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**RE: Proposed Changed to Regional Conditions for Nation Wide Permits**

Dear Mr. Frohlich:

The Iowa Environmental Council (IEC) offers the following comments on the Regional Conditions for Nationwide Permits (NWP) proposed by U.S. Army Corps of Engineers (Corps). These comments represent the views of the Iowa Environmental Council, an alliance of more than 75 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 lakes, rivers, and streams throughout the state.

IEC tracks Clean Water Act (CWA) section 404 permits to keep its members apprised of how permitted projects will affect local recreation and enjoyment of Iowa's lakes, rivers, and streams. We are concerned that the NWP and Regional Conditions proposed for Iowa fail to account for temporal loss of wetlands, will not protect wildlife health and habitat, and fail to meet Clean Water Act standards. These concerns arise in large part from changes to or removal of the regional conditions in effect under the existing permits.

**I. The Rock Island District Must Keep the Mitigation Scheduling Regional Condition to Prevent Temporal Loss of Wetlands.**

The Corps did not provide a rationale for its decision not to retain the regional condition applied to the existing permit concerning mitigation scheduling. The regional condition applicable under the existing permit states that “mitigation shall be scheduled prior to or concurrent with the discharge of dredged or fill material into waters of the United States unless an alternative timeline is specifically approved in the authorization” (hereinafter the mitigation condition).<sup>1</sup> IEC urges the Corps not to make such a determination without providing sufficient analysis or evidence to justify such a determination. Additionally, IEC offers information in support of retaining the regional condition.

*a. The removal of the condition was arbitrary and capricious.*

In *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co. (Motor Vehicles)*, the U.S. Supreme Court held that an agency’s decisions or actions can be reviewed under the arbitrary and capricious standard.<sup>2</sup> The court held that an agency’s action was arbitrary and capricious when it relied on factors that Congress did not intend to be considered by the agency, failed to consider an important aspect of the problem, offered an explanation of its decision not supported by the evidence, or offered an implausible explanation that cannot be justified by a mere difference in view or the product of agency expertise.<sup>3</sup> The Supreme Court further held in *Army Corps of Engineers v. Hawkes Co.*, that

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<sup>1</sup> U.S. Army Corps, Rock Island District, 2017 Nationwide Permits Regional Conditions, condition 3, (pub. Mar. 18, 2017, accessed Nov. 10, 2020) <https://www.nwo.usace.army.mil/Media/Public-Notices/Article/1125025/2017-nationwide-permit-reissuance-and-iowa-regional-conditions/>.

<sup>2</sup> 463 U.S. 29 (1983).

<sup>3</sup> *Id.*

Corps decisions are reviewable where they could be considered a final agency action.<sup>4</sup> The court relied upon the decision in *Bennet v. Spear*,<sup>5</sup> (1) where the determination of a final agency action must be final and (2) the agency's decision determines rights or obligations or from which legal consequences will flow.<sup>6</sup>

The definition of an enforceable agency decision has been interpreted broadly. For example, the Eighth Circuit held that letters from the EPA to Senator Chuck Grassley were regulations subject to public review and comment and were not interpretative documents meant to provide guidance.<sup>7</sup> Furthermore, the regional conditions fit the definition of rule in the Administrative Procedure Act (APA). The APA defines rule as whole or part of an agency statement designed to implement, interpret or prescribe law or policy.<sup>8</sup> While regional conditions are parts of the permits and are used in determination of issuance of permits, they apply to multiple projects and function as an agency's decision with future effect.<sup>9</sup> Therefore, when removing a condition that acts as a ruling and provides legal guidance to permittees in Iowa, the removal should be supported by evidence.<sup>10</sup>

The Corps has not provided any explanation for its removal of the condition regarding mitigation to satisfy this standard;<sup>11</sup> instead, the Corps instead simply proposes to reissue the permits without the regional condition disregarding current regulations for mitigation techniques that require previous or concurrent planning with the proposed activity.<sup>12</sup> The CWA states that

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<sup>4</sup> *US Army Corps of Engineers v. Hawkes Co.*, 782 F.3d 994 (2016).

<sup>5</sup> 520 U.S. 154 (1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013).

<sup>8</sup> 5 U.S.C. §551(4) (2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Army Corps of Engineers, *Iowa Proposed Regional Conditions 2020 Nationwide Permits* (Sept. 30, 2020).

<sup>12</sup> *Id.*

for dredge and fill permits under 404, the administrator of the permit has the ability to restrict and prohibit the removal and filling of an area if he or she determines that the discharge of such materials will have adverse effects on municipal water supplies, wildlife, or recreational areas.<sup>13</sup> Further, the administrator shall set forth in writing and make public the administrator's findings and reasons for making any determination.<sup>14</sup>

Under the Corps regulations controlling compensatory mitigation for losses of aquatic resources, 33 C.F.R. § 332.3(f), a district engineer is required to account for mitigation including temporal losses of aquatic functions.<sup>15</sup> For projects that use an in-lieu fee program the district engineer must consider alternatives to be implemented for compensatory mitigation concerns that arise during the project.<sup>16</sup> Additionally, section 332.2 defines adaptive management techniques as the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address challenges and unforeseen events.<sup>17</sup> The original regional condition would clarify that implementation of compensatory mitigation practices should occur during and prior to the permitted activity.<sup>18</sup> Because it fails to provide evidence and reasoning for removing the mitigation condition, the Corps' removal of such condition is arbitrary and capricious, and the mitigation condition should be retained in the permits.

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<sup>13</sup> 33 U.S.C. §1344 (2020).

<sup>14</sup> *Id.*

<sup>15</sup> Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19676 (April 10, 2008) (codified at 33 C.F.R. pt. 325 and 332).

<sup>16</sup> *Id.* at 19676.

<sup>17</sup> *Id.* at 19671.

<sup>18</sup> *See id.*; U.S. Army Corps of Engineers, *Iowa Proposed Regional Conditions 2020 Nationwide Permits* (Sept. 30, 2020).

- b. Evidence shows that mitigation during and prior to discharge of materials is key to mitigating environmental effects.*

Regardless of the lack of justification to remove the regional condition, evidence supports its inclusion to protect water quality. Most NWP's deal with bank stabilization, dredge and filling of water resources and increases of impervious surfaces.<sup>19</sup> Construction on waterways often involves heavy equipment activity both near and in the water.<sup>20</sup> This can increase turbidity and sediment loads in the streams.<sup>21</sup> Mitigation of the impacts of the activity may include bank stabilization, re-vegetation, use of sediment barriers to decrease sediment loss to the waterway, and efforts to minimize the spillage during transport of dredged and fill material.<sup>22</sup> While some of these mitigation activities deal with impacts after construction, best management practices are necessary before and during the work to minimize the effects during the activity itself.<sup>23</sup>

Interagency methods to evaluate mitigation also discourage temporal losses. In December 2018, the Corps, the Iowa Department of Natural Resources (IDNR), and other state agencies developed the State of Iowa Stream Mitigation Method Version 2.0 (ISMM).<sup>24</sup> ISMM was designed to quantify unavoidable stream impacts in compliance with the compensatory mitigation rules.<sup>25</sup> For example, for mitigation banks, one of the possible compensatory mitigation practices, a permit applicant should examine where there are currently credits available for stream mitigation banks under the credit system.<sup>26</sup> In another example, areas that

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<sup>19</sup> See Minnesota Pollution Control Agency, *Erosion Prevention Practices – Temporary Seeding and Stabilization* (last accessed Nov. 13, 2020) [https://stormwater.pca.state.mn.us/index.php/Erosion\\_prevention\\_practices\\_-\\_temporary\\_seeding\\_and\\_stabilization](https://stormwater.pca.state.mn.us/index.php/Erosion_prevention_practices_-_temporary_seeding_and_stabilization).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> U.S. Army Corps of Engineers, *State of Iowa Stream Mitigation Method*, (pub. 2017, accessed Nov. 13, 2020) <https://www.mvr.usace.army.mil/Portals/48/docs/regulatory/ISMM13July2017.pdf>.

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.*

operate under the in-lieu fee (ILF) programs provide guidance on the options available to a permittee if the permittee does not use all of the mitigation credits it is granted.<sup>27</sup> Both examples above require the permit applicant to consider mitigation practices before and during the construction so as to minimize adverse environmental impacts.<sup>28</sup>

The ISMM provides guidance on how to meet state and CWA water quality standards. The Corps had described the systems used both in the Mitigation Rule and the ISMM to make determinations that will quantify the adverse effects on water quality.<sup>29</sup> For a 404 permit applicant, the ISMM acts as a guidance document on best management practices for compensatory mitigation techniques. However, for these mitigation techniques to be successful, the regional conditions must alert the permit applicant to the need to avoid temporal losses because no other Corps permit will be required.<sup>30</sup> The mitigation condition therefore puts the permittee on notice and ensures enforceability to prevent temporal losses.<sup>31</sup> Thus, the mitigation condition is protective of water quality and is a necessary component of the 404 permits that should be retained.

## **II. The Requirement for Vegetation in Newly-Constructed Channels has been Arbitrarily Removed.**

The regional conditions for the existing NWP provide that 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 the bank must be planted along

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 11; 33 U.S.C. §1344 (2020).

<sup>31</sup> See U.S. Army Corps of Engineers, *State of Iowa Stream Mitigation Method*, at 11 (pub. 2017, accessed Nov. 13, 2020) <https://www.mvr.usace.army.mil/Portals/48/docs/regulatory/ISMM13July2017.pdf> ; 33 U.S.C. §1344 (2020).

both sides of the new channel.<sup>32</sup> The condition further requires an 80% survival rate within three years of establishing the buffer strip.<sup>33</sup> The Corps has not provided a rationale for removing the regional condition on construction with vegetation for channels (hereinafter vegetation condition).<sup>34</sup>

*a. The Corps must satisfy the arbitrary and capricious standard.*

The Corps has not provided any evidence or explanation for removing the vegetation condition to satisfy the arbitrary and capricious legal standard described above.<sup>35</sup> The Corps instead simply proposes to remove the regional condition.<sup>36</sup> When removing a condition that acts as an enforceable decision and provides legal guidance to permittees in Iowa, the removal should be supported by evidence.<sup>37</sup>

*b. Evidence shows that vegetation of sites reduces pollution.*

Regardless of the lack of justification to remove the regional condition, evidence supports its inclusion to protect water quality. Erosion and sediment pollution can be significantly reduced by vegetative covers or restoration.<sup>38</sup> Vegetation reduces erosion in several ways: it prevents initial erosion during rainfall but also reduces erosion once the ground is saturated by reinforcing the soil with its root system.<sup>39</sup> Runoff from areas with vegetation does not generally exceed 10 to 20% of rainfall received; however, where there is no vegetation the runoff can be as high as 60 to

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<sup>32</sup> U.S. Army Corps, Rock Island District, 2017 Nationwide Permits Regional Conditions, condition 4, (pub. Mar. 18, 2017, accessed Nov. 10, 2020) <https://www.nwo.usace.army.mil/Media/Public-Notices/Article/1125025/2017-nationwide-permit-reissuance-and-iowa-regional-conditions/>.

<sup>33</sup> U.S. Army Corps of Engineers, *Iowa Proposed Regional Conditions 2020 Nationwide Permits* (Sept. 30, 2020).

<sup>34</sup> See 5 U.S.C. §551(4) (2011); *Motor Vehicles*, 463 U.S. 29 (1983).

<sup>35</sup> U.S. Army Corps of Engineers, *Iowa Proposed Regional Conditions 2020 Nationwide Permits* (Sept. 30, 2020).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Shirley Morow, Michael Smolen, Jim Stiegler, Janet Cole, *Using Vegetation for Erosion Control on Construction Sites*, Oklahoma State University (2017) <https://extension.okstate.edu/fact-sheets/using-vegetation-for-erosion-control-on-construction-sites.html>.

<sup>39</sup> *Id.*

70% of rainfall received.<sup>40</sup> The Federal Highway Administration also provides guidance for revegetating roadside ditches and focuses on the importance of early development and planning to ensure successful revegetation of roadside areas.<sup>41</sup> Other states provide more detailed requirements for revegetation. For example, Minnesota provides guidance on how to use temporary seeding and stabilization to counteract erosion on bare soil during construction or other soil-disturbing activities.<sup>42</sup> To protect water quality and aquatic life, the Corps must retain the existing regional condition.

### **III. Removal of the Regional Condition Regarding the Use of Heavy Equipment in the Stream Channel Will Increase Turbidity.**

IEC is concerned the removal of the regional condition regarding the use of heavy equipment in the stream channel<sup>43</sup> will no longer ensure compliance with Iowa's water quality standard for turbidity because it removes requirements to control turbidity during the construction process.<sup>44</sup> For the NWP and regional conditions, the Corps acts as the administrator for the purpose of issuing 404 permits, but it has not provided any evidence for the removal of the condition regarding use of heavy machinery in the streambed.<sup>45</sup> Failure to ensure

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<sup>40</sup> *Id.*

<sup>41</sup> Federal Highway Administration, *Roadside Revegetation: An Integrated Approach to Establish Native Plants and Pollinator Habitat*, U.S. Department of Transportation (last accessed Nov. 13, 2020). [https://www.environment.fhwa.dot.gov/env\\_topics/ecosystems/roadside\\_revegetation/ch03.aspx](https://www.environment.fhwa.dot.gov/env_topics/ecosystems/roadside_revegetation/ch03.aspx).

<sup>42</sup> Minnesota Pollution Control Agency, *Erosion Prevention Practices – Temporary Seeding and Stabilization* (last accessed Nov. 13, 2020) [https://stormwater.pca.state.mn.us/index.php/Erosion\\_prevention\\_practices\\_-\\_temporary\\_seeding\\_and\\_stabilization](https://stormwater.pca.state.mn.us/index.php/Erosion_prevention_practices_-_temporary_seeding_and_stabilization).

<sup>43</sup> U.S. Army Corps, Rock Island District, 2017 Nationwide Permits Regional Conditions, condition 9, (pub. Mar. 18, 2017, accessed Nov. 10, 2020) <https://www.nwo.usace.army.mil/Media/Public-Notices/Article/1125025/2017-nationwide-permit-reissuance-and-iowa-regional-conditions/>.

<sup>44</sup> USGS, *Turbidity and Water*, [https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science_center_objects=0#qt-science_center_objects) (last accessed Nov. 6, 2020).

<sup>45</sup> *Id.*



compliance with Iowa’s water quality standards does not protect existing uses and therefore violates the Clean Water Act.<sup>46</sup>

Turbidity is the measurement of clarity in a liquid.<sup>47</sup> High turbidity levels affect the ecological productivity, recreational values and habitat quality of waters and streams.<sup>48</sup> IDNR has determined that to protect the ecological productivity, recreational values, and habitat quality of Iowa’s rivers, turbidity levels must be managed in accordance with the standards set under the CWA.<sup>49</sup> Constructing riprap and other erosion controls may require moving substantial amounts of soil on the bank of the water body.<sup>50</sup> If not properly managed during the construction of remedial measures, construction efforts can cause significant pollution through suspended solids that can impact the health of the waterways and aquatic life, even if the construction follows typical industry practices.<sup>51</sup>

The regional condition requires the permit applicant to not use heavy equipment in the stream channel unless it is unavoidable.<sup>52</sup> The regional condition further requires any use of heavy equipment to be done in a way that would minimize the duration of the disturbance, thereby minimizing turbidity associated with substrate disturbance, bank disturbance, and disturbance to riparian vegetation.<sup>53</sup> By removing the regional condition, there is no longer any assurance that permittees will meet Iowa’s narrative water quality standards for turbidity, nor

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<sup>46</sup> *Id.*

<sup>47</sup> IOWA ADMIN. CODE r. 567-61.3(2)(f).

<sup>48</sup> IOWA ADMIN. CODE r. 567-61.3(2).

<sup>49</sup> *Id.*

<sup>50</sup> Minnesota Pollution Control Agency, *Erosion Prevention Practices – Temporary Seeding and Stabilization* (last accessed Nov. 13, 2020) [https://stormwater.pca.state.mn.us/index.php/Erosion\\_prevention\\_practices\\_-\\_temporary\\_seeding\\_and\\_stabilization](https://stormwater.pca.state.mn.us/index.php/Erosion_prevention_practices_-_temporary_seeding_and_stabilization); USGS, *Turbidity and Water*, [https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science_center_objects=0#qt-science_center_objects) (last accessed Nov. 6, 2020).

<sup>51</sup> *Id.*

<sup>52</sup> U.S. Army Corps of Engineers, *Iowa Proposed Regional Conditions 2020 Nationwide Permits* (Sept. 30, 2020).

<sup>53</sup> *Id.*

does it prevent pollution affecting public health, wildlife, and recreation.<sup>54</sup> Because the Corps has not provided justification for removing the regional condition regarding heavy construction in the stream channel and such condition is necessary to meet state water quality standards and protect public health and the environment, the condition should be retained.

**IV. IEC Supports the New Condition for a Pre-Construction Notice for Projects But the 300-foot Loss of Waters of the U.S. Lacks Justification.**

IEC supports the Corps new regional condition requiring a Pre-Construction Notice for projects that result in a loss of a fixed amount of Waters of the U.S.<sup>55</sup> However, IEC is concerned about the selection by the Corps to use “300 feet of Waters of the U.S.” First, the term is ambiguous because it does not specify whether it is referring to linear feet or square feet. The new condition does not mention either and IEC is unfamiliar with a method for calculation of water loss that is not done by linear feet or by area.<sup>56</sup> The proposed NWP removed a 3,000 linear foot method and instead implement a measurement of water loss by acreage, which provides no further clarity.<sup>57</sup> Second, it is not clear how the Corps determined that the proposed length or area was adequate to protect water quality and wildlife habitat.<sup>58</sup> The Corps should provide analysis or justification for selecting the length or area of loss allowed under the NWP.

**V. IEC Supports the Retention of the Condition for Requiring an Individual 401 Certification for a Permittee to Exceed the Limits of the Nationwide Permit.**

IEC supports retaining the proposed the Regional Condition requiring an individual 401 certification where the Corps has issued a waiver to exceed the limits of nationwide permits.<sup>59</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Proposal to Reissue and Modify Nationwide Permits*, 85 Fed. Reg. 57298, 57311.

<sup>58</sup> U.S. Army Corps of Engineers, *Iowa Proposed Regional Conditions 2020 Nationwide Permits* (Sept. 30, 2020).

<sup>59</sup> *Id.*

This condition is necessary to ensure compliance with Iowa’s water quality standards. Without this condition, it is unclear how IDNR could certify that NWP’s will satisfy Iowa’s water quality standards because the terms of the permits may not apply in some circumstances.

The approach to require individual certifications in special circumstances is consistent with the condition that requires filing a pre-construction notice and obtaining individual 401 Certification for permits affecting Outstanding National Resource Water, Outstanding Waters of Iowa, fens, bogs, seeps, or sedge meadows.<sup>60</sup> This provision will continue to support and protect sensitive waters and wildlife in Iowa.<sup>61</sup> Requiring an individual 401 certification is essential to ensure that the 401 certifications have conditions tailored to ensure protection of the unique characteristics for each sensitive site.<sup>62</sup>

**VI. Conclusion**

The draft regional conditions proposed fail to protect Iowa’s federally-approved water quality standards because they remove essential elements of the existing permits. The proposed conditions would not protect waters of the state from turbidity pollution. The Corps must address these defects before issuing the final permits to ensure compliance with the Clean Water Act and its implementing regulations. Thank you for the opportunity to comment.

Sincerely,

/s/ Michael R. Schmidt

Michael R. Schmidt  
Staff Attorney  
Iowa Environmental Council

/s/ Katie Luzier

Katie Luzier  
Legal Intern  
Iowa Environmental Council

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*