

December 19, 2024

VIA E-MAIL

EPA - Region 7  
ATTN: Jeffery Robichaud  
11201 Renner Blvd.  
Lenexa, KS 66219

RE: comment in response to EPA's partial disapproval of Iowa's 303(d) list

Mr. Robichaud:

The Iowa Department of Natural Resources (DNR) objects to the EPA's November 12, 2024, decision to partially disapprove Iowa's 303(d) list because the EPA's letter contains several legal errors. DNR also objects to the letter's implication that some of Iowa's water is not safe, and that DNR is not meeting either the letter or the spirit of the law.

DNR agrees that nitrate is a harmful pollutant, and has created a water quality standard specific for surface drinking water sources consistent with this reality. This standard and its associated monitoring and testing methodologies are based on rigorous science and are protective. And it works: Iowa's out-of-faucet finished drinking water has a near-perfect compliance rate of 99.6% with the federal Safe Drinking Water Act's (SDWA) nitrate maximum contaminant level (MCL).<sup>1</sup> The tiny fraction of public water supplies that failed to hit the mark have subsequently installed more protective treatments or have acquired an alternative source.

The EPA approved Iowa's nitrate water quality standard for surface drinking water sources over 20 years ago. The EPA has likewise approved Iowa's 303(d) list based on that standard for just as long. The standard has not changed in the interim, and the EPA hasn't had concerns with the standard until now. Ultimately, the goal of both the EPA and DNR is the same: to ensure that Iowa's surface drinking water sources meet water quality standards so that, in turn, Iowa's tap water is safe to drink. It is safe.

While nitrate is a consequential and harmful pollutant, the EPA has never legally classified nitrate as a "Toxic Pollutant" under the CWA. Congress specifically mandated that the EPA "shall . . . list" all CWA-designated toxic pollutants in a table.<sup>2</sup> That table contains 65 pollutants but, notably, nitrate is not among them.<sup>3</sup> Nor is nitrate on EPA's alternative toxic "Priority Pollutants" list, which has 129 pollutants.<sup>4</sup> Yet, the EPA is suddenly demanding that Iowa act as if nitrate is one of these collective 194 pollutants. It is not. There is legal and scientific significance to listing nitrate as a "Toxic Pollutant" under the CWA, including more costs, regulatory oversight, and burdens. In the end, listed or not, Iowa's drinking water must meet SDWA's nitrate MCL, which it does.<sup>5</sup>

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<sup>1</sup> The DNR's Public Drinking Water Program 2023 Annual Compliance Report available at: <https://www.iowadnr.gov/Portals/idnr/uploads/water/wse/2023%20Iowa%20Drinking%20Water%20Annual%20Compliance%20Report.pdf> (as of Dec 17, 2024)

<sup>2</sup> 33 USC § 1317(a)(1)

<sup>3</sup> 40 CFR § 401.15

<sup>4</sup> 40 CFR Part 423, Appendix A

<sup>5</sup> *Supra*, FN 1

As this shows, the EPA is violating federal law in several ways. For one, the EPA's treatment of nitrate as a *de facto* listed Toxic Pollutant is illegal rulemaking under the Administrative Procedure Act.<sup>6</sup> So too is the EPA's treatment of its multitude of guidance documents and website statements as binding when, by law, they are not.<sup>7</sup> Second, the EPA's patchwork approach to nitrate across the country violates the Administrative Procedure Act for being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>8</sup> Some states mirror Iowa's approach to assessing nitrate in surface drinking water sources whereas others don't test at all. In other words, the EPA is holding Iowa to a very high standard that it does not enforce elsewhere. Third, the EPA is required by the CWA to evaluate Iowa's 303(d) list only against DNR's applicable, duly enacted, and EPA-approved water quality standard, not against what the EPA wishes the standard was.<sup>9</sup>

Furthermore, the EPA refused to explain or provide its reasoning, data, and methodology behind its partial disapproval. Both the DNR and the public are expected to provide comments on the EPA's decision, yet not all of the information is available. DNR takes great effort to explain its decisions and to provide data to the public, such as through the AQuIA and ABDNet databases, which have comprehensive historic monitoring and assessment data;<sup>10</sup> the EPA should hold itself to the same standard.

Therefore, the DNR requests that the EPA withdraw its partial disapproval. Absent a withdrawal, DNR demands that the EPA establish loads for the identified impaired waters consistent with 40 CFR § 130.7(d)(2) and provide the public an opportunity to review and comment by publishing in the Federal Register.<sup>11</sup>

Sincerely,

Kayla Lyon, Director

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<sup>6</sup> See, e.g., *Iowa League of Cities v. E.P.A.*, 711 F.3d 844 (8th Cir 2013) and 5 USC § 553; see also *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2261 (June 2024).

<sup>7</sup> Notwithstanding Congress' "shall list" mandate, the EPA has the following statement on its website: "'The list was intended . . . as a starting point. . . Portions of both lists are outdated. As such, the pollutants on these lists are not the only ones regulated. . . ." available at: <https://www.epa.gov/eq/toxic-and-priority-pollutants-under-clean-water-act> (as of Dec. 16, 2024); see also *supra* FN 6.

<sup>8</sup> 5 USC § 706(2)(A)

<sup>9</sup> 33 USC § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2); see also 40 CFR § 131.20(b) and 40 CFR part 25 (detailing public participation processes around establishing or modifying water quality standards)

<sup>10</sup> ADBnet database available at::

<https://programs.iowadnr.gov/adbnet/#:~:text=ADBNet%20is%20an%20online%20database,state%20water%20quality%20standards%20C%20and> (as of Dec 17, 2024)

<sup>11</sup> See, e.g., 119 Fed. Reg. 51884 (June 20, 2024) (containing the EPA's 303(d) list decision for Arkansas and formally soliciting public comment)