State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

WISCONSIN
DEPT. OF NATURAL RESOURCES

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March 30, 2007

Mr. Winslow:

On March 28, 2007, the Department received a letter from Northern States Power Company a Wisconsin Corporation and a wholly owned subsidiary of Xcel Energy Inc., d/b/a/ Xcel Energy ("NSPW") on the permitting issues presented by a proposed aquatic confined disposal facility ("CDF") as part of the Superfund remedial effort at the Ashland/NSP Lakefront site. Following are comments made by NSPW regarding comments made in the EPA response the NSPW Alternatives Screening Technical Memorandum.

> *"In several places in the agency's March 15, 2007 Comments to Alternatives Screening Technical Memorandum, it is stated, "It is assumed that lake bed fill can not be completed without action of the State Legislature and Governor, potentially making implementation difficult" (emphasis added). We request that the agencies clarify the legal basis for this comment so that we are better able to proceed with the alternatives screening, comparison and feasibility study portions of this project.*
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> *Our request for clarification is generated at least in part by our interpretation of the law and our disagreement with the comment. On that point, § 30.12(1)(a), Stats., prohibits the "[d]eposit [of] any material ... upon the bed of any navigable water" in the absence of a permit issued by WDNR or an authorization from the Wisconsin Legislature. But the statute clearly contemplates two methods by which an aquatic CDF (i.e., navigable water body bed fill) may be constructed: via individual or general permit pursuant to ch. 30 or via legislative authorization. The agency's comment suggests that only one method of approval is allowed, that being an act of the Legislature approved by the Governor. Indeed, statutory authorization for WDNR to permit such an engineered structure is provided by §§ 30.12(3) and 30.12(3m), Stats. In addition, § 30.20(1)(b) authorizes via general or individual permit the removal of material from the bed of any lake or navigable stream. Authorization to issue such general and individual permits is provided by §§ 30.20(1t) and (2), Stats., as well as ch. NR 347, Wis. Admin. Code.*
>
> *Additionally, one must consider that a proposed aquatic CDF at this site would be constructed "on-site" as defined in 40 C.F.R. § 300.400(e)(1). Given that the engineered CDF would be constructed on-site, then such activities are subject to the CERCLA on-site permit exemption and the permitting process becomes a process ARAR while the engineering design would be a substantive ARAR pursuant to § NR 347.04(1)(b), Wis. Admin. Code. See General Comment No. 4, USEPA March 15, 2007 Comments to Alternatives Screening Technical Memorandum; see*

also OSWER Directive 9355.7-03, USEPA February 19, 1992, re: "Permits and Permit 'Equivalency' Processes for CERCLA On-site Response Actions."
Given that there is statutory authority for the State to issue a permit for an aquatic CDF as cited above without the need for legislative action, and given that such permitting process is a process ARAR provided that the substantive ARAR of the facility design is met from a plan and specification approval standpoint, we are confused by the agency's comment that any lake bed fill can only occur via an action of the Wisconsin Legislature."

Department of Natural Resources Response

Section 30.12, Stats. does, as modified under Act 118, contemplate the authorization of the deposit of small amounts of incidental fill when associated with other structures. It does not authorize the placement of fill material in any significant amounts or any significant distance from shore. The Legislature has previously outlined what mechanisms could be used, under limited circumstances, for such larger fills. Those provisions were not modified or repealed by Act 118. Section 30.12 stats. is not the appropriate authorizing statute for construction of a CDF.

The mechanism normally used for construction of a CDF is, as we indicated in earlier correspondence, a lakebed grant from the Legislature. That is how the Green Bay and Milwaukee CDF's have been established.

The Legislature has contemplated two other mechanisms for placement of fill on the beds of state owned lakebed for limited purposes. These were discussed in Duane Lahti's memo (June, 1999, attachment 1)

The mechanisms are Section 30.11, Stats. which allows municipalities to establish, with DNR approval, "bulkhead lines". Such lines must be determined to be in the "public interest" by DNR and "shall conform as nearly as practicable to the existing shore". A CDF cannot be established using this mechanism since it would not "conform to the existing shoreline".

The other mechanism is a "lease" from the Board of Commissioners of Public Lands under Sections 24.39 and 30.11, Stats. Leases can only be granted for limited, specified purposes, which are outlined in sub. 24.39, Stats. These include, for a municipality, ""improvement or provision of recreational facilities related to navigation for public use" and for riparian owners, "Improvement of navigation or for improvement or construction of harbor facilities...." An "aquatic CDF" does not meet these standards, so a lakebed lease is not an option.

The only option available to authorize the amount of fill material contemplated in this situation is a lakebed grant from the Legislature. An activity requiring legislative approval is not and cannot be considered an ARAR.

Sincerely

John Spangberg
Water Management Specialist

Cc: Jamie Dunn – Spooner

Scott Hansen Remedial Response Branch, Region 5 U.S. EPA (SR-6J), 77 West Jackson Blvd., Chicago, IL 60604

Bad River

Red Cliff

Deb Johnson – LS/5

Mike Cain – LS/5

John Robinson – Rhinelander

Duane Lahti - Superior

108 ° DATE: ž date \@ "MMMM d, yyyy"– June 1, 1999 FILE REF: ATTACHMENT 1 Winslow 3/20/07 CTR

TO: Ashland Lakefront MGP Waste Site Oversight Team

FROM: Ashland Lakefront MGP Waste SiteTechnical Team

´ Printed on Recycled Paper

SUBJECT: Direction and Policy on Filling in StateProposal to Fill Lake Beds Draft

The following report details Duane Lahti's perspectives on the Lake Bed issue and was provided via e-mail.

In response to your request for my perspective on the "capping" alternatives identified in the Remediation Action Options Feasibility Study for the Ashland Lakefront Property, I have the following comments. Please be aware that I have only performed a very cursory review of this very complex project as it may pertain to potential water regulatory approvals and Public Trust issues.

The apparent regulatory mechanisms which would seem appropriate if alternatives involving filling of the bed of Lake Superior are the selected alternatives are Sections 30.11 and 24.39, WI Stats. These sections are the bulkhead line approval and the submerged lands lease respectively. The difficulty I would have in utilizing these statutes in this fact situation is that the requirements for establishing bulkhead lines and for obtaining submerged lands leases from the Board of Commissioners of Public Lands require that the purpose of the filling activity be related to the improvement of navigation or for the improvement or construction of harbor facilities or recreational facilities related to navigation for public use. The Department must also find that the proposed filling activity is consistent with the public interest in the navigable waters involved and that riparian rights of riparian proprietors are not abridged. Considering that the main purpose of the filling activity is to cap a heavily contaminated area of lakebed (and previously filled lakebed), I question how the Department could make a finding that this activity would be in the public interest, particularly when up to 10 acres of additional open water area of Lake Superior would be lost.

Having dealt with numerous "Public Trust" issues over my career, it has become clear that the State cannot abrogate its public trust responsibility over navigable waters, even on areas of lakebeds which were filled long ago, as is the case with much of the filled waterfront in question here. As the original shoreline of Lake Superior was located at the toe of the bluff adjacent to the present day railroad grade, virtually the entire "land" portion of the remediation area [other than the NSP property]is located on the bed of Lake Superior, which remains in trust for the public. I am concerned that allowing additional filling of trust lands would be inconsistent with our position on previous proposals on Lake Superior and would set a dangerous precedent for similar activities not only on Lake Superior but on other waterways.

Strictly from a nonregulatory standpoint, I have serious concerns about simply covering up materials which are environmental and human health hazards. This appears to me to be a throwback to the "out of sight, out of mind" mentality which we are all painfully aware of, as old problems, such as this very situation, resurface. I question the ability of any revetments or cut-off walls proposed for this alternative to withstand the highly erosive forces of Lake Superior for any length of time, and to successfully prevent the movement of the volatile substances into the ground and surface waters. If this occurs even several years down the road, who will have to deal with it and who will pay the bill?

In conclusion, I feel that the clean-up of the area in question should be done right the first time. That is, removal of the contaminanted material and restoration of the lakebed by the identified responsible party. Failure to do a complete job at this time will only prolong the problem and leave someone else to deal with it in the future. The cost of remediation should not be the driving force, it should be what is best for the environment, human health, and the public interest.

Linda Meyer has added the following comments:

I agree generally with Duane Lahti's comments (except that I would completely rule-out a bulkhead line approval in this case because I don't think that the requirements for a bulkhead line approval could be satisfied), but Duane did not mention two other possible mechanisms that could be used to authorize the filling of lakebed.

Those two mechanisms are: (1) A legislative authorization like that found in s. 30.203, Wis. Stats. Riparian owners would need to apply and it would have to be shown that the project would be consistent with the public trust doctrine; and (2) A lakebed grant to a municipality (in this case, the City of Ashland) that would exempt the project from ch. 30 requirements relative to the establishment of bulkhead lines, pierhead lines or the placing of structures or deposits in navigable waters or the removal of materials from the bed under s. 30.05, Wis. Stats. While a lakebed grant would remove the specified area from the general prohibition of deposits, any structure that is built to contain fill material would be required to comply with all approvals and permits required to protect the water quality of the surrounding bay.

I am not advocating either of these approaches. I doubt that a credible case could be made to support either option. Even if the remediation plan were to include some improvement to navigation or the construction of a harbor in a portion of the bay, I don't see how that permissible use could be used to justify capping contamination on that portion of the lakebed that was not going to used for harbor purposes. I have raised the possibility of a legislative authorization or lakebed grant simply to make sure that all possibilities have been identified so that Department management can decide how we should evaluate proposed cleanup options for the contaminated sediments and decide what position the Department will take if the City of Ashland or NSP decide to pursue one of these mechanism.