UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

DEC 2 1 2017

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 64

FROM: Candice Bauer, Chief
NPDES Permits Branch Section 2

TO: File

Issue 64 (Public Participation Enforcement Cases)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 64 stated the following:

> Wisconsin does not appear to have a provision equivalent to 40 C.F.R. § 123.27(d), which provides for public participation in the enforcement process (including provisions to 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). Wisconsin must document where it has the equivalent authority required by 40 C.F.R. § 123.27(d). If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

Letter from Susan Hedman, Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (July 11, 2011) (on file with U.S. EPA).

Wisconsin Attorney General's Written Explanation

Following EPA's 2011 letter to WDNR, through mutual agreement between EPA and WDNR, the issues in EPA's letter were prioritized for correction, with some 13 issues identified for resolution through an updated Wisconsin Attorney General's opinion. That opinion was submitted to EPA in early 2012, and in a December 5, 2012 letter, EPA concluded that issues covered by the Attorney General letter were resolved. In 2014, the views of the Attorney General's letter as to issue 5 of EPA's 2011 letter were not found persuasive by a state court of appeals in *Clean Water Action Council of N.E. Wisconsin v. Wisconsin Dep't of Nat. Res.*, 2014 Wis. App. 61 (Wis. Court of Appeals, District III, April 29, 2014). This is

the only decision of which EPA is aware where a court has formally nullified the State's position as expressed in the Attorney General letter. As a result of this decision, however, EPA requested that WDNR revisit the issues covered by the Attorney General letter. The additional information considered by EPA is included in this memorandum. As noted below, should the State take actions contrary to the positions outlined, EPA will reconsider the resolution of this issue.

Information Provided by WDNR

Attorney General Van Hollen's January 19, 2012 letter to WDNR addressed Issue 64 as follows:

> [Question:]Does the state provide for public participation in the state enforcement process consistent with 40 CFR § 123.27(d)?
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> Response: In my view the answer is yes. 40 CFR § 123.27(d) requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing either:" (1) an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program, or (2) by providing a system in which the Department or the DOJ will "provide written responses to all citizen complaints," "[n]ot oppose intervention by any citizen" when authorized by law, and "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."
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> The State does not provide for administrative enforcement actions under Wis. Stat. ch. 283. All enforcement actions are civil or criminal in nature. The State provides for public participation under option (1) above by allowing adversely affected citizens to intervene in any civil enforcement action. Wisconsin Stat. § 803.09(1) provides a right of intervention by anyone in an action if they meet the following requirements: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn,* 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994). The State often settles an enforcement action before a complaint is filed with a court, and then files the complaint and a stipulation and order for judgment at the same time effectively beginning and ending the lawsuit on the same day. An entry of judgment is not a bar to intervention. The Wisconsin Court of Appeals stated that "'[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner.'" *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources,* 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), quoting *United States v. Associated Milk Producers, Inc.,* 534 F.2d 113, 116 (8th Cir.), cert. denied, *National Farmers' Organization, Inc. v. US.,* 429 U.S. 940 (1976). "[P]ost judgment intervention may be allowed where it is the only way to protect the movant's rights." *Sewage Commission,* 104 Wis. 2d at 188.

Letter from J.B. Van Hollen, Wisconsin Attorney General, to Matt Moroney, Deputy Secretary, WDNR (January 19, 2012) (on file with U.S. EPA). The State's statutory provision on intervention, cited in the Attorney General letter provides:

> **Wis. Stat. § 803.09 Intervention.**
>
> (1) Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.
> (2) Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
> (3) A person desiring to intervene shall serve a motion to intervene upon the parties as provided in s. 801.14. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

Additionally, the statutory provision is followed by a number of annotations which note, among other things, that there is no precise definition of timeliness, but it can be interpreted according to circumstances by a court:

> Timeliness is not defined by statute, and there is no precise formula to determine whether a motion to intervene is timely. The question of timeliness is a determination necessarily left to the discretion of the circuit court and turns on whether, under all the circumstances, a proposed intervenor acted promptly and whether intervention will prejudice the original parties. Post judgment motions for intervention will be granted only upon a strong showing of justification for failure to request intervention sooner.

Olivarez v. Unitrin Property & Casualty Insurance Co. 2006 WI App 189, 296 Wis. 2d 337, 723 N.W. 2d 131, 05-2471. We note that 40 C.F.R. § 123.27 provides a choice to a state: a state can either provide for intervention as a matter of right or it can make other arrangements. Wisconsin's Attorney General letter clearly explains the State's provision of intervention as a matter of right.[1]

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[1] In the 2015 petition to withdraw the WI NPDES program petitioners focused on the portion of the Attorney General statement that described the practice of entering into a settlement and then simultaneously filing a complaint, consent agreement and order for judgment. Midwest Environmental Advocates, Inc. "Citizen Petition

Analysis

We find that the State's explanation of its statutes is a reasonable interpretation of its authorities for the purpose of addressing the issue identified by EPA in our 2011 letter. Should the EPA or the State determine that there is insufficient authority for purposes of a future proceeding, EPA will revisit the resolution of this issue.

Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 64 is resolved.

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for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Wisconsin" (October 20, 2015), posted at https://www.epa.gov/sites/production/files/201512/documents/mea_petition_2015_10_20.pdf. Petitioners raised concerns that attempting to intervene once something is settled is a higher bar than being able to intervene prior to the entry of such a settlement order. While EPA does not disagree that the bar may be higher in such instances, 40 C.F.R. § 123.27 does not preclude such a practice, nor does the federal regulation impose minimum timeframes within which a suit for intervention would need to be brought.