

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

IN THE MATTER OF:

NLC Energy -Riceville LLC (formerly
Big Ox Energy-Riceville, LLC)
Howard County, Iowa

**ADMINISTRATIVE CONSENT
ORDER**

NO. 2022-WW-08

TO: James Pray, Attorney for Big Ox Energy-Riceville, LLC dba NLC Energy Riceville
Brownwinick Law firm
666 Grand Ave. Ste 2000
Des Moines, Iowa
50309

National Registered Agents, Inc
400 East Court Avenue Des Moines, IA
50309

I. SUMMARY

This administrative consent order (Order) is entered into between NLC Energy – Riceville LLC (formerly Big Ox Energy-Riceville, LLC) (hereafter Big Ox or NLC)¹ and the Iowa Department of Natural Resources (Department).² The parties hereby agree to the issuance of this Order due to an illegal discharge of a pollutant to a water of the state. NLC agrees to pay an administrative penalty in the amount of \$10,000.00 and in the interest of

¹ Communications from NLC to the Department are in the name of NLC Energy; however, during the time the facts in this order occurred this entity was not registered with the Iowa Secretary of State. NLC Energy-Riceville LLC is registered with the Wisconsin Department of Financial Institutions and has the same address as Big Ox Energy-Riceville, LLC which during the facts which gave rise to this order was a registered entity with the Iowa Secretary of State. A Disclosure of Corporate Affiliations was filed in the US District Court for the District of Nebraska on February 27, 2019, in Case No. 8:19-cv-0010 that details the corporate affiliations of Big Ox Energy LLC. This filing shows that Big Ox Energy LLC and NLC Energy are related through either parent corporations, grandparent and/or great-grandparent corporations. On March 4, 2022, NLC Energy-Riceville LLC registered with the Iowa Secretary of State.

² The following information contained in this footnote has been put forth by by Big Ox and is admitted by Big Ox, however it is neither admitted nor verified by the Department: Big Ox Energy – Riceville LLC was an indirect subsidiary of NLC Energy – Big Ox, LLC (“NEBO”), a limited liability company that until July 31, 2020 was equally owned by RRCK Holding LLC (“RRCK”) and NLC Energy Venture 30 LLC (“NLC Energy”). RRCK personnel operated all digester facilities owned by indirect subsidiaries of NEBO, including the Riceville facility. In 2020 NLC Energy removed RRCK from NEBO and from all operational control over digester facilities. That formally occurred as of July 31, 2020 when RRCK’s ownership was redeemed. Once NLC Energy assumed control of NEBO, Big Ox Energy – Riceville LLC’s name was changed to NLC Energy – Riceville LLC.

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avoiding litigation, the parties have agreed to resolve the violations alleged herein through entry of this Order. NLC neither admits nor denies the statement of facts and conclusions of law contained in this order.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

Brian Jergenson
DNR Field Office #1
1101 Commercial Ct. Ste 10
Manchester, Iowa 52057
Phone: 563-608-6749

Relating to legal requirements:

Carrie Schoenebaum, Attorney for the DNR
Iowa Department of Natural Resources
502 E. 9th Street
Des Moines, Iowa 50319
Phone: 515-444-8165

Payment of Penalty to:

Department of Natural Resources
ATTN: Director
Wallace State Office Building
502 E 9th Street
Des Moines, IA 50319
[include Order number with penalty]

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 a violation of Iowa Code Chapter 455B, Division III, Part 1 (wastewater) and the rules adopted or permits issued pursuant to that part; 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. NLC operates an inactive anaerobic digester facility that received industrial wastewater and other organic waste materials for the creation of electricity. NLC's generator ceased creating electricity on approximately February 29, 2018. The facility continued to accept waste material for the digestion until approximately April 29, 2019. Historically, digestate from the facility was land applied on adjacent fields. In late 2018, it was determined that sludge in NLC's 7 million gallon earthen storage basin contained selenium concentrations above limits allowed for land application and land application ceased. The location that is the subject of this Order is located in the SE 1/4 of the NE 1/4 Section 7, T98N R14W (Afton Township) Howard County, IA. This facility does not have a 911 address.

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Past Violations

2. On July 2, 2019, the Department went to the above referenced site. Once on site the Department observed that the earthen storage basin had approximately 11 inches of freeboard. The Department recommended that because the site was no longer part of an animal feeding operation and therefore it may no longer land apply manure pursuant to a manure management plan (MMP) it should start the process for a wastewater land application permit.
3. On July 11, 2019, a Notice of Violation (NOV) was sent to NLC for failure to maintain the required minimum level of freeboard. This NOV summarized the violation, the relevant law and provided recommended corrective actions.
4. On October 8, 2019, the Department sent a letter to NLC stating that the violations cited in the July NOV had ceased.

Current Violations

5. On December 8, 2020, the Department received a complaint alleging contaminated water was discharging from a field tile outlet located 2800 feet west of the NLC facility. The complainant stated that the discharge had a septic odor and was a milky white color.

Later in the day, Mike Major, Vice President of Regulatory Strategy and Incentive Revenue at NLC Energy, sent the Department an e-mail indicating that NLC had been made aware of the complaint and that he did not believe the discharge originated from the tile lines that drain the NLC facility.

6. On December 9, 2020, Brian Jergenson, an Environmental Specialist Senior with the Department, went to the site to investigate. Throughout the day Mr. Jergenson took field samples and laboratory samples. The laboratory samples were sent to the State Hygienic Laboratory and the result of both sample types are provided below in Table 1 and 2. Mr. Jergenson began his investigation at the location of the tile outlet (site 1). At this location, Mr. Jergenson detected a strong pungent odor from the water discharging out of the tile outlet and observed a large amount of gray/white filamentous algae clinging to the tile outfall pipe and to rocks and sediment in the receiving stream, which is an unnamed tributary to the Wapsipinicon River. Mr. Jergenson then walked downstream and observed that for approximately ¼ of a mile milk white alga was present. Mr. Jergenson proceeded upstream of the tile discharge (site 2). At this location the water did not have an odor, the water was clear, and there was no algae present.

Throughout the day Mr. Jergenson observed the surrounding properties and road ditches for evidence of the source of the discharge but found no potential source. Mr. Jergenson met with Holden Kramper and Danny Stice, employees of NLC and the owners of an animal feeding operation (AFO) that is located to the south and southeast of NLC's digester. Mr. Jergenson observed the shallow manure pits that are pumped to the facility's

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above ground slurry store and saw no evidence of a manure release. The owners of the AFO stated that the tile that was discharging was connected to field tile located where NLC's filter bags and bermed secondary containment were located. Mr. Jergenson conducted field tests on the tile line located on the perimeter of NLC's earthen storage basin, the water in the tile line was clear with no odor and no ammonia nitrogen was detected in the field sample. Through discussions with the owners of the AFO and NLC staff, Mr. Jergenson learned that to create the containment berm NLC had hired contractors to excavate 2-3 feet below the normal field surface elevation. The field in which the containment area was constructed contains drainage tile. Mr. Jergenson was told that there were no tile maps available. Mr. Jergenson noted that the tile outlet discharging the contaminated water is oriented in a direction which indicates that it drains into the field where the NLC containment berm and filter bags are located. The AFO owners stated that no manure had been applied to the fields since fall or winter 2019.

Next, Mr. Jergenson met with Mr. Kramper and Mr. Stice in person and Mr. Major by phone. Mr. Jergenson stated that he suspected the contaminated water was being discharged from the tile line because of a leak in the bermed secondary containment liner. Mr. Jergenson recommended that NLC hire a contractor to conduct a tile investigation around the outside perimeter of the containment area to locate and inspect water in the tile lines intersecting the berm and to plug the tile lines if necessary to prevent further discharge of contaminated water to the tributary. Mr. Major declined the recommendation and stated he did not believe that NLC was the cause of the discharge and that he wanted to wait for the laboratory sample results.

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Table 1 Field Samples

Location	Observation	pH	Temperature Degrees Celsius	Ammonia parts per million(ppm)
Site 1 (tile outlet)	Strong septic odor, clear water, heavy gray/white algae present clinging to tile outlet, rocks and sediment in stream	7.1	13	≥ 3 ppm
Site 2 (up stream of site 1)	No odor, clear water, no gray/white algae	7.1	8.3	≤ 3 ppm
Site 3 (down stream site 1)	Slight septic odor, clear water, heavy gray/white algae present clinging to rocks and sediment in stream	7.1	9.0	≥ 3 ppm
Site 4 (containment berm on NLC's property)	Strong putrescent odor, brown stained water	7.1	14	≥ 3 ppm

Table 2 Laboratory samples

Location	Ammonia as N milligrams per liter (mg/L)	Selenium mg/L	Selenium Re-run mg/L
Site 1	24	0.03	0.02
Site 2	0.050	≤ 0.01 (less than the detectable level)	≤ 0.01 (less than the detectable level)
Site 3	3	≤ 0.01 (less than the detectable level)	≤ 0.01 (less than the detectable level)
Site 4	510	0.45	0.36

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7. On December 8 and 10, 2020, Mr. Major sent the Department an e-mail indicating that he did not believe NLC was responsible for the discharge. On December 10, 2020, he asked that the Department conduct additional diagnostic tests.
8. On December 11, 2020, Mr. Jergenson replied via e-mail to Mr. Major and explained why it was likely the discharge was coming from NLC. Mr. Jergenson also stated he would return to the site once lab samples were returned.
9. On December 16, 2020, Mr. Jergenson returned to the site to conduct a dye test of the water in the containment berm. Conditions were poor for conducting a dye test due to a heavy layer of ice present in the containment area. The dye did not mix into the water properly because the ice did not allow Mr. Jergenson to stir and incorporate it below the ice. Mr. Jergenson placed a white cotton t-shirt over the tile outlet and watched it for about 5 hours. At that time, Mr. Jergenson asked the land owner to observe the tile outlet periodically and report to the Department what he observed. Mr. Jergenson reiterated to Mr. Kramper that he believed the discharge was due to the containment berm leaking into the field tile below the ground.
10. On December 17, 18, 21 and 23, 2020, the land owner sent pictures of the tile outlet to the Department that indicated that the dye had not been discharged.
11. On December 17, 2020, Mr. Major sent an e-mail to the Department stating that the Department had not proven the source of the discharge. In another e-mail sent the same day Mr. Major stated that NLC had purchased Big Ox and that after the Department concluded its investigation it would ensure that permits designate the proper permittee and ownership structure.
12. On December 18, 2020, the laboratory samples were complete and sent to NLC. Mr. Jergenson spoke with Dr. Brian Wels of the laboratory who ran the analysis of the samples. Dr. Wels stated that because the levels were below quantitative limit the samples were rerun. He affirmed that the presence of the chemicals detected were not disputable.

A second e-mail was sent by Mr. Jergenson to NLC stating that it is the Department's expectation that NLC investigate and cease the discharge of contaminants from the tile line and remediate the receiving stream as necessary. This e-mail also requested that NLC respond with a plan of action.

13. On December 18, 2020, at 5:41 pm Mr. Major sent Mr. Jergenson an e-mail asking if the Department was investigating other potential sources of the discharge. Mr. Major also stated that NLC agreed the ammonia and selenium levels are high in the containment berm. Mr. Major also asked the Department for a "better description of the model you are considering which establishes that NLC Energy Riceville containment ponds are not sealed and entering the drain tile." Mr. Major presented a few additional comments asking for more information regarding the Department's investigation.

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14. On December 21, 2020, the Department and NLC had a conference call. The Department reiterated the expectation that NLC take actions to investigate and stop the discharge. Mr. Major questioned whether the test results proved NLC was the cause of the discharge. The Department explained that due to correlation of ammonia nitrogen and selenium results in both the containment structure and the tile outlet as well as no evidence of any other source of the discharge the Department determined that NLC was responsible for the discharge. Mr. Major requested that the Department follow-up with an e-mail stating exactly what needed to be done. The Department informed him that is not standard practice.

15. On December 23, 2020, Mr. Jergenson sent an e-mail to NLC reiterating that the Department expected NLC to take the steps necessary to cease the discharge of contaminants from the tile line and remediate the receiving stream as necessary. This e-mail also provided a recommended course of action as requested by Mr. Major.

16. On January 7, 2021, the Department sent NLC a copy of the report of investigation (ROI) for the above referenced discharge. This ROI detailed the Department's investigation which was ongoing from December 8-23, 2020. It also detailed the laws that had been violated and that corrective measures that were necessary. The ROI requested a response from NLC within 10 days of receipt. At the time the ROI was completed NLC had not taken any action to investigate and cease the discharge of contaminants.

17. On January 8, 2021, Mr. Major confirmed via e-mail that NLC received the ROI. In this e-mail Mr. Major stated that NLC did

“...not dispute[] that there is a non-compliant discharge in the drain tile; investigation to date do not support that it is coming from NLC Energy-Riceville. The ROI conclusion that discharges are coming from NLC Energy-Riceville seem based on ‘lack of evidence of other sources ...’ ... [I]f continued investigation presents evidence or determines that NLC Energy-Riceville is the source, we will cease such discharges as quickly as possible.”

18. On January 18, 2021, Mr. Major sent the Department an e-mail stating that NLC will expose the drain tile for a visual inspection and collect samples for laboratory analysis. But that NLC will

“...determine that ... the containment structure is discharging into the drain tile if:

1. the drain tile sample analysis determines ammonia or selenium concentrations are 50% or greater than in the ... containment structure [;]
2. there is visual indication of active flows from [the] containment structure [;]
3. polymer is present in the drain tile in concentrations exceeding 10% of the concentration in the ... containment structure.

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If this continued investigation presents information that ...containment structure is discharging into the drain tile NLC Energy-Riceville will immediately commission containment improvements and activity, including the contractor who build the containment structure.”

19. On January 27, 2021, NLC conducted tile exploration activities in the area of the containment berm and to do so they hired Mehmert Tiling. Mr. Jergenson was on site for this and met with staff of Mehmert Tiling and Mr. Kramper. The investigation commenced west of the containment area. Mehmert staff believed that the tile lines would be found in 70 to 80 foot increments in the field and that based on a review of historical aerial photographs of the field it was likely that at least one tile line would be intersected.

Mehmert Tiling excavated a trench approximately 15-20 feet west of the containment berm and encountered three tile lines 3-4 feet below the ground surface that ran under NLC’s containment area. These tiles lines were identified by the Department as 2, 3, and 4. Two additional lines were observed during the investigation and identified as 1 and 5 by the Department. These lines did not appear to intersect the containment area. Water samples were field tested for ammonia nitrogen and laboratory samples were collected. The results are in the below table.

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Tile Number	Observation	Laboratory results Ammonia as N mg/L	Laboratory results Selenium mg/L	Field Results Ammonia nitrogen parts per million (ppm)
Tile 1	This tile did not appear to intersect the containment area and did not contain enough water to sample.	NA	NA	NA
Tile 2	Intersects the containment area, contained water that had a strong septic odor.	98	0.03	≥3
Tile 3	Intersects the containment area, did not contain enough water to collect laboratory sample, a milky white sludge was observed that appeared to be bacteria or algae and a foul septic odor was detected.	NA	NA	NA
Tile 4	Intersects the containment area, did not contain enough water to collect laboratory sample, a milky white sludge was observed that appeared to be bacteria or algae and a foul septic odor was detected.	NA	NA	NA

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Tile 5	Does not appear to intersect the containment area	.34	≤ 0.01	≤ 3
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During a break in excavation Mr. Jergenson and Dan Cook an Environmental Specialist Senior with the Department, went to the location of site 1 and observed that the tile outlet was discharging at a rate of approximately one gallon per minute. This flow was less than observed during the December 9, 2020, investigation. Field samples were taken for ammonia nitrogen and a presence of ammonia nitrogen ≤ 3 ppm was detected. It was observed that conditions below the tile outlet remained the same as the December investigation and gray/white algae/bacteria was clinging to the rocks and sediment. Conditions further downstream could not be observed because of a layer of ice and snow over the unnamed tributary to Wapsipinicon River.

Because of the discovery of the white sludge in Tiles 3 and 4 and the indication of contaminated water in Tile 2, the Department told NLC to plug all the tile lines that intersect the containment area. Mehmert Tiling indicated that they were confident that additional lines would not be present due to the orientation and spacing of the tile lines that had been uncovered. Mehmert Tiling plugged the lines and backfilled the excavated trench.

20. On February 19, 2021, a NOV was sent to NLC for the above discussed violations. This NOV summarized the relevant law and provided a copy of the ROI.

21. On April 21, 2021, Mr. Jergenson returned to the location of site 1 to take a laboratory sample. The results are as follows: Ammonia as N 2.0 mg/l and Selenium ≤ 0.01 ppm.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.186 prohibits the discharge of pollutants into waters of the state, except for adequately treated pollutants discharged pursuant to a permit. The above stated facts demonstrate noncompliance with this provision of law.

2. Iowa Code section 455B.173(3) authorizes and requires the Environmental Protection Commission (Commission) to promulgate rules relating to the operation of waste disposal systems, the discharge of pollutants into waters of the state, and the issuance of permits to waste disposal systems. The Commission has done so at 567 IAC 60 through 69. 567 IAC 64.3(1) prohibits the operation of a waste disposal system without or contrary to the terms of a permit. The above stated facts demonstrate noncompliance with this provision of law.

3. 567 IAC 61.3(2)“c” and “e” states:

c. Such waters shall be free from materials attributable to wastewater discharges or agricultural practices producing objectional color, odor or other aesthetically objectional conditions. [and]

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e. Such waters shall be free from substances, attributable to wastewater discharges or agricultural practices, in quantities which would produce undesirable or nuisance aquatic life.

The above stated facts demonstrate noncompliance with these provisions of law.

V. ORDER

By the execution of this Order, the Department orders and the NLC agrees to do the following:

1. NLC shall cease all illegal discharges to waters of the state;
2. NLC shall submit a written plan to the Department to properly dispose of the material in the filter bags within 90 days of the Director signing this order;
3. NLC shall remove the material in the filter bags no later than July 1, 2022;
4. NLC shall work with the Department to assess and remediate soil or groundwater contamination caused by the leaking containment area;
5. In the future NLC will timely report all discharges to waters of the state; and
6. NLC shall pay a penalty in the amount of \$10,000.00 within 30 days of the date the Director signs 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 the 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 that may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties at 567 IAC Chapter 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 administrative order with an administrative penalty. The administrative penalty is determined as follows:

a. Economic Benefit. 567 IAC chapter 10 requires that the Department 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

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states, “reasonable estimates of economic benefit should be made where clear data are not available.” NLC saved a significant amount of money through illegal disposal of wastewater to a water of the state. It is estimated that between December 9, 2020, and January 27, 2021 a minimum of 1 gallon a minute was discharged. To properly dispose of this wastewater, it should have been trucked off site. The nearest wastewater treatment plant is located in Cresco, Iowa, and it charges .01762 a gallon for disposal; thus, it would have cost \$1,272.00. It is also estimated that trucking the wastewater to Cresco would have cost approximately \$7,220.00. Further, NLC saved a significant amount of money by delaying plugging the tile line and cleaning out the tributary. However, because the Department is handling this via an administrative consent order and in light of the administrative penalty cap, \$3,000.00 is assessed for this factor.

b. Gravity of the Violation. 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 the type of violation. As indicated above, substantial civil penalties are authorized by statute. Failure to properly dispose of wastewater degrades water quality. Degradation of Iowa’s waterways is a serious problem. Degraded water quality harms aquatic life, prevents the attainment of state water quality goals, and causes a decline in the quality of life generally. Further, the illegal discharge continued from at least December 9, 2020, through January 27, 2021. Therefore, the amount of \$3,000.00 is assessed for this factor.

c. Culpability. NLC operates an anaerobic digester and received industrial wastewater and other organic waste materials for the creation of electricity. This is a highly regulated activity. Therefore, NLC has an obligation to be aware of the applicable regulations and comply with those regulations. Further, NLC refused to take any actions to cease the discharge until it was, in its opinion, definitively proven that they were the source of the contaminant. However, because excavation of the tile lines on NLC’s property was required, only NLC could do this. The Department asked NLC on numerous occasions to take the steps necessary to cease the discharge. Nevertheless, NLC told the Department in writing multiple times that it would not take any steps to cease the illegal discharge. The discharge was ongoing from at least December 9, 2020, through January 27, 2021. Therefore, the amount of \$4,000.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This Order is entered into knowingly by and with the consent of the NLC. For that reason, it waives its right to appeal this Order or any part thereof.

III. 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.

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Jay Riker

On behalf of NLC Energy-Riceville, LLC
Jay Riker
Executive Vice President

Dated this 30 day of
March, 2022

Kayla Lyon, DIRECTOR
Iowa Department of Natural Resources

Field Office #1; Carrie Schoenebaum; EPA; Water Quality Bureau; I.C.1.6.a