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September 24, 2024

Courtney Cswercko
Iowa Department of Natural Resources
6200 Park Ave
Des Moines, IA 50321

RE: Iowa DNR Regulatory Analysis – Chapters 60, 64, and 66

Dear Ms. Cswercko:

The Iowa Environmental Council (IEC) and Environmental Law and Policy Center offer the following comments on the proposed revisions to 567 Iowa Administrative Code Chapters 60, 64, and 66. 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 changes violate requirements of the Clean Water Act and increase risks and costs to Iowans of poor water quality.

Regulatory Analysis

In evaluating the costs and benefits of retaining Chapter 60 and the rules to ensure proper wastewater treatment, DNR should account for the human health benefits of wastewater treatment. Recent reports by IEC quantified the health costs of existing drinking water contamination[1] and the health risks of drinking water contaminated with nitrate.[2] DNR did not quantify any costs or benefits of the rules, relying entirely on narrative analysis. The Regulatory Analysis should account for the costs of poor water quality in assessing the need for the rules in this chapter.

In addition, DNR should make the changes recommended below to support retention of its delegated authority. If the rules in this chapter fail to meet the minimum requirements of the

[1] *The Costs of CAFOs*, Iowa Environmental Council (Nov. 2023), available at https://www.iaenvironment.org/webres/File/The%20Costs%20of%20CAFOS%20-%20White%20Paper%2011_10_23.pdf.
[2] Nitrate in Drinking Water: A Public Health Concern for All Iowans, Iowa Environmental Council (May 2024), available at https://www.iaenvironment.org/webres/File/IEC_Nitrate_in_Drinking_Water_2024FINAL.pdf.

Clean Water Act, DNR risks EPA intervention; as noted in the Regulatory Analysis, this creates other costs or burdens for Iowans.

60.1, Definitions.

IEC and ELPC object to two changes DNR proposes in subsection 60.1(2) to define a "minor permit amendment."

First, the proposed definition deletes language allowing compliance schedule changes only if "the new date is not more than 120 days after the date specified in the permit and does not interfere with the attainment of the final compliance date."[3] This deletion would allow minor permit amendments that violate 40 C.F.R. § 122.63(c), which contains the language that DNR proposes to delete. DNR should retain this language to comply with the federal regulations.

Second, DNR proposes to add "revision of interim or final dates in a schedule to comply with the provisions of the Iowa Nutrient Reduction Strategy" to the definition of "minor permit amendment." This addition also violates federal requirements. DNR takes the position that "The NRS is not federally required, so NRS schedule changes do not need major amendments." This misinterprets the Clean Water Act.

Under the Act, a "schedule of compliance" means "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard."[4] Thus, schedules of compliance are not limited to *water quality-based* effluent limitations required under section 301 of the Act. Instead, effluent limitations include:

> any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.[5]

Final permit limits imposed as a result of the state's Nutrient Reduction Strategy are effluent limitations, and schedules of compliance lead to compliance with effluent limitations. The federal regulations in 40 C.F.R. § 122.63 that limit use of minor amendment procedures apply to all effluent limitations in a permit.

60.2, Construction Permits.

Table 1, footnote 4 at subpart 60.2(2) allows industrial facilities to be within 200 feet of private wells "at the department's discretion." It does not provide any criteria for DNR to evaluate in applying its discretion. This subjects DNR to risk because the rule does not provide guidance for future agency action, and any decision the agency makes could be found to be arbitrary.

[3] IOWA ADMIN. CODE r. 567-60.2 (2024).
[4] 33 U.S.C. § 1362(17).
[5] 33 U.S.C. § 1362(11).

In addition, the rule contains no requirement that wells be placed upgradient from industrial facilities, or restricting placement to industrial facilities that use no chemicals creating risks to human health from ingestion. Allowing well placement closer to industrial facilities increases the risk of contamination of chemicals that migrate through groundwater.

To protect public health and reduce the risk of future litigation, IEC and ELPC recommend that DNR delete the language allowing a reduction of the 200 foot separation distance or modify the rule to establish criteria related to location and limit the exception to facilities that do not use chemicals creating risks to human health from ingestion.

60.5, Notice and public participation in the individual permit process.

Proposed paragraph 60.5(1) defines the content required for a draft permit when the department's tentative determination is to issue the permit.

IEC and ELPC request the following addition to 60.5(1)"a":

> (4) a topographic map with location of discharges, if required as part of the application by 40 C.F.R. § 122.21(f)(7).

For large facilities, discharge points can be upstream or downstream of monitoring locations, lakes, or tributaries to the water body receiving the discharge. Having a facility map included in the permit would help the public understand the potential impact of a discharge. Other states, such as Minnesota, include maps in draft and final permits for individual permittees.[6]

This proposed addition does not place an additional burden on regulated entities because it is limited to instances where the regulated entity has already submitted a map. DNR could choose to simply use that map, eliminating nearly all burden on the agency, or use a standardized format for all permits.

60.7(2), Application of effluent and pretreatment standards, WQS, and other requirements.

IEC and ELPC have two concerns with proposed changes to subsection 60.7(2), both of which relate to compliance with the Clean Water Act.

A. Continuing planning process

DNR proposes to delete all references in proposed subparagraph 60.7(2)"d"(3) to the Continuing Planning Process (CPP) required by Clean Water Act section 303. The CPP is the state plan to comply with requirements of the Clean Water Act such as effluent limits and total maximum daily loads.[7] The existing language implements this by including CPP elements as a part of discharge permits that DNR issues.

[6] *See, e.g.*, Draft Permit no. MN0029882, available at https://scs-public.s3-us-gov-west-1.amazonaws.com/env_production/oid333/did200071/pid_209287/project-documents/Draft%20Permit%20-%20MN0029882%20-%202024.pdf, at 4 (showing discharge point in relation to multiple lakes).
[7] 33 U.S.C. § 1313(e)(3).

DNR proposes to delete the references to the CPP because it is "no longer needed."[8] The current CPP may not require specific elements in permits, but the CPP is, as its name suggests, a "continuing" effort. Federal regulations require the state to "implement the processes specified in the continuing planning process."[9] EPA provides continuing review of the CPPs.[10] A future revision to the CPP may trigger requirements in NPDES permits. DNR should retain this language.

B. Antidegradation

The proposed rule at 60.7(2)"d"(4) continues to incorporate the Iowa Antidegradation Implementation Procedure effective August 12, 2016. It also references the antidegradation subrule of Chapter 61 that directly addresses antidegradation. IEC and ELPC recommend that DNR only refer to the antidegradation subrule and not directly incorporate the 2016 antidegradation implementation procedure in this chapter.

Antidegradation is a fundamental part of the Clean Water Act's effort to restore the "chemical, physical, and biological integrity" of water across the county.[11] EPA has adopted regulations defining how states implement antidegradation requirements, including the process of considering alternatives and providing a justification before degrading water quality.[12]

A series of past actions has led to lack of clarity on the Iowa's antidegradation policy. Iowa adopted an antidegradation policy in 2010 that incorporated an Antidegradation Implementation Procedure (AIP), which U.S. EPA approved.[13] 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."[14] For high-quality waters (Tier 2 ½ and 3), the outstanding characteristics must be maintained.[15] In 2016, Iowa attempted to update its antidegradation policy and adopted a new procedure into rule, but the EPA disapproved the proposed rule amendments in 2017.[16] The denial left the 2010 Antidegradation Implementation Procedure issued by the DNR in effect as

[8] Iowa DNR, "Chapter 64 Proposed Changes (as of 7/29/2024)," at 25, available at https://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Quality-Rulemaking (last accessed Sept. 20, 2024).
[9] 40 C.F.R. § 130.5(a).
[10] 33 U.S.C. § 1313(e)(2); 40 C.F.R. § 130.5(c).
[11] 33 U.S.C. § 1251.
[12] 40 C.F.R. § 131.12.
[13] 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.
[14] 40 C.F.R. § 131.12(a)(2); IOWA ADMIN. CODE r. 567-61.2(2).
[15] IOWA ADMIN. CODE r. 567-61.2(2).
[16] 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.").

an enforceable water quality standard,[17] even though state rules were not updated to reflect the denial.

DNR's proposed rule continues to rely on and incorporate the 2016 antidegradation procedure, despite it not being effective. [18] Referring to the antidegradation rule chapter without separately incorporating the 2016 procedure will simplify a future correction of chapter 61.

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. We encourage DNR to adopt the recommended changes.

Sincerely,

/s/ Michael R. Schmidt

Michael R. Schmidt
Staff Attorney
Iowa Environmental Council

/s/ Joshua T. Mandelbaum

Joshua T. Mandelbaum
Senior Attorney
Environmental Law and Policy Center

[17] *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.
[18] Chapter 61 is exempt from Executive Order 10 and DNR is not updating the chapter at this time, making it impossible to correct IEC's concern directly through changes to Chapter 61. IEC provided comments on a draft antidegradation rule in 2022, but DNR never adopted the rule.