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November 7, 2022

DNR Water Quality Monitoring and Assessment Section
c/o TMDL Program
Wallace State Office Building
502 East 9th Street
Des Moines, IA 50319
Email: TMDLcomment@dnr.iowa.gov

RE: Intent to Withdraw the Nitrate TMDL in the Cedar River Watershed

Dear Ms. Greenstein:

The Iowa Environmental Council (IEC) offers the following comments on intent to withdraw the nitrate total maximum daily load (TMDL) in the Cedar River Watershed. These comments represent the views of the Iowa Environmental Council, an alliance of more than 100 organizations, over 500 individual members, and an at-large board of farmers, business owners, and conservationists. IEC works to build a safe, healthy environment and sustainable future for Iowa. Our members care about water quality across the state, and they fish, recreate, and drink water sourced from the Cedar River.

IEC disagrees with the DNR's intent to withdraw the nitrate TMDL for the Cedar River. DNR's public notice of the intent to withdraw makes unsubstantiated claims about the usefulness of the TMDL and is insufficiently supported. Our reasons for opposing the withdrawal include the following:

1. DNR has not provided a legal basis for withdrawal of the TMDL.
2. DNR should revise the Cedar River nitrate TMDL to fix any deficiencies, not withdraw the TMDL without a ready replacement.
3. DNR's attempted withdrawal continues a history of resistance and improper implementation of TMDL requirements.
4. Withdrawal of the TMDL will allow increased pollution, even with DNR's failure to properly implement the existing TMDL.
5. The delisting of the Cedar River from the Impaired Waters List does not reflect the long-term health of the river and does not constitute a justification for withdrawing the TMDL.
6. The Cedar River is an important recreational water and drinking water source. It should not be left unprotected by a TMDL for an undetermined amount of time.

We elaborate on each of these points below.

1. DNR has not provided a legal basis for withdrawal of the TMDL.

The Clean Water Act establishes the requirement for states to identify waters that fail to meet water quality standards after imposition of National Pollutant Discharge Elimination System (NPDES) permits with technology-based effluent limits.¹ States must then establish maximum daily loads for the pollutants causing the impairments that would allow the water to meet water quality standards.² The process states use to conduct these steps must be “clearly described” in a Continuing Planning Process document.³

The Clean Water Act sets a goal “to restore and maintain the chemical, physical, and biological integrity” of waters nationwide by eliminating discharges to surface waters.⁴ It severely restricts the mechanisms by which discharge limits may be relaxed.⁵ In practice, this creates a one-way ratchet that results in cleaner water.

TMDLs are written to limit pollution discharges to meet water quality standards. Accordingly, there is no direct statute, regulation, or guidance for withdrawing a TMDL and removing those limitations.

EPA has authority to approve and disapprove TMDLs submitted by states.⁶ DNR’s action in this matter amounts to seeking EPA disapproval of the already-approved TMDL. To obtain disapproval, DNR would need to show that the TMDL does not meet the requirements for EPA approval. Unfortunately for DNR, EPA’s past approval included reasons supporting the elements DNR now criticizes.

The public notice states the TMDL does not “adequately justify th[e] decision” to regulate total nitrogen rather than nitrate as nitrogen. In its approval of the TMDL on January 24, 2007,⁷ EPA explicitly approved this approach. EPA noted that “load capacity goal is derived from the nitrate-N drinking water standard” based on two types of modeling.⁸ EPA further noted that “Table 1-7 lists the existing loading and TMDL load allocations of total nitrogen needed to receive a 35% reduction in nitrate-N at the impaired site.” Thus, EPA specifically reviewed and approved the method DNR proposed, has used for more than 15 years, and now seeks to overturn.

¹ 33 U.S.C. § 1313(d)(1).

² *Id.*

³ 40 C.F.R. § 130.7(a).

⁴ 33 U.S.C. § 1251(a).

⁵ 33 U.S.C. § 1342(o); 40 C.F.R. § 122.44(l).

⁶ 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7.

⁷ “How’s my Waterway?” U.S. EPA (last visited November 4, 2022), available at <https://mywaterway.epa.gov/plan-summary/2IOWA/32009>. EPA’s TMDL review and approval criteria remain the same as in 2007. See “Overview of Total Maximum Daily Loads,” U.S. EPA (last visited November 4, 2022), available at <https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls#6> (identifying current review guidelines to be “Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992,” which was issued in 2002).

⁸ “EPA Region 7 TMDL Review,” TMDL ID No. IA 02 CED-0030_2 (Jan. 24, 2007) at 1.

Although EPA has no procedures for withdrawing an approved TMDL, EPA issued a draft memorandum on the subject for review in 2012 that is still available online.⁹ It recommends that a TMDL should *not* be withdrawn if it was successful and the waterway began meeting water quality standards (WQS). The memo states: “EPA recommends that such ‘successful’ TMDLs remain in place to ensure that WQS continue to be maintained in the future, and that their water quality analyses and allocation targets continue to inform permit writers’ and stakeholders’ efforts to maintain those water quality standards.”¹⁰

The memo lists three scenarios where removing the TMDL would be appropriate:

1. EPA approves a State-established TMDL to replace an earlier EPA-established TMDL. Having two TMDLs for the same water could be confusing. In this case, EPA might announce its “withdrawal” of the earlier federal TMDL at the same time it provides notice of its approval of the State TMDL, or alternatively, EPA may indicate that the state-established TMDL supersedes the EPA-established TMDL.
2. The State (or EPA) developed a TMDL for a water that was incorrectly placed on the 303(d) list. Subsequent information demonstrates that the water was then, and is now, attaining water quality standards. When withdrawing such TMDLs, the State should notify EPA and provide public notice of the withdrawal. This withdrawal could occur at the same time the State establishes its next 303(d) list.
3. EPA approves a State’s revised water quality criteria or water quality standard leading to a determination that the water body is no longer impaired. Under the circumstances, implementation of the waste load allocation (WLA) in the TMDL based on the old criteria may lead to permit effluent limits more stringent than necessary under the new criteria. When withdrawing such TMDLs, States should notify EPA and provide public notice of the withdrawal. The withdrawal could occur at the same time the State establishes its next 303(d) list. However, if the waterbody remains impaired under the new water quality standard, the TMDL should remain in place. The State may withdraw the TMDL if it chooses to develop a TMDL revision and EPA approves the revised TMDL; however, it is not necessary to withdraw the TMDL.¹¹

Two examples of withdrawn TMDLs that fall under these scenarios can be found in Attachment A.

⁹ “Considerations for Revising and Withdrawing TMDLs,” U.S. EPA (Mar. 22, 2012), available at https://www.epa.gov/sites/default/files/2015-10/documents/draft-tmdl_32212.pdf.

¹⁰ *Id* at 12.

¹¹ *Id* at 13.

The withdrawal scenarios described above will effectively maintain or protect WQS. A state TMDL replacing a federal TMDL must be designed to meet WQS. Removing a TMDL incorrectly placed on the impaired waters list amounts to a correction of an error. This is akin to the regulation that allows modification of an NPDES permit based on new information.¹² And revisions to WQS can mean the TMDL is no longer written to meet the revised WQS, as is required by the Clean Water Act.

The Cedar River nitrate TMDL does not satisfy any of the three scenarios outlined above. DNR has not proposed to replace the TMDL with another TMDL, the river was not mistakenly put on the 303(d) list, and the state has not revised its water quality criteria for nitrate. DNR has not justified withdrawing the TMDL at this time.

Withdrawing the TMDL because water quality has (at least temporarily) improved is akin to removing limits in an NPDES permit because the permittee always meets the limit. Compliance with the permit limits does not make the permit superfluous – it shows the permit is effective. Other states have maintained TMDLs after the waterbody meets water quality standards.¹³ They also affirmatively state they will not remove or withdraw TMDLs if the water is delisted.¹⁴ States also affirmatively write “protection” TMDLs to ensure high water quality.¹⁵ All these practices exist because TMDLs provide environmental benefits to water quality consistent with the Clean Water Act’s goals.

2. DNR should revise the Cedar River nitrate TMDL to fix any deficiencies, not withdraw the TMDL without a ready replacement.

DNR’s public notice cited the deficiencies of the TMDL design as a basis for its withdrawal. This does not provide an adequate basis for withdrawal because EPA uses the same standards for TMDL approval as it did when the TMDL was approved, and EPA’s position on TMDL

¹² See 40 C.F.R. § 122.62(a)(2).

¹³ See, e.g., Lake Roland, Maryland, which received a TMDL in 2001, was delisted in 2007, and was never subject to withdrawal of the TMDL. This process was summarized in a future TMDL for the lake. “Total Maximum Daily Load of Polychlorinated Biphenyls in Lake Roland of Jones Falls Watershed in Baltimore County and Baltimore City, Maryland,” Maryland Department of the Environment (Aug. 2013), available at <https://www.lakeroland.org/wp-content/uploads/2020/02/Lake-Roland-Jones-Falls-PCB-TMDL-MDE-Final-2013.pdf>.

¹⁴ See, e.g., “Total Maximum Daily Loads of Phosphorus for Selected Connecticut Basin Lakes,” Massachusetts Department of Environmental Protection (Dec. 2001), available at <https://www.mass.gov/doc/final-tmdls-of-phosphorus-for-selected-connecticut-basin-lakes/download> (“Even if removed from the 303d list, this TMDL for phosphorus will continue to be in effect as a protective TMDL to ensure maintenance of good water quality in the lake.”).

¹⁵ See, e.g., “Final Wild Harbor Estuarine System Total Maximum Daily Load For Total Nitrogen,” Massachusetts Department of Environmental Protection (Nov. 2017), available at <https://www.epa.gov/sites/default/files/2018-10/documents/wild-harbor-tn-tmdl-report.pdf>.

revisions support revision rather than withdrawal. Any revisions would need to follow the same public input and approval process as the original TMDL.¹⁶

The EPA Office of Water in a 2018 presentation requested that states consult with their regional EPA office prior to making any changes to a TMDL.¹⁷ The presentation listed several scenarios when it might be appropriate to revise a TMDL: changes to WQS, significant changes in data and/or modeling, or changes to allocations.¹⁸ For waterways that have achieved attainment, it is stated that “EPA does not consider this an appropriate reason to revise or withdraw an otherwise valid TMDL. The information and allocations contained within the TMDL may continue to provide environmental benefits and ensure continued water quality goals.”¹⁹

As with the draft 2012 guidance on withdrawal, the scenarios for revising a TMDL do not support withdrawal of the Cedar River nitrate TMDL. Attainment alone is not a reason to withdraw a TMDL and maintaining the TMDL provides environmental benefits.

3. DNR’s attempted withdrawal continues a history of resistance and improper implementation of TMDL requirements.

TMDLs must allocate wasteloads to point sources and nonpoint sources.²⁰ Permitting authorities must account for the wasteload allocations and only issue permits “consistent with the assumptions and requirements of any wasteload allocation,” which are predicated on reasonable assurance of nonpoint source reductions.²¹ DNR has a history of not following these requirements. With its stated intent to withdraw the Cedar River TMDL, DNR again demonstrates its disregard for Clean Water Act requirements and its unwillingness to hold polluters accountable.

A. DNR Refusal to Develop the Cedar River TMDL

In 1998, SAILORS Inc. and Mississippi River Revival, later joined by Iowa Sierra Club, sued U.S. EPA for the failure of the state of Iowa to develop TMDLs.²² The lawsuit alleged that the state had not developed TMDLs or implemented the TMDLs in permit requirements.²³ The parties entered into a consent decree in 2001 that included a paragraph titled “EPA BACKSTOP FOR CEDAR RIVER AT CEDAR RAPIDS AND RACCOON RIVER.”²⁴ This paragraph provided:

¹⁶ Following the same public input and approval process would allow the revised TMDL to satisfy Clean Water Act requirements applicable to all TMDLs.

¹⁷ Chris Hunter, “Making Changes to an Approved TMDL,” EPA (Nov. 2018), available at [Chris-Hunter-TMDL-Revisions.pdf \(acwa-us.org\)](#) at 4.

¹⁸ *Id.*

¹⁹ *Id.* at 10.

²⁰ 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7.

²¹ 40 C.F.R. § 122.44(d)(1)(vii)(B).

²² *SAILORS Inc., et al. v. US Environ Protect, et al.*, N.D. Iowa No. 1:98-cv-00134-LRR-JSS.

²³ “Joint Motion to Enter Consent Decree,” N.D. Iowa No. 1:98-cv-00134-LRR-JSS (filed Oct. 26, 2001).

²⁴ *Id.*

(I) Unless Iowa has established for the Cedar River at Cedar Rapids (WBID #[A 02-CED-0030-0) a TMDL for nitrates and a TMDL for fecal coliform bacteria ("the Cedar River TMDLs") by December 15, 2005, EPA will establish these two TMDLs by June 15, 2007.

DNR only implemented a TMDL program – and developed the Cedar River nitrate TMDL in particular – in response to the lawsuit and was bound to do so.

B. DNR Refusal to Enforce TMDL Wasteload Allocations

DNR's claims about the Cedar River TMDL further reveal its reluctance to enforce TMDL requirements in the Clean Water Act. DNR's public notice states that, "The total nitrogen limits in many applicable NPDES permit limits do not align with the TMDL." DNR is admitting that the department violated Clean Water Act requirements applicable to permitting agencies by over-allocating allowable discharges to point sources.

IEC brought this to the department's attention in 2013 when IEC questioned the methods used by DNR to calculate the nitrogen allocation for Rembrandt Enterprises (NPDES Permit #9500102).²⁵ In its response, DNR stated that there were "problems" with how the wasteload allocation was calculated in the TMDL.²⁶ Absent any process to modify the TMDL, the DNR has been violating the terms of the EPA-approved TMDL. Perceived problems with wasteload allocations do not create an exception to federal law.

DNR developed a process for establishing wasteloads under the TMDL in 2008.²⁷ If other means of calculating the wasteload allocation would be more appropriate, the DNR could have revised this approach. If the TMDL itself were a problem as far back as 2013, DNR could have begun the process at that time to revise the TMDL through the same EPA approval process with public input.

C. Failure to Provide Reasonable Assurance for Nonpoint Source Reductions

When a waterbody is impaired due to both point and nonpoint source pollution, the wasteload allocation for point sources in a TMDL may depend on reductions from nonpoint sources. The Clean Water Act does not regulate nonpoint sources. To address this discrepancy, EPA seeks to ensure water quality improvements by allowing point source allocations to rely on nonpoint source reductions only if there is "reasonable assurance" that the nonpoint source reductions will occur. This issue was recently addressed by the U.S. Court of Appeals for the Third Circuit, which upheld EPA's authority to require reasonable assurance of nonpoint source reductions.²⁸

²⁵ Ralph Rosenberg, "Re: Draft NPDES Permit #95000102 (EPA #IA0076252) for Rembrandt Enterprises," Iowa Environmental Council (Jul. 19, 2013).

²⁶ "Summary and Response to Comments, National Pollutant Discharge Elimination System (NPDES) Draft Permit, Rembrandt Enterprises Inc. – Thompson," Iowa DNR (Aug. 27, 2013).

²⁷ Tom Atkinson, "Deriving total nitrogen limits from the WLA in the Cedar River TMDL," Iowa DNR (Nov. 20, 2008).

²⁸ *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281 (3d Cir. 2015).

In the case, the American Farm Bureau Federation challenged EPA's authority to issue a TMDL for the Chesapeake Bay, including reasonable assurance. Regarding reasonable assurance, the court held:

Preventing the EPA from expressing allocations and timelines and from obtaining reasonable assurance from affected states appears to frustrate those goals, and thus the phrase 'total maximum daily load' has enough play in the joints to allow the EPA to consider and express these factors in its final action.

...

the reasonable assurance requirement helps guide the EPA's discretion in determining whether to approve a TMDL or a state's mandatory "continuing planning process," which must include the TMDL, 33 U.S.C. § 1313(e), as it would surely be arbitrary or capricious for the EPA to approve a plan that a state is incapable of following.²⁹

DNR stated in the public notice that it "will continue to implement the Iowa Nutrient Reduction Strategy and to provide funding opportunities for nonpoint source control projects."³⁰ IEC has repeatedly highlighted the state's failure to advance nonpoint source reductions on a reasonable timeframe under the Nutrient Reduction Strategy (NRS). The NRS has no single plan to implement, no timeline, and no substantial progress in nearly a decade, as described in the IEC report "The Iowa Nutrient Reduction Strategy: Ten Years and No Progress."³¹

4. Withdrawal of the TMDL will allow increased pollution, even with DNR's failure to properly implement the existing TMDL.

DNR claims that withdrawal of the TMDL will not lead to increased pollution in the Cedar River.³² This claim ignores restrictions that DNR should be applying only in the presence of a TMDL: limiting new discharges of nitrate pollution.

Unfortunately, DNR has failed to protect the Cedar River and properly implement the TMDL in ways that have already allowed new discharges and nitrate pollution. The Central Iowa Water Association (now the Iowa Regional Utilities Association) received a permit for a facility in Waverly, Iowa with a discharge of nitrate.³³ The wasteload allocation of the TMDL did not include this permit. Federal law does not allow DNR to issue a permit for new, unallocated discharges of nitrate.³⁴ Federal law also prohibits permits from authorizing discharges that may cause or contribute to an exceedance of a water quality standard, such as discharges that exceed

²⁹ *Id.* at 301, 307.

³⁰ DNR Public Notice at 1.

³¹ Iowa Environmental Council (Aug. 2022), available at <https://www.iaenvironment.org/webres/File/NRS%20Report%20and%20Recommendations%202022.pdf>.

³² Brittney Miller, "Iowa DNR says Cedar River water quality plan isn't necessary, experts disagree," *The Gazette* (Nov. 6, 2022), available at <https://www.thegazette.com/environment-nature/iowa-dnr-says-cedar-river-water-quality-plan-isnt-necessary-experts-disagree/>.

³³ Iowa DNR NPDES Permit No. 0900106 (last issued Oct. 11, 2017).

³⁴ 40 C.F.R. §§ 122.4(i), 122.44(d)(1)(vii)(B); see *Friends of Pinto Creek v. United States EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007).

the water quality standard in an impaired water.³⁵ Recent discharges from the Waverly site have consistently averaged greater than 37 mg/L nitrate, nearly four times the TMDL target concentration of 9.5 mg/L.³⁶

Table 1. Nitrogen Concentrations Reported from Permit No. 0900106

Year	Average Concentration	Number of Samples
2017	26.1	8
2018	38.5	50
2019	38.7	50
2020	38.0	48
2021	37.4	45
2022	37.5	23
Cumulative	37.7	224

The inappropriate and new point source loading allowed by DNR highlights the importance of maintaining and enforcing the TMDL. Failure to do so will allow further increases to nitrate loading, increasing the threat to drinking water safety.

If the Cedar River is re-listed as impaired for nitrate, it may take years to develop a TMDL. DNR says that it cannot commit to rewriting the Cedar River TMDL in the near future. A former DNR employee who led the TMDL section believes re-writing the TMDL may take years.³⁷ DNR currently lacks the staff capacity to develop TMDLs on a reasonable schedule: it has one staff person working on TMDLs and 785 impaired waters needing a TMDL.³⁸ The DNR is not in a position to ensure compliance with Clean Water Act requirements under these circumstances.

In the absence of the TMDL, no law or agency restricts further growth of nitrate pollution. As noted above, the NRS does not provide reasonable assurance of nonpoint source reductions. If the TMDL presents genuine problems, DNR should develop a revised load calculation while maintaining the existing TMDL.

5. The delisting of the Cedar River from the Impaired Waters list does not reflect the long-term health of the river and does not constitute a justification for withdrawing the TMDL.

³⁵ 40 C.F.R. § 122.44(d)(1)(i).

³⁶ Iowa Regional Utilities Association, “Nitrate Nitrogen (As N) - Final Effluent - Monitoring & Limits DMR Daily Summary,” Permit #0900106 via records request to The Gazette.

³⁷ Brittney Miller, “Iowa DNR says Cedar River water quality plan isn’t necessary, experts disagree,” The Gazette (Nov. 6, 2022), available at <https://www.thegazette.com/environment-nature/iowa-dnr-says-cedar-river-water-quality-plan-isnt-necessary-experts-disagree/>.

³⁸ *Id.* (noting one staff person); “2022 Assessment Summary - Category 5 - Water is impaired or threatened and a TMDL is needed 303(d) List of Impaired Waters,” Iowa DNR (last visited Nov. 6, 2022), available at <https://programs.iowadnr.gov/adbnet/Assessments/Summary/2022/Impaired> (showing 785 impaired waters).

The DNR evaluated waterbodies for the 2022 303(d) list using a three-year window. The 3-year monitoring period is too short to buffer against noise in the data and weather impacts on water quality. It does not accurately reflect the health of the waterbody. Recent sampling data show that water quality exceeded 10 mg/L nitrate on 50 days in 2022 as of November 1.³⁹

Table 2. Cedar River Nitrate Sampling, 2018-2022.

Year	Days with sample >10 mg/L
2018	6
2019	0
2020	15
2021	0
2022	50

Analysis of longer-term nitrate data show that there has not been a significant improvement in nitrate loading in the Cedar River.⁴⁰ Estimated annual concentrations of nitrate-N increased from 5.1 mg/L in 1990 to 6.6 mg/L in 2020.⁴¹ DNR cannot reasonably conclude that the Cedar River no longer has a nitrate problem. DNR should consider moving to a 5-year window for assessing waters for impairments. The 5-year window would conform to the window used to assess progress on the Nutrient Reduction Strategy.

6. The Cedar River is an important recreational water and drinking water source. It should not be left unprotected by a TMDL for an undetermined amount of time.

Leaving the Cedar River unprotected by a TMDL is unacceptable. It leaves the river vulnerable to backsliding and impairment. Further, it puts the health of Iowans at risk. At levels considerably below the drinking water standard of 10 mg/L, nitrate has been linked to increased rates of birth defects and cancer.⁴²

DNR should commit to revising the Cedar River nitrate TMDL if the department believes the TMDL incorrectly calculated wasteload allocations. As the DNR states in the public notice, “Protective TMDLs, or TMDLS that remain in place on waterbodies that are no longer impaired, can guard against acute conditions driving changes that negatively impact the goal of long-term non-impairment.” The Cedar River should receive the same treatment and be guarded against negative impacts that could place it on the Impaired Waters List in the future.

³⁹ USGS site 05464420 (last accessed Nov. 7, 2022), available at <https://waterdata.usgs.gov/monitoring-location/05464420/#parameterCode=99133&startDT=2018-01-01&endDT=2022-11-01>.

⁴⁰ “Water Quality Gauge, Cedar River, Palo, IA,” Iowa Water Quality Information System, IIHR, University of Iowa (last accessed Nov. 7, 2022), available at: <https://iwqis.iowawis.org/app/>.

⁴¹ Stephen J. Kalkhoff, “Hydrologic and Water-Quality Conditions in the Cedar River Alluvial Aquifer, Linn County, Iowa, 1990-2019,” U.S. Geological Survey (2021) at 48.

⁴² Iowa Environmental Council, “Nitrate in Drinking Water: A Public Health Concern for All Iowans,” (Sept. 2016), available at https://www.iaenvironment.org/webres/File/News%20%26%20Resources/Publications/Nitrate_in_Drinking_Water_Report_Web.pdf.

If the TMDL has worked to improve water quality in the Cedar River, DNR should not withdraw the TMDL. The TMDL should be left in place as a protective TMDL until a new TMDL is written. Withdrawing the TMDL will allow new point sources to discharge into the Cedar River without proper oversight or consideration of impact on the larger Cedar River system. Doing so in this case could set a dangerous precedent for other impaired waters.

Conclusion

DNR is using the delisting of the Cedar River as an opportunity to remove a TMDL that it found challenging to work with. The department had to be ordered by the court to write the TMDL in 2006. Now the department is saying it cannot commit to a rewrite of the TMDL in the near future. The history of DNR's resistance to writing and subsequently abiding by the Cedar River TMDL further demonstrate that its withdrawal is unacceptable.

Thank you for the opportunity to comment. If you have questions or we can clarify these comments further, please feel free to call us.

Sincerely,

/s/ Alicia Vasto

Alicia Vasto
Water Program Director
Iowa Environmental Council

/s/ Michael Schmidt

Michael Schmidt
Staff Attorney
Iowa Environmental Council

Cc: Jeffrey Robichaud, EPA Region 7

Attachment A: Examples of TMDL Withdrawals

(1) Pennsylvania’s Department of Environmental Protection (DEP) submitted rationale for withdrawing a TMDL for the Neshaminy Creek watershed. The rationale explains that the TMDLs are not sufficient to maintain water quality in the targeted body of water and that a different method for deriving TMDLs will allow them to meet their target. This example falls into the first category described by EPA’s draft memorandum. In order to make alleviate confusion, the state withdrew one TMDL to replace it with a new TMDL with a better program based on the “best scientifically and ecologically desirable target.”⁴³ The Pennsylvania DEP acknowledges the withdrawal is dependent on EPA approval.

(2) Texas requested a withdrawal of TMDLs for nickel for fourteen waterways.⁴⁴ In a presentation by Chris Loft of the Water Quality Planning Division of the Texas Commission on Environmental Quality, the three established reasons the EPA will withdraw a TMDL as state in the draft memorandum were listed. In this case, the waterbodies were not listed on the 303(d) list; the TMDLs were created as a precaution. With more evidence, there was little reason to continue using the TMDL. This scenario aligns with the second scenario the EPA listed for withdrawing a TMDL: “the state or EPA developed a TMDL for a waterbody that was incorrectly placed on the 303(d) list.”⁴⁵ EPA approved the withdrawal.

⁴³ “Rationale for Withdrawing the Neshaminy Creek Watershed Nutrient TMDL,” Pennsylvania Department of Environmental Protection (last viewed Oct. 30, 2022), available at https://www.dep.state.pa.us/dep/deputate/watermgt/wqp/wqstandards/tmdl/Neshaminy_Withdrawal2.pdf.

⁴⁴ Chris Loft, “Consideration for Withdrawal of Fourteen TMDLs for Nickel in the Houston Ship Channel,” Texas Commission on Environmental Quality (last viewed Oct 30, 2022), available at <https://www.tceq.texas.gov/downloads/water-quality/tmdl/houston-ship-withdrawn-01/01-consideration-for-withdrawal-nickel-tmdls.pdf>.

⁴⁵ *Id* at 12.