

**PUBLIC PARTICIPATION RESPONSIVENESS SUMMARY
FOR
SECTION 401 WATER QUALITY CERTIFICATION OF
U.S. ARMY CORPS OF ENGINEERS SECTION 404 NATIONWIDE PERMITS**

**IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION
WATER QUALITY BUREAU**

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INTRODUCTION

This is a summary of the Iowa Department of Natural Resources' (DNR) response to comments received regarding Section 401 Water Quality Certification (certification) of Section 404 U.S. Army Corps of Engineers (Corps) Nationwide Permits (NWP).

Nationwide Permits (NWP) are general permits authorizing certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The U.S. Army Corps of Engineers (Corps) proposed to reissue its existing NWP and associated general conditions and definitions, with some modifications. The Corps also proposed to issue five new NWP. 85 F.R. 57298. The DNR proposed granting certification with conditions for NWP numbered 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, C, D, and E. Nationwide permits numbered 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B are authorized using only Section 10 of the Rivers and Harbors Act of 1899 and do not require certification because they would authorize activities which could not reasonably be expected to result in a discharge into waters of the United States.

Notice of the draft certification and rationale was released for public review and comment on November 10, 2020. The notice and associated documents were posted on the DNR webpage (<https://www.iowadnr.gov/Environmental-Protection/Water-Quality/Wetlands-Permitting>). In addition, the public notice was published on November 12, 2020 in the DNR EcoNewsWire and on November 14, 2020 in the Des Moines Register. Public comments were accepted from November 10, 2020, through December 10, 2020.

This responsiveness summary provides a discussion of the issues raised by the comments received and how the comments were incorporated into the development of final documents associated with DNR's certification of NWP.

COMMENTER: Iowa Environmental Council (IEC)

Date Received: December 10, 2020

The original comment letter from Iowa Environmental Council (IEC) may be seen as Attachment 1. Herein, specific sections of the comment letter are shown, followed by corresponding DNR responses, respectively. Please note, references from the original comment letter are not included in the quotes for the sake of concisely providing responses, but the complete letter (including references) may be seen in Attachment 1.

1. Antidegradation Review/Alternatives Analysis

IEC Comment

"IDNR's Antidegradation Review Ignored Practicable Less-Degrading Alternatives and Did Not Demonstrate Necessity of Degradation.

Antidegradation requires an analysis of alternatives to ensure that, for waters meeting water quality standards, any "lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." In considering alternatives, "the least degrading alternative that is practicable, economically efficient, and affordable should be considered the preferred pollution control alternative." In considering alternatives, the applicant "shall evaluate a range of non-degrading or less-degrading pollution control alternatives" for the purpose of identifying "reliable, demonstrated processes or practices." As demonstrated by the rationale IDNR developed, general permit certifications under Section 401 require antidegradation review, and the review is conducted by IDNR rather than individual permit applicants.

IDNR's alternatives analysis for these NWP's relies entirely on the alternatives analysis conducted by the Corps. The Corps conducted its alternatives analysis to satisfy the National Environmental Policy Act for each nationwide permit. The Corps conducted an environmental assessment rather than a full environmental impact statement for which regulations define alternatives to consider. The Corps considered a no-action alternative, changes to the NWP text, discussion of the authority to issue regional conditions, and case-specific alternatives.

The set of alternatives that the Corps considered did not include the existing conditions imposed as Regional Conditions by the local Corps district or the conditions imposed by IDNR in the 401 certification. Because the IDNR relied on the Corps alternatives analysis, it did not consider the existing Regional Conditions or IDNR conditions. IDNR did not identify or describe its analysis of the proposed conditions, nor did it explain why those conditions are "the least degrading

alternative that is practicable, economically efficient, and affordable” as required by the state’s Antidegradation Implementation Procedure.

As explained in Sections III and IV of these comments, the proposed conditions in the 401 certification are less protective than existing conditions. They will therefore lead to additional degradation of Iowa waters, including waters that presently meet water quality standards and are subject to Tier 2 protection under Iowa’s antidegradation rules.

Additional degradation could be allowed if the antidegradation review provided justification that the degradation was “necessary to accommodate important economic or social development” in the area. For these general permits, IDNR considered the statewide impact of certifying the NWP's. IEC does not take issue with accounting for the statewide impact of certification for a general permit that is applicable statewide. However, the method of evaluating the economic need depends on a comparison of the costs of each alternative. IDNR compared the costs of: (a) denying certification entirely and (b) certifying, regardless of conditions. The evaluation gave no accounting of the costs of other alternatives, and it did not describe impracticality of the existing conditions that have been in effect for years. Absent a demonstration that the existing conditions are not practicable, economically efficient, and affordable, IDNR cannot impose conditions less stringent than the existing conditions, because doing so would allow degradation.

Because IDNR did not evaluate reasonable alternatives that are in effect today or provide justification for their future impracticality, it cannot conclude that it has selected the least degrading alternative. Because IDNR did not evaluate the costs of alternative conditions or demonstrate that the existing conditions are impractical, it cannot conclude that the degradation is necessary. IEC recommends that IDNR retain the existing conditions or make them more protective of Iowa’s waters, where doing so is practicable.”

DNR Response

Alternatives Analysis and Social/Economic Importance

Immediately preceding the statement that “the least degrading alternative that is practicable, economically efficient, and affordable should be considered the preferred pollution alternative,” the Antidegradation Implementation Policy (AIP) (February 17, 2010) states the following (pg. 13):

“These alternatives are compared (in terms of practicability, economic efficiency and affordability) to the controls required to protect existing uses and to achieve the highest statutory and regulatory requirements (*i.e., the more stringent between the water*

quality-based effluent limits to protect an existing use and the applicable technology-based effluent limits)." (emphasis added)

In this statement, "water quality-based effluent limits" and "technology-based effluent limits" are terms specific to Wastewater Engineering Construction (construction) permits and National Pollutant Discharge Elimination System (NPDES) permits, and do not play a role in certification of these NWP's. Due to differences between construction/NPDES permits and certification of these NWP's, the rationale/alternatives analysis for NWP certification included consideration of a best management practice (BMP)-based approach for projects. Consideration of this approach is discussed in the AIP pertaining to certification, as follows (pg. 24):

"Iowa manages its §401 water quality certification program to ensure that the placement of dredged or fill material into surface waters do not create any unmitigated water quality impairments or degradation of surface waters. Under the BMP-based approach adopted by Iowa, regulated activities for which mitigation has been certified by the state pursuant to §401 of the Clean Water Act will not be required to undergo a separate Tier 2 review in accordance with this document." (emphasis added)

Additionally, the AIP states the following, clarifying that an antidegradation analysis for certification needs to demonstrate "important social or economic development" as follows (pg. 23):

"In order to ensure that antidegradation and other water quality protection requirements are considered, reviewed and met in a comprehensive and efficient manner, these requirements will be addressed and implemented through the §404 permitting and §401 water quality certification processes. Under this approach, applicants who fulfill the terms and conditions of applicable §404 permits and the terms and conditions of the corresponding §401 water quality certification will have fulfilled the antidegradation requirements. Additional antidegradation considerations may be incorporated into §404 permits and the corresponding §401 certifications at the time of permit issuance. The department shall not issue a §401 certification where degradation resulting from the project is not necessary to accommodate important social or economic development." (emphasis added)

While economic importance was evaluated and included in the rationale for certification of the NWP's, the antidegradation analysis for certification did not follow the same structure as those completed for construction/NPDES permit antidegradation analyses. This is due to the differences between the programs. For example, the AIP states the following in Section 3.2 on "Evaluating and Selecting Alternatives" (pg. 15):

“The cost of each alternative is then compared to the base cost of pollution control. The base cost of pollution control is the cost of the controls required to protect existing uses and to achieve the highest statutory and regulatory requirements, *i.e., the more stringent of water quality based effluent limits for existing use protection or technology-based effluent limits.*” (emphasis added)

Once again, “water quality based effluent limits” and “technology-based effluent limits” are terms specific to construction/NPDES permits, and do not apply to certification of these NWP's.

The EPA has stated the following about alternatives analyses in compliance with Section 404(b)(1) of the Clean Water Act:

“EPA interprets [40 CFR] section 131.12(a)(1) of the antidegradation policy to be satisfied with regard to fills in wetlands if the discharge did not result in "significant degradation" to the aquatic ecosystem as defined under section 230.10(c) of the section 404(b)(1) Guidelines” (U.S. EPA Water Quality Standards Handbook, Chapter 4: Antidegradation, 2012).

Beyond demonstration of the economic importance of the NWP's in the rationale, the Corps' alternatives analyses for NWP's did evaluate more than two alternatives for NWP's. For example, the draft decision document for NWP 13 (bank stabilization) included the following alternatives: (1) No Action Alternative (No Nationwide Permit); (2) National Modification Alternatives; (3) Regional Modification Alternatives; and (4) Case-specific On-site Alternatives (Draft Decision Document, Nationwide Permit 13, Corps, 2020).

Analysis of alternatives for these NWP's is not structured in the same way it would be for construction/NPDES permits. When the AIP discusses “non-degrading and less-degrading pollution control measures,” it does so in the context of construction/NPDES permits (rather than these NWP's), as demonstrated by the following (AIP, pg. 13):

“The applicant shall evaluate a range of non-degrading or less-degrading pollution control alternatives with the intent of identifying reliable, demonstrated processes or practices that can be reasonably expected to achieve greater pollution reduction. The following alternatives are examples that may be considered depending upon applicability:

- *Land application*
- *Subsurface irrigation*
- *Waste transport*
- *Groundwater recharge*
- *Improvements in the collection system*
- *Recycling or reuse (i.e., closed loop system)*

- *Discharge to a regional wastewater collection and treatment system*
- *Improved operation and maintenance of existing treatment system*
- *Alternative discharge locations*
- *Installation of biological/physical/chemical treatment processes that provide higher levels of treatment*
- *Seasonal or controlled discharges to avoid critical water quality periods” (emphasis added)*

The listed alternatives are relevant to the construction/NPDES permit context, but are not necessarily applicable to Section 404 permits and certification. An alternatives analysis for certification of these NWRPs would not necessarily be identical in structure to that for a construction/NPDES permit. There is not an exact analogue to “non-degrading and less-degrading pollution control alternatives” nor “water quality-based effluent limits and technology-based effluent limits” as applicable to construction/NPDES permits (and included in the AIP) for certification of these NWRPs. The DNR continues to agree with the Corps’ findings in the NWP draft decision documents, including that discharges authorized by the draft NWRPs “are not expected to cause or contribute to significant degradation of waters of the United States” (e.g., Draft Decision Document, Nationwide Permit 13, Corps, 2020).

While the IEC mentions that the Corps did not develop a full environmental impact statement, a full environmental impact statement is not necessary for certification of these NWRPs. The following text supports that these NWRPs can be certified without a full environmental impact statement:

“Ultimately, the [U.S. Environmental Protection] Agency’s interpretation of section 401 is a legal interpretation that has been established within the overall framework and construct of the CWA, informed by important policy considerations and the Agency’s expertise. The purpose of this rulemaking is to provide a clear articulation of what is authorized by CWA section 401, including the appropriate procedures and scope of decision-making for water quality certifications, that is supported by a robust and comprehensive legal analysis of the statute. The federal licenses and permits that are subject to section 401 are also subject to additional federal agency statutory reviews, including the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act, all of which are intended to provide a comprehensive environmental evaluation of potential impacts from a proposed project. In addition, where applicable, the CWA’s longstanding regulatory permitting programs, like those under sections 402 and 404, will continue to address water quality issues related to the discharge of pollutants into waters of the United States, and the CWA’s non-regulatory measures, like protection of water quality from nonpoint sources of pollution under section 319, will continue to address pollution of water generally to achieve the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters. Section

401, on the other hand, provides specific and defined authority for States and Tribes to protect their water quality in the context of a federal licensing and permitting process, including those processes in which State or Tribal authority may otherwise be entirely preempted by federal law. *The language of section 401 makes it clear that this authority is limited and does not broadly encompass all potential environmental impacts from a project.*" (emphasis added) 85 F.R. 42253 (July 13, 2020).

Conditions

When developing conditions to include in the certification, rather than simply use the same conditions currently effective in certifications, the DNR needed to ensure any conditions in the certification of the draft NWP's complied with changes to 40 C.F.R. Section 121, effective September 11, 2020. The following excerpts are part of the revised 40 C.F.R. Section 121:

"The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements" (emphasis added) 40 C.F.R. 121.3.

"Any grant of certification with conditions shall be in writing and shall for each condition include, at a minimum:

(1) For certification conditions on an individual license or permit,

(i) *A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and*

(ii) *A citation to federal, state, or tribal law that authorizes the condition.*

(2) For certification conditions on issuance of a general license or permit,

(i) *A statement explaining why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements; and*

(ii) *A citation to federal, state, or tribal law that authorizes the condition"*

(emphasis added) 40 C.F.R. 121.7(d).

Water quality requirements are defined as "applicable provisions of §§301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." 40 C.F.R. 121.1(n). Conditions included in the certification are based in state or federal water quality requirements. Changes in conditions do not necessarily represent "less stringent permit limits" as included in the list in the AIP on pg.

11, which in that context refers to water quality-based effluent limits or technology-based effluent limits (that are not applicable to these NWRPs).

The DNR has included conditions applicable to point source discharges associated with projects, consistent with the following statement:

“[T]herefore that the plain language of section 401(d) supports the conclusion that certification conditions must address water quality concerns from the discharge, not the proposed activity as a whole.” 85 F.R. 42221 (July 13, 2020).

Further, the following is stated with respect to conditions:

“These commenters provided additional examples of conditions that certifying authorities have included in certifications, such as building and maintaining fish passages, compensatory mitigation, temporal restrictions on activities to mitigate hazards or protect sensitive species, preconstruction monitoring and assessment of resources, habitat restoration, tree planting along waterways, spill management plans, stormwater management plans, and facilitating public access. The EPA appreciates commenters’ providing additional examples of certification conditions. The EPA agrees that in many instances, each of these examples may be beyond the scope of certification as articulated in this final rule.” 85 F.R. 42257 (July 13, 2020).

The DNR has included conditions in certification that are applicable to water quality requirements for these NWRPs. In developing conditions to include in the certification, the DNR reviewed the draft general conditions and regional conditions to include water quality standard-based conditions absent from draft documents from the Corps. Some conditions relevant to IEC’s comment letter may be seen in Attachment 2.

Notably, certification does not waive the DNR’s regulatory authority to enforce water quality standard violations, should they occur (e.g., in the event of a failing BMP). However, conditions need to be enforceable by the relevant federal permitting or licensing agent, as supported by the following:

“Many commenters agreed with the proposal that the *enforcement of section 401 conditions in a federal license or permit is the sole responsibility of the federal agency that issues the license or permit*. A few commenters asserted that *nothing in the CWA provides States with the authority to enforce or implement conditions of a section 401 certification*. Another commenter stated that if certification conditions were enforceable independent of the federal license or permit, there would have been no need for Congress to require conditions to become part of the federal license or permit under section 401(d). Another commenter requested that the final rule unequivocally provide that section 401 certification conditions may be enforced only after they are incorporated into the federal license or permit and only in the same manner as the

other conditions of the federal license or permit, and that such conditions may not be independently enforced pursuant to the CWA. As reflected in the final rule regulatory text, the EPA generally agrees with these commenters." (emphasis added) 85 F.R. 42275 (July 13, 2020).

Antidegradation Conclusions

The DNR made the following finding in the public noticed rational/antidegradation analysis:

"1. The level of water quality necessary to protect applicable beneficial uses is fully maintained. Water quality shall not be degraded to a level that does not comply with the applicable Water Quality Standards (WQS)."

Based on the draft general, regional, and certification conditions and the Corps' decision documents, the DNR concluded that the level of water quality necessary to protect applicable beneficial uses is fully maintained. The DNR reviewed general and regional conditions, including but not limited to those shown in Attachment 2, when developing NWP certification conditions (as part of the BMP-based approach used for certification). The DNR's conditions, especially the first condition, ensure that "the level of water quality necessary to protect applicable beneficial uses is fully maintained." The conditions require water quality criteria for specific designated, beneficial uses be met. The first condition of certification is as follows:

"(1) During construction and upon completion of the project, actions must be taken to prevent pollution affecting public health, fish, shellfish, wildlife, and recreation due to turbidity, pH, nutrients, suspended solids, floating debris, visible oil and grease, or other pollutants entering a water of the state. This condition will ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2)"

Further, the DNR agrees with the Corps' alternatives analysis for these NWP's, and found important social and economic benefit to the NWP's, in compliance with the antidegradation component of Iowa's water quality standards.

The DNR made the following findings in the public noticed rational/antidegradation analysis:

"2. The highest statutory and regulatory requirements for new discharges are achieved through the NWP alternatives analyses.

3. All cost-effective and reasonable BMPs for nonpoint source pollution control are implemented."

The permit and certification conditions require water quality criteria for specific designated, beneficial uses be met. Further, the DNR continues to agree with the Corps' alternatives analysis for these NWP's, and found important social and economic benefit to the NWP's, in

compliance with the antidegradation component of Iowa's water quality standards. The DNR found that a BMP-based approach, as applicable to certification, with (1) general and regional conditions in NWP's (e.g., see Attachment 2), (2) conditions in certification as supported by 40 C.F.R. 121, and (3) the alternatives analyses provided by the Corps, ensures that the highest statutory and regulatory requirements for new discharges from NWP's are achieved.

As discussed, general, regional, and certification conditions (including but not limited to those shown in Attachment 2) ensure BMP's are implemented for NWP projects, and so all cost-effective and reasonable BMP's for nonpoint source pollution control are implemented. Additionally, the BMP-based approach would include any BMP's imposed by a storm water NPDES permit, when applicable (as discussed in the public noticed rationale).

The DNR made the following finding in the public noticed rational/antidegradation analysis:

"4. Allowing degradation of water quality is necessary and accommodates important economic or social development from activities authorized by NWP's."

In the event that any degradation of water quality occurs due to NWP's, the DNR has found that it would be necessary and accommodate important economic or social development from activities authorized by NWP's. The relevant text from the public noticed rationale follows:

"The applicants for NWP's include property owners, cities, counties, and state and federal agencies. The Corps estimates that the total permit cost (direct compliance cost) for a typical project is \$4,412 to \$14,705 with a NWP, versus \$17,646 to \$35,293 with a standard individual permit (Corps 2020).

As the Rock Island District of the Corps estimates the use of 804 NWP's in Iowa annually, the use of NWP's in Iowa could represent a cost savings \$2.4 million to permittees (conservatively, \$2,941 less in cost for a NWP compared with standard individual permit as smallest difference in projected permitting costs, based on Corps 2020). The quicker timeframe of NWP's (compared with standard individual permits) also decreases opportunity costs (indirect costs) associated with the permitting process.

Jurisdictional waters and wetlands provide ecosystem services, or benefits human populations receive from functions that occur in ecosystems. 33 C.F.R. § 332.2. When applicants minimize impacts to jurisdictional waters and wetlands to qualify for NWP's, unimpacted waters and wetlands continue to provide ecosystem services. Forested and floodplain wetlands were estimated to have ecosystem services value of \$10,401 per acre per year (in 2007 dollars) (Costanza et al. 2014).

NWP activities can improve people's quality of life. Some activities increase jobs, protect farm land or buildings from eroding streambanks, improve the ease and safety of transportation, transmit electricity/natural gas/oil, or create recreational facilities. The DNR uses a NWP when creating/improving environmental habitat for the public's use.

NWPs can only be used when the limitations set forth in the permits are met by a project. The use of NWPs is incentivized by quicker timeframes/less cost to permittees, as described above. This encourages the applicants to look at alternatives to lessen the amount of impacts to water bodies. The Corps anticipates that without NWPs available, many applicants would apply for standard individual permits with higher proposed impacts to jurisdictional waters and wetlands (Corps 2020). Beyond ecosystem services (discussed above), unimpacted waters and wetlands also provide recreational opportunities."

2a. Removed Condition on Mitigation Scheduling

IEC Comment

"IDNR Has Removed the Condition on Mitigation Scheduling Without Justification.

The existing certification for the NWP's requires mitigation practices to be scheduled prior to or concurrent with the discharge of dredged or fill material into waters of the United States. The proposed certification does not retain this condition. Removing the condition could significantly reduce compliance with Iowa's narrative water quality standards (WQS).

The scheduling approach is an integral part of wetland mitigation in the implementation guidance developed by IDNR and the Corps. IDNR worked with the Corps to generate a guidance document known as the ISMM, which provides best management practices (BMPs) for quantifying unavoidable stream impacts for permits under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. While the ISMM focuses on applications to permits requiring pre-construction notice, it provides key guidance on the implementation of the credit system identified in 33 C.F.R. Section 332.4(c)(6) of the Corps' Mitigation Rule. IDNR and the Corps worked together to develop the guidance on mitigation practices. Section 332.3(f)(1) further encourages, when appropriate, the use of practicable determinations of how much compensatory mitigation should be required for the individual or general permit. The process described in the Mitigation Rule uses a credit-based system to determine the loss of aquatic functions at an impact or product site. If the mitigation rule is not properly followed in determining what mitigation procedures are necessary to reduce the loss of aquatic functions, this could result in direct violations of Iowa's narrative water quality standards.

Iowa's narrative water quality standards focus on preserving Iowa's aquatic functions through describing conduct that would severely violate the purposes of the Clean Water Act and Iowa's policy of protecting and enhancing the quality of all waters of the state. Failure to schedule

mitigation practices, such as efforts to properly store dredged material or use vegetation in restoration of affected areas, could lead to floating debris, sludge deposits, discharge of materials that change the color or odor of the water way, and allow contamination of materials that are acutely toxic to human, animal, or plant life. Further failure in proper planning to mitigate an increase in turbidity could result in turbidity levels greater than the 25 Nephelometric turbidity unit (NTU) water quality standard. IDNR should retain the condition on mitigation scheduling or provide adequate justification for its removal."

DNR Response

Compensatory mitigation is required by 40 C.F.R. Section 230, based on Section 404 of the CWA. Compensatory mitigation requirements will be included as a condition of the Corps' permit for specific projects. The Corps' NWP verification letter would include what is required for a specific project's mitigation.

While specific mitigation scheduling was not included in certification of these NWP's based on 85 F.R. 42210 (July 13, 2020), any narrative water quality standard violation is still enforceable by the DNR. The water quality standard for turbidity, 567 IAC 61.3(2)"f", can be enforced by the DNR if violated.

2b. Removal of Condition on Construction of Filter Strips and Riparian Buffers on Newly Constructed Waterways

IEC Comment

"Removal of the Condition on Construction of Filter Strips and Riparian Buffers on Newly Constructed Waterways Will Degrade Water Quality.

The certification for the existing NWP's requires:

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 both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.

The condition is not incorporated into the regional conditions proposed by the Rock Island District of the Corps (District). The proposed certification does not include the condition. Removing the condition could result in violations of Iowa's narrative WQS.

Filter strips and riparian buffer zones improve water quality in streams and rivers, filter out pollutants, and regulate water temperature. Buffer strips serve to create healthier water in streams and provide opportunities for diverse microclimates and habitats. While each project

has different site-specific considerations for determining the effectiveness of BMPs and what factors are key to mitigating impacts from the permitted activity, Iowa State University has noted in particular the benefits of the USDA Forest Service three-zone buffer that can extend at minimum 95 feet outward from the river or stream bank.

By requiring filter strips or riparian buffers, IDNR ensures that permit applicants will make plans to mitigate some of the discharges into the waters and decrease erosion after the permitted activity is completed. Newly constructed channels affected by the condition will be properly managed to begin with so as to prevent floating debris and increases in turbidity and will provide natural filter systems to reduce concentrations or combinations of substances that are acutely toxic to human health, animal, or plant life.

Riparian buffers have the potential to provide public and private economic benefits to local Iowans. A review of collected research done by American Rivers highlights the key economic benefits as increasing property value. For example, the study indicates a positive relationship between residential property values and proximity to riparian buffers. A more site-specific study done by Delaware Riverkeeper Network found that buffer strips and riparian buffers provide reductions in costs relating to nutrient retention, air quality and carbon storage. Additionally, the local economy can see benefits through increases in revenue from recreation and property values. IDNR should retain the filter strip and riparian buffer condition."

DNR Response

The DNR agrees with IEC that "each project has different site-specific considerations for determining the effectiveness of BMPs and what factors are key to mitigating impacts from the permitted activity." However, the DNR has included conditions based on state water quality standards, consistent with 40 C.F.R. Section 121 (effective September 11, 2020). The DNR does not specify all means and methods by which permittees comply with water quality standards, but the conditions do require the use of BMPs. Based on this comment, the DNR will discuss co-developing a resource with the Corps that permit applicants can review related to BMPs.

2c. Removal of Condition Restricting the Use of Heavy Equipment in the Waterways

IEC Comment

"Removing the Condition Restricting the Use of Heavy Equipment in the Waterways Will Degrade Iowa's Water Quality.

The certification for the existing NWRPs requires:

Heavy equipment shall not be used or operated within the stream channel. If in-stream work is unavoidable, it shall be performed in such a manner as to minimize the duration of the

disturbance, turbidity increases, substrate disturbance, bank disturbance, and disturbance to riparian vegetation. This condition does not further restrict otherwise authorized drainage ditch maintenance activities (Iowa Section 401 Water Quality Certification condition).

The condition is not incorporated into the District's regional conditions, and the draft certification does not include this condition. Removing the restriction will violate policy regarding antidegradation as described in Section I. Additionally, removal of this requirement may result in turbidity increases above the numeric WQS.

The existing condition provides that the use of all equipment in a stream is only acceptable if the equipment is cleaned of all hazardous materials, pesticides, fuels, lubricants, oils, hydraulic fluids or other construction-related, potentially hazardous substance before arriving on site. However, this condition does not address the potential increase in pollution by increasing the levels of river/stream bottom stirred up from using heavy equipment in the stream bed. IDNR could add a requirement to use BMPs such as sediment curtains, which provide additional protection for the surrounding water. IDNR should retain the condition restricting the use of heavy equipment in waterways."

DNR Response

The DNR considers the combination of the following certification conditions (included in the public noticed draft certification) to provide equivalent protection of water quality standards, including turbidity, for the proposed NWP's (with all conditions collectively applicable to the NWP's):

"(1) During construction and upon completion of the project, actions must be taken to prevent pollution affecting public health, fish, shellfish, wildlife, and recreation due to turbidity, pH, nutrients, suspended solids, floating debris, visible oil and grease, or other pollutants entering a water of the state. This condition will ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2);

(2) Equipment used in waters of the state shall be cleaned of all hazardous materials, pesticides, fuels, lubricants, oils, hydraulic fluids, or other construction-related, potentially hazardous substances before arriving on site. Wash water shall not be discharged into a water of the state. This condition will ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2);

(3) All cleared vegetative material shall be properly managed in such a manner that it cannot enter a water of the state and cause a violation of water quality standards. This condition will

ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2);

(4) All construction debris shall be properly managed in such a manner that it cannot enter a water of the state. This condition will ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2);

(5) Erosion shall be managed so that sediment is not discharged to a water of the state in a manner that causes a violation of water quality standards. This condition will ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2)"

Erosion and turbidity are explicitly discussed in the conditions. The DNR does not specify all means and methods by which permittees comply with water quality standards, but the conditions do require the use of BMPs. Based on this comment, the DNR will discuss co-developing a resource with the Corps that permit applicants can review related to BMPs.

3. Condition 8 on Hydraulically Dredged Material

IEC Comment

"Condition 8 on Hydraulically Dredged Material Does Not Address Turbidity or the Native Mussel Species Likely to be Impacted.

Proposed condition 8 of IDNR's draft certification would require that "Hydraulically dredged material shall be managed to ensure the return water meets water quality standards found at 567 IAC 61.3(2)." The condition does not address protection of native mussel species likely to be impacted.

Hydraulic dredging relies on pumping dredged materials away from the excavation site to another location where sifting and sorting occurs. Common methodology relies on a slurry mix that is sucked to a sorting area. According to U.S. Aqua and other dredging service providers, there are several types of dredging: suction dredging, cutter suction dredging, trailing suction hopper dredging, and others. These methods usually require placing a pipe on the bottom of the river or lake bed and then using suction to remove the sediment on the river bed.

While these methods are widely used, the mussel populations in Iowa, including those that are listed as threatened and endangered, are already vulnerable. According to the U.S. Fish & Wildlife Service, mussels in the Midwest are historically among the most populous, and more than half of the 78 species are classified as federally endangered, threatened or a state species of special concern: "No other group of animals in the Midwest is so gravely imperiled."

According to the Nature Conservancy, about 70% of mussels in North America overall are extinct or imperiled while mammalian species and bird species are 16.5% and 14.6% extinct or imperiled, respectively. According to the Mollusk Conservation Organization in a report from 2002, Iowa had 55 species of freshwater mussels at the time of European settlement. Now Iowa only has about half of those species. The most recent online data provided by the U.S. Fish and Wildlife Service shows there are three still listed as endangered. However, an article recently published by Iowa Public Radio highlights that continued efforts to track mussel populations in Iowa has found smaller mussel populations than researchers hoped to find. Alarmingly, according to the data collected, sites that had registered in 2014 with the highest population density of mussels had zero mussels in 2018.

Mussels provide key biological functions such as food for aquatic life and serve as natural filters that improve water quality. IEC applauds consideration of the impacts of hydraulic dredging, but the importance of mussels in Iowa and the potential threats to mussel species requires further protection. The condition must specify how hydraulic dredging will be managed so as to prevent harm to the numerous native mussels under threat."

DNR Response

Turbidity is addressed by the first certification condition, and all certification conditions would apply to NWP's, as previously discussed. The DNR does not specify all means and methods by which permittees comply with water quality standards, but the conditions do require the use of BMPs. Based on this comment, the DNR will discuss co-developing a resource with the Corps that permit applicants can review related to BMPs.

Certification conditions must be based on and cite water quality requirements, including water quality standards (567 IAC Chapter 61). 40 C.F.R. Section 121 (effective September 11, 2020). Further, Iowa's water quality standards are protective of mussels. Iowa has adopted many aquatic life water quality criteria that have been developed by the EPA under CWA Section 304(a). These are "criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters." 33 U.S.C. 1314.

Further General Condition 18 (2020) for the NWP's states the following:

“Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed.” 85 F.R. 57386 (September 15, 2020).

The NWRPs task the Corps with evaluating these projects to protect all threatened and endangered species in coordination with the U.S. Fish and Wildlife Service (USFWS).

4. Conditions 3, 4, 5, and 7

IEC Comment

“IEC recognizes and appreciates the intent of conditions 3 through 5 and condition 7 of the draft certification to ensure compliance with the state’s water quality standards. However, the proposed conditions are vague to the point of not being meaningful to permittees. Each condition uses the phrase “shall be properly managed in such a manner that it cannot enter a water of the state and cause a violation of water quality standards.” It provides no indication what “properly managed” means for each condition, nor how it relates to the cited general water quality standards in the narrative form.

Condition 3 requires “all cleared vegetative materials shall be properly managed in such a manner that it cannot enter a water of the state and cause a violation of water quality standards.” There is no information on which WQS might be violated, how far removed the materials should be from the state’s water, or what is considered proper disposal of vegetative material.

Condition 4 applies the same language to construction debris. Condition 4 provides no clear guidance on whether debris generated by moving heavy equipment in and out of the stream bed meets the definition of construction debris. Iowa’s general water quality criteria provides that waters shall be free from floating debris, oil, grease, scum, and other floating materials as well as a turbidity limit of 25 NTUs. For the purposes of the certification, it is not clear whether construction debris is limited to those narrative standards or what constitutes properly managing construction debris so that those water quality standards are not violated.

Condition 5 addresses erosion management. Under the proposed certification, the condition would only indicate that erosion be managed in a way that sediment is not discharged to the water of the state in a manner that results in a violation of water quality standards. The

condition then refers the permittee to the general water quality criteria. The most relevant water quality standard is the turbidity requirement of 25 NTUs. IDNR could eliminate some confusion and merely restate the condition regarding turbidity in regards to protecting erosion and retain the previous conditions on vegetative buffers and filter strips as proper erosion management.

Finally, Condition 7 provides unclear guidance on the proper management of stockpiled dredged materials. The condition does not indicate whether a certain distance is required to ensure that the dredged materials do not enter the waters of the state due to normal weather conditions, nor is there any guidance on where the stockpiled dredged material is to be disposed of in compliance with Iowa's narrative water quality standards. As an alternative, Minnesota 401 certification requires compliance with the state's water quality standards, but also requires BMPs to be used. Iowa's own certification of erosion management could use language like Minnesota's to describe how dredged stockpiled materials must be managed to meet state water quality standards. Condition 7 could instead read: "stockpiled dredged materials shall be managed at such a distance from the waterway as to prevent sediment discharge to waters of the state in a manner that causes a violation of water quality standards." In Minnesota's guidance on BMPs, the state describes the practices to prevent soil erosion at project sites: "management of dredged material should take place at upland sites, with the material being spread out, seeded, mulched and stabilized in place." IDNR could provide similar guidance to permittees."

DNR Response

General water quality standards are cited for the conditions due to changes to 40 C.F.R. Section 121 (effective September 11, 2020), which requires certification conditions to cite relevant water quality standards. Further, the draft third, fourth, and fifth conditions of certification are in addition to the first condition, which states the following:

"(1) During construction and upon completion of the project, actions must be taken to prevent pollution affecting public health, fish, shellfish, wildlife, and recreation due to *turbidity, pH, nutrients, suspended solids, floating debris, visible oil and grease, or other pollutants* entering a water of the state. This condition will ensure permittees comply with Iowa's narrative water quality standards found at 567 IAC 61.3(2);" (*emphasis added*)

This includes many of the pollutants that are part of the narrative water quality standards in 567 IAC 61.3(2) as a condition with which permittees must comply.

The state of Iowa does not specify BMPs in rules. IEC has referenced Minnesota's guidance on BMPs. Based on this comment, the DNR will discuss co-developing a resource with the Corps that permit applicants can review related to BMPs.

IEC's recommended phrase for the seventh condition, "at a distance from the waterway," does not appear to append additional specificity to the draft condition.

The water quality standard for turbidity, 567 IAC 61.3(2)"f", can be enforced by the DNR if violated.

5a. Condition related to Outstanding Resources/Special Wetlands

IEC Comment

"The District has proposed regional conditions for the NWRPs that are necessary to ensure protection of Iowa's waters. IEC has no expectation for the District to change its proposed conditions. However, if the District does not to impose these conditions for any reason, IDNR must impose them to ensure compliance with Iowa's water quality standards.

a. Protection Is Necessary for Outstanding Resources and Special Wetlands

Iowa provides an additional degree of protection for Outstanding Iowa Waters and Outstanding Natural Resource Value waters. Iowa also has a variety of rare wetland types that could be difficult to replace. As a result, these high-value waters must be addressed through individual certification.

Reducing protections for bogs, fens, seeps and sedge meadows could have lasting consequences. "Fens are peat-forming wetlands that rely on groundwater input and require thousands of years to develop and cannot easily be restored once destroyed." Fens are a type of wetland that is fed by groundwater due to the water table existing at or near the ground surface. Fens usually exist on poorly aerated substrate and consist of plants that can exist in wet and reducing conditions. According to the Michigan State University, prairie fens are a globally rare wetland most common in the Midwest and Northeast United States.

In Iowa, one of the preserved fens is the Gray-Hart Preserve and it protects one of the state's largest calcareous fens. According to the Nature Conservancy, fens are Iowa's rarest type of wetland; they support thick peat soil accumulation and specialized calciphile plants such as grass-of-Parnassus and sterile sedge.

Fens, bogs, and other peatlands are significant carbon sinks as the formation of peatlands results in several feet of stored carbon material below the surface level. Most of the organic material does not degrade, which traps the carbon. As climate change affects farmers, outdoor recreationalists, and the overall population, protection of these areas is key to reducing impacts as well as preserving biodiversity in various ecological systems. IDNR should ensure that either the Corps or IDNR imposes conditions to protect such waters and wetlands."

DNR Response

The DNR must issue certifications based on draft NWPs, in compliance with 40 C.F.R. 121.5(c) (effective September 11, 2020). As such, the DNR bases inclusion of conditions on the draft documents (including draft conditions) the Corps provides. Therefore, no change will be made to the draft certification based on this comment. Additionally, the AIP also states the following: "Any regulated activity that may temporarily degrade an Outstanding National Resource Water or Outstanding State Resource Water [Outstanding Iowa Water] will require an [...] individual 401 certification to ensure that impacts will be temporary and limited and that the public can participate in the decision."

5b. Condition on Waivers of NWP Limits

IEC Comment

"b. Waivers of NWP Limits Allow Additional Degradation

The existing certification of the NWPs requires individual 401 certification when the Corps issues a waiver to exceed the limits of the NWP. Removal of this requirement would adversely impact water quality by allowing additional degradation without review by IDNR.

Waivers issued by the Corps allowing permittees to exceed pollution limits could result in violations of Iowa's 401 certification and violations of the state's water quality standards. The state certification that the activities will not violate water quality standards is entirely dependent upon the requirements in the approved NWPs. Waivers of those requirements could substantially affect the impact of the project and the effects on the state's water quality. The state cannot certify that a permit with conditions it has not seen will comply with water quality standards. If the District does not include the condition for some reason, IDNR must do so."

DNR Response

A Corps waiver would pertain to lineal/areal limits of a NWP (i.e., acreage of jurisdictional waters). The Corps cannot waive the applicability of Iowa's water quality standards (nor does the DNR waive the regulatory authority to enforce water quality standards in the event of a violation, e.g., a failing BMP). When a limit is waived, BMPs would need to be scaled

appropriately to ensure compliance with water quality standards. The Corps would not waive this expectation, nor that permittees are required to comply with water quality standards. Additionally, many BMPs are scalable.

Further, when the Corps waives a limit, 85 F.R. 57391 (September 15, 2020) indicates that they contact the resource agencies (e.g., DNR, EPA, USFWS) for comments, as follows:

“(d) Agency Coordination:

(1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the NWP’s and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.”

For certification, a BMP-based approach is applicable. While IEC refers to “pollution limits,” it is noted that water quality-based effluent limits and technology-based effluent limits (i.e., numeric effluent limits) are not applicable to certification of these NWP’s.

Attachment 1 - IEC's Comment Letter

Please see IEC's original comment letter on the following pages.



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December 10, 2020

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RE: Draft 401 Water Quality Certification for the Nationwide Permits

Dear Ms. Schwake:

The Iowa Environmental Council (IEC) offers the following comments on the proposed Clean Water Act Section 401 Certification of the Nationwide Permits (NWP) proposed by the U.S. Army Corps of Engineers (Corps). 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 certifications 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. IDNR's Antidegradation Review Ignored Practicable Less-Degrading Alternatives and Did Not Demonstrate Necessity of Degradation.

Antidegradation requires an analysis of alternatives to ensure that, for waters meeting water quality standards, any "lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located."¹ In considering alternatives, "the least degrading alternative that is practicable, economically efficient, and affordable should be considered the preferred pollution control alternative."² In considering alternatives, the applicant

¹ Iowa Admin. Code r. 567-61.2(2)(b) (Oct. 7, 2020). Because the Corps has proposed to require individual certification for outstanding waters and certain wetlands as a regional condition for the NWP, we do not address those waters in this antidegradation discussion.

² "Iowa Antidegradation Implementation Procedure," IDNR, Feb. 17, 2010, at 13.

“shall evaluate a range of non-degrading or less-degrading pollution control alternatives” for the purpose of identifying “reliable, demonstrated processes or practices.”³ As demonstrated by the rationale IDNR developed, general permit certifications under Section 401 require antidegradation review, and the review is conducted by IDNR rather than individual permit applicants.⁴

IDNR’s alternatives analysis for these NWP’s relies entirely on the alternatives analysis conducted by the Corps.⁵ The Corps conducted its alternatives analysis to satisfy the National Environmental Policy Act for each nationwide permit.⁶ The Corps conducted an environmental assessment rather than a full environmental impact statement for which regulations define alternatives to consider.⁷ The Corps considered a no-action alternative, changes to the NWP text, discussion of the authority to issue regional conditions, and case-specific alternatives.⁸

The set of alternatives that the Corps considered did not include the existing conditions imposed as Regional Conditions by the local Corps district or the conditions imposed by IDNR in the 401 certification. Because the IDNR relied on the Corps alternatives analysis, it did not consider the existing Regional Conditions or IDNR conditions. IDNR did not identify or describe its analysis of the proposed conditions, nor did it explain why those conditions are “the least degrading alternative that is practicable, economically efficient, and affordable” as required by the state’s Antidegradation Implementation Procedure.⁹

As explained in Sections III and IV of these comments, the proposed conditions in the 401 certification are less protective than existing conditions. They will therefore lead to additional degradation of Iowa waters, including waters that presently meet water quality standards and are subject to Tier 2 protection¹⁰ under Iowa’s antidegradation rules.

Additional degradation could be allowed if the antidegradation review provided justification that the degradation was “necessary to accommodate important economic or social development” in the area.¹¹ For these general permits, IDNR considered the statewide impact of certifying the

³ *Id.*

⁴ Christine Schwake, IDNR, “Rationale for Section 401 Water Quality Certification of the 2020 Nationwide Permits,” Nov. 10, 2020, at 3.

⁵ Christine Schwake, IDNR, “Rationale for Section 401 Water Quality Certification of the 2020 Nationwide Permits,” Nov. 10, 2020, at 3.

⁶ See “Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits,” U.S. Army Corps of Engineers, July 30, 2020, at 25 (comparing alternative costs); *see also, e.g.*, “Draft Decision Document Nationwide Permit 13,” U.S. Army Corps of Engineers, Sep. 14, 2020, at 4-7 (describing alternatives for NWP 13); “Draft Decision Document Nationwide Permit 14,” U.S. Army Corps of Engineers, Sep. 14, 2020, at 4-7 (describing alternatives for NWP 14).

⁷ “Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits,” U.S. Army Corps of Engineers, July 30, 2020, at 13; *cf.* 40 C.F.R. § 1502.14 (listing requirements for environmental impact statement alternatives).

⁸ *See, e.g.*, “Draft Decision Document Nationwide Permit 13,” U.S. Army Corps of Engineers, Sep. 14, 2020, at 4-7 (describing alternatives for NWP 13); “Draft Decision Document Nationwide Permit 14,” U.S. Army Corps of Engineers, Sep. 14, 2020, at 4-7 (describing alternatives for NWP 14).

⁹ “Iowa Antidegradation Implementation Procedure,” IDNR, Feb. 17, 2010, at 13.

¹⁰ Iowa Admin. Code r. 567-61.2(2)(b) (Oct. 7, 2020).

¹¹ *Id.*

NWPs.¹² IEC does not take issue with accounting for the statewide impact of certification for a general permit that is applicable statewide.¹³ However, the method of evaluating the economic need depends on a comparison of the costs of each alternative. IDNR compared the costs of: (a) denying certification entirely and (b) certifying, regardless of conditions.¹⁴ The evaluation gave no accounting of the costs of other alternatives, and it did not describe impracticality of the existing conditions that have been in effect for years. Absent a demonstration that the existing conditions are not practicable, economically efficient, and affordable, IDNR cannot impose conditions less stringent than the existing conditions, because doing so would allow degradation.

Because IDNR did not evaluate reasonable alternatives that are in effect today or provide justification for their future impracticality, it cannot conclude that it has selected the least degrading alternative.¹⁵ Because IDNR did not evaluate the costs of alternative conditions or demonstrate that the existing conditions are impractical, it cannot conclude that the degradation is necessary.¹⁶ IEC recommends that IDNR retain the existing conditions or make them more protective of Iowa's waters, where doing so is practicable.

II. IDNR Has Removed Conditions to Meet Water Quality Standards Without Justification.

To ensure compliance with water quality standards, IDNR must impose conditions comparable to those that are in the existing certification of the NWPs. The proposed certification removes conditions regarding mitigation scheduling, construction of filter strips, and use of heavy equipment in the water.

a. IDNR Has Removed the Condition on Mitigation Scheduling Without Justification.

The existing certification for the NWPs requires mitigation practices to be scheduled prior to or concurrent with the discharge of dredged or fill material into waters of the United States.¹⁷ The proposed certification does not retain this condition.¹⁸ Removing the condition could significantly reduce compliance with Iowa's narrative water quality standards (WQS).¹⁹

¹² Christine Schwake, IDNR, "Rationale for Section 401 Water Quality Certification of the 2020 Nationwide Permits," Nov. 10, 2020, at 2-3.

¹³ IEC notes that the Corps used its existing permits as a baseline to evaluate compliance costs for its economic analysis; IDNR did not use its existing permit conditions. *See* "Regulatory Impact Analysis for the Proposed 2020 Nationwide Permits," U.S. Army Corps of Engineers, July 30, 2020, at 23-24. Furthermore, requiring individual certification would not impose the same costs as requiring both an individual 404 permit and individual certification.

¹⁴ *Id.*

¹⁵ *Cf. id.* at Finding 3 ("All cost-effective and reasonable BMPs for nonpoint source pollution control are implemented").

¹⁶ *Cf. id.* at Finding 4 ("Allowing degradation of water quality is necessary and accommodates important economic or social development from activities authorized by NWPs.").

¹⁷ *See* Iowa Admin. Code r. 567-61.2(2)(g)(3) (2020).

¹⁸ Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020).

¹⁹ *See* Iowa Admin. Code r. 567-61.3(2) (2020).

The scheduling approach is an integral part of wetland mitigation in the implementation guidance developed by IDNR and the Corps. IDNR worked with the Corps to generate a guidance document known as the ISMM, which provides best management practices (BMPs) for quantifying unavoidable stream impacts for permits under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.²⁰ While the ISMM focuses on applications to permits requiring pre-construction notice, it provides key guidance on the implementation of the credit system identified in 33 C.F.R. Section 332.4(c)(6) of the Corps' Mitigation Rule.²¹ IDNR and the Corps worked together to develop the guidance on mitigation practices.²² Section 332.3(f)(1) further encourages, when appropriate, the use of practicable determinations of how much compensatory mitigation should be required for the individual or general permit.²³ The process described in the Mitigation Rule uses a credit-based system to determine the loss of aquatic functions at an impact or product site.²⁴ If the mitigation rule is not properly followed in determining what mitigation procedures are necessary to reduce the loss of aquatic functions, this could result in direct violations of Iowa's narrative water quality standards.²⁵

Iowa's narrative water quality standards focus on preserving Iowa's aquatic functions through describing conduct that would severely violate the purposes of the Clean Water Act and Iowa's policy of protecting and enhancing the quality of all waters of the state.²⁶ Failure to schedule mitigation practices, such as efforts to properly store dredged material or use vegetation in restoration of affected areas, could lead to floating debris, sludge deposits, discharge of materials that change the color or odor of the water way, and allow contamination of materials that are acutely toxic to human, animal, or plant life.²⁷ Further failure in proper planning to mitigate an increase in turbidity could result in turbidity levels greater than the 25 Nephelometric turbidity unit (NTU) water quality standard.²⁸ IDNR should retain the condition on mitigation scheduling or provide adequate justification for its removal.

b. Removal of the Condition on Construction of Filter Strips and Riparian Buffers on Newly Constructed Waterways Will Degrade Water Quality.

The certification for the existing NWP requires:

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 both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.²⁹

²⁰ *State of Iowa Stream Mitigation Method Version 2.0*, U.S. Army Corps of Engineers (2018).

²¹ *Id.* at 1.

²² *Id.*

²³ 33 C.F.R. §332.3(f)(1) (2020).

²⁴ 33 C.F.R. pt. 332 (2020).

²⁵ *Id.*

²⁶ See Iowa Admin. Code r. 567-61 (2020).

²⁷ See Iowa Admin. Code r. 567-61 (2020).

²⁸ Iowa Admin. Code r. 567-61 (2020).

²⁹ Iowa Admin. Code r. 567-61.2(g)(4) (2020).

The condition is not incorporated into the regional conditions proposed by the Rock Island District of the Corps (District). The proposed certification does not include the condition.³⁰ Removing the condition could result in violations of Iowa's narrative WQS.

Filter strips and riparian buffer zones improve water quality in streams and rivers, filter out pollutants, and regulate water temperature.³¹ Buffer strips serve to create healthier water in streams and provide opportunities for diverse microclimates and habitats.³² While each project has different site-specific considerations for determining the effectiveness of BMPs and what factors are key to mitigating impacts from the permitted activity, Iowa State University has noted in particular the benefits of the USDA Forest Service three-zone buffer that can extend at minimum 95 feet outward from the river or stream bank.³³

By requiring filter strips or riparian buffers, IDNR ensures that permit applicants will make plans to mitigate some of the discharges into the waters and decrease erosion after the permitted activity is completed.³⁴ Newly constructed channels affected by the condition will be properly managed to begin with so as to prevent floating debris and increases in turbidity and will provide natural filter systems to reduce concentrations or combinations of substances that are acutely toxic to human health, animal, or plant life.³⁵

Riparian buffers have the potential to provide public and private economic benefits to local Iowans. A review of collected research done by American Rivers highlights the key economic benefits as increasing property value.³⁶ For example, the study indicates a positive relationship between residential property values and proximity to riparian buffers. A more site-specific study done by Delaware Riverkeeper Network found that buffer strips and riparian buffers provide reductions in costs relating to nutrient retention, air quality and carbon storage.³⁷ Additionally, the local economy can see benefits through increases in revenue from recreation and property values.³⁸ IDNR should retain the filter strip and riparian buffer condition.

³⁰ See Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020).

³¹ Kimberly Lawson, *Why Bother With a Buffer? The Benefits of a Forested Riparian Buffer Zone*, Farm and Dairy (April 14, 2016), available at <https://www.farmanddairy.com/columns/why-bother-with-a-buffer-the-benefits-of-a-forested-riparian-buffer-zone/329765.html>.

³² See Daniel Burden, *What is a Riparian Buffer?*, Iowa State University Extension and Outreach (Dec. 4, 2020), available at <https://www.extension.iastate.edu/smallfarms/what-riparian-buffer>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ American Rivers, *Economic Value of Riparian Buffers* (Mar. 2016) https://americanrivers.org/wp-content/uploads/2016/05/AmericanRivers_EconomicValueRiparianBuffers-2016.pdf.

³⁷ ECONorthwest, *The Economic Value of Riparian Buffers in the Delaware River Basin*, Delaware Riverkeeper Network (Aug. 2018), available at <https://www.delawariverkeeper.org/sites/default/files/Riparian%20Benefits%20ECONW%200818.pdf>.

³⁸ *Id.*

c. Removing the Condition Restricting the Use of Heavy Equipment in the Waterways Will Degrade Iowa’s Water Quality.

The certification for the existing NWP requires:

Heavy equipment shall not be used or operated within the stream channel. If in-stream work is unavoidable, it shall be performed in such a manner as to minimize the duration of the disturbance, turbidity increases, substrate disturbance, bank disturbance, and disturbance to riparian vegetation. This condition does not further restrict otherwise authorized drainage ditch maintenance activities (Iowa Section 401 Water Quality Certification condition).³⁹

The condition is not incorporated into the District’s regional conditions, and the draft certification does not include this condition.⁴⁰ Removing the restriction will violate policy regarding antidegradation as described in Section I. Additionally, removal of this requirement may result in turbidity increases above the numeric WQS.⁴¹

The existing condition provides that the use of all equipment in a stream is only acceptable if the equipment is cleaned of all hazardous materials, pesticides, fuels, lubricants, oils, hydraulic fluids or other construction-related, potentially hazardous substance before arriving on site.⁴² However, this condition does not address the potential increase in pollution by increasing the levels of river/stream bottom stirred up from using heavy equipment in the stream bed. IDNR could add a requirement to use BMPs such as sediment curtains, which provide additional protection for the surrounding water.⁴³ IDNR should retain the condition restricting the use of heavy equipment in waterways.

III. Condition 8 on Hydraulically Dredged Material Does Not Address Turbidity or the Native Mussel Species Likely to be Impacted.

Proposed condition 8 of IDNR’s draft certification would require that “Hydraulically dredged material shall be managed to ensure the return water meets water quality standards found at 567 IAC 61.3(2).”⁴⁴ The condition does not address protection of native mussel species likely to be impacted.

³⁹ Iowa Admin. Code r. 567-61.2(g)(9) (2020).

⁴⁰ See Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020).

⁴¹ Iowa Admin. Code r. 567-61.3(2)(f) (Oct 7, 2020).

⁴² Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020).

⁴³ See *id.*; see also “Turbidity Curtain,” Michigan Department of Environmental Quality, available at https://www.michigan.gov/documents/deq/nps-turbidity-curtain_332136_7.pdf.

⁴⁴ Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020) at 2.

Hydraulic dredging relies on pumping dredged materials away from the excavation site to another location where sifting and sorting occurs.⁴⁵ Common methodology relies on a slurry mix that is sucked to a sorting area.⁴⁶ According to U.S. Aqua and other dredging service providers, there are several types of dredging: suction dredging, cutter suction dredging, trailing suction hopper dredging, and others.⁴⁷ These methods usually require placing a pipe on the bottom of the river or lake bed and then using suction to remove the sediment on the river bed.⁴⁸

While these methods are widely used, the mussel populations in Iowa, including those that are listed as threatened and endangered, are already vulnerable. According to the U.S. Fish & Wildlife Service, mussels in the Midwest are historically among the most populous, and more than half of the 78 species are classified as federally endangered, threatened or a state species of special concern: “No other group of animals in the Midwest is so gravely imperiled.”⁴⁹ According to the Nature Conservancy, about 70% of mussels in North America overall are extinct or imperiled while mammalian species and bird species are 16.5% and 14.6% extinct or imperiled, respectively.⁵⁰ According to the Mollusk Conservation Organization in a report from 2002, Iowa had 55 species of freshwater mussels at the time of European settlement.⁵¹ Now Iowa only has about half of those species.⁵² The most recent online data provided by the U.S. Fish and Wildlife Service shows there are three still listed as endangered.⁵³ However, an article recently published by Iowa Public Radio highlights that continued efforts to track mussel populations in Iowa has found smaller mussel populations than researchers hoped to find.⁵⁴ Alarming, according to the data collected, sites that had registered in 2014 with the highest population density of mussels had zero mussels in 2018.⁵⁵

⁴⁵ Dredge America, *Dewatering Services*, (last accessed Dec. 04, 2020)

<https://dredgeamerica.com/services/dewatering/>.

⁴⁶ *Id.*

⁴⁷ *Id.*; U.S. Aqua Services, *The Basics of Mechanical and Hydraulic Dredging* (last accessed Dec. 4, 2020)

<https://www.usdredge.com/blog/dredging-equipment-company/the-basics-of-mechanical-and-hydraulic-dredging/>.

⁴⁸ Dredge America, *Dewatering Services*, (last accessed Dec. 04, 2020)

<https://dredgeamerica.com/services/dewatering/>; U.S. Aqua Services, *The Basics of Mechanical and Hydraulic Dredging* (last accessed Dec. 4, 2020) <https://www.usdredge.com/blog/dredging-equipment-company/the-basics-of-mechanical-and-hydraulic-dredging/>.

⁴⁹ Midwest Region Endangered Species, *America’s Mussels: Silent Sentinels*, U.S. Fish & Wildlife Service (last accessed Dec. 4, 2020) <https://www.fws.gov/midwest/endangered/clams/mussels.html>.

⁵⁰ *Id.*

⁵¹ Cedar Valley Resource, Conservation & Development, Inc., *Freshwater Mussels of Iowa*, Mollusk Conservation Organization (2002), available at

https://molluskconservation.org/Library/Maps/pdfs/freshwater_mussels_of_iowa.pdf.

⁵² *Id.*

⁵³ Environmental Conservation Online System, *Listed Species Believed to or known to Occur in Iowa*, U.S. Fish & Wildlife Service (last accessed Dec. 9, 2020), available at <https://ecos.fws.gov/ecp/report/species-listings-by-state?stateAbbrev=IA&stateName=Iowa&statusCategory=Listed>.

⁵⁴ Kate Payne, *Mussel Populations In Iowa River Lower Than Researchers Hoped*, Iowa Public Radio (Aug. 27, 2018), available at <https://www.iowapublicradio.org/environment/2018-08-27/mussel-populations-in-iowa-river-lower-than-researchers-hoped>.

⁵⁵ *Id.*

Mussels provide key biological functions such as food for aquatic life and serve as natural filters that improve water quality.⁵⁶ IEC applauds consideration of the impacts of hydraulic dredging, but the importance of mussels in Iowa and the potential threats to mussel species requires further protection. The condition must specify how hydraulic dredging will be managed so as to prevent harm to the numerous native mussels under threat.

IV. Conditions 3 Through 5 and Condition 7 Should Be Clarified.

IEC recognizes and appreciates the intent of conditions 3 through 5 and condition 7 of the draft certification to ensure compliance with the state’s water quality standards.⁵⁷ However, the proposed conditions are vague to the point of not being meaningful to permittees. Each condition uses the phrase “shall be properly managed in such a manner that it cannot enter a water of the state and cause a violation of water quality standards.”⁵⁸ It provides no indication what “properly managed” means for each condition, nor how it relates to the cited general water quality standards in the narrative form.⁵⁹

Condition 3 requires “all cleared vegetative materials shall be properly managed in such a manner that it cannot enter a water of the state and cause a violation of water quality standards.”⁶⁰ There is no information on which WQS might be violated, how far removed the materials should be from the state’s water, or what is considered proper disposal of vegetative material.

Condition 4 applies the same language to construction debris.⁶¹ Condition 4 provides no clear guidance on whether debris generated by moving heavy equipment in and out of the stream bed meets the definition of construction debris. Iowa’s general water quality criteria provides that waters shall be free from floating debris, oil, grease, scum, and other floating materials as well as a turbidity limit of 25 NTUs.⁶² For the purposes of the certification, it is not clear whether construction is debris limited to those narrative standards or what constitutes properly managing construction debris so that those water quality standards are not violated.

Condition 5 addresses erosion management.⁶³ Under the proposed certification, the condition would only indicate that erosion be managed in a way that sediment is not discharged to the water of the state in a manner that results in a violation of water quality standards.⁶⁴ The condition then refers the permittee to the general water quality criteria.⁶⁵ The most relevant water

⁵⁶ *Id.*

⁵⁷ Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Iowa Admin. Code r. 567-61.3(2)(f) (2020).

⁶³ Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits.

⁶⁴ *Id.*

⁶⁵ *Id.*

quality standard is the turbidity requirement of 25 NTUs.⁶⁶ IDNR could eliminate some confusion and merely restate the condition regarding turbidity in regards to protecting erosion and retain the previous conditions on vegetative buffers and filter strips as proper erosion management.

Finally, Condition 7 provides unclear guidance on the proper management of stockpiled dredged materials.⁶⁷ The condition does not indicate whether a certain distance is required to ensure that the dredged materials do not enter the waters of the state due to normal weather conditions,⁶⁸ nor is there any guidance on where the stockpiled dredged material is to be disposed of in compliance with Iowa’s narrative water quality standards.⁶⁹ As an alternative, Minnesota 401 certification requires compliance with the state’s water quality standards, but also requires BMPs to be used.⁷⁰ Iowa’s own certification of erosion management could use language like Minnesota’s to describe how dredged stockpiled materials must be managed to meet state water quality standards. Condition 7 could instead read: “stockpiled dredged materials shall be managed at such a distance from the waterway as to prevent sediment discharge to waters of the state in a manner that causes a violation of water quality standards.” In Minnesota’s guidance on BMPs, the state describes the practices to prevent soil erosion at project sites: “management of dredged material should take place at upland sites, with the material being spread out, seeded, mulched and stabilized in place.”⁷¹ IDNR could provide similar guidance to permittees.

V. IEC Supports Conditions to Protect Outstanding Resources and Prevent Certifications in Case of Waiver.

The District has proposed regional conditions for the NWP that are necessary to ensure protection of Iowa’s waters. IEC has no expectation for the District to change its proposed conditions. However, if the District does not impose these conditions for any reason, IDNR must impose them to ensure compliance with Iowa’s water quality standards.

a. Protection Is Necessary for Outstanding Resources and Special Wetlands

Iowa provides an additional degree of protection for Outstanding Iowa Waters and Outstanding Natural Resource Value waters.⁷² Iowa also has a variety of rare wetland types that could be difficult to replace. As a result, these high-value waters must be addressed through individual certification.

Reducing protections for bogs, fens, seeps and sedge meadows could have lasting consequences. “Fens are peat-forming wetlands that rely on groundwater input and require thousands of years to

⁶⁶ Iowa Admin. Code r. 567-61.3(2)(f) (2020).

⁶⁷ Iowa Dept. of Natural Resources, Draft Section 401 Water Quality Certification for the Nationwide Permits (2020).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Minn. R. 7001.1080 (2020).

⁷¹ Minnesota Pollution Control Agency, *Best Management Practices for the Management of Dredged Material* (Dec. 7, 2020), at 6 <https://www.pca.state.mn.us/sites/default/files/wq-gen2-02.pdf>.

⁷² Iowa Admin. Code r. 567-61.3(2)(c), (d) (2020).

develop and cannot easily be restored once destroyed.”⁷³ Fens are a type of wetland that is fed by groundwater due to the water table existing at or near the ground surface.⁷⁴ Fens usually exist on poorly aerated substrate and consist of plants that can exist in wet and reducing conditions.⁷⁵ According to the Michigan State University, prairie fens are a globally rare wetland most common in the Midwest and Northeast United States.⁷⁶

In Iowa, one of the preserved fens is the Gray-Hart Preserve and it protects one of the state’s largest calcareous fens.⁷⁷ According to the Nature Conservancy, fens are Iowa’s rarest type of wetland; they support thick peat soil accumulation and specialized calciphile plants such as grass-of-Parnassus and sterile sedge.⁷⁸

Fens, bogs, and other peatlands are significant carbon sinks as the formation of peatlands results in several feet of stored carbon material below the surface level.⁷⁹ Most of the organic material does not degrade, which traps the carbon.⁸⁰ As climate change affects farmers, outdoor recreationalists, and the overall population, protection of these areas is key to reducing impacts as well as preserving biodiversity in various ecological systems.⁸¹ IDNR should ensure that either the Corps or IDNR imposes conditions to protect such waters and wetlands.

b. Waivers of NWP Limits Allow Additional Degradation

The existing certification of the NWPs requires individual 401 certification when the Corps issues a waiver to exceed the limits of the NWP.⁸² Removal of this requirement would adversely impact water quality by allowing additional degradation without review by IDNR.

Waivers issued by the Corps allowing permittees to exceed pollution limits could result in violations of Iowa’s 401 certification and violations of the state’s water quality standards. The state certification that the activities will not violate water quality standards is entirely dependent upon the requirements in the approved NWPs. Waivers of those requirements could substantially affect the impact of the project and the effects on the state’s water quality. The state cannot

⁷³ U.S. Forest Service, *What is a Fen?*, U.S. Dept. of Ag. (last accessed Dec. 4, 2020), available at https://www.fs.fed.us/wildflowers/beauty/California_Fens/what.shtml.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Dept. of Entomology Native Plants and Ecosystem Services, *Fen Restoration*, Michigan State University (last accessed Dec. 4, 2020), available at <https://www.canr.msu.edu/nativeplants/restoration/>.

⁷⁷ Grey-Hart Preserve, *Gray-Hart Preserve Protects One of the State’s Largest Calcareous Fens and Showcases Many of the Brilliant Wildflowers Native to Iowa’s Wet Prairies and Fens*, The Nature Conservancy (last accessed Dec. 4, 2020), available at <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/gray-hart-preserve/>.

⁷⁸ *Id.*

⁷⁹ See Jenny Hance, *Ultimate Bogs: How Saving Peatlands Could Help Save the Planet*, The Guardian (July 2017) <https://www.theguardian.com/environment/2017/jul/28/ultimate-bogs-how-saving-peatlands-could-help-save-the-planet>; UN Environment Program, *Peatlands Store Twice As Much Carbon as all the World’s Forests*, (2019) <https://www.unenvironment.org/news-and-stories/story/peatlands-store-twice-much-carbon-all-worlds-forests>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Iowa Admin. Code r. 567-61.2(2)(g)(7) (Oct 7, 2020).

certify that a permit with conditions it has not seen will comply with water quality standards. If the District does not include the condition for some reason, IDNR must do so.

VI. Conclusion

For the reasons articulated above, IDNR must strengthen the conditions in its draft certification to ensure compliance with the state’s water quality standards. The draft certification would allow unnecessary degradation, inappropriately removes protections from the existing certification, does not protect mussel species that are important for a healthy aquatic ecosystem, and contains conditions that are unreasonably vague. The IDNR must address these problems before issuing the certification to avoid violation of the Clean Water Act and its implementing regulations.

Thank you for the opportunity to provide these comments and for your consideration of them. We would be happy to address any questions about the comments and requested changes. We look forward to hearing from you soon.

Sincerely,

/s/ Michael R. Schmidt

Michael R. Schmidt
Staff Attorney
Iowa Environmental Council

/s/ Katie Luzier

Katie Luzier
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Iowa Environmental Council

cc: Carrie Schoenebaum, IDNR Counsel

Attachment 2 - Select Regional and General Conditions of NWRPs

The following are regional and general conditions reviewed during DNR's development of the certification. The DNR reviewed all regional and general conditions, but select conditions applicable in addressing IEC's comment are shown below.

Corps' Iowa Regional Conditions (2020)

"1. Side slopes of a newly constructed channel will be no steeper than 2:1 and planted to permanent, perennial, native vegetation if not armored."

"2. For projects that impact an Outstanding National Resource Water, Outstanding Iowa Water, fens, bogs, seeps, or sedge meadows, a Pre-Construction Notice in accordance with General Condition No. 32 and an Individual Section 401 Water Quality Certification will be required."

"5. Beyond what is described in General Condition No. 6, suitable fill material shall consist of clean materials, free from debris, trash, and other deleterious materials. If broken concrete is used as riprap, all reinforcing rods must be cut flush with the surface of the concrete, and individual pieces of concrete shall be appropriately graded and not exceed 3 feet in any dimension. Asphalt, car bodies, and broken concrete containing asphalt, and liquid concrete are specifically excluded."

"6. No non-native, invasive or other plant species included on the Corps "Excluded Plant List" shall be planted for re-vegetation or stabilization purposes. The plant list can be found on the Corps website at: <http://www.mvr.usace.army.mil/Missions/Regulatory.aspx>. To prevent the spread of non-native and/or invasive plant species, the permittee shall ensure that equipment to be utilized in Waters of the United States is cleaned before arriving on site. Wash water shall not be discharged into any wetland, waterway, or any other surface water conveyances."

Corps' General Conditions (85 F.R. 57385, September 15, 2020)

"6. Suitable Material. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act)."

"7. Water Supply Intakes. No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization."

"11. Equipment. Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance."

"12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides."

"13. Removal of Temporary Structures and Fills. Temporary structures and fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate."

"16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status."

"23. Mitigation. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may

determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

- (1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWP's, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.
- (2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)
- (3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.
- (4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).
- (5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).
- (6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).
- (g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWP's. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2- acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to

ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWP.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.”

“25. Water Quality. Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying agency for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by NWP. The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.”

“27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.”