

FILED  
U.S. DISTRICT COURT  
DISTRICT OF NEBRASKA

2009 OCT 15 PM 12: 14

IN THE UNITED STATES DISTRICT COURT OF THE CLERK  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA

and

Civil Action No. 8:08-CV-00293

STATE OF NEBRASKA

Plaintiffs,

v.

CITY OF WEST POINT, NEBRASKA,

Defendant.

CONSENT DECREE

Background

WHEREAS, Plaintiff, the United States of America ("United States"), by the authority of the Attorney General of the United States and through its undersigned counsel, acting at the request and on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), and Plaintiff, the State of Nebraska ("State" or "Nebraska"), by the authority of the Attorney General of Nebraska and through its undersigned counsel, acting at the request and on behalf of the Nebraska Department of Environmental Quality ("NDEQ"), previously filed a Complaint alleging that Defendant, the City of West Point, Nebraska ("West Point," "City," or "Defendant"), among others, has violated the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1251 et seq., and the conditions and limitations of its National Pollutant Discharge Elimination System ("NPDES") Permit;

WHEREAS, the Defendant is a municipality organized and existing under the laws and constitution of the State of Nebraska.

WHEREAS, the Defendant owns and operates a Publicly Owned Treatment Works ("POTW") in West Point, Nebraska;

WHEREAS, the State of Nebraska ("State") has joined in this action, in satisfaction of the requirements of Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e).

WHEREAS, the Plaintiffs allege that Defendant has violated Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and regulations promulgated under the CWA at 40 C.F.R. § 403.5(c)(2), by discharging pollutants from its POTW in excess of the numeric effluent limitations set forth in its NPDES permit and by failing to develop and enforce specific local effluent limits for its industrial dischargers;

WHEREAS, the Defendant has provided financial information to the Plaintiffs demonstrating that it has a limited ability to pay civil penalties;

WHEREAS, the Parties agree, and the Court by entering this Consent Decree finds, that settlement of the claims alleged in the Complaint without further litigation or trial of any issues, is fair, reasonable, and in the public interest and the entry of the Consent Decree is the most appropriate way of resolving the claims alleged in the Complaint.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows:

**JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action and over the parties to this action pursuant to Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b); and 28 U.S.C. §§ 1331, 1345, and 1355. The Complaint states a claim upon which relief may be granted against the City under Section 309 of the Clean Water Act, 33 U.S.C. § 1319, for injunctive relief and civil penalties. The City waives any and all objections that it may have to the Court's jurisdiction to enter and enforce this Decree. Authority to bring this action is vested in the United States Department of Justice ("DOJ") pursuant to Section 506 of the Clean Water Act, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

#### **VENUE**

2. Venue is proper in this Court pursuant to Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and 1395(a), because the violations alleged in the Complaint are alleged to have occurred in this judicial district. For purposes of this Consent Decree, the City consents to venue in this judicial district.

#### **BINDING EFFECT**

3. The provisions of this Consent Decree shall apply to and be binding on the City, as defined below, and its officers, directors, employees, agents, servants, successors and assigns, and all persons, firms and corporations under contract with the City to perform obligations of this Consent Decree and upon the United States and the State of Nebraska and their agencies, departments, representatives, employees,

consultants, agents, successors, and assigns.

4. Effective from the Date of Lodging of this Consent Decree until the earlier of three years from the Date of Lodging or the date this Consent Decree is terminated, the City shall provide a copy of this Consent Decree to any person or entity to whom the City transfers ownership or operation of any portion of the POTW that is subject to the requirements of this Consent Decree. The City shall notify EPA and the United States Department of Justice, and the NDEQ and the Office of the Nebraska Attorney General, in writing of any successor in interest at least thirty (30) days prior to any such transfer. Any sale or transfer of the City's interests in or operating role with respect to the POTW shall not in any manner relieve the City of its responsibilities in meeting the terms and conditions of this Consent Decree.

#### **DEFINITIONS**

5. Unless otherwise expressly provided herein, terms used in this Decree which are defined in the Clean Water Act, shall have the meaning assigned to them in that Act. In addition:

"Act" means the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

"Day" means a calendar day unless expressly stated to be a working day.

"Decree" means this Consent Decree.

"Defendant" means the City of West Point, Nebraska

"EPA" means the United States Environmental Protection Agency.

"Paragraph" shall mean a portion of this Decree identified by an Arabic numeral.

"Parties" means the Plaintiffs and the Defendant.

"Plaintiffs" means the United States and the State.

"Publicly Owned Treatment Works" or "POTW" shall mean a publicly owned treatment works or POTW as defined in 40 C.F.R. § 403.3(q), and includes the City's Wastewater Treatment Plant ("WWTP") and all aspects of the conveyance of wastewater from industrial dischargers to the City's WWTP.

"State" means the State of Nebraska, on behalf of the Nebraska Department of Environmental Quality.

"West Point" means the City of West Point, Nebraska.

"United States" means the United States of America, on behalf of the United States Environmental Protection Agency.

#### **CIVIL PENALTIES**

6. No later than thirty (30) days after the Effective Date of this Consent Decree, the City shall pay a civil penalty of \$100,000, together with interest, accruing on the day the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging, to the United States.

7. The United States shall be deemed a judgment creditor for purposes of collection of this civil penalty.

8. The City shall make the payment required by Paragraph 6 by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing DOJ Case Number 90-5-1-1-09326. Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Nebraska following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

9. At the time of payment, Defendant shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in this case, and shall reference the civil action number and DOJ Number 90-5-1-1-09326, by mail to the United States Department of Justice and EPA in accordance with Paragraph 27, by email to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov), and by mail to:

EPA Cincinnati Finance Office  
26 Martin Luther King Drive  
Cincinnati, Ohio 45268

10. If the City fails to tender any portion of the payment as set forth in Paragraph 6, interest shall accrue in accordance with the provisions of 31 U.S.C. § 3717.

11. Settlement of State Civil Penalties Claim. Within one (1) year following entry of this Decree, West Point shall pay to the State \$ 50,000 as a civil penalty pursuant to Neb. Const. art. VII, sec. 5. Payment shall be made payable to the "Cuming County District Court Clerk" and shall be mailed with notice referring to this action, to:

Katherine J. Spohn  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68508-8920

12. Performance and Funding of State S.E.P. Also within one (1) year following the Effective Date of this Decree, West Point shall pay to the Nebraska Attorney General for deposit into his Environmental Protection Fund an additional \$50,000.00. The Nebraska Attorney General and the State of Nebraska hereby promise and agree to pay from said account the sum of \$50,000.00 to the County of Cuming School District #1 d/b/a West Point Public School for purchase and installation of a HelixWind Vertical Axis Wind Turbine and a Photovoltaic Solar Array or equivalent equipment on such site and place as shall be designated by the West Point Public School. Once payment is received from West Point, payment from the Environmental Protection Fund shall be made upon presentation of a contract of the School District for the purchase and installation of said equipment. The State and City agree that this payment is made in furtherance of the objective of securing significant environmental or public health protection and improvement.

13. Interest. In addition to the stipulated penalties set forth below, in the event

West Point fails to make timely payments of any amounts required under this Decree, including stipulated penalties, West Point shall pay interest on the unpaid balance. Interest for late payments of the federal and State civil penalties, required under Paragraphs 6 shall be at the rate specified in 28 U.S.C. § 1961. Interest for late payments of state civil penalties under Paragraph 11 shall accrue pursuant to Neb. Rev. Stat. §45-103. The interest shall be calculated from the first day following the final due date for these payments, until the entire outstanding balance has been received.

**STIPULATED PENALTIES**

14. **Failure to Pay Civil Penalties.** The Defendant shall pay a stipulated penalty to the United States of one thousand dollars (\$1,000) per day for each day that Defendant fails to make the full payment required in Paragraph 6. Payment of a stipulated penalty for failure to make the payment required under Paragraph 6 shall be in accordance with the payment procedures outlined in Paragraph 8. The Defendant shall pay a stipulated penalty to the State of one thousand dollars (\$1,000) per day for each day that Defendant fails to make the full payment required in Paragraph 11.

15. **Written Notice of Penalties.** The United States or the State may give the Defendant written notification that it has failed to make a payment as required by Paragraphs 6 or 11. Such notice shall describe the noncompliance, and make a demand for the full payment due and payment of the applicable penalties. However, the penalties provided for in Paragraph 13 shall be owed and shall accrue regardless of

whether or not the Defendant has been notified of any non-compliance. The Defendant shall pay stipulated penalties within thirty (30) days from the date a written demand for such penalties is mailed.

16. Any stipulated penalty payments shall be accompanied by a reference to this Decree, and be identified as "Stipulated Penalties." Notice of payment of a stipulated penalty shall be provided to the United States and the State in the manner specified in Paragraphs 9 and 11. Stipulated penalties shall begin to accrue interest on the day after payment is due at the rate specified under 28 U.S.C. § 1961 and Neb. Rev. Stat. §45-103 and shall continue to accrue interest until full payment is made. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree.

17. Notwithstanding any other provision of this Section, the United States and/or the State may, in their unreviewable discretion, waive any portion of stipulated penalties or interest to which that party otherwise is entitled that have accrued pursuant to this Decree.

18. Nothing in this Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Defendant's violation of this Decree or of the statutes and regulations upon which it is based.

19. The City's duty to comply with the terms of this Consent Decree is not

contingent on the receipt of federal or state grant funds or the City's financial capabilities. Failure to comply is not excused by the lack of federal or state grant funds, or by the processing of any applications for the same, or by the City's financial capabilities.

**EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

20. This Consent Decree resolves the claims for civil penalties for the violations alleged in the Complaint filed by the United States and the State of Nebraska in this action through the date of lodging of this Consent Decree.

21. The United States and the State of Nebraska reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, unless expressly stated in the Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or State of Nebraska to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, unless expressly specified in this Consent Decree. The United States and State of Nebraska reserve all rights against Defendant with respect to criminal liability. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the City's POTW, whether related to the violations addressed in this Consent Decree or otherwise.

22. In any subsequent administrative or judicial proceeding initiated by the

United States or the State for injunctive relief, civil penalties, other appropriate relief relating to the City's POTW or violations, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 20.

23. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. The City is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and the City's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits. The United States and the State do not by their consent to the entry of this Consent Decree, warrant or aver in any manner that the City's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, 33 U.S.C. § 1251, et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

24. This Consent Decree does not limit or affect the rights of the Parties against any third parties, not party to this Consent Decree, nor does it limit the rights of

third parties, not party to this Consent Decree, against the City, except as otherwise provided by law.

25. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

#### **MODIFICATION**

26. **Material Modifications.** Material modifications to the Decree may be made only by written agreement of the Parties and the approval of the Court.

27. **Non-Material Modifications.** Non-material modifications of the Decree may be made only by written agreement of the Parties, and will become effective upon their filing with the Court.

#### **NOTICES**

28. Except as specified otherwise, when the parties transmit written notification (including all reports) or communication required by or in conjunction with the terms of the Consent Decree with the EPA, the United States Department of Justice, the State of Nebraska, and the City, the notification shall be addressed as follows:

**As to the United States Department of Justice:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Post Office Box 7611  
Washington, D.C. 20044-7611  
Reference Case No. 90-5-1-1-09326

Eric D. Albert

Environmental Enforcement Section  
P.O. Box 7611 Ben Franklin Station  
Washington, DC 20044-7611  
(202) 305-0439  
Fax: (202) 514-4180

As to U.S. EPA :

Chief, Water Enforcement Branch  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency, Region  
7901 N. 5th Street  
Kansas City, Kansas 66101

As to the State:

Katherine J. Spohn  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68509-8920  
(402) 471-2682  
Fax: (402) 471-2957

Steven Moeller, Esq.  
Nebraska Department of Environmental Quality  
1200 N Street, Suite 400  
PO Box 98922  
Lincoln, NE 68509-8922

As to City of West Point:

Thomas Goulette, City Administrator  
Richard Moodie, City Attorney  
444 S. Main Street  
P.O. Box 327  
West Point, NE 68788-0327

29. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

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30. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

**RETENTION OF JURISDICTION**

31. This Court retains jurisdiction over both the subject matter of this Decree and the Parties for the duration of the performance of the terms and provisions of this Decree for the purpose of enabling any of the Parties to apply to the Court for such further order, direction, and relief as may be necessary or appropriate to enforce compliance with its terms or to enable all of the Parties to apply to the Court for the material modification of this Decree.

**LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

32. This proposed Decree shall be lodged with the Court for a period of thirty (30) days from date of lodging for public notice and comment in accordance with 28 C.F.R. § 50.7.

33. The United States reserves the right to withdraw its consent if the comments regarding the Decree disclose facts or considerations which indicate that the Decree is inappropriate, improper or inadequate. The Defendant and the State of Nebraska consent to the entry of this Decree without any reservation.

34. If for any reason the United States withdraws its consent pursuant to Paragraph 33, or if the Court should decline to approve this Decree in the form

presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**FINAL JUDGMENT**

35. Upon approval and entry of this Decree by the Court, this Decree shall constitute a final judgment between and among the United States, the State and the Defendant.

**EFFECTIVE DATE**

36. The effective date of this Decree shall be the date this Decree is entered by the Court.

**COSTS**

37. The parties shall bear their own costs of this action, including attorney fees, except if the Settling Defendant fails to make any payment required under Paragraphs 6, 11, 12, or 14 (Civil Penalties) (State SEP) or (Stipulated Penalties) of this Decree when due, and the United States and/or the State file(s) with the Court a motion to enforce this Decree or any other application for such payment, and: (1) the United States and/or the State thereafter receives a payment; (2) an order is issued directing payment of any portion of the amount sought by the United States and/or the State; or (3) the action is settled in a manner in which the United States and/or the State receives any portion of the amount sought, the Settling Defendant shall reimburse the United States and/or the

State for all costs arising from such motion, complaint or application, including but not limited to costs of attorney time.

38. The Defendant is entitled to assert any arguments or defenses, claims or counterclaims, available to it by law in an effort to mitigate such costs or fees.

#### **INTEGRATION**

39. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

#### **SIGNATORIES/SERVICE**

40. The undersigned representatives of the Parties certify that they are fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such parties to this document.

41. The Defendant hereby agrees not to oppose entry of this Decree by this Court or to challenge any provision of this.

42. The Defendant hereby agrees to accept service by mail to the address listed in Paragraph 28 and to waive the formal service requirements set forth in Rule 4 of

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the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

**TERMINATION**

43. Upon West Point's complete satisfaction of all requirements hereunder, the Parties shall jointly move this Court to terminate this Consent Decree.

**FINAL JUDGMENT**

44. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the State of Nebraska, and the City. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 15<sup>th</sup> DAY OF October 2009.

s/ Richard G. Kopf  
Honorable Richard G. Kopf  
UNITED STATES DISTRICT JUDGE

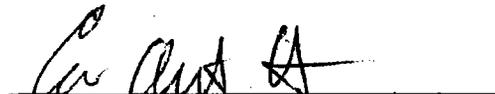
THE UNDERSIGNED PARTY enters in to this Decree in the matter of *United States and State of Nebraska v. City of West Point, Nebraska, et al.*

FOR THE UNITED STATES:



Ellen M. Mahan  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice

8/13/09  
Date



ERIC D. ALBERT  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
202-514-2800  
eric.albert@usdoj.gov

8/13/09  
Date

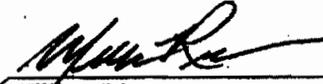
JOE W. STECHER  
United States Attorney  
District of Nebraska



LAURIE A. KELLY  
Assistant United States Attorney, Mass. Bar No. 557575  
District of Nebraska  
1620 Dodge Street  
Suite 1400  
Omaha, Nebraska 68102-1506  
(402) 661-3700  
laurie.kelly@usdoj.gov

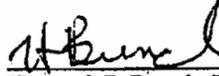
8/13/09  
Date

8/12/09  
DATE



William Rice  
Acting Regional Administrator  
U.S. Environmental Protection Agency, Region 7  
Kansas City, Kansas 66101

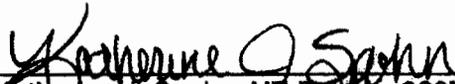
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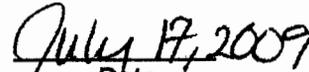


Howard C. Bunch, Esq.  
Sr. Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

THE UNDERSIGNED PARTY enters in to this Decree in the matter of *United States and State of Nebraska v. City of West Point, Nebraska, et al.*

FOR THE STATE OF NEBRASKA:

  
Katherine J. Spohn, NE Bar No. 22979  
Assistant Attorney General  
Office of the Nebraska Attorney General  
2115 State Capitol  
Lincoln, NE 68509-8920  
(402) 471-2682  
Fax: (402) 471-2957  
Katie.spohn@nebraska.gov

  
Date

THE UNDERSIGNED PARTY enters in to this Decree in the matter of *United States and State of Nebraska v. City of West Point, Nebraska, et al.*

FOR CITY OF WEST POINT, NEBRASKA:



Marlene E. Johnson  
Mayor  
City of West Point  
444 South Main Street.  
P.O. Box 327  
West Point NE. 68788