



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

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Christine Schwake
Iowa Department of Natural Resources Wallace State Office Building
502 East 9th Street
Des Moines, Iowa 50319
Fax: 515.725.8201
Email: christine.schwake@IDNR.iowa.gov

RE: Amended Notice of Intended Action for Chapter 61 401 Certifications

Dear Ms. Schwake:

The Iowa Environmental Council (IEC) offers the following comments on the Amended Notice of Intended Action Proposing Rule Making Related to Water Quality Certification Applications and Providing an Opportunity for Public Comment published in the Iowa Administrative Bulletin on March 10, 2021, by the Environmental Protection Commission (“Commission”). The rule making would revise the processes for the Iowa Department of Natural Resources (“IDNR”) when certifying nationwide and regional permits under section 404 of the Clean Water Act or other federal licenses and permits. These comments represent the views of the Iowa Environmental Council, an alliance of 80 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. These certifications apply to more than 800 projects per year,¹ magnifying the impact of any deficiency in the rule or certification requirements.

We wish to reiterate our previous comments, submitted September 11, 2020, regarding the proposed changes to 401 Certification. IEC met with IDNR on December 9, 2020. At the meeting, IDNR stated the new federal rule would impact the rule proposed in August 2020 and that a new rule would be issued in response. IEC did not receive a written response to its comments. IEC agrees that 401 certification rule needs to comply with the rule promulgated by the EPA. However, IEC still retains the concerns previously described regarding the new language and reiterates the concerns below.

¹ Memo from Christine Schwake, IDNR, “Rationale for Section 401 Water Quality Certification of the 2020 Nationwide Permits,” (Nov. 10, 2020) at 2 (citing estimates of nationwide permit coverage at 804 instances per year).

The Current 401 Certification Requirements Do Not Infringe on the New Federal Rule Regarding Scope.

The existing rule's requirements do not infringe on the scope of 401 Certification as described in the July 2020 Federal Register publication of EPA's new rule. The EPA rule defines the scope of 401 Certification as being "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."² The rule clarifies the use of the term discharge and "water of the United States" to provide consistency and clarity across the statute. Furthermore, the rule requires for each condition a statement explaining the necessity of the condition and a citation to federal, state or tribal law that authorizes the condition. IDNR could easily trace several of the existing conditions in state requirements regarding water quality.

The proposed rule language states IDNR "may require conditions, which may include" any of a list of nine items. This permissive language creates unnecessary ambiguity: the list of conditions in rule could be interpreted as the universe of certification conditions available to IDNR. This would be extremely problematic because it preemptively restricts IDNR's authority to determine conditions that might be necessary for any project requesting certification. Because IDNR did not provide a written response to IEC's prior comments on this issue, it is unclear how IDNR plans to interpret and implement the rule, creating increased risk for litigation. IEC again urges IDNR to resolve any ambiguity by rephrasing the language in proposed rule 61.2(6)(f) as follows:

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

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.³

I. The "Clarification" of the Certification Conditions Fails to Justify Substantial Differences Between the Proposed and Existing Conditions.

IEC described the differences between the conditions in the existing and proposed rule in its comments dated September 11, 2020. Although the reissued rule proposal continues to claim that the proposed rule merely "clarifies the list of potential conditions that may be included,"⁴ in fact the proposed rule significantly changes the conditions. The reissued proposal still 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:

² 85 Fed. Reg. 134 (July 2020) at 42250.

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

⁴ XLIII Iowa Admin. Bull. at 2022 (Mar. 10, 2021).

- 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.⁵ This condition is needed to ensure compliance with IAC 61.3(2) (a)-(f).
- The proposed conditions remove vegetative buffer zone requirements complying with IAC 61.3(2)(b)(f).
- The proposed conditions remove requirements for individual certification of projects impacting outstanding national resource waters, Outstanding Iowa Waters, and specific types of wetlands under IAC 61.2(2).⁶
- The proposed rule removes a requirement for individual certification of projects receiving special waivers to exceed the limits of nationwide permits, which could lead to violation of IAC 61.2(2).⁷
- The proposed rule removes additional construction requirements for side slopes leading to possible violations of IAC 61.3(2)(a)(f).⁸
- The proposed rule removes permanent wetland loss restrictions for single family residences authorized under nationwide permit 29 and nationwide permit 46, creating potential violations of IAC 61.2(2).⁹

The existing rule requires individual certifications for Outstanding National Resource Waters and Outstanding Iowa Waters. This implements IAC Section 61.2(2) regarding antidegradation of Iowa's outstanding waters, where new or expanded sources of pollutants is limited. The antidegradation standards are water quality requirements. The rule should ensure protection of these waters by incorporating the individual certification requirement. Because the condition ensures compliance with water quality requirements, the provision should be retained as a condition in Chapter 61.

The proposed rule does not provide any justification for modifying and removing these requirements.¹⁰ 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. The Commission must revise the rule to fulfill its legal obligation to ensure compliance with the state's water quality standards.

II. The Rules Should Require Conditions for All Nationwide Permits.

Many of the existing and proposed conditions would provide assurance of meeting water quality standards in any permit. IEC recommends these be mandatory conditions.

⁵ Iowa Admin. Code r. 567-61.2(2)(g) (2020).

⁶ XLIII Iowa Admin. Bull. at 2024 (Mar. 10, 2021).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.* at 2022 (“the rule making reorganizes and clarifies the list of potential conditions”).

Proposed rule 61.2(6)(f), items (1)-(7) would be the easiest to require for each permit.¹¹ 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).¹² 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.¹³

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.¹⁴ 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.¹⁵

Items (3) and (7) relate to sediment and pollutant discharge like items (4)-(6).¹⁶ Item (3) prevents the certification applicant from discharging cleared vegetation into the waters of the state.¹⁷ The discharge of cleared vegetation would increase turbidity in the waters of the state and should be properly managed for each certification application.¹⁸ Similarly, item (7) regulates stockpiled dredged materials management to prevent discharge of sediment that would violate water quality standards.¹⁹ 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.²⁰

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.

¹¹ *Id.* at 2025.

¹² *Id.*; Iowa Admin. Code r. 567-61.2(2) (2020).

¹³ Iowa Admin. Code r. 567-61.2(2) (2020).

¹⁴ XLIII Iowa Admin. Bull. at 2025 (Mar. 10, 2021).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

III. 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).²¹ The original rule required certain conditions to be met by each request for certification.²² 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. 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.²³

IV. 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 provide an allowance for special cases where stricter or more site-specific requirements are needed.

Sincerely,

/s/ Michael R. Schmidt

Michael R. Schmidt
Staff Attorney
Iowa Environmental Council

/s/ Katie Luzier

Katie Luzier
Legal Intern
Iowa Environmental Council

²¹ *Id.*

²² *Id.* at 2024.

²³ *Id.* at 2025.