

Iowa Department of Natural Resources
Environmental Protection Commission

ITEM



DECISION

TOPIC

Notice of Intended Action, Chapter 61, Water Quality Standards, Section 401
Certification of Section 404 Regional Permit (RP 7)

Commission approval is requested for the attached Notice of Intended Action which will amend Chapter 61.2(2) "g" to allow the Department to grant Section 401 Water Quality Certification for the Corps of Engineers (Corps) Regional Permit 7 (RP 7).

Section 401 water quality certifications are required by federal law prior to the issuance of nationwide and regional permits. This rulemaking constitutes certification by the State of Iowa that Army Corps of Engineers' (Corps') nationwide and regional permits, including Regional Permit 7 (RP 7), are consistent with Iowa's water quality standards. All of the listed nationwide and regional permits will be certified through the date of adoption. Without certification, contractors on these projects (e.g., dredging and filling in waters of the United States) would have to seek other means of approval from the State of Iowa, including submitting an individual permit from the Corps for approval. The average time to process a nationwide or regional permit is 2-4 weeks whereas the average time for an individual permit is closer to 2-4 months. This would add substantial delays to these projects.

RP 7 is a general permit issued to authorize work on bridges and road crossings of streams in Iowa and has been used since 1979. The Corps revised RP 7 to include information regarding the 2008 EPA/Corps Mitigation Rule as well as revising some of the conditions to be the same as those that would be included in an individual permit for bridge or road crossings. The 2008 Mitigation Rule is now effective and must be included in the new permit.

The proposed changes contained in this rule-making package will be published in the Iowa Administrative Bulletin and will also be found on the DNR website. The Public Hearing will be held on April 9, 2014 with public comments (oral or written) due by COB on April 18, 2014.

Christine Schwake, Environmental Specialist
Water Quality Bureau
Environmental Services Division
January 27, 2014

ENVIRONMENTAL PROTECTION COMMISSION [567]
Notice of Intended Action

Pursuant to the authority of Iowa Code sections 455B.105 and 455B.173, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 61, "Water Quality Standards," Iowa Administrative Code.

The proposed amendment will provide water quality certification pursuant to Section 401 of the federal Clean Water Act (33 U.S.C. Section 1341) for the reissuance of the U.S. Army Corps of Engineers' Regional Permit 7 (RP 7) and its associated conditions. The proposed amendment will also recertify all other listed nationwide and regional permits through the effective date of this rule making.

Section 404 of the Clean Water Act (CWA) requires a permit from the Corps of Engineers for the discharge of dredged or fill materials into the nation's waters. Section 401 of the CWA requires that before the Corps can issue a Section 404 permit, the state water quality agency must certify that the proposed activity will not violate state water quality standards.

Section 404 authorizes the Corps to issue general permits on a state, regional or nationwide basis for categories of activities where such activities will have minimal adverse effects. The Corps has used its general permit authority to issue a number of nationwide and regional general permits for use in Iowa. General permits, including RP 7, can be issued for a period not exceeding five years, and a state water quality agency must provide Section 401 certification for a Section 404 general permit before the general permit is valid for that particular state. RP 7 authorizes fill material placed in waters of the United States for bridge and road crossings. RP 7 was initially issued in 1979 and has been reissued in 1985, 1989, 1995, 1999, 2002, and 2009. The Commission previously provided Section 401 certification for this regional permit. This permit is referenced in 567—paragraph 61.2(2)"g."

The Corps issued a public notice of intent to reissue RP 7 with some modifications on July 3, 2013. The Corps revised RP 7 to include information regarding the 2008 EPA/Corps Mitigation Rule and also revised some of the conditions to make them the same as those that would be included in an individual permit for bridge or road crossings. On March 31, 2008, U.S. EPA and the Corps issued revised regulations governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters of the United States under Section 404 of the Clean Water Act. The regulations are designed to improve the effectiveness of compensatory mitigation to replace lost aquatic resource functions and area, expand public participation in compensatory mitigation decision making, and increase the efficiency and predictability of the mitigation project review process. The 2008 Mitigation Rule is now effective and must be included in the new permit. The Corps is incorporating the Iowa Department of Transportation's standard temporary bridge and road crossing provision into the permit. The proposed amendment will provide Section 401 certification for the modified RP 7.

The proposed amendment will also recertify all other listed nationwide and regional permits through the effective date of this rule making. In addition to the benefits of the adoption of RP 7, the other nationwide and regional permits also benefit regulated entities by speeding approval times and lowering costs. Because only RP 7 has been revised, there are no additional impacts related to the other nationwide and regional permits that will be reauthorized by this rule making.

Any interested person may file written comments on the proposed amendment on or before April 18, 2014. Written comments or questions regarding the proposed amendment should be directed to Christine Schwake, Iowa Department of Natural Resources, 502 East 9th Street, Des Moines, Iowa 50319-0034; telephone (515)281-6615; Fax (515)281-8895; or e-mail

christine.schwake@dnr.iowa.gov.

Oral and written comments will also be accepted at a public hearing to be held on April 9, 2014, at 1 p.m. in the Fifth Floor East Conference Room of the Wallace State Office Building, East 9th Street and Grand Avenue, Des Moines, Iowa.

The Corps issued a public notice in July 2013 requesting comments by August 1, 2013, on the revised RP 7. No comments were received during the public notice period. The Iowa Department of Transportation had the opportunity to review and comment on the draft RP 7 prior to the Corps' issuance of the public notice with the final version of RP 7.

This proposed amendment is intended to have a positive impact on jobs and small businesses. The Iowa certification of the Corps' nationwide and regional permits will reduce the regulatory burden on permit applicants by allowing these businesses to avoid individual certifications for their projects. The adoption of this proposed amendment will allow transportation projects to proceed more rapidly and should therefore allow more projects to be undertaken and completed, thus boosting economic activity.

This proposed rule is intended to implement Iowa Code Chapter 455B, division III, part 1.

The following amendments are proposed.

Item #1: Amend paragraph 61.2(2)"g" as follows:

g. This policy shall be applied in conjunction with water quality certification review pursuant to Section 401 of the Act. In the event that activities are specifically exempted from flood plain development permits or any other permits issued by this department in 567–Chapters 70, 71, and 72, the activity will be considered consistent with this policy. Other activities not otherwise exempted will be subject to 567–Chapters 70, 71, and 72 and this policy. United States Army Corps of Engineers (Corps) nationwide permits 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, and 52 as well as Corps regional permits 7, 27, 33, and 34 as promulgated ~~revised through June 20, 2012~~[insert effective date], are certified pursuant to Section 401 of the Clean Water Act subject to the following Corps regional conditions and the state water quality conditions:

(1) Side slopes of a newly constructed channel will be no steeper than 2:1 and planted to permanent, perennial, native vegetation if not armored.

(2) Nationwide permits with mitigation may require recording of the nationwide permit and pertinent drawings with the registrar of deeds or other appropriate official charged with the responsibility for maintaining records of title to, or interest in, real property and may also require the permittee to provide proof of that recording to the Corps.

(3) Mitigation shall be scheduled prior to, or concurrent with, the discharge of dredged or fill material into waters of the United States.

(4) For newly constructed channels through areas that are unvegetated, native grass filter strips, or a riparian buffer with native trees or shrubs a minimum of 35 feet wide from the top of bank must be planted along both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.

(5) For single-family residences authorized under nationwide permit 29, the permanent loss of waters of the United States (including jurisdictional wetlands) must not exceed 1/4 acre.

(6) For nationwide permit 46, the discharge of dredged or fill material into ditches that would sever the jurisdiction of an upstream water of the United States from a downstream water of the United States is not allowed.

(7) For projects that impact an outstanding national resource water, outstanding Iowa water, fens, bogs, seeps, or sedge meadows, an individual Section 401 Water Quality Certification will be required (Iowa Section 401 Water Quality Certification condition).

(8) For nationwide permits when the Corps' district engineer has issued a waiver to allow the permittee to exceed the limits of the nationwide permit, an individual Section 401 Water Quality Certification will be required (Iowa Section 401 Water Quality Certification condition).

(9) Heavy equipment shall not be used or operated within the stream channel. If in-stream work is unavoidable, it shall be performed in such a manner as to minimize the duration of the disturbance, turbidity increases, substrate disturbance, bank disturbance, and disturbance to riparian vegetation. This condition does not further restrict otherwise authorized drainage ditch maintenance activities (Iowa Section 401 Water Quality Certification condition).

Written verification by the Corps or 401 certification by the state is required for activities covered by these permits as required by the nationwide permits or the Corps, and the activities are allowed subject to the terms and conditions of the nationwide and regional permits. The department will maintain and periodically update a guidance document listing special waters of concern. This document will be provided to the Corps for use in determining whether preconstruction notices should be provided to the department and other interested parties prior to taking action on applications for projects that would normally be covered by a nationwide or regional permit and not require a preconstruction notice under nationwide permit conditions.

Date

Chuck Gipp, Director