

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

IN THE MATTER OF:

**Aerial Crop Care, Inc., Tri State Agri Corp., & Hoppe Airspray LLC**

**Lyon County, Iowa**

ADMINISTRATIVE CONSENT ORDER  
NO. 2015-WW- **03**

TO: Aerial Crop Care, Inc.  
Thomas A. Burdick, President  
6915 HWY. 103  
Washington, LA  
70589

Tri State Agri Corp.  
Brad Van Grootheest, President  
3180 US 75 Ave.  
Hull, IA  
51239

Hoppe Airspray LLC  
Roy Sharp, Registered Agent  
308 Hackberg Ln  
Conrad, IA  
50621

**I. SUMMARY**

This administrative consent order is entered into between the Iowa Department of Natural Resources (Department), Aerial Crop Care, Inc. (Aerial), Tri State Agri Corp (Tri State) and Hoppe Airspray LLC (Hoppe) (collectively referred to as the parties) for the purpose of resolving violations resulting from aerial application of the pesticide lambda-cyhalothrin, which resulted in a fish kill. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

**Relating to technical requirements:**

Tom Roos, Field Office 3  
Iowa Department of Natural Resources  
1900 N Grand  
Spencer, Iowa 51301  
Phone: 712/262-4177

**Relating to legal requirements:**

Carrie Schoenebaum, Attorney for the DNR  
Iowa Department of Natural Resources  
502 E. 9<sup>th</sup> St Wallace State Office Bldg  
Des Moines, Iowa 50319  
Phone: 515/281-0824

**Payment of penalty to:**

Director of the Iowa DNR  
Wallace State Office Building  
502 East Ninth Street

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Des Moines, Iowa 50319-0034

**II. JURISDICTION**

The parties hereby agree that this order is issued pursuant to Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part 1, and the rules promulgated or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties. Iowa Code section 481A.151 authorizes the assessment and recovery of damages to natural resources.

**III. STATEMENT OF FACTS**

1. During the evening of August 19, 2014, Greg Harson, Conservation Officer with the Department, contacted Department Senior Environmental Specialist, Tom Roos and informed him of a fish kill located in West Rat Creek. West Rat Creek is located in Section 14 of Dale Township in Lyon County. It is a tributary to Otter Creek which is a tributary of the Rock River. This tributary flows through a field farmed by Dale Winkowitsch.

2. On August 20, 2014, Mr. Roos went to the site to investigate. Site 1 was located on 230<sup>th</sup> Street west of Log Ave, upstream from the fish kill. Site 2 was located south of site 1 on Log Avenue and site 3 was located east of Log Ave on 24th Street downstream from the location of the fish kill.

At sites 1-3 field samples were taken for the following contaminants: dissolved oxygen (DO), ammonia (NH<sub>3</sub>-N) and potential Hydrogen (pH). With the exception of DO at site 2, the results of these test samples indicated normal conditions for water in a stream of this type. However, at the location of site 2 Mr. Roos observed dead fish and crayfish. At this site, the DO was .5 milligrams per liter (mg/L).

At the location of site 2, Mr. Roos interviewed neighboring property owners and discovered that the field adjacent to this site had been aerial sprayed the previous day. Then, Mr. Winkowitsch arrived at this location. Mr. Winkowitsch was unsure as to whether or not the field was sprayed but he informed Mr. Roos that he had hired Tri-State to do so. Upon receipt of this information Mr. Roos then went back to sites 1-3 and collected laboratory samples. These samples were sent to the University of Iowa State Hygienic Laboratory and tested for pesticides. Lambda-cyhalothrine was present at the location of Site 2 at .13 ug/L. Pesticides were not detected at the other sites.

3. On August 20, 2014, Mike Hawkins and James Sholly of the Department's Fisheries Bureau, also went to the site to conduct a fish kill investigation. They observed dead fish in West Rat Creek in Lyon County. They documented that the fish kill began in Section 14, T98N, R43W and extended downstream 950 yards to Section 15, T98N, R43W, Lyon County. Through Mr. Hawkins' and Mr. Sholly's observations it is estimated 517 fish were

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killed which have a monetary value of \$56.41. The Fisheries investigative costs equaled \$221.49 and the Field Office investigative costs equaled \$1,231.23. The total restitution and investigative costs equaled \$1,509.13.

4. Later in the day on August 20, 2014, Mr. Roos had a telephone call with Tri State. During this call it was determined that Mr. Winkowitsch's field had been aerial sprayed on August 19, 2014. The chemical sprayed on the field was lambda-cyhalothrin, a pyrethroid class chemical used to control soybean aphids. This product is labeled very toxic to aquatic organisms. Tri State explained that it had contracted with Hoppe which in turn subcontracted with Aerial. Aerial hired the pilot Karl Comeaux who conducted the aerial application on Mr. Winkowitsch's field.

5. On October 3, 2014, the Department sent Aerial a Notice of Violation (NOV) and Notice of Referral for the above discussed violations. This NOV detailed the investigation and sample results and informed Aerial of the relevant law.

**IV. CONCLUSIONS OF LAW**

1. Iowa Code section 455B.186 states that a pollutant shall not be disposed of by dumping, depositing, or discharging such pollutant into any water of the state except that this section shall not be construed to prohibit the discharge of adequately treated sewage, industrial waste, or other waste pursuant to a permit issued by the Director. The above mentioned facts indicate a violation of this provision.

2. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. The Department observed dead fish. Thus, the above mentioned facts indicate violations of the general water quality criteria.

3. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the Department for injury caused to a wild animal by the pollution. The Department has adopted 571 IAC chapter 113. 571 IAC chapter 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the Department for injury caused to a wild animal by the pollution. A fish kill resulted from aerial application of lambda-cyhalothrin.

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**V. ORDER**

1. The parties shall be jointly and severally liable for the payment of fish restitution in the amount of \$1,509.13 which includes investigative costs within 30 days of the date the Director signs this administrative consent order; and

2. The parties shall be jointly and severally liable for the payment of an administrative penalty in the amount of \$3,500.00 within 30 days of the date the Director signs this administrative consent order.

**VI. PENALTY**

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

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (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 Department 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 \$3,500.00. The administrative penalty is determined as follows:

Economic Benefit – 567 IAC chapter 10 requires that the Department 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.” The parties saved time and money by not turning off the sprayer or avoiding spraying West Rat Creek which borders the field. This resulted in an economic benefit of at least \$500.00. Therefore, this amount is 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 Department has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. The Department documented a discharge that led to documented water quality violations and a fish kill. These violations threaten the integrity of the regulatory programs because compliance with water quality requirements is required of all persons in this state. Therefore, \$2,000.00 is assessed for this factor.

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Culpability – The parties are engaged in the business of aerial pesticide application. This is a highly regulated activity. As companies engaged in this business they have an obligation to be aware of the applicable regulations and comply with those regulations. Through an application of the appropriate standard of care this violation could have been avoided. Thus, the amount of \$1,000.00 is assessed for this factor.

**VII. WAIVER OF APPEAL RIGHTS**

This administrative consent order is entered into knowingly and with the consent of the parties. For that reason the parties waive their right to appeal this administrative consent order or any part thereof.

**VIII. NONCOMPLIANCE**

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

  
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CHUCK GIPP, DIRECTOR  
Iowa Department of Natural Resources

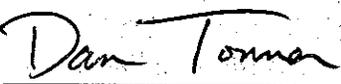
Dated this 23<sup>rd</sup> day of  
March, 2015

  
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Aerial Crop Care, Inc.  
Thomas A. Burdick, President

Dated this 4<sup>th</sup> day of  
March, 2015

  
\_\_\_\_\_  
Tri State Agri Corp.  
Brad Van Grootheest, President

Dated this 4 day of  
March, 2015

  
\_\_\_\_\_  
On behalf of Hoppe Airspray LLC  
Dan Tonner, President

Dated this 8<sup>th</sup> day of  
March, 2015

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Carrie Schoenebaum, DNR Field Office 3, EPA, I. C. 6.