

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

27

DECISION

TOPIC

**Notice of Intended Action -Chapter 65 – Confinement Feeding
Operation Applications for Construction Permits; Demand for
Hearing Procedures**

The Commission proposes to amend subrules 65.10(7), 65.10(8) and 65.10(9) related to demand for hearing procedures regarding the Department's preliminary decisions on construction permit applications.

Ed Tormey, Bureau Chief
Legal Services
June 4, 2009

ENVIRONMENTAL PROTECTION COMMISSION[567]

Notice of Intended Action

Pursuant to the authority of Iowa Code section 459.103, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 65, “Animal Feeding Operations,” Iowa Administrative Code.

The proposed amendment would modify the filing and hearing procedures when an applicant or county demands a hearing before the Commission regarding the Department’s preliminary decision on a construction permit application.

Any interested person may make written suggestions or comments on the proposed amendment on or before _____. Written comments should be directed to _____, Iowa Department of Natural Resources, Wallace State Office Building, 502 E. 9th St., Des Moines, Iowa 50319-0034; fax (515)281-8895; email _____.

[multiple hearings] Also, there will be public hearings as follows, at which time persons may present their views either orally or in writing:

_____, 2009	X a.m.	Wallace State Office Building Auditorium 502 E. 9 th Street Des Moines, Iowa
_____, 2009	X p.m.	_____ _____ _____ _____, Iowa

At the hearings people will be asked to give their names and addresses for the record and to confine their remarks to the subject of the proposed amendments.

OR

[single hearing] In addition to written comments, there will be a public hearing on XXXXX XX, 200X at X:00 X.m. in X, X, X, X, X, and X at which time persons may present their views either orally or in writing. At the hearing people will be asked to give their names and addresses for the record and to confine their remarks to the subject of this rule.

Any persons who intend to attend a public hearing and have special requirements such as those related to hearing or mobility impairments should contact the Department of Natural Resources and advise of specific needs.

This amendment is intended to implement Iowa Code sections 459.103 and 459.304.

The following amendment is proposed.

Rescind subrules 65.10(7), 65.10(8) and 65.10(9) and adopt the following **new** subrules in lieu thereof:

65.10(7) *County board of supervisors' demand for hearing.*

a. A county board of supervisors that has submitted an adopted recommendation to the department may contest the department's preliminary decision to approve or disapprove an application for permit by filing a written demand for a hearing before the commission. Due to the need for expedited scheduling, the county board of supervisors shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the board intends to file a demand for hearing. The demand for hearing shall be sent to Director, Department of Natural Resources, Henry A. Wallace Building, 502 East Ninth Street, Des Moines, Iowa 50319, and must be postmarked no later than 14 days following the board's receipt of the department's notice of preliminary decision.

b. The demand for hearing shall include a statement setting forth all of the county board of supervisors' reasons why the application for a permit should be approved or disapproved, all supporting documentation, and a further statement indicating whether an oral presentation before the commission is requested.

65.10(8) *Applicant's demand for hearing.* The applicant may contest the department's preliminary decision to approve or disapprove an application for permit by filing a written demand for a hearing. The applicant may elect, as part of the written demand for hearing, to have the hearing conducted before the commission pursuant to paragraph 65.10(8)"a" or before an administrative law judge pursuant to paragraph 65.10(8)"b." If no such election is made, the demand for hearing shall be considered to be a request for hearing before the commission. If

both the applicant and the county board of supervisors are contesting the department's preliminary decision, the applicant may request that the commission conduct the hearing on a consolidated basis.

a. *Applicant demand for hearing before the commission.* Due to the need for expedited scheduling, the applicant shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the applicant intends to file a demand for hearing. The demand for hearing shall be sent to Director, Department of Natural Resources, Henry A Wallace Building, 502 East Ninth Street, Des Moines, Iowa 50319, postmarked no later than 14 days following the board's receipt of the department's notice of preliminary decision. The demand for hearing shall include a statement setting forth all of the applicant's reasons why the application for permit should be approved or disapproved, all supporting documentation, and a further statement indicating whether an oral presentation before the commission is requested.

b. *Applicant contested case appeal before an administrative law judge.* The applicant may contest the department's preliminary decision to approve or disapprove an application according to the contested case procedures set forth in 561—Chapter 7; however, if the county board of supervisors has demanded a hearing pursuant to subrule 65.10(7), the applicant shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the applicant intends to contest the department's preliminary decision according to contested case procedures. In that event the applicant may request that the hearings be consolidated and conducted as a contested case. It is the responsibility of the

applicant to communicate with the department to determine if a county demand for hearing has been filed.

65.10(9) *Hearing and decision by the commission.*

a. Hearing before the commission.

(1) All hearings before the commission requested pursuant to subrules 65.10(7) and 65.10(8) shall be handled as other agency action and not as a contested case.

(2) Upon receipt of a timely demand for a hearing before the commission pursuant to subrules 65.10(7) and 65.10(8), the director shall set a hearing during a regular meeting of the commission scheduled no more than 35 days from the date the director receives the first such request. However, if the next regular meeting of the commission will take place more than 35 days after receipt of the demand for hearing, the director shall schedule a special in-person meeting or an electronic meeting of the commission pursuant to Iowa Code section 21.8.

(3) No later than 5 days from the date the director receives a demand for hearing, the director shall send one copy of the demand for hearing and associated documents, a notice of the hearing date assigned and the department's complete file on the application under review to each member of the commission. The director shall contact the applicant and the county board of supervisors and provide copies of documents they request.

(4) No later than 15 days from the date set for hearing, the applicant, the county board of supervisors and the department shall, if any chooses to do so, send, one copy of a brief and any written documents claimed to support their respective positions to each member of the commission and to each other. No further briefs or documents shall be permitted except upon request and permission of the commission.

(5) The commission shall use the following hearing procedures:

1. All written material accepted by the chairperson of the commission for inclusion in the record at the hearing shall be marked as coming from the party presenting it in the manner indicated by the chairperson of the commission.

2. Objections to submitted written material may be made for the record by the applicant and the county board of supervisors. All such objections shall be decided by the chairperson of the commission.

3. Oral participation before the commission will be limited to time periods specified by the commission and, unless otherwise determined by the commission, to presentations by representatives from the county board of supervisors, the applicant and the department. Representatives of the department shall not advocate for either the county board of supervisors or the applicant but may summarize the basis for the department's preliminary decision and respond to questions by members of the commission.

4. Members of the commission, or the commission's designated legal counsel, may ask questions of the representatives for the applicant, the county board of supervisors and the department. The members and counsel may also ask questions of any other person or entity appearing at the hearing. No other persons or entities may ask questions of anyone making a presentation or comment at the hearing except upon request and permission by the chairperson of the commission.

(6) The commission shall use the following hearing format:

1. Announcement by the chairperson of the commission of the permit application under review.

2. Receipt into the hearing record of the demand or demands for hearing, a copy of the department's complete file on the application under review and the briefs and written documents

previously provided by the applicant and county board of supervisors pursuant to subparagraph 65.10(9)“a”(4).

3. Oral presentation, if any, by the applicant if that party timely requested the hearing. If the applicant did not timely request the hearing, then the county board of supervisors shall make the first presentation.

4. Oral presentation, if any, by the applicant or county board of supervisors, whichever party did not have the opportunity to make the first presentation.

5. Oral presentation, if any, by the department.

6. Oral presentation, if any, by technical consultants or experts designated by the commission to assist in its establishment of a record at the hearing. To the extent possible, the commission shall notify the applicant and the board prior to the hearing of the names, addresses and professional capacity of any such technical experts or consultants..

7. Discussion by the commission, motion and final decision on whether the application for permit is approved or disapproved.

(7) The party filing a demand for hearing opposing the department’s preliminary decision shall have the burden to establish that party’s position by a preponderance of the evidence.

b. *Decision by the commission.* The decision by the commission shall be stated on the record and shall be final agency action pursuant to Iowa Code chapter 17A. If the commission reverses or modifies the department’s decision, the department shall issue the appropriate permit or letter of denial to the applicant. The letter of decision shall contain the reasons for the action regarding the permit. The commission may elect to provide within 20 days after the hearing a

written explanation of its decision as stated on the record. Such election must be stated on the record at the time of the decision.

Date

Richard A. Leopold, Director