

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA)	Civil Action No. _____
)	
Plaintiff,)	Plaintiff-Intervenor
)	
v.)	Nebraska’s Complaint
)	In Intervention
)	
CITY OF WAKEFIELD, NE,)	
A political subdivision of the)	
State of Nebraska, and M.G.)	
WALDBAUM COMPANY,)	
)	
Defendants.)	

COMPLAINT IN INTERVENTION

The State of Nebraska through the Nebraska Department of Environmental Quality, State of Nebraska (“NDEQ” or “the Department”), with the concurrence of the Attorney General of the State of Nebraska, alleges:

NATURE OF ACTION

1. This is a civil action brought against the City of Wakefield, Nebraska (“Wakefield”), and M.G. Waldbaum Company (“Waldbaum”), pursuant to the Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501 *et seq.* and the Clean Water Act (“CWA”), 33 U.S.C. § 1319(b) and (d), and the applicable state and federal regulations, for alleged environmental violations at their wastewater

collection and treatment facilities located in Dixon County, Nebraska and M.G. Waldbaum's egg farming and processing facilities in or near Wakefield, Nebraska.

2. At all times material herein, the Defendant, City of Wakefield, Nebraska ("Wakefield"), a political subdivision of the State of Nebraska, owned and operated a wastewater collection and treatment facility located in Dixon County, Nebraska. This facility, also referred to as a Publicly Owned Treatment Works facility ("POTW"), discharges wastewater directly into Logan Creek. NDEQ issued a National Pollutant Discharge Elimination System (NPDES) permit numbered 0049018 to Wakefield in 2001, which expired on March 31, 2006, and contained final effluent limitations for Wakefield's POTW. This permit was most recently reissued on April 1, 2006 and expires on October 31, 2008.

3. At all times material herein, the Defendant, Defendant M. G. Waldbaum Company ("Waldbaum"), a wholly owned subsidiary of Michael Foods Inc., owned and operated an egg processing facility in Wakefield, Nebraska. NDEQ issued Waldbaum a NPDES Pretreatment permit numbered NE0113735 on April 1, 2001, which expired on March 31, 2006, and allowed discharge of wastewater directly into the wastewater treatment facility owned and operated by Wakefield. Prior to March 31, 2006, Permit Number NE 0113735 prohibited Waldbaum from causing pass through and/or interference at Wakefield's POTW.

This permit was most recently reissued on April 1, 2006 and expires on October 31, 2008.

4. During the past five years, Waldbaum has also owned and operated several egg laying farms, including Husker Pride Farm (“Husker Pride”) and Big Red Farm (“Big Red”), pullet farms and egg processing facilities in or near the City of Wakefield, Nebraska.

5. During all times relevant to this Complaint, Waldbaum was the sole industrial user of Wakefield’s nine industrial wastewater lagoons. On or about April 1, 1006, Waldbaum became the owner and operator of the industrial wastewater lagoons previously owned and operated by the City of Wakefield. Wakefield continues to own and operate five municipal wastewater lagoons.

6. The Plaintiff-Intervenor is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. §81-1504(1) (Reissue 1999) of exercising exclusive supervision, administration and enforcement of the Environmental Protection Act, Neb. Rev. Stat. §81-1501 (Cum. Supp. 2004, Supp. 2005) *et seq.* and all rules and regulations promulgated thereunder.

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1355; Section 309(b) of the CWA, 33 U.S.C. § 1319(b); and as pendent State claims.

8. Venue is proper in this District pursuant to Section 309(b) of the

CWA, 33 U.S.C. § 1319(b); Section 309(b) of the CWA, 33 U.S.C. § 1319(f), because the Defendants are located or are doing business in this district.

9. The CWA statutory background set forth in paragraphs seventeen (17) through thirty-eight (38) of the Complaint filed by the United States (FN 1-1) is incorporated herein by reference.

10. EPA Approved the State of Nebraska's NPDES permit program under the authority of Section 402(b) of the CWA, 33 U.S.C. § 1342(b), in June 1974.

11. EPA Approved the State of Nebraska's Pretreatment program under the authority of Section 402(b) of the CWA, 33 U.S.C. § 1342(b), in September 1984.

FIRST CLAIM

(WAKEFIELD'S VIOLATION OF PERMIT LIMITS AND CONDITIONS)

12. The allegations in the foregoing paragraphs are incorporated herein by reference.

13. Pursuant to Neb. Rev. Stat. §81-1508.02 it is unlawful to violate any permit or license condition or limitation or the rules or regulations adopted and promulgated pursuant to the Nebraska Environmental Protection Act. Further, Neb. Rev. Stat. §81-1508.02 (2) states a civil penalty is provided in the amount of

not more than \$10,000 (Ten thousand dollars) for each day of violation, and in the case of a continuing violation, each day shall constitute a separate offense.

14. Pursuant to the Nebraska Environmental Quality Council's authority to adopt rules for the issuance of operating permits for sources of water pollution, as expressed in Neb. Rev. Stat. §81-1505(11), (Reissue 1999), the Council adopted a rule and standard codified as Title 119, Rules and Regulations Pertaining To The Issuance of Permits Under the National Pollutant Discharge Elimination System, and Title 127, Rules and Regulations Governing the Nebraska Pretreatment Program.

15. At all times material herein, the regulatory requirements in Title 119 and/or Title 127 were in full force and effect.

16. On or about April 1, 2001, the Plaintiff reissued a National Pollution Discharge Elimination System (NPDES) permit to the Defendant Wakefield, pursuant to Title 119, authorizing the discharge of wastewater to Logan Creek in accordance with the terms, conditions and limitations set out in the permit. This permit required the Defendant Wakefield to meet certain limitations on discharges of pollutants to Logan Creek. This permit was effective until March 31, 2006, and was reissued on April 1, 2006.

17. Defendant Wakefield violated its NPDES permit limits for Dissolved Oxygen, Total Suspended Solids, Carbonaceous Biochemical Oxygen Demand, and Acute Toxicity *Pimephales promelas* on various dates during the past five years.

18. On various dates during the past five years, Defendant Wakefield violated Title 119, Chapter, 24, Section 001, (1992 version); and Title 119 Chapter 14, Section 001.04G1 (2005 version) which requires reporting of noncompliance to the Department.

19. On various dates during the past five years, Defendant Wakefield violated Title 119, Chapter 36, Section 001 (1992 version); and Title 119, Chapter 14, Section 001.01E (2005 version) which states that a discharge of pollutants in excess of limitations found in the NPDES permit is a violation of said permit.

20. On various dates during the past five years, Defendant Wakefield has violated the requirements of its NPDES permit including, among other things, monitoring and reporting requirements, operation and maintenance by certified operators, and a requirement that effluent discharges shall not cause noxious odors, floating, suspended colloidal or settleable materials that produce objectionable films, colors, turbidity or deposits.

SECOND CLAIM

(WALDBAUM'S INTERFERENCE AND/OR PASSTHROUGH AT THE POTW)

21. The allegations in the foregoing paragraphs are incorporated herein by reference.

22. During the past five years, Waldbaum has been sending an average daily flow to the POTW greater than the POTW is designed to handle or capable of handling. During this time period, Waldbaum has increased the volume and strength of wastewater discharged to the POTW.

23. Waldbaum's discharges to the POTW, alone or in conjunction with the discharge or discharges from other sources, have caused the City to violate the final effluent limitations of NPDES Permit number 0049018.

24. Waldbaum's discharges to the POTW, alone or in conjunction with the discharge or discharges from other sources, have caused Wakefield to violate the Standard Conditions of NPDES Permit Number NE 0049018, by creating conditions under which Wakefield was unable to maintain adequate freeboard in the lagoon system.

25. On various dates during the past five years, Waldbaum violated its Pretreatment permit and Title 127, Nebraska Administrative Code, Chapter 3, Section 001, and Title 119, Nebraska Administrative Code, by inhibiting, passing through, or interfering with the operation and performance of the Wakefield wastewater treatment plant for Dissolved Oxygen, Total Suspended Solids, Carbonaceous Biochemical Oxygen Demand., Acute Toxicity *Pimephales promela*, and Acute Toxicity *Ceriodaphnia sp.*

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

THIRD CLAIM

(HUSKER PRIDE VIOLATIONS)

27. The allegations in the foregoing paragraphs are incorporated herein by reference.

28. At all times material herein, Waldbaum owned and operated the Husker Pride facility located near Wakefield.

29. Husker Pride was and is used by Waldbaum for egg laying, breaking and washing and consists of pasture land, maintenance buildings, and 18 egg laying houses. Husker Pride has a total capacity of approximately 2.5 million confined laying hens. Each of the 18 laying houses confines approximately 140,000 laying hens.

30. The facility confines laying hens for a total of 45 days or more in a given 12 month period.

31. Neither crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion of the lot or facility.

32. The facility is a “concentrated animal feeding operation” as that term is defined at 40 C.F.R. § 122.23. The definition in 40 C.F.R. § 122.23 has been adopted by the State of Nebraska in Nebraska Revised Statutes § 54-2424.

33. During an EPA inspection on July 1, 2003, Waldbaum was storing approximately 10,000 tons of manure outside at Husker Pride in a large storage pile up gradient from an unnamed drainage ditch that leads to Logan Creek.

34. Over the past five years, Waldbaum has periodically stored large piles of manure outside at the Husker Pride facility exposed to storm events of a magnitude where runoff could be expected to occur without adequate runoff controls.

35. Pursuant to Neb. Rev. Stat. §81-1506 (1) (a) (Reissue 1999), it is

unlawful for any person to place or cause to be placed wastes in a location where they are likely to cause pollution of any air, waters, or land of the State.

36. Waldbaum does not currently have and has never had an NPDES permit that would authorize a discharge of livestock waste from the Husker Pride facility.

37. Pursuant to Neb. Rev. Stat. §81-1508.02 (1) and (2), a civil penalty is provided in the amount of not more than \$10,000 (ten thousand dollars) for each day of violation of Neb. Rev. Stat. §81-1506. In case of a continuing violation, each day shall constitute a separate offense.

FOURTH CLAIM

(WALDBAUM'S VIOLATION OF NPDES PERMIT)

38. The allegations in the foregoing paragraphs are incorporated herein by reference.

39. During all times relevant to this Complaint, Waldbaum's NPDES permit NE0113735 has required that "[s]olids, sludge, filter backwash or other pollutants removed in the course of treatment or control of wastewater shall be disposed of at a site and in a manner approved by [NDEQ]."

40. Prior to September 2003, Waldbaum had disposed of at least 165 million gallons of egg processing wastes ("sludge") over 160 acres of pasture at Husker Pride and Big Red Farms at sites and in a manner not approved by NDEQ.

41. An EPA inspection in July 2003 identified this sludge disposal practice as a potential violation, and Waldbaum ceased its improper sludge disposal practice in September 2003.

WHEREFORE, the Plaintiff prays that judgment be entered in favor of the Plaintiff and against the Defendants in the form of civil penalties as provided in Neb. Rev. Stat. § 81-1508.02, that defendants be enjoined from further violating the CWA and the Environmental Protection Act as described above, and further that all costs of this action be taxed to Defendants.

Dated this 9th day of January, 2007.

**Nebraska Department of
Environmental Quality, State of
Nebraska, Plaintiff-Intervenor.**

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2007, I electronically filed the foregoing Brief in Support with the Clerk of the Court using the CM/ECF system which sent notification of such filing to attorneys for Defendant.

s/ Jodi M. Fenner
Jodi M. Fenner
Assistant Attorney General