

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. CWA-05-2021-0007
)	
Guggisberg Cheese, Inc., 5060 State Route 557 Millersburg, Ohio 44654)	Proceeding to Assess a Class II Civil Penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)
)	
Respondent.)	
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Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b)(2)-(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2)-(3).

2. The Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, EPA Region 5, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is Guggisberg Cheese, Inc. (“Guggisberg”), a corporation in Millersburg, Ohio.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO including, but not limited to, its right to request a hearing under 40 C.F.R. § 22.15(c) and Sections 309(g)(2)(B) and (4)(C) of the CWA, 33 U.S.C. § 1319(g)(2)(B) and (4)(C); its right to appellate review under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B); its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CAFO; and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA.

10. Section 402 of the CWA, 33 U.S.C. § 1342, establishes the NPDES program under which EPA and, upon receiving authorization from EPA, a state may permit discharges into navigable waters, subject to specific conditions. A violation of a NPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

11. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the State of Ohio requested approval from EPA to administer its own permit program for discharges into navigable waters within Ohio, and such approval was granted by EPA on March 11, 1974, 39 Fed. Reg. 26,061 (July 16, 1974). Therefore, pursuant to the State's permit program, the Ohio Environmental Protection Agency ("Ohio EPA") has issued Ohio NPDES permits.

12. Section 502(12) of the CWA defines "discharge of a pollutant," as, *inter alia*, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

13. Section 502(6) of the CWA defines "pollutant," as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological

materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

14. Section 502(14) of the CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

15. Section 502(7) of the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

16. Section 502(5) of the CWA defines a “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

17. The regulation at 40 C.F.R. § 122.2 (1993) defines the term “waters of the United States,” as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate “wetlands;”

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

18. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator to assess a Class II civil penalty under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), after consultation with the State in which the violation occurs, when the Administrator finds, on the basis of any information available, that a person has violated Section 301 of the CWA, 33 U.S.C. § 1311, which includes discharges not in compliance with a permit under Section 402 of the CWA, 33 U.S.C. § 1342.

Factual Allegations and Alleged Violations

19. Respondent is a corporation and therefore a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

20. At all specific times relevant to this Order, Respondent has owned and operated Guggisberg Cheese, Inc., located at 1545 County Road 70, Clark Township, Ohio (the “Facility”).

21. At all specific times relevant to this Order, Outfall No. 002 discharged process wastewater into Troyer Valley Creek.

22. Outfall No. 002 is a “point source,” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

23. Troyer Valley Creek is a tributary to the Ohio River, through Upper South Fork Sugar Creek, Tuscarawas River and Muskingum River, and “navigable waters” within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362, and “waters of the United States” within the meaning of 40 C.F.R. § 122.2 (1993).

24. At all times relevant to this Order, Outfall No. 002 acted as point sources of “discharges” of “pollutants” with its final wastewater discharge to the Troyer Valley Creek.

25. Because Respondent owns or operates a facility with outfalls that acted as point sources for the discharge of pollutants to navigable waters, Respondent and the facility have been subject to the CWA and the NPDES program at all times relevant to this Order. Thus, any such discharge has been and is subject to the specific terms and conditions prescribed in the applicable permit.

26. Respondent applied for and was issued an NPDES Permit No. OH0083771 (“Permit”) under Section 402 of the CWA, 33 U.S.C. § 1342, which became effective on July 1, 2017. At all times relevant to this Order, Respondent was authorized to discharge pollutants from the facility to waters of the United States only in compliance with the specific terms and conditions of the Permit.

27. The NPDES Permit contains “Effluent Limitations and Monitoring Requirements” that require Respondent to sample and test its effluent and monitor its compliance with the NPDES Permit conditions and applicable regulations, according to specific procedures. The NPDES Permit also requires Respondent to file certified Discharge Monitoring Reports (“DMRs”) of the results of monitoring and Noncompliance Reports with Ohio EPA.

28. The NPDES Permit also places certain limitations on the quality and quantity of effluent discharged by Respondent. The relevant discharge limitations are specified in Attachment A, which is incorporated herein by reference.

29. The Respondent has installed a \$2,000,000, membrane bioreactor at its wastewater treatment plant that treats wastewater for suspended solids, Biochemical Oxygen Demand, nitrogen and phosphorus

30. The Respondent rerouted the discharge from the old evaporator to the wastewater treatment plant which eliminated the discharge from the facility to Outfall 002.

31. The Respondent’s permit has been modified to remove the Lamella clarifier from its approved wastewater treatment system.

Count I: Unlawful Discharge of Pollutants through Outfall 001

32. The statements in Paragraphs 1-31 are incorporated by reference as if fully set forth herein.

33. The Permit includes a “Schedule of Compliance” that requires Respondent to achieve full compliance with the final effluent limitations of the Permit as soon as possible, but no later than November 1, 2017.

34. From November 1, 2017, to April 30, 2019, Respondent filed certified DMRs with the Ohio EPA that reported 20 instances where NPDES discharges of Pollutants from the facility exceeded the permitted effluent limitations established in the NPDES Permit related to Total Dissolved Solids, Ammonia and Total Phosphorus effluent limits at Outfall 001, as specified in Attachment A, which is incorporated by reference.

35. Each instance in which Respondent discharged Pollutants to navigable waters in amounts exceeding the effluent limitations contained in the Permit is a violation of the Permit and Section 301 of the CWA, 33 U.S.C. § 1311.

Count II: Unlawful Bypass of the wastewater treatment system

36. The statements in Paragraphs 1-31 are incorporated by reference as if fully set forth herein.

37. The Permit includes “Interim Effluent Limitations and Reporting Requirements,” Part I, A, that authorized Respondent to discharge pollutants from Outfall No. 002 only for the period of July 1, 2017, until October 31, 2017.

38. During its September 20, 2018, inspection of the facility, EPA observed discharges from Outfall No. 002 without going through the approved wastewater treatment system.

39. The permit includes Part III, “Unauthorized Discharges” that prohibits Respondent to “bypass” any portion of the approved treatment facility.

40. By discharging from Outfall No. 002 after October 31, 2017, and until at least September 20, 2018, Respondent failed to comply with Part III, C of the Permit and Section 301 of the CWA, 33 U.S.C. § 1311.

Count III: Unlawful Bypass of the wastewater treatment system

41. The statements in Paragraphs 1-31 are incorporated by reference as if fully set forth herein.

42. The Permit includes Part III, “Unauthorized Discharges” that prohibits Respondent to “bypass” any portion of the approved treatment facility.

43. On April 4, 2017, Ohio EPA approved a Permit-To-Install (PTI) application (PTI No. 1108945) that outlined and described the components of the wastewater treatment facility, which included the Lamella Clarifier as part of the approved treatment facility.

44. During its September 20, 2018, inspection EPA observed that Respondent bypassed the Lamella Clarifier from at least November 1, 2017, to September 20, 2018.

45. Respondent’s bypassing of the Lamella Clarifier from November 1, 2017, to September 20, 2018 is a violation of Part III, C of the Permit and Section 301 of the CWA, 33 U.S.C. § 1311.

Civil Penalty

46. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, the Administrator may assess a Class II civil penalty of up to \$22,584 per day of violation up to a total of \$282,293, for violations of the CWA that occurred after November 2, 2015 and for which penalties are assessed on or after December 23, 2020, or other amounts as penalty levels may be later adjusted at 40 C.F.R. Part 19.

47. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violations alleged, economic benefit or savings resulting from the violations, and such other matters as justice may require, U.S. EPA has determined that an appropriate civil penalty to settle this action is \$32,000.

48. Within 30 days after the effective date of this CAFO, Respondent must pay the \$32,000 civil penalty by:

For checks sent by regular U.S. Postal Service mail, sending a cashier’s or certified check, payable to “Treasurer, United States of America,” to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For checks sent by express mail, sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, Missouri 63101

The check must note Respondent's name and the docket number of this CAFO.

For electronic funds transfer, electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045

In the comment or description field of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

For Automated Clearinghouse (ACH), ACH electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22-checking

In the comment area of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

For on-line payment, an on-line payment. To pay on-line, go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter SFO 1.1 in the search field. Open the form and complete the required fields.

49. A transmittal letter, stating Respondent's name, complete address, and the case docket number must accompany the payment. Respondent must write the case docket number on the face of the check and send copies of the check and transmittal letter to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (E-19J)
Chicago, Illinois 60604-3590
And email copies to hodaj.andi@epa.gov and prout.susan@epa.gov.

50. This civil penalty is not deductible for federal tax purposes.

51. If Respondent does not timely pay the civil penalty, Complainant may request the United States Department of Justice bring a civil action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action. Respondent acknowledges that the validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

52. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established pursuant to 26 U.S.C. § 6621(a)(2); 31 U.S.C. § 3717. In addition to the assessed penalty and interest, Respondent must pay the United States' attorneys fees and costs for collection proceedings, and Respondent must pay a nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 20 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. *See* 33 U.S.C. § 1319(g)(9).

General Provisions

53. The parties consent to service of this CAFO by email at the following valid email addresses: prout.susan@epa.gov (for Complainant) and richard@babyswiss.com (for Respondent).

54. Full payment of the penalty as described in paragraphs 47 and 48 and full compliance with this CAFO shall not in any case affect the right of the U.S. EPA or the United

States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

55. As provided under 40 C.F.R. § 22.18(c), full payment of the penalty as described in paragraphs 47 and 48 and full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for the particular violations alleged in this CAFO.

56. This CAFO does not affect Respondent's responsibility to comply with the CWA and other applicable federal, state, or local laws, regulations, or permits.

57. Respondent certifies that it is complying with Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a), 1342.

58. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31 and the EPA's Interim Clean Water Act Settlement Penalty Policy (Mar. 1995).

59. The terms of this CAFO bind Respondent and its successors and assigns.

60. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to the terms of this CAFO.

61. Each party agrees to bear its own costs and attorneys fees in this action.

62. This CAFO constitutes the entire agreement between the parties.

63. The effective date for this CAFO is the date it is filed with the Regional Hearing Clerk, which is after completion of the notice and comment requirements of Sections 309(g)(4)(C) and 309(g)(5) of the CWA, 33 U.S.C. §§ 1319(g)(4)(C), (5) and 40 C.F.R. §§ 22.38, 22.45, and which shall be at least 30 days after the CAFO has been signed by the Regional Judicial Officer or Regional Administrator.

In the Matter of:
Guggisberg Cheese, Inc.,
Docket No. CWA-05-2021-0007

Guggisberg Cheese, Inc., Respondent



Richard Guggisberg
President
Guggisberg Cheese, Inc.

8/26/21

Date

In the Matter of:
Guggisberg Cheese, Inc.,
Docket No. CWA-05-2021-0007

United States Environmental Protection Agency, Complainant

Harris, Michael Digitally signed by Harris, Michael
Date: 2021.09.14 15:47:04 -05'00'

Michael D. Harris
Division Director
Enforcement and Compliance Assurance Division
U.S. EPA Region 5

Date

In the Matter of:
Guggisberg Cheese, Inc.,
Docket No. CWA-05-2021-0007

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

By: _____ Date: _____

Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5