

**VIA ELECTRONIC MAIL**

October 31, 2005

Roger Schlessner,  
Department of Natural Resources  
101 S. Webster St.  
P.O. Box 7921  
Madison, WI 53707

**Re: Comments on WPDES Permit No. WI-0022489-08-0**

Dear Mr. Schlessner:

Midwest Environmental Advocates, Inc. is a nonprofit environmental law center that provides technical assistance and legal representation to communities and groups working to protect the public's right to clean air and water. We appreciate the opportunity to comment on WPDES permit no. WI-0022489-08-0 regarding Ft. Atkinson's wastewater treatment facility.

Midwest Environmental Advocates is concerned about the amount of phosphorus being discharged into the Rock River by Ft. Atkinson's wastewater treatment facility. The Rock River in Ft. Atkinson is listed as impaired in Wisconsin's 2004 303(d) list due to low dissolved oxygen and eutrophication as a result of high phosphorus levels. Yet the DNR does not analyze the need for water quality based phosphorus limits in Ft. Atkinson's permit and allows the facility to continue discharging under a phosphorus variance.

**COMMENT: The DNR has failed to conduct a Reasonable Potential Analysis under 40 C.F.R. § 122.44(d)(1)(i).**

While the EPA does not have specific technology based standards for discharges of phosphorus from publicly owned treatment works, states are still required to adopt effluent limits that protect the quality of the receiving water, known as water quality based effluent limits. Specifically, federal law requires that NPDES permits, including state-delegated permits, contain conditions necessary to "[a]chieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). In order to decide whether such conditions are needed, states must first conduct an analysis to determine if pollutants are being or may be "discharged at a

level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard.” *Id.* at § 122.44(d)(1)(i). Federal regulations also specify how this analysis should be conducted.

When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent . . . and where appropriate, the dilution of the effluent in the receiving water. *Id.* at § 122.44(d)(1)(ii).

In this case, there is no evidence that the DNR has analyzed whether Ft. Atkinson’s discharge would cause or contribute to an excursion above a state water quality standard due to the level of phosphorus in the effluent. Instead, DNR set the phosphorus limit using the phosphorus variance procedure in Wis. Admin. Code § NR 217.04(2). This regulation allows variances when it is not “practically achievable” to attain the 1 mg/L technology based limit in § NR 217.04(1)(a)1. This procedure, however, does not require an analysis of the receiving water in determining whether or at what level to grant a variance. Even if it did, however, every WPDES permit still must comply with 40 C.F.R. § 122.44(d)(1) regarding the protection of water quality standards. Without this “reasonable potential” analysis, the DNR has not fulfilled its Clean Water Act obligation to ensure that permits adequately protect state water quality standards.

Midwest Environmental Advocates realizes that the phosphorus variance for Ft. Atkinson is not new and did not change in this permit reissuance. However, we believe it is appropriate for DNR to review Ft. Atkinson’s variance at this time because the section of the Rock River between Watertown and Lake Koshkonong, into which Ft. Atkinson’s wastewater treatment facility discharges, was only added to the 303(d) list in 2002. *See* Wisconsin 2002 303(d) List Approved by EPA, [http://dnr.wi.gov/org/water/wm/wqs/303d/Lists303d/2002\\_303\(d\)\\_Approved\\_by\\_EPA\\_public\\_version.pdf](http://dnr.wi.gov/org/water/wm/wqs/303d/Lists303d/2002_303(d)_Approved_by_EPA_public_version.pdf) (last visited October 27, 2005). Therefore, this is the first permit renewal where Ft. Atkinson is discharging into an impaired waterway.

Under the phosphorus variance in its permit, Ft. Atkinson is allowed to discharge 10,280 pounds of phosphorus into the Rock River annually. This is 50 percent, or 3,426 pounds, more than would be allowed under Wisconsin’s general 1 mg/L phosphorus standard. While this may be a reasonable amount, the DNR has not analyzed or shown whether this amount is causing or contributing to the current violation of water quality standards in the Rock River.

## **Conclusion**

Ft. Atkinson’s variance needs to be analyzed in light of the effects on receiving water quality. DNR needs to undertake an analysis to see if Ft. Atkinson’s phosphorus limit

causes or contributes to an exceedence of state water quality standards. If so, the variance should be reexamined.

Thank you for the opportunity to comment on permit no. WI-0022489-08-0. We hope that DNR will take these comments into consideration when drafting the final permit. Please feel free to call or e-mail me if you have any questions regarding this comment.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**

Andrew C. Hanson

cc: Erin Chalmers, Wisconsin Environmental Law Advocates  
Caryl Terrell, Sierra Club – John Muir Chapter