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VIA E-MAIL
AND U.S. MAIL

Ms. Nicole Richmond Clayton
Water Resources Management Specialist
WI Department of Natural Resources
P.O. Box 7921
Madison WI 53707-7921

RE: Fox River TMDL Comments on Behalf of the League of Wisconsin Municipalities

Dear Ms. Clayton:

Our office has represented the League of Wisconsin Municipalities on stormwater issues over the past year. In particular, we have worked with the Department of Natural Resources (DNR) on proposed revisions to NR 151 relating to urban stormwater standards for the MS4 permitted communities. The revisions were prompted because many MS4 communities were finding that reaching a 40% reduction in total suspended solids (TSS) by 2013 was not achievable, or was not achievable in a cost-effective manner. The proposed revisions allow for extended compliance schedules through the use of an extended implementation plan over 10 years or more beyond 2013.

We are writing today to comment on the Fox River TMDL as it relates to MS4 issues. The proposed TMDL proposes reductions in TSS for MS4 communities of 65.1%. We have a number of significant concerns with this proposal. As a preliminary matter, we are disappointed that many of the comments we made following the December 2009 presentation seem to be ignored. We are also disappointed that there have been few opportunities for involvement in the TMDL process and after years of work, the regulated

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community has been given such a limited time to review and comment on the draft. We hope that the following comments will be considered before the TMDL is finalized.

1. Implementation Issues

The Draft TMDL does not include a formal implementation plan, and provides little indication of how the draft allocations will translate into enforceable permit limits and best management practices. Such an implementation plan is critical. Based on our experience in trying to achieve 40% reductions through best management practices, we do not believe that communities will be able to reach a 65.1% reduction. Flexibility through trading and watershed permitting is critical to realize these goals.

The TMDL must allow for an implementation plan that provides flexibility in the timing and methods for meeting whatever standard is ultimately chosen. Communities will certainly not be able meet reductions of 65.1% in the course of the next 5-year MS4 permit. If an implementation plan is not included in the final TMDL, it must, at a minimum, acknowledge that the proposed allocations will not be enforceable in MS4 permits prior to the development of an implementation plan.

2. Integration with NR 151

It is also unclear from the Draft TMDL how the new TSS allocations will be integrated with DNR's recently-approved NR 151 rule package. As noted above, the League worked with the Department to establish a long term planning process to achieve TSS reductions. There is no reference to NR 151 in the TMDL or how those provisions will be integrated into the NR 151 process. In the absence of an integrated plan, the TMDL must make clear that the proposed allocations will not be enforceable in MS4 permits until an implementation plan is developed.

3. Basin-Wide Issues

The implementation of the Lower Fox River TMDL should also be delayed until corresponding studies have been completed for the rest of the basin. As acknowledged in section 4.1.5 of the Draft TMDL, the drainage basin feeding into Lower Green Bay (also known as the "Fox-Wolf Basin") is much larger than the LFR Basin alone. It also includes the Upper Fox River Basin and the Wolf River Basin. In fact, the LFR Basin comprises only ten percent of the total land area in the Fox-Wolf Basin. Draft TMDL, figs. 16 and 17, at 30. And while the LFR Basin accounts for significantly more than ten percent of the total TP and TSS load entering Lower Green Bay, the Draft TMDL

July 26, 2010
Page 3

estimates that approximately 57% of the TP load, and 42% of the TSS load originate from upstream sources outside of the LFR Basin.

4. Other Developed Area Issues

The Draft TMDL seems to focus on MS4s and does not appear to address other developed areas. The stormwater loading from state highway rights-of-way and County MS4s must be included in the analysis and allocation. Mapping and modeling data are available for these areas. In addition, there should be a waste load allocation for Urban Non-Regulated areas. Just because there are not permits for these areas does not mean they should not be included. The rate payers of municipal MS4s and treatment plants should take on the additional burden of these areas.

In summary, while this Draft TMDL is an important step in evaluating point and nonpoint contributions of TSS into the Lower Fox Basin, it is premature to utilize this TMDL for setting permit limits for MS4 communities. In addition, the Department should complete studies for the rest of the Fox basin before allocations in the Lower Fox River basin can be finalized and include all areas within the basin in deriving allocations.

Very truly yours,

STAFFORD ROSENBAUM LLP



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cc: Russell Rasmussen, DNR (via email)
Laura Blake, Cadmus Group (via mail)
League of Wisconsin Municipalities (via email)