

Midwest Environmental ADVOCATES

pro bono publico

VIA US MAIL

November 22, 2002

Al Shea, Director
Bureau of Watershed Management
Wisconsin Department of Natural Resources
PO Box 7921
101 S. Webster
Madison, WI 53707-7921

RE: DNR RESPONSE TO COMMENTS ON DRAFT 303(D) LIST

Dear Mr. Shea,

We recently received the Wisconsin Department of Natural Resources (“DNR”) response to our comments on the 2002 Section 303(d) Impaired Waters List. We are concerned the DNR misunderstood several of the comments submitted on behalf of our client organizations, and by this letter make several clarifications.

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I. LISTING OF THREATENED WATERS AND WATERS PARTIALLY MEETING DESIGNATED USES

MEA wishes to make two clarifications regarding the DNR's response to MEA's comment that the DNR should list threatened waters and waters partially meeting designated uses.

First, even if the DNR believes that threatened waters and waters partially meeting designated uses are not required to be listed, we reiterate that the policy behind listing these waters is sound: to prevent water quality problems from growing worse, thereby saving public resources on expensive clean-up efforts that could have been avoided had the DNR been more proactive. The Minnesota Pollution Control Agency said it quite well in its listing methodology in reference to the underlying philosophy of its antidegradation policy:

“...it is almost always less costly to prevent clean waters from becoming polluted in the first place, than it is to clean them up after they no longer support designated uses.”

MINNESOTA POLLUTION CONTROL AGENCY, GUIDANCE MANUAL FOR ASSESSING THE QUALITY OF MINNESOTA SURFACE WATERS FOR THE DETERMINATION OF IMPAIRMENT, 8 (2002). Although the DNR may argue that listing does not equate to clean-up by the DNR, it at least puts the local community on notice that clean-up may be needed and can encourage community members to restore the waterbody. Including those waters in the 305(b) report, unfortunately, is not enough because the public is less likely to participate in that report, and that report does not rank waters for cleanup. In short, simply arguing that “we don't have to” is a poor response to an otherwise compelling policy argument to list threatened waters.

Second, a water that is partially meeting a designated use is also partially *not* meeting the designated use, which is a violation of water quality standards and therefore warrants listing under 40 C.F.R. §130.7(b). According to the DNR's definition (not found in any central document specifically related to 303(d) listing but instead found in a basin plan), “partially supporting” means a stream's water quality is below the maximum biological potential of the stream. This is use impairment, and streams “partially supporting” the codified use must be listed.

II. DESIGNATED USES, CODIFIED USES, ATTAINABLE USES, POTENTIAL USES, EXISTING USES

The DNR's response to MEA's comment urging the DNR to list streams for which the current, or existing, use does not meet the potential use is somewhat confusing. First, the DNR appears to misunderstand the definition of "designated use" as it is used and interpreted by the EPA. As we highlight and document in footnote 23 of our October 4, 2002 comment letter, "designated uses" are

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

40 C.F.R. §131.2(f) (emphasis added). EPA guidance clarifies:

When designating uses, States may wish to designate only the uses that are attainable. However, if the State does not designate the uses specified in section 101(a)(2) of the Act, the State must perform a use attainability analysis under section 131.10(j) of the regulation. *States are encouraged to designate uses that the State believes can be attained in the future.*

U.S. EPA WATER QUALITY STANDARDS HANDBOOK, 2ND ED. §2.4 (1994) (emphasis added). In other words, the designated use was intended to be the *attainable* use of the waterbody, not simply the use that the DNR selects. Using the DNR's terminology, the *codified* use and the *potential* use should be identical. Moreover, the DNR appears to agree with this concept. See May 1, 2002 Comment Letter by MEA to DNR, at 7 *citing* DNR 104 Advisory Committee minutes of 2/3/98, 5/15/96, and 3/13/96. Designating attainable uses ensures that the goals of the Clean Water Act are being met by restoring our public waters to their full ecological potential.

To the extent that the DNR's codified uses are not also its potential uses, such use designations are inconsistent with EPA's interpretation of its own regulations, and as a result, are inconsistent with the Clean Water Act itself. Although the DNR argues that it is bound by the use designations in its administrative rules, those use designations are incorrect to the extent that they differ from the potential or attainable uses of the waterbody.

Second, if the potential use and the codified use were intended to be identical, then waters not meeting the potential use should be listed. The DNR's definition of "Not Supporting

[Potential Uses]” (again, not found in any central document specifically related to 303(d) listing but instead found in a basin plan) is defined as:

“When a stream or stream segment’s *existing* biological use is less than its *potential* biological use by a factor of 1 or more of the following codified use classifications:.....”

By definition, those waters where the existing use of the water body does not meet its potential use should be listed.

III. ALLEGED INCONSISTENCY WITH PREVIOUS COMMENTS

The DNR suggests that MEA’s comments on the 303(d) list are inconsistent with its comments on the DNR’s proposed waterbody use designations. This alleged inconsistency appears to arise from the fact that MEA had previously urged the DNR to use current and site-specific information in making use designations. Regarding the 303(d) list, MEA commented that the 303(d) list should include those streams where the existing use does not meet the potential use. The DNR laments that this conflicts with our previous comments because no monitoring information exists for many of those streams, but that they have only been evaluated and assessed and therefore will not be listed.

First, it is not incongruous for MEA to argue that the DNR should use current and site-specific information in making use designations, while also argue that the DNR should list streams where (even if only limited) data suggests an impairment exists. MEA simply urges the DNR to use the best data where available. Moreover, removal of designated uses, as the DNR attempts to do with revisions to NR 104, requires a an entirely different level of analysis under 40 C.F.R. §131.10 than that required in listing waters for impairment under 40 C.F.R. §130.7. In other words, they are apples and oranges.

Second, the DNR states that it is surprised by MEA’s comment but apparently forgets that neither MEA, nor likely any other member of the public, received the DNR’s alleged listing methodology which states that only monitored streams will be listed. With its response to comments, the DNR provided a document titled “Wisconsin Department of Natural Resources Methodology for Placing Waters on Impaired Waters List.” The header stated “Revised October 15, 2002.” The public comment period for the list closed on October 4,

2002. MEA did not receive this document during the comment period. We did not even receive this document at our October 15, 2002 meeting.

MEA *did* receive from the DNR sometime in September of 2002 a document titled “Wisconsin Department of Natural Resources Criteria for Placing Waters on Impaired Waters List.” In the header, that document stated “Draft – Revised September 2002.” At our October 15, 2002 meeting, the DNR provided a document titled “Guidance to Regions for October 2002 303(d) list.” In the header, that document stated “For Internal Use – February 26, 2002.” Both documents are attached. Neither document was intended for public consumption nor made available as part of the proposed 2002 303(d) list, nor did either document state that only “monitored streams” would be listed.

The DNR appears to assume that MEA and its clients had a copy of the listing methodology that it sent to the EPA for review, even though it had prepared that methodology subsequent to the public comment period. We are surprised by DNR’s statement in the comment response document that MEA and Wisconsin’s Environmental Decade had a copy of the listing methodology during the comment period, despite that the DNR admitted on October 15, 2002 that no such methodology existed.

In essence, the DNR had no final methodology available during the comment period, and then responded to the public’s comments based in part by referring to a methodology that did not previously exist. This is outrageous. We marvel at the DNR’s expectation that sending a press release to 1,000 entities would have any value when the public had no reliable knowledge regarding how the DNR determines impairment for purposes of listing.

IV. DNR’S METHODOLOGY

The DNR now claims, despite admissions to the contrary during our October 15, 2002 meeting, that it has a listing methodology for the 303(d) list and that our clients had a copy of that methodology during the comment period. Our remarks above dispose of that contention. Regardless, the DNR submitted that methodology to the EPA for review.

Although we are encouraged that the DNR has taken the first steps towards developing a methodology for public use, we have several concerns with the DNR’s listing methodology. For the sake of brevity, we will name only a few here. First, it appears to be entirely post-hoc. That is, it appears that the DNR put it to paper after it finalized the 303(d) list, posing

significant due process and notice problems to riparian landowners and members of the public.

Second, it lacks the detail and specificity that other states' listing methodologies in Region V appear to have. As one example, the DNR's methodology states that only those streams that meet the monitoring definition will be listed, although it does not state what the monitoring definition is or where it can be found. Perhaps the most resourceful citizen might realize that the definition can be found in the back of a state of the basin report, provided that citizen knows that these reports even exist. As another example, the DNR implicitly and categorically excludes "assessed" and "evaluated" streams, but does not define "assessed" or "evaluated" in the methodology, nor explain why those streams are excluded from the list. The DNR appears to have merely appended a portion of a basin plan to this new methodology. Again, the DNR did not provide the public with this information during the comment period or even inform the public that the information was available.

Third, aside from the lack of detail and explanation, the DNR's methodology excludes streams from the list which are impacted by flows. The methodology states that the DNR will not list those streams because no criteria exist for flows. However, also in the methodology, the DNR states that streams which are not meeting their designated uses will be listed. The lack of criteria for flows is immaterial. If the use is not being met, then the stream should be listed. See *Jefferson County PUD #1 v. Wash. Dep't of Ecology*, 114 S.Ct. 1900 (1994) (state had broad discretion to impose minimum stream conditions on a hydroelectric project to ensure that beneficial uses of the water would be protected). The DNR cannot categorically exclude these waters.

Attached to this letter, we provide the listing methodologies for Iowa, Illinois and Minnesota. Without endorsing the content of any of these methodologies, we note that Wisconsin's methodology falls embarrassingly short of the effort those states have put forth.

V. CONCLUSION

We hope this letter has helped clarify our position to the DNR on various elements of the 303(d) list. Although we are optimistic that the DNR's 303(d) listing process will improve, we will also closely watch the EPA's review of the DNR's submission.

Sincerely,

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Midwest Environmental Advocates, Inc.

On behalf of

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

cc: Jo Lynn Traub, Director
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