



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
KALAMAZOO DISTRICT OFFICE



LIESL EICHLER CLARK
DIRECTOR

September 16, 2020

VN No. SVN-00974

VIA EMAIL AND CERTIFIED MAIL

Mr. David H. Fox
Director, Licensing and Compliance
Eagle Creek Renewable Energy
Two Bethesda Metro Center, Suite 1330
Bethesda, Maryland 20814
david.fox@eaglecreekre.com

Dear Mr. Fox:

SUBJECT: Second Violation Notice-Morrow Dam
Federal Energy Regulatory Commission (FERC) Project No. 9000 –
Emergency Drawdown
Property Location: Comstock Township, Kalamazoo County, Michigan

The purpose of this letter is to notify Eagle Creek Renewable Energy (ECRE) of continued violations of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, (NREPA), Part 301, Inland Lakes and Streams, of the NRPEA and Part 303, Wetlands Protection, of the NREPA ; to inform ECRE of its obligations under Part 201, Environmental Remediation; and to identify actions necessary to address ongoing violations and immediately reduce downstream turbidity resulting from the extended drawdown at the Morrow Dam.

To date, the turbidity curtains installed at the end of July and beginning of August, 2020 have not been effective in reducing transport of sediment from the impoundment based on readings from ECRE's turbidity meters, as well as continued Michigan Department of Environment, Great Lakes and Energy (EGLE) sampling, showing significantly elevated turbidity downstream of the impoundment and immediately upstream of the impoundment, as compared to areas above Morrow Lake. Significant areas of sediment deposition have been observed and documented downstream. This information suggests that the lowered impoundment is and will continue to be a substantial source of sediment being mobilized to downstream areas until appropriate and effective corrective measures are implemented.

Notice under Part 31, 301, and 303

As stated in WRD's July 8, 2020 Violation Notice VN-010802, the continued discharge of sediment laden water and unnatural turbidity into waters of the state is a violation of

Section 3109(1) of Part 31. Discharge of fill material within the 100-year floodplain without a permit is a violation of Section 3108(1) of Part 31. Unauthorized filling of river bottomlands is a violation of Section 30102(1) of Part 301. Additionally, the lowering of Morrow Lake resulted in the diminishment of an inland lake in violation of Section 30102(d) of Part 301 and the draining of surface waters from wetlands in violation of Section 30304(d) of Part 303. As previously stated, the drawdown was conducted in violation of Part 301, Part 31, and Part 303. These violations have not been resolved and are ongoing.

According to the Michigan Department of Natural Resources (MDNR), Fisheries Division, numerous adverse natural resource impacts, including but not limited to aquatic organisms, recreational uses, and stream geomorphology are expected as a result of the ongoing drawdown:

Notice under Part 201

Persons who are liable for a facility pursuant to Section 20126 of Part 201 include the owners or operators of the facility who are responsible for an activity causing a release or threatened release of a hazardous substance. **ECRE is** the owner or operator of the **Morrow Dam Facility** (Facility). **ECRE was** an owner or operator of the Facility at the time of the release of hazardous substances at the Facility, and responsible for an activity causing the release of hazardous substances into the environment. **Therefore, ECRE is** a person who is liable under Section 20126(1) of Part 201.

Obligations under Part 201

As a liable party under Part 201, **ECRE is** responsible for:

(1) addressing the contamination at the Facility as provided in Section 20114 of Part 201, (2) all costs lawfully incurred by EGLE for addressing the contamination or undertaking response activities, (3) any other costs for response activity reasonably incurred by any other person, and (4) damages for the value of injury to, destruction of, or loss of natural resources.

ECRE has an affirmative obligation to comply with Section 20114 of Part 201, which lists the steps required of a liable party to address environmental contamination. These steps include, as applicable:

- **Place additional curtains on the Kalamazoo River channel banks to prevent further liberation of sediment**
- Immediately taking measures to contain or remove the contamination source;
- Immediately identifying and eliminating any threat of fire or explosion or direct contact hazards;
- Notifying EGLE and affected neighbors if contamination has migrated off the property;
- Immediately initiating removal of a hazardous substance that is in a liquid phase; and

- Defining the nature and extent of contamination and undertaking response activities to achieve Part 201 cleanup criteria.

Performance of Response Activities

State law, including Part 201 of the NREPA, authorizes EGLE to use public funds to undertake actions to protect the public health, safety, and welfare, and the environment. A person who is liable under Section 20126 of the NREPA is jointly and severally liable for all costs, including any associated interest, that are lawfully incurred by the state relating to the selection and implementation of response activity under Part 201, including the response activities specified by Sections 20107a, 20114, 20118, 20120a, 20120b, 20120c, 20120d and 20120e of Part 201 of the NREPA and Part 10 of the Part 201 Administrative Rules. Pursuant to state, federal, or common law, including Sections 20126a and 3115(2) of the NREPA, MCL 324.20126a and 324.3115(2), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9607(a), a liable person is subject to cost recovery actions by the state or federal government for all response activity costs incurred by either at a facility.

In consideration of the violations and subsequent resource impacts detailed above, EGLE requests that the following response activities (or comparable) be completed. Prior to the commencement of response activities, ECRE should submit a response plan to our office for review:

These response activities may include:

- Installation of boom and curtain along the Kalamazoo River channel banks through Morrow Lake to prevent further erosion of exposed bank soft sediment containing PCBs from river channel side scour and overbank runoff during precipitation events.
- Installation and maintenance of a series of sediment traps along the main river channel, properly engineered and located to prevent the downstream migration of bedload material from within Morrow Lake and from areas of sediment accumulation that have occurred downstream of the dam as a result of the drawdown.
- Installation of engineering controls to address head cutting occurring in the upstream river channel areas within Morrow Lake to prevent further sediment mobilization within the river channel from degradation and downcutting of the channel bed.
- Installation of cofferdams and/or other grade control to partially re-impound Morrow Lake to a level that would reduce sediment recruitment and migration but maintain hydraulic capacity of the dam and limit upstream flooding risk.

Please be advised that this letter serves as formal notice that EGLE has referred this issue to the US Environmental Protection Agency (EPA) to conduct emergency

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response efforts and EPA is prepared to conduct the necessary response activities at the Facility should ECRE not fulfill its responsibilities as outlined above.

If ECRE does not voluntarily perform the response activities required by Part 201, please also be advised that Section 20137(1)(f) of the NREPA provides for the assessment of a civil fine of up to \$10,000 for each day of violation of Part 201 and its administrative rules. Furthermore, a person who violates the due care provisions of Section 20107a(1) is liable for response activity costs and natural resource damages attributable to any exacerbation of existing contamination and for any civil fines that may be imposed under Part 201. Please note, Part 31, Part 301, and Part 303 also provide for the assessment of civil fines for violations of each of those parts.

As requested in VN-010802, ECRE should submit a plan, for EGLE review and approval, to assess the impacts to aquatic resources and stream functions of the Kalamazoo River including, but not limited to, water quality, biology, and geomorphology. Evaluation of the magnitude and spatial extent of the sediment released and deposited downstream as a result of the drawdown, including collection of bathymetry data for areas downstream of the dam where sediment may have accumulated, should be completed.

Please respond to this notice no later than **September 23, 2020** indicating whether you intend to undertake the response activities identified above. Please include a response plan, for EGLE review, documenting what activities will be undertaken and methods to be utilized. Commencement of response activities shall take place no later than **October 7, 2020**.

Upon ceasing the ongoing violations of the NREPA by conducting the response activities described above, EGLE will contact you to discuss resolution of all unauthorized impacts and violations.

To discuss any of the items in this letter further, or if you have any questions, please contact us at EGLE, 7953 Adobe Road, Kalamazoo, Michigan 49009. Thank you for your attention to this matter.

Sincerely,



Kyle Alexander
Kalamazoo District Supervisor
Water Resources Division
269-568-2681



David Haywood
Kalamazoo District Supervisor
Remediation and Redevelopment Division
269-547-0604

DH:SE

cc: Senator Sean McCann
Representative Brandt Iden
Ms. Michelle Mohney, Comstock Township Clerk
Mr. James Baker, City of Kalamazoo
Mr. Tom Weaver, U.S. Geological Survey
Ms. Jennifer Palodino, FERC
Ms. Kim Nguyen, FERC
Mr. John Zygaj, FERC
Ms. Jessica Pruden, U.S. Fish and Wildlife Service
Mr. Scott Hicks, U.S. Fish and Wildlife Service
Ms. Lisa Williams, U.S. Fish and Wildlife Service
Mr. Jim Saric, EPA
Ms. Cheryl Vosburg, Kalamazoo River Watershed Council
Ms. Elizabeth Binoniemi-Smith, Match-E-Be-Nash-She-Wish Band of Pottawatomi
Mr. John Rodwan, Nottawaseppi Huron Band of the Pottawatomi
Ms. Jodi Smet, ECRE
Mr. Jay Wesley, MDNR
Mr. Brian Gunderman, MDNR
Mr. Matt Diana, MDNR
Mr. Jessica Mistak, MDNR
Ms. Kesiree Thiamkeelakul, MDNR
Mr. Kyle Kruger, MDNR
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Mr. Derek Haroldson, EGLE
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Mr. Chris Lantinga, EGLE
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Mr. Dan Yordanich, EGLE