

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

IN THE MATTER OF:

**ROGER KILBURG AND KILBURG
FARMS, INC.**
Jackson County, Iowa

ADMINISTRATIVE CONSENT ORDER
NO. 2009-AFO- **45**

TO: Roger Kilburg
Kilburg Farms, Inc.
10157 500th Avenue
Miles, Iowa 52064

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Roger Kilburg for the purpose of resolving issues pertaining to failure to retain manure, failure to notify of a manure release, and improper manure discharge from one of Mr. Kilburg's open feedlot facilities. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Tom McCarthy, Field Office 1
Iowa Department of Natural Resources
909 West Main Street
Manchester, Iowa 52057
Phone: 319/927-2640

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8563

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 to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 or Iowa Code Chapter 459A and the rules adopted or permits issued pursuant thereto; and Iowa

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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. Roger Kilburg owns and operates Kilburg Farms, Inc. which includes several feedlots in rural Jackson County, Iowa. Two of the feedlots are located in the NW1/4 of Section 31, Washington Township, Jackson County. One of the facilities has 180 head confinement cattle and 590 head open lot cattle (Facility A). Facility A has two earthen storage structures for manure (upper basin and lower basin). Another open lot is located over 1,250 feet northeast from Facility A. The DNR currently considers the two operations to be separate facilities. The open lot to the northeast has 750 head open lot cattle and is a registered DNR facility (Facility B).
2. On April 28, 2008, Wayne Hass, a neighbor to Facility A, notified DNR Field Office 1 of a manure release from Facility A to Mr. Hass's pond on April 26, 2008. Mr. Hass stated heavy rains had caused the upper basin at Facility A to flow into the lower basin. There had been a cut in the lower basin, from which manure flowed into Mr. Hass's pond. The basins drain to the south/southwest into a gully which then flows into Mr. Hass's pond. The pond then discharges from its west end into a gully and a small unnamed tributary of the Maquoketa River. The tributary flows west. DNR Field Office 1 contacted Mr. Kilburg regarding the release and he stated that the upper basin had lost approximately 50,000 gallons of wastes and that as soon as he noticed the discharge from the upper basin it was remedied. Mr. Kilburg stated that the lower basin walls had been built up as well and the discharge to the pond was stopped by 8:00 am on April 26, 2008.
3. On April 29, 2008, Tom McCarthy, DNR Field Office 1 senior environmental specialist, met with Mr. Hass at his pond. Mr. Hass indicated that he had counted several dead fish. Mr. McCarthy noted that the gully water below Mr. Kilburg's basins was clear and the field tests indicated an ammonia level of <1 ppm. Mr. McCarthy checked the emergency overflow at Mr. Hass's pond. The field tests indicated an ammonia level of >3 ppm, pH was 8.4 and the water temperature was 59° F. Laboratory results indicated that ammonia was 8.2 ppm and Chemical Oxygen Demand (COD) was 150 ppm. Mr. McCarthy noted discolored water and a manure odor at the culvert discharge from Mr. Hass's pond. Mr. McCarthy noted foam on the top of the water and the field tests indicated an ammonia level of >3 ppm.
4. Following the visit to Mr. Hass's pond, Mr. McCarthy spoke to Mr. Kilburg. Mr. McCarthy informed Mr. Kilburg that he must pump all the manure and storm water from both the upper and lower basins and properly land apply them in order to avoid further discharges. Mr. McCarthy collected laboratory samples from the lower basin. The laboratory results indicated that ammonia was 120 ppm and COD was 1,800 ppm.

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5. On April 30, 2008, Mr. McCarthy spoke to Mr. Kilburg on the telephone. Mr. Kilburg stated that approximately 20,000 gallons of manure had been pumped from the basins and land applied. He also stated that he had been in contact with a commercial pumper.

6. On May 5, 2008, Mr. McCarthy spoke to Mr. Hess on the telephone. Mr. Hess stated that there was still foam coming out the pond culvert outlet and that the pond continued to smell like manure.

7. On May 7, 2008, Mr. McCarthy visited Mr. Kilburg's facility. He noted that the lower basin was still full, but had about two feet of freeboard. The upper basin had been reworked and had about two feet of freeboard. Mr. McCarthy then went to the pond area. The water was clear in the culvert above Mr. Hess's pond and there was no ammonia detected and a small stream to the east was also running clear. Mr. McCarthy conducted field samples at the pond emergency overflow and the field samples indicated ammonia levels of approximately 2.0 ppm, pH of 10.0 and water temperature of 66° F. The laboratory samples indicated that ammonia was 1.0 ppm and COD was 96 ppm. Mr. McCarthy noted a dead catfish in the pond. Mr. McCarthy also noted dark foamy water with a strong manure odor flowing from the culvert overflow pipe. Mr. McCarthy noted the water flowing out of the drain at the bottom of the pond had a strong manure odor and the field tests indicated ammonia levels greater than 3 ppm. The laboratory samples indicated that ammonia was 8.8 ppm and COD was 140 ppm. The discharge from Mr. Hess's pond to a small stream was turbid and field tests indicated ammonia levels between 2-3 ppm, a pH of 8.8, and a temperature of 57°F.

8. On May 9, 2008, Mr. McCarthy spoke to Mr. Kilburg on the telephone. Mr. Kilburg stated that he had pumped 200,000 gallons of manure from the basins that day.

9. On May 26, 2008, Mr. McCarthy received a telephone call from Mr. Hess who stated that black foamy water was coming into his pond. Once Mr. McCarthy arrived at Mr. Kilburg's facility he noted that the lower basin was full. The ditch from Mr. Kilburg's facility contained turbid water with an ammonia level greater than 3 ppm. Mr. McCarthy noted that the discharge from Mr. Hess's pond to a small stream was turbid. The field tests indicated an ammonia level between 2-3 ppm, a pH of 7.9, and a temperature of 69°F. The laboratory results indicated that ammonia was 1.2 ppm and COD was 66 ppm. The water ten feet below the pond discharge into the small stream was turbid and field tests indicated an ammonia level of 1.0 ppm, a pH of 8.0, and a temperature of 69°F. The laboratory samples indicated that ammonia was 0.66 ppm and COD was 66 ppm. Mr. McCarthy also noted that the water ten feet above the pond discharge was turbid and field tests indicated an ammonia level between 2-3 ppm, a pH of 8.0, and a temperature of 68°F. The laboratory samples indicated that ammonia was 0.28 ppm and COD was 53 ppm. Mr. McCarthy spoke to Mr. Kilburg concerning the discharge from the facility. Mr. Kilburg stated that a commercial pumper had pumped out 600,000 – 800,000 gallons of manure from the upper basin and had applied it to land adjacent to the basins. Mr. McCarthy noted seepage coming from the lower

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basin berm and the farm field east of the basin where the manure had been applied. Field tests of both areas indicated ammonia levels greater than 3 ppm. The laboratory analysis of the field seepage indicated an ammonia level of 44 ppm.

10. On May 25, 2008, Mr. Kilburg spoke to Mr. McCarthy on the telephone and informed him that 100,000 gallons had been removed from the lower basin. Mr. Kilburg also stated that he had spoke to NRCS about the use of hoop buildings at the facility. Mr. Kilburg stated that he would either cover the feedlots or considering abandoning the feedlots.

11. On June 5, 2008, Mr. Kilburg was issued a Notice of Violation for the environmental violations discovered during DNR Field Office 1's investigation. The Notice of Violation letter included the following violations: failure to properly retain all manure, failure to report a release, general water quality violations, and a prohibited discharge. The letter informed Mr. Kilburg that the matter was being referred for further enforcement. The letter required Mr. Kilburg to do the following: immediately cease the discharges; maintain at least 2 feet of freeboard in the two basins; and do one of the three options concerning the operation of the feedlot: continue to operate the facility as is and submit a NPDES permit application; construct covered open lots with dry manure storage; or abandon the facility.

12. On November 18, 2008, Mr. Kilburg informed DNR Field Office 1 that he intended to begin to cover the foed lots at Facility A. This would reduce the potential for runoff. Mr. Kilburg stated that he would only use dry manure storage. Since this time, Mr. Kilburg has submitted the cost estimates for the project and has informed DNR Field Office 1 that the project would start Spring 2009.

13. Mr. Kilburg has received prior Notice of Violations for his feedlots for discharge violations. On June 5, 2008, Mr. Kilburg was issued a Notice of Violation letter for this feedlot. The violations included the same violations as those cited in this administrative consent order. The letter required Mr. Kilburg to submit a written plan of action. The plan was never submitted. On July 18, 2006, Mr. Kilburg was issued a Notice of Violation letter for this feedlot. The violations included the same violations as those cited in this administrative consent order. The violations were never sufficiently corrected. On July 20, 2000, Mr. Kilburg was issued a Notice of Violation letter for another one of his feedlots. The violations included failure to meet the minimum manure control and water quality violations. On August 18, 1999, Mr. Kilburg was issued a Notice of Violation letter for another one of his feedlots. The violations included failure to meet the minimum manure control and water quality violations.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into waters of the State, except for adequately treated pollutants discharged pursuant to a permit from the DNR. Manure from Mr. Kilburg's facility was discharged into

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the pond and stream and Mr. Kilburg's facility does not have a permit to do so. The above-mentioned facts indicate a violation of this provision.

2. Iowa Code section 459A.104 requires the Environmental Protection Commission (Commission) to adopt rules related to the construction or operation of open feedlot operations. The Commission has done so at 567 IAC chapter 65.

3. Iowa Code section 459A.401(1) and 567 IAC 65.101(1) require the minimum level of manure control for any open feedlot shall be the removal of settleable solids from the manure prior to discharge into a water of the state. Mr. Kilburg's facility failed to properly retain the manure. The above-mentioned facts indicate a violation of this provision.

4. 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 watering; or are toxic to animal or plant life. DNR Field Office 1 observed turbid water and laboratory samples indicated numerous water quality violations caused by the discharge of manure from Mr. Kilburg's facility. The above-facts disclose a violation of one or more of these criteria.

5. 567 IAC 65.101(9) provides that a release, as defined in 567 IAC 65.100, shall be reported to DNR as soon as possible but not later than six hours after the onset or discovery of the release. Mr. Kilburg was aware of the manure discharge, but failed to notify DNR Field Office 1. The above-mentioned facts indicate a violation of this provision.

V. ORDER

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

1. Mr. Kilburg shall immediately cease any discharges from the basins;
2. Mr. Kilburg shall maintain at least two feet of freeboard at all times in each of the basins;
3. Mr. Kilburg shall either:
 - a. Submit a written plan to DNR Field Office 1 within 30 days of the date the Director signs this administrative consent order describing his plan to cover the feedlots at Facility A and use dry manure storage. In addition to the plan, she shall submit, within 30 days of the date the Director signs this administrative consent order, a time line for the completion of the covering of the feedlots at Facility A and cleaning out and closing of the basins; or

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- b. If Mr. Kilburg chooses not to cover the feedlots at Facility A and utilize dry manure storage, he shall abandon the feedlots and immediately comply with the closure rules within 90 days of the date the Director signs this administrative consent order.
4. Mr. Kilburg shall pay a penalty of \$7,000.00 in accordance with the following payment plan. If any of the payments are not made in accordance with the plan, the remaining portion of the penalty shall be due immediately.
- | | |
|---------------------------------|-----------------------------------|
| \$307.00 due December 1, 2009; | \$291.00 due December 1, 2010; |
| \$291.00 due January 1, 2010; | \$291.00 due January 1, 2011; |
| \$291.00 due February 1, 2010; | \$291.00 due February 1, 2011; |
| \$291.00 due March 1, 2010; | \$291.00 due March 1, 2011; |
| \$291.00 due April 1, 2010; | \$291.00 due April 1, 2011; |
| \$291.00 due May 1, 2010; | \$291.00 due May 1, 2011; |
| \$291.00 due June 1, 2010; | \$291.00 due June 1, 2011; |
| \$291.00 due July 1, 2010; | \$291.00 due July 1, 2011; |
| \$291.00 due August 1, 2010; | \$291.00 due August 1, 2011; |
| \$291.00 due September 1, 2010; | \$291.00 due September 1, 2011; |
| \$291.00 due October 1, 2010; | \$291.00 due October 1, 2011; and |
| \$291.00 due November 1, 2010; | \$291.00 due November 1, 2011 |

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 administrative consent order with an administrative penalty of \$7,000.00. The administrative penalty is determined as follows:

Economic Benefit - Mr. Kilburg has been able save time and money for several years by not installing sound manure control structures. He has avoided engineering fees and actual construction fees. Additionally, he has gained an economic benefit by failing to remove the manure which has led to manure discharges. \$2,000.00 is being 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 violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties

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authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Manure from the Kilburg facility reached a pond and small stream resulting in water quality violations. Additionally, the manure discharge has caused a fish kill in the pond. Mr. Kilburg's failure to report the manure releases, his failure to properly contain the manure, and the water quality violations threaten the integrity of the water quality program. Therefore, \$3,000.00 is assessed for this factor.

Culpability – Mr. Kilburg 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. Mr. Kilburg is aware of the DNR regulations concerning this facility and has been cited for several violations in previous Notice of Violation letters. Therefore, \$2,000.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Roger Kilburg. For that reason Roger Kilburg waives the right to appeal this administrative consent order or any part thereof.

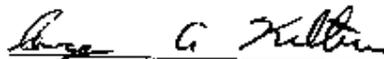
VIII. NONCOMPLIANCE

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.



RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 5 day of
Nov, 2009.



ROGER KILBURG AND KILBURG FARMS, INC.

Dated this 28 day of
Oct, 2009.

Kelli Book; Tom McCarthy (DNR Field Office 1); EPA; VIII.D.1.a, VIII.D.2.d, and VIII.D.3.a