

IOWA DEPARTMENT OF NATURAL RESOURCES

ADMINISTRATIVE ORDER

IN THE MATTER OF:

GONZALEZ & SONS EXPRESS, LLC

HIS Spill No. 112109-TAP-0913

ADMINISTRATIVE ORDER

2011-WW-04

TO: Gonzalez & Sons Express, LLC
Reg. Agent J. Felix Gonzalez
211 West 4th Street
Scott City, Kansas 67871

I. SUMMARY

The Iowa Department of Natural Resources (Department) issues this Administrative Order (Order) to Gonzalez & Sons Express, LLC (Gonzalez) to address regulatory violations arising out of a truck accident which resulted in the discharge of pollutants to a water of the state, and the failure to take adequate and timely response actions. This Order requires payment of a penalty of \$8,000 within 60 days of the receipt of this Order, subject to your appeal rights stated in this Order.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

Ted Peterson
Iowa Department of Natural Resources
Field Office #5
Des Moines, Iowa 50309
Ph: 515-242-6488

Relating to legal requirements:

Aaron Brees, Attorney
Iowa Department of Natural Resources
Des Moines, Iowa 50319-0034
Ph: 515-281-5965
aaron.brees@dnr.iowa.gov

Appeal, if any, addressed to:

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

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 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

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issued pursuant thereto. Iowa Code section 455B.109 and agency rules in chapter 567 Iowa Administrative Code (IAC) 10 authorize the Director to assess administrative penalties up to \$10,000.

III. STATEMENT OF FACTS

1. Gonzalez is a limited liability corporation registered in the State of Kansas.
2. On November 21, 2009, a semi truck owned and operated by Gonzalez was involved in a one vehicle accident in Iowa located at the eastbound Interstate 80 exit ramp to highway 169. The semi truck driver lost control of the vehicle while exiting, resulting in a rollover in the exit ramp ditch. The semi truck was pulling a tanker containing dairy cream.
3. The City of De Soto fire department was notified of the accident at 8:39AM. A Des Moines HazMat Unit and a Department emergency response staff person were onsite between 9:30AM – 10:00AM on November 21, 2009. It was estimated that most of the 5,000 gallon container of dairy cream had been spilled and diesel fuel was also observed leaking from the truck. The Department made arrangements with the Iowa Department of Transportation to deliver sand in order to build a containment berm at a location about one quarter of a mile from the release location in order to mitigate the flow of the product down a drainage ditch leading to a culvert which drains into Bulger Creek.
4. The Department staff person, Ted Peterson, contacted Felix Gonzalez, a principal in Gonzalez, at approximately 10:28AM on November 21, 2009. Mr. Peterson informed Mr. Gonzalez of the incident and notified him that Gonzalez would be responsible to take action to clean up the spill. Mr. Gonzalez responded that before he could take action he would need to contact his insurance company.
5. On November 21, 2009, Mr. Peterson contacted a Mr. Chris Gall with Rutter-Cline Associates, Inc. who was the insurance agent Mr. Gonzalez had identified. Mr. Peterson informed the representative of the condition and the necessity to take immediate action to clean up the spill. Mr. Gall informed him that the insured, Gonzalez, must file a claim before the insurance company could act.
6. On November 23, 2009, Mr. Peterson attempted several telephone contacts with Mr. Gonzalez, leaving messages. He also contacted Mr. Gall and other insurance representatives regarding the status of the insurance claim and the necessity of taking action to clean up the spill. Mr. Peterson specifically informed Mr. Gall that the containment berm was beginning to fail and if the cream/diesel mixture was released beyond the berm, it could enter Bulger Creek which would result in legal consequences.
7. By November 24, 2009, the Department confirmed that the containment berm had been breached and a cream/water mixture had reached a culvert and was flowing in a drainage ditch toward Bulger Creek. The cream mixture was observable in the drainage ditch throughout the town of De Soto. By approximately 10:37 AM, Mr. Peterson

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sampled water where the drainage ditch enters Bulger Creek and reported observing a milky sheen and odor within the stream. Laboratory results indicated high BOD concentration in Bulger Creek which could in some cases be lethal to aquatic organisms. In response to a call from an insurance representative at approximately 12:43PM, Mr. Peterson informed the person that the situation required immediate response to recover petroleum near the spill location and the continuing movement and discharge of the cream mixture to the stream. Mr. Peterson revisited the stream location at about 4:00PM and observed continuing discharges and an observable milky sheen at least 50 feet downstream.

8. On November 25, 2009 at about 8:44AM, Mr. Peterson telephoned the insurance representative, Mr. Gall, and left a message that the Department was moving ahead with emergency cleanup if the insured party did not respond before 12:00PM. At 8:46AM, the Department staff person telephoned Mr. Gonzalez and notified him that the Department would initiate cleanup and seek recovery of cost if action did not commence by 12:00PM. At 1:00PM, the Department was notified that Gonzalez's insurance company had retained Hydro Klean, an environmental remediation company, to assist in cleanup.

9. Hydro Klean began onsite assessment and cleanup later on November 25, 2009 and continued remedial activities on November 26, 27, 28, and 30 and December 1, 2009. After Gonzalez had submitted a hazardous condition report to the Department, the Department issued a Notice of Violation dated December 21, 2009 to Gonzalez citing the illegal discharge to water of the state and the failure to timely undertake remedial action. The report stated that Hydro Klean had recovered approximately 44,873 gallons of dairy cream impacted liquid, 10,255 gallons of petroleum impacted liquid, and about 69.89 tons of contaminated soil and sand.

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 authorized pursuant to a permit issued by the Director of the Department. The dairy cream and petroleum spilled from the Gonzalez semi truck and cream mixture which discharged to the drainage ditch and Bulger Creek constitutes a "pollutant" as defined in Iowa Code section 455B.171(18). The drainage ditch and Bulger Creek are "water of the state" as defined in Iowa Code section 455B.171(37). Gonzalez is a "person" as defined in Iowa Code section 455B.171(16) and is therefore responsible for an unauthorized discharge of a pollutant to a water of the state.

3. Iowa Code section 455B.173 authorizes the Environmental Protection Commission (Commission) to adopt rules applicable to water quality and permitting of discharges to water of the state. The Commission has adopted narrative general water

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quality standards in 567 IAC 61.3(2). In part this sub-rule requires that all surface waters be free from:

- b. ...floating debris, oil, grease, scum and other floating materials...sufficient to create a nuisance.
- c. ...materials...producing objectionable color, odor or other aesthetically objectionable conditions.
- d. ...substances attributable to wastewater discharges or agricultural practices in concentration or combinations, which are acutely toxic to human, animal, or plant life; and
- e. ...substances...in quantities which would produce undesirable or nuisance aquatic life.

The discharge of the cream mixture to Bulger Creek constitutes a violation of these general water quality standards in 567 IAC 61.3(2).

4. Gonzalez failed to timely respond to the spill and hazardous condition caused by this spill, which led to the unauthorized discharge of pollutants to water of the state and a violation of general water quality standards.

V. ORDER

THEREFORE, the Department orders Gonzalez to do the following:

1. Pay an administrative penalty of \$8,000 by check payable to the "Iowa Department of Natural Resources" within 60 days of receipt of this Order, subject to appeal rights stated in Section VII.

VI. PENALTY

1. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule for assessment of administrative penalties up to \$10,000. The Commission 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 the issuance of an Order with an administrative penalty of \$8,000.

ECONOMIC BENEFIT: The impacted area became more widespread as the result of the failure to immediately respond and take remedial action. Therefore, any economic benefit is minimal and no assessment has been calculated for economic benefit.

GRAVITY: Once released to a surface water, dairy cream can threaten aquatic organisms. The failure to take immediate action resulted in migration of the spilled material over several days, ultimately reaching Bulger Creek. Laboratory results indicated high BOD concentration in Bulger Creek which could in some cases be lethal to aquatic organisms. For this factor, \$4,500 is assessed.

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CULPABILITY: Mr. Gonzalez was personally notified on several occasions of the spill and the necessity to take immediate action. The Department also notified Gonzalez's insurance agent on several occasion of the necessity to retain a contractor and implement immediate corrective action. The availability of insurance coverage does not excuse the failure of Gonzalez to retain a contractor and take immediate remedial action. For this factor, \$2,500 is assessed.

MITIGATING OR AGRIVATING FACTORS: Similar incidents are responded to and resolved within 48 hours. Response time for this incident was over 96 hours, with the precipitation event which ultimately caused the contained material to breach coming after 72 hours. For this factor, \$1,000 is assessed.

VII. APPEAL RIGHTS

Pursuant to Iowa Code section 455B.175 and 561 IAC 7, as adopted by reference by 567 IAC 7, a written Notice of Appeal to the Commission may be filed within 30 days of receipt of this order. The Notice of Appeal should be filed with the Director of the Department, and must identify the specific portion or portions of this order being appealed and include a short and plain statement of the reasons for appeal. A contested case hearing will then be commenced pursuant to Iowa Code chapter 17A and 567 IAC 7.

VIII. NONCOMPLIANCE

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



ROGER L. LANDE, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 31 day of March, 2011