

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE UNITED STATES OF AMERICA)
)
 and)
)
 THE STATE OF NEBRASKA,)
)
 Plaintiffs,)
)
 v.)
)
 THE CITY OF WEST POINT, NEBRASKA,)
 PECKHAM, INC. (f/k/a West Point Dairy Products,))
 Inc.), MARK PECKHAM, WEST POINT DAIRY)
 PRODUCTS, LLC, and WIMMER’S MEAT)
 PRODUCTS, INC.,)
)
 Defendants.)
 _____)

CIVIL ACTION NO. 08 CV 00293

FIRST AMENDED COMPLAINT

Plaintiffs, the United States of America, by the Attorney General of the United States and on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and the Attorney General of Nebraska, on behalf of the Nebraska Department of Environmental Quality, allege as follows:

NATURE OF ACTION

1. This is a civil action for injunctive relief and civil penalties brought against the City of West Point, Nebraska, and Peckham, Inc., Mark Peckham, West Point Dairy Products, LLC, and Wimmer's Meat Products, Inc., for violations of the Clean Water Act, 33 U.S.C. §§ 1311, 1317, and/or 1342.

2. Plaintiffs seek injunctive relief and the assessment of civil penalties against Defendant City of West Point ("West Point" or "City"), for unlawful discharges from a Publicly Owned Treatment Works ("POTW"), in violation of 33 U.S.C. §§ 1311 and 1342, and against Defendants West Point Dairy Products, LLC and Wimmer's Meat Products, Inc., for causing or contributing to West Point's unlawful discharges in violation of 33 U.S.C. §§ 1311 and 1317, and the Pretreatment Standards at 40 C.F.R. Part 403. Plaintiffs seek civil penalties only against Defendants Peckham, Inc. and Mark Peckham for causing or contributing to West Point's violations during the period that those defendants owned and/or operated West Point Dairy Products, Inc.

3. This First Amended Complaint amends the complaint filed by Plaintiffs on July 9, 2008, commencing this action. Plaintiffs' original complaint sought relief from Peckham, Inc. and Mark Peckham (the "Peckham Defendants") only. This Amended Complaint seeks no additional relief from the Peckham Defendants, but alleges against additional parties violations essentially identical to those alleged against the Peckham Defendants.

JURISDICTION AND VENUE

4. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355; and 33 U.S.C. § 1319(b).

5. Notice of the commencement of this action has been given to the State of Nebraska pursuant to 33 U.S.C. §§ 1319(b), (f).

6. The State of Nebraska joins this action as a plaintiff, thereby satisfying the requirements of 33 U.S.C. § 1319(e).

7. Venue lies in the District of Nebraska pursuant to 33 U.S.C. §§ 1319(b) and (f) and 28 U.S.C. §§1391(b) and 1395(a), because it is the judicial district in which the Defendants are doing business and in which the alleged violations occurred.

DEFENDANTS

West Point Dairy Products, LLC

8. Defendant West Point Dairy Products, LLC (“West Point LLC”) is a Wisconsin Limited Liability Corporation engaged in butter and buttermilk production in West Point, Nebraska. West Point LLC’s main office is located at 300 Butterfield Road, West Point, Nebraska.

9. West Point LLC leased the West Point Dairy facility from Wuethrich Brothers-Nebraska, LLC, which purchased the West Point Dairy facility from West Point Dairy Products, Inc., on April 29, 2005. West Point LLC commenced operation of the facility at that time. It is believed that this facility currently produces more than 2 million pounds of butter per week.

10. West Point LLC is a “person” as defined by 33 U.S.C. § 1362(5).

11. West Point LLC is a “user” or “industrial user” as defined by 40 C.F.R. § 403.3(j).

Peckham, Inc.

12. Defendant Peckham, Inc. (f/k/a West Point Dairy Products, Inc.) is a Nebraska corporation, originally incorporated as West Point Dairy Products, Inc., on April 14, 1976, changing its name to Peckham, Inc. on May 25, 2005.

13. West Point Dairy Products, Inc., began operating the West Point facility on June 1, 1976, and operated the facility until selling it to Wuethrich Brothers on April 29, 2005.

14. Peckham, Inc. is a “person” as defined by 33 U.S.C. § 1362(5).

15. Prior to its sale of the dairy facility on April 29, 2005, West Point Dairy Products, Inc., Peckham, Inc.’s predecessor, was a “user” or “industrial user” of the City of West Point’s Publicly Owned Treatment Works (“POTW”) as defined by 40 C.F.R. § 403.3(j).

Mark Peckham

16. Defendant Mark Peckham served as President of West Point Dairy Products, Inc. until the company changed its name to Peckham, Inc. in May 2005. Since that time, Mr. Peckham has served as Vice-President and/or Secretary. Information provided by Peckham, Inc. states that Mr. Peckham and his wife were the “sole owners, directors and shareholders of Peckham, Inc., f/k/a West Point Dairy Products, Inc.” and that Mr. Peckham was responsible for “supervising the day to day operations of the Facility.” Specifically, Mr. Peckham controlled decisions bearing on West Point Dairy’s generation and treatment of wastewaters discharged to the City’s POTW.

17. Mark Peckham is a “person” as defined by 33 U.S.C. § 1362(5).

Wimmer's Meat Products, Inc.

18. Defendant Wimmer's Meat Products, Inc. ("Wimmer") is a producer of hot dogs and sausage doing business in West Point, Nebraska for more than fifty years. In recent years, Wimmer has produced more than 8 million pounds of meat annually.

19. Wimmer is a "person" as defined by 33 U.S.C. § 1362(5).

20. Wimmer is a "user" or "industrial user" of the City of West Point's wastewater treatment facility as defined by 40 C.F.R. § 403.3(j).

City of West Point, Nebraska

21. Defendant City of West Point ("West Point") is a political subdivision of the State and a "municipality" within the meaning of 33 U.S.C. § 1362(4).

22. West Point is a "person" as defined by 33 U.S.C. § 1362(5).

23. West Point owns and operates a wastewater treatment facility, which is a POTW, as that term is defined at 40 C.F.R. §§ 122.2 and 403.3.

24. During all times relevant to this Complaint, West Point Dairy Products, LLC, West Point Dairy Products, Inc./Peckham, Inc., and Wimmer's Meat Products, Inc. were "Industrial Users" of the West Point POTW, as that term is defined in 33 U.S.C. § 1362(18), discharging non-domestic "pollutants," as defined at 33 U.S.C. § 1362(6), into the West Point POTW.

STATUTORY BACKGROUND

CLEAN WATER ACT

25. The Administrator of EPA may commence a civil action for appropriate relief when any person introduces pollutants into a POTW which interfere with the operation of that POTW, or violates the terms or conditions of an NPDES permit. 33 U.S.C. § 1319(b).

26. The Clean Water Act, 33 U.S.C. § 1311(a), and implementing regulations, prohibit the discharge of pollutants into navigable waters of the United States by any person, except as in compliance with other sections of the Act, including Sections 307 and 402, 33 U.S.C. §§ 1317 and 1342, which govern activities subject to the Pretreatment Program and the issuance of NPDES permits.

27. The Clean Water Act defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

28. “Pollutants” within the meaning of the Clean Water Act include “biological materials . . . and industrial . . . and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

29. Navigable waters are “waters of the United States.” 33 U.S.C. § 1362(7).

30. Persons who discharge to a POTW are prohibited from introducing any pollutants to the treatment works that would cause “pass through or interference,” and must comply with pretreatment standards. 33 U.S.C. § 1317; 40 C.F.R. Part 403.

31. POTWs are required to develop and enforce specific effluent limits for industrial users in cases where pollutants contributed to the POTW by such users result in recurring interference and/or pass through at the POTW. 40 C.F.R. § 403.5(c)(2).

32. Effluent limitations, as defined in 33 U.S.C. § 1362(11), are restrictions on the quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges into navigable waters of the United States.

33. The Administrator of the EPA may issue NPDES permits that authorize the discharge of pollutants into navigable waters of the United States, subject to conditions and limitations set forth in such permits. 33 U.S.C. §1342(a).

34. Numeric effluent limitations, as well as various narrative conditions, are among the conditions and limitations prescribed in NPDES permits issued under 33 U.S.C. § 1342.

35. A state may establish its own NPDES permit program and, after receiving approval of its program from the Administrator of the EPA, may issue NPDES permits. 33 U.S.C. §1342(b).

36. A state may establish its own Pretreatment program upon receiving approval of its program from the Administrator of EPA. 33 U.S.C. § 1342(b).

37. In states authorized to implement their own NPDES programs and Pretreatment programs, EPA retains authority, concurrent with authorized state NPDES and Pretreatment programs, to enforce the state NPDES and Pretreatment programs. 33 U.S.C. §§ 1319 and 1342(i).

38. EPA approved the State's NPDES permit program under 33 U.S.C. § 1342(b), in June 1974.

39. EPA approved the State's Pretreatment program under 33 U.S.C. § 1342(b), in September 1984.

40. EPA may issue administrative orders requiring compliance with the Clean Water Act, whenever EPA finds that a person is in violation of, *inter alia*, 33 U.S.C. § 1317. *See* 33 U.S.C. § 1319(a).

41. A person who violates the Clean Water Act by violating the Pretreatment Standards or violating any permit condition or limitation in an NPDES permit shall be subject to a civil penalty not to exceed \$25,000 a day for each violation. 33 U.S.C. § 1319(d). Under 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation, as amended, and pursuant to 28 U.S.C. § 2461, the civil penalty amount was raised to a maximum of \$27,500 per day for each violation occurring after January 30, 1997, and \$32,500 per day for each violation occurring after March 15, 2004 (*See* 69 Fed. Reg. 7121, February 13, 2004).

CLEAN WATER ACT VIOLATIONS – GENERAL ALLEGATIONS

Factual/Legal Background

42. The City of West Point owns and operates a single POTW. The POTW was originally constructed in 1973 and was upgraded in 2005. The original design capacity of the POTW was 1,375 pounds/day for biological oxygen demand (“BOD”) and 550 pounds/day for total suspended solids (“TSS”); the upgrade increased the design capacity to 2,675 pounds/day BOD and 2,240 pounds/day TSS.

43. During all times relevant to this Complaint, the City’s POTW discharged wastewaters containing “pollutants,” within the meaning of 33 U.S.C. § 1362(6), into the Elkhorn River.

44. The Elkhorn River is a “navigable water” and a “water of the United States” under 33 U.S.C. § 1362(7).

45. The State issued NPDES Permit number NE 0023965 to the City of West Point on May 24, 1999. Permit number NE 0023965 contains final effluent limitations and other requirements for West Point's POTW. Included are express numeric concentration limits on, among other things, BOD, TSS, ammonia, and fecal coliform.

46. Permit number NE 0023965 was reissued, effective January 1, 2007, and expires on December 31, 2011.

47. In addition to numeric limitations on discharges of specified pollutants, the City's 2006 NPDES permit also contains narrative conditions prohibiting, among other things, discharges containing pollutants at concentrations or levels producing objectionable colors in receiving waters.

48. During all times relevant to this Complaint, the West Point Dairy facility and the Wimmer's Meats facility were the only industrial users of West Point's POTW. Industrial dischargers to a POTW subject to an NPDES permit are not required to obtain individual NPDES permits, but must comply with requirements for "pretreatment" of their discharges. Regulatory requirements governing pretreatment are set forth at 40 C.F.R. § 403.

49. 40 C.F.R. § 403.5 establishes "general prohibitions," among them, that a "User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. § 403.3 defines "Interference" to include any discharge of pollutants which inhibits or disrupts the treatment processes or operations of a POTW and which alone, or in conjunction with discharges from other sources, causes a violation of a POTW's NPDES permit. 40 C.F.R. § 403.3(k). "Pass Through" is defined as a discharge "which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or

discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit." 40 C.F.R. § 403.3(p).

50. In addition to the general prohibitions, EPA has promulgated pretreatment standards for specified categories of industrial users. These "categorical" industrial users are subject to specific pretreatment requirements. 40 C.F.R. Parts 405-471.

51. Industrial users not subject to the "categorical" pretreatment standards are described as "non-categorical" users. Pretreatment requirements for non-categorical users are to be established either by the POTW (40 C.F.R. §§ 403.8(a) and (f)) or by the state (40 C.F.R. § 403.10), and include "local limits" on discharges of industrial users designed to ensure the POTW's compliance with the terms of its NPDES permit.

52. 40 C.F.R. § 403.5(c)(2) requires POTWs, "in cases where pollutants contributed by User(s) result in Interference or Pass-Through, and such violation is likely to recur, to develop and enforce specific effluent limits for Industrial User(s)."

53. Where such "local limits" have not been established, a non-categorical industrial user remains subject to the general prohibitions prohibiting introduction of pollutants to a POTW which result in the "pass through" of pollutants through the POTW or in "interference" with the operations of the POTW.

54. 40 C.F.R. § 403.5(a)(2) provides an affirmative defense to alleged violations of the general pretreatment requirements if the user can demonstrate that:

(i) It did not know or have reason to know that its Discharge, alone or in conjunction with a discharge or discharges from other sources, would cause Pass Through or Interference, and

.....
(ii) (B) If a local limit . . . has not been developed . . . the User's Discharge directly prior to and during the Pass Through or Interference did not change

substantially in nature or constituents from the User's prior discharge activity when the POTW was regularly in compliance with the POTW's NPDES permit requirements

Factual Allegations

City of West Point

55. Nebraska Department of Environmental Quality ("NDEQ") inspections of the POTW noted as early as 1984 that the POTW was "poorly maintained" and that Wimmer's discharged "a highly colored waste to the plant" which color was "still present in the final effluent." Multiple subsequent inspections cite the POTW for non-compliance with its NPDES permit and the CWA.

56. On April 30, 2002, NDEQ issued an Administrative Consent Order ("ACO") requiring the City of West Point to upgrade the POTW in order to address chronic non-compliance with the terms and conditions of its permit. The Consent Order imposed no penalty and did not purport to resolve the City's ongoing CWA violations. The POTW upgrades required by the ACO were completed on September 1, 2005.

57. As required by its NPDES permits, the City of West Point submits Discharge Monitoring Reports ("DMRs") to NDEQ setting forth monitoring results obtained from the POTW during each quarterly reporting period. DMRs submitted by the City prior to completion of the POTW upgrade document nearly continuous non-compliance with effluent limitations in West Point's NPDES permit. Specifically, the DMRs for the period between October 1, 2002 and August 31, 2005 reflect approximately 5,860 violations of permit limits for BOD, TSS, ammonia and/or fecal coliform.

58. The POTW upgrades were completed on September 1, 2005. After this time, violations of NPDES permit limits were greatly reduced, but DMRs for the period between September 2005 and May 2007 still reflect 904 violations of numeric discharge limits.

59. Despite the City's long-time violation of the numeric limits of its NPDES permit, and the fact that it was billing the Industrial Users a surcharge for excessive loadings to the POTW, the City failed to develop local limits for these Users.

60. Inspections conducted in 1984, 1985, 1988, 1989, and 2006 all noted observed pass-through of red dye in the POTW's discharge, in violation of the narrative conditions of West Point's NPDES permits.

Peckham, Inc. (f/k/a West Point Dairy Products, Inc.)

61. Peckham, Inc. (f/k/a West Point Dairy Products, Inc.), operated the West Point Dairy facility from June 1, 1976, until selling the facility to Wuethrich Brothers-Nebraska, LLC, on April 29, 2005. At all times during this period, the West Point Dairy facility discharged wastewaters to the West Point POTW.

62. West Point's POTW exceeded its design capacity and its permit limits for average daily loading for BOD every month between at least June 2001 and September 2005. West Point's POTW also exceeded its permit limits for average daily loading for BOD during September 2006.

63. Available data indicates that West Point Dairy's average daily BOD loading to the POTW during the period of June 2001 through April 2005 exceeded 100% of the POTW's design capacity in all but ten months. West Point Dairy's average daily BOD loading in each of those ten months ranged from approximately 40% to 90% of POTW design capacity.

64. West Point's POTW exceeded its design capacity and its permit limits for average daily loading for TSS every month between at least June 2001 and August 2005.

65. Available data indicates that West Point Dairy's average daily TSS loading to the POTW during the period June 2001 through March 2005 exceeded 100% of the POTW's design capacity. In April 2005, West Point Dairy's average daily TSS loading constituted approximately 80% of POTW design capacity.

66. West Point Dairy's loading of BOD and TSS caused or substantially contributed to the West Point POTW's major and recurring violations of its NPDES permit limits during the period that Peckham, Inc., f/k/a West Point Dairy Products, Inc. owned and operated West Point Dairy.

Mark Peckham

67. Information provided by Peckham, Inc. states that Mr. Peckham and his wife were the "sole owners, directors and shareholders of Peckham, Inc., f/k/a West Point Dairy Products, Inc." and that Mr. Peckham was responsible for "supervising the day to day operations of the Facility." Mr. Peckham personally made decisions regarding West Point Dairy's quantity and quality of discharges to the POTW, and the failure to implement pretreatment of the Dairy's discharges, throughout the period that Peckham, Inc., f/k/a West Point Dairy Products, Inc. owned and operated the facility.

West Point Dairy Products, LLC

68. Wuethrich Brothers-Nebraska, LLC purchased the West Point Dairy facility from West Point Dairy Products, Inc. on or about April 29, 2005. Upon purchase, Wuethrich Brothers turned over operation of the facility to West Point Dairy Products, LLC, an entity created by

Wuethrich Brothers for the purpose of operating the Dairy. At all times during West Point Dairy Products, LLC's operation, the Dairy has discharged wastewaters to West Point's POTW.

69. Available data indicates that West Point Dairy's average daily BOD loading to the POTW for the months of May through September 2005 ranged from approximately 40% to well over 100% of the POTW's design capacity. In September 2006, the Dairy's average daily BOD loading to the POTW constituted approximately 65% of the POTW's design capacity. The POTW exceeded its permit limits for BOD during each of those months.

70. Available data indicates that West Point Dairy's average daily TSS loading to the POTW for the months of May through September 2005 ranged from approximately 75% to well over 100% of the POTW's design capacity. In February, April, and September 2006, the Dairy's average daily TSS loading to the POTW exceeded 100% of the POTW's design capacity. The POTW exceeded its permit limits for TSS during each of those months.

71. West Point Dairy's loading of BOD and TSS caused or substantially contributed to the West Point POTW's major and recurring violations of its NPDES permit limits throughout the period that West Point Dairy, LLC has operated the facility.

Wimmer's Meat Products, Inc.

72. Wimmer's has produced hot dogs and sausages at its West Point meat processing facility for more than fifty years. Wimmer's meat processing facility has discharged wastewaters to West Point's POTW for more than thirty years.

73. West Point's POTW exceeded its design capacity and its permit limits for average daily loading for BOD every month between at least June 2001 and September 2005. West

Point's POTW also exceeded its permit limits for average daily loading for BOD during September 2006.

74. Available data indicates that Wimmer's average daily BOD loading to the POTW for the period between June 2001 and September 2005 averaged nearly 35% of the POTW's design capacity, and exceeded 50% of design capacity on at least 10 occasions during that period. Wimmer's BOD loading also constituted approximately 10% of POTW design capacity in September 2006.

75. West Point's POTW exceeded its design capacity and its permit limits for average daily loading for TSS every month between at least June 2001 and September 2005. West Point's POTW also exceeded its design capacity and its permit limits for TSS during the months of February 2006, April 2006, and September 2006.

76. Available data indicates that Wimmer's average daily TSS loading to the POTW averaged approximately 40% of the POTW's design capacity during the June 2001 - September 2005 period, and exceeded 100% of design capacity on at least four occasions during this period. During the months of February 2006, April 2006, and September 2006, Wimmer's TSS loading constituted between approximately 8% and 20% of POTW design capacity.

77. At all times relevant to this Complaint, Wimmer's loading of BOD and TSS caused or substantially contributed to the West Point POTW's major and recurring violations of its NPDES permit limits.

FIRST CLAIM FOR RELIEF

(West Point's Violation of NPDES Permit Limits)

78. The allegations of the foregoing paragraphs are incorporated herein by reference.

79. During all times relevant to this Complaint, West Point's NPDES permit for its POTW has imposed effluent limitations for biochemical oxygen demand ("BOD"), total suspended solids ("TSS"), ammonia and fecal coliform, as well as narrative conditions prohibiting, among other things, the discharge of discolored effluent.

80. During the past five years and before, West Point has discharged pollutants from its POTW on numerous occasions in violation of the numeric effluent limitations set forth in its NPDES permit for CBOD and TSS and/or in violation of the narrative conditions of the Permit prohibiting the discharge of objectionably colored effluent.

81. West Point's discharge of pollutants in violation of effluent limitations in its NPDES permit violated its NPDES permit and unlawfully discharged pollutants into waters of the United States in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342.

82. Unless enjoined, West Point's violations will continue.

83. Pursuant to 33 U.S.C. § 1319(b) and (d), West Point is liable for civil penalties of up to \$25,000 per day for each violation occurring before January 30, 1997, up to \$27,500 per day for each violation occurring after January 30, 1997, and up to \$32,500 a day for each violation occurring after March 15, 2004.

SECOND CLAIM FOR RELIEF

(West Point's Failure to Develop/Enforce Local Limits)

84. The allegations of the foregoing paragraphs are incorporated herein by reference.

85. West Point did not develop and enforce specific local effluent limits for its industrial users, Wimmer's Meat Products and West Point Dairy, in violation of 40 C.F.R. § 403.5(c)(2).

86. Pollutants in the wastewater discharged to the POTW by Wimmer's and West Point Dairy caused or contributed to pass through and/or interference, resulting in effluent limit violations by West Point's POTW.

87. West Point's development and enforcement of specific effluent limits for Wimmer's and West Point Dairy, together with appropriate changes in West Point's POTW facility or operation, would have facilitated West Point's compliance with the POTW's NPDES permit. 40 C.F.R. § 403.5(c)(2).

88. West Point's failure to develop and enforce specific local effluent limits for Wimmer's and West Point Dairy violated the pretreatment regulations at 40 C.F.R. § 403.5(c)(2).

89. Unless enjoined, West Point's violation of the pretreatment regulations will continue.

90. Pursuant to 33 U.S.C. § 1319(b) and (d), West Point is liable for civil penalties of up to \$25,000 per day for each violation occurring before January 30, 1997, up to \$27,500 per day for each violation occurring after January 30, 1997, and up to \$32,500 a day for each violation occurring after March 15, 2004.

THIRD CLAIM FOR RELIEF

(Peckham, Inc.'s Interference and/or Pass Through)

91. The allegations of the foregoing paragraphs are incorporated herein by reference.

92. From at least June 2001 through April 29, 2005, West Point Dairy, Inc.'s wastewater discharges to the POTW, alone or in conjunction with the discharge or discharges from other sources, have caused the City to violate the final numeric effluent limitations of its NPDES Permit.

93. The discharges from West Point Dairy, which alone or in conjunction with the discharge or discharges from other sources have caused West Point to incur the violations stated above, constitute interference and/or pass through at the POTW.

94. West Point Dairy's discharges to the POTW violated 33 U.S.C. §§ 1311 and 1317, and 40 C.F.R. § 403.5.

95. As the successor-in-interest to West Point Dairy, Inc., Peckham, Inc. is liable, pursuant to 33 U.S.C. § 1319(b) and (d), for civil penalties of up to \$25,000 per day for each violation occurring before January 30, 1997, up to \$27,500 per day for each violation occurring after January 30, 1997, and up to \$32,500 a day for each violation occurring after March 15, 2004, until West Point Dairy, Inc.'s sale of the Dairy on April 29, 2005.

FOURTH CLAIM FOR RELIEF

(Personal Liability of Mark Peckham)

96. The allegations of the foregoing paragraphs are incorporated herein by reference.

97. From June 1, 1976 until April 29, 2005, Mark Peckham was an "operator" of the West Point Dairy within the meaning of 33 U.S.C. §§ 1317(d) and 1319(f).

98. During all times of Mark Peckham's operation, wastewater discharges from West Point Dairy, alone or in conjunction with the discharge or discharges from other sources, caused

interference with or pass through West Point's POTW, in violation of 33 U.S.C. §§ 1311 and 1317, and 40 C.F.R. § 403.5.

99. As the operator of West Point Dairy, Mark Peckham is liable, pursuant to 33 U.S.C. § 1319(b) and (d), for civil penalties of up to \$25,000 per day for each violation occurring before January 30, 1997, up to \$27,500 per day for each violation occurring after January 30, 1997, and up to \$32,500 a day for each violation occurring after March 15, 2004 until West Point Dairy, Inc.'s sale of the Dairy on April 29, 2005.

FIFTH CLAIM FOR RELIEF

(West Point Dairy, LLC's Interference and/or Pass Through)

100. The allegations of the foregoing paragraphs are incorporated herein by reference.

101. From April 29, 2005 through September 2005, and during the months of February, April, and September 2006, West Point Dairy, LLC's wastewater discharges to the POTW, alone or in conjunction with the discharge or discharges from other sources, caused the City to violate the final numeric effluent limitations of its NPDES Permit.

102. The discharges from West Point Dairy, LLC, which alone or in conjunction with the discharge or discharges from other sources have caused West Point to incur the violations stated above, constitute interference and/or pass through at the POTW.

103. West Point Dairy, LLC's discharges to the POTW violated 33 U.S.C. §§ 1311 and 1317, and 40 C.F.R. § 403.5.

104. West Point Dairy, LLC is liable, pursuant to 33 U.S.C. § 1319(b) and (d), for civil penalties of up to \$32,500 a day for each of its violations, all of which occurred after March 15, 2004. Unless enjoined, West Point Dairy, LLC's violations of the CWA will continue.

SIXTH CLAIM FOR RELIEF

(Wimmer's Meat Products, Inc.'s Interference and/or Pass Through)

105. The allegations of the foregoing paragraphs are incorporated herein by reference.

106. From at least June 2001 through September 2005, and during the months of February 2006, April 2006, and September 2006, Wimmer's wastewater discharges to the POTW, alone or in conjunction with the discharge or discharges from other sources, have caused the City to violate the final numeric effluent limitations of its NPDES Permit.

107. From at least 1984 through at least April 2006, Wimmer's wastewater discharge passed through the POTW, causing effluent from the POTW to have an objectionable color, in violation of the narrative conditions of the POTW's NPDES Permit.

108. The discharges from Wimmer's Meat Products, Inc., which alone or in conjunction with the discharge or discharges from other sources have caused West Point to incur the violations stated above, constitute interference and/or pass through at the POTW.

109. Wimmer's Meat Products, Inc.'s discharges to the POTW violated 33 U.S.C. §§ 1311 and 1317, and 40 C.F.R. § 403.5.

110. Wimmer's Meat Products, Inc. is liable, pursuant to 33 U.S.C. § 1319(b) and (d), for civil penalties of up to \$25,000 per day for each violation occurring before January 30, 1997, up to \$27,500 per day for each violation occurring after January 30, 1997, and up to \$32,500 a day for each violation occurring after March 15, 2004. Unless enjoined, Wimmer's violations of the CWA will continue.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Pursuant to 33 U.S.C. § 1319(b), enjoin the Defendants from any and all ongoing and future violations of the Clean Water Act by ordering compliance with the Act, the Pretreatment Regulations, and the Pretreatment Standards.
2. Pursuant to 33 U.S.C. § 1319(d), assess civil penalties against the Defendants, as permitted by law, for each violation of the Clean Water Act.
3. Award the United States its costs of this action.
4. Award such other and further relief as the Court may deem just and proper.

The United States of America hereby requests that trial of the above and foregoing action should be held in Omaha, Nebraska, and that the case be calendared accordingly.

Respectfully submitted,

RONALD J. TENPAS
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//s// Frederick S. Phillips
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