

STATE OF WISCONSIN

CIRCUIT COURT

KEWAUNEE COUNTY

STATE OF WISCONSIN
17 West Main Street
Post Office Box 7857
Madison, WI 53707-7857,

Plaintiff,

v.

GLEN STAHL, d/b/a
STAHL FARMS,
E389 Luxemburg Road
Luxemburg, Wisconsin 54217,

Defendant.

Case No. 04-CV-121

Unclassified – Civil: 30703

Judge: Hon. Dennis Mleziva

Points and Legal Authorities In Support of Scott and Judy Tremels' Motion to Intervene

Introduction

On June 29, 2004, Scott and Judy Tremel, individually and on behalf of their children, Kaitlyn, Emily, and Samantha (collectively “Tremels”), filed a lawsuit against the defendant in this action, Glen Stahl, d.b.a. Stahl Farms (“Stahl”) (Affidavit of Andrew Hanson, hereinafter “Hanson Aff.”, ¶ 3, Exhibit A) The Tremels filed their lawsuit in the United States District Court for the Eastern District of Wisconsin, pursuant to the citizen suit provision of the Federal Water Pollution Control Act (“Clean Water Act”), 33 U.S.C. § 1365, the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(A), and, under federal supplemental jurisdiction, the Wisconsin common law of nuisance, negligence, and trespass. (Hanson Aff., ¶ 3, Ex. A)

The Tremels’ lawsuit alleges that Stahl violated the terms of his Wisconsin Pollutant

Discharge Elimination System (“WPDES”) Permit WI-0062332-01-0 (hereinafter “WPDES Permit”) and RCRA. (Hanson Aff., ¶ 3, Ex. A at ¶¶ 59-122) These violations stem from Stahl’s discharges of manure and process wastewaters into navigable and intermittent tributaries to School Creek, a navigable water. (Hanson Aff., ¶ 3, Ex. A at ¶¶ 31-45) The Tremls own riparian property on a navigable tributary of School Creek (hereinafter “School Creek”) downstream from Stahl. (Hanson Aff., ¶ 3, Ex. A at ¶ 13) Further, the Tremls’ lawsuit alleges that Stahl caused the contamination of the groundwater supplying the Tremls’ drinking water, causing illness in each member of the Treml family. (Hanson Aff., ¶ 3, Ex. A at ¶¶ 126-142) Finally, the Tremls allege in their lawsuit that Stahl failed to satisfy reporting requirements contained in his WPDES Permit. (Hanson Aff., ¶ 3, Ex. A at ¶¶ 90-114) The Tremls seek declaratory relief, injunctive relief, statutory civil penalties, damages, costs, and attorney fees. (Hanson Aff., ¶ 3, Ex. A at pp. 30-33)

Stahl answered the Tremls’ federal complaint on July 19, 2004. (Hanson Aff., ¶ 6, Ex. C) On August 19, 2004, attorneys for the Tremls and Stahl met and conferred regarding the scope of discovery in the federal lawsuit under Federal Rule of Civil Procedure (“FRCP”) 26(f), and to discuss potential settlement of the federal lawsuit. On September 2, 2004, the Tremls and Stahl submitted the Parties Joint FRCP 26(f) Conference Report to the federal court. (Hanson Aff., ¶ 9 Ex. F) On September 21, 2004, U.S. Magistrate Judge Aaron Goodstein convened a scheduling conference among the parties. On September 27, 2004, Judge Goodstein issued a scheduling order in the federal case. (Hanson Aff., ¶ 7, Ex. D) On October 11, 2004, the Tremls and Stahl exchanged initial disclosures under FRCP 26(a)(1). The Tremls have already made discovery requests of Stahl under FRCP 33, 34, and 36.

The following day, and approximately three months after the Tremls filed their federal

lawsuit, on September 28, 2004 the State of Wisconsin filed a lawsuit in Kewaunee County Circuit Court against Stahl for violations of his WPDES Permit, including discharges of manure and process wastewater into School Creek. (*See* State of Wisconsin’s Complaint, hereinafter “State’s Compl.”) The Tremls’ Complaint contains similar claims, in addition to other claims. (Hanson Aff., ¶ 3, Ex. A) The State’s Complaint also contains claims that Stahl failed to satisfy state notification requirements when discharges occurred. (State’s Compl., ¶¶ 5, 6, 7, 8)

There are two important differences between the State’s Complaint and the Tremls’ lawsuit. First, the Tremls bring common law claims of nuisance, negligence, and trespass to seek compensation for damages suffered as the result of the contamination of their domestic drinking water supply and School Creek, which runs adjacent to their property. (Hanson Aff., ¶ 3, Ex. A at ¶¶ 126-142) These common law claims are not included in the State’s Complaint. Second, the Tremls allege that Stahls’ facility constitutes an “open dump” in violation of RCRA, 42 U.S.C. § 6972(a)(1)(A) because Stahl has failed to prevent discharges of manure and process wastewater from its facility. (Hanson Aff., ¶ 3, Ex. A at ¶¶ 115-122). This claim is also not included in the State’s Complaint.

The Tremls now file this motion to intervene in the State’s belated enforcement action to protect the same interest and rights they have asserted in the federal case. The Tremls’ federal suit against Stahl is proceeding in federal court and is procedurally further apace than the State’s action. Therefore, there is a clear judicial economy and value realized by all parties in deciding Stahl’s liability for WPDES Permit violations in one proceeding rather than two parallel proceedings.

Statement of Facts

Scott and Judy Treml are private citizens who reside and own property at E758 Church

Road, Luxemburg, Wisconsin, 54217. (Proposed Intervenors' Complaint, hereinafter "Int. Compl.," at ¶10) Scott and Judy Treml have three children: Kaitlyn, eight (8) years old; Emily, six (6) years old; and Samantha, nine (9) months, as of the time of filing the federal lawsuit. (Int. Compl., at ¶10) Scott and Judy Treml have been and continue to be injured by Stahl's ongoing and threatened future discharges of manure and process wastewaters to waters of the State of Wisconsin and United States, including both groundwater and surface waters. (Int. Compl., at ¶11)

Stahl owns and operates a concentrated animal feeding operation ("CAFO") that houses approximately 1,000 dairy cattle at E389 Luxemburg Road, Luxemburg, Wisconsin, 54217, approximately two miles to the south and west of Plaintiffs' residence. (Hanson Aff. ¶ 6, Ex. C at ¶ 18) Stahl holds Wisconsin Pollutant Discharge Elimination System ("WDPES") Permit WI-0062332-01 ("Permit"), issued by the Wisconsin Department of Natural Resources ("WDNR") pursuant to Chapter 283 of the Wisconsin Statutes and the Clean Water Act on July 1, 2003. (Hanson Aff. ¶ 6, Ex. C at ¶¶ 19, 32).

Stahl stores the liquid animal waste and other pollutants generated by the 1,000 head of cattle at his CAFO in an open air earthen-lined liquid animal waste storage pit constructed by the Stahl in 1982. (Hanson Aff. ¶ 8, Ex. E at P00283) WDNR initially believed that Stahl's animal waste storage pit had the capacity to hold approximately 3.6 million gallons of animal waste. (Hanson Aff. ¶ 8, Ex. E at P00259, P00268) WDNR later learned that Stahl's animal waste storage pit only had the capacity to store 2,451,407 gallons of animal waste, and so noted this revised capacity figure in the final WPDES Permit issued to Stahl on July 1, 2003. (Hanson Aff. ¶ 8, Ex. E at P00269) WDNR now states in the WPDES Permit that the animal waste storage pit has the capacity to hold 2.6 million gallons of animal waste, and refers to the 2.6 million gallon

animal waste storage pit in the Permit as Sample Point 001. (Hanson Aff. ¶ 8, Ex. E at P00283)

The Tremls understand that Stahl proposes to construct a ten (“10”) million gallon earthen and concrete animal waste storage structure, referred to in the Permit as Sample Point 003, at some point in the future but has not constructed Sample Point 003 at the present time. (Hanson Aff. ¶ 8, Ex. E at P00283)

The Tremls’ own riparian property on School Creek downstream of Stahl. (Int. Compl., at ¶13) School Creek is a small warm water tributary to the Kewaunee River, which in turn flows into Lake Michigan, an interstate water of the United States. (Hanson Aff. ¶ 8, Ex. E at P00261) School Creek supports a forage-based fishery. (Hanson Aff. ¶ 8, Ex. E at P00261) School Creek and its intermittent and navigable tributaries are waters of the State of Wisconsin and United States, subject to the jurisdiction of the Clean Water Act. (Hanson Aff. ¶ 6, Ex. C at ¶ 29).

The land area surrounding Stahl’s operation on Luxemburg Road is criss-crossed with drainage channels and waterways that are very full during the spring runoff and after heavy rains. (Hanson Aff. ¶ 8, Ex. E at P00013, P00258) These drainage ways drain in the direction of the navigable tributary to School Creek flowing through the Tremls’ property. (Hanson Aff. ¶ 8, Ex. E at P00077) Scott and Judy Treml and their three children would more frequently use and enjoy the tributary to School Creek but for the pollution in the tributary to School Creek, and when they do use it, their use and enjoyment is significantly diminished. (Int. Comp., at ¶14)

Public records show that Stahl has a history of operation and maintenance problems that have caused discharges of animal waste and other pollutants to intermittent and navigable tributaries to School Creek since at least 1982. (Hanson Aff. ¶ 8, Ex. E at P00001 – P00402) As part of the Tremls’ lawsuit, Stahl has agreed not to dispute the authenticity or admissibility of

these public records. (Hanson Aff. ¶ 9, Ex. F at ¶ 11) For example, notes taken by the WDNR show that on or around March 21, 1982, Stahl's liquid animal waste storage facility overflowed to a tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00001) On or around July 28, 1982, Stahl discharged animal waste to a tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00001) On or around March 12, 1985, Stahl caused spray-irrigation runoff on fields adjacent to Stahl's property to a tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00005)

On or around March 12, 1986, Stahl discharged pollutants as the result of an elbow pipe rupture underground to a drainage way that drains to a tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00006, P00007) On or around November 25, 1986, Stahl over-applied animal waste using spray irrigation equipment on frozen and snow-covered ground and discharged pollutants that traveled through a tributary to School Creek to the east of Stahl's facility as far as a culvert beneath Gasche Road at the border of Sections 31 and 32 in the Town Luxemburg. (Hanson Aff. ¶ 8, Ex. E at P00009 – P00024)

The WDNR collected evidence of "manure runoff to drainage ways and a tributary to School Creek" on or around November 25, 1986. (Hanson Aff. ¶ 8, Ex. E at P00022) On January 28, 1987, the WDNR issued Stahl a Notice of Discharge, noting that Stahl had caused "a significant discharge of animal waste to surface water resources of this state...as a result of over-application of liquid manure to frozen and snow-covered soil..." (Hanson Aff. ¶ 8, Ex. E at P00022 – P00024)

On or around September 10, 1993, Stahl over-applied animal waste near Stahl's livestock operation using Stahl's spray-irrigation system, causing a discharge of pollutants to tributaries to School Creek. (Hanson Aff. ¶ 8, Ex. E at P00044 – P00078) WDNR took photographs depicting Stahl's September 10, 1993 discharge of pollutants. (Hanson Aff. ¶ 8, Ex. E at

P00051 – P00057) On or around December 3, 1993, the WDNR issued a Notice of Discharge for the discharge of pollutants to tributaries to School Creek Stahl caused on or around September 10, 1993. (Hanson Aff. ¶ 8, Ex. E at P00073 – P00075). The December 3, 1993 Notice of Discharge required Stahl to, among other measures, “reduce the runoff from the barnyard to the stream located south of the barns.” (Hanson Aff. ¶ 8, Ex. E at P00074)

On or around May 12, 1994, Stahl experienced a mechanical failure in his animal waste handling system, resulting in discharges of animal waste to a tributary into School Creek. (Hanson Aff. ¶ 8, Ex. E at P00079 – P00088) Stahl’s May 12, 1994 discharge of animal waste traveled through an intermittent tributary to School Creek as far as Gasche Road. (Hanson Aff. ¶ 8, Ex. E at P00080) The May 12, 1994 discharge by Stahl continued until at least May 17, 1994. (Hanson Aff. ¶ 8, Ex. E at P00088) WDNR took photographs depicting Stahl’s May 12, 1994 discharge of pollutants. (Hanson Aff. ¶ 8, Ex. E at P00081, P00081)

On or around September 7, 1994, Stahl discharged pollutants to a tributary to School Creek when Stahl’s contractor opened earthen berms holding back animal waste from Stahl’s barn flushing system. (Hanson Aff. ¶ 8, Ex. E at P00097) On or around September 8, 1994, the WDNR conducted water sampling of the School Creek tributary at the Luxemburg Road crossing, and found that the bacterial levels in Stahl’s discharge were 20,000 colonies of fecal coliform per 100 milliliters (ml). (Hanson Aff. ¶ 8, Ex. E at P00121) WDNR took photographs depicting Stahl’s September 7, 1994 discharge of pollutants. (Hanson Aff. ¶ 8, Ex. E at P00107 – P00118) On or around September 15, 1994, WDNR issued a citation to Stahl for causing the September 7, 2004 discharge, requiring Stahl to pay \$447.00 in forfeitures. (Hanson Aff. ¶ 8, Ex. E at P00131)

On or around May 13, 1996, Stahl's animal waste storage facility overflowed and discharged into a tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00145 – P00152) WDNR took photographs depicting Stahl's May 13, 1996 discharge of pollutants. (Hanson Aff. ¶ 8, Ex. E at P00153 – P00163)

On or around April 15, 1998, Stahl discharged animal waste into a tributary of School Creek when Stahl drained his animal waste storage facility to prevent an overflow, and land application of the waste resulted in a discharge to a drain tile, which then flowed to a tributary to School Creek at least as far as Church Road to the north and east and likely farther. (Hanson Aff. ¶ 8, Ex. E at P00177 – P00227) WDNR took photographs depicting the discharge of animal waste as a result of the overflow of a manure pit from Stahl's concentrated animal feeding operation. (Hanson Aff. ¶ 8, Ex. E at P00181 – P00192)

On or around January 17, 2003, Stahl's animal waste storage pump failed and resulted in a discharge to a tributary to School Creek. (Hanson Aff. ¶ 8, Ex. E at P00228 – P00238)

On or around April 21, 2003, Stahl's animal waste storage facility overflowed and discharged animal waste and other pollutants into a tributary of School Creek on April 21, 2003 and April 26, 2003. (Hanson Aff. ¶ 8, Ex. E at P00240 – P00257) WDNR took photographs depicting the discharge of animal waste as a result of the overflow of a manure pit from Stahl's concentrated animal feeding operation. (Hanson Aff. ¶ 8, Ex. E at P00244 – P00257)

On or around June 18, 2003, Stahl applied animal waste on a property in the Town of Luxemburg known as the Lelou property, where animal waste flowed into a broken tile line and consequently discharged into a drainage ditch, a water of the state and a tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00270 – P00277) WDNR took photographs depicting Stahl's

June 18, 2003 discharge of pollutants to an intermittent tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00272 – P00277)

Despite this history of discharges, on or around July 1, 2003, WDNR issued Stahl a WPDES Permit to operate a Concentrated Animal Feeding Operation (“CAFO”), or an animal feeding operation that houses more than 700 mature dairy cattle. (Hanson Aff. ¶ 6, Ex. C at ¶ 32) (Hanson Aff. ¶ 8, Ex. E at P00278 – P00302) On or around July 12, 2003, WDNR received a complaint of manure draining into a ditch on a land area known as the Seidl Property to the north of Stahl’s CAFO on Luxemburg Road. (Hanson Aff. ¶ 8, Ex. E at P00304 – P00329) WDNR staff took photographs of Stahl’s July 12, 2003 discharge of discharge of pollutants to intermittent tributaries of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00308 – P00329) (State’s Compl., ¶ 8)

On or around January 10, 15, 16, 27, and 28 of 2004, and additional dates thereafter, Stahl applied animal waste on a land area known as the Lelou property. (Hanson Aff. ¶ 8, Ex. E at P00361) On February, 23, 2004, the animal waste that Stahl applied on the Lelou property ran off the Lelou property, into a tile line breather pipe, over the then-frozen ground and under the snow, into a drainage ditch-intermittent tributary to School Creek, under Gasche Road, and onto the front yard of N5110 Gasche Road. (Hanson Aff. ¶ 6, Ex. C. at ¶ 71, admitting “some runoff” by Stahl); (Hanson Aff. ¶ 8, Ex. E at P00332 – P00361) WDNR took photographs depicting Stahl’s February 23, 2004 discharge of pollutants to an intermittent tributary of School Creek. (Hanson Aff. ¶ 8, Ex. E at P00341 – P00356)

On or around February 24, 25, and 26, 2004, and on days thereafter, Stahl applied animal waste to a land area known as the Wachal property. (Hanson Aff. ¶ 8, Ex. E at P00374) On or around February 26, 2004 and days thereafter, the animal waste that Stahl applied on the Wachal

property ran off the property, into a roach ditch – intermittent tributary of School Creek on the south side of Church Road in the Town Luxemburg, and into a navigable tributary of School Creek. (Hanson Aff. ¶ 6, Ex. C at ¶ 73, admitting “some runoff” by Stahl); (Hanson Aff. ¶ 8, Ex. E at P00361A - P00372)

On or around the early evening of March 1, 2004, Scott and Judy Treml noticed that their well had become contaminated with animal waste approximately three days after Stahl spread animal waste on the Wachal Property. (Int. Compl., at ¶ 48) The Tremls immediately reported their well-contamination to WDNR, and took precautionary measures to avoid and minimize their exposure to the contaminated water. (Int. Compl., at ¶ 48)

On or around March 3, 2004, the DNR sampled the Tremls’ drinking water well. (Int. Compl., at ¶ 48) These samples results showed that the Tremls’ well had become contaminated with 9,800 colonies of fecal coliform bacteria per 100 ml, and 2,500 colonies of E.coli bacteria per 100 ml. (Int. Compl., at ¶ 48) The water sampled from the Tremls’ well exceeded the WDNR public health enforcement standard of “0” for bacteria. *See* Wis. Admin. Code s. NR 140.10, Table 1 (2004). Beginning on or around March 4, 2004 and continuing through March 11, 2004, each member of the Treml family became seriously ill from prior exposure to the contaminated water. (Int. Compl., at ¶ 50) The Tremls’ debilitating symptoms were consistent with a bacterial inflammation of the gastrointestinal tract. (Int. Compl., at ¶ 51) Several members of the family required emergency medical attention, including the Tremls’ then 7 month old daughter, Samantha. (Int. Compl., at ¶ 51)

As a result of the past actual and future threatened drinking water contamination of the Tremls’ well by Stahl, the Tremls relied on drinking water supplied in a tanker truck by the City of Luxemburg and a local citizen. (Int. Compl., at ¶ 52) The Tremls relied on a tanker truck as a

source of potable water from early March, 2004 to mid June, 2004. (Int. Compl., at ¶ 52) At a cost of thousands of dollars, in mid-June, 2004, the Tremels entered into a contract for the construction and drilling of a new, deeper well to serve as a source of drinking water for them and their children in an attempt to protect their drinking water from future contamination. (Int. Compl., at ¶ 53) The State's lawsuit against Stahl will not compensate the Tremels for personal injuries and property damage related to the contamination of their drinking water.

In addition to the discharges of pollutants and drinking water contamination identified above, Stahl has admitted in the federal lawsuit that it has failed to meet all recordkeeping requirements in the WPDES Permit as of the date the federal lawsuit had been filed. (Hanson Aff. ¶ 6, Ex. C at ¶ 94) These recordkeeping requirements include reporting the fertilizer value of the liquid manure produced and frequency and conditions under which that manure is applied on land. (Hanson Aff. ¶ 8, Ex. E at P00284 – P00288) The Tremels, as members of the public who use and enjoy School Creek, have been denied information necessary to protect their health, their children's health, and School Creek and its tributaries by Stahl's failure to satisfy the reporting requirements of his WPDES Permit.

In accordance with the notice requirements of the Clean Water Act's citizen suit provision and RCRA's citizen suit provision, on or around April 27, 2004, the Tremels provided 60 days notice to Stahl of his violations of the Clean Water Act, including violations of the WPDES Permit, and RCRA. (Hanson Aff. ¶ 4, Ex. B) The Tremels similarly provided notice to all entities required to receive such notices as required by the Clean Water Act and RCRA. 33 U.S.C. § 1365(b); 42 U.S.C. § 6972(b); 40 C.F.R. § 135.2; 40 C.F.R. § 254.2. (Hanson Aff. ¶ 4, Ex. B) Neither the State nor the federal government filed a court action or other federal administrative enforcement action against Stahl during the 60 day notice period, allowing the

Tremels to file their federal lawsuit at the end of the 60 day period.

The State of Wisconsin did not file this action until three months after the Tremels filed their federal action and five months after the Tremels gave notice to the State of their intent to enforce the Clean Water Act against Stahl. Moreover, the State has been aware of Stahl's habitual and intermittent discharges of pollutants to School Creek since at least 1982, but only initiated formal enforcement after the Tremels' filed their lawsuit in federal court. Despite the fact that the State's action was filed later than the Tremels', a decision in this case has the potential to impede the Tremels' federal action.

To avoid interference with its federal claims and to promote judicial efficiency in determining Stahl's liability in one action, the Tremels seek to intervene in this case and obtain: (1) a declaration that Stahl violated and continues to violate its WPDES Permit and Wis. Stat. § 283.31(1) by discharging and failing to take actions to prevent discharges of pollutants to waters of the State of Wisconsin and United States; (2) a declaration that Stahl violated and continues to violate Wis. Stat. § 283.55 by failing to meet the reporting requirements of his WPDES Permit; (3) an order compelling Stahl to remediate the damages caused by its unlawful discharges in violation of its WPDES Permit, Wis. Stat. § 283.31 and RCRA, (4) a declaration that Stahl violated and continues to violate 42 U.S.C. § 6945(a) and federal regulations implementing that provision by maintaining a prohibited open dump at its facility; (5) an order that Stahl pay civil penalties to the federal government for violations of RCRA; (6) compensatory damages for pain, suffering, inconvenience, medical expenses, the cost of a new drinking water well, and other damages; and (7) an award of fees and costs incurred pursuant to Wis. Stat. § 806.04(10), as deemed just and equitable by the Court.

Argument

A. THE TREMLS ARE ENTITLED TO INTERVENE IN THIS ACTION

The Tremls have a right to intervene in this action because they fulfill all four requirements in Wis. Stat. § 803.09(1). Specifically, (1) the Tremls' motion is timely; (2) the Tremls have distinct interests relating to the transactions that are the subject of this action; (3) the disposition of this action may interfere with the Tremls' interests; and, (4) the Tremls' interests are not adequately represented by the parties. Wis. Stat. § 803.09(1); *State ex rel. Bilder v. Town of Delavan*, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (Wis. 1983) ("*Bilder*"). Because the Tremls meet all four requirements, they are entitled by Wis. Stat. § 803.09(1) to intervene in this action.

1. The Treml's Motion to Intervene Is Filed Less Than Three Weeks After the State's Complaint And Is Therefore Timely.

The Tremls fulfill the first requirement of Wis. Stat. § 803.09(1): the Tremls' motion to intervene is timely. There is no precise formula for determining whether a motion is timely and the decision left to discretion of court. *Bilder*, 112 Wis. 2d at 550; accord *Sewerage Comm'n of City of Milwaukee v. State Department of Natural Resources*, 104 Wis. 2d 182, 186, 311 N.W.2d 677 (Ct. App. 1981). The critical factor is whether the movant acted promptly. *Bilder*, 112 Wis. 2d at 550. As a secondary consideration, the court can consider whether any delay in bringing the motion has prejudiced the existing parties to the case. *Id.*

The Tremls submit this motion less than three weeks after the State's Complaint was filed and before Stahl has answered. The Court of Appeals in *Roth v. La Farge School Dist. Bd. of Canvassers* found that a motion to intervene submitted less than two weeks after the action commenced, before proceedings on the merits, and before any hearing in the case, was timely. 2001 WI App 221, ¶ 18, 247 Wis. 2d 708, 721, 634 N.W.2d 882. Likewise, in *City of Madison v. WERC*, the Supreme Court of Wisconsin held that failure to intervene during the time period for filing a notice of appeal does not make a motion untimely. 2000 WI 39, ¶ 8; 234 Wis.2d

550, 554, 610 N.W.2d 94. The Wisconsin Supreme Court in *Bilder* found a motion to intervene timely even though it was filed after the original parties had agreed to a stipulated settlement. 112 Wis. 2d at 550-51. See also *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 472, 516 N.W.2d 357 (Wis. 1994) (motion to intervene timely because it was submitted prior to the first hearing in the action). In fact, a motion to intervene filed nine months after a judgment can be timely. See *C.L. v. Eau Claire Leader-Telegram*, 140 Wis. 2d 168, 178-79, 409 N.W.2d 417 (Wis. Ct. App. 1987). The Tremls' motion is more timely than the motions accepted in these cases. Therefore, the Tremls' motion to intervene, submitted only three weeks after the complaint and before Stahl's answer to the State's Complaint, is timely.

Further, the Tremls' intervention at this stage does not prejudice either party. It does not affect previous matters that have been settled by the court. *Bilder*, 112 Wis. 2d at 551 (no prejudice even when parties had agreed to settlement prior to motion to intervene because there was no court consideration or action on settlement agreement). This Court has not entered any decisions and has not considered any matters in this case. Additionally, Stahl has not yet answered the State's Complaint.¹ Merely having to oppose a motion or an interest in concluding a lawsuit is not prejudice to a party. *C.L.*, 140 Wis. 2d at 179.

2. The Tremls Have an Interest in School Creek and its Tributaries and In Continuing Their Own Litigation Regarding Stahl's Violations

The Tremls fulfill the second element of Wis. Stat. § 803.09(1): The Tremls have an interest "relating to the property or transaction which is the subject of this action." Wis. Stat. § 803.09(1).

Courts have not clearly defined what constitutes a sufficient interest relating to property

¹ Movants referenced the Wisconsin Circuit Court Access system for this information. <http://wcca.wicourts.gov/> (Last checked October 12, 2004)

or a transaction. *Bilder*, 112 Wis.2d at 547 (citations omitted). In Wisconsin, courts apply a broad practical approach. *Wolff v. Town of Jamiston*, 229 Wis. 2d 738, 743, 01 N.W. 2d 301 (Ct. App. 1999); *Armada*, 183 Wis. 2d at 474; *Bilder*, 112 Wis. 2d at 548. When applying Wisconsin's broad, practical approach, the court must measure the Tremels' interest in Stahl's long history of ongoing violations, the personal injuries and property damage they have suffered, the judicial economies accomplished by resolving related issues in a single lawsuit, and avoiding fruitlessly complex litigation. *Bilder*, 112 Wis. 2d at 547-49. This Court should also give additional consideration to the intervention statute's purpose of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Bilder*, 112 Wis. 2d at 548-49 (quoting *Nuess v. Camp*, 385 F.2d 649, 700 (D.C. Cir. 1967)).

The Tremels fulfill the requirement that they have an interest in the property and transaction forming the basis of the State's lawsuit. Wis. Stat. § 803.09(1). In fact, the Tremels have two distinct interests in this action. First, the Tremels own riparian property on a tributary to School Creek. (Int. Compl., at ¶ 13) They use and enjoy School Creek on their property downstream from Stahl, and their use and enjoyment is decreased and harmed by Stahl's violations. (Int. Compl., at ¶ 14) Second, the Tremels are the plaintiffs in an ongoing federal lawsuit to enforce Stahl's WPDES permit requirements and other violations of law, addressing many of the violations at issue in the State's enforcement action. Either of these interests, alone, is sufficient to allow the Tremels to intervene, and when taken together they multiply the Tremels' interest in Stahl's WPDES violations at issue in this case.

- a. The Tremels Have an Interest in Immediately and Permanently Enjoining Discharges of Pollutants by Stahl.

An intervenor must show a "practical," rather than legally "technical" interest in a case to

be entitled to intervene. *Bilder*, 112 Wis. 2d at 548. Having an interest in the case is to be a minimal prerequisite and not a strict, determinative, criteria for intervention. *Bilder*, 112 Wis. 2d at 549 (citing *Smuck v. Hobson*, 408 F.2d 175, 179-80 (D.C.Cir. 1969)). The law presumes an interest and that limits on intervention be based on the potential harm or adequacy of representation factors. *Id.* One commentator has stated:

It has been declared that the interest in the subject matter of the litigation must be a substantial interest, a legal interest, or an interest known and protected by the law. "Interest" means a concern which is more than mere curiosity, or academic or sentimental desire. One interested in an action is one who is interested in the outcome or result thereof because he or she has a legal right which will be directly affected thereby or a legal liability which will be directly enlarged or diminished by the judgment or decree therein.

State ex rel. Ball v. Cummings, 208 W.Va 393, 399, 540 S.E.2d 917, 924 (W.Va. 1999) quoting 59 Am.Jur.2d Parties § 134, p. 591 (1987).

Wisconsin courts have long recognized the important interest that residents have in the waters of the state. Wis. Const. art. IX, sec. 1; *State v. Muench*, 261 Wis. 492, 506-07, 53 N.W.2d 514 (Wis. 1952) quoting *Diana Shooting Club v. Husting*, 156 Wis. 261, 271, 145 N.W. 816 (Wis. 1914); See also *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183-84, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (recreational use and aesthetic enjoyment of a waterbody is a recognized interest). Further, the Seventh Circuit has made clear that harm suffered by common law nuisance conditions such as air and water pollution create a sufficient interest to justify intervention, even where they may be no independent private of right of action provided by a statute for the intervenor. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 101 F.3d 503, 506 (7th Cir. 1996), *rev'd on other grounds by* [*Solid Waste Agency v. United States Army Corps of Eng'rs*](#), 531 U.S. 159, 148 L. Ed. 2d 576, 121

S. Ct. 675 (2001) (hereinafter “SWANCC”).

The West Virginia Supreme Court also decided a case very similar to this one and granted a motion to intervene in a state water pollution enforcement action. *State ex rel. Ball v. Cummings*, 208 W.Va. 393, 540 S.E.2d 917 (W.Va. 1999). Applying a test virtually identical to Wisconsin’s, the *Ball* court held that a person claiming an interest in the water body at issue in the state’s enforcement case was entitled to intervene. *Id.* at 929. This is especially true when the intervenor has taken affirmative steps toward bringing a citizen suit action under the Clean Water Act, 33 U.S.C. § 1365(a). *Id.* at 929. Thus the *Ball* court echoed Congress’ recognition of citizen intervenors’ interests in abating pollution. *Id.* at 925, 929²; See also 33 U.S.C. § 1365; 40 C.F.R. § 123.27(d) (state agency administering the CWA must allow intervention of right or provide specific procedural rights for citizen involvement in enforcement).

The Tremls own riparian property on and use School Creek downstream of Stahl. (Int. Compl., at ¶ 13) The Tremls’ would enjoy the recreational opportunities of School Creek and enjoy School Creek’s aesthetic values. (Int. Compl., at ¶¶ 13 - 14) However, as a result of Stahl’s discharges, they no longer see fish or wildlife in the tributary, or in the pond that has formed on their property in the center of the tributary. (Int. Compl. at ¶ 14).

Stahl may argue that the Tremls must have some private right of action under Chapter 283 of the Wisconsin statutes to meet its burden of showing a “legally protected interest.” This would be incorrect. Wisconsin precedent makes clear that a proposed intervenor’s interest in the litigation need not be judicially enforceable in a separate proceeding. *Wolff v. Town of Jamestown*, 229 Wis. 2d at 744-746 (town need not demonstrate that it has a judicially

² The intervenors in *Ball* gave notice of intent to bring a federal citizen suit action but the state filed an enforcement action prior to the expiration of the mandatory sixty (60) day notice period. *Ball*, 540 S.E.2d 921-22. In this case the Tremls gave the required notice and filed a citizen suit in federal court three months before the state filed an enforcement action.

enforceable right to challenge a county zoning decision in order to intervene in a landowner's lawsuit to obtain a building permit from the county); *see also SWANCC*, 101 F.3d. at 507 (“The strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit.”)

Even if the Tremls' interest was required to be judicially enforceable in a separate proceeding, which is *not* required, the Tremls have more than adequately met that burden. The Tremls have filed a federal lawsuit against Stahl under the Clean Water Act, RCRA, and state common law. (Hanson Aff. ¶ 3, Ex. A). In the present case, the Tremls seek a declaratory judgment under Wis. Stat. § 806.04(1) that Stahl has violated its WPDES Permit, Wis. Stat. § 283.31(1) and Wis. Stat. § 283.55, among other relief. (Int. Compl., at ¶ 8) And, state courts such as this one have jurisdiction to hear citizen suit claims brought to enforce the Clean Water Act and Wisconsin's water quality laws, as well as RCRA. *Froebel v. Meyer*, 13 F.Supp.2d 843, 858 (E.D. Wis. 1998), 217 F.3d 928 (7th Cir. 2000) (“Wisconsin state courts can exert jurisdiction over a citizen suit under the Clean Water Act and order necessary injunctive relief.”); *Davis v. Sun Oil*, 148 F.3d 606, 612 (noting concurrent state and federal court jurisdiction over RCRA citizen suits).

Even if the Court found that it lacked jurisdiction to hear the Tremls' claims related to the enforcement of Stahl's WPDES Permit and RCRA, the Tremls have still asserted common law claims. (Int. Compl., ¶¶ 132-148) Neither the Clean Water Act nor RCRA preempt state common law, and both allow the Tremls to bring their state common law claims to seek compensatory damages and injunctive relief. 33 U.S.C. § 1365(e) (statutory or common law rights not restricted); 42 U.S.C. § 6972(f) (same). As a result, the Tremls have a legally

protected interest created in the Clean Water Act, RCRA, and state common law in this court sufficient to justify intervention of right in the State's lawsuit against Stahl.

The Tremls own riparian property on School Creek and are negatively impacted by Stahl's ongoing and future violations of its WPDES permit and RCRA, and Stahl's unreasonable, negligent, and trespassory invasions of the Tremls' property interests in their groundwater and riparian property on School Creek. The Tremls have brought their federal suit three months prior to the State bringing its own suit. The Tremls, therefore, have a sufficient interest in protecting their property on School Creek from Stahl's WPDES Permit violations.

- b. The Tremls Have an Interest in the Outcome of This Action Because it Addresses Some of the Factual and Legal Issues Involved in the Stahl's Ongoing Federal Litigation.

In addition to the Treml's interest in School Creek and its tributaries, the Tremls have an interest in continuing to pursue its ongoing federal case. A decision in this case may impact the outcome and is likely to impact the direction and course of the Tremls' federal claims.

Both the Tremls and the State seek injunctive relief. The Tremls have an interest in the injunctive relief this court may ultimately order, especially if this court orders different relief than the Tremls seek in its federal case. Avoiding the possibility of conflicting orders, requiring different remedial actions by the Stahl, is yet another of the Tremls' interests in this action.

Further, the Tremls are concerned that the federal court may deem any determination of Stahl's liability in the State's case to be *res judicata* in the federal lawsuit. *Friends of Milwaukee' Rivers v. Milwaukee Metropolitan Sewerage District*, No. 03-3809, Slip Op. at 19-33 (7th Circuit, September 2, 2004) (holding that citizen claims in a federal citizen suit, even though not identical to State enforcement claims, were barred on *res judicata* grounds by State enforcement action despite that citizens filed their lawsuit prior to the State's enforcement

action). Although the Tremls do not believe that a federal court would hold that *res judicata* applies to the Tremls' claims, the fact that a federal court may come to that conclusion constitutes an important "practical" interest in the transactions that form the basis of this action. *Bilder*, 112 Wis. 2d at 548 (intervenor must show a practical but not technical legal interest in the case). Moreover, Stahl can reasonably be expected to raise such a defense in the federal lawsuit. The Tremls' desire to avoid the time, effort and money spent defeating such a claim constitutes a significant interest sufficient to justify intervention of right in this proceeding.

3. A Judgment In This Case May, As a Practical Matter, Impair or Impede the Tremls' Ability to Protect its Interests.

The Tremls fulfill the third element of Wis. Stat. § 803.09(1): the disposition of this action, as a practical matter, affects the Tremls' interests. *Bilder*, 112 Wis. 2d at 539; Wis. Stat. § 803.09(1) (disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest (emphasis added)).

The disposition of this state enforcement action could have three negative effects on the Tremls' interests. First, the disposition may cause the Tremls to defend a motion to dismiss in federal court based on *res judicata*, impeding as a practical matter the Tremls' federal lawsuit. See *Bilder*, 112 Wis. 2d at 539. A decision in the State's case will determine Stahl's liability for violations of its WPDES permit. As such, this Court may determine that Stahl is not liable for violations of his WPDES Permit. A federal court may deem that liability determination to be *res judicata* in the Tremls' federal case. *Friends of Milwaukee's Rivers*, No. 03-3809, Slip Op. at 19-33 (7th Circuit, September 2, 2004); *Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 998 (7th Cir. 2000). Such a liability determination would clearly impair or impede the Tremls' ability to continue their federal case, and even if not, may be relevant to determining Stahl's liability for the Tremls' nuisance, negligence, and trespass claims.

Further, even though the state’s action does not duplicate all of the Tremls’ claims, a federal court may find the Tremls’ additional Clean Water Act and RCRA claims barred on *res judicata* grounds because the state could have litigated those issues in this action. *Friends of Milwaukee’s Rivers*, No. 03-3809, Slip Op. at 21-22. Alternately, a decision in the Tremls’ federal case may be *res judicata* for this state action, possibly requiring this court to dismiss the state’s claims and resulting in wasted time, effort, and resources by the state, Stahl, and this court.

Second, a determination of liability by this court may affect whether Wisconsin’s Right to Farm law, Wis. Stat. §.823.08, bars the Tremls’ claims for nuisance, negligence and trespass. Wis. Stat. § 823.08 bars nuisance claims against “agriculture uses”³ unless a plaintiff can show, among other requirements, that the agricultural use or practice “presents a substantial threat to public health or safety.” Wis. Stat. § 823.08(3)(a)2. No Wisconsin court has yet defined what agricultural uses constitute “a substantial threat to public health or safety” under Wis. Stat. § 823.08. The Tremls seek a declaratory judgment in their federal lawsuit that Wis. Stat. 823.08 does not bar their claims for nuisance, negligence or trespass. (Int. Compl., at ¶ 130) However,

³ Wis. Stat. s. 823.08 defines “agricultural use” by reference to Wis. Stat. s. 91.01, which defines that term as:

beekeeping; commercial feedlots; dairying; egg production; floriculture; fish or fur farming; forest and game management; grazing; livestock raising; orchards; plant greenhouses and nurseries; poultry raising; raising of grain, grass, mint and seed crops; raising of fruits, nuts and berries; sod farming; placing land in federal programs in return for payments in kind; owning land, at least 35 acres of which is enrolled in the conservation reserve program under 16 USC 3831 to 3836; participating in the milk production termination program under 7 USC 1446(d); and vegetable raising.

Wis. Stat. s. 91.01(1). An “agricultural practice” is defined as “any activity associated with an agricultural use.” Wis. Stat. s. 823.08(2)(a). For purposes of this motion and brief, the Tremls assume without admitting that Stahl is an “agricultural use.”

a finding by this court that Stahl has not violated its WPDES Permit may bear on whether Stahl has created a “substantial threat to public health or safety.” Such a finding would substantially harm and impair the Tremls’ case in federal court.

Third, a disposition in this case may impair or impede the Tremls’ desire and efforts to permanently enjoin Stahl’s discharges of pollutants. Enjoining Stahl’s WPDES Permit violations and the management problems that persist at Stahl, which the State has failed for years to effectively address, is the reason the Tremls filed a federal lawsuit against Stahl. Even though the State may ultimately seek an injunction, the State “may dispose of its action by agreeing to an order extending indefinitely the deadline for abatement activities.” *Ball*, 540 S.E.2d at 925.

The Tremls’ concerns are identical to those of the intervenors in *Ball* justifying the right to intervene. In *Ball*, the court held that a State settlement may “enact a longer deadline for the construction of a new wastewater treatment facility or other abatement activities than the petitioners are willing to accept.” *Id.* at 926. In fact, Stahl has been polluting intermittently for years. The State has attempted to address Stahl’s pollution through informal measures, has only minimally fined Stahl for its discharges of manure to School Creek, and has not otherwise formally prosecuted Stahl’s violations until after the Tremls filed suit. Participation in this action is essential if the Tremls are to ensure that Stahl abates the violations that have injured their riparian property rights in School Creek and have negatively affected their use and enjoyment of School Creek.

4. The Tremls’ Interests Are Not Adequately Represented By the Existing Parties.

The Tremls fulfill the fourth element of Wis. Stat. § 803.09(1): making the minimal showing of possible inadequate representation by the existing parties. The Wisconsin Supreme Court agrees with the United States Supreme Court holding that “the showing required for

proving inadequate representation ‘should be treated as minimal.’” *Armada*, 183 Wis. 2d at 476, quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972). “This requirement is satisfied if the applicant shows that the representation of his interest ‘may be’ inadequate.” *Wolff*, 229 Wis. 2d at 747-48. In determining the adequacy of representation, courts look to see if “there is a showing of collusion between the representative and the opposing party; if the representative’s interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.” *Armada*, 183 Wis.2d at 477. Adequacy of representation is presumed only where the interests of the original party and the intervenor are “identical.” *SWANCC*, 101 F.3d at 508. In other words, the Tremles need only show that the state *might not* adequately represent their interests, and that the Tremles’ interests are not identical to the State’s.

Even though the State and Tremles seek to enforce Stahl’s WPDES Permit, unlike in *SWANCC*, their interests are not identical and it is clear that the State will not represent the Tremles’ interests. First, the Tremles have brought claims for nuisance, negligence, and trespass, and seek damages to compensate them for their personal injuries and property damage. These claims stem from the contamination of the Tremles’ groundwater and from Stahl’s discharges to School Creek on which the Tremles own riparian property. The State has not brought these claims, and moreover lacks the authority to seek private damages on behalf of the Tremles.

Second, the Tremles have also brought a claim under RCRA, 42 U.S.C. § 6972(a)(1)(A), alleging that Stahl’s facility is a prohibited “open dump” by virtue of Stahl’s mismanagement, its lack of manure storage capacity, and intermittent discharges of pollutants to tributaries to School Creek. As with the common law claims, this claim is not included in State’s Complaint.

Third, the Tremles have included WPDES Permit violations in its federal complaint that

are not included in the State's Complaint and that therefore will not be adequately addressed by the State. The Tremls allege violations of Section 3.2.7 of Stahl's WPDES Permit resulting from Stahl's repeated spreading of manure near a broken tile inlet on the Lelou Property, and therefore discharging pollutants to a tributary of School Creek. (Hanson Aff. Hanson Aff. ¶3, Ex. A 3, Ex. A at ¶¶ 78-89) The Tremls also allege that Stahl's lack of manure storage capacity at its facility will cause future violations of Sections 1.1 and 3.2.11 of Stahls' WPDES Permit (prohibiting discharges of pollutants from the "animal production area" and land application areas, respectively). The State has not asserted these claims.

Fourth, the state may, through a stipulation or settlement agreement, allow Stahl long periods of time to come into compliance with its WPDES Permit. See *Ball*, 540 S.E.2d at 929. This contradicts the Tremls' desire to immediately and permanently enjoin Stahl's violations. The fact that an original party might be willing to settle for terms more favorable than the intervenor is sufficient to show that the representative party is not adequate. *Wolff*, 229 Wis. 2d at 748. Moreover, an extended timeframe for Stahl to come into compliance with its WPDES Permit is not in the Tremls' interest, in that Tremls own riparian property is downstream on School Creek of Stahl and wish to use that riparian property without worry of pollution from Stahl.

B. THE TREMLs SHOULD BE PERMITTED TO INTERVENE BECAUSE THE TREMLs' FEDERAL CLAIMS AND STATE COMMON LAW CLAIMS AND THIS ACTION HAVE QUESTIONS OF LAW AND FACT IN COMMON.

Even if this court finds that the Tremls are not entitled to intervene pursuant to Wis. Stat. § 803.09(1), this court should permit the Tremls to intervene pursuant to Wis. Stat. § 803.09(2). Intervention is allowed when a "movant's claim or defense and the main action have a question of law or fact in common." Wis. Stats. § 803.09(2). See *SWANCC*, 101 F.3d at 509 ("All that is

required for permissive intervention...is that the applicant have a claim or defense in common with a claim or defense in the suit”). The court “shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stats. § 803.09(2).

The Tremels’ federal court claims and state common law claims related to Stahls’ violations of its WPDES Permit share issues of fact and law in common with the state’s claims alleging WPDES Permit violations. Although the Tremels’ federal lawsuit includes claims in addition to those brought by the state in this action, including state common law claims, both the State and the Tremels claim that Stahl violated its WPDES Permit by discharging pollutants to School Creek and failing to maintain adequate records and submit those records to the WDNR.

The Tremels allege in its federal lawsuit that Stahl’s WPDES permit violations “have adversely affected and continue to adversely affect the Tremels’ health and School Creek and its tributaries.” (Hanson Aff. ¶3, Ex. A at ¶ 16) Stahl’s violations have impaired the Tremels’ use and enjoyment of School Creek and their property and will continue to diminish its members’ use and aesthetic enjoyment of School Creek in the future unless Stahls’ discharges are permanently enjoined. (Hanson Aff. ¶3, Ex. A at ¶ 14). Stahl’s violations of its WPDES Permit create factual and legal issues in common between the Tremels’ federal suit and the State’s action in this case.

Further, federal regulations under the Clean Water Act encourage citizen intervention in Wisconsin court proceedings to enforce Chapter 283, and prescribe one of two public participation procedures that Wisconsin and other states must allow in their enforcement proceedings. 40 C.F.R. § 123.27(d)(1) and (d)(2) (2004). The state “shall” either grant intervention as a matter of right to “any citizen having an interest which is or may be adversely

affected . . .” 40 C.F.R. § 123.27(d)(1), or the state shall “[n]ot oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation . . .” 40 C.F.R. § 123.27(d)(2)(ii). Although a state’s laws are not required to afford intervention of right, they must as at least provide the opportunity for citizens to move for permissive intervention, and states must agree not to oppose that intervention. *See also Natural Resources Defense Council v. EPA*, 859 F.2d 156, 178 (D.C. Cir. 1988) (explaining the public participation requirements of the Clean Water Act).

Lastly, the Tremls’ intervention will not unduly delay or prejudice the adjudication of rights of the original parties. Stahl must defend against claims by both the Tremls and the State, at the moment in separate forums. Therefore, having to defend those claims in one forum, rather than simultaneously in two forums, will not prejudice Stahl. That Stahl would rather not defend against both Tremls and the State, or wishes to settle with one party but not the other, are inconsequential and certainly do not show prejudice. *C.L.*, 140 Wis. 2d at 179 (having to oppose a motion or having an interest in concluding a lawsuit do not constitute prejudice). Further, because the state brings similar claims to the Tremls, Stahl is forced to defend against the same claims whether the Tremls intervene.

Finally, the Tremls’ motion for intervention is timely and will not delay the proceedings. The Tremls file their motion less than three weeks after the State filed its complaint with this court. Stahl has not yet answered the State’s Complaint. This court has not yet taken any action in the case. As a result, the Tremls’ intervention will not delay the proceedings.

VI. CONCLUSION

For the foregoing reasons, the court should grant the Tremls’ motion to intervene as required by Wis. Stat. § 803.09(1), or in the alternative, the court should grant the Tremls’

motion to intervene under Wis. Stat. § 803.09(2) because the Tremels have presented claims sharing issues facts and law with this action.

Dated this 13th day of October, 2004.

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