IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and STATE OF NEW YORK, Plaintiffs, v. FRIESLANDCAMPINA INGREDIENTS NORTH AMERICA, INC. Defendant.	)	CIVIL ACTION NO. 3:23-cv-937 (TJM/ML)

COMPLAINT

The United States of America, by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of New York ("New York" or "State"), by the authority of the Attorney General of the State of New York, acting at the request of the Commissioner of the New York State Department of Environmental Conservation ("NYSDEC"), (collectively referred to as the "Plaintiffs"), file this complaint against FrieslandCampina Ingredients North America, Inc. ("Defendant" or "Friesland") and allege as follows:

NATURE OF THE ACTION

1. Friesland owns and operates a hydrolyzed protein powder manufacturing facility ("Facility") in Delhi, New York.

2. Friesland's manufacturing process involves mixing raw material protein sources (e.g., casein, whey, rice, cotton) with water and enzymes, then heating the mixture so the large protein chains are cut into smaller protein fragments. Additional processes, including enzyme deactivation, filtration, evaporation and drying, are performed to produce a finished protein hydrolysate product. Toluene is used in the manufacture of some of the protein hydrolysates at the Facility.

3. Toluene, a volatile organic compound ("VOC") per 40 C.F.R. § 51.100(s), is listed as a hazardous air pollutant ("HAP") pursuant to Section 112(b)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(b)(1). Because of its volatility, toluene is emitted into the air from the Facility. Emissions of toluene contribute to the formation of ground-level ozone and are harmful to human health and the environment.

4. On or before July 31, 2013, Friesland installed a new emissions unit, without obtaining from New York a modification to its Title V permit.

5. Friesland violated Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and its implementing regulations, including Title 6 of the New York Codes, Rules and Regulations ("N.Y.C.R.R.") and requirements of New York federally enforceable state implementation plan ("SIP"), by: (1) failing to obtain a modification of its Title V CAA permit before its Facility became a major source of VOC emissions (toluene), as required by 40 C.F.R. § 70.5(a)(1)(ii) and 6 N.Y.C.R.R. § 201-6.1(a)(1); (2) failing to perform a Reasonably Available Control Technology ("RACT") demonstration and implement RACT before commencing operation of a major source of VOC emissions, as required by 6 N.Y.C.R.R. § 212-3.1(a)(2), (e), and (f); (3) constructing a new, modified or existing air contamination source at the Facility without first obtaining a

registration or permit, as required by 6 N.Y.C.R.R. § 201-1.2(a); (4) failing to accurately report its toluene emissions to the NYSDEC in its annual emissions statements, as required by 6 N.Y.C.R.R. §§ 202-2.3(a)(3)(xii) and (xiii), 202-2.3(c)(2), and 202-2.4(a); and (5) failing to maintain annual reports of its toluene emissions for at least five years, as required by 6 N.Y.C.R.R. § 202-2.5(a).

6. The Facility's process wastewater containing suspended solids (turbidity), ammonia, phosphorous, biochemical oxygen demand, total nitrogen, and other pollutants, is discharged from the Facility's wastewater pretreatment plant ("WWPTP") to the Village of Delhi's publicly owned treatment works ("POTW"), which discharges treated wastewater to the West Branch of the Delaware River, a drinking water supply source. Non-contact cooling water ("NCCW") containing heat from the Facility is discharged through an outfall pipe, also to the West Branch of the Delaware River. Further, stormwater that comes into contact with industrial activities on the Facility's ground discharges to Platner Brook, which joins the West Branch of the Delaware River. The pollutants in Friesland's discharges are harmful to human health, to water quality, and to aquatic food resources and habitats.

7. Friesland violated Sections 307 and 402 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1317 and 1342, and the implementing regulations at 40 C.F.R. Parts 122, 123, and 403, by: (1) failing to comply with its New York State Pollutant Discharge Elimination System ("SPDES") Permit No. NY0262838, by discharging non-contact cooling water to the Delaware River at temperatures that exceeded the Facility's permit limit of 70 degrees Fahrenheit on fifteen separate occasions between May 2019 and December 2022; (2) introducing total suspended solids ("TSS"), phosphorus, and ammonia into the Village of Delhi's POTW in

quantities that caused pass through and/or interference with the treatment works, on at least sixty-five separate occasions between February 28, 2016, and June 30, 2021, in violation of 40 C.F.R. § 403.5(a)(1); and (3) failing to comply with its New York State SPDES Multi-Sector General Permit ("MSGP") for Stormwater Discharges Associated with Industrial Activity (GP-0-17-004 – No. NYR00F872) No Exposure Certification, by failing to prevent exposure of industrial materials and activities to rain, snow, snowmelt and/or runoff, as required by 40 C.F.R. §§ 122.26(b)(14) and (g).

8. This is a civil action for injunctive relief and imposition of civil penalties under Section 113 of the CAA, 42 U.S.C. § 7413, and Section 309 of the CWA, 33 U.S.C. § 1319, and Article 19 of the New York State Environmental Conservation Law ("ECL"), and the regulations promulgated thereunder.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action and the parties to this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b). This Court has supplemental jurisdiction over the State law claims asserted by New York, pursuant to 28 U.S.C. § 1367.

10. Authority to bring this action is vested in the United States Department of Justice by 28 U.S.C. §§ 516 and 519; Section 113(b) of the CAA, 42 U.S.C. § 7413(b); Section 309(b) of the CWA, 33 U.S.C. § 1319(b); and in the Attorney General of the State of New York by Section 304 of the CAA, 42 U.S.C. § 7604, and ECL §§ 71-2103 and 71-2107.

11. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c), and 1395(a), and Section 113(b) of the CAA, 42 U.S.C. §7413(b), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), because the Facility is located in this judicial district and the violations alleged herein are alleged to have occurred in, and Defendant conducts business in, this judicial district.

NOTICE

12. The United States has notified New York of the commencement of this action, pursuant to Section 113(b) of the CAA, 42 U.S.C. §7413(b), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b). New York is a co-plaintiff in this action.

DEFENDANT

13. Defendant is incorporated under Delaware law and conducts business in the state of New York.

14. At all times relevant to this Complaint, Defendant owned and operated the Facility at 40196 State Highway 10, Delhi, Delaware County NY 13753, and is engaged in the manufacturing of a hydrolyzed protein product.

15. Friesland is a "person" within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e), Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7), 1362(5), and applicable federal and state regulations promulgated pursuant to these statutes, and the SIP.

STATUTORY AND REGULATORY BACKGROUND

I. CLEAN AIR ACT (CAA)

16. The CAA, 42 U.S.C. §§ 7401–7671q, establishes a regulatory scheme designed "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population…" 42 U.S.C. § 7401(b)(1).

17. Section 109 of the CAA, 42 U.S.C. § 7409, requires the Administrator of the U.S. Environmental Protection Agency ("EPA") to promulgate regulations prescribing a national primary ambient air quality standard ("NAAQS") and a national secondary NAAQS for each air pollutant for which air quality criteria have been issued.

18. Section 110 of the CAA, 42 U.S.C. § 7410, provides for the creation of SIPs for national primary and secondary ambient air quality standards, which implement, maintain, and enforce the NAAQS, and must be approved by EPA. Under CAA Section 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A), each implementation plan must include enforceable emission limitations and other control measures.

19. Section 112(b)(1) of the CAA, 42 U.S.C. § 7412(b)(1), sets forth a list of HAPs, which includes toluene.

20. Section 110 of the CAA, 42 U.S.C. § 7410, requires each state to adopt a SIP to meet requirements of the CAA, including the requirement to attain and maintain NAAQS. On July 8, 1994, New York adopted as part of its SIP, 6 N.Y.C.R.R. Part 212, entitled "General Process Emission Sources," effective 30 days after its adoption. On September 25, 2001, EPA approved Part 212 into the New York SIP, making the requirements federally enforceable. 66 Fed. Reg. 48961 (Sept. 25, 2001). On May 14, 2015, New York adopted a revised version of 6 N.Y.C.R.R. Part 212, entitled "Process Operations," effective June 13, 2015. On October 1,

2021, EPA approved these revisions of Part 212 into the SIP, and the requirements became federally enforceable. 86 Fed. Reg. 54377 (Oct. 1, 2021).

21. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines a "person" as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof."

22. 40 C.F.R. § 51.100(s), which applies to SIPs, defines VOCs in relevant part, as "any compound of carbon … which participates in atmospheric photochemical reactions."

23. Section 114(a)(1) of the CAA, 42 U.S.C. § 7414(a)(1), provides that in order to determine whether any person is in violation of any standard or requirement under, or to carry out any provision of this chapter, EPA is authorized to require owners or operators of any emission source to establish and maintain records; make reports; install, use, and maintain monitoring equipment; sample emissions; submit compliance certifications; and provide such other information as the Administrator may reasonably require.

24. Section 114(a)(2) of the CAA, 42 U.S.C. § 7414(a)(2), authorizes the EPA or its authorized representative, to enter and inspect any emission sources, monitoring equipment, and records, and to sample any regulated emissions.

25. Section 184 of the CAA, 42 U.S.C. § 7511c, designates New York as a "single transport region for ozone." All stationary sources in that region that emit at least 50 tons per year ("tpy") or more of VOCs must use RACT to control those emissions from any emissions point(s) with an emissions rate potential equal or greater than 3 pounds per hour or actual emissions equal to or greater than 15 pounds per day. 6 N.Y.C.R.R. § 212-3.1.

26. Title V of the CAA prohibits the operation of, among other things, any major source of air pollution, without an operating permit containing emissions limits, monitoring, and reporting requirements, 42 U.S.C. §§ 7661-7661f.

27. Pursuant to 40 C.F.R. § 70.5(a)(1)(ii) and 6 N.Y.C.R.R. § 201-6.1(a)(1), no person shall construct or operate a major source without a Title V permit.

28. CAA Section 113(a)(3), 42 U.S.C. § 7413(a)(3), authorizes EPA to bring a civil action for injunctive relief and civil penalties against any person who has violated any requirement or prohibition of the Act or regulations promulgated thereunder, or who has violated an applicable permit or plan. The United States may seek penalties of up to $32,500 per day for each violation occurring between March 15, 2004, and January 12, 2009, and $37,500 per day for each violation occurring after January 12, 2009. 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; 40 C.F.R. § 19.4.

A. NEW YORK STATE SIP REQUIREMENTS

29. New York's regulations in 6 N.Y.C.R.R. Part 201, govern the issuance of permits with emission limitations and requirements for major stationary sources, and are incorporated in the EPA-approved New York SIP.

30. At all times relevant to this case, New York's SIP has included 6 N.Y.C.R.R. Part 200 ("General Provisions"). 6 N.Y.C.R.R. §§ 200.1 and 200.7.

31. Under New York's SIP, a "person" is "[a]ny individual, public or private corporation, political subdivision, government agency, department or bureau of the State, municipality, industry, copartnership, association, firm, trust, estate or any other legal entity whatsoever." 6 N.Y.C.R.R. § 200.l(bi).

32. "Air contaminant or air pollutant" means "[a] chemical, dust, compound, fume, gas, mist, odor, vapor pollen or any combination thereof." 6 N.Y.C.R.R. § 200.l(d).

33. "Air contamination source or emission source" means any "[a]pparatus, contrivance, or machine capable of causing emission of any air contaminant to the outdoor atmosphere, including any appurtenant exhaust system or air cleaning device. Where a process at an emission unit uses more than one apparatus, contrivance, or machine in combination, the combination may be considered a single emission source." 6 N.Y.C.R.R. § 200.l(f).

34. The list of regulated "HAPs" includes toluene. 6 N.Y.C.R.R. § 200.1(ag).

35. "RACT" means the "[l]owest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economic feasibility." 6 N.Y.C.R.R. § 200.1(bq).

36. At all times relevant to this case, New York's SIP has included 6 N.Y.C.R.R. Part 212. On June 3, 2015, the Subparts of Part 212 were renumbered, but continue to contain all of the requirements applicable to this case ("General Process Emission Sources").

37. Pursuant to 6 N.Y.C.R.R. § 212-3.1 [formerly 6 N.Y.C.R.R. § 212.10], facilities located outside the Lower Orange County or New York City metropolitan areas with an annual potential to emit 50 tons or more of VOCs must demonstrate and implement RACT to control those emissions from any emission point(s) with an emissions rate potential equal to or greater than 3 pounds per hour or actual emissions equal to or greater than 15 pounds per day. The "Lower Orange County metropolitan area" means "the area including the Towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick and Woodbury." 6 N.Y.C.R.R. § 200.l(al).

38. Pursuant to 6 N.Y.C.R.R. § 212-3.1(e) [formerly 6 N.Y.C.R.R. § 212-10(e)], once a source is subject to the RACT requirements, it remains subject to them even if its annual potential to emit VOCs later falls below the applicability threshold.

39. At all times relevant to this case, New York's SIP has included 6 N.Y.C.R.R. Part 202. Pursuant to 6 N.Y.C.R.R. § 202-2.1(a)(1), the requirements of 6 N.Y.C.R.R. Subpart 202-2 apply to any owner or operator of a facility located in New York that is determined to be a major source, as defined in 6 N.Y.C.R.R. Subpart 201-2 for all or any part of such calendar year. And, pursuant to 6 N.Y.C.R.R. §§ 202-2.3(a)(xii) and (xiii), 202-2.3(c)(2), 202-2.4(a), and 202-2.5(a), major sources must annually report process and fugitive emissions of all regulated air contaminants and maintain those reports for at least five years.

B. TITLE V PERMIT REQUIREMENTS

40. Section 502(a) of the CAA, 42 U.S.C. §7661a, provides that after the effective date of any permit program approved or promulgated pursuant to Title V of the CAA, it shall be unlawful for any person to violate any requirement of a permit issued under Title V of the CAA, or to operate a Title V affected source, including a major source, except in compliance with a permit issued by a permitting authority under Title V of the CAA.

41. Section 503(a) of the CAA, 42 U.S.C. § 7661b(a), provides that any source specified in Section 502(a) of the CAA shall become subject to a permit program and shall be required to have a permit. Section 503(b)(2) of the CAA, 42 U.S.C. § 7661b(b), provides that the regulations promulgated pursuant to Section 502(b) shall include requirements that the permittee periodically, but no less frequently than annually, certify that the facility is in compliance with

any applicable requirements of the Title V permit, and promptly report any deviations from permit requirements to the permitting authority.

42. In accordance with Section 502(d)(1) of the CAA, 42 U.S.C. §7661a(d)(1), New York developed and submitted to the Administrator, a permit program under 6 N.Y.C.R.R. Part 201 (Title V Operating Permit Program), to meet the requirements of Title V of the CAA and 40 C.F.R. Part 70. This program is a merged Title V and state operating permit program. EPA granted approval of the program on February 5, 2002. 67 Fed. Reg. 5,216 (Feb. 5, 2002).

43. Pursuant to 6 N.Y.C.R.R. § 201-6.2(a)(2), an owner or operator of a facility subject to Title V permitting shall submit a complete application prior to commencement of construction of new emission units or modified emission units at an existing facility or apply for a modification of its Title V permit within one year of the commencement of operation of the new emission unit.

44. State-issued Title V operating permits apply to, among other things, any major facility. 6 N.Y.C.R.R. § 201-6.1(a)(1). New York's Title V Regulations define a "Major stationary source or major source or major facility" as, among other things, a source that is located within the ozone transport region with the potential to emit 50 tpy or more of VOCs, and a source that emits or has the potential to emit, in the aggregate, 10 tpy or more of any HAP as defined in Part 200 (including any fugitive emissions of such pollutants). 6 N.Y.C.R.R. § 201-2.1(b)(21).

45. On September 21, 2022, NYSDEC issued to Friesland a Title V Permit modification for the Facility, Permit ID No.: 4-1228-00027/00015, with an expiration date of September 20, 2027, and which includes the following significant modifications: (1) addition of

Emission Unit 2-WWPTP for the WWPTP, including the addition of a second regenerative thermal oxidizer ("RTO") to control VOC emissions from the WWPTP; (2) modification of Emission Unit 1-TANKS to remove the "3-hour waiting period" for startup of the RTO discussed in Friesland's prior permit; and (3) defining equipment that can continue to operate in the event of an unplanned or emergency shutdown of either RTO.

46. At all times relevant to this case, Friesland's Title V permit has incorporated the requirements of 6 N.Y.C.R.R. § 201-6, which requires an owner of or operator of a major source to obtain an operating permit before operating the source. 6 N.Y.C.R.R. § 201-6.1(a). The owner or operator of an existing Title V facility must apply for a modification of its Title V permit prior to constructing a new emission unit. 6 N.Y.C.R.R. § 201-6.2(a)(2).

47. 6 N.Y.C.R.R. § 201-2.1(14)(i)(a) defines an "emissions unit" as "[a]ny part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant … [including] a single emission point." 6 N.Y.C.R.R. § 200.1(t) defines an "emission point" as "[a]ny conduit, chimney, duct, vent, flue, stack or opening of any kind through which air contaminants are emitted to the outdoor atmosphere."

48. Sections 113(a)(3) & (b) of the CAA, 42 U.S.C. §§ 7413(a)(3) & (b), authorize the Administrator to commence a civil action against any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, for injunctive relief and to assess and recover a civil penalty, whenever such person has violated, or is violation of, any requirement or prohibition of an applicable implementation plan, permit, or rule.

49. Section 304 of the CAA, 42 U.S.C. § 7604, authorizes New York to bring a civil action against any person in violation of an emission standard or limitation under the CAA to enforce such emission standard or limitation and to apply any appropriate civil penalties.

50. Section 113(b) of the CAA, 42 U.S.C. § 7413(b), authorizes the Court to enjoin a violation, to require compliance, and to assess a civil penalty for each day of each violation.

II. CLEAN WATER ACT (CWA)

51. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 101(a) of the CWA, 33 U.S.C. § 1251(a). To achieve this objective, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" to waters of the United States, except, *inter alia*, in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA or an authorized state, pursuant to Section 402 of CWA, 33 U.S.C. § 1342.

52. Section 402(a)(1) of the CWA, 33 U.S.C. § 1342(a)(1), provides that the Administrator may, after an opportunity for a public hearing, issue a permit for the discharge of any pollutant to the waters of the United States, upon condition that such discharge will meet all applicable requirements of the CWA, or such other conditions as the permitting authority determines necessary to carry out the provisions of this chapter.

53. Section 402(a)(2) of the CWA, 33 U.S.C. § 1342(a)(2), directs the Administrator to prescribe conditions for such permits to assure compliance with the requirements of the CWA, including conditions on data and information collection, reporting, and such other requirements as the Administrator deems appropriate. Section 402(b) of the

CWA, 33 U.S.C. § 1342(b), authorizes the Administrator to approve state permit programs that ensure compliance with the CWA.

54. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."

55. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, biological materials, radioactive materials, heat, rock, sand, industrial municipal, and agricultural waste.

56. Effluent limitations, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11), means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources. Effluent limitations described in Section 301 of the CWA, 33 U.S.C. § 311, are among the conditions and limitations prescribed in NPDES permits issued under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

57. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."

58. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

59. Permits are required for stormwater discharges associated with industrial activity, pursuant to Section 402(p)(3)(A) of the CWA, 33 U.S.C. § 1342(p)(3)(A). Section 307 of the CWA, 33 U.S.C. § 1317, and 40 C.F.R. Part 403 require pretreatment standards for introduction of pollutants into POTWs.

60. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), provides that states may administer their own permit program for discharges into navigable waters within their jurisdiction if they are authorized by EPA. The Administrator has authorized New York to administer its program for permitting discharges of pollutants to navigable waters. *Memorandum of Agreement Between Chairman of New York State Board on Electric Generation Siting and the Environment and The United States Environmental Protection Agency, Region II* (Aug. 14, 1975). NYSDEC is the state agency with the authority to administer permits under the State's permitting program. *Id*.; 33 U.S.C. § 1342(b). The United States may enforce state issued NPDES permits under the CWA. 33 U.S.C. § 1342(i).

61. A NPDES permit sets forth effluent limitations for direct discharges to waters of the U.S. Where an industrial user discharges to a POTW that is subject to a NPDES permit, the industrial user does not need an individual NPDES (or SPDES) permit. Instead, the industrial user is subject to the pretreatment regulations found at 40 C.F.R. Part 403 that were promulgated by the EPA, pursuant to CWA Section 307(b), 33 U.S.C. § 1317(b).

62. Pretreatment standards are established "to prevent the discharge of any pollutant through treatment works ... which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works." 33 U.S.C. § 1317(b)(l).

63. "Pretreatment standards are intended to prevent these problems from occurring by requiring non-domestic users of [POTWs] to pretreat their wastes before discharging them to the POTW." 52 Fed. Reg. 1586 (Jan. 14, 1987). The pretreatment regulations contain general prohibitions, specific prohibitions, categorical pretreatment standards, and directions to POTWs or authorized states to develop local limits.

64. An industrial user may not introduce into a POTW any pollutant(s) which cause "Pass Through" or "Interference." 40 C.F.R. § 403.5(a).

65. The term "Industrial User" or "User" means a source of indirect discharge. 40 C.F.R. § 403.3(j). The term "Indirect Discharge" or "Discharge" means "the introduction of pollutants into a POTW from any non-domestic source regulated under Section 307(b), (c) or (d) of the Act." 40 C.F.R. § 403.3(i).

66. "Pass through," is defined, in pertinent part, 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 (including an increase in the magnitude or duration of a violation)." 40 C.F.R. § 403.3(p).

67. "Interference" is defined, in pertinent part, as a discharge, which alone or in conjunction with a discharge or discharges from other sources, both: (1) inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and (2) therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of the violation). 40 C.F.R. § 403.3(k).

68. The pretreatment regulations also contain specific pretreatment standards for certain categories of industrial users, or "categorical industrial users," set forth in 40 C.F.R. Parts 405-471.

69. Industrial users that are not subject to the categorical pretreatment standards are described as "non-categorical industrial users." Non-categorical industrial users are subject to the general and specific prohibitions as well as any other specific limitations established by the POTW. *See* 40 C.F.R. § 403.5.

70. Pursuant to CWA Sections 301(a) and 402(p)(2)(B), 33 U.S.C. §§ 1311(a), 1342(p)(2)(B), and 40 C.F.R. § 122.26(b)(14), a person who discharges to waters of the United States from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial facility must first obtain, and comply with the terms of, a NPDES (or SPDES) permit, unless eligible for a conditional exclusion for "no exposure" of industrial activities and materials to stormwater under 40 C.F.R. § 122.26(g). "No exposure" means that "all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section." *Id*.

71. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation under subsection (a) of this section, including violations of any condition or limitation which implements 33 U.S.C. § 1311 in a permit issued by a State under an approved permit program under section 1342 or 1344.

72. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates 33 U.S.C. § 1311, or any permit condition or limitation implementing such section in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States. The United States may seek penalties of up to $64,618 per day for each violation occurring after November 2, 2015, where penalties are assessed on or after January 6, 2023. 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; 40 C.F.R. 19.4.

GENERAL ALLEGATIONS

73. At all times pertinent to this action, Defendant has been and continues to be, the owner and operator at the Facility located at 40196 State Highway 10, Delhi, Delaware County, New York, where Friesland manufactures hydrolyzed protein products.

74. During the manufacturing process, toluene, which is a VOC, is added to act as a "biostat" to prevent microbial growth, and hydrochloric acid (HCl) is used to adjust the pH. Friesland utilizes a batch process, producing anywhere from 10-20 batches per month, and using about 40-50 gallons of toluene per batch.

75. Friesland became a major source of VOCs on or before December 31, 2007, requiring it to obtain a CAA Title V permit allowing for those emissions and requiring it to implement RACT.

76. On June 17, 2008, Friesland reported that it emitted 63.2 tons of toluene at the Facility, which therefore became a major facility or source subject to Title V permitting and SIP RACT requirements no later than that year. Under New York State law, once a facility becomes subject to the VOC RACT requirements, it remains subject to them even if subsequent

VOC emissions drop below 50 tpy, unless, among other things, the facility takes a federally enforcement permit limit below that threshold. 6 N.Y.C.R.R. § 212-3.1(e).

77. On or before July 31, 2013, Friesland installed a blower motor connected to an exhaust pipe (the "pit stack") to vent toluene fumes coming off the wastewater collection pit prior to the WWPTP at the Facility.

78. Friesland did not apply to the NYSDEC for a modification of its Title V operating permit prior to installing the pit stack allowing for those emissions, nor did it demonstrate the levels of controls required under the CAA. Further, Friesland did not install any controls for reducing its toluene emissions.

79. According to Friesland's July 2013 Toluene Evaluation Work Plan, Friesland had measured VOC emissions at the pit stack of at least 15,000 parts per million (ppm), which equates to a potential to emit over 50 tpy.

80. On August 6, 2015, Friesland submitted a Title V permit renewal application to NYSDEC that failed to mention the pit stack at the Facility.

81. On July 12 and 13, 2016, EPA conducted a compliance inspection of the Facility and observed the pit stack being used to vent toluene fumes coming from the WWPTP. EPA personnel measured the emissions coming through the pit stack, which resulted in a measurement of a VOC emission concentration (as toluene) of 20,000 ppm, which is the maximum detection limit of the instrument used.

82. On July 20 and 21, 2017, during batch manufacture of the product, Friesland performed sampling using EPA reference methods over a two-day period to quantify emissions of toluene from various points in the Facility. The sampling demonstrated that the pit

stack was the largest single source of toluene emissions at the Facility, and the average toluene emission rate at the pit stack, from 16 consecutive sample runs, was 14.07 pounds per hour and yields a potential to emit of 61.6 tpy of toluene. These results are consistent with EPA's conclusion that the Facility emits, or has the potential to emit, at least 50 tpy of toluene.

83. Friesland constructed the pit stack (a new emission unit) without first applying for a state construction permit, and operated it without applying to the NYSDEC for modification of its Title V permit within one year of the commencement of operation of the new emission unit.

84. Friesland failed to perform a RACT demonstration prior to commencing construction of the pit stack and to implement RACT before commencing operation of a major source of a VOC, which led to the emissions of excess toluene.

85. In ten emissions statements from 2007 through 2017, Friesland failed to accurately report its toluene emissions to the NYSDEC. Instead of reporting emissions that corresponded with the amount Friesland reported to the Toxics Release Inventory ("TRI") of 63.2 tons of toluene, Friesland reported to the NYSDEC that its 2007 toluene emissions were only 18.85 tons. For the following nine annual emission reports from 2008 to 2016, Friesland continued to report underestimates of its toluene emissions, including reporting in 2015 and 2016 that it had zero toluene emissions.

86. The toluene emissions levels reported by Friesland exceed applicable major facility or source thresholds for VOCs. As a major facility or source, Friesland's Facility is subject to the Title V operating requirements of the CAA and N.Y.C.R.R.

87. Friesland subsequently applied for a modification of its Title V Permit for the Facility, which was issued by NYSDEC, on September 21, 2022.

88. Also, during Friesland's manufacturing process, effluent containing toluene is sent to an on-site WWPTP, which includes an equalization tank and two aeration basins. The process wastewater from the Facility is pretreated prior to being discharged to the Village of Delhi's POTW, pursuant to a 2011 Industrial User Agreement, which specifies that Friesland shall not exceed an allowable concentration for Total Suspended Solids ("TSS") and Carbonaceous Biochemical Oxygen Demand ("CBOD") of 200 mg/l for monthly average, and 275 mg/l, respectively, as a daily maximum. Friesland's daily allowable flow maximum of 0.35 million gallons per day ("MGD") at 275 mg/l TSS concentration amounts to 803 pounds per day ("lbs/day") of TSS, which is almost half of the maximum allowable headworks load for TSS at the Village of Delhi's POTW.

89. Discharges from the Village of Delhi POTW to the West Branch of the Delaware River are regulated by New York State SPDES Permit No. NY0020265.

90. Based on sampling performed by the Village of Delhi, on at least sixty-five separate occasions between February 28, 2016, and June 30, 2021, Friesland introduced TSS, phosphorous, and ammonia from its WWPTP into the Village of Delhi's POTW in quantities that caused pass through and/or interference with the treatment works, which caused or contributed to the Village of Delhi's violation of its SPDES permit limits for turbidity and phosphorous.

91. Friesland also reported violations of its Village of Delhi User Agreement limits in the fourth quarter of 2020 to EPA. Specifically, on November 19 and 22, 2020,

Friesland exceeded its 15 mg/l ammonia limit with discharges of 24.8 mg/l and 25 mg/l, respectively.

92. Larger TSS loads increase the turbidity and settleable solids concentrations in the POTW, and at high TSS concentrations, TSS can interfere with the POTW's processes such as clarifiers and tertiary filters. High TSS and turbidity can also reduce the effectiveness of the Village of Delhi's POTW ultraviolet disinfection system and could cause more pathogens to be discharged to the West Branch of the Delaware River. Additionally, high phosphorus can lead to algal blooms.

93. During compliance inspections of the Facility's WWPTP on June 24 and 25, 2019, EPA observed that the effluent discharging from the WWPTP was turbid.

94. On June 26, 2019, EPA personnel inspected the Village of Delhi's POTW and observed turbid flows discharging from the Friesland WWPTP effluent entering the pump station wet well.

95. Stormwater from the Facility discharges via storm drains, sewer pipe, and a ditch to Platner Brook, which discharges into the West Branch of the Delaware River.

96. On November 3, 2016, in order to obtain an exclusion from the requirement to obtain coverage under New York State's Multi-Sector General Permit ("MSGP") for Stormwater Discharges Associated with Industrial Activity at its Facility, Friesland submitted a No Exposure Certification (NYR00F872), wherein it certified that materials and activities at the Facility would not be exposed to precipitation. During compliance inspections of the Facility on June 24 and 25, 2019, EPA observed several industrial materials and activities exposed to

precipitation, including open dumpsters, metals stored outside, trash and debris located near catch basins, and uncovered material storage piles.

97. NCCW containing heat from the Facility is discharged through an outfall pipe into the West Branch of the Delaware River.

98. Friesland is permitted to discharge cooling water to the West Branch of the Delaware River under an individual SPDES Permit (No. NY0262838), which includes a daily maximum temperature limit of 70 degrees Fahrenheit.

99. Friesland submitted discharge monitoring reports to the NYSEC that indicated that Friesland exceeded the temperature limit on at least fifteen separate occasions between May 2019 and December 2022.

CAA CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Failure to Obtain Title V Permit Modification)

100. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

101. Defendant is required to operate the Facility in accordance with New York's SIP to ensure the attainment of the federal NAAQS for each air pollutant for which it has issued air quality criteria pursuant to Section 108 and 109 of the CAA, 42 U.S.C. §§ 7408 and 7409.

102. On or before December 31, 2007, and continuing thereafter, Defendant operated the Facility as a major source of VOCs (toluene) under the CAA.

103. Defendant commenced operation of the Facility as a major source for VOCs without applying for and receiving from New York a modification to its Title V permit to cover

those emissions, as required by 40 C.F.R. § 70.5(a)(1)(ii) and 6 N.Y.C.R.R. §§ 201-6.1(a)(1) and (a)(3).

104. Pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b), the violations set forth above in Paragraphs 100 through 103 subject Friesland to injunctive relief and assessment of a civil penalty up to $25,000 per day for each violation. The statutory maximum civil penalty has been increased to reflect inflation by the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended, to $37,500 per day for each violation occurring after January 12, 2009, through November 2, 2015, and up to $117,468 per day per violation for each violation occurring after November 2, 2015, pursuant to EPA's Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19 ("Penalty Inflation Rule"). *See* 40 C.F.R. § 19.4, tbls. 1 & 2.

SECOND CLAIM FOR RELIEF
(Failure to Perform RACT Demonstration before Commencing Construction)

105. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

106. Rule 6 N.Y.C.R.R. §§ 212-3.1(a)(2), (e), and (f), requires the demonstration and implementation of RACT controls before operating a major source of VOCs.

107. On or before December 31, 2007, and continuing thereafter, Defendant emitted 50 tpy or more of toluene, which constituted a major source of VOC emissions.

108. Defendant failed to first demonstrate and implement RACT before becoming a major source of VOC emissions, which allowed VOC emissions from the Facility in excess of an emission rate achievable through the implementation of RACT.

109. Pursuant to Section 113(b) of CAA, 42 U.S.C. § 7413(b), the violations set forth above in Paragraphs 105 through 108 subject Friesland to injunctive relief and assessment of a civil penalty of up to $25,000 per day for each violation. The statutory maximum civil penalty has been increased to reflect inflation by the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended, to $37,500 per day for each violation occurring after January 12, 2009, through November 2, 2015, and up to $117,468 per day per violation for each violation occurring after November 2, 2015. *See* 40 C.F.R. § 19.4, tbls. 1 & 2.

THIRD CLAIM FOR RELIEF
(Construction of a New Emission Source Without a Permit)

110. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

111. 6 N.Y.C.R.R. § 201-6.2(a)(2) requires the owner or operator of an existing Title V facility to apply for a modification of its Title V permit prior to constructing a new emission unit.

112. On or before July 31, 2013, Friesland constructed a pit stack at the Facility, which constituted a new emission source.

113. Defendant constructed the new emissions source at the Facility without first applying for a modification of its CAA Title V permit, or obtaining a state facility permit to construct, as required by 6 N.Y.C.R.R. § 201-6.2(a)(2). The construction or operation of a new, modified, or existing air contamination source without a permit is prohibited. 6 N.Y.C.R.R. § 201-1.2(a).

114. Pursuant to Section 113(b) of CAA, 42 U.S.C. § 7413(b), the violations set forth above in Paragraphs 110 through 113 subject Friesland to injunctive relief and assessment of a civil penalty of up to $25,000 per day for each violation. The statutory maximum civil

penalty has been increased to reflect inflation by the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended, to $37,500 per day for each violation occurring after January 12, 2009, through November 2, 2015, and up to $117,468 per day per violation for each violation occurring after November 2, 2015. *See* 40 C.F.R. § 19.4, tbls. 1 & 2.

FOURTH CLAIM FOR RELIEF
(Failure to Accurately Report Emissions)

115. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

116. Defendant was required to accurately report its emissions to the NYSDEC, pursuant to 6 N.Y.C.R.R. §§ 202-2.3(a)(3)(xii) and (xiii), 202-2.3(c)(2), and 202-2.4(a).

117. For the years 2007 through 2016, Defendant failed to accurately report its toluene emissions to the TRI and to NYSDEC, in ten annual emission statements, by underestimating its emissions, including reporting that it had zero emissions in 2015 and 2016.

118. Pursuant to Section 113(b) of CAA, 42 U.S.C. § 7413(b), the violations set forth above in Paragraphs 115 through 117 subject Friesland to injunctive relief and assessment of a civil penalty of up to $25,000 per day for each violation. The statutory maximum civil penalty has been increased to reflect inflation by the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended, to $37,500 per day for each violation occurring after January 12, 2009, through November 2, 2015, and up to $117,468 per day per violation for each violation occurring after November 2, 2015. *See* 40 C.F.R. § 19.4, tbls. 1 & 2.

FIFTH CLAIM FOR RELIEF
(Failure to Maintain Reports of its Emissions)

119. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

120. Defendant was required to maintain annual reports of its toluene emissions for at least five years, pursuant to 6 N.Y.C.R.R. § 202-2.5(a).

121. During an inspection of the Facility on July 13, 2016, EPA requested copies of Defendant's annual inspection reports, but they were not provided, or otherwise not available for inspection.

122. Pursuant to Section 113(b) of CAA, 42 U.S.C. § 7413(b), the violations set forth above in Paragraphs 119 through 121 subject Friesland to injunctive relief and assessment of a civil penalty of up to $25,000 per day for each violation. The statutory maximum civil penalty has been increased to reflect inflation by the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended, to $37,500 per day for each violation occurring after January 12, 2009, through November 2, 2015, and up to $117,468 per day per violation for each violation occurring after November 2, 2015. *See* 40 C.F.R. § 19.4, tbls. 1 & 2.

CWA CLAIMS FOR RELIEF

SIXTH CLAIM FOR RELIEF
(Failure to Comply with SPDES Permitting Requirements)

123. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

124. Defendant's individual SPDES Permit limits the discharge of cooling water from the Facility to the West Branch of the Delaware River to a daily maximum temperature limit of 70 degrees Fahrenheit.

125. On at least fifteen separate occasions, between May 2019 and December 2022, Defendant discharged non-contact cooling water from the Facility to the West Branch of the Delaware River at temperatures that exceeded the Facility's individual SPDES permit limit of 70 degrees Fahrenheit.

126. Pursuant to Section 309(d) of the CWA, 33 U. S. C. § 1319(d), the violations set forth above in Paragraphs 123 through 125 subject Friesland to injunctive relief and assessment of a civil penalty of up to $64,618 per day for each violation occurring after November 2, 2015, where penalties are assessed on or after January 6, 2023. 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; 40 C.F.R. 19.4.

SEVENTH CLAIM FOR RELIEF
(Wastewater Discharges Causing Pass Through and/or Interference with Treatment Works)

127. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

128. Defendant discharges its process wastewater from the Facility to the Village of Delhi POTW under an Industrial User Agreement. Discharges from the Village of Delhi POTW to the West Branch of the Delaware River are regulated by the Village of Delhi's SPDES Permit.

129. On at least sixty-five separate occasions, between February 28, 2016 and June 30, 2021, Friesland introduced total suspended solids (TSS) and phosphorous from its on-site WWPTP to the Village of Delhi's POTW in quantities that caused pass through and/or interference with the treatment works and that caused or contributed to the Village of Delhi's violation of its SPDES permit limits for turbidity and phosphorous, in violation of 40 C.F.R. § 403.5(a)(1) and (3).

130. Pursuant to Section 309(d) of the CWA, 33 U. S. C. § 1319(d), the violations set forth above in Paragraphs 127 through 129 subject Friesland to injunctive relief and assessment of a civil penalty of up to $64,618 per day for each violation occurring after November 2, 2015, where penalties are assessed on or after January 6, 2023. 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; 40 C.F.R. 19.4.

EIGHTH CLAIM FOR RELIEF
(Failure to Comply with MSGP Permitting Requirements)

131. Paragraphs 1 through 99 are realleged and incorporated herein by reference.

132. In order to comply with the No Exposure Certification under its MSGP, Defendant must prevent exposure of industrial materials and activities to rain, snow, snowmelt and/or runoff, as required by 40 C.F.R. §§ 122.26(b)(14) and (g).

133. Defendant discharges stormwater from the Facility to Platner Brook, which flows into the Delaware River. During inspections of the Facility on June 24 and 25, 2019, EPA observed industrial materials and activities exposed to precipitation, including open dumpsters at the Facility, metals stored outside the Facility, trash and debris located near catch basins, and uncovered material storage piles at the Facility, in violation of 40 C.F.R. § 122.26(g)(1)(i) and Friesland's No Exposure Certification under its MSGP.

134. Pursuant to Section 309(d) of the CWA, 33 U. S. C. § 1319(d), the violations set forth above in Paragraphs 131 through 133 subject Friesland to injunctive relief and assessment of a civil penalty of up to $64,618 per day for each violation occurring after November 2, 2015, where penalties are assessed on or after January 6, 2023. 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; 40 C.F.R. 19.4.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations set forth above, the Plaintiffs respectfully request that this Court grant the following relief:

A. Enter judgment against the Defendant and in favor of Plaintiffs United States and New York, and assess against the Defendant civil penalties in an amount to up to $25,000 per day as adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996, 31

U.S.C. § 3701; the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 [Pub. L. 114-74, Section 701], and the Penalty Inflation Rule at 40 C.F.R. Part 19;

B. Award Plaintiffs injunctive relief pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7513(b);

C. Award Plaintiffs injunctive relief pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b);

D. Order Defendant to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations alleged above; and

E. Grant such other relief as this Court may deem just and proper.

Respectfully submitted,

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