Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Wisconsin

October 20, 2015

Petitioners:

John Domino, Acting Chairman of Tarrant Lake Preservation Committee
Ronald Grasshoff, Friends of the Lower Wisconsin Riverway
Dean Hoegger, Clean Water Action Council of Northeast Wisconsin
William Iwen, Kewaunee Citizens Advocating Responsible Environmental Stewardship
Doug & Sherryl Jones, Friends of the Lower Wisconsin Riverway
Dave Marshall, Friends of the Lower Wisconsin Riverway
Cheryl Nenn, Milwaukee Riverkeeper
Allie Raven, member of the Bad River Band of Lake Superior Chippewa
April Stone Dahl, member of the Bad River Band of Lake Superior Chippewa
Elaine Swanson, People Empowered Protect the Land of Rosendale
Jim Swanson, Wisconsin Wildlife Federation
Nancy & Lynn Utesch, Kewaunee Citizens Advocating Responsible Environmental Stewardship
Jim Wagner, Clean Water Action Council of Northeast Wisconsin
Timm Zumm, Friends of the Lower Wisconsin Riverway

Filed by Petitioners' Representative, Midwest Environmental Advocates, Inc.

TABLE OF CONTENTS

INTRODUCTION: page 1

PETITIONERS' INTERESTS: page 2

LEGAL BACKGROUND: page 20

- **I. The Clean Water Act Envisions Delegation of NPDES Programs to Authorized States: page 20**
- **II. The EPA has a Responsibility to Withdraw Delegated State Programs that Fail to Comply with the Clean Water Act: page 23**
  - **a. Wisconsin's Legal Authority No Longer Meets Requirements of the Clean Water Act: page 26**
    - i. Neither the Legislature nor the DNR has promulgated or enacted authorities necessary for Wisconsin to comply with the Clean Water Act.
      1. *The DNR is not adequately responding to known statutory and regulatory omissions and deficiencies that Wisconsin must resolve in order to meet minimum requirements of the Clean Water Act.*
      2. *The DNR lacks the legal authority to implement and administer the stormwater WPDES Program in compliance with federal law.*
      3. *Wisconsin has failed to enact new authorities to remedy antidegradation program deficiencies previously identified by the EPA.*
         a. Wisconsin's antidegradation implementation regulations allow a lowering of water quality without a showing that the new or increased discharge is necessary, and lack a cap on cumulative discharges exempted as "insignificant."
         b. The DNR allows permitted dischargers to increase total pollution loading to receiving waters without performing an antidegradation review.
         c. The DNR's antidegradation evaluation procedure contains exemptions that violate federal law.
         d. The DNR interprets its antidegradation rules as not requiring consideration of all reasonable alternatives before issuance of a WPDES permit.
         e. Wisconsin law lacks opportunity for public input regarding whether lowering of water quality is necessary or will accommodate economic and social development.
         f. The EPA should adopt federal antidegradation implementation procedures for Wisconsin.
    - ii. Wisconsin legislative action has struck down or limited Wisconsin's authority to operate the WPDES Program in compliance with the Clean Water Act.
      1. *Wisconsin's statutory rulemaking process prevents the DNR from timely revising the WPDES Program to comply with federal law and regulations.*
  - **b. The DNR's Operation of the WPDES Program Fails to Comply with the Requirements of the Clean Water Act: page 49**

i. The DNR interprets its authority to administer the WPDES Program in contradiction of the Department's commitments to the EPA, restricting the rights of Wisconsin residents.
   1. *Wisconsin restricts review of WPDES permits to groups of five or more persons in violation of the Clean Water Act.*
ii. The DNR repeatedly issues WPDES permits that violate the requirements of the Clean Water Act.
   1. *Despite the DNR's adoption of phosphorus criteria and the EPA's detailed approval of Wisconsin's associated implementation rules, the DNR continues to issue WPDES permits with phosphorus terms that fail to meet state and federal requirements.*
      a. WPDES permits include excessive compliance schedules that do not comport with the purpose or intent of federal law.
      b. WPDES permits allow violation of water quality standards in downstream waters.
iii. The DNR's operation of the WPDES Program violates public participation requirements of the Clean Water Act.
iv. The DNR fails to reissue expired permits in a timely manner.
v. The DNR fails to seek necessary EPA approval of WPDES Program changes.
   1. *The EPA has not approved statutory revisions to Wis. Stat. Ch. 283 that revise the approved WPDES Program as it relates to issuance of permits that authorize adaptive management option to meet water quality based effluent limits for phosphorus or TSS.*
   2. *Despite EPA disapproval, WPDES permits do not need to include mercury limits during the initial permit term.*
   3. *WPDES permits did not include WQBELs for additives in noncontact cooling water in certain circumstances.*
vi. The DNR does not allocate sufficient staff time toward resolution of WPDES Program deficiencies.
   1. *The DNR could address certain WPDES Program deficiencies by exercising its emergency rulemaking authority.*

c. The DNR Does Not Have an Adequate Regulatory Program for Developing Water Quality-Based Effluent limits in WPDES Permits: page 79

i. WPDES permits are not required to include effluent limitations to meet narrative water quality standards or prevent acute harm to fish and other aquatic life.

III. The Only Remedy to the DNR's Failure to Comprehensively Address the July 2011 Deficiency Letter is for the EPA to Require Prompt Corrective Action by the DNR or Withdraw the DNR's NPDES Program Authority: page 80

a. The Administrative Procedure Act Requires the EPA to Respond to this Petition for Corrective Action within a Reasonable Timeframe.
b. Other WPDES Program Deficiencies Require an Expedited Response from the EPA.
c. The EPA Constructively Approved the WPDES Program Despite the Program's Non-Compliance with the Clean Water Act.

CONCLUSION: page 85

INTRODUCTION

Petitioners, by their representative Midwest Environmental Advocates, Inc., submit this Petition for Corrective Action to the Environmental Protection Agency ("EPA") pursuant to 33 U.S.C. § 1342(c)(3). Petitioners request that the EPA withdraw the authority of the Wisconsin Department of Natural Resources ("DNR") to administer the state-delegated National Pollutant Discharge Elimination System ("NPDES") program if the DNR does not promptly correct permitting program deficiencies as outlined in this Petition.

NPDES permits are integral to federal regulation of our nation's water quality. The Clean Water Act allows the EPA to delegate its authority to issue NPDES permits to the states, but this delegation is neither permanent nor unconditional. 33 U.S.C. § 1342(b). At minimum, delegated programs must comply with Clean Water Act standards in federal statutes and regulations. If the EPA determines that a state's program is not in compliance with the Clean Water Act, it must rescind delegation of authority and resume issuing permits for dischargers in that state. 33 U.S.C. § 1342(c).

As Petitioners detail herein, Wisconsin's delegated NPDES program violates the Clean Water Act on many fronts. The DNR has failed to address Wisconsin Pollutant Discharge Elimination System ("WPDES") Program deficiencies despite a written notice from the EPA in July 2011 that detailed 75 ways in which the WPDES Program failed to comply with federal law. *See* Letter from Susan Hedman, Regional Administrator, EPA Region 5, to Cathy Stepp, Secretary, DNR (July 18, 2011) [hereinafter Hedman to Stepp]. The DNR continues to issue WPDES permits and promulgate and enforce state laws that do not comply with the Clean Water Act. Although the broken WPDES Program is troubling alone, the DNR also lacks the staffing and funding to remedy program deficiencies. Furthermore, even with appropriate staffing and

funding, the DNR lacks much of the legal authority necessary to bring Wisconsin into compliance with the Clean Water Act. As detailed throughout this Petition for Corrective Action, Wisconsin courts and the Legislature have for years cut away at the DNR's power to make and enforce rules. The EPA's longstanding knowledge of the defective WPDES Program imposes a mandatory duty upon the EPA to begin the process of corrective action or withdraw the DNR's authority to operate a state-delegated water permitting program.

Petitioners allege, at minimum, the following deficiencies in the WPDES Program as administered by the DNR, and reserve the right to detail further deficiencies both within this Petition for Corrective Action as well as in supplemental filings:

- The DNR no longer has authority necessary to administer the WPDES Program in full compliance with the Clean Water Act, which is grounds for program withdrawal pursuant to 40 C.F.R. § 123.63(a)(1);
- The DNR operates the WPDES Program in a manner that violates Clean Water Act requirements in federal statutes and regulations, which is grounds for program withdrawal pursuant to 40 C.F.R. § 123.63(a)(2); and
- The DNR lacks an adequate regulatory program to develop water quality-based effluent limits for inclusion in WPDES permits, which is grounds for program withdrawal pursuant to 40 C.F.R. § 123.63(a)(5).

Petitioners' first request of EPA is that the Agency begin withdrawal proceedings by fixing a date for one or more public hearings, and identifying specific WPDES Program deficiencies that hearing(s) will address. A public hearing is a crucial step toward making the general public aware of the fact that Wisconsin's water pollution permitting program violates minimum federal water protection laws and regulations.

PETITIONERS' INTERESTS

Petitioners are Wisconsin residents who face consistent and growing endangerment to our State's water resources, defying an expectation that the DNR will act in the name of the public

trust to protect water quality. Petitioners share a personal commitment to Wisconsin's waters and explain herein how particular WPDES Program deficiencies impact their ability to fish, swim, recreate, and otherwise utilize our State's treasured waters. Petitioners' testimonials demonstrate that water quality issues permeate throughout Wisconsin and are not confined to a particular area of the State.

Another commonality among Petitioners is their historical efforts at collaboration with the DNR in the name of protecting Wisconsin's water resources. Petitioners do not participate lightly in this effort; all have arrived at a conclusion that the status of the State's water quality warrants wide-sweeping change with participation and encouragement from the public as well as all levels of government.

1. Petitioner Cheryl Nenn is the Riverkeeper for Milwaukee Riverkeeper, a member organization of Waterkeeper Alliance. One of Cheryl's key responsibilities is to identify sources of and solutions to pollution in area rivers. She also oversees a citizen-based stream monitoring program as well as stormwater monitoring programs that detect illicit discharge and monitor the effectiveness of stormwater best management practices. Recently, she helped prepare several Watershed Restoration Plans and Implementation Plans for the Menomonee and Kinnickinnic River Watersheds in the Milwaukee area.

As part of this planning process, a ten-mile section of the Menomonee River was identified as having a large "unknown" source of bacteria, with "bacteria levels found to be about 1000 times higher than portions of the river upstream." The DNR did little to assist in determining the cause of the unknown source of pollution. Instead, Cheryl's group coordinated with University of Wisconsin-Milwaukee scientists to test stormwater pipes discharging to the polluted section of the river. The group ultimately found that "about 50% of those stormwater

pipes ha[d] human sewage in them," even though stormwater discharges should consist primarily of rain water and/or snow melt. Milwaukee Riverkeeper has tested stormwater pipes since 2008, and continues to find that municipalities are releasing human sewage via the stormwater system without adequate DNR enforcement.

Cheryl has experienced many occasions where the DNR has undermined community efforts to hold stormwater violators and other polluters accountable. Several years ago, Cheryl and other community members sought to negotiate a settlement with a developer for clearcutting a riparian forest, disturbing well over an acre of land next to the Milwaukee River, and discharging stormwater without a permit. The settlement would have required the developer to restore the site as well as provide permanent public access to the area, which was a historic fishing access point. The DNR stepped in toward the end of settlement discussions and granted an "after the fact" permit that insulated the developer from litigation and undermined settlement efforts. The DNR dealt a significant blow to the community, which lost environmental assets including a riparian forest with old- growth trees and the possibility of a long-term public access easement.

Unfortunately, Cheryl has seen more than this one instance of the DNR prioritizing the needs of industry above the needs of the people of Wisconsin. She has noted that when the community brings stormwater runoff cases or concerns to the DNR, "the DNR consistently sides with the developer." Even with added pressure from citizen advocates across the state, the DNR has not adequately strengthened or enforced stormwater permits to protect Wisconsin watersheds. This has led Milwaukee Riverkeeper to join the group of Petitioners seeking EPA intervention in strengthening stormwater regulations to address the impacts of stormwater runoff, which is keeping many urban rivers from achieving fishable, swimmable goals.

2. Petitioner Ron Grasshoff has witnessed the DNR consistently refuse to perform antidegradation studies for new dischargers. Ron lives in the Town of West Point and has worked with numerous advocacy groups and municipal planning committees to protect the water resources of his hometown. West Point borders the Lower Wisconsin State Riverway, Crystal Lake, and it is adjacent to Mud and Fish Lake. The Lower Wisconsin Riverway is classified as an Exceptional Resource Water. Ron is concerned that the DNR continues to issue WPDES permits for discharges to the Lower Wisconsin State Riverway without adequate study of antidegradation impacts. Ron knows that the shortcomings in the DNR's antidegradation efforts are non-compliant with the federal Clean Water Act and also have negative ramifications for Wisconsin's waters.

One of Ron's biggest citizen advocacy efforts resulted from a proposed pumping permit for the Fish, Crystal and Mud Lake Rehabilitation District. The Lake Rehabilitation District sought a permit to discharge to the Lower Wisconsin State Riverway in order to address rising lake levels at all three lakes in the district. The DNR granted a WPDES permit without any antidegradation review for the Mud and Fish Lake discharge. For the Crystal Lake discharge, they again did not complete a thorough antidegradation review. For example, they failed to consider the fact that water pumped from the lake ultimately flows to an environmentally sensitive backwater slough where threatened and endangered species are present. The slough has very low flows mainly from groundwater. Instead in their analysis they assumed that lake water discharges would be diluted by flows in the main river channel rather than the slough. Again, The Lower Wisconsin River is classified as an Exceptional Resource Water for which the Clean Water act requires an antidegradation review before permitting new discharges.

Ron has worked with experts to track water quality and has noticed large trails of algal blooms from the permitted Mud and Fish Lake discharge. Ron believes that the Crystal Lake discharge will have a cumulative adverse effect, deteriorate water quality, and affect endangered species in the area. Ron is upset that public funds have been invested in the protection of Fish, Crystal, and Mud Lakes, yet the DNR still lacks commitment to conducting thorough antidegradation analysis regarding the long-term effect of WPDES permitting upon the Lower Wisconsin State Riverway. The EPA needs to increase oversight of the DNR's antidegradation program to prevent further degradation to the Wisconsin River. It is time for the EPA and the DNR to acknowledge that it is not the role of local citizen activists to force regulatory agencies to perform duties that are already required by the public trust doctrine. Ron understands the importance of bringing water quality issues to the attention of the DNR, but he feels that it the responsibility of regulatory agencies to lead the ground work necessary to protect Wisconsin's water resources.

3. Petitioner Dave Marshall is directly affected by the DNR's scant reasonable alternatives analysis during the WPDES permitting process. A resident of Barneveld, Wisconsin, Dave is a professional hydrologist and aquatic ecologist who frequently fishes, swims, boats, and otherwise uses Wisconsin waters. Dave has channeled his misgivings about the DNR's antidegradation review into actions such as submitting comments to the DNR, participating in contested case hearings, and collecting evidence that details the effects of pollution from dischargers. Dave has noticed and recorded the impact of nutrient discharges to Wisconsin waters. For example, Dave has recorded nitrate concentrations in excess of 15 mg/L in his frequented fishing areas along the Lower Wisconsin State Riverway, which is one of the most biologically diverse large river ecosystems in the United States. Dave has recorded

concentrations over 30 mg/L in the drinking wells of some of his fellow community members. Because of his professional expertise, he is aware that the concentrations of nitrates that he has measured are dangerous for public health and detrimental to water quality and aquatic life.

Dave is rightfully concerned about impacts of agricultural practices implemented by concentrated animal feeding operations ("CAFOs") in the absence of effectively implemented regulations. The DNR has largely disregarded his pleas to robustly consider alternatives to issuance of WPDES permits for surface water discharges that will lower the water quality of the Lower Wisconsin State Riverway. He expressed his concern that "[the] DNR has routinely demonstrated that it will approve the WPDES permits even when confronted with substantial evidence that the waterbody and landscape cannot accommodate the excessive nutrient loadings." Because his attempts to encourage the DNR to incorporate a thorough reasonable alternatives analysis into the WPDES permitting process have ultimately resulted in frustration, with this Petition for Corrective Action Dave is urging the EPA to get involved and compel the DNR to protect Wisconsin's waters from unnecessary degradation.

4. Petitioner Jim Wagner, resident of De Pere, Wisconsin, is impacted by the DNR's failure to promptly implement a comprehensive antidegradation program. One of his biggest concerns regarding water quality in Wisconsin is whether the DNR takes seriously its public trust responsibilities to protect the state's waters from degradation. In fact, the status of Wisconsin's waters causes Jim to question the safety of drinking water treated by municipal water systems, as well as the health ramifications of consuming fish from the water bodies around his home. For example, he made a personal decision not to fish the Fox River because of polychlorinated biphenyl (PCB) contamination that he became aware of as a teenager. Learning of this contamination permanently turned him away from wanting to catch and prepare his own fish. He

is consistently worried that the DNR, in light of growing industrial activities and large, industrialized farming, does not have the resources to comprehensively monitor the safety of local drinking water supplies or the safety and quality of the state's broader water resources.

Jim feels that it was initially proper for the EPA to delegate NPDES permitting authority to the DNR, but at this point he feels it is time for the EPA to step in and respond to the consistent and steady decline of the DNR's protection of Wisconsin's water resources. He appreciates that major environmental laws such as the Clean Water and Clean Air Acts require power at the federal and state level. He also appreciates the importance of local commitment to water quality, and Jim has made numerous efforts to protect state waters through his participation as the secretary of the board of the Clean Water Action Council. However, after failing to see meaningful updates in Wisconsin's antidegradation program, he is relying upon this Petition for Corrective Action to urge the EPA to adopt federal antidegradation implementation procedures for Wisconsin.

5. Petitioner Dean Hoegger, Executive Director of the Clean Water Action Council of Northeast Wisconsin, is also signing on to this Petition for Corrective Action in part because of the EPA's failure to bring the WPDES antidegradation program into compliance with the Clean Water Act. His concerns regarding the WPDES Program have steadily increased in the 35 years he has lived in Door County, Wisconsin, even as the DNR admits the Department's failures and commits to rectifying such failures. Dean is an avid outdoorsman and frequents numerous parks and lakes around his house, including one of favorite beaches in Algoma, Wisconsin. Dean describes trying to swim or navigate through the algal blooms as "paddling through soup," and at numerous times the smell emanating from algal blooms has forced him to close all doors and windows of his teaching studio that is three blocks away from the beach.

Dean is personally impacted by the worsening of algal blooms at numerous beaches surrounding his home. The Green Bay dead zone is most concerning to him because he lives near the shoreline of the Bay and witnesses the formation of an extreme dead zone each summer as surface waters become contaminated with nitrogen and phosphorus. Dean and his neighbors experience first-hand effects of the dead zone, including but not limited to unacceptable odor from algae blooms and dead fish that pile up on the shoreline. He is glad to see this problem receive increasing attention and media coverage, but he is distressed that increasing attention is not yet translating to meaningful improvement. *See, e.g.*, Lee Bergquist, *Pollutants Likely to Create Longest Dead Zone Yet in Green Bay*, Milwaukee Journal Sentinel (Apr. 1, 2015), *available at* http://www.jsonline.com/news/statepolitics/pollutants-likely-to-create-longest-dead-zone-yet-in-green-bay-b99473535z1-298367521.html (last visited Oct. 15, 2015).

Dean has written letters to legislators, attended conferences, and done numerous presentations to encourage robust water quality laws and halt degradation to Wisconsin's waters. He is disheartened by the continued lack of response from the DNR. Furthermore, through Clean Water Action Council's participation in litigation to enforce water quality laws, Dean has come to understand that comprehensive efforts such as this Petition are necessary to address the breadth and complexity of deficiencies with the WPDES Program. Though the DNR is aware of antidegradation failures, the Department fails to comprehensively resolve the issues. Dean feels that if the DNR will not or cannot address his numerous concerns regarding antidegradation laws in Wisconsin, it is time for the EPA to get involved.

6. Petitioners Lynn and Nancy Utesch think that Wisconsin laws and regulations make it too difficult for individuals and organizations to find a like-minded group of individuals that have the time, resources and will to challenge a WPDES permit. Though an entire

community may have concern regarding a permit, formalizing a group of petitioners is a complicated matter. Petitioners are leaders in the citizen group Kewaunee Citizens Advocating Responsible Environmental Stewardship (CARES)[1] and are water monitoring citizen partners with the DNR. The Utesches invest "time, energy, and personal finances" to help keep their community healthy through water testing, outreach, and education. Lynn Utesch explains that state law as currently interpreted by the courts serves as a barrier that prevents interested or concerned parties from challenging permits. Lynn has experienced difficulties in finding four other community members "with a strong case, need, and connection to the permit" that would allow a cohesive group to form around a permit challenge. Lynn has also struggled to appease multiple parties with divergent priorities when looking to form a group of petitioners. Lynn has found that forcing five interested parties to challenge together devalues individual concerns such that only the strongest voices are heard.

Nancy Utesch states that community members are often reluctant to speak out against a permit for fear of local political and social ramifications. By creating a rule that limits citizen permit challenges to groups of five or more individuals, the DNR places an additional burden upon citizen advocates that are already going above and beyond their daily responsibilities to protect their community.

7. Petitioner April Stone Dahl is experiencing the degradation of waters in and near the Bad River Reservation in Northern Wisconsin as a result of the DNR's refusal to consider downstream waters during WPDES permitting decisions. Though historically healthy, the waters of the state that April uses and relies upon are becoming contaminated by upstream polluters. April lives near numerous farms that discharge to the same surface and groundwaters, and she is

[1] *See* Kewaunee Cares, https://kewauneecares.wordpress.com (last visited Oct. 16, 2015); Restore Kewaunee, http://www.restorekewaunee.com (last visited Oct. 16, 2015).

“concerned that facilities are permitted with insufficient regard or consideration of downstream water quality.” One of the creeks that she monitors in cooperation with the Bad River Watershed Association is located just a few miles from her home and is impacted by runoff from a nearby farm. April has spent roughly six of the last ten years volunteering her time gathering data about various waterways located within five to 15 miles of her home.

April, along with other monitors with the Bad River Watershed Association, dedicate significant time and effort collecting data for chemical, bacterial and other analyses. “All of this data paints a picture of our watershed. It asks the question ‘is the water healthy or not,’ and if it's not - something needs to change.” For April, the data is important to gather, to interpret, and to use. She is thankful that the Bad River Watershed Association monitors the waters and informs the communities about the state of the waters. “They are providing vital information that the DNR cannot.” April lacks confidence that the DNR thoroughly analyzes the data or issues permits with sufficient consideration of what happens downstream as a result.

April has observed downstream pollution adversely affecting water quality as well as individuals and families who rely on subsistence farming. She is very concerned about the impact of pollutants upon downstream waters that are used for harvesting of wild rice and for other traditional and community purposes such as fishing and trapping. April is a firsthand witness to a change of her natural environment as a result of pollution from upstream contributors. Every year, she helps sponsor the Lake Superior Traditional Ways Gathering, an event where she and a group of educators teach paddling and other earth-based skills. Starting in 2014, the event organizers noticed an abnormal amount of bacteria in the water. April contacted the Tribal Natural Resources Department and was told that they “couldn’t pinpoint the cause of this problem but the pollutants were likely flowing downstream.” The Lake Superior area saw a

spike in bacteria that year, likely as a result of upstream polluters. The shores of Lake Superior where educators held their event was closed due to extremely high bacteria levels after the 2014 event. In 2015, attendees of the gathering were prevented during three days of a week-long event from swimming or otherwise utilizing the waters of Lake Superior due to unsafely high bacterial levels.

April and her peers are now concerned that the waters are unfit, even dangerous, for teaching and other traditional and community uses. April understands that the DNR may have limited capacity, but states that these limitations are not an excuse for failure to "consider downstream impacts when they issue a permit." April believes that the DNR needs assistance to find the balance between encouraging Wisconsin business and creating detrimental downstream impacts for communities that are disproportionately harmed without a say in the matter. EPA oversight and consideration of downstream effects would help ensure communities such as April's can continue thriving.

8. Petitioner Timm Zumm, resident of Spring Green, Wisconsin, is no longer able to enjoy some of his favorite areas in Wisconsin as a result of phosphorus pollution. Timm is the President of the Friends of the Lower Wisconsin Riverway and has spent over 25 years of his life working to protect the Lower Wisconsin River. Timm relies upon this treasured state water resource for canoeing, hiking, camping, fishing, and bird watching. Timm is concerned with the constantly increasing levels of nitrogen and phosphorus in the Lower Wisconsin River and the impact of excessive phosphorous loading upon ecology, public health, recreational activities, and the well-being of his friends and family.

Timm is a Petitioner because he has seen the intended purpose and benefits of the Clean Water Act "unravel due to regulatory inaction in Wisconsin." Though the Wisconsin River was

at one point threatened by municipal and industrial runoff, the Clean Water Act revitalized the area and greatly improved river quality. The Lower Wisconsin River is currently one of the most biologically diverse large river ecosystems in the U.S., but recent degradation due to runoff from large factory farms throughout central Wisconsin is cause for concern that the river may not maintain that designation.

Timm has seen the quality of some central Wisconsin lakes degrade so severely as to halt all recreational use. Water quality has forced him to change location or cancel recreational activities because it is impossible to camp, canoe, or fish on lakes that are so full of algae that they become toxic to plants and animals. The once pristine oxbow lakes adjacent to the Wisconsin River provided ecosystems for rare or endangered species, but recent toxicity is threatening these ecosystems. Timm consistently organizes citizen river monitoring but knows that these efforts do not provide long-term relief for state waters that are being damaged by regulatory failures. Timm has resorted to participation in this Petition for Corrective Action because the DNR has failed to monitor and protect Wisconsin's exceptional waters, necessitating that the EPA step in and enforce federal regulations.

9. Nitrate pollution also reduces the ability of Petitioners Doug and Sherryl Jones to use and enjoy Wisconsin's waters. Doug and Sherryl purchased property in Spring Green, Wisconsin, 15 years ago in part because the property includes a 13-acre slough that is part of the Lower Wisconsin River. Since that time, Doug and Sherryl have witnessed their clear lake transition to a green, algae-filled "golf course" with three to four inches of algae along the top. In response to these extreme algal blooms, Doug and Sherryl began testing their well water in 2007 and discovered nitrate levels at 20.3 ppm. Because this amount of nitrates can cause severe

health problems, Petitioners initial aesthetic concerns shifted toward fear that their water was no longer potable for visiting children and pregnant family members.

When Petitioners shared water testing results, more neighbors started testing their water and finding similar contaminant levels. Many were over the EPA's 10 ppm standard, with results ranging over 20 ppm and one as high as 39 ppm, almost four times the EPA's maximum contaminant level goals for drinking water. One of Doug's primary motivations for participating in this Petition for Corrective Action is his understanding that a substantial cost barrier prevents some families from purchasing a reverse osmosis system. The DNR's inaction with respect to phosphorus, nitrate, and related agricultural pollution has forced some residents in Doug's community to drink water that is grossly unsafe. Doug's discovery that his drinking water is polluted also affects the nearby sloughs because the nitrate-laden groundwater feeds those sloughs.

Doug and Sherryl are also participating in this Petition because the DNR continues to issue WPDES permits to facilities near and within their community with no regard for the area's sandy soils or the ever-increasing pollutant levels. Doug and Sherryl have created buffer zones, enacted a conservation easement, and received state grants to monitor their wells and lakes, but have not seen a significant improvement in their community's water resources. Unfortunately, the DNR has indicated that they will review these Petitioners' water monitoring results but will not commit to action as a result of Petitioners' efforts. Doug and Sherryl now feel that the DNR's longstanding inaction warrants the EPA's intervention to address the fact that the condition of Wisconsin waters, such as the oxbow lake present on their property and unsafe drinking water, presents a public health hazard.

10. Phosphorus and other nutrient pollution impact the ability of Petitioner Jim Swanson to use and enjoy Wisconsin's water resources. Jim has lived in the Menomonie area for almost 30 years and has watched the water quality around his home go from bad to worse as he uses Wisconsin waters for canoeing, fishing, biking, and swimming. Unfortunately, summer algal blooms have rendered unsafe and unusable all of the water bodies that he has lived near over the last two decades. Since 1987, Jim has observed the consistent degradation of numerous lakes in the Menomonie area and has been forced to travel further away from his home to enjoy the water. Jim's current home is several blocks from Lake Menomine, but summer algal blooms and the corresponding stench prevent him from using and enjoying the water or his backyard. Worsening water quality has affected Jim's enjoyment of Wisconsin's water resources and his ability to pass his love of canoeing down to his daughters.

Jim has attempted to work with the DNR to resolve worsening water quality--particularly increased phosphorus and other nutrient pollution—in the Red Cedar River Watershed. After years of meeting with the DNR, Jim feels that the DNR has abandoned efforts of real rehabilitation and demonstrated a low level of resolve to act upon the Department's knowledge of phosphorus pollution in his watershed. Jim has undertaken individual and citizen-lead efforts to improve the Red Cedar River Watershed, but he has arrived at an understanding that any longstanding change must involve a DNR that is committed to public health and water quality. The DNR has had decades to fix the Red Cedar River Watershed in the Menomonie area and "has simply avoided working on the problem." As he sees nutrient pollution and corresponding algal blooms in the Menomonie area and throughout Wisconsin continue to worsen, Jim feels that it is essential the EPA's involvement is a necessary prerequisite to any meaningful restoration of the water resources of his region of the state.

11. Petitioner Allie Raven signed on to this Petition for Corrective Action as a venue to detail the lacking opportunity for public participation in the DNR's decisions regarding protection of water quality and other natural resources. Allie is a Bad River Tribal member who lives in Bayfield County, near her Tribe's reservation. She and her family rely intimately upon the waters of the state for ceremonial, recreational, and sustenance purposes. Allie is signing on to this Petition for Corrective Action in part because her identity and culture tie her to the reservation near Lake Superior in northern Wisconsin, meaning that she will not be able to move in the event that water quality issues decrease her use and enjoyment of the lands and waters that surround her home.

Allie's efforts to collaborate with the DNR involve attending numerous DNR hearings to testify regarding wetlands protection as well as the water quality impact of a proposed open-pit iron ore mine. At least one of her hearing experiences caused her generally to feel disrespected and more specifically to feel that her concerns were minimized below the concerns of industry. After that, she decided that this Petition was necessary for the large task of bringing the DNR's WPDES permitting program into compliance with the Clean Water Act. Her biggest concern is that the DNR is consistently losing the wherewithal to monitor and enforce standards, much less encourage robust opportunities for public participation in the state's permitting processes. Allie urges the EPA to step in and protect the people of Wisconsin because the state is remiss in fulfilling their responsibility to protect public health and the environment.

12. Petitioner Bill Iwen resides in Algoma, Wisconsin and is also an active member of Kewaunee CARES. Bill decided to sign on to this Petition for Corrective Action primarily due to the lack of DNR responsiveness to his concerns regarding WPDES permits issued to Wisconsin's large farming operations. He is a neighbor of such a farm and has observed

numerous egregious instances of manure runoff into Kewaunee County's ground and surface waters, especially during the winter thaw and high-risk runoff season. His local land and water conservation responded by obtaining taxpayer-funded grant money to assist the farm owner in building a larger manure lagoon. The DNR was unfortunately not as responsive; and Bill continues to see the DNR "rubber-stamp" WPDES permits as large farming operations expand unchecked in his county with inadequate consideration of the impact upon Kewaunee County's water resources.

Through his individual efforts and his participation in Kewaunee CARES, Bill has made efforts to collaborate with the DNR. He is resorting to this Petition as a final, necessary effort because the DNR falls short of adequately resolving contamination of local wells and the streams, rivers and spring-fed lakes near his home and throughout Kewaunee County. Bill has personally tested dangerously high levels of nitrates and bacteria in Kewaunee County surface waters, and he is also concerned about the water quality impact of widespread use of unknown pesticides and herbicides. He feels that without EPA intervention, heavier rains and bigger farms will continue to endanger the health, safety and welfare of Kewaunee County residents and of the nation as a whole.

13. Petitioner Elaine Swanson takes issue with the DNR's lack of staff and funding necessary to issue and monitor robust permits, or enforce against permit violations. Elaine resides in the Town of Rosendale, located in Fond du Lac County. For over 30 years, her family has worked to restore woodlands, ponds, and native grasses on the land surrounding their home. Elaine's efforts have made her aware that the wetlands, high water table, and topographic features make the waters that surround her home particularly susceptible to contamination. Elaine stresses that the DNR's failure to focus resources on resolving WPDES program

deficiencies leaves Wisconsinites shouldering the burden of understanding the true water quality impact of permitted operations such as CAFOs. The DNR's lack of WPDES permitting staff has fostered a problematic regime that increasingly relies upon permittee self-regulation.

Elaine's grassroots group, People Empowered Protect the Land ("PEPL") of Rosendale, prepared for the public hearing on a proposed CAFO that would become the largest dairy operation in the state of Wisconsin by investing thousands of dollars in gathering valid science regarding the water quality and public health impacts of the proposed operation. The group prepared detailed soils maps, identified impacted watersheds and drain tiles within spreading fields, and hired an environmental expert to review the proposed WPDES permit. On the day of the public hearing, the DNR denied a display table to PEPL but allowed a table and opportunity for a video presentation by CAFO representatives. The DNR's denial deprived Elaine and concerned citizens from presenting all of the data and science that they had invested so much time and resources in gathering. PEPL and other monitoring groups were further alarmed by the DNR's hasty process of preparing an environmental impact statement for the CAFO in a matter of weeks, rather than taking the time for a more thorough and meaningful review.

Elaine's water protection efforts to date have led her to rely upon this Petition for Corrective Action as a necessary, wide-sweeping effort to encourage the EPA to remove political influence from the WPDES program and start aggressively requiring the DNR to bring the WPDES program into compliance with the Clean Water Act. She has seen an understaffed DNR focus their limited resources to address CAFO industry requests while simultaneously denying requests made by citizen monitoring groups. Elaine urges the EPA to recognize the DNR as an understaffed, underfunded and demoralized agency that is in need of restored integrity and ethics.

14. Petitioner John Domino was among a group of seven Columbia County residents who initiated an enforcement action in 2009 against an ethanol facility for WPDES permit violations. The enforcement action stemmed in part from residents' concerns that the WPDES permit violated the Clean Water Act by failing to analyze the impact of pollutants such as zinc, chlorine and arsenic upon fish, aquatic life, and recreational uses. John was a resident of Cambria, Wisconsin at the time of the enforcement action and corresponding administrative permit challenge and he continues to reside in Columbia County. As a resident of Cambria, he resided near Tarrant Lake and was alarmed to observe the negative water quality impact of discharges from the ethanol facility into Tarrant Lake and nearby waterbodies such as Duck Creek.

Prior to the beginning of the ethanol facility's discharges, John fished for largemouth bass, bluegill and northern pike in Tarrant Lake almost daily. He also enjoyed observing birds and other wildlife with his wife and family. After a severe storm in 2004 impacted Tarrant Lake's water quality, John and other community members donated time and financial resources to restoration of the lake and its fish populations. The community's efforts resulted in visible improvement of aquatic life as well as other wildlife that relied upon Tarrant Lake, Duck Creek, and surrounding waters. Understandably, when the DNR issued a permit to the ethanol facility with insufficient consideration of impact upon fish and aquatic life, John and his wife felt that this decision was a direct undoing of the community's commitment to improving Tarrant Lake's water quality. John stopped eating fish from the lake when he starting observing discharge from the ethanol facility in colors such as bright orange, yellow, and milky white.

John and the other participants in the enforcement action against the ethanol facility were pleased when the permittee ultimately agreed to cap its discharge pipe and stop discharging

wastewater. The progressing rehabilitation has led to a resurgence of fishing on the Tarrant Lake; with people now catching their limit of bluegill and bass. Several years after restoration of Tarrant Lake, it is once again a common focal point for the community. However, John is participating in this Petition for this Corrective Action because he believes that it is the role of the DNR, not piecemeal citizen-driven enforcement actions, to address water pollution throughout Wisconsin. He feels that this Petition and EPA involvement are necessary to require the DNR to implement numeric water quality standards in WPDES permits in order to protect the aquatic life and recreational uses of Tarrant Lake and Wisconsin's water resources in general.

LEGAL BACKGROUND

I. The Clean Water Act Envisions Delegation of NPDES Programs to Authorized States.

"[T]he Clean Water Act envisions a partnership between the states and the federal government." *Andersen v. Wis. Dep't of Natural Res.,* 2011 WI 19, ¶ 34, 332 Wis. 2d 41, 796 N.W.2d 1 (citations omitted); *see also Ark. v. Okla.*, 503 U.S. 91, 101 (1992). The EPA has primary authority over the Clean Water Act's NPDES permit program, and the EPA may delegate its authority to a state agency so long as the state program imposes standards at least as stringent as those of the federal program. 33 U.S.C. § 1342(b). In 1974, the EPA authorized Wisconsin, via the DNR, to administer the NPDES permit program in Wisconsin. *See* Wis. Stat. § 283.001(2); *see also* Letter from Russell Train, Administrator, EPA, to Wisconsin Governor Patrick J. Lucey, DNR (Feb. 4, 1974) [hereinafter Train to Lucey]; *Andersen*, 2011 WI 19; 33 U.S.C. § 1342(b).

Mindful of the federal nature of the Clean Water Act, Congress did not entirely eliminate the EPA's ability to oversee state-delegated NPDES programs. The EPA retains authority to take certain actions, including but not limited to: review of state program revisions; objection to

permits; and complete rescindment of the state program if the program no longer meets federal standards and the state fails to take corrective action. 33 U.S.C. § 1342(d)(2); 40 C.F.R. §§ 123.62-.63. In order to comply with NPDES permit program requirements and retain delegated authority, states must have the legal authority to implement specified federal regulations. 40 C.F.R. § 122.1(a)(5); *see also* 40 C.F.R. § 123.25(a). State programs may impose more stringent requirements, but must at all times retain the minimum specified federal requirements. 40 C.F.R. §§ 122.1(a)(2), 123.25(a), 123.25(a)NOTE. While state programs are not required to implement provisions identical to the federal requirements, "[i]mplemented provisions must . . . establish requirements at least as stringent as the corresponding listed provisions." 40 C.F.R. § 123.25(a)NOTE.

In 2011, the Wisconsin Supreme Court considered the relationship between NPDES requirements and Wisconsin's permitting authority under the WPDES Program. *See Andersen*, 2011 WI 19. In *Andersen*, the court held that concerned citizens could not challenge a WPDES permit in a contested case hearing on the basis that the permit does not comply with the federal Clean Water Act. *Id*. at ¶ 8; *see also* Att'y Gen. Statement Regarding Authority to Administer NPDES Permit Program, 16 (Jan. 19, 2012) [hereinafter 2012 AG Statement]. As a result of *Andersen* and subsequent judicial decisions, no remedy exists in Wisconsin law to force the DNR to issue permits in compliance with federal Clean Water Act standards. The decision in *Andersen* resulted in two significant outcomes that altered the state-federal balance of Clean Water Act oversight and severely limited citizen participation in WPDES permit challenges.

First, the *Andersen* court eliminated the only legal venue for citizens to challenge state-issued permits—an administrative contested case hearing—on the grounds that a permit violates federal law. According to the court, the EPA is the agency with the authority to determine

whether a WPDES permit complies with the Clean Water Act. *Andersen*, 2011 WI 19, ¶ 63. Specifically, the court opined that "requiring the DNR to . . . determine whether the permit complies with . . . federal regulations . . . would be to empower the DNR to undercut the EPA's determination [and] . . . the legislature could not have intended for the DNR to have the final say on a permit's compliance with federal law." *Id.* With one decision, Wisconsin courts therefore all but abolished the ability of citizens to enforce the terms and conditions of a WPDES permit at the state level when compliance with federal law is in dispute.

Second, the *Andersen* court established a presumption that a permit complies with federal law so long as the EPA does not disapprove or object to a particular permit. The court noted that in approving the WPDES Program, the EPA found that Wisconsin has adequate statutory and regulatory authority to issue permits in compliance with the Clean Water Act. *Andersen*, 2011 WI 19, ¶¶ 36-37, 60. The court also acknowledged that "any substantial revisions to the WPDES permit program have been, and will continue to be, subject to the EPA's approval." *Id.* ¶ 61. Because the EPA approved the WPDES Program and did not specifically object to the permit at issue in *Andersen*, the court found that the EPA effectively determined that the permit complied with the Clean Water Act. *Id.* ¶ 63.

Undercutting potential recourse in state court is more troubling when viewed in tandem with well-established precedential limits on challenges to WPDES permit terms and conditions in federal court, particularly when the EPA takes no action in response to permit issuance or violations. In general, it is difficult to challenge the EPA's failure to act. In the context of a NPDES permit challenge, the D.C. Circuit recognized this difficulty in stating, "a claim under § 706(1) [of the APA] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *See, e.g., Nat'l Wildlife Fed'n v. EPA*, 945 F.

Supp. 2d 39, 36 (D.C. Cir. 2013) (citation omitted); *see also Save the Bay, Inc. v. Adm'r of the EPA*, 556 F.2d 1282, 1295 (5th Cir. 1977) (litigation against the EPA for failure to veto a particular permit impermissible, with limited exception). Further, the 7th Circuit has specifically precluded federal court review of WPDES permits by holding that federal courts lack subject matter jurisdiction to review state Clean Water Act permits. *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 874-75 (7th Cir. 1989). Therefore, unless the EPA was required to act and it failed to do so, it is difficult, if not impossible, for citizens to challenge EPA inaction in court.

The EPA responded to *Andersen* by identifying 75 concerns with Wisconsin's authority to administer the WPDES Program and requesting that "the omissions and deviations in State authority be corrected quickly." *See* Hedman to Stepp at 2. The EPA also emphasized that it "has not approved those elements of the State's program that are less stringent or comprehensive than federally required." *Id.*

In response to the EPA, the Wisconsin Attorney General opined that "[t]o the extent that Wisconsin permits might not be consistent with the Clean Water Act all its regulations, this would not be a 'violation' of the Clean Water Act per se, certainly not in the sense that the state can be forced to administer the Act as EPA requires." 2012 AG Statement at 16. Rather, according to the Wisconsin Attorney General, "when there is no violation of state law and it is alleged that a state permit is inconsistent with the existing federal law, it is up to the EPA, the agency that administers and enforces the federal law, to decide whether a permit or the state program does not comply with federal law." *Id.* Furthermore, "the whole point of . . . Wisconsin's WPDES Program is to allow the State to administer a program that would not invite such federal intervention." *Id.* at 17.

II. The EPA has a Responsibility to Withdraw Delegated State Programs that Fail to Comply with the Clean Water Act.

Regrettably, federal intervention is one of the limited options remaining that could bring Wisconsin's water permitting program into compliance with the Clean Water Act and ensure that Wisconsin waters receive the minimum protections established by federal statute and regulations.

According to federal statute, "[a]ny State permit program . . . shall at all times be in accordance with [Section 402 of the Clean Water Act] . . . ." 33 U.S.C. § 1342(c)(2). Where the EPA Administrator determines after a public hearing that a state is not administering a program in accordance with Section 402, the state must take appropriate corrective action within ninety days or the Administrator shall withdraw approval of such program. 33 U.S.C. § 1342(c)(3). The EPA has identified several circumstances warranting withdrawal of state delegated NPDES permit programs. *See* 40 C.F.R. § 123.63(a)(1)-(6). These circumstances are detailed throughout this Petition for Corrective Action where relevant.

Either the EPA Administrator or a petition from interested parties may initiate proceedings for withdrawal of an approved state NPDES program. 40 C.F.R. § 123.64(b)(1).[2] Federal regulation addresses the rather complex and time-consuming process for withdrawal of a delegated program. *See* 40 C.F.R. § 123.64.

The EPA has identified omissions and deficiencies in the WPDES Program and has worked extensively with the state to encourage prompt resolution where program correction is necessary. *See generally* Hedman to Stepp. However, it has been four years since the EPA issued a deficiency letter and gave formal notice to the DNR to fulfill its obligation to correct the

[2] For example, when the EPA approved Wisconsin's phosphorus implementation regulations in July 2012, the EPA Region 5 Administrator reserved rights to take NPDES program withdrawal action pursuant to 40 C.F.R. § 123.63-64. *See* Letter from Susan Hedman, Regional Administrator, EPA Region 5, to Cathy Stepp, Secretary, DNR, at pages 2-3 (July 25, 2012).

WPDES Program. To date, the DNR has failed to make adequate corrections.[3] The DNR lacks the necessary staff or budgetary resources to rectify the identified omissions and deficiencies in the WPDES Program. Therefore, the DNR's current operational standards cannot and will not meet federal requirements under the Clean Water Act. This leaves the EPA with little choice but to withdraw the State's NPDES permitting authority, unless Wisconsin can provide immediate and ongoing resources sufficient to meet the minimum requirements of the Clean Water Act.

Moreover, the DNR would have to follow Wisconsin's onerous rulemaking procedures in order to bring the WPDES Program into compliance with federal law.[4] Compounding this rulemaking stalemate is the lack of state laws requiring compliance with federal law, as well as the lack of DNR resources necessary to bring state programming into compliance with the Clean Water Act. As outlined below, the DNR has refused to meet obligations identified by the EPA, to utilize its resources to address identified WPDES Program deficiencies, or to efficiently utilize rulemaking authority granted to the agency.

The EPA has for many years attempted, through the use of comments on and objections to state permits, to bring Wisconsin into compliance with the Clean Water Act. However, Wisconsin courts have neither deferred to the state Attorney General's efforts to interpret state law in compliance with the Clean Water Act nor required the DNR to take discrete action to bring the WPDES Program into compliance with federal law. *See generally Clean Water Action Council v. Wis. Dep't of Natural Res.*, 2014 WI App. 61, 354 Wis. 2d 286, 848 N.W.2d 336 [hereinafter *CWAC*]; *see also Petenwell & Castle Rock Stewards, Inc. v. Wis. Dep't of Natural*

---

[3] An EPA spokesperson commented in July 2015 that Wisconsin has addressed or started to address 40 of the 75 issues detailed in the Hedman to Stepp letter. *See* Steven Verburg, *Scott Walker Calls for Dramatic Rollback of EPA's Role in Regulating Polluters*, Wisconsin State Journal (July 28, 2015) http://host.madison.com/wsj/news/local/environment/scott-walker-calls-for-dramatic-rollback-of-epa-s-role/article_1b837577-6ffe-5fa4-8b6c-2561990ef91f.html (last visited Oct. 16, 2015).

[4] When the DNR deems it necessary to revise or enact rules in a quick manner, the Department has demonstrated willingness to rely upon emergency rulemaking authority as discussed further *infra*, Part II.b.vi.1.

Res., No. 13CV290, Circuit Court Final Decision and Order (July 22, 2014). The EPA has taken the position that it will object to permits that fail to comply with the Clean Water Act, and this commitment has produced limited success but no real change. Underlying this lack of change is the DNR's failure to incorporate EPA permit objections into proceeding WPDES permits with the same unresolved issues. *Compare* Letter from Kevin Pierard, NPDES Programs Branch Chief, Administrator, EPA Region 5, to Mike Lemcke, Wastewater Section Chief, DNR (Nov. 20, 2012) (regarding review of City of Oshkosh draft WPDES Permit No. WI-0025038-08), *with* WPDES Permit No. WI-0003620-07-0, Final WPDES Permit for Domtar A.W. LLC, Nekoosa Mill (Dec. 26, 2012). In sum, the EPA objected to the City of Oshkosh WPDES permit in 2012 with the expectation that the DNR would issue future permits in accordance with that objection, but then the DNR did not address the EPA's objection or guidance when it issued the permit in the Domtar case.

During its examination of the WPDES Program, the EPA explained that the DNR must implement revisions in accordance with the Clean Water Act. *See generally* Hedman to Stepp. Unfortunately, the DNR has largely ignored this federal direction. As discussed throughout this Petition for Corrective Action, it appears that the EPA cannot rely upon a voluntary, timely response from the DNR and therefore must either withdraw the state's NPDES permitting authority or require the DNR to provide immediate and ongoing resources sufficient to meet the minimum standards of the Clean Water Act.

a. Wisconsin's Legal Authority No Longer Meets Requirements of the Clean Water Act.

Petitioners outline in this subsection the actions of the DNR, the Wisconsin Legislature, and the Wisconsin Judiciary that have left the Department with inadequate authority to operate

the WPDES Program in compliance with federal law. This lack of authority warrants withdrawal of Wisconsin's authority to administer a NPDES permit program. 40 C.F.R. § 123.63(1)(i),(ii).

i. Neither the Legislature nor the DNR has promulgated or enacted authorities necessary for Wisconsin to comply with the Clean Water Act.

Both the DNR and the EPA have known since at least 2011 that resolution of WPDES Program requires department rulemaking. *See* Hedman to Stepp; Letter from Cathy Stepp, Secretary, DNR, to Susan Hedman, Regional Administrator, EPA Region 5 (May 18, 2012) [hereinafter Stepp to Hedman]. The following discussion details the failure of the DNR to adhere to the rulemaking schedule that was submitted to the EPA as necessary to bring the WPDES Program into compliance with federal law. Petitioners also highlight numerous ways in which the DNR lacks authority to administer the WPDES stormwater and antidegradation programs according to commitments previously made to the EPA.

1. The DNR is not adequately responding to known statutory and regulatory omissions and deficiencies that Wisconsin must resolve in order to meet minimum requirements of the Clean Water Act.

As noted above, the EPA sent a letter to the DNR in 2011 with directions to correct 75 WPDES program deficiencies and omissions that violated the minimum requirements of the Clean Water Act. *See generally* Hedman to Stepp. The EPA requested that "the omissions and deviations in State authority be corrected quickly," within one to two years, due in part to the *Andersen* decision. *Id.* at 2. The EPA recognized that it had previously disapproved certain omissions and deviations and emphasized the need for "immediate corrective action by the State." *Id.* at 1. Finally, the EPA reiterated that it had not yet approved "those elements of the State's program that are less stringent or comprehensive than federally required." *Id.* at 2.

The EPA requested a written response to the letter, and set a deadline on October 15, 2011, by which the DNR was required to submit "a detailed statement from the Wisconsin Attorney General, with specific citations, demonstrating that the State has adequate authority on the topics identified." Hedman to Stepp at 2. The EPA also asked that the DNR "provide the State's plan, including a schedule with milestones, for establishing the required authority." *Id.* These requests were intended to ensure that the DNR complete the required administrative rule changes no later than October 15, 2012, and the promulgation of any required statutory provisions by October 15, 2013. *Id.* Unfortunately, the DNR did not meet its deadlines for statutory and rulemaking updates. The timeline below details significant steps in the DNR's response to the 2011 deficiency letter:

- **October 14, 2011**: The DNR loosely identified intended remedies for each of the 75 federally-identified issues, including: rulemaking; statutory changes; an attorney general's certification statement; technical supporting information; and an addendum to the Memorandum of Agreement between the EPA and the DNR. *See* Letter from Matt Moroney, Deputy Secretary, DNR, to Susan Hedman, Regional Administrator, EPA Region 5 (Oct. 14, 2011).
    - The DNR did not provide a schedule for carrying out such remedies; rather the Department stated only that "[d]ue to recent statutory changes governing Wisconsin's rulemaking process, it is unlikely that rule changes can be completed in less than two years." *Id.* at 1. The DNR stated that "rules will now routinely take two to four years to become law." *Id.*

- **October 14, 2011**: The DNR also requested that the Wisconsin Attorney General prepare a statement regarding the DNR's authority to administer the WPDES permit program, particularly with regard to 12 of the 75 EPA-identified issues. *See* Letter from Matt Moroney, Deputy Secretary, DNR, to Attorney General Van Hollen, Wisconsin Department of Justice (Oct. 14, 2011).

- **January 19, 2012**: The Wisconsin Attorney General issued a "Statement Regarding [Wisconsin's] Authority to Administer [the] NPDES Permit Program." 2012 AG Statement. The statement included an analysis of state statutes, regulations, and case law and found that Wisconsin retained adequate authority to issue permits in compliance with the Clean Water Act on the 12 specified issues. *Id*. DNR Secretary Stepp later noted that the statement

"resolved a number of issues [identified in the EPA's July 2011 letter.]" Stepp to Hedman.

- **December 5, 2012**: The EPA confirmed resolution of these 12 issues, based on the Attorney General's statement as well as subsequent communications with the DNR. *See* Letter from Tinka Hyde, Water Div. Director, EPA Region 5, to Kenneth G. Johnson, Administrator, DNR Division of Water (Dec. 5, 2012) [hereinafter Hyde to Johnson].
    - Since 2012, Wisconsin courts have invalidated both the force and legal relevance of the Attorney General's statement. *See CWAC*, 2014 WI App. 61, ¶ 21. To the best of Petitioners' knowledge, the DNR has not proposed any regulatory or statutory changes to remedy the deficiencies that the Attorney General's statement would have resolved if the courts had upheld it.

- **May 18, 2012**: The DNR Secretary provided a more detailed schedule for regulatory changes to bring Wisconsin regulations into compliance with the Clean Water Act. *See* Stepp to Hedman. The DNR proposed eight rule packages to address multiple deficiencies with the state program. *Id.* The DNR committed to revisions to its regulatory authority according to a staggered timeline between January 2013 and June 2015. *Id.* The DNR cautioned that the Department's current rulemaking procedures take a minimum of 31 months and expressed willingness to resolve some issues more quickly through an Addendum to the Memorandum of Agreement to Administer the WPDES Permit Program. *Id.*[5] Because the EPA had "already received an Attorney General's Statement from Wisconsin which resolved a number of issues," the DNR's proposal did not suggest that the Department would take any further action on those issues. *See* Hyde to Johnson and enclosures.

The table below illustrates the progress of the eight rule packages that Secretary Stepp proposed in May 2012 in response to the EPA's legal deficiency letter. *See* Natural Resources Board Agenda Item, No. 3.C.4. (June 2012) (providing an update on the Department's schedule for responding to the EPA 2011 letter regarding WPDES program inefficiencies). Note that to date, Wisconsin has finalized only four rulemaking packages to address a minimal percentage of the more than 50 deficiencies that the DNR proposed to resolve via rulemaking. This is particularly concerning in light of the fact that four rulemaking packages were already in

[5] Petitioners are not aware of any pertinent Addendum to the Memorandum of Agreement as between the EPA and the DNR that has occurred since the 2012 Stepp to Hedman letter.

progress at the time of the EPA's July 2011 deficiency letter. Stepp to Hedman. The first two rule packages in particular were initiated years before the EPA's legal deficiency letter.

Rule Package	**EPA Identified Issues Addressed by Package**	**Public Hearings**		**Natural Resources Board (NRB) Adoption**		**Submission to Legislature**		**Current Status**
		Proposed	**Actual**	**Proposed**	**Actual**	**Proposed**	**Actual**	
1	1							Complete[6]
2	16							Complete[7]
3	8, 10, 17, other	5/2013	-[8]	9/2013	-	11/2013	-	October 2015 NRB vote on approval for public comment[9]
4	28, 32, 31, 35-38, 2, 30, 34, 41, 39-43, 70, 10, 74	4/2014	-	8/2014	-	1/2015	-	October 2015 NRB vote on approval for public comment[10]
5	2, 7, 11, 13, 14, 15, 20, 29, 46, 61,	10/2014	-	1/2015	-	6/2015	-	No action after Governor approval of scope statement[11]
6	3, 18, 21, 66, 22, 45, 47, 48, 50, 49, 51, 62, 65	3/2014	5/2014	6/2014	1/2015	1/2015	3/2015	Effective as of 8/2015[12]
7	9	4/2014	1/2013	6/2014	4/2014	1/2015	4/2015	Effective as of 6/2015[13]
8	23-26, 52, 53, 57, 67	8/2014	-	10/2014	-	1/2015	-	The DNR hasn't completed rule draft, environmental impact assessment

[6] Upon Petitioners' opinion and belief according to publicly available information. *See* State of Wisconsin Administrative Rules, https://health.wisconsin.gov/admrules/public/Search (last visited Oct. 16, 2015).
[7] *Id.*
[8] All cells with a dash indicate steps that have not occurred as of the filing date of this Petition for Corrective Action.
[9] Natural Resources Board Agenda Item, No. 3.A.2. (Oct. 2015), *available at* http://dnr.wi.gov/About/NRB/2015/Oct/10-15-3A2.pdf (last visited Oct. 16, 2015).
[10] Natural Resources Board Agenda Item, No. 3.A.3. (Oct. 2015), *available at* http://dnr.wi.gov/About/NRB/2015/Oct/10-15-3A3.pdf (last visited Oct. 16, 2015).
[11] State of Wisconsin Administrative Rules (July 12, 2012), https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=13186 (last visited Oct. 16, 2015).
[12] State of Wisconsin Administrative Rules (July 1, 2015), https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=13187 (last visited Oct. 16, 2015); *see also* Wisconsin State Legislature, CR 14-027, http://docs.legis.wisconsin.gov/code/chr/all/cr_14_027 (last visited Oct. 16, 2015).
[13] *See* State of Wisconsin Administrative Rules (Jan. 16, 2014), https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=13223 (last visited Oct. 16, 2015); *see also* Wisconsin State Legislature, CR 13-112, http://docs.legis.wisconsin.gov/code/chr/all/cr_13_112 (last visited Oct. 16, 2015).

								process, or scope statement[14]

The table demonstrates a failure of the DNR to fully adhere to the rulemaking schedule that the Department submitted to the EPA as necessary to bring the WPDES Program into compliance with federal law. Because roughly 11 months will pass between approval for a public hearing and submittal to the Legislature,[15] a rule that has yet to reach the public hearing phase is unlikely to get finalized within the next year. Furthermore, without a built-in mechanism for early EPA involvement in the rulemaking process,[16] it remains possible—if not likely—that finalized rules may not actually resolve the WPDES Program deficiency that a rule is intended to address. The burden then remains on the interested public to challenge a rule's validity rather than rely upon an expectation that state laws and regulations comply with minimum Clean Water Act requirements.

The DNR's failure to meet its proposed rulemaking timelines is not primarily due to dispute over the need for revisions; in fact, the DNR conceded the need for statutory, regulatory, or similar revisions in its response to the EPA 2011 legal deficiency letter. See generally Stepp to Hedman. As detailed later in this Petition for Corrective Action, lack of sufficient financial and staff resources certainly contributes to the DNR's failure to meet its commitments to the EPA and comply with the Clean Water Act. However, undue inaction on the part of the Department to enact new, necessary authorities underlies the agency's failure to correct its non-compliance with minimum Clean Water Act requirements.

[14] Petitioners base this statement on the lack of scope statement or other information available to the general public on the State's administrative rules website. *See* State of Wisconsin Administrative Rules, https://health.wisconsin.gov/admrules/public/Search (last visited Oct. 16, 2015).
[15] *See* DNR, *Permanent Administrative Rules Promulgation Procedure*, Rule Flow Chart 020514 Revision 3, *available at* http://dnr.wi.gov/news/input/documents/rules/AdminRuleProcedure.pdf (last visited Oct. 16, 2015).
[16] *See infra* Part II.b.v.

2. The DNR lacks the legal authority to implement and administer the stormwater WPDES Program in compliance with federal law.

The Clean Water Act makes it unlawful in certain circumstances to discharge stormwater into regulated waters unless the discharger first obtains a NPDES permit that "meet[s] all applicable provisions of" sections 1311 and 1342 of the Clean Water Act. 33 U.S.C. § 1342(p)(3)(A). Among other things, section 1311 requires the achievement of: (1) "best practicable control technology currently available," as reflected in effluent limitations guidelines that the EPA has set for particular point source categories, 33 U.S.C. § 1311(b)(1)(A); and (2) "any more stringent limitation" necessary to meet or implement federal water quality standards and compliance schedules. 33 U.S.C. § 1311(b)(1)(C). These requirements apply to state-issued NPDES permits for stormwater discharges "associated with industrial activity," 40 C.F.R. § 122.26(a)(1)(ii), and permits for municipal separate storm systems (MS4s). 40 C.F.R. § 122.26(a)(1)(iii), (iv); *see also Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) ("Regardless of the issuer, every NPDES permit is statutorily required to set forth, at the very least, 'effluent limitations,' that is, certain 'restriction[s] … on [the] quantities, rates, and concentrations'" of pollutants) (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (alterations in original)).

EPA regulations mandate that every state or federal NPDES permit include certain provisions, including "[b]est management practices … to control or abate discharge of pollutants when … [a]uthorized under section 402(p) of the CWA for the control of storm water discharges." 40 C.F.R. § 122.44(k)(2). The EPA has promulgated effluent limitations guidelines for particular industries to address stormwater discharge, incorporating review of available

control technology. *See generally* 40 C.F.R. Parts 401 to 471.[17] The EPA has also established new source performance standards ("NSPS") for many of these industries.[18]

With this stormwater regulatory scheme in mind, Wisconsin lacks the legal authority necessary to implement and administer the stormwater discharge permit program in a manner consistent with federal law. First, unlike with permits issued under Wis. Stat. § 283.31, no statute or regulation requires stormwater permits under Wis. Stat. § 283.33 to achieve the "best practicable control technology currently available" or any more stringent limitation necessary to Clean Water Act water quality standards. *See, e.g.*, Wis. Stat. § 283.11(2)(a)-(b). As such, neither the EPA nor the general public has assurance that a particular stormwater permit conforms to federal NPDES requirements. The DNR has responded to stormwater-related petitions for contested case hearings with indication that the Department does not intend to meet water quality standards by terms and conditions of WPDES stormwater permits. *See* Letter from Matt Moroney, Deputy Secretary, DNR to James N. Saul, Attorney, McGillivray, Westerberg & Bender, LLC (Dec. 20, 2011) (discussing petition for review and request for a contested case hearing under Wis. Stat. § 283.63). Furthermore, the DNR interprets stormwater statutes and regulations as not requiring compliance with minimum Clean Water Act requirements. *Id.*

---

[17] Industries with specific effluent limitations guidelines relating to stormwater discharges include: cement manufacturing, 40 C.F.R. Part 411; fertilizer manufacturing, 40 C.F.R. Part 418; petroleum refining, 40 C.F.R. Part 419; phosphate manufacturing, 40 C.F.R. Part 422; steam electric power generating, 40 C.F.R. Part 423; wetting of logs at wet dock storage areas, 40.C.F.R. Part 429; mineral mining and processing, 40 C.F.R. Part 436; ore mining and dressing, 40 C.F.R. Part 440; paving and roofing materials, 40 C.F.R. Part 443; landfills, 40 C.F.R. Part 445; and airport deicing, 40 C.F.R. Part 449.

[18] *See, e.g.*, 40 C.F.R. § 411.35 (establishing NSPS for runoff from materials storage piles at cement manufacturing facilities); 40 C.F.R. § 418.15 (establishing NSPS for runoff from phosphate fertilizer manufacturing facilities that comes into contact with any raw materials, finished products, byproducts or waste products); 40 C.F.R. § 423.15 (establishing NSPS for runoff from coal storage piles at steam electric generating facilities); 40 C.F.R. § 429.104 (establishing NSPS for discharges resulting from spray down or intentional wetting of logs as wet deck storage areas); 40 C.F.R. § 443.15 (establishing NSPS for runoff from asphalt emulsion facilities); 40 C.F.R. §§ 445.14, 445.24 (establishing NSPS for runoff from hazardous and non-hazardous waste landfills); and 40 C.F.R. § 449.11 (establishing NSPS for discharges from primary airports with over 1,000 annual jet departures that conduct deicing operations).

Second, aside from performance standards for construction and transportation facilities, state law does not incorporate effluent limitation guidelines or new source performance standards that the EPA has implemented for industry-specific stormwater discharges. The EPA's effluent limitations guidelines reflect mandatory standards for all NPDES permits, yet the State has not incorporated guidelines into law or regulations and as such does not include them in permits issued pursuant to Wis. Stat. § 283.33.

Third, like the EPA's industrial stormwater program, the DNR's program relies heavily on development and implementation of stormwater pollution prevention plans ("SWPPPs"), but state rules governing these SWPPPs do not meet federal standards. Specifically, Wisconsin rules require that a permit applicant submit only a summary of the SWPPP —the full SWPPP is ordinarily not part of the public record or written in the permit itself—and the DNR need not actually review it before approving the permit. *See* Wis. Admin. Code §§ NR 216.29(1)(a), (b), (d), (f). Because industrial stormwater discharges are otherwise subject only to broad limitations and conditions in the General Permit, SWPPP terms become *de facto* effluent limitations for industrial stormwater dischargers. Therefore, consistent with *Waterkeeper Alliance*, 399 F.3d at 502-503 (requiring submission and agency review of CAFO nutrient management plans) and *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 855-856 (9th Cir. 2003) (requiring submission and agency review of MS4 stormwater programs), an applicant must submit full SWPPPs to the DNR for agency review in every instance to assure compliance with the law. The stormwater WPDES permit itself must incorporate SWPPP terms and the DNR must make these terms publicly available for discharger accountability purposes.

Fourth, current state regulations contain other stormwater-related deficiencies, notwithstanding the EPA urging the State to correct deficiencies in 2011. Specifically, the EPA

noted that Wis. Stat. § 30.2022(1), along with Wis. Ch. NR 216.42(4), (5), (6), (9), impermissibly authorize stormwater discharges without a valid NPDES permit. Hedman to Stepp, ¶ 23. As the EPA noted, such exemptions are not permitted under federal law. *Id.* The State's clear lack of legal authority to implement a compliant stormwater program and its repeated issuance of stormwater WPDES permits that do not conform to Clean Water Act requirements make it imperative that the EPA require prompt DNR corrective action or withdraw the State's approval to administer the NPDES stormwater program.

Finally, Petitioners anticipate that the DNR's novel, narrow interpretation of its authority to administer state statutes and regulations means that the DNR cannot resolve stormwater program deficiencies discussed in the 2011 deficiency letter merely through an interpretation of its existing regulatory and statutory authority. Specifically, the DNR's new interpretation of Wis. Stat. § 227.10(2m)[19] ("No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule. . . .) could affect parts of the stormwater program that the EPA approved. The DNR now takes the position that this narrowly restricts the DNR's authority to impose any conditions that are not listed in a statute or rule. The following, non-exhaustive list of state stormwater regulations purport to allow the DNR to impose appropriate conditions based on its discretion and expertise, but are insufficient under the DNR's interpretation of 227.10(2m):

- Wis. Admin. Code § NR 216.27(3)(i): "The SWPPP shall maintain best management practices necessary to maintain compliance with the performance standards in s. NR 151.12 for those areas that are described in s. NR 151.12 (2)."
- Wis. Admin. Code § NR 216.27(3)(k) "When source area control best management practices are not feasible, not cost effective or are inadequate to control storm water pollution, or when the department determines source area

[19] For more in-depth discussion, *see also infra* Part II.a.ii.1.

> control best management practices are inadequate to achieve a water quality standard, the SWPPP shall prescribe appropriate storm water treatment practices as needed to reduce the pollutants in contaminated storm water prior to discharge to waters of the state."

Understandably, Petitioners question whether the DNR will exercise explicit, general authority to impose appropriate permit conditions given the DNR's position that its authority is very limited to that explicitly listed in a statute or regulation. Any forthcoming discussions between the EPA, the DNR and Petitioners must address whether the DNR interprets its authority pursuant to Wis. Stat. § 227.10(2m) such that it has existing powers to resolve known WPDES stormwater program deficiencies.

3. Wisconsin has failed to enact new authorities to remedy antidegradation program deficiencies previously identified by the EPA.

The Clean Water Act mandates that states adopt an "antidegradation policy" and implement regulations that protect clean waters and ensure that water quality is not lowered without sound justification. *See generally* 33 U.S.C. § 1313. Federal regulations require states to implement methods to maintain and protect high quality waters unless the state finds that a lowering of water quality is both necessary and will accommodate "important economic or social development." 40 C.F.R. § 131.12(a)(1)-(2). The necessity of any new or increased discharge of pollutants is based upon the availability of alternatives that will cause less pollution or no pollution at all.

Furthermore, Clean Water Act regulations at 40 C.F.R. § 131.12 require state-delegated NPDES programs to include antidegradation programs that accomplish the following: 1) maintain and protect the level of water quality necessary to protect existing uses (Tier 1); 2) maintain and protect water quality in high quality waters, unless after public participation the state determines that the lowering of water quality is both necessary and will accommodate

important economic or social development in the area in which the waters are located (Tier 2); and 3) prohibit any lowering of water quality in outstanding resource waters with exceptional recreational or ecological significance (Tier 3). 40 C.F.R. § 131.12.

While Wisconsin's antidegradation policy appears on its face to comply with Clean Water Act requirements, Wisconsin's antidegradation implementation regulations at NR 207 do not comply with Clean Water Act requirements. Recognizing these deficiencies and as outlined immediately below, the DNR agreed many years ago to amend Wis. Admin. Code Ch. NR 207 in order to meet Clean Water Act Requirements. The DNR is falling short of this agreement for the reasons detailed immediately below.

a. Wisconsin's antidegradation implementation regulations allow a lowering of water quality without a showing that the new or increased discharge is necessary, and lack a cap on cumulative discharges exempted as "insignificant."

Wisconsin's WPDES regulations automatically exempt new or increased discharges that would consume up to one-third of a water's remaining assimilative capacity from compliance with Wisconsin's antidegradation policy and requirements. *See* Wis. Admin. Code § NR 207.05. According to Wisconsin regulations, such discharges are "insignificant" and the DNR need not determine the necessity of associated lowering of water quality. Wis. Admin. Code §§ NR 207.04(d), 207.05(4)(a). The EPA has recognized that the Clean Water Act contains no explicit statutory authority to exempt such discharges as *de minimis*; rather, regulatory agencies are informed by EPA guidance documents. For example, EPA Region VIII's Guidance for Antidegradation Implementation notes that proposed activities that would "reduce the available assimilative capacity by more than 5%" will be "presumed to pose significant degradation." EPA, *Region 8 Antidegradation Guidance*, 18, *available at*

http://water.epa.gov/scitech/swguidance/standards/adeg/upload/Region8_ch2_pg5-20.pdf (last visited Oct. 15, 2015).

The danger with allowing regulatory agencies to rely only upon EPA guidance to set *de minimis* thresholds is that high thresholds may not sufficiently protect water quality. According to the EPA, using "a high threshold of significance" for creating categorical exemptions to antidegradation review could "unduly restrict[] the number of proposed activities that are subject to a full antidegradation review" and "may not adequately prevent cumulative water quality degradation on a watershed scale." *See* Water Quality Standards Regulation, 63 Fed. Reg. 36, 783. The EPA has acknowledged that "the current [antidegradation] regulation does not specify a threshold below which antidegradation review would not be required" and has "indicate[d] that more than a ten percent reduction in assimilative capacity would be significant, and thus not *de minimis*." *Id.* In 1995, for example, the EPA addressed *de minimis* water degradation in the Great Lakes ecosystem, allowing states to categorize discharges of non-bioaccumulative chemicals that caused a loss of less than ten percent of the available assimilative capacity as *de minimis*. *See* EPA, *Water Quality Guidance for the Great Lakes System: Supplementary Information Document*, EPA-820-B-95-001, 207 (Mar. 1995).

According to federal courts, the "operative question" in determining whether regulatory exemptions to antidegradation review are truly *de minimis* is as follows: "will the extent to which various emitters avail themselves of the exemptions result in significant, rather than *de minimis*, degradation?" *See Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 492 (6th Cir. 2008). An assessment of "whether each individual exemption result[s] in 'significant or 'insignificant' degradation" avoids necessary assessment of cumulative effects. *Id.* Applying the reasoning of the *Ky. Waterways* decision to Wisconsin, state regulations that automatically exempt *de minimis*

discharges with no consideration of cumulative effects clearly fall short of the intent and requirements of federal antidegradation program to maintain and protect water quality.

Rather than reviewing all new or increased discharges for compliance with antidegradation requirements, the DNR regularly imposes limits that equal one-third of the calculated water quality based effluent limit but otherwise considers a new or increased discharge exempt from antidegradation review. The DNR is able to skirt Tier 2 review[20] because most facilities are permitted to discharge at a level that will consume exactly one-third of the remaining assimilative capacity of the receiving stream with no cumulative cap. Wis. Admin. Code § NR 207.05(4)(a)(1). The lack of cumulative cap is important because a permittee can degrade water quality by one-third for each permit reissuance, allowing the discharger to consume the entire assimilative capacity of a waterbody within 15 years.

Without such an assessment, the DNR has failed to require advanced treatment technology for new or increased discharges. The following examples of language included in WPDES permit documents illustrate that DNR staff do not consider the availability of cost-effective treatment alternatives where the new or increased discharge will consume one-third of the available assimilative capacity.

- The DNR, "[a]fter reevaluating the [biochemical oxygen demand ("BOD")] . . . limitations," "determined that the BOD limits should be included equal to one-third the assimilative capacity of the receiving stream to account for antidegradation" and issued the permit to a new discharger without any further assessment of compliance with Wisconsin's antidegradation policy or implementing regulations. *See* DNR Notice of Final Determination to Reissue WPDES Permit No. WI-0049964-03-0-to Fish, Crystal and Mud Lake Rehabilitation Dist., at DNR Response #8 [hereinafter Fish Lake NFD].
- "One-third of the weekly and monthly ammonia limits represent prevention of significant lowering of water quality in the [receiving water]. Proposed dischargers above those one-third level would require additional evaluation of cost effective alternatives under s. NR

[20] *See* 40 C.F.R. § 131.12(a)(2) (defines high-quality waters and the Tier 2 review factors that apply to such waters).

207.04(1)(d). The remaining limits are believed to be protective of [the receiving water] and do not require additional limits based on antidegradation in NR 207." See 2012 Baker Cheese Fact Sheet and enclosures, Facility Planning Effluent Limits Letter (Dec. 2, 2013).

- "For a direct discharge to the creek, one-third of the calculated limits would represent significant lowering of water quality (SLOWQ) as defined in s. NR 207.05 based on the determination of one-third of the available assimilative capacity in the creek. This issue is important because a proposed discharge in excess of SLOWQ limits would need to be evaluated to determine whether any cost-effective alternatives exist that would prevent SLOWQ." *Id.* at 8.

b. The DNR allows permitted dischargers to increase total pollution loading to receiving waters without performing an antidegradation review.

The DNR authorizes a lowering of water quality without a finding that the discharge is necessary and will accommodate important social and economic development in part because of the State's definition of "increased discharge." Increased discharge is defined under Wis. Admin. Code § NR 207 as "any change in concentration, level or loading of a substance which would exceed an effluent limitation specified in a current WPDES permit." *See* Wis. Admin. Code § NR 207.02(6)(a). Other than an entirely new discharge, this is the only trigger for antidegradation review in Wisconsin. However, federal regulation requires the DNR to determine whether there will be a lowering of water quality, not whether there will be a violation of an effluent limit in a WPDES permit. 40 C.F.R. § 131.12(a)(2) (water quality "shall be maintained and protected").

A problem arises when permits contain only concentration-based effluent limits but no mass limits or flow limits, which is common in Wisconsin. In these circumstances, Wisconsin's definition of increased discharge appears to exclude increases in pollutant loadings that do not exceed an effluent limitation, but nonetheless may cause a lowering of water quality. For example, when an effluent limit is concentration-based, such as a phosphorus limit, the total

loading of a substance may increase if the discharger increases the volume of effluent discharged although the concentration-based effluent limit may not be exceeded. In addition, a lowering of water quality associated with a change in a management practice would also not likely trigger antidegradation review.

In effect, state regulations and the DNR's implementation of those regulations allow in a variety of scenarios for a new or increased discharge to lower water quality without a full antidegradation review. For example, the DNR allowed a lowering of water quality without performing a full antidegradation review where a WPDES permit prohibited discharge to occur during the months of July through September, except in the case of a flood emergency "because the prior (existing) permit allowed a discharge to occur during July, August and September if there was an emergency as was the case in July 2013." *See* Fish Lake NFD at DNR Response #5. Rather than automatically applying an identical no-discharge period to the new WPDES permit, the DNR should have performed an antidegradation review to determine if the condition was still adequate to protect water quality.

c. The DNR's antidegradation evaluation procedure contains exemptions that violate federal law.

Wisconsin also improperly exempts from antidegradation review the lowering of water quality associated with increased permit limits: 1) for which the state has promulgated less stringent water quality criteria for discharges without bioaccumulative chemicals of concern; and 2) based on dissolved metals criteria pursuant to Section NR 106.07(7)(b), as long as the increased permit limitations will protect "existing designated uses" and the river is not an exceptional or outstanding resource water. *See* Wis. Admin. Code § NR 207.03(1)-(2). However, federal antidegradation rules require protection of existing uses and prevention of unnecessary pollution, even where existing water quality exceeds water quality standards. *See generally* 33

U.S.C. § 1313. The DNR therefore violates Clean Water Act requirements when a discharger is permitted to immediately consume the entire assimilative capacity of a waterway without a demonstration of necessity, simply because the Department had promulgated a "less stringent criterion."

d. The DNR interprets its antidegradation rules as not requiring consideration of all reasonable alternatives before issuance of a WPDES permit.

Federal antidegradation regulations require an antidegradation analysis that considers the necessity of new or increased pollution, based in part upon available alternatives that will cause less pollution or no pollution at all. 40 C.F.R. § 131.12(a)(1)-(2). Petitioners set forth the following examples of the DNR's inadequate consideration of alternatives to allowing new or increased discharges when issuing WPDES permits.

The DNR issued a WPDES permit in a 2013 for a new discharge without assessing alternatives that would eliminate or reduce the water quality impacts resulting from this new discharge. *See generally* Fish Lake NFD. The permittee and the DNR should have assessed alternatives including installation of technology to significantly reduce pollution levels in the discharge, imposition of best management practices, or other treatment options. In fact, the DNR had considered other no-discharge options as viable and potentially "the best overall and most cost effective" options. *See* DNR, *Environmental Analysis and Decision on the Need for an Environmental Impact Statement (EIS)*, 21, *available at* http://dnr.wi.gov/files/PDF/pubs/ea/EA0183.pdf (last visited Oct. 15, 2015). The DNR further found that the chosen option of installing a new discharge source was uncertain, considering that the permittee had not assessed viable options that eliminated the need for a new discharge and the lowering of water quality. *Id.* In response to concerns that the DNR failed to assess the

necessity of a new discharge and alternatives, the DNR acknowledged existence of alternatives but stated that the DNR "does not have the authority to require that every possible alternative be explored or implemented" and "lacks authority to require a treatment technology or installation of best management practices on private property." *See* Fish Lake NFD at DNR Response #10.

As another example, in 2008 the DNR issued a WPDES permit to Didion Ethanol LLC for a new discharge that found no downstream impacts and therefore required no antidegradation review. Memorandum from Susan Sylvester to Dan Joyce & Brenda Howald (Jan. 16, 2008) (discussing WQBELs for proposed new discharge from Didion Ethanol LLC's plant); *see generally* WPDES Permit No. WI-0063771-01-0, Final WPDES Permit for Didion Ethanol LLC (Apr. 1, 2008). After protracted litigation, the facility agreed in settlement to cease water pollutant discharges based on a feasibility determination for a no-discharge option. Settlement Agreement, *Domino et al. v. Didion Ethanol, LLC*, Case No. 3:09-cv-00213-bbc (May 19, 2010). The DNR's antidegradation rule implementation should have required a more robust process both for determining the need for antidegradation review and for determining the feasibility of alternatives such no-discharge options. This should have occurred before permitting the new discharge, not years after local concerned citizens challenged the WPDES permit and filed a citizen suit.

e. Wisconsin law lacks opportunity for public input regarding whether lowering of water quality is necessary or will accommodate economic and social development.

Clean Water Act regulations mandate an opportunity for public input in a decision to lower water quality in Tier II waters.[21] Wisconsin Admin. Code § NR 207 does not contain public participation procedures that would apply to the DNR's antidegradation review of

[21] 40 C.F.R. § 131.12(a)(2).

discharges under section NR 207.04. Short of adjudication, the only opportunity for the public to comment on effluent limits and conditions established in WPDES permits is the public comment period provided in Wis. Stat. § 283.39 and Sections NR 203.02 and 203.04 of the Wisconsin Administrative Code. However, the DNR establishes effluent limits *after* antidegradation review during the facility planning process in Wis. Stat. § 281.41, and this provision has no public participation process comparable to Wis. Stat. § 283.39. The DNR's decision regarding appropriate technology for new or increased discharges occur well before the facility's WPDES permit is available for public comment. The Department's antidegradation review goes to the methods of wastewater treatment selected by the permittee, not the effluent limits that a pre-chosen technology can ultimately achieve.

Wisconsin residents may feel that it is futile for the public to comment on effluent limits when the real issue is often whether a surface water discharge is necessary in the first place. Moreover, Wisconsin's antidegradation implementation regulations do not provide a meaningful opportunity for public comment on whether the lowering of water quality is necessary based on economic development or a lack of wastewater treatment alternatives. This lack of opportunity directly conflicts with the federal requirement for public participation in any decision to lower water quality in Tier II waters,[22] and is arguably a grounds for WPDES Program withdrawal for failure to operate the Program in compliance with public participation requirements of the Clean Water Act. *See* 40 C.F.R. § 123.63(a)(2)(iii).

f. The EPA should adopt federal antidegradation implementation procedures for Wisconsin.

Both the EPA and the DNR have been aware of antidegradation program deficiencies since at least mid-2007. *See* Letter from Envtl. Law & Policy Center, Clean Wis., Midwest

[22] *Id.*

Envtl. Advocates and Sierra Club, to Mary Gade, Regional Administrator, EPA Region 5, and Scott Hassett, Secretary, DNR, 4 (July 31, 2007). Despite the DNR's commitments to remedy these deficiencies, the Department has not enacted necessary, comprehensive regulatory changes and the DNR continues to issue permits based on Wisconsin's deficient antidegradation implementation regulations. In December 2009, the Department revised a 2008 statement of scope to more fully address the EPA's ongoing concerns with antidegradation regulations at Wis. Admin. Code Chapter NR 207. DNR, *Scope Statement Relating to Proposed Changes to NR 207, Water Quality Antidegradation*. In their statement of scope, the DNR estimated the need for approximately 1000 hours of staff time to revise Wisconsin's antidegradation rules. *Id.* More than five years after the DNR committed to correcting the deficiencies in Wisconsin's antidegradation rules, it is unclear how many hours, if any, the DNR has committed to this issue.

As of the date of the filing of this Petition for Corrective action, the DNR has neither amended NR 207, nor does the DNR consistently perform full antidegradation analysis prior to issuance of WPDES permits. *See, e.g.*, Baker Cheese Fact Sheet, *supra* Part II.a.i.3.a. The DNR's commitment to remedying its deficient antidegradation implementation procedures is at best unclear. The table below outlines the Department's prioritization of antidegradation program updates in triennial standards revisions ("TSR") cycles:

Date of Statement	**TSR Cycle, if applicable**	**DNR Antidegradation Priority Statement**
September 2009	2008-2011	"An automatic high priority . . . [that] will be begun in 2008-2011."[23]
July 21, 2010, analyzed in May 2, 2011 comment letter	-	Due to other rulemaking priorities, the Department had not started antidegradation rule updates.[24]
January 3, 2012	2012-2014	• "Identified by DNR as one of five Triennial Standards

[23] DNR, *Wisconsin's Surface Water Quality Triennial Standards Review 2008-2011 - FINAL Prioritized Topic List* (Sept. 30, 2008), *available at* http://dnr.wi.gov/topic/SurfaceWater/documents/FINAL_TSR_ResultsTable2008-2011.pdf (last visited Oct. 16, 2015).

[24] Letter and Attachments from Midwest Envtl. Advocates, to Bob Masnado & Amanda Boyce, DNR, 1 (May 2, 2011).

		Review topics that will receive automatic high priority for review during the upcoming triennial cycle [2012-2014]"; • Revisions in progress; • The Department had completed other priorities from the 2008-2011 Triennial Review Cycle; and • "Antidegradation continues to be a high priority for key externals including U.S. EPA;" warranting antidegradation revisions as a high priority for the 2012-2014 cycle.[25]
October 2013	2012-2014	• The DNR chooses to await the EPA's development of guidance or rule language on the topic of antidegradation before continuing with the rule revisions.[26][27] • The DNR elects for delay despite the Department's work reviewing other state policies, establishing definitions and developing a work plan.[28]
April 2014	2015-2017	• Not automatically designated as high priority[29] • The DNR acknowledges that "EPA has encouraged WDNR to review and revise its rules and implementation procedures to address 7 key areas of antidegradation" and that "revisions to policies/procedures may be needed."[30] • The DNR commits resources to other issues that the DNR automatically designated as high priority because the topics are "already being worked on," not including NR 207 revisions.[31] • Prioritized topics list includes antidegradation as a priority below eight other revisions that are listed as "currently in progress."[32]

In sum, the DNR promised to revise antidegradation rule and program deficiencies over five years ago, but the Department has systematically prioritized other initiatives. This illustrates the DNR's lack of commitment to bringing Wisconsin's water pollution permitting program into

[25] *See* DNR, Bureau of Water Quality Evaluation Section, *2011-2014 Triennial Standards Review (TSR) Priorities for the Water Quality Standards Program* (Jan. 3, 2012), *available at* http://dnr.wi.gov/topic/SurfaceWater/documents/2011-2014FinalTSRReport.pdf (last visited Oct. 16, 2015).
[26] DNR, *Surface Water Quality Triennial Standards Review: Status of 2012-2014 Topics*, *available at* http://dnr.wi.gov/topic/SurfaceWater/documents/Status%20Review%20TSR%202012%202014%20Final.pdf (last visited Oct. 16, 2015).
[27] These updates to federal antidegradation requirements were finalized as of August 5, 2015. *See Final Rulemaking to Update the National Water Quality Standards Regulation*, EPA, http://water.epa.gov/lawsregs/lawsguidance/wqs_index.cfm (last visited Oct. 12, 2015).
[28] *Supra* note 26.
[29] *See* DNR, *Bureau of Water Quality Water Evaluation Section, 2015-2017 Triennial Standards Review (TSR) Priorities for the Water Quality Standards Program*, *available at* http://dnr.wi.gov/topic/SurfaceWater/documents/TSRFinalReport040815.pdf (last visited Oct. 16, 2015)
[30] *Id.* at 3.
[31] This list includes: Aquatic Macrophyte Biotic Index for Lakes; Biological Criteria; Mixing Zone Policy Revision; Phosphorus Site-Specific Criteria (SSC) Guidance and Rules; Phosphorus Assimilative-Capacity Modeling in Great Lakes; Phosphorus Implementation Guidance Revision; Use Designations Revision; Variance Determination Procedure Revision. *See Triennial Standards Review*, DNR, http://dnr.wi.gov/topic/surfacewater/tsr.html (last visited Oct. 16, 2015).
[32] *Id.*

compliance with the Clean Water Act as well as the DNR's disinclination to protect the quality of Wisconsin's clean waters.[33]

The EPA should promulgate Clean Water Act compliance antidegradation rules for Wisconsin, and should object to WPDES permits that fail to meet federal antidegradation requirements and Wisconsin's Antidegradation Policy at Wis. Admin. Code § NR 102.05(1). Dischargers will unnecessarily degrade Wisconsin waters in violation of the Clean Water Act until the DNR discontinues permitting discharges that lower water quality without requiring new facilities to utilize the most cost effective and water quality effective technology to eliminate as much pollution is technically and economically feasible.

The DNR and the EPA's inaction related to Wisconsin's antidegradation regulations undoubtedly meets the standard for unreasonable delay as discussed in Part III of this Petition for Corrective Action. As such, the EPA should commit in writing to object to WPDES permits that fail to meet the antidegradation requirements of the Clean Water Act and its implementing regulations.

ii. Wisconsin legislative action has struck down or limited Wisconsin's authority to operate the WPDES Program in compliance with the Clean Water Act.

The DNR is not solely responsible for allowing the WPDES Program to reach or maintain its current status as non-compliant with federal law. Petitioners highlight the following legislative action that prevents the DNR from comprehensively updating its permitting program to satisfy minimum Clean Water Act requirements, constituting grounds for withdrawal of the Department's ability to administer the WPDES Program. 40 C.F.R. § 123.63(1)(ii).

[33] As of the date of the filing of this Petition for Corrective Action, the DNR has not finalized its priorities for the 2015-2017 triennial standards. *See id.*

1. Wisconsin's statutory rulemaking process prevents the DNR from timely revising the WPDES Program to comply with federal law and regulations.

Any state NPDES permit program approved by the EPA "shall at all times be conducted in accordance with the requirements of [40 C.F.R. Part 123]", "must have the legal authority to implement," and must "be administered in conformance" with provisions specified in 40 C.F.R. § 123.25. *See* 40 C.F.R. §§ 123.1(f), 123.25(a). Where revisions to a state NPDES permit program such as Wisconsin's are necessary to conform to Clean Water Act requirements, the state must revise the program within one year after promulgation of corresponding federal regulations. 40 C.F.R. § 123.62(e). Where a state must amend or enact a statute in order to make the required revisions, revision must occur within two years. *Id.*

The DNR is currently unable to meet these federal timelines due to onerous rulemaking procedures adopted by the Wisconsin Legislature in 2011. According to documents outlining the process for rulemaking, the DNR now estimates rule revision to take just over 27 months in a best-case scenario.[34] *See* DNR, *Permanent Administrative Rule Promulgation Procedure*, Rule Flow Chart 020514 Revision 3, *available at* http://dnr.wi.gov/news/input/documents/rules/AdminRuleProcedure.pdf (last visited Oct. 16, 2015). Permits issued during that 31-month waiting period potentially violate the Clean Water Act because Wisconsin law does not require the DNR to issue permits that comply with federal Clean Water Act standards. *See generally Andersen*, 2011 WI 19. The decision in *Andersen* leaves no overarching authority that would require the DNR to comply with minimum Clean Water Act requirements during the lengthy rulemaking process.

[34] The State Legislature has exempted the DNR from this onerous rulemaking procedure for the development of specified rules, including certain mining-related rulemaking, but has not created an exception for regulatory updates necessary to comply with the Clean Water Act.

In many cases, lack of DNR staff resources means that rule adoption and policy updating necessary to comply with the Clean Water Act takes much longer than 31 months. *See, e.g.*, WT-29-09 (related to waterworks and wastewater treatment plant operator certification requirements at Wis. Admin. Code Ch. NR 114; over 60 months passed between Statement of Scope dated Mar. 20, 2009 and rulemaking order dated May 16, 2014.); WT 28-10 (related to wastewater pretreatment standards at Wis. Admin. Code Ch. NR 211; Statement of Scope dated Mar. 30, 2010, final rulemaking order 44 months later dated Dec. 9, 2013).

These egregiously delayed timelines leave Petitioners and many Wisconsin residents with a misplaced trust that the DNR promptly uses its powers to address known regulatory program deficiencies, including programs intended to protect our State's water resources. The EPA must require the DNR to initiate a statutory or rulemaking fix that allows Wisconsin to bring its WPDES Program into compliance with federal law according to the timelines required by Clean Water Act implementing regulations. 40 C.F.R. § 123.62(e). At minimum, the EPA should insist that the DNR exercise its emergency rulemaking powers[35] to resolve outstanding issues outlined in the 2011 deficiency letter. The DNR should provide a regular, publicly-accessible status update regarding the rulemaking that is necessary to bring the WDPES Program into compliance with minimum Clean Water Act requirements. The general public should not need to instigate litigation or efforts such as this Petition for Corrective Action to force DNR rulemaking updates to which the Department has already committed.

b. The DNR's Operation of the WPDES Program Fails to Comply with the Requirements of the Clean Water Act.

Federal regulations authorize the EPA to withdraw a state-delegated NPDES program

[35] *See infra* Part II.b.vi.1.

when a state operates its program in violation of the Clean Water Act. 40 C.F.R. § 123.63(a)(2). Factors that demonstrate a state's non-compliant operation of a permitting program include but are not limited to the following: failure to exercise control over activities required to be regulated; including failure to issue permits; repeated issuance of permits which do not conform to the requirements of [the Clean Water Act]; or failure to comply with the public participation requirements of [the Clean Water Act]. 40 C.F.R. at (2)(i)-(iii). Petitioners detail in the following subsection the DNR's repeated issuance of non-compliant WPDES permits, WPDES Program violation of Clean Water Act public participation requirements, as well as other operation-based reasons that the DNR's permitting program does not fully comply with federal law.

i. The DNR interprets its authority to administer the WPDES Program in contradiction of the Department's commitments to the EPA, restricting the rights of Wisconsin residents.

The DNR has failed to defend its commitments to the EPA to remedy the failures of its Clean Water Act program and has taken legal positions before state courts that directly contradict the Department's commitments to the EPA. Wisconsin courts have then upheld the DNR's position, resulting in limitation of the DNR's authority to administer the WPDES Program in compliance with federal law. Despite its commitment to the EPA to amend provisions of the Wisconsin Administrative Code to meet minimum Clean Water Act requirements, the DNR has spent years attempting to persuade the Wisconsin judiciary that the court should not deem certain rules as invalid. *See, e.g., Midwest Envtl. Def. Ctr. v. Wis. Dep't of Natural Res.*, Case No. 12CV3654, Decision on Plaintiff's Motion for Summary Judgment (July 1, 2014) [hereinafter MEDC v. DNR Decision].

MEDC filed a declaratory judgment action in 2012, asking the court to deem invalid several state rules that the EPA had identified in its 2011 deficiency letter as inconsistent with

minimum Clean Water Act requirements. *See, e.g.*, *Midwest Envtl. Def. Ctr. v. Wis. Dep't of Natural Res.*, Case No. 12CV3352, Petition for Judicial Review and Declaratory Judgment (Aug. 17, 2012). Specifically, MEDC alleged that several state rules that the EPA had identified as violating Clean Water Act requirements were therefore non-compliant with state law, which requires all rules promulgated pursuant to Wis. Stat. Chapter 283[36] to comply with the Clean Water Act. *Id.* After the DNR spent years opposing MEDC's claims, the Wisconsin Circuit Court issued a decision finding specified portions of the Wisconsin's regulations invalid insofar as they were inconsistent with federal law. *See generally* MEDC v. DNR Decision. Specifically, the Court declared invalid the rules underlying Issues #8, #31, #35, and #40 in the EPA's July 2011 letter. *Id*. The DNR argued that these rules should not be deemed invalid for a variety of reasons, including: that the rules were no longer of consequence; that is was improbable that the rule would be applied in the future; that the DNR had committed not to apply the rule in the future; or that the DNR does not implement the rules as written. *Id.* at 6, 7, 8, 17. The DNR even argued that some of these rules did not violate the Clean Water Act, despite its commitment to the EPA to revise the rules to bring them in line with Clean Water Act requirements. *See* Hyde to Johnson, encl. 1 at 4 (addressing Issue #31 and Rule Package #4); *see also* MEDC v. DNR Decision at 13-14.

The Court noted that the DNR's commitment to implement a rule differently from how that rule is codified could mean that the DNR would "violate state law if it deliberately failed to implement its promulgated rules as written" because "an administrative agency must abide by its own rules." MEDC v. DNR Decision at 8. Finally, the Court stated that "[i]t may be that the current staff at WDNR are implementing the rule according to the federal standards. However,

[36] An exception exists within Wis. Stat. § 283.11(2)(a), a stormwater statute that "relate[s] to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards."

the situation may change when the current staff who are implementing the rule depart WDNR. The guidance for the new employees would be the rule itself . . . the implementation of the rule is immaterial." *Id.* at 17. The DNR, in essence, cannot rely upon rule implementation practices as a replacement for prompt legislative resolution to correct state rules that violates the Clean Water Act.

More recently, the DNR posited in the context of a CAFO WPDES permit challenge that state law leaves the Department with authority to act only as explicitly granted by statute or administrative rule.[37] *See* Letter from Timothy A. Andryk, Chief Legal Counsel, DNR, to Andrew Cook, Deputy Attorney, DOJ (Aug. 17, 2015). The office of the Attorney General supported the Department's position and claimed that the DNR could not lawfully impose an animal unit cap or off-site groundwater monitoring requirements in the challenged permit due to the alleged lack of explicit statutory authority to do so. *See* Letter from Daniel P. Lennington, Assistant Attorney General, DOJ, to Timothy A. Andryk, Chief Legal Counsel, DNR (Aug. 18, 2015). Both the DNR and the Wisconsin Department of Justice essentially denied any implied authority to act as needed to comply with more broad statutory mandates. *Id.*

The DNR's increasingly narrow tailoring of its authority is pertinent here because the Department's position contradicts past assurance to the EPA that the Department has the authority, including necessarily implied authority, to resolve WPDES Program deficiencies. *See* 2012 AG statement; *see also Andersen*, 2011 WI 19, ¶¶ 36-37, 60. Combined with the Attorney General's position that it is incumbent upon the EPA, not the DNR, to step in where a violation

[37] The DNR cited Wis. Stat. § 227.10(2m) ("No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.").

of federal law is at issue,[38] Petitioners are confident that EPA action is now necessary to force the DNR to administer the WPDES Program in compliance with the Clean Water Act and consistent with the DNR's public trust responsibilities to protect Wisconsin's waters. Because history demonstrates that loose commitments from the DNR fall short of protecting our State's water resources, Petitioners ask the EPA to demand written and concrete fixes to statutory and regulatory deficiencies as outlined in this Petition for Corrective Action.

1. Wisconsin restricts review of WPDES permits to groups of five or more persons in violation of the Clean Water Act.

Clean Water Act regulations require any state that administers an approved NPDES permit program to "provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation and the permitting process." 40 C.F.R. § 123.30. "Any interested person" who commented on the permit and sought review of the final permit decision by the Environmental Appeals board within 30 days of the EPA's decision to issue the permit may obtain federal court review. 33 U.S.C. § 1369; 40 C.F.R. § 124.19. State law will satisfy minimum Clean Water Act requirements if it "allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit." 40 C.F.R. § 123.30. In contrast, states that narrowly restrict the class of persons who may challenge the approval or denial of a permit fail to comport with the Clean Water Act and implementing regulations. *Id.*

In its July 2011 deficiency letter, the EPA questioned whether Wisconsin provided an opportunity to seek judicial review of a WPDES permit that was equivalent to minimum requirements of the Clean Water Act. *See* Hedman to Stepp, ¶ 5. The Wisconsin Attorney General confirmed in his January 2012 Statement that Wisconsin law does not provide an

[38] 2012 AG Statement at 16.

opportunity for an individual to challenge WPDES permit decisions before an administrative law judge. *See* 2012 AG Statement at 2-3. The Attorney General still found that Wisconsin law meets minimum Clean Water Act requirements because state statutes provide individuals the opportunity to challenge WPDES permit in a judicial review proceeding. *Id.* Based on the Attorney General's Statement, the EPA had considered that issue "resolved." *See* Hyde to Johnson. However, after the Attorney General issued his Statement, several permittees challenged the Attorney General's interpretation and Wisconsin residents were forced to attempt to defend the right of individuals to file petitions for judicial review of WPDES permits. *See, e.g., Midwest Envtl. Def. Ctr., Inc. v. Wis. Dep't of Natural Res*., Appeal No. 20113-AP-002746, Brief of Petitioner-Respondent Midwest Envtl. Def. Ctr, Inc. (April 28, 2014); Circuit Court Decision and Order for Reconsideration in Domtar, Case No. 13CV290; *CWAC*, 2014 WI App 61.

The DNR has, at best, weakly supported the Attorney General's interpretation in WPDES permit challenges. In the *MEDC v. WDNR* Appeal, the Assistant Attorney General provided the court with the Attorney General's letter, noting that the DNR "does not necessarily agree with the argument . . . that petitioners do not have a right to seek judicial review, but must first exhaust its administrative remedies by requesting an administrative review." *See* Letter from Lorraine Stoltzfus, Wisconsin Department of Justice, to Hon. Frank Remington, Dane County Circuit Court (Dec. 17, 2012). The DNR declined to participate when the petitioner appealed the *CWAC* circuit court ruling. *See generally CWAC*, 2014 WI App 61. Thereafter, the DNR did not support the CWAC petitioners' request for review of the Court of Appeals decision by the Wisconsin Supreme Court where the Court did not grant review.

The judiciary responded to the DNR's failure to support the 2012 Attorney General statement by limiting the ability of residents to voice WPDES permitting concerns before state courts. In a WPDES permit challenge where the DNR failed to provide any statements to the circuit court, the court concluded that individual petitioners had no right to seek judicial review of WPDES permits. *See* Decision on Appleton Coated LLC's Motion to Dismiss, Case No. 12CV2197 (July 31, 2013). The Court of Appeals' decision in *CWAC* found unpersuasive the Attorney General's opinion and the DNR's assurances to the EPA that state law did in fact provide individuals an opportunity to challenge a final WPDES permit via judicial review. *See CWAC*, 2014 WI App 61, ¶ 21-22. Furthermore, the Court of Appeals decision in *CWAC* precluded citizens from filing petitions for judicial review unless they have exhausted all possible administrative remedies, requiring citizens to seek a contested case hearing pursuing to Wis. Stat. § 283.63 before petitioning for judicial review. *Id.* ¶ 24. Despite its knowledge of the EPA's concerns that Wisconsin's public participation procedures failed to meet the requirement so of 40 C.F.R. § 123.30, the court was "not convinced" that restricting individuals, or anything less than a total of five named individuals from obtaining review of state issued WPDES permits contradicted the minimum requirements of the Clean Water Act. *Id.* ¶¶ 18-19.

The DNR has, to Petitioners' knowledge, not sought statutory revisions to align the WPDES Program with Clean Water Act requirements in light of the Wisconsin judiciary's unwillingness to uphold the Attorney General's 2012 statement. The Court of Appeals decision places the WPDES permitting program at odds with federal regulations that require states to provide an opportunity for judicial review that is as expansive as is provided by federal law. Instead, Wisconsin law now requires individuals to prove to the courts that they could not find four other interested individuals to join their challenge.

Under *CWAC* and *Andersen*, there is no state venue—neither administrative nor judicial—in which any individual, group of individuals, or organization can challenge a WPDES permit for failure to comply with federal law. *CWAC*, 2014 WI App 61, ¶ 26; *see generally Midwest Envtl. Def. Ctr., Inc. v. Wis. Dep't of Natural Res*., Appeal No. 20113-AP-002746, Brief of Petitioner-Respondent Midwest Envtl. Def. Ctr, Inc. (April 28, 2014); *see also Andersen*, 332 Wis. 2d 41, ¶ 66. These decisions are published, binding precedent in the state of Wisconsin and they limit permissible action of state authorities. *See generally* Wis. Stat. § 809.23. Moreover, the Court of Appeals decision in *CWAC* calls into question whether any of the issues which the DNR and the EPA considered resolved based on the Attorney General's statement are actually resolved. *See generally CWAC*, 2014 WI App 61.

Wisconsin's courts have, in sum, unlawfully restricted the class of persons who can challenge a water permit and the legal arguments that those persons may raise. This restriction on the DNR's authority as well as the opportunity for public participation is the basis for the withdrawal of Wisconsin's authority to administer the WPDES Program. *See* 40 C.F.R. §§ 123.63(a)(1)(ii); 123.63(a)(2)(iii). Prompt statutory revision initiated by the DNR and approved by the Wisconsin Legislature is the legislative remedy to this public participation deficiency. If such a remedy is not possible, it is incumbent upon the EPA to withdraw Wisconsin's authority to administer its WPDES Program.

ii. <u>The DNR repeatedly issues WPDES permits that violate the requirements of the Clean Water Act.</u>

The repeated issuance of WPDES permits with phosphorous terms and conditions that violate the Clean Water Act constitutes grounds for the EPA to withdraw the DNR's authority to administer the WPDES Program. *See* 40 C.F.R. § 123.63(2)(ii). Petitioners detail within this

subsection several phosphorus-related violations of the Clean Water Act that commonly incorporated into WPDES permits.

1. *Despite the DNR's adoption of phosphorus criteria and the EPA's detailed approval of Wisconsin's associated implementation rules, the DNR continues to issue WPDES permits with phosphorus terms that fail to meet state and federal requirements.*

In December 2010, the EPA approved Wisconsin's statewide phosphorus criteria for rivers, streams and lakes. *See* Hyde to Johnson. The EPA proceeded in July 2012 to approve Wisconsin's phosphorus implementation regulations. *See* Letter from Susan Hedman, Regional Administrator, EPA Region 5, to Cathy Stepp, Secretary, DNR (July 25, 2012). The EPA relied on an addendum to the State's Memorandum of Agreement with the EPA, and also relied on the opinion from the Wisconsin Attorney General that the DNR's authority to impose limits to protect downstream waters complies with federal law. *Id.*; 2012 AG Statement at 7-8. Within its 2012 approval, the EPA specifically outlined its rights and authority with regard to the DNR's implementation of the phosphorus regulations, including authority to:

- "[I]nitiate a subsequent revision to the Wisconsin program under 40 C.F.R. § 123.62 if, among other things, a Wisconsin court strikes down or limits the State's authority to administer the NPDES program including, but not limited to, the legal authority on which our approval of the present revision is based."
- "[R]eview and object to specific proposed and draft permits in accordance with Section 402(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2), for any of the grounds set forth in 40 C.F.R. § 123.44(c), even if Wisconsin developed the permit in accordance with State law or our Memorandum of Agreement, including any aspects of State law that EPA has approved as part of Wisconsin's NPDES program."
- "[R]eview and object to a permit if it contains a compliance schedule that is not in conformance with 40 C.F.R. § 122.47"
- Take other actions related to program withdrawal.

See Letter from Susan Hedman, Regional Administrator, EPA Region 5, to Cathy Stepp, Secretary, DNR at 2 and encl. page 8 (July 25, 2012).

More than three years later, the DNR continues to issue WPDES permits that violate minimum requirements of the Clean Water Act as well as the EPA's contingencies for approval of Wisconsin's phosphorus criteria and implementing regulations. The DNR has repeatedly failed to properly implement NR 217 in issuing WPDES permits. Beyond the obvious failure of the DNR to timely implement these rules, the DNR has issued permits with extended compliance schedules where none are justified and without limits to meet water quality standards in downstream waters. Absent the valid implementation of Wisconsin's phosphorus rule, Wisconsin lakes and rivers will continue to decline in quality, as will the state's recreation and tourism industries, as well as other businesses that are inextricably intertwined with Wisconsin water quality.

a. WPDES permits include excessive compliance schedules that do not comport with the purpose or intent of federal law.

The EPA's 2011 deficiency letter pointed to the failure of Wisconsin law to require facilities to demonstrate how much time is necessary and appropriate for a facility to comply with permit effluent limits. *See* Hedman to Stepp, ¶ 15. The EPA also indicated that State law allows facilities to rely on schedules of compliance to perform work that is intended to justify a change in effluent limitation, rather than require a facility to comply with effluent limits. *Id.* These deficiencies likely authorize additional and unnecessary time to reduce pollutant effluent concentrations in order to meet water quality standards, in violation of 40 C.F.R. § 122.47. Although this Petition emphasizes excessive compliance schedules for achieving phosphorus limits, Petitioners note that the EPA's 2011 deficiency letter outlined six concerns with "compliance schedules in permits" generally and any corrective action following this Petition should fully address EPA's concerns. *See* Hedman to Stepp, ¶ 15

Prior to issuing a compliance schedule in an NPDES permit, the permitting authority must make a reasonable finding, adequately supported by the administrative record and described in the fact sheet, that: 1) the discharger cannot immediately comply with the WQBEL upon the effective date of the permit; 2) a compliance schedule is appropriate; and 3) the compliance schedule will result in compliance as soon as possible.[39] Wisconsin law further requires fact sheets to contain any "proposed schedule of compliance, including interim dates and requirements, for meeting the proposed effluent limitations." Wis. Stat. § 283.45(2)(d)(2). According to state regulations, the DNR may only provide a schedule of compliance for water quality-based phosphorus effluent limits where, "based on available information," the DNR determines that the schedule of compliance: 1) will lead to compliance with the phosphorus WQBEL *as soon as possible*; and 2) is appropriate and necessary because the permittee cannot immediately achieve compliance with the WQBEL based on existing operation of its treatment facility. Wis. Admin. Code § NR 217.17(1)(a) (emphasis added). These regulations specifically note that "[b]efore any compliance schedule is established in a permit pursuant to this subchapter, the department must make the[se] finding[s]." Wis. Admin. Code § NR 217.17(1)(a)Note.

When determining whether the compliance schedule will bring a permittee into compliance "as soon as possible," the DNR *must* consider the steps needed and time necessary to modify or install treatment facilities, operations or other measures.[40] *See* Wis. Admin. Code § NR 217.17(1)(b). Factors relevant to whether a compliance schedule is "appropriate" include: 1) the time the discharger has already had to meet the WQBELs; 2) whether there is a need for

[39] *See* Memorandum from James A. Hanlon, Director, Office of Wastewater Management, to Alexis Strauss, Director, Water Division, EPA Region 9 (May 10, 2007) [hereinafter Hanlon Memo]; *see also* 40 C.F.R. § 122.47; Wis. Admin. Code NR § 217.17.
[40] *See* Hanlon Memo at 3.

modifications to the treatment facilities; and 3) the time necessary to implement those modifications. *Id.* Additional state regulations specific to phosphorus require the DNR to consider the effectiveness and availability of phosphorus removal process technologies. Wis. Admin. Code § NR 217.17(1)(b)4. In addition the DNR *may* consider: 1) any need to acquire property to accommodate needed modifications; and 2) any need to develop an extensive financial plan and obtain financial for the proposed treatment plant upgrade. Where the DNR determines that operational changes are all that is necessary to achieve compliance, the schedule must be "as brief as possible" and "only allow time for operation start-up adjustments." Wis. Admin. Code NR § 217.17(1)(b).

The DNR's process for issuing compliance schedules to meet phosphorus WQBELs is problematic in several respects. First, the DNR does not require facilities to determine prior to issuing a permit whether operational changes are all that is necessary to achieve compliance with the final phosphorus limitation. Instead, the DNR almost uniformly grants permittees a full year to make such a determination, and an additional two years to come into compliance with the final limit if it is found that only operational changes are needed. Second, the DNR does not require permittees to assess alternative compliance options—such as facility upgrades, water quality trading, and variances—prior to permit reissuance but almost uniformly grants permittees five years to do so. Third, DNR routinely fails to make the individual determinations required by law concerning the necessity and appropriateness of a compliance schedule. Compliance schedules are therefore not tailored to ensure that each permittee comes into compliance with their phosphorus WQBEL as soon as possible. Petitioners' representative is able to provide specific examples of these three deficiencies upon request from the EPA.

These deficiencies are not just isolated incidents of DNR staff failing to comply with permitting regulations; they are official DNR policy memorialized in the agency's 2012 Guidance for Implementing Wisconsin's Phosphorus Water Quality Standards and born out in the vast majority of permit issuances. Rather than making the determinations required by law and tailoring compliance schedules to the needs of individual permittees, the DNR determines length and interim requirements of a compliance schedule based solely on the stringency of the phosphorus WQBEL contained in the WPDES permit.[41] In fact, the DNR is proposing to revise its guidance document to make this time allowance more explicit. The proposed language would require permittees to "evaluate compliance alternatives for meeting the final phosphorus WQBEL"[42] during the first permit term following rule promulgation. The proposed guidance updates also note that "it is not necessary that a study of possible operational improvements be conducted as part of the application process. This can be included as a first step of the compliance schedule."[43] If the operational evaluation demonstrates that a permittee cannot achieve final phosphorus limits via source reduction measures or other facility enhancements, "the permittee shall initiate a study of feasible alternatives for meeting the final limits."[44]

b. WPDES permits allow violation of water quality standards in downstream waters.

Federal law unambiguously requires a water discharge permit to contain a water quality based effluent limit when a discharge has the potential to cause or contribute to a violation of water quality standards. *See* 33 U.S.C. §§ 1311(a), 1342(a); *see also* 40 C.F.R. § 131.10(b). No

[41] *See generally* DNR, *Guidance for Implementing Phosphorus Water Quality Standards for Point Source Discharges*, Guidance Number 3800-2011-02 (1st ed. 2012) at page 60, *available at* http://dnr.wi.gov/topic/surfacewater/documents/phosphorus_guidance_signed.pdf (last visited Oct. 17, 2015).
[42] DNR, *Proposed Program Guidance Updates – Phosphorus Implementation Guide*, Guidance Number: 3400-2011-02, at page 65 (2d ed. 2014), *available at* http://dnr.wi.gov/news/input/documents/guidance/phosphorusguidance.pdf (last visited Oct. 16, 2015).
[43] *Id.* at 67.
[44] *Id.* at 68.

exception exists in federal law for discharges that may cause or contribute to a violation of waters *downstream* of a permittee's effluent pipe. The EPA has determined that state law may not meet federal Clean Water Act requirements if WQBELs that are necessary to protect downstream waters are not mandatory. *See* Hedman to Stepp, ¶ 12.

The EPA has expressed concern that Wisconsin legal authority allows issuance of a permit that does not assure compliance with applicable water quality requirements of all affected states. *See* Hedman to Stepp, ¶ 12; *see also* 40 C.F.R. § 122.4(d). In response to the Legal Authority Letter, the Wisconsin Attorney General stated that state statutes and regulations, including but not limited to Wis. Stat. §§ 283.15 and 283.31, provide the authority to impose limits necessary to assure compliance with downstream waters, including both intrastate and interstate waters. 2012 AG Statement at 7-8. However, Assistant Attorneys General representing the DNR before the circuit court and Court of Appeals have interpreted Wis. Stat. §§ 283.15 and 283.31 to provide the DNR the discretion *not* to impose limits necessary to protect downstream waters. *See generally*, DNR's Response Brief in *MEDC v. WDNR*, Case No. 12-CV-3352; *see also* DNR's Response Brief in *PACRS v. WDNR*, Appeal No. 2014AP2465. A state court agreed in July of 2014 that Wis. Stat. §§ 283.13 and 283.31 do not require the DNR to calculate a WQBEL to protect downstream waters where necessary. *See PACRS v. WDNR* Final Decision and Order, Case No. 13CV290. That issue is now before the Wisconsin Court of Appeals. *PACRS v. WDNR*, Appeal No. 2014AP2465.

The "repeated issuance of permits which do not conform to the requirements of [the Clean Water Act]" constitutes grounds for withdrawal of a State program such as the WPDES Program as administered by the DNR. 40 C.F.R. § 123.63(2)(ii). Therefore, the EPA must commit to objecting to all WPDES permits that fail to protect downstream intrastate and

interstate waters, and the DNR must revise all permits that were issued in non-compliance with this Clean Water Act requirement. These remedies will likely entail revision of the NPDES delegation memorandum of agreement as between the EPA and the DNR. The EPA must exercise some or all of the rights reserved in its 2012 approval of phosphorus implementation regulations, including but not limited to WPDES Program revision and/or other actions related to program withdrawal. *See* Letter from Susan Hedman, Regional Administrator, EPA Region 5, to Cathy Stepp, Secretary, DNR (July 25, 2012); *see also supra* Part II.b.ii.1.

iii. The DNR's operation of the WPDES Program violates public participation requirements of the Clean Water Act.

In addition to the lack of a state law authorizing individuals to challenge a WPDES permit,[45] Wisconsin residents have inadequate opportunity to intervene in state enforcement actions against permittees who violate terms and conditions of a WPDES permit. *See* Hedman to Stepp, ¶ 64 (Wisconsin law lacks equivalent to federal provisions that "allow intervention as of right in any civil or administrative action; or assurance that the State will provide written responses to requests to investigate and respond to citizen complaints, provide for permissive intervention, and provide public notice and comment on proposed settlements"). Federal regulations require that states with delegated NPDES program authority, such as Wisconsin, provide for public participation in state enforcement by: (1) allowing citizen intervention as of right; or (2) assuring the EPA that citizens have certain participation rights including guaranteed written response to complaints, unopposed intervention in state actions, and 30 days for public comment on settlement of such an action. 40 C.F.R. § 123.27(d).

Wisconsin's Attorney General opined in a 2012 statement that the DNR complies with the public participation requirements of 40 C.F.R. § 123.27(d) because state law affords

[45] *See supra* Part II.b.i.1.

intervention in civil enforcement actions. Wis. Stat. § 803.09(1); 2012 AG Statement at 13. However, the Attorney General went on to confirm that "the State often settles an enforcement action before a complaint is filed with court, and . . . end[s] the lawsuit on the same day." 2012 AG Statement at 13. Although intervention is possible in such scenarios, this sets a difficult if not impossible timeline and legal standard by which interested citizens must abide. *Id.* The EPA questioned this component of the Attorney General's 2012 statement, but the Attorney General maintained the position that state law allows the public to participate in WDPES enforcement actions to an extent that comports with federal law. *See* Letter from Thomas Dawson, Assistant Attorney General, to Attorney Robin Nyffeler, DNR (July 2, 2012).

Until resolution of the aforementioned issues, state law diminishes the rights of Wisconsin residents to assert their Clean Water Act rights in the State. Petitioners and other Wisconsinites seek venues in which to require the DNR to issue WPDES permits that are compliant with minimum requirements in federal law and regulations. Rather than afford these clean water advocates a meaningful, adequate forum for voicing concerns, the combined actions of the DNR and Wisconsin's legislative and judicial system have resulted in insurmountable procedural difficulties.

iv. <u>The DNR fails to reissue expired permits in a timely manner.</u>

The operational failure to issue permits constitutes failure to exercise control over activities required to be regulated, and therefore constitutes grounds for withdrawal of the DNR's authority to administer the WPDES Program. 40 C.F.R. § 123.63(a)(2)(i). The DNR's failure to timely issue WPDES permits has resulted in extreme permit backlog rates. This is particularly true where a permittee challenges the terms of a reissued WPDES permit or where new regulations require more stringent permit requirements. The DNR's failure to timely issue

WPDES permits is primarily a result of the State's failure to provide sufficient staffing or funding resources to the DNR.

The DNR maintains a website with data regarding current WPDES wastewater permit holders.[46] The Department's spreadsheets, last updated as of March 6, 2015, show 185 individual municipal wastewater permittees and 96 individual industrial wastewater permittees with permit expiration dates prior to March 6th. The DNR has allowed many of these permits to backlog for several years; for example, of the 96 expired industrial permits approximately 60 have been expired since 2012 or prior.[47] The EPA backlog reduction website[48] also provides data indicating that permit backlog is a hindrance to effective water permitting in Wisconsin. As of mid-year 2015, the EPA indicates that roughly 200 minor facilities[49] and 25 major facilities[50] have an expired WPDES permit. Even worse, when considering issuance of WPDES permits to all major, minor, and non-stormwater general permittees, the EPA estimates that only 34.4% of facilities are operating with a current permit.[51]

This significant number of backlogged permits shows a lack of adequate DNR resources to timely issue permits and also demonstrates the DNR's years-long avoidance of issuing certain permits. According to Wisconsin's 2012 Water Quality Report to Congress, delay in permit

---

[46] *Current WPDES Wastewater Permit Holders*, DNR (last updated Mar. 6, 2015), http://dnr.wi.gov/topic/Wastewater/PermitLists.html (last visited Oct. 16, 2015). Spreadsheets and more specific data available from Petitioners' representative upon request.
[47] *Id.*
[48] *Backlog Reduction*, EPA, http://water.epa.gov/polwaste/npdes/basics/Backlog-Reduction.cfm (last visited Oct. 16, 2015).
[49] EPA, *Permanent Status Report for Non-Tribal Individual Minor Permits – Mid-Year 2015, available at* http://water.epa.gov/polwaste/npdes/basics/upload/Permit-Status-Report-for-Non-Tribal-Individual-Minor-Permits-Mid-Year-2015.pdf (last visited Oct. 16, 2015).
[50] EPA, *Permanent Status Report for Non-Tribal Individual Major Permits – Mid-Year 2015, available at* http://water.epa.gov/polwaste/npdes/basics/upload/Permit-Status-Report-for-Non-Tribal-Individual-Major-Permits-Mid-Year-2015.pdf (last visited Oct. 16, 2015).
[51] EPA, *Permit Status Report for Non-Tribal Major Individual, Minor Individual, and Non-Stormwater General Permit Covered Facilities – Mid-Year 2015, available at* http://water.epa.gov/polwaste/npdes/basics/upload/Permit-Status-Report-for-Non-Tribal-Major-Individual-Minor-Individual-and-Non-Stormwater-General-Permit-Covered-Facilities-Mid-Year-2015.pdf (last visited Oct. 16, 2015).

reissuance can result from additional review necessitated after public comment period, delay in obtaining additional information from a permittee, a permittee failing to be in substantial compliance with terms of an expired permit, and pending enforcement actions.[52] According to the DNR, the 34% backlog as of January 1, 2012, was due to new phosphorus and thermal regulations and staff vacancies.[53] The DNR states that permit backlog was reduced to 29% as of February 13, 2014 and further states the Department's expectation that this number will continue to decrease.[54] Yet the DNR simply lacks the staff and monetary resources to sufficiently reduce its permit backlog times.[55]

Notwithstanding the DNR's efforts to hire new staff to reduce the permit backlog since 2012, the Department only reduced the permit backlog by five percent.[56] This reduction means that at current rates, without any new policies that may "complicate" permit issuance, the DNR will not achieve its 10% backlog goal until approximately seven years from now in 2022.

The DNR's inability to reduce its permit backlog also reflects its lack of capacity to meaningfully monitor Wisconsin's water resources. Permittees continue to operate under expired permits while awaiting reissuance of a backlogged permit. This delay affects water quality because expired permits fail to account for advances in water quality standards and other water quality protections that went into effect or were enforced after issuance of an expired permit. Permits that the DNR has allowed to backlog over the past five years have, at a minimum, failed to adequately limit key pollutants including but not limited to chlorine, phosphorus, and heat discharges and have failed to include limits necessary to address whole effluent toxicity.

---

[52] *See* DNR, *Wisconsin Water Quality Report to Congress – Year 2012, available at* http://dnr.wi.gov/topic/surfacewater/documents/2012irfinalhard%20copy%204.20.12.indd.pdf (last visited Oct. 16, 2015).
[53] *See* DNR, *Wastewater Management Update for Clean Water Act – 2014 IR, available at* http://dnr.wi.gov/topic/surfacewater/documents/2014UPDATEDIRWastewater.pdf (last visited Oct. 16, 2015).
[54] *Id.*
[55] *Id.*
[56] *Id.*

Wisconsin water quality will suffer if DNR understaffing continues and if the permit backlog increases each time a new policy or water quality standard is adopted. For example, the WPDES permit for Domtar A.W. Corporation's Wastewater Reclamation Center, Nekoosa Mill and Port Edwards Mill expired in January 2007. WPDES Permit No. WI-0003620-06-1, Final WPDES Permit for Domtar A.W. LLC, Nekoosa Mill (July 28, 2003). Because the DNR failed to comply with EPA-approved WPDES permitting requirements for the facility's chlorine and mercury discharges, the EPA indicated that it would object to the permit if the DNR issued the permit without following approved methods for calculating mercury and chlorine WQBELs. *See* Letter from Peter Swenson, NPDES Program Branch Chief, EPA Region 5, to Russell Rasmussen, Director, DNR Bureau of Watershed Management (June 4, 2007) [hereinafter Swenson to Rasmussen].

Home and business owners located downstream of the Domtar discharge expressed concern with the delayed issuance of the permit in a letter to the DNR on March 12, 2008. *See* Letter from Bruce Carlson, Chairman, Petenwell and Castle Rock Stewards, to Russell Rasmussen, Director, DNR Bureau of Watershed Management (March 12, 2008). On April 30, 2008, the DNR responded with note that the Department was delaying issuance of the Domtar permit while attempting to resolve concerns with the phosphorus and mercury requirements. *See* Letter from Russell Rasmussen, Director, DNR Bureau of Watershed Management, to Bruce Carlson, Chairman, Petenwell and Castle Rock Stewards (April 30, 2008) [hereinafter Rasmussen to Carlson]. The Department also stated that it would delay issuance of the Domtar permit until at least late 2008 pending collection of additional data. *Id.*

The DNR recognized that because state law departed from federal requirements related to the imposition of chlorine limits, Domtar could challenge the permit as inconsistent with state

law if the DNR issued the permit with chlorine limits. *Id.* The DNR also recognized that a challenge would delay the effectiveness of the chlorine limits at issue. *Id.* When the DNR finally issued the permit, Domtar did indeed contest the chlorine limits it its WPDES permit and cause a years-long delay in the effectiveness of the permit terms and conditions. Petition for Adjudicatory Hearing, Domtar Paper Co., LLC, Permit No. WI-0026042-07-0 (May 6, 2009) [hereinafter Domtar Petition]. The Domtar permitting process demonstrates that the EPA's commitment to object to a permit's compliance with minimum Clean Water Act requirements does not result in a comprehensive solution. Instead, the DNR simply "backlogs" the permit and the permittee continues to discharge under outdated and likely less protective standards.

To remedy the untimely reissuance of WPDES permits, the DNR must make a concrete and enforceable commitment to the EPA to allocate more funding and other necessary resources toward permit drafters in order to decrease the permit backlog. The DNR must also commit to continued issuance of permits as new rules are passed such that permittees cannot rely upon the time-consuming rulemaking process to avoid compliance with the minimum requirements of the Clean Water Act. NPDES program withdrawal is appropriate if the DNR cannot make and promptly implement such a commitment.

v. <u>The DNR fails to seek necessary EPA approval of WPDES Program changes.</u>

Provisions of the Clean Water Act require the DNR to seek and receive EPA approval for revisions to its WPDES Program. *See* 40 C.F.R. § 123.62. When program modifications become effective at the state level and are later deemed by the EPA as non-compliant with the Clean Water Act, these modifications have questionable legal force. *See, e.g., id.*; *see also* 40 C.F.R. §§ 122.44, 123.25(a). Therefore, failure to seek EPA approval leaves permittees, the public, the

DNR and the EPA in a state of uncertainty regarding the legal obligations and responsibilities of all involved parties.

1. The EPA has not approved statutory revisions to Wis. Stat. Ch. 283 that revise the approved WPDES Program as it relates to issuance of permits that authorize adaptive management option to meet water quality based effluent limits for phosphorus or TSS.

The Wisconsin Legislature enacted the following statutory revisions to the WPDES Program in April 2014: creation of a new WPDES permit adaptive management compliance option for total suspended solids ("TSS") discharges; extension of an existing adaptive management option for phosphorus from 15 to 20 years; requirement that state agencies prepare a statewide phosphorus variance within 240 days; and establishment of permit terms for inclusion in any WPDES permit for which the DNR approved the statewide phosphorus variance. *See* Wis. Stat. §§ 283.13(7), 283.16. The phosphorus variance is the only component of these statutory revisions that has a built-in requirement for EPA approval, and to the best of Petitioners' knowledge, the DNR has not yet submitted any of these statutory revisions to the EPA for approval.

The recently enacted Wis. Stat. § 283.13(7) "authorize[s] a permittee to use an adaptive management option to achieve compliance with the water quality standard for phosphorus or an approved total maximum daily load for [TSS]" and authorizes the DNR to "provide[] 4 permit terms for the permittee to comply with its water quality based effluent limitation for phosphorus or [TSS]." Wis. Stat. § 283.13(7)(b). Adaptive management allows a permittee to achieve compliance with a water quality standard or a total maximum daily load by implementing "verifiable reductions in the amount of water pollution from point sources and nonpoint sources," and the permittee may adjust the plan over time to achieve compliance.[57]

[57] Wis. Stat § 283.13(7)(a).

While this approach appears to reflect the watershed adaptive management option under Wis. Admin. Code § NR 217.18, the EPA's approval of that regulatory section was limited to phosphorus and did not authorize a permittee to use the adaptive management option to meet a total maximum daily load for TSS. Furthermore, the EPA's approval of the phosphorus adaptive management option required compliance with the WQBEL within five years of the expiration of the permittees second permit term after approval of the plan.[58] Under the DNR's current implementation of the adaptive management option as outlined in NR 217.18, WPDES permittees are not required to seek approval of an adaptive management plan and begin implementation until five years after receiving a WPDES permit. Wis. Admin. Code § NR 217.18(3)(e).

This essentially allows permittees to disregard water quality standards of a receiving water for an additional five years. For example, facilities that received an initial WPDES permit after the state's 2012 adoption of phosphorus water quality standards are not required to meet WQBELs or meet water quality standards in the receiving water until 2032. Wis. Stat. § 283.17 extends that timeline to 2037. WPDES permittees that implement an adaptive management plan but do not achieve compliance with water quality standards in the receiving waters must simply meet their WQBEL. The EPA must disapprove WPDES permits that include WPDES statutory revisions that make WPDES permits less protective than Wisconsin's current approved program.

2. Despite EPA disapproval, WPDES permits do not need to include mercury limits during the initial permit term.

The DNR issued a new rule in 2002 that imposed mercury limitations in WPDES permits but allowed a new permittee to discharge unlimited amounts of mercury for a "data collection" period of up to two years. Wis. Admin. Code § NR 106.145. The DNR implemented this two-

[58] Wis. Admin. Code § NR 217.18(3)(e)4.

year data collection period in a manner that allowed permittees to discharge unlimited amounts of mercury for one full permit term. A permit term lasts five years but is often administratively extended. For example, mercury effluent limits were not included in the Georgia Pacific Broadway Mill WPDES permit until April 1, 2014. *Compare* 2005 Permit Fact Sheet, Georgia-Pacific Consumer Products LP Green Bay Broadway, WPDES Permit No. WI-0001848-07-0 (no mercury effluent limit) *with* 2013 Permit Fact Sheet, Georgia-Pacific Consumer Products LP Green Bay Broadway, WPDES Permit No. WI-0001848-08-0, at 10-11.

The DNR and DOJ submitted this mercury rule to the EPA for review and approval in May of 2007. *See* Letter and Attachments from Todd Ambs, Water Div. Administrator, DNR, to Jo Lynn Traub, Water. Div. Director, EPA Region 5 (May 30, 2007). Between 2002 and 2007, and then during that timeframe of the EPA's rule review, the DNR relied upon the unapproved rule to give most permittees a "free pass" on mercury discharges. On February 17, 2009, the EPA disapproved certain components of the mercury rule, including the excessive two-year data collection period, as inconsistent with Clean Water Act regulations. *See* Letter from Bharat Mathur, Acting Regional Administrator, EPA Region 5, to Matthew Frank, Secretary, DNR (Feb. 17, 2009). Scores of industrial and municipal dischargers were issued permits between 2002 and 2009 that did not contain mercury effluent limitations, in contradiction of the EPA's 2009 position on Wisconsin's mercury rule.

To date, and despite the EPA's disapproval of the mercury variance and a note in the 2011 deficiency letter, the DNR has not removed the pertinent language from the Administrative Code. *See* Wis. Admin. Code § NR 106.045; *see also* Hedman to Stepp, ¶ 8. The DNR could have pursued emergency mercury rulemaking with the EPA's involvement and approval. Instead, more than ten years after rule promulgation, a court declared in July 2014 that portions

of the rule were invalid due to violation of Clean Water Act and state law. *See generally* MEDC v. DNR Decision. In addition to operation of a delegated state program in violation of the Clean Water Act, this is arguably a failure to operate a regulatory program to develop a mercury WQBEL for inclusion in WPDES permits. *See* 40 C.F.R. §§ 123.63(a)(2) and (a)(5). To date, Wisconsin water quality is insufficiently protected because WPDES permittees who do not receive a mercury variance are able to challenge the DNR on the grounds that the lack of a variance is non-compliant with state law.

3. WPDES permits did not include WQBELs for additives in noncontact cooling water in certain circumstances.

Wisconsin Admin. Code § NR 106.10 prohibited the imposition of WQBELs for discharges of additives, including chlorine, in noncontact cooling water if the addition is similar in amount as is typically added to a public drinking water supply. Both the DNR and the EPA for years acknowledged that this provision violates Clean Water Act regulations at 40 C.F.R. § 122.44(d)(1)(i), which "requires WQBELS for all pollutants that are or will be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria." *See* Hedman to Stepp, ¶ 17. The EPA also issued a letter committing to object to the WPDES permit for at least one pulp and paper manufacturing facility if the DNR issued the permit without WQBELs for chlorine. *See generally* Swenson to Rasmussen.

The DNR explained to concerned citizens that permittees could challenge a WPDES permit as violating state law if DNR issues the permit in compliance with the Clean Water Act rather than a corresponding, less stringent state law. *See* Rasmussen to Carlson. The result is delayed implementation of more stringent limits that are necessary to comply with federal law. This is precisely what occurred when a permittee challenged the limits required by the Clean

Water Act, but not required by state law. The EPA indicated its objection to issuance of the permit without necessary limits in mid-2007, and the DNR responded by issuing a WPDES permit to Domtar in 2009 with the limits necessary to comply with the Clean Water Act. Domtar then challenged those limits as contrary to state law. *See* Domtar Petition. Domtar's challenge to the chlorine terms in its permit under Wis. Stat. § 283.63 effectively nullified the efficacy of those challenged terms during the pendency of the challenge. *See* Wis. Stat. § 283.63(1)(am).

It was not until mid-2012 that the DNR forwarded Domtar's petition for review to the Division of Hearings and Appeals, and this occurred only as the result of a stipulated agreement to do so. Stipulation and Order, Midwest Envtl. Defense Center v. Wis. Dep't of Natural Res., Case No. 12CV0569 (Mar. 12, 2012). At that time, the DNR also stipulated to append a note to the administrative code that the provision exempting chlorine limits does not comply with the requirements of the Clean Water act and is therefore invalid. *Id.* However, this scenario is likely to repeat itself where the DNR continues to delay revision of its WPDES Program to correct other omissions and deficiencies as identified by the EPA in 2011.

In sum, no requirement or mechanism exists within the broken Wisconsin WPDES permitting process to ensure that the EPA approves significant WPDES Program revisions. In the interest of regulatory efficiency as well as the interests of Petitioners and general public, the DNR must commit not to implement rules until after EPA review and approval. This will likely require a statutory revision and/or a revision to the memorandum of agreement between the EPA and the DNR. Petitioners request a written statement from the EPA regarding the legal force of rules that the DNR has implemented without federal approval.

vi. <u>The DNR does not allocate sufficient staff time toward resolution of WPDES Program deficiencies.</u>

The Department has prioritized other initiatives over the resolution of deficiencies in its WPDES permitting program. The DNR has directed resources to other policy priorities, including but not limited to the following proposals: developing new rules for site specific numeric phosphorus water quality criteria; Surface Water Designated Uses; associated water quality criteria; variance waters and qualifying factors for variances based on economic impacts; processes for water body assessments and impaired waters listing; biological criteria for water quality standards; and biological confirmation of phosphorus impairments. *See, e.g.* Statements of Scope for Rule Nos. WY 23-13, WY 25-13, WT-17-12, *available at* http://dnr.wi.gov/news/input/ProposedPermanent.html (last visited Oct. 15, 2015). Petitioners also direct the EPA to the long list of proposed DNR program guidance that is unrelated to bringing the WPDES Program into compliance with the Clean Water Act. *See Proposed DNR Program Guidance* (last updated Oct. 9, 2015), *available at* http://dnr.wi.gov/news/input/guidance.html#about (last visited Oct. 17, 2015). Petitioners appreciate the breadth of subject matter over which the DNR is tasked with regulating; however, the status of Wisconsin's waters and the extent of WPDES Program non-compliance with federal law and regulations mean that the DNR is long overdue to prioritize guidance and other efforts that will align the water pollution permitting program with the Clean Water Act.

Recent DNR reorganization raises even more doubt regarding the Department's intention to dedicate sufficient resources toward the task of bringing the WPDES Program into compliance with the Clean Water Act. In July 2015, the DNR announced that the Department would dissolve the water division and manage water and air pollution within a Business Support and External Services Division. *See DNR Reorganization Memo,* Madison.com, *available at* http://host.madison.com/dnr-reorganization-memo/pdf_119177ae-aa01-59ed-9feb-

091f5f0f5641.html (last visited Oct. 17, 2015). The Department has indicated that the purpose of reorganization is to "make government more efficient and effective," but Petitioners join George Meyer, former DNR Secretary, in questioning whether the change is enough to address deep resource cuts, such as loss of 600 positions in the last 20 years. *See Here and Now: Meyer Weighs In On Recent Reorganization Of The DNR* (Wisconsin Public Television broadcast July 31, 2015), *available at* http://wpt.org/Here_and_Now/meyer-weighs-recent-reorganization-dnr (last visited Oct. 16, 2015). Furthermore, the reorganization's focus on addressing business needs will likely do very little to address the expectations of Petitioners and the general public that the DNR exists to maintain, improve, and protect the quality of Wisconsin's water resources. *Id.*

The DNR's oversight of CAFOs provides a stark example of the extent and effect of DNR understaffing. CAFOs are generally defined by Wisconsin statute as animal feeding operations with 1,000 animal units or more at any given time. *See* Wis. Admin. Code § NR 243.03(12). Statistics from the DNR demonstrate exponential growth of the number of dairy CAFOs in Wisconsin between 1985 and 2014. *See* Wisconsin CAFO WPDES permits by animal type over time, *available at* http://dnr.wi.gov/topic/AgBusiness/CAFO/StatsMap.html (last visited Oct. 15, 2015). The DNR's leadership has stated that the Department has the same number of CAFO program staff today as in 1999 despite this industry growth. Furthermore, analysis of open records requests submitted by Midwest Environmental Advocates, Petitioners' representative, does not reveal a corresponding increase in the number of enforcement actions or judgments based upon the WPDES permitting program. Therefore, the DNR is not seeking enforcement against a consistent percentage of facilities when comparing relatively stagnant referral, enforcement and judgment numbers against a rapidly increasing number of CAFO WPDES permittees. Petitioners request that any corrective action that follows the filing of the

Petition for Corrective Action include further EPA investigation into whether the DNR's enforcement program fails to comply with minimum Clean Water Act requirements such that program withdrawal is warranted. *See* 40 C.F.R. § 123.63.

A growing industry that was generally compliant with federal and state regulations might justify a stagnant amount of CAFO enforcement actions. Unfortunately, a lack of such general compliance is demonstrated by increasing attention of national watchdog groups to Wisconsin water quality issues. This attention has focused on CAFO permit and water quality violations, especially those that are occurring in Kewaunee County. *See* SOCIALLY RESPONSIBLE AGRICULTURE PROJECT, THE RAP SHEETS: INDUSTRIAL DAIRIES IN KEWAUNEE COUNTY, WISCONSIN, *available at* http://sraproject.org/pdfs/SRAP_rapsheet_2015.pdf (last visited Oct. 15, 2015). Furthermore, Petitioners' representative as well as other state and national partners filed a petition in 2014 asking the EPA to exercise emergency Safe Drinking Water Act authority to address Kewaunee County's "widespread and pervasive groundwater contamination from nitrate and bacteria." *See* 42 U.S.C. § 300(i); *see also* Petition for Emergency Action Pursuant to the Safe Drinking Water Act (Oct. 22, 2014), page 37, *available at* http://midwestadvocates.org/assets/resources/Safe%20Drinking%20Water%20Act%20Petition/2014-10-22_Kewaunee_SDWA_Petition_to_EPA.pdf. It should be the role of the DNR, not concerned citizens or non-profit interest groups, to shoulder the primary burden of addressing the impact of certain industries upon Wisconsin's water resources.

The DNR has, in summary, prioritized a long list of issues over the WPDES Program's compliance with the minimum requirements of the Clean Water Act. Furthermore and as detailed immediately below, the Department has exercised emergency rulemaking authority to promptly resolve issues that appear less pressing than the fixing the DNR's non-compliance with federal

requirements that are intended to protect our State's waters as well as the people that use and enjoy Wisconsin's water resources.

1. The DNR could address certain WPDES Program deficiencies by exercising its emergency rulemaking authority.

The DNR may utilize its emergency rulemaking authority to promulgate a rule without complying with certain notice, hearing and publication requirements that are found in Wisconsin's statutes for non-emergency rules. Wis. Stat. § 227.24(1)(a). Emergency rules become effective upon publication and remain in effect for 150 days, but the Joint Committee for Review of Administrative Rules ("JCRAR") may extend efficacy for up to an additional 120 days at the request of the DNR. Wis. Stat. § 227.24(1)(c), (2)(a).

Wisconsin statutes authorize promulgation of emergency rules when "preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures." Wis. Stat. § 227.24(1)(a). The DNR has utilized this standard of appropriateness to promulgate many emergency rules, including but certainly not limited to the following examples:

- "To clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages," and "to ensure that the intent of the recent ch. NR 150 rewrite is being met" Statement of Scope for Rule Nos. OE-09-14 and OE-10-14 (July 2, 2014), *available at* https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=17463 (last visited Oct. 15, 2015).
- "To revise the administrative code to make it consistent with the new federal [Clean Air Act] rule" such that Wisconsin air pollution sources can benefit from the tailoring rule limiting applicability under air permit and emission control regulations. Order of the State of Wisconsin Natural Resources Board Amending and Creating Rules AM-48-10(E), page 1 (Nov. 16, 2010).
- To modify an existing rule "to establish a new general permit with appropriate conditions" for dredging on the beds of the Great Lakes to remove "algae, mussels, dead fish and similar large plant and animal nuisance deposits," an activity that would otherwise require an individual permit." Notice of Public

Hearing WT-26-07(E) (June 12, 2007).

The DNR also seemingly interprets state statutes to allow the Department to enact a substantially similar or identical emergency rule once a rule expires. For example, the DNR published an emergency rule revising Wis. Admin. Code ch. NR 150 in September 2014. *See* Emergency Rulemaking Order No. OE-10-14 (Sept. 4, 2014), *available at* https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=17463 (last visited Oct. 15, 2015). This administrative code provision relates to the DNR's "environmental analysis and review procedures under the Wisconsin Environmental Policy Act." *Id.* JCRAR extended the emergency rule for an additional 120 days and as such the rule expired on May 27, 2015. See Wis. Natural Res. Bd. Order No. OE-21-14. When the DNR issued the statement of scope for the August 2014 emergency rule, it found "that putting this rule into effect prior to that time would take effect using the permanent rule process is necessary to ensure that the department and public time involved in lengthy rule processes for current rules is not compromised by a confusing definition" in Wisconsin regulations. Statement of Scope OE-09-14 and OE-10-14 (May 12, 2014). The DNR recently issued a substantially similar, if not identical statement of scope with the same finding of emergency, description of objective of the proposed rule and explanation of statutory authority for the rule so that it could further extend the "emergency" changes to NR 150. *See* Statement of Scope for Rule Nos. OE-20-14(E) and OE-21-14 (Dec. 9, 2014), *available at* https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=18644 (last visited Oct. 15, 2015).

In conclusion, the emergency rulemaking standard as applied thus far by the Department is appropriately invoked to correct the regulatory omissions and deficiencies that occur each time that the DNR issues a WPDES permit that fails to comply with the purpose and intent of the

Clean Water Act. The DNR must accompany the use of its emergency rulemaking authority with a more comprehensive fix to address the ongoing lack of DNR staff or resources needed to issue compliant permits, monitor permittees and enforce violations of federal law and regulations.

c. The DNR Does Not Have an Adequate Regulatory Program for Developing Water Quality-Based Effluent Limits in WPDES Permits.

The DNR has not resolved the deficiencies identified by the EPA in its 2011 deficiency letter with respect to the State's regulatory program for developing WQBEL limits in WPDES permits. States with delegated NPDES programs must develop an adequate regulatory program for incorporating WQBELs into water discharge permits or risk the EPA's withdrawal of state authority. 40 C.F.R. § 123.63(a)(6).

i. <u>WPDES permits are not required to include effluent limitations to meet narrative water quality standards or prevent acute harm to fish and other aquatic life.</u>

Clean Water Act implementing regulations require states in certain circumstances to meet water quality standards by establishing numeric or narrative effluent limitations. *See* 40 C.F.R. § 122.44(d). Among other things, states such as Wisconsin with delegated NPDES authority must set WQBELs such that "the level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards." 40 C.F.R. § 122.44(d)(1)(vii)(A). The EPA has reviewed corresponding Wisconsin regulations and determined deficiencies and omissions in the DNR's compliance with the Clean Water Act. *See* Hedman to Stepp, ¶¶ 11, 28.

State regulations are particularly problematic where the DNR lacks a numeric water quality standard but a discharge contributes to violation of narrative water quality standards found in Wis. Admin. Code § NR 102. This provision requires control of "[p]ractices attributable to municipal, industrial, commercial, domestic, agricultural, land development or other

activities." Wis. Admin. Code § NR 102.04(1). The purpose of controlling such practices is to protect public rights in waters of the state from interference from "substances that will cause objectionable deposits on the shore or in the bed of a body of water;" "floating or submerged debris, oil, scum or other material;" "materials producing color, odor, taste or unsightliness;" "substances in concentrations or combinations which are toxic or harmful to humans;" and "substances [] present in amounts which are acutely harmful to animal, plant or aquatic life." Wis. Admin. Code § NR 102.04(1)(a)-(d).

Furthermore, permit limits that are calculated pursuant to state regulations to prevent acute harm to fish and other aquatic life may violate federal requirements and water quality standards. For example, Wisconsin law allows a discharger's effluent to equal half or greater of the total flow of the receiving water, which may cause chronic toxicity without companion limits based on chronic water quality criteria. *See* Wis. Admin. Code §§ NR 106.06(3)(b), 106.32(2)(b), 106.87(1); Hedman to Stepp, ¶ 28.

To conclude, because Wisconsin has a delegated NPDES programs with an inadequate regulatory program for incorporating WQBELs into water discharge permits, and because both the DNR and EPA have been aware of these deficiencies since at least 2011, the EPA must require prompt program correction or withdrawal the DNR's authority to administer the WPDES Program. 40 C.F.R. § 123.63(a)(6).

III. The Only Remedy to the DNR's Failure to Comprehensively Address the July 2011 Deficiency Letter is for the EPA to Require Prompt Corrective Action by the DNR or Withdraw the DNR's NPDES Program Authority.

Few meaningful remedies exist to address regulatory deficiencies and omissions given the status of the WPDES Program as outlined in this Petition for Corrective Action. Because the EPA has already identified in its 2011 deficiency letter the shortcoming in the DNR's WPDES permit program, the EPA's failure to respond to this petition, as required by 40 C.F.R. §

123.64(b)(1), or to commence withdrawal proceedings in a timely manner would constitute unreasonable delay. Furthermore, judicial remedies exist to enforce agency action within a reasonable timeframe. *See generally In re Am. Rivers & Idaho Rivers United,* 372 F.3d 413 (D.C. Cir. 2004); *Forest Guardians v. Babbitt,* 174 F.3d 1178 (10th Cir. 1999); *Pub. Citizen Health Research Group v. Fed. Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984).

The EPA does not need to conduct additional informal investigation or assess the DNR's implementation of rulemaking and other response to the EPA's 2011 deficiency letter. Before issuance of that letter, the EPA and the DNR coordinated "to understand the State's authority and identify and resolve questions" which was a "lengthy process which included six meetings or calls with the State beginning September 2009." Hedman to Stepp at 1. The EPA's letter specifically identified "[o]missions or deviations from federal requirements" and further stated that "certain of the concerns remain the subject of prior disapprovals by EPA under 40 C.F.R. § 123.62" and "[t]hese require immediate corrective action by the State." *Id.* As such, the DNR has been aware of these omissions or deviations since at least 2011, in many instances since prior to 2009.

Given the lengthy investigation into shortcomings of the DNR's WPDES Program, as well as the DNR's years-long delay in remedying known omissions and deficiencies, the EPA has a duty to proceed to conclude this petition within a reasonable timeframe. Pursuant to 40 C.F.R. § 123.64(b)(1), the EPA has a mandatory duty to respond in writing to this Petition by denying the Petition, scheduling a public hearing or taking other responsive action. *See* 33 U.S.C. § 1342(c)(3); *see also, e.g., Sierra Club v. Whitman,* 268 F.3d 898 (9th Cir. 2001)*; Dubois v. Thomas,* 820 F.2d 943 (8th Cir.1987).

a. The Administrative Procedure Act Requires the EPA to Respond to this Petition for Corrective Action within a Reasonable Timeframe.

The Administrative Procedure Act imposes a mandatory duty upon the EPA to respond to actions such as the filing of this Petition for Corrective Action within a reasonable timeframe. *See* 5 U.S.C. § 553(e); 5 U.S.C. § 555(b) ("within a reasonable time, each agency *shall* proceed to conclude a matter presented to it.") (emphasis added). Courts may order agency action that is unreasonably delayed. 5 U.S.C. § 706, *See, e.g.*, *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987). A concrete statutory deadline is not a prerequisite to making such a finding and courts will find agency delay as unreasonable when such delay is egregious. *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 616 (7th Cir. 2003); *Forest Guardians*, 174 F.3d at 1190; *Saleem v. Keisler*, 520 F. Supp. 2d 1048 (W.D. WI 2007). While "[t]here is no *per se* rule as to how long is too long to wait for agency action, [ ] a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 418–19.

b. Other WPDES Program Deficiencies Require Expedited Response from the EPA.

The calculation of a reasonable timeframe for the EPA to respond to this Petition for Corrective Action is subject to the well-analyzed "TRAC factors":

> (1) the time agencies take to make decisions must be governed by the rule of reason ...;
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason ...;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake ...;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority ...;
> (5) the court should also take into account the nature and extent of the interests prejudiced by the delay ...; and

> *(6)* the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed....”

See Telecomm. Research and Action Ctr. (TRAC) v. Fed. Commc’ns Comm’n, 750 F.2d 70, 80 (D.C. Cir. 1984) (citations and internal quotation omitted). Looking to the second of the *TRAC* factors, the Clean Water Act includes a statutory scheme with “reasonable” deadlines that one can logically extend to establish a timeline for the EPA’s response to this Petition for Corrective Action. The Clean Water Act and its implementing regulations show that the DNR’s delay in correcting deficiencies and the EPA’s failure to commence withdrawal proceedings are not reasonable.

For example, the EPA had 90 days to review and approve or disapprove Wisconsin’s initial request for authority to implement and administer a state-delegated NPDES permitting.[59] *See* 33 U.S.C. § 1342(b); *see generally* 40 C.F.R. § 123. As another example, if a state with a delegated NPDES program must amend or enact a statute in order to comply with revised federal Clean Water Act regulations, such changes must occur within two years. 40 C.F.R. § 123.62(e). Any necessary revisions to state regulatory program must occur within one year of federal revision to the Clean Water Act. *Id.* In sum, neither the DNR nor the EPA have resolved known deficiencies and omissions in the WPDES Program in a time frame considered reasonable under the Clean Water Act because both agencies have had at least the four years since the 2011 deficiency letter to act. Although Petitioners acknowledge the strained financial and staffing

[59] Wisconsin sought approval within weeks after the first anniversary of the adoption of the Clean Water Act to operate the state-delegated WPDES Program. Wisconsin’s approval submission included a statement from the Attorney General certifying that the state had adequate authority to establish and administer a State water pollution control permit program consistent with all the requirements of section 402(b) of the Clean Water Act. *See* Letter from Anthony Earl, Secretary, DNR, to John McGuire, Regional Administrator, EPA Region 5 (June 21, 1979). Ninety days later, the EPA approved Wisconsin’s operation of state permit program pursuant to the Clean Water Act. *See generally* Train to Lucey.

resources at the DNR, lack of resources alone is not an excuse for unreasonably delayed action by either the DNR or the EPA. *Forest Guardians*, 174 F.3d 1178.

The EPA's responsibility to respond to this Petition within a reasonable timeframe is also heightened in light of the known public health and welfare implications of the broken WPDES Program. *See TRAC*, 750 F.2d at 80; *see also* the public health and welfare discussion within Petitioners' Interest section *supra*. Furthermore, the EPA's failure to commence proceedings is unreasonable given Wisconsin's flagrant violation of lengthy, self-imposed timelines for corrective action and failure to utilize all available administrative tools to correct the deficiencies and omissions. *See, e.g.*, *Save the Valley, Inc. v. EPA*, 223 F. Supp. 2d 997, 1013 (S.D. Ind. 2002); *Save the Valley, Inc. v. EPA*, 99 F. Supp. 2d 981, 985-86 (S.D. Ind. 2000); *Illinois v. Hoffman*, 425 F. Supp. 71, 77 (S.D. Ill. 1977) (finding in the context of 33 U.S.C. § 1319 that the Administrator's duty to act is triggered "[w]henever a violation is directed to the attention of the Administrator.").

c. The EPA Constructively Approved the WPDES Program Despite the Program's Non-Compliance with the Clean Water Act.

The DNR's failure to timely respond to the EPA Legal Authority Letter is akin to a constructive submission for approval of the admittedly lacking WPDES Program. *Sierra Club*, 828 F.2d at 793 (finding that failure to take an action, such as rule promulgation, is judicially enforceable when inaction has the "same impact on the rights of the parties as denial of relief"). In turn, the EPA's failure to deny such a submission could arguably have the same effect as approving the program. *Id*. The EPA's constructive approval may serve as a final agency action that could form the basis of a lawsuit. *Id.*; *see also* 5 U.S.C. §§ 704, 706(1).

In conclusion, Petitioners appreciate and respect the EPA's efforts to bring Wisconsin into compliance with the minimum requirements of the Clean Water Act. However, Petitioners

remain concerned that without further and reasonably prompt action by the EPA, that the DNR's resistance to bringing Wisconsin into full compliance with the Clean Water Act will continue to endanger our state's public welfare, water quality, and industries such as tourism and recreation that are so interconnected to the health of Wisconsin's waters. Petitioners aim for a timely and constructive resolution of this Petition, yet it remains important to note potential legal claims against the already egregious delay in addressing Wisconsin's noncompliance with the Clean Water Act.

CONCLUSION

The facts outlined in this Petition for Corrective Action demonstrate that the DNR is knowingly and consistently administering the WPDES Program in a manner that violates the Clean Water Act. Furthermore, Petitioners' stories show that Wisconsin residents who work tirelessly to protect their state's water quality have voiced their concerns to the DNR in an attempt to avoid the need to petition the EPA for corrective action. The DNR's response to Petitioners' concerns has been insufficient at best. At worst, the DNR has allowed Wisconsin's water quality to backslide while supporting state laws and regulations that stymy citizen ability to use the judicial process to challenge a WPDES permitting system that falls short of minimal federal requirements.

Petitioners therefore request that the EPA exercise its authority pursuant to 33 U.S.C. § 1342(c) and 40 C.F.R. § 123.63 and mandate prompt, comprehensive corrective action from the DNR or withdraw the Department's authority to administer Wisconsin's delegated NPDES program.

Respectfully submitted this 20th day of October, 2015.

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Kimberlee Wright, Executive Director
Betsy Lawton, Of Counsel
Tressie Kamp, Staff Attorney
Midwest Environmental Advocates, Inc.
612 West Main St., Suite 302
Madison, WI 53703
Tel: (608) 251-5047, ext. 8
Fax: (608) 268-0205

PETITIONERS

Timm Zumm — Date 9/3/15

Doug Jones — Date 9-3-15

Ron Grasshoff — Date 9/3/15

Bill Iwen — Date 9/3/15

Lynn & Nancy Utesch — Date 9/3/15

Jim Swanson — Date 9-3-15

Dave Marshall — Date 9/3/2015

Dean Hoegger — Date 9/12/15

JOHN DOMINO — Date 9-12-15

Elaine Swanson — Date 9/12/15

Cheryl A. Nenn — Date 9/23/15

ALLIE B. RAVEN — Date 9/27/15

April L. Stone Dahl — Date 9/27/15

Jim Wagner — Date 9/30/15

Date

Date