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RE: 401 Certification for Regional Permit 40 (CEMVR-OD-P-2020-641) and Regional Permit 41 (CEMVR-OD-P-2020-643)

Dear Ms. Schwake:

The Iowa Environmental Council (IEC) offers the following comments on the 401 Certification for U.S. Army Corps of Engineers Regional Permits 40 and 41. 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 wetlands, 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 wetlands, lakes, rivers, and streams.

IEC is concerned that the draft certifications do not meet the requirements of the Clean Water Act because they allow unnecessary degradation, fail to ensure compliance with the turbidity water quality standard, and lack adequate conditions that had previously been imposed to protect water quality.

I. The Certifications Will Allow Degradation of High-Quality Waters of the State in Violation of Applicable Water Quality Standards.

A fundamental component of water quality standards under the Clean Water Act is the restriction on degradation of high-quality waters.¹ States must adopt antidegradation policies – subject to EPA approval – to protect existing uses and restrict degradation in waters that meet water quality standards.² The policy assigns waters to tiers based on the quality of water and value of the

¹ 33 U.S.C. § 1313; 40 C.F.R. § 131.12.

² 40 C.F.R. § 131.12(a).

resource, requiring that the exceptional water quality be “maintained and protected.”³ Antidegradation policy serves as a one-way ratchet to improve water quality over time.

The proposed certifications would allow alteration of up to 2,000 linear feet of stream bank (Permit 40) or loss of up to 1,000 feet of stream bed (Permit 41) without requiring an individual permit.⁴ In addition, Permit 41 allows loss of up to two acres of Waters of the United States.⁵ As explained below, these alterations and losses are subject to the requirements of antidegradation.

A. Antidegradation rules apply to these 401 certifications.

Iowa has a complicated history of antidegradation policy. Iowa adopted an antidegradation policy in 2010 that incorporated an Antidegradation Implementation Procedure (AIP), which U.S. EPA approved.⁶ Under this policy, degradation of surface water that meets water quality standards is only allowed where “lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.”⁷ For high-quality waters (Tier 2 ½ and 3), the outstanding characteristics must be maintained.⁸ In 2016, Iowa attempted to update its antidegradation policy, but the EPA disapproved the proposed rule amendments in 2017.⁹ The denial left the 2010 Antidegradation Implementation Procedure issued by the Iowa Department of Natural Resources (IDNR) in effect as an enforceable water quality standard.¹⁰

The AIP expressly and repeatedly defines regulated activities subject to antidegradation review to include §404 permits and §401 certifications, which are the subject of this action.¹¹ For purposes of §401 certifications, “The department shall not issue a §401 certification where degradation resulting from the project is not necessary to accommodate important social or economic development.”¹² Consistent with the policy generally, this clearly requires an antidegradation analysis before any certification that may cause degradation.

The AIP goes on to provide that for general permits under §404, applicants themselves only need to comply with the requirements in the 401 certification to satisfy the antidegradation

³ IOWA ADMIN. CODE r. 567-61.2(2).

⁴ Regional Permit 40 (“Permit 40”), No. CEMVR-OD-P-2020-641, at 1; Regional Permit 41 (“Permit 41”), No. (CEMVR-OD-P-2020-643) at 1.

⁵ *Id.*

⁶ See “Chapter 61, Water Quality Standards,” U.S. EPA, available at <https://www.epa.gov/sites/production/files/2017-05/documents/ia-chapter61-provisions.pdf>.

⁷ 40 C.F.R. § 131.12(a)(2); IOWA ADMIN. CODE r. 567-61.2(2).

⁸ IOWA ADMIN. CODE r. 567-61.2(2). Permits 40 and 41 require individual certifications for these outstanding waters. Permit 40 at 2; Permit 41 at 2.

⁹ Letter from Mark Hague, U.S. EPA Region 7, to John Tack, IDNR (Jan. 19, 2017), at 8 (“Despite the concerted effort by IDNR and EPA to reach consensus on an approvable rule, the EPA is disapproving the revised rules.”)

¹⁰ *Id.* (“Pursuant to 40 C.F.R. 131.21, the Antidegradation Rules and AIP approved by the EPA on September 30, 2010 remain in effect for CWA purposes.”). See “Section 2: Chapter 61, Water Quality Standards,” U.S. EPA, available at <https://www.epa.gov/sites/production/files/2017-05/documents/ia-chapter61-provisions.pdf>.

¹¹ “Iowa Antidegradation Implementation Procedure,” Iowa DNR, Feb. 17, 2010, at 2, 3, 10, 23.

¹² *Id.* at 23.

procedures.¹³ IDNR, then, must conduct an antidegradation analysis to determine whether the actions authorized by a certification will cause degradation and whether that degradation is “necessary to accommodate important social or economic development.” This is consistent with IDNR’s approach for general permits under other programs, for which IDNR conducts an antidegradation analysis as part of the general permit issuance process.¹⁴ The similarity in approach in the AIP for general permits and certification of general §404 permits reinforces the position that IDNR must conduct the analysis itself before issuing the certification.

B. IDNR did not conduct antidegradation review for these certifications.

IDNR provided no evidence of conducting or even considering antidegradation review for the certification of the general permits. It provided no documentation of alternatives, consideration of other best management practices to include, or demonstration of the need for degradation to accommodate important social or economic development. In addition, IEC has requested and regularly receives notice of antidegradation analyses, but received no such notice for this certification.

Permits 40 and 41 identify the types of engineering mechanisms that will be used.¹⁵ Additionally, the permits describe the types of material that may be used in each construction project such as clean fill materials.¹⁶ However, the permits and certifications contain no analysis of alternative practices that would avoid or minimize degradation, such as installation of biological/physical/chemical treatment processes that provide higher levels of treatment as required by the AIP.¹⁷

Further, the certifications lack an analysis of possible alternatives with respect to their practicability, economic efficiency, affordability, and the community affected.¹⁸ Even more alarming is that the certifications make no distinction between the tiers of protection described in both the IAP and IAC 61.2(2).¹⁹ Permits 40 and 41 and the corresponding certifications imply that the same measure will be used regardless of whether the water is protected through Tier 1 or Tier 2.²⁰ Compliance with the AIP for Tier 1 protections can be as simple as requiring an analysis showing that the permit applicant will follow the water quality standards outlined in IAC Ch. 61.²¹ The clearest examples of applicable water quality standards are in the turbidity and pH levels described in Iowa Administrative Code 567-61.3(2), general water quality criteria.²²

¹³ *Id.* at 23-24.

¹⁴ AIP at 22.

¹⁵ Regional Permit 40 at 2-5 and Regional Permit 41 at 2-3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; *See* IAP at 11.

¹⁹ *See* IAP at 14-16.

²⁰ *See* Regional Permit 40; Regional Permit 41; draft certifications for Regional Permits 40 and 41; IAP at 4, 5.

²¹ IAP at 3; IOWA ADMIN. CODE r. 567-61.3(2).

²² IOWA ADMIN. CODE r. 567-61.3(2)(f)(h).

C. The permits are not subject to exemptions from antidegradation review.

IDNR's failure to conduct an antidegradation analysis would be excusable if the permits and certifications were subject to an exception to the requirement to conduct antidegradation review. Unfortunately for IDNR, the certifications are not eligible for the exceptions and the water quality standards contain no *de minimis* exception.²³

The most obvious potential exception for Permits 40 and 41 is for temporary and limited degradation.²⁴ Even for Tier 1, which has the minimum protection against the degradation of Iowa's waterways, the applicant must include for activities resulting in temporary and limited degradation: (1) the length of time during which water quality will be lowered, (2) percent change in ambient conditions, (3) pollutants affected, (4) the likelihood for long-term water quality benefits to the water body, (5) the degree to which achieving the applicable WQS during the proposed activity may be at risk *and* (6) the potential for any residual long term effects on existing uses.²⁵

Neither permit addresses any of the considerations required for temporary degradation of Tier 1 waterways. Subsection D of Permit 40 and subsection C of Permit 41 respectively address the temporary degradation of water quality over a period of time. The respective subsections address replanting temporary right of ways, side slopes and excavation of wetlands. This discussion does not provide a time frame or time limitation for the projects started under either permit. Nor does it provide any analysis of any percent change in ambient conditions, the likelihood for long-term water quality benefits to the water body, or any of the potential residual long-term effects on existing uses. In short, they contain none of the requirements to meet the most basic elements of an antidegradation review for the state's lowest-quality waters. IDNR has not conducted this analysis itself and there is no indication that future permit applicants will be required to submit the analysis.

While the permits generally address the use of clean materials to mitigate the potential release of pollutants, and each permit explicitly restricts the return of material excavated to the impacted waterway, outlining the methodology cannot reasonably be considered an analysis of effects of the pollutants or the degree to which applicable water quality standards are achieved. The glaring absence of discussion on the temporary impacts of the permits fails to comply with the required information of the AIP.

Permits 40 and 41 and their respective draft certifications fail to provide the information on temporary and limited degradation as described in the AIP. They fail to address any time frame for degradation, any percent change in ambient conditions, any likelihood for long-term water quality benefits, any achievability of WQSs and any potential for residual long-term effects on

²³ See AIP at 23 (specifying the application of antidegradation to general §404 permits).

²⁴ The AIP identifies other bases for exemption, but they require site- or facility-specific evaluation, which is not possible under a general permit. See AIP at 11.

²⁵ AIP at 2, 12.

existing uses. The certifications must address all of the requested information on temporary and limited degradation to qualify for the exemption.

II. The Certifications Fail to Require Compliance With the Turbidity Water Quality Standard.

IEC is concerned that the draft certification does not require compliance with Iowa's water quality standard for turbidity because it lacks requirements to control turbidity during the construction process. Failure to require compliance with water quality standards in Tier 2 waters does not protect existing uses and therefore violates the Clean Water Act.²⁶

Iowa's general surface water quality standard for turbidity prohibits turbidity above 25 Nephelometric turbidity units.²⁷ The standard is one of the few numeric requirements applied to all waters of Iowa.²⁸ Turbidity is the measurement of clarity in a liquid.²⁹ High turbidity levels affect the ecological productivity, recreational values and habitat quality of waters and streams.³⁰ IDNR has determined that to protect the ecological productivity, recreational values and habitat quality of Iowa's rivers turbidity levels must not increase above 25 Nephelometric turbidity units.³¹

Permits 40 and 41 do not discuss mitigation efforts to reduce turbidity that would result from actively working on the stream or river bank. Constructing riprap and other erosion controls may require moving substantial amounts of soil on the bank of the water body. If not properly managed during the construction of remedial measures, the 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.

In contrast, and as discussed below, the certification for the prior issuance of these permits required the permit applicant to not use heavy equipment in the stream channel unless it was unavoidable.³² The certification further required 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.³³ By not addressing discharge of sediment or use of machinery in the streambed area, the certification does not meet Iowa's narrative water quality standards protection nor does it prevent pollution affecting public health, fish, shellfish, wildlife, and recreation.³⁴

²⁶ 40 C.F.R. § 131.12(a)(1).

²⁷ IOWA ADMIN. CODE r. 567-61.3(2)(f).

²⁸ See IOWA ADMIN. CODE r. 567-61.3(2)(f); IOWA ADMIN. CODE r. 567-61.3(2); IOWA ADMIN. CODE r. 567-61.3(b).

²⁹ 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 (Last Accessed Oct. 17, 2020).

³⁰ *Id.*

³¹ IOWA ADMIN. CODE r. 567-61.3(2)(f).

³² IOWA ADMIN. CODE r. 567-61.2(2)(g)(9) (Oct. 7, 2020).

³³ *Id.*

³⁴ See IOWA ADMIN. CODE r. 567-61.3(2)(f); See IOWA ADMIN. CODE r. 567-61.3(2)(f).

The permits themselves and the certification lack assurance that permittees will avoid sediment loads that increase turbidity above the water quality standard.³⁵ Neither permit addresses how the best management practices listed in the permits provide the least-degrading alternative, despite the existence of other potential BMPs, for example by using a sediment curtain or other best management practice.³⁶ IDNR must revise the certification to provide additional assurance that the permitted activities will not cause a violation of the state's water quality standard for turbidity.

III. Conditions Placed on Existing Regional General Permits Should Not Have Been Removed.

The removal of the previous conditions on the existing Regional General Permits (RGPs) puts Iowa's waters at significant risk. The previous permit certifications provided clear instructions on how IDNR expected compliance with state water quality standards (WQS).³⁷ The previous permits understood that when reseeding the land, it was best to use the native grasses, trees and shrubs to maintain a healthy habitat for the wildlife in Iowa's streams and rivers.³⁸ Additionally, it was clear any project on water determined to be an Outstanding National Resource Water or an Outstanding Iowa Water had to have a separate permit application.³⁹ As stated above, the current certification does not adequately address turbidity and reduces the requirements for turbidity – placing Iowa's water and wildlife at significant risk.⁴⁰

IV. Conclusion

The draft certification proposed by IDNR violates the state's federally-approved antidegradation requirements, does not adequately protect waters of the state from turbidity pollution, and inappropriately removes protections from the existing certification, and. The DNR must address these defects before issuing the certification to avoid violation of the Clean Water Act and its implementing regulations. We look forward to reviewing the antidegradation analysis and the revised certifications that follow.

Sincerely,

/s/ Michael R. Schmidt

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Staff Attorney
Iowa Environmental Council

/s/ Katie Luzier

Katie Luzier
Legal Intern
Iowa Environmental Council

³⁵ See Permits 40 and 41.

³⁶ *Id.*; see "Turbidity Curtain," Michigan Department of Environmental Quality, available at https://www.michigan.gov/documents/deq/nps-turbidity-curtain_332136_7.pdf.

³⁷ IOWA ADMIN. CODE r. 567-61.2(2)(g)(9) (Oct. 7, 2020).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*; IOWA ADMIN. CODE r. 567-61.3(2)(f).