

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

IN THE MATTER OF:

NICHOLAS PHELPS
Ringgold County, Iowa

ADMINISTRATIVE CONSENT ORDER
NO. 2010-AFO- 18

TO: Nicholas Phelps
11699 Bluegrass Rd
Lamoni, Iowa 50140

I. SUMMARY

This administrative consent order is entered into between Nicholas Phelps and the Iowa Department of Natural Resources (DNR) for the purpose of resolving the issues surrounding a manure discharge into an unnamed farm pond in Ringgold County and Mr. Phelps' failure to be a certified manure applicator at the time of the violation. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Any questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Alison Manz, Field Office 4
Iowa Department of Natural Resources
1401 Sunnyside Lane
Atlantic, Iowa 50022
Phone: 712/243-1934

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

RECEIVED

APR 06 2010

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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 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

1. Roger Dolecheck owns and operates a 3,840 head hog confinement facility located in Section 17, Monroe Township, Ringgold County. Nicholas Phelps owns and operates a small hog confinement. He was hired by Mr. Dolecheck to land apply manure from Mr. Dolecheck's facility.

2. On February 20, 2009, while in the area of Section 17, Monroe Township, Ringgold County, Alison Manz, DNR Field Office 4 environmental specialist, noticed Mr. Phelps was applying manure on frozen and snow covered ground. Ms. Manz determined the manure was from Mr. Dolecheck's facility. The facility's manure management plan required that manure be applied by a certified manure applicator. Ms. Manz determined that Mr. Phelps was not a certified manure applicator. Ms. Manz observed manure running off the field into a nearby farm pond. Ms. Manz took photographs documenting the manure runoff and collected a laboratory sample. The laboratory sample indicated the following results: E.coli 33,000/100mL, membrane fecal coliform 48,000/100mL, total suspended solids 10,000 mg/L, ammonia 2,500 mg/L, and biochemical oxygen demand 68,000 mg/L.

3. On April 7, 2009, DNR issued a Notice of Violation letter to Mr. Phelps for the water quality and manure applicator violations discovered in February 2009. A similar Notice of Violation letter was also issued to Mr. Dolecheck.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.186 prohibits the discharge of pollutants into a water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. DNR Field Office 4 documented manure runoff entering the pond. The above-facts indicate a violation of this provision.

2. 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.

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3. 567 IAC 65.2(7) states that all manure removed from an animal feeding operation or its manure control facilities shall be land-applied in a manner which will not cause surface or groundwater pollution. The improper application of manure onto frozen ground resulted in water quality violations. The above-mentioned facts indicate a violation of this provision.

4. 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. DNR Field Office 4 observed manure entering a water of the state. The laboratory results indicated the elevated levels of several pollutants. The above-facts disclose a violation of one or more of these criteria.

5. Iowa Code section 459.315(2) and 567 IAC 65.19(1) states that a commercial manure service, a commercial manure service representative or a confinement site manure applicator shall not apply dry or liquid manure to land, unless the person is certified. During the investigation, it was determined that Mr. Phelps was not a certified manure applicator at the time of the violation. The above-mentioned facts indicate a violation of this provision.

V. ORDER

THEREFORE, DNR orders and Mr. Phelps agrees to do the following:

1. Mr. Phelps shall pay a penalty of \$1,500.00 in accordance with the following payment plan. If any of the payments are not received in accordance with the payment plan, the remaining penalty payments shall be due immediately.

\$62.50 due May 15, 2010	\$62.50 due May 15, 2011
\$62.50 due June 15, 2010	\$62.50 due June 15, 2011
\$62.50 due July 15, 2010	\$62.50 due July 15, 2011
\$62.50 due August 15, 2010	\$62.50 due August 15, 2011
\$62.50 due September 15, 2010	\$62.50 due September 15, 2011
\$62.50 due October 15, 2010	\$62.50 due October 15, 2011
\$62.50 due November 15, 2010	\$62.50 due November 15, 2011
\$62.50 due December 15, 2010	\$62.50 due December 15, 2011
\$62.50 due January 15, 2011	\$62.50 due January 15, 2012
\$62.50 due February 15, 2011	\$62.50 due February 15, 2012
\$62.50 due March 15, 2011	\$62.50 due March 15, 2012
\$62.50 due April 15, 2011	\$62.50 due April 15, 2012

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VI. PENALTY

Iowa Code section 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.

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 \$1,500.00. The administrative penalty assessed by this order is determined as follows:

Economic Benefit – Mr. Phelps was not a certified confinement site manure applicator at the time of the incident. Mr. Phelps benefitted by avoiding the annual \$100.00 fee required to be paid by confinement site manure applicators. Based on these considerations, \$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 the violations administratively at this time, as the most equitable and efficient means of resolving the matter. The manure was applied on frozen and snow covered ground resulting in manure runoff to a water of the state. Failure to properly land apply manure threatens the water quality program. Improper land application can lead to elevated levels of nitrates, ammonia, phosphorus, organic matter, fecal bacteria, e-coli and other microorganisms in both ground water and surface water. These conditions can endanger human health as well as that of livestock and other wildlife. Based on the above considerations, \$1,000.00 is assessed for this factor.

Culpability – While Mr. Phelps claims he was not aware of the need to be certified, as a hog producer (small or large) he should be aware of the DNR's regulations. Additionally, whether the manure was applied from a small operation or an operation required to have a certified applicator land apply, water quality violations should not occur. Failure to properly land apply the manure, especially during frozen and snowy conditions, resulted in a water quality violation. Therefore, \$400.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

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

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VIII. NONCOMPLIANCE

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in this order. Failure to comply with this order may result in the imposition of further administrative penalties 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 9 day of
April, 2010



Nicholas Phelps

Dated this 3rd day of
April, 2010

No Facility Number; Kelli Book; Field Office 4; EPA; VIII.D.3, VIII.D.4