

IN THE DISTRICT COURT OF THAYER COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel.,)	
JIM MACY, Director,)	Case No. _____
NEBRASKA DEPARTMENT OF)	
ENVIRONMENT AND ENERGY,)	
)	
Plaintiff,)	COMPLAINT
)	
v.)	
)	
EXIDON, INC. d/b/a MID-AMERICA)	
FEED YARD,)	
)	
Defendant.)	

COMES NOW Jim Macy, Director of the Nebraska Department of Environment and Energy, 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 Environment and Energy (“Department”) is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504, to administer and enforce the Nebraska Environmental Protection Act (“NEPA”), Neb. Rev. Stat. § 81-1501 *et seq.*, the Livestock Waste Management Act (“LWMA”), Neb. Rev. Stat. § 54-2416 *et seq.*, and all rules, regulations, orders, and permits issued pursuant to those Acts.

2. The Department is further charged with the duty to “administer the animal feeding operation permitting program in accordance with the National Pollutant Discharge Elimination System [“NPDES”] of the federal Clean Water Act ... through [NEPA], the [LWMA], and the rules and regulations adopted and promulgated pursuant to such act” Neb. Rev. Stat. § 54-2418(1).

3. Defendant Exidon, Inc. d/b/a Mid-America Feed Yard (“Mid-America”) is a corporation incorporated in Nebraska. Mid-America owns and operates an animal feeding operation in Thayer County, Nebraska.

4. Mid-America is considered a “person” for purposes of NEPA and LWMA. Neb. Rev. Stat. §§ 81-1502(10) & 54-2417(16).

JURISDICTION AND VENUE

5. The District Court has jurisdiction over the subject-matter of this action, pursuant to Neb. Rev. Stat. § 24-302, and over the parties to this action.

6. Venue is proper pursuant to Neb. Rev. Stat. § 25-403.01, as Mid-America’s animal feeding operation is located in Thayer County and the events at issue took place in Thayer County.

LEGAL BACKGROUND

7. NEPA was enacted in 1971 to protect the water, land, and air of this State by, *inter alia*, making 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” and “[t]o discharge or emit any wastes into any air, water, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established ... by the council[,] including the aesthetic quality of surface waters.” *Id.* §§ 81-1501, 81-1506(1).

8. “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); *see* 117 Neb. Admin. Code § 1-047 (defining “pollutant” to mean “any gas, liquid, or solid introduced into a body of water that causes water pollution”).

9. “Water pollution” is defined as “the manmade or man-induced alteration of the chemical, physical, biological, or radiological integrity of water[.]” Neb. Rev. Stat. § 81-1502(20).

10. All surface waters of the state are to be “aesthetically acceptable,” which means “waters are to be free from human-induced pollution which causes: 1) noxious odors; 2) floating, suspended, colloidal, or settleable materials that produce objectionable films, colors, turbidity, or deposits; and 3) the occurrence of undesirable or nuisance aquatic life” 117 Neb. Admin. Code § 4-005.

11. NEPA also makes it unlawful to violate the LWMA, an animal feeding operation permit, or any rules or regulation adopted and promulgated pursuant to NEPA or LWMA. Neb. Rev. Stat. § 81-1506(5).

12. LWMA provides, *inter alia*, permitting requirements, livestock waste management requirements, and prohibited acts for animal feeding operations. *E.g.*, Neb. Rev. Stat. §§ 54-2418–19, 2422–25, 2432, & 2434. Prohibited acts under LWMA include, *inter alia*, the discharge of livestock wastes in violation of permits and failing to comply with rules and regulations.

13. Pursuant to its authority under Neb. Rev. Stat. § 81-1505, the Nebraska Environmental Quality Council (“council”) promulgated Title 117, to regulate water quality, and Title 130—*Livestock Waste Control Regulations*, to regulate animal feeding operations and management of livestock waste.

14. Title 130 of the Nebraska Administrative Codes makes it unlawful for an animal feeding operation to, *inter alia*, discharge livestock wastes in violation of an NPDES permit or construction and operating permit, apply livestock wastes in a manner that discharges to waters of the State, fail to land apply on all available dewatering days until adequate storage is restored, fail to monitor and maintain an irrigation distribution system during land application, and fail to comply with recordkeeping requirements. *E.g.*, 130 Neb. Admin. Code §§ 2-008.02, 2-008.10, 7-005, 11-001, 11-003, 12-001, 12-002 & 12-004.

15. An “animal feeding operation” is “a location where beef cattle ... or other livestock have been, are, or will be stabled or confined and fed or maintained for a total of forty-five days or more in any twelve-month period and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the location.” Neb. Rev. Stat. § 54-2417(1). Animal feeding operations can be large (more than 1,000 non-dairy, non-veal cattle), medium (300 to 999 non-dairy, non-veal cattle), or small (less than 300 non-dairy, non-veal cattle). *See* 130 Neb. Admin. Code §§ 1-024, 1-029, 1-044.

16. A “discharge” means “the spilling, leaking, pumping, pouring, emitting, or dumping of pollutants into any waters of the State or in a place likely to reach waters of the State.” 130 Neb. Admin. Code § 1-016.

17. “Livestock wastes” are “animal and poultry excreta and associated feed losses, bedding, spillage or overflow from watering systems, wash and flushing waters, sprinkling waters from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation, and other materials polluted by livestock wastes.” 130 Neb. Admin. Code § 1-027.

18. An “irrigation distribution system” is “any device or combination of devices having a hose, pipe, or other conduit through which livestock wastes or a mixture of water and livestock wastes is drawn and applied for agricultural or horticultural purposes.” 130 Neb. Admin. Code § 1-022.

19. An animal feeding operation also must comply with its Nutrient Management Plan (“NMP”), which provides protocols for land application of manure, the fields available for land application, application rates, and any limitations. *See* 130 Neb. Admin. Code §§ 5-007.05 & 7-005.02.

20. Generally, irrigation distribution systems are used by animal feeding operations to dewater livestock waste control facilities, like holding ponds, by land applying livestock wastes on fields and at rates provided in an NMP.

21. Under NEPA, the Department, through the Attorney General’s Office, is empowered to file an enforcement action seeking civil penalties and/or injunctive relief. *See* Neb. Rev. Stat. §§ 81-1508 & 81-1508.02.

22. Each violation of NEPA subjects “a person to a civil penalty of no more than ten thousand dollars per day. In the case of a continuing violation, each day shall constitute a separate offense. In assessing the amount of the fine, the court shall consider the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance.” Neb. Rev. Stat. § 81-1508.02(2).

FACTUAL BACKGROUND

23. At all times relevant to this Complaint, Mid-America owned and operated a large animal feeding operation in Thayer County, Nebraska. Mid-America had a permitted capacity of over 31,000 cattle during this time period.

24. At all times relevant to this Complaint, Mid-America held a modified construction and operating permit, which was issued on November 13,

2018, and an NPDES General Permit NEG019000, which was issued on January 4, 2019. Mid-America also had an NMP, which was received by the Department on July 13, 2019 and approved when the modified construction and operating permit was issued.

25. The modified construction and operating permit describes the livestock waste control facilities (“LWCF”) utilized by Mid-America for management of livestock wastes, which were holding ponds (1A, 1B, 2, Upper 3A, Lower 3B), debris basins (1A, 3A, 3B), and a clearwater diversion. Only holding ponds 1B and 3B are relevant to this Complaint.

26. Mid-America’s NMP showed it had approximately ten fields for land application and a number of pivots as part of its irrigation distribution system. Only fields numbered 25, 26, 27, and 45 and the pivots used for those fields are relevant to this Complaint.

27. Dry Sandy Creek is west of and adjacent to Mid-America’s animal feeding operation. Runoff from fields 25, 26, 27, and 45 drains into Dry Sandy Creek.

28. Holding pond 1B had a max water level of 24.5 feet, a start pump level of 21 feet, and a winter pump down level of 19 feet.

29. Holding pond 3B had a max water level of 22.5 feet, a start pump level of 17 feet, and a winter pump down level of 10 feet.

30. Both holding ponds 1B and 3B had staff gauges, which determined the current capacity of the holding ponds.

31. At all times relevant to this Complaint, Mid-America recorded the levels of the holding ponds in pond level logs.

32. October 2018 through July 2019 pond level logs showed both holding pond 1B and holding pond 3B were both above the start pump level as of October 1, 2018 and continued to be above the start pump level through the summer of 2019.

33. Holding pond 1B remained above the start pump level from October 1, 2018 until on or about July 16, 2019. The winter pump down level for holding pond 1B was not achieved between October 2018 and the end of 2018.

34. From October 1, 2018 to July 16, 2019, there were at least 45 days on which Mid-America could have dewatered holding pond 1B, but Mid-America did not dewater on those days.

35. Holding pond 3B remained above the start pump level from October 1, 2018 until on or about June 28, 2019. The winter pump down level for holding pond 3B was not achieved between October 2018 and the end of 2018.

36. From October 1, 2018 to June 28, 2019, there were at least 25 days available for dewatering holding pond 3B, but Mid-America did not dewater on those days.

37. The August 2019 through October 2019 pond level logs showed both holding pond 1B and holding pond 3B were above their start pump levels again in late summer 2019 and continued to be above their start pump level until end of October 2019.

38. Holding pond 1B remained above the start pump level from September 10, 2019 until on or about October 23, 2019.

39. From September 10, 2019 to October 23, 2019, there were at least 18 days available for dewatering holding pond 1B, but Mid-America did not dewater on those days.

40. Holding pond 3B remained above start pump from August 5, 2019 until on or about October 31, 2019.

41. From August 5, 2019 to October 31, 2019, there were at least 15 days available for dewatering holding pond 3B, but Mid-America did not dewater on those days.

42. On or about October 18, 2019, a Department inspector visited Mid-America to investigate a discharge. During the investigation, the Department inspector observed no pivots were operating at the time. Mid-America's dewatering logs showed the pivots on fields 27 and 45 had been shut off around 8:20 a.m. on October 18, 2019 and did not start up again until October 19, 2019. The pivots on fields 25 and 26 were not operating.

43. On or about October 23, 2019, the Department received a public complaint that high volumes of livestock waste were discharging to Dry Sandy

Creek through multiple, stationary pivots that had not moved in days. The complainant stated it first observed the discharges on October 1, 2019.

44. The Department sent an inspector to conduct a complaint and discharge investigation at Mid-America's animal feeding operation the next morning, on October 24, 2019.

45. During the investigation, the Department inspector observed multiple discharges of livestock waste, both active and recent, from four pivots on four land application fields that had or were draining into Dry Sandy Creek.

46. The Department inspector observed the pivot on field 25 and the pivot on field 26 were not moving or rotating in the fields but were still applying livestock waste to the land. The inspector further observed the livestock waste being applied was running off both field 25 and field 26 and into Dry Sandy Creek.

47. For field 25, the inspector observed there were no visible pivot tracks and several of the pivot nozzles were creating geysers when the livestock waste was being applied.

48. During the investigation, an employee for Mid-America told the inspector that the pivot on field 26 was not moving due to a broken U-joint and was supposed to be fixed that day.

49. Mid-America's dewatering logs for holding pond 1B showed the pivot on field 25 had been operating from October 19, 2019 to October 24, 2019 and had applied 5,082,000 gallons of livestock waste during that time.

50. Mid-America's dewatering logs for holding pond 3B showed the pivot on field 26 had been operating from October 19, 2019 to October 24, 2019 and had applied 5,159,000 gallons of livestock waste during that time.

51. The Department inspector also observed the pivot on field 45 was moving and applying livestock waste to the land, but the livestock waste was running off the field and into an intermittent drainage that connects to Dry Sandy Creek. The Department inspector further observed that the pivot on field 45 did not stop applying livestock waste when it crossed through an intermittent drainage and instead applied livestock waste onto the intermittent drainage.

52. Mid-America's dewatering logs for holding pond 3B showed the pivot on field 45 had been operating from October 14, 2019 until approximately 8:20 a.m. on October 18, 2019 and then from October 19, 2019 to October 24, 2019. During these time periods, Mid-America applied 3,598,000 gallons and 5,078,000 gallons of livestock waste, respectively.

53. The Department inspector observed the pivot on field 27 was not operating, but there was evidence that livestock waste had run off field 27, went through a culvert under Highway 4, and into the intermittent drainage located in field 45. Mid-America's dewatering logs for holding pond 3B showed the pivot on field 27 had been operating from October 14, 2019 to October 18, 2019 at approximately 8:20 a.m. and from October 19, 2019 to October 23, 2019 and had applied 3,836,000 gallons of livestock waste.

54. The Department inspector also made observations of Dry Sandy Creek upstream of the Facility and where the livestock waste entered Dry Sandy Creek at various points to observe the visual quality of Dry Sandy Creek. Upstream of the Facility, the Department inspector observed the water in Dry Sandy Creek to be clear. Downstream of the Facility and where the discharges were entering Dry Sandy Creek, the Department inspector observed the water to be brown and not clear due to livestock waste entering the creek.

55. On October 24, 2019, Mid-America submitted a written discharge report that indicated the pivots were shut off and would be fixed.

56. The Department conducted a review of Mid-America's records from October 2018 to December 2019, including pond level logs and observed that Mid-America failed to record the level each week for holding pond 1B on at least 26 occasions and for holding pond 3B on at least 22 occasions. The Department also observed Mid-America failed to record the level after precipitation events for holding pond 1B on at least 119 occasions and for holding pond 3B on at least 119 occasions.

57. On November 15, 2019, the Department issued a Notice of Violation ("NOV") to Mid-America. The NOV cited the following violations:

- a. Improper land application in violation of Neb. Rev. Stat. §§ 54-2432, 81-1506, and 130 Neb. Admin. Code § 11-004;

- b. Discharging livestock waste to waters of the State in violation of Neb. Rev. Stat. § 81-1506 and 130 Neb. Admin. Code § 2-008;
- c. Failing to report a discharge within 24 hours in violation of Neb. Rev. Stat. §§ 54-2432, 81-1506, and 130 Neb. Admin. Code § 2-010; and
- d. Failing to properly maintain adequate holding pond levels and utilize all available dewatering days in violation of Neb. Rev. Stat. § 54-2432 and 130 Neb. Admin. Code §§ 2-008, 11-003.

58. The November 2019 NOV also requested Mid-America to take corrective actions, including immediately ceasing all discharges of livestock waste from the land application fields, immediately implement weekly recordkeeping of holding pond levels, and repairing pivots. Mid-America responded on January 30, 2020 that those corrective actions had been completed.

59. Since 2019, Mid-America has improved its recordkeeping, managed the levels in its holding ponds, added additional acres of land application, and there have been no known discharges of livestock waste.

FIRST CAUSE OF ACTION

DISCHARGES OF LIVESTOCK WASTE AND/OR IMPROPER LAND APPLICATION OF LIVESTOCK WASTE IN VIOLATION OF NEB. REV. STAT. § 54-2432 AND 130 NEB. ADMIN. CODE § 2-008.

60. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1-59 as though fully set forth herein.

61. Under NEPA, it is “unlawful for any person to ... [v]iolate any provision of the [LWMA];” “any term or condition of an animal feeding operation permit;” or “any rule or regulation adopted and promulgated by the council pursuant to” NEPA or the LWMA. Neb. Rev. Stat. § 81-1506(5)(b)-(d).

62. LWMA makes it “unlawful for any person to ... [d]ischarge animal excreta, feed, bedding, spillage or overflow from watering systems, wash and flushing waters, sprinkling water from livestock cooling, precipitation

polluted by falling on or flowing onto an animal feeding operation, or other materials polluted by livestock waste in violation of ... a [NPDES] permit, a construction and operating permit, ... or the rules and regulations” Neb. Rev. Stat. § 54-2432(4); *see also* 130 Neb. Admin. Code § 2-008.10.

63. 130 Neb. Admin. Code § 2-008.03 provides “[a]ny person who owns or operates an animal feeding operation shall not ... [a]pply manure, litter, or process wastewater to land in a manner that results in a discharge to waters of the State or that is not in accordance with nutrient management practices that ensure agricultural utilization of the nutrients in the manure, litter, or process wastewater.”

64. NPDES General Permit NEG019000 provides, *inter alia*:

1) *Discharge Prevention Methods* – The permittee shall prevent a discharge of livestock waste into waters of the State resulting from land application by:

- (a) Utilizing application sites that are under proper conservation treatment to prevent runoff into waters of the State;
- (b) Applying livestock wastes at a rate and in such a manner that will not produce runoff into waters of the State;
- (c) Utilizing suitable application methods and equipment;
- (d) Monitoring and maintaining the land application equipment to ensure that the equipment operates as intended; and
- (e) Managing land application irrigation practices to prevent runoff and to reduce or minimize ponding of livestock waste on application area.

65. On or about October 23, 2019, the Department received a complaint that high volumes of livestock waste were discharging to Dry Sandy Creek from Mid-America’s land application fields.

66. On October 24, 2019, the Department conducted a complaint investigation at Mid-America’s animal feeding operation and observed multiple discharges of livestock waste from pivots on four of Mid-America’s land application fields.

67. The Department observed livestock waste was actively running off fields 25 and 26 and into Dry Sandy Creek. Mid-America had been land applying livestock waste on fields 25 and 26 from October 19, 2019 to October 24, 2019. During that time, Mid-America had applied over five million gallons of livestock waste on field 25, as well as on field 26.

68. The Department further observed livestock waste was running off field 45 and into an intermittent drainage that connects to Dry Sandy Creek and the pivot on field 45 also did not shut off when it passed over an intermittent drainage. Mid-America had been land applying livestock waste on field 45 from October 19, 2019 to October 24, 2019. During that time, Mid-America had applied over five million gallons of livestock waste on field 45.

69. The Department also observed evidence that livestock waste had run off field 27 and through a culvert and into the intermittent drainage located in field 45. Mid-America had been land applying livestock waste on field 27 from October 19, 2019 to October 23, 2019. During that time, Mid-America had applied over three million gallons of livestock waste on field 27.

70. Livestock waste is animal excreta, as defined in 130 Neb. Admin. Code §1-027.

71. The intermittent drainage in field 45 and Dry Sandy Creek are waters of the State, as defined in Neb. Rev. Stat. § 81-1502(21).

72. Livestock waste being land applied by pivots and running off of land application fields to waters of the state is a discharge, as defined in 130 Neb. Admin. Code §1-016.

73. Mid-America applied livestock waste in a manner that resulted in at least four separate discharges to waters of the State in October 2019, which is not in compliance with its NPDES permit, the LWMA, or Title 130.

74. Mid-America violated Neb. Rev. Stat. § 54-2432, 130 Neb. Admin. Code § 2-008, and NPDES General Permit NEG019000 by applying livestock waste in a manner that resulted in at least four discharges and/or runoff to waters of the State.

75. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Mid-America is subject to a civil penalty of not more than \$10,000 per day for each violation.

SECOND CAUSE OF ACTION
POLLUTION OF WATER OF THE STATE IN VIOLATION OF NEB.
REV. STAT. § 81-1506(1)(a).

76. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1-59 as though fully set forth herein.

77. 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” and “[t]o discharge or emit any wastes into any air, water, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established ... by the council[,] including the aesthetic quality of surface waters.” Neb. Rev. Stat. § 81-1506(1).

78. On or about October 23, 2019, the Department received a complaint that high volumes of livestock waste were discharging to Dry Sandy Creek from Mid-America’s land application fields.

79. On October 24, 2019, the Department conducted a complaint investigation and observed two separate, active discharges of livestock waste running off fields 25 and 26 and into Dry Sandy Creek.

80. The Department observed another discharge of livestock waste running off field 45 and into an intermittent drainage that connects to Dry Sandy Creek and the pivot on field 45 also did not shut off when it passed over the intermittent drainage.

81. The Department also observed evidence that livestock waste had run off field 27 and through a culvert and into the intermittent drainage located in field 45.

82. The Department observed Dry Sandy Creek, which was discolored, brown, and not clear due to livestock waste entering the creek.

83. Upstream of the locations where livestock waste was entering Dry Sandy Creek, the water was clear.

84. Livestock waste is a “waste” as defined by Neb. Rev. Stat. § 81-1502(14), and a pollutant.

85. An intermittent drainage is a waterway, which is a water of the State, as defined in Neb. Rev. Stat. § 81-1502(21).

86. Dry Sandy Creek is a water of the State, as defined in Neb. Rev. Stat. § 81-1502(21).

87. Land application by Mid-America that resulted in at least four discharges of livestock waste into Dry Sandy Creek is “water pollution,” as defined by Neb. Rev. Stat. § 81-1502(20), and reduced the aesthetic quality of Dry Sandy Creek.

88. Mid-America’s at least four discharges of livestock each separately caused pollution to an intermittent drainage and/or Dry Sandy Creek, which are both waters of the State, in October 2019.

89. Mid-America violated Neb. Rev. Stat. § 81-1506(1) by causing pollution of waters of the state and reduced the aesthetic quality of a water of the state.

90. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Mid-America is subject to a civil penalty of not more than \$10,000 per day for each violation.

THIRD CAUSE OF ACTION

FAILURE TO LAND APPLY ON ALL AVAILABLE DEWATERING DAYS UNTIL ADEQUATE STORAGE IS RESTORED IN VIOLATION OF NEB. REV. STAT. §§ 81-1506 AND 130 NEB. ADMIN. CODE § 11-003.

91. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1-59 as though fully set forth herein.

92. Under NEPA, it is “unlawful for any person to ... [v]iolate any provision of the [LWMA];” “any term or condition of an animal feeding operation permit;” or “any rule or regulation adopted and promulgated by the council pursuant to” NEPA or the LWMA. Neb. Rev. Stat. § 81-1506(5)(b)-(d); *see also id.* § 54-2432(5); 130 Neb. Admin. Code § 2-008.13.

93. Under Title 130, “[a]ny time the waste storage volume in the livestock waste control facility exceeds the [start pump level] ... livestock wastes

shall be land applied on all available dewatering days until adequate storage is restored.” 130 Neb. Admin. Code § 11-003.

94. Likewise, NPDES General Permit NEG019000 Part II(F)(2) includes the following term and conditions:

- (a) Dewatering of holding ponds shall begin on the first dewatering day following a precipitation event and continue on all subsequent dewatering days until the “Must Pump” level is reached
- (b) The holding pond shall be dewatered prior to the winter months to provide capacity indicated by the “Winter Pump Down” level

95. Mid-America held NPDES General Permit NEG019000 in 2019.

96. In 2019, Mid-America had and was using livestock waste control facilities, including holding pond 1B and holding pond 3B.

97. Holding pond 1B was above the start pump (or must pump) level from October 1, 2018 until on or about July 16, 2019 when adequate storage was restored. Mid-America had not dewatered to the winter pump down level between October 2018 and prior to the winter months.

98. Between October 1, 2018 and July 16, 2019, there were at least 45 days available for dewatering, but Mid-America did not dewater on those available days.

99. Holding pond 1B was again above the start pump level from September 10, 2019 until on or about October 23, 2019. Between September 10, 2019 and October 23, 2019, there were at least 18 days available for dewatering, but Mid-America did not dewater on those available days.

100. Holding pond 3B was above the start pump level from October 1, 2018 until on or about June 28, 2019 when adequate storage was restored. Mid-America had not dewatered to the winter pump down level between October 2018 and prior to the winter months.

101. Between October 1, 2018 and June 28, 2019, there were at least 25 days available for dewatering, but Mid-America did not dewater on those available days.

102. Holding pond 3B was again the above start pump level from August 5, 2019 until on or about October 31, 2019. Between August 5, 2019 and October 31, 2019, there were at least 15 days available for dewatering, but Mid-America did not dewater on those available days.

103. When holding ponds reach the start pump level, the animal feeding operation must land apply on all available dewatering days until the holding ponds are below the start pump level.

104. Mid-America failed to land apply on all available dewatering days to restore adequate storage when holding pond 1B and holding pond 3B were above the start pump level.

105. Mid-America violated Neb. Rev. Stat. § 81-1506, 130 Neb. Admin. Code § 11-003, and NPDES General Permit NEG019000 by failing to land apply on all available dewatering days when its holding ponds were above the start pump level, which totals 103 available days. Each day constitutes a separate violation.

106. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Mid-America is subject to a civil penalty of not more than \$10,000 per day for each violation.

FOURTH CAUSE OF ACTION

FAILURE TO RECORD POND LEVELS ON A WEEKLY BASIS AND AFTER PRECIPITATION EVENTS IN VIOLATION OF NEB. REV. STAT. §§ 81-1506(3)(c) & 81-1508.02(1)(e) AND 130 NEB. ADMIN. CODE § 12-001.

107. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1-59 as though fully set forth herein.

108. Under NEPA, it is “unlawful for any person to ... [v]iolate any provision of the [LWMA];” “any term or condition of an animal feeding operation permit;” or “any rule or regulation adopted and promulgated by the council

pursuant to” NEPA or the LWMA. Neb. Rev. Stat. § 81-1506(5)(b)-(d); *see also id.* § 54-2432(5).

109. 130 Neb. Admin. Code § 12-001 requires permitted feedlots to conduct “[w]eekly inspections at the production area of the manure, litter, and process wastewater impoundments. An inspection record shall note the level in liquid impoundments as indicated by the depth marker” and “daily monitoring and recording of any precipitation events[.]” 130 Neb. Admin. Code §§ 12-001.03 & 12-001.04; *see also* 130 Neb. Admin. Code § 12-004.01.

110. NPDES General Permit NEG019000 Part II(A) & (E) also require inspections and recording of the holding pond levels weekly and after precipitation events.

111. The Department reviewed Mid-America’s pond level logs for holding pond 1B and holding pond 3B and observed Mid-America failed to:

- a. Record the level of holding pond 1B each week on at least 26 occasions;
- b. Record the level of holding pond 1B after each precipitation event on at least 119 occasions;
- c. Record the level of holding pond 3B each week on at least 22 occasions; and
- d. Record the level of holding pond 3B after each precipitation event on at least 119 occasions;

112. Mid-America violated 130 Neb. Admin. Code § 12-001 and NPDES General Permit NEG019000 by failing to record the level of its holding ponds weekly and after each precipitation event, which occurred on 286 occasions. Each occasion constitutes a separate violation.

113. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Mid-America is subject to a civil penalty of not more than \$10,000 per day for each violation.

FIFTH CAUSE OF ACTION

FAILURE TO MONITOR THE IRRIGATION DISTRIBUTION SYSTEM IN VIOLATION OF NEB. REV. STAT. §§ 81-1506(3)(c) AND 128 NEB. ADMIN. CODE § 12-001.05.

114. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1-59 as though fully set forth herein.

115. Under NEPA, it is “unlawful for any person to ... [v]iolate any provision of the [LWMA];” “any term or condition of an animal feeding operation permit;” or “any rule or regulation adopted and promulgated by the council pursuant to” NEPA or the LWMA. Neb. Rev. Stat. § 81-1506(5)(b)-(d); *see also id.* § 54-2432(5).

116. 130 Neb. Admin. Code § 12-001.05 requires irrigation distribution systems to be “monitored while in use to insure the system operates as intended[.]”

117. NPDES General Permit NEG019000 Part II(D)(2)(b) provides “[t]he irrigation system and other application equipment shall be monitored while in use to ensure proper operation.” NPDES General Permit NEG019000 Part III(H) provides “[t]he permittee shall prevent a discharge of livestock waste into waters of the State resulting from land application by ... [m]onitoring and maintaining the land application equipment to ensure that the equipment operates as intended” and “[m]anaging land application irrigation practices to prevent runoff and to reduce or minimize ponding of livestock waste on application area.”

118. Mid-America was land applying livestock waste using its irrigation distribution system on fields 25, 26, and 45 from October 19, 2019 to October 24, 2019.

119. On October 23, 2019, the Department received a complaint that Mid-America was discharging livestock waste from multiple, stationary pivots that had not moved in days.

120. The next day the Department conducted a complaint investigation and observed the pivot on field 25 and the pivot on field 26 were not moving but were still applying livestock waste to the fields. A Mid-America employee stated that the pivot on field 26 had a broken U-joint.

121. The Department also observed the field 25 had no pivot tracks.

122. On field 45, the Department observed the pivot did not shut off when it went over the intermittent drainage.

123. Mid-America failed to monitor its irrigation distribution system to ensure it was in proper working order because from at least October 23, 2019 until October 24, 2019, the pivots on field 25 and field 26 had not been moving and should have been shut off to prevent discharges to waters of the state. Mid-America also failed to monitor the pivot in field 45 because it did not shut off when crossing over an intermittent drainage.

124. Mid-America also failed to monitor its irrigation distribution system to ensure it was in proper working order because from at least October 23 until October 24, 2019, there were multiple, active discharges from its land application fields to waters of the state that could have been prevented or reduced.

125. Mid-America violated 130 Neb. Admin. Code § 12-001.05 and NPDES General Permit NEG019000 by failing monitor its irrigation distribution system to ensure it was in proper working order. Each day constitutes a separate violation.

126. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Mid-America is subject to a civil penalty of not more than \$10,000 per day for each violation.

SIXTH CAUSE OF ACTION

FAILURE TO MAINTAIN ITS IRRIGATION DISTRIBUTION SYSTEM IN PROPER WORKING CONDITION IN VIOLATION OF NEB. REV. STAT. § 81-1506(3)(c) AND 130 NEB. ADMIN. CODE § 12-002.

127. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1-59 as though fully set forth herein.

128. Under NEPA, it is “unlawful for any person to ... [v]iolate any provision of the [LWMA];” “any term or condition of an animal feeding operation permit;” or “any rule or regulation adopted and promulgated by the council pursuant to” NEPA or the LWMA. Neb. Rev. Stat. § 81-1506(5)(b)-(d); *see also id.* § 54-2432(5).

129. 130 Neb. Admin. Code § 12-002 provides: “The owner or operator shall maintain all facilities and equipment in proper working condition. Any deficiencies found shall be corrected as soon as possible.”

130. NPDES General Permit NEG019000 Part III(H) provides “[t]he permittee shall prevent a discharge of livestock waste into waters of the State resulting from land application by ... [m]onitoring and maintaining the land application equipment to ensure that the equipment operates as intended[.]”

131. On October 23, 2019, the Department received a complaint that Mid-America was discharging livestock waste from multiple, stationary pivots that had not moved in days.

132. The next day the Department conducted a complaint investigation and observed the pivot on field 25 and the pivot on field 26 were not moving but were still applying livestock waste to the fields. A Mid-America employee stated that the pivot on field 26 had a broken U-joint.

133. The Department also observed the field 25 had no pivot tracks and the pivot’s nozzles were creating geysers.

134. Mid-America failed to maintain its irrigation distribution system because two pivots were not moving but still operating and one pivot had broken nozzles.

135. Mid-America violated 130 Neb. Admin. Code § 12-002 by failing to maintain the pivots on its land application fields. Each day constitutes a separate violation.

136. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Mid-America is subject to a civil penalty of not more than \$10,000 per day for each violation.

REQUEST FOR RELIEF

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

- A. Declare Mid-America violated the Nebraska Environmental Protection Act, the Livestock Waste Management Act, and/or Title 130 of the Nebraska Administrative Code;

- B. Enter the statutory maximum civil penalty against Mid-America, as provided under Neb. Rev. Stat. § 81-1508.02(2), for each day of each violation;
- C. Tax all court costs herein to Mid-America; and
- D. Grant Plaintiff such additional and further relief as this Court deems just and proper.

DATED this 21st day of July 2022.

STATE OF NEBRASKA, ex rel.,
JIM MACY, Director of the NEBRASKA
DEPARTMENT OF ENVIRONMENT
AND ENERGY, Plaintiff

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