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COMMUNITY SHARES

July 29, 2016

To: Members of the Wisconsin Natural Resources Board
ATTN: Laurie Ross, NRB Liaison
Via email at laurie.ross@wisconsin.gov

Re: Statement of Scope for Board Order WT-15-16

Midwest Environmental Advocates, Inc., (MEA) appreciates the opportunity to submit written comments with respect to agenda item 2.C.1. of your August 2016 Natural Resources Board (NRB) agenda. MEA is a non-profit environmental law center that provides legal and technical assistance to communities and families working for clean air, clean water, and clean government. The following comments address MEA's support for and concerns about the Statement of Scope for Board Order WT-15-16. This scoping statement describes proposed rulemaking for agricultural performance standards in targeted sensitive areas.

MEA, along with other organizations, petitioned the U.S. Environmental Protection Agency (EPA) in October 2014 to use its Safe Drinking Water Act emergency authority to address the groundwater quality crisis in Kewaunee County. This Petition catalyzed formation of stakeholder work groups, convened by the Department of Natural Resources (DNR) to address the crisis by examining the letter and implementation of existing law that regulates a major source of groundwater pollution in sensitive areas—land application of manure by concentrated animal feeding operations (CAFOs) and smaller farms. Many of the changes to Wis. Admin. Code ch. 151 (NR 151) proposed in the scope statement come from the work group final recommendations.

We support revisions to NR 151 to implement recommendations necessary to protect surface water and groundwater quality in sensitive areas. These changes, and many more, are necessary to protect drinking water quality. Members of the Kewanee County work groups have vetted changes and agreed that these updates are necessary to protect public health. Such updates are therefore appropriately resolved via emergency rulemaking, as is within the DNR's authority, so that changes occur without the years-long delay of permanent rulemaking.

While we support the proposed rule change, it does not go far enough and will not be enough to improve water quality in sensitive areas. DNR initially proposed additional, necessary rule changes to Wis. Admin. Code ch. NR 243 (NR 243) to protect groundwater from manure land application in sensitive

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areas, but DNR seems to have abandoned that proposal. Any rule package intended to better protect Wisconsin's targeted sensitive areas would not be complete without an update to NR 243 and NR 151. Many of the changes proposed for NR 243 that DNR has now abandoned are also necessary to correct inconsistencies between state law and the federal Clean Water Act.

Stalling updates of NR 243 discredits many important recommendations of the Kewaunee County work groups and disregards the federal, state and local resources that were allocated toward this and other work groups convened to protect water resources from manure application. MEA asks that the NRB request an update from the DNR regarding the status of related Statement of Scope WT-14-16, which would have revised rules in NR 243. We further request that DNR explain its reasons for withdrawing this proposal. For reference, please see attachments A and B for the original Statement of Scope for WT-15-16 and WT-14-15, respectively.

It is with expertise gained through our participation in the Kewaunee County stakeholder work groups, along with ongoing related work in Wisconsin's targeted sensitive areas, that we submit the following comments.

Comments on Statement of Scope WT-15-16 for revisions to NR 151, and incorporation by reference into NR 243:

<u>Collaboration with DATCP on changes to agricultural performance standards</u>: The scope statement before the NRB differs from DNR's initial proposal in that it does not explain the importance of concurrent rule changes by the Department of Agriculture, Trade and Consumer Protection (DATCP). The scope statement sent to the Governor stated as follows:

> "Pursuant to s. 281.16(3)(b), DATCP is required to promulgate technical standards and conservation practices to implement the performance standards. An alternative that does not include any revision to these rules will result in widespread inconsistency in what practices are followed in sensitive areas similar to the current status, and continue to result in groundwater and surface water that does not achieve water quality standards."

Collaboration between DNR and DATCP—the agencies with shared rulemaking authority over the landspreading practices at issue in NR 151—is necessary to ensure regulatory consistency among Wisconsin's livestock operations. MEA asks that the NRB direct the DNR to work with DATCP on these proposed rules and provide updates to the NRB on this collaboration during the rulemaking process.

<u>Best Management Practices that take into account manure type</u>: Different types of manure present different risks to surface water and groundwater. The work group recommendations take into account different types of manure and appropriate practices that apply. Agricultural performance standards in NR 151 should take into account an

operation's manure solids, nutrient, and pathogen content, in addition to total quantity, in order to better protect groundwater.

Addressing emergency land application of manure on frozen or snow-covered ground: The statement of scope for Rule No. WT-15-16 proposes an important update to emergency spreading restrictions. Manure applied in certain winter conditions cannot be used by crops for nutrient uptake and as such create an increased risk for runoff and water pollution. The DNR currently has a very broad authority to allow emergency winter spreading. In a recent letter by Secretary Stepp regarding the work group recommendations, she stated that DNR has developed a staff guide regarding emergency land spreading approvals. For consistency and transparency, the considerations in the staff guide should be promulgated by rule. At a minimum, revised NR 151 and NR 243 should require DNR to track operator requests and approvals for emergency winter spreading, and provide strict limits on and consequences for operators who routinely seek approval for emergency spreading in winter.

Include performance standards for sensitive areas in addition to karst regions: Wisconsin has numerous areas with different hydrologic, geologic, and soil features that are highly susceptible to groundwater contamination. Kewaunee County and other karstic regions of our State certainly pose particular groundwater quality concerns. However, regions of Wisconsin such as the Central Sands and the clay plain of the Lake Superior region also lend to rapid pollutant and nutrient leaching from the surface to groundwater resources. A more accurate, protective NR 151 update would acknowledge that Wisconsin's sensitive areas extend beyond the State's counties with karstic features.

Advocacy for adequate DNR staff and resources: The revised NR 151 would establish new agricultural performance standards that place additional staffing and financial burden upon local governments to facilitate the implementation of required best-management practices. Decreased funding for the DNR Targeted Runoff Management Grant Program in this coming fiscal year will further strain implementation resources available to local governments. The scope of proposed rulemaking should address local government implementation costs and challenges to ensure widespread adoption of performance standards and to achieve desired water quality results.

Comments on Statement of Scope WT-14-16 regarding proposed changes necessary to protect water quality and comply with the federal Clean Water Act:

The following changes to NR 243 were included in DNR's statement of scope WT-14-16, and must be a part of this rule change to achieve real water quality improvements and comply with the Clean Water Act.

Updated rainfall data for manure volume, storage and land application: The draft Statement of Scope for WT-14-16 would have updated NR 243 to reflect more accurate rainfall data from NOAA Atlas 14. This update is not extended to the proposed scope of updates to NR 151. Currently, NR 243 provides the amount of rain that constitutes the 25-year 24-hour storm for each Wisconsin county. This rainfall data is used as a trigger for key regulatory

requirements that apply to large CAFOs, including discharge limits from the production area, manure volume and storage calculations, and the amount of land needed for manure application. The NRB should approve a revised statement of scope that requires the update of both NR 151 and NR 243 to reflect more accurate climate data available from the federal government.

Public notice requirements for substantial changes to NMPs: The scope statement sent to the Governor provided "Propose revision to add public notice requirements related to the Nutrient Management Plan (NMP), as well as to define substantial revision to an NMP, to be consistent with Federal Regulations." The Clean Water Act requires public notice of all substantial changes to NMPs, such as additions of land application fields. Currently, and for the past several years, DNR does not comply with this requirement and does not provide public notice of substantial changes to NMPs for large CAFOs. DNR has told stakeholders for several years that it's working on this issue and developing a web portal on which it can public notice substantial changes to NMPs and provide copies of revised NMPs, which can be very large documents. But DNR continues to put other priorities ahead of public notice, including a web portal to make the permit process easier for large CAFO operators. MEA requests that the NRB ask DNR to update NR 243 to clarify public notice requirements and do whatever it needs to start public noticing all substantial changes to NMPs.

Incorporate updated NRCS standards: NR 243 incorporates by reference numerous Natural Resources Conservation Service (NRCS) technical standards that provide specific, detailed performance standards for manure applications, the design of manure storage facilities and vegetated treatment areas (VTAs), among others. But DNR has not incorporated the most recent versions of these technical standards, which have come a long way in protecting water quality. For example, NRCS recently updated the NRCS 590 standard regarding manure applications to make necessary changes to protect water quality. DNR also recently proposed a guidance document regarding VTAs to fill the gap between outdated standards that do not adequately protect water quality. *See* Attachment C. These standards must be incorporated by rule for transparency and to protect water quality. There is no reason for DNR to require large CAFOs to comply only with outdated standards.

Maximum hydraulic rates for land application: The scope statement sent to the Governor provided "Section NR 243.14(2) is proposed to be revised to add maximum hydraulic application rates, based on site soil type and thickness over saturation and bedrock, such as is in the current s. NR 214.17, Table 3." The work groups discussed at length appropriate maximum hydraulic rates and noted that the standard for land applications of wastewater for non-CAFOs in NR 214 provide better water quality protections. Currently, NR 243 allows CAFOs to put crop yields ahead of water quality protections. DNR should revive its proposal to update NR 243 to balance the protection of our water resources with producers' interest in maximizing crop yields.

Practices to reduce pollutant load to impaired waters, and ORWs and ERWs: The scope statement sent to the Governor provided for "Additional practices to reduce pollutant load to impaired waters (303(d) listed), and to waters classified as ORW or ERW." This comment acknowledges that rule WT-15-16 by itself insufficiently protects Wisconsin's

highest-quality waters. The DNR is required by authority delegated from the EPA to implement an antidegradation program that maintains the status of the state's high-quality waters. The NRB must direct the DNR to fully implement its Clean Water Act obligations and promulgate rules as outlined in Statement of Scope WT-14-16.

Define "limited acreage" and percent of land required as "extra land" in NMP: Current rules require that NMPs include sufficient acreage for land spreading of manure, yet the rules do not clearly define such requirements. The DNR therefore implements acreage requirements on a case-by-case basis, leading to uncertainty and inconsistency for operators and lack of public transparency. When NMP review for land base requirements is uncertain or insufficient, the need for emergency winter spreading increases and causes additional emergency manure spreading concerns as discussed above on page 3 of these comments.

Practices to prevent public health impacts of manure irrigation: WT-15-16 omits promulgation of more protective rules for manure irrigation—an agricultural practice with unique public health and water quality concerns. A state manure irrigation workgroup concluded years of meetings in spring 2016 with recommendations regarding certain public health impacts of manure irrigation.

Comments regarding other critical work group recommendations that DNR should implement:

Inspection and monitoring of large CAFOs for compliance with the law: DNR needs sufficient staff to monitor, inspect, and perform other oversight functions to fully implement the proposed rule changes and existing law. The following recommendations should be incorporated into rules to provide accountability and consistency:

- DNR should fully review all NMPs when large CAFOs are issued or reissued WPDES permits, and when the operation requests significant changes to the NMP;
- DNR should conduct more frequent audits of how and when manure land spreading is occurring in sensitive areas, particularly karst areas and areas with shallow soils with less than 20 inches to bedrock;
- DNR should inspect land application sites during precipitation events that are likely to cause runoff-related water pollution, including significant rainfall and first snowfall;
- DNR should inspect all CAFOs at least one (1) time per year; and
- NMPs should be public noticed on a fully-funded web portal so that the public can better review, track and comment on NMPs.

Groundwater monitoring at large CAFO production areas and land application fields: Groundwater monitoring wells are the best way to quickly and accurately determine whether new performance standards actually achieve desired water quality results. Monitoring wells can also detect groundwater contamination from nitrates and bacteria before it causes harmful health impacts to nearby residents with drinking water wells. The scope of proposed rulemaking should include on and off-site groundwater monitoring for

CAFOs in order to evaluate the effectiveness of new performance standards and to protect human and community health.

In conclusion, MEA urges the NRB to direct DNR to address and incorporate the previously listed comments in the final version of the NR 151 scope statement. The legislative and gubernatorial control over the rulemaking process leaves ample room for special interest influence, as evidenced by the opposition of rule updates from the Dairy Business Association that may have led to withdrawal of proposed changes to NR 243 described above. It is therefore critical that NRB members and elected officials track this rulemaking package and ensure that revised rules move toward resolving the public health and water quality problems that the stakeholder work groups were intended to address.

Again, we appreciate the opportunity for written and in-person public comment on this important update to Wisconsin's regulation of runoff management and nonpoint source performance standards. Please contact us if you have questions.

Respectfully,

/s/

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