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ENVIRONMENTAL
ENFORCEMENT

west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
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Joe Manchin III, Governor
Randy C. Huffman, Cabinet Secretary
www.wvdep.org

**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Boggess Dairy, Inc.
PO Box 144
Peterstown, WV 24963

DATE: January 6, 2010

ORDER No.: 6890

INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management (hereinafter "Director"), under the authority of West Virginia Code, Chapter 22, Article 11, Section 1 et seq. to Boggess Dairy, Inc. (hereinafter "Boggess").

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. Boggess operates a dairy farm located between Peterstown and Bozoo, Monroe County, West Virginia (37°25'46.44"N Latitude, 80°47'21.53"W Longitude).
2. On August 21, 2009, West Virginia Department of Environmental Protection (WVDEP) and West Virginia Division of Natural Resources (WVDNR) personnel conducted an investigation of a reported fish kill located in Brush Creek of Rich Creek of the New River between Peterstown and Bozoo, WV. During the investigation, the following violations of WV Legislative Rules (Requirements Governing Water Quality Standards) were observed and documented:
 - a. A large dark plume along with numerous dead fish was observed in Brush Creek. The plume was traced back to its source, a discharging manure pond located within the Boggess Dairy Farm. Boggess caused conditions not allowable in Brush Creek by discharging wastewaters into the stream from a manure pond, which caused a plume of distinctly visible floating, settleable, or suspended solids in the receiving stream, a violation of Legislative Rule, Title 47, Series 2, Section 3.2.a (47CSR2-3.2.a).

Promoting a healthy environment.

- b. Samples for fecal coliform and biochemical oxygen demand (BOD₅) were collected by WVDEP personnel (See Attachment #1). Sampling results revealed a fecal coliform count of 320 colonies per 100 milliliters (col/100ml) and a BOD₅ of 14 milligrams per liter (mg/l) for Brush Creek upstream of its confluence with the Bogges pond discharge. A fecal coliform count of greater than 6,000 col/100ml and a BOD₅ result of 851 mg/l was determined for the sample of Bogges' manure pond discharge. A fecal coliform count of greater than 6,000 col/100ml and a BOD₅ result of 210 mg/l was determined for the sample collected approximately 50 meters downstream of the confluence of Brush Creek and Bogges' manure pond discharge. Bogges has caused conditions not allowable in Brush Creek by discharging wastewaters into the stream from a manure pond in concentrations which are harmful, hazardous or toxic to man, animal, or aquatic life (a violation of 47CSR2-3.2.e).

Because of the above noted violations, Notice of Violation (NOV) No. I-09-8-21-1-MDP was issued to Bogges.

3. On October 13, 2009, WVDNR personnel conducted an electrofishing survey in Brush Creek immediately upstream of the mouth of the ephemeral tributary coming from Bogges' Dairy Farm. The WVDNR indicated that 9,292 fish were killed over an estimated 2.6 mile stretch of Brush Creek through the town of Peterstown.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with Chapter 22, Article 11, Section 1 et seq. of the West Virginia Code, it is hereby agreed between the parties, and ORDERED by the Director:

1. Bogges shall immediately take all measures to initiate compliance with all terms and conditions of all pertinent laws and/or rules.
2. Within twenty (20) days of entry of this Order, Bogges shall submit for approval a proposed corrective action plan and schedule, outlining how and when Bogges will achieve compliance with all pertinent laws and rules. The plan shall be submitted to:

**Chief Inspector
Environmental Enforcement-Mail Code #031328
WVDEP
601 57th Street SE
Charleston, WV 25304**

A copy of this plan shall be submitted to:

**Environmental Inspector Supervisor
WVDEP/Environmental Enforcement
116 Industrial Drive
Oak Hill, WV 25901-8320**

3. Because of Bogges's Legislative Rule violations, Bogges shall be assessed a civil administrative penalty of thirteen thousand thirty dollars (\$13,030) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of entry of this Order. Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. Payment shall be mailed to:

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304**

OTHER PROVISIONS

1. Bogges hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia. Under this Order, Bogges agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, Bogges does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding Bogges other than proceedings, administrative or civil, to enforce this Order.
2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.
3. If any event occurs which causes delay in the achievement of the requirements of this Order, Bogges shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after Bogges becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Bogges intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of Bogges (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.

4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving Bogges of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject Bogges to additional penalties and injunctive relief in accordance with the applicable law.
5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
6. This Order is binding on Bogges, its successors and assigns.
7. This Order shall terminate upon Bogges's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

Bogges Dairy Inc
Wally Bogges
Wally Bogges

Bogges Dairy, Inc.

1-14-10

Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

Scott G. Mandirola, Acting Director
Division of Water and Waste Management

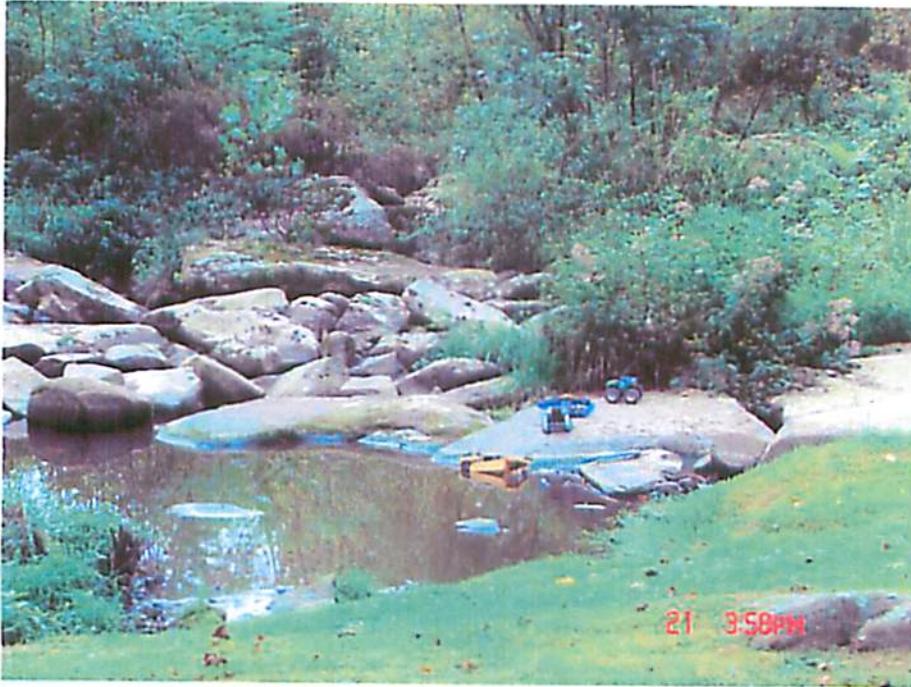
Date



Manure Pond



Second Instream Pond below Manure Pond



Downstream of Sample Site



Pond Discharge at Confluence with Brush Creek



Brush Creek above Confluence with Pond Discharge



Brush Creek from Bridge at Roy Martin Road



Dead Fish in Brush Creek at Roy Martin Road Bridge

Attachment No. 1

Sample Results

(Includes three (3) pages after this cover page)

REI Consultants, Inc.

Analytical Results

Date: 31-Aug-09

CLIENT: WV DEP - OAK HILL	WorkOrder: 0908G66	Lab ID 0908G66-01A
Client Sample ID: BOGESS POND DISCHARGE	DateReceived: 8/21/2009	
Project:	Collection Date: 8/21/2009 3:30:00 PM	
Site ID:	Matrix: LIQUID	

Analytes	Result Units	Qual	MDL	PQL	Date Analyzed
FECAL COLIFORM BY MEMBRANE FILTER		8MS222 D			Analyst: CC
Fecal Coliform	>5000 col/100mL	NA		1	8/21/2009 6:51:00 PM
BOD, 5 DAY, 20°C		8MS210 B			Analyst: PF
Biochemical Oxygen Demand	851 mg/L	2.0		2	8/22/2009 12:06:00 PM

Key:	MCL Maximum Contaminant Level	J Analyte detected below quantitation limits
	MDL Minimum Detection Limit	B Analyte detected in the associated Method Blank
	NA Not Applicable	E Estimated Value above quantitation range
	ND Not Detected at the PQL or MDL	H Holding times for preparation or analysis exceeded
	PQL Practical Quantitation Limit	S Spike/Surrogate Recovery exceeds REIC control limits
	TIC Tentatively Identified Compound, Estimated Concentration	* Value exceeds MCL or Regulatory Limits

REI Consultants, Inc.

Analytical Results

Date: 31-Aug-09

CLIENT: WV DEP - OAK HILL	WorkOrder: 0908G66	Lab ID 0908G66-02A
Client Sample ID: BRUSH CREEK US	DateReceived: 8/21/2009	
Project:	Collection Date: 8/21/2009 3:35:00 PM	
Site ID:	Matrix: LIQUID	

Analytes	Result Units	Qual	MDL	PQL	Date Analyzed
FECAL COLIFORM BY MEMBRANE FILTER		888222 D			Analyst: CC
Fecal Coliform	320 cfu/100mL	NA		1	8/21/2009 6:51:00 PM
BOD, 5 DAY, 20°C		888210 B			Analyst: PF
Biochemical Oxygen Demand	14 mg/L	2.0		2	8/22/2009 12:08:00 PM

Key:	MCL Maximum Contaminant Level	J Analyte detected below quantitation limits
	MDL Minimum Detection Limit	B Analyte detected in the associated Method Blank
	NA Not Applicable	E Estimated Value above quantitation range
	ND Not Detected at the PQL or MDL	H Holding times for preparation or analysis exceeded
	PQL Practical Quantitation Limit	S Spike/Surrogate Recovery exceeds REEC control limits
	TEC Tentatively Identified Compound, Estimated Concentration	* Value exceeds MCL or Regulatory Limits

REI Consultants, Inc.**Analytical Results**

Date: 31-Aug-09

CLIENT: WV DEP - OAK HILL**WorkOrder:** 0908G66 Lab ID 0908G66-03A**Client Sample ID:** BRUSH CREEK DS**Date Received:** 8/21/2009**Project:****Collection Date:** 8/21/2009 3:40:00 PM**Site ID:****Matrix:** LIQUID

Analytes	Result Units	Qual	MDL	PQL	Date Analyzed
FECAL COLIFORM BY MEMBRANE FILTER					Analyst: CC
Fecal Coliform	>8000 col/100mL	NA		1	8/21/2009 8:51:00 PM
BOD, 5 DAY, 20°C					Analyst: PF
Biochemical Oxygen Demand	210 mg/L	2.0		2	8/22/2009 12:10:00 PM

Key: MCL Maximum Contaminant Level
MDL Minimum Detection Limit
NA Not Applicable
ND Not Detected at the PQL or MDL
PQL Practical Quantitation Limit
TIC Tentatively Identified Compound, Estimated Concentration

J Analyte detected below quantitation limits
B Analyte detected in the associated Method Blank
E Estimated Value above quantitation range
H Holding times for preparation or analysis exceeded
S Spike/Surrogate Recovery exceeds REIC control limits
• Value exceeds MCL or Regulatory Limits

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

Boggess Dairy, Inc.

Receiving Stream:

Brush Creek

Treatment System Design Maximum Flow: MGD

Treatment System Actual Average Flow: MGD (if known)

Enter FOF# and rate each finding as to Potential and Extent.

1)	Potential for Harm Factor	Factor Range	FOF#											
			2a	2b										
a)	Amount of Pollutant Released	1 to 3	3	3										
b)	Toxicity of Pollutant	0 to 3	2	2										
c)	Sensitivity of the Environment	0 to 3	1	1										
d)	Length of Time	1 to 3	1	1										
e)	Actual Exposure and Effects thereon	0 to 3	3	3										
Average Potential for Harm Factor			2	2	No									
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	3	3										

Potential for Harm Factors:

- 1)c - Sensitivity of the Environment Potentially Affected (0 for "dead" stream)
- 1)d - Length of Time of Violation
- 1)e - Actual Human/Environmental Exposure and Resulting Effects thereon

Examples/Guidance:

Note: Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Minor = exceedance of permit limit by <=40% for Avg. Monthly or <=100% for Daily Max., exceed numeric WQ standard by <= 100%, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by >= 41% and <= 300% for Avg. Monthly , >= 101% and <= 600% for Daily Max., exceed numeric WQ standard by >= 101% and <= of 600% or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by >= 301% for Avg. Monthly, >= 601% for Daily Max., exceed numeric WQ standard by >= 601%, failure to submit a report, failure to obtain a permit, failure to report a spill, etc. Note that a facility in SNC should be rated as major for length of time and degree of non-compliance.

Narrative WQ standard violations - case-by-case.

		Extent of Deviation from Requirement		
		Major	Moderate	Minor
Potential for Harm to Human Health or the Environment	Major	\$8,000 to \$10,000	\$6,000 to \$8,000	\$5,000 to \$6,000
	Moderate	\$4,000 to \$5,000	\$3,000 to \$4,000	\$2,000 to \$3,000
	Minor	\$1,500 to \$2,000	\$1,000 to \$1,500	Up to \$1,000

FOF #	Potential for Harm	Extent of Deviation	Penalty	Multiple Factor	Base Penalty
2a	Moderate	Major	\$5,000	1	\$5,000
2b	Moderate	Major	\$5,000	1	\$5,000
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
Total Base Penalty					\$10,000

Penalty Adjustment Factors

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor

6.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase

6.2.b.4 - Previous compliance/noncompliance history - 0% to 100% increase - based upon review of last three (3) years - Warning = maximum of 5% each, N.O.V. = maximum of 10% each, previous Order = maximum of 25% each - Consistent DMR violations for <1 year = 10% maximum, for >1 year but <2 years = 20% maximum, for >2 years but <3 years = 30% maximum, for >3 years = 40 % maximum

6.2.b.6 - Economic benefits derived by the responsible party (increase to be determined)

6.2.b.7 - Public Interest (increase to be determined)

6.2.b.8 - Loss of enjoyment of the environment (increase to be determined)

6.2.b.9 - Staff investigative costs (increase to be determined)

6.2.b.10 - Other factors

Size of Violator: 0 - 50% decrease

NOTE: This factor is not available to discharges that are causing a water quality violation. This factor does not apply to a commercial or industrial facility that employees or is part of a corporation that employees more than 100 individuals.

Avg. Daily WW Discharge Flow (gpd)	% Reduction Factor
< 5,000	50
5,000 to 9,999	40
10,000 to 19,999	30
20,000 to 29,999	20
30,000 to 39,999	10
40,000 to 99,999	5
> 100,000	0

Additional Other factors to be determined for increases or decreases on a case-by-case basis.

Public Notice Costs (cost for newspaper advertisement)

6.2.b.2 - Good Faith - 10% decrease to 10% increase

6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease

6.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease

Base Penalty Adjustments

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
6.2.b.1 - Willfulness and/or negligence -	30		\$3,000
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)			\$0
6.2.b.7 - Public Interest - (flat monetary increase)			\$0
6.2.b.8 - Loss of enjoyment - (flat monetary increase)			\$0
6.2.b.9 - Investigative costs - (flat monetary increase)			\$0
6.2.b.10 - Other factors (size of violator)			\$0
6.2.b.10 - Additional Other Factors - Increase (flat monetary increase)			\$0
6.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease)			\$0
Public Notice Costs (flat monetary increase)	\$30		\$30
6.2.b.2 - Good Faith - Increase			\$0
6.2.b.2 - Good Faith - Decrease			\$0
6.2.b.3 - Cooperation with the Secretary			\$0
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$3,030
Penalty =			\$13,030

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	\$0
Comments: None determined.	