

# Midwest Environmental ADVOCATES

*pro bono publico*

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July 20, 2011

Mr. Lawrence Lynch  
Wisconsin Department of Natural Resources  
PO Box 792  
Madison, WI 53707-7921

Via Email: [Lawrence.lynch@wisconsin.gov](mailto:Lawrence.lynch@wisconsin.gov)

Re: Proposed High Capacity Well  
Long Property  
Town of Utica, Wisconsin

Dear Mr. Lynch:

On May 16, 2011, my colleague, Jodi Habush Sinykin, submitted comments on the Environmental Assessment regarding the application for this high capacity well proposed in close proximity to the North Branch of Copper Creek, a Class I trout stream. In addition to outlining various requirements and conditions which are required to be included in high capacity well approvals under NR 820.30, Wis. Adm Code, Ms. Sinykin noted the need for expert scientific input on hydrogeology and biology in order to appropriately evaluate the potential impacts of the proposed well.

It should be apparent from the fact that 87 individuals and groups provided comments on the EA regarding this well that protecting high quality trout streams is a matter of interest and importance to a great many Wisconsinites. It is also clear from the Department's June 24, 2011 Comment Summary and Response that the Department has attempted to devise some conditions and requirements to protect Copper Creek. Unfortunately, due in large part to the inadequacy of the information submitted by the applicant regarding the hydrogeology of the area, and regarding the aquatic biology and ecology of Copper Creek, the Department's effort to fashion protective conditions required by Wisconsin law has essentially been conducted in the dark. The Department has had to guess at the likely impacts of the well, and make assumptions regarding the hydrogeology and biology of the area without the actual scientific data that is necessary to make reasoned, and reasonable

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decisions regarding well approval conditions that could be expected to protect the resources that Wisconsin law requires the Department to protect. Moreover, review by scientific and technical experts confirms that the Department's hydrogeological and biological interpretations, understandings, and assumptions are erroneous, unsupported, and contrary to readily available data. While the Department can be commended for trying to fashion conditions to protect Copper Creek, the unfortunate conclusion is that it has failed at that effort to date.

Please be informed that following review of the Comment Summary and Response, Save Copper Creek has retained Midwest Environmental Advocates to represent it in connection with the Department's approval of this high capacity well. It is our opinion that approval of this well, with the terms and conditions outlined in the Comment Summary and Response, would be unlawful for a number of reasons, including:

- Inadequacy of the environmental review and analysis
- Failure to include conditions that "ensure that the well does not cause significant adverse environmental impact"
- Failure to include conditions that will assure maintenance of flow conditions in Copper Creek "such that the fish populations and critical habitat are not adversely affected."

These conclusions are based, in part, on review of the letters submitted to you by hydrogeologist Robert J. Nauta on July 13, 2011 and UW-Milwaukee Biology Professor Timothy J. Ehlinger on July 17, 2011, and on Ehlinger's July 19, 2011 email. The input of those scientific and technical experts should lead the Department to change course. Instead of approving the well with conditions that the Department hopes and assumes will be protective, the Department should determine that it does not currently have the necessary field data, both hydrogeological and biological, to fashion conditions that will assure protection of the resources which Wisconsin law mandates it to protect. Additional data should be collected, additional analysis should be performed, and an Environmental Impact Statement should be prepared, before approval of this well should be considered.

As to hydrogeology, Mr. Nauta notes that the Department's characterization of nearby springs as seepage springs is contrary to his personal observation of upwelling springs, with important implications for understanding the hydrology of the area. The Department's calculation of reduced flows resulting from groundwater pumping is based on assumptions regarding the presence, location, and functioning of layers of shale noted in well logs in the region. However, as Mr. Nauta points out, there is no indication that any effort has been undertaken to determine the relative elevation of the shale layers at those residential wells compared to the shale layers at the Long well site. This is important given the location of the Long well in a local "valley" and the location of many of the residences in the area on the region's higher "ridges." Moreover, Mr. Nauta's review has identified 11 of the residential wells

as being finished in the shale, meaning that the shale is acting as an aquifer, transmitting water, rather than as a barrier, or aquitard, as assumed in the Department's calculations. The interpretation of the underlying hydrology on which the Department's analysis of the well application was based is contradicted by the readily available data. To approve the well under these circumstances would be arbitrary, unreasonable, and erroneous.

Both Mr. Nauta and Dr. Ehlinger criticized the reliance on a single stream measurement, taken in March, to calculate the reduction in stream flow which could result from the proposed pumping. Both indicate that during low flow periods, the reduction in flow would be much greater. Both noted the increased sensitivity of the fishery to reductions of flow during low flow periods. As Dr. Ehlinger noted, neither the EA nor the Comment Summary and Response considered the severe negative impacts on the fishery of reduced temperatures resulting from lowered flow during the winter. Moreover, Dr. Ehlinger's letter points out the complete lack of any factual basis for the Department's conclusions regarding the ability of the fishery to recover in the event that groundwater pumping is found to have harmed the Copper Creek fishery, and pumping is then reduced or even ended completely. It is apparent from Dr. Ehlinger's review that approval of this high capacity well has the potential for irrevocably damaging the class 1 trout fishery in Copper Creek. Under those circumstances, an EIS is clearly required.<sup>1</sup>

Mr. Nauta and Dr. Ehlinger have identified the areas in which further investigation is needed in order to obtain the data upon which meaningful scientific and technical conclusions can be drawn, and on which reasonable decisions regarding well approval conditions can be made. These include:

- An aquifer performance test
- A groundwater model
- A detailed examination of trout age structure in the vicinity of the proposed well and at the location of the other adjacent populations referenced in the EA
- Review by qualified cold water fisheries biologists and hydrogeologists

In addition to conducting the further investigations and analyses noted above as part of preparing an EIS regarding this proposal, the Department needs to consider the implications of the Public Trust doctrine, and of the recent Supreme Court decision in *Lake Beulah Management District v. State of Wisconsin Department of Natural Resources*, 2011 WI 54 (2011), on its duties to protect the waters of the state in connection with this proposed well.

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<sup>1</sup> The prospect that the class 1 trout fishery could be permanently damaged or destroyed, before pumping is reduced or discontinued, could lead to a real "train wreck", for both the well developer and for those primarily interested in protecting the natural resources. A damaged fishery and an unusable investment in a high capacity well would benefit no one. It would seem that it would be in the well developer's interest to invest in the upfront hydrological and biological investigations needed to provide the factual basis on which the Department could sensibly make decisions regarding approval of the well.

It is Save Copper Creek's position, for all the reasons set forth above, that the proposed well should not be approved at this time. If, the Department nevertheless proceeds on its previously announced plan to issue the well approval in the near future, without further analysis, Save Copper Creek believes changes to some of the proposed conditions are advisable:

*1. Amend Condition 2 as follows:*

Use of the well in a manner other than as described is a violation of this approval. If the owner intends to use the well for a purpose not expressly allowed under this approval or requests a modification to any other condition, the owner shall submit a new application for a high capacity well approval, subject to full review under Chapters NR 820 and NR 812.

*Explanation:* The owner should be obligated to submit a new application for any change, not just a change in the "purpose." The owner might request a change in the pumping limits, in the monitoring requirements, record-keeping, the 80-mile hauling distance, etc., which could be interpreted as something other than a change in the "purpose." Since any of these changes could expand the adverse environmental impact of the well's operation beyond that anticipated in the original approval, they should likewise trigger a full review. In a July 1 radio interview, the well owner clearly stated that he intends to push for liberalization of the conditions.

*2. Amend Condition 5 as follows:*

Water from the well shall not be hauled a distance greater than 80 miles ~~without approval of the Department.~~

*Explanation:* The owner's application indicated that the well would be used for "nearby" water users. The 80-mile restriction is a key condition and the DNR should not be able to waive the 80-mile limitation unilaterally without a full review and without an opportunity for public input. Furthermore, the condition as written contains no standards by which the DNR would decide whether to waive the 80-mile limitation. "Nearby" should mean "nearby".

*3. Amend condition 9 as follows:*

The well shall be equipped with instrumentation capable of monitoring water levels on a continuous basis and shall allow for remote access by the Department through either telephone or internet connections.

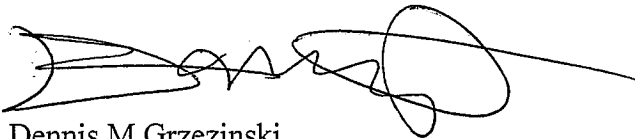
*Explanation:* The monitoring well data should be available to the Department on a continuing basis.

4. *Amend the conditions to require the data and reports to be made available to the public via the internet on a continuing basis.*

*Explanation:* In view of the numerous vacancies, retirements, and staffing constraints at DNR, it is important that this information be available on a timely basis for public review as well as review by shorthanded and understaffed DNR personnel.

Your consideration is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Dennis M Grzezinski', with a long horizontal line extending to the right.

Dennis M Grzezinski

Senior Counsel

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