

# District Court of Nebraska

## *Tenth Judicial District*

STEPHEN R. ILLINGWORTH  
DISTRICT JUDGE  
ADAMS COUNTY COURTHOUSE  
P.O. BOX 9  
HASTINGS, NEBRASKA 68902-0009  
E-MAIL: [abauer@adamscounty.org](mailto:abauer@adamscounty.org)

DEPARTMENT OF JUSTICE

AUG 28 2007

STATE OF NEBRASKA

DORIS B. SCHUESSLER, Court Reporter  
AMANDA L. BAUER, Bailiff/Secretary

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August 24, 2007

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Ms. Katherine J. Spohn  
Assistant Attorney General  
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Lincoln NE 68509-8920

Re: State of Nebraska v Dahlgren  
Phelps County Case No. CI 04-176

Counsel:

Enclosed herewith is a copy of the Journal Entry and Order filed today. The original has been sent to the Clerk of the District Court for filing.

Very truly yours,



Stephen R. Illingworth  
District Judge

SRI/alb

Enclosure(s)

ADAMS

FRANKLIN

HARLAN

KEARNEY

PHELPS

WEBSTER

IN THE DISTRICT COURT OF PHELPS COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel., )  
MICHAEL J. LINDER, Director, )  
NEBRASKA DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, )  
)  
)  
Plaintiff, )  
)  
vs )  
)  
DAHLGREN CATTLE CO., INC., )  
)  
)  
Defendant. )

Case No. CI 04-176

JOURNAL ENTRY  
AND ORDER

The case came on for Trial to the Court on the 8<sup>th</sup> day of January 2007 before Stephen R. Illingworth, District Judge. The Plaintiff was represented by Assistant Attorney General, Katherine J. Spohn and the Defendant, by Mr. Stephen D. Mossman. Opening statements were made and the Plaintiff presented evidence. The Court recessed for the day. On the 9<sup>th</sup> day of January 2007 the Trial continued. The Plaintiff continued to present evidence and rested. The Defendant made a Motion to Dismiss which was argued and Overruled. The Defendant presented evidence and rested. The Plaintiff did not present rebuttal. Counsel advised the Court that final arguments would be submitted in briefs. The Court took the case under advisement pending receipt of briefs and final arguments.

Now on this 24<sup>th</sup> day of August 2007 the Court finds and Orders as follows:

FINDINGS OF FACT

1. The Defendant, Dahlgren Cattle Co., Inc., hereinafter Dahlgren, owned and operated a livestock feeding operation in Phelps County.

2. The feedlot is located adjacent to the Cottonwood Waterfowl Production Area Wetland, hereinafter Cottonwood WPA.
3. The Nebraska Department of Environmental Quality, hereinafter NDEQ, was at all times the agency of the State of Nebraska in Neb. Rev. Stat. 81-1504 (1) charged with exercising exclusive supervision, administration, and enforcement of the Environmental Protection Act Neb. rev. Stat. 81-1501 et seq.
4. On November 19, 2000 Jeff Drahota, a Biologist for the United States Fisheries and Wildlife Service (hereinafter USFWS) discovered yellow ice and feedlot sewage pooling in the Cottonwood WPA.
5. Drahota determined the source of the livestock waste was the Defendant's feedlot.
6. Drahota did not report the pollution to the NDEQ as he hoped to resolve the problem with the Defendant without involving the State.
7. Drahota attributed all of the pollution to the Defendant's livestock operation as he observed livestock waste coming from the Defendant's facility and determined that no cattle had grazed on the Cottonwood WPA during 2000 growing season.
8. Elevated levels of nitrates and ammonia were found in WPA water in June 2001 by Walt Schwartz, a toxicologist for the USFWS.
9. On November 2, 2001 Drahota again discussed the Defendant's pollution of the Cottonwood WPA with Gary Dahlgren. Mr. Dahlgren informed Drahota that an Engineering firm was designing stilling basins for the feedlot but construction had not yet commenced.
10. Jerry Newth, a representative of NDEQ visited the Dahlgren facility on September

- 18, 2002 to investigate a discharge complaint.
11. Mr. Newth observed water and livestock waste flowing down a drainage ditch into the Cottonwood WPA.
  12. Dahlgren had been issued a construction permit on July 12, 2002 which required completion of a livestock waste control facility by November 1, 2002.
  13. On November 20, 2002 Drahota discovered livestock waste continued to pollute the Cottonwood WPA and he filed a complaint with the NDEQ.
  14. Representatives of NDEQ visited the Defendant's facility on November 20, 2002 and observed that the drainage ditch had water and livestock waste flowing through it to the area or the WPA.
  15. Jerry Newth of the NDEQ spoke with Cal Dahlgren on November 20, 2002 and informed him of the complaint.
  16. The Defendant had failed to complete Phase 1 of its construction permit by November 1, 2002 and did not request an extension until November 20, 2002.
  17. On November 26, 2002 David Bubb, a field data specialist for NDEQ inspected the drainage ditch and the Cottonwood WPA and observed runoff from the Defendant's operation forming a stream that flowed into the cottonwood WPA.
  18. Bubb observed the source of water and livestock waste was the Defendant's facility.
  19. Bubb collected samples of water in two locations in the Cottonwood WPA where water pools and from the drainage ditch just before it goes under the road.
  20. At both locations, when a hole was punched in the ice to collect water samples,

there was a strong odor and the water was dark in color.

21. At the Cottonwood site testing disclosed the average one-hour ammonia concentration was 19.0 parts per million (ppm). The maximum total ammonia concentration allowed by Title 117 was 10.2 ppm.
22. At no time between November 20, 2002 through November 26, 2002 did Dahlgren notify NDEQ of its discharge.
23. Dahlgren was under an obligation, pursuant to its construction application approved on July 12, 2002 to notify NDEQ of the discharge within twenty-four hours of the event.
24. For purposes of assessing the civil penalties in this case the Court finds the Defendant's date of non-compliance to be May 15, 2003.

#### CONCLUSION OF LAW

The Court finds the Defendant violated the provisions of Neb. Rev. Stat. 81-1506 (1) (a) because it allowed water from its facility to carry livestock waste to the drainage ditch and ultimately to the Cottonwood WPA for the period of November 20, 2002 through November 26, 2002. On November 20<sup>th</sup> and 26<sup>th</sup> NDEQ observed livestock waste from the Defendant's operation flowing into the drainage ditch and ultimately Cottonwood WPA. Bubb also testified that there was no other possible place where the stream of waste could have come from than the Defendant's facility, when he observed the site on November 26, 2002 and collected samples. He further testified there was no indication the ditch had been cleared within the week. He also testified the samples he took had a definite livestock odor, were brown in color and contained straw and corn. It was clear to the witnesses that the Defendant's livestock operation caused the

physical and chemical alteration of the water of the Cottonwood WPA which caused water pollution for the period of November 20<sup>th</sup>, 2002 through November 26<sup>th</sup>, 2002.

It is also clear to the Court that the Defendant was the source of the livestock waste. It should also be noted that on February 12, 2004 NDEQ issued a Complaint, Compliance Order and Notice of Opportunity for hearing pursuant to Neb. Rev. Stat. 81-1507 which found that the Defendant had violated Neb. Rev. Stat. 81-1506 (1) (a) by placing livestock waste in a location it was likely to cause pollution. The Defendant did not file an answer or request for hearing. The only document sent in by the Defendant agreed to the terms of the Administrative Order and stated the Defendant's intent to forego its right to request a hearing. The Administrative Order became a final Order and all allegations of the Complaint were then deemed admissions pursuant to Neb. Rev. Stat. 81-1507 (1) et. seq. The Court therefore finds the Defendant polluted the waters of the State in Violation of Neb. Rev. Stat. 81-1506 (1) (a). The Court further finds it did so for a period of seven days from November 20, 2002 to November 26, 2002. The Court finds the Defendant should not suffer civil penalty for failure to notify NDEQ of the discharge from the operation within twenty-four hours as the agency already had notice. The Court further finds that civil penalties should not be assessed based on the second and third claims alleged in the Third Amended Complaint because they are cumulative of the first claim.

#### CIVIL PENALTIES

Neb. Rev. Stat. 81-1508.02 (2) requires the Court to consider, "the degree and extent of the violation, the size of the operation and any economic benefit derived from non-compliance," when determining civil penalties.

### Degree and Extent

The Court notes the Defendant had a history of polluting the Cottonwood WPA which was documented back to November of 2000. The USFWS representative attempted to resolve the problem without involving the State. Two years later the Defendant's feedlot continued to pollute the WPA. The Defendant finally came into compliance on August 4, 2004. This factor demands a substantial civil penalty.

### Size of the Operation

At the time of the violation, the Defendant had 8,000 head of cattle in his feedlot. He was in the top twenty percent of feeders in the State. This is the type of operation which can cause significant pollution as shown by the evidence in this case. The financial ability of this size operation to prevent pollution should also require a large civil penalty. The Defendant had the financial ability to prevent the pollution but did not do so in a timely fashion.

### Economic Benefit

It is clear from the State's expert, Mr. Simons, that the Defendant received an economic benefit by delaying construction. The Court has found that the date of May 15, 2003 is the proper date of non-compliance due to the extension granted by the State. Mr. Simons testified the economic benefit to the Defendant on that date was \$36,023.00. The Court should assess a civil penalty that negates this economic benefit.

Upon consideration of the above three factors the Court finds in favor of the Plaintiff and against the Defendant on the First Cause of Action and assess a civil penalty of \$49,000.00 (\$7,000 per day). The Court finds in favor of the Defendant on the Second, Third and Fourth causes of action.

Wherefore, the Court enters a Judgement against the Defendant for a total civil penalty of \$49,000.00. Costs are taxed to the Defendant.

IT IS SO ORDERED THIS 24<sup>TH</sup> DAY OF AUGUST 2007.

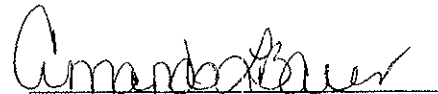
BY THE COURT:



Stephen R. Illingworth  
District Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the true and correct copies of the foregoing were served upon Mr. Stephen D. Mossman Attorney at Law 134 South 13<sup>th</sup> Street Suite 1200 Lincoln NE 68508 and Ms. Katherine J. Spohn Assistant Attorney General 2115 State Capitol Building Lincoln NE 68509-8920 thereof, duly addressed and postage prepaid in the regular United States Mail this 24<sup>th</sup> day of August 2007.



Amanda L. Bauer  
Bailiff