

1 **IOWA ILLICIT DISCHARGE MODEL ORDINANCE 6/6/05**

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4 ORDINANCE NO. \_\_\_\_\_

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6 ORDINANCE AMENDING THE CODE OF ORDINANCES, CITY<sup>1</sup> OF \_\_\_\_\_  
7 \_\_\_\_\_, BY ADDING CHAPTER \_\_\_\_\_,  
8 "ILLICIT DISCHARGE TO STORM SEWER SYSTEM"

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10 Section 1. THE CODE OF ORDINANCES, CITY OF \_\_\_\_\_  
11 \_\_\_\_\_, is hereby amended to add CHAPTER \_\_\_\_\_ "ILLICIT  
12 DISCHARGE TO STORM SEWER SYSTEM," in the form attached hereto.

13  
14 Section 2. Repealer Clause. All ordinances or parts of ordinances in conflict herewith are  
15 hereby repealed.

16  
17 Section 3. Severability Clause. If any section, provision or part of this ordinance shall be  
18 adjudged invalid or unconstitutional, such adjudication shall not affect the validity of the  
19 ordinance as a whole or any section, provision or part thereof not adjudged invalid or  
20 unconstitutional.

21  
22 Section 4. Effective Date. This ordinance shall be effective from and after the final passage,  
23 approval and publication as provided by law.

24  
25 PASSED AND APPROVED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

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29 \_\_\_\_\_  
30 Mayor

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33 (SEAL)

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35 ATTEST:

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39 \_\_\_\_\_  
40 City Clerk

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44 APPROVED AS TO FORM:

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<sup>1</sup> IMPORTANT NOTE: For drafting purposes, this ordinance has been prepared for adoption by a city; however, with appropriate modifications it may serve as a model for other governmental subdivisions as well.

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\_\_\_\_\_  
City Attorney<sup>2</sup>

I, \_\_\_\_\_, City Clerk of the City of \_\_\_\_\_  
\_\_\_\_\_, Iowa, do hereby certify that the foregoing ORDINANCE  
was passed and approved by the City Council of the City of \_\_\_\_\_  
Iowa, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and was  
published in the \_\_\_\_\_, a newspaper of general  
circulation in the said City of \_\_\_\_\_, on the \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
<sup>2</sup> This model ordinance is furnished as a drafting guide for attorneys representing governmental subdivisions in Iowa that are subject to NPDES Permit Program requirements. CAVEAT: THIS MODEL ORDINANCE SHOULD NOT BE ADOPTED WITHOUT CONFIRMING INDEPENDENT LEGAL RESEARCH BY AN ATTORNEY LICENSED TO PRACTICE LAW IN IOWA. LOCAL CIRCUMSTANCES WILL VARY SIGNIFICANTLY FROM JURISDICTION TO JURISDICTION. CONSIDERATION OF SUCH AN ORDINANCE CALLS FOR CAREFUL ANALYSIS AND DETERMINATION OF A NUMBER OF CRITICAL POLICY ISSUES BY THE GOVERNING BODY OF THE JURISDICTION.

73 CHAPTER \_\_\_\_\_, ILLICIT DISCHARGE TO STORM SEWER SYSTEM  
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77 SECTION 1. FINDINGS:

- 78 1.1. The U.S.EPA’s National Pollutant Discharge Elimination System  
79 (“NPDES”) permit program (Program) administered by the Iowa  
80 Department of Natural Resources (“IDNR”) requires that cities meeting  
81 certain demographic and environmental impact criteria obtain from the  
82 IDNR an NPDES permit for the discharge of storm water from a  
83 Municipal Separate Storm Sewer System (MS4) (MS4 Permit).<sup>3</sup> The City  
84 of \_\_\_\_\_ (City) is subject to the Program and is  
85 required to obtain, and has obtained, an MS4 Permit; the City’s MS4  
86 Permit is on file at the office of the city clerk and is available for public  
87 inspection during regular office hours.
- 88 1.2. As a condition of the City’s MS4 Permit, the City is obliged to adopt and  
89 enforce an ILLICIT DISCHARGE TO STORM SEWER SYSTEM  
90 ordinance.
- 91 1.3. No state or federal funds have been made available to assist the City in  
92 administering and enforcing the Program. Accordingly, the City shall fund  
93 its operations under this ordinance entirely by charges imposed on the  
94 owners of properties which are made subject to the Program by virtue of  
95 state and federal law, and/or other sources of funding established by a  
96 separate ordinance.<sup>4</sup>
- 97 1.4. Terms used in this ordinance shall have the meanings specified in the  
98 Program.  
99

100 SECTION 2. ILLICIT DISCHARGES PROHIBITED

- 101 2.1 For purposes of this ordinance, a “responsible party” is one or more  
102 persons that control or are in possession of or own property. Responsible  
103 parties shall be jointly and severally responsible for compliance with this  
104 ordinance and jointly and severally liable for any illicit discharge from the  
105 property controlled, possessed or owned. For purposes of this ordinance,  
106 “property” includes but is not limited to real estate, fixtures, facilities and  
107 premises of any kind located upon, under or above the real estate.
- 108 2.2 Nothing in this ordinance shall be deemed to relieve a responsible party  
109 subject to an IDNR-issued industrial discharge permit or any other federal,  
110 state or City permit, statute, ordinance or rule from any obligation  
111 imposed by such permit, statute, ordinance or rule if any such obligation is  
112 greater than any obligation imposed by this ordinance.

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<sup>3</sup> A list of cities and entities subject to the Program as of the date of preparation of this model ordinance can be found at this website: <http://www.iowadnr.com/water/stormwater/ms4.html>. Copies of all the forms associated with the NPDES Program can be found at this website: <http://www.iowadnr.com/water/stormwater/forms.html>.

<sup>4</sup> A city may choose to create a stormwater utility in conjunction with a stormwater fee ordinance as a means of providing a source of funding in addition to or in lieu of the administrative cost recovery mechanism suggested in ¶5.9 below.

- 113 2.3 Any discharge into the City's storm sewer system prohibited by the City's  
114 MS4 Permit, the terms of which are hereby incorporated by reference, shall  
115 be deemed an "illicit discharge" in violation of this ordinance.  
116 2.4 Sediment pollution originating from excessive erosion rates on a  
117 construction site not otherwise subject to the City's COSESCO ordinance or  
118 sediment pollution entering a municipal storm sewer that causes a water  
119 quality violation as determined by the DNR shall be deemed an illicit  
120 discharge in violation of this ordinance.<sup>5</sup>  
121

122 SECTION 3. ILLICIT CONNECTIONS PROHIBITED

- 123 3.1 For purposes of this ordinance, an "illicit connection" to the City's storm  
124 sewer system is any physical connection or other topographical or other  
125 condition, natural or artificial, which is not specifically authorized by  
126 ordinance or written rule of the City, which causes or facilitates, directly or  
127 indirectly, an illicit discharge.  
128 3.2 The construction, use, maintenance or continued existence of any illicit  
129 connection shall constitute a violation of this ordinance.  
130 3.3 This prohibition expressly includes, without limitation, illicit connections  
131 made in the past, regardless of whether the connection was permissible  
132 under law or practices applicable or prevailing at the time of connection.  
133

134 SECTION 4. INDUSTRIAL DISCHARGES

- 135 4.1 Any responsible party subject an industrial NPDES discharge permit issued  
136 by the IDNR shall comply with all provisions of such permit.  
137 4.2 Proof of compliance with said permit may be required in a form acceptable  
138 to the enforcement officer prior to discharges to the storm sewer system  
139 authorized by said permit.  
140

141 SECTION 5. ILLICIT DISCHARGE DETECTION AND REPORTING; COST RECOVERY

- 142 5.1 All detection activities permitted under this ordinance shall be conducted by  
143 [the city engineer][the city public works director][the community  
144 development director][the building inspector][a subcontractor credentialed  
145 in a manner satisfactory to the city], or his or her designee, hereinbefore and  
146 after referred to as the "enforcement officer."  
147 5.2 The City shall not be responsible for the direct or indirect consequences to  
148 persons or property of an illicit discharge, or circumstances which may  
149 cause an illicit discharge, undetected by the City.  
150 5.3 Every responsible party has an absolute duty to monitor conditions on  
151 property owned or controlled by them, to prevent all illicit discharges, and  
152 to report to the enforcement officer illicit discharges which the responsible  
153 party knows or should have known to have occurred. Failure to comply with  
154 any provision of this ordinance is a violation of this ordinance

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<sup>5</sup> It is acknowledged that this provision essentially subjects all construction sites to regulation which is more than state or federal law may mandate; however, the DNR has indicated that any discharge that constitutes a water quality violation is subject to regulation.

155 5.3.1 Notwithstanding other requirements of law, as soon as any  
156 responsible party has information of any known or suspected illicit  
157 discharge, the responsible party shall immediately take all necessary  
158 steps to ensure the discovery, containment, and cleanup of such  
159 discharge at the responsible party's sole cost.

160 5.3.2 If the illicit discharge consists of hazardous materials, the  
161 responsible party shall also immediately notify emergency response  
162 agencies of the occurrence via emergency dispatch services.

163 5.3.3 If the illicit discharge emanates from a commercial or industrial  
164 establishment, the owner or operator of such establishment shall also  
165 retain an on-site written record of the discharge and the actions  
166 taken to prevent its recurrence. Such records shall be retained for at  
167 least three years.

168 5.3.4 A report of an illicit discharge shall be made in person or by phone  
169 or facsimile or email to the enforcement officer immediately but in  
170 any event within twenty-four (24) hours of the illicit discharge;  
171 notifications in person or by phone shall be confirmed by written  
172 notice addressed and mailed or emailed to the enforcement officer  
173 within twenty-four (24) hours of the personal or phone notice.

174 5.4 Any person or entity shall also report to the City any illicit discharge or  
175 circumstances which such person or entity reasonably believes pose a risk  
176 of an illicit discharge.

177 5.5 Upon receiving a report pursuant to the previous subsections, or otherwise  
178 coming into possession of information indicating an actual or imminent  
179 illicit discharge, the enforcement officer shall conduct an inspection of the  
180 site as soon as reasonably possible and thereafter shall provide to the  
181 responsible party, and any third party reporter, a written report of the  
182 conditions which may cause or which have already caused an illicit  
183 discharge. The responsible party shall immediately commence corrective  
184 action or remediation and shall complete such corrective action or  
185 remediation within twenty-four (24) hours.

186 5.6 The enforcement officer shall be permitted to enter and inspect property  
187 subject to regulation under this section as often as is necessary to determine  
188 compliance with this section. If a responsible party has security measures  
189 that require identification and clearance before entry to its property or  
190 premises, the responsible party shall make the necessary arrangements to  
191 allow access by the enforcement officer. By way of specification but not  
192 limitation:

193 5.6.1 A responsible party shall allow the enforcement officer ready access  
194 to all parts of the property for purposes of inspection, sampling,  
195 examination and copying of records related to a suspected, actual, or  
196 imminent illicit discharge, and for the performance of any additional  
197 duties as defined by state and federal law.

198 5.6.2 The enforcement officer shall have the right to set up on any  
199 property such devices as are necessary in the opinion of the

- 200 enforcement officer to conduct monitoring and/or sampling related  
201 to a suspected, actual or imminent illicit discharge.
- 202 5.6.3 The enforcement officer shall have the right to require any  
203 responsible party at responsible party's sole expense to install  
204 monitoring equipment and deliver monitoring data or reports to the  
205 enforcement officer as the enforcement officer directs. The sampling  
206 and monitoring equipment shall be maintained at all times in a safe  
207 and proper operating condition by the responsible party at  
208 responsible party's sole expense. All devices shall be calibrated to  
209 ensure their accuracy.
- 210 5.6.4 Any temporary or permanent obstruction to safe and easy access to  
211 property to be inspected and/or sampled shall be promptly removed  
212 by the responsible party at the written or oral order of the  
213 enforcement officer and shall not be replaced. The costs of clearing  
214 such access shall be borne by the responsible party.
- 215 5.6.5 An unreasonable delay in allowing the enforcement officer access to  
216 a property is a violation of this ordinance.
- 217 5.6.6 If the enforcement officer has been refused access to any part of the  
218 property from an illicit connection and/or illicit discharge to a  
219 municipal storm sewer is occurring, suspected or imminent, and is  
220 able to demonstrate probable cause to believe that there may be a  
221 violation of this ordinance, or that there is a need to inspect and/or  
222 sample as part of a routine inspection and sampling program  
223 designed to verify compliance with this ordinance or any order  
224 issued hereunder, or to protect the overall public health, safety, and  
225 welfare of the community, then the enforcement officer may seek  
226 issuance of a search warrant from any court of competent  
227 jurisdiction.
- 228 5.7 If it is determined that an illicit discharge is imminent or has occurred, the  
229 actual administrative costs incurred by the City in the enforcement of this  
230 ordinance shall be recovered from the responsible party. The enforcement  
231 officer shall submit an invoice to the responsible party reflecting the actual  
232 costs and wages and expenses incurred by the city for the enforcement  
233 activities undertaken. Failure to pay charges invoiced under this ordinance  
234 within thirty (30) days of billing shall constitute a violation of this  
235 ordinance.

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237 **SECTION 6. SUSPENSION OF ACCESS TO THE CITY'S STORM SEWER SYSTEM**

- 238 6.1 Emergency suspension. The enforcement officer may, without prior notice,  
239 suspend storm sewer system access to a property when such emergency  
240 suspension is necessary to stop an ongoing or imminent illicit discharge. If  
241 the responsible party fails to immediately comply with an emergency  
242 suspension order, the enforcement officer shall take such steps as deemed  
243 necessary to prevent or minimize the illicit discharge. All costs of such  
244 action shall be recovered from the responsible party for the property  
245 identified as the source of the illicit discharge.

246 6.2 Non-emergency suspension. If the enforcement officer detects or is  
247 informed of circumstances which could cause an illicit discharge but such  
248 illicit discharge is not ongoing or imminent, and if the suspension of storm  
249 sewer system access would reasonably be expected to prevent or reduce the  
250 potential illicit discharge, the enforcement officer shall notify the  
251 responsible party of the proposed suspension of storm sewer system access  
252 and the time and date of such suspension. Notice to one responsible party  
253 for the property shall be sufficient notice to all. Remediation of the  
254 circumstances shall avoid a violation of this ordinance provided that no  
255 illicit discharge occurs. In the alternative, the responsible party may request  
256 a meeting with the enforcement officer for the purpose of presenting  
257 information which the responsible party believes will show that remediation  
258 is unnecessary, and if the enforcement officer finds such information is  
259 satisfactory the enforcement officer may rescind or modify the notice of  
260 suspension. If the enforcement officer finds such information unsatisfactory  
261 the enforcement officer shall issue a final written order of suspension  
262 including the date and time of suspension and such order may be appealed  
263 as provided hereinafter. Any physical action to reinstate storm sewer system  
264 access to property subject to such order prior to obtaining a court order of  
265 relief shall be deemed a violation of this ordinance. An order of suspension  
266 shall not preclude charging the responsible party with a municipal infraction  
267 as provided hereinafter or taking any other enforcement action permitted by  
268 statute or ordinance.  
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270 SECTION 7 WATERCOURSE PROTECTION. Every person owning property through which  
271 a watercourse passes, or such person's lessee, shall keep and maintain that part of  
272 the watercourse within the property below the elevation of the 100 year flood free  
273 of trash, debris, grass clippings or other organic wastes and other obstacles that  
274 would pollute, contaminate, or significantly alter the quality of water flowing  
275 through the watercourse. In addition, the owner or lessee shall maintain existing  
276 privately owned structures within or adjacent to a watercourse, so that such  
277 structures will not become a hazard to the use, function, or physical integrity of the  
278 watercourse.  
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280 SECTION 8. ENFORCEMENT

281 8.1 Violation of any provision of this ordinance may be enforced by civil action  
282 including an action for injunctive relief. In any civil enforcement action,  
283 administrative or judicial, the City shall be entitled to recover its attorneys'  
284 fees and costs from a person who is determined by a court of competent  
285 jurisdiction to have violated this ordinance.

286 8.2 Violation of any provision of this ordinance may also be enforced as a  
287 municipal infraction within the meaning of §364.22, pursuant to the City's  
288 municipal infraction ordinance.<sup>6</sup>

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<sup>6</sup> A city may consider various enforcement mechanisms. However, the Iowa Code furnishes cities with a very useful tool called "municipal infractions." A municipal infraction is a hybrid between a crime and a common law tort, e.g., nuisance, but it is much easier to establish than either a crime or a tort. If a city adopting this ordinance does not

289                   8.3     Enforcement pursuant to this section shall be undertaken by the  
290                                   enforcement officer upon the advice and consent of the City Attorney.

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292     SECTION 9.   APPEAL

293                   9.1     Administrative decisions by city staff and enforcement actions of the  
294                                   enforcement officer may be appealed by the applicant to the city council  
295                                   pursuant to the following rules:<sup>7</sup>

296                   9.1.1   The appeal must be filed in writing with the city clerk within five (5)  
297                                   business days of the decision or enforcement action.

298                   9.1.2   The written appeal shall specify in detail the action appealed from,  
299                                   the errors allegedly made by the enforcement officer giving rise to  
300                                   the appeal, a written summary of all oral and written testimony the  
301                                   applicant intends to introduce at the hearing, including the names  
302                                   and addresses of all witnesses the applicant intends to call, copies of  
303                                   all documents the applicant intends to introduce at the hearing, and  
304                                   the relief requested.

305                   9.1.3   The enforcement officer shall specify in writing the reasons for the  
306                                   enforcement action, a written summary of all oral and written  
307                                   testimony the enforcement officer intends to introduce at the  
308                                   hearing, including the names and addresses of all witnesses the  
309                                   enforcement officer intends to call, and copies of all documents the  
310                                   enforcement officer intends to introduce at the hearing.

311                   9.1.4   The city clerk shall notify the applicant and the enforcement officer  
312                                   by ordinary mail, and shall give public notice in accordance with  
313                                   Chapter 21, Iowa Code, of the date, time and place for the regular or  
314                                   special meeting of the city council at which the hearing on the  
315                                   appeal shall occur. The hearing shall be scheduled for a date not less  
316                                   than four (4) nor more than twenty (20) days after the filing of the  
317                                   appeal. The rules of evidence and procedure, and the standard of  
318                                   proof to be applied, shall be the same as provided by Chapter 17A,  
319                                   Code of Iowa. The applicant may be represented by counsel at the  
320                                   applicant's expense. The enforcement officer may be represented by  
321                                   the city attorney or by an attorney designated by the city council at  
322                                   City expense.

323                   9.2     The decision of the city council shall be rendered in writing and may be  
324                                   appealed to the Iowa District Court.

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already have a municipal infraction ordinance, one should be seriously considered for reasons which are beyond the scope of this model ordinance.

<sup>7</sup> If the city already has rules applicable to the appeal of enforcement actions, the existing process may be incorporated by reference in lieu of the indicated language. The specificity of this provision in terms of time-lines, hearings and decisions are necessary in order to satisfy constitutional principles of due process and equal protection.