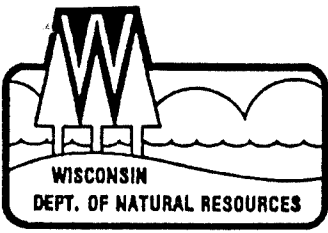


(LMD) - Jim Reyburn - SHWM



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

Box 7921
101 South Webster Street
Madison, Wisconsin 53707-7921
TELEPHONE 608-266-2621
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February 23, 1996

Thomas P. McElligott, Esq.
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, WI 53202

Casetrack ID 96-LMEE-006
FID# 431052270

SUBJECT: Revised Consent Order for Kewaunee Marsh Arsenic Site

Dear Mr. McElligott:

Enclosed is your client's copy of the signed Consent Order.

Failure to abide by the conditions of this Consent Order to which you have agreed may cause the Department to pursue further enforcement action.

If you have any questions on this matter, please contact Attorney Joseph Renville, Bureau of Legal Services, at (608) 266-9454.

Sincerely,

Brenda B. Hagman
Brenda B. Hagman, Director
Office of Environmental Enforcement
Bureau of Law Enforcement

- c: ERR/SW/3
- J. Renville - LC/5
- L. Liebenstein - WR/2
- J. Reyburn - LMD
- D. Helf - LMD



**BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES**

In the Matter of Hazardous Substance)	Casetrack ID# 96-LMEE-006
Contamination at the Kewaunee Marsh)	CONSENT ORDER No. 96-LMEE-006
Site in the Town of Pierce, Kewaunee)	FID No. 431052270
County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The following constitutes a summary of the Findings of Fact and Conclusions of Law upon which the Wisconsin Department of Natural Resources ("the Department") bases Consent Order No. 96-LMEE-006.

FINDINGS OF FACT

The Department asserts the following finding of facts:

1. Arsenic contamination exists in the Kewaunee Marsh and adjacent wetlands located in the Southwest One-Quarter (1/4) of Section Seven (7), Township Twenty Three (23) North, Range Twenty Five (25) East, near the Town of Pierce, Kewaunee County, (hereinafter referred to as "the Site"). The Site has an area of approximately 8 acres.
2. The Department became concerned that arsenic contaminants, posing a risk to human health and the environment, existed at the Site. Fox Valley & Western Ltd. ("as a successor in interest to the Green Bay and Western Railroad (hereinafter collectively referred to as "the Railroad"), has conducted an environmental assessment of the Site and has initially identified areas of higher concentration of arsenic contamination. The Railroad has also installed a security fence and warning signs around a portion of the perimeter of the Site.
3. The Department has conducted an environmental assessment at the Site and has collected soil and groundwater samples, and conducted toxicity testing.
4. Interim actions to be completed at the Site include the installation of groundwater monitoring wells, periodic sampling of the Kewaunee River water, a biological study and a program of long term monitoring of the groundwater and biota of the Site. An Interim Action proposed by the Railroad and

approved by the Department includes geotextile membrane and cap of woodchips, grass and leaves (hereinafter collectively referred to as "woodchips") to isolate the direct exposure pathway to the arsenic contaminated areas.

CONCLUSIONS OF LAW

It is the Department's position that:

1. Arsenic present at the Site is a "hazardous substances" as that term is defined in s.144.01(4m), Stats.
2. Under s. 144.76(7)(a), Stats., the Department has the authority to take actions to "identify, locate, monitor, contain, remove, or dispose" of hazardous substances that are discharging, or threaten to discharge, to the environment. Under s. 144.442, Wis. Stats., the Department has the authority to take environmental repair action to protect public health, safety or welfare, or the environment.
3. Under s. 144.76(7)(c), Stats., the Department has the authority to issue an administrative order to persons possessing, controlling, or responsible for the discharge of hazardous substances to in order to protect public health, safety or welfare. This includes the authority to enter into a consent order with owners of contaminated property.
4. This Consent Order is reasonable and necessary to accomplish the purposes of s. 144.76, Stats., and is enforceable under ss. 144.98 and 144.99, Stats.

CONSENT ORDER

Without admitting any finding of fact or conclusion of law alleged by the Department, the Railroad agrees to fully comply with the requirements of the following Department Consent Order:

1. The Department and the Railroad agree to cooperate in the implementation of the Interim Actions. Implementation of the interim action plan shall be in compliance with the terms and conditions of the Department's approvals and the requirements of chs. NR 103, 105, 140, 141 and 724, Wis. Adm. Code. Local permits and approvals must be obtained before conducting the interim actions.
2. The interim action plan includes the following activities:

- a. the stockpiling and delivery of woodchips to be used in the interim action;
- b. the installation of the geotextile and woodchip cover; and the installation of the security fence;
- c. Monitoring of the site will be conducted as a partnership to include:
 - (1). Groundwater
 - A. The Railroad will install a minimum of five groundwater monitoring points in the wetland. At least one point will be located south of the tracks where elevated arsenic levels were found in the groundwater. The design and location of the monitoring wells shall be selected by the Department Project Manager. The monitoring points shall be installed within thirty (30) days following selection of the design and location.
 - B. The monitoring points will be constructed, located, operated to determine groundwater elevations, flow directions, and quality. The locations of the wells and all groundwater elevations will be referenced to state plane coordinates and the national vertical geodetic datum of 1929.
 - C. A staff gauge will be installed to obtain water level readings in the river.
 - D. Given the wetland soil conditions, installation of driven point monitoring wells under s. NR 141.27, Wis. Adm. Code, will be done in lieu of standard well construction procedures under ch. NR 141, Wis. Adm. Code. Periodic resurveying to check the driven point well elevations will be performed to ensure the accuracy of groundwater elevation readings and to correct for potential datum changes as a result of winter freeze-thaw cycles.
 - E. Groundwater table elevations and river level staff gauge readings will be taken monthly during April through October of 1996. During the period of November of 1996 through March of 1997, groundwater table elevations and river level readings will be taken on a quarterly basis.
 - F. Sampling of monitoring points to assess groundwater quality will occur on a quarterly basis for the first year. Sampling frequency thereafter will depend on the first year's data.

- G. The data available after each monitoring event will be reviewed by the Department and the Railroad for changes and/or trends.
- H. In-field measurements of groundwater will include temperature and specific conductance. Color, odor, and turbidity of the sample should be noted in the field. Laboratory analysis will be performed for total arsenic in an unfiltered sample and in the filtrate from a filtered sample. Other measurements and sampling detail will be established by the Department Project Manager.
- I. The Railroad will retain consultants or in-house expertise to perform an analysis of the monitoring data, including data collected by other parties (e.g., the USGS river gauge near Kewaunee, Site 04085200) to calculate the transport of arsenic by groundwater from the site to the Kewaunee River. This analysis will determine the transport and fate of arsenic from this site.

(2). Kewaunee River Water

- A. Surface water samples shall be collected by the Railroad at a near-shore location along the right downstream bank of the Kewaunee River in a line directly east of the area to be covered in the wetland. The sample location may be anywhere along the 300-foot segment of river bank south of the above line where it intersects the river.
- B. River water samples shall be collected by the Railroad on a quarterly basis for the first year. Sampling frequency thereafter will depend on the results of the first year's data.
- C. Field measurements will be made for temperature and conductivity. Total arsenic will be analyzed for in unfiltered river water samples. Other measurements and sampling detail will be established by the Department Project Manager.

(3). Biological Studies

- A. In order to assess the short and long term effectiveness and impact of the interim action, the Department is committed to conducting a biological studies component. In committing to the biological studies component, the Department will provide, at a minimum, in-kind services of approximately \$35,000 for pre-and-post interim action implementation monitoring with a post implementation monitoring period covering one year. Biological studies may

include laboratory toxicity testing of soils and water, in-field studies of biota to arsenic exposure levels, and chemical analysis of soils, water, plant and animal tissues.

- B. Commitment, continuation, and design of biological field studies after one year of interim action implementation by the Department will depend on the first year of monitoring results.
 - C. The results of the Department's June 1995 biological studies demonstrated that the existing dug wildlife ponds to the North and East of the impacted wetland present an unacceptable risk of exposure to humans, wildlife, or aquatic life. Therefore, the Railroad shall fill the ponds with wood chips as part of the interim actions.
 - D. The Department will keep the Railroad informed of the progress and results of the biological studies, including but not limited to sending the Railroad copies of reports or memorandums regarding the studies.
3. In order to assure the implementation of the interim action, the Department shall contribute monetary and in-kind services of \$105,000 to the costs of interim actions. This amount will be used to cover the following costs.
- a. \$50,000 from the Environmental Fund. This amount will be contributed as cost share to cover expenses related to the covering and fencing of the most highly contaminated arsenic area. The Department shall reimburse the Railroad \$50,000, within 45 days after the Railroad or its consultant submits to the Department a report which documents that the Railroad has covered the arsenic contaminated areas, and has successfully fenced the area.
 - b. In addition to \$30,000 already expended by Water Resource Management (WRM), to conduct toxicity testing at six locations at the site, \$35,000 of WRM funds will be used by the Department for conducting a study of the impact and threats of the arsenic on the biological components of the site.

- c. The Department will contribute \$20,000 of Water Resource Management funds as cost share for the installation and monitoring of the groundwater monitoring points. The Department will provide the \$20,000 to the Railroad or its consultants upon the Department's review and approval of an installation and monitoring plan to be submitted no later than April 1, 1996.
4. The Department will be responsible for the upkeep, maintenance and repair of the security fence.
 5. Following completion of the groundwater and Kewaunee River water sampling provided in paragraph 3c.(1) and (2) above, the Department and the Railroad will cooperatively discuss the need and responsibility for continued monitoring and, if necessary, modify this consent order.
 6. The parties acknowledge and agree that although approved only as an interim action, the work to be undertaken pursuant to this order may, depending on the results of the long term monitoring and /or hydraulic modeling, be a reasonable and appropriate final remedy.
 7. In the event that the Railroad receives any insurance proceeds which reimburse the Railroad for costs incurred to conduct the interim action at the Site, the Railroad agrees to repay the Department either the amount reimbursed or the \$105,000, whichever is less, within 30 days of receiving said reimbursement. Nothing contained herein shall be construed to require the Railroad to commence an action against its insurers or any other party.
 8. Nothing in this Consent Order shall be deemed to waive the right of the Department or the Railroad to seek cost recovery for the costs incurred in connection with the Site from any other parties. The Railroad and the Department will cooperate in any reasonable efforts by the Department to identify other potential responsible parties and to recover the state's cost share under this Consent Order.
 9. The Railroad shall submit three copies of any report required by this Consent Order to the following address:

Department of Natural Resources
Lake Michigan District, Green Bay Office
1125 N. Military Avenue
Green Bay, Wisconsin 54307-0448
Attn: Jim Reyburn

10. The Railroad's consent to the issuance of this order and agreement to undertake the work herein shall not be construed as an admission or acknowledgement that it is liable or responsible in any manner for the contamination at the Site.
11. This Consent Order may be modified in writing upon mutual agreement of the parties.
12. Except as set forth below, the Department shall not initiate or cause to be initiated any administrative or judicial action (including issuance of subsequent administrative orders) against the Railroad in connection with or related to the interim actions for the Site or cost incurred in connection therewith. Provided, however, the Department may initiate such action: (1) to the extent necessary to enforce the terms of this order; or (2) if the interim actions are determined not to be a reasonable and appropriate final remedy to allow closure in accordance with s. 144.76 Stats. and ch. NR. 726, Wis. Adm. Code, or (3) if conditions at the site have materially changed and such changes necessitate the initiation of an action to protect human health or the environment.
13. Nothing contained in this order shall be deemed as a waiver or relinquishment of any right the Railroad may have to contest or defend any subsequent administrative or judicial action initiated by the Department, including not limited to any attempt to modify this order.
14. This Consent Order shall be effective on the date that it is signed by the second of the two parties.

The undersigned hereby certifies that he/she is legally authorized to sign this Consent Order on behalf of the respective parties.

FOX VALLEY & WESTERN LTD.

Glenn J. Korba

Date FEB. 7, 1996

Title: V.P. - ENGINEERING

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary
By:

Brenda B. Hagman

Date Feb 23, 1996

Brenda B. Hagman, Director
Office of Environmental Enforcement
Bureau of Law Enforcement

STIPULATION AND WAIVER

Fox Valley & Western Ltd. hereby waives further notice, its statutory right to demand an administrative hearing before the Department of Natural Resources and to commence any judicial action regarding the foregoing Consent Order under ss. 144.76, 227.42, 227.52 and 227.53 Stats., or any other provision of law. Fox Valley & Western Ltd. further stipulates and agrees that the Consent Order is effective and enforceable upon being signed by both parties and may be enforced in accordance with ss. 144.76, 144.98, and 144.99, Stats., and chs. NR 700-736, Wis. Admin Code. The undersigned hereby certifies that he/she is legally authorized by Fox, Valley & Western Railroad to execute such Consent Order, Stipulation and Waiver.

FOX VALLEY & WESTERN LTD.

X Glenn J. Korba

Date FEB. 7, 1996

Title: V.P. - ENGINEERING

RECEIVED DNR
MAR 1 1996
LAKE MICH. DIST.