

Executive Order 80

Workgroup for Topsoil Preservation Requirements in NPDES General Permit #2

Date: Thursday, May 29th, 2014

Time: 9 AM – 2 PM

Location: DNR Central Office, Henry Wallace Building, 502 E 9th Street, Des Moines
Rooms: Auditorium; 2nd Floor Conference Room

Staff Support: Joe Griffin, Adam Schnieders

In attendance: Pat Sauer, Iowa Storm Water Education Program; Creighton Cox, Home Builders Association of Greater Des Moines; Joe Pietruszynski, Hubbell Realty Company; Chip Classon, Jerry's Homes; Lucy Hershberger, Forever Green Nursery; Mark Watkins, McAninch Corporation; Chad Ingels, Environmental Protection

Commission

1. Adam Schnieders introduced the workgroup and the rule change process to the people in attendance at the public hearing.
2. Members of the workgroup introduced themselves to the people in attendance.
3. Chairperson Cox opened the hearing at 9:07 AM.
4. Adam Schnieders spoke to the audience and outlined the rules for the hearing. Mr. Schnieders taped the public hearing and acted as the hearing moderator.
5. Joe Pietruszynski requested that the tapes be the official minutes of the meeting to reflect actual public comments. He asked that the workgroup questions and written notes be recorded only and the requirement that written minutes taken by him to be suspended. The workgroup unanimously agreed.
6. The public hearing started immediately after Adam Schnieders gave direction that the tape was recording.
7. Comments were made, as officially recorded by the Iowa Department of Natural Resources, for and against the rule.
8. The hearing concluded at 12:43 PM.
9. At 1:00 PM, Chairperson Cox asked to open the workgroup meeting following the public hearing. Pat Sauer moved to open the meeting. Lucy Hershberger seconded the motion. The vote was unanimous to open the meeting.
10. Joe Griffin communicated that there were no further staff updates.
11. The workgroup discussed public comments in written form and from the hearing. General discussion included that builders and developers present were opposed to the rule and people representing water quality interests were for the rule.
12. Lucy Hershberger asked the workgroup to find a compromise to the rule. She stated she understood the difficulty of meeting a 4-inch absolute and asked for a compromise suggesting a range of 3 to 5 inches of top-soil or for suggestions of another compromise

that would be acceptable to contractors. Pat Sauer asked for consideration of Hershberger's request. Classon, Cox, Watkins, and Pietruszynski stated they could not support absolute measures. Pietruszynski stated absolute measures created the cost problems that builders and developers in the metro are concerned about.

13. The workgroup discussed the need to keep soil on-site, unless infeasible. The workgroup was in agreement that soil should remain on-site.
14. Pat Sauer stated that she did not believe it would be possible for the group to meet consensus. Joe Pietruszynski spoke in agreement with Sauer's statement.
15. General discussion took place regarding measurements. Classon, Watkins, and Cox discussed the processes and costs necessary to achieve absolute measurements.
16. Lucy Hershberger introduced that compromise could be a soil application range. Hershberger explained that she represented people who feel that developers and builders left them with dysfunctional lawns in the development process by not replacing topsoil removed in the grading of the development.
17. Watkins expressed the concerns about public perception and lack of education in the process.
18. Lucy Hershberger stated that many contractors do not have a good understanding of the importance of topsoil to water quality and the value it provides to the homeowner as demonstrated by the comments at the public hearing. Pat Sauer discussed a need for the Home Builders Association and developers to educate the industry and buyers. Sauer spoke of her experiences in educating cities and developers and asked Chairperson Cox to explore educational opportunities. Chairperson Cox agreed with Sauer that education is important and should be pursued.
19. Open discussion took place on viewpoints associated with the rule. The workgroup discussed the improbability of finding common ground.
20. Joe Pietruszynski introduced to the group that consensus on every viewpoint was not likely and asked the chairperson to ask for a vote.
21. Chairperson Cox moved that language written in conformance with existing federal guidelines as previously presented to the group on May 2, consensus and non-consensus items from the 5-2-2014 meeting minutes, an affidavit example from Waukee, and all written and recorded public comments be submitted as the recommendation of the workgroup. Joe Pietruszynski, acting as recording secretary, asked that the motion be properly reflected by the actual documents the chair was referencing. Mr. Pietruszynski asked that the documents be part of the minutes (as attached hereto) and emailed to the workgroup after a vote was taken. Chairperson Cox agreed to make the actual documents part of the motion and include them in the minutes.
22. Chairperson Cox asked for motion. Chip Classon moved to approve Chairperson Cox's recommendation. Chad Ingels seconded the motion.
23. The workgroup discussed the points and document being presented. Chairperson Cox was asked for clarification on the motion. After brief discussion, the vote to approve the recommendation to provide to the EPC the language written in conformance with existing federal guidelines as previously presented to the group on May 2, the consensus and non-consensus items from the 5-2-2014 meeting minutes, an affidavit example from Waukee, and all written and recorded public comments be submitted as

the recommendation of the workgroup, made by Cox was unanimous. Chairperson Cox signed the recommendation and asked the group if they would like to sign the recommendation packet as well. The group stated Chairperson Cox's signature was sufficient.

24. Chairperson Cox called DNR Staff member, Joe Griffin to notify that a unanimous recommendation had been made and was ready to be presented to EPC.
25. Mr. Pietruszynski asked that the minutes of the 5-2-2014 meeting and 5-29-2014 workgroup meeting be reviewed by the group and voted on for approval of the record via email because the group had not had a chance to review the 5-2-2014 minutes prior to the meeting. The workgroup was in agreement to this process. Chairperson Cox agreed to send the draft minutes out for approval.
26. Joe Griffin arrived at the meeting, Chairperson Cox presented Mr. Griffin with the packet as recommendation to the EPC on behalf of the working group and explained the contents of the packet, including: language written in conformance with existing federal guidelines as previously presented to the group on May 2, consensus and non-consensus items from the 5-2-2014 meeting minutes; items 14-17, an affidavit example from Waukee, and all written and recorded public comments are the recommendation of the workgroup. Chairman Cox asked if copies could be made, Joe Griffin suggested Chairman Cox scan the documents and submit a cover letter describing the documents. Chairman Cox agreed and offered to send the cover letter to the group for approval, along with the original documents to be included in the recommendation packet.
27. Joe Griffin concluded that IDNR will be writing the final language and that the group's input was only a recommendation to the EPC. The group was presented a memo on the stringency of the 4" requirement. (attached below)

The workgroup meeting concluded at 2:02 PM.

MEMO

From: Jon Tack, Legal Services Bureau
To: Adam Schnieders, Supervisor – NPDES Permitting Section
Date: May 28, 2014

RE: Stringency of soil preservation requirements of General Permit #2 "Storm Water Discharge Associated with Industrial Activity for Construction Activities"

The DNR has formed a stakeholder rulemaking group pursuant to Executive Order No. 80 for the purpose of providing recommendations with respect to the topsoil preservation requirements contained in Part IV(D)(2)(A)(2)(c) of General Permit #2. The DNR has been asked to respond to the following question:

Is the requirement more stringent than federal law?

The answer is "No", as will be explained below.

The Code of Federal Regulations CFR now requires topsoil preservation at construction sites required to have a permit. Topsoil preservation has not been defined in the federal regulations. The regulation states:

40 CFR 450.21(a)(8) Unless infeasible, preserve topsoil. Preserving topsoil is not required where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.

In order to implement the federal requirement, Iowa's General Permit #2 contains Part IV(D)(2)(A)(2)(c) which states:

A.(2).(c). Unless infeasible, the following measures shall be implemented at all sites: utilize outlet structures that withdraw water from the surface when discharging from basins, provide and maintain natural buffers around surface waters, direct storm water to vegetated areas to increase sediment removal and maximize storm water infiltration and minimize soil compaction. Topsoil shall be preserved at all construction sites unless land use precludes the practice. The requirement to preserve topsoil shall be met only when the depth of topsoil after soil disturbing activities have been completed and final stabilization achieved for the permitted activity is equal to, or greater than, 4.0 inches, including soil contained in sod, on all areas of the site where the surface of the ground disturbed for the permitted construction activities is exposed and not covered by concrete, asphalt, gravel or other such material and where 4.0 inches or more of topsoil existed prior to the commencement of soil disturbing activities that are permitted under the current permit authorization for the site. On areas where less than 4.0 inches of topsoil existed prior to the commencement of soil disturbing activities that are permitted under the current permit authorization for the site, the minimum depth of topsoil after soil disturbing activities have been completed and final stabilization achieved for the permitted activity shall be equal to, or greater than, the depth of topsoil that existed prior to the commencement of soil disturbing activities that are permitted under the current permit authorization for the site.

The final topsoil depth is to be measured after the soil has been compacted in a fashion generally considered adequate for an established lawn and so that the expected settling that will occur after measurement will be minimal and shall include the soil contained in any sod that has been placed on the site. The type of topsoil at the site after soil disturbing activities have been completed and final stabilization achieved for the permitted activity shall be similar to that which exists or existed in the general area of the site.

For construction activity which is part of a larger common plan of development, such as a housing or commercial development project, in which a new owner agrees in writing to be solely responsible for compliance with the provisions of this permit for the property which has been transferred or in which the new owner has obtained authorization under this permit for a lot or lots (as specified in subrule 567-64.6(6) of the Iowa Administrative Code), the topsoil preservation requirements described above must be met no later than at the time the lot or lots have reached final stabilization as described in this permit.

For sites where less than 4.0 inches of topsoil is to be in place after soil disturbing activities have been completed and final stabilization achieved for the permitted activity, a soil survey conducted by properly qualified personnel who regularly conduct soil surveys as part of their normal job duties must be conducted prior to commencement of soil disturbing activities that are permitted under the current permit authorization for the site. The results of the soil survey shall become part of the Pollution Prevention Plan and shall indicate the depth of topsoil at a suitable number of points on the site commensurate with standard engineering practices established for the size of the site.

Similarities:

Both the state and federal rule require topsoil preservation. Preservation is understood in both cases to refer to the topsoil in existence prior to construction activities. Both rules provide a limitation that preservation is only required “unless infeasible”. Both rules provide an exception where the intended land use is contrary to the requirement. The underlying basic requirement and the exceptions from the requirement appear to be identical at the state and federal level.

Difference:

The state and federal requirements are different in that the federal rule fails to define or explain what it means to “preserve topsoil”. It could be reasonably interpreted to mean that all topsoil must remain on site in the volume that existed prior to development. If “preserve topsoil” means something different than retaining **all** soil, the federal rule does not explain how much less is acceptable. No one knows. The state rule therefore provides a definition for sufficient minimum preservation.

The state requirement establishes a threshold of 4.0 inches, including the soil on the sod, as compliant with the topsoil preservation requirement. Lesser amounts can be justified, but a developer or builder is always in compliance if they meet the 4.0 inch standard. The limited federal case law indicates that state rules are not considered more restrictive than the federal regulations if they merely describe the “manner” to be used to comply with the federal rule. *See Covington v. Jefferson County*, 358 F.3d 626, C.A.9 (Idaho) 2004.

In this way, the Iowa topsoil preservation requirement cannot be found to be more stringent than the federal requirement because the Iowa permit requirement merely explains how to comply with a federal requirement that can be interpreted to be either more restrictive or less restrictive than the state requirement. More specific is not necessarily more restrictive. It is dependent upon what the federal rule is interpreted to mean.