

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

<p>IN THE MATTER OF:</p> <p>HY-VEE, INC.</p> <p>Ankeny, Iowa</p>	<p>ADMINISTRATIVE CONSENT ORDER</p> <p>NO. [REDACTED]- 2021-WW-04</p>
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TO: Hy-Vee, Inc.
c/o Mic Jurgens
5820 Westown Pkwy
West Des Moines, Iowa 50266-8223

I. SUMMARY

This Administrative Consent Order (Order) is entered into between the Iowa Department of Natural Resources (DNR) and Hy-Vee Inc. (Hy-Vee) for the purpose of resolving water quality violations and a fish kill resulting from a milk discharge from the Hy-Vee Ankeny #1 Food Store. 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:

Janet Gastineau, Field Office #5
Iowa Department of Natural Resources
509 East 9th Street
Des Moines, Iowa 50319-0034
Phone: 515/250-4291

Relating to legal requirements:

Rachel Zander, Attorney for the DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034
Phone: 515/305-0324

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 section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess

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administrative penalties; and Iowa Code section 481A.151 authorizes the assessment and recovery of damages to natural resources.

III. STATEMENT OF FACTS

1. Hy-Vee owns and operates a food store identified as Ankeny #1 Hy-Vee Food Store (Ankeny #1 Store), located at 410 North Ankeny Boulevard, Ankeny, Iowa 50023. The Ankeny #1 Store stocks and sells milk, stored on-site in refrigerators.
2. On August 10, 2020, Ankeny experienced damaging winds that resulted in residential and commercial power loss. Ankeny #1 Store experienced prolonged power outage and the delay in obtaining auxiliary power and refrigerated trailers resulted in spoilage of the refrigerated products within the grocery store. On August 11 and 12, 2020, Hy-Vee employees disposed of approximately 800 gallons of milk through the storm sewer on the southwest corner of the Ankeny #1 Store. Hy-Vee does not have a National Pollutant Discharge Elimination System (NPDES) permit for Ankeny #1 Store and is not authorized for any discharge to a surface water.
3. At or about 4:20 p.m. on August 11, 2020, DNR Field Office 5 received a telephone call from an Ankeny resident who lives near Tributary A to Fourmile Creek to report that the stream near his home appeared to be milky white, after appearing clear the day before. DNR Field Office 5 Environmental Specialist Senior Janet Gastineau contacted Jared Bright of the City of Ankeny Stormwater Management. Mr. Bright agreed to look at Tributary A that evening and report conditions the following morning.
4. At or about 7:00 a.m. on August 12, 2020, DNR Field Office 6 Environmental Specialist Mark Heiderscheid received a call through the Environmental Emergency Reporting Hotline from an Ankeny resident who lives near Tributary A to report that the stream was white and that he observed fish coming to the surface for oxygen.
5. At or about 9:00 a.m. Mr. Bright contacted Ms. Gastineau to request assistance. Ms. Gastineau, along with Mr. Bright and Becky Ford, also with the City of Ankeny, met at the crossing of the stream and NE Trilein at approximately 9:40 a.m. By that time, Ankeny public works staff had removed storm sewer manhole covers and traced the discharge to the Ankeny #1 Store. City of Ankeny staff observed Hy-Vee staff disposing of milk by dumping it down a storm sewer.
6. Ms. Gastineau, Mr. Bright, and Ms. Ford observed Tributary A from the confluence of the storm sewer outlet near the culvert crossing at NE Trilein to the downstream extent of the milky water in Tributary A. Small bullheads were seen at the surface of the water to breath air at the same location reported through the Emergency Reporting Hotline earlier that morning.
7. At approximately 10:22 a.m. Ms. Gastineau contacted Jen Kopriva, Store Manager of the Ankeny #1 Store. Ms. Kopriva reported 800 gallons of milk was disposed of through the storm sewer, mostly on August 11, 2020, with a smaller amount the morning of August 12, 2020. Ms. Gastineau instructed Ms. Kopriva to contact an environmental cleanup contractor to remediate

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stream conditions, and Ms. Gastineau provided a list of contractors and indicated which ones are commonly used in central Iowa.

8. Later that day, August 12, 2020, Seneca Companies (Seneca) contacted Ms. Gastineau to discuss location, conditions, and expectations for removal of milk product from Tributary A. Seneca was onsite by 3:31 p.m. at the downstream-most reach of the stream where milk was observed. Seneca stationed the truck on the west side of NE Delaware Avenue overnight and removed seven loads of water-milk mixture from Tributary A. Each truck load held between 2,000 and 2,500 gallons, for a total of 14,000 to 17,500 gallons of water-milk mixture removed from Tributary A by August 13, 2020.

9. On August 13, 2020, Seneca set up a trash pump to recirculate water from downstream of the recovery point to the pool used for skimming water. Seneca stationed a vac truck on the east side of NE Delaware Avenue. Seneca received approval from Des Moines Waste Reclamation Authority to gravity feed the contents of the vac truck to the sanitary sewer using a sewer manway located on the west side of NE Delaware. Prior to receiving this approval, Seneca stored the water in tanks at their headquarters. Seneca also used an air compressor to aerate Tributary A on the edge of the recovery area.

10. Mid-day August 13, 2020, Ms. Gastineau observed dead fish at multiple locations along the impacted stream. After Ms. Gastineau reported the fish kill to DNR Field Office 5 supervisor Ted Peterson, Mr. Peterson contacted DNR Fisheries Management Office at Boone, Iowa.

11. On August 13, 2020, DNR's Fisheries Bureau personnel conducted its fish kill assessment of the impacted areas of Tributary A to Fourmile Creek within the City of Ankeny. The fish kill investigation was led by Andy Otting, Tyler Stubbs, and Jordan Vetter. Fisheries personnel determined that the fish kill extended 3,489 feet in Tributary A between the Interstate 35 and NE Trilein culverts. The Fisheries Bureau personnel performed a complete count in accordance with the methods outlined in American Fisheries Society, Special Publication 30.

12. The fish kill assessment determined that 2,056 fish were killed, valued at \$18,241.36. Investigative costs associated with the fish kill totaled \$688.62. The total fish value and investigative costs totaled \$18,929.98.

13. Between 4:09 p.m. and 6:30 p.m. on August 13, 2020, Ms. Gastineau measured dissolved oxygen and pH in Tributary A and Fourmile Creek. Field measurements confirmed low dissolved oxygen levels and reduced pH levels in the effected reach of Tributary A.

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Location	Dissolved Oxygen (mg/L)	pH
Upstream behind Stoneridge Court (upstream of the storm sewer outlet-Tributary A confluence)	11	8.8
Upstream side of culvert at NE Trilein Drive (downstream of storm sewer outlet-Tributary A confluence)	5	7.4
In stream behind 726 NE Brook Haven Drive	1.5	6.9
Sock dam on west side of NE Delaware Avenue (original location of Seneca recovery)	<1	6.2
East side of NE Delaware Avenue (downstream of Seneca recovery area)	1.5	6.0
Fourmile Creek at Heritage Park (downstream of where Tributary A enters Fourmile Creek)	7	7.1

14. Seneca's recovery efforts continued overnight from August 13 to August 14, 2020.

15. Ms. Gastineau visited Fourmile Creek and Tributary A beginning at approximately 8:30 a.m. on August 14, 2020. Ms. Gastineau did not observe any impacts in Fourmile Creek at the crossings at either SE Fourmile Drive or Enterprise Road, which are both downstream of the mouth of Tributary A. Ms. Gastineau observed the stretch of Tributary A upstream of NE Trilein Drive culvert downstream to the Interstate 35 culvert still appeared to be milky. Ms. Gastineau discussed continuing remediation and additional efforts with Seneca. Later that day, Seneca reported taking four more vac truck loads from different impacted points along Tributary A.

16. On August 15, 2020, Seneca checked Tributary A and an approximately three-mile stretch of Fourmile Creek from Heritage Park to NE Berwick Drive. Seneca reported that it appeared overnight rains removed residuals from Tributary A and that the stream looked good. Seneca also reported that Fourmile Creek had increased flow and no visible stress.

17. At approximately 12:20 p.m. on August 17, 2020, Ms. Gastineau visited Tributary at NE Trilein Drive. Ms. Gastineau took field measurements for dissolved oxygen at four locations within Tributary A and observed no visible impacts to Fourmile Creek at the crossing along SE Fourmile Drive north of Oralabor Road. Ms. Gastineau did not observe any additional dead or struggling fish in Fourmile Creek or Tributary A.

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Location	Dissolved Oxygen (mg/L)
Downstream of storm sewer outlet between NE Trilein Drive and NE Cornerstone Court	7
Upstream and downstream sides of the twin culverts at NE Trilein Drive (downstream of storm sewer outlet-Tributary A confluence)	4
Sock dam on west side of NE Delaware Avenue (original location of Seneca recovery)	8
East side of NE Delaware Avenue (downstream of Seneca recovery area)	9

Ms. Gastineau summarized these observations in an email to Ms. Kopriva, Ankeny stormwater management staff, Seneca, DNR Fisheries staff, and Mr. Peterson.

18. On August 26, 2020, DNR issued a Notice of Violation letter to Hy-Vee for the prohibited discharge and violations of general water quality standards. The letter informed Hy-Vee that the matter had been referred to the Iowa DNR Legal Services Bureau for further enforcement.

19. On September 3, 2020, Seneca transmitted the DNR Spill Report (Form 542-0029) to Ms. Gastineau and DNR Emergency Response authorities via email.

20. On September 8, 2020, Ms. Kopriva sent an email to Ms. Gastineau and stated that Hy-Vee is taking steps to make sure a release would not be repeated and that Hy-Vee was planning on training staff at their Ankeny #1 Store and a Des Moines store location.

IV. CONCLUSIONS OF LAW

DNR and Hy-Vee agree that the following Conclusions of Law are applicable to this matter:

1. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into the water of the state without an applicable permit. During the August 2020 Field Office 5 investigation it was determined that employees at the Ankeny #1 Store disposed of milk into a storm sewer, discharging the milk to Tributary A and causing violations of the water quality standards. Hy-Vee does not hold an NPDES permit for discharges from the Ankeny #1 Store to a surface water. The above-mentioned facts indicate violations of these provisions.

5. 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; or are toxic to animal or plant life. A documented fish kill occurred as a result of the release from the Ankeny #1 Store. The above-mentioned facts indicate violations of the general water quality criteria.

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6. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of the state in violation of the state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution as well as for the administrative costs for investigating the incident. The Natural Resource Commission has adopted 571 IAC 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the milk discharge from the Ankeny #1 Store.

7. DNR has determined that there is a minimal likelihood that the violations identified in this administrative consent order will recur if Hy-Vee complies with the provisions listed in Paragraphs 1 through 6, Section V of this administrative consent order.

V. ORDER

THEREFORE, the DNR orders and Hy-Vee agree to do the following:

1. Hy-Vee and/or its employees shall comply with all laws and regulations applicable to discharging pollutants into a water of the State.
2. Within 30 days of the date the Director signs this Order, Hy-Vee shall apply for Iowa DNR General Permit No. 1 for the Ankeny #1 Store, which includes preparation of a Stormwater Pollution Prevention Plan (PPP) in advance of submitting the Notice of Intent for coverage. Full implementation of the PPP will be executed concurrently with the operation of this retail grocery store.
3. By January 1, 2021, Hy-Vee shall conduct and document employee training for the Ankeny #1 Store in accordance with Part III of the Iowa DNR NPDES General Permit No. 1.
4. By April 1, 2021, Hy-Vee shall conduct a risk assessment of store operations at all Hy-Vee stores and develop emergency response plans and document the staff who are familiar with its implementation.
5. Hy-Vee shall pay fish restitution and investigative costs in an amount of \$18,929.98 within 30 days of the date the Director signs this Order.
6. Hy-Vee shall pay an administrative penalty in the amount of \$5,200 within 30 days of 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 Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00 which may be

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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.

3. Because the DNR determines this matter is best handled administratively, the DNR must follow the limits of Iowa Code section 455B.109 and 567 IAC chapter 10. Pursuant to those limits, a penalty of \$5,200 is assessed. 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." Hy-Vee gained an economic benefit by failing to properly dispose of the discharged milk; \$200 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 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. DNR Field Office 5 documented a discharge of milk that led to documented water quality violations and a fish kill. These violations threaten the integrity of the regulatory programs because compliance with water pollutant discharge prohibitions is required of all persons in this state. Therefore, \$3,000 is assessed for this factor.

Culpability - Hy-Vee has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that its conduct is subject to DNR's rules. The discharge was the result of failure to conform to water pollutant discharge limitations. Once the effects of the discharge were identified, Hy-Vee began remediation of Tributary A. Accordingly, \$2,000 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.175(1) and 561 IAC 7.4(1), as adopted by reference by 567 IAC 7.1, authorize a written notice of appeal to the Commission. This Order is entered into knowingly and with the consent of Hy-Vee. For that reason, Hy-Vee waives the right to appeal this Order or any part thereof.

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 administrative penalties pursuant to an administrative order or referral to the

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Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.

Kayla
Lyon

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Kayla Lyon
Date: 2021.02.19
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KAYLA LYON, DIRECTOR

Dated this 19th day of
February, 2020



MIC JURGENS
SENIOR VICE PRESIDENT, SECRETARY,
AND CHIEF COUNSEL
HY-VEE, INC.

Dated this 16th day of
February, 2020

Rachel Zander, DNR Field Office 5, EPA