

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER**

<p>IN THE MATTER OF:</p> <p><b>Steven &amp; Jane Hemmingstad</b></p>	<p style="text-align:center">ADMINISTRATIVE ORDER</p> <p style="text-align:center">NO. 2020-FP- <u>05</u></p>
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To: Steven Hemmingstad  
1210 Benton Avenue  
Sioux City, Iowa 51108

Re: Non-compliance with Iowa dam safety regulations.

**I. SUMMARY**

This administrative order (Order) is issued by the Iowa Department of Natural Resources (DNR) to Steven Hemmingstad to resolve violations of state law restricting certain construction activities in floodplains and permit requirements for dam construction.

As detailed below, Mr. Hemmingstad shall bring the dam referenced in this Order into compliance with all Iowa regulations, obtain a county floodplain permit for any work occurring in the floodplain, and to pay an administrative penalty of \$10,000.00. The bases for these requirements are enumerated herein.

Any questions regarding this Order should be directed to:

**Relating to technical requirements:**

Casey Welty, Env. Engineer  
Iowa Department of Natural Resources  
Flood Plain Management and Dam  
Safety Section  
Wallace State Office Building  
Des Moines, Iowa 50319  
Phone: 515-725-8330

**Relating to legal requirements:**

David Scott, Attorney  
Iowa Department of Natural Resources  
1023 W. Madison Street  
Washington, Iowa 52353  
Phone: 319-321-8504 (cell)

**II. JURISDICTION**

This Order is issued pursuant to Iowa Code § 455B.279, which authorizes the Director to issue any order necessary to secure compliance with or prevent violation of 455B, Division III, Part IV (Water Allocation and Use; Floodplain Control), and, Iowa Code § 455B.109 and 567 Iowa Administrative Code (IAC) 10, which authorize the Director to assess administrative penalties.

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**III. STATEMENT OF FACTS**

The following facts are considered most relevant to this matter:

1. A dam is located on the property owned by the Hemminstads at 1210 Benton Avenue, Sioux City, Iowa. Based on photographic archive data, the dam was constructed in 2011 without DNR approval as required by law.

2. On June 25, 2019, the Woodbury County Engineer called DNR Field Office (FO) 3 to report that a dam failed and was being reconstructed.

3. On June 26, 2019, Mr. Hemmingstad notified DNR staff that the dam failed due to uncontrolled seepage and erosion through the dam sometime in March, 2019. On the same day, Mr. Hemmingstad was issued a Notice of Violation (NOV) alerting him that he was in violation Iowa law for construction of a dam without a permit. He was advised that he must have a qualified engineer contact DNR engineering staff prior to repairs being completed, and he was informed that the dam would need to be designed to meet all requirements in Iowa DNR Technical Bulletin 16.

4. On July 1, 2019, staff from DNR FO3 visited the property and met with Mr. Hemmingstad to discuss the dam. Mr. Hemmingstad stated that the dam was not built properly originally and that he planned to do it the right way. He said he had hired an engineer and that the engineer would contact DNR engineering staff to review construction plans. DNR FO3 staff noted that construction was in progress during this site visit.

5. On July 2, 2019, Mr. Hemmingstad called DNR engineering staff and discussed the NOV. He notified staff that he would have his engineer call, and he stated he was performing emergency repairs of his dam that failed due to flow along the outside of the pipe. He stated the dam had never overtopped.

6. On July 6, 2019, DNR engineering staff again had a phone call discussion with Mr. Hemmingstad. They discussed that Mr. Hemmingstad would need approval for any repairs. Mr. Hemmingstad again stated he would have his engineer call the engineering staff. He also stated that the dam would be built back the same as it was before and that he had original design plans that he would send to DNR.

7. On August 6, 2019, DNR FO3 staff visited the site and noted that construction appeared to be complete and seeded. No approval had been sought or obtained.

8. On August 7, 2019, Mr. Hemmingstad was again notified in a letter that the dam remained in violation of Iowa law and that he needed to provide

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information from a qualified engineer that the dam had been constructed according to Iowa DNR Technical Bulletin 16.

9. On August 19, 2019, DNR engineering staff received mail from Mr. Hemmingstad with pictures taken during construction and information from the U.S. Natural Resources Conservation Service (NRCS) that showed the drainage area map, curve number calculation, and provided a cost estimate.

10. On August 27, 2019, Mr. Hemmingstad called to determine if DNR engineering staff had received the information sent in. Staff confirmed receipt but notified Mr. Hemmingstad that the information provided was not the information requested. On the same date, a letter was sent to Mr. Hemmingstad notifying him that the information he submitted was incomplete. He was given the option to submit as-built survey information to determine if the dam complied with applicable regulations, or alternatively, he could hire an engineer to submit plans and calculations that showed the dam met applicable regulations.

11. On October 15, 2019, DNR engineering staff again received a phone call from Mr. Hemmingstad. He asked if engineering staff had been working with his engineer. He was notified that his engineer had not been in touch with DNR.

12. On March 3, 2020, DNR was copied on a letter to Mr. Hemmingstad by Woodbury County reminding him that he needed a County floodplain permit. The County issued a late fee equal to the application fee.

13. On March 6, 2020, as-built survey information was received from Mr. Hemmingstad's engineer. It appeared to include the information requested in August, 2019.

14. On March 10, 2020, DNR notified Mr. Hemmingstad and his engineer that the information submitted showed that the dam does not meet Iowa dam regulations and requirements. Mr. Hemmingstad was given a deadline of April 17, 2020, to submit plans and calculations to bring the dam into compliance.

15. As of April 24, 2020, there had been no response.

16. In early June, 2020, DNR proposed an administrative consent order to Mr. Hemmingstad. He notified DNR that he would not sign the consent order.

#### **IV. CONCLUSION OF LAW**

1. 567 IAC 71.3 requires, in part, approval by the DNR for construction, operation, or maintenance of a dam in the floodway or flood plain of any water source. The facts above establish a violation of the regulatory requirement.

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2. 567 IAC 71.3(4) requires, in part, DNR approval for modification or alteration of any dam or appurtenant structure beyond the scope of ordinary maintenance or repair, or any change in operating procedures, if the dimensions or effects of the dam exceed the applicable thresholds in this rule. Changes in the spillway height or dimensions of the dam or spillway are examples of modifications for which approval is required. The facts above establish a violation of this regulatory requirement. This dam failed and was reconstructed with a different spillway pipe and was raised to create a larger pond.

3. 567 IAC 72.3 requires, among other things, that dams in Iowa are approved by DNR prior to construction, operation and modification and that projects must be designed in accordance with accepted engineering practice and methods and in a manner consistent with the applicable criteria and guidelines in DNR Bulletin No. 16, "Design Criteria and Guidelines for Iowa Dams," December 1990. The facts above establish violations of these regulatory requirements. During preliminary review of the as-built survey that was provided, it is apparent that many of the criteria in Technical Bulletin 16 are not met.

4. 567 IAC 51.2 requires a permit for the storage of 18 acre-feet or more of water in permanent storage. No permit has been obtained by Mr. Hemmingstad.

**V. ORDER**

**THEREFORE**, the DNR orders the following:

1. Pay an administrative penalty of \$10,000.00 within 60 days of this Order being signed by the Director.
2. All fill must be removed above elevation 1169 feet National Geodetic Vertical Datum (NGVD). This removed earthfill material must be disposed of out of the floodplain and remaining floodplain fill materials must comply with all Woodbury County Floodplain Development Permit requirements. This work must be completed within 60 days of this Order being issued by the Director. A licensed engineer or surveyor must submit to DNR certification of completion of this required work within ten days of work completion.
3. A Woodbury County Floodplain Development Permit must be obtained for all work within the regulatory Floodplain.

**VI. CIVIL PENALTY**

1. Iowa Code § 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 that may be assessed administratively. The Commission has adopted this schedule with procedures authorizing the Director to assess administrative penalties at 567 IAC 10.

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2. Iowa Code § 455B.279(2) provides for civil penalties of up to \$500.00 per day for flood plain permit violations. Iowa Code § 455B.191 provides for civil penalties of up to \$5,000.00 per day for water quality violations.

3. 567 IAC 10 establishes the criteria that the DNR must consider in determining whether an administrative penalty is warranted, and if so how much the fine should be. The general categories for consideration are the economic benefit of the alleged non-compliance by the violator, the gravity of the alleged violation, and the culpability of the violator. Pursuant to this rule, the DNR has determined that the most effective and efficient means to addressing the above-referenced violations is the issuance of an Order with a \$10,000.00 penalty. The administrative penalty assessed by this Order is determined as follows:

- i. 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.” The section further states that “reasonable estimates of economic benefit should be made where clear data are not available.”

The cost of engineering service to design the dam was avoided or delayed by failing to provide engineer specifications prior to original construction as required by Iowa law. Additional costs were avoided or delayed when engineer specifications were not provided to DNR prior to repair and reconstruct the dam. Assuming a rate of \$200 per hour for at least 60 hours of work (40 hours for original dam design and 20 hours for the dam repair design), \$12,000.00 is assessed for this factor.

- ii. Gravity of the Violations: Elements to consider when determining the gravity of a violation include the actual or threatened harm to the environment or public health and safety, and whether the violation threatens the integrity of the regulatory program.

Mr. Hemmingstad constructed a dam without a permit that failed and washed sediment downstream and then repaired the dam without a permit. Failure to obtain approval for construction of a dam, followed by failure to obtain approval for reconstruction of the failed dam, threatens the integrity of the regulatory program. As such, \$3,000.00 is assessed for this factor.

- iii. Culpability: The factors to be considered in determining the culpability of the violator include the degree of intent or negligence,

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and whether the violator has taken remedial measures to address the harm caused by the violations.

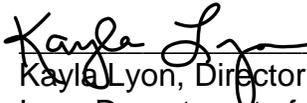
Mr. Hemmingstad was informed after numerous site visits, letters, and phone calls that he would need approval for any repairs on his unauthorized dam. He continued with construction despite all of these discussions. As such, \$3,000.00 is assessed for this factor.

**VII. APPEAL RIGHTS**

A written notice of appeal may be filed with the Director within 60 days of the date this Order is issued. The appeal should be sent to David Scott at the address above. A contested case hearing will then be scheduled pursuant to Iowa Code § 17A and 561 IAC 7.

**VIII. NONCOMPLIANCE WITH THIS ORDER**

Failure to comply with any requirement of this Order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the Iowa Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code § 455B.146. Compliance with Section V (Order) of this Order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section IV (Conclusions of Law) of this Order.

  
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Kayla Lyon, Director  
Iowa Department of Natural Resources

Dated this 14th day of  
July, 2020.

CC: DNR Flood Plain/ Dam Safety Section; David Scott; III.A.1.