

[Filed 12-11-06]

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

PETITION AT LAW

COMES NOW Plaintiff State of Iowa, ex rel., Iowa Department of Natural Resources (DNR) and for its claim against Kenneth Moellers (Moellers) states as follows:

INTRODUCTION

1. The State of Iowa seeks the assessment of civil penalties and the issuance of a permanent injunction against Kenneth Moellers for repeated illegal discharges of manure to a water of the state and resulting water quality violations, repeatedly failing to notify the DNR of manure releases, and failing to remove manure solids from open feedlot effluent prior to discharge to a water of the state. These violations were committed at two (2) open feedlot facilities for swine and cattle operated by the defendant in Howard County.

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 Supp. § 455B.171(37) (2005). 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 Supplement section 455B.171(37) (2005).

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

9. 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”.

10. 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”.

11. 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).

12. 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

13. 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.

14. 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.

15. “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.

16. 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.

17. 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).

18. Each open feedlot operation shall remove all settleable solids from open feedlot effluent prior to discharge to a water of the state. Iowa Code Supp. § 459A.401(1) (2005), 567 Iowa Admin. Code 65.101(1).

19. 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), Iowa Code Supp. § 459A.501 (2005).

20. 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, Iowa Code Supp. § 459A.502 (2005).

FACTS

21. On February 20, 2006, the EPC voted to refer the matters described in paragraphs twenty-two (22) through twenty-eight (28) below to the Attorney General for purposes of initiating judicial enforcement proceedings against Moellers.

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

23. 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. This facility consists of three (3) open feedlots. Two (2) open lots are for approximately 800 sows with a settled open feedlot effluent basin. One (1) open lot is 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.

24. On August 10, 2005, DNR officials investigated the 110th Street 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 Chiark 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.

25. 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.

26. 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.

27. On August 11, 2005, DNR officials again investigated the 110th Street 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.

28. On September 26, 2005, DNR officials investigated the 110th Street 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.

VIOLATIONS

Water Pollution Control Violations

29. 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).

30. 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).

31. 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).

32. 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".

33. 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".

34. 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".

35. 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 Chialk Creek in violation of Iowa Code section 455B.186(1).

36. 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".

Animal Feeding Operation Violations

37. 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 Supplement section 459A.401(1) (2005) and 567 Iowa Administrative Code 65.101(1).

38. 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 Supplement section 459A.401(1) (2005) and 567 Iowa Administrative Code 65.101(1).

39. 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).

40. 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).

41. 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).

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 section 455B.186(1), 459A.401(1); 567 Iowa Administrative Code 61.3(2)“b”, 61.3(2)“d”, 65.101(1) 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 section 455B.186(1), 459A.401(1); 567 Iowa Administrative Code 61.3(2)“b”, 61.3(2)“d”, 65.101(1) 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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