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Christine Schwake
Iowa Department of Natural Resources Wallace State Office Building
502 East 9th Street
Des Moines, Iowa 50319
Email: christine.schwake@dnr.iowa.gov

RE: Proposing Rule Making Related to Water Quality Certification Applications and Providing an Opportunity for Public Comment

Dear Ms. Schwake:

The Iowa Environmental Council (IEC) offers the following comments on the Proposing Rule Making Related to Water Quality Certification Applications and Providing an Opportunity for Public Comment published in the Iowa Administrative Bulletin on August 12, 2020, by the Environmental Protection Commission (Commission). The rule making would revise the processes for the Iowa Department of Natural Resources (IDNR) in certifying nationwide and regional permits under section 404 of the Clean Water Act. These comments represent the views of the Iowa Environmental Council, an alliance of 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 section 401 certification permits to keep their members apprised of how permitted projects will affect local recreation and enjoyment of Iowa's lakes, rivers, and streams.

I. The Commission Cannot Restrict Conditions Placed on a 401 Certification Application to the List in the Proposed Rule.

The proposed rules significantly change the previous requirements of the certification process. The Commission stated the purpose of the rule change is to "streamline the process" the IDNR uses to certify certain federal 404 permits.¹ The Commission's proposed change to list all possible conditions is more restrictive than the existing rule, thereby limiting IDNR's ability to condition the section 404 permits to protect water quality standards.

The proposed rules state that IDNR "may require conditions, which may include one or more of the following, to ensure water quality standards are met."² IDNR could interpret the language to

¹ XLIII Iowa Admin. Bull. p. 264 (Aug. 12, 2020).

² *Id.* at 267.

mean the agency is limited to imposing the set of conditions listed in the rule. This interpretation restricts IDNR's authority in a way that is inconsistent with the Clean Water Act's requirement for states to impose the conditions necessary to ensure compliance with the state's water quality standards.³ Because the rule applies to federal permits that have not yet been issued, the Commission cannot be certain that the proposed conditions will ensure compliance with water quality standards.

To avoid the restrictive interpretation, the Commission should revise the rule at 61.2(6)(f) to read as follows:

f. Certification of federal permits or licenses may require conditions to ensure water quality standards are met. These may include, but are not limited to, one or more of the following:

The rephrasing makes clear that IDNR can impose any condition necessary to ensure compliance with water quality standards, consistent with the Clean Water Act and its implementing regulations.⁴

II. The “Clarification” of the Certification Conditions Fails to Justify Substantial Differences Between the Proposed and Existing Conditions.

Although the proposal claims that the proposed rule merely “clarifies” the conditions that it can impose,⁵ in fact the proposed rule significantly changes the conditions. The proposal provides no justification for the substantive changes, nor does it demonstrate how changing the substance of the conditions would streamline the process or better protect water quality. These changes affect numerous conditions that IDNR has historically imposed:

- The existing rules do not allow heavy equipment in the waterway; the proposed rule would allow use of any equipment in the waterway as long as it has been thoroughly cleaned.⁶
- The proposed conditions remove vegetative buffer zone requirements.
- The proposed conditions remove requirements for individual certification of projects impacting outstanding national resource waters, outstanding Iowa waters, and specific types of wetlands.⁷
- The proposed rule removes a requirement for individual certification of projects receiving special waivers to exceed the limits of nationwide permits.⁸
- The proposed rule removes additional construction requirements for side slopes.⁹
- The proposed rule removes permanent wetland loss restrictions for single family residences authorized under nationwide permit 29 and nationwide permit 46.¹⁰

³ 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.2(4); 33 C.F.R. § 325.4(a)(1).

⁴ See 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.2(4); 33 C.F.R. § 325.4(a)(1).

⁵ XLIII Iowa Admin. Bull. P. at 264 (Aug. 12, 2020).

⁶ *Id.*

⁷ *Id.* at 266, 267.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The proposal does not provide any justification for removing these requirements.¹¹ Thus, the proposed rule offers significant changes to the certification requirements but has provided little to support them, even though some conditions show little clear correlation to the current rule.¹² In some cases, such as the waivers granted to nationwide permits, IDNR would have no opportunity to evaluate the effects of waiving permit conditions.

The proposed changes would reduce protections for Iowa's waters and would not ensure protection with the state's water quality standards adopted under the Clean Water Act, 33 U.S.C. § 1313. IDNR must revise the rule to fulfill its legal obligation to ensure compliance with the state's water quality standards.

III. The Rules Should Require Certain Conditions for All Nationwide Permits.

The Commission proposes to add requirements specific to hydropower dams, adds language similar to Iowa's water quality narrative standard, and changes riparian buffers to riprap and temporary crossing. Many of the existing and proposed conditions would provide assurance of meeting water quality standards in any permit. IEC recommends these be mandatory conditions.

Proposed rule 61.2(6)(f), items (1)-(7) would be the easiest to require for each permit.¹³ Item (1), requiring actions taken to prevent pollution affecting public health, should be required for each permit because it will require each certification applicant to protect public health and wildlife in accordance with the state antidegradation policy outlined in 61.2(2).¹⁴ At minimum this requirement protects existing surface water uses for Tier 1 protection, but it further covers Tier 2 protected waters where the quality of water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreational uses of the water.¹⁵

Item (2), requiring all equipment to be cleaned of hazardous material prior to use, is less stringent than the existing requirement under 61.2(2)(g)(9), which prohibits the use of heavy equipment in streams unless the equipment is used in a manner that minimizes the duration of the disturbance, the increase in turbidity, substrate disturbance, bank disturbance and disturbance of riparian vegetation.¹⁶ However, if the rule lists proposed items (4), (5), and (6) as mandatory requirements, it will effectively retain the same protection as existing item 61.2(2)(g)(9) while providing greater specificity.¹⁷

Items (3) and (7) relate to sediment and pollutant discharge like items (4)-(6).¹⁸ Item (3) prevents the certification applicant from discharging cleared vegetation into the waters of the state.¹⁹ The discharge of cleared vegetation would increase turbidity in the waters of the state and should be

¹¹ See *id.* at 264 (“the rule making reorganizes and clarifies the list of potential conditions”).

¹² *Id.* at 266, 267.

¹³ *Id.* at 267.

¹⁴ *Id.*; Iowa Admin. Code r. 567-61.2(2) (2020).

¹⁵ Iowa Admin. Code r. 567-61.2(2) (2020).

¹⁶ XLIII Iowa Admin. Bull. P. at 266, 267 (Aug. 12, 2020).

¹⁷ *Id.*

¹⁸ *Id.* at 266.

¹⁹ *Id.*

properly managed for each certification application.²⁰ Similarly, item (7) regulates stockpiled dredged materials management to prevent discharge of sediment that would violate water quality standards.²¹ Both subsections focus on regulating the potential discharges to the state waters and maintaining the current water quality so it remains available for public use, fish, and wildlife management.²²

By maintaining similar standards as requirements, the rule fulfills the streamlining goal as well as provides clarity for both certification applicants and parties affected by the permits. The approach would also ensure that Iowa's water quality standards are met and considered by the permit applicants.

If the Commission does not agree that certain requirements should be mandatory to ensure compliance with state water quality standards, it should justify the changes to the conditions currently in effect.

IV. The New Optional Conditions Will Create Different Standards for Each 401 Certification.

The proposed rule 61.2(6)(f) allows the IDNR to include conditions in the permits based on a list provided in 61.2(6)(f)(1-10).²³ The original rule required certain conditions to be met by each request for certification.²⁴ This change will affect the clarity for both permit applicants and interested parties affected by the proposed permit.

For federal permits and projects that span several states the change could lead to confusion about what the permit applicant is required to provide to meet state water quality standards.²⁵ The federal permit applicant could for one permit be required to provide information on actions to mitigate pollution, manage areas lacking vegetative material and construction debris but not manage erosion or clean their equipment of hazardous materials prior to using equipment in the waters of the state.²⁶

V. The Proposed Rules Should Define the Public Notice Process.

The proposed changes to the rule fail to define a method of providing public notice for 401 certifications. The proposed changes provide that new or amended permits or certifications be posted electronically to provide public notice.²⁷ However, the proposed section 61.2(6)(c) provides no guidance as to where the public notice of certification applications will be posted.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 266, 267.

²⁴ *Id.* at 267.

²⁵ *Id.*

²⁶ *Id.* at 266.

²⁷ *Id.* at 266-67.

Other permits and notifications similar to 401 certifications allow for the public to sign up for email notifications either through newsletters like EcoNewsWire for air permits or an email notification issued through the Wastewater Permit Information Exchange system for new draft wastewater permits.²⁸ The rules governing other types of permits require some public notice electronically either on the IDNR's website or an email subscriber list.²⁹

IEC recommends that the Commission revise the proposed rule to include a method of electronic notice similar to the permits referenced above. IDNR could add the notice of application to a current newsletter, such as EcoNewsWire, publish the notice of application to the department's webpage with an option for subscription notification, or create a database similar to the Wastewater Permit Information Exchange system that tracks 401 certification applications.

VI. Conclusion

IEC is concerned with the significant changes proposed to the certification conditions. While we understand the need for clarity and ease of process, providing a predefined list of potential conditions will not adequately protect Iowa's water quality. IEC urges the Commission to mandate the requirements in the proposed rule that are applicable to all permits and continue provide an allowance for special cases where stricter or more site-specific requirements are needed.

IEC understands the difficulty in issuing 401 certifications when each certification requires rule making. At the same time, the permits can have widespread application and impact around the state. To ensure adequate public notice, IEC requests that the application for 401 certification, new and renewed permits be added to a newsletter or a subscription service to make public notice more readily available.

Sincerely,

/s/ Michael R. Schmidt

Michael R. Schmidt
Staff Attorney
Iowa Environmental Council

/s/ Katie Luzier

Katie Luzier
Legal Intern
Iowa Environmental Council

²⁸ See Iowa Admin. Code r. 567-33.3(17)(b)(3) (2020); Iowa Admin. Code r. 567-42.1(1) (2020); IDNR's NPDES Wastewater Permitting; Major Components of a Permit, <https://www.iowadnr.gov/Environmental-Protection/Water-Quality/NPDES-Wastewater-Permitting>; DNR News Release, *DNR Air Quality to provide streamlined public notice* (2018), <https://www.iowadnr.gov/About-DNR/DNR-News-Releases/ArticleID/1831/DNR-Air-Quality-to-provide-streamlined-public-notice>.

²⁹ See Iowa Admin. Code r. 567-33.3(17)(b)(3) (2020); Iowa Admin. Code r. 567-42.1(1) (2020).