

567—65.105(455B,459,459B) Construction permit application review process, site inspections and complaint investigations.

65.105(1) *Delivery of application to county.* The applicant for a construction permit for a confinement feeding operation or related AFO structure shall deliver in person or by certified mail a copy of the permit application and MMP to the county board of supervisors of the county where the confinement feeding operation or related AFO structure is proposed to be constructed. Receipt of the application and MMP by the county auditor or other county official or employee designated by the county board of supervisors is deemed receipt of the application and MMP by the county board of supervisors. Documentation of the delivery or mailing of the permit application and MMP shall be forwarded to the department.

65.105(2) *Public notice and county comment.*

a. Public notice. The county board of supervisors shall publish a notice that the board has received the construction permit application in a newspaper having general circulation in the county. The county board shall publish the notice as soon as possible but no later than 14 days after receiving instructions from the department that a complete application has been received. The notice shall include all of the following:

- (1) The name of the person applying to receive the construction permit;
- (2) The name of the township where the confinement feeding operation structure is to be constructed;
- (3) Each type of confinement feeding operation structure proposed to be constructed;
- (4) The animal unit capacity of the confinement feeding operation if the construction permit were to be approved;
- (5) The time when and the place where the application may be examined as provided in Iowa Code section 22.2;
- (6) Procedures for providing public comments to the board as provided by the board.

The county shall submit to the department, within 30 days of receipt of the construction permit application, proof of publication to verify that the county provided public notice as required in this paragraph.

b. County comment. Regardless of whether the county board of supervisors has adopted a construction evaluation resolution, the board may submit to the department comments by the board and the public regarding compliance of the construction permit application and MMP with the requirements in this chapter and Iowa Code chapter 459 for obtaining a construction permit. Comments may include but are not limited to the following:

- (1) The existence of an object or location not included in the construction permit application that benefits from a separation distance requirement as provided in Iowa Code section 459.202 or 459.310.
- (2) The suitability of soils and the hydrology of the site where construction or expansion of a confinement feeding operation or related AFO structure is proposed.
- (3) The availability of land for the application of manure originating from the confinement feeding operation.
- (4) Whether the construction or expansion of a proposed AFO structure will impede drainage through established tile lines, laterals, or other improvements which are constructed to facilitate the drainage of land not owned by the person applying for the construction permit.

65.105(3) *Master matrix.* A county board of supervisors may adopt a construction evaluation resolution relating to the construction of a confinement feeding operation structure. The board must submit such resolution to the director of the department for filing. Adoption and filing of a construction evaluation resolution authorizes a county board of supervisors to conduct an evaluation of a construction permit application using the master matrix as follows:

a. Enrollment periods.

- (1) The county board of supervisors must file an adopted construction evaluation resolution with the department between January 1 and January 31 of each year to evaluate construction permit applications received by the department between February 1 of that year and January 31 of the following year.
- (2) Filed construction evaluation resolutions shall remain in effect until the applicable enrollment period expires or until such time as the county board of supervisors files with the department a resolution rescinding the construction evaluation resolution, whichever is earlier.

(3) Filing of an adopted construction evaluation resolution requires a county board of supervisors to conduct an evaluation of a construction permit application using the master matrix. However, if the board fails to submit an adopted recommendation to the department or fails to comply with the evaluation requirements in paragraph 65.105(3)“b,” the department shall disregard any adopted recommendation from that board until the board timely submits a new construction evaluation resolution.

b. Use of the master matrix. If a county board of supervisors has adopted and filed with the department a construction evaluation resolution, as provided in paragraph 65.105(3)“a,” the board shall evaluate all construction permit applications filed during the applicable period using the master matrix as follows:

(1) In completing the master matrix, the board shall not score criteria on a selective basis. The board must score all criteria that are part of the master matrix according to the terms and conditions relating to construction as specified in the application or commitments for manure management that are to be incorporated into an MMP as provided in Iowa Code section 459.312.

(2) The board shall include with the adopted recommendation a copy of the master matrix analysis, calculations, and scoring for the application. The board’s adopted recommendation submitted to the department may be based on the master matrix or on comments received by the board. The adopted recommendation shall include the specific reasons and any supporting documentation for the decision to recommend approval or disapproval of the application.

(3) The board shall not use the master matrix to evaluate a construction permit application for the construction or expansion of a confinement feeding operation structure if the construction or expansion is for expansion of a confinement feeding operation that includes a confinement feeding operation structure constructed prior to April 1, 2002, and, after the expansion of the confinement feeding operation, its animal unit capacity is 1,666 animal units or less. The board may still submit comments regarding the application.

65.105(4) *Inspection of proposed construction site.* The department may conduct an inspection of the site on which construction of the confinement feeding operation is proposed after providing a minimum of 24 hours’ notice to the construction permit applicant or sooner with the consent of the applicant. If the county in which the proposed facility is located has adopted and submitted a construction evaluation resolution pursuant to subrule 65.105(3) and has not failed subsequently to submit an adopted recommendation, the county may designate a county employee to accompany a department official during the site inspection. In such cases, the department shall notify the county board of supervisors or county designee at least three days prior to conducting an inspection of the site where construction of the confinement feeding operation is proposed. The county designee shall have the same right to access to the site’s real estate on which construction of the confinement feeding operation is proposed as the departmental official conducting the inspection during the period that the county designee accompanies the departmental official. The departmental official and the county designee shall comply with standard biosecurity requirements customarily required by the owner of the confinement feeding operation that are necessary in order to control the spread of disease among an animal population.

65.105(5) *Determination by the department.* The department must receive the county board of supervisors’ comments or evaluation for approval or disapproval of an application for a construction permit not later than 30 days following the applicant’s delivery of a complete application to the department. Regardless of whether the department receives comments or an evaluation by a county board of supervisors, the department must render a determination or a preliminary determination to approve or disapprove an application for a construction permit within 60 days following the applicant’s delivery of a complete application to the department. However, the applicant may deliver a notice requesting a continuance. Upon receipt of a notice, the time required for the county or department to act upon the application shall be suspended for the period provided in the notice but for not more than 30 days after the department’s receipt of the notice. The applicant may submit more than one notice. However, the department may terminate an application if no action is required by the department for one year following delivery of the application to the board. The department may also provide for a continuance when it considers the application. The department shall provide notice to the applicant and the board of the continuance. The time required for the department to act upon the application shall be suspended for the period provided in the notice but for not more than 30 days. However, the department shall not provide for

more than one continuance. If review of the application is delayed because the application is incomplete, and the applicant fails to supply requested information within a reasonable time prior to the deadline for action on the application, the permit may be denied and a new application will be required if the applicant wishes to proceed. The department will approve or disapprove an application as follows:

a. If the county board of supervisors does not submit a construction evaluation resolution to the department, fails to submit an adopted recommendation, submits only comments, or fails to submit comments, the department shall approve the application if the application meets the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B. The department will disapprove the application if it does not meet such requirements.

b. If the board of supervisors for the county in which the confinement feeding operation is proposed to be constructed has filed a county construction evaluation resolution and submits an adopted recommendation to approve the construction permit application, which may be based on a satisfactory rating produced by the master matrix, to the department, the department shall preliminarily approve an application for a construction permit if the department determines that the application meets the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B. The department shall preliminarily disapprove an application that does not satisfy the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B regardless of the adopted recommendation of the board of supervisors. The department shall consider any timely filed comments made by the board as provided in this subrule to determine if an application meets the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B.

c. If the board submits to the department an adopted recommendation to disapprove an application for a construction permit that is based on a rating produced by the master matrix, the department shall first determine if the application meets the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B. The department shall preliminarily disapprove an application that does not satisfy the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B, regardless of any result produced by using the master matrix. If the application meets the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B, the department shall conduct an independent evaluation of the application using the master matrix. The department shall preliminarily approve the application if it achieves a satisfactory rating according to the department's evaluation. The department shall preliminarily disapprove the application if it produces an unsatisfactory rating regardless of whether the application satisfies the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B. The department shall consider any timely filed comments made by the board as provided in this subrule to determine if an application meets the requirements of this chapter and Iowa Code chapters 455B, 459, 459A and 459B.

65.105(6) *Departmental notification of permit application decision.* Within three days following the department's determination or preliminary determination to approve or disapprove the application for a construction permit, the department shall deliver a notice of the decision to the applicant.

a. If the county board of supervisors has submitted to the department an adopted recommendation for the approval or disapproval of a construction permit application, the department shall notify the board of the department's preliminary decision to approve or disapprove the application at the same time. For a preliminary decision to approve an application, the notice shall consist of a copy of the draft construction permit. For a preliminary decision to disapprove an application, the notice shall consist of a copy of the department's letter of preliminary denial. The preliminary decision to approve or disapprove an application becomes final without further proceedings if neither the county board of supervisors nor the applicant demands a hearing before the commission or appeals pursuant to subrules 65.105(7) and 65.105(8).

b. If the county board of supervisors has not submitted to the department an adopted recommendation for the approval or disapproval of a construction permit application, the department notice shall include the construction permit or letter of denial. The applicant may appeal the permit or denial as provided in subrule 65.105(8).

65.105(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 intent to demand a hearing and a demand for a hearing before the commission. The intent to demand a hearing shall be sent to the director of the department and must be postmarked no later than 14 days following the board's receipt of the department's notice of preliminary decision. The demand for hearing shall be sent to the director of the department and must be postmarked no later than 30 days following the board's receipt of the department's notice of preliminary decision. A county board of supervisors that has submitted an adopted recommendation to the department may waive the right to file a demand for hearing following the receipt of the department's notice of preliminary decision by filing a written notice of waiver with the department.

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, including legal briefs and all supporting documentation, and a further statement indicating whether an oral presentation before the commission is requested.

65.105(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 intent to demand a hearing and a 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 65.105(8) "a" or before an administrative law judge pursuant to paragraph 65.105(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.* The intent to demand a hearing shall be sent to the director of the department and must be postmarked no later than 14 days following the board's receipt of the department's notice of preliminary decision. The demand for hearing shall be sent to the director of the department and must be postmarked no later than 30 days following the applicant's receipt of the department's notice of preliminary decision. If the county board of supervisors has filed a demand for hearing, the times for facsimile notification and filing a demand for hearing are extended an additional three business days. It is the responsibility of the applicant to communicate with the department to determine if a county demand for hearing has been filed. 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, including legal briefs and 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 65.105(7), the applicant shall provide facsimile notification to the department within the time frame set forth in paragraph 65.105(7) "a" 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.

65.105(9) *Hearing and decision by the commission.*

a. *Hearing before the commission.*

(1) All hearings before the commission requested pursuant to subrules 65.105(7) and 65.105(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 65.105(7) or 65.105(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 five days from the date the director receives a demand for hearing, the director shall post on the department's website the demand for hearing and associated documents, letters notifying the parties of the hearing date, and the department's complete file on the application under review. The director shall provide hard copies of these documents to members of the commission as requested by each member.

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 reply brief to respond to issues raised in the demand for hearing and any supporting documentation to the department. The director shall post the briefs and associated written documents on the department's website and provide hard copies to members of the commission as requested by each member. No further briefs or documents shall be permitted except upon request and permission of the commission.

(5) No later than 15 days from the date set for hearing, any person may submit written material for the commission to review. Whether such material is accepted into the record will be the decision of the chairperson of the commission depending on whether the chairperson deems it relevant to the appeal.

(6) 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 person or entity presenting the document.

2. Objections to submitted written material shall be noted for the record.

3. Oral participation before the commission shall be limited to time periods specified by the chairperson of the commission and, unless otherwise determined by the commission, to presentations by representatives for the applicant, the county board of supervisors and the department and by technical consultants or experts designated by the commission. 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, and the commission's legal counsel, may ask questions of the representatives for the applicant, the county board of supervisors and the department and of technical consultants or experts designated by the commission. The members and counsel may also ask questions of any other person or entity appearing or in attendance at the hearing. Representatives for the applicant and the county board of supervisors may ask questions of technical consultants or experts designated by the commission. 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.

(7) 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 65.105(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. No later than seven days prior to the hearing, the commission shall notify the applicant and the board 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.

(8) Only the issues submitted by the parties in the demand for hearing and responses shall be considered by the commission as a basis for its decision.

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.

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