

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 & Water 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