IN THE IOWA DISTRICT COURT FOR MONTGOMERY COUNTY

STATE OF IOWA, ex rel., IOWA DEPARTMENT OF NATURAL RESOURCES (99AG23542), Plaintiff, vs. NEW COOPERATIVE, INC, Defendant.	)	NO. _____ **PETITION IN EQUITY**

COMES NOW Plaintiff State of Iowa, ex rel., Iowa Department of Natural Resources and for its claim against Defendant NEW Cooperative, Inc., states as follows:

INTRODUCTION

1. The State of Iowa seeks the assessment of civil penalties and injunctive relief against Defendant NEW Coop. for discharging a pollutant into a water of the State in violation of Iowa's water quality rules, resulting in a large fish kill.

PARTIES

2. The State of Iowa is a sovereign state of the United States of America.

3. The Iowa Department of Natural Resources ("IDNR") is a duly constituted agency of the State of Iowa pursuant to Iowa Code section 455A.2.

4. Defendant NEW Cooperative, Inc. ("NEW Coop.") is an Iowa Cooperative Association with its home office at 2626 1st Ave S., Fort Dodge, Iowa 50501.

DEFINITIONS

5. "Cleanup" means "actions necessary to contain, collect, control, identify, analyze, clean up, treat, disperse, remove, or dispose of hazardous substance." Iowa Code § 455B.381(1).

6. "Cleanup costs" means "costs incurred by the state or its political subdivisions or the agents of the state or a political subdivision in the prevention or mitigation of damages from a hazardous condition or the cleanup of a hazardous substance involved in a hazardous condition." Iowa Code § 455B.381(2).

7. "Hazardous condition" means "any situation involving the actual, imminent, or probable spillage, leakage, or release of a hazardous substance onto the land, into a water of the state, or into the atmosphere, which creates an immediate or potential danger to the public health or safety or to the environment." Iowa Code § 455B.381(4).

8. "Hazardous substance" means "any substance or mixture of substances that presents a danger to the public health or safety and includes but is not limited to a substance that is toxic, corrosive, or flammable, or that is an irritant or that generates pressure through decomposition, heat, or other means." Iowa Code § 455B.381(5).

9. "Pollutant" means "sewage, industrial waste, or other waste." Iowa Code § 455B.171(22).

10. "Release" means "a threatened or real emission, discharge, spillage, leakage, pumping, pouring, emptying, or dumping of a hazardous substance into or onto the land, air, or waters of the state …" Iowa Code § 455B.381(9).

11. "Water of the state" means "any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water, surface or underground, natural or artificial, public or private, which

are contained within, flow through, or border upon the state or any portion thereof." Iowa Code § 455B.171(41).

12. "Water pollution" means "the contamination or alteration of the physical, chemical, biological, or radiological integrity of any water of the state by a source resulting in whole or in part from the activities of humans, which is harmful, detrimental, or injurious to public health, safety, or welfare, to domestic, commercial, industrial, agricultural, or recreational use or to livestock, wild animals, birds, fish, or other aquatic life." Iowa Code § 455B.171(42).

JURISDICTION

Water Quality Regulations

13. The IDNR is the agency of the state responsible for the prevention, abatement, or control of water pollution. Iowa Code § 455B.172(1). The IDNR maintains jurisdiction over and regulates the direct discharge of pollutants to a water of the state. Iowa Code § 455B.172(5)(a).

14. The Iowa Environmental Protection Commission ("EPC") has authority to establish water quality standards, pretreatment standards, and effluent standards; adopt rules relating to the location, construction, operation, maintenance, or modification of disposal systems, or for the discharge of any pollutant; and inspection, monitoring, record keeping, and reporting requirements for owners and operators of disposal systems. Iowa Code §§ 455A.6(6)(a) and 455B.173(2), (3) and (6). The EPC's rules implementing these provisions are contained in 567 Iowa Admin. Code 60-69.

15. The dumping, depositing, or discharging of pollutants into any water of the state is prohibited, except adequately treated sewage, industrial waste, or other waste in accordance with rules adopted by the EPC. Iowa Code § 455B.186(1).

16. All Iowa surface waters are to be free from substances attributable to wastewater discharges or agricultural practices in concentrations or combinations which are acutely toxic to human, animal, or plant life. 567 Iowa Admin. Code 61.3(2)(d).

17. A person who violates any provision of Iowa Code chapter 455B, Division III, Part 1 or any permit, rule, or order issued thereunder shall be subject to a civil penalty not to exceed Five Thousand Dollars ($5,000.00) for each day of such violation. Iowa Code § 455B.191(2).

18. The Attorney General is authorized, at the request of the IDNR director with approval of the EPC, to initiate any legal proceedings, including an action for injunction or temporary injunction, necessary to enforce the penalty provisions of said statutes and any rules promulgated or any provision of any permit issued thereunder. Iowa Code § 455B.191(5).

Hazardous Condition Regulations

19. The IDNR shall be the agency of the State to prevent, abate, and control the exposure of the citizens of the State to hazardous conditions. Iowa Code § 455B.382.

20. The IDNR is authorized to establish such rules as are necessary to protect the public from unnecessary exposure to hazardous substances, and to develop comprehensive plans for the prevention, abatement and control of hazardous conditions within the state. Iowa Code §§ 455B.383(1)-(2).

21. A person manufacturing, storing, handling, transporting, or disposing of a hazardous substance shall notify the department and the local police department or the office of the sheriff of the affected county of the occurrence of a hazardous condition as soon as possible but not later than six hours after the onset of the hazardous condition or discovery of the hazardous condition. Iowa Code § 455B.386.

22. If requested, a person shall submit, within thirty days of the department's request, a written report of particulars of the hazardous condition incident. Iowa Code § 455B.386.

23. A person violating Iowa Code section 455B.386 shall be subject to a civil penalty of not more than One Thousand and no/100 Dollars ($1,000.00). Iowa Code § 455B.386.

24. If a hazardous condition exists, the IDNR Director may either remove and dispose of, or provide for the removal and disposal of, any hazardous substance that causes a hazardous condition. Iowa Code § 455B.387.

25. Persons with control over a hazardous substance are strictly liable to the state or relevant political subdivision for costs incurred for the removal of hazardous substances, the abatement of a hazardous condition, the loss of natural resources caused by the hazardous substance, and any excessive or extraordinary costs expended in responding to a hazardous condition. Iowa Code § 455B.392(1)(a)(1-4).

26. The Attorney General shall, at the request of the IDNR, institute any legal proceedings, including an action for an injunction or temporary injunction, necessary to obtain compliance with the provisions of this part 4 of division IV. Iowa Code § 455B.391(1).

PAST ENFORCEMENT ACTIONS

27. In 2009, the IDNR and NEW Coop. entered into Administrative Consent Order No. 2009-AQ-26 and 2009-SW-17 to resolve violations of Iowa's air quality and solid waste disposal laws related to NEW Coop.'s illegal burning and disposal of solid waste at a grain facility in Bode, Iowa, and required NEW Coop. to pay a $8,500.00 administrative penalty.

28. In 2020, the IDNR and NEW Coop. entered into Administrative Consent Order No. 2020-AQ-15 and 2020-SW-07 to resolve violations of Iowa's air quality and solid waste disposal laws related to NEW Coop.'s illegal burning and disposal of solid waste at a grain

facility in Bode, Iowa, and required NEW Coop. to pay a $10,000.00 administrative penalty.

29. In 2023, the IDNR and NEW Coop. entered into Administrative Consent Order No. 2023-AQ-17 to resolve violations of Iowa's air quality laws related to NEW Coop.'s illegal burning and disposal of solid waste failure to conduct proper opacity stack testing at a grain facility in Duncombe, Iowa, and required NEW Coop. to conduct the proper stack testing and to pay a $6,000.00 administrative penalty.

FACTS

30. NEW Coop. is a cooperative association with more than 80 locations, headquartered in Fort Dodge, IA. NEW Coop. operates a cooperative facility located at 203 West Oak St., Red Oak, IA 51566. The Red Oak facility provides agricultural services for grain, energy, feed, and agronomy to local farmers. Located at the facility is a 500,000-gallon tank for nitrogen fertilizer storage.

31. Nitrogen fertilizer contains ammonium, which can be toxic to aquatic wildlife.

32. Unless excepted, all liquid fertilizer and soil conditioner facilities must have secondary containment areas to prevent spillage. 21 Iowa Admin. Code 44.55. NEW Coop. was compliant with its secondary containment requirements.

<u>IDNR Investigation into Fertilizer Spill</u>

33. On Monday, March 11, 2024, at 9:18 a.m., NEW Coop. notified IDNR Field Office 4 of a release of approximately 265,000 gallons of fertilizer, containing 32% nitrogen from an open hose valve in a loading area, which then flowed from the facility into a stormwater ditch and ultimately into the East Nishnabotna River ("River").

34. NEW Coop. stated the contents of the 500,000-gallon nitrogen fertilizer storage tank began to be released from the valve on March 9, 2024, at approximately 11:30 a.m. due to a

rise in temperature which broke loose a previously frozen clog in the valve, which had inadvertently been left in the open position on Friday, March 8, 2024, when staff left the facility for the weekend. The piping infrastructure, including the valve, sits in the loading area. While there is secondary containment for the loading area to contain spills, the loading area and valve are not located within the much larger secondary containment area for the storage tank, and the release eventually overwhelmed the secondary containment for the loading area.

35. The release from the valve continued throughout the weekend until around 6:45 a.m. Monday, March 11, 2024, when workers arrived for their shift and closed the valve. During the farming "off-season," employees typically do not work on weekends, which contributed to the release going undetected for the entirety of the weekend. The release flowed through the loading area containment structure, which could hold approximately 5,000 gallons. Once the containment structure was full, the product flowed outside the building, pooling in the gravel lot, and then eventually reached the stormwater ditch. After discovery, New Coop. installed four berms within the stormwater ditch to contain the remaining fertilizer product and prevent it from flowing further down the ditch and into the River, deployed absorbent materials on the ground, and plugged the stormwater intake drain to prevent further releases into the stormwater ditch.

36. On March 11, 2024, IDNR staff arrived at the facility and immediately began its investigation into the release. IDNR staff determined the fertilizer pooled on the gravel lot outside the loading area, flowed through a stormwater tile intake and into a stormwater ditch, through a levee with an open gate in the stormwater ditch, and then into the River. IDNR staff learned that city officials closed the levee gate to contain the remaining fertilizer on site prior to IDNR's arrival. A depiction of the facility and fertilizer flow path is detailed in the image below:

37. Later the same day, IDNR staff visited various downstream points along 33.8 miles of the River and used field test kits to test the water for elevated ammonia levels, which showed elevated ammonia levels at each location. IDNR staff observed dead fish during the investigation and then started assessing the extent of the fish kill.

38. On March 12, 2024, IDNR staff collected water samples from the River near Red Oak, Riverton, and Hamburg, respectively, for State Hygienic Laboratory analysis. Elevated ammonia levels were detected all along the River south of Red Oak, including near Hamburg, close to the border with Missouri.

39. On March 13, 2024, IDNR staff met with Missouri Department of Conservation ("MO DOC") staff to discuss the release. The MO DOC stated they would be following their own sampling protocols. Fish were still actively dying in the River, so IDNR staff could not get a full determination of the fishkill at that time. Water samples were collected near Hamburg, and the results continued to show elevated ammonia levels.

40. On March 18, 2024, IDNR staff traveled to Hamburg to monitor the status of ammonia levels in the River, and water samples indicated that, while the ammonia levels had dropped significantly, they were still elevated.

41. On March 25, 2024, Red Oak received approximately 1"-1.5" of rain, and, in order to avoid flooding, city officials ordered the levee gate, which was blocking any contaminated water in the stormwater ditch from entering the River, to be opened. The combination of the heavy rainfall and opening of the levee gate caused the berms in the stormwater ditch to fail, allowing contaminated water in the stormwater ditch to flow into the River. IDNR staff returned to Red Oak the same day to collect additional water samples, which showed elevated levels of ammonia at the confluence of the stormwater ditch and the River. The IDNR also advised city officials to close the levee gate until cleanup was complete.

42. On March 27, 2024, IDNR staff finalized the results of its fish kill investigation and provided a memorandum summarizing the investigation. IDNR documented that all 49.8 miles of the River downstream of NEW Coop.'s facility were affected by elevated ammonia levels. The IDNR observed dead snakes, frogs and mussels along the River and an estimated 749,242 fish were killed by the release. The fish kill then continued past the Missouri border and ended near the River's confluence with the Missouri River in Missouri.

43. On April 11, 2024, IDNR staff sent a report with their investigative findings and a Notice of Violation letter to NEW Coop., which stated that because the cleanup would extend beyond the 30-day time limit to submit a hazardous condition report, New Coop. would be required to submit a 30-day hazardous condition report at the time of final cleanup.

44. On May 9, 2024, IDNR notified NEW Coop. that the IDNR would be seeking a referral to the Iowa Attorney General's Office for wastewater violations.

45. On May 22, 2024, the EPC voted to refer the environmental enforcement action against NEW Coop. to the Iowa Attorney General's Office.

46. On June 10, 2024, NEW Coop. provided IDNR with the required written notice of the hazardous condition. In this notice, NEW Coop. stated that an estimated 3.2 million pounds of impacted soil was excavated and disposed of as a result of the release, as well as 160,000 gallons of impacted water from the dammed areas behind the berms that was pumped and removed.

47. The wastewater discharged from the facility constitutes a "pollutant" as defined by Iowa Code section 455B.171(22). The East Nishnabotna River constitutes a "water of state" as defined by Iowa Code section 455B.171(41).

NEW Coop. Clean-up Efforts of Fertilizer Spill

48. NEW Coop. brought in Green Tree Company ("Green Tree") on March 11, 2024, to aid in the cleanup efforts. Green Tree constructed berms in the stormwater ditch to contain the remaining fertilizer and cleared the ground to prepare for excavation. NEW Coop. also retained the firm Terracon to assist in cleanup.

49. On March 12, 2024, NEW Coop. began excavating to remove contaminated soil and temporarily store it before final disposal. NEW Coop. also pumped out the stormwater ditch, and the liquid product was removed into mobile tanks and was later moved to large tanks at the facility.

50. On March 26, 2024, IDNR approved NEW Coop.'s disposal plan for the contaminated soil that had been excavated and temporarily stored pending final disposal.

51. On March 29, 2024, NEW Coop. informed the IDNR that the berm at the confluence of the stormwater ditch and the River, which had been destroyed from the opened

levee on March 25, 2024, was back in place, and NEW Coop. had resumed pumping out and dewatering the ditch.

52. On April 2, 2024, Terracon's soil and water samples from the stormwater ditch showed elevated ammonia levels, causing the stormwater ditch to be dewatered again. Further sampling would be required after the dewatering efforts.

53. On April 16, 2024, Terracon's water sampling showed elevated levels of ammonia and nitrates/nitrites in the stormwater ditch, including the area in-between the berm blocking the stormwater ditch and the River. IDNR required further dewatering and more sampling after dewatering was completed.

54. On April 26, 2024, in anticipation of an incoming storm, a meeting was held between the IDNR, NEW Coop., and the Montgomery County Emergency Management Agency ("EMA"). All parties agreed that pumping the areas surrounding the stormwater ditch could ensure protection from further contamination due to the rain. NEW Coop. staff continued to pump the stormwater ditch and hold the pumped water on-site.

55. On May 15, 2024, Terracon conducted water sampling of both the stormwater ditch and the River. River samples showed low nitrate/nitrite levels but elevated levels of ammonia. The stormwater ditch samples showed elevated levels of both nitrate/nitrite and ammonia remained. Terracon also conducted soil samples of the stormwater ditch and determined further excavation was required to remove contaminated soil.

56. That same day, NEW Coop. notified the IDNR they were reaching storage capacity of the contaminated water. They discussed reaching out to farmers to store contaminated water in manure storage facilities for later land application. IDNR did not approve the plan at the time as there were many unanswered questions about the plan.

57. On or about May 21, 2024, a storm in Red Oak caused river levels to rise and flooding to occur. By May 26, 2024, river levels had receded from the flood, and it was discovered that the berm between the River and stormwater ditch had been partially destroyed by the flood. On May 26, 2024, after determining there was no longer any need to retain contaminated water in the stormwater ditch, the IDNR and Montgomery County EMA agreed to opening the levee gate blocking the stormwater ditch from the River. Once the levee was opened, the remainder of the berm was destroyed.

58. On May 28, 2024, the IDNR required NEW Coop. to collect soil samples to determine potential impact of floodwaters to any remaining on-site contamination. Terracon collected approximately 28 samples at 14 locations. Results varied from high levels of ammonia to low depending on the location of the sample.

59. On May 31, 2024, NEW Coop. provided the IDNR a map for the proposed application of the contaminated, pumped water. On June 6, 2024, the IDNR approved land-application of the stored, contaminated water to pasture ground.

60. From March 13, 2024 to June 10, 2024, NEW Coop. and Terracon continued to excavate contaminated soil and pump water out of the stormwater ditch.

61. On June 13, 2024, approximately three months after the initial release, Terracon submitted water samples from the confluence of the stormwater ditch and the River, and the results continued to show high ammonia and nitrate/nitrite levels.

62. On July 26, 2024, the IDNR approved Terracon's proposal to conduct addition excavation and backfilling with clay and erosion stone along the stormwater ditch to reduce direct contact to surface water at the Red Oak facility.

63. On July 30, 2024, Terracon submitted a 30-day hazardous condition report and UAN Tank Release Interim Summary Report to the IDNR, providing a summary of the release and cleanup activity up to that date. In the Summary, Terracon stated that so far, NEW Coop. had land-applied approximately 1,600 tons of excavated soil and 204,000 gallons of pumped water at various locations approved by the IDNR.

64. On July 30, 2024, IDNR Field Office 4 notified NEW Coop. that no further excavations would be required to address the immediate emergency response as the last round of sampling indicated ammonia levels were below statewide standards. This marked the conclusion of the emergency response requirements by IDNR Field Office 4, and the matter was transferred to IDNR's Solid Waste and Contaminated Sites section to determine whether additional remediation, cleanup, or monitoring is necessary.

65. NEW Coop. may be required to perform additional remediation, cleanup and monitoring after NEW Coop. completes the required site assessment pursuant to 567 Iowa Admin. Code 133.4(3)(a).

66. The IDNR Field Services and Compliance Bureau incurred $4,886.52 in costs for labor, mileage and equipment during its investigation of the release and assistance it rendered during the cleanup process.

VIOLATIONS

67. From March 9 through March 11, 2024, NEW Coop. discharged a pollutant into a water of the state in violation of Iowa Code 455B.186.

68. From March 9 through March 25, 2024, NEW Coop. was responsible for a discharge of a pollutant into a water of the state, which was acutely toxic to human, plant, or

animal life and led to an estimated 749,242 fish killed in violation of 567 Iowa Administrative Code 61.3(2)(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff State of Iowa, ex rel., Iowa Department of Natural Resources requests that the Court:

a. assess civil penalties against Defendant NEW Coop., pursuant to Iowa Code section 455B.191(2), for violations of Iowa Code section 455B.186, and 567 Iowa Admin. Code 61.3(2)(d), not to exceed Five Thousand Dollars ($5,000.00) per day, per violation, for each day of such violation; and

b. issue a permanent injunction, pursuant to Iowa Code 455B.191(5), enjoining Defendant NEW Coop. from any violation of Iowa Code 455B.186 and 567 Iowa Admin. Code 61.3(2)(d).

Plaintiff further requests that the Court tax the costs of this action to the Defendant NEW Coop. and provide such other relief as the Court may deem just and proper.

Respectfully submitted,

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