

**IN THE IOWA DISTRICT COURT FOR MONTGOMERY COUNTY**

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| <p><b>NISHNABOTNA WATER DEFENDERS,</b></p> <p><b>Plaintiff,</b></p> <p><b>v.</b></p> <p><b>NEW COOPERATIVE, INC.</b></p> <p><b>Defendant.</b></p> | <p><b>Case No.</b></p> <p><b>PETITION AT LAW</b></p> <p><b>AND</b></p> <p><b>JURY DEMAND</b></p> |
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**COMES NOW** Plaintiff Nishnabotna Water Defenders, and for its Petition at Law and Jury Demand, hereby states as follows:

**INTRODUCTION**

1. This is a civil action on behalf of Plaintiff Nishnabotna Water Defenders, a nonprofit membership corporation whose Members are advocates for clean water. These Members use and enjoy their real and personal properties and have established business activities in the Nishnabotna River watershed, and are entitled to the beneficial use of land and water held in trust by the State of Iowa for the people of this state. These interests have been infringed by repeated illegal and unpermitted discharges of water pollutants, and the unabated threat of further discharges, by Defendant from its facility (the “Facility”) at 203 200<sup>th</sup> Street, Red Oak, Montgomery County, Iowa.

2. At the Facility, Defendant maintains one or more 500,000-gallon storage tanks containing urea ammonium nitrate (UAN) liquid fertilizer. Over a period of days in 2024, but not known to Plaintiff’s Members, or to the general public, until at least March 11, 2024, the Facility illegally discharged UAN liquid fertilizer, totaling at least 266,929 gallons, which reached the East Nishnabotna, Nishnabotna, and Missouri Rivers, specifically:

- a. It has been reported that on or around Friday, March 8, 2024, NEW Cooperative, Inc. (“NEW Cooperative”) Red Oak employees left a frozen tank hose valve in an open position. By information and belief, over the weekend, Plaintiff understands that the valve thawed, releasing hundreds of thousands of gallons of this liquid fertilizer from the tank onto the lot surface below. The discharge reportedly went undetected for over forty-eight (48) hours. The stream of liquid fertilizer moved down gradient, over the surface of the lot, through a storm drain, into a stormwater drainage ditch, then into the East Nishnabotna River, where the spill progressed over fifty (50) miles downstream to the Missouri River. In the course of the pollutant’s travels downstream, over 700,000 fish of all species were reportedly killed, as well as amphibians, birds, and other wildlife, before NEW Cooperative employees discovered the discharge on Monday, March 11, 2024.
- b. After NEW Cooperative employees discovered the discharge, NEW cooperative reportedly contacted the City of Red Oak to close the levy gate, and then hired contractors to construct earthen dams in the storm water drainage ditch in an attempt to prevent further releases of liquid fertilizer into the East Nishnabotna River.
- c. On March 25, 2024, following heavy rains, the City of Red Oak reportedly opened stormwater ditch flood gates, releasing sufficient quantities of water to breach the recently installed earthen dams, resulting in another illegal discharge of liquid fertilizer and contaminated soils to the East Nishnabotna River.

d. One or more subsequent heavy rains soon thereafter reportedly again washed out the berm separating the liquid fertilizer discharge from the East Nishnabotna River, resulting in additional illegal discharges.

3. Defendant has failed and refused to follow accepted industry standards of care, including, but not necessarily limited to: complying with state regulations regarding construction standards for liquid fertilizer storage facilities at 22 IAC 44.55(200); providing adequate staffing; appropriate maintenance, housekeeping, and safety measures; installing appropriate pollution controls; and utilizing the best practicable control technology currently available to eliminate or drastically reduce the risk of adverse effects caused by its operations on neighboring and downstream communities. Instead, NEW Cooperative has used, and continues to use, outdated or no technologies for discharge detection and shutdown. It has no secondary containment structures. It has failed to take adequate measures to prevent secondary discharges after an initial catastrophic discharge occurs. And, it has failed to obtain Iowa NPDES (National Pollutant Discharge Elimination System) permits required for discharges of pollutants to state waters, despite repeated discharges.

4. The result of this misconduct is that polluting substances have been, or have threatened to be, released repeatedly and in vast quantities into the East Nishnabotna River. NEW Cooperative has not taken adequate steps to abate the risk of future discharges. These discharges and the risk on ongoing discharges have caused Plaintiff's Members to change their recreational, construction, and business activities to avoid the river, its flood plain, and groundwater in potential hydrological contact with the discharged pollutant. Plaintiff's Members are concerned that such contact with the river now puts them unreasonably at risk for serious health effects. The Facility's discharges have generally diminished Plaintiff's Members' ability to

use and enjoy their properties and state lands and waters held in trust by the State of Iowa, for the people of Iowa, with particularized impacts upon Plaintiff's Members.

### **PARTIES**

5. Plaintiff Nishnabotna Water Defenders ("Defenders") is an Iowa nonprofit corporation with IRS 501c3 tax-exempt status, founded in 2024 to advance the interests in a safe, clean, and thriving watershed of all those who use and enjoy the Nishnabotna River and its tributaries. Defenders' nearly two hundred Members in Southwest Iowa rely upon the organization to protect citizen access to and enjoyment of the Nishnabotna River watershed's natural resources. These resources include land and waters held by the State of Iowa in public trust for the people of Iowa. Defenders' registered agent is James C. Larew, 504 E. Bloomington Street, Iowa City, Iowa.

6. Defendant, NEW Cooperative, is an Iowa cooperative, is the owner and operator of the Facility and many other similar operations across Iowa. The Defendant's registered agent is Keith Jensen, 2626 First Avenue South, Fort Dodge, Iowa.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over Plaintiff and Defendant in this dispute, and Plaintiff seeks damages within its jurisdictional limits.

8. Venue is proper in this county, in that the actions complained of occurred here and the properties and business and recreational activities at issue are located here.

### **COUNT I: NUISANCE**

9. Plaintiff incorporates the preceding paragraphs of this Petition as if set forth fully herein.

10. Pursuant to Iowa Code § 657.1-657.2 (2011) and Iowa common law, Defendant's conduct at the Facility has created, and continues to constitute, a nuisance, in that Defendant has used and continues to use its property in such a manner as unreasonably to interfere with Plaintiff's Members' reasonable use and enjoyment of their own properties as well as their business and recreational activities that are dependent upon the clean and healthful condition of state lands and waters held in trust by the State of Iowa, for the people of Iowa.

11. Plaintiff's Members seek damages for the loss of the use and enjoyment of their properties and of affected state lands and waters held in trust by the State of Iowa, for the people of Iowa, among other damages.

12. Plaintiff seeks injunctive relief to force Defendant to modify and upgrade equipment and practices at the Facility, to remedy the threat of further unlawful discharges of hazardous chemicals and pollutants into state waters.

### **COUNT II: NEGLIGENCE**

13. Plaintiff incorporates the preceding paragraphs of this Petition as if set forth fully below.

14. Plaintiff avers that Defendant has negligently operated the Facility so as to cause numerous illegal discharges of hazardous chemicals and pollutants into state waters, proximately causing harm to Plaintiff's Members in the following non-exclusive particulars:

- a. Defendant has caused or has permitted to be caused repeated harmful discharges of hazardous substances at the Facility, into the East Nishnabotna River, the threat of which discharges is ongoing;
- b. Defendant has failed to comply with state regulations regarding construction of liquid fertilizer storage facilities at 22 IAC 44.55(200), obtain required Iowa

NPDES permits after repeated discharges, follow accepted industry standards with respect to maintaining in-person or remote sensing monitoring of discharge valves, providing staffing the Facility at sufficient levels to detect discharges of pollutants to state waters, and to utilize other available means to prevent discharges of pollutants into state waters. Such conduct is ongoing;

- c. Defendant has failed to exercise reasonable and prudent care in the conduct of its operations, with respect to providing available valve and related equipment designed to prevent actual or potential discharges of hazardous chemicals into state waters, and such conduct is ongoing;
- d. Defendant has failed to implement, follow, and enforce proper operations procedures, that would substantially reduce or eliminate the possibility of discharging hazardous fertilizers and chemicals into state waters, and such conduct is ongoing; and
- e. Defendant has failed to implement, follow, and enforce proper safety procedures adequate to reduce or eliminate the possibility of discharging hazardous fertilizers and chemicals into state waters and such conduct is ongoing.

15. Defendant, by and through its officers, employees, agents, and representatives, has committed acts of omission and commission, which, collectively and severally, constitute negligence.

16. Said acts have caused the conditions discussed above, resulting in harm to Plaintiff's Members, including but not limited to discomfort, inconvenience, and annoyance, loss of full use of their properties, and loss of business and recreational opportunities, in short, the impairment of Plaintiff's Members' full use and enjoyment of their properties, and to the injury

to, or destruction of, state lands and waters held in trust by the State of Iowa, for the people of Iowa, with particularized impacts upon Plaintiff, for all of which Plaintiff's Members seek injunctive relief and damages.

17. Plaintiff's Members also specifically plead the doctrine of *res ipsa loquitur*, to wit: the character of the toxic discharges has been such that they would not have ordinarily occurred in the absence of Defendant's negligence; and, the acts or omissions of the equipment and personnel that led to the toxic discharges were under control of Defendant or reasonably foreseeable and avoidable by Defendant at all relevant times.

18. Defendant's past and continuous negligent acts are the proximate cause of Plaintiff's Members' loss of the full use and enjoyment of their property and public trust property, for which Plaintiff's Members seek declaratory and injunctive relief and damages payable to Plaintiff and to the state treasury.

### **COUNT III: TRESPASS**

19. Plaintiff incorporates the preceding paragraphs of this Petition as if set forth fully below.

20. Defendant's harmful discharges have contacted Plaintiff's Members' properties without their consent, or, alternatively, Defendant has had substantial knowledge that its actions would cause such harmful discharge contact, and such contact resulted in Plaintiff's Members' lost use and enjoyment of their properties, or of state lands and waters held in trust for the people of Iowa.

21. Defendants' conduct constitutes a tortious physical intrusion upon Plaintiff's Members' properties and state lands and waters held in trust by the State of Iowa, for the people

of Iowa, i.e., trespass, and a violation of Plaintiff's Members' property rights and rights as beneficiaries of the public trust in state lands and waters.

22. Such contact has harmed Plaintiff's Members by impairing their full use and enjoyment of their property and state lands and waters held in trust by the State of Iowa, for the people of Iowa.

23. Defendant's conduct has been committed intentionally, purposefully, or with substantial knowledge that harms would result to Plaintiff's Members.

24. Defendant's past and continuous trespasses and unlawful intrusions upon Plaintiff's Members' property and state lands and waters held in trust by the State of Iowa for the people of Iowa are the proximate cause of Plaintiff's Members' loss of the full use and enjoyment of their properties and public trust property, for which Plaintiff's Members seek damages payable to Plaintiff and to the state treasury, and injunctive relief.

**WHEREFORE**, Plaintiff prays for all appropriate Orders and for Judgment:

A. Declaring against Defendant and in favor of Plaintiff, finding and declaring the acts and practices of Defendant to be unlawful;

B. Awarding damages against Defendant and in favor of Plaintiff, plus pre-judgment and post-judgment interest, for the improper and wrongful acts that are the subject of this action;

C. Awarding all declaratory relief requested above;

D. Awarding injunctive relief from this Court tailored to ensure the cessation of Defendant's harmful conduct;

E. Awarding Plaintiff the costs and disbursements of the action, including reasonable attorneys' and experts' fees and expenses; and

F. Awarding such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiff hereby respectfully demands a trial by jury for all matters triable to a jury in the State of Iowa.

Respectfully submitted,

/s/James C. Larew

James C. Larew, AT0004543

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**ATTORNEY FOR PLAINTIFF**

**(REINSTATEMENT APPLICATION**

**PENDING)**