

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel.,)
JIM MACY, Director,)
NEBRASKA DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
)
Plaintiff,)
)
v.)
)
THE WESTERN SUGAR COOPERATIVE,)
CORP.,)
)
Defendant.)

Case No. _____

COMPLAINT

COMES NOW Jim Macy, Director of the Nebraska Department of Environmental Quality, who institutes this action through Douglas J. Peterson, Nebraska Attorney General, on behalf of the State of Nebraska, as Plaintiff, and alleges as follows:

PARTIES AND INTERESTS

1. Plaintiff Nebraska Department of Environmental Quality (“NDEQ”) is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504 (Cum. Supp. 2016), to administer and enforce the Nebraska Environmental Protection Act (“NEPA”), Neb. Rev. Stat. § 81-1501 *et seq.* (Reissue 2014), and all rules, regulations, orders, and permits issued pursuant to NEPA.

2. Under NEPA, NDEQ is further charged with the duty to act as the water pollution and air pollution control agency for all purposes of the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and the Clean Air Act (“CAA”), 42 U.S.C. § 7401 *et seq.* Neb. Rev. Stat. § 81-1504(4). NDEQ is also charged with the duty to issue, revoke, modify, or deny permits consistent with rules and regulations. *Id.* § 81-1504(11).

3. Defendant Western Sugar Cooperative, Corporation (“Western Sugar”) is a Colorado corporation with its headquarters in Denver, Colorado. Western Sugar is registered as a foreign corporation in Nebraska. Western Sugar owns and operates a sugar beet processing facility at 2100 E. Overland, Scottsbluff, Nebraska 69361 (“Facility”).

4. Western Sugar is considered a “person” for purposes of NEPA. Neb. Rev. Stat. § 81-1502(10).

JURISDICTION AND VENUE

5. The District Court has subject-matter jurisdiction pursuant to Neb. Rev. Stat. § 24-302 (Reissue 2016).

6. Venue is proper in Scotts Bluff County pursuant to Neb. Rev. Stat. § 25-403.01 (Reissue 2016), as Western Sugar’s Facility is located in Scotts Bluff County and the events at issue took place in Scotts Bluff County.

LEGAL BACKGROUND

A. General.

7. NEPA provides NDEQ with the power to act as the state water and air pollution control agency for all purposes of the CWA and CAA. Neb. Rev. Stat. § 81-1504(4).

8. Pursuant to its authority in Neb. Rev. Stat. § 81-1505(13), the Nebraska Environmental Quality Council promulgated the following relevant rules and regulations:

- a. Title 117 of the Nebraska Administrative Code, *Nebraska Surface Water Quality Standards*;
- b. Title 119 of the Nebraska Administrative Code, *National Pollutant Discharge Elimination System (“NPDES”) Regulations*; and
- c. Title 129 of the Nebraska Administrative Code, *Nebraska Air Quality Regulations*.

B. Water.

9. NEPA makes it unlawful “[t]o cause pollution of any air, waters, or land of the state or to place any wastes in a location where they are likely to cause pollution of the air, waters, or land of the state; or ... [t]o discharge or emit any wastes into any air, waters, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established therefor by the council.” Neb. Rev. Stat. §1506(1).

10. “Wastes” are defined as “sewage, industrial waste, and all other liquid, gaseous, solid, radioactive, or other substances which may pollute or tend to pollute any air, land, or waters of the state” Neb. Rev. Stat. § 81-1502(14).

11. “Water pollution” means “the manmade or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 117 Neb. Admin. Code § 1-079.

12. “Water quality” means “the biological, chemical, physical, and radiological integrity of water.” “Physical integrity” means “the physical properties (e.g., temperature, turbidity, sedimentation) of a body of water.” 117 Neb. Admin. Code § 1-080.

13. Beneficial use of surface waters includes aesthetics. 117 Neb. Admin. Code § 4-001. “To be aesthetically acceptable, waters shall be free from human-induced pollution which causes: 1) noxious odors; 2) floating, suspended, colloidal, or setteable materials that produce objectionable films, colors, turbidity, or deposits” 117 Neb. Admin. Code § 4-005.

14. NEPA also makes it unlawful “to ... [d]ischarge any pollutant into waters of the state without first obtaining a permit as required by the National Pollutant Discharge Elimination System created by the [CWA] ... and by rules and regulations adopted and promulgated pursuant to section 81-1505[.]” Neb. Rev. Stat. § 1506(2); *see also* 119 Neb. Admin. Code § 2-001.

15. “Discharge” means “accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of pollutants into any waters of the State or in a place which will likely reach waters of the state.” 119 Neb. Admin. Code § 1-038.

16. “Pollutant” means, *inter alia*, “solid waste ... and industrial, municipal, and agricultural waste discharged into water.” 119 Neb. Admin. Code § 1-087.

17. “Waters of the state” means “all waters within the jurisdiction of this state including all streams, lakes, ponds, impounding reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigations systems, drainage systems, and all other bodies or accumulation of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state.” 119 Neb. Admin. Code § 1-125.

18. “Point source” means “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container ... from which pollutants are or may be discharged.” 119 Neb. Admin. Code § 1-086.

C. Air.

Fugitive Dust

19. No person, including a private or public corporation, “may cause or permit the handling, transporting or storage of any material in a manner which may allow particular matter to become airborne in such quantities and concentrations that it remains visible in the ambient air beyond the premises where it originates.” 129 Neb. Admin. Code §§ 32-001, 1-109.

20. “Fugitive dust” means “solid airborne particulate matter emitted from any source other than a flue or stack.” 129 Neb. Admin. Code § 1-061.

21. “Particulate matter” means “any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers.” 129 Neb. Admin. Code § 1-103.

22. “Ambient air” means “the portion of the atmosphere, external to buildings, to which the general public has access.” 129 Neb. Admin. Code § 1-016.

Failure to Comply with Permit Conditions

23. It is unlawful to “[v]iolate any term or condition of an air pollution permit or any emission limit set in the permit; or ... [v]iolate any emission limit or air quality standard established by the council.” Neb. Rev. Stat. § 81-1506(4); *see also* 129 Neb. Admin. Code § 8-007.01.

Opacity

24. No person, including a private or public corporation, “shall cause or allow emissions, from any source, which are of an opacity equal to or greater than twenty percent (20%), as evaluated by an EPA-approved method” 129 Neb. Admin. Code §§ 20-004, 1-109.

25. “Opacity” means a state which renders material partially or wholly impervious to rays of light and causes obstruction of an observer’s view.” 129 Neb. Admin. Code § 1-095.

26. “Method 9” is “a visual determination of the opacity of emissions from a stationary source” 129 Neb. Admin. Code § 1-084.

Operation and Monitoring of Coal-Fired Boilers

27. NDEQ has adopted and incorporated the following “National Emissions Standards for Hazardous Air Pollutants” (“NESHAP”), published at 40 C.F.R. Part 63: 001.71 Industrial, Commercial, and Institutional Boilers (area sources), Subpart JJJJJJ. 129 Neb. Admin. Code § 28-001; *see* 40 C.F.R. § 63.11236(a). As such, the requirements of 40 C.F.R. Part 63, Subpart JJJJJJ are incorporated into Title 129 of the Nebraska Administrative Code—*Nebraska Air Quality Regulations*.

28. The owner or operator must comply with each operating limit specified in Table 3 to subpart JJJJJ. 40 C.F.R. § 63.11201. Specifically, the following applicable operating limits:

If you demonstrate compliance with applicable emission limits using...	You must meet these operating limits except during period of startup and shutdown...
7. Performance stacking testing	For boilers that demonstrate compliance with a performance stack test, maintain the operating load of each unit such that it does not exceed 110 percent of the average operating load recorded during the most recent performance stack test.
8. Oxygen analyzer system	For boilers subject to a CO emission limit that demonstrate compliance with an oxygen analyzer system as specified in § 63.11224(a), maintain the 30-day rolling average oxygen level at or above the minimum oxygen level as defined in § 63.11237. This requirement does not apply to units that install an oxygen trim system since these units will set the trim system to the level specified in § 63.11224(a)(7).

40 C.F.R. Part 63, Subpart JJJJJ, Table 3.

29. The owner or operator must “demonstrate continuous compliance with each emission limit and operating limit in Tables 1 and 3 ... that applies ... according to the methods specified in Table 7” 40 C.F.R. § 63.11222. Specifically, the following:

If you must meet the following operating limits...	You must demonstrate continuous compliance by...
7. Oxygen content	(a) Continuously monitor the oxygen content of the flue gas according to § 63.11224 (This requirement does not apply to units that install an oxygen trim system since these units will set the trim system to the level specified in § 63.11224(a)(7)); and (b) Reducing the data to 30-day rolling averages; and (c) Maintaining the 30-day rolling average oxygen content at or above the minimum oxygen level established during the most recent CO performance test.

9. Boiler operating load	(a) Collecting operating load data (fuel feed rate or steam generation data) every 15 minutes; and (b) Reducing the data to 30-day rolling averages; and (c) Maintaining the 30-day rolling average at or below the operating limit established during the performance test according to § 63.11212(c) and Table 6 to this subpart.
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40 C.F.R. Part 63, Subpart JJJJJ, Table 7.

Performance Stack Test Requirement

30. The owner or operator using a boiler with a heat input capacity of 10 million Btu or greater must conduct a performance stack test on a triennial basis and “must be completed no more than 37 months after the previous performance stack test.” 40 C.F.R. § 63.11220(a).

D. Record Keeping.

31. The owner or operator using stack testing to demonstrate compliance with emission limits must develop and maintain a site-specific monitoring plan. 40 C.F.R. § 63.11224(c). The site-specific monitoring plan must, *inter alia*, address ongoing data quality assurance procedures. 40 C.F.R. §§ 63.11224(c)(2)(ii), 63.8(d).

32. The owner or operator also must maintain records as follows:

- (5) Records of actions taken during periods of malfunction to minimize emissions in accordance with the general duty to minimize emissions in § 63.11205(a), including corrective actions to restore the malfunctioning boiler, air pollution control, or monitoring equipment to its normal or usual manner of operation.
- (6) You must keep the records of all inspection and monitoring data required by §§ 63.11221 and 63.11222, and the information identified in paragraphs (c)(6)(i) through (vi) of this section for each required inspection or monitoring.
 - (i) The date, place, and time of the monitoring event.
 - (ii) Person conducting the monitoring.

- (iii) Technique or method used.
- (iv) Operating conditions during the activity.
- (v) Results, including the date, time, and duration of the period from the time the monitoring indicated a problem to the time that monitoring indicated proper operation.
- (vi) Maintenance or corrective action taken (if applicable).

40 C.F.R. §§ 63.11225(c)(5) & (6).

33. In addition, the owner or operator must keep records “in a form suitable and readily available for expeditious review” “on-site or ... accessible from a central location by computer or other means” 40 C.F.R. § 63.11225(d). Each record must be kept for five years.

Id.

34. The owner or operator must also keep records of daily monitoring system checks. 40 C.F.R. § 63.8(c)(6); *see* 40 C.F.R. Part 63, Subpart JJJJJ, Table 8.

FACTUAL BACKGROUND

A. General.

35. At all times relevant, Western Sugar was engaged in sugar beet processing operations at the Facility.

36. As part of its operations, Western Sugar utilizes a retention pond at the Facility. The retention pond holds precipitated calcium carbonate and mud water produced during its operations. Western Sugar does not hold a NPDES permit for this retention pond.

37. Western Sugar holds a Class I Operating Permit (OPSR1-0024) (“Air Permit”), which was issued September 10, 2007. At all times relevant, the Air Permit was in effect.

38. The Air Permit covers operation of two 196 million Btu per hour coal-fired steam boilers that emit through a single stack at the Facility. Each boiler is equipped with a wet scrubber to remove particulate matter and with an oxygen analyzer designed to monitor the percentage of oxygen in the boiler flue gas.

B. Water Pollution and Discharge.

39. On April 18, 2017, water in the retention pond began percolating through an opening in the pond wall, but did not exit the Facility. Western Sugar began trying to shore up the wall to prevent a breach.

40. Later, on or about April 18, 2017, the wall of the retention pond completely breached causing precipitated calcium carbonate and mud water to spill into nearby road ditches, Winters Creek, and the North Platte River.

41. Approximately, 300,000 to 500,000 gallons of precipitated calcium carbonate and mud water exited the retention pond and reached the road ditches, Winters Creek, and the North Platter River.

42. The precipitated calcium carbonate and mud water are nonhazardous and reusable byproduct streams.

43. The precipitated calcium carbonate and mud water contained precipitated calcium carbonate, chemical oxygen demand (COD below), biological oxygen demand (BOD below), and ammonia. Grab samples were taken of the mud water, Winters Creek, and the North Platte River and showed:

	<u>COD</u>	<u>BOD</u>	<u>Ammonia</u>	<u>pH</u>
Winter Creek 4/19/17 5:30 AM	471	271	0.0	7.42
North Platte River 4/19/17 5:30 AM	515	296	0.0	7.47
Mud Water 1 4/19/17 1:00 AM	1650	948	22.1	5.1
Mud Water 2 4/19/17 1:00 AM	1650	948	20.2	5.06

44. The precipitated calcium carbonate and mud water left a foamy residue in the road ditches and on the banks of Winter Creek.

C. Fugitive Dust.

45. Western Sugar's Air Permit prohibits fugitive dust and requires Western Sugar to implement its EPA Region VII-approved Fugitive Dust Control Plan.

46. According to the Fugitive Dust Control Plan, Western Sugar must control dust so it does not remain visible beyond the Facility's boundary line.

47. On or about November 14, 2017, NDEQ employees observed fugitive dust emissions leaving the Facility and remaining visible beyond the Facility's boundary line.

D. Water Flow Rates for Boiler No. 1 and Boiler No. 2.

48. Western Sugar's Air Permit requires the minimum scrubber water feed rate established during performance testing to be maintained. It also requires daily records of the scrubber water feed rates to be kept.

49. The minimum scrubber water feed rate for Boiler No. 1 is 315 gallons per minute ("gpm").

50. The minimum scrubber water feed rate for Boiler No. 2 is 330 gpm.

51. Western Sugar kept daily records of the scrubber water feed rates and indicated where deviations occurred. Western Sugar submitted these daily records as part of its Semi-Annual Deviation Reports.

52. NDEQ received Western Sugar's Semi-Annual Deviation Report for July 1, 2015 through December 31, 2015 ("2015 Report") on April 1, 2016.

53. The 2015 Report showed Boiler No. 1 operated below its 315 gpm minimum scrubber water feed rate on three occasions in March 2015.

54. The 2015 Report showed Boiler No. 2 operated below its 330 gpm minimum scrubber water feed rate on nine occasions in December 2015.

55. NDEQ received Western Sugar's Semi-Annual Deviation Report for January 1, 2016 through December 31, 2016 ("2016 Report") on September 5, 2017.

56. The 2016 Report showed Boiler No. 1 operated below its 315 gpm minimum scrubber water feed rate on nine occasions between August 2016 and December 2016.

57. The 2016 Report showed Boiler No. 2 operated below its 330 gpm minimum scrubber water feed rate on or about eighty occasions between January 2016 and December 2016.

58. NDEQ received Western Sugar's Semi-Annual Deviation Report for July 7, 2017 through December 31, 2017 ("2017 Report") on April 3, 2018.

59. The 2017 Report showed Boiler No. 1 operated below its 315 gpm minimum scrubber water feed rate on three occasions between November 2017 and December 2017.

60. The 2017 Report showed Boiler No. 2 operated below its 330 gpm minimum scrubber water feed rate on or about forty-seven occasions between July 2017 and December 2017.

E. Opacity.

61. Western Sugar's Air Permit requires opacity of visible emissions to be less than 20% as evaluated by an EPA-approved method. If opacity is equal to or greater than 20%, the Air Permit requires Western Sugar to take corrective action and record the cause of the emissions, the corrective action taken, and the approximate opacity in increments of 5% after corrective action is taken.

62. Method 9 is an EPA-approved method used to evaluate opacity.

63. On or about July 11, 2017, NDEQ employees observed emissions coming from the coal-fired boilers stack. The opacity of the emissions appeared to be above 20%.

64. NDEQ employees conducted a Method 9 observation of the visible emissions.
65. The Method 9 observation resulted in a total period average of 52%.
66. On or about July 12, 2017, NDEQ employees again observed emissions coming from the coal-fired boilers stack. The opacity of the emissions appeared to be above 20%.

67. NDEQ employees conducted a Method 9 observation of the visible emissions.
68. The Method 9 observation resulted in a total period average of 36%.
69. On or about October 18, 2017, NDEQ employees observed emissions coming from the coal-fired boilers stack. The opacity of the emissions appeared to be above 20%.

70. NDEQ employees conducted a Method 9 observation of the visible emissions.
71. The Method 9 observation resulted in a total period average of 38.12%.
72. Western Sugar's 2017 Report also provided opacity was greater than or equal to 20% on three occasions between September 2017 and November 2017, including on or about October 18, 2017.

73. Western Sugar took no corrective actions or took follow-up readings for the July, September, and October 2017 opacity exceedances. According to the 2017 Report, Western Sugar took corrective action for the December 2017 opacity exceedance by taking the boiler down for repairs, but did not take any follow-up readings.

F. Boiler Operation Within Operating Limits.

74. The operating limit for Boiler No. 1 is 122,910 pounds per hour (pph).
75. The operating limit for Boiler No. 2 is 124,469 pph.
76. NDEQ received Western Sugar's Re-submittal of Annual Compliance Certification Reports for 2015 and 2016 ("2015/2016 Annual Report") on November 21, 2017.

77. The 2015/2016 Annual Report showed Boiler No. 1 operated approximately thirty days above the average allowable operating load in 2015.

78. The 2015/2016 Annual Report showed Boiler No. 2 operated approximately three days above the average allowable operating load in 2015.

79. The 2015/2016 Annual Report showed Boiler No. 1 operated approximately ten days above the average allowable operating load in 2016.

80. The 2015/2016 Annual Report showed Boiler No. 2 operated approximately 164 days above the average allowable operating load in 2016.

81. NDEQ received Western Sugar's Annual Compliance Certification Report for 2017 ("2017 Annual Report") on March 16, 2018.

82. The 2017 Annual Report showed Boiler No. 2 operated approximately 53 days above the average allowable operating load in 2017.

83. The minimum oxygen level for Boiler No. 1 is 7.5%.

84. The minimum oxygen level for Boiler No. 2 is 8.0%.

85. The 2015/2016 Annual Report showed Boiler No. 2 operated approximately 84 days below the 30-day rolling average oxygen level in 2015.

86. The 2015/2016 Annual Report showed Boiler No. 1 operated approximately 55 days below the 30-day rolling average oxygen level in 2016.

87. The 2015/2016 Annual Report showed Boiler No. 2 operated approximately 129 days below the 30-day rolling average oxygen level in 2016.

88. The 2017 Annual Report showed Boiler No. 1 operated approximately 36 days below the 30-day rolling average oxygen level in 2017.

89. The 2017 Annual Report showed Boiler No. 2 operated approximately 301 days below the 30-day rolling average oxygen level in 2017.

G. Performance Stack Test.

90. Owners or operators using boilers with a heat capacity of 10 million Btu or greater must conduct a performance stack test.

91. Western Sugar's boilers have a heat input capacity of 10 million Btu or greater.

92. Western Sugar conducted a performance stack test on October 23, 2014.

93. The new performance stack test was not completed until February 8, 2018.

94. The new performance stack test should have been completed by November 23, 2017 to be within 37 months of the prior test.

H. Monitoring.

95. Western Sugar uses oxygen analyzer to monitor flue gas oxygen concentration and steam load levels. A data acquisition and handling system calculates and reports 30-day-rolling-average values.

96. Western Sugar's boilers are subject to operating limits on flue gas concentration and steam load.

97. The 2015/2016 Annual Report showed Boiler No. 1 was not monitored continuously for the oxygen content of the flue gas during boiler operations on approximately 162 occasions in 2016.

98. The 2015/2016 Annual Report showed Boiler No. 2 was not monitored continuously for the oxygen content of the flue gas during boiler operations on approximately 166 occasions in 2016.

99. The 2017 Annual Report showed Boiler No. 1 was not monitored continuously for the oxygen content of the flue gas during boiler operations on approximately 62 occasions in 2017.

100. The 2017 Annual Report showed Boiler No. 2 was not monitored continuously for the oxygen content of the flue gas during boiler operations on approximately 301 occasions in 2017.

101. The 2017 Annual Report showed the operating load for Boiler No. 2 was not monitored continuously on approximately 29 occasions in 2017.

I. Recordkeeping.

102. On February 27, 2018, NDEQ employees conducted an inspection at the Facility.

103. During the inspection, NDEQ employees asked for and located the original monitoring plan developed in 2015. There was also a revised plan amended on February 26, 2018.

104. Neither the original or revised plan contained the required site-specific quality control plan for Western Sugar's boilers and oxygen analyzer.

105. NDEQ employees also asked for records of monitoring system calibration, maintenance, malfunction, and repairs the oxygen analyzer and/or DAHS.

106. In response, Western Sugar provided an equipment order list for maintenance and repair and a calibration record from December 2017, but was unable to provide any records of preventative, other maintenance, malfunction, or additional calibration records for the oxygen analyzer or DAHS for NDEQ to review.

107. NDEQ employees were unable to determine whether the monitoring system was being properly operated and maintained.

FIRST CAUSE OF ACTION

POLLUTION OF WATERS OF THE STATE IN VIOLATION OF NEB. REV. STAT. § 81-1506(1) AND 117 NEB. ADMIN. CODE § 4-005.

108. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

109. Under NEPA, it is “unlawful for any person ... [t]o cause pollution of any air, waters, or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, waters, or land of the state; or ... [t]o discharge or emit any wastes into any air, waters, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established therefor by the council.” Neb. Rev. Stat. § 81-1506(1).

110. On or about April 18, 2017, Western Sugar’s retention pond wall breached causing 300,000 to 500,000 gallons of contained PCC and mud water to spill into road ditches and reach Winters Creek and the North Platte River. The precipitated calcium carbonate and mud water left foam on the banks of Winters Creek and in the road ditches.

111. The precipitated calcium carbonate and mud water mixture is a waste and contains chemical oxygen demand, biological oxygen demand, and ammonia.

112. Winters Creek and the North Platte River are waters of the State.

113. The precipitated calcium carbonate and mud water reduced the quality of and altered the integrity and aesthetics of Winters Creek and the North Platte River.

114. Western Sugar violated Neb. Rev. Stat. § 81-1506(1).

115. Pursuant to Neb. Rev. Stat. § 81-1508.02(2) (Reissue 2014), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of

NEPA, any rules or regulations adopted and promulgated pursuant to such Act, or any provision of Neb. Rev. Stat. § 81-1506.

SECOND CAUSE OF ACTION

**DISCHARGE OF POLLUTANTS INTO A WATER OF THE STATE
IN VIOLATION OF NEB. REV. STAT. § 81-1506(2) AND
119 NEB. ADMIN. CODE**

116. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

117. Under NEPA, it is “unlawful for any person to ... [d]ischarge any pollutant into waters of the state without obtaining a permit as required by the National Pollutant Discharge Elimination System created by the [CWA] ... and by rules and regulations adopted and promulgated” Neb. Rev. Stat. § 81-1506(2)(a).

118. On or about April 18, 2017, Western Sugar’s retention pond wall breached causing 300,000 to 500,000 gallons of contained PCC and mud water to spill into road ditches and reach Winters Creek and the North Platte River. The PCC and mud water left foam on the banks of Winters Creek and in the road ditches.

119. Western Sugar does not hold a NPDES permit for its retention pond.

120. The precipitated calcium carbonate and mud water is a pollutant.

121. The breach of the retention pond was a discharge into waters of the State in violation of Neb. Rev. Stat. § 81-1506(2)(a).

122. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

THIRD CAUSE OF ACTION

**ALLOWING FUGITIVE DUST TO REMAIN VISIBLE
BEYOND THE PREMISES IN VIOLATION OF
129 NEB. ADMIN. CODE § 32-001 AND AIR PERMIT**

123. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

124. On or about November 14, 2017, Western Sugar's operations caused or permitted fugitive dust to become airborne and remain visible in the air beyond the Facility's premises.

125. Western Sugar failed to control the fugitive dust as part of its operations from becoming airborne and remaining visible beyond the Facility's premises in violation of 129 Neb. Admin. Code § 32-001 and its Air Permit.

126. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

FOURTH CAUSE OF ACTION

**FAILURE TO MAINTAIN REQUIRED WATER FLOW FOR BOILER NO. 1 AND
BOILER NO. 2 IN VIOLATION OF 129 NEB. ADMIN. CODE § 8-007
AND AIR PERMIT**

127. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

128. Western Sugar's Air Permit requires it to maintain the minimum scrubber water feed rate on Boiler No. 1 and Boiler No. 2.

129. In March 2015, Western Sugar operated Boiler No. 1 below the minimum scrubber water feed rate approximately three times.

130. In December 2015, Western Sugar operated Boiler No. 2 below the minimum scrubber water feed rate approximately nine times.

131. Between August 2016 and December 2016, Western Sugar operated Boiler No. 1 below the minimum scrubber water feed rate approximately nine times.

132. Between January 2016 and December 2016, Western Sugar operated Boiler No. 2 below the minimum scrubber water feed rate approximately eighty times.

133. Between November 2017 and December 2017, Western Sugar operated Boiler No. 1 below the minimum scrubber water feed rate approximately three times.

134. Between July 2017 and December 2017, Western Sugar operated Boiler No. 2 below the minimum scrubber water feed rate approximately forty-seven times.

135. Western Sugar violated its Air Permit approximately fifteen times between March 2015 and December 2017 for Boiler No. 1 and approximately 136 times between December 2015 and December 2017 for Boiler No. 2.

136. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

FIFTH CAUSE OF ACTION

EXCEEDANCE OF OPACITY OF 20% IN STACK EMISSIONS IN VIOLATION OF 129 NEB. ADMIN. CODE § 20-004 AND AIR PERMIT

137. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

138. Western Sugar's Air Permit requires its visible emissions to be less than 20% as evaluated by an EPA-approved method.

139. On or about July 11 and July 12, 2017, Western Sugar's visible emissions exceeded 20% opacity.

140. On or about September 10, 2017, Western Sugar's visible emissions exceeded 20% opacity.

141. On or about October 18, 2017, Western Sugar's visible emissions exceeded 20% opacity.

142. On or about November 27, 2017, Western Sugar's visible emissions exceeded 20% opacity.

143. Western Sugar violated its Air Permit approximately five times by exceeding the opacity threshold.

144. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

SIXTH CAUSE OF ACTION

FAILURE TO TAKE CORRECTIVE ACTIONS AS A RESULT OF OPACITY EXCEEDANCES IN VIOLATION OF 129 NEB. ADMIN. CODE §§ 20-004, 8-007 AND AIR PERMIT

145. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

146. If Western Sugar's visible emissions are greater than or equal to 20%, then the Air Permit requires Western Sugar to take corrective actions and make a record documenting the cause, the corrective action taken, and the opacity in 5% increments after corrective action is taken.

147. Between July 2017 and November 2017, Western Sugar's visible emissions exceeded 20% opacity on approximately five occasions.

148. Western Sugar did not take corrective actions for the opacity exceedances between July 2017 and October 2017. Western Sugar also did not record information as required by its Air Permit.

149. Western Sugar did take corrective action for the November 2017 opacity exceedance, but did not conduct any follow-up readings in 5% increments after the corrective action was taken.

150. Western Sugar violated its Air Permit approximately five times by failing to take corrective action and/or document its actions regarding the opacity exceedances.

151. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

SEVENTH CAUSE OF ACTION

FAILURE TO OPERATE BOILER NO. 1 AND BOILER NO. 2 AT OR BELOW 110% OF AVERAGE ALLOWABLE OPERATING LOADS IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJ

152. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

153. The operating load limit for Boiler No. 1 is 122,910 pph and for Boiler No. 2 is 124,469 pph.

154. In 2015, Western Sugar exceeded 110% of the average allowable operating load for Boiler No. 1 on approximately thirty occasions.

155. In 2015, Western Sugar exceeded 110% of the average allowable operating load for Boiler No. 2 on approximately three occasions.

156. In 2016, Western Sugar exceeded 110% of the average allowable operating load for Boiler No. 1 on approximately ten occasions.

157. In 2016, Western Sugar exceeded 110% of the average allowable operating load for Boiler No. 2 on approximately 164 occasions.

158. In 2017, Western Sugar exceeded 110% of the average allowable operating load for Boiler No. 2 on approximately fifty-three occasions.

159. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by exceeding 110% of the average allowable operating load for Boiler No. 1 approximately 40 times between 2015 and 2016 and for Boiler No. 2 approximately 220 times between 2015 and 2017.

160. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

EIGHTH CAUSE OF ACTION

FAILURE TO OPERATE BOILER NO. 1 AND BOILER NO. 2 AT OR ABOVE 30-DAY ROLLING AVERAGE OXYGEN LEVELS IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJ

161. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

162. The minimum oxygen level for Boiler No. 1 is 7.5% and for Boiler No. 2 is 8.0%.

163. In 2015, Western Sugar operated Boiler No. 2 below the 30-day rolling average oxygen level on 84 occasions.

164. In 2016, Western Sugar operated Boiler No. 1 below the 30-day rolling average oxygen level on fifty-five occasions.

165. In 2016, Western Sugar operated Boiler No. 2 below the 30-day rolling average oxygen level on 129 occasions.

166. In 2017, Western Sugar operated Boiler No. 1 below the 30-day rolling average oxygen level on thirty-six occasions.

167. In 2017, Western Sugar operated Boiler No. 2 below the 30-day rolling average oxygen level on 301 occasions.

168. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by operating Boiler No. 1 below the 30-day rolling average oxygen level approximately 91 times between 2016 and 2017 and operating Boiler No. 2 below the 30-day rolling average oxygen level approximately 514 times between 2015 and 2017.

169. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

NINTH CAUSE OF ACTION

FAILURE TO CONDUCT A PERFORMANCE TEST WITHIN 37 MONTHS IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJ

170. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

171. Western Sugar is required to conduct a performance stack test for its boilers on a triennial basis.

172. Western Sugar conducted a performance stack test on October 23, 2014.

173. Western Sugar failed to conduct another performance stack test by November 23, 2017, which is 37 months from the previous test.

174. Western Sugar conducted the new performance stack test on February 8, 2018.

175. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by failing to conduct a new performance stack test within 37 months of the previous performance stack test.

176. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

TENTH CAUSE OF ACTION

FAILURE TO CONTINUALLY MONITOR THE OXYGEN CONTENT OF THE FLUE GAS FOR BOILER NO. 1 AND BOILER NO. 2 IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJ

177. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

178. Western Sugar's boilers are subject to operating limits on flue gas concentration and steam load.

179. Western Sugar is required to continually monitor the flue gas oxygen concentration and steam load levels for Boiler No. 1 and Boiler No. 2.

180. In 2016, Western Sugar failed to continuously monitor the oxygen content of the flue gas for Boiler No. 1 on approximately 162 occasions.

181. In 2016, Western Sugar failed to continuously monitor the oxygen content of the flue gas for Boiler No. 2 on approximately 166 occasions.

182. In 2017, Western Sugar failed to continuously monitor the oxygen content of the flue gas for Boiler No. 1 on approximately 62 occasions.

183. In 2017, Western Sugar failed to continuously monitor the oxygen content of the flue gas for Boiler No. 2 on approximately 301 occasions.

184. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by failing to continuously monitor the oxygen content of the flue gas for Boiler No. 1 on approximately 224 occasions between 2016 and 2017 and by failing to continuously monitor the oxygen content of the flue gas for Boiler No. 2 on approximately 467 occasions between 2016 and 2017.

185. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

ELEVENTH CAUSE OF ACTION

FAILURE TO CONTINUOUSLY MONITOR THE BOILER NO. 2 OPERATING LOAD IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJ

186. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

187. In 2017, Western Sugar failed to continuously monitor the operating load for Boiler No. 2 on approximately 29 occasions.

188. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by failing to continuously monitor the operating load for Boiler No. 2 on approximately 29 occasions in 2017.

189. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

TWELFTH CAUSE OF ACTION

FAILURE TO MAINTAIN A SITE SPECIFIC MONITORING PLAN IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJJ

190. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

191. Western Sugar is required to develop a site-specific monitoring plan and maintain such plan as necessary.

192. During NDEQ's inspection in 2018, Western Sugar's site-specific monitoring plan did not address all of the required procedures, such as ongoing data quality assurance procedures.

193. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJJ by failing to maintain the site-specific monitoring plan and/or include the necessary procedures.

194. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

THIRTEENTH CAUSE OF ACTION

FAILURE TO KEEP RECORDS OF ACTIONS TAKEN DURING MONITORING SYSTEM MALFUNCTIONS IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJJ

195. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

196. Western Sugar is required to create and keep records during period of malfunctions.

197. During NDEQ's inspection in 2018, Western Sugar did not have any malfunction records despite experiencing malfunctions.

198. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by failing to keep records of malfunctions.

199. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

FOURTEENTH CAUSE OF ACTION

FAILURE TO KEEP RECORDS OF ALL INSPECTION AND MONITORING DATA AND MAINTENANCE OR CORRECTIVE ACTIONS IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJ

200. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

201. Western Sugar is required to maintain and keep records of all inspection and monitoring data or maintenance or corrective action information.

202. During NDEQ's inspection in 2018, Western Sugar did not have records of all inspection and monitoring data or maintenance or corrective actions information.

203. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by failing to keep of all inspection and monitoring data maintenance or corrective action information.

204. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

FIFTEENTH CAUSE OF ACTION

FAILURE TO KEEP RECORDS AVAILABLE FOR REVIEW IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJJ

205. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

206. Western Sugar is required to keep records for five years and have them readily available for expeditious review.

207. During NDEQ's inspection in 2018, Western Sugar did not have all records readily available.

208. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJJ by failing to have all records readily available for NDEQ to review during inspection.

209. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

SIXTEENTH CAUSE OF ACTION

FAILURE TO KEEP RECORDS OF DAILY MONITORING SYSTEM CHECKS IN VIOLATION OF 129 NEB. ADMIN. CODE § 28-001 AND 40 C.F.R. PART 63, SUBPART JJJJJJ

210. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

211. Western Sugar is required to keep records of daily monitoring system checks to make sure it is working, as well as calibration records.

212. During NDEQ's inspection in 2018, Western Sugar did not have records of daily monitoring system checks or calibration records for the CPMS.

213. Western Sugar violated 129 Neb. Admin. Code § 28-001 and 40 C.F.R. Part 63, Subpart JJJJJ by failing to keep records of daily monitoring system checks.

214. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), a civil penalty not to exceed ten thousand dollars (\$10,000.00) per day per violation is provided for violations of NEPA, as well as any rules or regulations adopted and promulgated pursuant to such Act.

REQUEST FOR RELIEF

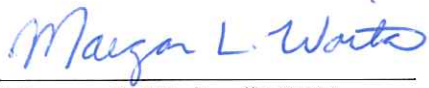
WHEREFORE, Plaintiff requests this Court to enter judgment on this Complaint in its favor and grant the following relief:

- A. Declare Western Sugar violated the Nebraska Environmental Protection Act, Title 117 of the Nebraska Administrative Code, *Nebraska Surface Water Quality Standards*; and/or Title 119 of the Nebraska Administrative Code, *National Pollutant Discharge Elimination System ("NPDES") Regulations*;
- B. Declare Western Sugar violated Title 129 of the Nebraska Administrative Code, *Nebraska Air Quality Regulations* and its Air Permit;
- C. Declare Western Sugar violated Title 129 of the Nebraska Administrative Code, *Nebraska Air Quality Regulations* and 40 C.F.R. Part 63, Subpart JJJJJ;
- D. Enter the statutory maximum civil penalty against Western Sugar, as provided under Neb. Rev. Stat. § 81-1508.02(2);
- D. Tax all court costs herein to Western Sugar; and
- E. Grant Plaintiff such additional and further relief as this Court deems just and proper.

DATED this 4th day of April 2019.

STATE OF NEBRASKA, ex rel.,
JIM MACY, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY, Plaintiff

By: Douglas J. Peterson, #18146
Attorney General

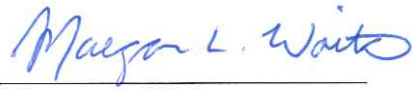
By: 
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Complaint has been served on the Defendant through its counsel, by regular U.S. Mail, first-class postage prepaid on this 4th day of April 2019, addressed as follows:

Stephen D. Mossman
Mattson Ricketts Law Firm
134 South 13th Street, Suite 1200
Lincoln, Nebraska 68508


Maegan L. Woita
Assistant Attorney General