Minks, Kyle

From: Tom Mathies <TMathies@town.verona.wi.us>
Sent: Wednesday, September 1, 2021 1:37 PM
To: Land&WaterResources Mail
Subject: Comments on 2021 OA-018 – Amending Chapter 14

Hello,

I am not able to attend today's public hearing so I am submitting these comments. These comments are my own. I am not writing on behalf of anyone else.

I write in support of 2021 OA-018, revising erosion control and stormwater regulation.

From the *2020 Dane County Climate Action Plan*:

> Southern Wisconsin will continue to get hotter and wetter.

And:

> We can expect to see more extreme rainfall events in the future due to global warming.
>
> https://daneclimateaction.org/climate-action-plan

The proposed changes to Chapter 14 will help protect people, homes, and the environment.

I'm not sure if corrections are needed in the current version of OA-018 but here are a few minor comments:

- Line 120: change "Connected impervious" to "Connected imperviousness" to match the usage in Line 407.
- Line 244: move the definition of "Permittee" to appear in alphabetical order
- Line 748: change "200-yr" to "200-year" to match usage elsewhere.

Best regards,

Tom Mathies
Town of Verona Supervisor

Sept. 1, 2021

Dear County Supervisors and members of EANR, LWC, and LCC committees,

I am writing in regards to the public hearing on the creation of Chapter 50 of the Dane County Code of Ordinances (illicit discharge) on tonight's agenda.

I strongly support the creation of a county illicit discharge ordinance, which should have been done decades ago as required by state law. **Specifically, I support SUB. 1 to 2021 OA-017 [Proposed – Erickson] and oppose version 2021 OA-017**.

I also want to highlight several problems in the process and transparency in drafting this ordinance, how it will affect city policy, and the Dane County illicit discharge program budget:

1. The substitute resolution was only posted on Legistar yesterday afternoon, while version 2021 OA-017, dated July 28, 2021, was shared with us by Jeremy Balousek on August 2 (with sponsors Chawla, Erickson and Ritt copied) and posted on Dane County Legistar last Friday. This was the only draft available to the public since October 2020. The July 28 ordinance included several problematic changes to the October draft. Since the July 28 draft was the only version available to us until yesterday afternoon, I and other members of the public reviewed it in preparation for this hearing. **My comments and questions about version 2021 OA-017, which I strongly oppose, are attached.**

2. The July 28 draft was based on changes to a June 18 draft (which was not publicly available) and were made by Melinda Pierson from Corporation Counsel's office. The June 18 draft was originally authored by Cal Kornstedt, an attorney with Dane County Corporation Counsel who retired in 2002. Supervisor Chawla told us this draft was likely posted due to an "administrative error." It is hard to believe that this document, with substantive changes made by Corporation Counsel's office, was sent to us and co-sponsors by Mr. Balousek on Aug. 2, and then posted on Legistar, due to an "administrative error." **Please ask Corporation Counsel to explain this. What was the basis of these changes, who was involved in making them, and when?**

3. Jeremy Balousek stated clearly at previous county meetings that the proposed county ordinance will cover the city's legal authorities for illicit discharge for its MS4 permit under state law NR 216. The city and county have been meeting for nearly two years (or more) to develop this ordinance, including in non-public meetings and/or meetings the public and city elected officials are largely unaware of (e.g., MAMSWaP meetings). City staff also agreed with the county that under this county legal authority, a city-county (PHMDC) staffperson will be responsible for carrying out the illicit discharge activities for both the county and the city. **So, in effect, in creating this ordinance, the county is also creating policy for the city**. **Given this, city alders, relevant city committees, Common Council, and Madison residents should be publicly engaged in discussions and decisions about it before it becomes law.**

4. The Dane County and City of Madison illicit discharge programs have been woefully underfunded and understaffed since they began in the 1990s, despite the fact that they are obviously critical for preventing toxic pollution such as PFAS from entering our waterways. Since the inception of the programs, as far as we understand, just one city-county (PHMDC)

staff has been largely responsible for illicit discharge investigations and enforcement in the city and the county. It should be evident to anyone that one person cannot adequately and comprehensively do these important tasks. In addition, the city and county have very limited funds for illicit discharge detection and elimination (IDDE), including testing of contaminants at major stormwater outfalls, required in the permit. Unfortunately, this lack of funding indicates that preventing pollution discharges into city and county stormdrains and waters is not a top priority for the city and county. Now, it appears that along with creating this new ordinance handing the legal authorities over to the county, both Land and Water Resources and PHMDC will be responsible for illicit discharge investigations and enforcement--*but with the same funding and staffing levels as before.*

To help prevent further toxic chemicals such as PFAS, as well as other pollutants, from entering Starkweather Creek, other creeks/rivers, and the Yahara Lakes, the county should work to significantly increase the amount of funds for the illicit discharge program.

Thank you for considering my comments,

Maria Powell, PhD
Madison Environmental Justice Organization

ATTACHMENT

Background and comments/questions on 2021 OA-017

Nearly two years ago, on November 14, 2019, Jeremy Balousek, Division Manager of the Dane County Land & Resources Department, informed the Lakes & Watershed Commission that the county did not have the illicit discharge ordinance required in its municipal separate stormwater sewer system permit (MS4), as specified under state stormwater laws (NR 216). Apparently, nobody did anything about this, including DNR, even after Dane County Corporation Counsel submitted a letter to DNR in 2004 explicitly stating that they did not have the required illicit discharge authority.

At the November 2019 meeting, Balousek also explained to commissioners that following from the Clean Water Act in the 1970s, the city had created an ordinance (Water Pollution Control, MGO 7.46/7.47) that sufficed as the legal authority to enforce its illicit discharge requirements in the MS4 stormwater laws (which were developed in the mid-1990s). The county never established the required ordinance; PHMDC staff took responsibility for illicit discharge investigations for the entire county, but could only legally enforce violations within the city.

In 2019, when its permit was being renewed, DNR finally asked the county to create the required ordinance. At the November 2019 meeting, Balousek presented the first draft of an ordinance that he said was modeled on the city's ordinance. He noted that the city ordinance exempted firefighting (which isn't correct).[1] Commissioners commented that given recent developments (re PFAS released to Starkweather and Lake Monona from firefighting), it shouldn't be exempted. Balousek agreed.

At several subsequent meetings where this item was discussed, committee members again advised that firefighting *not* be exempted. At the October 2020 meeting, the commission agreed not to exempt firefighting discharges (this includes any firefighting foam, with PFAS or not). On November 12, 2020, Balousek discussed the proposed ordinance with the county's Environment, Agriculture, and Natural Resources committee (EANR), for information only, and assured committee members who asked that under this ordinance, putting firefighting foam into county storm drains would be a violation and the county would have the authority to order a cleanup if that happened. The October 2020 draft was the last publicly available draft ordinance.

Problematic changes made to the draft ordinance since October 2020 (numbered below):

1. ***Firefighting was exempted as an illicit discharge***

We understand that firefighting and discharges authorized under WPDES permits are exempted from the illicit discharge definitions under NR 216. However, we also know that NR216 requires municipal permittees to have "*a strategy to address all types of illicit discharges*," including firefighting, and that "*…firefighting and discharges authorized under a WPDES permit shall be included in the strategy if identified by the municipality as significant sources of pollutants to waters of the state.*" See links on the first page.

[1] State stormwater law exempts firefighting as an illicit discharge, but the city's ordinances were developed well before that and do not exempt firefighting.

In line with this, the current MAMSWaP permit, after describing "*categories of non-storm water discharges that are not considered illicit discharges*," including firefighting, says "*However, the occurrence of a discharge listed above may be considered an illicit discharge on a case-by –case basis if the co-permittee or the Department identifies it as a significant source of a pollutant to waters of the state*."

Following this language, the October 10, 2020 draft of the ordinance said: "*These and other discharge exceptions do not apply if the discharge is identified by Public Health Madison and Dane County as a source of pollution to the waters of Dane County*."

2. **The above sentence was struck from the current draft.**

This deletion appears to eliminate any discretionary authority Dane County would have, as allowed by NR 216 and its MS4 permit, to address discharges in the exempted categories (including firefighting) and discharges from WPDES-permitted sites that it believed were causing pollution to Dane County waterways.

3. **The following clause was added to the ordinance:** "***This ordinance does not apply to an illicit discharge that is being addressed by a state or federal remediation process***."

This clause presumably means that under this ordinance, neither the county nor the city will have legal authority to address "illicit discharges" into their storm sewers, groundwater, ditches, etc., and waterways from Truax Field (airport, burn pits, Air National Guard), the former Burke sewage treatment plant (currently owned by MGE), the Oscar Mayer site (owned by Reich Rabin), Madison-Kipp Corporation and numerous other sites.

This exemption is not required in NR 216 or the MAMSWaP permit as far as we can tell. The city has had the authority to address pollution into its stormdrains from these sites through MGO 7.46-7.47 since 1975, though it has very rarely used them.

Some may argue that there is no need for the city or county to address water pollution from sites already being addressed by state and/or federal remediation programs. Abundant real-world evidence refutes this. State and federal remediation processes to date have clearly not kept toxic pollution such as PFAS, PCBs, heavy metals, and many more from discharging from state-regulated sites into Madison and Dane County storm drains and waterways. WPDES permits also do not prevent pollution from entering storm drains and waterways (as Madison-Kipp, Oscar Mayer, DCRA/ANG sites show; in fact, DCRA's expired permit doesn't even mention PFAS, nor do other WPDES permits at this point, because there are no state effluent standards yet.)

Please address the following questions about these proposed changes:

1. Why is firefighting now exempted in the proposed ordinance given that commissioners and county staff asked that it not be exempted, and it wasn't in previous drafts? Who made this decision and on what basis?
2. Why was this clause ("However, the occurrence of a discharge listed above may be considered an illicit discharge on a case-by–case basis if the co-permittee or the Department identifies it as a significant source of a pollutant to waters of the state") deleted from the proposed version, when

it was included in previous drafts? Why would the county and the city give up this discretionary authority? Who made this decision and on what basis?

3. Why was this clause ("This ordinance does not apply to an illicit discharge that is being addressed by a state or federal remediation process") added to the proposed ordinance? Who made this decision and on what basis?

Thanks in advance for helping us obtain comprehensive answers to these questions.

Please make sure you have answers before deciding on how to vote on this ordinance. Creating an ordinance is a public policy decision that will have impacts for decades. It should not be fashioned to create loopholes for the county (and possibly the city) during the current debacles regarding responsibilities and liabilities for the PFAS in our storm systems and waterways.

Sincerely,

Maria Powell, PhD /s/
Madison Environmental Justice Organization

Minks, Kyle

From: Tom Mathies <TMathies@town.verona.wi.us>
Sent: Wednesday, September 1, 2021 12:39 PM
To: Land&WaterResources Mail
Subject: Comments on 2021 OA-017 – Discharge of pollutants to waters

Hello,

I am not able to attend today's public hearing so I am submitting these comments. These comments are my own. I am not writing on behalf of anyone else.

I write in support of 2021 OA-017, prohibiting discharge of pollutants to the waters of Dane County. This ordinance will help make people aware of possible sources of water pollution and provide authority to resolve them.

If this ordinance is approved, it would be helpful to have the Lakes and Water Resources Depart or Public Health create a web page with information about this, perhaps including examples of prohibited practices and problems that have been resolved.

It looks like extra words are in § 50.10, lines 147– 150. Suggested deletion:

147 50.10 STORAGE OF POLLUTING SUBSTANCES. ~~It shall be unlawful for any~~
148 ~~person to store~~ any potentially polluting substances shall be stored in such
149 manner as to securely prevent them from escaping onto the ground surface,
150 municipal storm sewer system, drainage way, wetland, lake or stream.

Best regards,

Tom Mathies
Town of Verona Supervisor

CAPITAL AREA RPC
100 State St Suite 400, Madison, WI 53703

ph: 608.474.6017
info@capitalarearpc.org

CARPC Resolution No. 2021-04

Supporting the Proposed Dane County Stormwater Ordinance Amendment

WHEREAS, in March 1975, Dane County was designated by the Governor of Wisconsin as an area having substantial and complex water quality control problems, and certified such designation to the federal Environmental Protection Agency; and

WHEREAS, the Capital Area Regional Planning Commission is a duly created regional planning commission under Wis. Stats. § 66.0309, and has an agreement with the Wisconsin Department of Natural Resources to provide water quality management planning assistance; and

WHEREAS, the Dane County Lakes and Watershed Commission has been created under Wis. Stats. § 33.42, with the authority to propose to the Dane County Board minimum standards to protect and rehabilitate the water quality of the surface waters of the County; and

WHEREAS, climate change is increasing the frequency of wetter conditions, more severe storms, and threats to public health, safety and public and private property; and

WHEREAS, since 2000 the region has experienced a large number of extreme storm events, with significant flood events occurring in 2000, 2006, 2007, 2008, and 2018; and

WHEREAS, the result of these events has been both flash flooding in the areas directly affected by the storms, flooding of low-lying areas, and elevated lake levels; and

WHEREAS, rainfall statistics research by U.W. Madison Professor Dan Wright has demonstrated that large rainfall events are occurring more frequently than accounted for by current stormwater management design standards; and

WHEREAS, greater flood resilience particularly utilizing green infrastructure was identified as a top priority for the region through the Greater Madison Vision process; and

WHEREAS, In March 2020, City of Madison engineering staff presented an overview of proposed changes to Madison General Ordinance Chapter 37 and the Regional Planning Commission adopted Resolution No. 2020-05, supporting the proposed stormwater ordinance updates and encouraging Dane County and the other cities, villages, and towns throughout the region to adopt comparable minimum standards; and

WHEREAS, in June 2020 the City of Madison adopted the proposed changes to the design standards for new development and redevelopment in its stormwater ordinance for the purpose of reducing the threat to residences, businesses, and the environment by damage from stormwater and flooding events; and

WHEREAS, Dane County Land & Water Resources Department staff presented an overview of the proposed changes in Dane County Stormwater Ordinance Amendment Chapter 14 to the Regional Planning Commission on March 11, 2021; and

WHEREAS, stormwater management and flooding are regional, watershed, issues that are best addressed by the widespread adoption of consistent minimum standards throughout the region; and

NOW, THEREFORE, BE IT RESOLVED that the Capital Area Regional Planning Commission supports the adoption of the proposed Dane County stormwater ordinance amendment.

BE IT FURTHER RESOLVED that the Capital Area Regional Planning Commission supports the widespread adoption of consistent minimum standards throughout the region and encourages the other cities, villages, and towns throughout the region to adopt comparable minimum standards to the City of Madison and Dane County.

BE IT FURTHER RESOLVED that, the Capital Area Regional Planning Commission offers its assistance with these efforts, if desired.

April 8, 2021
Date Adopted

Larry Palm, Executive Chairperson

Kris Hampton, Secretary

Dane County Lakes and Water Commission,
Land Conservation Committee, and
Environment, Agriculture & Natural Resources Committee

August 31, 2021

Dear Committee Members:

I am writing on behalf of Stonebrook Estates Homeowners Association, a Homeowner Association in the Town of Middleton. We oppose some portions of the proposed amendments to Chapter 14 of the Dane County Ordinances (DCO) which are on the agenda for your September 1, 2021 meeting, namely those associated with DCO 14.10. The changes unfairly burden our Association and similar landowners – but more importantly, they are bad public policy. Specifically, the amended ordinance:

- allows easement holders to bind landowners to financial penalties and legal restrictions on their land without their consent;

- imposes a potential financial penalty on landowners when a responsible utility or municipal easement holder fails to meet stormwater requirements;

- effectively requires certain utility and municipal stormwater permittees to grant the County an easement over land they don't own; and

- unfairly burdens landowners who have disputes with utility and municipal easement holders by requiring the County to take sides against the landowner. By doing so, it potentially embroils the County in legal disputes.

As explained below, these issues can largely be resolved if the ordinance were to require that in the event of a dispute between an easement holder and landowner over a permit, the County decline to issue the permit until the dispute is resolved. This would still meet the goal of expediting the permitting process, and staff from Land and Water Resources (LWR) have rightfully told us they have no desire to involve the County in the middle of such disputes anyway.

The current stormwater ordinance appropriately requires a landowner to sign off on stormwater permits.

The current ordinance requires that when an easement holder such as a utility or municipality applies for a stormwater permit for construction on private property, the property owner must either sign the permit or give written authority for the easement holder to sign the permit. That makes sense because the current ordinance imposes permanent financial and legal obligations on the landowner. Among other things, applying for a permit constitutes express permission by

the landowner for the County to enter the property for inspection, to take action to correct any deficiencies, and then to seek reimbursement from the landowner. These obligations are also recorded. So, requiring someone who could be responsible for these obligations to sign off on the permit application is fair and appropriate.

The proposed ordinance removes the landowner and allows utilities and municipalities to sign permits while still imposing the permit obligations on the landowner.

The proposed ordinance, by contrast, allows the utility or municipal easement holder to obtain a stormwater permit on its own, as long as it tells the landowner it is doing so. If the landowner doesn't agree to accept these obligations, or disputes whether the easement holder as a right to do what it proposes to do in the construction permit, it doesn't matter – as long as the application is complete, the County is required to issue the permit. *However, the financial and legal burdens still fall on the landowner. First,* this new ordinance expressly requires the *landowner* to pay a penalty if the *easement holder* fails to fulfill its stormwater obligations.[1] *Second*, this new ordinance effectively requires someone who is not the landowner to grant the County an easement over land that person does not own.[2] We don't see how someone else other than the owner can grant an easement over private land. We think there are significant questions about whether this is legal or consistent with the Constitution.

The proposed ordinance will require the County to take sides in land disputes, unfairly place the burden to act on landowners, and potentially embroil the County in legal disputes.

Currently, if the landowner and utility or municipal easement holder don't agree on the construction at issue, the permit can't be issued until they work it out (because it requires the owner to sign). The County stays out of private legal matters. Under the new ordinance, the County is *required* to issue the permit as long as the application is complete – regardless of what the landowner believes.[3] In the case of a dispute this will unfairly put the onus on the small landowner to take legal action to stop a utility or municipality. This is wrong for several reasons. First, the new language effectively means that easement holders can bind landowners to permanent legal and financial obligations without their consent. Second, the County is unfairly siding with powerful utilities or municipalities over its citizens. Third, the County is potentially embroiling itself in legal disputes over the appropriateness of the permit and of saddling landowners with the above legal and financial obligations, because landowners may be forced to bring the permitting process into litigation over these matters.

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[1] Proposed DCO 14.18(3) says "[t]he permittee and landowner further consent to reimburse the authority for the total costs and expenses of the corrective actions. Reimbursement may be collected as a special charge upon the property for current services rendered as provided by law."

[2] In proposed DCO 14.10(4)(c), one of the conditions of the permit is that the permittee is giving permission to the County to enter the property for inspection or curative action. Proposed DCO 14.10(3)(d) requires that the stormwater obligations be recorded with the Register of Deeds.

[3] Proposed DCO 14.10(3)(a).

Why this Proposed Ordinance Change is Here

This proposed change was prompted by a dispute between our Association and the Town of Middleton. The Town, which is the holder of a disputed easement, wants to build a stormwater retention pond on property owned by the Association. The majority of our homeowners are willing to allow the Town to do so, as long as the Town accepts responsibility for liability associated with the pond, because the pond is solely for the public purpose of helping the Town meet DNR discharge requirements. However, the Town refuses to fully indemnify the Association. This is a problem for the Association, because if an injury where to occur due to the design, maintenance, or even presence of the pond, the injured would likely sue both the Town and the Association as the landowner. In that case, the Town's liability is limited under state law to a few hundred thousand dollars, whereas the Association's is not. Thus, the Town is shifting liability for a public project to private landowners. The Town believes the Association's fears are unfounded, but the Town is not willing to "put its money where its mouth is" and back up this supposedly unfounded claim by agreeing to indemnify the Association.

When the Town decided to proceed with building the pond anyway, the Association made clear it was not going to sign the stormwater permit application until the issue was resolved. The Association then contacted the County Corporation Counsel and afterwards, the County's lawyers advised LWR not to issue the Stonebrook Estates permit application without the Association's signature. After that incident, LWR sought to make changes to the ordinance that would allow the Town to sign off on the stormwater permit with our involvement.

Our members have spoken with various LWR staff on several occasions and have found them to be helpful and informative. They told us that they don't want to be in the middle of a dispute we have with the Town of Middleton. We understand they proposed this change because they believe if they have to follow the current ordinance and obtain a landowner signature for permits, it will be burdensome for utilities with large projects who hold noncontroversial easements to have to get signatures from a large number of landowners, and this may further cause delays.

The proposed ordinance should be modified to prohibit the County from issuing permits in disputed projects until the parties work out the dispute.

Although we think the current ordinance represents the best public policy, we understand LWR's concerns and do not oppose the portion of the ordinance change that allows easement holders to sign off on permits as long as they notify the landowner. In the vast majority of cases that will be the end of the matter. However, DCO 14.10 should be changed so that if the landowner objects, the County should not issue the permit until the parties resolve the matter. This is the way the current ordinance works in practice (because it requires landowner signature) – rightfully so given the burdens imposed on the landowner. There is no basis for slanting the new ordinance to favor one side in a dispute. This is also consistent with LWR's position that they do not want to be involved in individual landowner disputes, and it would

also keep the County from being embroiled in legal actions over the permitting process. Our proposal would also still address LWR's concern about the current ordinance – it would still allow speedy processing of permit applications for large projects because in the vast majority of cases there is no dispute over easement rights.

Finally, we believe the penalty provision discussed above ((14.18(3)) should be modified to apply to easement holders only unless the landowner expressly consents in writing. Traditionally, an easement holder is responsible for the costs of maintaining an easement, so the law should reflect that. Additionally, we believe the provisions that allow someone who is not a landowner to grant an easement over land they do not own should be removed.

Thank you for considering our comments. We remain committed to working with LWR to develop a balanced ordinance that good public policy and helps the Town of Middleton to meet its environmental goals.

STONEBROOK ESTATES HOMEOWNERS ASSOCIATION

/s/ Edward J. Pardon, President
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608-239-5197