

IOWA DEPARTMENT OF NATURAL RESOURCES

ADMINISTRATIVE ORDER

IN THE MATTER OF: HIGMAN SAND AND GRAVEL, INC. PLYMOUTH COUNTY, IOWA	ADMINISTRATIVE ORDER NO. 2010-FP- 01
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TO: Higman Sand and Gravel, Inc.
c/o Harold C. Higman, Jr., Reg. Agent
16485 HWY 12
Akron, IA 51001

I. SUMMARY

This Order requires you, by December 31, 2010, to remove all deposits and obstructions placed in the floodway of the Big Sioux River necessary to achieve a "no-rise" condition consistent with FEMA Procedures and to submit a certification to that effect prepared by a licensed professional engineer; and to pay an administrative penalty of \$10,000.00, subject to your appeal rights stated in Part VII of this Order.

Any questions or response regarding this Order should be directed to:

Relating to technical requirements:

Kelly Stone
Water Resources Section
Iowa Department of Natural Resources
Henry A. Wallace Building
Ph: (515) 281-4312
Fax: (515) 281-8895

Appeal, if any, addressed to:

Director, Iowa Dept. of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034

Relating to legal requirements:

Randy Clark, Attorney II
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: (515) 281-8891

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Attn: Randy Clark

II. JURISDICTION

This Order is issued pursuant to Iowa Code subsection 455B.279 which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code sections 455B.261 through 455B.281 or the rules adopted pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

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III. STATEMENT OF FACTS

1. On May 2, 2005, Department Field Office #3 (FO3) staff investigated a complaint that levees and other obstructions constructed by Higman Sand and Gravel, Inc. (Higman) on the flood plain of the Big Sioux River near Akron were causing adverse flooding impacts on adjacent landowners. FO3 staff observed a levee being constructed along the Big Sioux River at the Higman operation located in Sections 2 and 11, T92N, R49W, (Westfield Township) Plymouth County, Iowa. Numerous already-constructed levees were observed at other locations on the Big Sioux River flood plain at the Higman operation. Subsequent investigation by FO3 staff revealed that the Department has not authorized flood plain construction at any Higman operation in Plymouth County. Further, the levee that FO3 staff observed being constructed is located in the floodway that must remain unobstructed for flood flows and where construction generally cannot be approved.

2. By certified letter dated May 16, 2005, FO3 notified Higman that the levee construction was unauthorized and thus violated state law. Higman was directed to remove, within 60 days, the levee being constructed on May 2, 2005 and to submit, within 30 days, an as-built survey of all levees constructed by Higman in Plymouth County.

3. On July 21, 2005, FO3 was notified by Higman's attorney that the as-built levee survey was being prepared and that engineers were working on the hydraulic analysis and application necessary to obtain a permit for the levee FO3 staff observed being constructed on May 2, 2005. By letter dated July 25, 2005, FO3 confirmed the foregoing communication and extended the deadline to submit the as-built survey and hydraulic analysis/application to August 10, 2005 and September 1, 2005, respectively. On July 28, 2005, Justin Higman contacted FO3 via telephone, indicating that an engineering firm was preparing the as-built survey and that another engineering firm was working on the hydraulic analysis/application.

4. By letter dated November 21, 2005, FO3 acknowledged that the Department had received the as-built levee survey on October 20, 2005 and the hydraulic analysis/application for flood plain development permit on October 21, 2005. Higman was informed that, due to the workload at that time, it might take 7-9 months for the Department to review and make a decision regarding the hydraulic analysis/application for an after-the-fact flood plain development permit; in that regard Higman was cautioned that it was not authorized to construct new levees in the flood plain or floodway unless it first obtained approval from the Department.

5. On April 5, 2006, FO3 staff inspected the vicinity of the Higman operation when the Big Sioux River was at a flood stage of 19 feet. No new levees were observed at that time. On April 10, 2006, FO3 staff investigated a complaint that Higman had constructed a new levee which was causing flooding. FO3 staff observed that a levee approximately 10 feet high and ¼ mile long had been constructed since the April 5, 2006 inspection; it was located near Higman's southern pit and appeared to be blocking the flow of flood waters to the north. The Big Sioux River flood stage on April 10, 2006 was approximately 22.5 feet.

6. On May 19, 2006, FO3 staff observed that the new levee observed on April 10, 2006 had not been removed. By letter dated May 26, 2006, Higman was notified that the new levee

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observed on April 10, 2006 violated Iowa law; Higman was directed to stop all levee construction until authorization from the Department was obtained

7. On May 30, 2006, Justin Higman contacted FO3 via telephone, stating that the new levee was constructed in response to rising flood waters but was removed in a few days when the flood waters receded.

8. On May 31, 2006, FO3 staff visited the Higman operation and observed that the new levee observed on April 10, 2006 had not been removed.

9. On August 10, 2006, FO3 staff visited the Higman operation and again observed that the new levee observed on April 10, 2006 had not been removed.

10. On August 15, 2006, Department staff attended a meeting of the Environmental Protection Commission (EPC) and sought the EPC's approval to refer the Higman violations to the Iowa Attorney General for judicial enforcement. Higman's attorney stated that the levee observed on April 10, 2006 was to provide protection from rising flood waters, that it should not have been constructed, but that a hole had been "cut" in the levee by the time of the EPC meeting. The EPC declined to refer the case to the Attorney General.

11. By letter dated February 28, 2007, Higman was notified that the application received October 21, 2005, requesting a permit for existing deposits was not approvable because it did not comply with state law requiring documentation of a "no-rise" condition.

12. On November 9 and 20, 2007, FO3 staff visited the Higman operation in response to a complaint and observed new levee construction in the NE¼ of Section 11, Westfield Township, and new soil deposits in Section 2, Westfield Township. Upon further investigation by FO3 staff, it was determined that this new activity was located in the floodway and that it had not been approved by the Department. By letter dated November 29, 2007, FO3 notified Higman that this activity was unauthorized, that it violated Iowa law and directed Higman to immediately cease all such activity until a permit is obtained from the Department.

13. On April 16, 2008, Department staff met with Higman officials, Higman's attorney and engineers, and state legislators at the state Capitol. Higman agreed to submit an application for approval concerning work anticipated on the flood plain during the upcoming construction/mining season that it considered crucial to stay in business and supply needed material to Plymouth County. Higman agreed to include in the application information for existing deposits and future deposits showing that mitigation measures for existing deposits and predicted impacts of future deposits met "no rise" conditions.

14. On July 22, 2008, the Department received an application from Higman for approval to use a material conveyor system for a "continuous" gravel mining operation in Sections 1, 2 and 11, Westfield Township. By letter dated July 31, 2009, the Department notified Higman that the application was incomplete and required Higman to submit, by September 15, 2009, either: a plan of operation certifying that the conveyor structure is temporary and removable from the

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floodway prior to a flood event; or a “no rise” certification and evidence that the conveyor would not be damaged by flood waters. The Department’s July 31, 2009, letter also cautioned Higman that the project described in the application was not yet authorized and any operation prior to approval violates state law; the Department indicated it would consider withholding enforcement action for unauthorized operation provided Higman submitted the requested information by September 15, 2009. The Department received the “no rise certification” on October 13, 2009.

15. By letter dated July 31, 2009, the Department again notified Higman that the hydraulic analysis it submitted in October, 2005 did not substantiate that the fill placement causes no increase to the water surface profile at all locations and, as such, could not be approved. Higman was also reminded of its commitment during the April 16, 2008, meeting at the state Capitol to provide a hydraulic model to show the extent of the obstruction in the floodway and a plan to remove any obstruction as indicated in the model; Higman was advised that the Department had not received said model and plan. This letter also directed Higman to notify the Department by August 14, 2009, that it would undertake one of the following options: 1. removal, by March 1, 2010, to the level of the surrounding flood plain, specified deposits and placement of the resulting spoil out of the mapped floodway or; 2, provide, by October 1, 2009, a new hydraulic model to show the extent of the obstruction in the floodway and a plan to remove all obstruction as indicated by the model as necessary to certify a “no-rise” condition for the area-the plan was required to call for all necessary removal and submission of the “no-rise” certification by March 1, 2010.

16. By letter dated September 14, 2009, Higman’s engineer submitted a proposal calling for the “excavation, transport, and placement of soil deposits” to previously and future “mined areas” over a four year period. The four year period was described as necessary, first, to spread the cost of the operation because Higman does “not have the necessary equipment and personnel resources to do the work” and, second, to produce “the further excavated area to use for transporting and placing these soil deposits...”

IV. CONCLUSIONS OF LAW

1. Iowa Code subsection 455B.275(3) requires that approval be obtained from the Department if a person desires to construct or maintain an obstruction or deposit on any floodway or flood plain as defined in Iowa Code section 455B.261. Iowa Code subsection 455B.275(1) prohibits the erection, use or maintenance of obstructions or deposits on the floodway or flood plain which adversely affect the efficiency of or unduly restrict the capacity of the floodway and declares them to be public nuisances.

2. Iowa Code subsection 455B.275(8) requires the EPC to establish regulatory thresholds by administrative rules. The regulatory thresholds are set forth in 567 IAC Chapter 71. More specifically, 567 IAC 71.4 and 71.12(2) require Department approval for the construction, operation and maintenance of levees or dikes and miscellaneous structures, obstructions or deposits on the floodway or flood plain of any river or stream draining more than ten square miles in rural areas.

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3. The above-summarized facts establish that the foregoing statutory and rule provisions have been and are being violated and support the additional conclusion that the deposits and obstructions described herein constitute a public nuisance.

V. ORDER

THEREFORE, Higman is hereby ordered to do the following:

1. By December 31, 2010, remove all deposits and obstructions placed by Higman in the mapped floodway of the Big Sioux River (delineated on Flood Insurance Rate Maps, FEMA Flood Insurance Study, Plymouth County, Iowa, unincorporated areas, June 6, 2001) in Sections 2 and 11, T92N, R49W, (Westfield Township) Plymouth County, Iowa, necessary to achieve a "no-rise" condition consistent with the attached FEMA "Procedures For No-Rise Certification For Proposed Development In The Regulatory Floodway" (FEMA Procedures) and submit a certification to that effect prepared by a licensed professional engineer. The "no rise" certification must include all "no rise" supporting documentation specified in the attached FEMA Procedures. All resulting spoil must be placed in a non-wetland area that is out of the mapped floodway or otherwise accounted for in the "no-rise certification."

2. Pay an administrative penalty of \$10,000.00 within 60 days of receipt of this Order, subject to the appeal rights stated in Section VII.

VI. PENALTY

1. Iowa Code subsection 455B.279(2) authorizes the assessment of civil penalties of up to \$500.00 per day per violation of flood plain laws, rules or permits.

2. Iowa Code section 455B.109 authorizes the EPC 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; 567 IAC Chapter 10. Pursuant to these provisions the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an Order with a penalty.

3. A penalty of \$10,000.00 is assessed effective 30 days from your receipt of this Order, unless you appeal this proposed penalty within that time, as provided in Part VII of this Order. The penalty shall be paid within 60 days of your receipt of this Order, unless you file a timely appeal. The penalty is assessed for continuing flood plain violations over a period of more than 4 years. The administrative penalty is determined as follows:

a. Economic Benefit. Higman has enjoyed long term financial savings by proceeding with flood plain construction prior to obtaining approval. However, Higman will incur significant costs by removing the obstructions and deposits, and certifying the removal, as required in this Order. Therefore, no amount 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 that type of violation. As indicated above, moderate civil penalties are authorized by statute. To the extent that

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obstructions in the floodway (the area reserved to convey flood flows) increase the water surface profile, Higman's actions threaten public safety. Further, the integrity of the flood plain regulatory program is threatened in that Higman's actions encourage others to disregard approval requirements. Unauthorized flood plain construction and maintaining that construction has persisted for more than four years. For these reasons, \$500.00 per day could be assessed for this factor for continuous violations over a period of more than four years. However, in view of the maximum administrative penalty and the Culpability factor, below, \$5,000.00 is assessed for this factor.

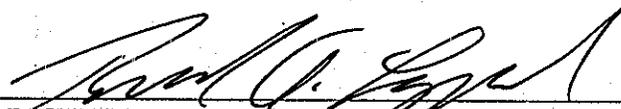
c. Culpability. Higman has been notified on numerous occasions regarding its responsibility to comply with construction permit requirements prior to proceeding with construction on the flood plain but it has repeatedly violated these requirements. For these reasons, \$500.00 per day could be assessed for this factor for the above-described continuous violations over a period of more than four years. However, in view of the maximum administrative penalty and the Gravity factor, above, \$5,000.00 is assessed for this factor.

VII. APPEAL RIGHTS

Pursuant to Iowa Code subsection 455B.279(1) and 561 IAC 7.4(1), as adopted by reference by 567 IAC Chapter 7, a written Notice of Appeal may be filed within 30 days of issuance of this Order. The Notice of Appeal must be filed with the Director of the Department, and must identify the specific portion or portions of this Order being appealed and include a short and plain statement of the reasons for appeal. A contested case hearing will then be commenced pursuant to Iowa Code Chapter 17A and 561 IAC Chapter 7.

VIII. NONCOMPLIANCE

Failure to comply with this Order may result in the imposition of additional administrative penalties or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.275 and 455B.279. Compliance with Section V. of this Order constitutes full satisfaction of all requirements pertaining to the violations specifically cited in Sections III. and IV. of this Order.



RICHARD A. LEOPOLD, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 27 day of
Jan., 2010.

Field Office 3; Randy Clark; Dennis Ostwinkle; EPA; III.A 1



Federal Emergency Management Agency

Region VII

2323 Grand Boulevard, Suite 900

Kansas City, Missouri 64108-2670

PROCEDURES FOR "NO-RISE" CERTIFICATION

FOR PROPOSED DEVELOPMENT IN THE REGULATORY FLOODWAY

Section 60.3 (d) (3) of the National Flood Insurance Program (NFIP) regulations states that a community shall "prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base (100-year) flood discharge."

Prior to issuing any building, grading, or development permits involving activities in a regulatory floodway, the community must obtain an engineering certification stating the proposed development will not impact the pre-project base flood elevations (mandatory), floodway elevations (optional), or floodway data widths (optional). The certification should be obtained from the permittee and be signed and sealed by a professional engineer.

The Engineering or "no-rise" certification must be supported by technical data or an explanation of why a hydraulic analysis is not required. A hydraulic analysis is anticipated to be required in most cases. The supporting technical data should be based upon the standard step-backwater computer model utilized to develop the 100-year floodway shown on the community's effective Flood Insurance Rate Map (FIRM) or Flood Boundary and Floodway Map (FBFM) and the results tabulated in the community's Flood Insurance Study (FIS).

Communities are required to review and approve the "no-rise" submittals. The community must review the technical submittal package and verify that all supporting data, listed in the following paragraphs are met and maintained in the community's project file.

When a hydraulic analysis is performed to support a "no-rise" certification for proposed floodway development, the following steps should be taken:

Currently Effective Model

1. Obtain the step-backwater computer model for the specified stream and community, identifying the limits of the requested data. A fee will be assessed for providing the data.

Send data requests to:

FEMA Library
Michael Baker, Jr., Inc
3601 Eisenhower Avenue, Suite 600
Alexandria, Virginia 22304
(703) 960-8800

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Duplicate Effective Model

2. Upon receipt of the step-backwater computer model, the engineer should run the original step-backwater model to duplicate the data in the effective FIS.

Existing Conditions Model

3. Revise the original step-backwater model to reflect site specific conditions by adding sufficient new cross-sections in the vicinity of the proposed development, without the proposed development in place. Floodway limits should be manually set at the new cross section locations by measuring from the effective FIRM or FBFM. The cumulative reach lengths of the stream should also remain unchanged. The results of these analyses will indicate the 100-year floodway elevations for revised existing conditions at the proposed project site.

Proposed Conditions Model

4. Modify the revised existing conditions model to reflect the proposed development at the new cross-sections, while retaining the currently adopted floodway widths. The overbank roughness coefficients should remain the same, unless a reasonable explanation of how the proposed development will impact Manning's "n" values, is included with the supporting data. The existing floodway should be reviewed to determine if the encroachment will have an impact on floodway parameters. The results of this floodway run will indicate the 100-year floodway elevations for proposed conditions at the project site. These results must indicate NO impact on the 100-year flood elevations, as shown in the Duplicate Effective Model or in the Existing Conditions Model.

The "no-rise" supporting data and a copy of the engineering certification must be submitted to and reviewed by the appropriate community official prior to issuing a permit.

The "no-rise" supporting data should include, but may not be limited to:

- a. Duplicate of the original FIS step-backwater model printout or floppy disk.
- b. Revised existing conditions step-backwater model.
- c. Proposed conditions step-backwater model.
- d. FIRM and topographic map, showing floodplain and floodway, the additional cross-sections, the site location with the proposed topographic modification superimposed onto the maps, and a photocopy of the effective FIRM or FBFM showing the current regulatory floodway.
- e. Documentation clearly stating analysis procedures. All modifications made to the original FIS model to represent revised existing conditions, as well as those made

Procedures for "No-Rise" Certification

to the revised existing conditions model to represent proposed conditions, should be well documented and submitted with all supporting data.

- f. Copy of effective Floodway Data Table copied from the FIS report.
- g. Statement defining source of additional cross-section topographic data and supporting information.
- h. Cross-section plots of the added cross sections, for revised existing and proposed conditions.
- i. Certified planimetric (boundary survey) information indicating the location of structures on the property.
- j. Copy of the microfiche, or other applicable source, from which input for original Step-Backwater model was taken.
- k. Floppy disk with all input files.

The engineering "no-rise" certification and supporting technical data must stipulate NO impact on the 100-year flood elevations (mandatory), floodway elevations (mandatory by state), or floodway widths (optional) at the new cross-sections and at all existing cross-sections anywhere in the model. Therefore, the revised computer model should be run for a sufficient distance (usually one mile, depending on hydraulic slope of the stream) upstream of the development site to ensure proper "no-rise" certification

If published floodway widths are changed as a result of the encroachment, then a floodway revision will be required as described in Part 65 7 of the NFIP regulations.

Attached is a sample "no-rise" certification form that can be completed by a registered professional engineer and supplied to the community, along with the supporting technical data when applying for a development permit.

ENGINEERING "NO-RISE" CERTIFICATION

Community: _____ County: _____ State: _____

Applicant _____ Date _____ Engineer _____ Date _____

Address _____ Address _____

Telephone _____ Telephone _____

SITE DATA:

1. Location: _____ 1/4; _____ 1/4; Section _____; Range _____; Township _____

Street Address: _____

2. Panel(s) No. of NFIP map(s) affected: _____

3. Type of development: Filling _____ Grading _____ Excavation _____ Minor Improv _____

Substantial-Improv _____ New Construction _____ Other _____

4. Description of Development: _____

5. Name of flooding source: _____

COMMENTS:

This is to certify that I am a duly qualified engineer licensed to practice in the State of _____
It is to further certify that the attached technical data supports the fact that the proposed development described above will not create any increase to the 100-year elevations on said flooding source above at published cross-sections in the Flood Insurance Study for the above community dated ___ and will not create any increase to the 100-year flood elevations at unpublished cross-section in the vicinity of the proposed development.

Signature _____ Date _____

(Seal)

Title _____ License No. _____