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GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF  
ENVIRONMENT, GREAT LAKES, AND ENERGY  
LANSING



PHILLIP D. ROOS  
DIRECTOR

February 7, 2024

VIA EMAIL AND CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Eric Rupprecht, Compliance Manager  
Jason Kain, Factory Manager  
Nick Klein, Vice President of Operations  
Michigan Sugar Company  
2600 South Euclid Avenue  
Bay City, Michigan 48706

**SUBJECT:** Department of Environment, Great Lakes, and Energy  
Statement of Position  
Regarding Notice of Dispute Dated December 20, 2022, for:  
Michigan Sugar Company (MSC)  
2600 South Euclid Avenue, Bay City, Michigan 48706  
Consent Judgement Case No. 17-000727-CE; Site ID Number: B1493

This letter serves as the Michigan Department of Environment, Great Lakes, and Energy's (EGLE) Statement of Position in response to the Notice of Dispute MSC invoked on December 20, 2022 (enclosed). Pursuant to Section 13.2 of the Consent Judgment entered between EGLE and MSC on December 28, 2018, MSC and EGLE agreed to extend the informal dispute period to January 29, 2024, to allow the parties to engage in a dialogue regarding the dispute and, if possible, reach resolution.

On November 29, 2022, EGLE provided MSC with its Demand for Stipulated Penalties for Violations of the Consent Judgment (Demand). On December 20, 2022, EGLE received MSC's response to EGLE's Demand. In their response, MSC articulated several issues related to the Demand, including disagreements regarding the adequacy of the Demand, calculation of stipulated penalties, disputed facts, and force majeure.

EGLE's Statement of Position is as follows:

1. MSC's Notice of Dispute declares that EGLE failed to provide a Demand for Stipulated Penalties consistent with the requirements of the Consent Judgment. Specifically, MSC's Notice of Dispute asserts that EGLE failed to specify the stipulated penalty amount that EGLE has demanded for each violation and/or to provide the calculation method for such penalties. MSC states that although EGLE provided a summary table for Discharge Monitoring Report Violations, it failed to provide a similar summary or method of calculation for proposed stipulated penalties relating to: (1) dissolved oxygen concentrations in the aeration ponds; (2) flume pond peroxide dosing; (3) storm water pond peroxide dosing; (4) the channel; and (5) centrifuge uptime. MSC further states EGLE failed to specify the days of alleged violations and/or failed to identify the evidence in support of its conclusions that a

violation had occurred. MSC thus claims that, in the absence of the detailed information required pursuant to Section 14.20 of the Consent Judgment, they cannot fully evaluate EGLE's calculations of stipulated penalties.

MSC requested that EGLE provide detailed information required by Section 14.20 of the Consent Judgment for all alleged violations and reserved the right to provide additional comments or objections.

EGLE disagrees. EGLE's Demand was drafted in compliance with Section 14.20 of the Consent Judgment, including specific information regarding violations (e.g., dates and penalties incurred). The Demand included an appendix referencing violations of National Pollutant Discharge Elimination System (NPDES) requirements by pollutant and by date as well as an appendix identifying non-NPDES violations (respectively Appendix 1 and Appendix 2). Attached to this statement are revised Appendix 1, outlining penalties showing one violation per day, and Appendix 2.

EGLE has further provided MSC with extensive documentation regarding violations, including Violation Notices and spreadsheets documenting violations as well as correspondence directly addressing matters contested by MSC.

2. MSC's Notice of Dispute states that EGLE failed to calculate stipulated penalties consistent with the express provisions of the Consent Judgment. They assert that based on their review of proposed penalties, EGLE calculated excessive stipulated penalties under Section 14.9 by counting multiple violations per day even when those violations related to a common cause, event, or occurrence.

EGLE disagrees in part. Specifically, in the course of informal dispute resolution, EGLE concluded it was appropriate to reduce the NPDES violation penalty from \$236,750 to \$124,500. This reduction accurately reflects the Consent Judgment's requirement of one penalty per day of daily effluent limit violations. The specific dates of violation are included in Appendix 1.

3. MSC's Notice of Dispute states that EGLE calculated stipulated penalties based on disputed facts, specifically regarding hydrogen peroxide dosing in the Bay City facility's storm water pond and channel operations.

MSC first claims that EGLE's Demand fails to provide any basis or reasoning for the alleged violation in its Demand other than Appendix E, which notes, "Black water and noticeable odors noted by Hydrite," and "Hydrite recommended increased H2O2." MSC asserts that the information provided does not support an alleged violation. MSC further states that: (1) MSC could not violate the Consent Judgment based on perceived colors or odors (as the Consent Judgment does not contain any requirements relating to odors or appearance of stormwater); and (2) MSC follows all hydrogen peroxide dosing recommendations from Hydrite and dosed the stormwater pond appropriately each time there was a recommended dosing change.

Second, MSC states that EGLE's Demand failed to identify with reasonable specificity the evidence or basis for its assertion that MSC violated Section 5.11 of the Consent Judgment. MSC disputes the alleged violations on the basis that: (1) Appendix 2 to the Demand Letter indicates that the dates of violation were from March 1 to May 10 (MSC disputes that standing water was continuously present from March 1 to May 10; as a result, EGLE has calculated additional stipulated penalties pursuant to Section 14.4 of the Consent Judgment for days on which no violations could have occurred); and (2) MSC asserts that the alleged violations of Section 5.11 were the result of a force majeure event that occurred when the digester malfunctioned.

EGLE disagrees. The Consent Judgment requires MSC to apply hydrogen peroxide dosing consistently in accordance with the Operations Plan.

Penalty calculations for stormwater dosing are based on documentation provided by MSC in the September 2022, Semi-Annual Report, Appendix E. EGLE based its violations on Hydrite's documented periods of the presence of black water and observed odors, as well as a high negative oxygen reduction potential, combined with statements from Hydrite that recommended increased dosing levels of hydrogen peroxide. MSC has not recorded or provided documentation that it followed these recommendations. MSC has not provided adequate documentation to demonstrate that the site was in compliance with the requirements of the Consent Judgment regarding hydrogen peroxide feed rates to the stormwater pond.

Regarding standing water in the channel from March 1 to May 10, 2022, photos and written documentation generated pursuant to site visits, as well as examination of the MSC Bay City Consent Judgment Semi-Annual Report weekly log records, identify that the channel was not pumped between those dates.

With respect to MSC's claims of digester malfunction based upon force majeure, EGLE disagrees. The Consent Judgment provides that force majeure must be "an occurrence or non-occurrence beyond the control of and without the fault of [MSC]," specifically including "malfunctions...that could not have been avoided or overcome by MSC's due diligence." Force majeure does not include failure to maintain equipment, operating equipment beyond capacity, or failure to account for reasonably foreseeable events or incidents.

As identified in MSC's Basis of Design Report dated September 2022, the anaerobic digester system is operated beyond its biological treatment capacity and is severely limited by the buildup of inert solids in the reactor. Excessive inert solids, estimated at 75 percent of the total solids, in the digester negatively affected the performance of the digester by taking up treatment capacity. No steps were taken at the beginning of the 2022 campaign to remove inert solids. No reduction in factory production was implemented during the digester malfunction to prevent effluent violations. MSC's failure to properly maintain the digester system and operation of the digester system beyond capacity made the digester system's malfunction reasonably foreseeable. As such, it was not a force majeure event under the terms of the Consent Judgment.

4. MSC's Notice of Dispute states that EGLE's Demand inappropriately seeks penalties for violations that were subject of a force majeure notice. MSC notes that EGLE rejected or disregarded a number of force majeure notifications, including the following:
  - a. Decanter — frozen lines, January 11, 2022
  - b. East Aeration Pond Blower — covered in ice, February 18, 2022
  - c. Digester Upset — March 18, 2022
  - d. Decanter # 3 Plugging — April 12, 2022

MSC states that EGLE failed to provide the rationale for its rejection of its force majeure claims. It further claims that EGLE does not have the discretion to unilaterally determine what might or might not constitute a force majeure event. MSC thus objected to EGLE's rejection of its force majeure notices, as well as the manner in which the notices were rejected. MSC thus disputes stipulated penalties for violations arising from or relating to what they claim is a force majeure event. Specifically, they dispute stipulated penalties for alleged violations of Section(s) 5.1 (Centrifuges); 5.6 (Dissolved Oxygen Concentrations); 5.11 (Channel); and 5.23 (Effluent Limits).

Additionally, MSC believes that force majeure events must be included in the calculation of centrifuge operating hours. MSC claims that the centrifuges satisfied the 85 percent operating hour requirement of the Consent Judgment. MSC noted that it believes there is confusion regarding calculation of operating hours.

EGLE disagrees. EGLE may determine whether an event qualifies as force majeure when calculating stipulated penalties in accordance with the Consent Judgment. EGLE further disagrees that it "disregarded" MSC's force majeure claims, noting that it has responded to such claims numerous times in writing, including both Violation Notices and written correspondence. While EGLE acknowledges it did not immediately respond to later force majeure claims in writing, it did provide ample notice to MSC in response to the Semi-Annual Reports that MSC's numerous claims of force majeure were insufficient.

As noted in paragraph 3, *supra*, EGLE's position has been, and remains, that system failures (and subsequent downtimes and limitation exceedances) have repeatedly resulted from reasonably foreseeable and thus avoidable incidents. Maintenance issues or malfunctions resulting from inadequate capacity, insufficient redundancy, or insufficient maintenance do not qualify as force majeure. Additionally, inadequate maintenance issues or malfunctions resulting from failure to exercise due diligence regarding known site conditions or other reasonably foreseeable events do not qualify as force majeure.

For example, system problems such as frozen lines to the decanter and pond blowers, which are operated in areas where freezing temperatures are common, and during times of the year when temperatures regularly drop below freezing, are

reasonably foreseeable to MSC, and repeated claims of force majeure are insufficient to overcome MSC's failure to comply with the Consent Judgment. Similarly, system problems such as plugging resulting from improper operation of decanters and the frac tank do not qualify as force majeure.

EGLE further states that potential economic loss caused by delays in production is insufficient to trigger the bypass of treatment systems.

Stated succinctly, MSC is obligated to maintain its systems appropriately, to employ them in accordance with applicable limitations, and to exercise due diligence in the operation of all systems in the Bay City facility. Failure to do so does not permit MSC to then claim force majeure as a means of avoiding stipulated penalties under the Consent Judgment.

EGLE demands \$462,600 for payment of stipulated penalties for MSC's violations of the Consent Judgment, as reflected in the attached appendices. Should MSC have questions regarding this Statement of Position, please contact me at 517-281-0376 or [MeadM1@Michigan.gov](mailto:MeadM1@Michigan.gov).

Sincerely,



Malcolm Mead-O'Brien  
Enforcement Specialist  
Air Quality Division

Enclosures

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