6744

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF: **Larry Nilges** **Bremer County, Iowa** **AFO # 62496**	ADMINISTRATIVE CONSENT ORDER NO. 2016-AFO-181

TO: Larry Nilges
1042 Usher Avenue
Sumner, Iowa 50674

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Larry Nilges for the purpose of resolving violations associated with the expansion of an animal feeding operation without a construction permit. 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:
Chris Gelner, Field Office 1
Iowa Department of Natural Resources
909 West Main Street, Suite 4
Manchester, Iowa 52057
Phone: 563/927-2640

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 a violation 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.

III. STATEMENT OF FACTS

1. Larry Nilges owns and operates an animal feeding operation located at 1042 Usher Avenue, Sumner, Iowa (NW ¼ of Section 4, Sumner Township, Bremer County Iowa). Mr. Nilges owns and operate the Nilges site and the Evans site at this location. The Nilges site had two 1,000 head swine finisher confinement buildings with a total capacity of 800 animal units. During the construction of the Evans site in 2014, one 2,490 head swine finisher confinement building with a total capacity of 996 animal units was added.

2. On February 14, 2014, Mr. Nilges submitted a Manure Management Plan (MMP) and Construction Design Statement (CDS) to DNR Field Office 1 for the Evans site. The submittal stated the facility was a new operation and not an expansion.

3. On March 10, 2014, DNR Field Office 1 sent a letter to Mr. Nilges approving the construction of the Evans site. The letter stated that if Mr. Nilges owned or managed other animal feeding operations within 2,500 feet to contact the DNR because the operations could be considered one facility.

4. On January 14, 2016, DNR Field Office 1 issued a letter to Mr. Nilges indicating that the field office conducted desktop assessments of the two sites. The letter indicated the two sites were likely in compliance with the regulations and on-site inspections would not occur. However, upon further review, the desktop assessment indicated that the Nilges site and Evans site were both owned by Mr. Nilges, had a combined animal unit capacity over 1,000 and were within 2,500 feet of each other, thus were considered one facility. Therefore, on March 3, 2016, DNR Field Office 1 issued a Notice of Violation letter to Mr. Nilges for failing to obtain a construction permit with the expansion of the Evans site. The letter informed Mr. Nilges that the operation must be brought into compliance and required a response within 15 days detailing how Mr. Nilges would come into compliance. The letter also informed Mr. Nilges that the matter would be referred for further enforcement.

5. On March 15, 2016, Three Rivers Ag Consulting, Mr. Nilges' consultant, submitted a written response to the field office. The response indicated that Mr. Nilges and the consultant have reviewed the situation and determined that a construction permit application should have been submitted and an error had been made when at the time of the Evans site expansion. Therefore, on April 27, 2016, Mr. Nilges submitted information to the DNR for an "as-built" approval of the expansion. On May 23, 2016, DNR Field Office 1 sent Mr. Nilges a Construction Approval Letter for the submittal.

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. 567 IAC 65.1 defines *"Adjacent—water quality"*, for the purpose of determining the construction permit requirements and manure management plan requirements that two or more confinement feeding operations are adjacent if they have confinement feeding operation structures that are separated at their closest points by less than the following:

1. 1,250 feet for confinement feeding operations having a combined animal unit capacity of less than 1,000 animal units.
2. 2,500 feet for confinement feeding operations having a combined animal unit capacity of 1,000 or more animal units.
3. The distances in "1" and "2" above shall only be used to determine that two or more confinement feeding operations are adjacent if at least one confinement feeding operation structure is constructed or expanded on or after May 21, 1998.

The Nilges site and Evans site are both owned by Mr. Nilges, have a combined animal unit capacity over 1,000 and are within 1,700 feet of each other, thus are consider adjacent to one another and determined to be one operation.

3. 567 IAC 65.7(1)"b"(2) states that a construction permit is required if constructing, installing or modifying a confinement building or a formed manure storage structure at a confinement feeding operation, if after construction, installation or expansion, the animal unit capacity of the operation is 1,000 animal units or more. Mr. Nilges failed to submit a construction permit application at the time of the Evans site expansion in 2014. The expansion increased the animal units at Mr. Nilges' operation from 800 animal units to 1,796 animal units. The above-facts indicate a violation of this provision.

V. ORDER

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

1. Mr. Nilges shall pay an administrative penalty in the amount of $1,500.00 within 30 days of the Directors 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 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. Mr. Nilges delayed the costs associated with obtaining a construction permit for two years. He was able to construct without delay. Mr. Nilges gained an economic benefit of at least $100.00 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. A construction permit is required to be obtained prior to construction in order to allow for the prior review of plans and specifications. The purpose of this review is to determine if the building will meet all requirements. This review insures that the interests of the citizens of Iowa in clean water are protected. Because the building was constructed prior to issuance of a construction permit, compliance with the separation distances and construction specifications were not verified prior to construction. Proper compliance with the siting and construction requirements is essential to the animal feeding program. Therefore, $900.00 is assessed for this factor.

Culpability – Mr. Nilges has a duty to know the regulations and to be aware that his actions are subject to the regulations. Therefore, $500.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Larry Nilges. For that reason Larry Nilges 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.

Chuck Gipp

CHUCK GIPP, DIRECTOR
Iowa Department of Natural Resources

Dated this 19th day of October, 2016.

Larry Nilges

Larry Nilges

Dated this 11 day of October, 2016.

AFO #62496; Kelli Book, DNR Field Office 1, EPA, VIII.A.1