

STATE OF COLORADO

John W. Hickenlooper, Governor
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Executive Director and Chief Medical Officer

Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department
of Public Health
and Environment

June 27, 2011

Ms. Mariane Maes, Registered Agent
Brushco Farms, Inc.
1450 South Clayton Street
Brush, Colorado 80723

Certified Mail Number: 7006 2760 0003 4263 9410

RE: Service of Notice of Violation/Cease and Desist/Clean-up Order, No.: IO-110627-2

Dear Ms. Maes:

Brushco Farms, Inc. is hereby served with the enclosed Notice of Violation / Cease and Desist / Clean-up Order (the "NOV/CDO/CUO"). This NOV/CDO/CUO is issued by the Colorado Department of Public Health and Environment's Water Quality Control Division (the "Division") pursuant to the authority given to the Division by §§25-8-602, 25-8-605 and 25-8-606, C.R.S., of the *Colorado Water Quality Control Act*, (the "Act"). The Division bases this NOV/CDO/CUO upon findings that Brushco Farms, Inc. has violated the Act, and/or Permit regulations promulgated pursuant to the Act, as described in the enclosed NOV/CDO/CUO.

Pursuant to §25-8-603, C.R.S., Brushco Farms, Inc. is required, within thirty (30) calendar days of receipt of this NOV/CDO/CUO, to submit to the Division an answer admitting or denying each paragraph of the Findings of Fact and responding to the Notice of Violation.

This action could result in the imposition of civil penalties. The Division is authorized pursuant to §25-8-608, C.R.S. to impose a penalty of \$10,000 per day for each day during which such violation occurs.

Please be advised that the Division is continuing its investigation into this matter and the Division may identify supplementary violations that warrant amendments to this NOV/CDO/CUO or the issuance of additional enforcement actions.

Should you or representatives of Brushco Farms, Inc. desire to discuss this matter informally with the Division, or if you have any questions regarding the NOV/CDO/CUO, please do not hesitate to contact Kelly Morgan of this office by phone at (303) 692-3634 or by electronic mail at kelly.morgan@state.co.us.

Sincerely,



Russell Zigler, Legal Assistant
Compliance Assurance Section
Enforcement Unit
WATER QUALITY CONTROL DIVISION

Enclosure(s)

cc: Northeast Colorado Health Department

ec: Natasha Davis, EPA Region VIII
Dennis Pontius, Engineering Section, CDPHE
Dick Parachini, Watershed Program, CDPHE
Gary Beers, Permits Unit, CDPHE
Michael Beck, OPA
Kelly Morgan, Case Person
Tania Watson, Compliance Assurance, CDPHE



COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
DIVISION OF ADMINISTRATION
WATER QUALITY CONTROL DIVISION

NOTICE OF VIOLATION/ CEASE AND DESIST/ CLEAN-UP ORDER

NUMBER: IO-110627-2

IN THE MATTER OF: BRUSHCO FARMS, INC.
UNPERMITTED
MORGAN COUNTY, COLORADO

Pursuant to the authority vested in the Colorado Department of Public Health and Environment's (the "Department") Division of Administration by §§25-1-109 and 25-8-302, C.R.S., which authority is implemented through the Department's Water Quality Control Division (the "Division"), and pursuant to §§25-8-602, 25-8-605, and §25-8-606 C.R.S., the Division hereby makes the following Findings of Fact and issues the following Notice of Violation / Cease and Desist/ Clean-Up Order:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to the alleged violations identified herein, Brushco Farms, Inc. ("Brushco Farms") was a Colorado corporation in good standing and registered to conduct business in the State of Colorado.
2. Brushco Farms is a "person" as defined under the Water Quality Control Act, §25-8-103(13), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(73).
3. Brushco Farms owns and/or operates a hydroponic tomato growing operation, located at or near 1450 South Clayton Street, near the City of Brush, Morgan County, Colorado (the "Facility").
4. The Facility is a hydroponic tomato growing operation that consists of two greenhouses: the southern greenhouse which is currently not in operation, and the northern greenhouse which contains approximately nineteen (19) acres of tomato growing space, offices, and a packaging plant where harvested tomatoes are packaged. To support the tomato growing operation, well water is extracted from the Brungardt well located approximately 1.5 miles south of the Facility and conveyed to a tank located south of the parking lot. The well water is pumped to the northern greenhouse where it undergoes chemical treatment including aeration, acidification, and the addition of chemical fertilizers that contain potassium, nitrate, iron, sulfur, and phosphorus, among others. The amended water is drip irrigated in excess onto the plants and the excess water is drained and collected in three sumps within the northern greenhouse. Each of the

three sumps discharge collected water through poly vinyl chloride (PVC) pipes to an unlined earthen ditch located between the southern and northern greenhouses. The discharged water collects in an on-site unlined pond near the southeastern corner of the property then is conveyed in an easterly direction via an unlined earthen ditch to Beaver Creek. Water in Beaver Creek flows in a northeasterly direction and discharges into the South Platte River.

Discharging Without a Permit

5. Pursuant to §25-8-501(1), C.R.S., and its implementing permit regulation, 5 CCR 1002-61, §61.3(1)(a), no person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the Division for such discharge, and no person shall discharge into a ditch or man-made conveyance for the purpose of evading the requirement to obtain a permit under this article.
6. The poly vinyl (PVC) pipes that discharge water collected from the sumps, the on-site unlined earthen ditches, and the on-site unlined pond near the southeastern corner of the property are each a "point source" as defined by §25-8-103(14), C.R.S.
7. Groundwater near or beneath the earthen ditch located between the southern and northern greenhouses, groundwater near or beneath the unlined pond near the southeastern corner of the property, groundwater near or beneath the earthen ditch that conveys the discharge water to Beaver Creek, Beaver Creek, and the South Platte River are "state waters" as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2 (102).
8. The effluent being discharged into groundwater, Beaver Creek, and the South Platte River contains, among other things, dissolved solids, suspended solids, chemical oxygen demand, ammonia as N, phosphorus, silicon, fecal coliform, arsenic, boron, copper, iron, magnesium, manganese, zinc, chloride, nitrate, nitrite, sulfate, and exhibits an acidic pH value.
9. Division records establish that groundwater monitoring conducted during 2010 by the Colorado Department of Agriculture establish nitrate groundwater contamination in exceedance of the groundwater standard in the near vicinity of the Facility.
10. Dissolved solids, suspended solids, chemical oxygen demand, ammonia as N, phosphorus, silicon, fecal coliform, arsenic, boron, copper, iron, magnesium, manganese, zinc, chloride, nitrate, nitrite, sulfate, and exhibited acidic pH value are "pollutants," or indicators thereof, as defined by §25-8-103(15), C.R.S.
11. Division records establish that Brushco Farms does not have any permits authorizing the discharge of pollutants from the poly vinyl (PVC) pipes, the on-site unlined earthen ditches, and the on-site unlined pond near the southeastern corner of the property into groundwater, Beaver Creek, and the South Platte River.
12. Brushco Farms' discharge of dissolved solids, suspended solids, chemical oxygen demand, ammonia as N, phosphorus, silicon, fecal coliform, arsenic, boron, copper, iron, magnesium, manganese, zinc, chloride, nitrate, nitrite, sulfate, and an exhibited acidic pH into groundwater, Beaver Creek, and the South Platte River constitutes an unauthorized discharge of pollutants from point sources into state waters in violation of §25-8-501(1), C.R.S.

NOTICE OF VIOLATION

13. Based on the foregoing Findings of Fact and Conclusions of Law, you are hereby notified that the Division has determined that the Brushco Farms has violated the following sections of the Colorado Water Quality Control Act's implementing permit regulations.

Section 25-8-501(1), C.R.S., which states "No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division for such discharge, and no person shall discharge into a ditch or man-made conveyance for the purpose of evading the requirement to obtain a permit under this article..."

REQUIRED CORRECTIVE ACTION

Based upon the foregoing factual and legal determinations and pursuant to §25-8-602, §25-8-605, C.R.S., and §25-8-606, C.R.S., Brushco Farms is hereby ordered to:

14. Cease and desist from all violations of the Colorado Water Quality Control Act, §§25-8-101 through 25-8-703, C.R.S., its implementing regulations promulgated thereto and the Permit.

Furthermore, the Division hereby orders Brushco Farms to comply with the following specific terms and conditions of this Order:

15. Brushco Farms shall immediately initiate measures to cease all unauthorized discharges of pollutants from the Facility to all state waters, specifically including groundwater.
16. Brushco Farms shall immediately begin monthly water quality monitoring of Beaver Creek at a point upstream of the intersection of County Road 28.5 and County Road Q 7/10 and at the point where County Road R crosses Beaver Creek for the following parameters: BOD5 (mg/l), Total Suspended Solids (mg/l), Oil and Grease (mg/l), E. coli (#/ 100 ml), pH (s.u.), Sulfide (mg/l), Nitrite (mg/l), Nitrate (mg/l), and Total Ammonia (mg/l). Sample collection and laboratory analysis shall be conducted using U.S. Environmental Protection Agency approved methods, and the analytical method selected for analysis of each parameter shall be the one that can measure the lowest detected limit for that parameter. Brushco Farms shall report the results of the monthly monitoring to the Division within seven (7) calendar days of receipt of the results. Brushco Farms shall continue the monthly monitoring until closure of this Order or until such time as the Division issues written notice modifying the requirement or written notice that the monitoring may cease.
17. Within thirty (30) calendar days of receipt of this Order, Brushco Farms shall provide the Division with a written certification that it has ceased the unauthorized discharge of pollutants to groundwater and to Beaver Creek. If Brushco Farms is unable to cease the unauthorized discharge of pollutants from the Facility into groundwater and to Beaver Creek, Brushco Farms shall alternatively submit, with thirty (30) calendar days of receipt of this Order, a detailed written plan and expedited time schedule for the implementation of interim measures that Brushco Farms has, or will, implement to reduce or mitigate the concentrations of pollutants in the unauthorized discharge. Implementation of the interim measures shall

continue until such time as the discharge has ceased or coverage for the discharge under a Colorado Discharge Permit System ("CDPS") permit has been obtained. The submitted plan and time schedule shall become a condition of this Order and Brushco Farms shall comply with the plan and time schedule, as submitted, unless notified by the Division in writing that an alternate plan or schedule is appropriate. If the Division imposes an alternate plan or schedule, it shall also become a condition of this Order.

18. If Brushco Farms chooses to apply for a CDPS individual permit, within thirty (30) calendar days of receipt of this Order, Brushco Farms shall prepare and submit a complete CDPS permit application in order to obtain such permit coverage for the Facility.
19. By July 29, 2011, Brushco Farms shall submit to the Division a detailed written description and time schedule outlining Brushco Farms' plan for the long term management of pollutant sources and pollutant discharges from the Facility to state waters. The submitted plan and time schedule shall become a condition of this Order and Brushco Farms shall comply with the plan and time schedule, as submitted, unless notified by the Division in writing that an alternate plan or schedule is appropriate. If the Division imposes an alternate plan or schedule, it shall also become a condition of this Order.
20. Within thirty (30) calendar days of receipt of this Order, Brushco Farms shall retain a qualified entity, such as a professional geologist, engineer, or hydrologist to perform a comprehensive investigation to determine the nature and extent of the groundwater contamination as a result of the discharge of pollutants from the Facility into groundwater. The investigation shall include, at minimum:
 - A. A determination of the geologic and hydrologic characteristics of the site, including but not limited to, depth to ground water, ground water flow direction and velocity, soil types, and pumping rates associated with all groundwater wells located within one (1) mile of the Facility; and
 - B. A determination of the toxicity, mobility, and persistence in the environment of all contaminants discharged from the Facility; and
 - C. A determination of all potential human and environmental receptors, including but not limited to, all surface water features that could be impacted and all municipal, agricultural, and domestic ground water users in the vicinity of the contaminated area; and
 - D. A determination of the full vertical and horizontal extent of ground water contamination originating from the Facility; and
 - E. A detailed description of the methodology to be used to assess if any groundwater wells located in the vicinity of the contaminated area have been, or will be, impacted by the discharge from the Facility.
21. Within one hundred twenty (120) calendar days of receipt of this Order, Brushco Farms shall submit a summary report of the findings of the investigation outlined in paragraph 20. In addition to the summary, Brushco Farms shall submit a corrective action plan, outlining all interim and final actions necessary to remediate or mitigate the identified groundwater contamination. The corrective action plan shall include a timeline for initiation and completion of each action identified and shall also define the monitoring that will be done until the remediation or mitigation goals are reached. The submitted corrective action plan shall become a condition of this Order and Brushco Farms shall comply with the plan and the completion dates unless notified by the Division, in writing, that alternate activities and/or time schedule(s) are

appropriate. If the Division imposes alternate activities and/or time schedule(s), they shall also become a condition of this Order.

22. Brushco Farms shall submit monthly progress reports to the Division outlining efforts taken to achieve compliance with this Order. The first report shall be submitted to the Division on or before July 31, 2011. At a minimum, each report shall outline activities undertaken in the previous thirty (30) days and planned activities for the next thirty (30) days to remain in compliance with this Order. The monthly progress reports shall be required until the issuance of written notice from the Division indicating the reports are no longer necessary.
23. If Brushco Farms become aware of any situation or circumstances that cause Brushco Farms to become unable to comply with any condition or time schedules set forth by this Order, Brushco Farms shall provide written notice to the Division within five (5) calendar days of Brushco Farms becoming aware of such circumstances. Brushco Farms' notice shall describe what, if any, impacts will occur on Brushco Farms' ability to comply with the Colorado Water Quality Control Act and any impacts on the remaining conditions and/or time schedules specified by this Order, and what steps are being taken to mitigate the impacts.
24. All documents submitted under this Order shall use the same titles as stated in this Order, and shall reference both the number of this Order and the number of the paragraph pursuant to which the document is required. Within thirty (30) calendar days of receiving Division comments on submitted documents, Brushco Farms shall revise the submitted document(s) to properly address the Division's comments and resubmit the document(s) for Division review.

NOTICES AND SUBMITTALS

For all documents, plans, records, reports and replies required to be submitted by this Notice of Violation/Cease and Desist Order, the Brushco Farms shall submit an original and an electronic copy to the Division at the following address:

Colorado Department of Public Health and Environment
Water Quality Control Division / WQCD-B2-CAS
Compliance Assurance Section
Attention: Kelly Morgan
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530
Email: kelly.morgan@state.co.us
Fax: (303) 782-0390

(For any facsimile transmittals, please include a cover sheet addressed to Ms. Morgan.)

For any person submitting documents, plans, records and reports pursuant to this Notice of Violation / Cease and Desist Order, that person shall make the following certification with each submittal:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

OBLIGATION TO ANSWER AND REQUEST FOR HEARING

Pursuant to §25-8-603, C.R.S. and 5 CCR 1002, §21.11 you are required to submit to the Division an answer affirming or denying each paragraph of the Findings of Fact and responding to the Notice of Violation. The answer shall be filed no later than thirty (30) calendar days after receipt of this action.

Section 25-8-603, C.R.S. and 5 CCR 1002, §21.11 also provide that the recipient of a Notice of Violation may request the Division to conduct a public hearing to determine the validity of the Notice, including the Findings of Fact. Such request shall be filed in writing with the Division and include the information specified in 5 CCR 1002, §21.4(B)(2). Absent a request for hearing, the validity of the factual allegations and the Notice of Violation shall be deemed established in any subsequent Department proceeding. The request for hearing, if any, shall be filed no later than thirty (30) calendar days after issuance of this action. The filing of an answer does not constitute a request for hearing.

FALSIFICATION AND TAMPERING

Be advised, in accord with §25-8-610, C.R.S., that any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Colorado Water Quality Control Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

POTENTIAL CIVIL AND CRIMINAL PENALTIES

You are also advised that any person who violates any provision of the Colorado Water Quality Control Act (the "Act"), §§25-8-101 to 703, C.R.S., or of any permit issued under the Act, or any control regulation promulgated pursuant to the Act, or any final cease and desist order or clean-up order issued by the Division shall be subject to a civil penalty of not more than ten thousand dollars per day for each day during which such violation occurs. Further, any person who recklessly, knowingly, intentionally, or with criminal negligence discharges any pollutant into any state waters commits criminal pollution if such discharge is made without a permit, if a permit is required by the Act for such discharge, or if such discharge is made in violation of any permit issued under the Act or in violation of any Cease and Desist Order or Clean-up Order issued by the Division. By virtue of issuing this Notice of Violation / Cease and Desist Order, the State has not waived its

right to bring an action for penalties under §§25-8-608 and 609, C.R.S, and may bring such action in the future.

RELEASE OR DISCHARGE NOTIFICATION

Pursuant to §25-8-601, C.R.S., you are further advised that any person engaged in any operation or activity which results in a spill or discharge of oil or other substance which may cause pollution of the waters of the state, shall notify the Division of the discharge. If said person fails to so notify, said person is guilty of a misdemeanor, and may be fined or imprisoned or both.

EFFECT OF ORDER

Nothing herein contained, particularly those portions requiring certain acts to be performed within a certain time, shall be construed as a permit or license, either to violate any provisions of the public health laws and regulations promulgated thereunder, or to make any discharge into state waters. Nothing herein contained shall be construed to preclude other individuals, cities, towns, counties, or duly constituted political subdivisions of the state from the exercise of their respective rights to suppress nuisances or to preclude any other lawful actions by such entities or the State.

For further clarification of your rights and obligations under this Notice of Violation / Cease and Desist Order you are advised to consult the Colorado Water Quality Control Act, §§25-8-101 to 703, C.R.S., and regulations promulgated thereunder, 5 CCR 1002.

Issued at Denver, Colorado, this 27th day of June, 2011.

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT



Lori M. Gerzina, Section Manager
Compliance Assurance Section
WATER QUALITY CONTROL DIVISION