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## Memorandum

**TO:** Kyle Burton, DNR  
**FR:** Sarah Geers and Tressie Kamp, Midwest Environmental Advocates  
**DT:** December 11, 2015  
**RE:** Applicability of Wis. Stat. Ch. 292 and Wis. Admin. Code Ch. 738 to Manure Contamination of a Well

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### **BACKGROUND & QUESTION PRESENTED**

Per discussion at the November 16, 2015, Kewaunee County Short-Term Solutions Workgroup meeting, Midwest Environmental Advocates (“MEA”) submits this brief memorandum to answer the following question:

- Whether funding from Wis. Stat. Ch. 292 and corresponding regulations at Wis. Admin. Code Ch. 738 (hereinafter the “Spills Law”) would apply to manure contamination of a well, specifically to bacterial and/or nitrate contamination.

### **ANSWER**

As detailed herein, MEA reads the Spills Law to apply to contamination of a well in a special eligibility area when bacterial and/or nitrate contamination is caused by livestock manure.

MEA respectfully requests that you share this memorandum with Legal Services at the Department of Natural Resources (“DNR”) and clarify whether the DNR’s opinion is aligned with the following analysis.

### **ANALYSIS**

1. *Pursuant to the Spills Law, manure in groundwater is a hazardous substance.*

The Spills Law applies to actions taken by the DNR under Chapter 292 to provide temporary emergency water supplies to an affected party with a “contaminated well” or “contaminated private water supply” impacted by environmental pollution from a site or facility subject to Wis. Stat. § 292.31 or impacted by a discharge of a hazardous substance subject to Wis. Stat. § 292.11. *See* Wis. Admin. Code § NR 738.02.

The threshold question is therefore whether manure falls within the Spills Law definition of environmental pollution or hazardous substance. A “hazardous substance” is

any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics.

Wis. Stat. § 292.01(5). Manure is therefore appropriately classified as a “hazardous substance” once it enters groundwater.

2. *Spills Law funding applies to bacterial and nitrate well contamination caused by livestock in special eligibility areas.*

Spills Law funding generally does not apply to wells “contaminated by bacteria or nitrate or both” when a well is not contaminated by any other substance. Wis. Admin. Code § NR 738.13(7). Significantly, this exclusion “does not apply to a residential well that is in an area of special eligibility for compensation as declared by the department under s. NR 738.06(1m).” *Id.*

DNR regulations define a well is contaminated if it “is located in an area of special eligibility for compensation as declared by the department under s. NR 738.06 (1m) and meets criteria under s. NR 738.06 (1m) (a) and (b).” *See* Wis. Admin. Code § NR 738.03(4).

DNR regulations also state the following with respect to areas of special eligibility for compensation:

The department may approve a temporary emergency water supply funded by the environmental fund if the affected party is in an area of special eligibility for compensation for well contamination . . . if the following criteria are satisfied:

- (a) Results of tests . . . establish that *wells in the area* are contaminated by fecal bacteria, and
- (b) Evidence demonstrates that the bacterial contamination is caused by livestock.

Wis. Admin. Code § NR 738.06(1m) (emphasis added).

When read together, these provisions of NR 738 unambiguously require that the DNR define an area of special eligibility according to presence of wells contaminated by fecal bacteria from livestock manure. Once a special eligibility area is so defined, however, within that area an owner of a well contaminated only with nitrates would be eligible for Spills Law funding. MEA's interpretation is based on the regulatory language providing that special eligibility areas are established when "wells in the area" test positive for fecal bacteria from livestock manure, and once that area is designated, the exclusion for both bacteria or nitrates does not apply. *See* Wis. Admin. Code §§ NR 738.06(1m)(a), 738.13(7). Stated otherwise, when a well owner in a special eligibility area seeks compensation for a well contaminated only with nitrates, the exclusion in NR 738.13(7) does not apply and that well owner is eligible for Spills Law funding.

3. *Contaminated wells outside of special eligibility areas cannot receive funding based on nitrate contamination alone.*

Wisconsin Admin. Code § NR 783.03(4) also defines a well as contaminated when all four following criteria are met:

- a. The well serves potable water for humans or humans and livestock.
- b. The well is not a "public water supply" as defined in ch. NR 809.
- c. The well has been determined or is suspected by the department to have been adversely affected by a site or facility subject to s. 292.31, or by a hazardous substance discharge subject to s. 292.11.
- d. The well produces water that meets one or more of the following criteria:
  1. Contains one or more substances of public health concern, other than bacteria or nitrate, in excess of a primary maximum contaminant level contained in ch. NR 809.
  2. Contains one or more substances of public health concern, other than nitrates, in excess of an enforcement standard established in ch. NR 140.
  3. Is subject to drinking water advisory from the department for substances other than bacteria or nitrates.

*See* Wisconsin Admin. Code § NR 783.03(4)(a)-(d). Because of the nitrate exclusions in sub. d(1)-(3), this provision would not apply to wells outside of special eligibility are that are contaminated by only nitrates. It would, however, apply to a well contaminated with bacteria from concentrated animal feeding operation manure. Wis. Admin. Code § NR 783.03(4)(d)2. Note, however, that this provision could trigger applicability for Spills Law funding when viral contamination is at issue, provided that the DNR has issued a drinking water advisory per sub. (d)(3).

## **CONCLUSION**

The recommendations of the Short-Term Solutions Workgroup should include the use of Spills Law funding to address contamination of a well in a special eligibility area when bacterial and/or nitrate contamination is caused by livestock manure. In order for Spills Law funding to be an accessible and a meaningful resources for owners of contaminated wells, the Short-Term Solutions Workgroup should recommend that the DNR streamline the process of designating areas of special eligibility for compensation.