

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

IN THE MATTER OF:

TODD SMEBY dba SMEBY FARMS

Hancock County, Iowa

ADMINISTRATIVE CONSENT ORDER

NO. 2010-AFO- 36

TO: Todd Smeby
1470 Welch Avenue
Klemme, IA 50449

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Todd Smeby dba Smeby Farms (Smeby Farms) for the purpose of resolving violations for failure to have employees certified as commercial manure applicators. 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:

Eric Wiklund, Environmental Specialist
DNR Field Office #2
2300 15th Street SW
Mason City, IA 50401
Phone: 641/424-4073

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8563

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent 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 Iowa Code Chapter 459 and the rules promulgated or permits issued pursuant to that part; and Iowa Code section 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: SMEBY FARMS

III. STATEMENT OF FACTS

Smeby Farms neither admits nor denies the Statement of Facts and enters into this administrative consent order for settlement purposes only.

1. Smeby Farms is a commercial manure service located at 1470 Welch Avenue, Klemme, Iowa. The business is owned by Todd Smeby and has been in operation since 2004.
2. On November 7, 2007, DNR Field Office 2 environmental specialist, Jeremy Klatt conducted a commercial manure applicator inspection for Smeby Farms. During the inspection, Mr. Klatt found that two of Smeby Farms' employees, Brad Nelson and Terry Smeby, were working as applicators for Smeby Farms, but DNR was unable to determine if they were certified to do so. No further action was taken at this time.
3. On November 21, 2008, DNR Field Office 2 environmental specialist, Eric Wiklund conducted a commercial manure applicator inspection at the Mark Staudt confinement site, ID# 64413, located at Section 7, Scott Township, Floyd County. Smeby Farms employees Dan Nedved and Todd Smeby were applying manure at the site. Mr. Wiklund spoke with Mr. Nedved, who admitted that he was not certified and that he had been land applying manure for Mr. Smeby for over one year. Mr. Wiklund then spoke with Mr. Smeby, who was aware that Mr. Nedved was not certified, but tried to defend it with three arguments: that Mr. Nedved had not hauled for more than 30 days, that Mr. Nedved was within site and sound of Mr. Smeby, and that Mr. Nedved was a part-time employee. Mr. Wiklund explained that none of those exemptions applied to the situation, because the 30 day exemption ended 30 days after Mr. Nedved's hiring, which was over one year ago, and the two other arguments apply to confinement site applicators and not to commercial manure services. Mr. Wiklund explained that Mr. Nedved must stop land applying manure until he received certification. Mr. Smeby then stated that he had been certified for four years, but had not understood the requirements.
4. On November 21, 2008, later in the day, Mr. Wiklund returned to the site to verify that Mr. Nedved had stopped applying. Mr. Wiklund once again spoke to Mr. Smeby. Mr. Wiklund explained that the DNR's database showed that Smeby Farms only had two people certified. Mr. Smeby stated that the rest of his crew was not certified, but that he had notified them and informed them to get certified.
5. In further discussions with Mr. Smeby he contended that Mr. Nedved was an independent contractor during the manure applications prior to November 21, 2008. He also contended that those manure applications only occurred for a few nights in 2002.
6. On November 24, 2008, a Notice of Violation letter was issued to Smeby Farms for failing to have its employees become certified manure applicators. Mr. Nedved also received a Notice of Violation letter. The letter required Mr.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: SMEBY FARMS

Nedved to immediately cease land applying manure until he received certification, and required Mr. Smeby to ensure that all of his employees were certified to land apply manure. Smeby Farms had no prior enforcement history with the DNR and this was the first Notice of Violation letter issued to the company.

IV. CONCLUSIONS OF LAW

Smeby Farms neither admits nor denies the Conclusions of Law and enters into this administrative consent order for settlement purposes only.

1. Iowa Code section 459.103 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. 567 IAC 65.19(1) states that a commercial manure service, a commercial manure service representative, or a confinement site manure site applicator shall not apply dry or liquid manure to land, unless the person is certified. The above facts indicate noncompliance with this provision.

V. ORDER

THEREFORE, the DNR orders and Smeby Farms agrees to do the following:

1. Smeby Farms shall pay a penalty of \$4,500.00 in accordance with the following payment plan. If any of the said payments are not received in accordance with the payment plan, the remaining portion of the penalty shall be due immediately:

\$187.50 due April 1, 2010;	\$187.50 due April 1, 2011;
\$187.50 due May 1, 2010;	\$187.50 due May 1, 2011;
\$187.50 due June 1, 2010;	\$187.50 due June 1, 2011;
\$187.50 due July 1, 2010;	\$187.50 due July 1, 2011;
\$187.50 due August 1, 2010;	\$187.50 due August 1, 2011;
\$187.50 due September 1, 2010;	\$187.50 due September 1, 2011;
\$187.50 due October 1, 2010;	\$187.50 due October 1, 2011;
\$187.50 due November 1, 2010;	\$187.50 due November 1, 2011;
\$187.50 due December 1, 2010;	\$187.50 due December 1, 2011;
\$187.50 due January 1, 2011;	\$187.50 due January 1, 2012;
\$187.50 due February 1, 2011;	\$187.50 due February 1, 2012;
\$187.50 due March 1, 2011;	\$187.50 due March 1, 2012.

2. Smeby Farms shall ensure that all employees are properly certified at all times of manure handling and manure application.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: SMEBY FARMS

VI. PENALTY

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

Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 that may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties at 567 IAC Chapter 10. Pursuant to this rule, 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 a penalty of \$4,500.00. The administrative penalty assessed by this administrative consent order is determined as follows:

Economic Benefit – Mr. Smeby gained an economic benefit over other employers whose employees are certified applicators. Mr. Smeby saved time and money by not having his employees complete applicable certification training/testing, and by not paying all applicable certification fees. Therefore, \$100.00 is assessed for this factor.

Gravity of the Violation – 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 to violations administratively at this time, as the most equitable and efficient means of resolving the matter. The certification program is an important component of the regulatory laws relating to animal feeding operation, and failure to comply threatens the integrity of this program. Therefore, \$2,500.00 is assessed for this factor.

Culpability – All commercial manure applicators have a duty to remain knowledgeable of the DNR's requirements. Moreover, the certification requirements have been widely publicized in this industry. As a commercial manure service owner, Mr. Smeby is responsible for making sure that his employees follow the certification requirements. Therefore, \$1,900.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

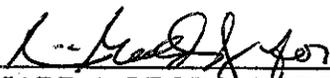
This administrative consent order is entered into knowingly and with the consent of Todd Smeby dba Smeby Farms. For that reason, Todd Smeby dba Smeby Farms waives its right to appeal this administrative consent order or any part thereof.

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

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: SMEBY FARMS

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.



RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 23 day of
June, 2010.



TODD SMEBY
Smeby Farms

Dated this 1 day of
Sept, 2010.

#1391-CMS; Kelli Book; Field Office 2 (Eric Wiklund); EPA; VIII.D.4