

# Midwest Environmental ADVOCATES

*pro bono publico*

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Of Counsel

April 4, 2008

**Jim Fratrack**, Watershed Expert  
Wisconsin Department of Natural Resources  
2300 N Dr Martin Luther King Jr Dr  
Milwaukee WI 53212-3128

## Re: Milwaukee Metropolitan Sewerage District Pretreatment Enforcement

Dear Mr. Fratrack:

Midwest Environmental Advocates is a non-profit environmental law firm that has represented a variety of public interest groups working to protect Wisconsin's waters by enforcing the Clean Water Act. Over the years, we have supplemented the work of the Milwaukee Metropolitan Sewerage District ("MMSD") by bringing enforcement actions against industrial dischargers that are in Significant Non Compliance ("SNC") with their pretreatment permits.

Our most recent experience with this involved initiating an enforcement action against Fontarome Chemical for nearly 500 violations of their water permit, violations which mainly involved toxic and carcinogenic substances. What transpired with this case has alerted us to a problem with MMSD's enforcement that is so significant that it warrants DNR involvement and oversight into the pretreatment program that it is allowing MMSD to run.

On December 19, 2007, we filed on behalf of the Friends of Milwaukee's Rivers a Notice of Intent to sue Fontarome Chemical. (See attached letter.) Fontarome Chemical handles thousands of chemicals in the process of making both pharmaceuticals and fragrances. As the chemical mixtures change often, so did the discharges into MMSD and ultimately into Lake Michigan. What was constant, however, was that Fontarome repeatedly violated the terms of its permit by discharging excessive amounts of toxic and carcinogenic chemicals into MMSD's system, amounting to almost 500 days of violation. The company was on the SNC list for 2002, 2005, 2006 and 2007. The public interest groups sent the Notice of Intent to Sue because it was clear that MMSD was not enforcing the permit terms.

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During the 60 day notice period, Fontarome disconnected from MMSD's system and installed tanks to collect the chemical waste it produces. Instead of discharging directly into MMSD, Fontarome now sends its chemical waste across the city to ChemWorks, a company that receives chemicals from multiple companies and discharges them into MMSD. To make matters worse, ChemWorks has appeared on the SNC list for 2005, 2006, and 2007, and ChemWorks is even less regulated than Fontarome was, so many of the chemicals for which Fontarome was violating its permit are not even regulated by ChemWorks' permit as shown below:

Fontarome Permit Limits

ChemWorks Permit Limits

Ammonia = 3700g/d  
1300 monthly ave.

Ammonia = no limit

Toluene = 9.3 g/d  
5.8 monthly ave.

Toluene = no limit

Methylene Chloride = 83 g/d

Methylene Chloride = no limit

Chloroform = 8.4 g/d  
2.8 monthly ave.

Chloroform = no limit

Bis(2-ethylhexyl) phthalate = 23.5 g/d  
4.2 monthly ave.

Bis(2-ethylhexyl) phthalate = no limit

Tetrahydrofuran = 839 g/d  
310 monthly ave.

Tetrahydrofuran = no limit

pH (acidity) = > 5

pH = no limit

oil and grease = 300 mg/L

oil and grease = no limit

As you know, although the government can seek penalties for wholly past violations of a water permit, a citizen's group cannot. So once Fontarome stopped discharging directly into MMSD's system, Friends of Milwaukee's Rivers was unable to seek penalties for the hundreds of past chronic and significant violations. It is well known that penalties for violating water permits are useful not only to deter future noncompliance by the entity paying the penalty, but to deter violations by other regulated entities.

In this situation, we would expect that MMSD would step in to require payment of penalties to deter future significant violations by the over 100 other industries that are discharging industrial chemicals into MMSD's system. Instead, MMSD sent a very damaging letter to Fontarome stating their intent to NOT enforce the law stating that: "Penalties for past violations in this instance are **not essential** to pretreatment program

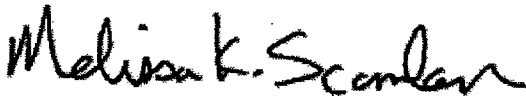
deterrence.” (See attached letter, emphasis in original) In summary, for a company that appeared on the SNC list for four years due to discharging toxic and carcinogenic substances in violation of its pretreatment limits, MMSD never sought a fine or penalty payment in any amount. Not only do we think this an error in judgment that should be reversed in this specific case, but a violation of MMSD’s WPDES permit requirements to enforce the pretreatment program permits. (See WPDES Permit No. WI-0036820-1, Milwaukee Metropolitan Sewerage District.)

As MMSD’s permit is currently up for renewal by DNR, this is an appropriate time to review MMSD’s enforcement of its pretreatment program and compliance with DNR’s requirement that it effectively enforce the pretreatment permits in order to minimize the amount of industrial pollution that is getting into Lake Michigan.

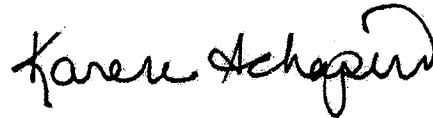
We seek immediate corrective action, and look forward to meeting with you to discuss these matters.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES**



Melissa K. Scanlan  
*Founder and Senior Counsel*



Karen Schapiro  
*Executive Director*

Cc: Sharon Gayan, DNR Milwaukee River Basin Supervisor  
David Bolha, DNR Pretreatment  
Todd Ambs, DNR Division of Water Administrator  
Kevin Shafer, MMSD  
MMSD Commissioners



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## VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

December 19, 2007

Frederick R. Croen  
Registered Agent for Fontarome Chemical, Inc.  
250 E. Wisconsin Ave., Suite 1550  
Milwaukee, WI 53202

Carl Sheeley, President  
Fontarome Chemical, Inc.  
4170 S. Nevada Ave.  
St. Francis, WI 53235

**Re: 60 Day Notice of Intent to Sue under the Federal Water  
Pollution Control Act, 33 U.S.C. § 1365(a)(1), for Violations  
of Wastewater Discharge Permits 96.01 and 96.02 and  
Section 11.203 of the Milwaukee Metropolitan Sewerage  
District Regulations.**

To Whom It May Concern:

We represent the Friends of Milwaukee's Rivers ("FMR"), a non-profit, membership-based organization whose mission is to protect water quality and wildlife habitat in the river corridors and to advocate for sound land use in the Milwaukee, Menomonee, and Kinnickinnic River Watersheds, which feed into Lake Michigan. FMR is a member of the Waterkeeper Alliance, a national coalition dedicated to protecting and restoring our nation's waterways, and is the licensed Riverkeeper® for Milwaukee. FMR's members use and enjoy the waters of the Greater Milwaukee area rivers and Lake Michigan.

This letter is to inform you that FMR intends to sue Fontarome Chemical, Inc. ("Fontarome"), a domestic corporation doing business in Wisconsin, for violations of Wastewater Permits 96.01 and 96.02 and Section 11.203 of the Milwaukee Metropolitan Sewerage District ("MMSD") regulations. Fontarome began discharging under its first permit from MMSD in February of 2001, and appeared on MMSD's list of

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industrial dischargers in Significant Non-Compliance with permit terms by 2002. Fontarome's past and ongoing violations of its permit landed them on the Significant Non-Compliance list for all of 2005, part of 2006, and the first half of 2007.

Fontarome has repeatedly violated, and continues to violate, its Permits to discharge pollutants into the MMSD publicly owned treatment works and regulations setting forth limits for pollutants established pursuant to 33 U.S.C. § 1317(b) (2003). See also 40 C.F.R. § 403.5(d) (2003). The Clean Water Act prohibits the operation of a source in violation of an effluent or pretreatment standard. 33 U.S.C. § 1317(d). Violation of a pretreatment standard or permit is a violation of an effluent standard or limitation and is actionable under the citizen suit provision of the Clean Water Act. 33 U.S.C. 1365(f)(4); 40 C.F.R. § 403.5(d).

Records in the public domain indicate that Fontarome continues to engage in a pattern of recurring, intermittent violations sufficient to keep the company from operating in a state of compliance with the Clean Water Act. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 64 (1987). Furthermore, because Fontarome has made no effort to install the control technology or address the high risk of operator error necessary to prevent present and future violations, Fontarome is "in violation of" the Clean Water Act for purposes of the Act's citizen suit provision. Gwaltney, 484 U.S. at 69; Atlantic States Legal Found. v. Stroh Die Casting Co., 116 F.3d 814, 820 (7<sup>th</sup> Cir. 1997).

Under Permits Nos. 96.01 and 96.02, section 4.01(1), Fontarome "may not discharge to the sewerage system except in compliance with ch. 11, MMSD Rules, and this permit."

On at least the following dates, records in the public domain show that Fontarome discharged excessive pollutants into the MMSD treatment system from the Fontarome facility located at 4170 S. Nevada Avenue in St. Francis, Wisconsin, violating section 4.01(1) of its Permits Nos. 96.01 and 96.02 for at least 477 separate days of violation.

## **TOLUENE**

Fontarome's illegal discharges of toluene, an organic solvent, began the same year it received its first permit from MMSD to discharge industrial wastewater.<sup>1</sup> This pattern of excessive pollution continued over the years and still persists today with the latest illegal discharge exceeding 12 times the permit limit for toluene.

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of toluene in violation of section 4.01(1) of both Permits; in violation of Permit No. 96.01, section 1.02, Table 2, which originally limited discharges to 9.5 grams/day monthly average, and then allowed 19.1 grams/day daily maximum and 12 grams/day monthly average; and in violation of Permit No 96.02,

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<sup>1</sup> Fontarome violated the monthly limit for toluene in October 2001, violated the daily limits on December 18 and 19, 2001, and violated the December 2001 monthly limit.

section 1.02, Table 2, which limits toluene discharges to 9.3 grams/day daily maximum and 5.8 grams/day monthly average.

Sample Date	Result (grams/day)	Permit Limit (grams/day)
6/6/2002	11.7 monthly avg.	9.5 monthly avg.
10/1/2002	20 daily	19.1 daily
10/31/2002	19.98 monthly avg.	12 monthly avg.
9/20/2005	60 daily	9.3 daily
9/30/2005	60 monthly avg.	5.8 monthly avg.
7/2/2007	140 daily	9.3 daily
7/31/2007	70.2 monthly avg.	5.8 monthly avg.

### MERCURY

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of mercury in violation of section 4.01(1) of both Permits; and in violation of Permit No. 96.01 and Permit No. 96.02, section 1.02(2), Table 1, which limits mercury discharges to .0026 mg/L daily maximum.

Sample Date	Result (mg/L)	Permit Limit (mg/L)
10/14/2003	0.0027 daily	0.0026 daily
4/3/2006	0.048 daily	0.0026 daily

### AMMONIA

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of ammonia in violation of section 4.01(1) of both Permits; and in violation of Permit No. 96.02, section 1.02, Table 2, which limits ammonia discharges to 3,700 grams/day daily maximum and 1,300 grams/day maximum monthly average.

Sample Date	Result (grams/day)	Permit Limit (grams/day)
7/6/2005	5610 daily	3700 daily
7/31/2005	5609 monthly	1300 monthly avg.
5/31/2006	2226 monthly	1300 monthly avg.

### ZINC

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of zinc in violation of section 4.01(1) of both Permits; in violation of Permit No. 96.01, section 1.02(2), Table 1, which limited zinc discharges to 8.0 mg/L daily maximum; in violation of Permit No. 96.01, section 1.02, Table 2, which limited zinc discharges to 238 grams/day daily maximum and 95.8

grams/day maximum monthly average; and in violation of Permit No 96.02, section 1.02, Table 2, which limits zinc discharges to 120 grams/day daily maximum and 46 grams/day maximum monthly average.

Sample Date	Result	Permit Limit
7/6/2004	10.8 mg/L daily	8 mg/L daily
7/6/2004	493 grams/day daily	238 grams/day daily
7/31/2004	493 grams/day monthly avg.	95.8 grams/day monthly avg.
7/6/2005	156 grams/day daily	120 grams/day
7/31/2005	156 grams/day monthly avg.	46 grams/day monthly avg.

#### **BIS(2-ETHYLHEXYL)PHTHALATE (EHPL)**

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of Bis(2-Ethylhexyl) Phthalate in violation of section 4.01(1) of both Permits; in violation of Permit No. 96.01, Section 1.02, Table 2, which limited EHPL discharges to 23.5 grams/day daily maximum, and 8.67 grams/day monthly average; and in violation of Permit No 96.02, Section 1.02, Table 2, which limits EHPL discharges to 4.2 grams/day monthly average.

Sample Date	Result (grams/day)	Permit Limit (grams/day)
6/1/2005	26 daily	23.5 daily
6/30/2005	26.5 monthly avg.	8.67 monthly avg.
July 2007	4.8 monthly avg.	4.2 monthly avg.

#### **TETRAHYDROFURAN (THF)**

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of Tetrahydrofuran in violation of section 4.01(1) of both Permits; in violation of Permit No. 96.01, section 1.02, Table 2, which set THF limits at 839 grams/day daily maximum and 310 grams/day monthly average; and in violation of Permit No 96.02, section 1.02, Table 2, which limits THF discharges to 410 grams/day daily maximum and 150 grams/day monthly average.

Sample Date	Result (grams/day)	Permit Limit (grams/day)
11/5/2002	1429 daily	839 daily
11/30/2002	1429 monthly avg.	310 monthly avg.
9/20/2005	510 daily	410 daily
9/30/2005	510 monthly avg.	150 monthly avg.

## ACIDITY (pH)

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of wastewater in violation of section 4.01(1) of both Permits; and in violation of the pH limit in Permit Nos. 96.01 and 96.02, section 1.02(4), by discharging wastewater with a pH below 5.

Sample Date	Time	Lowest Level	Permit Limit
8/23/2002	12:40 pm to 1:05 pm	3.3	> 5
8/28/2002	12:25 am to 1:25 am	4.1	>5
	6:45 am to 7:20 am	2.3	>5
	4:40 pm to 5:20 pm	4.7	>5

## METHYLENE CHLORIDE

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of methylene chloride, an organic solvent, in violation of section 4.01(1) of both Permits; and in violation of Permit No 96.02, section 1.02, Table 2, which limits methylene chloride discharges to 83 grams/day daily maximum and 19 grams/day monthly average.

Sample Date	Result (grams/day)	Permit Limit (grams/day)
5/8/2006	266 daily	83 daily
5/31/2006	266 monthly ave.	19 monthly ave.
6/30/2006	21.25 monthly ave.	19 monthly ave.

## CHLOROFORM

Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of chloroform in violation of section 4.01(1) of both Permits; and in violation of Permit No 96.02, section 1.02, Table 2, which limits chloroform discharges to 8.4 grams/day daily maximum and 2.8 grams/day monthly average. In fact, during 2007, Fontarome's discharge was 87 times higher than the legal monthly limit.

Sample Date	Result (grams/day)	Permit Limit (grams/day)
6/4/2007	243.2 daily	8.4 daily
6/30/2007	243.2 monthly ave.	2.8 monthly ave.

## HEXANE EXTRACTABLE MATERIALS (OIL & GREASE)

Most recently, Fontarome has illegally discharged and continues to present a reasonable likelihood of continuing and future illegal discharges of hexane extractable materials (oil and grease) in violation of section 4.01(1) of Permit 96.02; and in violation of Permit 96.02, section 1.02, Table 1, which limits oil and grease discharges to 300 mg/L daily maximum.

Sample Date	Result (mg/L)	Permit Limit
10/16/2007	550 daily	300 mg/L daily maximum

FMR's members use and enjoy the Greater Milwaukee area rivers, streams, and Lake Michigan, for paddling, fishing, and other recreational and aesthetic purposes. Fontarome has continuously violated its Permits and MMSD's rules by sending excessive amounts of pollutants into the MMSD system. MMSD's sewer system is not designed to treat or remove these chemicals, but instead relies on industrial pretreaters to not discharge in excess if permitted limits. Thus, these chemicals may be discharged into Lake Michigan. Further, due to sewer overflows, these excessive amounts of pollutants in violation of Fontarome's permit limits may discharge into Lake Michigan. FMR's members have a reasonable concern that their use and enjoyment of Lake Michigan has been and will be diminished by Fontarome's Permit violations. Members of FMR are also ratepayers for sewer and water service provided by MMSD whose sewer rates are affected by the extent to which MMSD must expend public resources to monitor and respond to excessive and illegal effluent discharged by Fontarome. FMR believes that a federal court can redress its injuries by ensuring that Fontarome complies with the law and pays penalties for its violations.

FMR intends to file a citizen suit pursuant to 33 U.S.C. §1365(a)(1) of the Federal Water Pollution Control Act against Fontarome for all violations of the Permit and MMSD regulations set forth in this letter, as well as other, yet to be discovered violations of the same nature.

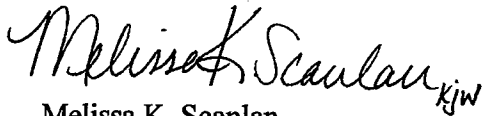
During the 60-day notice period, FMR welcomes discussion that would resolve this matter without litigation. Additionally, we request that you share any information that is relevant but not included in this notice, and any information that may be inconsistent with the facts stated in this notice. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within the next 10 days so that they may be completed before the end of the 60-day notice period.

If the violations described in this letter persist at the end of the 60-day notice period, you may be liable for a civil penalty of up to \$32,500 per day, for each violation. 33 U.S.C. §1319(d); 40 C.F.R. §19.4, Table 1. If FMR files suit, it will seek the imposition of the highest statutory civil penalties for all past and ongoing violations; injunctive relief barring further unlawful discharges; and attorneys' fees and costs as allowed by law.

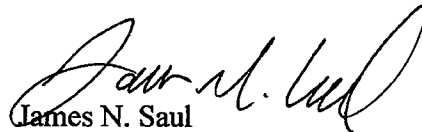
The persons giving notice are Friends of Milwaukee's River, whose office is located at 1845 N. Farwell Avenue, Suite 100, Milwaukee WI 53202, (414) 287-0207 ext. 29. FMR can be contacted through its attorneys as follows: Melissa K. Scanlan and James N. Saul, Midwest Environmental Advocates, 551 W. Main Street, Suite 200, Madison, Wisconsin 53703, (414) 688-4171.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**



Melissa K. Scanlan  
Senior Counsel



James N. Saul  
Staff Attorney

CC: Stephen L. Johnson, Administrator, United States Environmental Protection Agency  
Mary A. Gade, Regional Administrator, EPA Region V  
Matthew Frank, Secretary, Wisconsin Department of Natural Resources  
Todd Ambs, Water Division Administrator, Wisconsin Department of Natural Resources  
Tom Nowicki, MMSD





Preserving The Environment •  
Improving Water Quality

March 11, 2008

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Donald P. Gallo, Esq.  
Reinhart Boerner Van Deuren S.C.  
N16 W23250 Stoneridge Drive  
Suite 1  
Waukesha, WI 53188

Re: The Fontarome Chemical, Inc., 60 Day Notice of Intent to Sue for  
Pretreatment violations.

Dear Counsel,

Please be advised that the enforcement and civil penalty posture  
outlined at our February 26<sup>th</sup> meeting has evolved in this case.

After thinking more about the nature and extent of the effluent  
exceedances and the termination of any possible future violations by  
Fontarome, we believe that justice does not compel the District to be involved  
in a punitive action against Fontarome. Penalties for past violations in this  
instance are **not essential** to pretreatment program deterrence.

The parties should not rely on the District initiating enforcement for  
past violations.

I wish you both success in the settlement of this matter.

Sincerely,

Thomas J. Crawford

Milwaukee Metropolitan Sewerage District  
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