

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**JACOB SUTTER, TYLER SUTTER,
AND KENNETH SUTTER**

Warren County Iowa

ADMINISTRATIVE CONSENT ORDER
NO. 2023-AFO- 05

TO: Kenneth Sutter
610 G40 Hwy
Pleasantville, Iowa 50225

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Jacob Sutter, Tyler Sutter, and Kenneth Sutter for the purpose of resolving water quality violations resulting from a manure release during land application of manure and uncertified manure applicators. This administrative consent order requires Jacob Sutter, Tyler Sutter, and Kenneth Sutter to: 1) develop and submit a Standard Operating Procedure for land application of manure; 2) ensure that all manure applicators are properly certified; and 3) pay an \$4,500.00 administrative penalty.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Bill Gibbons, Field Office 5
Iowa Department of Natural Resources
502 East Ninth Street
Des Moines, Iowa 50319-0034
Phone: 515/725-0335

Relating to legal requirements:

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

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 administrative consent order is issued pursuant to the provisions of Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary

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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.

III. STATEMENT OF FACTS

1. Kenneth Sutter owns Sutter Finisher #2. Sutter Finisher #2 is a 2,489 head swine finishing confinement feeding operation located at 23997 Keokuk Street; Pleasantville, Iowa (Section 36, Union Township, Warren County). The facility has one confinement building with a concrete below building manure storage pit.

2. On April 16, 2022, Jacob Sutter contacted DNR Field Office 5 to report a manure spill. Mr. Sutter stated they were land applying manure from the facility and a valve in the agitation pump on the north side of the building failed causing manure to be pumped to the ground. The manure traveled to an unnamed tributary of Coal Creek and then to Coal Creek. Mr. Sutter explained that as soon as the release was discovered, the pump was turned off and they used a skid loader to dam up the liquid manure near the confinement building. A second earthen dam was constructed about a ¼ mile downstream of the confinement building in the unnamed tributary and a third earthen dam was constructed further downstream in the unnamed tributary. They began pumping manure from the tributary and began land applying it.

3. Later in the day on April 16, 2022, Bill Gibbons, environmental specialist DNR Field Office 5, traveled to the spill location and met with Jacob and Tyler Sutter. At the time, they were pumping manure from the tributary at the third earthen dam. Mr. Gibbons conducted several field tests between the facility and the third earthen dam and all the field tests indicated an ammonia nitrogen concentration greater than 6 mg/L. The field tests upstream, beyond the third dam indicated an ammonia nitrogen concentration between 2 and 3 mg/L. Further downstream where the tributary flowed into Coal Creek, Mr. Gibbons noted a tile line entering Coal Creek. A laboratory sample of the liquid from the tile line indicated an ammonia nitrogen concentration of <0.50 mg/L. Mr. Gibbons also collected a laboratory sample from Coal Creek at the 245th Avenue bridge crossing. The sample indicated an ammonia nitrogen concentration of 5.2 mg/L.

4. Mr. Gibbons returned to the Sutter facility and met with Jacob, Tyler, and Kenneth Sutter. Mr. Gibbons instructed them to continue to pump manure from the two dams closer to the facility and land apply the impacted soil. Mr. Gibbons asked that they continue to monitor the three dammed areas and continue to pump the manure and land apply it.

5. On April 18, 2022, Mr. Gibbons and Jeff Theobald, environmental specialist DNR Field Office 5, returned to the facility and met with Jacob Sutter at

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the third earthen dam. Mr. Sutter stated he pumped the manure and land applied it several times on the previous day. The field office personnel conducted a field test of the liquid behind the dam and the ammonia nitrogen concentration was 3.0 mg/L. The field test conducted approximately ¼ mile downstream of the earthen dam indicated an ammonia nitrogen concentration between 2 and 3 mg/L. Later in the day, Mr. Sutter contacted Mr. Gibbons and stated that he was moving the earthen dam further downstream to have better access to the area to remove the manure. Mr. Sutter stated they would continue to pump and remove manure from this new earthen dam area.

6. On April 20, 2022, Mr. Gibbons returned to the facility and met with Jacob Sutter. They traveled to a 245th Avenue bridge crossing and the field test indicated an ammonia nitrogen concentration of 0.25 mg/L. Mr. Gibbons instructed Mr. Sutter to continue to pump manure from the two earthen dams closest to the facility until the ammonia nitrogen concentrations were less than 1 mg/L. Mr. Gibbons noted that all impacted soil had been removed and land applied.

7. Mr. Gibbons checked the manure applicators' certification database to confirm the certifications for the Sutters. The database indicated that Jacob, Tyler, and Kenneth Sutter were not certified manure applicators. Their commercial manure applicator certifications expired in March 2015 and their confinement site applicator certifications expired in December 2017.

8. On November 3, 2022, Mr. Gibbons contacted Jacob Sutter and informed him the violations were being referred for further enforcement that would include a monetary penalty. Mr. Gibbons also reminded him to complete the manure applicator certification.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.173 provides that the Environmental Protection Commission (Commission) shall adopt rules related to water quality standards, pretreatment standards, and effluent standards. The Commission has adopted such rules at 567 IAC chapters 61 and 62.

2. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into a water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. During the April 2022 investigation, DNR Field Office 5 noted that a manure release that occurred during manure application from the Sutter facility entered an unnamed tributary of Coal Creek and Coal Creek. The above-mentioned facts indicate a violation of these provisions.

3. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock

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watering; or are toxic to animal or plant life. During the April 2022 investigation, DNR Field Office 5 noted that a manure release that occurred during manure application from the Sutter facility entered an unnamed tributary of Coal Creek and Coal Creek and caused elevated pollutant levels. The above-mentioned facts indicate violations of the general water quality criteria.

4. 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.

5. 567 IAC 65.2(3) states that the minimum level of control for a confinement feeding operation shall be the retention of all wastes between periods of application. In no case shall manure from a confinement feeding operation be discharged directly into a water of the state or into a tile line that discharges to a water of the state. During the April 2022 investigation, DNR Field Office 5 noted that a manure release occurred during manure application from the Sutter facility entered an unnamed tributary of Coal Creek and Coal Creek. The above-mentioned facts indicate a violation of this provision.

6. 567 IAC 65.3(6) states that a confinement feeding operation required to submit an MMP to the DNR must use a certified commercial manure service for land application of manure and an operation that applies its own manure must comply with certification requirements in 567 IAC 65.19. 567 IAC 65.19(1) states that a confinement site manure applicator shall not apply dry or liquid manure to land unless the person is certified. During the April 2022 investigation, it was determined that Jacob, Tyler, and Kenneth Sutter were not certified to apply manure. The above-mentioned facts indicate violations of these provisions.

7. DNR has determined that there is no likelihood that the violations identified in this administrative consent order will recur if Jacob and Kenneth Sutter comply with the provisions listed in Paragraph 1, Section V Order of this administrative consent order.

V. ORDER

THEREFORE, the DNR orders and Jacob, Tyler, and Kenneth Sutter agree to do the following:

1. Develop and submit a Standard Operating Procedure documenting the land application procedures, including equipment inspections, employee training, and notification procedures. The Standard Operating Procedure shall be submitted to DNR Field Office 5 within 30 days of the date the Director signs this administrative consent order and implemented immediately upon approval by DNR Field Office 5;

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2. Ensure that land application of manure from the facility is either conducted by a certified commercial manure applicator or that you are certified confinement manure applicators; and
3. Pay an administrative penalty in the amount of \$4,500.00 within 30 days of the date the Director signs this administrative consent 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. Iowa Code section 455B.146 authorizes the assessment of civil penalties of up to \$10,000.00 per day of violation for the air 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 administrative consent order with an administrative penalty of \$4,000.00. Jacob, Tyler, and Kenneth Sutter are jointly and severally liable for the payment of the administrative penalty. 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.” The manure release was accidental and the Sutters realized little to no economic benefit. However, Jacob, Tyler, and Kenneth Sutter gained an economic benefit of applying manure for several years without being properly certified. They avoided the costs associated with training and certification. Confinement site applicators are certified for a period of three years with a \$100.00 fee for the certification. Confinement site applicators are required to attend training and pay a \$25.00 education fee. The Sutters were uncertified for 5 years; therefore, they avoided the certification and education fees of \$250.00 each. Based on the above facts, the economic benefit the Sutters received was at least \$750.00 and that amount is assessed for this factor.

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

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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 release of manure from the Sutter facility ultimately resulted in the degradation of water quality. Manure applicators are required to obtain training and certifications to ensure they are properly trained. Applying manure without the proper training and certification increases the risk a manure related discharge during application. The manure applicator certification and manure containment requirements are integral parts of the animal feeding operation programs and violations of the regulations threaten the integrity of the animal feeding operation regulations. Based on the information above, \$2,000.00 is assessed for this factor.

Culpability – The Sutters have a duty to know the regulations and to be aware that its actions are subject to the regulations. The release was accidental and the Sutters took immediate steps to limit the impact of the release. The Sutters had been previously certified manure in the past and they remained uncertified for several years. Based on the information above, \$1,750.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

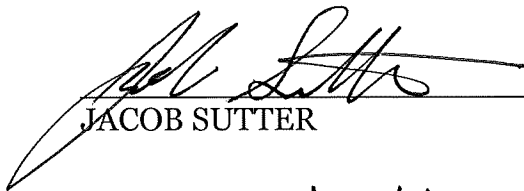
This administrative consent order is entered into knowingly and with the consent of Jacob, Tyler, and Kenneth Sutter. For that reason, the Sutters waive the right to appeal this administrative consent order or any part thereof.

VIII. NONCOMPLIANCE

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent 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.

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KAYLA LYON, DIRECTOR
Iowa Department of Natural Resources




JACOB SUTTER

Dated this 24 day of
February, 2023.



TYLER SUTTER

Dated this 24 day of
February, 2023.



KENNETH SUTTER

Dated this 24 day of
Feb., 2023.