

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER**

IN THE MATTER OF: ROGER KILBURG AFO Facility ID 66543 Jackson County, Iowa	ADMINISTRATIVE ORDER NO. 2020-AFO- 22
---	--

TO: Roger Kilburg
11483 500th Avenue
Miles, Iowa 52064

I. SUMMARY

This administrative order (Order) requires you to comply with the provisions in Section V of this Order, subject to your appeal rights stated in this Order.

Questions regarding this Order should be directed to:

Relating to technical requirements:

Brian Jergenson
DNR Field Office 1
909 W Main St, Ste 4
Manchester, Iowa 52057
Phone: 563-927-2640

Relating to legal requirements:

Noah Poppelreiter, Attorney for the DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034
Phone: 515-725-8248

Payment of penalty to:

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

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; 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.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: ROGER KILBURG

III. STATEMENT OF FACTS

1. Mr. Kilburg owns and operates a confinement feeding operation located at 11483 500th Avenue Miles, Iowa (Facility). The Facility currently houses 1,800 head of non-dairy cattle, totaling 1,800 animal units. There are several residences and other properties bordering the Facility.

2. On September 9, 2015, DNR issued Construction Permit CP-A2015-146 (Permit) to Mr. Kilburg. The Permit authorized the expansion of the Facility by 1,000 animal units. Subparagraph (6)"b" requires Mr. Kilburg to "plant, maintain, and replace trees and shrubs" at the Facility. This subparagraph is included in the Permit because Mr. Kilburg selected points for criterion 15 in the Master Matrix ("Utilization of landscaping around confinement structure").

3. On January 27, 2019, DNR environmental specialist senior Brian Jergenson contacted Mr. Kilburg regarding the planting of trees and shrubs. Mr. Kilburg stated the planting would be complete by June 1, 2019.

4. On February 4, 2019, the DNR received a letter from ProAg Engineering, Inc., that construction on the expansion at the Facility was complete, except for the planting of trees and shrubs. The letter stated that Mr. Kilburg would complete this requirement in the spring of 2019.

5. On February 5, 2019, the DNR sent a letter to Mr. Kilburg authorizing the population of the Facility. However, the letter also reminded Mr. Kilburg of the requirement to plan trees and shrubs and required the planting to be done in 2019.

6. On June 10, 2019, Mr. Jergenson contacted Mr. Kilburg to discuss the planting of trees and shrubs. Mr. Kilburg stated the planting had not begun.

7. On October 9, 2019, Mr. Jergenson visited the Facility. Mr. Jergenson observed that the Facility had been populated with cattle but that no trees or shrubs had been planted.

8. On October 14, 2019, the DNR issued a Notice of Violation to Mr. Kilburg for failure to comply with the construction permit by not planting the trees and shrubs.

IV. CONCLUSIONS OF LAW

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 chapter 65.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: ROGER KILBURG

2. 567 IAC 65.7(1)"b"(2) requires a confinement feeding operation obtain a permit if the operation constructs a confinement building or manure storage structure, if the operation will exceed 1,000 animal units after the construction. The Facility post-construction has an animal unit capacity of 1,800. The Facility was required to obtain a construction permit.

3. If a county board of supervisors adopts a construction evaluation resolution pursuant to 567 IAC 65.10(3), pursuant to 567 IAC 65.10(3)"b" a board shall evaluate all construction permits issued for its county using the points-based Master Matrix. This may include criteria the permittee agrees to include as a term of the construction permit. Criterion 15 in the Master Matrix grants 20 points for the utilization of landscaping. Mr. Kilburg agreed to include this criterion in the Permit, allowing the County to consider this criterion in its evaluation.

4. 567 IAC 65.7(10) requires compliance with all terms and conditions of construction permits. Mr. Kilburg has failed to comply with the Permit's requirement that trees and shrubs be planted around the Facility's structures. The facts of this case show a violation of this section.

V. ORDER

THEREFORE, the DNR orders Mr. Kilburg to do the following:

1. Mr. Kilburg shall operate and maintain all animal feeding operation structures in compliance with all applicable DNR rules and regulations;
2. Mr. Kilburg shall plant trees and shrubs at the Facility in accordance with the Permit no later than December 1, 2020;
3. Mr. Kilburg shall maintain and replace the planted trees and shrubs at the Facility in accordance with the Permit; and
4. Mr. Kilburg shall pay an administrative penalty in the amount of \$3,000.00 within 30 days from the date the Director signs this Order.

VI. PENALTY

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 an

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: ROGER KILBURG

administrative penalty of \$3,000.00 is appropriate in this matter. 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 “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. Kilburg gained a delayed benefit by failing to plant and maintain the trees and shrubs. An economic benefit of \$500.00 is assessed.

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. Failing to comply with the terms of a construction permit threatens the integrity of the animal feeding operation regulations. Failing to plant trees and shrubs in this case may cause harm to neighboring properties. Therefore, \$1,500.00 is assessed for this factor.

Culpability – Mr. Kilburg has a duty to know and comply with the terms of the Permit. Mr. Kilburg knew the terms of the Permit, but failed to comply with those terms. Therefore, \$1,000.00 is assessed for this factor.

VII. APPEAL RIGHTS

Pursuant to Iowa Code section 455B.175 (through Iowa Code section 459.601(2)(b)) and 567 IAC Chapter 7, a written Notice of Appeal may be filed with the Director, at the address provided above, within 60 days of the date of issuance of this Order. The Notice of Appeal must identify the specific portion or portions of this Order being appealed and include a short and plain statement of the reasons for appeal. A contested case hearing will then be commenced pursuant to Iowa Code Chapter 17A and 561 IAC Chapter 7.

[Intentionally left blank]

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: ROGER KILBURG

VIII. 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 additional 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 17th day of
July, 2020.

Noah Poppelreiter, DNR Field Office 1, EPA, VIII.A.2