



505 Fifth Ave Suite 850
Des Moines IA 50309
515.244.1194
iaenvironment.org

September 24, 2024

Jon Garton, Supervisor
Floodplain and Dam Safety Section
Iowa Department of Natural Resources
6200 Park Ave
Des Moines, IA 50321

RE: Iowa DNR Regulatory Analysis – Chapter 70

Dear Mr. Garton:

The Iowa Environmental Council (IEC) offers the following comments on the proposed revisions to 567 Iowa Administrative Code Chapter 38. These comments represent the views of the Iowa Environmental Council, an alliance of more than 100 organizations, at-large board members from business, farming, the sciences and education, and over 500 individual members. IEC's members hike, fish, paddle, swim, and recreate in and around wetlands, lakes, rivers, and streams throughout the state.

We are concerned that DNR's regulatory analysis and the associated rule changes do not address the serious consequences of severe flooding in Iowa and fail to provide clear processes that meet the legal standard for rules.

Regulatory Analysis

Floodplains and floodways in Iowa have increasing importance in Iowa as we face severe weather events and longer-term shifts that result in prolonged flooding. The Regulatory Analysis for Chapter 70 does not address the increasing costs Iowa has faced due to these types of events. Iowa suffered \$1.6 billion in costs from flooding in 2019,¹ part of the \$7.6 billion in inflation-adjusted costs that year from Mississippi River flooding.² Iowa has suffered from more billion-dollar storms in the last 15 years than in the prior 15 years.³ IEC encourages discussion of the costs of flooding in the regulatory analysis.

¹ Kevin Hardy and Austin Cannon, "Iowa flooding: Damage from floodwaters reaches \$1.6B, Gov. Kim Reynolds estimates," Des Moines Register (Mar. 22, 2019), available at <https://www.desmoinesregister.com/story/news/2019/03/22/iowa-flooding-damage-estimate-governor-kim-reynolds-federal-flood-relief-trump-nebraska-missouri/3232934002/>.

² NOAA, "Billion-Dollar Weather and Climate Disasters - Events," available at <https://www.ncei.noaa.gov/access/billions/events/IA/2019> (last accessed Sept. 20, 2024).

³ NOAA, "Billion Dollar Weather and Climate Disasters - Iowa Summary," available at <https://www.ncei.noaa.gov/access/billions/state-summary/IA> (last accessed Sept. 20, 2024).

70.3(3), Permit Application Submittal Requirements.

This subsection of rule contains requirements for submitting an application for floodplain development. The language of the rule repeats “Application should” without specifying whether it is a requirement (shall or must) to follow the steps in the rule. IEC recommends rephrasing to clarify whether the rule components are required for approval.

IEC also notes that the rule lacks clarity with respect to which types of projects require certified engineering plans. While each development is site-specific, rules must apply generally and specify whether an action is required.

70.4, Establishment of a floodway.

As with 70.3(3), the phrasing of the rule lacks clarity about what criteria DNR will use to approve projects. For example:

- “review and approval will often depend on the location of the project....” What criteria will DNR use in its review?
- FEMA maps “may be used....” Does DNR intend this to be optional in every case?
- Conform to criteria “insofar as possible....” Who decides how much is possible?
- “To the extent feasible...” Who decides how much is feasible?

The lack of clarity in this chapter, and particularly in this section, does not satisfy the definition of a rule as provided in Iowa Code. Under the Administrative Procedure Act, rules must be “generally applicable” in a way that “implements, interprets, or prescribes a law or policy.”⁴ Where language fails to be generally applicable and does not prescribe the action to be taken, it should not be adopted as a rule. IEC recommends rephrasing to ensure the rules are phrase to be generally applicable.

70.5(3), Project investigation.

In paragraph “f” of subpart 70.5(3), the proposed rule states that if a project does not meet the criteria in rule, “the department shall notify the applicant and, when practical, suggest appropriate project modifications. The department shall offer the applicant an opportunity to submit comments before an initial decision is made.” This process fails to define when DNR will “suggest appropriate modifications” to applicants. This section also lacks clarity because it contains no timelines for suggestions or notification. It creates the possibility of unequal treatment if some applicants receive suggestions and others do not.

IEC recommends DNR reevaluate its approval process. DNR is not charged with helping applicants build in floodways or floodplains. DNR rules should set clear criteria; if an application does not meet the criteria, DNR must deny the application and the applicant can submit a new application if it so chooses.

⁴ IOWA CODE § 17A.2(11).

70.5(4), Initial decision by the department.

IEC recommends renaming the “initial decision” to be the “decision.” There is no need to call it “initial.” If the applicant chooses to appeal the agency decision, it can do so. IEC notes that DNR rules at Chapter 60, also has decisions subject to appeal and does not call them “initial decisions.”

Conclusion

We appreciate DNR’s efforts to evaluate the need for rules and to make the rules more accessible consistent with Executive Order 10, but that effort cannot undermine the protection of the state’s natural resources. DNR needs to revise the rules to clarify its criteria for approval and reevaluate the process it undertakes in evaluating applications. We encourage DNR to adopt IEC’s recommended changes.

Sincerely,

/s/ Michael R. Schmidt

Michael R. Schmidt
Staff Attorney
Iowa Environmental Council