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DORCAS L. MILLER, CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

IN THE COURT OF COMMON PLEAS FOR HOLMES COUNTY, OHIO

STATE OF OHIO *ex rel.*, MARC DANN, ATTORNEY GENERAL,	:	Case No. 06-CV-089
	:	
	:	Judge Thomas White
Plaintiff,	:	
	:	
v.	:	**CONSENT ORDER**
	:	
GUGGISBERG CHEESE, INC.,	:	
	:	
Defendant.	:	

Q197 p. 796 - 808

The Complaint in the above-captioned matter having been filed herein, and Plaintiff State of Ohio by and through its Attorney General Marc Dann (hereinafter referred to as "Plaintiff" or "State of Ohio") and Defendant Guggisberg Cheese, Inc., (hereinafter referred to as "Defendant") having consented to the entry of this Consent Order.

NOW THEREFORE, without trial of any issue of fact or law beyond those set forth in the Court's September 26, 2007, Order and Journal Entry, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. The Court has both personal and subject-matter jurisdiction over the parties. The Complaint states a claim upon which relief can be granted against Defendant under Chapter 6111 of the Ohio Revised Code (hereinafter referred to as "R.C.") and the rules promulgated under that Chapter. Venue is proper in this Court.

II. PERSONS BOUND

2. All terms and provisions of this Consent Order shall apply to and be binding upon the parties, their agents, officers, employees, assigns, successors in interest,

buyers, lessors and lessees, and any others bound by Rule 65(D) of the Ohio Rules of Civil Procedure, who are or will be acting in concert and/or in privity with the parties. Defendant shall provide a copy of this Consent Order to its wastewater certified operator(s) and to any other contractor and/or consultant employed to perform any compliance activities required hereunder.

III. SATISFACTION OF LAWSUIT AND RESERVATION OF RIGHTS

3. As reflected in the Court's September 26, 2007, Order and Journal Entry, Defendant has operated the Charm and Sugar Creek facilities of Guggisberg Cheese Inc., in such a manner as to violate the water pollution control laws and rules of the State of Ohio, in violation of applicable National Pollutant Discharge Elimination System ("NPDES") permits. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendant for the specific claims under such laws as alleged in the Complaint against Defendant through December 31, 2007.

4. Nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to seek relief against other appropriate persons for claims or conditions alleged in the Complaint. Nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to seek relief against Defendant or other appropriate persons for claims or conditions not alleged in the Complaint, including violations that occur after the entry of the Consent Order. Similarly, nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to undertake any action against any person, including Defendant, to eliminate or mitigate conditions which may present a threat to the public health, welfare or the environment.

5. Notwithstanding the provisions of this Consent Order, Defendant reserves the right to file a motion for relief from judgment pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure. The State of Ohio takes no position at this time regarding whether such motion would meet the requirements of Rule 60(B), and the State of Ohio reserves the right to oppose said motion.

IV. PERMANENT INJUNCTION

6. Defendant is hereby permanently enjoined and ordered to immediately comply with the requirements of R.C. Chapter 6111, the rules adopted thereunder, and the terms and conditions of its effective NPDES permits, and any extensions, renewals or modifications of those permits.

V. CIVIL PENALTY

7. Pursuant to R.C. 6111.09, it is hereby ordered that Defendant shall pay to the State of Ohio a total civil penalty of Two Hundred Thousand Dollars ($200,000.00) in four installments as follows: (a) fifty thousand dollars ($50,000.00) to the State of Ohio no later than thirty days after the date of journalization of this Consent Order by the Court, and (b) additional payments of fifty thousand dollars ($50,000.00) to the State of Ohio on or before September 1, 2008, December 31, 2008, and September 30, 2009. Each civil penalty payment shall be paid by certified check for the appropriate amount made payable to "Treasurer, State of Ohio", which check shall be delivered by mail, or otherwise, to Martha Sexton, Administrative Assistant, or her successor, at the Ohio Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400.

8. If Defendant fails to timely make any of the payments as set forth in paragraph 7, any remaining balance of the total civil penalty provided in paragraph 7 shall then become immediately payable to the State of Ohio in its entirety.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT

9. In lieu of payment of an additional fifty thousand dollars ($50,000.00) civil penalty, and in furtherance of the parties' objective to improve the environment and reduce pollutant impacts to waters of the State of Ohio in Holmes County, Ohio, Defendant agrees to, and is hereby ordered to, spend fifty thousand dollars ($50,000.00) to implement a Supplemental Environmental Project (the "SEP" or "the project") as follows:

a. Defendant shall create a trust or escrow account with an established financial institution on or before June 30, 2008.

b. Defendant shall pay twenty five thousand dollars ($25,000.00) into said trust or escrow account no later than June 30, 2008.

c. Defendant shall pay an additional twenty five thousand dollars ($25,000.00) into said trust or escrow account no later than December 31, 2008.

10. Money in the trust/escrow account shall be used for the purpose of funding projects that improve the environment by reducing or preventing pollutant impacts to waters of the State of Ohio located in Holmes County, Ohio, through support of a livestock management program administered by The Ohio State University (OSU) in cooperation with the Holmes County Soil and Water Conservation District. The livestock management program will provide assistance to farmers to reduce or prevent adverse impacts of traditional farming practices on streams in Holmes County. The funds

will assist in the construction of livestock exclusion fencing, stream crossings, and watering facilities along streams in Holmes County, and also assist in funding the costs of implementing and administering OSU's livestock management program. The livestock management program will give priority to assisting farmers located along Doughty Creek and Troyer Valley Creek. Remaining funds will be used to assist other farmers in the Sugar Creek and Killbuck River watersheds in Holmes County until the funds are expended. The Defendant may assist in publicizing the availability of the trust/escrow fund to local farmers, the Holmes County Soil and Water Conservation District, and the Upper Sugar Creek Farmer Partners Watershed Group (a watershed group of the Ohio Watershed Network).

11. The trust or escrow agreement shall state that disbursements from the trust/escrow fund shall be made by the trustee or escrow agent only upon written approval from the Division Chief for Surface Water of the Ohio EPA in the amount authorized by the approval. Said disbursements shall be made payable to "The Ohio State University c/o Dr. Richard H. Moore or designated successor," and mailed to "The Ohio State University c/o Dr. Richard H. Moore or designated successor, Department of Human and Community Resource Development, 119 Williams Hall, OARDC, 1690 Madison Avenue, Wooster, OH 44691." Each disbursement shall be denoted as "Guggisberg Cheese SEP – OSU Livestock Management Program, Holmes County, Ohio." Defendant shall provide the trustee or escrow agent a copy of this Consent Order at the time of executing the trust/escrow agreement, and shall provide the Division Chief for Surface Water with a copy of the signed trust/escrow agreement.

12. The trust/escrow agreement shall require that the trustee fax or email to the Division Chief for Surface Water a verification or statement indicating the date and amount of all disbursements from the trust/escrow account, along with the balance remaining in the account, and shall state that upon request of Ohio EPA or the Defendant the trustee or escrow agent shall provide a statement of the dates and amounts of all disbursements, remaining balance, and income to or charges against the escrow or trust account. All costs of administering the trust/escrow account, if any, shall be paid by the Defendant if interest income generated by the account is insufficient to cover such costs. Any interest not expended on the cost to administer the trust/escrow account shall be added to the principle of the trust/escrow account.

VII. STIPULATED PENALTIES

13. Except as provided in paragraph 14, if Defendant fails to comply with any terms and conditions of its effective NPDES permits, or any future extensions, renewals or modifications of those permits, Defendant shall pay a stipulated penalty for each failure according to the following payment schedule: (a) for each day of each failure to meet each requirement, up to thirty (30) days – five hundred dollars ($500.00) per day for each requirement not met; (b) for each day of each failure to meet each requirement, from thirty-one (31) to sixty (60) days - seven hundred and fifty dollars ($750.00) per day for each requirement not met; (c) for each day of each failure to meet each requirement, over sixty-one (61) days - one thousand dollars ($1000.00) per each day for each requirement not met.

14. While the State of Ohio maintains that any failure to meet a thirty-day or monthly effluent limit constitutes a separate violation for each day of the applicable

month, solely for purposes of calculating stipulated penalties under this Consent Order, each failure to meet a monthly or 30-day average effluent limit in Defendant's NPDES permits for its Charm and Sugarcreek facilities shall be calculated as a single violation. If Defendant fails to comply with a monthly or 30-day average effluent limit contained in its NPDES permits, Defendant shall be immediately and automatically liable for, and shall pay, a stipulated penalty according to the following schedule:

CHARM FACILITY

a. One thousand five hundred ($1,500.00) dollars for each failure to meet any monthly or 30-day average effluent limit at the Charm facility for each monthly or 30-day period during which each failure occurs;

b. Two thousand five hundred ($2,500.00) dollars for each second consecutive failure to meet any monthly or 30-day average effluent limit at the Charm facility for each monthly or 30-day period during which each failure occurs;

c. Three thousand five hundred ($3,500.00) dollars for each third consecutive failure to meet any monthly or 30-day average effluent limit at the Charm facility for each monthly or 30-day period during which each failure occurs; and

d. Four thousand five hundred ($4,500.00) dollars for each fourth or subsequent consecutive failure to meet any monthly or 30-day average effluent limit at the Charm facility for each monthly or 30-day period during which each failure occurs.

SUGARCREEK FACILITY

a. One thousand five hundred ($1,500.00) dollars for each failure to meet any monthly or 30-day average effluent limit at the Sugarcreek facility for each monthly or 30-day period during which each failure occurs;

b. Two thousand five hundred ($2,500.00) dollars for each second consecutive failure to meet any monthly or 30-day average effluent limit at the Sugarcreek facility for each monthly or 30-day period during which each failure occurs;

c. Three thousand five hundred ($3,500.00) dollars for each third consecutive failure to meet any monthly or 30-day average effluent limit at the Sugarcreek facility for each monthly or 30-day period during which each failure occurs; and

d. Four thousand five hundred ($4,500.00) dollars for each fourth or subsequent consecutive failure to meet any monthly or 30-day average effluent limit at the Sugarcreek facility for each monthly or 30-day period during which each failure occurs.

15. The provisions of paragraph 14 apply on a parameter by parameter basis to the monthly or 30-day average effluent limits in Defendant's NPDES permits.

16. Any payment required to be made under the provisions of Section VII of this Consent Order shall be made by delivering to Martha Sexton or her successor, at the address set forth in Section VII within forty-five (45) days from the date of the failure to meet the requirement of the Consent Order, a certified check or checks for the appropriate amount(s), made payable to the order of "Treasurer, State of Ohio". Defendant shall also state in writing the specific failure of the Consent Order, which was not complied with, and the date(s) of non-compliance. The payment of stipulated penalties by the Defendant and the acceptance of such stipulated penalties by the Plaintiff for specific violations pursuant to Section VII shall not be construed to limit Plaintiff's authority to seek judicial enforcement of this Consent Order.

17. The imposition of stipulated penalties hereunder may be terminated as to each individual NPDES permit for Defendant's Charm and Sugarcreek facility only after Defendant has achieved and maintained consistent compliance with all requirements of the applicable permit for a minimum of twelve (12) consecutive months and has paid all stipulated penalties incurred related to the applicable permit. Termination of the stipulated penalties provision for one of the Defendant's facility's shall not terminate the provision for Defendant's other facility until such time as Defendant fulfills the conditions necessary to support termination thereof for the other facility. Termination of the stipulated penalties provision shall only occur upon written application or motion filed by either party, and by order of the Court after it determines that the requirements of this paragraph have been satisfied.

VIII COMPLIANCE NOT DEPENDENT ON GRANTS OR LOANS

18. Performance of the terms of this Consent Order by Defendant is not conditioned on the receipt of any federal or state grant or loan funds. In addition, Defendant's performance is not excused by the failure to obtain any federal or state grant or loan funds, or by the processing of any applications for the same.

IX. POTENTIAL FORCE MAJEURE

19. If an event occurs which causes or may cause a delay in Defendant's compliance with any requirement of this Consent Order, Defendant shall notify the Ohio EPA in writing within ten (10) days from the date when the Defendant knew or, in the exercise of due diligence should have known, of the event. The notification to Ohio EPA shall describe in detail the anticipated length of the delay, the precise cause or causes of

the delay, and the timetable by which those measures will be implemented. Defendant shall adopt all reasonable measures to avoid or minimize any such delay.

20. In any action by the Plaintiff to enforce any of the provisions of this Consent Order, Defendant may raise that it is entitled to a defense that its conduct was caused by reasons entirely beyond its control such as, by way of example and not limitation, acts of God, strikes, acts of war or civil disturbances. While the Plaintiff does not agree that such defense exists, it is, however, hereby agreed upon by Defendant and Plaintiff that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time, if ever, that a court proceeding to enforce this Consent Order is commenced by the Plaintiff. At that time, Defendant will bear the burden of proving that any delay was or will be caused by circumstances entirely beyond the control of Defendant. Unanticipated or increased costs associated with the implementation of any action required by this Consent Order, or a change in Defendant' financial circumstances, shall not constitute circumstances entirely beyond the control of Defendant or serve as a basis for an extension of time under this Consent Order. Failure by Defendant to timely comply with the notice requirements of this Section shall render this Section null and void and of no force and effect as to the particular incident involved and shall constitute a waiver of Defendant's rights to request an extension of its obligations under this Consent Order based on such incident. An extension of one date based on a particular incident does not mean that Defendant qualify for an extension of a subsequent date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought. Acceptance of this Consent Order

with a Potential Force Majeure Clause does not constitute a waiver by Defendant of any rights or defenses it may have under applicable law.

X. RETENTION OF JURISDICTION

21. The Court will retain jurisdiction of this action for the purpose of enforcing and administering Defendant's compliance with this Consent Order.

XI. MODIFICATION

22. No modification shall be made to this Consent Order without the written agreement of the parties and the approval of the Court.

XII. SUBMITTAL OF DOCUMENTS

23. All documents or notices submitted by the parties under this Consent Order shall be submitted to:

(a) for Plaintiff -

Ohio EPA
Northeast District Office
2110 E. Aurora Rd.
Twinsburg, Ohio 44087
Attn.: Surface Water Unit Supervisor

(b) for Defendant -

Richard Guggisberg, President
Guggisberg Cheese, Inc.
5060 State Route 557
Millersburg Ohio 44654.

XIII. COURT COSTS

24. Defendant is hereby ordered to pay the court costs of this action.

XIV. ENTRY OF CONSENT ORDER AND FINAL JUDGEMENT BY CLERK

25. The parties agree that final approval to the Court's entry of this Consent Order as a final judgment is subject to the federal notice requirements of 40 C.F.R. §

123.27(d)(1)(iii), which provides for notice of the lodging of the Consent Order, opportunity for public comment, and the consideration of any public comments. Both Plaintiff and Defendant reserve the right to withdraw approval of this Consent Order based upon comments received during the public comment period. Defendant shall pay the costs of public notice associated with this Consent Order. The parties shall submit a joint motion to the Court within two (2) weeks after the date the comment period expires, therein informing the Court whether the parties individually or jointly withdraw approval of the Consent Order, or moving the Court to proceed to sign the Consent Order and enter it as a final judgment upon the journal.

26. Pursuant to Rule 58 of the Ohio Rules of Civil Procedure, upon signing of this Consent Order by the Court, the clerk is hereby directed to enter it upon the journal. Within three (3) days of entering the judgment upon the journal, the clerk is hereby directed to serve upon the parties notice of the judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

XV. SIGNATORIES

27. Richard Guggisberg, acting as President and corporate representative of the Defendant, understands the terms and conditions of this Consent Order, and certifies that he is fully authorized to execute this Consent Order and to legally bind the Defendant to the terms and conditions of the Consent Order.

SO APPROVED:

MARC DANN, ATTORNEY GENERAL

DANIEL J. MARTIN (0065249)
L. SCOTT HELKOWSKI (0068622)
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, OH 43215-3400
(614) 466-2766
Counsel for Plaintiff State of Ohio

February 26, 2008
DATE

STEPHEN N. HAUGHEY (0010459)
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, OH 45202-4182
(513) 651-6127
Trial Counsel for Defendant Guggisberg Cheese, Inc.

February 25th, 2008
DATE

SAMUEL M. STEIMEL (0018912)
Steimel Law Office
111 S. Clay Street
Millersburg, OH 44654
(330) 674-0001
Local Counsel for Defendant Guggisberg Cheese, Inc.

2/27/08
DATE

RICHARD GUGGISBERG, President
Guggisberg Cheese Inc.
5060 State Route 557
Millersburg, Ohio 44654

2/27/08
DATE

IT IS SO ORDERED:

JUDGE THOMAS WHITE

4/14/08
DATE

To the Clerk: Signed copy mailed to all counsel of record.