Midwest Environmental ADVOCATES

pro bono publico

January 15, 2010

VIA ELECTRONIC MAIL

Robert Masnado
Section Chief, Water Evaluation
Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707

Re: Comments on Proposed 2010 Section 303(d) List of Impaired Waters

Dear Mr. Masnado:

Thank you for the opportunity to submit comments on the proposed 2010 section 303(d) list of impaired waters. Midwest Environmental Advocates, Inc. ("MEA"), a nonprofit environmental law center, is submitting comments on the proposal on behalf of MEA and Milwaukee Riverkeeper.

We would like to acknowledge the positive steps that DNR has taken since the 2008 listing. Chief among these steps is the creation of the 2010 Wisconsin Consolidated Assessment and Listing Methodology Report (WisCALM). Although problems remain, WisCALM includes notable improvements to DNR's listing process, especially in terms of transparency. DNR staff deserves recognition for the time and energy spent on this project. Also, it is encouraging that DNR produced a 303(d) webinar to increase public understanding. In addition, it appears that DNR is taking steps to make the data underlying its 303(d) decisions more accessible. We commend DNR for taking these steps, and we hope that it will continue moving toward a transparent, accurate, and comprehensive listing process.

The creation of a comprehensive 303(d) list is a vital step toward cleaner waters in Wisconsin. The Clean Water Act (CWA) requires that DNR establish water quality standards that reflect existing and attainable uses in a water body and to set numeric and narrative criteria to protect those uses and the health of humans and fish. The CWA requires DNR to use water quality data to determine if

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water bodies are meeting these water quality standards.[1] When any water quality standard is not met, the water body is impaired. DNR must prepare a list of these impaired waters and rank them based on the severity of the pollution.[2] The product is the 303(d) list.[3] In turn, the 303(d) list serves as a trigger for CWA provisions designed to address the complex environmental problems causing these impairments. One of these potentially powerful tools is a Total Maximum Daily Load (TMDL), which forms a basis for restricting pollution from the discharge pipes and non-point sources that affect an impaired water body. A TMDL makes the cleanup of Wisconsin's most polluted waters possible. A failure to include impaired waters on the 303(d) list undermines the purpose and intent of the CWA and is a failure to meet CWA obligations.

While we applaud the progress that has been made, in the comments that follow we are highlighting the areas where the 303(d) list inadequately protects Wisconsin waters and is in violation of federal law. We hope that DNR will continue to improve its listing practices by making the changes requested below.

I. Summary of Comments

First, federal law requires that DNR consider "all existing and readily available water quality-related data and information" when creating the 303(d) list. 40 C.F.R. § 130.7(b)(5). In addition, DNR must actively solicit organizations that have data about water bodies with reported pollution problems. 40 C.F.R. § 130.7(b)(5)(iii). DNR's data policy is not consistent with these regulations. The 303(d) list should be amended to include impaired water bodies based on all available data, not just DNR's in-house data.

Second, DNR should apply the proposed phosphorus criteria in Draft NR 102.06 to all readily available data about phosphorus pollution in Wisconsin, including data from USGS. In addition, DNR should change its data sample policies so that more phosphorus impaired waters are considered for the 303(d) list.

Third, many southeastern Wisconsin waters are improperly omitted from the 2010 listing. The omissions are the result of overly stringent data requirements, a failure to consider readily available data for bacteria and total suspended solids, and the risky delisting of some beaches. These flaws are indicative of statewide 303(d) listing problems. DNR should amend its policies to address these flaws and add waters to the 303(d) list accordingly.

Fourth, DNR is required to list waters that contain fish with mercury levels (or other pollutants) that may injure public health when the fish are used as a food source. The existence of a general fish consumption advisory does not satisfy DNR's obligation to list these impaired waters.

Fifth, WisCALM should be amended to make it clear that "threatened" and "partially meeting" waters are to be considered for the 303(d) list. DNR should amend the 2010 303(d) list

[1] *See* 40 C.F.R. § 131.11; 40 C.F.R. § 131.3(f); 33 U.S.C. § 1313(d).
[2] 33 U.S.C. § 131(d)(1).
[3] 33 U.S.C. § 1313(d).

to include waters where data shows that they are "threatened" or are "partially meeting" water quality standards.

II. Comments

1. DNR must consider all existing and readily available water quality data, and DNR must actively solicit data when water quality problems are reported.

The 303(d) list is an important step toward water quality improvement. Unfortunately, DNR's resources are inadequate to collect all the necessary data. Given this, DNR should be especially receptive to third-party data. Much high quality data is already collected and sorted for Wisconsin waters, and its systematic use would allow DNR to stretch its resources significantly further. Yet, it appears that DNR ignores much of this data when creating its 303(d) list. This approach is unlawful because it leads to an inadequate impaired waters list.

DNR is bound by federal law that requires an expansive approach to data. This federal requirement helps ensure that impaired waters actually end up on the list. The applicable regulation states:

> Each State shall assemble and evaluate *all existing and readily available water quality-related data and information* ... [which] includes but is not limited to all of the existing and readily available data and information about the following categories of waters:
> ...
> (iii) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. *These organizations and groups should be actively solicited for research they may be conducting or reporting*. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data;

40 C.F.R. § 130.7(b)(5) (emphasis added).

DNR has not met these requirements because it limits its consideration of data to the Surface Water Integrated Monitoring System (SWIMS)[4] and a very brief 30-day window for public submission of third party data.[5] Beyond these sources, DNR does not systematically consider "all existing and readily available" data. Nor has DNR "actively solicited" relevant groups,

[4] *See* Wisconsin Department of Natural Resources, Wisconsin 2010 Consolidated Assessment and Listing Methodology (WisCALM), p. 15.

[5] *See id.* at 13-14 (DNR states that the department issued a news release on June 9, 2009 notifying the public that it could submit its own or third party data for DNR's consideration no later than July 17, 2009.).

including governmental and academic organizations, when water quality problems have been reported by the public or other entities.

Third-party data is readily available from sources such as the United States Geological Survey (USGS), the UW-Madison Long Term Ecological Research Project (LTER),[6] County Public Health Departments, and other governmental and academic sources. Notably, a number of these sources are specifically listed in 40 C.F.R. § 130.7(b)(5)(iii) as groups from which DNR is required to actively solicit data when pollution problems are reported. USGS reports data on pollutants such as phosphorus for hundreds of Wisconsin's rivers and streams.[7] This data shows that many Wisconsin rivers and streams are impaired for phosphorus,[8] yet DNR only included a small number of these impaired waters on the proposed 2010 303(d) list.

The Madison area lakes provide another example of where DNR fails to follow 40 C.F.R. § 130.7(b)(5). High quality data is available from LTER for Trout Lake, Allequash Lake, Big Muskellunge Lake, Sparkling Lake, and Crystal Lake in northern Wisconsin and Fish Lake, Lake Mendota, Lake Wingra, and Lake Monona in the Madison area.[9] The Madison lakes fit the description of "[w]aters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions."[10] For example, the Department of Public Health for Madison & Dane County issues report cards on local conditions, including data on surface waters. The 2008 report card states that Dane County surface waters have high levels of phosphorus, which is leading to harmful algae blooms.[11] It reports that phosphorus levels in Lake Mendota and Lake Monona have consistently increased.[12] This report also states that chloride is an increasing problem, especially in Lake Wingra.[13] The report card, and other reports like it, is readily available and must be considered by DNR. In addition, this public report triggers the active solicitation requirement of 40 C.F.R. § 130.7(b)(5)(iii).[14]

Additionally, there is readily available data that many near shore zones in Lake Michigan are impaired with excess phosphorus and nutrient levels, causing serious algae problems. DNR should apply the 7 µg/L target value set by the International Joint Commission and the current

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[6] The North Temperate Lakes Long-Term Ecological Research program can be accessed at http://www.lternet.edu/sites/ntl/.

[7] U.S. Geological Survey, Professional Paper 1754, Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin, *available at* http://pubs.usgs.gov/pp/1754; U.S. Geological Survey, Professional Paper 1722, Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin, *available at* http://pubs.usgs.gov/pp/pp1722.

[8] Professional Paper 1754, Appendix 1, p. 76; Professional Paper 1722, Appendix 1, p. 96-109.

[9] *See* North Temperate Lakes Long Term Ecological Research, Lake Characteristics, *available at* http://lter.limnology.wisc.edu/lter_lake.html#table2.

[10] *See* 40 C.F.R. § 130.7(b)(5)(iii).

[11] Department of Public Health for Madison & Dane County, Madison and Dane County Environmental Health Report Card 2008, p. 21-22, *available at* http://www.publichealthmdc.com/publications/documents/2008RptCard.pdf.

[12] *Id.* at 22.

[13] *Id.* at 20.

[14] In fact, DNR has joined a Memorandum of Understanding acknowledging the need to address the pollution problems in the Yahara lakes. *See* Yahara CLEAN, Memorandum of Understanding, Feb. 13, 2008, *available at* http://danedocs.countyofdane.com/webdocs/pdf/lwrd/lakes/Clean_MOU.pdf.

and draft phosphorus regulations to these waters.[15] The Milwaukee Metropolitan Sewerage District (MMSD) data shows that these near shore waters consistently have phosphorus levels over 7 μg/L. Data is also available from beach managers and USGS showing phosphorus impairment. DNR is required to consider these and other readily available data sources and list these impaired waters accordingly.

By failing to take advantage of readily available data, DNR violates 40 C.F.R. § 130.7(b)(5) and risks violation of the Clean Water Act's 303(d) scheme generally. The Clean Water Act requires that states "shall identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). By failing to consider all readily available data, DNR violates this mandate by omitting many water bodies with water quality standard violations.

DNR also is in violation of the CWA when it fails to list impaired waters based on information that it already has. For example, DNR has information, submitted according to its own 30-day data solicitation,[16] that shows Musky Bay of Lac Courte Oreilles as impaired. The information shows that Musky Bay's main monitoring site, MB-1, has averaged 43 ug P/L and 9.9 ug/L chlorophyll-a.[17] This indicates that Musky Bay is a eutrophic shallow bay advancing to hypereutrophic conditions with likely turbid/algal conditions and is in need of immediate intervention. Under 33 U.S.C. § 1313(d)(1)(A), DNR "shall" list impaired waters, and DNR violates the CWA when it fails to do so here.

Comment: DNR must systematically consider "all existing and readily available water quality-related data and information" when creating the 303(d) list. 40 C.F.R. § 130.7(b)(5). DNR's current approach of using SWIMS data and allowing for a short public data submission does not meet this broad requirement. DNR should change WisCALM to systematically incorporate this data and amend the 303(d) list accordingly.

Comment: When water quality problems have been reported, DNR must also actively solicit organizations that have data regarding these water bodies. 40 C.F.R. § 130.7(b)(5)(iii). The Madison area lakes are an example of water bodies reported as polluted by local agencies. DNR should change WisCALM consistent with this mandate and amend the 303(d) list accordingly.

Comment: DNR should list all phosphorus-impaired near shore waters based on all readily available data.

Comment: When DNR has data showing impairment, it must place those waters on the 303(d) list. The Musky Bay of Lac Courte Oreilles is an example of one such water body.

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[15] *See* NR 102.06; Draft NR 102.06 Phosphorus, June 16, 2009.

[16] WisCALM at 13-14.

[17] The Courte Oreilles Lakes Association submitted this data on July 15, 2009. The Association also submitted "Lac Courte Oreilles Sawyer County, Wisconsin 2010 WisCALMS Review Submitted to the Wisconsin Department of Natural Resources Lakes Partnership" by C. Bruce Wilson and Daniel Tyrolt, together with supporting data and documentation.

2. DNR must apply the proposed phosphorus criteria to USGS data and list the phosphorus impaired waters.

As discussed above, DNR is obligated to consider all readily available data when assembling the 303(d) list. One source of this data, the United States Geological Survey (USGS), is specifically listed in 40 C.F.R. § 130.7(b)(5)(iii). USGS collects data for hundreds of Wisconsin waters, and it makes this data readily available.[18] In addition to other pollutant parameters, USGS provides data on phosphorus concentrations in a variety of Wisconsin rivers and streams.

DNR has recognized in WisCALM that the numerical phosphorus criteria in Draft NR 102.06[19] should apply to Wisconsin waters.[20] Draft NR 102.06 sets phosphorus impairment thresholds for rivers and streams at less than or equal to 0.100 mg/L for waters specifically listed in NR 102.06(3) and at less than or equal to 0.075 mg/L for other rivers and streams.[21] Applying these thresholds to the USGS data, it can be seen that a large number of Wisconsin's waters exceed the NR 102.06(3) threshold.[22] A few examples include: Bassett Creek (0.237 mg/L total phosphorus), Beaver Creek (0.149 mg/L), and Casper Creek (0.239 mg/L), and the list continues.[23] USGS also provides data on nonwadeable rivers. For example, USGS reports high phosphorus in the Trempealeau River at Dodge (0.399 mg/L total phosphorus), the Crawfish River at Milford (0.497 mg/L), and the Baraboo River near Baraboo (0.204 mg/L). Again, this list is not exhaustive.

By law, DNR must consider this and other readily available data from USGS and similar sources. The high phosphorus levels in this data put DNR on notice of likely impairments, and DNR should list these water bodies accordingly. If DNR finds the available data insufficient for listing, DNR must actively solicit additional data and explain the basis for its finding that USGS data is insufficient.

Comment: DNR should consider all readily available phosphorus data as required by law. DNR should actively solicit additional data if necessary for listing purposes. It should then list all water bodies that exceed the phosphorus threshold found in Draft NR 102.06.

Comment: DNR must list those waters identified by USGS in both its wadeable stream and nonwadeable rivers studies as having a higher concentration of phosphorus than the proposed

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[18] *See* United States Geological Survey, USGS Water Data for the Nation, *available at* http://waterdata.usgs.gov/nwis; U.S. Geological Survey, Professional Paper 1754, Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin, *available at* http://pubs.usgs.gov/pp/1754; U.S. Geological Survey, Professional Paper 1722, Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin, *available at* http://pubs.usgs.gov/pp/pp1722.

[19] Draft NR 102.06 Phosphorus, June 16, 2009.

[20] *See* WisCALM, Table 6, p. 38 (criteria for lakes); WisCALM, Table 10, p.50 (criteria for rivers and streams); *see also* 40 C.F.R. 122.44(d)(1)(vi) (when a final numerical criterion is not in place for conducting a reasonable potential analysis, requiring that states derive a criterion by using a proposed criterion).

[21] WisCALM, Table 10, p.50.

[22] *See* Attachment 1; USGS Professional Paper 1754, Appendix 1, p. 76; USGS Professional Paper 1722, Appendix 1, p. 96-109.

[23] USGS Professional Paper 1722, Appendix 1, p. 96-109.

numeric phosphorus criteria. Waters meeting this definition are listed in an attached chart.[24] This data conforms to DNR's requirement that data be from "the most recent 10-year period."[25] If DNR finds this data insufficient, it should explain why.

Comment: DNR has proposed to add a small number of water bodies based on numerical phosphorus criteria. Yet, it is widely known that many more Wisconsin water bodies are polluted with phosphorus. DNR should amend WisCALM phosphorus sample data requirements and methodology so that it considers phosphorus-impaired Wisconsin waters more comprehensively. DNR is legally obligated to list these impaired waters under the CWA. 33 U.S.C. § 1313(d).

3. DNR's methodology unlawfully omits polluted southeastern Wisconsin waters, and these flaws should be addressed to improve the accuracy of listings statewide.

A number of southeastern Wisconsin waters suffer from impairments and should be placed on the 303(d) list. *See* 33 U.S.C. § 1313(d). DNR unlawfully omitted these waters because: (A) DNR's phosphorus, DO, and chloride data requirements are unduly strict; (B) DNR failed to consider data for bacteria and total suspended solids; and (C) DNR illegally delisted beaches where confirmed sources of human bacteria are present.

A. DNR should adopt a more practical approach to minimum data requirements, especially with regard to phosphorus, DO, and chloride.

DNR requires minimum data samples when considering a water body for listing. For phosphorus in rivers and streams, 10 base flow values collected between May and October are required.[26] At least 10% of these samples must exceed 0.100 mg/L for specifically listed waters and 0.075 mg/L for all other waters.[27] This minimum data requirement is unduly strict. In most cases, to achieve the 10 base flow values, only areas that have automatic sonde devices will yield sufficiently large samples. In turn, only this small subset of waters will be considered for listing. The automatic sonde devices are expensive, and the result is that DNR is failing to list many impaired waters simply because this sample size makes them ineligible.

To remedy this, DNR must alter its sample requirements for phosphorus to meet the practical reality under its legal obligations. The Clean Water Act requires that states "shall identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(5).

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[24] *See* Attachment 1. This attached chart lists the summary data from USGS that reveal phosphorus impairment for certain waters not currently on the 303(d) list. For nonwadeable streams, USGS sampled the discharge and water quality at each site monthly during a 6-month period (May through October, 2003). For more details about the nonwadeable data collection methods, see Professional Paper 1754, p. 9-15. For wadeable streams, discharge and water quality of each stream were sampled monthly over a 6-month period (May through October 2001); some of the data has been updated in 2002. For more details about the wadeable data collection methods, see Professional Paper 1722, p. 10-14.

[25] *See* WisCALM at 19.

[26] WisCALM, Table 10, p. 50.

[27] *Id.*

For example, the Southeastern Wisconsin Regional Planning Commission (SEWRPC) collects data on many southeastern Wisconsin water bodies and makes this data readily available to DNR and the public. SEWRPC's Technical Report No. 39 (TR-39) details water quality and pollution sources in Milwaukee area watersheds, including phosphorus pollution data.[28] DNR should use TR-39 to analyze whether points on the Menomonie River warrant listing. The Menomonee River Watershed Restoration Plan has identified a number of modeled assessments points that are potentially impaired. These include: MN-2, MN-5, MN-9, MN-12, MN-17, and MN-18.[29] These points are exceeding water quality standards at least 30% of the time, and MN-18 is exceeding them almost 50% of the time.[30]

DNR should also alter its minimum data requirement for dissolved oxygen. Current listing guidance calls for three or more days of continuous DO measurements (no less than one sample per hour) in July or August, with a minimum of three years of data and an exceedance frequency of 10%.[31] To achieve these results in practice, automatic sonde devices for oxygen must be used, which are very expensive. In turn, where DNR cannot afford to install automatic samplers, an impaired water body is never considered for listing.

In addition, DNR should amend its minimum data requirements for chloride when impairment is suspected. For chloride, DNR requires eight values, where maximum daily concentration (or acute toxicity) of 757,000 ug/L is not exceeded more than once every three years.[32] Many waters may be impaired that do not meet this minimum data requirement. For example, in the southeastern region, several waters are likely impaired for chloride but are not listed, including Underwood and Honey Creeks and the Lower Menomonee, which receive the bulk of the runoff from I-94. If DNR is unable to collect sufficient data to consider these waters, then it must either seek out other sources of data or amend its minimum data requirements.

When minimum data requirements are not met, DNR states that "a waterbody may still be impaired if the available data provide overwhelming evidence of impairment."[33] Given DNR's limited monitoring resources, the requirement that evidence be "overwhelming" is unreasonable and omits many of the impaired water bodies that DNR is required to list under the CWA.

Comment: DNR should adopt phosphorus data sample requirements that ensure all phosphorus-impaired water bodies will be properly listed. Given the cost of monitoring, the current policy unduly restricts the waters considered and risks violation of 33 U.S.C. § 1313(d).

Comment: DNR should systematically consider the readily available data found in TR-39 and list water bodies accordingly. In particular, DNR should consider listings based on the assessment point data noted above.

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[28] Southeastern Wisconsin Regional Planning Commission, Technical Report No. 39, Water Quality Conditions and Sources of Pollution in the Greater Milwaukee Watersheds, Nov. 2007.

[29] *See* Milwaukee Metropolitan Sewerage District, Menomonee River Watershed Restoration Plan. A map and description of these assessment points are available at http://www.swwtwater.org/home/WatershedActionTeamDocuments.cfm.

[30] See Menomonee River Watershed Restoration Plan, Chapter 4.

[31] WisCALM, Table 10, p. 50.

[32] *Id.* at 51.

[33] WisCALM at 20.

Comment: DNR's DO sample requirements should conform to practical restraints. For example, DNR should use a one-year threshold for DO listing. This would allow DNR to move sonde devices to different suspected areas of concern based on citizen or agency data. In turn, DNR could take one sample per month throughout the summer for water bodies of concern.

Comment: DNR should list waters that are likely to be chloride impaired even when its minimum data requirements cannot be met. It should consider all readily available data for waters that are likely to be chloride impaired, including those listed above. DNR should also actively solicit chloride data when a water quality problem has been reported.

Comment: DNR should reconsider its minimum data requirements generally. DNR has limited resources with which to collect sample data, which results in the passing over of many impaired waters. To meet its legal obligation to list Wisconsin's impaired waters, DNR must either increase its data pool so that more water bodies are considered for listing or DNR must change its minimum data requirements to conform to the data DNR has available. *See* 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(5).

B. DNR must consider all readily available data for bacteria and total suspended solids.

As stated above, DNR must consider all readily available data when creating the 303(d) list. This includes an obligation to consider Southeastern Wisconsin Regional Planning Commission (SEWRPC) data found in Technical Report No. 39 (TR-39) and data collected in Watershed Restoration Plans.[34] Using this data, DNR should list the South Branch of Underwood Creek[35] and Underwood Creek downstream of the South Branch for bacteria impairments. Likely bacteria impairments also exist in Underwood Creek upstream of the confluence of the South Branch (running through Elm Grove and Brookfield) and in the Menomonee and Kinnickinnic Rivers.

Data from SEWRPC and the Milwaukee Metropolitan Sewerage District also indicates fecal coliform bacteria problems in Underwood Creek and the South Branch of Underwood Creek in 2004 and 2005.[36] Also, under the threshold found in NR 102.04(5)(a), data from MMSD indicates fecal coliform impairments at the following assessment points on the Menomonee River: MN-2 (124 geometric mean; 75% compliance with single sample standard); MN-5 (205 geometric mean; 68% compliance); MN-9 (489 geometric mean; 72% compliance); MN-12 (795 geometric mean; 50% compliance); MN-15 (1,063 geometric mean; 47% compliance); MN-17 (1,124 geometric mean; 63% compliance).[37] This data conforms to DNR's requirement that data

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[34] Milwaukee Metropolitan Sewerage District's (MMSD) Kinnickinnic River Watershed Restoration Plan and the Menomonee River Watershed Restoration Plan are available at http://www.swwtwater.org/home/documents.cfm.

[35] This water body is officially listed as an unnamed creek (WBIC 16800).

[36] SWRPC, Technical Report No. 39. For example, SWRPC data shows that the mean concentration of fecal coliform bacteria in Underwood Creek during this period was 4,367 cells per 100 ml. Concentrations in individual samples ranged between 28 cells per 100 ml and 97,000 cells per 100 ml. The mean concentration of fecal coliform bacteria in South Branch Underwood Creek during this period was 5,422 cells per 100 ml. Concentrations in individual samples ranged between 23 cells per 100 ml and 55,000 cells per 100 ml.

[37] MMSD, Menomonee River Watershed Restoration Plan, Chapter 4.

be from "the most recent 10-year period."[38] DNR is obligated to consider this readily available data and list these waters accordingly.

In addition, DNR should consider readily available data about total suspended solids (TSS). The following Menomonee River assessment points appear to have significant TSS: MN-6 (meeting USGS reference standard of 17.2 mg/L only 60% of the time); MN-7 (meeting it 10% of the time); MN-8 (meeting it 30% of the time); MN-10 (meeting it 0%), and MN-13 and MN-14 (meeting it 60% of the time).[39]

Comment: DNR must consider readily available data from the Milwaukee Metropolitan Sewerage District's Watershed Restoration Plans and the Southeastern Wisconsin Regional Planning Commission when compiling the 303(d) list. DNR should add all waters impaired for bacteria and TSS to the 303(d) list, including those mentioned above.

C. DNR should list beaches when human health hazards are present.

The CWA states a goal of water quality that supports recreation in and on the water. *See* 33 U.S.C. § 1251(a)(2). In turn, when establishing water quality standards, each state must classify waters to protect recreation in and on the water. 40 C.F.R. § 131.10. When a water body does not support the swimmable standard, it is impaired and must be placed on the 303(d) list. *See* 33 U.S.C. § 1313(d).

DNR proposes to delist Doctors Park, Atwater, and Bender beaches for E. coli based on the last three years of monitoring data. Before delisting these and other beaches, DNR should consider human health concerns related to high levels of bacteroides. The presence of these bacteroides would likely make these waters unsafe for recreational use. This approach is consistent with the practice of allowing E. coli or other pathogen data to be used in lieu of or supplementary to fecal coliform data together with best professional judgment for listing decisions.

In addition, DNR should add beaches to the list that have a significant number of unsafe swimming days. Using DNR data, EPA reports that the following beaches have been closed or under an advisory for 14 days or more in 2008: in Door County, Ephraim Beach, Lakeside Park Beach, Otumba Park Beach, and Sunset Park Beach-Sturgeon Bay; in Douglas County, Brule River State Forest (Beach 2); in Milwaukee County, South Shore Rocky Beach and Watercraft Beach; in Ozaukee County, Harrington Park Sate Park Beach-North; in Sheboygan County, General King Park Beach.[40] DNR should list (or should not delist) these beaches because they are impaired as not swimmable under the CWA. *See* 40 C.F.R. § 131.10.

Comment: DNR should consider the human health consequences of delisting beaches that may be impacted by harmful bacteria; it should not delist these beaches if recreational use of these beaches is in fact impaired.

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[38] *See* WisCALM at 19.

[39] SWRPC, Technical Report No. 39.

[40] U.S. Environmental Protection Agency, 2008 Swimming Season Update, Raw data ("Beach Days" tab), *available at* http://www.epa.gov/waterscience/beaches/seasons/2008/wi.html#duration.

Comment: DNR should list beaches that show a pattern of unsafe swimming days. The beaches noted above should either be added to the list or should not be removed from the list.

4. DNR should list water bodies as impaired for fish consumption regardless of whether they are subject to the general consumption guidelines.

One of the primary goals of the Clean Water Act is to provide for fishable waters, and the states are required to adopt water quality standards that protect this use. *See* 33 U.S.C. § 1251(a)(2); 40 C.F.R. § 131.10. This goal is reflected in the narrative water quality standards for Wisconsin found in NR 102.04(d).

All waters in Wisconsin fall under a general fish consumption advisory.[41] This reflects the fact that "most fish from most waters in the state contain mercury in at least low levels of concentration."[42] DNR has adopted the policy of not listing waters that are subject to this general advisory unless the waters are also subject to a special advisory.[43] To earn a special advisory, a water body must have consumption advice of "do not eat" for gamefish and one meal per month for panfish.[44] For PCBs, a water body must have special advice of one meal per month or less for gamefish and one meal per week or less for panfish.[45] In other words, unless a water body contains mercury so high that it is never safe to eat gamefish, it is not considered impaired by DNR.

This approach is not a reasonable application of the CWA and NR 102.04. DNR is required to create water quality standards that protect the fishability of Wisconsin's waters, and DNR is required to list waters when these water quality standards are violated. Therefore, DNR should list waters that contain fish with mercury levels that may injure health when the fish are relied on as a food source.[46] Many of the waters under the general consumption advisory violate this standard, yet DNR does not consider them for 303(d) listing.[47]

Placing these mercury-impaired waters on the 303(d) list makes a TMDL process possible. In fact, this has been accomplished in Minnesota. Using the 303(d) list and a TMDL process, Minnesota has created a TMDL to address atmospheric and effluent mercury on a large scale.[48] The TMDL includes 998 lake and river mercury impairments, and EPA has approved its primary provisions.[49] Minnesota generally considers a water body to be impaired when "the

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[41] *See* WisCALM at 56.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *See* NR 102.04(d) ("Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance.").
[47] The general guidelines recommend that women of childbearing age and children limit their intake of certain listed fish to one meal per week and all other fish to one meal per month. For the rest of the population, all but six species have a limit of one meal per week. *See* Wisconsin Department of Natural Resources, Fish Consumption Advisory, *available at* http://dnr.wi.gov/fish/consumption.
[48] *See* Minnesota Pollution Control Agency, Statewide Mercury Total Maximum Daily Load, http://www.pca.state.mn.us/water/tmdl/tmdl-mercuryplan.html (last visited Jan. 7, 2010).
[49] *See* TMDL Decision Document, Revised Minnesota Statewide Mercury TMDL, *available at* http://www.pca.state.mn.us/publications/tmdl-mercury-dd.pdf.

recommended consumption frequency is less than one meal per week, such as one meal per month, for any member of the population."[50] Yet, in Wisconsin, large numbers of inland waters contain fish that cannot be consumed more than one meal per week by certain portions of the population, but DNR methodology only lists these waters when contaminated gamefish are labeled "do not eat."[51]

Comment: DNR is required to list waters that contain fish with mercury levels (or other pollutants) that may injure public health when the fish are used as a food source. Listing more of these waters may help reverse mercury contamination through a TMDL process addressing all major mercury sources.

Comment: DNR should adopt a threshold that would list waters where the recommended fish consumption frequency is less than one meal per week for any member of the population.

5. DNR should amend its policy guidance to clarify that "threatened" waters and waters only "partially meeting" designated uses should appear on the 303(d) list.

DNR's current guidance does not clearly state that "partially meeting" and "threatened" waters are to be included on the 303(d) list. By definition, when a water body is "partially meeting" a designated use, it is partially not meeting that use. This is a violation of water quality standards and therefore warrants listing under 40 C.F.R. § 130.7(b). In addition, it is in the public interest to list "threatened" waters in addition to impaired waters. This preemptive approach helps prevent the further degradation of our public waters. In addition, a proactive approach allows for cleanup at an earlier stage, saving the people of Wisconsin money.

Comment: DNR's current guidance does not clearly state that "partially meeting" and "threatened" waters are to be included on the 303(d) list. WisCALM section 5.0, "General Aspects of Data Assessment," should be amended to make it clear that these waters are to be considered for 303(d) listing. DNR should amend the 2010 303(d) list to include "threatened" and "partially meeting" waters.

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[50] Minnesota human health-based water quality standards are calculated assuming people eat 30 grams of fish per day. Thirty grams per day equals about a half-pound meal per week (0.463 pounds/week). *See* Minnesota Pollution Control Agency, Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List, 2010 Assessment Cycle, p. 45, *available at* http://www.pca.state.mn.us/publications/wq-iw1-04.pdf P.45.

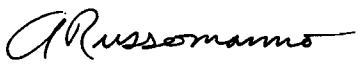
[51] Wisconsin Department of Natural Resources, Choose Wisely, A Health Guide for Eating Fish in Wisconsin, *available at* http://dnr.wi.gov/fish/consumption/FishAdvweb09lo.pdf.

III. Conclusion

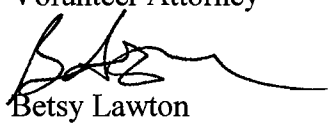
Thank you for the opportunity to comment on Wisconsin's proposed 2010 303(d) list of impaired waters. We look forward to your response.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



Anthony Russomanno
Volunteer Attorney



Betsy Lawton
Supervising Attorney

On behalf of:

Milwaukee Riverkeeper

Attachment 1

Stream name	Total phosphorus (mg/L)	USGS site number	Longitude	Latitude	Year
WADEABLE (median values)					
18-mile	0.295	05367515	90.1219	44.3022	2001
Alder Cr	0.093	05362409	90.7197	45.4133	2001
Baker	0.112	05545102	88.5392	42.7061	2001
Bassett Cr	0.237	05545955	88.2278	42.5406	2001
Bear	0.086	05406670	90.1756	43.3272	2001
Beaver	0.106	054040135	90.3594	43.6261	2001
Beaver Cr	0.149	05401764	90.1814	44.5983	2001
Black	0.173	05381000	90.6150	44.5597	2002
Black Brook	0.134	05341676	92.3417	45.1833	2001
Blake	0.159	05413245	90.8583	42.8692	2002
Bohris	0.141	05379472	91.5972	44.1456	2001
Branch Mineral Point	0.107	05432140	90.1722	42.9589	2001
Bull	0.183	05413885	90.5889	42.8467	2001
Calamus Cr	0.253	05425913	88.9044	43.4347	2001
Casper Cr	0.239	05425935	88.7647	43.3094	2001
Cedar Cr	0.104	04086500	87.9786	43.3231	2002
Crazy Horse Cr	0.102	05362325	90.7192	45.4336	2001
Daggets Cr	0.258	04081775	88.5994	44.1414	2001
Dilly	0.087	05404112	90.3958	43.6531	2001
Door Cr	0.127	05429560	89.2392	43.0839	2001
East Branch Pecatonica	0.128	05433000	89.8611	42.7856	2002
East Fork Hamann	0.178	05399420	90.0786	44.9317	2001
East Twin	0.111	04085281	87.6364	44.2378	2002
Eau Claire - Antigo	0.085	05397110	89.2339	45.1258	2002
Fennimore	0.140	05407039	90.5631	43.0278	2002
Friedens	0.091	04086465	88.1614	43.3400	2001
Galena	0.102	05415000	90.3778	42.5136	2002
Gilbert Cr	0.103	05361833	90.6583	45.4586	2001
Grimms	0.349	040854193	87.8619	44.1517	2001
Hackett Br	0.126	05413268	90.8822	42.8311	2001
Hamann Cr	0.094	05399415	90.1119	44.9308	2001
Hamann Trib	0.112	05399434	90.1117	44.9019	2001
Hay	0.111	053563725	91.3178	45.4647	2001
Hay River	0.095	05368000	91.9108	45.0478	2002
Hinkson	0.100	05405648	89.4111	43.4172	2001
Husher	0.143	040872347	87.9200	42.8364	2001
Hutton Cr	0.092	053416927	92.3561	45.1217	2001
Indian Cr - Dickeyville	0.370	05414278	90.6322	42.6183	2001
Johnson Cr - Farmington	0.159	05425534	88.7047	43.1228	2001
Kettle Moraine	0.103	04086096	88.2600	43.6517	2001
Kewaunee	0.076	04085200	87.5564	44.4583	2002
Kickapoo	0.122	05408000	90.6431	43.5750	2002
Kieler Cr	0.114	05414753	90.5967	42.5814	2001
Kuenster	0.169	054134435	90.9572	42.7908	2001
Lacrosse	0.092	05382325	90.8106	43.9375	2002
Little La Crosse - Sparta	0.084	05382500	90.8403	43.8958	2002

Stream name	Total phosphorus (mg/L)	USGS site number	Longitude	Latitude	Year
Little Menomonee	0.082	04087050	88.0383	43.2067	2001
Manitowoc	0.247	04085427	87.7142	44.1072	2002
Mayfield Cr	0.166	04086443	88.1814	43.3078	2001
Mcadam Br	0.084	05414259	90.5189	42.6247	2001
Mccartney Br	0.125	05412709	90.9161	42.7164	2001
Mcdermott	0.139	05356729	91.4408	45.3386	2001
Meadow Cr	0.160	05361730	90.6183	45.4500	2001
Meeme	0.103	04085454	87.8125	43.9222	2002
Milwaukee	0.116	04086600	87.9428	43.2803	2002
Molash	0.150	040852095	87.5342	44.1811	2001
Moore	0.198	05407428	90.5967	43.7933	2002
Moore	0.093	05407410	90.6181	43.8303	2001
Muskellunge Cr - Beetown	0.210	05413447	90.9358	42.7939	2001
Neshota	0.203	04085305	87.8142	44.3928	2002
North Branch Honey	0.115	05406210	89.9692	43.3514	2001
North Branch Milwaukee	0.170	040863075	88.0528	43.5569	2002
North Fork Eau Claire	0.155	05365707	90.8492	44.9736	2002
North Fork Hemlock Cr	0.304	05402040	90.0281	44.5697	2001
North Fork Willow	0.132	05341629	92.2189	45.2344	2001
Onion	0.196	04085845	87.8200	43.6967	2002
Ore	0.123	05545187	88.3994	42.6400	2001
Otter Cr - Plymouth	0.104	040857005	87.9222	43.7889	2001
Parnell	0.087	04086175	88.1600	43.6478	2001
Pensaukee - Krakow	0.132	04071795	88.2764	44.7525	2002
Pensaukee - Pensaukee	0.086	04071858	87.9533	44.8189	2002
Pigeon	0.611	05413415	90.8161	42.7864	2002
Pigeon	0.125	040854496	87.8583	43.8917	2001
Pine Cr - Newton	0.162	0408543802	87.7219	44.0039	2001
Platte - Rockville	0.121	05414000	90.6403	42.7319	2002
Point Cr	0.247	04085439	87.7314	43.9692	2001
Pumpkinseed Cr	0.162	04081480	88.8197	44.0936	2001
Raeder Cr	0.188	05399348	90.2350	44.8511	2001
Rattlesnake	0.104	05413449	90.9411	42.7817	2002
Running Valley	0.203	05367506	91.6614	45.0267	2001
Sauk	0.605	04086017	87.8692	43.4703	2002
Skinner	0.082	05359698	90.6994	45.5833	2002
Smith Lake	0.092	053318635	91.4883	46.0450	2001
Soft Maple	0.114	05356700	91.3507	45.4178	2001
South Branch Manitowoc	0.242	04085395	88.1181	44.0247	2002
South Branch Oneill Cr	0.196	05380984	90.3761	44.6031	2001
South Branch Sheboygan	0.119	04085480	88.2511	43.8092	2002
South Branch Suamico	0.247	040719496	88.1867	44.6175	2003
South Fork Popple	0.172	053808864	90.3753	44.8000	2001
South Fork Willow	0.177	053416925	92.3531	45.1275	2001
Trib 1 French Spring Cr	0.093	040727260	89.3103	43.5917	2001
Trib 1 Shoulder Cr	0.101	05362010	90.8222	45.3186	2001

Stream name	Total phosphorus (mg/L)	USGS site number	Longitude	Latitude	Year
Trib 1 West Branch Fond Du Lac	0.189	04082831	88.7006	43.8800	2001
Trib Pratt Cr	0.109	05425929	88.7258	43.3939	2001
Trib To Beaver Cr	0.179	054017645	90.1675	44.5981	2001
Trout Run	0.196	05379430	91.5683	44.2136	2001
Unnamed Trib 1 Rock Cr	0.132	05381168	90.4942	44.4661	2001
Van Dyne Cr	0.741	04082580	88.5194	43.8792	2001
Wallace	0.106	04086335	88.0864	43.4983	2001
Weedens	0.297	04085995	87.7733	43.7175	2001
West Branch Milwaukee	0.118	04086125	88.3936	43.6161	2001
West Branch Nippersink	0.145	05548159	88.3636	42.5181	2001
West Branch Sugar - #1	0.118	05436010	89.5972	42.9031	2002
Willow	0.115	05413959	90.5964	42.7942	2001
Willow	0.090	05341752	92.7083	45.0117	2002
Willow Cr - Waupun	0.146	05422990	88.6892	43.6836	2001
Yellow - Barron	0.099	053674464	91.8300	45.3953	2002
Young Br	0.116	05414205	90.5322	42.7619	2001
NONWADEABLE					
Baraboo River near Baraboo	0.204	05405000	89.6358	43.4808	2003
Bark River at State Highway D	0.182	05426460	88.7014	42.8942	2003
Black River near Galesville	0.15	05382000	91.2872	44.0603	2003
Buffalo River near Tell	0.33	05372000	91.8492	44.3917	2003
Crawfish River at Milford	0.497	05426000	88.8494	43.1000	2003
Fox River at Berlin	0.133	04073500	88.9522	43.9539	2003
Grant River at Burton	0.216	05413500	90.8192	42.7203	2003
Kickapoo River at Steuben	0.146	05410490	90.8583	43.1828	2003
La Crosse River at La Crosse	0.195	05383075	91.2103	43.8608	2003
Lemonweir River near New Lisbon	0.115	05403500	90.1775	43.9292	2003
Pecatonica River at Martintown	0.269	05434500	89.7994	42.5094	2003
Red Cedar River at Colfax	0.125	05367500	91.7111	45.0525	2003
Sheboygan River at Sheboygan	0.151	04086000	87.7539	43.7414	2003
Sugar River near Brodhead	0.199	05436500	89.3981	42.6117	2003
Trempealeau River at Dodge	0.399	05379500	91.5533	44.1317	2003