

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

IN THE MATTER OF:

SMITH AG, INC.

#1253CMS Mitchell County

ADMINISTRATIVE CONSENT ORDER
NO. 2015-AFO-18

TO: Jeffrey Smith, Registered Agent
Smith Ag, Inc.
419 7th Street
Osage, Iowa 50461

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Smith Ag, Inc. (Smith Ag) for the purpose of resolving violations resulting from a manure discharge that resulted in water quality violations and a fish kill. 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:

Cindy Garza, Field Office 2
Iowa Department of Natural Resources
2300 15th Street SW
Mason City, Iowa 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) 725-9572

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 violations of Iowa Code chapter 455B, Division III, Part 1; 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. Iowa

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Code section 481A.151 authorizes the assessment and recovery of damages to natural resources.

III. STATEMENT OF FACTS

1. Smith Ag is a commercial manure service with several employees. The business uses umbilical hose and drag line application. Jeff Smith is the commercial manure service manager for Smith Ag.

2. On October 31, 2014, Mr. Smith contacted the DNR Spill Line to report a manure spill from a manure application resulting in a discharge to an unnamed tributary of Little Cedar River. He stated that Smith Ag was applying manure from a confinement building to a field. Smith Ag personnel were checking the line when they noticed that manure was not coming out the end of the hose. They found that a coupling had come apart and immediately shut the pump down. Manure was flowing down the hill to an unnamed tributary of Little Cedar River. Smith Ag personnel went 1,400 feet downstream in the tributary to the Primrose crossing and installed a pump and began pumping the manure water mixture until it ran clear.

3. On November 1, 2014, Cindy Garza, DNR Field Office 2, investigated the discharge. Ms. Garza met with Mr. Smith at the Primrose crossing where the Smith Ag personnel had pumped the manure water mixture. The water was clean at this area, but Ms. Garza did observe a small dead fish. Ms. Garza continued downstream to the Ocean Bridge. The water was cloudy and Ms. Garza observed dead fish. Ms. Garza collected a laboratory sample from this location and laboratory sample result indicated an ammonia concentration of 72 mg/L. Ms. Garza went downstream in the tributary before it entered the river and collected a laboratory sample. The laboratory sample result indicated an ammonia concentration of 14 mg/L, indicating the slug of ammonia was still in the tributary. Ms. Garza then met with Theresa Shay, DNR Fisheries Bureau, at the spill location. They tracked the end of the contamination to an area approximately 1.33 miles downstream in the river. Ms. Garza met with Mr. Smith. She explained what she had found and asked that Mr. Smith do a second pumping to lower the ammonia concentration in the tributary. Following the second pumping the field test at the Ocean Bridge indicated the ammonia concentration was approximately 4 ppm and the ammonia concentration between the Primrose crossing and the Ocean Bridge was approximately 3 ppm.

4. DNR's Fisheries Bureau conducted the fish kill investigation. The fish kill investigation was led by Ms. Shay who was assisted by Chris Larson and Mike Siepker. The Fisheries personnel used the methods for narrow streams, incompletely accessible as outlined in American Fisheries Society, Special Publication 30. The length of the kills extended over one mile of an incompletely accessible section of the tributary. The tributary bottom was dark due to the manure

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and sediment covering the bottom. Dead fish were trapped in leaf litter covering the bottom and sides of the tributary.

5. The fish kill assessment determined that 11,181 fish were killed, valued at \$1,973.27. The Fisheries Bureau investigative costs were \$1,644.79 and the Field Office investigative costs were \$457.31. The total fish value and investigative costs totaled \$4,075.37.

6. On December 17, 2014, DNR issued a Notice of Violation letter to Smith Ag for the violations discovered by DNR Field Office 2 in November 2014. The letter indicated the violations would be referred for further enforcement. The letter included the investigative report and the Fisheries report.

IV. CONCLUSIONS OF LAW

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 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. During DNR Field Office 2's investigation it was determined that manure from Smith Ag's land application was released into an unnamed tributary of the Little Cedar River. The above-mentioned facts indicate violations of these provisions.

3. 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. The field office personnel noted the water was cloudy and a laboratory result indicated an elevated level of ammonia. DNR Fisheries Bureau also documented a fish kill. The above mentioned facts indicate violations of the general water quality criteria.

4. Iowa Code section 459.311(3) and 567 IAC 65.2(7) state that 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. During DNR Field Office 2's investigation it was determined that confinement manure from Smith Ag's land application was released into an unnamed tributary of Little Cedar River. The above-mentioned facts indicate violations of these provisions.

5. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay

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restitution to the DNR for injury caused to a wild animal by the pollution. The DNR has adopted 571 IAC 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the manure discharge from Smith Ag's land application.

6. Based on the fact Smith Ag has no previous violations, the DNR has determined that there is no likelihood that the violations identified in this administrative consent order will recur if Smith Ag implements the requirements set forth in Paragraphs 1-2, Section V. Order of this administrative consent order.

V. ORDER

THEREFORE, the DNR orders and Smith Ag agrees to do the following:

1. Smith Ag shall ensure that all handling, transferring and land application of manure is done in a manner that does not result in a manure discharge to a water of the state;
2. Within 30 days of the date the Director signs this administrative consent order, Smith Ag shall develop a Standard Operating Procedure detailing a preventative maintenance program for its equipment. The Standard Operating Procedure shall also detail how employees will be trained in proper operation of the equipment. It shall also include information on how Smith Ag would control and contain any manure release including a detailed plan on how manure would be contained in the event of a release. A copy of the Standard Operating Procedure shall be submitted to DNR Field Office 2 within 45 days of the date the Director signs this administrative consent order; and
3. Smith Ag shall pay fish restitution and investigative costs in an amount of \$4,075.37 and an administrative penalty in the amount of \$1,500.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

1. 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.
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 this chapter, 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

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administrative penalty of \$1,500.00. The administrative penalty is determined as follows:

Economic Benefit – 567 IAC chapter 10 requires that the DNR consider the costs saved or likely to be saved by noncompliance. 567 IAC 10.2(1) states that “where the violator received an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit.” 567 IAC 10.2(1) further states, “reasonable estimates of economic benefit should be made where clear data are not available.” Smith Ag did not receive an economic benefit from the equipment failure that led to the manure release. Smith Ag was required to pump the impacted area and pay a landowner for lost crops so it could gain access downstream for the pumping. Based on the above-mentioned information no economic benefit is being assessed.

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. DNR Field Office 2 documented a manure discharge that led to documented water quality violations and a fish kill. These violations threaten the integrity of the regulatory programs because compliance with animal feeding operation requirements is required of all persons in this state. Therefore, \$1,300.00 is assessed for this factor.

Culpability – Smith Ag 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. Therefore, \$200.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

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

VIII. NONCOMPLIANCE

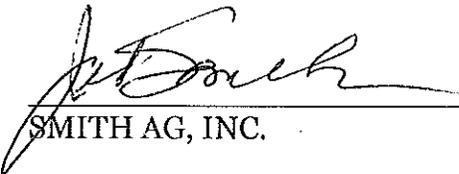
Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties 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.

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CHUCK GIPP, DIRECTOR
Iowa Department of Natural Resources

Dated this 17th day of
June, 2015.



SMITH AG, INC.

Dated this 3 day of
June, 2015.

Kelli Book, DNR Field Office 2, EPA, VIII.D.1 and VIII.D.3