IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF: AIR ADVANTAGE, INC. AND ANF AIR SERVICE, INC.	ADMINISTRATIVE CONSENT ORDER 2010-WW-04

To: **Air Advantage, Inc.**
Attn. Steve Hohl
1720 S. Lexington Ave.
Mt. Pleasant, IA 52641

ANF Air Service, Inc.
Attn. Michael L. Thompson
PO Box 407
Garwood, TX 77442

I. SUMMARY

The Iowa Department of Natural Resources (Department), Air Advantage, Inc. and ANF Air Service, Inc. enter into this Consent Order (Order) for the purpose of resolving regulatory violations arising out of the misapplication of pesticides to Flint Creek which resulted in a fish kill. Under the terms of the Order, ANF Air Services, Inc. (ANF) agrees to pay the Department $7,824.44 as restitution for the fish kill and Department laboratory analysis costs of $3,444 (total of $11,268.44). ANF also agrees to pay an administrative penalty of $8,500 in four installments. Air Advantage, Inc. while denying liability agrees to pay any of the fish restitution and administrative penalties in the event ANF fails to comply with the payment terms of this order.

For further details, see Division V below.

Any questions regarding this order should be directed to:

Relating to technical requirements:
Kurt Levetzow
Iowa Department of Natural Resources
Field Office #6
Washington, Iowa 52353
Ph: 319/653/2135

Relating to appeal rights:
David Wornson, Attorney
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: 515/242-5817

II. JURISDICTION

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. Iowa Code sections 481A.158 and 455B.392(1)"c" authorize the assessment and recovery of damages to natural resources.

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Iowa Code section 455B.109 and agency rules in Chapter 567 IAC 10 authorize the Director to assess administrative penalties up to $10,000.

III. STATEMENT OF FACTS

1. Air Advantage, Inc. (AAI) is a company incorporated and doing business in Iowa and a licensed commercial pesticide applicator company. The business includes providing aerial spraying of pesticides to farm property.

2. ANF Air Service, Inc. (ANF) is a company incorporated in the State of Texas but which was doing business in Iowa at all times relevant to this Order. Its president and the pilot of the airplane that applied pesticide as described in this Order, Michael L. Thompson, is an Iowa license commercial pesticide applicator.

3. Dan Gabeline is an owner of farm property located in the vicinity of New London, Des Moines County, Iowa and does business as Gabeline Family Farms which also leases property to which pesticides were applied as described in this Order.

4. On July 28, 2009 at about 6:00 PM, William "Bill" Totemeier reported to the Department's emergency response line that pesticides were being aerially applied to his farm property without his consent. At around 7:15 PM, a Department's field office staff person, Kurt Levetzow, responded to the complaint and met with Mr. Totemeier at his property. Mr. Totemeier reported that not only had the airplane applied pesticide to his farm property he had also observed the plane applying pesticides to the adjoining farm property to the north owned by Dan Gabeline (Gabeline property).

5. In the course of conducting an investigation of the incident, the Department determined the following undisputed facts:

a. Dan Gabeline contracted with AAI to aerially apply pesticide to his soybean fields located north of Flint Creek in Des Moines County, Iowa. AAI subcontracted with ANF to provide the airplane and pilot to perform the application. Michael Thompson, President and principal stockholder in ANF, piloted the plane and applied the pesticide. Mr. Thompson is licensed as a commercial pesticide applicator by the Iowa Department of Agriculture and Land Stewardship (IDALS).

b. Dan Gabeline purchased a fungicide commercially known as "Laredo" (EPA No. 62719-412) and an insecticide known as "Cobalt" (EPA No. 62719-575) from Golden Furrow Fertilizer, Inc. in Mt. Union, Iowa. The active ingredient in Cobalt is "Chlorpyrifos". The active ingredient in Laredo is "Myclobutanil".

c. An employee of Mr. Gabeline, Scott Strothman, mixed the two pesticides and delivered and filled the application tanks on the ANF owned airplane for this application.

d. On July 28, 2009, Mr. Thompson and ANF mistakenly applied the pesticide mixture to portions of Mr. Totemeier's soybean field.

e. ANF and Michael Thompson then proceeded to aerially apply the pesticide to the Dan Gabeline soybean fields on July 28, 2009.

6. On July 28, 2009, Department investigator Kurt Levetzow interviewed Mr. Totemeier at his property. Mr. Totemeier reported that he was concerned the airplane may have applied or cause pesticide to drift into Flint Creek because it was observed flying very close to the creek. As of about 6:00 PM, Mr. Levetzow observed an airplane applying product to the Gabeline fields on the north side of Flint Creek. Mr. Levetzow took a sample from Flint Creek just north and east of the Totemeier property and within the aerial application area. He walked upstream to a location identified as the "clearing" and took a water sample. Mr. Levetzow observed dead and dying crayfish at the "clearing" location. He returned and took a sample from Mr. Totemeier's pond.

7. On July 29, 2009, Mr. Levetzow and another Department investigator continued their investigation. They walked upstream in a northwesterly direction on Flint Creek toward the "clearing" from the 220th Ave crossing. They did not see the dead crayfish at the location Mr. Levetzow had observed them on the previous evening and saw clear evidence of scavenging. They observed a few dead fish, perhaps 5-6 fish along the stream. They did not observe evidence of dead or dying fish about 200 yards upstream of the "clearing". The staff observed that in some locations the soybean field was planted within feet of the stream and in other areas as far as 60 feet from the stream edge.

8. The Department investigators then drove to the 180th St. "Missouri" crossing. They observed dead bluegill and as they walked downstream of this location they saw more and more dead and dying fish including bluegill, minnows and bullheads. They contacted the Department's fisheries section. The Department biologist, Vance Polton, arrived on site at about 3:00 PM to conduct a fish kill investigation and count dead fish. Mr. Levetzow and Mr. Stouder took water samples from the 180th St. crossing and the 220th St. culvert. On July 30, 2009, Department staff took water samples from Flint Creek at the 240th St. bridge location and at the "country club outfall" which is an area at the headwaters of the creek and upstream and out of the aerial application area.

9. All the water samples taken by the Department staff were laboratory tested at the University of Iowa Hygenic Lab (UHL) for the presence of a range of pesticides including Chlorpyrifos and Myclobutanil. The sample locations as described above are identified on the attached Exhibit A. The location, dates and sample results are summarized in the following table:

Dated Sampled	Location	Chlorpyrifos (ppb)	Myclobutanil (ppb)
7/28/09	Totemeier pond	0.28	<4.4
7/28/09	Flint Creek gabeline/ rubble	12	6.0
7/28/09	Flint Creek	9.2	3.1
7/29/09	180th St. crossing	2.7	0.660
7/29/09	220th Ave & 180th culvert	1.5	0.83
7/30/09	Country Club outfall	<0.1	<4.4
7/30/09	240th bridge	<0.1	<4.4

10. The water sample results taken on July 28, 2009 are all within the area of aerial application and demonstrate that the application of Laredo and Cobalt entered into the Totemeier pond and Flint Creek. Both samples taken on July 29, 2009 were at downstream locations just south and west of the Gabeline field application area and demonstrate that the Cobalt and Laredo mixture entered Flint Creek.

11. The EPA approved label for Chlorpyrifos states that the product is toxic to fish and states that it should not be applied directly to water or to "areas where surface water is present". The EPA approved Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) re-registration decision document states that the acutely toxic level (LC 50) for Chlorpyrifos to freshwater fish (bluegill sunfish) is 1.8 parts per billion (ppb).

12. The IDALS pesticide bureau conducted an investigation of the aerial misapplication of pesticides by ANF. The IDALS investigator concluded that pesticide had been misapplied by applying pesticide over Mr. Totemeier's farm field and by allowing pesticide to drift into Flint Creek. ANF and IDALS entered into a "Joint Stipulation" in which ANF agreed to pay an administrative penalty of $1,040. The IDALS investigator took plant samples along Flint Creek at the approximate location of the Department's water sample identified as "Flint Creek rubble" and had them laboratory tested. One plant sample taken about 10 feet north of Flint Creek at the rock crossing showed levels of Chlorpyrifos of 62 ppb and Myclobutanil of 200 ppb. The second sample taken about 25-30 feet south of Flint Creek at the rock crossing did not find detectable levels of Chlorpyrifos but did find Myclobutanil at 110 ppb.

13. Department fisheries staff conducted a fish count in accordance with Department rules. The staff determined that the fish kill zone was within the segment of Flint Creek where pesticide entered the stream due to drift from the aerial application by ANF. The staff counted 542 dead fish and calculated the fish restitution valuation to be $7,342.74. Total investigatory costs were $481.70. The total fish restitution valuation is $7,824.44. See attached Exhibit B. The UHL laboratory sampling costs for 7 samples at $492 per sample is $3,444.

14. The Department determined that the cause of the fish kill was due to toxic levels of pesticide, particularly Chlorpyrifos, in Flint Creek arising from the drift of Cobalt and Laredo from the aerial application by ANF. The Department issued a notice of violation to the Dan Gabeline, AAI and AFN dated September 30, 2009.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.175 authorizes the Director of the Department to issue an order to any "person" determined to be in violation of that part.

2. Iowa Code section 455B.186 prohibits the discharge of a pollutant into waters of the state unless the discharge is pursuant to a permit issued by the Director of the Department. The misapplication of the pesticide mixture containing Cobalt and Laredo which entered into Flint Creek

and resulted in a fish kill constitutes the discharge of a "pollutant" as defined in Iowa Code section 455B.171(18). Flint Creek is a "water of the state" as defined in Iowa Code section 455B.171(37).

3. Iowa Code section 455B.173 authorizes the Environmental Protection Commission (EPC) to adopt rules applicable to water quality and permitting of discharges to water of the state. The EPC has adopted rules in Chapter 567 IAC 61. Specifically, paragraph 567 IAC 61.3(2)(d) requires that all surface waters be free from "...substances attributable to wastewater discharges or agricultural practices in concentrations or combinations, which are acutely toxic to human, animal, or plant life." The misapplication of the pesticide which entered Flint Creek resulting in a fish kill constitutes a violation of this water quality standard and rule.

4. The Department takes the position that AAI is a "person" as defined in Iowa Code section 455B.171(16) who is strictly liable for the water quality violation in 567 IAC 61.3(2(d) and the unpermitted discharge of a pollutant to Flint Creek in that it is a licensed commercial pesticide application company who contracted with ANF for the aerial application of this pesticide which resulted in a fish kill. AAI neither admits nor denies liability under this provision but enters into this agreement in the interest of settlement.

5. ANF is a "person" as defined in Iowa Code section 455B.171(16) who is strictly liable for the water quality violation in 567 IAC 61.3(2(d) and the unpermitted discharge of a pollutant to water of the state in that its employed pilot caused the misapplication of this pesticide which entered Flint Creek resulting in a fish kill.

6. Iowa Code section 455B.392(1)"c" provides that a "...person having control of a hazardous substance is strictly liable to the state..." for reasonable damages to the state for "...injury to, destruction of, or loss of natural resources resulting in a hazardous condition...". Damages include the costs of investigation and assessment of those damages. The Department has adopted rules applicable to the assessment of natural resource damages in 567 IAC 133.6.

7. The pesticides Cobalt and Laredo when misapplied constitute "hazardous substances" as defined in Iowa Code section 455B.381(5) and the misapplication which resulted in the pesticide entering Flint Creek and killing fish constitutes a "hazardous condition" as defined by Iowa Code section 455B.381(4). The Department's position is that AAI as the licensed commercial applicator and ANF as the sub-contracted aerial applicator are persons having control of a hazardous substance whose actions caused a fish kill. AAI neither admits nor denies liability under these provisions but enters into this agreement in the interest of settlement.

8. Iowa Code section 481A.151 provides that any person who is liable for polluting water of the state in violation of state law shall be required to pay restitution for injury to wild animals. The Department's position is that AAI and ANF are "persons" as defined in Iowa Code section 481A.1(26). Their actions caused pollution of water of the state in violation of state laws as described above and caused the fish kill as described in this order. AAI neither admits nor denies liability under this provision but enters into this agreement in the interest of settlement.

9. Iowa Code section 481A.151 authorizes the Iowa Natural Resources Commission (NRC) to adopt rules applicable to the method for calculating restitution assessments and authorizes the Department to recover these restitution assessments through contested procedures under Iowa Code Chapter 17A. The NRC has adopted these rules in Chapter 571 IAC 113.

10. In accordance with Chapter 571 IAC 113 and EPC rule 567 IAC 133.6, the Department has calculated the monetary value for loss of fish to be $7,342.74. The fish count investigation costs are $481.70. The laboratory costs for analyzing water samples is $3,444.

11. The Department position is that Dan Gabeline, d/b/a Gabeline Farms is also strictly liable under the above cited provisions. However, in the interest of settlement, the Department has not named Mr. Gabeline as a party to this order but reserves the authority to take enforcement again him in the event ANF and AAI fail to fully comply with the terms of this order.

V. ORDER

THEREFORE, the Department orders and the named parties agree to the following in settlement of this claim:

1. ANF shall pay for fish restitution costs of $7,342.74, fish count investigatory costs of $481.70 and water sample laboratory costs of $3,444 for a total of $11,268.44. This amount shall be paid by check paid to the order of the "Iowa Department of Natural Resources" no later than April 31, 2010.

2. ANF shall pay an administrative penalty of $8,500 in four equal installments of $2,125. The first installment is due May 1, 2010, the second installment is due August 1, 2010, the third installment is due November 1, 2010 and the final installment is due February 1, 2011. Payment shall be made by check payable to the order of the "Iowa Department of Natural Resources". Each payment shall include either cover letter referencing this order by name and number or a reference to this order on the check.

3. In the event ANF fails to comply with the above payment terms within 30 days of written notice of non-compliance by the Department, AAI agrees to pay any unpaid costs as specified in paragraph (1) or any unpaid installment as provided in paragraph (2) above within 30 days of written notice by the Department.

VI. PENALTY

1. Iowa Code section 455B.109 authorizes the EPC to establish by rule a schedule for assessment of administrative penalties up to $10,000. The EPC has adopted this schedule with procedures and criteria for assessment of penalties. See Chapter 567 IAC 10. Pursuant to this chapter, the Department has determined that the most effective and efficient means of addressing the above-cited violations is through an administrative order with a penalty. The Department and the named parties have agreed to a total assessment of $8,500 with payment to be according to the terms in Division V. above.

VII. APPEAL RIGHTS

Iowa Code section 455B.175 and 561 IAC 7.5(1), as adopted by reference in chapter 567 IAC 7, provide the opportunity to appeal adverse decisions of the Department. AAI and ANF enter into this consent order knowingly and consent to the waiver of all rights to appeal the Department's actions based on the violations cited in this order.

VIII. NONCOMPLIANCE

Failure to comply with this order may result in further administrative enforcement and assessment of penalties or referral to the Attorney General to obtain appropriate relief in Iowa District Court pursuant to Iowa Code sections 455B.191 and 455B.391. Compliance with division V. of this order constitutes full satisfaction of all requirements pertaining to the violations described in this order as to the named parties.

Richard A. Leopold, Director
Iowa Department of Natural Resources

Dated this 14 day of April, 2010

AAI, ANF, FO 6, I.C(1),

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SIGNATURE PAGE
CONSENT ORDER NO. 2010-UT-

Michael L. Thompson
ANF Air Service, Inc.
By Its Authorized Representative

Dated this 6 day of April, 2010

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SIGNATURE PAGE
CONSENT ORDER NO. 2010-UT-

Air Advantage, Inc.
By Its Authorized Representative

Dated this 1st day of April, 2010

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