IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF: **AVERY ACRES, INC.** Monroe County, Iowa	ADMINISTRATIVE CONSENT ORDER NO. 2010-AFO-02

TO: Larry Kinsinger, Registered Agent
Avery Acres, Inc.
10265 Highland Center Road
Ottumwa, Iowa 52501

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Avery Acres, Inc. (Avery Acres) for the purpose of resolving violations relating to an animal feeding operation previously owned and operated by Avery Acres. 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:
Jeff Theobald, Field Office 5
Iowa Department of Natural Resources
401SW 7th Street, Suite 1
Des Moines, Iowa 50309
Phone: 515/725-0268

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:
Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued pursuant to the provisions of 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 or Iowa Code Chapter 459, Subchapter III and the rules adopted 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.

III. STATEMENT OF FACTS

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

1. Avery Acres owned and operated a swine feeding confinement operation with approximately 475 animals. Manure from the operation was stored in an 80' x 330' unformed manure storage lagoon. The facility was located in the NE ¼ of NW ¼ of Section 10, Mantua Township in Monroe County, Iowa. The facility is currently being purchased under contract by Kevin Van Loon.

2. On March 5, 2007, Jeff Theobald, DNR Field Office 5 Environmental Specialist, conducted an earthen lagoon manure storage structure inspection at the Avery Acres facility. During the inspection, Larry Kinsinger, Avery Acres representative, stated the facility had been in limited operation and the last time the site had hogs was in November 2006. Mr. Kinsinger stated the last time manure was removed from the lagoon was in 2005. During the inspection, Mr. Theobald noted the lagoon freeboard was less than three inches. On March 9, 2007, DNR Field Office 5 sent Mr. Kinsinger a Notice of Violation letter for failing to maintain the minimum two feet of freeboard in the lagoon. The letter required Mr. Kinsinger to remove the manure as soon as possible to avoid a manure discharge. The letter also explained the requirement that a lagoon must be properly closed by removing all the manure within six months after the operation had been discontinued. The field office advised Mr. Kinsinger to clean out the basin within the following month so that he would have land available to land apply the manure before the crop was planted.

3. On June 8, 2007, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger indicated that he intended to start the closure within the next few weeks. On August 27, 2007, Mr. Theobald spoke to Mr. Kinsinger on the telephone. Mr. Kinsinger once again indicated he planned to start the closure within the next few weeks. On October 2, 2007, DNR Field Office 5 issued a Notice of Violation letter to Mr. Kinsinger for failing to remove all the manure from the basin and properly close it within six months of discontinuing operations. The letter indicated the matter would be referred for further enforcement if the manure was not removed and the basin closed by November 30, 2007.

4. On November 2, 2007, Mr. Theobald spoke to Mr. Kinsinger on the telephone. Mr. Kinsinger indicated he would begin pumping the lagoon the week of November 12, 2007. On November 16, 2007, Mr. Theobald spoke to Mr. Kinsinger on the telephone. Mr. Kinsinger indicated that he had started pumping the lagoon on November 15, 2007. On November 30, 2007, Mr. Theobald spoke to Mr. Kinsinger on the telephone. Mr. Kinsinger stated that because of the bad weather he would need to stop the closure for the winter. On April 15, 2008, Mr. Theobald spoke to Mr. Kinsinger on the telephone. Mr. Kinsinger indicated he would begin pumping the lagoon when the area dried out.

5. On June 25, 2008, DNR Field Office 5 personnel visited the Avery Acres facility. The lagoon had been drained down with some liquid remaining in the basin. Mr. Kinsinger had removed the southwest corner of the lagoon in order to get the pump further into the lagoon.

6. On July 7, 2008, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger stated that the spring had been too wet, but that he had done some pumping and had an excavator ready when the area dried out. On August 8, 2008, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger stated that he was almost done pumping the lagoon out and had cut into the berm to be able to pump more manure out.

7. On September 5, 2008, DNR Field Office 5 personnel visited the facility and nothing had been done since the previous visit on June 25, 2008.

8. On October 10, 2008, DNR Field Office 5 personnel visited the facility. The field office personnel observed that some of the northwest corner and west side of the lagoon walls had been removed. On October 14, 2008, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger stated that he was done pumping the liquid manure from the lagoon and was trying to determine how to scrape the manure solids from the lagoon. On November 4, 2008, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger had not determined how he was going to remove the manure solids from the lagoon.

9. On January 5, 2009, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger stated he was going to have a contractor look at the site and would then begin removing the manure solids. On February 2, 2009, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Kinsinger stated that it was too cold for the equipment to work and that he may be able to start at the end of the week.

10. On February 20, 2009, DNR Field Office 5 personnel visited the facility. Nothing had been done at the facility. On February 24, 2009, Mr. Theobald spoke to Mr. Kinsinger on the telephone regarding the basin closure. Mr. Theobald informed Mr. Kinsinger that the matter would be referred for further enforcement if the manure solids were not removed within the following weeks.

11. On May 13, 2009, DNR Field Office 5 personnel visited the facility. Nothing had been done at the facility.

12. On October 21, 2009, DNR Field Office 5 personnel visited the facility. The liquid manure and manure solids had been removed. The sides and bottom of the lagoon had been scraped to the clay liner and were then leveled. The manure liquids and manure solids had been properly land applied to nearby fields.

IV. CONCLUSIONS OF LAW

Avery Acres 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. Iowa Code section 459.311 and 567 IAC 65.2(8) state as soon as practical, but no later than six months after the use of an animal feeding operation is discontinued, all manure shall be removed from the discontinued animal feeding operation and its manure control facilities and be land applied. There have not been pigs at the Avery Acres facility since at least November 2006. Avery Acres owned the facility at the time it was discontinued and is liable for the manure removal. As of October 21, 2009, the DNR considers the lagoon properly closed. The above-facts disclose a violation of this provision.

V. ORDER

THEREFORE, the DNR orders and Avery Acres agrees to do the following:

1. Avery Acres shall pay an administrative penalty of $2,000.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

Avery Acres neither admits nor denies the Penalty assessments and enters into this administrative consent order for settlement purposes only.

1. Iowa Code sections 459.603 and 455B.191 authorize 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 section 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 these rules, 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 – Avery Acres saved time and money by not properly removing and land applying the manure from the facility after discontinuation of the operation. Avery

Acres was able to delay pumping fees and excavating fees for at least two and a half years. Therefore, $1,000,000 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 DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. By failing to properly remove all the manure from the lagoon and removing portions of the lagoon berms, Avery Acres created a potential threat to the environment. Failure to properly close the lagoon undermines the integrity of the animal feeding program. Additionally, DNR Field Office 5 expended a large amount of staff time in working with Avery Acres in an attempt to have the lagoon properly closed. Based on the above considerations, $500.00 is assessed for this factor.

Culpability – Avery Acres has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that its conduct is subject to DNR's rules. This facility ceased operations in November 2006 and DNR Field Office 5 made several attempts to work with the facility. Avery Acres was notified on numerous occasions of the requirements and was given numerous opportunities to properly close the lagoon. Therefore, $500.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Avery Acres. For that reason Avery Acres waives the 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.

RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 11 day of January, 2010.

AVERY ACRES, INC.

Dated this 23 day of December, 2009.

CAFO Facility #60103; Kelli Book; DNR Field Office 5; Ken Hessenius; EPA; VIII.D.2.c