

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SIERRA CLUB,)
)
 Plaintiff,)
) Civil Action
 v.) File No. _____
)
 EMMPAK FOODS, INC.,) **COMPLAINT**
)
)
 Defendant.)
 _____)

COMPLAINT

The Sierra Club, by and through its counsel, Midwest Environmental Advocates, Inc., hereby alleges:

I. INTRODUCTION

1. This is a civil action brought under the citizen suit provision, 33 U.S.C. § 1365, of the Federal Water Pollution Control Act (commonly known as and hereinafter referred to as the “Clean Water Act” or “CWA”), 33 U.S.C. §§ 1251 *et seq.* The Sierra Club is bringing this citizen suit in order to remedy four and a half years of violations of the Wastewater Permit 5.01 (“Permit”) held by Emmpak Foods, Inc. (“Emmpak”) for its slaughterhouse and meat packing facility located in Milwaukee, Wisconsin.

2. Under the terms of its Permit, Emmpak discharges at least 188 million gallons of wastewater annually into the sewer system owned by the Milwaukee Metropolitan Sewage District (“MMSD”).

3. Emmpak has routinely and repeatedly discharged oil and grease at levels greater

than those allowed by its Permit, in violation of sections 301 and 307 of the CWA, 33 U.S.C. §§ 1311, 1317.

4. When MMSD's system is working properly, Emmpak's wastewater is treated at an MMSD wastewater treatment plant and then released into Lake Michigan.

5. When the MMSD system is not working properly, as has occurred on numerous occasions, MMSD has discharged untreated or partially treated wastewater into Lake Michigan and other local waterways, including the Menomonee River.

6. When there are sewage overflows, Emmpak's excessive amounts of oil and grease may enter Lake Michigan and the Menomonee River untreated or partially treated.

7. Emmpak's violations of its Permit have harmed the individual members of the Sierra Club's recreational and aesthetic interests in a clean and healthy Lake Michigan and Menomonee River.

II. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (Clean Water Act's citizen suit provision) and 28 U.S.C. § 1331 (federal question jurisdiction).

9. In accordance with the notice requirements of the Clean Water Act's citizen suit provision, on or around August 13, 2004, the Sierra Club provided written notice to Emmpak of its violations of the CWA, local regulations, and its Permit, and of the Sierra Club's intention to file suit at the end of the 60 day period. The Sierra Club similarly provided notice to all entities required to receive such notice as required by the CWA, 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.2.

10. More than sixty days have passed since notice was served on the Defendant and

the state and federal agencies. Upon information and belief, Plaintiff alleges that neither the United States Environmental Protection Agency nor the State of Wisconsin has commenced or is diligently prosecuting a court action to redress the violations alleged in this complaint. This action is not barred by any prior administrative penalty under Section 309(g) of the Act, 33 U.S.C. § 1319(g).

11. Venue is appropriate in this judicial district and in this court pursuant to 33 U.S.C. § 1365(c), in that the violations of the effluent standards and limitations giving rise to the claims in this suit occurred in the Eastern District of Wisconsin.

III. PARTIES

A. Plaintiff

12. The Plaintiff, the Sierra Club, is a foreign 501(c)(4) nonprofit organization incorporated under California law with over 700,000 members nationwide. The Sierra Club's principal office is located at 85 Second Street, 2nd Floor, San Francisco, California, 94105-3441. The Sierra Club is dedicated to exploring, enjoying and protecting the wild places of the Earth, to practicing and promoting the responsible use of the Earth's resources and ecosystems, to educating and enlisting humanity to protect and restore the quality of the natural and human environment, and to using all lawful means to carry out these objectives.

13. The Great Waters Group of the Sierra Club is a local member group of the John Muir Chapter of the Sierra Club. The Great Waters Group is based in Southeastern Wisconsin and represents approximately 3,200 members in Milwaukee, Ozaukee, Washington and Waukesha Counties. Similar to the national Sierra Club, the Great Waters Group's mission is to promote and protect the health of Wisconsin's natural environment for the use and enjoyment of the people of Wisconsin. Through local member groups like the Great Waters Group, the Sierra

Club actively advocates for the enforcement of local, state and federal environmental laws, including the CWA, to stop violators of these laws from receiving the economic benefits of pollution to the detriment of the public and their state's natural resources.

14. The Great Waters Group has a particular interest in the preservation and restoration of water quality in the lakes and waterways of Wisconsin because its members reside or own property on or near the Menomonee River and Lake Michigan in the Milwaukee area. The Sierra Club's members regularly use and enjoy these waters for kayaking, boating, and other forms of recreation, as well as aesthetic enjoyment.

15. Emmpak's past, present, and continuing excessive discharges of pollution in violation of its Permit directly harms the health, economic, recreational, aesthetic and environmental interests and well being of Sierra Club's members.

16. Enforcement of the provisions of the CWA, MMSD regulations, and the wastewater discharge Permit under which Emmpak is operating will stop illegal pollution and help restore and preserve water quality, thereby promoting the objectives of the Sierra Club and the use and enjoyment of the area by its individual members.

B. Defendant

17. Defendant Emmpak is a slaughterhouse and meat packaging and processing facility located in Milwaukee, Wisconsin, at several addresses within a several block radius, including 200 South Emmer Lane, Milwaukee, Wisconsin, 53233, and 1915 W. Canal Street, Milwaukee, Wisconsin, 53233, with a principal office address of PO Box 626, Minneapolis, Minnesota, 55440. As owner and operator of this facility, Emmpak is directly responsible for compliance with the pretreatment standards, monitoring requirements and other terms contained in its Permit and Chapter 11 of MMSD Regulations in accordance with CWA sections 301 and

307, (33 U.S.C. §§ 1311 and 1317) and Wis. Stat. § 200.45.

18. Upon information and belief, Emmpak (f/k/a Emembers Foods) is owned by Excel Corporation (“Excel”), a corporation headquartered in Witchita, Kansas, with a principal address of P.O. Box 2519, Wichita, Kansas, 67201, which operates numerous slaughterhouses and meat processing plants across North America; Excel is a subsidiary of Cargill Food Solutions.

19. Cargill Food Solutions is a privately held corporation based in Minneapolis, Minnesota, with a principal address of P.O. Box 626, Minneapolis, Minnesota, 53233.

IV. STATUTORY FRAMEWORK: THE CLEAN WATER ACT

20. Congress enacted the Clean Water Act (“CWA”) in 1972 to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C. § 1251(a). In the CWA, Congress identified the national goal of eliminating “the discharge of pollutants into navigable waters” by 1985. 33 U.S.C. § 1251(a)(1). In furtherance of this goal, the CWA provides a comprehensive approach for the regulation of pollutant discharges into the waters of the United States. Section 301 of the CWA prohibits the “discharge of any pollutant by any person” without proper authorization, such as a permit issued under sections 402 and 404 of the CWA. 33 U.S.C. § 1311(a).

21. One of the most common types of direct dischargers is a municipal wastewater treatment plant, commonly known as a Publicly Owned Treatment Works (“POTW”). POTWs are usually owned by a city or other local governmental entity, such as the Milwaukee Metropolitan Sewage District (“MMSD”). These dischargers must comply with the terms of their National Pollutant Discharge Elimination System, or “NPDES,” permits. 33 U.S.C. § 1342(h). Because Wisconsin has been delegated authority by the United States Environmental Protection Agency to implement CWA section 402, Wisconsin issues Wisconsin Pollutant

Discharge Elimination System (“WPDES”) permits to these dischargers pursuant to Section 283.31 of the Wisconsin Statutes.

22. There are also indirect dischargers, such as Emmpak, that produce wastewater with heavy pollutant loads and send it to POTWs. To protect POTWs and, in turn, navigable waters from being negatively impacted by these waste streams, the CWA also requires these industrial users to pre-treat their wastewater before sending it to a POTW. 33 U.S.C. § 1317. Pretreatment means using physical, chemical, biological, or other processes to reduce, render harmless, or eliminate pollutants prior to their discharge into a POTW. 40 C.F.R. § 403.3(q). Under the regulations promulgated by the United States Environmental Protection Agency (“USEPA”) to implement the CWA, municipalities, POTW’s and other local entities may promulgate specific local limits on pretreatment discharges. 40 C.F.R. § 403.8. These local limits are then fully enforceable and have the same legal stature as limits set by the USEPA under the CWA. 40 C.F.R. § 403.5(d).

23. Congress also provided for enforcement of the discharge limitations in the CWA through citizen suits like the present one. Citizens are authorized to bring a claim for a violation of any effluent standard or limitation under the CWA. 33 U.S.C. § 1365(a)(1)(A). Violation of a pretreatment standard or permit is a violation of an effluent standard or limitation and is actionable under the citizen suit provision of the Clean Water Act. 33 U.S.C. 1365(f); 40 C.F.R. § 403.5(d)

V. FACTUAL BACKGROUND: EMMPAK’S VIOLATIONS OF THE CLEAN WATER ACT

24. Upon information and belief, since at least 2000, Emmpak has operated a slaughterhouse and meat processing and packing operation in Milwaukee, Wisconsin, encompassing a several block radius including addresses at 1915 W. Canal Street and 200 South

Emmber Lane. The Emmpak facility consists of several buildings that lie within a one-half mile radius of each other. The largest building is the Peck Plant, where the slaughtering and boning of the cattle occurs. After the cattle are slaughtered and boned, the meat is sent to another building to be cooked and packaged or to be ground into hamburger meat. The remnants of the slaughter process remain on the killing floor, including animal bones, fat, blood, internal organs, bull rings, magnets, and wire.

25. Upon information and belief, Emmpak employees hose down the killing floor several times a day in an effort to wash away the remnants of the slaughter process. Among the pollutants produced by the slaughter and cleaning processes of the Emmpak facility, and found in its wastewater discharges, are excessive concentrations of oil and grease.

26. Discharges of oil and grease in excessive concentrations to MMSD's sewerage system can harm the POTW's treatment process. For example, oil and grease discharges can carry organic poisons to the POTW, creating an additional treatment burden on the POTW or a pollution risk in the event of a combined or sanitary sewer overflow.

27. Oil and grease in excessive concentrations can also restrict and clog sewer pipelines, limiting the wastewater-carrying capacity of MMSD sewerage pipes, thereby causing and contributing to the risk of sewage overflows into local waterways.

28. Oil and grease can also interfere with a POTW's ability to treat effluent with high levels of Biological Oxygen Demand ("BOD"), which consumes the available oxygen in the water and can harm fish and wildlife in Lake Michigan and other waters. High levels of BOD can create an additional treatment burden on the POTW or a pollution risk in the event of a sewerage overflow.

29. MMSD's continuing problem with sanitary and combined sewage overflows into

Lake Michigan and other area waterways has been well documented over the years, with the record amount of 4.6 billion gallons being released into Lake Michigan and local waterways in the Spring of 2004 alone.

30. On information and belief, sewage overflow events are likely to reoccur despite measures undertaken by MMSD to address and prevent the overflows.

31. Discharges of effluent containing high concentrations of oil and grease from an indirect discharger, such as Emmpak, may be directly discharged into Lake Michigan and local waterways during the course of combined or sanitary sewer overflows.

32. In accordance with Emmpak's designation by MMSD as a significant industrial user, on or around March 15, 2000, MMSD issued to Emmpak Wastewater Discharge Permit No. 5.01 ("Permit"). The Permit required Emmpak to comply, *inter alia*, with the oil and grease pretreatment limit of 300 mg/l in addition to other sampling, reporting, record-keeping, and waste management requirements.

33. In May of 2000, MMSD began sampling Emmpak's discharges to determine its compliance with its permitted limit for oil and grease of 300 mg/l.

34. In September of 2000, MMSD issued a Notice of Noncompliance and Notice of Continuing Violation to Emmpak for violations that occurred in May, July, August, September and October of 2000.

35. In February of 2001, MMSD issued a Notice of Violation to Emmpak for its additional oil and grease violations in the month of February 2001. Because of this noncompliance MMSD increased the frequency of sampling for oil and grease at the Emmpak facility to a minimum of once a month, to continue until Emmpak either ceased discharging or was in consistent compliance.

36. Over the course of the ensuing four years, this monthly monitoring and testing of the Emmpak facility has shown repeated, severe violations of the terms of the MMSD Permit. Emmpak's wastewater discharges have violated the oil and grease limit of 300 mg/l set forth under section 1.02(2) of the Permit and section 11.203 of MMSD's regulations, in some instances by as much as five, thirteen, and even twenty-one times greater than the allowable limit.

37. Since the issuance of the MMSD Permit, Emmpak has violated the 300 mg/l pretreatment limit on at least the following seventy-three dates:

SAMPLE DATE	RESULT (mg/L)
5/22/00	487
5/22/00	1,220
7/27/00	850
8/03/00	1,500
8/24/00	750
9/15/00	4,020
10/11/00	500
2/9/01	6,400
2/23/01	980
3/13/01	890
4/20/01	1,200
5/18/01	320
5/21/01	350
6/11/01	870
6/19/01	1,100
8/06/01	880
9/26/01	3,430
10/24/01	520
10/29/01	370
11/16/01	1,100
12/03/01	470
12/17/01	410
1/11/02	790
2/11/02	1,100
2/22/02	370
3/11/02	420
4/8/02	1,500

4/17/02	1,300
4/23/02	640
5/10/02	660
6/26/02	1,400
7/12/02	1,600
9/13/02	330
10/10/02	370
1/6/03	880
2/20/03	330
3/17/03	320
5/13/03	800
6/09/03	640
6/16/03	5,800
6/17/03	2,200
6/18/03	2,700
7/22/03	960
8/29/03	390
9/05/03	670
9/10/03	1,500
9/22/03	610
9/24/03	400
9/29/03	460
10/13/03	850
11/04/03	730
11/05/03	2,000
11/11/03	910
11/19/03	3,800
12/10/03	710
1/8/04	410
3/10/04	1,700
4/1/04	510
4/28/04	430
5/6/04	1,100 ¹
5/11/04	1,100 ²
5/17/04	780 ³
5/21/04	730 ⁴
5/24/04	670 ⁵
5/26/04	1,200 ⁶
6/1/04	730

¹ The highest sample from three grab samples, with an average of 610 mg/l computed by MMSD.

² The highest sample from four grab samples, with an average of 775 mg/l computed by MMSD.

³ Represents an average of three to four grab samples computed by MMSD.

⁴ The highest sample from two grab samples, with an average of 580 mg/l computed by MMSD.

⁵ The highest sample from four grab samples, with an average of 433 mg/l computed by MMSD.

⁶ The highest sample from four grab samples, with an average of 566 mg/l computed by MMSD.

6/4/04	460
6/15/04	1,300
7/09/04	420
7/26/04	330
8/02/04	570
8/13/04	370
8/25/04	350

38. These repeated violations, as set forth above, have the potential to prevent the proper operation of MMSD's sewerage lines and POTWs, and to adversely affect Sierra Club members and their interest in and use of a clean and healthy Lake Michigan and Menomonee River.

39. The ongoing violations identified in paragraph 37 and in the Notice of Intent are caused by Emmpak's ongoing failure to install adequate treatment technology or treatment practices that will consistently ensure that Emmpak's discharges will comply with the pretreatment limit of 300 mg/l for oil and grease.

40. On information and belief, Emmpak installed a Dissolved Air Flotation (DAF) system on or around October 8, 2004.

41. On information and belief, it is questionable whether the DAF system will ensure consistent, continuous compliance with the Permit. The DAF system may need to be combined with additional technology or work place practices to ensure consistent compliance.

42. Additionally, on information and belief, most DAF systems installed throughout the MMSD system have experienced multiple violations of effluent limits in the weeks following the installation.

VI. ALLEGATIONS

First Cause of Action: Violations of Permit, MMSD Regulations and the Clean Water Act

43. Plaintiff incorporates the allegations of paragraphs 1 through 42 inclusive, as though fully set forth herein.

44. Plaintiff alleges that since at least May of 2000 and continuing to the present, Emmpak has been discharging more than 300 mg/l of oil and grease in violation of section 1.02(2) of its Permit and section 11.203 of MMSD's regulations.

45. Each of the seventy-three foregoing violation dates from May 22, 2000 through August 25, 2004, and any violations thereafter, constitute a separate and distinct violation of the Permit; MMSD Regulations § 11.203; 33 U.S.C. § 1317(b) (requiring compliance with pretreatment standards); and 40 C.F.R. 403.5(d).

46. Because Emmpak has not installed appropriate pretreatment technology or implemented pretreatment practices that will provide a complete and permanent solution to its ongoing violations of the oil and grease pretreatment limit, Emmpak is reasonably likely to continue to violate its Permit in the future. As such, Emmpak's failure to adequately prevent these ongoing and future violations renders it in violation of the terms of the CWA, 33 U.S.C. § 1251 *et seq.*

47. By committing the acts and omissions alleged above, Emmpak is subject to an assessment of civil penalties pursuant to CWA sections 309(d) and 505, 33 U.S.C. §§ 1319(d) and 1365; 40 C.F.R. § 19.4, Table 1.

48. An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above will irreparably harm individual members of the Sierra Club and the citizens of the State of

Wisconsin, for which harm they have no plain, speedy or adequate remedy at law.

VII. PRAYER FOR RELIEF

WHEREFORE, the Sierra Club respectfully prays that this Court grant the following relief:

- (1) A declaration that Emmepak's violations of the terms of the Permit constitute violations of the CWA and its implementing regulations;
- (2) An award of civil penalties of up to \$32,500 per day for each violation of the Permit that occurred after March 15, 2004, and \$27,500 for each violation on or before March 15, 2004 and after January 30, 1997;
- (3) An injunction requiring Emmepak to take all actions necessary, including the permanent installation of appropriate treatment technology, to prevent violation of the CWA in the future;
- (4) A decision to retain jurisdiction of this matter to ensure compliance with its decree;
- (5) An award of reasonable plaintiffs' attorneys' fees, expert fees, and other costs; and
- (6) Such other and further relief as the Court finds proper.

Dated this 13th day of October, 2004.

Respectfully submitted,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

/s/ Jodi Habush Sinykin

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