

IN THE IOWA DISTRICT COURT FOR HOWARD COUNTY

STATE OF IOWA, ex rel., IOWA)
DEPARTMENT OF NATURAL)
RESOURCES (99AG23542),)
)
Plaintiff,)
)
vs.)
)
KENNETH MOELLERS,)
)
Defendant.)

LAW NO. LACV015754

SECOND AMENDED AND
SUBSTITUTED PETITION AT LAW

2009 JAN 12 AM 10:01
CLERK OF DISTRICT COURT
HOWARD COUNTY, IOWA

FILED

COMES NOW Plaintiff State of Iowa, ex rel., Iowa Department of Natural Resources (DNR), and for its Second Amended and Substituted Petition at Law against Kenneth Moellers (Moellers), states as follows:

INTRODUCTION

1. Defendant Kenneth Moellers owns and operates three (3) open feedlot and confinement facilities for swine, beef and dairy cattle in Howard County. Moellers has repeatedly violated Iowa laws concerning water pollution control and animal feeding operations. Moellers has illegally discharged manure to a water of the state with resulting water quality violations. Moellers has failed to notify the DNR of manure releases, failed to remove manure solids from open feedlot effluent and applied manure too close to a water source. He has expanded the confinement dairy operation without a permit, failed to submit a manure management plan for this facility, and land-applied manure without a manure management plan. The State of Iowa seeks the assessment of civil penalties and issuance of a permanent injunction for these violations.

PARTIES

2. The State of Iowa is a sovereign state of the United States of America.
3. The DNR is a duly constituted agency of the State of Iowa pursuant to Iowa Code section 455A.2.
4. Defendant Kenneth Moellers resides at 11687 Yankee Avenue, Cresco, Howard County, Iowa.

JURISDICTION

Water Pollution Control Regulations

5. The DNR is the agency of the state responsible for the prevention, abatement, or control of water pollution. Iowa Code § 455B.172(1). Rulemaking authority for establishing water quality and effluent standards is contained in Iowa Code section 455B.173(2). Rulemaking authority relating to disposal systems is contained in Iowa Code section 455B.173(3).
6. The dumping, depositing, or discharging of pollutants into any water of the state except adequately treated sewage, industrial waste, or other waste pursuant to a permit issued by the DNR is prohibited. Iowa Code § 455B.186(1).
7. A "water of the state" means "any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water, surface or underground, natural or artificial, public or private, which are contained within, flow through or border upon the state or any portion thereof." Iowa Code § 455B.171(37). The Turkey River, Chialk Creek and their tributary streams, watercourses,

waterways and drainage systems are each a "water of the state" as defined in Iowa Code section 455B.171(37).

8. "High quality waters" means those waters designated as such in 567 Iowa Admin. Code chapter 61, which exceed the levels described in chapter 61 as necessary to protect existing uses. The chemical integrity of these waters is enhanced and distinguished as high quality by the exceptional water clarity necessary to protect and maintain the designated uses of these waters. Examples include the cold water streams designated by the Iowa Conservation Commission (now the DNR), as Iowa's catchable and special trout streams, and the Iowa Great Lakes Chain. 567 Iowa Admin. Code 60.2. Segments of the Turkey River in Howard County are designated as high quality under 567 Iowa Admin. Code chapter 61.

9. Cattle and hog manure waste are "pollutants" as defined in Iowa Code section 455B.171(18).

10. Surface waters shall be free from floating debris, oil, grease, scum and other floating materials attributable to wastewater discharges or agricultural practices in amounts sufficient to create a nuisance. 567 Iowa Admin. Code 61.3(2)"b".

11. Surface waters shall be free from substances attributable to wastewater discharges or agricultural practices in concentrations or combinations which are acutely toxic to animal life. 567 Iowa Admin. Code 61.3(2)"d".

12. A person who violates any provision of part 1 of division III of Iowa Code chapter 455B or any permit, rule, standard, or order issued under part 1 of division III of chapter 455B shall be subject to a civil penalty not to exceed Five Thousand Dollars (\$5,000.00) for each day of such violation. Iowa Code § 455B.191(1).

13. The Attorney General shall, at the request of the director with approval of the Environmental Protection Commission (EPC), institute any legal proceedings, including an action for an injunction or a temporary injunction, necessary to enforce the penalty provisions of part 1 of division III of chapter 455B or any rules promulgated or any provision of any permit issued under part 1 of division III of chapter 455B. Iowa Code § 455B.191(4).

Animal Feeding Operation Regulations

14. Rulemaking authority relating to the construction and operation of animal feeding operations is contained in Iowa Code sections 455B.173(13) and 459.103(1). 567 Iowa Administrative Code 65 contains rules relating to animal feeding operations.

15. An “open feedlot” is “a lot, yard, corral, building, or other area used to house animals in conjunction with an open feedlot operation.” An “open feedlot operation” is “an unroofed or partially roofed animal feeding operation if crop, vegetation, or forage growth or residue is not maintained as part of the animal feeding operation during the period that animals are confined in the animal feeding operation.” “Open feedlot effluent” is “a combination of manure, precipitation-induced runoff, or other runoff from an open feedlot before its settleable solids have been removed.” 567 Iowa Admin. Code 65.100.

16. “Settleable solids” means:

[T]hat portion of open feedlot effluent that meets all the following requirements:

1. The solids do not flow perceptibly under pressure.
2. The solids are not capable of being transported through a mechanical pumping device designed to move a liquid.
3. The constituent molecules of the solids do not flow freely among themselves but do show the tendency to separate under stress.

567 Iowa Admin. Code 65.100. "Settled open feedlot effluent" is "a combination of manure, precipitation-induced runoff, or other runoff originating from an open feedlot after its settleable solids have been removed." A "settled open feedlot effluent basin" or "runoff control basin" is "a covered or uncovered impoundment which is part of an open feedlot operation, if the primary function of the impoundment is to collect and store settled open feedlot effluent." 567 Iowa Admin. Code 65.100.

17. A "release" is "an actual, imminent or probable discharge of process wastewater, manure, open feedlot effluent, settled open feedlot effluent, or settleable solids from an open feedlot operating structure to surface water, groundwater, or an actual, imminent or probable discharge directly to a drainage tile line or intake resulting from storing, handling, transporting or land-applying process wastewater, manure, open feedlot effluent, settled open feedlot effluent or settleable solids." 567 Iowa Admin. Code 65.100.

18. "Designated area" means a known sinkhole, or a cistern, abandoned well, unplugged agricultural drainage well, agricultural drainage well surface tile inlet, drinking water well, designated wetland, lake, or water source. A designated area does not include a terrace tile inlet or surface tile inlet other than our agricultural drainage well surface tile inlet. 567 Iowa Admin. Code 65.100.

19. Open feedlot effluent shall be land-applied in a manner which will not cause pollution of surface water or groundwater. Application in accordance with the provisions of state law and the rules in this chapter shall be deemed as compliance with this requirement. 567 Iowa Admin. Code 65.101(6)(a).

20. A person shall not apply manure on land within 200 feet from a designated area or, in the case of a high quality water resource, within 800 feet, unless one of the following applies:

1. The manure is land-applied by injection or incorporation on the same date as the manure was land-applied.

2. An area of permanent vegetation cover, including filter strips and riparian forest buffers, exists for 50 feet surrounding the designated area other than an unplugged agricultural drainage well or surface intake to an unplugged agricultural drainage well, and the area of permanent vegetation cover is not subject to manure application. 567 Iowa Admin. Code 65.101(6)(b).

21. Any person storing, handling, transporting, or land-applying manure, process wastewater, open feedlot effluent, settled open feedlot effluent or settleable solids from an open feedlot operation who becomes aware of a release shall notify the DNR as soon as possible, but not later than six (6) hours after the onset or discovery of the release. 567 Iowa Admin. Code 65.101(9).

22. Each open feedlot operation shall remove all settleable solids from open feedlot effluent prior to discharge to a water of the state. Iowa Code § 459A.401(1), 567 Iowa Admin. Code 65.101(1).

23. A confinement feeding operation shall obtain a construction permit prior to constructing or modifying any unformed manure storage structure, or constructing or modifying a confinement building that uses an unformed manure storage structure. 567 Iowa Admin. Code 65.7(1)"b"(1).

24. The owner of a confinement feeding operation, other than a small animal feeding operation, is required to submit a manure management plan to the department if the confinement feeding operation was constructed after May 31, 1985, regardless of whether the confinement

feeding operation was required to have a construction permit, or the owner constructs a manure storage structure regardless of whether the person is required to be issued a permit for the construction. Iowa Code § 459.312(1)"a"(1) and (2); 567 Iowa Admin. Code 65.16(1)"b"(1) and (2). A "small animal feeding operation" means an animal feeding operation which has an animal unit capacity of five hundred or fewer animal units. Iowa Code § 459.102(44).

25. Manure shall not be removed from a manure storage structure which is part of a confinement feeding operation for which a manure management plan is required, until the DNR has approved the manure management plan. Iowa Code § 459.312(5); 567 Iowa Admin. Code 65.16(5).

26. The DNR and the Attorney General shall enforce the provisions of chapter 459 and 459A in the same manner as provided in chapter 455B, division I unless otherwise provided. Iowa Code §§ 459.103(3), 459A.501.

27. A person who violates subchapter III of chapter 459 and any provision of chapter 459A shall be subject to a civil penalty which shall be established, assessed and collected in the same manner as provided in section 455B.191. Iowa Code §§ 459.603, 459A.502.

FACTS

28. On February 20, 2006, the EPC voted to refer the matters described in paragraphs thirty (30) through forty-one (41) below to the Attorney General for purposes of initiating judicial enforcement proceedings against Moellers.

29. Moellers owns and operates an open feedlot operation for swine at 24343 - 110th Street, Cresco, Iowa. The operation is located in the SW 1/4 of Section 25, T99N, R11W, Vernon Springs Township, Howard County, Iowa. At all times material to this matter, the

facility consisted of two (2) open feedlots. The south lot had approximately 500 finishing hogs with a 40' x 80' solids settling structure and a two-staged settled open feedlot effluent basin. The north lot had approximately 800 sows with a solid settling structure and a 150' x 100' settled open feedlot effluent basin.

30. Moellers also owns and operates an open feedlot operation for cattle and swine at 11687 Yankee Avenue, Cresco, Iowa. The operation is located in the SE 1/4 of Section 25, T99N, R11W, Vernon Springs Township, Howard County, Iowa. At all times material to this matter, the facility consisted of three (3) open feedlots. Two (2) open lots were for approximately 800 sows with a settled open feedlot effluent basin. One (1) open lot was for approximately 240 cows with a 200' x 200' concrete solids settling structure, four (4) settled open feedlot effluent basins, and a grass filter strip.

31. Moellers also owns and operates a confinement operation for dairy cattle at 23542 - 110th Street, Cresco, Iowa. The operation is located in the SW1/4 of Section 25, T99N, R11W, Vernon Springs Township, Howard County, Iowa. The facility consists of two (2) buildings with a combined animal unit capacity of 910. The site has one (1) open lot with 150 heifers. Manure from the facility is stored in an earthen storage basin with a concrete base.

32. On August 10, 2005, DNR officials investigated the 110th Street open feedlot site in response to two (2) complaints of manure runoff from the facility. They observed manure flowing from the south lot settled open feedlot effluent basin through an eroded flow path with dead vegetation along the flow path. The manure flowed from the basin approximately 25 feet south into a nearby road ditch, then east approximately 1/4 mile and into an unnamed tributary of Chialk Creek. The DNR officials observed manure solids in the ditch and the unnamed tributary.

The unnamed tributary emitted a strong manure odor and there was foam in the stream. Samples of the stream showed extremely high levels of ammonia nitrogen (720 mg/L). Moellers told DNR officials that the basin had been overflowing "for a couple of weeks." No fish were observed in the unnamed tributary.

33. Later that day, DNR officials visited Chialk Creek approximately ½ mile south of where they had sampled the unnamed tributary. Chialk Creek is designated as a high quality water resource. Since 1979, it has been a naturally producing brown trout stream. Chialk Creek emitted a strong manure odor, and a field test kit found elevated ammonia nitrogen in the water. Returning to the facility, DNR officials observed that the settled open feedlot basin was still overflowing to the road ditch.

34. On August 10, 2005, DNR officials also inspected the Yankee Avenue operation. They observed that a PVC pipe was discharging a brown, foamy liquid with strong manure odor from an earthen manure storage structure into the Yankee Avenue road ditch approximately 200 feet east of the basin. A sample of the discharge indicated a high level of ammonia nitrogen (310 mg/L). Approximately 200 feet south of the discharge point, the Yankee Avenue road ditch drains into an unnamed tributary of the Turkey River. DNR officials observed that 1/4 mile downstream the unnamed tributary was brown in color, turbid, foamy and emitted a strong manure odor. A sample of the unnamed tributary indicated an elevated level of ammonia nitrogen (160 mg/L). No fish were observed in the unnamed tributary. Returning to the Yankee Avenue operation on August 11, 2005, DNR officials again observed that the PVC pipe continued to discharge. A field test of the discharge again indicated the presence of ammonia nitrogen.

35. On August 11, 2005, DNR officials again investigated the 110th Street open feedlot site. Manure continued to flow from the settled open feedlot effluent basin in the south lot. Moellers stated to the DNR officials that the settled open feedlot basin at the north lot was also overflowing. The DNR officials observed that manure from this basin was discharging into the unnamed tributary. Flow in the unnamed tributary of Chialk Creek was brown in color and emitted a manure odor. DNR officials then returned to Chialk Creek. Chialk Creek emitted a manure odor. Samples of Chialk Creek showed extremely high levels of ammonia nitrogen (250 mg/L). No fish dead or alive were observed in Chialk Creek. No invertebrates could be found attached to rocks and gravel in the bottom of the stream.

36. On September 26, 2005, DNR officials investigated the 110th Street open feedlot facility after receiving two (2) complaints of manure runoff. DNR officials observed that the settled open feedlot effluent basin in the south lot was again overflowing. Manure solids were observed in the unnamed tributary. The unnamed tributary emitted a strong manure odor. Samples of the stream again showed extremely high levels of ammonia nitrogen (600 mg/L). No fish were observed.

37. On March 13, 2008, DNR officials investigated a complaint of manure runoff from a field at the corner of 110th Street and County Road V58 near Cresco, Iowa. The complainant stated that the manure originated from a Moellers facility. At the Prairie's Edge Nature Center, a Howard County Conservation Park, DNR officials observed a tributary of the Turkey River. The water in the tributary was turbid with a strong manure odor and foam. Manure solids were present in the stream. Samples of the stream showed elevated levels of ammonia nitrogen

(10 mg/L) and chemical oxygen demand (330 mg/L). DNR officials followed the stream to its confluence with the Turkey River. At this point, the Turkey River is designated as high quality. Water in the Turkey River was turbid, with manure odor and foam present. Fifteen feet downstream of the confluence, DNR officials still noted a manure odor and foam in the Turkey River. Samples of the Turkey River showed elevated levels of ammonia nitrogen (9.8 mg/L) and chemical oxygen demand (320 mg/L).

38. DNR officials then inspected the field where the manure had been applied. At the west edge of the field, DNR officials noted a water source, an unnamed stream with a defined bed and bank. The unnamed stream in this field becomes the tributary to the Turkey River which DNR officials had sampled earlier. Manure had been applied within 200 feet of the stream. The manure had not been incorporated. There was no vegetation buffer. Manure solids were present in the water, along with foam and a strong manure odor. Samples of the water source indicated elevated levels of ammonia nitrogen (7.3 mg/L) and chemical oxygen demand (270 mg/L).

39. At the Yankee Avenue site, on March 13, 2008, DNR officials observed the culvert and tile outlet south of the residence. Liquid was present in both the east and west road ditches with a strong manure odor. Samples of liquid in the west road ditch showed elevated levels of ammonia nitrogen (22 mg/L) and chemical oxygen demand (460 mg/L). Manure had been applied on a field east of the Yankee Avenue residence and was running off the field, entering a culvert and flowing through a road ditch approximately 20 feet south into a water source. The water source then flowed into the ditch which had been sampled. Moellers subsequently

confirmed to DNR officials that the manure applied to these fields came from the hog operation at 24343 - 110th Street.

40. On October 22, 2008, DNR officials conducted an inspection of the defendant's dairy cattle confinement operation at 23542 - 110th Street. The defendant was present during the inspection. DNR officials noted two (2) confinement buildings for dairy cattle, and also observed 150 heifers in an open lot. The defendant indicated that in the fall of 2007, he had expanded one (1) building so that the two (2) confinement buildings had a combined animal unit capacity of 910. Manure was stored in an earthen basin with a concrete base. The defendant had not obtained a construction permit from the DNR prior to expanding his operation. The defendant had not submitted a manure management plan to the DNR. The defendant had land-applied manure from the earthen basin without an approved manure management plan.

VIOLATIONS

Water Pollution Control Violations

41. On and before August 11, 2005, manure discharged from Moellers' 110th Street facility settled open feedlot effluent basin at the south lot into Chialk Creek, and an unnamed tributary of Chialk Creek in violation of Iowa Code section 455B.186(1).

42. On and before August 11, 2005, manure discharged from Moellers' 110th Street facility settled open feedlot basin in the north lot into an unnamed tributary of Chialk Creek in violation of Iowa Code section 455B.186(1).

43. On and before August 10, 2005, manure discharged from Moellers' Yankee Avenue facility settled open feedlot effluent basin into an unnamed tributary of the Turkey River in violation of Iowa Code section 455B.186(1).

44. On and before August 11, 2005, manure discharged from the south lot at Moellers' 110th Street facility caused exceedance of applicable water quality standards in violation of 567 Iowa Administrative Code 61.3(2)"b" and "d".

45. On and before August 10, 2005, manure discharged from Moellers' Yankee Avenue operation caused exceedance of applicable water quality standards in violation of 567 Iowa Administrative Code 61.3(2)"b" and "d".

46. On and before August 11, 2005, manure discharged from the north lot at Moellers' 110th Street operation caused exceedance of applicable water quality standards in violation of 567 Iowa Administrative Code 61.3(2)"b" and "d".

47. On and before September 26, 2005, manure discharged from Moellers' 110th Street facility settled open feedlot effluent basin in the south lot into an unnamed tributary of Chiawk Creek in violation of Iowa Code section 455B.186(1).

48. On and before September 26, 2005, manure discharged from Moellers' 110th Street operation caused exceedance of applicable water quality standards in violation of 567 Iowa Administrative Code 61.3(2)"b" and "d".

49. On or before March 13, 2008, manure land-applied from Moellers' 110th Street operation discharged into the Turkey River and one of its tributary streams in violation of Iowa Code section 455B.186(1).

50. On or before March 13, 2008, manure land-applied from Moellers' 110th Street operation discharged causing exceedance of applicable water quality standards in violation of 567 Iowa Admin. Code 61.3(2)"b" and "d".

51. On or before March 13, 2008, manure land-applied from Moellers' 110th Street operation discharged into unnamed water sources in violation of Iowa Code section 455B.186(1).

52. On or before March 13, 2008, manure land-applied from Moellers' 110th Street operation discharged causing exceedance of applicable water quality standards in the unnamed water source in violation of 567 Iowa Admin. Code 61.3(2)"b" and "d".

Animal Feeding Operation Violations

53. On and before August 10, 2005, Moellers failed to remove all settleable solids from open feedlot effluent prior to discharge to a water of the state in violation of Iowa Code section 459A.401(1) and 567 Iowa Administrative Code 65.101(1).

54. On and before September 26, 2005, Moellers failed to remove all settleable solids from open feedlot effluent prior to discharge to a water of the state in violation of Iowa Code section 459A.401(1) and 567 Iowa Administrative Code 65.101(1).

55. On or before August 11, 2005, Moellers failed to notify the DNR of a release of manure from his 110th Street operation in violation of 567 Iowa Administrative Code 65.101(9).

56. On or before August 10, 2005, Moellers failed to notify the DNR of a release of manure from his Yankee Avenue operation in violation of 567 Iowa Administrative Code 65.101(9).

57. On or before September 26, 2005, Moellers failed to notify the DNR of a release of manure from his 110th Street operation in violation of 567 Iowa Administrative Code 65.101(9).

58. On or before March 13, 2008, Moellers land-applied open feedlot effluent in a manner which caused pollution of surface water in violation of 567 Iowa Admin. Code 65.101(6)(a).

59. On or before March 13, 2008, Moellers land-applied manure within 200 feet of a designated area which had no vegetation buffer, without injecting or incorporating the manure on the same date, in violation of 567 Iowa Admin. Code 65.101(6)(b).

60. On or before October 22, 2008, Moellers expanded his dairy cattle confinement feeding operation without a construction permit from the DNR in violation of 567 Iowa Admin. Code 65.7(1)"b"(1).

61. On or before October 22, 2008, Moellers failed to submit and obtain DNR approval of a manure management plan for his dairy cattle confinement feeding operation in violation of Iowa Code section 459.312(1)"a"(1) and (2) and 567 Iowa Admin. Code 65.16(1)"b"(1) and (2).

62. On or before October 22, 2008, Moellers removed and land-applied manure from his dairy cattle confinement feeding operation without an approved manure management plan in violation of Iowa Code section 459.312(5) and 567 Iowa Admin. Code 65.16(5).

PRAYER FOR RELIEF

WHEREFORE, State of Iowa, ex rel., Iowa Department of Natural Resources requests that the Court:

a. assess a civil penalty against Defendant Kenneth Moellers pursuant to Iowa Code section 455B.191(1) for each day of violation of Iowa Code sections 455B.186(1), 459.312(1)"a"(1) and (2), 459.312(5), and 459A.401(1); 567 Iowa Admin. Code 61.3(2)"b", 61.3(2)"d", 65.7(1)"b"(1), 65.16(1)"b"(1) and (2), 65.16(5), 65.101(1), 65.101(6)(a), 65.101(6)(b) and 65.101(9) not to exceed Five Thousand Dollars (\$5,000.00) for each day of such violation; and

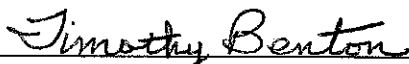
b. issue a permanent injunction enjoining Defendant Kenneth Moellers from any violation of Iowa Code sections 455B.186(1), 459.312(1)"a"(1) and (2), 459.312(5), and 459A.401(1); 567 Iowa Admin. Code 61.3(2)"b", 61.3(2)"d", 65.7(1)"b"(1) and (2), 65.16(1)"b"(1) and (2), 65.16(5), 65.101(1), 65.101(6)(a), 65.101(6)(b), and 65.101(9).

Plaintiff further requests that the Court tax the costs of this action to the defendant and provide such other relief as the Court may deem just and proper.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent regular mail to the party of record addressed as follows:

Joseph P. Braun
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ATTORNEY FOR DEFENDANT

on this 8th day of January, 2009

