



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

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DOVER, DELAWARE 19901

Office of the
Secretary

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CONCILIATION ORDER BY CONSENT

SECRETARY'S ORDER No. 2018-W-0057

Issued Pursuant to 7 Del. C. §6005(b)(2)

Issued to: Mr. Joe Moran – President & CEO
Allen Harim, LLC
29984 Pinnacle Way
Millsboro, DE 19966

Dear Mr. Moran:

This Conciliation Order by Consent and Secretary's Order ("Order") reflects the mutual effort by Allen Harim, LLC ("Allen Harim") and the Secretary of the Department of Natural Resources and Environmental Control ("Secretary or DNREC") (collectively the "Parties") to attain compliance with 7 Del. C. Chapter 60 by Conciliation pursuant to 7 Del. C. §6005(b)(2).

SECTION I : BACKGROUND

WHEREAS, Allen Harim, LLC owns and operates a poultry processing facility located at 18752 Harbeson Road, Harbeson, Delaware ("Harbeson Facility"); and

WHEREAS, DNREC is responsible for the administration of the National Pollutant Discharge Elimination System (NPDES) program in accordance with 33 U.S.C. §§1251 *et seq.* and 7 Del. C. Chapter 60; and

WHEREAS, pursuant to this authority, DNREC issued NPDES Permit DE 0000299 ("NPDES Permit"), effective February 1, 2006, to Allen Harim Foods, LLC, which regulates the Wastewater Treatment Plant ("WWTP"), and authorizes the discharge of treated effluent from the Harbeson Facility through Outfall identified as 001, 002, 003, and 004, to the Beaver Dam Creek, and ultimately the Broadkill River; and

WHEREAS, pursuant to Part I.B, of the NPDES Permit, Allen Harim is required to monitor its discharge by collecting samples of said discharge and analyzing them for a number of pollutant parameters as more fully specified in the NPDES Permit, summarizing this data in a monthly Discharge Monitoring Report (DMR) regularly submitted to DNREC; and

WHEREAS, Allen Harim submitted DMRs, "5-Day Letters," and non-compliance letters to DNREC reporting effluent limitation and permit violations, more fully delineated in Exhibit A, attached hereto and incorporated by reference herein; and

WHEREAS, these incidents appear to be the direct result of equipment failures, process overloads, and various other circumstances as described in the reports as submitted to DNREC; and

WHEREAS, as a result of these reported incidents, Notice of Violation (NOV) W-16-SWD-04 was delivered to Allen Harim on November 4, 2016; and

WHEREAS, Allen Harim investigated the violations of the NPDES Permit and formally responded to the NOV on December 1, 2016, conveying the effectiveness of their corrective actions; and

WHEREAS, by the end of December 2016, the previously planned and authorized "phase 1" upgrade to the WWTP was complete; and

WHEREAS, since completion of the improvements Allen Harim has not violated the NPDES Permit wastewater discharge limits, which confirms that the modifications have corrected the circumstances giving rise to the violations; and

WHEREAS, in view of the incidents delineated *supra* and pursuant to 7 Del. C. §6005(b)(3), DNREC has drafted a Notice of Administrative Penalty Assessment and Secretary's Order 2018-W-0014, attached hereto as Exhibit A, assessing an administrative penalty of Two Hundred Forty One Thousand Dollars (\$241,000) for the incidents described herein, and further, pursuant to 7 Del. C. §6005 (c), assessing an amount of Seven Thousand, Eight Hundred and Eighty Eight Dollars (\$7,888) to cover DNREC abatement expenses; and

WHEREAS, Allen Harim, LLC owns and operates a hatchery facility located at 26867 Nine Foot Road, Dagsboro, Delaware ("Dagsboro Hatchery"); and

WHEREAS, pursuant to the authority delineated *supra*, DNREC issued State Permit 258994-04 ("Hatchery Permit"), authorizing spray irrigation of screened hatchery processing wastewater pursuant to a nitrogen loading limit of 260 lbs/acre/year; and

WHEREAS, based on Annual Reports filed by Allen Harim, Allen Harim violated the Hatchery Permit nitrogen loading limits in 2016 and 2017, with 872.3 lbs/acre and 407.9 lbs/acre respectively causing the groundwater to exceed drinking water standards for nitrate nitrogen; and

WHEREAS, groundwater monitoring wells have exceeded the drinking water standard of 10 mg/L for Nitrate Nitrogen. Reported 2016 data from groundwater indicated Nitrate Nitrogen has been as high as 32.7 mg/L in June 2016 with an annual average of 23.95 mg/L. In 2017 groundwater monitoring data identified Nitrate Nitrogen as high as 27.8 mg/L in November 2017 with an annual average of 25.65 mg/L for Monitoring Well DNREC ID 82943; and

WHEREAS, these incidents appear to be related to the use of high ammonia chemicals, process overloads, and various other circumstances as described in the reports as submitted to DNREC; and

WHEREAS, both DNREC and Allen Harim agree that the resolution of these compliance issues without further protracted formal enforcement actions is in the best interest of the Parties and can be effectively accomplished *via* this Order designed to comprehensively address the matters contained in Secretary's Order 2018-W-0014, 5-day and non-compliance letters, and other permitting issues at both the Harbeson Facility and the Dagsboro Hatchery on a facility-wide basis in a systematic manner and additionally providing DNREC with enforceable assurances that the necessary actions will be timely undertaken and completed.

SECTION II: CONCILIATION

NOW THEREFORE, Allen Harim and DNREC jointly execute this Order to effectuate the purposes and actions delineated herein, and pursuant to 7 *Del. C.* §6005(b)(2), it is Ordered and Agreed as follows:

1. Pursuant to 7 *Del. C.* §6005(b)(3), DNREC assesses and Allen Harim expressly stipulates and agrees to an administrative penalty of **\$300,000**. Further, pursuant to 7 *Del. C.* §6005(c)(1), Allen Harim shall reimburse DNREC for its abatement expenses in the amount of **\$7,888**.
2. In lieu of paying the administrative penalty, Allen Harim has proposed to offset said administrative penalty by undertaking an Environmental Improvement Project (EIP). Allen Harim has not yet submitted a proposed EIP for DNREC's approval. Due to the November 13, 2018 EAB Hearing, however, the parties agree that executing this Order is in their best interests.
 - a. Allen Harim expects that the EIP will fund a Nature Conservancy project related to improving water quality by eliminating agricultural runoff and groundwater transfer of nutrients in the Broadkill River Watershed.
 - b. The EIP will be memorialized by written agreement ("Agreement") between Allen Harim and any third parties performing and/or directing the work, as accepted and approved by DNREC, which will expressly stipulate the roles, responsibilities and accountabilities of both parties. Further, Allen Harim shall remain in regular contact with DNREC. At a minimum, Allen Harim shall update DNREC every ninety (90) days with an explanation of the work

completed since the previous update and disclosure of any delays or issues reasonably anticipated to affect the timeline. The Agreement must be finalized within sixty (60) calendar days from the effective date of this Order and must stipulate that the EIP will commence within sixty (60) calendar days from the effective date of the Agreement.

- c. The successful completion of the EIP, subject to DNREC approval thereof, will result in the direct offset not to exceed **50%** of the Administrative Penalty Assessment (an amount not to exceed **\$150,000**), leaving a remaining balance of not less than **\$150,000**, plus DNREC abatement expenses in the amount of **\$7,888**.
 - d. It is anticipated by the Parties that Allen Harim will utilize the maximum direct offset amount to fund the EIP. Accordingly, Allen Harim shall remit the minimum \$150,000 administrative penalty, plus DNREC abatement expenses in the amount of \$7,888 within thirty (30) calendar days of the effective date of this Order. Payment shall be remitted in two checks payable to the State of Delaware, and mailed to: State of Delaware, Department of Natural Resources and Environmental Control, Attn: Kayli Spialter, Esquire, Delaware Department of Justice, 820 North French Street, Sixth Floor, Wilmington, DE 19801.
 - e. In the event that any of the above deadlines are not met, the entire Administrative Penalty assessment of **\$300,000** and abatement expenses of **\$7,888** shall become immediately due and payable.
3. Notwithstanding any express stipulation in this Order to the contrary, if any event occurs that causes or may cause a delay or have a materially adverse effect on Allen Harim's ability to perform in compliance with this Order, and such event is beyond Allen Harim's reasonable control and is not the product or result of Allen Harim's negligence (*Force Majeure* Event), Allen Harim shall notify DNREC, in writing, within five (5) calendar days of when Allen Harim first knew of the event or should have known of the event by the exercise of due diligence. In this written notice, Allen Harim shall provide sufficient evidence to support this claim. Unanticipated or increased costs or expenses associated with the performance of Allen Harim's obligations as described herein shall **not** constitute a *Force Majeure* Event. DNREC shall respond to Allen Harim, in writing, regarding its claim of delay or impediment to performance within fifteen (15) calendar days of receipt of notice of claim. Assessment of the effect, if any, of the enumerated factors on Allen Harim's ability to comply with the terms of this Order shall be in the sole discretion of DNREC, and DNREC retains full discretion to extend or modify the terms of this Order, or not, as it sees fit.

4. In the event Allen Harim and/or any third party to the Agreement fails to meet any deadlines or fails to fund the EIP as expressly stipulated in the Agreement, DNREC reserves the right to commence any administrative, civil and/or criminal remedies against Allen Harim pursuant to *7 Del. C. §6005*.
5. When Allen Harim believes that the Agreement has been fully satisfied, in compliance with the requirements of this Order, then Allen Harim shall so certify to DNREC, in writing, including a delineation of the actual expenses incurred in the completion of EIP activities described herein. Within sixty (60) calendar days after the receipt of Allen Harim's certification, DNREC shall provide a written response to Allen Harim indicating partial or complete concurrence. If DNREC determines that concurrence is complete, this Order will be deemed satisfied; if concurrence is partial, DNREC will identify the outstanding activities that require satisfaction. Either notice will be in writing.
6. Allen Harim has terminated all spray irrigation activities at the Dagsboro Hatchery and does not intend to resume spray irrigation activities under State Permit 358994-04. Allen Harim will proceed with spray facility closure requirements in accordance with *7 Del. C Admin § 7101-6.14*. Allen Harim will continue to comply with all monitoring and reporting requirements of State Permit 358994-04 until DNREC has completed and the facility has passed the final inspection. In lieu of spray irrigation, Allen Harim has planned for a proposed connection to the Sussex County Waste Water Treatment Facility ("WWTF"). Plans for this project have been formally submitted by Allen Harim to Sussex County and are under review. The expected date for the completion of the connection to the Sussex County WWTF is within 12 months from receipt of all required approvals.
7. Pursuant to statute, *7 Del. C. §6005(b)(2)*, Allen Harim has the right to a hearing regarding conciliation and, where no hearing is requested, all of the deadlines set forth herein will be entered as a binding Order. By executing this Order, Allen Harim formally acknowledges that it has read and understands this Conciliation Order by Consent, accepts all the stipulations contained herein, and voluntarily waives its right to a hearing. Further, Allen Harim voluntarily waives any right to appeal or contest this Order and further agrees to perform each of the actions listed in this Order pursuant to the schedule set forth herein. Additionally, Allen Harim acknowledges and does not contest the violations set forth in the attached Exhibit A.
8. Miscellaneous Provisions:

- a. **Binding on Successors:** It is the intention of the parties that this Order shall be binding upon and enforceable against the Parties and their successors, heirs, executors, administrators and assigns.
- b. **Severability:** In the event that any provision (section, paragraph, or portions thereof) of this Order shall be held invalid or unenforceable for any reason, it shall not in any way invalidate, affect, or impair the remaining provision(s) (sections, paragraphs, or portions thereof) of this Order, and to this end, the provisions of this Order are hereby declared to be severable.
- c. **Construction:** The agreement shall be construed according to the intent of the parties to resolve the pending violations and to prevent future violations and harm to the environment. No provision(s) or paragraph(s) of this Order shall be construed based on authorship.
- d. **Compliance with Law:** Nothing in this Order shall relieve Allen Harim of its obligation to comply with all applicable federal, state or local laws or regulations.
- e. **Good Faith:** The Parties agree to act in good faith and to cooperate fully with each other in carrying out the intent of this Order, provided that nothing in this Order shall be construed to restrict DNREC's regulatory and permitting judgment and discretion, and nothing in this Order shall be construed to require DNREC to pay or appropriate any monies or expend any funds.
- f. **Publicity:** The Parties agree that the EIP proposed and undertaken pursuant to this Order is undertaken as the result of an enforcement action. Accordingly, Allen Harim is prohibited from publicizing or being recognized for the EIP. If the EIP or results thereof are made public by Allen Harim, it will state in a prominent manner that the project is being undertaken as part of a settlement of an enforcement action.
- g. **Notices:** Any notices in regard to this Order shall be in writing and sent to: Department of Natural Resources and Environmental Control, Division of Water, Surface Water Discharges Section, Compliance & Enforcement Branch, ATTN: Mr. Bryan Ashby, Environmental Program Manager II, 89 Kings Highway, Dover, Delaware, 19901, with a copy sent to: Delaware Department of Justice, ATTN: Kayli Spialter, Esquire, Delaware Department of Justice, 820 North French Street, Sixth Floor, Wilmington, DE, 19801.
- h. **Entire Understanding:** This Order constitutes the entire agreement and settlement between the Parties. The Parties acknowledge that this Order may not be amended except in writing executed by both Parties.
- i. **No Third Party Rights:** The Parties to this Order expressly intend that this Order shall create no right(s) in any person or entity not a party to this Order.

j. This Order becomes effective on the date of execution by the Secretary of DNREC.

Date: 10/30/18


Shawn M. Garvin, Secretary
Department of Natural Resources
and Environmental Control

Agreed and Accepted:

Date: 10/29/18

Allen Harim, LLC

By: Joe Moran
Name: Joe Moran
Title: CEO & President

