



# Capitol LINK

CURRENT ISSUES AFFECTING WISCONSIN AGRICULTURE & AGRI-BUSINESS

May 4, 2012

## Wisconsin DNR Proposes New Impaired Waters List for Phosphorus

By Jordan Lamb -- DeWitt Ross & Stevens

Section 303(d) of the federal Clean Water Act (CWA) requires all states to publish a list of waters that do not meet state water quality standards every two years. That list is called the “Impaired Waters List” or the “303(d) List.”

The Wisconsin Department of Natural Resources (WDNR) published and publicly noticed its newest 303(d) list for 2012 in December of 2011. However, in April of 2012, in response to comments from the U.S. Environmental Protection Agency (EPA) and other public comments, the WDNR published a *changed* list and re-opened the public comment period for review of those changes. The comment period on this new list is currently open through [May 18, 2012](#).

The most significant change for Wisconsin farmers is the creation of a new category of impaired waters called category “5P.” This new category consists of 98 additional waters that exceed the state’s water quality limitations for Phosphorus.

The addition of these 98 new waters to Wisconsin’s 303(d) list has significance. The overall objective of the CWA is to “restore and maintain the chemical, physical and biological integrity of the nation’s waters” (Section 101(a)). Consistent with this objective, states are required to identify, prioritize and establish “Total Maximum Daily Loads” (TMDLs) for each of water on the list (Section 303(d)). Therefore, for each water identified by the State of Wisconsin as “impaired” and placed on the 303(d) list for Phosphorus, the state must calculate the maximum amount of Phosphorus allowed to enter each water body such that the water body will meet the state’s water quality standards for Phosphorus.

The pollutant load is calculated in TMDLs. A TMDL allocates the pollutant load for a water body among both nonpoint sources and point sources of pollution. The TMDL may specify Phosphorus reductions that are required to meet a water body’s TMDL that are more stringent than Wisconsin’s nonpoint source pollution performance standards for Phosphorus. If so, then those reductions must be formally promulgated as an administrative rule as an amendment to Wis. Admin. Code § NR 151.

To review the WDNR’s complete list of proposed 5P waters and review the public comment process, go to the DNR’s web site at: <http://dnr.wi.gov/org/water/condition/impaired/>.

# Revisiting the Lake Beulah Decision –DNR’s Expanded Duty to Review Effects of High Capacity Wells

By Jordan Lamb -- DeWitt Ross & Stevens

In July 2011, the Wisconsin Supreme Court unanimously decided a case called *Lake Beulah Management District v. Dep’t of Natural Res.* that has altered the scope of the Department of Natural Resources’ required environmental review associated with the issuance of high capacity well approvals in Wisconsin.

In *Lake Beulah*, the Supreme Court unanimously held that, despite the restrictions in Wisconsin’s high capacity well statute, the DNR has a *duty* to “consider the environmental impact of [any] proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state.”

Prior to this decision, Wisconsin statutes only required DNR to conduct an environmental review of: (1) a high capacity well that is located in a groundwater protection area; (2) a high capacity well with a water loss of more than 95 percent of the amount of water withdrawn; or (3) a high capacity well that may have a significant environmental impact on a spring. Wis. Stat. § 281.34(4). For all other high capacity wells, approvals and recordkeeping were required, but the statute did not impose a specific requirement for an environmental review for *every* well.

The *Lake Beulah* decision is of concern not only for its obvious potential effects on getting an approval for a high capacity well and the potential for active citizen groups to challenge the approval of wells, but it also brings into question the effect that the high capacity well statute has with regard to providing limits on DNR’s duty and authority. Specifically, it has raised the issue that the DNR may be required to consider the *cumulative effects* of approving a new well (*i.e.*, the effect that the new well might have on existing wells or future water use.) The full effects of this decision on the DNR are yet unknown, but those seeking high capacity well permits should be aware of this change in the DNR’s duty.

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