

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER**

IN THE MATTER OF:

ROGER KILBURG

AFO Facility ID 66543

Jackson County, Iowa

ADMINISTRATIVE ORDER
NO. 2021-AFO- 05

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.

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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 July 17, 2020, the Director issued Administrative Order 2020-AFO-22 (First Order).

3. This Order restates the “Statement of Facts” section of the First Order.

4. On July 22, 2020, Mr. Kilburg signed a consent order containing the same terms as the First Order. By verbal agreement between DNR staff and Mr. Kilburg, it was decided to keep the First Order in place as the terms of the consent order and the First Order were identical.

5. Also on July 22, 2020, Mr. Kilburg paid the administrative penalty of \$3,000 required by the First Order, demonstrating he was aware of the terms of the First Order.

6. Mr. Kilburg did not plant trees and shrubs at the Facility prior to December 1, 2020 as required by the First Order.

IV. CONCLUSIONS OF LAW

1. This Order restates the “Conclusions of Law” section of the First Order.

2. The “Noncompliance” section of the First Order states that “[f]ailure to comply with [the First Order] may result in the imposition of additional administrative penalties pursuant to an administrative order...”

3. Iowa Code section 455B.191(2), as referenced by Iowa Code section 459.603, states that a person who violates an order issued to remedy a violation of Iowa Code chapter 459, part III, shall be subject to civil penalties not to exceed five thousand dollars per day of the violation. Mr. Kilburg failed to comply with the First Order and is subject to civil penalties pursuant to this section.

V. ORDER

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

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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 as required by the First Order no later than July 1, 2021;
3. Mr. Kilburg shall maintain and replace the planted trees and shrubs at the Facility as required by the First Order; and
4. Mr. Kilburg shall pay an administrative penalty in the amount of \$5,000.00 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 administrative penalty of \$5,000.00 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 continues to gain 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. Mr. Kilburg has repeatedly failed to comply with the terms of the construction permit and the First Order. This failure threatens the integrity of animal feeding operation regulations and administrative orders. Failing to plant trees and shrubs in this case may cause harm to neighboring properties. Therefore, \$2,000.00 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 First Order, notably as shown by the signed

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consent order and the paid penalty, but failed to fully comply with those terms. Therefore, \$2,500.00 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.

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 25th day of
February, 2021.

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