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April 25, 2016

United States Environmental Protection Agency

Region 5

Barbara Wester and John Colletti

77 West Jackson Blvd.

Chicago, IL 60604-3590

RE: WN-16J

Attorney Wester and Mr. Colletti:

On behalf of the 16 Wisconsin residents who filed a Petition for Corrective Action (Petition) with the U.S. Environmental Protection Agency (EPA) in October 2015, Midwest Environmental Advocates thanks you for the opportunity comment on the draft Petition investigation protocol as transmitted on March 25, 2016. We are copying the Wisconsin Department of Natural Resources (WDNR) on the following comments and ask that EPA provide the WDNR's comments to us if we are not party to the WDNR's transmittal.

As an initial note, EPA states in 1.a of its investigation protocol that it will work with the WDNR to determine which of the 75 issues outlined in the 2011 legal deficiency letter are successfully resolved. Petitioners understand that they will have a later opportunity, *prior to the EPA's Petition findings*, for input on whether we agree with the status of these WPDES Program issues. Please confirm this opportunity; otherwise Petitioners would respectfully request to have a representative at the review meeting mentioned in 1.a of the protocol.

Petitioners have two pressing and overarching concerns that the EPA should consider throughout the entirety of its preliminary investigation into the Petition. The first concern is with respect to allegations within the Petition that the EPA can and should resolve without a formal, lengthy investigation. If, for example, a Wisconsin statute or regulation is on its face in clear violation of the Clean Water Act (CWA), resolution would not require permit reviews or audit meetings and as such should proceed along a much more condensed timeline. We will highlight such issues throughout the following comments.

Petitioners' second concern is with respect to Wis. Stat. § 227.10(2m), referenced in the Petition<sup>1</sup> in the context of concentrated animal feeding



<sup>1</sup> Petition for Corrective Action, October 20, 2015, at pages 35, 52 [hereinafter Petition].

operations and stormwater Wisconsin Pollutant Discharge Elimination System (WPDES) permits, but this provision is almost certain to impact the WDNR's administration of the WPDES Program in its entirety. 2011 Wisconsin Act 21 narrowed the scope of a state administrative agency's authority to interpret implement state statutes and regulations by providing that:

“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.”<sup>2</sup>

The impact of this provision on an agency's decision making authority has not been fully realized. However, when the WDNR refused to comply with the administrative order regarding the Kinnard Farms WPDES permit that is discussed in the Petition, the WDNR adopted the extremely narrow interpretation of Wis. Stat. § 227.10(2m) offered by the Wisconsin Department of Justice.<sup>3</sup>

The WDNR's construction of section 227.10(2m) has the potential to render meaningless all statutes and rules that provide general authority to agencies to tailor permits to the specific action being authorized, given site-specific conditions. These circumstances require that throughout the EPA's Petition investigation it must not accept the State's assurances that it will implement necessary WPDES program changes unless WDNR adopts said updates in explicit, unambiguous state statute or agency regulations.

WDNR is not adequately responding to known statutory and regulatory omissions and deficiencies that Wisconsin must resolve in order to meet minimum requirements of the CWA.

In response to Petitioners' allegation, the EPA states that it will investigate the “WDNR's anticipated schedule for submitting the rule packages to resolve outstanding issues.” Petitioners request that the preliminary investigation detail not only the “anticipated schedule” but what action(s) the EPA will take if any unresolved issues are not addressed via rulemaking according to the schedule provided by WDNR. This request is particularly important for at least two reasons: (1) the rulemaking packages did not proceed according to the schedule provided by WDNR in response to the EPA's 2011 deficiency letter; and (2) Wisconsin's current rulemaking requirements almost always require gubernatorial approval and as such any commitment from the WDNR to resolve a WPDES Program deficiency via rulemaking does not ensure that the commitment will come to fruition.

Petitioners appreciate that the preliminary investigation protocol indicates that the EPA will analyze whether rulemaking will “timely” resolve program deficiencies. We ask for

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<sup>2</sup> See Wis. Stat. § 227.10(2m).

<sup>3</sup> See Petition at 52.

further clarification of what the EPA will consider as “timely,” and, again, for information regarding what the EPA will do if promised rulemaking that could be timely resolved is not in fact completed during the agreed-upon timeframe.

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

Petitioners’ one additional comment with respect to this allegation is to request that the EPA review a recently re-issued WPDES permit for Agropur, Inc. (Agropur), a cheese-making facility in Luxemburg, Wisconsin. This permit exemplifies an antidegradation program deficiency detailed in the Petition; specifically the WPDES regulation exemption of 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.<sup>4</sup> The Agropur WPDES permit documentation is attached hereto for reference.

This is an example of a Petition allegation that does not require a prolonged investigation prior to a finding that a WPDES Program change is necessary. Particularly because the EPA and the WDNR already agreed to pertinent revisions to Wis. Admin. Code Ch. NR 207, the EPA should require the beginning of a rulemaking fix prior to the resolution of investigation into other issues raised in the Petition.<sup>5</sup>

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

The Petition and supplementary documentation such as the WDNR’s own administrative rules procedure flowchart<sup>6</sup> demonstrate that no further investigation is necessary to determine that the DNR cannot complete their permanent rulemaking process within the deadlines imposed by 40 C.F.R. § 123.62(e). The EPA’s preliminary investigation and proceeding findings must detail the instances where the WDNR must exercise its emergency rulemaking authority to resolve known WPDES Program deficiencies within the one or two-year timeframe contemplated by federal regulations.

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

Respectfully, it is not necessary for the EPA to take the time to determine “the State’s current interpretation of its legal authority” in the context of restricting WPDES permit review to five or more persons. The WDNR’s position, while important, has no legal effect if neither the Attorney General nor the judiciary upholds that position. Petitioners refer the

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<sup>4</sup> See Wis. Admin. Code § NR 207.05; *see also* Petition at 37-40.

<sup>5</sup> See Petition starting at page 37.

<sup>6</sup> See <http://dnr.wi.gov/news/input/documents/rules/AdminRuleProcedure.pdf> (last visited Apr. 22, 2016).

EPA back to the Petition and its discussion of the thoroughly litigated issue of whether the WDNR can restrict WPDES permit review as it currently does.<sup>7</sup>

Your cohort regional EPA offices have publicly acknowledged the importance of the public participation requirements of the Clean Water Act<sup>8</sup> and noted dedelegation as an authority that the EPA will exercise to fix related deficiencies. It is therefore reasonable without further investigation to ask EPA Region 5 staff to require WDNR and the Legislature to modify state statutes as necessary to comport with corresponding federal law.

The WDNR repeatedly issues WPDES permits that violate the requirements of the CWA.

With respect to the downstream waters component of the Petition, Petitioners refer the EPA back to their correspondence sent to your office in December 2015, detailing a Wisconsin Appeals Court decision that interpreted pertinent statute to allow the WDNR to forgo imposing water quality based effluent limitations (WQBELs) to protect downstream waters, even if the WDNR determines that the discharge will cause or contribute to a violation of downstream water quality standard.<sup>9</sup> Neither WDNR practice nor policy can fix a regulation that violates the Clean Water Act; a rulemaking change is necessary and this process should begin without waiting for conclusion of the EPA's Petition investigation.

The WDNR fails to reissue expired permits in a timely manner.

The EPA's investigation protocol states that "the EPA will develop a list of permits to review." Please clarify whether WDNR will assist the EPA in developing this short list of permits. Petitioners request equal input into this list so as to better ensure an accurate and unbiased sample set. Petitioners have two particular permits that the EPA should include in its investigation: (1) Milwaukee Metropolitan Sewerage District, which was delayed for almost five years; and (2) Valley Power, which was delayed for almost 20 years. This permit documentation is available from MEA if necessary to facilitate EPA's review.

Petitioners also ask the EPA to clarify that its preliminary investigation will consider the extent to which permittee-instituted permit challenges are the cause for permit backlog, and whether such challenges could be instituted intentionally to delay implementation of more stringent WPDES permit terms and conditions. Petitioners outlined this concern on pages 67-68 of the Petition.

The WDNR fails to seek necessary EPA approval of WPDES Program changes.

Please note that Petitioners believe that the failure to include WPDES permit WQBELs for additives in non-contacting cooling water was resolved via litigation in 2012.<sup>10</sup> Instead, Petitioners set forth this example to demonstrate that the general public has no insurance

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<sup>7</sup> See Petition at 53-56.

<sup>8</sup> See <http://www.newsobserver.com/news/business/article44892177.html#storylink=cpy> (last visited Apr. 22, 2016).

<sup>9</sup> See Letter and attached decision from Jimmy Parra, Staff Attorney, Midwest Environmental Advocates, to EPA Region 5, Dec. 10, 2015 (attached hereto).

<sup>10</sup> See Petition, page 73.

that WDNR is seeking necessary approval of WPDES Program changes to ensure that state laws are compliant with minimum federal requirements. Instead, citizens often end up taking on the burden of seeking clarification via lengthy, costly litigation to determine whether the WPDES Program comports with the CWA.

Petitioners still request the EPA thoroughly review the unapproved revisions to Wis. Stat. Ch. 283 that revised the approved WPDES Program as it relates to issuance of permits that authorize an adaptive management option to meet WQBELs for phosphorus or total suspended solids. More broadly, the EPA should look beyond the three specific examples outlined in 2.e of your preliminary investigation protocol and determine whether the WDNR consistently seeks approval of WPDES Program changes as required pursuant to 40 C.F.R. § 123.62.

Petitioners have remaining questions regarding duration and oversight of the Petition investigation timeline.

The EPA intends to visit the WDNR's offices in fiscal year (FY) 2016. Please clarify whether this timeline extends to the completion of the EPA's preliminary investigation. Specifically, does the EPA intend to make available by end of FY 2016 the anticipated draft spreadsheet that details WDNR's progress toward resolving issues identified in the EPA's 2011 letter?

EPA's preliminary investigation and any appropriate next steps include a forthright and realistic discussion about the enforceability the EPA's findings in response to the Petition. Without imposition of an enforceable timeline, the WDNR will likely respond to the EPA's findings in the same protracted, incomplete impact as it did to its July 2011 legal deficiency letter. Both Petitioners and the general public are entitled to full resolution of allegations outlined in the Petition in a reasonable timeframe. Because, for example, change(s) to Wisconsin statute and/or regulations could be necessary to fix a certain WPDES Program deficiency, Petitioners call on the EPA to include within their preliminary investigation and proceeding findings a system for EPA oversight and approval of necessary WPDES Program deficiencies.

Thank you, and please don't hesitate to contact MEA with questions or concerns regarding this letter.

Sincerely,

/s/

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cc: Cheryl Heilman, Quinn Williams, and Patrick Stevens, WDNR