

**VIA ELECTRONIC MAIL & HAND DELIVERY**

April 2, 2004

Attn: Jim Baumann WT/2  
Wisconsin Department of Natural Resources  
Bureau of Watershed Management  
PO Box 7921  
Madison WI 53707-7921

**Re: Clean Water Coalition Comments on Wisconsin DNR's Proposed  
2004 303(d) List of Impaired Waters.**

Dear Mr. Baumann,

Midwest Environmental Advocates, Inc. is writing on behalf of several organizations of the Clean Water Coalition to comment on Wisconsin's proposed 2004 Section 303(d) list of impaired waters ("303(d) list").

Midwest Environmental Advocates, Inc. ("MEA") is a 501(c)(3) non-profit environmental law center that provides legal representation and technical assistance to communities working for clean air and water in the upper Great Lakes region. The Clean Water Coalition is a broad coalition of Wisconsin-based environmental and conservation organizations working for clean water throughout the state. Clean Water Coalition member organizations signing on to this comment letter include:

Clean Wisconsin  
Fox Wolf Watershed Association  
Friends of Milwaukee's Rivers  
Madison Audubon Society  
River Alliance of Wisconsin  
Sierra Club-John Muir Chapter  
Trout Unlimited-Wisconsin State Council  
Wisconsin Audubon Council  
Wisconsin Wildlife Federation.

The Clean Water Coalition has worked in good faith with DNR since 2002 to improve DNR's methodology for preparing the 303(d) list. For example, the DNR's listing methodology now clarifies when DNR will place waters having a default "fish and aquatic life" codified use on the 303(d) list, and when DNR will place threatened waters on the 303(d) list. The 2004 proposed 303(d) list also

invites citizen monitored data for consideration in the last, though it fails to identify what procedures the citizens must follow to ensure the validity of the data. Nonetheless, the current listing methodology represents a considerable improvement over the past methodology, and should ultimately lead to a more complete 303(d) list by informing the public of the conditions in which DNR will add waters to the list.

Unfortunately, the substance of DNR's proposed 2004 303(d) list indicates that this is not the case. Despite improvements in DNR's listing methodology, DNR has proposed the addition of only seven new stream segments to the 2004 303(d) list of approximately 660 impaired stream segments in Wisconsin. Those 660 impaired stream segments comprise approximately 5,810 miles of Wisconsin's most polluted waters.

However, those 5,810 miles of waters likely underestimate the true number of fouled streams in Wisconsin. This is in part because of DNR's failure to conduct appropriate water quality monitoring and data collection across the state to determine which waters need clean-up. DNR claims that it lacks the financial resources to do so. However, DNR may not avoid the federal requirement to assemble all "existing and readily available" water quality data in preparing the 303(d) list by failing to monitor streams altogether. Instead, the Clean Water Act and federal regulations place an affirmative duty on DNR to conduct water quality monitoring to determine whether Wisconsin's waters are meeting the basic "fishable/swimmable" goals of the Clean Water Act. *See* 33 U.S.C. § 1251(a)(2).

## **I. DNR'S MONITORING PROGRAM AND PROCEDURES ARE INADEQUATE TO IDENTIFY THE MOST HEAVILY POLLUTED WATERS IN WISCONSIN.**

### **A. Clean Water Act Sections 303(d) and 106(e)(1) Require DNR to Establish a Program for Monitoring Wisconsin's Public Waters.**

Federal regulations require that DNR, in preparing its 303(d) list of impaired waters, "shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list." 40 C.F.R. § 130.7(b)(5). The amount of a state's "existing and readily available" data is, in part, dependent on the effectiveness of the state's water quality monitoring program. Clean Water Act section 106(e)(1) prohibits the United States Environmental Protection Agency ("EPA") from making any grant to a state that has not established an appropriate water quality monitoring program. 33 U.S.C. § 1256(e)(1). Specifically, EPA may not make a grant under Clean Water Act section 106(e)(1) if the state does not have:

appropriate devices, methods, systems, and procedures necessary to monitor, and to compile and analyze data on (including classification according to eutrophic condition), the quality of navigable waters and to the extent practicable, ground waters including biological monitoring; and [provide] for annually updating such data and including it in the report required under [Section 305];...

33 U.S.C. § 1256(e)(1). *See also* 40 C.F.R. § 130.4(a) and (b); 40 C.F.R. § 35.168(a). EPA has established guidance for states on implementing a recommended monitoring program sufficient to remain eligible for Clean Water Act section 106(e)(1) grants. (Memorandum from Diane C.

Regas, Director, Office of Wetlands, Oceans and Watersheds, to Water Management Division Directors, Regions 1-10 (March 14, 2003)) (hereinafter “EPA 2003 Monitoring Program Guidance”). EPA intends that the section 106(e)(1) monitoring program grants will form the foundation of water monitoring and data gathering needed to prepare Clean Water Act section 305(b) Water Quality Reports, which a state submits to EPA with its section 303(d) List of Impaired Waters. *Id.* at 1. (See also United State Environmental Protection Agency, *2004 Assessment, Listing and Reporting Requirements for 303(d) lists* (2003)).

EPA’s 2003 Monitoring Program Guidance recommends that states establish a ten-part water quality monitoring program as part of their application for the Fiscal Year (“FY”) 2004 Clean Water Act section 106(e)(1) grants. In short, EPA guidance states that this program should include:

1. A monitoring program that addresses all state waters;
2. Monitoring objectives consistent with Clean Water Act goals, including the identification of impaired waters;
3. A monitoring design that includes a probability-based network for making statistically valid references about the condition of all state waterbody types, over time;
4. A tiered approach to monitoring that includes core indicators that represent each applicable designated use, and supplemental indicators selected according to site-specific or project-specific design criteria;
5. Quality management plans to ensure the scientific validity of monitoring and laboratory activities;
6. A data management system using EPA’s STORET water quality monitoring database to make monitoring data publicly available;
7. A methodology for assessing attainment of water quality standards for waterbody types and all state waters;
8. Timely submission of reports required under Clean Water Act sections 305(b) (Water Quality Report to Congress), 303(d) (“Impaired Waters List”), 314 (“Lakes Assessment Report”), 319 (“Nonpoint Source Pollution Report”) and Beaches Act section 406;
9. Programmatic evaluation of the state’s water quality monitoring program to determine needed changes and improvements to the program;
10. An analysis of the general support and infrastructure planning and current and future resource needs, including funding, staff, training, and laboratory resources.

(EPA 2003 Monitoring Program Guidance, at \*7-14.) EPA states that it will use the ten monitoring program elements above to help determine whether a state remains eligible for Clean Water Act section 106(e) grants, although it does not intend to withhold funds on this basis. *Id.* at 1.

EPA must disapprove a 303(d) list where a state has failed to conduct sufficient monitoring to determine whether a state should place certain waters on the 303(d) list. *Sierra Club v. Hankinson*, 939 F.Supp. 865, 870-871 (N.D. Ga. 1996) (finding that “Georgia's undisputed failure to monitor or evaluate over ninety percent of its waters” is relevant to whether EPA approval of Georgia’s 303(d) list was arbitrary and capricious.”); *Alaska Center for the Environment v. Reilly*, 796 F.Supp. 1374, 1380 (W.D. Wash. 1992) *aff’d*, 20 F.3d 981 (9<sup>th</sup> Cir. 1994) (requiring EPA to prepare a report on ambient water quality monitoring of Alaska public waters where Alaska had failed to conduct such monitoring and prepare a 303(d) list of impaired waters).

Further, EPA must withhold Clean Water Act section 106(e)(1) grant funds where a state has failed to properly operate a water quality monitoring program. 33 U.S.C. § 1256(e)(1). A state may not avoid the requirement to assemble and evaluate all existing and readily available data under 40 C.F.R. § 130.7(b)(5) by refusing to devote sufficient resources to collect that data as part of a water quality monitoring program required under Clean Water Act section 106(e). See *Hankinson*, 936 F.Supp. at 870-871. Because EPA envisions that the quality of the section 303(d) list is dependent upon the effectiveness of monitoring programs under Clean Water Act section 106, EPA must disapprove a 303(d) list where the state lacks an adequate monitoring program to systemically monitor and identify the most heavily polluted waters in the state.

**B. DNR Has Failed to Satisfy the Requirements of Clean Water Act sections 303(d) and 106(e) and 40 C.F.R. 130.7(b)(5) by Failing to Conduct Appropriate Monitoring to Assemble All Existing and Readily Available Data.**

DNR’s water quality monitoring program is inconsistent with EPA’s 2003 Monitoring Program Guidance and woefully inadequate for the purpose of assembling its section 303(d) list. First, DNR appears to lack a comprehensive monitoring program strategy, monitoring objectives, or any cohesive monitoring design to determine whether Wisconsin’s public waters are meeting Clean Water Act goals, including monitoring for purposes of compiling the 303(d) list of impaired waters. DNR has monitored only 9,199 of the total 57,698 stream miles in the state, or less than 16% of all stream miles. Wisconsin Department of Natural Resources, *Wisconsin Water Quality Assessment Report to Congress*, 90 (2002) [http://www.dnr.state.wi.us/org/water/wm/watersummary/305b\\_2002/5-chap3.pdf](http://www.dnr.state.wi.us/org/water/wm/watersummary/305b_2002/5-chap3.pdf) (last visited March 26, 2004). Of the 16% percent of stream miles that have been monitored, very few are monitored specifically to determine impairment in preparing the 303(d) list. For example, in preparing the proposed 2004 303(d) list, DNR conducted new monitoring on fewer than twelve streams in the entire state since its formulation of the 2002 303(d) list. This effort is clearly inadequate to evaluate Wisconsin’s water quality, does not satisfy the requirements of Clean Water Act section 106(e)(1) for federal grant funding, and does not satisfy the requirement to assemble all existing and readily available data in 40 C.F.R. § 130.7(b)(5).

Second, DNR’s Bureau of Watershed Management is responsible for preparing Wisconsin’s 303(d) list, yet lacks sufficient human and financial resources to conduct monitoring activities to determine whether waters should be placed on the 303(d) list. The Bureau of Watershed management estimates that it currently devotes less than 10 full time bureau employees (“FTEs”)

to conduct or oversee monitoring activities statewide. The Bureau of Watershed Management devotes only .25 FTE to preparing the entire 303(d) list and determining whether the limited monitoring activities have produced data indicating impairments on Wisconsin's thousands of lakes and stream miles. Further, DNR is aware of streams that are likely impaired, but admits that it lacks the resources to monitor those streams. As one example, DNR is aware of 10-12 streams in the Sugar River – Pecatonica Basin that may be impaired but also claims to lack data to support proposing those streams on the 303(d) list. (Letter from Jim Baumann, DNR, to Denny Caneff, River Alliance of Wisconsin, March 16, 2004). As a result, there may be polluted streams that DNR will never propose for inclusion on the 303(d) list and clean up because DNR has not devoted sufficient resources to monitor those streams and determine the causes of impairment. This violates the requirement to assemble and evaluate all existing and readily available data in 40 C.F.R. § 130.7(b)(5).

Third, DNR's Bureau of Watershed Management lacks the resources to coordinate monitoring activities performed by other bureaus within the DNR. For example, the Bureau of Fisheries and Habitat conducts some water quality monitoring, but not for the purpose of preparing the 303(d) list and not necessarily in areas that the Bureau of Watershed Management believes monitoring may be needed to confirm impairments. Additionally, DNR provides grants to river protection groups to conduct restoration and monitoring activities, but does not have a centralized system for gathering and collecting that data. The DNR also does not determine in advance what purpose the data will serve once the river protection group collects it, frequently rendering the data useless. Finally, the DNR allocated \$300,000 in a grant to the United States Geological Survey to conduct dissolved oxygen and total phosphorus monitoring on over 250 stream segments, but has excluded almost all of that data from inclusion in the proposed 2004 303(d) list without showing good cause for that exclusion (see discussion in Part II below).

Finally, DNR's Bureau of Watershed Management has yet to establish a system for analyzing water quality data collected by citizen volunteers in preparing the 303(d) list, despite that citizen groups around the state stand ready to assist the DNR in its data collection effort for purposes of compiling the 303(d) list. DNR's volunteer monitoring program for rivers has been decentralized and unfocused, and by DNR's admission, has not produced data for water quality analysis in the state. (See Wisconsin Department of Natural Resources, 2002 Section 305(b) Water Quality Report to Congress, 74, [http://www.dnr.state.wi.us/org/water/wm/watersummary/305b\\_2002/3-part3chap1.pdf](http://www.dnr.state.wi.us/org/water/wm/watersummary/305b_2002/3-part3chap1.pdf), (last visited March 26, 2004). DNR's failure to more actively engage citizens in volunteer monitoring activities is in part responsible for its inability to collect data in preparation of the 303(d) list.

We are encouraged that DNR has initiated a citizen volunteer water quality monitoring pilot project in coordination with Centerville Citizens for Air, River, and Environmental Solutions ("Centerville CARES") in Manitowoc County, Wisconsin. The goal of the project is to establish protocols for citizens to follow in providing the DNR with water quality data that meets the quality assurance requirements of its Quality Management Plan and that DNR can use in preparing the 303(d) list.

Other river protection groups stand ready to aid DNR in its data collection effort for purposes of compiling the 303(d) list. Friends of Milwaukee's Rivers, a nonprofit river conservation group, has expressly stated its willingness to work with DNR on water quality monitoring efforts on

impaired or non-impaired waterways in its Milwaukee River basin territory. Another citizens' group in Jackson County, Concerned Farmers and Neighbors of the Town of Hixton, is interested in participating in a volunteer monitoring program for the purpose of preparing the 303(d) list. Of course, we understand that Centerville CARES will continue to work with DNR to conduct water quality monitoring and identify streams for the 303(d) list in northeastern Wisconsin. Finally, the River Alliance of Wisconsin, through its network of scores of local watershed and river friends groups, will work with DNR and those interested local groups in developing protocols for citizen volunteer water quality monitoring.

**Required Action:** Withdraw the proposed 2004 303(d) list pending completion of a water quality monitoring and assessment program consistent with EPA's 2003 Monitoring Program Guidance and Clean Water Act section 106(e)(1), and apply that program in assembling and evaluating data for a revised and expanded 303(d) list.

**Requested Action:** Provide a complete accounting of all DNR funds dedicated to water quality monitoring activities for Fiscal Years 2003, 2004 and projected funding in Fiscal Year 2005, as compared to all funding for 1) DNR's Division of Water and 2) DNR's Bureau of Watershed Management. Please also include an accounting of funds dedicating to monitoring water quality in preparation of the 303(d) list for Fiscal Years 2003, 2004 and projected funding in Fiscal Year 2005, as opposed to funds spent on monitoring for other activities.

## **II. DNR HAS NOT SHOWN "GOOD CAUSE" FOR ITS EXCLUSION OF UNITED STATES GEOLOGICAL SURVEY DATA SHOWING EXCESSIVE TOTAL PHOSPHORUS CONCENTRATIONS IN OVER 250 WATERBODY SEGMENTS IN WISCONSIN; DNR HAS NOT SHOWN GOOD CAUSE FOR ITS EXCLUSION OF FISHER CREEK AND POINT CREEK IN MANITOWOC COUNTY.**

The EPA's 2004 listing guidance requires that a state place a water on the 303(d) list when the state determines that "in accordance the state's assessment and listing methodology, a pollutant has caused, is suspected of causing, or is projected to cause an impairment or threat." United States Environmental Protection Agency, *Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act*, 8 (July 21, 2003). EPA further clarifies that "a water is considered impaired when one or more designated uses are not attained." *Id.* at 9.

Upon request by EPA, DNR must show "good cause" for not listing waters where water quality data indicates impairment. 40 C.F.R. § 130.7(b)(6)(iv). "Good cause" can include "more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to [listing]; or changes in conditions." *Id.*

DNR recently obtained data from the United States Geological Survey ("USGS"), at a cost of \$300,000 in state and federal funds, showing dissolved oxygen and total phosphorus concentrations in over 250 stream segments in Wisconsin. (See United States Geological Survey, *Water Resources Data, Wisconsin, Water Year 2002*). However, DNR has excluded many streams with high total phosphorus concentrations and low dissolved oxygen concentrations from its 303(d) list, stating that the data is not yet ready for inclusion on the

303(d) list because no relationship has yet been established between total phosphorus concentrations and stream impairments. This justification is inadequate, given that DNR can use its best professional judgment to determine whether total phosphorus concentrations in polluted streams may be contributing to violations of narrative water quality criteria and consequently, causing impairments.

Phosphorus is a plant nutrient that contributes to algal blooms in and eutrophication of streams and lakes. Much of the phosphorus inputs to Wisconsin's streams come from agricultural lands. One report in Wisconsin has shown that increased phosphorus additions to cropland cause more phosphorus loss through runoff to waters of the state.<sup>1</sup> And, as of 1998, there is an estimated 31 million pounds in excess phosphorus on Wisconsin cropland.<sup>2</sup> Further, this excess phosphorus use is confirmed by increasing soil test phosphorus values over the last 25 years in Wisconsin.<sup>3</sup> A recent summary of data compiled by the Wisconsin Public Interest Research Group ("WISPIRG") in 2002 that 94% of streams and rivers and 93% of lakes in Wisconsin exceed the EPA's recommended phosphorus criterion of .033 mg/l.<sup>4</sup> We attach and incorporate WISPIRG's report by reference in these comments.

USGS has identified dozens of stream segments that have excessively high phosphorus levels that may be contributing to algal blooms and eutrophication in streams and downstream lakes. For example, the Wisconsin shore of Lake Michigan has been experiencing severe algal blooms and a significant number of beach closings each summer, most recently during the summer of 2003. USGS identified several tributaries to Lake Michigan that have excessively high total phosphorus levels, such as Meeme River at CTH XX near Cleveland, WI, Silver Creek near Silver Road at Manitowoc, WI, and the Manitowoc River at Manitowoc, WI, and Point Creek near Cleveland, WI. Many of these streams in the USGS report have total phosphorus concentrations that are more than 20 times EPA's recommended total phosphorus criterion of .033 mg/L for Ecoregion VII, comprising land in Wisconsin that drains to Lake Michigan.

In addition, MEA represents Centerville CARES. Members of Centerville CARES collected two sets of monitoring data at two locations each on Fisher Creek and Point Creek in southern Manitowoc County. Both streams have a designated use of Fish and Aquatic Life under Section NR 102.04(3) of the Wisconsin Administrative Code. Those water quality samples indicate exceedances of numeric water quality criteria for fecal coliform and EPA's recommended phosphorus criterion of .033 mg/L. Citizens observed cloudy, turbid, foul-smelling water, the absence of fish and other aquatic life, and algal mats on Lake Michigan less than one mile downstream. These are clearly violations of the narrative water quality criterion in § NR 102.04(1)(b) and (c) (prohibiting "floating or submerged debris, oil, scum or other material" and "materials producing color, odor, taste, or unsightliness"). Centerville CARES conducted further testing that confirmed that the high fecal coliform levels originated from cattle feces. Attached are two letters providing two sets of monitoring data sent to DNR in 2003 requesting that DNR place Fisher Creek and Point Creek on the 303(d) list based on the citizen monitored data and

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<sup>1</sup> Larry G. Bundy, *A Phosphorous Budget for Wisconsin Cropland*, University of Wisconsin Department of Soil Science, 6 (1998).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Wisconsin Public Interest Research Group, *Phosphorus in Runoff Pollution in Wisconsin: Key Omissions in the Department of Natural Resources Proposed Runoff Management Rules*, 15-16 (2002) (enclosed).

visual observations of members of Centerville CARES. We incorporate those letters by reference into this letter and again request that DNR list Fisher Creek and Point Creek on the 2004 303(d) list, as it is clear that designated uses in these and other similar streams nearby are not being met.

DNR has not shown good cause to the public for why streams identified by USGS as having total phosphorus concentrations greater than .033 mg/L should not be listed. Nor has DNR provided good cause for why it has not proposed to list those streams, or Fisher Creek or Point Creek. DNR does not have “more recent or accurate data;” “more sophisticated water quality modeling”; nor has DNR identified any “changes in conditions.” 40 C.F.R. § 130.7(b)(6)(iv). Moreover, DNR has not provided its own data to refute the submitted data, nor has DNR established designated uses are being met in Fisher Creek and Point Creek or other streams identified by USGS.

**Required Action:** Propose Fisher Creek, Point Creek, and other streams identified by USGS total phosphorus concentrations greater than EPA’s recommended criterion of .033 mg/L for Ecoregion VII or wherever total phosphorus concentrations are contributing to violations of narrative water quality criteria in § NR 102.04(b) and (c) for inclusion on the 2004 303(d) list as impaired, or alternatively, threatened.

### **III. CONCLUSION**

Thank you for the opportunity to comment on Wisconsin’s proposed 2004 303(d) list of impaired waters. We look forward to your response.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**

Andrew C. Hanson  
Staff Attorney

Encl.

On behalf of:

Fox Wolf Watershed Association  
Friends of Milwaukee's Rivers  
Madison Audubon Society  
River Alliance of Wisconsin  
Sierra Club-John Muir Chapter  
Southern Wisconsin Trout Unlimited  
Trout Unlimited-Wisconsin State Council  
Wisconsin Audubon Council  
Wisconsin Public Interest Research Group  
Wisconsin Wildlife Federation.

cc: Russ Tooley (via email only, w/o attachments)  
Centerville CARES

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Concerned Farmers and Neighbors of the Town of Hixton

Todd Ambs (via email only, w/o attachments)  
Wisconsin Department of Natural Resources

Donna Keklic (via U.S. mail w/ attachments)  
U.S. Environmental Protection Agency