

Fw: Comments 7-10-24

Tanya Sime <tanyas@capitalarearpc.org>

Wed 7/10/2024 2:07 PM

To: Nick Bower <nickb@capitalarearpc.org>

📎 1 attachments (326 KB)

City of Verona Comments Letter 7-10-24.pdf;

Tanya Sime
608-474-6017

From: Heidi Jimenez <hjimenez@pinesbach.com>

Sent: Wednesday, July 10, 2024 1:41 PM

To: Tanya Sime <tanyas@capitalarearpc.org>

Cc: Christa Westerberg <cwesterberg@pinesbach.com>; Elizabeth Pierson <epierson@pinesbach.com>

Subject: Comments 7-10-24

Hello,

Attached is a letter regarding comments on the MMSD's Proposed Amendment to the Dane County Water Quality Plan.

Thank You.

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July 10, 2024

Capital Area RPC
Attn: Tanya Sime
Via email: tanyas@capitalarearpc.org

Re: Comment on MMSD's Proposed Amendment to the Dane County Water Quality Plan

Dear Ms. Sime:

Please accept these comments submitted on behalf of the City of Verona, which opposes the Madison Metropolitan Sewerage District's proposal to amend the Dane County Water Quality Plan (in turn a modification to MMSD's WPDES permit) by cutting off the supply of treated wastewater effluent discharge to Badger Mill Creek. MMSD suggests the amendment as a means of complying with phosphorus standards, but as further explained below, MMSD's analysis and proposal contain several key deficiencies. The City urges CARPC and DNR to consider alternative phosphorus compliance solutions and keep the water flowing to Badger Mill Creek.

Background

As you know, Badger Mill Creek flows for most of its length through the City of Verona. Its residents use and enjoy the creek for fishing, boating, and other forms of recreation, including walking and biking on the trails on public lands around Badger Mill Creek.

The City has consistently raised concerns about how the loss of base flow to Badger Mill Creek would affect the Verona community. On January 23, 2023, the Common Council unanimously passed a resolution opposing the stoppage of flow to the creek, stating

that “diverting the water taken from the Upper Sugar River watershed to Badfish Creek ... will permanently and significantly reduce the flow of the Badger Mill Creek in the City of Verona, harming the environment around the Badger Mill Creek.” The resolution not only opposed the diversion of water, but also expressed the Council’s support for “continuation of the current practice of the MMSD returning the Upper Sugar River waters to the Upper Sugar River watershed.”

Moreover, Mayor Luke Diaz signed onto a [letter](#) to MMSD from the Badger Mill Creek Preservation Coalition opposing the proposal. Mayor Diaz also testified at the April 27, 2023 MMSD Commission Meeting regarding the plan.¹

Comments

The City highlights three main deficiencies with MMSD’s proposal. *First*, MMSD ignores the DNR’s responsibilities under the public trust doctrine, which include preserving its recreational value as a class 2 trout stream. *Second*, MMSD ignores the presence of wetlands around the stream, which triggers the application of water quality standards for wetlands. *Third*, MMSD’s proposal ignores the current and future impact of climate change, which as a science-driven agency, the DNR should consider as it considers the amendment. These deficiencies are further explained below.

1. CARPC must consider and preserve Badger Mill Creek’s status as a Class 2 trout stream.

Badger Mill Creek is a navigable water which the state must protect in accordance with the public trust doctrine. MMSD’s proposal ignores this requirement.

The public trust doctrine is grounded in the Wisconsin Constitution, which states:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and *the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.*

Wis. Const. Art. IX, § 1. Wisconsin courts “have long interpreted this provision broadly and consistent with its sweeping scope, explaining that it protects more than strictly

¹ Comments begin at 10:23, <https://www.youtube.com/watch?v=qI2lj780aLc>.

navigable waters or related commercial navigation rights.” *Clean Wisconsin, Inc. v. Wisconsin Dep’t of Nat. Res.*, 2021 WI 72, ¶ 12, 398 Wis. 2d 433, 961 N.W.2d 611. The doctrine applies to “all areas within the ordinary high water mark of the body of water in question.” *Id.* (cleaned up). Put another way, the public trust doctrine applies to any waterway that is “navigable in fact for any purpose.” *Rock-Koshkonong Lake Dist. v. State Dep’t of Nat. Res.*, 2013 WI 74, ¶ 76, 350 Wis. 2d 45, 833 N.W.2d 800. (emphasis in original, citation omitted). This includes recreational watercraft like kayaks and canoes. *Id.* But the doctrine protects far more than navigation, extending to “safeguard the public’s use of the state’s waters for even purely recreational purposes.” *Clean Wisconsin*, 2021 WI 72, ¶ 12. (cleaned up). Those purposes include “boating, swimming, fishing, hunting, and preserving scenic beauty.” *Rock-Koshkonong Lake Dist.*, 2013 WI 74, ¶ 72. (cleaned up); see also *Movrich v. Lobermeier*, 2018 WI 9, ¶ 27, 379 Wis.2d 269, 905 N.W.2d 807. The legislature has delegated significant public trust responsibilities to the DNR. *Clean Wisconsin*, 2021 WI 72, ¶ 13.

Badger Mill Creek is a navigable water. Kayakers already paddle it,² and as the City of Verona continues to grow and attract young professionals, this use is only likely to increase.

The DNR’s responsibilities under the public trust doctrine are additionally codified in Wis. Stat. Ch. 30, which governs navigable waters. Cutting off the flow of treated wastewater to the stream is functionally indistinguishable from withdrawing water from it, which is prohibited without a permit issued under Chapter 30. Wis. Stat. § 30.18(2)(a). MMSD has not indicated whether it will request such a permit.

Notably, CARPC seems to acknowledge its public trust duties in its characterization of its environmental protection strategy, as implemented through its Water Quality Plan: “This strategy encompasses waste treatment, best management practices, erosion control, vegetation management, stormwater management, and land use planning. Resource protection recognizes that land and natural resources perform critical environmental functions such as groundwater recharge and discharge, water quality improvement, erosion control, storage of floodwaters, wildlife habitat and scenic beauty.”³ This holistic view of resource protection is consistent with the public trust doctrine.

² See one account of paddling Badger Mill Creek here:

<https://www.wisconsinrivertrips.com/segments/badger-mill-creek>

³ Capital Area RPC, *About*, <https://www.carpcwaterqualityplan.org/dane-county-water-quality-plan/>.

The public trust doctrine requires the DNR to consider Badger Mill Creek's status as a class 2 trout stream.

The public trust doctrine requires the DNR to protect Badger Mill Creek for recreation, which includes protecting its status as a popular fishing stream. The DNR classified the creek as a class 2 trout stream in 2008.⁴ A class 2 trout stream classification has significant ecological and recreational value:

'Class II'. A class II trout stream is a stream or portion thereof that:

- a. Contains a population of trout made up of one or more age groups, above the age one year, in sufficient numbers to indicate substantial survival from one year to the next, and
- b. May or may not have natural reproduction of trout occurring; however, stocking is necessary to fully utilize the available trout habitat or to sustain the fishery.

Wis. Admin Code. § NR 1.02(7)(b)2. Badger Mill Creek has historically been stocked with Brown Trout, and a public-private partnership invested in habitat improvements along the creek. Badger Mill Creek hit another milestone when it began receiving fingerling trout, instead of yearlings, in 2014. In a recent survey, the catch rates for Brown Trout in Badger Mill Creek were above the state average. In addition, Mottled Culpin, a cold-water indicator species, were found to be present in Badger Mill Creek at relatively high rates, indicating "the stream temperatures are suitable and water quality sufficient to support increased trout abundances with habitat improvements."⁵

Although MMSD acknowledges that Badger Mill Creek is a class 2 trout stream, it does not analyze the impact its plan amendment would have on the trout population in the stream, or the recreational use of the trout stream. Instead, MMSD focuses on the water quality standards under the outdated water resources designation of the stream as a limited forage fishery, sometimes mentioning the cold-water (i.e., trout stream) standards, too. But the classification of Badger Mill Creek as a limited forage fishery dates to the 1970's, see Wis. Admin. Code. § NR 104.05, and conflicts with the more recent classification as a class 2 trout stream.

⁴ *Trout Stream Management and Status Report of the Sugar River Watershed: Dane and Green Counties, Wisconsin 2020–2021*, Wis. Dept. of Natural Resources, p. 6, available at <https://dnr.wisconsin.gov/sites/default/files/topic/Fishing/DaneSugarRiver20202021Watershed.pdf>.

⁵ *Trout Stream Management and Status Report* at 3, 5–6, 10.

This outdated classification is overdue for amendment. It conflicts with the avowed purpose of the statute regulating pollution discharge elimination, the goal of which is fulfilling the state's policy "to restore and maintain the chemical, physical, and biological integrity of its waters to protect public health, safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial, agricultural, and other uses of water." Wis. Stat. § 283.001(1). The outdated classification also arguably violates the public trust doctrine by failing to account for the current reality of the stream's status and recreational uses.

As part of their public trust duties to the state, CARPC and the DNR must consider all scientific evidence of the classification of Badger Mill Creek in evaluating MMSD's proposal. When presented with "concrete, scientific evidence of potential harm to waters of the state," the DNR must consider that evidence before accepting the proposal that could cause the harm. *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 46, 335 Wis. 2d 47, 799 N.W.2d 73.⁶ This responsibility to consider the evidence flows directly from the DNR's responsibility to fulfil the state's public trust duties. *Id.* ¶ 62. The DNR's own classification of Badger Mill Creek as a class 2 trout stream surely qualifies as concrete, scientific evidence of a significant trout population in need of protection.

As MMSD notes, the DNR is statutorily required to base its decision on proposed revisions to the water quality management plan for Dane County on compliance with the water quality standards in Wis. Stat. § 281.15. Wis. Stat. § 283.83(1m). A reading of the statute that prohibits the DNR from considering other information as required by its public trust duties, however, would violate the Wisconsin Constitution. The DNR can and must consider both the water quality standards, and the other values protected under the public trust doctrine.

Accordingly, CARPC and the DNR must look beyond water quality standards to preserve the use of the stream as a class 2 trout stream, including by meeting its fisheries and aquatic resources management standards in considering MMSD's proposal. DNR programs "shall be based on scientific management principles which emphasize the protection, perpetuation, development, and use of all desirable aquatic species." NR 1.01(1)." When MMSD began discharging its treated wastewater into Badger Mill Creek, the Creek's baseflow increased by 35%.⁷ The MMSD baseflow has been part of the trout habitat since it began in 1998, through over two decades of the Creek's increasing viability as a trout stream. As the City and its co-signatories pointed

⁶ The *Lake Beulah* case concerned an application for a high-capacity well permit, but its reasoning applies to other DNR actions.

⁷ *Trout Stream Management and Status Report* at 6.

out in an earlier letter to MMSD, when the MMSD flow was shut off in 2023, the water level lowered so much that recently installed habitat improvements were left exposed, no longer helpful to the trout. This is not sound fisheries management.

Even looking at water quality standards alone, MMSD has not clearly shown that cutting off the flow would substantially improve the stream's water quality, as it sometimes suggests. Badger Mill Creek currently meets many of the criteria for a class 2 trout stream, according to MMSD's data. With regard to toxic substances, MMSD suggests that cutting off the flow will reduce the level of toxicity in the stream but does not cite evidence to this effect. The permit currently includes a variance for mercury and chloride, and even with this variance, Badger Mill Creek is a thriving trout stream. Keeping the variance thus appears to be a viable option, rather than cutting off flow entirely. MMSD has also not provided specific evidence of how the effluent affects e.coli levels in the creek, which are regulated under NR 104.04(6)(a).

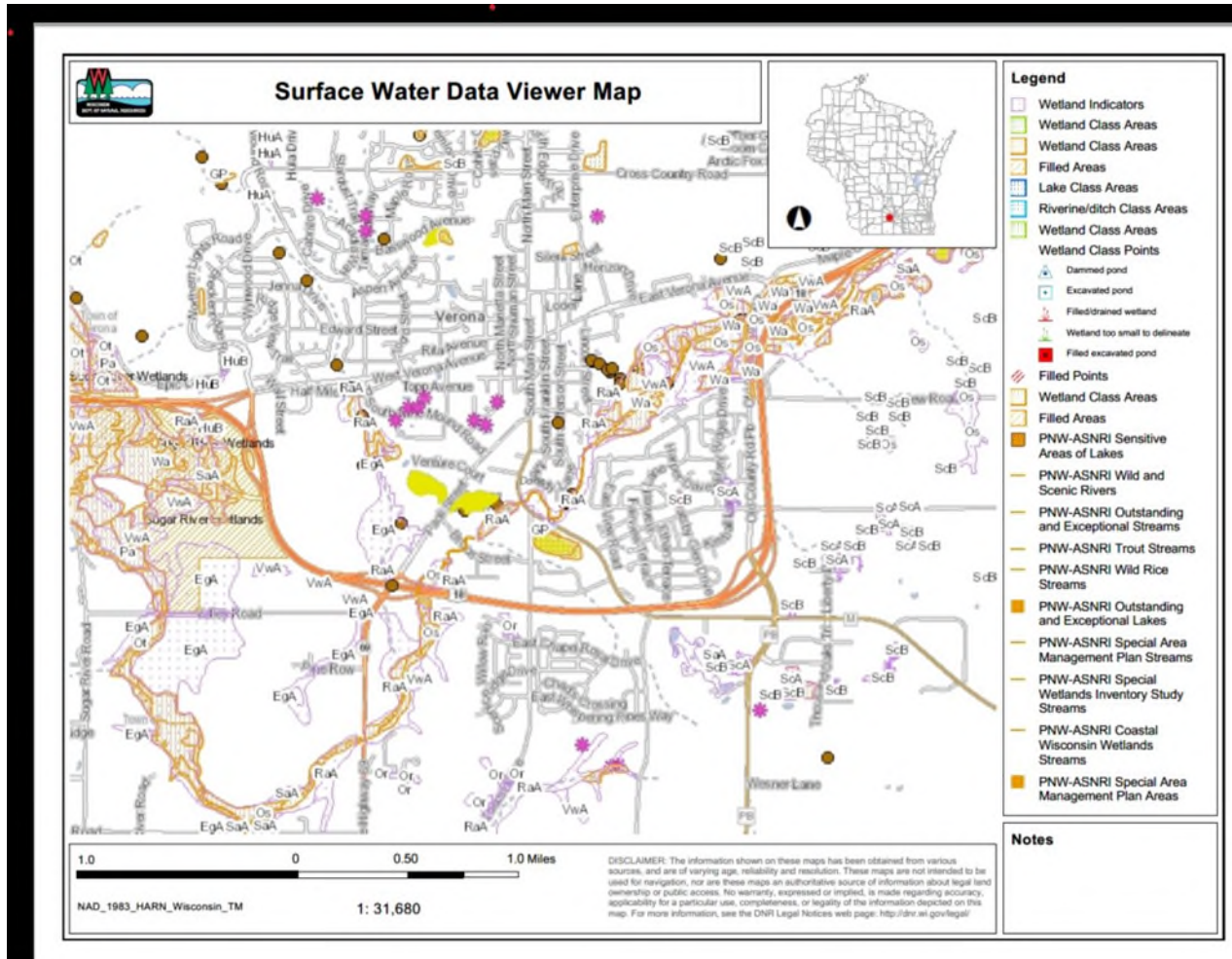
More likely, MMSD's proposal, if implemented, will harm Badger Mill Creek. For example, based on some sampling points, dissolved oxygen barely meets standards for a cold water fishery in its upper reaches, where flow is more limited, towards Highway PB. (MMSD Mod. At 6.) MMSD's limited data does not prove that dissolved oxygen levels will be improved by permanently reducing flow.

The DNR should ensure that MMSD's phosphorus compliance plan is consistent with its obligations under the public trust doctrine, including preserving the current recreational uses of the stream.

2. Wetlands are present surrounding Badger Mill Creek and require both consideration and protection.

Wisconsin's water quality standards include those intended to "protect, preserve, restore and enhance the quality of waters in wetlands and other waters of the state influenced by wetlands." Wis. Admin. Code § NR 103.03(1). These standards are applicable to MMSD's proposal, Wis. Admin. Code §§ NR 103.01, .05, .06(1)(b), yet MMSD's proposal does not address any of them. It should have.

The DNR's water surface viewer shows wetland class areas around much of Badger Mill Creek, and wetland indicators in additional areas:



Despite the presence of wetlands around Badger Mill Creek, MMSD has not discussed whether and how its proposal to reduce water levels would or would not comply with the wetland water quality standards in Wis. Admin. Code § NR 103.03. Several wetland functional values in NR 103.03 are implicated by MMSD's proposal, including:

- (a) Storm and flood water storage and retention and the moderation of water level fluctuation extremes;
- (b) Hydrologic functions including the maintenance of dry season streamflow, the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another area and the flow of groundwater through a wetland;

...

I Habitat for aquatic organisms in the food web including, but not limited to fish, crustaceans, mollusks, insects, annelids, planktonic organisms and

- the plants and animals upon which these aquatic organisms feed and depend upon for their needs in all life stages;
- (f) Habitat for resident and transient wildlife species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food; and
- (g) Recreational, cultural, educational, scientific and natural scenic beauty values and uses.

The wetlands around Badger Mill Creek have been influenced by water discharged by MMSD for 26 years. Cutting off that flow would have repercussions for “the moderation of water level fluctuation extremes,” “the maintenance of dry season streamflow,” flora and fauna, and of course, “recreational, cultural, educational, scientific and natural scenic beauty values and uses” for the Verona community and its visitors. DNR must protect these values as it considers MMSD’s proposal.

Multiple criteria are in place to protect the wetland functional values identified above, which again MMSD does not address. These include protecting “[h]ydrological conditions necessary to support the biological and physical characteristics naturally present in wetlands... [from] significant adverse impacts on,” among other things, “[w]ater temperature variations” and “[w]ater levels or elevations. NR 103.03(2)I. These factors are clearly implicated by MMSD’s proposal. Even by MMSD’s own account, cutting off the flow will lead to greater variation in water temperature in Badger Mill Creek. This could have adverse effects on the wetlands, which MMSD should have addressed.

The area is subject to additional wetland protections because Badger Mill Creek is a class 2 trout stream, and thus an “area of special natural resource interest.” NR 103.04(1), 103.08(4). The DNR must consider “[a]ny potential adverse impacts to wetlands in areas of special natural resource interest as listed in s. NR 103.04.” NR 103.08(3)(f).⁸

Cutting off the flow of treated MMSD wastewater to Badger Mill Creek would affect not only the Creek itself, but the surrounding wetlands. DNR must consider whether MMSD’s proposal is compliant with NR 103.

⁸ MMSD has not proposed any wetland mitigation project as a result of its proposal, but even if it had, the DNR “may not consider potential functional values provided by any mitigation project that is part of the subject application.” NR 103.08(4)(b).

3. The DNR should consider the impact of climate change, which MMSD ignores.

Climate change is already affecting Badger Mill Creek, the City of Verona, and Wisconsin at large, and its impact will only grow over time – the DNR should consider this impact as it evaluates the available options for phosphorous compliance. Water level and temperature are two aspects of the stream that will most obviously be affected.

When it comes to water level, climate change models suggest that this area will become warmer, and in the summer months, drier. The University of Wisconsin Center for Climatic Research predicts that in 60 years, Madison will closely resemble present-day Pawnee, Oklahoma, with summers 11.9° F warmer and 5.6% drier, whereas winters will be 12.5° warmer and 22.5% wetter.⁹ Because summer is the peak season for waterway recreation, a warmer and drier summer is cause for concern for Badger Mill Creek, but continuing the MMSD flow into the stream could help preserve the stream’s current uses.

In addition, water temperatures in streams and lakes are expected to rise across the board in Wisconsin. MMSD’s proposal offers conflicting notes on its impact on the temperature of the creek. On the one hand, MMSD points out that the creek’s temperature in the summer months exceeds the limit for a cold water community like a trout stream, and that the effluent issued into the stream is warm enough that MMSD has been required to obtain alternate effluent limits for temperature from DNR. (MMSD Proposal at 7–8.) On the other hand, MMSD notes that removing the flow will cause Badger Mill Creek to “experience more natural fluctuation of temperature,” because the constant flow of treated wastewater has a stabilizing effect on the creek’s temperature. (MMSD Proposal at 8.) To the extent MMSD is suggesting that its proposal would lower the temperature of the creek, the DNR should consider how realistic it is to expect the creek’s temperatures to drop significantly over time, given the overall warming of our climate.

The DNR should factor the available science on climate change into its decision on MMSD’s proposal.

...

⁹ *Wisconsin Initiative on Climate Change Impacts (WICCI): Analogs*, UW Center for Climatic Research, <https://ccr.nelson.wisc.edu/visualization-and-tools/> (accessed July 2, 2024).

For at least the three above reasons, the City of Verona respectfully requests that CARPC advise the DNR to reject MMSD's proposal to amend the Dane County Water Quality Plan. MMSD and the DNR should instead consider alternatives to cutting off the flow of treated wastewater to Badger Mill Creek and find a way to comply with the phosphorus standards while still preserving this important resource for the Verona community, today and for generations to come.

Thank you.

Sincerely,

PINES BACH LLP



Christa O. Westerberg
Elizabeth M. Pierson