

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER**

IN THE MATTER OF:

SCOTT ELLSWORTH
Kossuth County Iowa

AFO #61369 and AFO #66022

ADMINISTRATIVE ORDER
NO. 2022-AFO-20

TO: Scott Ellsworth
4409 170th Avenue
Lakota IA 50451

I. SUMMARY

This administrative order (Order) requires to comply with the provision 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: **Relating to legal requirements:**

Jeremy Klatt, DNR Field Office 2
Wallace State Office Building
2300 15th Street SW
Mason City, Iowa 50401
Phone: 641/424-4073

Kelli Book, Attorney for the DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034
Phone: 515/210-3408

Appeal or 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 or 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. Scott Ellsworth owns an animal feeding operation located at 4406 160th Avenue; Ledyard, Iowa (Section 10, Ledyard Township, Kossuth County). The confinement operation houses 2,400 wean to finish swine (960 animal units). The annual MMP update deadline was established as July 1 of each calendar year and the annual compliance fee for the facility is \$144.00. The last Phosphorus Index MMP for the facility was submitted July 2017.

2. The 2021 MMP submission was to be a complete Phosphorus Index MMP. It was not submitted by July 1, 2021. On July 12, 2021, DNR issued a Notice of Violation letter for the late 2021 Phosphorus Index MMP and fee. The letter informed Mr. Ellsworth that if the complete Phosphorus Index MMP and fee were not submitted within 10 days of receipt of the letter that further enforcement would be pursued.

3. On July 30, 2021, Lori Rattay, DNR Field Office 2, called and spoke to Mr. Ellsworth. Ms. Rattay explained that the 2021 Phosphorus Index MMP and fee needed to be submitted by August 15, 2021 or the matter would be referred for further enforcement. The complete 2021 Phosphorus Index MMP and fee were not submitted until December 1, 2021.

4. Mr. Ellsworth also owns and operates an animal feeding operation located at 4405 170th Avenue; Lakota, Iowa (Section 10, Ledyard Township, Kossuth County), known as Ellsworth Finishing 2. The confinement operation houses 4,160 swine (1,664 animal units). An original Phosphorus Index MMP for the facility was submitted in 2010. The annual MMP update deadline was established as August 1 of each calendar year and the annual compliance fee for the facility is \$249.60.

5. The 2021 MMP update and fee for the Ellsworth Finishing 2 facility were due August 1, 2021. The update and fee were not submitted by August 1, 2021. On August 10, 2021, DNR issued a Notice of Violation letter for the late 2021 MMP update and fee. The letter informed Mr. Ellsworth that the MMP update and fees must be submitted within 10 days and failing to submit the information within 10 days would result in further enforcement, including a monetary penalty. The 2021 MMP update and fee were not submitted until December 27, 2021.

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

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of animal feeding operations. The Commission has adopted such rules at 567 IAC Chapter 65.

2. Iowa Code section 459.12(13) and 567 IAC 65.16(3)"b" require an owner of a confinement feeding operation who is required to submit a MMP to submit a complete updated MMP and compliance fee on an annual basis to the DNR. The updated plan must reflect all amendments made during the period of time since the previous MMP submission. The compliance fee is fifteen cents per animal unit. The 2021 MMP update and fee were due July 1, 2021 for one of Mr. Ellsworth's facility August 1, 2021 for another of Mr. Ellsworth's facility. The 2021 MMP updates and fees were not submitted until December 2021. The above-mentioned facts indicate violations of this provision.

V. ORDER

THEREFORE, the DNR orders Scott Ellsworth to do the following:

1. Pay an administrative penalty in the amount of \$5,000.00 within 60 days from the date the Director signs this Order.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. 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 that the most effective and efficient means of addressing the above-cited violations is the issuance of an Order with an administrative penalty of \$5,000.00. 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. Ellsworth's failure to timely submit the 2021 MMP updates and fees has allowed him to save time and money. It is estimated Mr. Ellsworth gained an economic benefit of at least \$250.00 and that amount is assessed for this factor.

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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. The MMP is a crucial aspect of the DNR’s animal feeding operation program. The MMP ensures that an animal feeding operation has adequate production land available so that the manure can be properly applied to cropland at an agronomic rate in order to prevent over application of manure. Mr. Ellsworth’s facilities have capacities of 1,664 animal units and 960 animal units and environmental harm is likely to occur if the manure is not applied properly. Failing to timely submit the MMP updates and fees threatens the integrity of the animal feeding operation regulations. Therefore, \$2,750.00 is assessed for this factor.

Culpability – Mr. Ellsworth has a duty to remain knowledgeable of DNR’s requirements and to be alert to the probability that his conduct is subject to DNR’s rules. Therefore, \$2,000.00 is assessed for this factor.

VII. APPEAL RIGHTS

Pursuant to Iowa Code section 455B.175(1)(a) 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 administrative consent order. Failure to comply with this Order may result in the imposition of 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