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ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

MAY 21 2024

IND/MUN BRANCH WATER DIVISION

IN THE MATTER OF:
DFA Dairy Brands Ice Cream, LLC.
d/b/a Mayfield Ice Cream of Birmingham
126 Barber Court
Birmingham, Jefferson County, AL 35209
Permit No. IU393700329 and ALG150072

Consent Order No. XX-XXX-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management ("the Department") and DFA Dairy Brands Ice Cream LLC., d/b/a Mayfield Ice Cream of Birmingham ("the Permittee") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-17, as amended, the Alabama Water Pollution Control Act ("AWPCA"), Ala. Code §§ 22-22-1 to 22-22-14, as amended, and the regulations promulgated pursuant thereto.

STIPULATIONS

- 1. The Permittee operates a milk and juice processing, and ice cream products manufacturing facility ("Facility" or "Facilities") located at 36 and 126 Barber Court in the city of Birmingham, Jefferson County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-17, as amended.
3. Pursuant to Ala. Code § 22-22A-4(n), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1388. In addition, the Department is authorized to administer and enforce the provisions of the AWPCA.
4. The Department issued National Pollutant Discharge Elimination System ("NPDES") Permit No. ALG150072 ("General Permit") on May 11, 2017, effective June 1, 2017, for

discharges associated with the food product industry to Waters of the State. The Permittee submitted a timely Notice of Intent for Coverage; however, the Department has not yet reissued the coverage as additional/clarifying information is necessary. The General Permit establishes limitations/conditions on the discharges of pollutants from Outfall No. DSN001-1, DSN001-2, DSN001-3, DSN001-4, DSN001-5, DSN001-6, and DSN001-7 for the discharge of storm water from food production and kindred industries; and Outfall No. DSN003-1 for discharges associated with non-contact cooling water, cooling tower blowdown, boiler blowdown, and demineralizer wastewater; and DSN007-1 for discharges of uncontaminated storm water from equipment maintenance and storage, fueling, and petroleum storage, and handling areas. The General Permit requires that the Permittee monitor its discharges and submit monthly, semiannual and annual Discharge Monitoring Reports (“DMRs”) to the Department describing the results of the monitoring. In addition, the General Permit requires that the Permittee properly operate and maintain all facilities and systems of treatment and control which are installed and used by the Permittee to achieve compliance with the conditions of the General Permit. The Permittee shall maintain documentation and implementation of a Best Management Practices (“BMP”) Plan.

5. The Department reissued State Indirect Discharge (“SID”) Permit No. IU393700329 (“the SID Permit”), in accordance with ADEM Admin. Code chap. 335-6-5 and the AWPCA, to Dairy Farms of America (DFA) Dairy Brands Ice Cream, LLC, d/b/a Mayfield Ice Cream of Birmingham on May 31, 2022, effective June 1, 2022, establishing limitations on the discharges of pollutants from a point source, designated therein as outfall number S01, to the Valley Creek Water Reclamation Facility. The SID Permit requires that the Permittee monitor its discharges and submit periodic DMRs to the Department describing the results of the monitoring. In addition, the SID Permit requires that the Permittee properly operate and maintain all facilities and systems of treatment and control which are installed or used by the Permittee to achieve compliance with the terms and conditions of the permit.

6. Ala. Code § 22-22-9(i)(3) requires every person, prior to discharging any new or increased pollution into any waters of the state, to obtain a permit before discharging such pollution. ADEM Admin. Code r. 335-6-6-.03(1) states: "No person shall discharge pollutants into waters of the state without first having obtained a valid NPDES permit or coverage under a valid General NPDES Permit."

7. Pursuant to ADEM Admin. Code r. 335-6-10-.06(c), "State waters shall be free from substances attributable to sewage, industrial wastes or other wastes in concentrations or combinations which are toxic or harmful to human, animal or aquatic life to the extent commensurate with the designated usage of such waters."

8. Pursuant to ADEM Admin. Code r. 335-6-10-.09(5)(e)2, "industrial wastes or other wastes shall not cause the pH to deviate more than one unit from the normal or natural pH, nor be less than 6.0, nor greater than 8.5. For salt waters and estuarine waters to which this classification is assigned, wastes as herein described shall not cause the pH to deviate more than one unit from the normal or natural pH, nor be less than 6.5, nor greater than 8.5."

9. On December 9, 2023, the Department received a call from the Alabama Emergency Management Agency concerning a spill of Anhydrous Ammonia, of approximately 40 pounds, from a storage vessel that had flowed into the storm drain and into an unnamed tributary of Shades Creek, a water of the state, resulting in a fish kill.

10. In a letter dated December 14, 2023, the Permittee acknowledged a spill did occur when a contractor was attempting to blow down an ammonia vessel to perform maintenance. A 55-gallon drum was setup outside the building and approximately 95% full of water. The contractor inserted the service hose from the ammonia vessel into the drum and opened the valve on the service hose. Shortly after, the contractor inserted a garden hose into the drum and turned on the water, causing the contents of the drum to overflow to the asphalt around the drum for 30-40 minutes. The maintenance supervisor observed the overflow and turned off the valve, on or around 10:00 am. He directed the contractor to fill additional drums for blowing down the vessel and not to overflow the drums. In total six drums were filled with water and

used to remove ammonia from the vessel. At some point, the water hose was turned back on by the contractor and allowed to flow on the asphalt. The water from the hose pooled and migrated across the parking lot and out the front gate of the plant to the stormwater drain along Barber Court, which leads to Griffin Creek, a water of the state.

11. On December 9, 2023, Department personnel arrived at the Facility and noted several hundred 1-2" dead fish in the creek. Department personnel also collected various pH samples with the below pH results exceeding the instream water quality criteria:

	Sampling 12/09/2023
	pH s.u.
Oxmoor Circle Buffalo Rock	9.5
Homewood Athletic Park	8.95
Homewood Athletic Complex	8.9

12. The December 9, 2023, release was an unpermitted discharge in violation of Ala. Code § 22-22-9(i)(3). The toxic discharge resulted in a fish kill in violation of ADEM Admin. Code r. 335-6-10-.06(c), and also caused violations of the instream pH water quality criteria enumerated in ADEM Admin. Code r. 335-6-10-.09(5)(e)2.

13. On Sunday, December 10, 2023, the Permittee indicated that there was no further evidence of dead fish. The Permittee also indicated it had updated its procedures to prevent future occurrences.

14. The Permittee consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

15. The Department has agreed to the terms of the Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in

further prosecuting the alleged violations. The Department has determined that the terms contemplated in the Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS OF THE DEPARTMENT

Pursuant to Ala. Code § 22-22A-5(18)c., as amended, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent, and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day that such violation continues shall constitute a separate violation. In arriving at this civil penalty (summarized in Attachment #2), the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATIONS AND BASE PENALTY:** Based on information available to the Department, violations of the Permit, ADEM Admin. Code div. 335-6, and the AWPCA were noted. The Department considered the general nature of each violation, the magnitude and duration of each non-compliant discharge, the characteristics of each pollutant discharged, the condition of the receiving waters, the violations' effects, if any, on the receiving waters, and any available evidence of irreparable harm to the environment or threat to the public.

B. **THE STANDARD OF CARE:** Some of the violations cited, such as the unpermitted discharge, are considered to be easily avoidable. In consideration of the standard of care manifested by the Permittee, the Department has enhanced the penalty based on this factor.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Department is not aware of an economic benefit conferred upon the Permittee as a result of the violations cited above.

D. **EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT:** The Department is unaware of any efforts by the Permittee to minimize or mitigate the effects of the violations upon the environment.

E. **HISTORY OF PREVIOUS VIOLATIONS:** The Department has considered the Permittee's history of previous violations and has determined that enhancement of the penalty is not appropriate.

F. **THE ABILITY TO PAY:** The Permittee has not alleged an inability to pay the civil penalty.

G. This Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

H. The civil penalty is summarized in Attachment #1.

CONTENTIONS OF THE PERMITTEE

Mayfield made the following efforts to minimize or mitigate the effects of the violations upon the environment: A third party contractor was called and responded to the request for assistance. Immediately upon arrival, booms were deployed around the storm drain to prevent any material from entering the storm drain. After securing the drain, absorbent was spread across the parking lot to the north side of the facility. All material was cleaned up and disposed of properly.

ORDER

THEREFORE, without admitting or denying any allegations contained herein, the Permittee, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c., as amended, as well as the need for

timely and effective enforcement, and the Department believes that the penalty assessed below and the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Permittee (collectively "Parties") agree to enter into this CONSENT ORDER with the following terms and conditions:

A. The Permittee shall pay to the Department a civil penalty in the amount of \$28,000.00 in settlement of the violations alleged herein within forty-five days after issuance of this Consent Order. Failure to pay the civil penalty within forty-five days after issuance may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. All penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. The Permittee shall prepare and submit to the Department, not later than sixty days after the issuance of this Consent Order, a Report that identifies the potential causes of noncompliance and summarizes an investigation of the changes necessary for the Permittee to achieve and maintain compliance with the Permit. The Report shall include a Compliance Plan with a schedule for implementation of necessary corrective actions and cost of such necessary corrective actions, if known. At a minimum, the Permittee shall consider each of the following in making its investigation: the need for changes in maintenance and operating procedures and the need for additional containment to avoid spills and releases. The Report should also contain a map of the Facility/Facilities that are owned or operated by the Permittee. The map should include all stormwater outfalls at the Facility/Facilities. The receiving stream for each outfall should be provided including if the discharge is via a storm sewer or via a municipal separate storm sewer system. The report should clarify if the portion of the Facility that is involved in the

manufacture of tea is owned or operated by the Permittee. If that portion of the Facility is not owned or operated by the Permittee, the report should provide information as to the current owners or operators. If the Department determines through its review of the submitted Report that the Report is not sufficient, then the Report shall be modified accordingly. The Permittee shall submit modifications to the Report, if required, so that they are received by the Department no later than thirty days after receipt of the Department's comments. The Permittee shall complete implementation of the recommendations made in the Report not later than 180 days after the issuance of this Consent Order.

D. The Permittee shall submit a revised notice of intent for the General NPDES Permit not later than 30 days from the issuance of this Consent Order including all additional information which the Department has identified as necessary to process the NOI. The Permittee shall submit additional modifications, if requested by the Department for processing the NOI, within 30 days of the Department's request.

E. The Permittee shall comply with all other terms, conditions, and limitations of the SID and General Permits immediately upon the issuance of this Consent Order.

F. The Permittee shall submit a certification to the Department indicating whether the Permittee is in compliance with all requirements of this Consent Order. The Permittee shall submit such certification so that it is received by the Department no later than 210 days after issuance of this Consent Order.

G. After the issuance date of this Consent Order, the Permittee shall pay stipulated penalties for each day it fails to meet any of the written submittal milestone dates or satisfy any of the requirement dates set forth in or established by Paragraphs C, D and F contained herein. The stipulated civil penalties for failure to meet each milestone or any requirement date, except for *Force Majeure* acts as hereinafter defined, shall be as follows:

<u>Period of Noncompliance</u>	<u>Penalty per Day per Violation</u>
1st to 30th day	\$ 100.00
31st to 60th day	\$ 200.00

After 60 days

\$ 300.00

If the Permittee fails to meet any milestone or any assigned date ninety days after the required dates found in Paragraphs C, D, and F the Department reserves the right to file a new action against the Permittee.

H. Should violations continue to occur after 210 days after the issuance of this Consent Order or as stipulated in Paragraph G above, then the Department may issue an additional order or file suit against the Permittee in the Circuit Court of Montgomery County or other court of competent jurisdiction to enforce compliance of this Consent Order.

I. Payment of stipulated penalties for violations of milestone dates under this Consent Order are due no later than the 28th day of the month following the month a milestone date was not achieved. Notification to the Permittee by the Department of the assessment of any stipulated penalty is not required.

J. This Consent Order shall apply to and be binding upon both Parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the Party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the Party represented, and to legally bind such Party.

K. Subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations cited in this Consent Order.

L. The Permittee is not relieved from any liability if it fails to comply with any provision of this Consent Order.

M. For purposes of this Consent Order only, the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. In any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee shall be limited to the defenses of *Force Majeure*,

compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Permittee, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline shall be accompanied by the reasons (including documentation) for each extension and the proposed extension time. The Permittee shall submit this information so that it is received by the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Permittee, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

N. The sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in other orders as may be issued by the Director, by litigation initiated by the Department, or by such other enforcement action as may be appropriate. The Permittee shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if such future orders, litigation or other enforcement action addresses new matters not raised in this Consent Order.

O. This Consent Order shall be considered final and effective immediately upon signature of all Parties. This Consent Order shall not be appealable, and the Permittee does hereby waive any hearing on the terms and conditions of same.

P. This Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

Q. Final approval and entry into this Consent Order are subject to the requirements that the Department provide notice of proposed orders to the public, and that the public have at least thirty days within which to comment on the proposed Consent Order.

R. Should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

S. Any modification of this Consent Order shall be agreed to in writing and signed by both Parties.

T. Except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Permittee of its obligation to comply in the future with any permit.

Executed in duplicate, with each part being an original.

DFA DAIRY BRANDS ICE CREAM LLC

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

EXECUTED AND ISSUED:

By: *Ty Hammy*

By: _____

Its: *QA Manager*

Its: _____

Date: *5/17/24*

Date: _____

Attachment 1: Penalty Synopsis

Attachment 1


**DFA Dairy Brands Ice Cream LLC
Birmingham, Jefferson County
IU39-37-00329, ALG150072**

Violation*	Number of Violations*	(A)	(B)	(C)
		Seriousness of Violation*	Standard of Care*	History of Previous Violations*
Unpermitted Discharge	1	\$ 10,000.00	\$ 5,000.00	
Fish Kill / Water Quality Standard (Free from Toxics / Harmful Substances)	1	\$ 10,000.00	\$ -	
pH instream violations / Water Quality Standard	3	\$ 10,000.00	\$ -	

\$30,000.00	\$5,000.00	\$0.00
Total (A)	Total (B)	Total (C)
Base Penalty Total		\$35,000.00
[Total (A) + Total (B) + Total (C)]		
Mitigating Factors (-)		
Economic Benefit (+)		
Ability to Pay (-)		
Other Factors (+/-)		
INITIAL PENALTY		\$35,000.00
Total Adjustments (+/-)		-\$7,000.00
FINAL PENALTY		\$28,000.00

Additional Adjustments due to negotiations, receipt of additional information, or public comment

Mitigating Factors (-)	
Economic Benefit (+)	
Ability to Pay (-)	
Other Factors (+/-)	-\$7,000.00
Total Adjustments (+/-)	-\$7,000.00



Footnotes

*See the "Stipulations" portion of the Order for a detailed description of each violation and the penalty factors