

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

IN THE MATTER OF: GARY NIELSEN Shelby County, Iowa AFO #70243	ADMINISTRATIVE CONSENT ORDER NO. 2021-AFO- 04
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TO: Gary Nielsen
303 Oak Road
Avoca, Iowa 51521

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Gary Nielsen for the purpose of resolving violations of the animal feeding operations regulations. This administrative consent order requires Mr. Nielsen to: if not already submitted, submit a Construction Design Statement and Manure Management Plan; submit past Manure Management Plan fees; and pay an administrative penalty in the amount of \$1,500.00. 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:

Jake Theis, Field Office 4
Iowa Department of Natural Resources
1401 Sunnyside Lane
Atlantic, Iowa 50022
Phone: 712/243-1934

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034
Phone: 515/210-3408

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: GARY NIELSEN

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

Gary Nielsen neither admits nor denies the Statement of Facts and enters into this administrative consent order for settlement purposes only.

1. Gary Nielsen owns an animal feeding operation located at 303 Oak Road; Avoca, Iowa (Section 24, Fairview Township, Shelby County). The facility consists of three confinement buildings with a capacity of 2,000 head (800 animal units) grow to finish swine. The facility was constructed in 1982, expanded in 1991 and 1996. In 1997, the facility was expanded again and had an animal unit capacity of 320 after the expansion. In 2016, the facility expanded and had an animal unit capacity of 800 after the expansion.

2. On August 31, 2020, Jake Theis, DNR Field Office 4 Environmental Specialist, conducted a routine inspection at Mr. Nielsen's animal feeding operation. During the inspection, Mr. Theis spoke to Mr. Nielsen. Mr. Nielsen stated the facility had expanded slowly over the years. Mr. Theis reviewed the Shelby County Assessor's Page and determined that when the facility was expanded in 2016, it went from 320 animal units to 800 animal units and Mr. Nielsen failed to submit a Manure Management Plan (MMP) and Construction Design Statement (CDS) when the expansion occurred.

3. On October 27, 2020, DNR issued Mr. Nielsen a Notice of Violation letter for the violations observed during the inspection. Mr. Nielsen was required to submit a CDS and MMP by December 1, 2020. The letter also informed Mr. Nielsen the matter was being referred for further enforcement.

IV. CONCLUSIONS OF LAW

Gary Nielsen neither admits nor denies the Conclusions of Law and enters into this administrative consent order for settlement purposes only.

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 chapters 65.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: GARY NIELSEN

2. 567 IAC 65.16(1)"b" requires that an owner of a confinement feeding operation, other than a small animal feeding operation, to submit an original MMP and updated MMPs when the confinement feeding operation is constructed or expanded after May 31, 1985, regardless of if the confinement feeding operation is required to have a construction permit. A small animal feeding operation is defined as an animal feeding operation with an animal unit capacity of 500 or fewer animal units. When Mr. Nielsen expanded the facility in 2016, the animal unit numbers in confinement expanded from 320 to 800. The facility was required to submit an original MMP at that time. The above-mentioned facts indicate a violation of this provision.

3. 567 IAC 65.17(1)"d" requires that a person who submits an MMP shall include a phosphorus index with the MMP. 567 IAC 65.16(7) requires any person submitting an original MMP to also pay to the DNR an MMP filing fee of \$250.00. The filing fee is required to be submitted with the MMP. The filing fee has not been submitted. 567 IAC 65.16(6) require all persons required to submit an MMP to also submit an indemnity fee. The indemnity fee is ten cents per animal unit. Mr. Nielsen's indemnity fee is \$80.80. The indemnity fee is required to be submitted with the MMP.

4. 567 IAC 65.16(3)"b" requires an owner of a confinement feeding operation who is required to submit a MMP to submit a complete updated MMP and compliance fee on an annual basis to the DNR. The updated plan must reflect all amendments made during the period of time since the previous MMP submission. The compliance fee is fifteen cents per animal unit. The compliance fee for Mr. Nielsen's facility is \$121.20. Mr. Nielsen should have submitted an MMP update and annual compliance fee for 2017, 2018, 2019, and 2020. The above-mentioned facts indicate violations of this provision.

5. 567 IAC 65.7(7) requires that a person planning to construct a confinement feeding operation, other than a small animal feeding operation as defined in 65.1 or other than an operation required to obtain a construction permit pursuant to 65.7(1), obtain from the DNR a construction approval letter as provided in 65.9(3) prior to beginning construction of a formed manure storage structure or a confinement building. 567 IAC 65.1 defines a small animal feeding operation as an animal feeding operation with an animal unit capacity of 500 or fewer animal units. 567 IAC 65.7(1) requires an animal feeding operation with an animal unit capacity of 1,000 animal units or more to obtain a construction permit. The animal unit capacity of the Mr. Nielsen's animal feeding operation is 800 and the animal feeding operation was required to obtain a construction approval letter prior to the construction in 2016. The above-mentioned facts indicate a violation of this provision.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: GARY NIELSEN

6. 567 IAC 65.9(3) requires that an animal feeding operation required to obtain a construction approval letter to submit a CDS and an MMP, along with alluvial soils information, karst terrain information, information showing the location of the confinement feeding operation, a filing fee of \$250.00, an indemnity fee, and documentation that the MMP has been submitted to the county auditor. The above-mentioned information was not submitted before construction began. The above-mentioned facts indicate a violation of this provision.

V. ORDER

THEREFORE, the DNR orders and Gary Nielsen agrees to do the following:

1. If not already submitted, Mr. Nielsen shall submit an original MMP and CDS, with supporting documentation to DNR Field Office 4 within 60 days of the date the Director signs this administrative consent order;
2. If not already submitted, Mr. Nielsen shall submit a filing fee in the amount of \$250.00 and an indemnity fee in the amount of \$80.80 with the submission of the MMP and CDS to DNR Field Office 4;
3. Mr. Nielsen shall pay the compliance fees for 2017, 2018, 2019, and 2020 in the amount of \$484.80 with the submission of the MMP and CDS to DNR Field Office 4; and
4. Mr. Nielsen shall pay 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 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

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: GARY NIELSEN

“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. Nielsen has delayed the costs associated with developing and submitting an MMP and CDS for the animal feeding operation. The delayed costs include the preparation costs for the MMP and CDS, the payment of the filing fee, indemnity fee, and compliance fees. It is estimated that Mr. Nielsen gained an economic benefit of at least \$200.00 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. Mr. Nielsen avoided the construction approval process during the construction of the confinement building thus threatening the integrity of the animal feeding operation program and the construction approval process. By avoiding the construction approval process, Mr. Nielsen was able to construct the buildings without review or any other requirements and this did not allow the DNR the opportunity to review the animal feeding operation prior to the beginning of construction. The MMP is a crucial aspect of the DNR’s animal feeding operation program. The MMP ensures that an animal feeding operation has adequate production land available so that the manure can be properly applied to cropland at an agronomic rate in order to prevent over application of manure. Mr. Nielsen’s facility has a capacity of 808 animal units and environmental harm is likely to occur if the manure is not applied properly. Therefore, \$1,000.00 is assessed for this factor.

Culpability – Mr. Nielsen has a duty to know the regulations and to be aware that his actions are subject to the regulations. Therefore, \$300.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

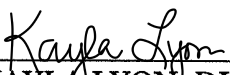
This administrative consent order is entered into knowingly and with the consent of Gary Nielsen. For that reason, Gary Nielsen waives the right to appeal this administrative consent order or any part thereof.

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

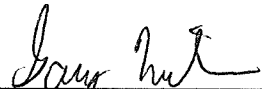
IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: GARY NIELSEN

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.



KAYLA LYON, DIRECTOR
Iowa Department of Natural Resources

Dated this 15th day of
February, 2021.



Gary Nielsen

Dated this 15 day of
JANUARY, 2021.

Kelli Book, DNR Field Office 4, EPA, VIII.A.2