

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

IN THE MATTER OF: City of Ely Linn County, IA	ADMINISTRATIVE CONSENT ORDER NO. 2023-WW-28
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TO Honorable Mayor & City Council
Eldy Miller
1570 Rowley Street
Ely, IA 52227

I. SUMMARY

This administrative consent order (order) is entered into by the City of Ely (City) and the Iowa Department of Natural Resources (Department). The parties hereby agree to the issuance of this order due to violations of the City’s stormwater National Pollutant Discharge Elimination System (NPDES) permit at its Hoosier Creek Trunk Sewer Construction Site. The City agrees to pay an administrative penalty of \$4,000.00. In the interest of avoiding litigation, the parties have agreed to resolve the violations alleged herein through entry of this order.

Any questions or responses regarding this order should be directed to:

Relating to technical requirements:

Chris Gelner
IDNR Field Office No. 1
Iowa Department of Natural Resources
1101 Commercial Ct. Ste. 10
Manchester, IA 52057
563-920-1738

Relating to legal requirements:

Carrie Schoenebaum, Attorney
Iowa Department of Natural Resources

502 East 9th
Des Moines, Iowa 50319-
Phone: 515-444-8165

Payment of penalty to:

Iowa Department of Natural Resources
502 East 9th Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This order is issued pursuant to 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 I and the rules promulgated or permits issued pursuant

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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. On December 13, 2021, the City was issued a notice of coverage under NPDES General Permit No. 2 No. 40427-40046 for storm water discharge associated with construction activity at the location of the Hoosier Creek Trunk Sewer Construction Site (site). This site is located at Section 25, Township 82 Range 7W, Linn County Iowa. Storm water from this property flows to an unnamed tributary of Hoosier Creek.

2. On January 6, 2022, the Department received a complaint alleging storm water violations at the site.

3. Following receipt of the complaint, the Department went to the site to investigate. Once on site the Department observed and/or documented the following:

- (1) In two locations silt fences were covered with soil;
- (2) Contractors had not signed the Storm Water Pollution Prevention Plan (SWPPP); and
- (3) Storm water site inspections were not being conducted, thus, there were no records of inspections.

4. On January 13, 2022, the Department sent the City a letter of noncompliance for the above-discussed violations. Included in this letter was a summary of the violations, the investigation report, and recommended corrective actions.

5. On February 10, 2023, the Department received a complaint alleging a lack of storm water controls at the site. The complainant alleged that sediment may be discharging to an unnamed tributary of Hoosier Creek.

6. On February 14, 2023, the Department went to the site to investigate. Once on site the Department observed and/or documented the following:

- (1) No sediment and erosion controls were in place; and
- (2) Sediment was observed discharging to an unnamed tributary of Hoosier Creek.

Following the onsite inspection, the Department reviewed the weekly inspections from November 7, 2022 through February 13, 2023. These inspections did not document the deficiencies on the site. Specifically, the inspections failed to identify that sediment had been discharged and the lack of sediment and erosion controls.

7. On February 17, 2023, a Notice of Violation (NOV) was sent to the City for the above-discussed violations. Included with this NOV was a summary of the investigation, recommended corrective action, and a summary of the law.

IV. CONCLUSIONS OF LAW

The parties hereby agree to the following conclusions of law:

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1. Iowa Code section 455B.186 prohibits the discharge of pollutants into a water of the state, except for adequately treated pollutants discharged pursuant to a permit issued by the Department. The above stated facts demonstrate non-compliance with this provision of law.
2. Iowa Code sections 455B.103(A) and 455B.197 authorize the issuance of permits for storm water discharges. The Environmental Protection Commission (Commission) has adopted federal regulations pertaining to the issuance of NPDES permits for storm water discharge at 567 IAC 60.2 and in 567 IAC chapter 64. Pursuant to rule 60.2, "Storm water discharge associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant." Number 10 under this definition includes "construction activity," which includes clearing, grading, and excavation activities. Excluded are operations that result in the disturbance of less than one acre of total land area that are not part of a larger common plan of development or sale.
3. 567 IAC 61.3(2)"c" and "e" state:
 - c. Such waters shall be free from materials attributable to wastewater discharges or agricultural practices producing objectional color, odor or other aesthetically objectional conditions. [and]
 - e. Such waters shall be free from substances, attributable to wastewater discharges or agricultural practices, in quantities which would produce undesirable or nuisance aquatic life.

The above stated facts demonstrate noncompliance with these provisions of law.

4. Subrule 567 IAC 64.3(1) provides that no person shall operate any wastewater disposal system or part thereof without, or contrary to any condition of, an operation permit issued by the Director. The above stated facts demonstrate noncompliance with this provision.
5. NPDES Part III. C (1) of NPDES General Permit No. 2 requires that erosion and sediment controls be installed and maintained. The above stated facts demonstrate noncompliance with this provision of law.
6. NPDES Part IV. D (7) of NPDES General Permit No. 2 requires "[a]ll contractors and subcontractors identified in the plan must sign a copy of the certification statement[.]" The above stated facts demonstrate noncompliance with this provision of law.
7. Part VI. A of NPDES General Permit No. 2 requires that the permittee "comply with all conditions of th[e] permit." The above stated facts demonstrate noncompliance with this provision of law.
8. Part VI. D of NPDES General Permit No. 2 requires that the permittee "take all reasonable steps to minimize or prevent any discharge in violation of this permit." The above stated facts demonstrate noncompliance with this provision of law.

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V. ORDER

THEREFORE, the Department orders, and the City consents to do, the following:

1. Comply with all conditions of City's NPDES permits, which includes the SWPPP;
2. Cease all illegal discharges to waters of the state; and
3. Pay an administrative penalty of \$4,000.00 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 the 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 Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative order with an administrative penalty. The administrative penalty is determined as follows:

a. **Economic Benefit.** 567 IAC chapter 10 requires that the Department 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." An economic benefit was obtained by avoiding the cost of installing and maintaining adequate storm water erosion and sediment control measures throughout the construction site. This avoided several thousand dollars in materials and labor expenses. Thus, it is reasonable to estimate that \$1,000.00 was saved. Therefore, \$1,000.00 is assessed for this factor.

b. **Gravity of the Violation.** 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 the type of violation. As indicated above, substantial civil penalties are authorized by statute. Failure to properly manage storm water runoff from construction sites degrades surface water quality and deposits excess sediment in water channels. Sedimentation of Iowa's waterways is a serious problem, and regulatory agencies have recognized that uncontrolled runoff is a significant contributor to these problems. Degraded water quality harms aquatic life, prevents the attainment of state water quality goals, and causes a decline in the quality of life generally. The erosion and sediment controls contained in the City's NPDES permits protect Iowa's waterways from sedimentation. Such noncompliance thwarts the integrity of the NPDES permit and water quality programs. Therefore, the amount of \$2,000.00 is assessed for this factor.

c. **Culpability.** The City has an obligation to be aware of the applicable regulations and comply with those regulations. Therefore, the amount of \$1,000.00 is assessed for this factor.

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VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.175(1) and 561 IAC 7.4(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Commission. This order is entered into knowingly by and with the consent of the City. By signing this order, all rights to appeal this order are waived by the City.

VIII. NONCOMPLIANCE

Failure to comply with this order may result in the imposition of further administrative penalties or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section V. of this order constitutes full satisfaction of all requirements pertaining to the violations described in this order.

Eddy Miller
On behalf of, the City of Ely.

Dated this 6th day of
December, 2023

Kayla Lyon, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

The City of Ely (Copy of Order to Courtney Cswercko), FO 1, Carrie Schoenebaum- Legal Services Bureau, U.S. E.P.A, I.C.7.b.