

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

<p>IN THE MATTER OF:</p> <p>William Smidt</p>	<p>ADMINISTRATIVE CONSENT ORDER</p> <p>NO. 2021-FP- <u>01</u></p>
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To: William Smidt
2104 330th Street
Titonka, Iowa 50480

Re: DNR Project ID Number: 2020-1145. Construction of a dike (unpermitted) (Buffalo Creek). Project Location: NW1/4 of NE1/4 of Section 9, T97N, R27W, Kossuth County, Iowa; Latitude: between 43.2394 and 43.2418; Longitude: between -94.0370 and -94.0378; Upstream (south) of the 330th Street/7th Ave NW bridge, roughly parallel to the left (descending) bank of the creek, within the corporate limits of the City of Titonka.

I. SUMMARY

This administrative consent order (Order) is entered into between the Iowa Department of Natural Resources (DNR) and Mr. William Smidt to settle an appeal of the DNR's November 24, 2020 proposed decision to deny Mr. Smidt's Floodplain Construction Permit Application for the above-referenced project.

By signing this consent order, Mr. Smidt is agreeing to withdraw his appeal of the proposed decision and to complete the actions listed in Section V, below, by the deadlines listed in that section.

Any questions regarding this Order should be directed to:

Relating to technical requirements:
Chad Billings, Environmental Engineer
Iowa Department of Natural Resources
Flood Plain Management and Dam
Safety Section
Wallace State Office Building
Des Moines, Iowa 50319
Phone: 515-725-8356

Relating to legal requirements:
David Scott, Attorney
Iowa Department of Natural Resources
1023 W. Madison Street
Washington, Iowa 52353
Phone: 319-321-8504

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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.

III. STATEMENT OF FACTS

1. On August 10, 2020, the DNR issued a Notice of Violation (NOV) to Mr. Smidt for the construction of an earthen structure/levee/dike on the flood plain of Buffalo Creek without a permit. Mr. Smidt was requested to submit a joint application for post-construction approval of the dike.

2. On September 1, 2020, the DNR received the joint application. However, the joint application did not include the engineering analysis needed by the DNR. Because the application did not include the required information, additional information was requested.

3. On October 13, 2020, the DNR did receive an engineering report (a summary of engineering analysis) prepared by the Iowa Flood Center.

4. On November 4, 2020, the DNR issued a proposed decision denying the application due to the determination that the existing construction could not meet floodplain permitting criteria outlined in 567 IAC Chapter 72.

5. In early December, 2020, the DNR was notified that Mr. Smidt had appealed the proposed decision.

6. Since the appeal was submitted, the DNR has worked with Mr. Smidt to determine if a waiver from floodplain permitting criteria could be granted to allow for the existing dike to remain in its current location. Mr. Smidt, in consultation with his engineer, has determined that they will no longer pursue a waiver and will remove the existing dike. Mr. Smidt intends to submit an application for an alternative project if deemed feasible, which the DNR has agreed to consider pursuant to the terms of this Consent Order.

IV. CONCLUSION OF LAW

1. 567 IAC 72.4 establishes that the construction, operation, and maintenance of certain levees or dikes must be approved by the DNR. The facts above establish a violation of this regulatory requirement.

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V. ORDER

THEREFORE, the DNR and Mr. Smidt agree to the following:

1. By entering this agreement, Mr. Smidt agrees that he will no longer pursue a waiver for the existing dike and will withdraw his appeal of the prior project permit denial.

2. By June 15, 2021, Mr. Smidt will move the dike out of the floodway and re-establish the original site conditions within the floodway. The original west bank of the Buffalo Creek may be cut down when the pond embankment is removed.

3. In order to complete the requirement in paragraph V.2 above, Mr. Smidt will complete the following steps prior to moving the dike:

- a. Determine the pre-construction encroachment limits (floodway) using existing LiDAR data. Mr. Smidt's engineering firm will develop a model of the floodway for this stretch of Buffalo Creek. The model will be sent to the DNR for their review and approval by May 15, 2021.
- b. While the model is being reviewed by the DNR, Mr. Smidt will cut a minimum of 75-foot openings in the dike on the upstream and downstream ends to allow it to convey flood flows behind the dike. Regardless of the amount of time it takes DNR to review the model, these openings will be completed as soon as possible and no later than June 1, 2021.
- c. If there are disputes or inadequate information submitted regarding the modeling of the floodway, Mr. Smidt will still proceed to have the existing dike removed and re-establish original site conditions by June 15.

4. If there is adequate area remaining outside the floodway based on the floodway model, Mr. Smidt's engineering firm will assist Mr. Smidt on the design of a new pond layout with all grading and fill placement occurring outside of the floodway. If a new design is feasible, Mr. Smidt will submit a new joint application for a construction permit to the DNR and the Army Corps of Engineers for approval. This may also require submission of an NPDES permit application. No construction work will occur on a new design until all state, federal and local permits have been obtained.

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

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administratively. The Commission has adopted this schedule with procedures authorizing the Director to assess administrative penalties at 567 IAC 10.

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.

4. In the interest of settling this appeal and working cooperatively with Mr. Smidt to implement a plan that is compliant with Iowa Flood Plain regulations, the DNR is not issuing an administrative penalty as part of this Order. However, the DNR reserves the right to issue penalties in the future in a subsequent order if the terms enumerated in Section V, above, are not complied with or for any other violation of state law.

VII. APPEAL RIGHTS

As this Order is entered by the consent of the parties, there is no right of appeal.

VIII. NONCOMPLIANCE WITH THIS ORDER

Failure to comply with any requirement of this Order may result in the imposition of administrative penalties or referral to the Iowa Attorney General to obtain injunctive relief and civil penalties. Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section IV (Conclusions of Law) of this Order.

Kayla Lyon, Director
Iowa Department of Natural Resources



William Smidt April, 2021

Dated this 30th day of Mr.

CC: DNR FO2; Chad Billings; David Scott; III.A.1.