

**STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER RESOURCES DIVISION**

In the matter of:

ACO-000236

Date Entered: 6/30/15

John B. Schaendorf Dairy, LLC
2730 130th Avenue
Allegan, Michigan 49010

SETTLEMENT AGREEMENT

This document results from allegations by the Department of Environmental Quality ("DEQ"), Water Resources Division (WRD). The DEQ alleges John B. Schaendorf Dairy, LLC ("John Schaendorf Dairy"), located at 2730 130th Avenue in Allegan County, is in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended ("NREPA"), MCL 324.3101 *et seq.* John Schaendorf Dairy is a person, as defined by Section 301 of the NREPA, and is registered with the Michigan Department of Licensing and Regulatory Affairs as able to conduct business in the State of Michigan under identification number D6897N. John Schaendorf Dairy and the DEQ agree to resolve the alleged violations set forth herein by this Settlement Agreement ("Settlement Agreement" or "Agreement").

I. STIPULATIONS

The John Schaendorf Dairy and the DEQ stipulate as follows:

- 1.1 The NREPA MCL 324.101 *et seq.*, is an act that controls pollution to protect the environment and natural resources in the state.
- 1.2 Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 *et seq.*, and the rules promulgated pursuant thereto provide for the protection, conservation, and the control of pollution of the water resources of the state.
- 1.3 The DEQ is authorized by Section 3112(4) of Part 31 of the NREPA to enter orders requiring persons to abate pollution, and the director of the DEQ may delegate this authority to a designee under Section 301(b) of the NREPA, MCL 324.301(b).

- 1.4 John Schaendorf Dairy consents to the issuance and entry of this Settlement Agreement. John Schaendorf Dairy agrees not to contest the issuance of this Settlement Agreement, and that the resolution of this matter by the entry of this Settlement Agreement is appropriate and acceptable. It is also agreed that this Settlement Agreement shall become effective ("Effective Date") on the date it is signed by the chief of the WRD, delegate of the director, pursuant to Section 301(b) of the NREPA.
- 1.5 John Schaendorf Dairy and the DEQ agree that the signing of this Settlement Agreement is for settlement purposes only and does not constitute an admission by John Schaendorf Dairy that any law has been violated and does not affect John Schaendorf Dairy's verification status, nor its eligibility for renewal, under the Michigan Agriculture Environmental Assurance Program.
- 1.6 The signatory to this Agreement certifies that he is fully authorized by John Schaendorf Dairy to enter into the terms and conditions of this Agreement and to execute and legally bind John Schaendorf Dairy to this document.
- 1.7 John Schaendorf Dairy shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section III, Compliance Program, of this Agreement.

II. FINDINGS

- 2.1 During a regularly scheduled facility inspection on July 16, 2012, DEQ staff observed land application of manure less than 100 feet from roadside ditches that is allegedly a violation of John Schaendorf Dairy's Certificate of Coverage (COC) No. MIG010103, effective April 24, 2012, issued under the National Pollutant Discharge Elimination System (NPDES) General Permit No. MIG019000, collectively "the Permit", at Part 1.A.4.b.7.g.A.
- 2.2 During a facility inspection on August 29, 2013, the following alleged violations were noted:

- (a) The waste storage structure, identified as Pit #3, was missing a depth gauge. This is a violation of the Permit at Part 1.A.4.a.2.a.
- (b) Record reviews revealed incomplete recordkeeping of daily waterline inspections, weekly storage structure inspections, weekly manure depth readings, and weekly clean storm water and floodwater diversion device inspections. This is a violation of the Permit at Part 1.B.11.
- (c) Record reviews revealed the lack of documented weather conditions in the land application log. This is a violation of the Permit at Part 1.A.4.d.E).
- (d) Record reviews revealed the lack of calibration records in the land application log. This is a violation of the Permit at Part 1.A.4.b.F).
- (e) Record reviews revealed a failure to report animal numbers that resulted in a "significant change" (more than ten percent) to the DEQ within 90 days of the change. This is a violation of the Permit at Part 1.A.5.e.
- (d) As a result of the significant change, failure to provide an updated Comprehensive Nutrient Management Plan (CNMP) after increasing animal numbers beyond the previously stated amount is a violation of the Permit at Part 1.A.5.e.
- (e) Record reviews revealed use of a modified manifest form. As a result, documentation of required signatures were not present. This is a violation of the Permit at Part 1.B.8.b. and b.10.

2.3 The above alleged Permit violations were formally cited within a Violation Notice (VN) issued by the DEQ to John Schaendorf Dairy on dated October 14, 2013.

2.4 On October 3, 2013, a separate VN was issued by DEQ staff alleging that records submitted with John Schaendorf Dairy's 2012 Annual Report indicated that manure was applied to fields with soil samples above 150 parts per million (ppm) phosphorus (P). This is an alleged violation of the Permit at Part 1.A.4.b.7.a.C..

2.5 On February 14, 2014, DEQ staff responded to various reports of a manure discharge into a creek near John Schaendorf Dairy and proceeded to investigate.

- 2.6 On February 14, 2014, DEQ staff observed an alleged unlawful discharge of CAFO waste to the Weicks Drain. CAFO waste was observed discharging from John Schaendorf Dairy's Pit #3 and flowing through a failed valve into the farm operation's clean storm water system. That system discharges through an outlet at the southeast corner of the farm before flowing overland into the Weicks Drain. The alleged unauthorized discharge of agricultural waste to waters of the state may be a violation of Section 3109 of the NREPA, MCL 324.3109.
- 2.7 Sample collections of the receiving water revealed *E. coli* contamination that exceeded water quality standards (WQS) outlined in Rule 62, microorganisms of the Part 4 WQS promulgated pursuant to Part 31, R 323.1062, ACS 2006.
- 2.8 On the evening of February 14, 2014, DEQ staff contacted Ben Schaendorf of John Schaendorf Dairy. Mr. Schaendorf stated that the exact location of the failure had been discovered.
- 2.9 The discharge was stopped at approximately 10:30 a.m. on February 15, 2014.
- 2.10 On February 17, 2014, the Allegan County Health Department issued an advisory warning the public to avoid contact with surface waters of the Weicks Drain, Bear Creek, and the Rabbit River due to the potential for high bacteria levels associated with the manure discharge.
- 2.11 On February 17, 2014, John Schaendorf Dairy used a vacuum tanker to pump manure from the Weicks Drain near 24th Street and 127th Avenue.
- 2.12 During the February 14, 2014, facility investigation it appeared that Pit #3 was allegedly modified from its original construction such that it no longer meets the structural design requirements outlined in the Natural Resources Conservation Service's Practice No. 313, Waste Storage Facility, dated November 2005 (NRCS 313). The pipe and valve system appeared to be added at a later date and may not have been properly designed as required by the Natural Resource Conservation Service practice standard adopted within

the Permit (NRCS 313). Waste storage structures not meeting minimum requirements, including NRCS 313, are a violation of the Permit at Part 1.A.4.b.7.

- 2.13 During the February 14, 2014 inspection, the DEQ believed it was apparent that neither the location of the failed valve, nor the clean storm water outlet were regularly inspected as required by the Permit at Part 1.A.4.b.
- 2.14 Also, during the February 14, 2014, facility investigation, DEQ staff noted stockpiling of production area waste in an adjacent farm field. This is allegedly a violation of the Permit, at Part 1.A.4.a.2.b.A, as the waste is not stored in a properly designated waste storage structure or properly land applied as required in Part 1.A.4.b.7.
- 2.15 During a subsequent visit to John Schaendorf Dairy, on February 19, 2014, as-built drawings for Pit #3 were not available for review at the facility which is allegedly a violation of the Permit at Part 1.B.11.
- 2.16 As noted in a June 2, 2014, Second Violation Notice (SVN) issued to John Schaendorf Dairy, records submitted with John Schaendorf Dairy's 2013 Annual Report again indicated that manure was applied to fields with soil samples above 150 ppm. The June 2, 2014, SVN was proceeded by an April 18, 2014, DEQ inspection which confirmed that manure had been applied to fields with existing high P levels. This is a violation of the Permit at Part 1.A.4.b.7.a.C.

III. COMPLIANCE PROGRAM

It is, therefore, agreed that John Schaendorf Dairy shall take the following actions to prevent further violations of Part 31:

- 3.1 By not later than **July 1, 2015**, John Schaendorf Dairy, or its agent, shall submit a written certification of performance, along with associated supporting documentation, to the DEQ confirming that the following activities have been completed:

- A. that John Schaendorf Dairy has removed the connection between the storm water system and Pit #3.
 - B. that John Schaendorf Dairy has installed a valve at the outlet of its storm water system to ensure any future accident or spill can be quickly stopped and contained.
 - C. that John Schaendorf Dairy has installed a permanent, appropriate, durable, clearly marked and visible depth gauges.
- 3.2 John Schaendorf Dairy shall build additional solids storage and/or liquid storage to ensure it can achieve the minimum required six (6) months available storage each year between November 1 and December 31. By not later than **July 1, 2015**, John Schaendorf Dairy shall submit written certification to the DEQ describing additional solids storage and/or liquid storage that has been constructed to meet this requirement and confirming that "as-built" documentation that all structures were constructed in accordance with Natural Resource Conservation Service Practice Standard 313 of 2005 is available at the Dairy.
- 3.3 Through 2018, John Schaendorf Dairy shall annually report to the DEQ, in writing, within seven (7) days of achieving six (6) months total available storage between the dates of November 1 and December 31. In the alternative, if six (6) months storage is not achieved by December 31 of each year through 2018, written notice of same shall be provided to the DEQ not later than **January 7 of each such year**.
- 3.4 In addition to Annual Reports required by the Permit for submittal not later than April 1 of each year, John Schaendorf Dairy shall provide not more than four Semi-Annual Land Application Reports to the DEQ identifying fields where the facility has land applied CAFO waste during the reporting period which extends from January 1 through June 30. Semi-Annual Land Application Reports shall be submitted to the DEQ in accordance with the following schedule:
- July 15, 2015;**
July 15, 2016;
July 15, 2017; and
July 15, 2018.

- 3.5 John Schaendorf Dairy shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to the Kalamazoo District Supervisor, WRD, DEQ, 7953 Adobe Road, Kalamazoo, Michigan 49009-5025. The cover letter with each submittal shall identify the specific paragraph and requirement of this Consent Order that the submittal is intended to satisfy.

IV. EXTENSIONS

- 4.1 John Schaendorf Dairy and the DEQ agree that the DEQ may grant John Schaendorf Dairy a reasonable extension of the specified deadlines set forth in this Agreement. Any extension shall be preceded by a written request in duplicate to the DEQ, WRD, Enforcement Unit Chief, Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909-7773, and the Kalamazoo District Supervisor at the address in paragraph 3.5, no later than ten (10) business days prior to the pertinent deadline, and shall include:
- a. Identification of the specific deadline(s) of this Agreement that will not be met.
 - b. A detailed description of the circumstances that will prevent John Schaendorf Dairy from meeting the deadline(s).
 - c. A description of the measures John Schaendorf Dairy has taken and/or intends to take to meet the required deadline.
 - d. The length of the extension requested and the specific date on which the obligation will be met.

The district supervisor, in consultation with the Enforcement Unit Chief, shall respond in writing to such requests. No change or modification to this Agreement shall be valid unless in writing from the DEQ, and if applicable, signed by both parties.

V. REPORTING

- 5.1 John Schaendorf Dairy shall verbally report any violation(s) of the terms and conditions of

this Agreement to the Kalamazoo District Supervisor by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with a written report within five (5) business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). John Schaendorf Dairy shall report any anticipated violation(s) of this Agreement to the above-referenced individual in advance of the relevant deadlines whenever possible.

VI. RETENTION OF RECORDS

- 6.1 Upon request by an authorized representative of the DEQ, John Schaendorf Dairy shall make available to the DEQ all records, plans, logs, and other documents required to be maintained under this Agreement or pursuant to Part 31 or its rules. All such documents shall be retained by John Schaendorf Dairy for at least a period of three (3) years from the date of generation of the record unless a longer period of record retention is required by Part 31 or its rules.

VII. RIGHT OF ENTRY

- 7.1 John Schaendorf Dairy shall allow any authorized representative or contractor of the DEQ, upon presentation of proper credentials, to enter upon the premises of the facility at all reasonable times for the purpose of monitoring compliance with the provisions of this Agreement. This paragraph in no way limits the authority of the DEQ to conduct tests and inspections pursuant to the NREPA and the rules promulgated thereunder, or any other applicable statutory provision.

VIII. PENALTIES

- 8.1 John Schaendorf Dairy agrees to pay to the State of Michigan **Seventeen Thousand and no/100 DOLLARS (\$17,000.00)** in settlement and in resolution of the cost of investigations, enforcement activities and the alleged violations specified in Section II of this Agreement. Payment shall be made within 30 days of the effective date of this

Agreement in accordance with paragraph 8.5.

- 8.2 For each failure to comply with a provision of Section III or IV of this Agreement, but only following written notice of such default and a failure to cure such default within seven (7) days following receipt of such default notice, John Schaendorf Dairy shall pay stipulated penalties of **\$100** per violation per day for 1 to 7 days of violation, **\$200** per violation per day for 8 to 14 days of violation, and **\$300** per violation per day for each day of violation thereafter.
- 8.3 For each failure to comply with a provision of Section VI, VII, or VIII of this Agreement, or any other requirement of this Agreement, but only following written notice of such default and a failure to cure such default within seven (7) days following receipt of such default notice, John Schaendorf Dairy shall pay stipulated penalties of **\$200** per violation per day for each day of violation.
- 8.4 To ensure timely payment of the above amounts, John Schaendorf Dairy shall pay an interest penalty to the General Fund of the State of Michigan each time it fails to make a complete or timely payment. This interest penalty shall be based on the rate set forth at MCL 600.6013(8), using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally made in full.
- 8.5 John Schaendorf Dairy agrees to pay all funds due pursuant to this agreement by check made payable to the State of Michigan and delivered to the Accounting Services Division, Cashier's Office for DEQ, P.O. Box 30657, Lansing, MI 48909-8157; or hand delivered to the Accounting Services Division, Cashier's Office for DEQ, 425 W. Ottawa Street, Lansing, MI 48933. To ensure proper credit, all payments made pursuant to this Agreement must include the **Payment Identification No. WTR40102**.
- 8.6 John Schaendorf Dairy agrees not to contest the legality of the amounts paid pursuant to paragraph 8.1, but reserves the right to dispute the factual basis upon which a demand by the DEQ for stipulated penalties or interest penalties may be made pursuant to paragraph 8.2, 8.3 and 8.4.

IX. FORCE MAJEURE

- 9.1 John Schaendorf Dairy shall perform the requirements of this Agreement within the time limits established herein, unless performance is prevented or delayed by events that constitute a "Force Majeure." Any delay in the performance attributable to a "Force Majeure" shall not be deemed a violation of John Schaendorf Dairy obligations under this Agreement in accordance with this section.
- 9.2 For the purpose of this Agreement, "Force Majeure" means an occurrence or nonoccurrence arising from causes not foreseeable, beyond the control of, and without the fault of John Schaendorf Dairy, such as: an Act of God, untimely review of permit applications or submissions by the DEQ or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by John Schaendorf Dairy diligence and that delay the performance of an obligation under this Agreement. "Force Majeure" does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of John Schaendorf Dairy actions or omissions.
- 9.3 John Schaendorf Dairy shall notify the DEQ, by telephone, within 48 hours of discovering any event that causes a delay in its compliance with any provision of this Agreement. Verbal notice shall be followed by written notice within ten (10) calendar days and shall describe, in detail, the anticipated length of delay, the precise cause or causes of delay, the measures taken by John Schaendorf Dairy to prevent or minimize the delay, and the timetable by which those measures shall be implemented. John Schaendorf Dairy shall adopt all reasonable measures to avoid or minimize any such delay.
- 9.4 Failure of John Schaendorf Dairy to comply with the notice requirements and time provisions under paragraph 9.3 shall render this Section IX void and of no force and effect as to the particular incident involved. The DEQ may, at its sole discretion and in appropriate circumstances, waive in writing the notice requirements of paragraph 9.3, above.

- 9.5 If the parties agree that the delay or anticipated delay was beyond the control of John Schaendorf Dairy, this may be so stipulated, and the parties to this Agreement may agree upon an appropriate modification of this Agreement. However, the DEQ is the final decision-maker on whether or not the matter at issue constitutes a force majeure. The burden of proving that any delay was beyond the reasonable control of John Schaendorf Dairy, and that all the requirements of this Section IX have been met by John Schaendorf Dairy, rests with John Schaendorf Dairy.
- 9.6 An extension of one (1) compliance date based upon a particular incident does not necessarily mean that John Schaendorf Dairy qualifies for an extension of a subsequent compliance date without providing proof regarding each incremental step or other requirement for which an extension is sought.

X. GENERAL PROVISIONS

- 10.1 With respect to any violations not specifically addressed and resolved by this Agreement, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of John Schaendorf Dairy to comply with the requirements of the NREPA and its rules.
- 10.2 The DEQ and John Schaendorf Dairy consent to enforcement of this Agreement in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 *et seq.*
- 10.3 The parties agree to diligently and in good faith pursue informal negotiations to resolve any disputes arising out of this order prior to resorting to judicial enforcement. Such negotiations shall proceed in a timely manner.
- 10.4 This Agreement in no way affects John Schaendorf Dairy's responsibility to comply with any other applicable state, federal, or local laws or regulations.

- 10.5 The WRD reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Agreement, and at its discretion, may also seek stipulated fines or statutory fines for any violation of this Agreement. However, the WRD is precluded from seeking both a stipulated fine under this Agreement and a statutory fine for the same violation.
- 10.6 Nothing in this Consent Order is or shall be considered to affect any liability John Schaendorf Dairy may have for natural resource damages, if any, caused by John Schaendorf Dairy's ownership and/or operation of the facility. The State of Michigan does not waive any rights to bring an appropriate action to recover such damages to the natural resources.
- 10.7 In the event John Schaendorf Dairy sells or transfers the facility, it shall advise any purchaser or transferee of the existence of this Agreement in connection with such sale or transfer. Within 30 calendar days, John Schaendorf Dairy shall also notify the WRD Kalamazoo District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Agreement has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Agreement must agree, in writing, to assume all of the obligations of this Agreement. A copy of that agreement shall be forwarded to the WRD Kalamazoo District Supervisor within 30 days of assuming the obligations of this Agreement.
- 10.8 The provisions of this Agreement shall apply to and be binding upon the parties to this action, and their successors and assigns.
- 10.9 This Agreement constitutes a civil settlement and satisfaction as to the resolution of the violations specifically addressed herein; however, it does not resolve any criminal action that may result from these same violations.

XI. TERMINATION

11.1 This Agreement shall remain in full force and effect until the date set forth by a written Termination Notice (TN) issued by the DEQ. Prior to issuance of a written TN, John Schaendorf Dairy shall submit a request consisting of a written certification that John Schaendorf Dairy has fully complied with the requirements of this Agreement and has made those payments, required in this Agreement. Specifically, this certification shall include:

- a. The date of compliance with each provision of the compliance program in Section III, and the date any fines or penalties were paid.
- b. A statement that all required information has been reported to the district supervisor.
- c. Confirmation that all records required to be maintained pursuant to this Agreement are being maintained at the facility.

The DEQ may also request additional relevant to determine whether or not John Schaendorf Dairy has complied with this Agreement. The DEQ shall not unreasonably withhold issuance of a TN.

Signatories

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Settlement Agreement to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

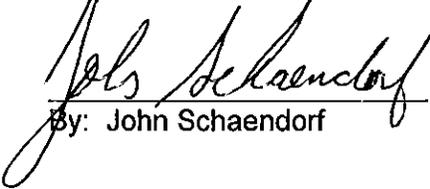
DEPARTMENT OF ENVIRONMENTAL QUALITY



William Creal, Chief
Water Resources Division

June 30, 2015
Date

JOHN B. SCHAENDORF DAIRY, LLC

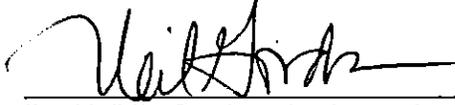


By: John Schaendorf

Title: Manager

6-10-15
Date

APPROVED AS TO FORM:



By: Neil D. Gordon, Assistant Attorney General
For: S. Peter Manning, Chief
Environment, Natural Resources, and Agriculture Division
Michigan Department of Attorney General

6/24/15
Date