

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

BEN MCKINNEY
Sheffield, Iowa (Franklin County)

ADMINISTRATIVE CONSENT ORDER
NO. 2011-AFO-12

TO: Ben McKinney
2010 240th Street
Sheffield, Iowa 50475

I. SUMMARY

This Administrative Consent Order (Order) is entered into between the Iowa Department of Natural Resources (DNR) and Ben McKinney for the purpose of resolving issues regarding Mr. McKinney's failure to be certified to transport manure. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this Order should be directed to:

Relating to technical requirements:

Trent Lambert
DNR Field Office #2
2300 15th St, S.W.
Mason City, IA 50401
Ph: (641) 424-4073

Relating to legal requirements:

Randy Clark, Attorney II
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: (515) 281-8891

Payment of penalty to:

Iowa Department of Natural Resources
502 E. 9th Street
Des Moines, Iowa 50319-0034
Attn: Randy Clark

II. JURISDICTION

This Order is issued pursuant to the provisions of Iowa Code §455B.175(1), which authorizes the Director to issue any Order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 459, subchapter III, and the rules adopted or permits issued pursuant thereto; and Iowa Code §455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: BEN MCKINNEY

III. STATEMENT OF FACTS

1. Ben McKinney owns and operates a trucking business which is primarily involved in hauling rock, sand, asphalt and agricultural lime.

2. On January 4 and 5, 2011, DNR Field Office #2 staff, (FO2) investigated a report of a spill of poultry manure on County Highway C25. The investigation confirmed that dry poultry manure had been spilled on four county roadways over a total distance of approximately 10.5 miles. Further investigation by FO2 staff revealed that Ben McKinney had been hauling poultry manure from the Sparboe Farms Coulter Pullet Site along the route where the poultry manure was observed. Manure on the roadway was first observed a short distance from a railroad crossing, leading FO2 staff to conclude that the rough railroad crossing caused the truck's end gate to open. Upon questioning by FO2 staff, Ben McKinney admitted that his truck was the only logical source of the manure spill and that he was not certified to haul manure. Mr. McKinney further explained that he had never hauled manure before this incident, that the Sparboe Farms manager repeatedly requested that he haul the manure due to manure storage capacity issues, and that the Sparboe Farms manager assured him that a specific permit or certification was not required to transport manure. Mr. McKinney went on to explain that due to his experience in the trucking business he is well acquainted with the need to obtain permits and would have willingly done so to haul the manure if he had been aware of the requirement.

3. On January 19, 2011, FO2 issued a Notice of Violation letter to Ben McKinney for the manure applicator certification violation discovered as a result of the January 4-5, 2011 investigation. The letter notified Mr. McKinney that the matter was being referred to DNR's Legal Services Bureau for further enforcement.

IV. CONCLUSIONS OF LAW

1. Iowa Code §459.103(1) provides that the Environmental Protection Commission (Commission) shall adopt rules related to the construction or operation of animal feeding operations, including permit and minimum manure control requirements. The Commission has adopted such rules at 567 IAC Chapter 65.

2. Iowa Code §§459.314A and 459.315, and 567 IAC 65.19(1) provide that a commercial manure service or a commercial manure service representative shall not transport, handle, store or apply dry or liquid manure to land, unless the person is certified. During the investigation by FO2, it was determined that Mr. McKinney was not properly certified to transport manure from the Sparboe Farms Coulter Pullet Site. The above-summarized facts document a violation of these provisions.

V. ORDER

THEREFORE, the DNR orders and Ben McKinney agrees to do the following:

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: BEN MCKINNEY

1. Ben McKinney shall not transport, handle, store, or apply manure until he is properly certified; and

2. Ben McKinney shall pay an administrative penalty of \$2,000.00 to the DNR. The penalty shall be paid to the DNR in four installments. The first installment of \$500.00 shall be paid by June 16, 2011; the second installment of \$500.00 shall be paid by June 30, 2011; the third installment of \$500.00 shall be paid by July 13, 2011; the fourth installment of \$500.00 shall be paid by July 27, 2011.

VI. PENALTY

1. Iowa Code §455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code §455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC Chapter 10. Pursuant to this chapter, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty of \$2,000.00. The administrative penalty is determined as follows:

Economic Benefit – 567 IAC Chapter 10 requires that the DNR consider the costs saved or likely to be saved by noncompliance. 567 IAC 10.2(1) states that “where the violator received an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit.” 567 IAC 10.2(1) further states, “reasonable estimates of economic benefit should be made where clear data are not available.” Ben McKinney saved time and money by not being properly certified to transport manure. He avoided the expenses of the training and certification fees. An estimated economic benefit of \$200.00 is being assessed for this factor.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. The manure applicator certification program is an important component of the animal feeding operation regulations. The program ensures that manure is transported and applied properly. Mr. McKinney’s failure to be properly certified threatens the integrity of the animal feeding operation program. Therefore, \$2,000.00 is assessed for this factor.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: BEN MCKINNEY

Culpability – Mr. McKinney has a duty to remain knowledgeable of DNR’s requirements and to be alert to the probability that his conduct is subject to DNR’s rules. While Mr. McKinney maintains that he relied on representations by Sparboe Farms officials, he is not relieved of the responsibility to verify the accuracy of such representations with official sources. Therefore, \$800 00 is assessed for this factor.

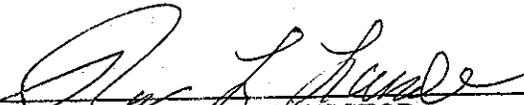
Mitigating or Aggravating Factors -- Prior to this incident Mr. McKinney was not in the business of transporting manure and he succumbed to repeated requests by Sparboe Farms officials to assist in addressing its manure storage issues. Mr. McKinney accepted full responsibility for the spill and was extremely cooperative in working with FO2 to clean up the spill. Finally, the spill was not caused by negligence on the part of Mr. McKinney; rather, the spill apparently occurred when a rough railroad crossing caused the end gate of Mr. McKinney’s truck to partially open. These facts mitigate the foregoing penalty assessment and the penalty is reduced by the maximum amount, \$1,000.00.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Ben McKinney. For that reason Ben McKinney waives the right to appeal this Order or any part thereof.

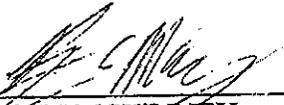
VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of additional administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code §455B.191.



ROGER E. LANDE, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 24th day of
May, 2011.



BEN MCKINNEY

Dated this Monday day of
May 9, 2011.

Randy Clark, Trent Lambert - Field Office 2, Ken Hessenius, Gene Tinker, EPA, VIIL.D.4