

*Darla Simpson*

CLERK OF THE DISTRICT COURT

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel., )  
JIM MACY, Director, )  
NEBRASKA DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, )

Case No. CI-19-202

Plaintiff, )

**CONSENT DECREE**

v. )

THE WESTERN SUGAR COOPERATIVE, )  
CORP., )

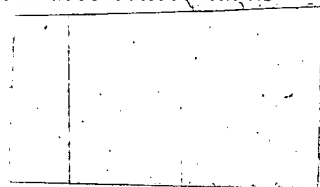
Defendant. )

COMES NOW Plaintiff, the State of Nebraska on behalf of Jim Macy, Director of the Nebraska Department of Environmental Quality ("NDEQ"), proceeding on the Complaint filed herein and appearing through counsel, Douglas J. Peterson, Attorney General, and Defendant, The Western Sugar Cooperative, a Colorado Corporation, appearing through counsel, and each party having consented to the making and entering of this Consent Decree without trial, request entry of this Consent Decree.

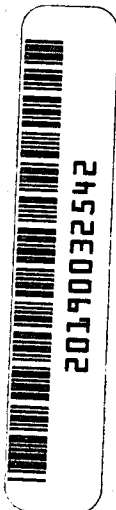
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. This Court has jurisdiction over the subject-matter of this action pursuant to Neb. Rev. Stat. § 24-302. Venue is proper pursuant to Neb. Rev. Stat. § 25-403.01, as Defendant's Facility is located in Scotts Bluff County and the events at issue took place in Scotts Bluff County.

2. In the Complaint, Plaintiff alleges Defendant violated its Air Operating Permit No. OPSPRI-0024, the Nebraska Environmental Protection Act, and the implementing rules and regulations in Titles 117, 119, and 129 of the Nebraska Administrative Code. Plaintiff alleges Defendant failed to operate its coal-fired boilers and air emissions controls in accordance with its



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Air Operating Permit and the National Emissions Standards for Hazardous Air Pollutants (“NESHAP”), 40 C.F.R. Subpart JJJJJ, and Title 129 of the Nebraska Administrative Code—*Nebraska Air Quality Regulations*. Plaintiff also alleges Defendant polluted a water of the State when the wall of its retention pond, containing precipitated calcium carbonate and mud slurry, breached and, thereby, ultimately discharged the pollutants contained by the retention pond into a water of the State. Plaintiff further alleges Defendant violated monitoring and record-keeping requirements associated with its Air Operating Permit and, also, allowed fugitive dust to remain visible beyond its premises and exceeded the opacity threshold in stack emissions.

3. On January 9, 2019, Defendant and NDEQ entered into an Order for Compliance on Consent (“Consent Order”) in *In re Western Sugar Cooperative Corporation*, Case No. 3418.

This Consent Order is hereby incorporated into this Consent Decree and is attached hereto as

Exhibit 1. In this Consent Order, Defendant agreed to:

- A. Maintain its retention basin in good working order and conduct and record the results of weekly inspections of the lagoon walls and dikes and to make such observations available to NDEQ on request.
- B. Complete as soon as possible but no later than June 1, 2019 the reinforcement of the retention basin walls and dikes in accordance with Specifications and responses to comments prepared by M.C. Schaff and Associates.
- C. Submit annually on or before December 31 of each year, certification stating that the integrity of Defendant’s retention basin walls and dikes is sufficient to prevent a breach from occurring under normal operating conditions.
- D. Implement as soon as possible but no later than March 1, 2019, the Discharge Sampling Plan in accordance with plans prepared by Baker & Associates, Inc. and received by NDEQ on June 20, 2018.
- E. Implement as soon as possible but no later than March 1, 2019, the Groundwater Sampling and Analyses Plan in accordance with

plans prepared by Baker & Associates, Inc. and received by NDEQ on June 20, 2018.

Defendant further agreed to perform and conduct all actions required by the Consent Order in accordance with all applicable local, state, and federal laws, regulations, and permits. Upon completion of the above-listed activities, the Consent Order provides NDEQ will file a Satisfaction of Compliance Order no earlier than December 31, 2021 if NDEQ is satisfied that Defendant fully and completely satisfied the Consent Order.

4. The parties agree settlement of this matter is in the public interest and entry of this Consent Decree is the most appropriate means of resolving their dispute. The parties desire to conclude this case without trial or adjudication of any issues of fact or law. The parties further desire to conclude this case without this Consent Decree constituting an admission by Defendant with respect to such issues.

5. This Consent Decree will be in full satisfaction of all claims between the parties alleged in Plaintiff's Complaint and the Consent Order, as well as claims arising during the pendency of the Consent Decree for which stipulated penalties are paid by Defendant unless Plaintiff seeks injunctive relief or additional civil penalties for those claims.

6. IT IS THEREFORE ORDERED that Defendant, in lieu of a monetary civil penalty under Neb. Rev. Stat. § 81-1508.02(2) (Reissue 2014), agrees to purchase and install new natural gas-fired boiler(s) ("natural gas-fired boilers"), for use at its Facility in Scottsbluff, Nebraska, thereby replacing the two coal-fired boilers currently in use. Defendant further agrees to the following:

- A. By September 30, 2023, Defendant will have the natural gas-fired boilers installed and begin commissioning for start-up at its Facility in Scottsbluff, Nebraska. In the event Defendant fails to have the new natural gas-fired boiler(s) installed and begin commissioning for start-up by September 30, 2023, Defendant

must pay a civil penalty in the amount of one million dollars (\$1,000,000.00) by October 31, 2023. Failure to have the natural gas-fired boilers installed and begin commissioning for start-up by September 30, 2023 and failure to pay the civil penalty of one million dollars by October 31, 2023 shall be violations of this Consent Decree.

- B. After the natural gas-fired boilers are installed and commissioning for start-up begins, Defendant shall decommission the coal-fired boilers at the Facility in Scottsbluff, Nebraska as outlined in its construction permit.
- C. Defendant's construction and operation of the natural gas-fired boilers will comply with all applicable regulations and permitting requirements, including a monitoring system if applicable.
- D. Prior to installing and operating the natural gas-fired boilers, Defendant will obtain the necessary permit(s) from NDEQ as outlined by each milestone (and corresponding deadline) below. These milestones (and corresponding deadlines) may only be modified by written agreement of the parties.
  - i. Defendant determines what type of construction permit (State or Prevention of Significant Deterioration, *i.e.*, PSD) is needed to install and operate the natural gas-fired boilers by December 31, 2019. Once determined, Defendant notifies NDEQ of the type of permit it will need in writing.
  - ii. Defendant submits the construction permit application on NDEQ forms, and modeling information if warranted, to NDEQ by December 31, 2020. In its construction permit application, Defendant will also include its plan to decommission the coal-fired boilers.
  - iii. Once Defendant submits the construction permit application, NDEQ will draft the construction permit and provide to Defendant for review by December 31, 2021.
  - iv. Defendant completes its review of the draft construction permit and provides comments by February 28, 2022.
  - v. If there are any comments, NDEQ responds to Defendant's comments by March 30, 2022.
  - vi. After NDEQ's response to any comments, NDEQ provides Defendant with a 30-day comment period.

- vii. After the end of the 30-day comment period, NDEQ will address comments and issue the final construction permit.
  
- E. If Defendant fails to comply with any of the milestones listed in Paragraph 6(D) or the terms of its construction permit, then Defendant agrees to pay five hundred dollars (\$500.00) per violation per day.
  
- F. Defendant will comply with the Nebraska Environmental Protection Act, Title 129 of the Nebraska Administrative Code—*Nebraska Air Quality Regulations*, 40 C.F.R. Subpart JJJJJJ, and other applicable federal and state statutes, rules, and regulations. Defendant will also comply with the Consent Order. If Defendant violates these statutes, rules, and regulations or Consent Order during the timeframe of this Consent Decree, then Defendant agrees to pay stipulated penalties as follows:
  - i. Unpermitted Discharges and Water Quality. If Defendant discharges pollutants or wastes (not in accordance with a permit) into a water of the State or causes pollution of a water of the State pursuant to Neb. Rev. Stat. §§ 81-1506(1) and (2) and applicable rules and regulations, and NDEQ issues a notice of violation (“NOV”) for these violations, then Defendant agrees to pay \$1,000.00 per violation per day until remedied. For purposes of this Consent Decree only, Defendant’s historical practice of discharging its process water to the evaporation basin located at its Scottsbluff Facility will not be considered an Unpermitted Discharge, as described in this paragraph, for which there is a stipulated penalty of \$1,000.00 per violation per day until remedied. If, however, a breach of the evaporation basin occurs and results in an Unpermitted Discharge, as described in this paragraph, then Defendant agrees to pay \$1,000.00 per violation per day until remedied.
  
  - ii. Violations of 40 C.F.R. Subpart JJJJJJ, Title 129 of the Nebraska Administrative Code, and Air Operating Permit No. OPSPR1-0024. If Defendant fails to: (1) operate, control, or monitor the coal-fired boilers at the Facility in accordance with Air Operating Permit No. OPSPR1-0024, 40 C.F.R. Subpart JJJJJJ, and Title 129 of the Nebraska Administrative Code; (2) allows fugitive dust beyond the premises of the Facility; (3) exceeds opacity of 20% in stack emissions; or (4) violates any other permit condition, and NDEQ issues a NOV for these violations, then

Defendant agrees to pay \$1,000.00 per violation per day until remedied.

- iii. Record-keeping requirements. If Defendant fails to keep records as required by 40 C.F.R. Part 63 and Title 129 of the Nebraska Administrative Code and NDEQ issues a NOV for these violations, then Defendant agrees to pay \$250.00 per violation per day until remedied.
  - iv. Violation of the Consent Order. If Defendant violates any terms of the Consent Order while it is effective and NDEQ issues a NOV for these violations, then Defendant agrees to pay \$500.00 per violation per day until remedied.
  - v. Reporting and payment of stipulated penalties. Upon discovery of the violations listed in Paragraph 6(F), Defendant shall notify NDEQ, in writing, within fourteen (14) business days of discovery unless required sooner by statute, rules and regulations, or permit. If NDEQ discovers one of the violations listed in Paragraph 6(F), then NDEQ will notify Defendant within fourteen (14) business days of discovery by issuing a NOV. If a NOV is issued, Plaintiff will demand payment of the stipulated penalty for that violation. Payment of the stipulated penalty shall be remitted within thirty (30) days of Plaintiff's demand for payment.
  - vi. Any payment of a stipulated penalty for a violation listed in Paragraph 6(F) will not preclude Plaintiff from seeking injunctive relief and/or additional civil penalties if the violation is not remedied or compliance is not reached.
- G. Within forty-five (45) days following the end of each six-month period, Defendant will submit a semi-annual progress report to NDEQ, *i.e.*, August 15th and February 15th of each year. Each semi-annual progress report will describe what relevant activities occurred during the time period from the last report, as well as describe the relevant activities planned for the next six-month period. If Defendant fails to submit a semi-annual progress report within forty-five days after the end of the applicable six-month period, then Defendant agrees to pay a \$250.00 penalty per day until submitted. The semi-annual progress reports are to be submitted to:

Air Quality Division  
Nebraska Department of Environmental Quality  
1200 N Street, Suite 400  
P.O. Box 98922  
Lincoln, Nebraska 68509

Maegan L. Woita  
Assistant Attorney General  
Nebraska Attorney General's Office  
2115 State Capitol  
Lincoln, Nebraska 68509-8920  
maegan.woita@nebraska.gov

- H. Upon completion of the activities outlined in the Consent Order, Defendant shall provide Plaintiff with a Showing of Compliance with the Consent Order as incorporated into the Consent Decree. This Showing of Compliance must indicate Defendant completed all activities outlined in the Consent Order. NDEQ will verify compliance with the Consent Order and, if NDEQ files a Satisfaction of Compliance Order in *In re Western Sugar Cooperative Corporation*, Case No. 3418, then the Consent Order will no longer be an effective component of this Consent Decree.
- I. Within fifteen (15) business days after the natural gas-fired boilers are installed and commissioning for start-up begins, Defendant shall provide Plaintiff with written notice. This written notice must indicate Defendant installed the natural gas-fired boilers in compliance with all applicable regulations and permitting requirements and began commissioning for start-up by September 30, 2023.
- J. Within fifteen (15) business days after the coal-fired boilers are decommissioned, Defendant shall provide Plaintiff with written notice. This written notice must indicate Defendant decommissioned the coal-fired boilers in compliance with the terms of its construction permit.
- K. Upon completion of the obligations outlined in this Consent Decree (other than obligation to submit semi-annual progress reports), Defendant shall provide Plaintiff with a Showing of Compliance with the Consent Decree. This Showing of Compliance must indicate Defendant completed all obligations outlined in this Consent Decree. NDEQ will verify compliance with this Consent Decree. Plaintiff shall file a Satisfaction of Judgment with the Court after Defendant provides its final

Showing of Compliance and NDEQ verifies Defendant fully complied with all obligations in this Consent Decree.

- L. If Defendant, however, violates the requirements of this Consent Decree during the period of compliance following entry of this Consent Decree and has not paid the stipulated penalties for those violations, then Plaintiff, in its sole discretion, may file with the Court a motion to enforce the terms of the Consent Decree for payment of the stipulated penalties.
- M. If Defendant becomes aware of a true force majeure event, including, but not limited to tornadoes and war, preventing Defendant from meeting any of the completion dates set forth in this Consent Decree, then Defendant shall notify NDEQ within a reasonable period of time upon its knowledge of such true force majeure event and request either an excuse of performance due to such event or an appropriate period of time to extend the affected completion date. If Defendant and NDEQ are unable to agree on a mutually satisfactory resolution to Defendant's request, then Defendant may file a motion with the Court seeking to excuse its performance or extend the period of time for the affected completion date. The Court, after hearing, shall enter any order it deems appropriate which may address, without limitation, payment of stipulated penalties as set forth in this Consent Decree or setting of new completion dates.

7. This Consent Decree is binding on Defendant's successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Defendant under this Consent Decree.

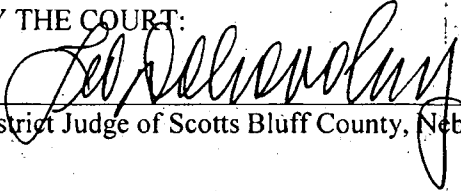
8. This Consent Decree will have no effect on any enforcement action brought by NDEQ against Defendant for future violations of any statutes or regulations.

9. The undersigned consent without further notice to the form and entry of this Consent Decree.

DATED this 16<sup>th</sup> day of April 2019, in Scotts Bluff County, Nebraska.



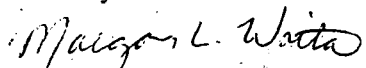
BY THE COURT:

  
District Judge of Scotts Bluff County, Nebraska

STATE OF NEBRASKA, ex rel.,  
JIM MACY, Director, NEBRASKA DEPARTMENT  
OF ENVIRONMENTAL QUALITY, Plaintiff

BY: Douglas J. Peterson, #18146  
Attorney General

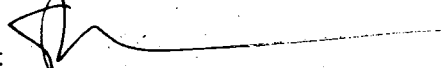
BY:



Maegan L. Woita, #26287  
Assistant Attorney General  
2115 State Capitol  
P.O. Box 98920  
Lincoln, Nebraska 68509-8920  
Tel: (402) 471-1912  
maegan.woita@nebraska.gov  
*Attorneys for Plaintiff*

THE WESTERN SUGAR COOPERATIVE, CORP.,  
Defendant

BY:



Stephen D. Mossman, #19859  
Mattson Ricketts Law Firm  
134 South 13th Street, Suite 1200  
Lincoln, Nebraska 68508  
(402) 475-8433  
sdm@mattsonricketts.com  
*Attorney for Defendant*

# EXHIBIT

1

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF WESTERN SUGAR  
COOPERATIVE CORPORATION

SCOTTSBLUFF, NEBRASKA

NDEQ # 44141

Respondent

CASE NO. 3418

ORDER FOR COMPLIANCE ON  
CONSENT

**I. INTRODUCTION**

1. The Nebraska Department of Environmental Quality (Department) and Western Sugar Cooperative Corporation (Respondent) voluntarily enter into this Order for Compliance on Consent (Consent Order). The Consent Order establishes a schedule of corrective actions necessary to reinforce the structural integrity of Respondent's wastewater lagoon and to conduct discharge and groundwater monitoring associated with the Respondent's wastewater discharges as required by the Nebraska Environmental Protection Act, Neb. Rev. Stat. §§ 81-1501 to 81-1532 (Reissue 2014; Cum. Supp. 2016) and rules and regulations promulgated under such Act.
2. The Respondent owns and operates a sugar beet processing facility located at 2100 E Overland, Scotts Bluff County, Scottsbluff, Nebraska 69361.
3. As part of the beet washing process, Respondent discharges wastewater containing mud and solids to a wastewater lagoon, also known as a retention basin, located between the North Platte River and South Beltline Highway in Sections 31 and 32, Township 22 North, Range 54 West.

**II. JURISDICTION**

4. The Department is the agency of the state of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504(1), of exercising exclusive general supervision, administration, and

enforcement of the Nebraska Environmental Protection Act, Neb. Rev. Stat. §§ 81-1501 to 81-1532 and all rules, regulations, and orders promulgated thereunder. This Consent Order is issued under the authority vested in the Director of the Department by Neb. Rev. §§ 81-1504(25) and 81-1507(1).

5. The Department made certain allegations in a Complaint, Compliance Order and Notice of Opportunity for Hearing dated August 1, 2017 as a result of a breach of the dike surrounding the Respondent's retention basin.

6. In response to the Complaint, Respondent filed an Answer and Request for hearing, dated September 1, 2017. Respondent has prepared a long term plan to ensure the structural integrity of the retention basin that was the subject of the Department's complaint.

7. The Respondent agrees to not contest the Department's jurisdiction to enforce this Consent Order in any subsequent enforcement proceedings, either administrative or judicial. The Respondents further agree, without making any admissions to liability, to undertake all corrective actions required by and agreed to in this Consent Order.

8. The Department and the Respondent acknowledge that this Consent Order has been negotiated in good faith and the Request for a Hearing for a contested case in this matter is withdrawn upon the signature of the Director of the Department.

### III. PARTIES

9. This Consent Order is binding on the Respondent and its employees, agents, contractors, consultants, successors and assigns. Any change in ownership or corporate status of the Respondent, including but not limited to, any transfer of assets or property, shall not alter Respondent's responsibilities and obligations under this Consent Order.

10. The Respondent shall ensure that any contractors implementing any provision of this Consent Order receive a copy of this Consent Order. Respondent shall be responsible for ensuring that its contractors perform work in accordance with this Consent Order.

#### **IV. STATUTORY AND REGULATORY FRAMEWORK**

11. Neb. Rev. Stat. § 81-1506(1) makes it unlawful to cause pollution of any waters or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any water or land of the state; or to discharge or emit any wastes into any waters or land of the state which reduce the quality of such waters or land below established standards.

12. Pursuant to the Nebraska Environmental Quality Council's authority to adopt rules and regulations for the purpose of setting standards for the discharge of wastewater and the operation of wastewater lagoons, as expressed in Neb. Rev. Stat. § 81-1505, the Council adopted and promulgated rules codified as Neb. Adm. Code, Title 119 – *Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System*.

#### **V. COMPLIANCE ORDER**

13. Respondent agrees to maintain their retention basin in good working order and conduct and record the results of weekly inspections of the lagoon walls and dikes and to make such observations available to the Department upon request.

14. Respondent agrees to complete the following actions within the timeframes specified:

- a. Complete as soon as possible but no later than June 1, 2019 the reinforcement of the retention basin walls and dikes in accordance with Specifications and responses to comments prepared by M.C. Schaff and Associates. The Specifications were received by the Department on October 16, 2018 and are identified by the Department as Document No. 20180052984. The response to

comments were received by the Department on November 1, 2018 are identified by the Department as Document No. 20180052985. Such documents are incorporated into and made a part of this Consent Order.

- b. Submit annually on or before December 31 of each year following June 1, 2019, certification stating that the integrity of the Respondent's retention basin walls and dikes is sufficient to prevent a breach from occurring under normal operating conditions. The certification must be signed a Professional Engineer registered in the State of Nebraska.
- c. Implement as soon as possible but no later than March 1, 2019, the Discharge Sampling Plan in accordance with plans prepared by Baker & Associates, Inc. and received by the Department on June 20, 2018. The Discharge Sampling Plan is identified by the Department as Document No. 20180046854 and such document is incorporated into and made a part of this Consent Order.
- d. Implement as soon as possible but no later than March 1, 2019 the Groundwater Sampling and Analyses Plan in accordance with plans prepared by Baker & Associates, Inc. and received by the Department on June 20, 2018. The Groundwater Sampling and Analyses Plan is identified by the Department as Document No. 20180043357 and such document is incorporated into and made a part of this Consent Order.

15. Respondent agrees to respond in writing within seven (7) working days to all requests for information from the Department.

#### **VI. SATISFACTION AND COMPLIANCE WITH OTHER LAWS**

16. The Respondent shall perform and conduct all actions required by this Consent Order in accordance with all applicable local, state, and federal laws, regulations and permits.

17. Upon completion of the activities required by this Consent Order to the satisfaction of the Department, but no earlier than December 31, 2021, a Satisfaction of Compliance Order stating the Consent Order has been fully and completely satisfied will be filed by the Department.

#### **VII. RESERVATION OF RIGHTS AND PENALTY PROVISIONS**

18. The Department reserves the right to require the Respondent to complete additional work or take additional actions as necessary to achieve compliance with all applicable laws and regulations. Further, the Department reserves the right to pursue enforcement in the proper court of law for injunctive relief or to seek civil or criminal penalties for any violations that are the subject of this Complaint, Compliance Order, and Notice of Opportunity for Hearing. Nothing in this Complaint, Compliance Order, and Notice of Opportunity for Hearing precludes the Department from pursuing such enforcement.

19. Failure to obey this order may result in fines up to \$10,000 per violation per day, as set out in Neb. Rev. Stat. § 81-1508.02.

#### **VIII. NEGATION OF AGENCY RELATIONSHIP**

20. Nothing contained in this Consent Order shall be construed to create, either expressly or by implication, the relationship of agency between the Department and the Respondents.

#### **IX. AMENDMENT**

21. This Consent Order may be modified and amended in writing by mutual agreement of the Department and the Respondents.

#### **X. EFFECTIVE DATE**

22. This Consent Order shall become effective on the date it is signed by the Director of the Department or his designee.

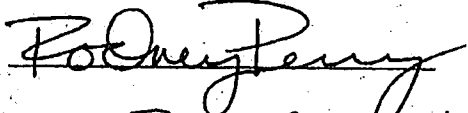
**XI. SEVERABILITY**

23. If any provision or authority of this Consent Order or the application of this Consent Order to any party or circumstances is held by any judicial or administrative authority to be invalid, the application of such provisions to other party or circumstances and the remainder of the Consent Order shall remain in force and shall not be affected thereby.

**XII. SIGNATURES**

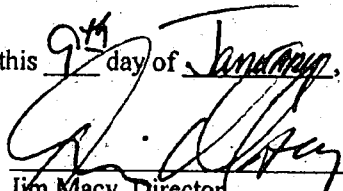
For the Respondents: The undersigned certifies that they are fully authorized to enter into the terms and conditions of this Consent Order and to bind the Respondents.

For Western Sugar Cooperative Corporation:

By:  Date: Jan. 7<sup>th</sup> 2019

Rodney Perry, President & CEO  
[Name, Title]

For the Department: IT IS ORDERED and agreed this 9<sup>th</sup> day of January, 2019.

By:   
Jim Macy, Director  
Department of Environmental Quality