

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE UNITED STATES OF AMERICA)
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 and)
)
 THE STATE OF NEBRASKA,)
)
 Plaintiffs,)
)
 v.) CIVIL ACTION NO. 08CV00293
)
 PECKHAM, INC. (f/k/a West Point Dairy Products,))
 Inc.) and MARK PECKHAM,)
)
 Defendants.)
 _____)
 _____)
 _____)

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 civil penalties brought against Peckham, Inc. and Mark Peckham, for violations of the Clean Water Act, 33 U.S.C. §§ 1311 and 1317.
2. Plaintiffs seek civil penalties against Defendants Peckham, Inc. and Mark Peckham for causing or contributing to the City of West Point’s violations of its National

Pollution Discharge Elimination System (“NPDES”) permit, in violation of 33 U.S.C. §§ 1311 and 1317, and the Pretreatment Standards at 40 C.F.R. Part 403, during the period that those Defendants owned and/or operated West Point Dairy Products, Inc.

JURISDICTION AND VENUE

3. 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).

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

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

6. 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 or were doing business and in which the alleged violations occurred.

DEFENDANTS

Peckham, Inc.

7. 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.

8. 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.

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

10. 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

11. 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.

12. Mark Peckham is a "person" as defined by 33 U.S.C. § 1362(5).

13. 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.

14. During all times relevant to this Complaint, West Point Dairy Products, Inc./Peckham, Inc., was an "Industrial User" 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

15. 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).

16. 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.

17. 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).

18. “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).

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

20. 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.

21. 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).

22. 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.

23. 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).

24. 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.

25. 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).

26. 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).

27. 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).

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

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

30. 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).

31. 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

32. 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.

33. 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.

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

35. 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.

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

37. During all times relevant to this Complaint, the West Point Dairy facility was an industrial user 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.

38. 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).

39. 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.

40. 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.

41. 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).”

42. 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.

43. 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

Discharges in Violation of the City of West Point's NPDES Permit

44. Nebraska Department of Environmental Quality ("NDEQ") inspections of the POTW noted as early as 1984 that the POTW was "poorly maintained." Multiple subsequent inspections cite the POTW for non-compliance with its NPDES permit and the CWA.

45. 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.

46. 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.

47. 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.

48. 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.

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

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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

55. 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.

FIRST CLAIM FOR RELIEF

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

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

57. 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.

58. 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.

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

60. 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.

SECOND CLAIM FOR RELIEF

(Personal Liability of Mark Peckham)

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

62. 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).

63. 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.

64. 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. 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.
2. Award the United States its costs of this action.
3. 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,

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