



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

PIEDMONT REGIONAL OFFICE

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L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Gerard Seeley, Jr.
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT

ISSUED TO

The Scotts Company LLC of Ohio

VPDES General Permit Registration No. VAR051268

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and The Scotts Company LLC of Ohio, for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

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

1. "Va. Code" means the Code of Virginia (1950), as amended.
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. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Special Order.
6. "Scotts" means The Scotts Company LLC of Ohio certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
7. "Facility or Site" means the Scotts soil amendment bagging facility located at 3175 Bright Leaf Road in Lawrenceville, Virginia.

8. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
9. "Permit" means the General VPDES Permit for Discharges of Storm Water Associated with Industrial Activity Number VAR05 as described in 9 VAC 25-151-70. The Permit became effective on July 1, 2004, and expires on June 30, 2009.

SECTION C: Findings of Fact and Conclusions of Law

1. Scotts owns and operates a soil amendment bagging Facility in Brunswick County, Virginia which is subject to the General VPDES Permit for Discharges of Storm Water Associated with Industrial Activity, Number VAR05. Permit coverage for the Facility was established under Registration Statement No.VAR051268 submitted on February 24, 2005. Scotts is allowed to discharge stormwater into Huckleberry Branch, a tributary of Wilson Creek, in strict compliance with terms, limitations and requirements outlined in the Permit.
2. On August 14, 2007, in an investigative response to a citizen's complaint of red colored water flowing in Wilson Creek, Department staff observed severe impacts to the Creek as it flowed under the Route 712 bridge, 1.5 miles downstream from the Scotts Company property. At this location the Creek was red in color, with a dissolved oxygen ("DO") measurement of 0.2 mg/l and a pH of 3.5. In addition, the Creek contained excess bacterial colonies on its substrate, no fish, a poor benthic community, and a strong odor of decaying mulch. DEQ staff traced the low pH/DO, reddish discoloration upstream into Huckleberry Branch and found its source to be the Scotts Company Facility. Large quantities of mulch products commingled with stormwater had discharged at the northwestern edge of the Site, just west of Outfall 001 in an area that is not designated as an authorized outfall by the Permit. A poorly maintained stormwater conveyance system was discovered to be the cause of the unauthorized discharge. Decaying mulch can cause low pH and DO due to the release of tannic acids and oxygen-depleting biological materials. DEQ staff conducted upstream surveys and determined that Outfall 001 is located at the headwaters of Huckleberry Branch and that the abovementioned unauthorized discharge was the sole cause of the noted water quality impacts. During an inspection of the Facility, DEQ staff noted that annual comprehensive and quarterly Facility inspections, although conducted, had not been adequate and that Scotts had not reported the unauthorized discharge to DEQ. Finally DEQ staff noted from the condition and amount of mulch in Huckleberry Branch, the condition of the stream itself and the condition of the area adjacent to the stream, that the unauthorized discharge had been of long duration and that, had the above referenced inspections been performed, Scotts would have discovered the discharge.
3. Va. Code § 62.1-44.5.A and Part II.F of the Permit prohibit the discharge of wastes or other noxious or deleterious substances into state waters except in compliance with the Permit. Va. Code § 62.1-44.3 defines wastes to include

decayed wood, sawdust, shavings, bark and other substances which may cause pollution in state waters. Va. Code § 62.1-44.3 defines state waters to include all waters above and below the ground, located within the Commonwealth. In addition, Va. Code § 62.1-44.5.B and Part II.G of the Permit require that such unauthorized discharges be reported to the Board by the party that causes or allows such a discharge.

4. Within certain limited exceptions, inapplicable in this case, Part I.B.1 of the Permit prohibits discharges that are not comprised entirely of stormwater.
5. Parts I.A.1.a and III.E of the Permit require, respectively, inspections of permitted discharges on a quarterly basis and a comprehensive inspection of the Site on an annual basis. In addition, the Facility Storm Water Pollution Prevention Plan, required by Part III of the Permit, states that as a best management practice or "BMP" to minimize pollutants in stormwater discharges, routine inspections of the Facility will be performed at least quarterly.
6. Part I.B.7 of the Permit requires the implementation of BMPs to minimize pollutants to the degree necessary to ensure that permitted discharges do not contravene water quality standards. As indicated in 9 VAC 25-260-50, the minimum pH water quality standard for Huckleberry Branch is 6.0 and the minimum DO standard is 4.0 mg/l.
7. On December 4, 2007, the Department issued an NOV to Scotts citing it for an unauthorized discharge and failure to implement and maintain best management practices at the Facility to minimize pollutants in the storm water discharges as necessary to meet applicable water quality standards. In addition, Scotts was cited in the NOV for failure to report the discharge.
8. The Department met with Scotts on December 18, 2007 to discuss the discharge and the NOV. Scotts reported that it had completed restoration of the stormwater conveyance system at the Facility and that it believed that and Huckleberry Branch and Wilson Creek were recovering. Scotts agreed to conduct stream analysis and benthic surveys to monitor the recovery of the streams since the completion of the stormwater conveyance system repairs. Scotts also agreed to increase its frequency of inspections and discharge monitoring at the Facility. DEQ informed Scotts that if monitoring and or stream studies conducted by DEQ or as part of this Order over the next year indicate continued impairment of Wilson Creek or Huckleberry Branch, then Scotts would be required to submit an individual VPDES Permit application accompanied by plans and specifications for the installation of any control technology required by the Department to ensure that discharges from the Facility do not continue to cause stream impacts.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Scotts, and Scotts agrees, to perform the actions described in Appendix A and Appendix B of this Order. In addition, the Board orders Scotts, and Scotts agrees, to pay a civil charge of \$52,500 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note that it is being made pursuant to this Order and shall note the Federal Identification Number for Scotts. Payment shall be by check, certified check, money order, or cashier's check payable to "Treasurer of Virginia" and delivered to:

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

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Scotts, for good cause shown by Scotts, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to Scotts by DEQ on December 4, 2007. 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 as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. In the interest of resolving this matter without delay and expense of litigation Scotts agrees to the entrance of this Consent Order, and admits the jurisdictional allegations of the Order but neither admits nor denies the Findings of Fact or the Conclusions of Law herein.
4. Scotts 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. Scotts declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, 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 enforce this Order.

6. Failure by Scotts 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. Scotts 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 occurrence. Scotts shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Scotts shall notify the DEQ Piedmont Regional Director in writing 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 Piedmont Regional Director within 24 hours of learning of any condition above, which Scotts intends 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, their 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 Scotts. Notwithstanding the foregoing, Scotts 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. Scotts 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
 - b. The Director or Board terminates the Order in his or its sole discretion upon 30 days notice to Scotts.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve Scotts from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, Scotts voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of July 30, 2008.

Gerard Seeley, Jr.
Gerard Seeley, Jr., Regional Director
Department of Environmental Quality

The Scotts Company LLC of Ohio voluntarily agrees to the issuance of this Order.

By: Dwight Sulant

Date: 6/4/8

Commonwealth of ~~Virginia~~ ^{Ohio}
City/County of Union

The foregoing document was signed and acknowledged before me this 4th day of

June, 2008, by Dave Sulant, who is
(name)

SR VP. of Scotts, on behalf of the Company.
(title)

JAR
Notary Public

My commission expires: _____

JAMES E. ROBERTS, Notary Public
My commission has no expiration date
Section 143.03 R.C.

APPENDIX A

1. Within thirty (30) days of the issuance of this Order, Scotts must submit to the Department an amended stormwater pollution prevention plan (SWPPP) for review and approval. The amendments shall include Best Management Practices that will allow Scotts stormwater discharges to meet the requirements of the Permit. Scotts must implement the SWPPP immediately upon approval by the Department. Scotts must comply with the current SWPPP until the amended SWPPP is approved.
2. Within thirty (30) days of the issuance of this Order, Scotts must submit to the Department a study plan for in-stream water quality monitoring of Huckleberry Branch and Wilson Creek. The study plan shall include a detailed description of the study area, a map accurately depicting the location of Scotts' discharge outfalls and sampling locations and the sampling methodology to be used. Sampling must include, at a minimum, locations upstream and immediately downstream of the Facility's discharge pipes. The study plan must have Department approval before the collection of data can begin.
3. Within thirty (30) days of the Department's approval of the study plan, Scotts must begin the water quality monitoring for Huckleberry Branch and Wilson Creek. The monitoring shall be conducted monthly until November 30, 2008. Ten (10) days following each monthly monitoring period, Scotts must submit to the Department a report with the analytical results of the water quality sampling and an interpretation of the results and conclusions with respect to the status of the streams' recovery.
4. Within thirty (30) days of the issuance of this Order, Scotts must submit to the Department a study plan for two in-stream biological assessments of Huckleberry Branch and Wilson Creek. One assessment must be conducted in the Fall of 2008 and one in the Spring of 2009. The study plan shall include a detailed description of the study area, a map accurately depicting the location of Scotts' discharge outfalls and sampling locations and the sampling methodology to be used. The study plan must have Department approval before the collection of data can begin.
5. Within thirty (30) days of completing the approved biological assessment study plan, or no later than May 15, 2009, whichever occurs first, Scotts must submit to the Department the results of the in-stream biological assessments of Huckleberry Branch and Wilson Creek, and an interpretation of the results and conclusions with respect to the status of the streams' recovery.
6. Within thirty (30) days of the issuance of this Order, Scotts must increase the frequency of inspections required by the Permit and SWPPP (Permit Part I.A.1.a., Part III.B.6.b.(1)(e), & Part III.E.) from quarterly to weekly and increase the discharge monitoring frequency required by the Permit for the effluent parameters total nitrogen,

total phosphorous, total recoverable zinc and total recoverable iron from yearly to monthly.

7. In addition, Scotts must monitor and comply with the discharge limitations for the parameters specified in Appendix B.
8. Should the Department determine, by June 15, 2009, based on monitoring and/or stream studies, that Scotts' ongoing or past stormwater discharges have and/or continue to impair Wilson Creek or Huckleberry Branch, then Scotts must submit to the Department for review and approval, an application for an individual VPDES Permit with a proposed implementation schedule for any system modifications on or before August 15, 2009. The application must be accompanied by plans and specifications for the installation of any control technology required by the Department to ensure that discharges from the Facility do not continue to cause or contribute to impairment of Huckleberry Branch or Wilson Creek

Pursuant to this Order communications regarding this Order and its requirements must be addressed as follows:

Frank Lupini
Department of Environmental Quality
Piedmont Regional Office
4949-A Cox Road
Glen Allen, Virginia 23060
felupini@deq.virginia.gov

Scotts must confirm, in writing, completion of the Order requirements to the above address **within five (5) days of completion.**

APPENDIX B

Interim limitations:

During the period beginning with the effective date of this Order and lasting until the Order is closed by the Department, discharges from all outfalls shall be limited and monitored by Scotts in accordance with the Permit, except as specified below:

	Monthly Average Concentration	Maximum Concentration	Frequency*
Total Nitrogen		2.2 mg/L	1/month
Total Phosphorous		2.0 mg/L	1/month
Total Zinc		120 µg/L	1/month
Total Iron		1.0 mg/L	1/month
BOD ₅	30 mg/L	45 mg/L	2/month
TSS	30 mg/L	45 mg/L	2/month
pH	minimum of 6.0 maximum of 9.0		3/week

* -samples must be collected at least 7 days apart.