

**IN THE DISTRICT COURT OF CLAY COUNTY, NEBRASKA**

STATE OF NEBRASKA, ex rel.,	)	
JIM MACY, Director,	)	Case No. _____
NEBRASKA DEPARTMENT OF	)	
ENVIRONMENT AND ENERGY,	)	
	)	
Plaintiff,	)	<b>COMPLAINT</b>
	)	
v.	)	
	)	
HEARTLAND SWINE, INC., a Nebraska	)	
Corporation,	)	
	)	
Defendant.	)	

COMES NOW Jim Macy, Director of the Nebraska Department of Environment and Energy (hereinafter “Department”), 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. The 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.*, and all rules, regulations, orders, and permits issued pursuant to NEPA.

2. The Department also has and may “exercise exclusive general supervision of the administration and enforcement of...the Integrated Solid Waste Management Act [“ISWMA”]...and all rules and regulations adopted and promulgated under such acts.” Neb. Rev. Stat. § 81-1504(1).

3. The Department is further charged with the duty to “administer the state program for construction and operating permits and major modification approval for animal feeding

operations and livestock waste control facilities provided under...[NEPA], the Livestock Waste Management Act [“LWMA”], and the rules and regulations adopted and promulgated pursuant to such acts.” Neb. Rev. Stat. § 54-2418(1).

4. Defendant Heartland Swine, Inc. (“Heartland Swine”) is a Nebraska corporation that operates a confined swine operation near Sutton, Nebraska.

5. Heartland Swine is considered a “person” for purposes of NEPA and the LWMA. Neb. Rev. Stat. § 81-1502(10); *id.* § 54-2417(16).

6. Kenneth Lorenzen is the President and Director of Heartland Swine. John T. Waddell is the Secretary and Treasurer and also a Director of Heartland Swine.

### **JURISDICTION AND VENUE**

7. The District Court has subject-matter jurisdiction pursuant to Neb. Rev. Stat. § 24-302.

8. Venue is proper in Clay County pursuant to Neb. Rev. Stat. § 25-403.01, as Heartland Swine operates a confined swine operation in Clay County and the causes of action took place in Clay County.

### **LEGAL BACKGROUND**

9. The Department administers NEPA, ISWMA, LWMA, and all rules and regulations implementing those acts. Neb. Rev. Stat. § 81-1504(1).

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

- a. Title 130 of the Nebraska Administrative Code, *Livestock Waste Control Regulations*; and
- b. Title 132 of the Nebraska Administrative Code, *Integrated Solid Waste Management Regulations*.

11. One of the purposes of NEPA is to protect the water and land of the state from pollution. Neb. Rev. Stat. § 81-1501(1). NEPA achieves this purpose by prohibiting pollution of the State’s resources, as well as empowering the Department to administer permit programs and pursue environmental enforcement of violations. Neb. Rev. Stat. § 81-1504.

12. Under NEPA, it is “unlawful for any person to construct, install, modify, or operate any disposal system or part thereof or any extension thereto without obtaining necessary permits from the department.” Neb. Rev. Stat. § 81-1506(2)(b).

13. “Disposal system” means “a system for disposing of wastes, including hazardous wastes, either by surface or underground methods...treatment works, disposal wells and fields, and other systems.” Neb. Rev. Stat. § 81-1502(8).

14. Under NEPA, it is also “unlawful for any person to”:

- a. “Violate any provision of the [LWMA];”
- b. “Violate any term or condition of an animal feeding operation permit; or”
- c. “Violate any rule or regulation adopted and promulgated by the council pursuant to [NEPA] or the [LWMA].”

Neb. Rev. Stat. § 81-1506(5).

15. Under LWMA, it is “unlawful for any person to construct a livestock waste control facility...” Neb. Rev. Stat. § 54-2432(2); *see also* 130 Neb. Admin. Code § 2-008-07.

16. “Livestock waste control facility” is defined as “any structure or combination of structures utilized to control livestock waste at an animal feeding operation until it can be used, recycled, or disposed of in an environmentally acceptable manner. Such structures

include... lagoons, and other devices utilized to control livestock waste.” Neb. Rev. Stat. § 54-2417(10).

17. If a person makes a major modification to its livestock waste control facility, an application for a major modification and an application fee must be submitted to the Department for review and approval. 130 Neb. Admin. Code § 3-003.

18. A “major modification” means a “change in the location of the animal feeding operation; change in the methods of waste treatment, waste storage, or land application of waste...or change in the size or location of the livestock waste control facility.” Neb. Rev. Stat. § 54-2417(11); *see also* 130 Neb. Admin. Code § 1-028. A major modification would also be required for “the installation of any new erosion protection measures, such as splash pads or wave protection measures.” 130 Neb. Admin. Code § 4-008.

19. Additionally, “if sloughing, slope failure, or excessive erosion of a facility occurs, or where other failure has occurred,” the Department must be notified. 130 Neb. Admin. Code § 4-009. The Department may require the owner or permittee to provide “information the Department determines necessary to ensure that the design and construction is acceptable such that the excessive erosion or other failure is not likely to recur” and, also, may require the owner or permittee to submit an application for a major modification. *Id.*

20. Other changes to livestock waste control facilities, such as “[r]outine repairs or minor maintenance of facility side-slope erosion[,] may be considered repair work,” and would not require “a major modification or issuance of a construction or operating permit.” 130 Neb. Admin. Code § 4-007.

21. NEPA and ISWMA work in tandem to prevent the improper disposal of solid wastes that represent potential hazards to the environment and to the public health and welfare. Neb. Rev. Stat. § 13-2002(2).

22. Under NEPA, it is “unlawful for any person to construct or operate a solid waste management facility without first obtaining a permit required under [NEPA] or the [ISWMA] and the rules and regulations adopted and promulgated by the council pursuant to the acts[.]” Neb. Rev. Stat. § 81-1506(3)(a); *see also* 132 Neb. Admin. Code § 2-001. It is also “unlawful for any person to, after October 1, 1993, dispose of any solid waste at any location other than a solid waste management facility holding a current permit issued by the department pursuant to the [ISWMA].” Neb. Rev. Stat. § 81-1506(3)(d).

23. A “solid waste management facility” is defined as “any site owned and operated or utilized by any person for the collection, source separation, storage, transportation, transfer, processing, treatment, or disposal of solid waste and shall include a solid waste landfill.” Neb. Rev. Stat. § 13-2010.

24. “Solid waste” means “any garbage, refuse, or sludge...other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, and mining operations and from community activities.” Neb. Rev. Stat. § 81-1502(26).

25. “Refuse” means “putrescible and nonputrescible solid wastes, except body wastes, and includes garbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, and solid market and industrial wastes.” Neb. Rev. Stat. § 81-1502(15).

26. “Rubbish” means “nonputrescible solid wastes, excluding ashes, consisting of both combustible and noncombustible wastes, such as paper, cardboard, tin cans, yard clippings,

wood, glass, bedding, crockery, or litter of any kind that will be a detriment to the public health and safety.” Neb. Rev. Stat. § 81-1502(17).

27. Under NEPA, it is “unlawful for any person to violate any...order of the director....” Neb. Rev. Stat. § 81-1508.02(1)(b).

### **FACTUAL BACKGROUND**

28. Heartland Swine is a Nebraska corporation that operates a confined swine operation with a permitted capacity of 4,402 swine near Sutton, Nebraska.

29. In October 1994, Heartland Swine’s predecessor was issued a construction and operating permit for its livestock waste control facility. No National Pollutant Discharge Elimination System (“NPDES”) permit was required at that time.

30. The permitted livestock waste control facility consisted of a five-lagoon system located near School Creek, which is a tributary of the Big Blue River.

31. Lagoon #1 was part of this system and its west bank is adjacent to School Creek.

32. Heartland Swine became the owner of this confined swine operation by May 1996. Heartland Swine continued operations under the same construction and operating permit issued to its predecessor in 1994 and was required to follow the parameters of that permit.

33. On January 11, 2006, the Department conducted an inspection of Heartland Swine and its five-lagoon system for swine waste. During this inspection, the Department discovered erosion on the west bank of lagoon #1, which is the side closest to School Creek.

34. On February 27, 2006, the Department sent Heartland Swine a letter requesting that the erosion on the west bank of lagoon #1 be repaired by June 1, 2006.

35. In January 2012, the Department conducted another inspection. The inspection revealed that lagoon #1 was the only lagoon in the permitted five-lagoon system that was still in

operation. The inspection also observed erosion on the west bank of lagoon #1 that needed to be repaired.

36. On February 7, 2012, the Department issued a Notice of Violation (“NOV”) requiring Heartland Swine to submit an application for a major modification to demonstrate lagoon #1, by itself, had adequate capacity for the swine waste coming from its confined operation. The NOV also required the erosion on the west bank to be repaired and perennial grass established on lagoon #1.

37. On April 16, 2012, Heartland Swine was administratively dissolved by the Secretary of State for non-payment of taxes, but continued confined swine operations.

38. On April 24, 2012, the Department issued an Administrative Order, based, in part, on the previous noncompliance by Heartland Swine, that required Heartland Swine, *inter alia*, to submit an application for a new construction and operating permit and an application for an NPDES permit. This Administrative Order further required the livestock waste control facility to operate in compliance with the approved plans and submit monthly progress reports. Heartland Swine did not respond to the Administrative Order.

39. On October 26, 2012, the Department conducted another inspection. During the inspection, the inspector observed the erosion on the west bank of lagoon #1 had not been remedied. After this inspection, the Department began referring to lagoon #1 as an earthen storage pit because the permitted five-lagoon system was no longer in use.

40. During the same inspection, the inspector noted that there was a concern that the west bank of lagoon #1 could breach and swine waste could spill into School Creek.

41. On November 25, 2013, the Department conducted another inspection. The inspection showed that the berms of the earthen storage pit contained holes and were overgrown with weeds.

42. On February 7, 2014, the Department issued another NOV to Heartland Swine that required the erosion on the west bank of the earthen storage pit be repaired along with the holes in the banks of the earthen storage pit.

43. On June 13, 2014, Mr. Lorenzen notified the Department that the erosion and holes were repaired. Mr. Lorenzen also informed the Department the banks had been seeded with perennial grass.

44. On October 16, 2014, the Department inspected the property to verify whether the repairs to the earthen storage pit had occurred. During this inspection, it was observed that the erosion on the earthen storage pit had worsened. The inspector was unable to observe whether the holes were repaired because the banks of the earthen storage pit had a large number of overgrown weeds.

45. The inspector also noticed flattened vegetation on the bank of the earthen storage pit indicating that the earthen storage pit may have discharged swine waste into School Creek.

46. During this inspection, the inspector also noticed a separate pit on Heartland Swine's property that contained dead swine and building debris (hereinafter "swine pit").

47. On November 5, 2014, the Department issued an NOV to Heartland Swine that required it to:

- a. Provide a licensed professional engineering evaluation of the earthen storage pit;
- b. Conduct an asbestos inspection of all solid waste on the property;



- c. Repair the erosion on the west bank of the earthen storage pit and provide compaction tests for the repaired berms to verify structural stability;
- d. Establish and implement a weed control program;
- e. Submit a mortality management plan;
- f. Submit an application for a construction and operating permit; and
- g. Submit monthly progress reports.

48. On December 4, 2014, the Department conducted an inspection and found that the earthen storage pit had been dewatered and was essentially dry.

49. During the same inspection, the inspector observed that no changes had been made to the swine pit containing dead swine and building debris.

50. On March 4, 2015, Mr. Lorenzen informed the inspector by phone that an asbestos inspection had been carried out and that no asbestos had been found in the swine pit. He also informed the inspector that winter conditions prevented him from repairing the erosion to the west bank of the earthen storage pit.

51. On March 5, 2015, the Department conducted another inspection and observed the swine pit still contained dead swine and debris. The inspector also noted evidence that a burning event had taken place in the swine pit and new dead swine and debris had been added to the swine pit since the burning event.

52. On December 17, 2015, the Department conducted another inspection and found that no changes had been made to the swine pit, which still contained dead swine and debris, and the erosion to the west bank of the earthen storage pit also had not been repaired.

53. On May 23, 2016, the Department conducted a compliance status inspection. The inspector observed the erosion to the west bank of the earthen storage pit had been fixed. Rip rap

had been placed around the inside of most of the earthen storage pit's banks and the banks had been seeded with perennial grass.

54. At the time of the inspection, however, Heartland Swine still needed to accomplish the following items from the November 5, 2014 NOV:

- a. Complete and provide an engineering evaluation of the earthen storage pit;
- b. Provide compaction tests for the repaired erosion on the west bank of the earthen storage pit;
- c. Establish and implement a weed control program;
- d. Submit a Mortality Management Plan; and
- e. Submit an application for a new construction and operating permit.

55. On September 21, 2017, the Department conducted another inspection. Heartland Swine still had not taken any action on the remaining November 5, 2014 NOV items.

56. On April 24, 2018, the Department issued an Administrative Order. This Administrative Order required Heartland Swine to:

- a. Submit a complete application for a new construction and operating permit; an application for an NPDES permit; a revised Mortality Management Plan to the Department describing the methods of mortality disposal to be implemented by the operation;
- b. Provide the Department with compaction tests for the repaired berm;
- c. Provide the Department with a licensed professional engineering evaluation of the earthen storage pit; and
- d. Repair any additional inadequacies identified in the professional engineering evaluation of the earthen storage pit.

57. Heartland Swine received this Administrative Order on May 2, 2018. Heartland Swine had thirty days to comply with the requirements listed in the April 24, 2018 Administrative Order or request a hearing. Heartland Swine did not take any action to accomplish the requirements and did not request a hearing.

58. On August 24, 2018, the Secretary of State issued a certificate of revival to Heartland Swine. Pursuant to Neb. Rev. Stat. § 21-2,195, Heartland Swine's reinstatement "relates back and takes effect as of the date of the administrative dissolution...as if the administrative dissolution had never occurred."

59. On August 1, 2019, the Department conducted its most recent inspection. At that time, Heartland Swine had not addressed any of the items required by the April 24, 2018 Administrative Order.

60. On March 11, 2020, the Department received an engineering review of the earthen storage pit from ProAg Engineering, Inc., that was submitted on behalf of Heartland Swine. This submission fulfilled requirement (C) of the April 24, 2018 Administrative Order. Upon information and belief, no other requirements from the Administrative Order have been fulfilled.

61. This is the second enforcement action against Heartland Swine for violations of NEPA. In the first enforcement action, a complaint was filed on November 19, 2012 addressing violations of NEPA that occurred in January 2012, specifically pollution of a water of the State and discharges from an unpermitted pipe. This Court entered and approved a consent decree covering those violations on March 12, 2014 and the terms of that consent decree were satisfied in April 2014. This complaint alleges violations that are new and different from those violations at issue in the first enforcement action.

## FIRST CAUSE OF ACTION

### **OPERATING A SOLID WASTE MANAGEMENT FACILITY WITHOUT A PERMIT IN VIOLATION OF NEB. REV. STAT. § § 81-1506(3)(a), (d) AND 132 NEB. ADMIN. CODE § 2-001.**

62. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs 1 through 61 as though fully set forth therein.

63. Under NEPA, it is “unlawful for any person to construct or operate a solid waste management facility without first obtaining a permit required under [NEPA] or under the [ISWMA] and the rules and regulations adopted and promulgated by the council pursuant to the acts.” Neb. Rev. Stat. § 81-1506(3)(a); *see also* 132 Neb. Admin. Code § 2-001.

64. It is also “unlawful for any person to, after October 1, 1993, dispose of any solid waste at any location other than a solid waste management facility holding a current permit issued by the Department pursuant to the ISWMA.” Neb. Rev. Stat. § 81-1506(3)(d).

65. On October 16, 2014, the Department discovered a separate pit on Heartland Swine’s property filled with dead swine and building debris, *i.e.*, the swine pit.

66. Dead swine and building debris are solid waste, as defined by Neb. Rev. Stat. § 81-1502(26), because both are “refuse”, “rubbish” or “discarded materials” from a “commercial operation[,]” as defined by *id.* § 81-1502(15-17).

67. The swine pit is considered a “solid waste management facility”, as defined by Neb. Rev. Stat. § 13-2010, because the site is owned and utilized by Heartland Swine to collect and dispose of solid waste.

68. The Department has notified Heartland Swine numerous times that it must discard its solid waste in a manner that is allowed under NEPA, ISWMA, and applicable rules and regulations.

69. Upon information and belief, Heartland Swine has not disposed of the solid waste in the swine pit. This is a continuing violation.

70. By using the swine pit to collect and dispose of solid waste, Heartland Swine is operating a solid waste management facility without a permit in violation of Neb. Rev. Stat. §§ 81-1506(3)(a), (d); *see* 132 Neb. Admin. Code § 2-001.

71. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), “each violation of this section...shall subject a person to a civil penalty of no more than ten thousand dollars (\$10,000) per day. In 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.”

## **SECOND CAUSE OF ACTION**

### **MODIFYING OR OPERATING A LIVESTOCK WASTE CONTROL FACILITY WITHOUT THE NECESSARY PERMIT IN VIOLATION OF NEB. REV. STAT. § 81- 1506(2)(b) AND NEB. REV. STAT. § 81-1506(5)(b).**

72. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs 1 through 61 as though fully set forth therein.

73. Under NEPA, it is “unlawful for any person to construct, install, modify, or operate any disposal system or part thereof or any extension thereto without obtaining necessary permits from the department.” Neb. Rev. Stat. § 81-1506(2)(b).

74. Both lagoons and earthen storage pits are disposal systems as defined by Neb. Rev. Stat. § 81-1502(8).

75. Under NEPA, it is also “unlawful for any person to violate any provision of the [LWMA].” Neb. Rev. Stat. § 81-1506(5)(b).

76. Under the LWMA, it is “unlawful for any person to construct a livestock waste control facility without first obtaining a construction and operating permit from the department...” Neb. Rev. Stat. § 54-2432(2); *see also* 130 Neb. Admin. Code § 2-008.07.

77. Lagoons and earthen storage pits are livestock waste control facilities because both are structures utilized to control livestock waste, as defined by Neb. Rev. Stat. § 54-2417(10).

78. Under Title 130 of the Nebraska Administrative Code, “any modification meeting the definition of a major modification in Neb. Rev. Stat. § 54-2417(11) and these regulations requires the submittal of an application for a major modification and an application fee.” 130 Neb. Admin. Code § 3-003.

79. By May 1996, Heartland Swine was operating the same five-lagoon system its predecessor had used and was subject to the same construction and operating permit its predecessor had received in 1994.

80. On January 30, 2012, the Department inspected Heartland Swine and discovered that lagoon #1 was the only lagoon in the five-lagoon system being used to hold swine waste.

81. When Heartland Swine began using only one lagoon of its permitted five-lagoon system, it changed the method of waste treatment and waste storage from a lagoon to an earthen storage pit. Heartland Swine also changed the size of its livestock waste control facility when it began using only lagoon #1.

82. These changes to its livestock waste management facility were major modifications as defined by Neb. Rev. Stat. § 54-2417(11). Thus, Heartland Swine should have applied for a major modification of its permit prior to modifying its original livestock waste control facility. 130 Neb. Admin. Code § 3-003.

83. Upon information and belief, Heartland Swine continues to utilize the earthen storage pit as its livestock waste control facility.

84. Upon information and belief, Heartland Swine did not, and has not, applied for a major modification to its construction and operating permit since changing its livestock waste control facility from a five-lagoon system to an earthen storage pit.

85. The Department has notified Heartland Swine of this violation numerous times in NOV's and Administrative Orders that required Heartland Swine to submit a major modification application for its modified livestock waste control facility.

86. Because Heartland Swine made a major modification to its livestock waste control facility without applying to make a major modification through the Department, Heartland Swine violated Neb. Rev. Stat. § 54-2432(2).

87. Because Heartland Swine modified its disposal system without receiving the proper permits from the Department, Heartland Swine violated Neb. Rev. Stat. § 81-1506(2)(b).

88. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), "each violation of this section...shall subject a person to a civil penalty of no more than ten thousand dollars (\$10,000) per day. In 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."

### **THIRD CAUSE OF ACTION**

#### **FAILING TO MAINTAIN LIVESTOCK WASTE CONTROL FACILITIES IN PROPER OPERATING CONDITION IN VIOLATION OF 130 NEB. ADMIN. CODE § 4-009.**

89. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs 1 through 61 as though fully set forth therein.

90. Under the LWMA, it is “unlawful for any person to...violate any provision of the [LWMA] and the rules and regulations adopted and promulgated by the council pursuant to the act.” Neb. Rev. Stat. § 54-2432(5); *see* 130 Neb. Admin. Code § 2-008.13.

91. Under Title 130 of the Nebraska Administrative Code, “[t]he owner or permittee may be required to provide an engineering evaluation and any other information the Department determines necessary to ensure that the design and construction is acceptable such that the excessive erosion or other failure is not likely to recur. In the event the existing design or construction is determined to be inadequate, the owner or permittee may be required to submit an application for a major modification.” 130 Neb. Admin. Code § 4-009.

92. On October 16, 2014, the Department conducted an inspection and observed excessive erosion on the west bank of the earthen storage pit.

93. The west bank of the earthen storage pit is adjacent to School Creek. School Creek is a water of the State, as defined by Neb. Rev. Stat. § 81-1502(21).

94. The excessive erosion to the west bank of the earthen storage pit created a greater likelihood that the earthen storage pit may fail and discharge swine waste into School Creek.

95. On November 5, 2014, the Department issued a NOV that required Heartland Swine, *inter alia*, to:

- a. Provide a licensed professional engineering evaluation of the earthen storage pit within fifteen days of receipt of the NOV;
- b. Repair the erosion on the west bank of the earthen storage pit and provide compaction tests for the repaired berms to verify structural stability by December 15, 2014; and
- c. Submit an application for a construction and operating permit as soon as possible.



96. The information requested by the Department in the November 5, 2014 NOV was necessary to ensure that the design and construction was acceptable such that excessive erosion or other failure was not likely to recur. *See* 130 Neb. Admin. Code § 4-009.

97. Although notified numerous times by the Department, Heartland Swine did not repair the erosion on the west bank until May 23, 2016.

98. Although Heartland Swine repaired the erosion required by the November 5, 2014 NOV, Heartland Swine failed to provide an engineering evaluation of the earthen storage pit within fifteen days of receipt, which was required by the NOV. This is also a violation of 130 Neb. Admin. Code § 4-009.

99. Heartland Swine did not provide the Department with an engineering evaluation until March 11, 2020.

100. Upon information and belief, Heartland Swine has not provided the Department with a compaction test confirming that the erosion has been repaired and the earthen storage pit is in proper operating condition, which is a continuing violation of 130 Neb. Admin. Code § 4-009.

101. Upon information and belief, Heartland Swine also has not submitted an application for a construction and operating permit, which was required by both the November 5, 2014 NOV and 130 Neb. Admin. Code § 4-009.

102. Because Heartland Swine failed to provide the Department with compaction test, engineering evaluation, and application for a construction and operating permit by the time specified in the November 5, 2014 NOV, Heartland Swine violated 130 Neb. Admin Code § 4-009. The failure to submit each item by the time period specified in the November 5, 2014 NOV is a separate violation under NEPA.

103. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), “each violation of this section...shall subject a person to a civil penalty of no more than ten thousand dollars (\$10,000) per day. In 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.”

#### **FOURTH CAUSE OF ACTION**

#### **FAILURE TO COMPLY WITH AN ORDER OF THE DIRECTOR IN VIOLATION OF NEB. REV. STAT. § 81-1508.02(1)(b).**

104. Plaintiff hereby realleges and incorporates by reference the allegations contained in the preceding paragraphs 1 through 61 as though fully set forth therein.

105. Under NEPA, it is “unlawful for any person to violate...any order of the director...” Neb Rev. Stat. § 81-1508.02(1)(b).

106. On April 24, 2018, the Department issued an Administrative Order. This Administrative Order is an order of the Director of the Department.

107. The Administrative Order required Heartland Swine to:

- a. Submit a complete application for a new construction and operating permit; an application for an NPDES permit; a revised Mortality Management Plan to the Department describing the methods of mortality disposal to be implemented by the operation;
- b. Provide the Department with compaction tests for the repaired berm;
- c. Provide the Department with a licensed professional engineering evaluation of the earthen storage pit; and
- d. Repair any additional inadequacies identified in the professional engineering evaluation of the earthen storage pit.

108. The Administrative Order required Heartland Swine to comply with its listed requirements within thirty days of receiving the Administrative Order.

109. Heartland Swine received the Administrative Order on May 2, 2018.

110. Heartland Swine did not comply with the requirements listed in the Administrative Order within the thirty-day window and did not request a hearing.

111. Heartland Swine did not respond to the Administrative Order until January 13, 2020 when its consultant, ProAg Engineering, Inc., submitted an engineering evaluation of the earthen storage pit. This submission fulfilled requirement (C) of the April 24, 2018.

112. Upon information and belief, Heartland Swine has still not fulfilled requirements (A), (B), and (D) in the April 24, 2018 Administrative Order.

113. By failing to comply with the Administrative Order, Heartland Swine has violated and continues to violate Neb. Rev. Stat. § 81-1508.02(1)(b).

114. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), “each violation of this section...shall subject a person to a civil penalty of no more than ten thousand dollars (\$10,000) per day. In 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.”

### **REQUEST FOR RELIEF**

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

- A. Declare Heartland Swine violated the Nebraska Environmental Protection Act and/or the Livestock Waste Management Act and/or Title 130 of the Nebraska Administrative Code, *Livestock Waste Management Regulations*, and/or its construction and operating permit;

- B. Declare Heartland Swine violated the Nebraska Environmental Protection Act and/or Title 132 of the Nebraska Administrative Code, *Integrated Solid Waste Management Regulations*;
- C. Order Heartland Swine to comply with items (A), (B), and (D) of the April 24, 2018 Administrative Order;
- D. Order Heartland Swine to dispose of all solid waste in the unpermitted swine pit;
- E. Enter the maximum civil penalty against Heartland Swine, as provided under Neb. Rev. Stat. § 81-1508.02(2);
- F. Tax all court costs herein to Heartland Swine; and
- G. Grant Plaintiff such additional and further relief as this Court deems just and proper.

DATED this 31st day of July 2020.

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

By: Douglas J. Peterson, #18146  
Attorney General

By: /s/ Maegan L. Woita  
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STATE OF NEBRASKA, ex rel.,  
JIM MACY, Director,  
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