

**STATE OF GEORGIA
DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION**

IN RE: David A. and Roger G. McAvoy

1152 Happy Hollow Road
Washington, Georgia 30673
Wilkes County

Respondent(s)

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ORDER NO. EPD- WP - 9285

CONSENT ORDER

Authority

WHEREAS, David A. and Roger G. McAvoy (the "Respondent(s)") are the owners of Parcel Number 052047A (the "Facility"), operating as Mar-Leta Farms, Inc., located in Wilkes County Georgia; and

WHEREAS, under the "Georgia Water Quality Control Act" as amended O.C.G.A. § 12-5-20 *et seq.* (hereinafter the "Water Quality Act"), the General Assembly of Georgia designated the Director of the Georgia Department of Natural Resources, Environmental Protection Division, (hereinafter the "Director" and the "EPD") to administer the provisions of the Water Quality Act; and

WHEREAS, the Rules for Water Quality Control, Chapter 391-3-6, as amended, (hereinafter "Rules") required under O.C.G.A. § 12-5-23 of the Water Quality Act, were established and became effective; and

WHEREAS, O.C.G.A. § 12-5-23 of the Water Quality Act, assigns the Director the authority to govern water use classifications and water quality standards; and the authority to issue orders as may be necessary to enforce compliance with the provisions of the Act and all rules and regulations promulgated thereunder; and

WHEREAS, Chapter 391-3-6-.03(5)(c) and (d) of the Rules, states all waters shall be free from material related to municipal, industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which unreasonably interfere with the designated use of the water body. All waters shall be free from turbidity which results in a substantial visual contrast in a water body due to a man-made activity, upstream versus downstream of the activity. For land disturbing activities, proper design, installation, and maintenance of best management practices and compliance with issued permits (if applicable) shall constitute compliance with Paragraph 391-3-6-.03(5)(d) of the Rules; and

Civil Penalty

WHEREAS, O.C.G.A. § 12-5-52(a) provides that any person violating any provision, or any limitation established pursuant to this article shall be liable to a civil penalty not to exceed \$50,000.00 per day for each day during which such violation continues, and

Background

WHEREAS, January 19, 2021, a representative of Georgia's Department of Agriculture (GDA) emailed EPD a complaint on waste dumping at the Facility; and

WHEREAS, a representative of the EPD inspected the Facility on January 20, 2021. EPD documented the Respondent(s) were storing wastewater in a former dairy lagoon and a farm pond at the Facility. The Respondent reported the wastewater originated from the Publix milk plant located in Gwinnett County and the Purina pet food plant located in Hart County; and

WHEREAS, the GDA issued a Georgia Certificate of Soil Registration for Proponic Solutions H-96 Soil Amendment dated February 6, 2021; and

WHEREAS, the GDA soil amendment form describes the soil amendment as "this liquid product is the result of cleaning and rinsing food grade pet food tanks, bins and processing equipment. This liquid

has been further processed to remove solids. Post manufacturing additional separation and drying operations modify this liquid to control plant nutrient content”; and

WHEREAS, on March 10, 2021, the Georgia Department of Agriculture issued a Notice to Cease and Desist (Notice). The Notice ordered the Respondents to immediately cease all surface applications of Proponic Solution H-96. Further, the Notice ordered the Respondent to cease storing Proponic Solution H-96 in the Facility’s unlined farm pond, and

WHEREAS, GDA issued a Certificate of Soil Amendment for Proponic Solutions H-91 pb dated March 31, 2021, and

WHEREAS, the GDA soil amendment form describes the soil amendment as “This liquid product results from cleaning and rinsing food grade dairy product processing equipment. This liquid has been further processed to remove solids. Post manufacturing separation modifies this liquid to affect product constituents and plant nutrient content”; and

WHEREAS, EPD did not take further action regarding the storage and application of Proponic Solutions H-96 or H-91 pb due to these activities being regulated by the Georgia Department of Agriculture, and

WHEREAS, on June 17, 2022, representatives of EPD were notified and confirmed a fish kill in the Little River at the HWY 47 in Wilkes County; and

WHEREAS, on June 18, 2022, representatives of EPD conducted an inspection of the Facility; and

WHEREAS, at the time of the inspection, the Respondents informed the representatives of EPD that the farm pond berm failed and a breach in the berm allowed the discharge of soil amendment. The breach was found and the berm was repaired the evening of June 17, 2022, and

WHEREAS, upon inspection of the berm, representatives of EPD confirmed a breach of the berm and the filling of soil in the breach to repair the berm, and

WHEREAS, the downgradient side of the of where the breach occurred, the drainage channel contained a blackish/gray liquid and some solids (soil amendment) released from the farm pond; and

WHEREAS, representatives of EPD followed the soil amendment release to where it entered Little River, and

WHEREAS, during the inspection, representatives of EPD observed and documented dead vegetation and signs of channelized, concentrated flow in a hay field at the Facility. The Respondent's representative informed EPD that soil amendment from the farm pond was applied to the hay field; and

WHEREAS, Proponic Solutions Inc. identified the soil amendment as "Proponic Solutions H-96 Soil Amendment" and provided a count of 222 loads delivered to Facility from May 1, 2022, through June 17, 2022, originating from Nestle Purina Hart County Plant; and

WHEREAS, representatives of EPD collected samples on June 22, 2022, of the Little River at the HWY 47 bridge, the discharge of the dairy lagoon (soil amendment), tributary from the farm pond at the confluence of the Little River and up stream of the tributary in the Little River; and

WHEREAS, EPD performed water testing to assess the levels of ammonia and biochemical oxygen demand in the discharge from the dairy lagoon, the tributary, and the Little River; and

WHEREAS, representatives from the Department of Natural Resources, Wildlife Resources Division confirmed the presence of dead fish in the fish kill zone; and

WHEREAS, June 21, 2022, representatives, of the EPD hand delivered a Notice of Violation dated June 21, 2022, directing the Respondents to:

1. Stop delivery of additional soil amendment.
2. Remove all liquids and sludge from the tributaries on your property (Stream receiving stormwater from your spray field and the stream from you farm pond) to the Little River; and

WHEREAS, the notice of violation had an attached list of third-party contractors any of which could be contracted to remove the liquids and sludge from the tributaries, and

WHEREAS, the Respondent reported to a representative of EPD on June 27, 2022, that 12 tanker loads of clean water were used to flush the stream starting from the farm pond and the flush water collected at a berm in the tributary near the Little River and by vacuum truck was taken to GWAR. The Respondent further reported that 6 tankers of clean water was used to flush the stream adjacent to the hay field and the flush water was collected at the small pool in the stream bed and taken to GWAR. Lastly, the Respondent reported the farm pond berm was reinforced and raised with red clay and that a berm was constructed to divert storm water from entering the farm pond; and

Alleged Violations

WHEREAS, Water Quality Rule 391-3-6-.05(c) states “All waters shall be free from material related to municipal, industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which unreasonably interfere with the designated use of the water body”; and

WHEREAS, the Respondent(s) allowed the grey, turbid wastewater and sludge stored in the Facility’s farm pond to overflow and enter Waters of The State, and a fish kill occurred; and

WHEREAS, Water Quality Rule 391-3-6-.03(6)(c)(ii) states that: “Dissolved Oxygen: A daily average of 5.0 mg/L and no less than 4.0 mg/l at all times for waters supporting warm water species of fish”; and

WHEREAS, Water Quality Rule 391-3-6-.03(6)(c)(ii) applies to the tributary from the Facility and the Little River; and

WHEREAS, the water testing performed by EPD confirmed violation of Water Quality Rule 391-3-6-.03(6)(c)(ii); and

Conditions

WHEREAS, the Director has determined that an amicable disposition of the alleged violations set forth herein is in the best interest of the citizens of the State of Georgia.

NOW THEREFORE, before the taking of any testimony and without adjudicating the merits of the parties' positions, the parties hereby resolve the allegations in this matter upon order of the Director and consent of Respondent as follows:

1. The Facility shall not receive or accept any additional soil amendment.
2. Within sixty (60) days of the execution date of this Order, the Respondent(s) shall submit a Corrective Action Plan (hereinafter "CAP"), prepared by a third-party professional engineer or ecological firm, to achieve the following:
 - A. Inspect all streams at and leaving the Facility to identify receiving waters impacted by soil amendment discharges from the Facility.
 - B. Construct an itemized list of the inspection results for all locations listed in Condition 2.A.
 - C. Identify an area upstream of the impacted streams to use as background.
 - D. For each area identified as impacted, the CAP shall include a detailed narrative to fully restore each receiving water to its pre-impacted condition, as compared to the background area identified in Condition 2.C., to include but not limited to

morphology, substrate, and flora.

- E. For each area identified as impacted, the CAP shall include a detailed narrative to sample and fully restore each receiving water to its pre-impacted condition, as compared to the background area identified in Condition 2.C., to include but not limited to Dissolved Oxygen, Escherichia Coliform/EPA Method SM9221F, Biochemical Oxygen Demand/EPA Method SM5210B, Conductivity/EPA Method SM2510B, Dissolved Organic Carbon/EPA Method SM5310B, Ammonia/EPA Method 4500-NH3-G, Oil & Grease/EPA Method EPA 1664B, Ortho-Phosphate/EPA Method EPA 365.1, Suspended Solids/EPA Method SM 2540D, Total Kjeldahl Nitrogen/EPA Method EPA 351.2, Total Organic Carbon/EPA Method SM5310B and Total Phosphorus/EPA Method EPA 365.1.
 - F. Develop a planned closing and in-fill of the lower farm pond following removal of all water containing soil amendments currently stored therein.
 - G. Assess the upper dairy lagoon and develop an operations plan to ensure the upper dairy lagoon does not exceed operational capacity.
 - H. A scheduled timeline for implementation of the CAP.
3. Within thirty (30) days of the execution of this Order, Respondents shall commence removal of all water containing soil amendments stored at the Facility in the lower farm pond, in accordance with GDA regulations and Georgia law pertaining to soil amendments. Respondent further agrees to complete removal of such stored soil amendment no later than November 30, 2022.
4. If, by November 1, 2022, it appears the Respondent(s) are not going to meet the November 30, 2022 deadline, they shall notify EPD in writing, providing the reason(s) prohibiting the

Respondent(s) from meeting the deadline and including a new proposed deadline. EPD will evaluate this submittal and determine if any additional administrative steps are necessary to amend this Order or escalate the enforcement action.

5. The Respondent(s) agree to a monetary settlement in the amount of eighty-five thousand (\$85,000) dollars. Such monetary settlement shall be allocated as follows:
 - a. The first sixty thousand (\$60,000) shall be remitted to the Georgia Department of Natural Resources within thirty (30) days of the execution of this Order.
 - b. The remaining twenty-five thousand (\$25,000) shall be paid in the following manner: Expenditures made directly by the Respondent towards completing the CAP may be used to offset, in partial or in full, the stipulated penalty of twenty-five thousand (\$25,000). Should expenditures only partly offset the stipulated penalty by the completion date established by the approved CAP or by three hundred and fifty (350) days from the execution date of this Order, whichever comes first, the remaining penalty amount will then be due within thirty (30) days.

Deadlines

Time is of the essence in this Consent Order. Compliance with any deadline that falls on a Saturday, Sunday or state-recognized holiday shall be by the next business day.

Addresses

All notices, correspondence, etc., from the Director and EPD to Respondent relating to this Consent Order shall be sent to:

David and Roger McAvoy
1188 Happy Hollow Road

Washington, Georgia 30673

Respondent shall submit address changes to EPD in written notice sent by certified mail; such notice shall include this Order number.

All correspondence from Respondent to EPD relating to this Consent Order shall be sent to:

Charles D. Williams

Environmental Protection Division

745 Gaines School Road

Athens, Georgia 30605

Public Notice

This Consent Order may be subject to public notice and comment.

Required Submissions

Upon the submission of any reports, plans, schedules or other information required by any Condition(s) of this Consent Order, EPD shall review the submission to determine its completeness. Upon review of such submission(s), EPD shall notify Respondent in writing within fifteen (15) days thereof that either the submission is complete and approved or that such submission is incomplete.

If EPD determines that the submission is incomplete, it shall provide Respondent with written notice of the deficiencies. Respondent shall have fifteen (15) days from issuance of EPD's notice of deficiency to submit a corrected submission.

All submissions required by this Consent Order are, upon approval by EPD, incorporated by reference into, and made part of, this Consent Order. Any noncompliance with an approved submission shall be deemed noncompliance with this Consent Order.

Approval by EPD of any submission required by this Consent Order is not an agency determination that compliance with any state laws, regulations and/or permits, licenses, etc., will thereby be achieved, but is strictly limited to the completeness of the technical aspects of the submission with regards to the requirements of this Consent Order.

Force Majeure

Failure of Respondent to complete the requirement(s) of any Condition(s), other than payment obligations, by the deadline(s) specified therein may be excused by EPD if 1) Respondent's failure was caused by a force majeure event, and 2) Respondent complies with all notification requirements in this section. Respondent shall have the burden of proving to EPD that it was rendered unable, in whole or part, by the force majeure event to meet the deadline(s).

The term "force majeure event" as used herein shall be limited to the following: an act of war (whether declared or not), including an invasion, act of foreign enemies, or terrorism; a strike, lockout, or other labor or industrial blockade or embargo which is not attributable to any unreasonable action or inaction on the part of Respondent; public riot; specific incidents of exceptional adverse weather conditions or natural disasters such as a hurricane, flood, or earthquake; a fire or explosion affecting the Respondent's operations; failure to secure timely and necessary federal, state, or local approvals or permits, provided approvals or permits have been timely and diligently sought; and any other occurrence caused by unforeseeable circumstances beyond the reasonable control of Respondent, as determined by EPD in its sole discretion.

Within two (2) business days of learning of any force majeure event that may reasonably be expected to cause a deadline to be missed, Respondent shall notify EPD verbally or in writing. Within seven (7) business days of learning of any force majeure event that may reasonably be expected to cause a deadline to be missed, Respondent shall submit written notice to EPD of the force majeure event, the possible effects and the anticipated length (if known) of any delay. EPD shall review the submission and negotiate with Respondent regarding the length of the proposed extension of deadlines, if any. The Respondent shall exercise due diligence and adopt all reasonable measures to avoid or minimize any delay.

Effect of Order

Respondent consents and the Director executes this Consent Order solely for the purpose of addressing the alleged violations set forth herein. This Consent Order does not relieve Respondent of any obligations or requirements of any statute, rules, permit, or other matter administered by EPD except as specifically authorized herein, which authorization shall be strictly construed. This Consent Order is not a finding, determination, or adjudication of a violation of any state laws, rules, standards and/or requirements, nor does Respondent by consenting to this Consent Order make any admission with respect to any factual allegation contained in this Consent Order or to any liability to any third party.

Unless modified or terminated by a subsequent order, or otherwise specified in writing by the Director, this Order shall be deemed satisfied and terminated upon full, complete, and timely performance of each and every condition set forth herein.

Further Enforcement

Failure by Respondent to comply with any provision of this Consent Order may result in further enforcement action. Issuance of this Consent Order does not waive the Director's right to use the violation(s) alleged herein, upon sufficient evidence, to show past violations in any subsequent enforcement proceeding.

Finality

For the purpose of enforcement, this Consent Order constitutes a final order of the Director in accordance with applicable Georgia law. By agreement of the parties, this Consent Order shall be final and effective immediately upon execution by the Director, shall not be appealable, and Respondent does hereby waive all administrative proceedings and judicial hearings concerning the entry of this Consent Order.

Electronic Signatures

The parties agree that any electronic signatures on this Consent Order constitute original, valid signatures pursuant to the Uniform Electronic Transactions Act, O.C.G.A. § 10-12-1 *et seq.*

It is so ORDERED and CONSENTED TO on the following date ^{9/13/22} _____.

For the Georgia Environmental Protection Division:

By: Richard E. Dunn

Richard E. Dunn, Director

For Respondent:

By: Roger McAvey

Printed

Name: R. McAvey

Title: MAR-LETA FARM INC

By: [Signature]

Printed

Name: PAUL M. AVEY

Title: MAR-LETA FARM INC.