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October 4, 2002

Jim Bauman
Wisconsin Department of Natural Resources
Watershed Protection Division
101 S. Webster St.
Madison, WI 53707

RE: COMMENTS ON WISCONSIN'S 2002 LIST OF IMPAIRED WATERS.

Dear Mr. Bauman,

Midwest Environmental Advocates, Inc. is a 501(c)(3) non-profit environmental law center, and submits these comments on behalf of the John Muir Chapter of the Sierra Club, the Mississippi River Revival, River Alliance of Wisconsin, Wisconsin's Environmental Decade Institute, and Wisconsin Public Interest Research Group.

I. BACKGROUND

When Congress enacted the Federal Water Pollution Control Act almost 30 years ago, it wove together a tapestry of water quality protection measures.¹ Wisconsin's list of impaired waters required in Section 303(d) of the federal Clean Water Act (CWA) is one of those measures, and is critical to an effective and organized clean-up of Wisconsin's polluted waters. Although a highly technical law, the Clean Water Act calls for common sense solutions to complex environmental problems in our streams and lakes. One of these solutions requires states to compile data on polluted waters and establish clean up plans for those waters based on the severity of the pollution.²

¹ 33 U.S.C. §§1251-1387.

² 33 U.S.C. §1313(d).

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A. Water Quality Standards Are the First Step Toward Protecting Wisconsin's Waters Under the Federal Clean Water Act.

Water quality standards play an integral role in measuring and restoring the quality of our public waters, and consist of three components:

1. a "use" for the water designated by the state of Wisconsin, such as "Warm Water Sport Fishery" or "Cold Water Class II Trout Stream;"³
2. numeric and narrative criteria designed to protect that use, such as temperature or dissolved oxygen limits or a prohibition against oily, odorous, or unsightly materials in the water;⁴ and
3. an antidegradation requirement that, except in limited circumstances, prohibits any decline in water quality from the existing or designated use of the waterbody.⁵

The DNR is clearly aware of the importance of properly designating uses that reflect both the existing aquatic ecosystem and the restoration which the ecosystem can achieve through the affirmative protections of the Clean Water Act.⁶ Moreover, the DNR is aware of the need to properly set numeric and narrative criteria protective of those uses and that the criteria ensure that healthy populations of fish and other wildlife that rely on healthy aquatic ecosystems can thrive in Wisconsin's waters.⁷

B. Properly Listing Waters that Do Not Meet Water Quality Standards is Critical to Developing Clean-up Plans for Wisconsin's Polluted Waters.

The Clean Water Act establishes the simple proposition that where water quality standards are not being met in our public waters, the DNR must prepare a list of those waters and rank them in order of the "severity of the pollution" in each waterway.⁸ The ranking system determines which waters will receive clean-up plans known as Total Maximum Daily Loads (TMDLs), which in turn restrict the total amount of pollution from discharge pipes and diffuse sources of runoff, and other impacts a waterbody can take without violating water quality standards. These clean-up plans place limits on the amount of pollutants an industrial or municipal wastewater treatment facility can discharge into a lake or stream, as well as runoff from an agricultural operation or construction site.⁹ The TMDL is the final step in implementing the federal Clean Water Act.

³ 40 C.F.R. §131.3(f).

⁴ 40 C.F.R. §131.3(b).

⁵ 40 C.F.R. §131.12.

⁶ 40 C.F.R. §131.3(f).

⁷ 40 C.F.R. §131.11.

⁸ 33 U.S.C. §1313(d)(1).

⁹ *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002); *Sierra Club v. EPA*, 162 F.Supp.2d 406, 413 (D.Md. 2001).

Because the clean-up plans rely so heavily on the Wisconsin's list of impaired waters, it is important that the list be as comprehensive as possible. Federal law prescribes the content of each list. In compiling each list, each state is required to "assemble and evaluate all existing and readily available water quality-related data and information."¹⁰ Federal regulations define categories of information that consist of readily identifiable information that the state must use in developing the list.¹¹ The state must also develop the methodology for how it will make decisions on whether to list a waterbody, a description of the data and information used, a rationale for the decision not to use any one of the categories of existing and readily identifiable data identified in federal regulation and any other information requested by the EPA.¹²

II. THE DNR'S PROPOSED §303(d) LIST

A. Wisconsin's 303(d) Strategy is Flawed Because Listing Policies May Prevent the Inclusion of Many Impaired Waters.

Although the DNR has worked hard to develop a list of impaired waters that require TMDL clean-up plans, DNR's policies in selecting those waters may prevent some polluted waters from receiving the attention and public resources that they need. Federal law requires the DNR to list waters regardless of the source of impairment.¹³ However, the DNR has carved out several exclusions from its listing criteria which undermine its implementation of the Clean Water Act.

1. The DNR must consistently include "threatened" waters and waters only "partially meeting" designated uses in the 303(d) list.

Wisconsin has a stated policy of not including "threatened" waters in its 303(d) list,¹⁴ despite that federal law requires states to list waters identified by the state as "partially meeting" or "not meeting" designated uses or as "threatened."¹⁵ Federal regulations also require states to list waters that are "impaired or threatened" by nonpoint sources of pollution, also known as run-off.¹⁶

The DNR's listing criteria for the 2002 list states that it will only list waters where narrative and numeric criteria are exceeded. However, the listing criteria should make clear that waters that are expected to exceed the water quality standards will be listed, as well. This will ensure that "threatened" waters are included in the 303(d) list. Further, the list must

¹⁰ 40 C.F.R. §130.7(b)(5).

¹¹ *Id.*

¹² 40 C.F.R. §130.7(b)(6).

¹³ 40 C.F.R. §130.7(b)(1).

¹⁴ See www.dnr.state.wi.us/org/water/wm/wqs/303d/index.html (last visited September 23, 2002).

¹⁵ 40 C.F.R. §130.7(b)(5)(i).

¹⁶ 40 C.F.R. §130.7(b)(5)(iv).

include those waters that are only “partially meeting” designated uses. The DNR has not listed any waters that are “partially meeting” designated uses.

The policy behind listing “threatened” waters in addition to impaired waters is sound: to prevent the further degradation of our public waters before they are entirely degraded and require clean up plans that are more costly to the public. This saves public funds by stopping the pollution before it arises. The DNR must, as a matter of law, include waters “threatened” by any source of pollution. This same logic applies to listing waters “partially meeting” designated uses.

A brief survey of four State of the Basin reports show that there are “threatened” waters and waters only “partially meeting” designated uses listed in those reports, but not in the Wisconsin’s 303(d) list. They are excluded in part because of the listing criteria established by the DNR. These waters are listed below and must be included in Wisconsin’s 303(d) list.

Table 1. Waters that should be listed as “threatened” or “partially meeting” designated uses.

BASIN	WATERSHED	WATERS THREATENED AND/OR PARTIALLY MEETING DESIGNATED USES
Lower Rock River ¹⁷	Turtle Creek Watershed	Darien Creek
		Jackson Creek
		Ladd Creek
		Little Turtle Creek
		Spring Brook, T2N R14E S22
		Turtle Creek (0-24.5 miles)
		Swan Creek
		Picasaw Creek
		Spring Brook T2N R13E S31
	Blackhawk Creek Watershed	Blackhawk (0-2 miles)
	Bass Creek Watershed	Bass Creek
	Marsh Creek Watershed	Marsh Creek
	Yahara/Kegonsa Watershed	Gibbs Creek
	Badfish Creek	Frog Pond Creek
		Oregon Branch
		Rutland Branch
	Yahara-Monona	Murphy (Wingra) Creek (only listed for

¹⁷ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, LOWER ROCK RIVER BASIN WATER QUALITY MANAGEMENT PLAN (1998).

		aquatic toxicity, but should also be listed for hab, DO, flow, tox. turb., Fkill)
		Nine Springs Creek
		Murphy's Creek
		Unnamed Creek
	Yahara – Mendota	Token Creek (miles 6.5-10 only partially meeting potential use)
	Six Mile and Pheasant Branch Creeks	Pheasant Branch
		Six Mile Creek
		Spring (Dorn) Creek
	Whitewater Creek	Galloway Creek
		Whitewater Creek
	Scuppernong River	Funk Creek
		Paradise Springs
		Scuppernong River
		Steel Brook (0-7.6 miles, but only listed for 1.7-2.7 miles)
		Mud Creek
	Lower Koshkonong Creek	Koshkonong Creek
		Otter Creek
		Saunders Creek
	Upper Koshkonong Creek	Koshkonong Creek
		Mud Creek
	Bark River	Bark River
		Duck Creek
Manitowoc River¹⁸	Sevenmile-Silver Creek	Centerville Creek
		Calvin Creek
		Memee Creek
		Point Creek
		Fischer Creek
		Pine Creek
		Sevenmile Creek
	Lower Manitowoc River Watershed	Little Manitowoc River
		Manitowoc River (only listed for PCBs and FCA, but should also be listed for nps, hab. nut., turb., sb)
		Mud Creek

¹⁸ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, MANITOWOC RIVER BASIN WATER QUALITY MANAGEMENT PLAN (1997).

		Schisel Creek
	South Branch Manitowoc River	Pine Creek (listed for PCBs and FCA, but should also be listed for nps and sc)
		Cedar Creek
		Jordan Creek (listed for PCBs and FCA, but should also be listed for nps, sed., psm, sc)
		Killsnake (isted for PCBs and FCA, but should also be listed for nps, sc, cl)
		South Branch Manitowoc River
		Stony Brook
Upper Fox River¹⁹	Lake Winnebago East Watershed	De Neveu Creek
		Johnson Creek
		Mill Creek
		Mud Creek (currently listed, but not listed for hab, sed, turb.)
		Pipe Creek
		Roberts Creek
		Stockbridge tributary to Mud Creek
		Taycheedah Creek
	Fond du Lac Watershed	Anderson Creek
		Campground Creek
		E. Br. Fond du Lac River
		Mosher Creek
		Parsons Creek
		Sevenmile Creek
		Van Dyne Creek
		W. Br. Fond du Lac River
		Unnamed Creek
		Unnamed tributary to Parsons Creek
	Lac Butte des Morts South Watershed	Campbell Creek
		Spring Brook
	Fox River – Rush Lake	Eightmile Creek
		Fox River
		Waukau Creek
	Fox River – Berlin Watershed	Black Creek
		Fox River
		Harrington Creek

¹⁹ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, THE STATE OF THE UPPER FOX BASIN (2001).

	Puchyan River
	Snake Creek
Big Green Lake	Hill Creek
	Roy Creek
	Silver Creek (currently listed, but not listed for hydrological modification)
	Spring Creek
	White Creek
White River	Bird Creek
	Lunch Creek
	Sucker Creek
	W. Br. White River
	White River
Mecan River	Chaffee Creek
	Mecan River
	N. Br. Wedde Creek
	Schmudluck Creek
	S. Br. Wedde Creek
	Wedde Creek
	W. Br. Little Pine Creek
Buffalo and Puckaway Lakes	Allen Creek
	Chapman Creek
	Fox River (currently listed, but not for hab., mig.)
	French Creek
	Good Earth Creek
	Mad River
	Ox (Laing) Creek
	Page Creek
	Spring Creek
Lower Grand River	Graham Creek
	Grand River
	S. Br. Belle Fountain
	Spring Creek
Upper Grand River	Grand River
Montello River	Caves Creek
	Montello River
	Westfield Creek
Neenah Creek	Big Slough
	Big Spring Creek
	Neenah Creek
	Peppermill Creek

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		S. Br. Neenah Creek
		Widow Green Creek
		Unnamed Tributary to Mason Lake
	Swan Lake	Fox River
Bad Axe – La Crosse River²⁰	Rush Creek	Cooley Creek
		Copper Creek
		Copper Creek, North Branch
		Copper Creek, South Branch
		Du Chame Creek
		Copper Creek, Upper
		Leitner Creek
		Mill Coulee Creek
		Picatee Creek
		Rush Creek
		Sugar Creek
		Sugar Creek, South Fork
		Unnamed Creek 23-7 (Morgan Valley)
	Bad Axe River	Cox Creek
		Esofea Branch (Upper 9 miles of No. Fk. Bad Axe River
		Frohock Creek
		Hornby Creek
		North Fork, Bad Axe River
		Norwegian Hollow Creek
		Sidie Hollow Creek
		South Fork, Bad Axe River
		Springville Branch
		Unnamed Creek 28-16
	Coon Creek	Chipmunk Coulee Creek
		Coon Creek
		Fishback Creek
		Hasley Creek
		Hohlfield Creek
		John's Coulee Creek
		Lindahl Creek
		Mormon Coulee Creek
		Poplar Creek

²⁰ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, THE STATE OF THE BAD AXE – LA CROSSE RIVER BASIN (2002).

		Rullands Creek
		Spring Coulee Creek
	Lower La Crosse River	Bostwick Creek
		Eggens Coulee Creek
		Larson Coulee Creek
		McKinley Creek
		Neshonoc Creek
		Pommel Creek
	Little La Crosse River	Adams Valley Creek
		Big Creek
		Big Creek, East Upper
		Big Creek, Upper
		Burns Creek
		Dutch Creek
		Farmer's Valley Creek
		Fish Creek
		La Crosse River (currently listed, but not for sed., hab.)
		Little La Crosse River
	Upper La Crosse River	Cole's Valley Creek
		La Crosse River (currently listed, but not for sed., hab.)
		Silver Creek
		Sparta Creek
		Squaw Creek
		Stillwell Creek
		Tarr Creek
		Unnamed Creek 15-13
		19-15
		29-11
		29-12
		20-11
		23-11 (Ash Run)
		23-12 (So. Ditch)

REQUIRED ACTION: Include all "threatened" waters and waters only "partially meeting" designated uses on the 303(d) list in accordance with federal law.

2. **The DNR must list the waters in which the current use of the water does not meet its potential use.**

As mentioned above, water quality standards consist of three components: 1) designated uses; 2) narrative and numeric criteria; and 3) an antidegradation element that requires the protection of “existing uses,” or those uses that existed in November of 1975 when EPA promulgated the first water quality standards regulation under the Clean Water Act.²¹

Existing uses can be more stringent or protective than designated uses, as where a stream once supported a coldwater fishery in 1975 but now only supports a warm water sport fishery because of water quality degradation, and has been designated as such by the DNR. These waters must be listed as impaired because they do not support the existing use, and therefore violate water quality standards.

In its State of the Basin reports, or Water Quality Management Plans, the DNR appears to define “existing use” as the “current use” in the waterbody. As noted above, an existing use is the use of the waterbody that existed in 1975, not necessarily as it exists today. For the purposes of using the State of the Basin reports as a data source, the DNR must list those waters where the current use of the stream is inconsistent with the designated use of the stream. For example, if the current use of the waterbody is for Warm Water Forage Fishing, but the water may potentially be used, if restored, as a Cold Water Class II Trout Fishery, then the the stream should be listed as impaired.

In light of this federal regulation and the policy implementing it, the DNR must list all streams in which the current use of the waterbody does not support the potential use of the waterbody. Below are waters for which federal law requires listing because current uses do not meet potential uses, based on a survey of four of the twenty-one State of the Basin reports compiled by the DNR.

Table 2. Waters for which current uses do not meet potential uses.

BASIN	WATERSHED	WATERS FOR WHICH CURRENT USES DO NOT MEET POTENTIAL USES
Lower Rock River	Blackhawk Creek	Black hawk Creek (0-2 miles)
	Bass Creek	Stevens Creek
	Yahara Kegonsa	Door Creek
	Badfish Creek	Rutland Branch
		Spring Creek
	Yahara Monona	Starkweather Creek
	Whitewater Creek	Whitewater Creek
	Scuppernong River	Funk Creek
		Scuppernong River
		Spring Creek

²¹ See 40 C.F.R. §131.12(a). See also 40 C.F.R. §131.2(e).

		Steel Brook
	Bark River	Wales Creek
Manitowoc River	South Branch Manitowoc River	Unnamed Creek T18N, R19E, S24
		Pine Creek (currently listed for PCBs and FCA, but should also be listed for nps and sc)
		Stony Brook
Upper Fox River	Montello River	Westfield Creek
Bad Axe – La Crosse River	Rush Creek	Buck Creek
		Copper Creek
		Copper Creek N. Br.
		Copper Creek S. Br.
		Copper Creek Upper
		Du Charme Creek
		Leitner Creek
		Mill Coulee Creek
		Picatee Creek
		Rush Creek
		Sugar Creek
		Sugar Creek S. Fork
		Unnamed Creek 17-7
		Unnamed Creek 19-7
		Unnamed Creek 23-7 (Mogan Valley)
	Bad Axe River	N. Fork Bad Axe River
		N. Fork Bad Axe River (from mouth to Esofea Branch)
		Norwegian Hollow Creek
		Sidie Hollow Creek
		S. Fork Bad Axe River
		Springville Branch
		Unnamed Creek 28-16
	Coon Creek	Coon Creek (from mouth to Bohemian Creek)
		Fishback Creek
		Hasley Creek
		Mormon Coulee Creek
		Poplar Creek
		Spring Coulee Creek (Creek 16-6)
		Unnamed Creek 29-1
		Unnamed Creek 2-4

		Unnamed Creek 7-3
	Lower La Crosse River	Bostwick Creek
		Eggens Coulee Creek
		Larson Coulee Creek
		McKinley Creek (Creek 23-12)
		Neshonoc Creek
		Pommel Creek
	Little La Crosse River	Adams Valley Creek
		Big Creek
		Big Creek East Upper
		Big Creek Upper
		Cannon Valley Creek (Creek 24-7)
		Dutch Creek
		Fish Creek
		Pleasant Valley Creek (Creek 14-15)
	Upper La Crosse River	Bailey Creek
		Squaw Creek
		Unnamed Creek 15-13
		Unnamed Creek 12-4
		Unnamed Creek 23-12 (No. Ditch)

REQUIRED ACTION: List all waters whose existing water quality has declined below the DNR's listed potential use of the water body, or in the alternative, where existing water quality is inconsistent with the codified or designated use.

3. The DNR must list waters in which the current use of the waterbody does not meet the designated or codified use.

The DNR appears to differentiate between "potential use" with designated or "codified use." However, according to U.S. Environmental Protection Agency regulations and guidance, the potential and codified (or designated use) are intended to be the same concept.²² That is, the DNR is required to designate waterbody uses according to a stream's potential to support the "protection and propagation of fish, shellfish, and wildlife."²³

²² 40 C.F.R. §131.2(f). *See also*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WATER QUALITY STANDARDS HANDBOOK, 2ND ED., §2.4 (1994).

²³ See 33 U.S.C. §1251(a)(2) (2000); 40 C.F.R. §131.2, §131.2(f). Specifically, section 131.2(f) states:

Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.

Id. (emphasis original).

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The DNR must at least list waters where the current use does not meet the codified or designated use. Based on this methodology, there are several waters for which federal law requires listing because current uses do not meet codified or designated uses, based on a survey of four of the twenty-one State of the Basin reports compiled by the DNR.

REQUIRED ACTION: Include all waters in which the current use of the water does not meet the designated use in the 303(d) list, in accordance with federal law.

4. **The DNR must list waters impaired by dams and other physical structures.**

Wisconsin has failed to provide a complete list of streams that have been impaired by hydrological modifications. The DNR has listed only a few waters impaired by physical structures, despite that there are dozens of streams impaired by hydrological modifications found in four of the twenty-one State of the Basin Reports.

All river segments within a few miles upstream and downstream of each dam structure should be listed. This should include all impounded portions of the river and the first 3-4 miles of river downstream of the dam.

This listing could be limited to include river segments within a few miles upstream and downstream of each dam structure but must, at a minimum, include all impounded portions of the river and the first 3-4 miles of river downstream of the dam.

Wisconsin's DNR has repeatedly recognized that dams impact rivers. The *1996 Wisconsin Water Quality Report to Congress* states that hydropower/habitat modifications have resulted in major impairments to 162 miles of rivers and moderate/minor impairments to 2,306 miles of rivers.²⁴

*Wisconsin's Biodiversity as a Management Issue*²⁵ has an entire section on how the rivers of our state have been and continue to be impacted by dams. This section lists many of the impacts caused by dams, all of which have been used as reasons for listing other waterbodies on the 303(d) list.²⁶ These impacts include:

- habitat modification,

²⁴ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, 1996 WISCONSIN WATER QUALITY REPORT TO CONGRESS 37 (1996). According to this report, the only source category that impairs more river miles is all of the agriculturally-caused impairments combined, with a total of 4,431 impaired river miles.

²⁵ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN'S BIODIVERSITY AS A MANAGEMENT ISSUE 164-169 (1995) (*hereinafter* Wisconsin's Biodiversity as a Management Issue).

²⁶ This is according to the DNR web site, "Key for List of 303(d) Waterbodies," located at <http://www.dnr.state.wi.us/org/water/wm/wqs/303d/key.html>.

- hinderance to fish migration,
- low levels of dissolved oxygen,
- hydrologic modifications,
- low flows, loss of in-stream habitat,
- fish community imbalance,
- wetland loss,
- excessive total suspended solids leading to turbidity, and
- elevated water temperatures for designated biological use.

The authors of the *Biodiversity* report found dam-related impairments to be of such concern to our state's aquatic ecosystems that several of their recommended "possible actions" include dams such as, protecting the few remaining un-dammed rivers, installing fish passage, insuring adequate minimum flows, and consideration of dam removal.²⁷

Below are waters for which federal law requires listing based on impairments, possible or otherwise, due to hydrological modifications such as dams, based on a survey of four of the twenty-one DNR State of the Basin reports.

Table 4. Waters Impaired By Hydrological Modification.

BASIN	WATERSHED	WATERS IMPACTED BY HYDROLOGICAL MODIFICATION	
Lower Rock River	Rock River Mainstem	Rock River (currently listed nps/ps blend, but should also be listed for hab., turb., nut., tox, pst, flow, mig.)	
		Jackson Creek	
		Ladd Creek	
		Little Turtle Creek	
		Piscasaw Creek	
		Spring Brook, T2N R13E S31	
		Turtle Creek	
		Blackhawk Creek	Springbrook (currently listed for nps dom., but not for hydrological modification)
		Bass Creek	Bass Creek
			Fischer Creek
			Stevens Creek
		Marsh Creek	Marsh Creek

²⁷ See WISCONSIN'S BIODIVERSITY AS A MANAGEMENT ISSUE, *supra* note 23 at 198-199.

	Yahara/Kegonsa Watershed	Door Creek
		Gibbs Creek
		Leuten Creek
		Little Door Creek
		Yahara River (currently listed, but not for hydrological modification)
	Badfish Creek	Badfish Creek (currently listed, but not for hydrological modification)
		Frog Pond Creek
		Oregon Branch
		Rutland Branch
	Yahara-Monona	Murphy (Wingra) Creek
		Nine Springs Creek
		Yahara River
		Murphy's Creek
		Swan Creek
		Unnamed Creek
	Yahara-Mendota	Yahara River
	Six Mile and Pheasant Branch Creeks	Pheasant Branch
		Six Mile Creek
		Spring (Dorn) Creek
	Whitewater Creek	Galloway Creek
		Whitewater Creek
	Scuppernong River	Funk Creek
		Paradise Springs
		Scuppernong River
		Mud Creek
	Lower Koshkonong Creek	Koshkonong Creek
		Otter Creek
		Saunders Creek
	Upper Koshkonong Creek	Koshkonong Creek
		Mud Creek
	Bark River	Bark River
		Duck Creek
		Deer Creek
		Scuppernong Creek
		Wales Creek
Upper Fox River	Lake Winnebago North and	Unnamed Tributary

	West Branch	
	Lake Winnebago East Branch	Unnamed Streams
	Fond du Lac	E. Branch Fond du Lac River
		Campground Creek
		Sevenmile Creek
	Fox River – Rush Lake	Unnamed Streams
	Fox River – Berlin	Fox River (currently listed, but not for hydrological modification)
		Unnamed Streams
	Big Green Lake	Unnamed Streams
	White River	Unnamed Streams
	Upper Grand River	Unnamed Streams
	Montello River	Unnamed Streams
	Neenah Creek	Unnamed Streams
	Swan Lake	Unnamed Streams
Bad Axe-La Crosse River	Rush Creek	Battle Hollow Creek
	Bad Axe River	Hornby Creek
		South Fork Bad Axe River
	Little La Crosse River	Unnamed Creek 6-16
	Upper La Crosse River	Sparta Creek
		Squaw Creek
		Stillwell Creek
		Unnamed Creek 29-11
Manitowoc River	Lower Manitowoc River	Unnamed Creek
		Mud Creek
	South Branch Manitowoc River	Unnamed Creek

REQUIRED ACTION: In addition to the eleven river segments already listed, the DNR must list all river segments 3-4 miles up and downstream of dams and physical structures causing impairment.

B. Wisconsin's 303(d) Strategy is Flawed Because It Does Not Employ All Existing and Readily Available Water Quality-Related Data and Information to Identify Impaired and Threatened Waters.

Federal law requires that the DNR employ all existing and readily available water quality-related data and information in compiling the list of impaired waters that need clean-up plans. This includes but is not limited to:

- Waters identified by the state in its most recent section 305(b) report as partially “meeting” or “not meeting” designated uses or as “threatened,”
- Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards,
- Waters for which water quality problems have been reported by local, state, or federal agencies, members of the public, or academic institutions, including university researchers, the U.S. Department of Agriculture, the National Oceanic and Atmospheric Administration, the U.S. Geological Survey, and the U.S. Fish and Wildlife Service,
- Waters identified by the state as impaired or threatened in a nonpoint source assessment submitted to the EPA.²⁸

The DNR’s listing process is inconsistent with federal law. First, there is little evidence that the DNR has actively solicited research from local, state, or federal agencies, members of the public, or academic institutions other than by announcing the availability of the proposed list for public comment in the September 4, 2002 press release published on its website.

For example, the DNR has not used information housed within a Department of Hygiene water quality database frequently used by the DNR. This data shows more than 1200 streams that violate the fecal coliform standard for Wisconsin surface waters. It is clear that many of these 1200 waters are not on the 303(d) list given that the DNR has compiled a 303(d) list of only 594 waters. As another example, the University of Wisconsin – Stevens Point Environmental Task Force also has data on fecal coliform violations for the following waters: Unnamed Trib (Spring Creek Road), Lower Whitcomb, Shaw Creek, Beaver Creek, and Little Creek. And, Bear Lake in Waupaca County is impaired by low dissolved oxygen levels and is showing signs of eutrophication, and yet is not on the §303(d) list. Finally, there no evidence that the DNR has actively solicited information from federal agencies such as the U.S. Geological Survey or U.S. Department of Agriculture, which may have vital water quality data on Wisconsin’s waters.

Second, the data that the DNR does appear to use is drawn from a relatively shallow pool which includes Water Quality Management Plans, Fish Consumption Advisory (only published “periodically”), Contaminated Sediment Inventory and Project Lists, and “Other Information.”²⁹

These data sources, although helpful, are incomplete. First, we have already pointed to several streams identified in the Water Quality Management Plans as either “threatened” or only “partially meeting” designated uses.³⁰ Second, the Water Quality Management Plans, or State of Basin Reports, are rarely produced every two years to coincide with the submittal of 303(d) lists. For example, the Upper Wisconsin River, Central Sub-Basin State of the Basin

²⁸ 40 C.F.R. §130.7(b)(5).

²⁹ See www.dnr.state.wi.us/org/water/wm/wqs/303d/index.html (last visited September 23, 2002).

³⁰ See section II.A.1, 2, and 3, *supra*.

Report was just revised this year, and had not been revised since 1992. There may be streams that have become impaired since 1992, but may not be listed if the DNR relies on the State of the Basin Reports. Third, the DNR has only selectively used data in the State of the Basin Reports, listing only entirely impaired streams and not those partially impaired or threatened.

Additionally, although Fish Consumption Advisories are helpful, they are only published “periodically” by the DNR and the Division of Health. The advisories represent data that is passively collected by the DNR to analyze problems, but does not represent an aggressive search for data on toxic pollution in our public fisheries.

REQUIRED ACTION: Demonstrate that the DNR has actively solicited members of the public and other state, local, and federal agencies for data on impaired streams in Wisconsin, or actively solicit such data from the aforementioned parties and consider such data in compiling the 303(d) list.

C. Wisconsin’s 303(d) Strategy is Flawed Because the DNR Has Not Produced a Listing Methodology By Which To List Impaired Waters.

Federal regulations require that the DNR prepare and submit to the EPA a methodology used to develop the 303(d) list.³¹ The DNR is also required to submit a description of the data and information used to identify waters.³² And yet, none of this information has been made publicly available. Furthermore, it does not appear that it exists and therefore will be submitted to the EPA for approval.

REQUIRED ACTION: Prepare and make publicly available a listing methodology and a description of the data used in compiling the 303(d) list.

D. Wisconsin’s 303(d) Strategy is Flawed Because the DNR Does Not Plan to Develop TMDL’s for All Impaired Waters.

Federal law requires that states prepare TMDLs for all waters listed as impaired.³³ The DNR states in its 303(d) Strategy that listing a water as impaired “will not automatically translate to implementation of a TMDL methodology which involves traditional watershed or water

³¹ 40 C.F.R. §130.6(b)(6)(i).

³² 40 C.F.R. §130.6(b)(8)(ii).

³³ 40 C.F.R. §130.7(c)(1). Specifically, EPA’s regulations on the development of TMDLs state that

Each State shall establish TMDL’s for the water quality limited segments identified in paragraph (b)(1) of this section, and in accordance with the priority ranking.

Id.

quality modeling and analysis techniques.”³⁴ The DNR has stated that TMDLs can take the form of “institutional controls (e.g. fish consumption advisories), ordinances, best management practices, watershed plans, effluent trading, restrictive covenants or other types of land management agreements,” and other activities. The DNR has also stated that, for streams polluted by runoff, TMDLs can take the form of a priority watershed program based on voluntary participation, enforcement of nonpoint source controls for designated “critical sites,” or the newly enacted and effective Non Point Source Pollution Rules developed by the DNR.

Although we appreciate the DNR’s strategic approach to solving water quality problems, federal law defines the parameters of an acceptable TMDL clean-up plan, and prescribes the TMDL methodology to be employed accordingly. Federal regulations provide that:

TMDLs shall be established at levels to attain and maintain the applicable narrative and numerical [Water Quality Standards] with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.³⁵

Each TMDL must consist of “load allocations” for nonpoint sources of pollution and “waste load allocations” for point sources of pollution. A “load allocation” is a best estimate of the loading of pollutants attributable to nonpoint sources, while a “waste load allocation” is that “portion of a receiving water’s loading capacity that is allocated to one its existing or future point sources of pollution.”³⁶

The DNR’s approach to characterizing its watershed programs as “TMDL’s” defies the methodology for developing TMDL’s set in federal law. The DNR must estimate on a water or watershed basis the total of amount of pollutants the receiving water can accept without violating water quality standards, calculate load allocations for nonpoint sources and waste load allocations for nonpoint sources, and then implement measures to ensure those load allocations and waste load allocations can be met.

The DNR’s approach to TMDL development is inadequate. First, a small scale priority watershed project simply cannot satisfy those requirements because it is too local in nature, aside from the fact that the program no longer exists. Second, merely implementing of the Nonpoint Source regulations is also not enough, particularly where there is no cost-share funding available to assist farmers in controlling barnyard runoff. And, the DNR is already obligated by state law to implement and enforce the Nonpoint Source regulations. Finally,

³⁴ See www.dnr.state.wi.us/org/water/wm/wqs/303d/index.html (last visited September 23, 2002).

³⁵ 40 C.F.R. §130.7(c)(1).

³⁶ 40 C.F.R. §130.2(g) and (h).

none of the suggested approaches are parameter or pollutant specific, as federal regulations clearly intended TMDL's to be. In short, a definition of a TMDL is set in federal law. Enforcing existing laws is not a TMDL, nor is small scale barnyard runoff project. The DNR must back up, take a science-driven approach, and implement the 303(d) program according to its statutory mandate under the Clean Water Act.

REQUIRED ACTION: For those waters already listed, perform TMDL analyses and calculations in accordance with federal law.

III. CONCLUSION

The current 303(d) list fails to comply with minimum federal requirements. We hope that the DNR will address the deficiencies in the current §303(d) list by complying with federal law and improving the completeness of the current list. We look forward to your response to these comments, and to working with you to improve the §303(d) list and the water quality standards program overall.

Sincerely,



Andrew C. Hanson, Attorney
Midwest Environmental Advocates, Inc.

On behalf of:

Mississippi River Revival
River Alliance of Wisconsin
Sierra Club – John Muir Chapter
Wisconsin's Environmental Decade Institute
Wisconsin Public Interest Research Group

Cc: Donna Keclie
U.S. EPA Region 5

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10/4/2002
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