

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER**

IN THE MATTER OF:

JOHN WESTRA

Primghar, Iowa

Facility #64241 O'Brien County

ADMINISTRATIVE ORDER

NO. 2015-AFO- **25**

TO: John Westra
3882 Redwing Avenue
Primghar, Iowa 51245

I. SUMMARY

This Order requires you to comply with the provisions in Section V of this Order, subject to your appeal rights stated in this Order.

Questions regarding this Order should be directed to:

Relating to technical requirements:

Brandon Miner, Field Office 3
Iowa Department of Natural Resources
1900 North Grand – Gateway North Mall
Spencer, Iowa 51301
Phone: (712) 262-4177

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

Appeal, if any, addressed to:

Iowa Department 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 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; Iowa Code chapter 459A 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 Code

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

III. STATEMENT OF FACTS

1. John Westra owns and operates Summit Dairy located at 5564 390th Street, Primghar, Iowa (Section 33, Summit Township, O'Brien County). The facility was issued a construction permit for an expansion of the dairy to 1,500 head of confinement dairy cattle, the associated construction of two deep-pit confinement buildings and a concrete slab for silage storage with runoff controls consisting of a bermed vegetated infiltration area. At the time of the investigation, the construction authorized under the construction permit was partially complete with the concrete slab for silage storage having been poured. At the time of the investigation, Mr. Westra also had a 60 head open feedlot. An unnamed tributary of Mill Creek is located approximately 550 feet to the west of the confinement building and less than 250 feet from the feed storage area.

ENVIRONMENTAL SERVICES DIVISION INVESTIGATION:

August 16, 2014:

2. DNR Field Office 3 received a complaint regarding dead fish in Mill Creek near the 430th Street bridge and at several other bridges to the north. The complainant stated that the water in the creek at the 430th Street bridge smelled like dairy manure.

3. Brandon Miner, DNR Field Office 3 environmental specialist, arrived at the 390th Street bridge, under which flows an unnamed tributary, located approximately ¼ mile south of Summit Dairy. Mr. Miner observed approximately 15 dead fish at this area. The water was clear and the field test indicated an ammonia concentration of 1.0 mg/L. Mr. Miner determined that the presence of dead fish but fairly low ammonia indicated that the contamination source was likely upstream while the contamination plume had already moved downstream of the current location.

4. Mr. Miner checked two other bridges on 390th Street. The first bridge was located where Mill Creek crosses 390th Street, located approximately 3,000 feet to the east of the unnamed tributary and the second bridge was located where the west branch of Mill Creek crosses 390th Street, located approximately 450 feet west of the unnamed tributary. The water was clear at both bridges and no dead fish were observed at either location.

5. Mr. Miner proceeded to the 400th Street bridge located one mile south of the 390th Street bridge downstream of the confluence of the unnamed tributary and Mill Creek. Mr. Miner observed approximately 15 dead fish. The field test

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indicated an ammonia concentration of 0.4 mg/L and the water was clear with no odor.

6. Mr. Miner continued two miles south to the 420th Street bridge at Mill Creek. Mr. Miner observed approximately 20 dead fish. The field test indicated an ammonia concentration of 5-10 mg/L and dissolved oxygen of 1 mg/L. Mr. Miner determined that although there was not a manure smell in the water that the elevated ammonia level and the low dissolved oxygen indicated that the contamination plume was still moving downstream at this location.

7. Mr. Miner continued one mile south to the 430th Street bridge at Mill Creek. This is the location where the complainant had noticed the dead fish and the manure odor. Mr. Miner observed more than 100 dead fish. The field test indicated an ammonia concentration of 30 mg/L and dissolved oxygen of 1 mg/L. The laboratory samples indicated the following concentrations levels: ammonia – 55 mg/L, E. Coli – 31,000 Col/100 mL, and BOD - 540 mg/L.

8. Mr. Miner proceeded approximately one and a half miles south of the 430th Street bridge to the next Mill Creek bridge crossing at Polk Avenue. There were no dead fish observed at this location and the water was clear. Mr. Miner determined that the contamination plume had not yet reached this location.

9. Mr. Miner traveled to Summit Dairy. Mr. Miner noted that there were areas of standing water and the areas of new construction were muddy indicating a recent rainfall event. Mr. Miner noted that water from the excavated pit had been recently pumped to a tile intake; however, the field tests and laboratory samples indicated low levels of contaminants thus it was not the source of the contamination in the creek. Mr. Miner drove to the north side of the facility and noted a tile intake to the north of the existing confinement building. He also noted that manure was stockpiled within approximately 70 feet of the tile intake in two locations and it appeared that runoff from the manure stockpiles had reached the tile intakes during the recent rainfall event. Mr. Miner believed he found at least partially the source of the contamination and due to the lateness in the day he left the facility.

10. Mr. Miner proceeded approximately 3/4 mile upstream or north of Summit Dairy to the 380th Street bridge at the unnamed tributary. The water was clear and no dead fish were observed. The field test indicated an ammonia concentration of 0.2 mg/L and dissolved oxygen of 7.0 mg/L. The laboratory samples indicated the following concentration levels: ammonia – 0.2 mg/L, E. Coli – 2,300 Col/100mL, and BOD – 3 mg/L.

11. Mr. Miner contacted John Westra and informed him of the dead fish and manure smell in Mill Creek downstream of Summit Dairy. Mr. Miner told Mr. Westra that he needed to move the manure stockpiles away from the tile intake. Mr.

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Westra stated the stockpiles would be moved the following day. Mr. Miner explained that he would return the following day to continue the investigation.

August 17, 2014:

12. Mr. Miner and Tom Roos, DNR Field Office 3 environmental specialist senior, returned to the Polk Avenue bridge. The water was discolored and had a dairy manure odor. The field test indicated an ammonia concentration of 15-20 mg/L and dissolved oxygen of 1 mg/L. The field office personnel observed hundreds of dead fish indicating that the contamination plume had reached this location and had moved downstream.

13. The field office personnel continued approximately one mile downstream to the Redwing Avenue bridge at Mill Creek. The water was clear with no dead fish leading the field office personnel to determine that the contamination plume had not yet reached this location.

14. Mr. Miner contacted Mr. Westra and stated that the field office personnel would be at Summit Dairy to inspect the area between the facility and the unnamed tributary. Mr. Westra stated he was unable to join the field office personnel.

15. While Mr. Miner and Mr. Roos were inspecting the facility and area near the unnamed tributary they noted that a trench had been dug south of the existing feed storage area, directly north of the recently poured concrete feed storage pad. Runoff from the open feedlot located south of the existing confinement building and runoff from the feed storage pad had flowed through the trench. The field office personnel collected laboratory samples from the runoff in the trench. The laboratory samples indicated the following concentration levels: ammonia – 210 mg/L, E. Coli - > 2,400,000 Col/100mL, and BOD – 4,400 mg/L. The field office personnel noted a flow path where the runoff left the trench and flowed to an adjacent field and to the west to the unnamed tributary. The unnamed tributary was approximately 230 feet west of the trench.

16. Mr. Miner contacted Mr. Westra regarding the trench. Mr. Westra explained that the trench had been dug as a temporary measure to divert the water and runoff from the flowing in the area where the new concrete feed storage pad had recently been poured. Mr. Westra stated that the cattle would be removed from the open lot the following day and that actions would be taken the following day to eliminate the potential for the trench water to reach the unnamed tributary.

August 18, 2014:

17. Mr. Miner and Mr. Roos returned to Mr. Westra's facility and met with him regarding the investigation. The field office personnel observed that dirt work

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had been completed to eliminate the potential for the trench water to reach the unnamed tributary. The flow path had been diverted to a bermed basin to the south of the newly poured storage pad. The field office personnel informed Mr. Westra it had been determined the rainfall events during the previous week had carried the trench water, contaminated with manure and feed storage runoff, to the unnamed tributary causing the fish kill in Mill Creek. The field office personnel informed Mr. Westra that the matter would be referred for further enforcement.

18. Mr. Roos and Mr. Miner proceeded to the Paullina area to determine how far the contamination plume had traveled downstream. They observed hundreds of dead fish and elevated ammonia levels at the 460th Street bridge and the 470th Street bridge at Mill Creek.

19. The field office personnel continued to the Redwing Avenue (County Road L48) bridge at Mill Creek located approximately 1 1/2 miles south of Paullina. It appeared the contamination plume was beginning to reach this location as discolored water was observed moving downstream and mixing with the clear water in the creek. Fish were also observed darting away from the contaminated area. The field test indicated an ammonia concentration of 2.4 mg/L and dissolved oxygen of 9-10 mg/L.

August 19, 2014:

20. Mr. Miner and Mr. Roos checked the redwing Avenue bridge approximately 1 1/2 miles south of Paullina and observed hundreds of dead fish. The field tests indicated an ammonia concentration of 1.8 mg/L and dissolved oxygen of 8 mg/L. Based on the dead fish the field tests, it was determined the contamination had moved down stream.

21. The field office personnel proceeded downstream to the 490th Street bridge at Mill Creek. The water was discolored and smelled like manure. The field office personnel observed hundreds of dead fish. Some live fish were observed but appeared stressed with many flopping out of the water onto the creek bank. The field tests indicated an ammonia concentration of > 3 mg/L and dissolved oxygen of 8 mg/L.

22. The field office personnel continued downstream to the 500th Street bridge at Mill Creek. They observed discolored water and more than 50 dead fish with more fish dying. The field tests indicated an ammonia concentration >3 mg/L and dissolved oxygen of 0 mg/L.

23. The field office personnel continued downstream to another Redwing Avenue bridge located 4 miles south of Paullina. The field officer personnel did not observe any dead fish at this location. The field tests indicated an ammonia concentration of 0.1 mg/L and dissolved oxygen of 11-12 mg/L. The field office

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personnel determined that the contamination plume was just reaching or had not reached the location.

September 11, 2014:

24. DNR issued a Notice of Violation and Referral letter to Mr. Westra for the violations discovered during the August 2014 investigation. The letter informed Mr. Westra that the matter would be referred for formal enforcement. The letter included a copy of the inspection memo and the Fisheries Bureau memo.

25. During the course of the investigation, DNR Field Office 3 personnel checked other possible sources of contamination. To the south of the Westra facility there were only a small number of pasture cows and a few very small feedlots and to the north of the facility there was a feedlot with no cattle and another feedlot that recently installed controls to contain runoff. In conclusion of the investigation, DNR Field Office 3 personnel calculated its investigative costs at \$1,998.10.

November 14, 2014:

26. On November 14, 2014, Lois Benson, DNR Field Office 3 environmental specialist, returned to Mr. Westra's facility to conduct a follow up inspection. Mr. Westra stated that he was planning to keep the open feedlot in operation. He stated that he was permitted to construct two buildings but at the time he would only be able to building one of the buildings. Mr. Westra had controls constructed for all of the facility. Concrete had been poured over the entire area and a four to five foot berm had been constructed to protect the creek at the west edge of the facility. A retention pond was also constructed and was built larger than designed to ensure that future discharges could be retained.

FISHERIES BUREAU INVESTIGATION:

August 16, 2014:

27. Late in the day, Tom Roos contacted Mike Hawkins, Natural Resources Biologist with the DNR's Fisheries Bureau regarding the fish kill in Mill Creek. Mr. Roos stated there were many dead fish in the area and that the source of the fish kill had likely been found.

August 17, 2014 – August 21, 2014:

28. On August 17, 2014, the Fisheries personnel began its fish kill assessment of the impacted areas of the drainage ditch (unnamed tributary) near Mr. Westra's facility and Mill Creek. The fish kill investigation was led by Mr. Hawkins who was assisted by Jim Berquist, Natural Resources Technician; James Sholly, Natural Resources Aide; and Timothy Byl, Natural Resources Aide. It was evident

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early in the investigation that it would not be feasible or possible to do a total enumeration of dead fish. Limited access to large portions of the stream along with the shear length of the kill required that the Fisheries personnel stratify and subsample the stream. Cattle pasturing is very common on this stretch of Mill Creek. Cattle, some with calves, and some bulls prevented access to much of the stream without help from landowners/tenants. Most bridge access areas were fenced with electric fencing, requiring the Fisheries personnel to find ways around the fencing. In some cases, the Fisheries personnel could not traverse safely. The total fish kill extended nearly 28 stream miles downstream in Mill Creek. Based on the length of the fish kill and the accessibility of Mill Creek, the Fisheries personnel used the methods for narrow streams, incompletely accessible as outlined in American Fisheries Society, Special Publication 30.

29. The Fisheries personnel noted during the investigation that high heat and humidity during this fish kill was causing accelerated decomposition of dead fish. As the slug of manure moved downstream and the Fisheries personnel performed counts each day that fresh dead fish were observed. There were very few fish that looked to have floated down from upstream. The Fisheries personnel noted that parts of the stream, especially upstream during the initial day of investigation had very strong manure odor with obvious manure residue on the surface and the bottom of the stream. The Fisheries personnel observed signs of scavenger activity (birds and animals) throughout the investigation.

30. The fish kill assessment determined that approximately 865,940 fish were killed, valued at \$158,551.63. The Fisheries Bureau investigative costs were \$1,945.73. The total fish value and investigative costs totaled \$160,497.36. Early on in the investigation it became obvious that the drainage ditch (unnamed tributary), Bridges 1-5, was very different morphologically from the rest of the affected stream, Bridges 6-16. In addition, the numbers of fish and species composition was different. Because of these differences, statistical analysis and expansion was performed separately on these two segments. Numbers and species of fish for the ditch portion were calculated based on those samples collected in that stream segment, Bridges 1-5. Numbers and species of fish for the larger stream segment were based on the samples collected in that segment, Bridges 6-16. These totals were then combined to calculate an overall total. The two segments of stream were separated at the confluence of Mill Creek and the drainage ditch below Bridge 6 (430th St).

IV. CONCLUSIONS OF LAW

1. 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 3's investigation it was determined that manure runoff from the open feedlot and feed storage area at Mr. Westra's facility flowed to a trench to an unnamed tributary to

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Mill Creek and then to Mill Creek. The above-mentioned facts indicate violations of these provisions.

2. 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 discolored and had a manure odor. The laboratory results indicated elevated pollutants and a fish kill was confirmed. The above mentioned facts indicate violations of the general water quality criteria.

3. 567 IAC 65.101(9) for open feedlots and 567 IAC 65.2(9) for confinement feeding operations require that a person who becomes aware of a release to notify the DNR of the occurrence of release as soon as possible but no later than six hours after the onset or discovery of the release. Manure runoff from the open feedlot and feed storage area at Mr. Westra's facility flowed to a trench that carried it to an unnamed tributary to Mill Creek and then to Mill Creek. No notification was received by the DNR of this release. The above mentioned facts indicate a violation of this provision.

4. 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 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 Mr. Westra's facility.

5. Based on the information provided by Mr. Westra and the observations made by DNR Field Office 3 at the facility, the DNR has determined that there is no likelihood that the violations identified in this administrative consent order will recur if Mr. Westra implements the requirements set forth in Paragraphs 1-3 Section V. Order of this Order.

V. ORDER

THEREFORE, it is hereby order that John Westra does the following:

1. Operate and maintain all animal feeding operation structures and production areas in compliance with all applicable rules and regulations;
2. Immediately cease discharging any runoff from production areas to a water of the State;

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3. Ensure the vegetated infiltration area is properly established and properly maintained; and
4. Pay fish restitution and investigative cost in amount of \$162,495.46 and an administrative penalty in the amount of \$10,000.00 within 60 days receipt of this 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 Environmental Protection Commission (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 Order with an administrative penalty of \$10,000.00. 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.” John Westra received an economic benefit by failing to construct an adequate facility to contain runoff from the open feedlot and the feed storage area during the construction process. John Westra avoided the costs associated with the construction of adequate storage during the construction process as well as avoiding any delays in facility construction. It is estimated that economic benefit is at least \$5,000.00 and that amount 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. DNR Field Office 3 documented a manure discharge that led to documented water quality violations and a large fish kill. These violations threaten the integrity of the regulatory programs because compliance with animal feeding

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operation requirements is required of all persons in this state. Therefore, \$3,000.00 is assessed for this factor.

Culpability – John Westra has a duty to remain knowledgeable of DNR’s requirements and to be alert to the probability that his conduct is subject to DNR’s rules. Mr. Westra constructed a trench and failed to determine where the water in the trench would empty to. Therefore, \$2,000.00 is assessed for this factor.

VII. APPEAL RIGHTS

Pursuant to Iowa Code section 455B.175, and 567 IAC chapter 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 DNR 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 561 IAC chapter 7.

VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this 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.



CHUCK GIPP, DIRECTOR
Iowa Department of Natural Resources

Dated this 14th day of
September, 2015.

Facility #64241; Kelli Book, DNR Field Office 3, EPA, VIII.D.1 and VIII.D.3