Thomas H. Fitzgerald who is
Manager of Fitzgerald's Orchards, LLC on behalf of the company.

Debra B. Miller
Notary Public

368664
Registration No.

My commission expires: 7/31/2021

Notary seal:

