→ File

APR 13 1988

AFFIDAVIT OF MAILING

EE# 1505
~~SW/3~~
Curtis - SD

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

Marty Ringquist being first duly sworn on oath, deposes and says that said person is employed as a secretary in the Office of Environmental Enforcement, Division of Enforcement, State of Wisconsin Department of Natural Resources;

that on the 6th day of April, 1988, said person mailed a copy of Proposed Special Order

dated April 6, 1988, ~~xx~~ to the following person at the address listed:

Mr. John DeBeck
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

that said mailing was accomplished by properly enclosing the aforesaid copy addressed as stated above in a certified, postpaid, securely enclosed envelope, return receipt number P611 579 325, and causing it to be deposited for mailing in the United States mail in the City of Madison, Dane County, Wisconsin.

Marty Ringquist
Office of Environmental Enforcement

Subscribed and sworn to before me

this 6th day of April, 1988.

Nancy R. Diebold
Notary Public, State of Wisconsin
Nancy Diebold
My commission expires July 21, 1991

CORRESPONDENCE/MEMORANDUM — STATE OF WISCONSIN

Date: June 20, 1988

File Ref:

To: ~~Carol J. Turner~~ Marie Stewart
~~Administrative Assistant~~
Department of Natural Resources

From: Linda A. Bredeson LAB
Paralegal
Department of Justice
(608) 266-7344

Subject: Notice of Claim of Albert and Carolyn Stoppleworth
Date of Knowledge of Alleged Damage: March 10, 1988

Enclosed is a copy of the above-entitled notice of claim, filed by mail with the Attorney General on June 15, 1988. We request that you investigate this matter at your earliest convenience and provide this office with any information you have pertinent to this matter so that we can determine the appropriate response or course of action to follow regarding this claim.

In order to enable us to complete our investigation and make a timely response, we would appreciate receiving this information within two weeks.

Thank you for your prompt attention to this matter.

LAB

Enclosure

JUN 17 1988

TO: Attorney General Donald J. Hanaway
114 E. State Capitol
Madison, WI 53702

(Certified Mail/Return Receipt Requested)

NOTICE OF INJURY PURSUANT TO
SECTION 893.82, WISCONSIN STATUTES

Albert and Carolyn Stoppleworth ("Mr. and Mrs. Stoppleworth") are adult residents residing at 7750 Hwy. 14, Middleton, Wisconsin, 53562. Mr. and Mrs. Stoppleworth, by their attorneys, Michael, Best and Friedrich, One S. Pinckney Street, Suite 900, Madison, Wisconsin, 53703, and Richard J. Callaway, 306 E. Wilson Street, Madison, Wisconsin, 53703, hereby file a Notice of Injury Pursuant to Section 893.82(4), Wisconsin Statutes.

Mr. and Mrs. Stoppleworth learned on March 10, 1988 that the well providing water to their residence is contaminated with hazardous chemicals including, but not limited to dichloroethane, trichloroethane, trans-1,2-dichloroethylene, tetrachloroethylene, trichloroethylene and vinyl chloride. Mr. and Mrs. Stoppleworth learned of the contamination upon receipt of a letter from Creative Resource Ventures, Ltd. which stated that the results of sampling done by R.M.T., Inc. indicated the presence of such contaminants.

The contamination is believed to have been caused by a landfill located in the Town of Middleton, Dane County, Wisconsin and operated by Refuse Hideaway, Inc. ("Refuse Hideaway"). As a result of the contamination, Mr. and Mrs. Stoppleworth have sustained injuries including, but not limited to their need to find an alternative source of water for their home, fear of long-term carcinogenic risk, increased susceptibility to a variety of illnesses including, but not limited to cancer, genetic damage and neurological impairment, all to their damage in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) and other damages in accordance with law.

Mr. and Mrs. Stoppleworth further believe that the actions of the employees of the Wisconsin Department of Natural Resources ("DNR"), including but not limited to Lester P. Voight, C.D. Besadny, Robert Behrens, Anthony Earl, Robert Glebs, John Reinhardt, Gary Burdick, A.E. Ehly, Floyd Stautz and David G. Nichols, contributed to and caused the injuries described above. In 1974, the DNR granted a permit to Refuse Hideaway landfill. This was done despite DNR's knowledge that the Refuse Hideaway landfill was not properly designed to handle the materials contemplated to be placed therein. DNR further failed pursuant to State law and regulations to adequately investigate the operation prior to licensing. Such an investigation could have prevented the injuries sustained by Mr. and Mrs. Stoppleworth.

Mr. and Mrs. Stoppleworth hereby give notice of their injuries as a result of the above-named State of Wisconsin Department of Natural Resources employees' acts growing out of and committed in the course of their duties.

Dated this 14th day of June, 1988.

MICHAEL, BEST & FRIEDRICH, S.C.

Arvid A. Sather

CALLAWAY, DUNN & MEEKER, S.C.

Richard J. Callaway

Attorneys for Albert
& Carolyn Stoppleworth
900 First Wisconsin Plaza
One S. Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806

CALLAWAY, DUNN & MEEKER S.C.
J. CALLAWAY BUILDING
306 EAST WILSON STREET
MADISON, WISCONSIN 53703

CERTIFIED
P 670 747 254
MAIL

RETURN RECEIPT
REQUESTED

Attorney General Donald J. Hanaway
114 E. State Capitol
Madison, WI 53702

STATE OF WISCONSIN : CIRCUIT COURT DANE COUNTY

REFUSE HIDEAWAY, INC. and JOHN W. DeBECK,

Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

PETITION FOR REVIEW

Case No. 88CV5455

Petitioners Refuse Hideaway, Inc. and John W. DeBeck, by their attorneys, Davis & Kuelthau, S.C., by David W. Neeb, hereby petition this Court for review of the Decision of the Wisconsin Department of Natural Resources (WDNR) dated September 6, 1988, entitled "Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill (# 1953)", a copy of which is attached hereto as Exhibit A.

1. Petitioner Refuse Hideaway, Inc. is a Wisconsin corporation which owns and operated a nonhazardous solid waste disposal facility known as Refuse Hideaway Landfill and located in the Town of Middleton, Dane County, Wisconsin.

2. Petitioner John W. DeBeck resides at 2114 Sunnyside Crescent, City of Madison, Dane County, and is the President and a shareholder of Refuse Hideaway, Inc.

3. The Wisconsin Department of Natural Resources is an agency of the State of Wisconsin within the meaning of § 227.01(1), Wis. Stats., and has responsibility for the licensing and regulation of solid waste disposal facilities such as Refuse Hideaway Landfill pursuant to authority granted by applicable Wisconsin statutes.

4. Prior to April 7, 1987, Refuse Hideaway, Inc. submitted to WDNR a proposed Closure Plan for review and approval by the WDNR. On April 7, 1987, the WDNR issued a "Closure Plan Approval." A copy of the approval is attached as Exhibit B.

received 3 pm M. Gold

Re - 11/1/88 xc: Diane Stewart-Anton

to:

5. On May 2, 1988, as a result of contamination found in private water supply wells near the Refuse Hideaway Landfill, Refuse Hideaway, Inc. and John DeBeck agreed to enter a consent order with the WDNR which, among other things, provided for the early closure of Refuse Hideaway Landfill and prescribed steps to be taken to assess the environmental damage which may have been caused by the landfill. In the Consent Order Petitioners also agreed to submit a proposed closure plan modification to contain revisions of the original closure plan on the subjects of topographic plans, revised final grades, revised surface water drainage system, revised final cover design and documentation of a source for clay to be used in the final cover. A copy of that Consent Order SOD-88-02A is attached as Exhibit C.

6. The proposed closure plan modification was submitted to the WDNR on behalf of Petitioner Refuse Hideaway, Inc. on June 1, 1988 as required and, pursuant to the request of the WDNR, was amended on June 8, 1988. The proposed closure plan modification did not in any way deal with gas extraction.

7. Paragraph 3 of the Consent Order SOD-88-02A required that: "John DeBeck and Refuse Hideaway, Inc., shall, by no later than July 1, 1988, submit a plan to the Department for approval to effectively monitor or prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants." Such a report was submitted by John DeBeck and Refuse Hideaway, Inc. on July 1, 1988.

8. On September 6, 1988, in response to Refuse Hideaway, Inc.'s proposed closure plan modification of June 1, 1988, the WDNR issued a "Conditional Closure Plan Approval Modification For The Refuse Hideaway Landfill (# 1953)" (hereinafter "September 6 Modification"), a copy of which is attached as Exhibit A, which made certain findings of fact and conclusions of law and which purported to impose additional conditions upon the WDNR's April 7, 1987 Closure Plan Approval, those conditions relating to installation of gas monitoring probes and a gas extraction system.

9. Petitioner Refuse Hideaway, Inc. is an aggrieved party within the meaning of § 227.53, Stats., in that enforcement of the September 6 Modification will force it to expend substantial sums of money for installation of a gas extraction system without the WDNR's having a factual basis for concluding that such a system is necessary under applicable regulations and, in addition, enforcement of the September 6 Modification will expose it to substantial penalties for violation of the September 6 Modification since the deadline for installation of a gas probe system is arbitrary and unreasonable and cannot possibly be met by Refuse Hideaway, Inc.

10. Petitioner John W. DeBeck is an aggrieved party within the meaning of § 227.53, Stats., since, although he is not the owner, operator or licensee of Refuse Hideaway, Inc., the September 6 Modification seeks to obligate him to satisfy the conditions of the September 6 Modification individually, thereby exposing him to substantial personal liability for the lawful activities of a corporation.

11. As grounds for review within the meaning of § 227.57, Petitioners allege as follows:

A. WDNR has erroneously interpreted the Consent Order as requiring installation of a gas extraction system at Refuse Hideaway Landfill.

B. WDNR has erroneously interpreted its own regulations, in particular NR 506.08(6), Wisconsin Administrative Code, to require installation of a gas extraction system at Refuse Hideaway Landfill.

C. The WDNR has no basis in fact for determining that a gas extraction system is required to protect human health and the environment.

D. WDNR's requirement for installation of gas monitoring probes by October 31, 1988 is outside the WDNR's discretion and is an abuse of that discretion in that such order is not reasonably related to the purpose of the installation of such probes, i.e., to determine whether a gas extraction system is, in fact, required to protect human health and the environment.

E. WDNR's requirement for installation of gas monitoring probes by October 31, 1988 is an abuse of discretion in that the time now available for the installation of those probes is unreasonably short, is not possible to accomplish and not necessary to effectuate the purpose of the installation.

F. WDNR has abused its discretion in imposing, as conditions to its September 6 Modification, requirements which do not relate to the subject matter of the proposed modification to closure plan of June 1, 1988.

G. WDNR has no basis in fact or law and has abused its discretion in seeking to impose upon John W. DeBeck the individual responsibility to satisfy the conditions of its September 6 Modification.

WHEREFORE, Petitioners Refuse Hideaway, Inc. and John W. DeBeck request that the Court grant the following relief pursuant to §§ 227.52 and 227.57, Stats:

A. An Order reversing and setting aside the WDNR September 6 Modification; and;

B. Remanding the matter to the WDNR with an Order to:

1. Direct any modification and/or conditions of modification of the Closure Plan for the Refuse Hideaway Landfill to Refuse Hideaway, Inc. and not John W. DeBeck;

2. Delete from its conditional Closure Plan Approval Modification any conditions which do not relate to the subject matter of the requested modifications;

3. Revise deadlines for installation of a gas probe system so as to provide Refuse Hideaway, Inc. with a reasonable time to accomplish the installation of those gas probes and to reflect the purpose of installation of the gas probes, i.e., determination of whether a gas extraction system is required by applicable regulations;

4. Delete from its September 6 Modification conditions relating to the installation of a gas extraction system until such time as facts are available indicating that such a gas extraction system is necessary to protect human health and the environment.

C. Enjoining WDNR from taking other action inconsistent with the Court's Order in this case; and

D. Such other and further relief as the Court deems appropriate under § 227.57, Stats.

Dated this 6th day of October, 1988.

David W. Neeb, Attorney for
Refuse Hideaway, Inc. and John W.
DeBeck

Of Counsel:

DAVIS & KUELTHAU, S.C.
250 E. Wisconsin Avenue
Milwaukee, WI 53202-4285
(414) 276-0200

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny
Secretary

BOX 7921
MADISON, WISCONSIN 53707

SEP 0 6 1988

IN REPLY REFER TO: 4410-2

Mr. John DeBeck
Refuse Hideway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Modification to the Closure Plan Approval, Gas Monitoring and Collection System, Refuse Hideaway Landfill #1953, Dane County

Dear Mr. DeBeck:

I am pleased to inform you that your requested modifications to your closure plan approval have been reviewed and conditionally approved. The Department believes that the proposed modifications will not have an adverse effect on the performance of your landfill provided the conditions in the enclosed conditional closure plan approval modification are fulfilled. You should attach this conditional closure plan approval modification directly to the closure plan approval issued on April 7, 1987.

The report contained a proposed gas migration monitoring system, a proposed conceptual plan for gas management, and a summary on the progress of groundwater monitoring well construction.

The report implies that an active gas system which controls hazardous air contaminants is not required. Consent order SOD-88-02A requires a system which prevents the migration of explosive gases and efficiently collects and combust hazardous air contaminants. The requirements of Consent Order SOD-88-62A are in addition to the requirements of NR 500-520, Wis. Adm. Code.

As discussed on June 24, 1988, the proposal to place the waste removed during gas well construction back into the landfill is acceptable provided the area of waste placement is initially final covered with the remainder of the landfill. The gas well construction waste must be placed in the area stated in condition 4 of the August 15, 1988 closure plan modification. The final cover must be removed prior to construction waste placement and the final cover must be immediately replaced and redocumented following waste placement.

NR 506.08(6), Wis. Adm. Code requires the gas collection system to be installed by August 1, 1989. We are extending this date to September 30, 1989 due to the length of time needed to perform testing prior to gas system installation in order to determine an efficient design for the gas collection system.

Please call Susan Fisher at (608) 267-9387 or Mark Gordon at (608) 267-7567 if you have any questions regarding this approval.

Sincerely,

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section
Bureau of Solid & Hazardous Waste Management

LS:SF:so32
8810\SW97747M.SMF

cc: Joe Brusca - SD
Marie Stewart - Madison Area
Chuck Leveque - LC/5
Dave Neeb - Davis & Kuehlton, S.C.
Bob Selk - DOJ
Lee Bartlett - RMT
PSS - SW/3

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL MODIFICATION FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. John DeBeck and Refuse Hideaway, Inc., own and formerly operated a ~~non~~hazardous solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin.

2. The Department issued a conditional closure plan approval for the facility on April 7, 1987.

3. The Department issued special consent order SOD-88-02A on May 2, 1988. Condition 3 of the order required John DeBeck and Refuse Hideaway, Inc., to submit a plan to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants.

4. On July 1, 1988, RMT, Inc., submitted a report to the Department proposing a conceptual plan for gas management and summarizing monitoring well construction to date.

5. The information submitted in connection with the modification request includes the following: a letter, two appendices and one plan sheet submitted by RMT, Inc., dated July 1, 1988 and received by the Department on July 1, 1988.

6. Additional documents considered in connection with the modification request include the following:

   a. Special consent order SOD-88-02A

   b. Various technical documents on file with the Solid Waste Management Section.

7. Additional facts relevant to the review of the closure plan modification request include the following:

   a. Municipal refuse produces methane gas. The clay cap and frozen ground conditions will inhibit release of the methane gas to the atmosphere and methane gas may migrate off site.

   b. NR 506.08(6) requires that a Department approved system to efficiently collect and combust hazardous air contaminants be installed within 18 months of February 1, 1988.

8. The special conditions set forth below are needed to assure that human health and the environmental are adequately protected. If the special conditions are complied with, the proposed modifications will not inhibit compliance with the standards set forth in NR 500-520, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44(3), Stats., to modify a plan approval if the modification would not inhibit compliance with chapters NR 500-520, Wis. Adm. Code.

2. The Department has authority to approve a closure plan modification with special conditions if the conditions are needed to ensure compliance with chapter NR 500-520, Wis. Adm. Code.

3. The conditions set forth below are needed to ensure compliance with NR 500-520, Wis. Adm. Code.

4. In accordance with the foregoing, the Department has authority under s. 144.44 Stats., to issue the following conditional closure plan approval modification.

CONDITIONAL CLOSURE PLAN APPROVAL MODIFICATION

The Department hereby modifies the closure plan approval for the Refuse Hideaway landfill, subject to the following conditions:

1. The 24 gas monitoring probes shall be installed by October 31, 1988. Documentation of the gas probe installation including a gas probe diagram for each probe showing the probe depth and a plan sheet showing the location of all probes shall be submitted to the Department within 30 days of completing gas probe installation.

2. A final detailed plan for construction of a gas extraction system to prevent the migration of explosive gases and efficiently collect and combust hazardous air contaminants shall be submitted to the Department by January 1, 1989.

3. A Department approved gas extraction system shall be installed and made operational by September 30, 1989.

4. The final cover over the area used for disposal of gas well construction waste shall be completed within 60 days following completion of drilling of the final gas well.

5. The final cover over areas disturbed for gas well construction waste placement shall consist of the approved cover and shall be documented as follows:

   a. Dry density and as-placed moisture content on an approximate 50-foot grid patter for each one-foot thickness of clay placed.

   b. One moisture density curve developed for every 5,000 cubic yards or less of clay placed and for each major soil type utilized.

   c. A plan sheet documenting the final landfill surface following topsoil placement. A table showing as constructed grades at specific location on maximum 50 foot centers for the grading layer, clay capping layer, cover layer and topsoil layer shall be included on the plan sheet.

d. A plan review showing the location of all tests performed (this may be included with the final surface plan sheet).

6. The gas probes shall be monitored on a weekly basis for one month during initial ground freeze-up this winter. If the methane level at all probes does not exceed 25% of the lower explosive limit the gas probe monitoring may be reduced to a monthly basis. Based on the results of the above required methane monitoring, a proposed long term monitoring program may be submitted to the Department following construction of the gas extraction system. All results shall be submitted to the Department.

The Department retains the right to require the submittal of additional information and to further modify this Plan of Operation approval at any time if, in the Department's opinion, further modifications are necessary. Unless specifically noted, the conditions of this approval modification do not supercede or replace any previous conditions of approval for this facility.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: SEP 06 1988

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section

Paul M. Huebner / for RT

Ray Tierney, Hydrogeologist
Solid Waste Management Section

Susan M. Fisher

Susan M. Fisher, Environmental Engineer
Solid Waste Management Section

cc: Program Services Section - SW/3

32\8810\SW97747M.SMF

SW-DANE

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Robert A. Selk
Assistant Attorney General
608/267-7163

October 18, 1988

Ms. Cynthia Fokakis
Clerk of Circuit Court
210 Martin Luther King, Jr. Boulevard
Madison, Wisconsin 53709

Re: Refuse Hideaway, Inc. and John W. DeBeck v. DNR
Case No. 88-CV-5455

DearMs. Fokakis:

Enclosed for filing is a Notice of Appearance and Statement of Position of respondent in the above-entitled matter. By copy of this letter the papers are being served on the petitioners.

Thank you for your assistance in this matter.

Sincerely,

Robert A. Selk
Assistant Attorney General

RAS:aag

Enclosure

cc: David W. Neeb

BCC: ~~DEBORAH ROSZAK~~
CHUCK LEVEQUE

Rc - 10/24/88
xc: Marie Stewart-mdsn
Mark Gordon-Stafs

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

REFUSE HIDEAWAY, INC. and
JOHN W. DeBECK,

Petitioners,

v. Case No. 88-CV-5455

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

NOTICE OF APPEARANCE AND
STATEMENT OF POSITION

TO: David W. Neeb
Davis and Kuelthau, S.C.
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4285

PLEASE TAKE NOTICE that Donald J. Hanaway, Attorney General, and Robert A. Selk, Assistant Attorney General, appear on behalf of the State of Wisconsin, Department of Natural Resources, in the above entitled proceeding in the Circuit Court for Dane County, Wisconsin. The respondent takes the position that the petition should be dismissed because the Department of Natural Resources has acted within the scope of its authority and discretion, and because the agency findings of fact are fully supported by the facts of record. Further, respondent's position as to the material allegations is:

1. Respondent ADMITS paragraphs 1, 2, 3 and 4.

RC - 10/24/88
cc: Marie Stewart
Mark Gorba

2. Answering paragraph 5, respondent lacks sufficient knowledge or information as to the reasons why petitioners agreed to the Special Consent Order and therefore DENIES that part of the paragraph. Respondents affirmatively state that the findings of fact in the Special Consent Order set out the environmental concerns that form the basis for the requirements of the Order. Respondents ADMIT that Exhibit C is a copy of the Special Consent Order entered into on May 2 and 3, 1988, and affirmatively state that paragraph 3 of the Order requires that the respondent submit by no later than July 1, 1988, ". . . a plan to the department for approval to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants."

3. Answering paragraph 6, respondent states that on or about June 1, 1988, a plan addressing requirements of paragraphs 2 and 5 in the Special Consent Order was submitted to the DNR by petitioners. The submitted plan did not address that part of the closure plan requiring gas monitoring and control of explosive gases or hazardous air contaminants.

4. Answering paragraph 7, respondent states that paragraph 3 of the Special Consent Order is as stated except that the petitioners are required to submit a plan to effectively monitor and permit the migration of explosive gases, etc., not "or" as stated by petitioners in paragraph 7. Respondent affirmatively states that the report submitted on July 1, 1988, by

petitioners did not comply with the requirements of paragraph 3 in the Special Consent Order in that it only presented a technical approach and proposed a phased development rather than a comprehensive plan.

5. Answering paragraph 8, respondent states that petitioner's June 1, 1988, submission did not address the requirements relating to gas monitoring and control and that respondent's September 6, 1988, conditional approval was in response to petitioners' July 1, 1988, submittal.

6. Answering paragraph 9, respondent DENIES it and affirmatively states that the conditions in the September 6, 1988, approval are necessary to ensure compliance with the Special Consent Order and solid waste regulations at Wis. Admin. Code §§ NR 500-520.

7. Answering paragraph 10, respondent DENIES it and affirmatively states that John W. DeBeck is lawfully obligated to comply with the decision under review.

8. Answering paragraph 11, respondent DENIES it and affirmatively states that the October 31, 1988, deadline for installation of gas monitoring probes was proposed by the petitioners and accepted by respondent.

WHEREFORE, the decision of September 6, 1988, should be affirmed and the petition dismissed.

Dated this 18 day of October, 1988.

DONALD J. HANAWAY
Attorney General

ROBERT A. SELK
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7163

113 112 010

12/6/88

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,
a domestic corporation,

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this summons, you must respond with a written answer, as that term is used in ch. 802, Stats., to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Dane County Courthouse, City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to Robert A. Selk, Assistant Attorney General, plaintiff's attorney, whose address is Post Office Box 7857, Madison, Wisconsin 53707-7857. You may have an attorney help or represent you.

RC - 12/23/88
XC: Marie Stewart-Adam
Sue Fiedler-5413

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 6 day of December, 1988.

DONALD J. HANAWAY
Attorney General

ROBERT A. SELK
Assistant Attorney General

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-7163

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No.

JOHN W. DeBECK and
REFUSE HIDEAWAY, INC.,
a domestic corporation,

Defendants.

COMPLAINT

The State of Wisconsin by Donald J. Hanaway, Attorney General, and Robert A. Selk, Assistant Attorney General, brings this complaint against the above-named defendants and shows the court as follows:

1. Plaintiff is a sovereign state of the United States of America with its seat of government at the State Capitol, Madison, Dane County, Wisconsin 53702.

2. The defendant John W. DeBeck is an adult whose residence is 2114 Sunnyside Crescent, Madison, Dane County, Wisconsin 53704.

3. The defendant Refuse Hideaway, Inc., is a domestic corporation, incorporated in the State of Wisconsin on February, 1982 and presently in bad standing. The registered agent for service is John W. DeBeck, 6629 Gettysburg Drive, Madison, Wisconsin 53562.

4. At all times material herein, the defendant John W. DeBeck has controlled a parcel of real estate, hereafter referred to as, "the property" located in the SW 1/4 of the NW 1/4 of section 8, T7N, R8E, Town of Middleton, Dane County, Wisconsin.

5. The defendant John W. DeBeck was the owner of record of the property from November 2, 1972, to March 1, 1982.

6. On March 1, 1982, the defendant John W. DeBeck and his son Thomas G. DeBeck conveyed the property to the defendant Refuse Hideaway, Inc., and the property remains with the corporation to the present.

7. From November 2, 1972, to October 1, 1982, the defendant John W. DeBeck owned and operated a landfill on the property known as the Refuse Hideaway Landfill under a license (# 1953) issued by the Wisconsin Department of Natural Resources.

8. From October 1, 1982 to May 15, 1988, the defendant Refuse Hideaway, Inc., under the control of its president, John W. DeBeck, has operated a landfill on the property for the disposal of solid wastes under a license (# 1953) issued by the Wisconsin Department of Natural Resources.

9. From 1974 to May 15, 1988, the landfill received municipal solid waste for consideration.

10. The defendants are owners and operators of the landfill on the property.

11. On April 7, 1987, the Department of Natural Resources issued a Closure Plan Approval for the landfill. A true copy of the plan approval is affixed hereto as attachment A.

12. On May 3, 1988, the Department of Natural Resources issued a Special Consent Order to the defendants. A true copy of the order is affixed hereto as attachment B.

13. Paragraph 3 of the consent order requires the defendants, by no later than July 1, 1988, to submit a plan to the Department of Natural Resources for approval, "to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants."

14. On July 1, 1988, the defendants submitted to the Department of Natural Resources a proposed landfill gas management plan which provided, among other things, for the installation of twenty-four gas monitoring probes around the perimeter of the site. The stated purpose of the probes was to, "document the presence or extent of landfill gas migration around the site. This data will be used as data for the management plan design." This phase of the proposed plan, which included gas sampling, testing and analysis was stated by the defendants to require eight weeks to complete.

15. On September 6, 1988, the Department of Natural Resources approved the proposed landfill gas management plan by duly issuing to the defendants a Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill. A copy of the approved modification is affixed hereto as attachment C.

16. The Conditional Closure Plan requires that twenty-four gas monitoring probes be installed by the defendants by October 31, 1988, and that a final detailed plan for construction

of a gas extraction system to prevent the migration of explosive gases and efficiently collect and combust hazardous air contaminants shall be submitted by January 1, 1989.

17. To date the defendants have failed to install any of the twenty-four gas monitoring wells required by the Conditional Closure Plan Approval Modification and are therefore in violation of the plan.

18. The Conditional Closure Plan was validly issued pursuant to the authority of the Department of Natural Resources under sec. 144.44(3), Stats.

19. Section 144.98, Stats., provides that the attorney general shall enforce chapter 144, Stats., and all rules, special orders, licenses and plan approvals and permits of the Department of Natural Resources. It further states that the circuit court where a violation has occurred has jurisdiction to provide injunctional and other relief appropriate for enforcement.

20. Section 144.99, Stats., provides that any person who violates chapter 144, Stats., except sections 144.42, 144.426 and 144.96(1), Stats., or any plan approval issued under the chapter shall forfeit not less than $10 nor more than $5,000 for each violation.

WHEREFORE plaintiff asks judgment against the defendants as follows:

1. The forfeitures as provided in section 144.99, Stats.

2. The penalty assessment provided for in section 165.87, Stats.

3. The costs and disbursements of the action.

4. A temporary and permanent injunction requiring the defendants to:

a. Immediately commence installation of the twenty-four gas monitoring probes as approved in the plan and complete installation as soon as practicable and in no event later than thirty days from the date of issuance of the injunction.

b. Immediately following installation of the gas monitoring probes, carry out the sampling, testing and analysis required by the plan.

c. Unless a later date is approved by the Department of Natural Resources, develop and submit to the Department for approval a final detailed plan for construction of a gas extraction system to prevent migration of explosive gasses and to efficiently collect and combust hazardous air contaminants by no later than February 1, 1989.

5. Such other relief as the court may be deemed just and appropriate.

Dated this 6 day of December, 1988.

DONALD J. HANAWAY
Attorney General

ROBERT A. SELK
Assistant Attorney General

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-7163

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
Carroll D. Besadny
Secretary

BOX 7921
MADISON, WISCONSIN 53707

APR 0 7 1987

IN REPLY REFER TO: 4410-2

Mr. John DeBeck, President
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Closure Plan Approval, Refuse Hideaway Landfill, License #1953, Dane County

Dear Mr. DeBeck:

I am pleased to inform you that your Closure Plan has been reviewed and approved. The Department believes that the proposed Closure Plan will not have an adverse affect on the performance of your landfill provided the conditions in the enclosed conditional Closure Plan Approval are fulfilled. You should attach this conditional Closure Plan Approval directly to the Plan Approval issued on November 12, 1974.

We have reviewed the letter, calculations, and plans submitted by Creative Resource Ventures (CRV) on October 31, 1986, and the report and plans submitted by CRV on November 24, 1986. These reports were submitted in response to our Plan Modification approval dated November 21, 1986. We consider the information in those two reports to partially fulfill the Closure Plan requirements. A review fee of $600 was received on March 30, 1987. An addendum report is required to address items that were not addressed by the two previous submittals. Our comments on how each condition of the Closure Plan was addressed, and requirements for changes or additional work follow.

CLOSURE PLAN REVIEW

This section directly addresses each point and the conditions of the Department's November 21, 1986 Plan Modification letter.

1. We consider the October 31, 1986 letter and plans and the November 24, 1986 report and plans to comprise the Closure Plan that was required by the plan modification letter.

   a. Updated plan sheets showing the proposed closure grades, the approved 1974 closure grades, and existing grades were provided. However, the existing grades were based primarily on a 1985 survey, with limited spot elevations taken in 1986. Cross sections showing the relationship between the three sets of grades were included.

In a conversation between Robert Glebs (CRV) and Daniel Carey (DNR) on December 10, 1986, Mr. Glebs stated that an updated contour map had been completed, the locations of the leachate headwells were revised, and the actual ditch elevations were surveyed. We would like the contour map and information to be submitted as an addendum to the Closure Plan. It must also include the north-south and east-west grid systems, and the grid origin, as well as the existing cross-section locations. We expect that the plan will consist of an updated drawing of plan sheet #1 (November 21, 1986) and will show all the phasing and drainage information for closure.

b. The redesigned topslope grades are approved. We noted that the volume calculations provided in the October 31 report compared the volume remaining under the final grades in the 1974 plans to the volume remaining under the final grades in the 1986 revision. However, the remaining volume (194,990 cubic yards) was referenced to the 1985 existing grades, and does not represent the current volume remaining at the site.

We are requiring that volume calculations be performed on the updated survey grades and the 1986 Closure Plan grades to determine the remaining site volume. The remaining site life shall be estimated by using the latest refuse loading rate (from at least the last half of 1986) and the remaining site volume. This information will be required as part of the addendum.

c. The cross sections drawn for the existing east-west grid lines were satisfactory; cross sections were not drawn for the north-south grid lines requested.

The north-south cross section can be submitted with the infield conditions report. The locations may be changed to be within 3+00N to 4+00N, 5+00N to 6+40N, and 8+00N to 9+00N. The exact locations of the cross sections may be chosen by your consultant to correspond with the leachate headwell locations, new groundwater monitoring wells, and known base soil information.

d. Only some of the detailed drawings requested were provided. For the present this is satisfactory. Additional drawings may be needed for other provisions in the infield conditions report.

2. The Closure Plan is considered to be the report and letters mentioned in #1 of this letter.

a. Progressive closure of the site, in Phases I through IV and the revised runoff routing plan are approved.

b. Calculations for runoff volume and velocity will have to be performed and provided. Specifications for the rip-rap and the drainage swales are needed. We are particularly concerned with the design of the southwest corner drainage swale which is quite long and steep. If the initial construction of the swale and rip-rap is not satisfactory, severe erosion is likely to occur.

c. The proposed gas probe system needs revisions. The location of G-3 and G-1 are satisfactory. Probe G-2 should be moved north to approximately 4+00 N, 12+00 W. Two (2) shallow gas probes shall be placed in the southern berm to assess gas migration and vegetative stress. A combination groundwater monitoring well and gas probe could be constructed at the location for P-18 and P-17/G-3.

The multi-level gas probe (Detail 5/5) may not be an appropriate type of probe construction for all the proposed locations. A gas probe with a continuous monitoring interval over its entire length, and a separate short probe interval at its base, may be better for G-3 and G-2. Detail 5/5 may be more appropriate for G-1 and probes located in the south berm.

As part of the addendum, please submit specific gas probe locations, and proposed depths and construction details prior to installation. The type of construction applicable may change after the subsurface soil and bedrock conditions are known. Please describe what conditions may be expected at each probe location, and how the probe construction would change if different conditions are encountered.

d. The gas control and venting system proposal may be submitted as part of the infield conditions report. The provisions of this condition shall remain unchanged.

e. We do not agree with the reasoning used for not proposing construction of additional leachate headwells. Although LH-1 is actually located further west than originally shown, both leachate headwells are located on the southern end of the site. The main mass of refuse is further north, in the center of the site, and leachate head levels may be greater at that location. There is no evidence that the leachate heads in LH-1 and 2 would be the maximum head level in the site; this would imply horizontal flow over the base of the site, which is unlikely since there is no granular drainage blanket or appreciable base slope. A section in the Closure Plan addendum report with the following information is required:

1) A table giving all leachate head levels obtained to date. The sampling dates and measured elevations of the levels at LH-1 and LH-2, and the estimated depth of leachate above the base of the site for those locations must be provided. Boring logs and well construction diagrams for LH-1 and LH-2 must be included.

2) A proposal to locate at least one additional headwell approximately in the center of the site. The proposed construction and date of installation shall be included. This well shall be installed and sampled at the same frequency as LH-1 and LH-2.

Sampling information for all three headwells shall be included in the infield conditions report. The information will be used as a part of the analysis of site conditions.

f. The following groundwater monitoring wells shall be sampled according to the schedule below:

Existing wells: P1S, P1D, P3, P4, P8, P9S

Proposed wells: Piezometer P9D, Water Table wells P16, P17, P18, P19, P20

Additional new wells:

Type	Location
Water table, piezometer	approximately 150' north of P4
Piezometer, bedrock piezometer	at location of P8
Piezometer	at location of proposed P16
Piezometer	at location of proposed P19

Schedule/parameters:

Three sampling rounds (at least a month apart) at each well, analyzed for the following parameters:

Field, specific conductance, field pH, COD, dissolved iron, total iron, hardness, chloride, alkalinity, sodium, sulfate, total dissolved solids, dissolved manganese, and total manganese.

Two rounds (at least a month apart) at each well, analyzed for the following parameters:

Volatile Organic Compound scan with quantification. Any VOCs detected shall be quantified in the following round of sampling at that well.

g. All wells shall be constructed according to the Bureau of Solid Waste Management's April, 1985, "Guidelines for Monitoring Well Design and Installation."

h. A hydrogeologist or other person qualified to perform the duties of a hydrogeologist shall observe and direct the drilling of all borings, the installation of all wells, visually describe and classify all geologic samples and prepare a boring log for each new well. Each log shall include soil descriptions (based upon undisturbed samples collected from each major soil unit at maximum 5-foot increments), method of sampling, depth of sampling, date of boring, water level measurements, and date of water level measurements. All new wells

should be installed without the use of drilling fluids which may affect future water quality analyses. All new wells should be installed without the use of drilling fluids which may affect future water quality analyses. All new wells shall be installed with factory slotted screens, appropriately sized filter pack and threaded joints. Soil boring information for all wells shall be recorded to the depth of the bottom of the well screen. Soil boring information and well construction reports shall be submitted in the in-field conditions report.

i. The soil sample collected at the depth of any subsequently placed monitoring well screen shall be analyzed for grain size distribution by sieve and hydrometer tests, and Atterberg limits, as appropriate for the particular soil type. Each soil sample shall be described according to its physical texture, color, geologic origin, and classified according to the Unified Soil Classification System.

j. Slug or baildown tests shall be conducted on each well required in the monitoring program to determine in-situ hydraulic conductivity.

k. All new wells shall be thoroughly developed soon after installation.

l. A well information form (WIF) shall be completed for all wells required in the monitoring program. One line for the WIF must be completed for each new well installed and submitted to the Department with the in-field conditions report.

m. A water table contour map and potentiometric surface map (reflecting current conditions at the site) shall be submitted with the in-field conditions report.

n. The in-field conditions report shall contain a proposal for long term groundwater monitoring at the site.

o. The requirement for the infield conditions report shall remain. The report will be due 120 days after the date of this approval letter. The following items shall be included with the report.

1-5) As originally stated in the November 24, 1986 plan modification approval letter.

6) The north-south gridline cross sections, as outlined in l.c. of this letter.

7) Detailed drawings as needed for the different sections of the report.

8) A proposed methane gas control venting system as outlined in 2.d. of this letter.

Please call Jodi Feld at (608) 267-3532, or Daniel Carey at (608) 267-7572 if you have any questions regarding this approval.

Sincerely,

Richard G. Schuff, P.E., Chief
Residuals Management & Land Disposal Section
Bureau of Solid Waste Management

RGS:DC:cn/7549R

cc: Marie Stewart - Madison Area
Joe Brusca - SD
Systems Management Section - SW/3
Robert Glebs - CRV, Ltd.

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. Refuse Hideaway, Inc. owns and operates a nonhazardous solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T7N, R8E, Town of Middleton, Dane County, Wisconsin.

2. A conditional Plan Approval was issued by the Department for the facility on November 12, 1974.

3. On November 21, 1986, Creative Resource Ventures, Ltd. on behalf of Refuse Hideaway, Inc. submitted a request to the Department for changes to the conditional Modification to the Plan Approval, dated November 21, 1986. The proposed changes include revised grades for closure of the landfill, revised surface water runoff routing, changes to the groundwater monitoring plan, and a proposed methane gas monitoring plan.

4. The information submitted in connection with the changes requested includes the following:

   a. A cover letter from Creative Resource Ventures, Ltd. (CRV), dated October 31, 1986, and a set of volume calculations and computer drawn cross sections by Residuals Management Technology, Inc. (RMT) and a set of six plan sheets by RMT.

   b. A cover letter from CRV dated November 21, 1986 and received on November 24, 1986, and a report entitled "Additional Information for the Closure of the Refuse Hideaway Landfill" prepared by RMT, with two plan sheets included in the report.

5. Additional documents considered in connection with the modification request include the following:

   a. The Department's "Modification to The Plan Approval" dated November 21, 1986.

   b. Various documents, plans, and letters contained in the correspondence and plan files for the landfill at the Department office.

6. Additional facts relevant to the review of the Plan of Operation approval modification request include the following:

   The two letters and associated reports from CRV did not completely address every condition for the Closure Plan submittals as required in the Department's November 21, 1986 approval

7. The special conditions set forth below are needed to assure that all the conditions of the Department's November 21, 1986 approval are complied with, and the methane gas and groundwater monitoring networks are able to detect potential impacts from the site. If the special conditions are complied with, the proposed modifications will not inhibit compliance with the standards set forth in NR 140 and NR 180.13, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44(3), Stats., to modify a Plan Approval if the modification would not inhibit compliance with chapter NR 140 and NR 180, Wis. Adm. Code.

2. The Department has authority to approve a Closure Plan with special conditions if the conditions are needed to ensure compliance with chapter NR 180, Wis. Adm. Code.

3. The conditions of approval set forth below are needed to ensure compliance with NR 180.13, Wis. Adm. Code.

4. In accordance with the foregoing, the Department has authority under s. 144.44, Stats., to issue the following conditional Closure Plan Approval.

CONDITIONAL CLOSURE PLAN APPROVAL

The Department hereby approves the Closure Plan for the Refuse Hideaway Landfill, subject to the following conditions:

1. An addendum to the Closure Plan shall be submitted within 30 days of the date of this letter. The addendum shall contain the following information:

   a. An updated plan showing the existing grades, an estimate of the remaining site volume and an estimate of the remaining site life as noted in section 1.a. and b. of the cover letter.

   b. Calculations for runoff volume and velocity, and specifications for swale design and rip-rap as noted in section 2.b. of the cover letter.

   c. Revised gas probe locations, proposed construction details for each location, proposed depth of the probes, and a proposed monitoring schedule as noted in section 2.c. of the cover letter.

   d. An update on all monitoring data obtained to date from the leachate headwells, and a proposal to install at least one additional leachate headwell as noted in section 2.e. of the cover letter.

2. An infield conditions report as required in the November 21, 1986 letter, shall be submitted within 120 days of the date of this letter and shall contain the additional items noted in sections 2.f. through 2.o. of the cover letter.

The Department retains the jurisdiction either to require the submittal of additional information or to modify this approval at any time if, in the

Department's opinion, further modifications are necessary. Unless specifically noted, the conditions of this approval do not supercede or replace any previous conditions of approval for this facility.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: APR 07 1987

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Richard G. Schuff, P.E., Chief
Residuals Management & Land Disposal Section

Jodi Feld, Hydrogeologist
Residuals Management & Land Disposal Section

Daniel Carey, Environmental Engineer
Residuals Management & Land Disposal Section

7549R
4/1/87

SPECIAL CONSENT ORDER

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Closure of the Refuse Hideaway Landfill, License Number 01953, Town of Middleton, Dane County, Wisconsin	))))	Special Consent Order No. SOD-88-02A

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND CONSENT ORDER

FINDINGS OF FACT

1. John DeBeck and Refuse Hideaway, Inc., own and operate the Refuse Hideaway Landfill, which is located in the Town of Middleton, Dane County, Wisconsin. The landfill initially was licensed by the Department during 1974 and has been in operation since that time. The landfill has received approximately 1.3 million cubic yards of solid waste.

2. The Refuse Hideaway Landfill is a licensed landfill which is classified as a "Nonapproved facility" as defined by sec. 144.441(1)(c), Stats. However, there is an April 7, 1987, approved closure plan for the landfill.

3. The Refuse Hideaway Landfill has been developed as a natural attenuation landfill. The natural attenuation design concept was a common design alternative at the time the site was initially licensed. As such, the site was constructed without substantial engineering modifications, such as a clay liner and leachate collection system.

4. Unconsolidated soils in the vicinity of the landfill consist of lake derived sediments over glacial till. Soils deposits of over 100 feet in depth are present south of the landfill while bedrock is at the ground surface north of the landfill. The water table is located approximately 10 feet below the base of the landfill. Downward vertical gradients were measured in areas around the perimeter of the landfill showing that there is the potential for migration of contaminants downward into the bedrock aquifer.

5. Because of mounded leachate within the landfill, there may be flows of leachate radially outward from the landfill. Additional investigation should be done to determine if this is the case and to what extent flow is affected by the leachate mound. However, it is clear that one component of the groundwater flows southernly toward Black Earth Creek, which is a local groundwater discharge area. Black Earth Creek is a Class I trout stream.

6. Groundwater in the vicinity of the landfill is utilized as a domestic water supply by a number of homeowners. Several private wells in the area have shown elevated concentrations of certain contaminants, including vinyl chloride. However, the source of the contamination in these wells cannot be definitely established at this time without further investigation.

7. A number of groundwater monitoring wells have been installed at and in the vicinity of the landfill. Results obtained from some of these wells indicate that disposal operations at the landfill have caused a detrimental affect on groundwater quality. Evaluation of available groundwater quality information indicates that disposal operations have caused the attainment and exceedance of groundwater quality standards established under ch. NR 140, Wis. Adm. Code. Exceedances of preventative action limits for indicator parameters and substances of health or welfare concern, as well as enforcement standards for substances of health or welfare concern have been caused by operation of the landfill.

8. These groundwater impacts will continue for some time in the future. However, termination of waste filling operations will prevent additional contaminants from being introduced into the landfill and additional contaminants from being introduced into the groundwater system from those wastes. Installation of a final cover system over the fill area will reduce the rate at which leachate is generated within the landfill.

9. The Department has considered the range of responses to groundwater standard exceedances listed in secs. NR 140.24 and 140.26, Wis. Adm. Code. Based upon this evaluation, termination of disposal operations and closure of the landfill, and further investigation to determine the scope and extent of groundwater impacts, and any necessary remedial action, is reasonable and necessary to achieve compliance with groundwater standards, and to protect public health, safety, and welfare.

CONCLUSIONS OF LAW

1. The Department has authority under secs. 144.44(8) and 144.431, Stats., to order necessary corrective action at a landfill where minimum standards established under ch. NR 504, Wis. Adm. Code, have not been complied with.

2. The Refuse Hideaway Landfill is being operated and maintained in violation of sec. NR 504.04(4)(d), Wis. Adm. Code, and the groundwater standards established in ch. NR 140, Wis. Adm. Code.

3. Based upon the foregoing, the Department has authority to issue the following order.

CONSENT ORDER

The Department, therefore, orders:

1. John DeBeck and Refuse Hideaway, Inc., shall, by no later than May 16, 1988, cease all solid waste disposal operations at the Refuse Hideaway landfill.

2. John DeBeck and Refuse Hideaway, Inc., shall, by no later than June 1, 1988, submit a proposed closure plan modification to the Department for approval. This submittal shall contain:

   a. An updated topographic survey with a maximum 2 foot contour interval of the 40 acre landfill property.

   b. Revised final grades with slopes of at least 3%, but no greater than 33%.

   c. A drainage system meeting the requirements of NR 506.08(3)(b), Wis. Adm. Code.

   d. A final cover system design that meets the requirements of NR 504.07, Wis. Adm. Code.

   e. Documentation of a clay borrow source or sources for sufficient quantities of clay to cap the entire area of the landfill where solid waste has been disposed. The soils shall meet the requirements of NR 504.07(4), Wis. Adm. Code and have a minimum Plasticity Index (PI) of 10 and an average PI of 12 and a minimum Liquid Limit (LL) of 20 and an average LL of 25.

3. John DeBeck and Refuse Hideaway Inc., shall, by no later than July 1, 1988, submit a plan to the Department for approval to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants.

4. John DeBeck and Refuse Hideaway Inc., shall, by no later than August 15, 1988, install the 2 foot thick clay capping layer of the approved final cover system over the entire area of the landfill where solid waste has been disposed, and shall, by no later than September 15, 1988 complete placement of the cover layer as well as topsoiling, seeding, fertilizing, and mulching of the approved final cover system.

5. John DeBeck and Refuse Hideaway, Inc., shall construct and develop 5 of the following 10 wells by May 16, 1988, and the remaining 5 wells by June 1, 1988, in accordance with NR 508, Wis. Adm. Code at the locations specified below :

   a. The upper well (P-23S) of a well nest located between the landfill and well P-20S, approximately 200 feet east of the eastern property boundary of the landfill.

b. The upper (P-25S) well of a 3 point well nest located approximately 300 feet south of the southeastern corner of the property boundary of the landfill.

c. A well nest (P-26S and P-26D) located approximately 300 feet northwest of the northwestern corner of the property boundary of the landfill.

d. The upper well (P-27S) of a well nest located approximately 200 feet west of the southwestern corner of the property boundary of the landfill.

e. A water table observation well (P-28S) located in the north eastern corner of the property boundary of the landfill.

f. The upper well (4c) of a well nest located approximately 1,750 feet southwest of the southwestern corner of the property boundary of the landfill.

g. A well nest (4e) approximately 50 feet south of the southern property boundary of the landfill at approximate western coordinates of B-24.

h. A bedrock piezometer (P-21BR) at the location of P-21S.

6. John DeBeck and Refuse Hideaway, Inc., shall by July 1, 1988 construct and develop the following additional wells installed into the bedrock in accordance with NR 508, Wis. Adm. Code at the locations specified below:

a. The lower well (P-23D) of the well nest listed in 5a., above.

b. The intermediate well (P-25D) and bedrock piezometer (P-25BR) of the 3 point well nest listed in 5b., above.

c. The piezometer (P-27D) of the well nest listed in 5d., above.

d. The piezometer (4c) of the well nest listed in 5f., above.

During installation, wells installed under this paragraph shall be sampled continuously in maximum 10 foot intervals using a field gas chromatograph (GC) for the purpose of detecting the presence of contamination with depth in the aquifer. This information shall be used to properly locate the screened interval of the monitoring well. [The exact locations and depths of the required monitoring wells shall be approved by Department staff prior to installation].

7. As part of the groundwater investigation, all existing and proposed monitoring wells shall be sampled twice with a minimum of 15 days between sampling dates. Each well shall be sampled and analyzed for the following parameters:

a. Field pH, field temperature, field specific conductance (corrected to 25 degrees centigrade), COD, total alkalinity, total hardness, notation of color, odor and turbidity at the time of sampling, and measurement of water elevation prior to purging the wells.

b. Public health and welfare parameters:

Chloride, copper, dissolved iron, manganese, sulfate, total dissolved solids, zinc, arsenic, barium, cadmium, chromium, fluoride, lead, mercury, nitrate plus nitrite-nitrogen, selenium, and silver. The metals analyses shall be performed using a method which is capable of detecting and quantifying values at or below the preventive action limit for each parameter, except selenium.

c. A GC-MS volatile organic compound scan with quantification shall be run on both sampling rounds. These analyses shall be performed according to EPA SW-846 method 8240 or EPA wastewater method 624. As an alternative, the VOC analyses shall be performed according to EPA SW-846 methods 8010/8020 or EPA wastewater methods 601/602. The Department shall be notified and approve of detection limits for the volatile organic compound scans prior to the first sampling date.

8. John DeBeck and Refuse Hideaway, Inc., shall, by August 1, 1988 submit, a phase 1 groundwater investigation report for Department review and approval. The report shall include documentation of the well installations in accordance with NR 508.11, Wis. Adm. Code, a water table contour map and the results of the field GC sampling.

9. John DeBeck, and Refuse Hideaway, Inc., shall, by October 1, 1988, submit a remedial action report for Department review and approval. The report shall include:

a. An evaluation of the local and regional groundwater flow directions and the degree and extent of groundwater contamination around the site; the nature, persistence and likely fate of any contaminants; the existing or potential environmental and health effects of the contamination.

b. A proposal for remedial measures which are technically and economically feasible for renovating or restoring ground/surface water quality. The report shall include:

i. An evaluation of the technical and economical feasibility for extracting and lowering the existing leachate mound within the landfill.

ii. An evaluation of the technical and economical feasibility for pumping and treating contaminated groundwater around the landfill for the purpose of preventing the further migration of contamination, and to restore the contaminated groundwater to compliance with state groundwater standards listed in NR 140.10-.12, Wis. Adm. Code.

c. A proposal for long-term environmental monitoring which would evaluate the effects of any remedial action on the continued performance of the landfill.

The report shall also include justification of why remedies other than those proposed are not technically or economically feasible to implement.

10. Nothing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose other than for action taken for failure to comply with the terms of this order.

The Department reserves the right to require the submittal of additional information or modify this order if conditions warrant in which case John DeBeck and Refuse Hideaway, Inc., will have full right under the law to contest any modification of this order.

Waiver and Stipulation

John DeBeck, individually and as president of Refuse Hideaway, Inc., hereby waives further notice and all statutory rights to demand a hearing before the Department of Natural Resources and to commence any judicial action regarding the foregoing Findings of Fact, Conclusions of Law, and Consent Order under Sections 144.431, 144.44(8), 227.42, 227.52 and 227.53, Wisconsin Statutes, or any other provision of law. John DeBeck, individually and as president of Refuse Hideaway, Inc., 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 Sections 144.98 and 144.99, Wisconsin Statutes. The undersigned certifies that he is authorized by Refuse Hideaway, Inc., to execute such Consent Order, Waiver, and Stipulation.

STATE DEPARTMENT OF NATURAL RESOURCES

by Kathryn A. Curtner — May 3, 1988

Kathryn A. Curtner
Assistant Administrator
Division of Enforcement

Date

John DeBeck — 5-2-88

John DeBeck

Dated

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny
Secretary

BOX 7921
MADISON, WISCONSIN 53707

SEP 0 6 1988

RECEIVED
SEP 1 4 1988
DEPT. OF NR

IN REPLY REFER TO: 4410-2

Mr. John DeBeck
Refuse Hideway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Modification to the Closure Plan Approval, Gas Monitoring and Collection System, Refuse Hideaway Landfill #1953, Dane County

Dear Mr. DeBeck:

I am pleased to inform you that your requested modifications to your closure plan approval have been reviewed and conditionally approved. The Department believes that the proposed modifications will not have an adverse effect on the performance of your landfill provided the conditions in the enclosed conditional closure plan approval modification are fulfilled. You should attach this conditional closure plan approval modification directly to the closure plan approval issued on April 7, 1987.

The report contained a proposed gas migration monitoring system, a proposed conceptual plan for gas management, and a summary on the progress of groundwater monitoring well construction.

The report implies that an active gas system which controls hazardous air contaminants is not required. Consent order SOD-88-02A requires a system which prevents the migration of explosive gases and efficiently collects and combust hazardous air contaminants. The requirements of Consent Order SOD-88-62A are in addition to the requirements of NR 500-520, Wis. Adm. Code.

As discussed on June 24, 1988, the proposal to place the waste removed during gas well construction back into the landfill is acceptable provided the area of waste placement is initially final covered with the remainder of the landfill. The gas well construction waste must be placed in the area stated in condition 4 of the August 15, 1988 closure plan modification. The final cover must be removed prior to construction waste placement and the final cover must be immediately replaced and redocumented following waste placement.

NR 506.08(6), Wis. Adm. Code requires the gas collection system to be installed by August 1, 1989. We are extending this date to September 30, 1989 due to the length of time needed to perform testing prior to gas system installation in order to determine an efficient design for the gas collection system.

ATTACHMENT C

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL MODIFICATION FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. John DeBeck and Refuse Hideaway, Inc., own and formerly operated a nonhazardous solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin.

2. The Department issued a conditional closure plan approval for the facility on April 7, 1987.

3. The Department issued special consent order SOD-88-02A on May 2, 1988. Condition 3 of the order required John DeBeck and Refuse Hideaway, Inc., to submit a plan to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants.

4. On July 1, 1988, RMT, Inc., submitted a report to the Department proposing a conceptual plan for gas management and summarizing monitoring well construction to date.

5. The information submitted in connection with the modification request includes the following: a letter, two appendices and one plan sheet submitted by RMT, Inc., dated July 1, 1988 and received by the Department on July 1, 1988.

6. Additional documents considered in connection with the modification request include the following:

   a. Special consent order SOD-88-02A

   b. Various technical documents on file with the Solid Waste Management Section.

7. Additional facts relevant to the review of the closure plan modification request include the following:

   a. Municipal refuse produces methane gas. The clay cap and frozen ground conditions will inhibit release of the methane gas to the atmosphere and methane gas may migrate off site.

   b. NR 506.08(6) requires that a Department approved system to efficiently collect and combust hazardous air contaminants be installed within 18 months of February 1, 1988.

8. The special conditions set forth below are needed to assure that human health and the environmental are adequately protected. If the special conditions are complied with, the proposed modifications will not inhibit compliance with the standards set forth in NR 500-520, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44(3), Stats., to modify a plan approval if the modification would not inhibit compliance with chapters NR 500-520, Wis. Adm. Code.

2. The Department has authority to approve a closure plan modification with special conditions if the conditions are needed to ensure compliance with chapter NR 500-520, Wis. Adm. Code.

3. The conditions set forth below are needed to ensure compliance with NR 500-520, Wis. Adm. Code.

4. In accordance with the foregoing, the Department has authority under s. 144.44 Stats., to issue the following conditional closure plan approval modification.

CONDITIONAL CLOSURE PLAN APPROVAL MODIFICATION

The Department hereby modifies the closure plan approval for the Refuse Hideaway landfill, subject to the following conditions:

1. The 24 gas monitoring probes shall be installed by October 31, 1988. Documentation of the gas probe installation including a gas probe diagram for each probe showing the probe depth and a plan sheet showing the location of all probes shall be submitted to the Department within 30 days of completing gas probe installation.

2. A final detailed plan for construction of a gas extraction system to prevent the migration of explosive gases and efficiently collect and combust hazardous air contaminants shall be submitted to the Department by January 1, 1989.

3. A Department approved gas extraction system shall be installed and made operational by September 30, 1989.

4. The final cover over the area used for disposal of gas well construction waste shall be completed within 60 days following completion of drilling of the final gas well.

5. The final cover over areas disturbed for gas well construction waste placement shall consist of the approved cover and shall be documented as follows:

   a. Dry density and as-placed moisture content on an approximate 50-foot grid patter for each one-foot thickness of clay placed.

   b. One moisture density curve developed for every 5,000 cubic yards or less of clay placed and for each major soil type utilized.

   c. A plan sheet documenting the final landfill surface following topsoil placement. A table showing as constructed grades at specific location on maximum 50 foot centers for the grading layer, clay capping layer, cover layer and topsoil layer shall be included on the plan sheet.

d. A plan review showing the location of all tests performed (this may be included with the final surface plan sheet).

6. The gas probes shall be monitored on a weekly basis for one month during initial ground freeze-up this winter. If the methane level at all probes does not exceed 25% of the lower explosive limit the gas probe monitoring may be reduced to a monthly basis. Based on the results of the above required methane monitoring, a proposed long term monitoring program may be submitted to the Department following construction of the gas extraction system. All results shall be submitted to the Department.

The Department retains the right to require the submittal of additional information and to further modify this Plan of Operation approval at any time if, in the Department's opinion, further modifications are necessary. Unless specifically noted, the conditions of this approval modification do not supercede or replace any previous conditions of approval for this facility.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: SEP 0 6 1988

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section

Paul M. Huebner / for RT

Ray Tierney, Hydrogeologist
Solid Waste Management Section

Susan M. Fisher

Susan M. Fisher, Environmental Engineer
Solid Waste Management Section

cc: Program Services Section - SW/3

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STATE OF WISCONSIN | CIRCUIT COURT Branch 7 | DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 88-CV-6418

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,
a domestic corporation,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

NATURE OF CASE AND PROCEDURAL STATUS

This is a civil action for injunctional relief and forfeitures brought by the State of Wisconsin against John W. DeBeck and Refuse Hideaway, Inc. The complaint alleges that the defendants have failed to install any of the twenty-four gas monitoring probes required by the Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill issued by the Department of Natural Resources on September 6, 1988. The deadline for installation of the wells was October 31, 1988.

The defendants have sought judicial review under ch. 227, Stats., of the plan modification. However, the review does not relieve the defendants from the requirements of the plan.

The complaint also alleges that under the approved closure plan the installment of the gas monitoring probes is necessary in order to develop a final detailed plan for construction of a gas extraction system to prevent the migration of explosive gases and

to efficiently collect and combust hazardous air contaminants. The final plan is required to be submitted by January 1, 1989.

The complaint seeks a temporary and permanent injunction. The temporary injunction seeks to require the defendants to:

1. Immediately commence installation of the twenty-four gas monitoring probes as approved in the Conditional Closure Plan Modification for the Refuse Hideaway landfill (#1953) dated September 6, 1988, and complete installation as soon as practicable and in no event later than thirty days from the date of issuance of this injunction.

2. Immediately following installation of the gas monitoring probes, carry out the sampling, testing and analysis required in the plan.

3. Unless a later date is approved by the Department of Natural Resources, develop and submit to the Department for approval a final detailed plan for construction of a gas extraction system to prevent migration of explosive gases and efficiently collect and combust hazardous air contaminants by no later than February 1, 1989.

A complaint and summons and a motion for temporary injunction were filed on December 6, 1988. The papers were served on the defendants on December ___, 1988.

An evidentiary hearing on the temporary injunction is scheduled for December 19, 1988, at 1:30 p.m. in Dane County Circuit Court.

FACTS THE STATE EXPECTS TO PROVE

At the hearing on the motion for a temporary injunction the state expects to prove the following facts. From approximately November 1972 to October 1, 1982, John W. DeBeck owned and operated a landfill on the property known as Refuse Hideaway landfill under license #1953 issued by the Department of Natural Resources. The property is located in the SW 1/4 of the NW 1/4 of sec. 8, T7N, R8E, Town of Middleton, Dane County, Wisconsin.

John W. DeBeck was the owner of record of the real property upon which the Refuse Hideaway landfill ~~was~~ is located from November 2, 1972 to March 1, 1982. By warranty deed dated March 1, 1982, the landfill property was conveyed from John W. DeBeck and Thomas DeBeck to Refuse Hideaway, Inc.

From October 1, 1982, to the present, the license #1953 has been held in the name of Refuse Hideaway, Inc., a domestic corporation. Refuse Hideaway, Inc., was incorporated in February 1982. The last corporate filing with the secretary of state was in 1983 and shows the president of the corporation to be John W. DeBeck.

From 1974 to May 15, 1988, the site operated as a commercial solid waste landfill. The landfill ~~was~~ is about twenty-three acres in size and has a design capacity of 1,300,000 to 1,500,000 cubic yards.

The landfill has received municipal refuse ~~and~~ which produces methane gas as it decomposes. The gas is explosive when under certain conditions. The landfill does not have an underlying liner to retard or prevent the migration of landfill gases off-site. A two-foot compacted clay layer has been placed over almost all of the landfill. The clay capping

began in August of 1988 and is nearing completion. The clay cap and frozen ground conditions will inhibit release of explosive gases to the atmosphere and thereby increase the likelihood of methane gas migration off-site. The migration route is through granular soils and bedrock. Residents in the vicinity of the landfill are subject to impact from migrating explosive gases from the landfill. A system to monitor control and prevent off-site gas migration is necessary to protect public health and safety.

Explosive gas (methane) is migrating off-site in concentrations approaching or exceeding the lower explosive limit for the gases.

The present gas monitoring probes and other available information is inadequate to measure or determine the extent and quantity of off-site gas migration. Installation of gas probe monitors is necessary to determine the extent of subsurface explosive gas migration away from the landfill. In addition, the installation of gas monitoring probes as set out in the September 6, 1988, plan modification is necessary to provide data needed to design the gas extraction system in order to prevent the migration of explosive gases and to efficiently collect and combust hazardous air contaminants. The probe installation and the sampling, testing and analysis required by the September 6, 1988, order must be carried out during the 1988-89 winter season in order for the defendants to meet the regulatory deadlines (as extended by DNR) of September 30, 1989. This deadline requires that a system be installed to collect and combust hazardous air contaminants. ~~Finally, the data is also needed to protect the~~

~~newly installed cover over the landfill.~~

Under present landfill conditions, it is necessary to collect gas migration data during the winter months in order to measure the effect of frost on the subsurface migration. The failure to install gas probes before the winter season will substantially delay gathering information necessary to design a gas extraction system. If explosive gases are permitted to migrate off-site they are likely to disperse and later capture of the gases will not be feasible.

The installation of gas monitoring probes can be accomplished within thirty days using accepted engineering practices.

On April 7, 1987, the DNR issued a Closure Plan Approval for the landfill which included the requirement that the defendants were to submit an infield conditions report. The report was to include a proposal to control and vent gas.

On May 3, 1988, the DNR issued a Special Consent Order to John W. DeBeck and Refuse Hideaway, Inc., that required, among other things, that the defendants were to submit a plan for DNR approval that would, "effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants."

On July 1, 1988, John W. DeBeck and Refuse Hideaway, Inc., through its consultant, RMT, Inc., submitted to the DNR a proposed gas management plan which included a proposal to install twenty-four gas monitoring probes around the landfill. The stated purpose was to, "document the presence or extent of

landfill gas migration around the site. This data will be used for the management plan design." The proposal stated that the plan, which included gas sampling, testing and analysis, would take eight weeks to complete.

On September 6, 1988, the DNR approved the gas management plan by issuing to John W. DeBeck and Refuse Hideaway, Inc., a Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill. The plan requires that twenty-four gas monitoring probes are to be installed by October 31, 1988, and that a final detailed plan for construction of a gas extraction system to prevent the migration of explosive gases and efficiently collect and combust hazardous air contaminants be submitted by January 1, 1989.

The defendants have failed to install any of the twenty-four gas monitoring probes required by the plan. The defendants have not applied for or obtained any extension of the October 31, 1988, deadline for installation of the gas probes or any other deadline in the plan modification.

The installation of gas probe monitors is necessary to determine the extent of subsurface explosive gas migration off the landfill site.

APPLICABLE SOLID WASTE LAW

The regulation of solid waste is governed by secs. 144.43-144.799, Stats., and the Wis. Admin. Code chs. NR 500-NR 551. The DNR is given primary responsibility for regulating solid waste. Sec. 144.431(1), Stats.

The Refuse Hideaway Landfill is a, "solid waste facility" under the definition at sec. 144.43(5), Stats., and has received "municipal solid waste" as the term is defined in Wis. Admin. Code § NR 500.03(86).

Wisconsin Administrative Code § NR 500.03(92) & (93) define the terms "owner" and "operator" applicable to Wis. Admin. Code chs. NR 500-NR 522 by adopting the definition at sec. 144.42(9), Stats. That definition states as follows:

> 1. "Operator" means any person who operates a site or facility or who permits the disposal of wastes at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of wastes at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
>
> 2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

Sec. 144.442(9)(a), Stats.

Under these definitions, because they are either present or past property owners and operators, both John W. DeBeck and Refuse Hideaway, Inc., are owners and operators subject to the Wis. Admin. Code regulations in chs. NR 500-NR 551.

Wisconsin Administrative Code § NR 506.07(3) requires that no person may operate or maintain a new or existing land disposal facility except in conformity with an approved plan of operation and the minimum requirement that

> Effective means shall be utilized to prevent the migration of explosive gases generated by the waste fill. At no time shall the concentration of explosive gases in any facility structure, excluding the leachate collection system or gas control or recovery system components, or in the soils or air at or beyond the facility property boundary exceed 25% of the lower explosive limit for such gases. The department may require the concentration of explosive ~~gas is not to~~ gases not exceed the lower detection limit for that gas at the facility property boundary.

Wis. Admin. Code § NR 506.07(3).

In addition, Wis. Admin. Code § NR 506.08(6) requires that, "all solid waste disposal facilities which have a design capacity greater than 500,000 cubic yards are to install a system to efficiently collect and combust hazardous air contaminants. By rule, the system is to be installed by August 1, 1988, however, the DNR in this case has extended the deadline to September 30, 1989.

In partial compliance with the special consent order of May 3, 1988, and the requirements of Wis. Admin. Code chs. NR 500 et seq., the defendants, on July 1, 1988, submitted a gas management plan to DNR for approval.

On September 6, 1988, DNR approved the proposal, with conditions, by issuing the Conditional Closure Plan Approval Modification. The state seeks a temporary injunction to enforce and require the implementation of those parts of the plan that threaten harm if delayed.

The granting of a temporary injunction is within the discretion of the court. Sec. 813.02(1) and 144.98, Stats.; Schearer v. Congdon, 25 Wis. 2d 663, 665, 131 N.W.2d 377 (1964). The threshold question is the proper legal standard the court is

to apply in exercising its discretion.

Section 813.02(1), Stats., grants general authority to issue a temporary injunction:

> When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

The statute is a codification of the common law standard for the issuance of a temporary injunction. The leading case construing the statute is Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 259 N.W.2d 310 (1977). It summarizes the standard as follows:

> Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

Werner, 80 Wis. 2d at 520 (footnotes omitted).

Although Grootemaat accurately describes the standard for injunctions under the common law, it is not fully applicable to injunctions sought under statutory authority. When the Legislature has specifically authorized the issuance of injunctions to insure compliance with regulatory statutes and

rules, a showing of irreparable injury is not necessary. In Wisconsin this principle has been established in several cases. State v. Fonk's Mobile Home Park & Sales, Inc., 117 Wis. 2d 94, 343 N.W.2d 820 (Ct. App. 1983), involved a civil action for injunctive relief under sec. 100.20(6), Stats., brought by the state against the defendant for mobile home park trade practices in violation of Wis. Admin. Code ch. Ag 125. Fonk's argued that the common law standards for an injunction must be met regardless of the statutory origin of the injunction. 117 Wis. 2d at 99. Section 100.20(6), Stats., authorized injunctive relief for violations of any order issued under this section. The court rejected Fonk's argument and stated that the statutory injunction need not meet all of the common law requisites. The court stated:

> The statute at issue here specifically provides the court with authority to issue an injunction if an order has been violated.
>
> Section 100.20(6), Stats., establishes the requirements for issuing an injunction. It does not require threat of future harm. The first sentence of section 100.26(6) indicates the legislative intent that past violations are the gravamen of the injunctive action. "The department may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction the violation of any order issued under this section."
>
> In two recent cases, the supreme court has enumerated the requirements for the issuance of a statutory injunction. Pure Milk Products Cooperative v. National Farmers Organization, 90 Wis. 2d 781, 280 N.W.2d 691 (1989), addressed injunctive relief based on sec. 185.43(2), Stats., regulating competitive practices among cooperatives. The court held that an injunction may be issued under sec. 185.43(2) upon a showing that a cooperative has a contract with a member or members, that the defendant had actual or constructive notice of the contract and that the

> defendant has induced or attempted to induce a member to breach his or her contract. Id. at 789, 280 N.W.2d at 695. "It is not necessary for the cooperative to prove that there is malicious intent, that the injunction is necessary to prevent an irreparable injury, or that the benefits flowing from the injunction will outweigh the harm the injunction will cause." Id. at 789-90, 280 N.W.2d at 695. Thus, common law prerequisites are not a necessity to successful pleading of an action under sec. 185.43. There is no language in the opinion to indicate that future injury must be shown.

117 Wis. 2d at 100-02 (footnotes omitted).

The statutory language at sec. 144.98, Stats., authorizing injunctive relief is broader than sec. 100.20(6), Stats., in that it permits injunctive relief and other relief appropriate for enforcement. Thus, not only may past violations be enjoined; injunctive relief may be used as an enforcement tool to correct past misconduct and prevent future violations. The section includes injunctions for enforcement of plan approvals, "[t]he Circuit Court for Dane County or any other county where a violation ~~has~~ occurred in whole or in part has jurisdiction to enforce this chapter or the rule, special order, license, plan approval or permit by injunctional and other relief appropriate for enforcement." Sec. 144.98, Stats.

In this case there can be little question but that there has been a serious violation of a plan approval. The DNR approved the proposal of the defendants to install twenty-four gas monitoring probes. The defendants stated in their proposal that eight weeks were required to install probes and to complete sampling testing and analysis. The DNR gave the defendants essentially eight weeks to install the probes and waited another

three weeks before referring the matter to the Department of Justice for enforcement. Plainly, the state has shown a reasonable probability of succeeding on the merits.

The requirements of the plan remain in full force and effect and the defendants have not installed a single monitoring probe required by the plan approval. If the defendants are permitted to continue to violate the law, valuable and necessary gas migration data will be lost and the state will not be in a position to judge the extent of off-site migration of explosive gases. Once the explosive gas is off-site, there is little that can be done to control its migration. Action needs to be taken now to protect the public and to enforce the law.

CONCLUSION

A temporary injunction enjoining the defendants as requested in the motion should be granted.

Dated this _____ day of _____, 1988.

DONALD J. HANAWAY
Attorney General

_____
ROBERT A. SELK
Assistant Attorney General

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STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 88 CV 6418

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,
a domestic corporation,

Defendants.

MEMORANDUM IN OPPOSITION OF MOTION FOR TEMPORARY INJUNCTION

NATURE OF THE CASE

This Motion for Injunctive Relief arises from an action commenced by the State of Wisconsin ("State") against John W. DeBeck ("DeBeck") and Refuse Hideaway, Inc. ("Refuse Hideaway") to force DeBeck and Refuse Hideaway to comply with the terms of a Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill ("Closure Plan Modification"). The Refuse Hideaway landfill ("landfill") is currently owned and operated by Refuse Hideaway. Refuse Hideaway acquired the landfill from DeBeck by warranty deed dated March 1, 1982. The license to operate the landfill was transferred to Refuse Hideaway on October 1, 1982. The material facts pertinent to this Motion are as follows:

On April 7, 1987, the Wisconsin Department of Natural Resources ("DNR") issued a Closure Plan Approval for the landfill. After extensive negotiations, the parties on May 3, 1988 executed a Special Consent Order ("Consent Order"). The Consent Order

reserved to DeBeck and Refuse Hideaway full right to contest any modification of the Consent Order by the DNR. Pursuant to the terms of the Consent Order, DeBeck and Refuse Hideaway agreed to perform certain activities designed to expedite the closure of the landfill. Specifically, they agreed to submit to the DNR by no later than July 1, 1988, a Plan to monitor for and to prevent migration of explosive gases and to collect and combust hazardous air contaminants ("Gas Extraction Plan"). The Consent Order, however, neither addressed nor required that DeBeck or Refuse Hideaway implement the Gas Extraction Plan.

Without consultation or negotiation with DeBeck or Refuse Hideaway, the DNR, on September 6, 1988 issued the Closure Plan Modification. Among other things, the Closure Plan Modification required DeBeck and Refuse Hideaway to install twenty-four (24) gas monitoring probes by October 31, 1988 and provide by January 1, 1989 a final detailed plan for construction of a gas extraction system.

In accordance with the rights reserved under the Consent Order, DeBeck and Refuse Hideaway on October 6, 1988 filed in the Circuit Court of Dane County a Petition pursuant to Chapter 227 of the Wisconsin Statutes to review the efficacy of the Closure Plan Modification issued by the DNR. That action is presently before the Honorable George Northrup.

On December 6, 1988, the State of Wisconsin commenced this action. The Complaint alleges that the Closure Plan Modification was validly issued pursuant to the provisions of sec. 144.44(3),

Stats., and seeks temporary and permanent injunctive relief compelling DeBeck and Refuse Hideaway to comply with the terms of the Closure Plan Modification.

ARGUMENT

I. THIS COURT LACKS AUTHORITY TO CONSIDER THE MERITS OF PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

A threshold issue which this Court must address is whether it possesses authority to consider the merits of the State's Motion for a Temporary Injunction. Wisconsin courts have long recognized that the pendency of a prior suit for the same cause of action, and between the same parties, may be plead in abatement of a subsequently commenced suit. See, e.g., Wood vs. Lake, 13 Wis. 84 (1860).

Wood involved an action commenced in the Circuit Court of Milwaukee County to foreclose a mortgage given by the defendant to secure repayment of a note. In his answer, the defendant requested that the action be stayed pending resolution of a federal court action commenced by certain creditors of plaintiff's husband against the plaintiff, plaintiff's husband, and the defendant. The plaintiff demurred to the defendant's answer and the trial court sustained the demurrer.

In affirming the trial court, the Supreme Court set forth a two-part test which must be met in order to plead the pendency of a former suit in abatement of a subsequent action:

(a) First, the two actions must be pending in courts of the same state or government; and

(b) Second, the parties, in general, must be the same parties, plaintiff and defendant, in both actions.

Wood, at 81-92.

On its face, Wood appears to require that the plaintiffs in the former suit be the plaintiffs in the subsequent suit and vice a versa with regard to the defendants. Subsequent decisions of the Wisconsin Supreme Court, however, have adopted a more narrow interpretation of Wood. Calteaux v. Mueller, 102 Wis. 525, 528 (1899), for instance, construed Wood to require only that there be identity of parties or privies in the two actions. Similarly, Lorenz v. Dreske, 214 N.W.2d 753, 62 Wis. 2d 273 (1974) construed Wood to require identicality between the parties and the issues involved in the two actions. The Court stated:

> "It is clear here that the parties to these two actions are not identical and that those that are have reversed positions in the two actions. The appellants urge that the Assignment of Northwest makes the Plaintiffs 'privies'. But the Defendants have ignored the necessity of identical causes of action."

Id. at 294.

The identicality of parties and issues required by Calteaux and Lorenz is clearly met in this case. The issues presented in this case are identical to those posed in the suit pending before Judge Northrup. In each case, the parties seek a determination from the Court as to the enforceability of the Plan Closure

Modification. Each party's interest is identical in the two actions. DNR seeks a determination that the Plan Closure Modification is enforceable, DeBeck and Refuse Hideaway, on the other hand, seek a contrary determination. In the final analysis, the issue posed is whether the State should be allowed, by means of this subsequently commenced lawsuit, to make an end run on Judge Northrup's jurisdiction of the Petition for Review. We believe that issue should be answered with a resounding no.

The above discussion amply demonstrates that the issues raised on this Motion and in this Complaint should be addressed to Judge Northrup and that this Court should stay the proceedings of this action pending the resolution of the action in that Court. The defendants, accordingly respectfully request that the Motion for Temporary Injunction be denied and that the Court enter an Order staying these proceedings pending resolution of the suit currently pending before Judge Northrup.

II. ALTERNATIVELY, THE MOTION FOR TEMPORARY INJUNCTION MUST BE DENIED ON THE GROUNDS THAT THERE IS NO LIKELIHOOD THAT PLAINTIFF WILL PREVAIL ON THE MERITS OF THIS ACTION

In the event this Court determines that it has authority to consider the State's Motion for injunctive relief, DeBeck and Refuse Hideaway submit that the Motion must be denied on its merits because there is no likelihood that the State will prevail on the merits of this action.

As the State readily concedes in its motion papers and supporting Memorandum, to sustain its Motion for Temporary Injunction, the State, at a minimum, must demonstrate that there is a likelihood that it will prevail on the merits of the underlying action. Defendants submit that the DNR in issuing the Closure Plan Modification failed to comply with relevant applicable statutory provisions and therefore there is no likelihood that the State will prevail on the merits of its underlying action.

A. The Plan Closure Modification Is Non-Enforceable By Virtue Of DNR's Failure To Comply With Section 144.44(4)(g),(8) Of The Wisconsin Statutes.

As noted in the State's Memorandum, the Refuse Hideaway Landfill was first licensed in 1972. As such, the landfill is a nonapproved facility as that term is defined by the solid waste laws. See, Section 144.44(1)(a),(c), Stats. The closure of a nonapproved landfill initially licensed on or before January 1, 1977 is governed by Section 144.44(4)(g) and (8) Stats. which provides as follows in pertinent part:

> (4)(g) **Closure agreement.** Any person operating a solid or hazardous waste facility which is a nonapproved facility as defined under s. 144.442(1)(c) may enter into a written closure agreement at any time with the department to close the facility on or before July 1, 1999.
>
> (8) **Enforcement procedures for older facilities.** Notwithstanding s. 144.47, for solid waste facilities licensed on or before January 1, 1977, which the department believes do not meet minimum standards promulgated under s. 144.435, the following enforcement procedure shall apply.

(a) The department may issue an order relating to the facility or may refuse to relicense the facility.

(b) The department shall notify the licensee of its intended action under par. (a), and the licensee, within 30 days of receipt of such notice, shall notify the department whether it desires a hearing under par. (c).

(c) If the licensee desires a hearing, the department may not issue the order or decision under par. (a) until a hearing, conducted as a class 2 proceeding under ch. 227, is held. The hearing shall be held in the county where the facility is located. At the hearing the department must establish by a preponderance of all the available evidence that the facility does not adhere to the minimum standards promulgated under s. 144.435. If the hearing examiner's decision is in favor of the department, the order or decision may be issued. The order or decision shall be subject to judicial review under ch. 227.

According to the procedures prescribed by subparagraph (8), before an Order may be issued by the DNR, the DNR must first inform the licensee of its intent to issue the Order and, if the licensee requests a hearing within thirty (30) days of receiving such notice, provide a hearing conducted as a class two proceeding under Chapter 227 of the Wisconsin Statutes. In the present case, DNR neither informed the defendants of its intent to issue the Closure Plan Modification nor provided defendants an opportunity for hearing before issuing the Order. Having failed to comply with the procedures set forth in Section 144.44(8), the DNR and State are without authority to enforce the Closure Plan Modification Order.

By issuing the Closure Plan Modification Order ex parte, the DNR also violated the provisions of subparagraph (4)(g) of Section 144.44. Subparagraph (4)(g) is the only statute which directly

addresses the closure of a nonapproved landfill facility. Subparagraph (4)(g) provides that the operator may at any time prior to July 1, 1999 enter into a closure agreement with the DNR. The use of the terms "closure agreement" and "may" clearly evince a legislative intent that closure plans for nonapproved facilities should, if at all possible, be the result of negotiation between the DNR and the licensee. If subparagraph (4)(g) is to be given any meaning, it must minimally be construed to require that the DNR in good faith attempt to negotiate with the licensee the terms of a closure plan prior to invoking the enforcement procedures provided by subparagraph (8). Such a construction is consistent with principles of statutory construction which provide that a statute should be construed in a manner which will avoid a construction that makes a word or phrase superfluous, State x Ralph Smith v. City of Oak Creek, 407 N.W.2d 901, 139 Wis. 2d 788, 796-797 (1987), and that each part of a statute should be construed in connection with every other part so as to produce an harmonious whole, Levy v. Levy, 388 N.W.2d 170, 130 Wis. 2d 523, 530, reconsideration denied 393 N.W.2d 462, 133 Wis. 2d 33 (1986).

By failing to in good faith negotiate the terms of the Closure Plan Modification, the DNR violated the provisions of subparagraph (4)(g) and the Closure Plan Modification therefore cannot be enforced.

For the reasons set forth above, the defendants respectfully request that the Motion for Temporary Injunction be denied on its merits.

B. Alternatively, This Court Lacks Authority To Issue An Injunction As To Defendant DeBeck.

Should the Court determine that injunctive relief is appropriate under the circumstances of this case, DeBeck submits that such relief may be directed solely at Refuse Hideaway, the current owner and operator of the landfill.

Since October 1, 1982, Refuse Hideaway has been the record owner and licensed operator of the landfill. Notwithstanding this fact, the State contends that DeBeck is nonetheless personally obligated to comply with the Closure Plan Modification. For support of its contention, the State relies upon Wisconsin Administration Code sec. NR 500.03(92) and (93) which incorporates the definitions of owner and operator set forth in sec. 144.442(9), Stats. The state argues that the definitions of owner and operator under sec. 144.442(9), are sufficiently broad so as to encompass any past owner or operator of a licensed landfill. Since DeBeck was a former owner and operator of the landfill, the State reasons that he is personally obligated to comply with the Closure Plan Modification.

DeBeck submits that the State's position is without merit for two reasons: First, the DNR clearly lacked authority to promulgate the regulation relied upon by the State. Second, even if the DNR possessed such authority, the regulation promulgated by the DNR is inconsistent with and patently unreasonable as applied to the statutory framework of the solid waste laws.

1. The DNR Lacked Authority to Promulgate Wisconsin Administrative Code Sec. NR 500.03(92) and (93).

It is the general rule in Wisconsin that an agency created by the legislature has only those powers which are either expressly conferred or which are, by necessity, to be implied from the four corners of the statute under which it operates. Racine Fire & Police Commission v. Stanfield, 234, N.W. 2d 307, 70 Wis. 2d 395, 399 (1975); Peterson v. National Resources Board, 288 N.W. 2d 845, 94 Wis. 2d 587, 592-93 (1980). The effect of this general rule is that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. Racine Fire & Police Commission, 70 Wis. 2d at 399.

The authority of the DNR to issue solid waste regulations is governed by sections 144.431(a), Stats. and 144.435(1) Stats.

Section 144.431(a), Stats. provides that the DNR shall: "promulgate rules implementing and consistent with ss. 144.43 to 144.47."

Section 144.435(1) provides as follows in pertinent part:

> "The department shall promulgate rules establishing minimum standards for the location, design, construction, sanitation, operation, monitoring and maintenance of solid waste facilities...."

Strictly construing these statutes, it is evident that neither statute expressly nor by implied necessity authorized the DNR to define by regulation the terms "owner" and"operator." The

statutory framework of the solid waste laws in fact negates such an intent.

Section 144.442(9) provides as follows in pertinent part:

> (9) RECOVERY OF EXPENDITURES. (a) **Definitions.** In this subsection:
>
> 1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
>
> 2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
>
> (c) **Persons responsible.** 1. An owner or operator is responsible for conditions at a site or facility which presents a substantial danger to public health or welfare or the environment if the person knew or should have known at the time the disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner which would cause a substantial danger to public health or to the environment.
>
> 2. Any person, including an owner or operator and including a subsidiary or parent corporation which is related to the person, is responsible for conditions at a site or facility which present a substantial danger to public health or welfare or the environment if:
>
> (a) The person violated any applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation caused or

contributed to the condition at the site or facility; or

(b) The person's action related to the disposal caused or contributed to the condition at the site or facility and would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for that person at the time the disposal occurred.

(d) **Right of Action.** A right of action shall accrue to the state against any person responsible under par. (c) if an expenditure is made for environmental repair at the site or facility or if an expenditure is made under sub. (8).

(f) **Action to Recover Costs.** The attorney general shall take action as is appropriate to recover expenditures to which the state is entitled.

By its express terms, the legislature intended to limit the definitions provided in Section 144.442(9) to actions by the State to recover expenditures for environmental repair. If the legislature had intended the definitions to apply to all provisions of the solid waste laws, it would have simply defined such terms in Section 144.43 Stats., the general definition section. By expanding Section 144.442(9)'s definition of owner and operator to apply in all situations, the DNR exceeded it authority and in doing so ascribed to such terms a meaning which the legislature clearly intended to have only limited application.

Even if Sections 144.431(a) and 144.435(1) could be construed to authorize the DNR to define the terms owner and operator, the definitions adopted by Section NR 500.103(92) and (93) are inconsistent with and patently unreasonable when applied to the

framework of the solid waste laws and would lead to absurd results surely not contemplated by the legislature.

Under the definitions adopted by the DNR, any person who at any time owned or possessed stock, even one share of stock, in a corporation which at some point in time owned or operated a landfill may be personally compelled to comply with any enforcement Order rendered by the DNR. Such an interpretation of the solid waste laws not only constitutes an outright abolition of the doctrine of shareholder limited liability but raises serious state and federal due process concerns.

Such interpretation also would permit the incongruous result of enabling the DNR to make an end run on the requirements of Section 144.442(9) by compelling a party by means of an administrative order to expend funds which it could not otherwise exact under Section 144.442(9). Under Section 144.442(9)(a), an owner or operator is liable to the State in a cost recovery action only if such person knew or should have known at the time the disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner which would cause a substantial danger to public health or welfare or to the public, or, at the time of disposal, such person violated an applicable statute, rule, plan approval or special order in effect and such violation contributed or caused the condition to occur, or if the persons' actions relating to the disposal of waste would have exposed such person to liability under common law standards in effect at the time disposal occurred. Under the DNR's

interpretation, the DNR could avoid such issues by simply rendering an administrative order directing the party to clean-up the landfill.

The statutory framework of the solid waste laws provide further evidence that the legislature did not intend the expansive interpretation advanced by the DNR. Section 144.441(3)(a), for instance, provides as follows in pertinent part:

> (3) IMPOSITION OF TONNAGE FEE;EXCEPTION; USE. (a) Imposition of tonnage fee. Except as provided under pars. (b) to (d) and (e), the owner or operator of a licensed solid or hazardous waste disposal facility shall pay periodically to the department a tonnage fee for each ton or equivalent volume of solid or hazardous waste received and disposed of at the facility during the preceding reporting period. The department may determine by rule the volume which is equivalent to a ton of waste.

According to the State, a past owner or operator of a landfill would be liable for the tonnage fee notwithstanding the fact that such person no longer receives any remuneration from the landfill and has no control over the amount of waste disposed at the landfill.

Similarly, Section 144.441(7)(b) provides that:

> (b) Collection. The owner or operator of a licensed solid or hazardous waste disposal facility shall collect the groundwater fee from the generator, a person who arranges for disposal on behalf of one or more generators or an intermediate hauler and shall pay to the department the amount of the fees required to be collected according to the amount of solid or hazardous waste received and disposed of at the facility during the preceding reporting period.

The State would impose upon a past owner or operator of a landfill a duty to collect and pay to the DNR the statutory mandated groundwater fee notwithstanding the fact such party would lack any knowledge of from whom it should collect the fee or how much it should collect.

As the above cited sections of the solid waste laws amply demonstrate, except as provided in Section 144.442(9), it is evident that the legislature intended that the terms "operator" and "owner," as applied to the solid waste laws, mean the current owner and licensed operator of the landfill. Since DeBeck is neither the current owner nor current licensed operator of the landfill, he is not an owner or operator for purposes of the relief sought by the State in this action and cannot be compelled to personally comply with the Closure Plan Modification.

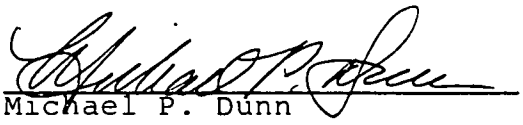
SUMMARY

For the reasons set forth above, Defendants, DeBeck and Refuse Hideaway respectfully request that the Motion for Temporary Injunction be denied or alternatively that relief be directed

solely to Refuse Hideaway, the current owner and licensed operator of the landfill.

Dated at Milwaukee, Wisconsin, this 19th day of December, 1988.

DAVIS & KUELTHAU, S.C.
Attorneys for Defendants
John W. DeBeck and
Refuse Hideaway, Inc.

By: 
Michael P. Dunn

P.O. ADDRESS:

250 E. Wisconsin Avenue
Suite 800
Milwaukee, WI 53202
(414) 276-0200

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Robert A. Selk
Assistant Attorney General
608/267-7163

December 30, 1988

David W. Neeb
Davis & Kaelthau, S.C.
Suite 800
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4285

Re: State of Wisconsin v. John W. DeBeck and Refuse Hideaway, Inc.
Case No. 88-CV-6418

Dear Dave:

Enclosed is a signed copy of the stipulation and order.

Sincerely,

Robert A. Selk
Assistant Attorney General

RAS:jan

Enclosure

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 88-CV-6418

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,
a domestic corporation,

Defendants.

STIPULATION

The State of Wisconsin brought this action against the defendants on December 6, 1988, and has moved the court for the issuance of a temporary injunction. The parties stipulate and agree to the following:

1. Refuse Hideaway, Inc., agrees to install twenty-four gas monitoring probes as set out in the Conditional Closure Plan Approval Modification dated September 6, 1988. The probes shall be installed at the earliest practicable time and in no event later than February 1, 1989, unless a later date is agreed to in writing by the parties. The Department of Natural Resources will consider reducing the total number of monitoring probes to be installed after consultation with Refuse Hideaway, Inc.

2. The gas monitoring probes shall be installed in a sequence that will give priority to the placement of probes in the areas of highest potential gas migration. Technical staff of the parties shall consult on the appropriate installation

sequence and thereafter the Department of Natural Resources shall forthwith approve an installation sequence. Installation shall be in accord with the approval.

3. As the probes are installed, each shall be monitored on a weekly basis for a minimum of one month. Thereafter, if methane levels at all probes do not exceed twenty-five percent of the lower explosive limit, the Department of Natural Resources may, after consultation with Refuse Hideaway, Inc., reduce the frequency of monitoring. All results of monitoring shall be submitted to the Department of Natural Resources.

4. Nothing in this stipulation or order shall be construed or used in any manner to determine the appropriateness or validity of any provision of the September 6, 1988, Conditional Closure Plan Approval Modification, or of the authority of the Department of Natural Resources to issue the Modification.

5. The attached order may be issued by the court without further notice to the parties.

Dated: 12/30/88

DONALD J. HANAWAY
Attorney General

ROBERT A. SELK
Assistant Attorney General

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-7163

Dated: 29 Dec 88

DAVIS & KUELTHAU, S.C.

DAVID W. NEEB

Attorneys for Defendants

250 East Wisconsin Avenue
Suite 800
Milwaukee, Wisconsin 53202
(414) 276-0200

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 88-CV-6418

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,
a domestic corporation,

Defendants.

ORDER

The State of Wisconsin, having moved the court for a temporary injunction, and the parties having entered into a stipulation that an order may issue;

NOW, THEREFORE, upon the record and file herein, the defendant Refuse Hideaway, Inc., is hereby ordered to do the following:

1. Refuse Hideaway, Inc., shall install twenty-four gas monitoring probes as set out in the Conditional Closure Plan Approval Modification, dated September 6, 1988. The probes shall be installed at the earliest practicable time and in no event later than February 1, 1989, unless a later date is agreed to in writing by the parties.

2. The gas monitoring probes shall be installed in a sequence that will give priority to the placement of probes in the areas of highest potential gas migration. Technical staff of the parties shall consult on the appropriate installation

sequence and thereafter the Department of Natural Resources shall forthwith approve an installation sequence. Installation shall be in accord with the approval.

3. As the probes are installed, each shall be monitored on a weekly basis by Refuse Hideaway, Inc., for a minimum of one month. Thereafter, if methane levels at all probes do not exceed twenty-five percent of the lower explosive limit, the Department of Natural Resources may, after consultation with Refuse Hideaway, Inc., reduce the frequency of monitoring. All results of monitoring shall be submitted to the Department of Natural Resources.

4. Nothing in this stipulation or order shall be construed or used in any manner to determine the validity of any provision of the September 6, 1988, Conditional Closure Plan Approval Modification, or of the authority of the Department of Natural Resources to issue the Modification.

Dated: 12-30-88

BY THE COURT:

MORIA G. KRUEGER
Circuit Judge

Speed Letter®

To C. Levesque DNR

From Bob Selk DOJ

Subject State v DeBerry 88 CV 618

— No. 9 & 10 FOLD

MESSAGE

Date 1/30 1989

Enclosed is copy of defendant's answer & transmittal letter -

— No. 9 FOLD

— No. 10 FOLD

Signed

REPLY

Date 19

— No. 9 & 10 FOLD

Signed

Wilson Jones Company
GRAYLINE FORM 44-912 3-PART
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RECIPIENT—RETAIN WHITE COPY, RETURN PINK COPY.

Davis & Kuelthau, s.c.
ATTORNEYS AT LAW

January 27, 1989

Cynthia Fokakis
Clerk of Circuit Court
Dane County Courthouse
210 Monona Avenue
Madison, WI 53709

Re: State of Wisconsin v. John W. DeBeck and Refuse Hideaway, Inc.
Case No.: 88-CV-6418

Dear Mr. Selk:

Enclosed please find an original and one (1) copy of Defendants' Answer and Affirmative Defenses in the above-captioned matter. Please file same and return a conformed copy in the enclosed self-addressed stamped envelope.

By copy of this letter, Attorney Selk is being served with a copy of same.

Thank you for your attention to this regard.

Very truly yours,

DAVIS & KUELTHAU, S.C.

Michael P. Dunn

MPD:dvv
Enclosure

cc: Mr. Robert A. Selk

P.S. Mr. Selk: It is unclear to me whether our Stipulation has mooted this action. To the extent you blieve it hasn't, I've filed this response.

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 88-CV-6418

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,
Domestic Corporation,

Defendants.

ANSWER AND AFFIRMATIVE DEFENSES

Defendants, John W. DeBeck and Refuse Hideaway, Inc., as and for an Answer to the Complaint of the Plaintiff, allege and state as follows:

1. Defendants admit the allegations contained in ¶1 and ¶2 of the Complaint.

2. Answering ¶3 of the Complaint, Defendants admit that Refuse Hideaway, Inc. is a domestic corporation and corporate in the State of Wisconsin on February, 1982, and that its registered agent for service is John W. DeBeck, 6629 Gettysburg Drive, Madison, Wisconsin 53562. Defendants deny that it is presently in bad standing.

3. Answering ¶4 of the Complaint, Defendants deny that Defendant John W. DeBeck has at all times material controlled the property.

4. Defendants admit the allegations contained in ¶5-7 of the Complaint.

5. Answering ¶8 of the Complaint, Defendants admit that since

October 1, 1982 to May 15, 1988, Defendant, Refuse Hideaway, Inc. has operated a landfill on the Property for the disposal of solid waste under License No. 1953 issued by the Wisconsin Department of Natural Resources and that throughout the time period in question, John W. DeBeck served as President of Refuse Hideaway, Inc. Defendants deny the remaining allegations contained in ¶8.

6. Defendants admit the allegations contained in ¶9 of the Complaint.

7. Answering ¶10 of the Complaint, Defendants admit that Refuse Hideaway, Inc. is an owner/operator of the landfill on the Property. Defendants deny that Defendant, John W. DeBeck is a current owner or operator of the landfill or the property.

8. Defendants admit the allegations contained in ¶11 and ¶12 of the Complaints. Defendants specifically allege that the Special Consent Order was a result of negotiations between the Department of Natural Resources and Defendants as to Defendants' obligations with respect to the Closure Plan Approval issued on April 7, 1987.

9. Answering ¶13 of the Complaint, Defendants allege that ¶3 of the Consent Order speaks for itself and therefore requires no response from these answering Defendants.

10. Answering ¶14 of the Complaint, Defendants admit that on July 1, 1988, in compliance with ¶3 of the Consent Order, Defendants submitted to the Department of Natural Resources a proposed landfill gas management plan, the terms of which, speak for itself. To the extent the allegations contained in ¶14 are

inconsistent with the terms and provisions of gas management plan submitted by Defendants or Defendants' obligations under the Special Consent Order, Defendants deny the same.

11. Answering ¶15 of the Complaint, Defendants admit that on September 6, 1988, the Department of Natural Resources issued to Defendants a Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill. Defendants deny that the Department of Natural Resources possessed authority to issue the document.

12. Answering ¶16 of the Complaint, Defendants state that the Conditional Closure Plan document speaks for itself and therefore requires no comments from these answering Defendants.

13. Answering ¶17 of the Complaint, Defendants admit that as of the date of the Complaint, Defendants had not installed any of the 24 gas monitoring wells. Defendants deny that they were in violation of any binding plan or order issued by Plaintiff.

14. Defendants deny the allegations contained in ¶18.

15. Answering ¶19 and ¶20 of the Complaint, Defendants allege and state that §§144.98 and 144.99, stats. speak for themselves, and therefore require no response from these answering Defendants.

AFFIRMATIVE DEFENSES

As and for its Affirmative Defenses, Defendants allege and state as follows:

1. The Conditional Closure Plan was not validly issued by the Department of Natural Resources.

2. Even if validly issued, the Department of Natural Resources lacked authority to bind Defendant John W. DeBeck to the terms and conditions set forth therein.

3. The Department of Natural Resources owed a duty to Plaintiff to negotiate the terms and conditions of the Conditional Closure Plan prior to its issuance.

WHEREFORE, Defendants demand Judgment as follows:

1. Dismissing the Complaint of the Plaintiff.

2. Alternatively that the Conditional Closure Plan be held to have no binding force or effect upon Defendant John W. DeBeck.

3. Their costs and disbursements of this action.

4. Such other and further relief as the Court may deem just and equitable.

Dated this 27th day of January, 1989.

Michael P. Dunn, Esq.
Attorney for Defendants,
Refuse Hideaway, Inc. and
John W. DeBeck

P.O. ADDRESS

DAVIS & KUELTHAU, S.C.
111 E. Kilbourn Avenue
Suite 1400
Milwaukee, WI 53202-3101
(414) 276-0200

Speed Letter®

To Ch hevequne
DNR

From R. Selh
DOJ

Subject DeBeck / Refuse Hideaway Dr

— No. 9 & 10 FOLD

MESSAGE

Date 2. 2 1989

Here is copy of petitioner's brief in DeBeck 227 case. If you have any words of wisdom as to how I should respond, I would be grateful

— No. 9 FOLD

— No. 10 FOLD

Signed

REPLY

Date 2/3 1989

(1) Under nuisance law, former owners/operators are jointly & severally liable w/ current owners/operators (See CJS, Nuisances). Our sub/position is consistent w/ this.

(2) We are not bringing action vs. DeBeck as a shareholder; we are pursuing him because he owned/operated the L/F, & contributed to the existing problem. Piercing corp. veil is an entirely different issue. There are strong public policy implications in releasing someone from liability for their actions if they simply convey title to a (wholly owned) corp.[2] It would be different if corp. owned/operated the entire time.

(3) The limitations in 144.442(9) apply only to cost recovery under ERF, which is not at issue here. 144.442(11) provides for no abrogation of other remedies.

(4) 144.44(3)(a) & (7)(b) are enforcible only against current owners/operators since 144.44(4)(c) provides for revocation of operating license for failure to pay fees. Past owners/operators wouldn't care about that.

Signed

RECIPIENT—RETAIN WHITE COPY, RETURN PINK COPY.

Davis & Kuelthau, s.c.
ATTORNEYS AT LAW

January 31, 1989

Cynthia Fokakis
Clerk of Circuit Court
Dane County Courthouse
210 City-County Building
Madison, WI 53709

Re: State of Wisconsin v. John W. DeBeck, et al.
Case No.: 88-CV-5455

Dear Ms. Fokakis:

Enclosed for filing please find an original and one (1) copy of a Memorandum in Support of Petition for Review in the above-captioned proceeding. Please return a conformed copy to me in the envelope provided.

I certify that by copy of this letter, Attorney Robert A. Selk is being served with a copy of same.

Thank you for your attention to this regard.

Very truly yours,

DAVIS & KUELTHAU, S.C.

Michael P. Dunn

MPD:dvv
Enclosures

cc: Robert A. Selk
Assistant Attorney General

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,

Petitioners.

vs. Case No.: 88-CV-5455

STATE OF WISCONSIN,

Respondent,

MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

NATURE OF THE CASE

This matter arises from a Petition for Review filed by Petitioners, Refuse Hideaway, Inc. ("Refuse Hideaway") and John W. DeBeck ("DeBeck"), of an administrative order issued by the Department of Natural Resources ("DNR") entitled "Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill (#1953)" ("September 6 Modification"), a copy of which is attached to the Petition for Review as Exhibit A.

Refuse Hideaway is the owner of a landfill located in Middleton, Wisconsin, known as the Refuse Hideaway Landfill ("Landfill"). DeBeck is the president of Refuse Hideaway. Refuse Hideaway acquired the Landfill from DeBeck by a warranty deed dated March 1, 1982. A license to operate the Landfill (#1953) was issued to Refuse Hideaway on October 1, 1982. Refuse Hideaway operated the Landfill from that date until its closure in the Spring of 1988.

Prior to April 7, 1987, Refuse Hideaway submitted to the DNR a proposed Closure Plan. On April 7, 1987, the DNR issued a Closure Plan Approval, a copy of which is attached as Exhibit B to the Petition for Review.

On May 2, 1988, as a result of contamination found in private water supply wells near the Landfill, Refuse Hideaway and DeBeck agreed to enter into a Consent Order with the DNR, a copy of which is attached as Exhibit C to the Petition for Review. The Consent Order reserved to DeBeck and Refuse Hideaway full right to contest any modification of the Consent Order. The Consent Order further provided that nothing contained therein was to be construed as an admission of liability on the part of DeBeck, personally, or Refuse Hideaway for any purpose other than for action taken for failure to comply with the terms of the Consent Order.

Pursuant to the terms of the Consent Order, DeBeck and Refuse Hideaway agreed to submit to the DNR by no later than July 1, 1988 a plan to monitor for and to prevent migration of explosive gases generated by the Landfill and to collect and combust hazardous air contaminants ("the Plan"). The Consent Order, however, neither addressed nor required that DeBeck or Refuse Hideaway implement the Plan. In compliance with the Consent Order, DeBeck and Refuse Hideaway, through their consultants, RMT, Inc., on July 1, 1988 submitted to the DNR a proposed gas management plan to monitor and prevent migration of explosive gases generated by the Landfill and to collect and combust hazardous air contaminants. A copy of the

Plan and the transmittal letter from RMT, Inc. accompanying the Plan are attached to this Memorandum as Exhibit A.

On September 6, 1988, the DNR issued its September 6 Modification which, among other things, obligated Refuse Hideaway and DeBeck, personally, to install twenty-four (24) gas monitoring probes by October 31, 1988, provide by January 1, 1989 a final detailed plan for construction of a gas extraction system and install and make the gas extraction system operational by September 30, 1989.

In accordance with the rights reserved under the Consent Order, DeBeck and Refuse Hideaway filed this Petition for Review on October 6, 1988. As grounds for review, DeBeck and Refuse Hideaway raised issue as to:

(a) The authority of the DNR to compel DeBeck personally to comply with the terms of the September 6 Modification;

(b) The authority for and propriety of the DNR's decision to require installation of a gas extraction system;

(c) The propriety of the October 31, 1988 deadline to install the twenty-four (24) gas monitoring probes; and,

(d) The authority for and propriety of the DNR's decision to impose, as a part of the September 6 Modification, conditions which do not relate to the subject matter of the proposed Closure Plan of June 1, 1988.

On December 6, 1988, the State of Wisconsin commenced an action in the Circuit Court of Dane County to enforce the terms of the September 6 Modification against Refuse Hideaway and DeBeck. The proceeding is currently pending before the Honorable Moria Krueger.

Pursuant to a Stipulation reached in open court in the enforcement proceeding, Refuse Hideaway agreed to install the gas monitoring probes and to negotiate with the State modification of the deadlines set forth in the September 6 Modification. By virtue of the Stipulation, the only issue which remains to be resolved in this proceeding is whether the DNR possesses authority to compel DeBeck to personally comply with the terms of the September 6 Modification.

THE DNR LACKS AUTHORITY TO COMPEL DEBECK TO PERSONALLY COMPLY WITH THE TERMS OF THE SEPTEMBER 6 MODIFICATION

Since October 1, 1982, Refuse Hideaway has been the record owner and licensed operator of the landfill. Notwithstanding this fact, the State seeks to compel DeBeck to personally comply with the September 6 Modification. The only support for this contention is Wisconsin Administration Code sec. NR 500.03(92) and (93) which incorporates the definitions of owner and operator set forth in sec. 144.442(9), Stats. The definitions of owner and operator under sec. 144.442(9) are sufficiently broad so as to encompass a past owner or operator of a licensed landfill. Since DeBeck was a former owner and operator of the landfill, the State reasons that

he is personally obligated to comply with the September 6 Modification.

DeBeck submits that NR500.03(92) and (93) should be disregarded for two reasons: First, the DNR clearly lacked authority by regulation to define the terms owner and operator; and second, even if the DNR possessed such authority, the regulation promulgated by the DNR is inconsistent with and patently unreasonable as applied to the statutory framework of the solid waste laws.

It is the general rule in Wisconsin that an agency created by the legislature has only those powers which are either expressly conferred or which are, by necessity, to be implied from the four corners of the statute under which it operates. Racine Fire & Police Commission v. Stanfield, 234, N.W. 2d 307, 70 Wis. 2d 395, 399 (1975); Peterson v. National Resources Board, 288 N.W. 2d 845, 94 Wis. 2d 587, 592-93 (1980). The effect of this general rule is that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. Racine Fire & Police Commission, 70 Wis. 2d at 399.

The authority of the DNR to issue solid waste regulations is governed by sections 144.431(a), Stats. and 144.435(1), Stats.

Section 144.431(a), Stats. provides that the DNR shall: "promulgate rules implementing and consistent with ss. 144.43 to 144.47."

Section 144.435(1) provides as follows in pertinent part:

"The department shall promulgate rules establishing minimum standards for the location, design, construction, sanitation, operation, monitoring and maintenance of solid waste facilities...."

Strictly construing these statutes, it is evident that neither statute expressly nor by implied necessity authorized the DNR to define by regulation the terms "owner" and"operator." The statutory framework of the solid waste laws in fact negates such an intent.

Section 144.442(9) provides as follows in pertinent part:

(9) RECOVERY OF EXPENDITURES. (a) **Definitions.** In this subsection:

1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

(c) **Persons responsible.** 1. An owner or operator is responsible for conditions at a site or facility which presents a substantial danger to public health or welfare or the environment if the person knew or should have known at the time the disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner

which would cause a substantial danger to public health or to the environment.

2. Any person, including an owner or operator and including a subsidiary or parent corporation which is related to the person, is responsible for conditions at a site or facility which present a substantial danger to public health or welfare or the environment if:

(a) The person violated any applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation caused or contributed to the condition at the site or facility; or

(b) The person's action related to the disposal caused or contributed to the condition at the site or facility and would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for that person at the time the disposal occurred.

(d) **Right of Action.** A right of action shall accrue to the state against any person responsible under par. (c) if an expenditure is made for environmental repair at the site or facility or if an expenditure is made under sub. (8).

(f) **Action to Recover Costs.** The attorney general shall take action as is appropriate to recover expenditures to which the state is entitled.

By its express terms, the legislature intended to limit the definitions provided in Section 144.442(9) to actions by the State to recover expenditures for environmental repair. If the legislature had intended the definitions to apply to all provisions of the solid waste laws, it would have simply defined such terms in Section 144.43 Stats., the general definition section. By

expanding Section 144.442(9)'s definition of owner and operator to apply in all situations, the DNR exceeded it authority and in doing so ascribed to such terms a meaning which the legislature clearly intended to have only limited application.

Even if Sections 144.431(a) and 144.435(1) could be construed to authorize the DNR to define the terms owner and operator, the definitions adopted by Section NR 500.103(92) and (93) are inconsistent with and patently unreasonable when applied to the framework of the solid waste laws and would lead to absurd results surely not contemplated by the legislature.

Under the definitions adopted by the DNR, any person who at any time owned or possessed stcck, even one share of stcck, in a corporation which at some point in time owned or operated a landfill may be personally compelled to comply with an enforcement Order rendered by the DNR. Such an interpretation of the solid waste laws not only constitutes an outright abolition of the doctrine of shareholder limited liability but raises serious state and federal due process concerns.

Such interpretation would also permit the incongruous result of enabling the DNR to make an end run on the requirements of Section 144.442(9) by compelling a party by means of an administrative order to expend funds which it could not otherwise exact under Section 144.442(9). Under Section 144.442(9)(a), an owner or operator is liable to the State in a cost recovery action only if such person knew or should have known at the time the

disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner which would cause a substantial danger to public health or welfare or to the public, or, at the time of disposal, such person violated an applicable statute, rule, plan approval or special order in effect and such violation contributed or caused the condition to occur, or if the person's actions relating to the disposal of waste would have exposed such person to liability under common law standards in effect at the time disposal occurred. If given effect, NR500.03(92) and (93) would enable the DNR to avoid such issues by simply issuing an administrative order directing the party it seeks recovery from to clean-up the landfill.

The statutory framework of the solid waste laws provide further evidence that the legislature did not intend the expansive interpretation advanced by the DNR. Section 144.441(3)(a), for instance, provides as follows in pertinent part:

> (3) IMPOSITION OF TONNAGE FEE;EXCEPTION; USE. (a) Imposition of tonnage fee. Except as provided under pars. (b) to (d) and (e), the owner or operator of a licensed solid or hazardous waste disposal facility shall pay periodically to the department a tonnage fee for each ton or equivalent volume of solid or hazardous waste received and disposed of at the facility during the preceding reporting period. The department may determine by rule the volume which is equivalent to a ton of waste.

According to the DNR's regulation, a past owner or operator of a landfill would be liable for the tonnage fee notwithstanding the

fact that such person no longer receives any remuneration from the landfill and has no control over the amount of waste disposed at the landfill.

Similarly, Section 144.441(7)(b) provides that:

> (b) Collection. The owner or operator of a licensed solid or hazardous waste disposal facility shall collect the groundwater fee from the generator, a person who arranges for disposal on behalf of one or more generators or an intermediate hauler and shall pay to the department the amount of the fees required to be collected according to the amount of solid or hazardous waste received and disposed of at the facility during the preceding reporting period.

If given effect, the DNR's definition of owner and operator would impose upon a past owner or operator of a landfill a duty to collect and pay to the DNR the statutory mandated groundwater fee notwithstanding the fact such party would lack any knowledge of from whom it should collect the fee or how much it should collect.

As the above cited sections of the solid waste laws amply demonstrate, except as provided in Section 144.442(9), it is evident that the legislature intended that the terms "operator" and "owner," as applied to the solid waste laws, mean the current owner and licensed operator of the landfill. Since DeBeck is neither the current owner nor current licensed operator of the landfill, he is not an owner or operator for purposes of the relief sought by the State in this action and cannot be compelled to personally comply with the September 6 Modification.

SUMMARY

For the reasons set forth above, Defendant DeBeck respectfully requests that the Court reverse the September 6 Modification to the extent it seeks to compel DeBeck to personally comply with its terms.

Dated at Milwaukee, Wisconsin, this 31st day of January, 1989.

DAVIS & KUELTHAU, S.C.
Attorneys for Defendants
John W. DeBeck and
Refuse Hideaway, Inc.

By: Michael P. Dunn

P.O. ADDRESS:

111 E. Kilbourn Avenue
Suite 1400
Milwaukee, WI 53202-3101
(414) 276-0200

RMT, INC.

RMT, Inc.
Suite 124
1406 East Washington Ave.
Madison, WI 53703-3009
Phone: 608-255-2134
FAX: 608-255-0234

July 1, 1988

Ms. Kathryn A. Curtner
Assistant Administrator
Division of Enforcement
WI Department of Natural Resources
P.O. Box 7921
Madison, WI 53707

Re: Special Consent Order SOD-88-02A

Dear Ms. Curtner:
On behalf of Refuse Hideaway Landfill, Inc., (RHL) we have prepared this submittal to address and comply with your May 3, 1988, Special Consent Order (Item No. 3, 5, and 6). Enclosed are the following:

Appendix A

- A proposed landfill gas management plan to monitor and prevent migration of explosive gases generated by the landfill. The plan also addresses the issue of the collection and destruction of hazardous air contaminants.

Appendix B

- A letter summary on the status of monitoring well construction activities.

Please call if we can be of any assistance in your review of the enclosed materials or with any other aspects of the site. It is our understanding that we will receive a response from you concerning the gas management plan in approximately three (3) days.

Sincerely,
Ed Scaro
Ed C. Scaro, P.E.
Senior Project Engineer
Lee A. Bartlett
Lee A. Bartlett, P.E.
Project Manager

slr

Enclosure
cc: John DeBeck
Tom DeBeck
Dave Neeb
Chuck Leveque
Bob Selk
Paul Didier
Paul Huebner

1181.05 208:SLR:curtner

APPENDIX A: LANDFILL GAS MANAGEMENT PLAN

Background:

On May 2, 1988, Refuse Hideaway, Inc., and John DeBeck signed Consent Order SOD-88-02A with the WI Department of Natural Resources. The consent order contained a broad Scope of corrective actions associated with the closure of the Refuse Hideaway landfill. One of the tasks included in the consent order is the development of a landfill gas management plan. Specifically, Item No. 3 of the order required that a plan be submitted to the Department, by July 1, 1988, to effectively monitor the migration of explosive gases generated by the landfill and efficiently collect and control hazardous air contaminants.

On June 3, 1988, RHL was selected for a grant under Wisconsin Energy Bureau's Waste to Energy Evaluation and Technical Assistance Program for a landfill gas recovery project. RHL intends to incorporate this grant into the overall gas management plan. Department and RMT staff met on June 17, 1988 to discuss gas related issues and agreed that a conceptual plan for gas management at the landfill would be to the WDNR by the July 1 deadline.

Purpose:

The purpose of this submittal is to comply with Consent Order SOD-88-02A. This letter report comprises a portion of the overall submittal which responds to Items 3, 5 and 6 of the Consent Order.

This submittal presents a conceptual Landfill Gas Management Plan for Refuse Hideaway Landfill, including a planned technical approach and proposed schedule for the phased development of the plan, that will

monitor and efficiently collect and control landfill gas and hazardous air contaminants.

Scope:

The scope of this submittal is to present the technical approach and design concepts of a Landfill Gas Management Plan for Refuse Hideaway Landfill. The plan has been developed as a four-phase approach and is presented below.

Phase 1: Site Monitoring and Data Collection

Phase 1 will instrument the site and document the presence or extent of landfill gas migration around the site. This data will be used as data for the management plan design. The phase includes the following tasks:

- Install 24 multi-level, perimeter gas monitoring probes.
- Monitor landfill gas concentrations in two separate monitoring rounds and assess compliance/non-compliance of 25% L.E.L. at property boundary.
- Monitor, sample, and analyze the landfill gas for hazardous constituents from the three existing leachate head wells.
- Summarize monitoring data, establish locations for gas extraction/migration control, test wells as needed, and present findings and conclusions to Wisconsin DNR.

Time Line: Phase 1 will require eight (8) weeks to complete.

Phase 2: Test Extraction Well Installation

Phase 2 will install test landfill gas extraction wells on which pumping and performance testing will be performed. This phase includes the following tasks:

- Install three test gas extraction wells for migration

control/landfill gas recovery if needed and for internal hazardous constituents across the site.

- Install radius of influence probes around the gas extraction wells to monitor test well performance during pump testing.

- Summarize project status and present findings and conclusions to the WDNR.

Time line: Phase 2 work will require four weeks and assumes the final cover is completed prior to the installation of test wells and probes.

Phase 3: Pump Testing

Phase 3 pump testing will be performed on the three test landfill gas extraction wells to establish the engineering design data needed to develop a landfill gas migration recovery system. The phase includes the following tasks:

- Perform pump test on gas extraction wells.

- Monitor radius of influence probes, gas monitoring probes, and gas extraction wells.

- Analyze extracted gas for hazardous contaminants, methane concentration, and gas contaminants (i.e., chlorinated hydrocarbons).

- Summarize data and present findings and conclusions to the WDNR.

Time line: Phase 3 work will require six weeks to perform and would follow immediately after completion of Phase 2 work.

Phase 4: Landfill Gas Migration Control/Recovery System Design

Phase 4 will assess the data gathered under Phases 1-3 and apply it to the design developed for the landfill gas control/recovery system. This phase includes the following tasks:

- Prepare and submit a report and plans which describe and illustrate the gas management system to be implemented. The report and plans will be submitted by January 1, 1989.

- Implement perimeter gas migration control system as required to meet 25 percent L.E.L. at property boundary.

- Implement internal gas collection system to control hazardous air emissions as required.

- Implement internal gas collection/gas utilization project if this type of project is feasible based on the testing results.

Time line: Phase 4 work is likely to be performed from December 1, 1988, to July 31, 1989, with the field construction to begin at the latest by June 1, 1989.

DESIGN CONCEPTS:

Existing Conditions:

Two separate areas of gas migration potential have been identified at the Refuse Hideaway Landfill site: an area of lower potential for migration and an area of higher potential. Table 1 summarizes the physical characteristics of the existing gas probes and their relationship to the hydrogeology and waste. Existing data indicate an area of lower potential for landfill gas migration to the south of the site due to the high ground water table (0-5 feet below ground surface) and the geology, which consists of silty clayey sands (see Table 1). The data indicate an area of higher potential for gas migration to the west, north, and east areas of the site. This is mainly due to the deeper ground water table (greater than 40') and the fractured sandstone bedrock geology. The shallow soils and fractured bedrock found in these areas provide an area of high potential for gas migration.

The landfill gas monitoring performed on the existing gas probes is included in Table 2. Based on this limited data it is difficult to assess if the compliance standard (25% of the L.E.L.) is exceeded at the property line of the facility.

Based on existing site data and the potential for gas migration in the two separate areas, the following phases were established to

comprise the Landfill Gas Management Plan.

Phase 1:

Twenty-four, multi-level landfill gas monitoring probes will be installed around the perimeter of the landfill limits within the two identified migration areas. In the south area, along the south boundary of the site, where a lower potential for gas migration exists, four, multi-level gas monitoring probes will be installed at a maximum spacing of 300 feet. The probes will be placed in the unsaturated zone and will be screened from two feet below the surface to two to six feet below the water table. All four probes will be installed to a minimum depth of ten feet. Around the west, north, and east boundaries of the site where a high potential for gas migration exists, 20 multi-level gas monitoring probes will be installed at spacing ranging from 100 to 200 feet on center to depths of 40, 70, or 100 feet. The probes in these areas will be screened (depending on depth) from 5 to 15 feet, 25 to 40 feet, 55 to 70 feet, and 85 to 100 feet (See Figure 1 for locations of probes and Figure 2 for diagram of probe detail). All probe locations are tentative and are subject to field conditions depending on the accessibility of the particular area.

Gas concentrations will be measured at each of the monitoring probes over two monitoring rounds. After two rounds of monitoring data have been compiled, an assessment of areas of compliance or non-compliance with Wisconsin Administrative Code NR504 Section 7 (a) will be made. NR504 Section 7 (a) states that the concentration of gases in any facility structure, and in the soils or air at or beyond the

facility property boundary, shall not exceed 25% of the lower explosive limit for such gases at any time. The monitoring should be performed after a final cover has been applied to the site as this data will be more representative of future long-term conditions.

The three existing leachate head wells will be sampled and analyzed for hazardous constituents as required in the Consent Order. Two rounds of landfill gas monitoring and analysis will be performed. The gas will be analyzed for hazardous constituents, including vinyl chloride and benzene. The gas will also be tested for methane, oxygen, nitrogen, carbon dioxide, and chlorinated hydrocarbons.

The monitoring data will be summarized, and the findings and conclusions of the monitoring program will be presented to the DNR. The time frame for this phase of work to be completed is based on the proposed final cover to be completed by August 15, 1988.

Phase 2:

Three landfill gas extraction wells have been conceptually laid out at key locations within the limits of waste (See Figure 1 for conceptual locations and Figure 3 for construction level detail). The three gas extraction well locations have been conceptually located and their location may be adjusted depending on the monitoring results of Phase 1. At each extraction well location, eight radius of influence probes will be installed at approximate 25-foot centers along two different radial lines (See Figure 1 for conceptual locations and Figure 4 for construction level detail).

Phase 3:

Pump testing will be performed on the gas extraction wells installed in Phase 2. This testing will provide data on gas composition, and gas generation rates within the landfill. The gas will also be analyzed for hazardous constituents (i.e. vinyl chloride, benzene) and for gas contaminants (ie. chlorinated hydrocarbons). Gas composition is one of the primary factors in a landfill gas testing program, since the energy content of landfill gas is directly proportional to its methane concentration. This factor will be used to determine the feasibility of a gas utilization project for the site.

The radius of influence probes and perimeter gas monitoring probes installed in the previous phases will be monitored to determine the performance of the extraction wells at specified pumping rates. The gas extraction well installation and testing will be performed to comply with the State Department of Energy's grant program so that these funds will be used to help in determining the feasibility of a landfill gas utilization project.

Phase 4:

After monitoring data from the three previous phases have been compiled and analyzed, design alternatives will be developed for the implementation of a complete landfill gas management plan which will incorporate the following goals:

1. A perimeter gas migration control system that ensures compliance with the greater than 25 percent lower explosive limit at the property boundary.

2. An internal gas collection system that effectively controls hazardous air emissions from the landfill (if required).

3. An internal gas recovery and utilization system that generates

electricity in an environmentally safe and cost-effective manner (if feasible).

These three goals may be interrelated and combined to make up the gas management system. A report and plans will be submitted which will indicate what type of system will be installed at the site to accomplish the above-stated objectives. This report will pull together all of the information gathered in Phases 1, 2, and 3 and then, based on this information, will present a logical approach to meet the goals of the WDNR and Refuse Hideaway, Inc.

TABLE 1
EXISTING GAS PROBES

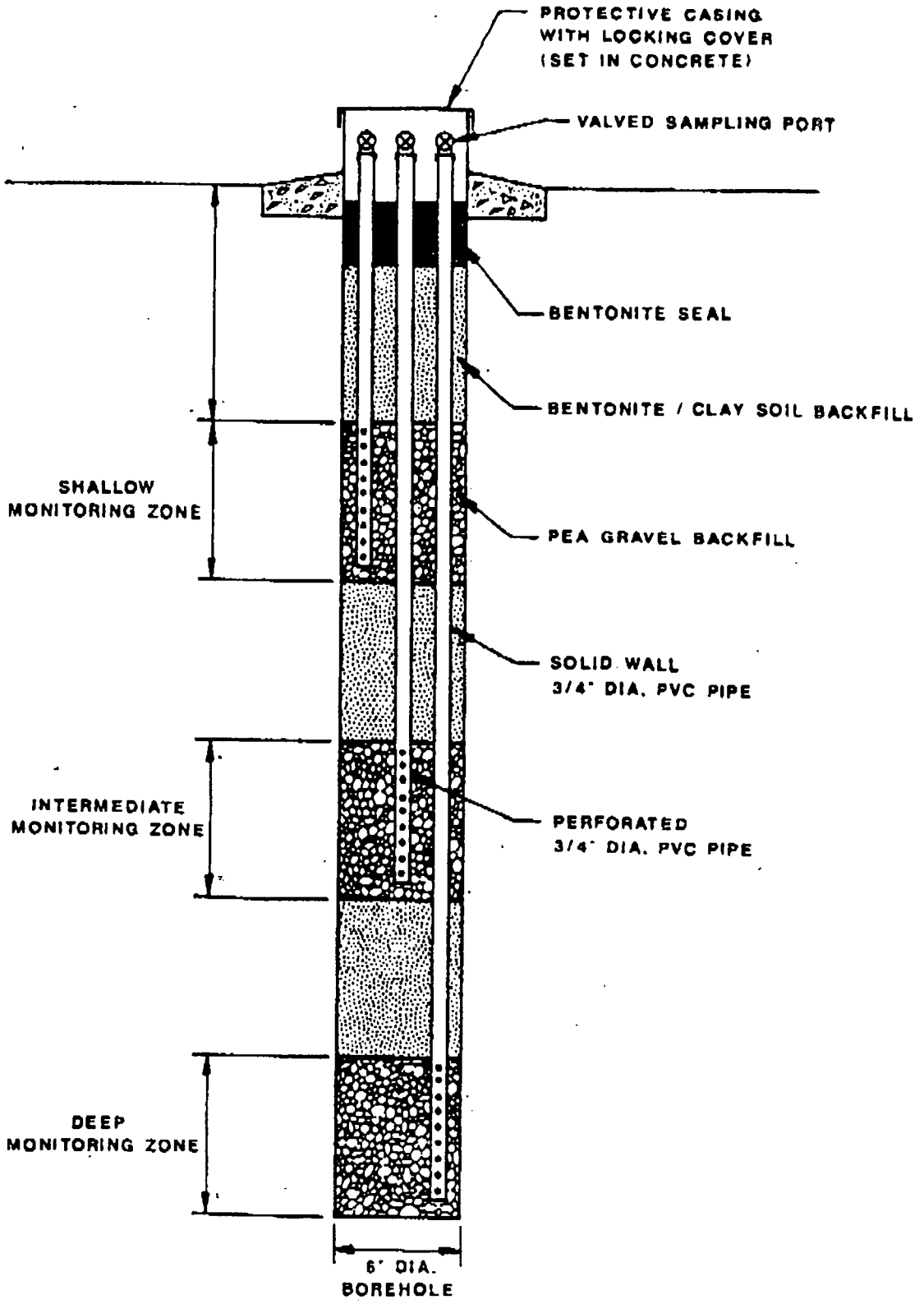
PROBE	PERFORATED INTERVAL	STRATIGRAPHY	DEPTH TO WATER	HORIZ. DISTANCE FROM WASTE
G1-1 Deep	20'-30"	0-1' Sandy silt, 1-39' Sandstone bedrock	39'	130'
G1-2 Shallow	2'-17'	0'1 Sandy silt, 1-39' Sandstone bedrock	39'	130'
G2-S	2'-17'	1'-3' Soil 3'-20'+ Sandstone	?	70'
G2-D	20'-30'	1'-3' Soil, 3'-20'+ Sandstone	?	70'
G3-S	2'-10'	0'-4' Silty sand/ gravel, 4'-100' Dolomite, 100'+ Sandstone	150'	120'
G3-D	12'-20'	0'-4' Silty Sand/ gravel, 4'-100' Dolomite 100'+ Sandstone	150'	120'
G4-A	7'-14'	0'-15' Sandy clay soil	-	20± in Berm
G4-B	2'-5'	0'-15' Sandy clay soil	-	20± in Berm
G5	2'-8'	0'-41' Silt/sand soil	6'	50'
G6	20'-30'	0'-10' Silty sand and gravel 10'-100'± Sandstone bedrock	95'	240'

1181.05 208:PRO:refu0629T

TABLE 2
SUMMARY OF GAS PROBE SAMPLING RESULTS

		8/4/87	8/18/87				12/30/87
Gas Probe Identification	Depth	Percent of Lower Explosive Limit (LEL)*	Percent of Lower Explosive Limit (LEL)	Percent Oxygen	Ground Cover	Cover Condition	Percent of Lower Explosive Limit (LEL)
G-1	Shallow	90%	> 100%	6.2	bare	damp	0%
	Deep	80%	12%	20.5	bare	damp	0%
G-2	Shallow	90%	63%	10.9	rock	dry	1%
	Deep	90%	> 100%	.4	rock	dry	2%
G-3	Shallow	1%	> 100%	10.3	bare	dry	90%
	Deep	3%	> 100%	7.8	bare	dry	89%
G-4		7%	69%	8.5	bare	damp	86%
G-5		10%	2	20.8	sparse grass	damp	87%
G-6		7%	1	21.2	bare	dry	2%

*The Lower Explosive Limit for Methane is 5% (i.e., an LEL of 100% is equal to 5% Methane).

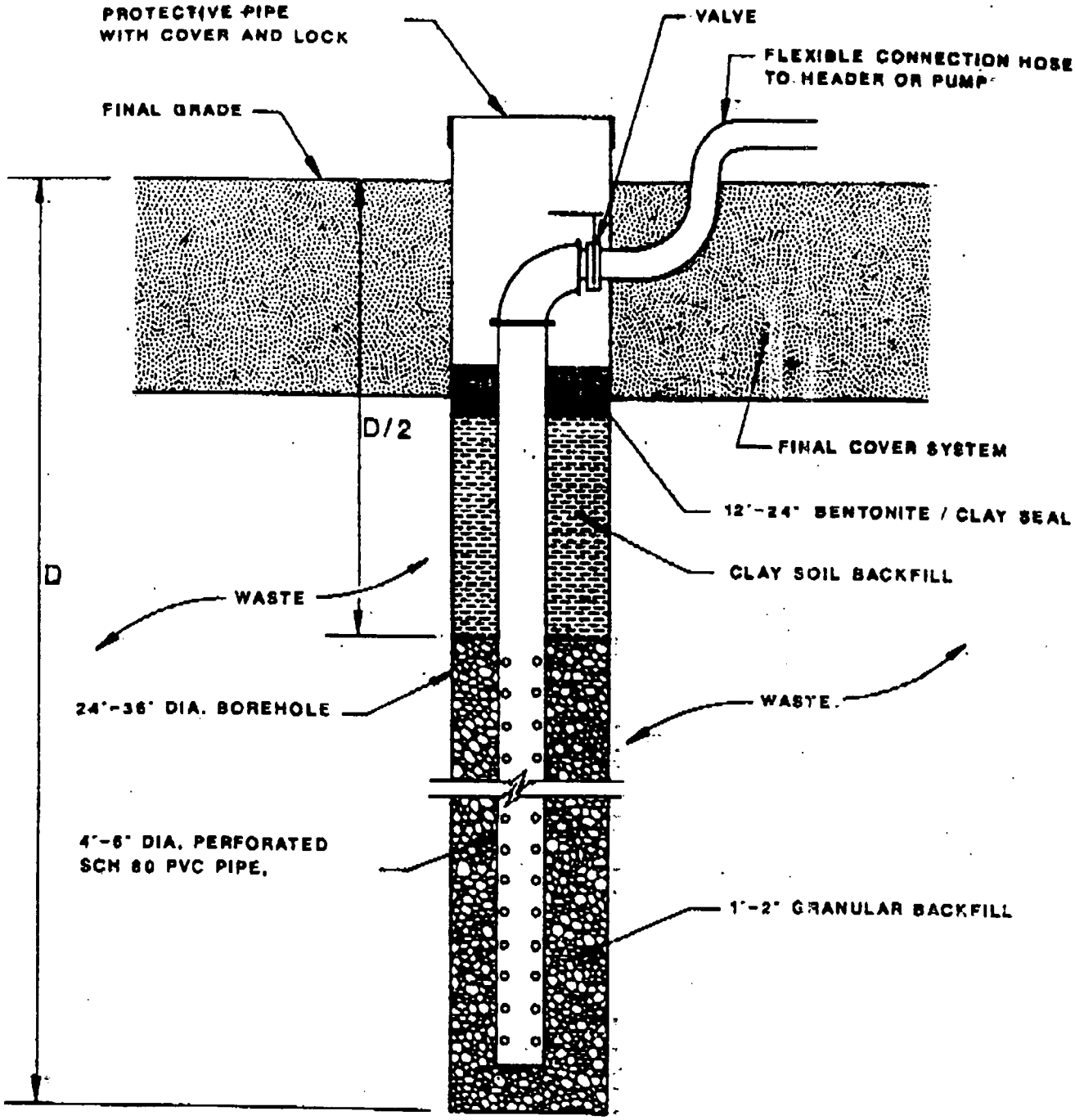


MULTI-LEVEL GAS MONITORING PROBE

RMT INC

Drwn by	PPD
Date	JUNE, 1988
Proj #	1181.05

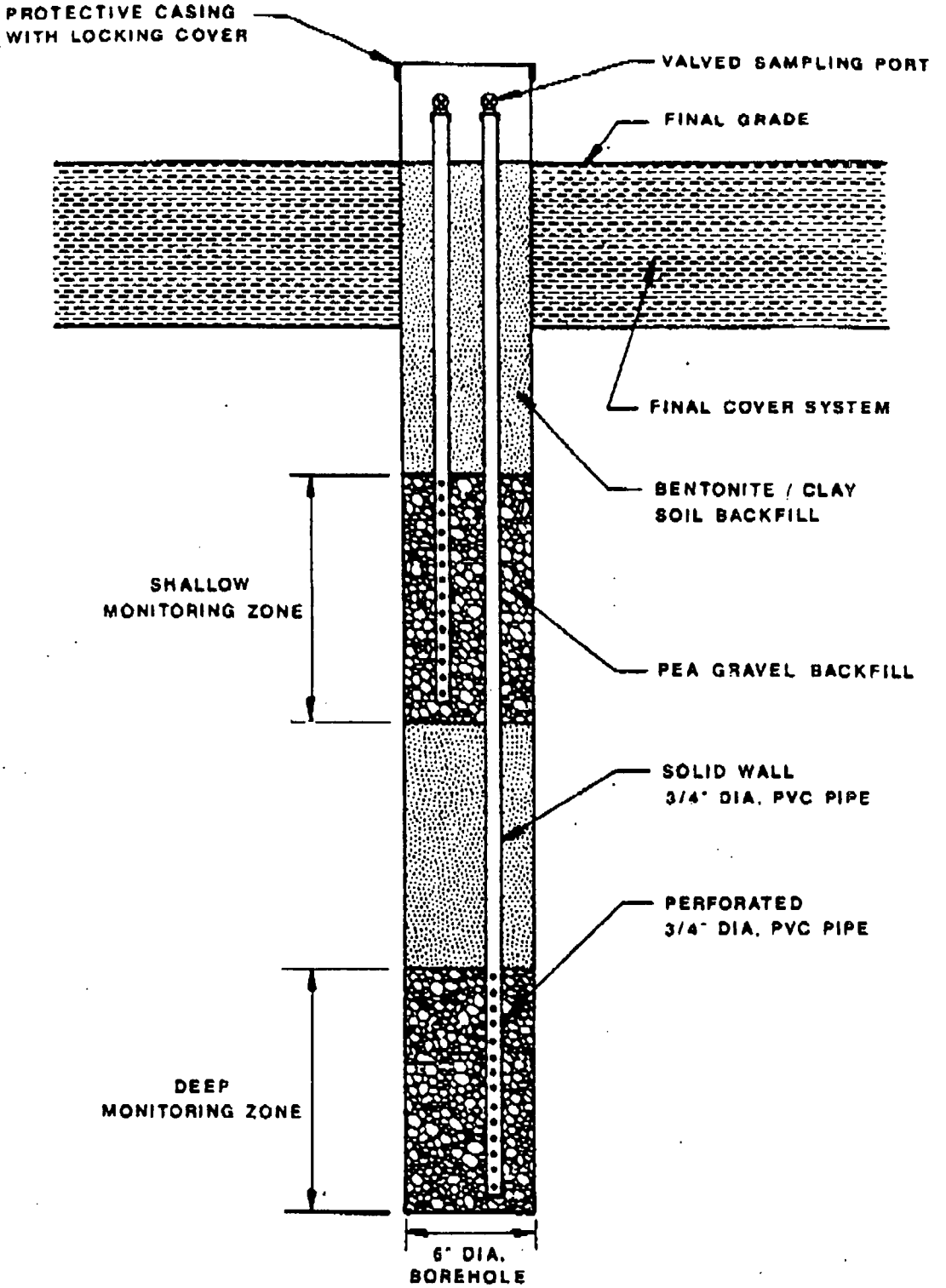
Figure 2



LANDFILL GAS EXTRACTION WELL

RMT INC	Dwn by PPD
	Date JUNE, 1988
	Proj # 1181.05

Figure 3



MULTI-LEVEL RADIUS OF INFLUENCE PROBE

RMT INC	Dwn by RPD
	Date JUNE, 1988
	Proj # 1181.05

Figure 4

APPENDIX B: SUMMARY LETTER

July 1, 1988

Mr. Raymond Tierney
Department of Natural Resources
SW-3
P.O. Box 7921
Madison, WI 53714

Dear Ray:

The purpose of this letter is to update you on the progress of the drilling at the Refuse Hideaway Landfill. Between two and three drilling rigs have been on-site for the past three weeks in an effort to complete well installation as soon as possible. We anticipate that 12 of the 15 wells required in the Consent Order will be substantially completed by July 1. We hope to install a 13th well next Tuesday. These will include the following wells:

P-21BR	P-22S
P-23S	P-24E
P-24D	P-25D
P-25S	P-26S
P-25BR	P-27S
P-26D	
P-28S	

We have used the field gas chromatograph (FGC) to select well screen depths at P-25D, and P-23D. The FGC measured VOC concentrations in soil head space samples from P-25BR, and the water samples at P-23D. At P-25BR, a sand and gravel zone from 85 to 95 feet deep was identified as a zone containing higher concentrations of chlorinated volatile organic compounds (VOCs). While aromatic hydrocarbons were also identified, it is not clear whether these compounds were contaminants in the drilling mud.

The discrete zone testing and sampling of water at P-23D appeared to work better than soil head space analysis, because there was less chance of cross-contamination so the integrity of the samples appeared to be better. However, this zone testing is a slow process. Some water is used in drilling and coring, so this water must be purged from the formation prior to sampling. Testing at P-23D appeared to differentiate a zone higher in the formation that contained chlorinated ethylene compounds and a deeper zone that also contained some aromatic hydrocarbons such as toluene.

Three rounds of landfill gas have been collected from gas probes and leachate head wells and analyzed using the FGC. Chlorinated VOCs and aromatic hydrocarbons were identified in the gas.

We will be unable to meet the deadline of July 1 for completion of all wells. The reasons for this delay include the following:

- Difficult drilling conditions have been encountered. The soft sandstone presented a problem for the drillers because soft sand in the borehole would cave in and wedge the drill bit or core barrel in the borehole. As a result, three boreholes will have to be abandoned with equipment in the bottom of the hole. This resulted in additional delays because:
  - boreholes had to be re-drilled;
  - alternative measures such as casing the borehole, or getting a more powerful rig had to be arranged; and
  - efforts were made to retrieve the drilling bits and core barrel.
- Packer testing of discrete zones is taking longer than anticipated. It is taking approximately one day to drill, case, purge, and sample a single 10-foot zone in the rock. We had originally anticipated that at least two zones could be sampled in a day.

At this time, we hope to be finished with the 15 wells by July 15, assuming that 50 feet of sampling is performed on each of the two remaining wells. Deeper drilling and more testing will result in additional delays. At this time, we anticipate that samples will be collected the week of July 18, 1988. Furthermore, it should be possible to submit a water table map and summary of FGC results by August 1.

Please call if you have any questions.

Sincerely,

Howard Evan Canfield
Project Hydrogeologist

Lee A. Bartlett, P.E.
Project Manager

ljv

Enclosure

1181.05 103:SLR:tierney

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Robert A. Selk
Assistant Attorney General
608/267-7163

February 21, 1989

David W. Neeb
Davis and Kuelthau, S.C.
111 East Kilbourn Avenue
Suite 1400
Milwaukee, Wisconsin 53202-3101

Re: State of Wisconsin v. John W. DeBeck, etal.
Case No. 88-CV-6418

Dear Mr. Neeb:

Enclosed please find a Notice of Motion and Motion for an Order Finding Contempt and the Imposition of Remedial Sanctions in the above matter. You will see that the matter is scheduled for March 2, 1989, at 2:00 p.m. The clerk of court has informed me that there is a case ahead of ours and we may not be able to proceed at that time.

I have just been informed that the Department of Natural Resources has hired a contractor to do gas monitoring at the landfill, but needs to obtain keys to unlock the probes. At this time the DNR has been unable to determine who has the keys. I would appreciate your assisting in letting us know where the keys are and where we might obtain them.

Thank you for your attention to this matter.

Sincerely,

Robert A. Selk
Assistant Attorney General

RAS:aag

Enclosures

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 88-CV-6418

JOHN W. DEBECK and REFUSE HIDEAWAY, INC., a domestic corporation,

Defendants.

NOTICE OF MOTION

To: David W. Neeb
Michael P. Dunn
Davis and Kuelthau, S.C.
111 East Kilbourn Avenue
Suite 1400
Milwaukee, Wisconsin 53202-3101

PLEASE TAKE NOTICE that the State of Wisconsin, by its attorneys, Donald J. Hanaway, Attorney General, and Robert A. Selk, Assistant Attorney General, will move the court at the Dane County Courthouse, 210 Martin Luther King, Jr. Boulevard, in the City of Madison on the 2nd day of March, 1989, at 2:00 p.m., or as soon thereafter as counsel can be heard for an order finding the defendant Refuse Hideaway, Inc., in contempt of court and for

imposition of remedial sanctions under ch. 785, Stats. A copy of the motion is attached hereto.

Dated this 21 day of February, 1989.

DONALD J. HANAWAY
Attorney General

ROBERT A. SELK
Assistant Attorney General

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-7163

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 88-CV-6418

JOHN W. DEBECK and REFUSE HIDEAWAY, INC., a domestic corporation,

Defendants.

MOTION FOR AN ORDER FINDING CONTEMPT AND THE IMPOSITION OF REMEDIAL SANCTIONS

The State of Wisconsin, by its attorneys, Donald J. Hanaway, Attorney General, and Robert A. Selk, Assistant Attorney General, move the court to find the defendant Refuse Hideaway, Inc., in contempt of court for failure to comply with the order issued by the court on December 30, 1988, and for imposition of remedial sanctions under sec. 785.04(1), Stats. As grounds therefore, the State of Wisconsin informs the court that the defendant Rufuse Hideaway, Inc., has failed in any manner to comply with the provisions of paragraph three of the order requiring the monitoring of all installed gas probes on a weekly basis and for the submission of all monitoring results to the Department of Natural Resources.

The motion is supported by such evidence as may be received at the hearing.

Dated this 21 day of February, 1989.

DONALD J. HANAWAY
Attorney General

ROBERT A. SELK
Assistant Attorney General

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-7163

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Marie Stewart - Madison Area

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Shari Eggleson
Assistant Attorney General
608/266-9627

February 24, 1989

Ms. Linda Bochert
Executive Assistant
Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: John W. DeBeck v. Wisconsin Department of Natural Resources
Case No. 89-CV-0960

Dear Linda:

This is to acknowledge receipt of the above-entitled referral and to inform you that Assistant Attorney General Robert A. Selk will represent the Department in this matter.

Sincerely,

Thomas L. Bosch for

Shari Eggleson
Assistant Attorney General

SE:jak

cc: Charles Leveque
Ronald Curtis

cc - Leveque
cc - Curtis
Marie Stewart -

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Robert A. Selk
Assistant Attorney General
608/267-7163

March 17, 1989

Cynthia Fokakis
Clerk of Circuit Court
Dane County Courthouse
210 City County Building
Madison, Wisconsin 53709

Re: John DeBeck v. Wisconsin Department of Natural Resources
Case No. 89-CV-0960, Branch 12

Dear Ms. Fokakis:

Enclosed for filing is the record in the above-entitled matter. By copy of this letter, petitioner's counsel is being informed of the filing. Thank you for your attention to this matter.

Sincerely,

Robert A. Selk
Assistant Attorney General

RAS:jan

Enclosure

cc: Michael P. Dunn

F3-1

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

FAX 608/267-2223

Justice Building
P.O. Box 7857
Madison, WI
53707-7857

SW/3 7-9387

#267-3579

TO: SUE FISCHER

FROM: BOB SEIK

OF PAGES (including this page): 3

MESSAGES: Enclosed is DeBerk affidavit listing all assets of Corporation. Please talk to M. Stewart & let me know whether it appears OK. I will be in touch on Thursday. BS

NOTE: If you did not receive all of the pages, please contact Mary Berger at 608/267-7959 at your earliest convenience.

Talked to Bob 3/23

MAR-22-'89 WED 09:50 ID:WIS. DEPT OF JUSTICE TEL NO:608/267-2223 #479 P01

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No.: 88-CV-6418

JOHN W. DEBECK and
REFUSE HIDEAWAY, INC.,

Defendants.

AFFIDAVIT OF JOHN W. DEBECK

JOHN W. DeBECK, being first duly sworn on oath, does depose and state that: The list provided below,

1. to the best of his knowledge and belief, constitutes all of the known assets of Refuse Hideaway, Inc., and affiant's best estimate of the fair market value and if appropriate, the advertised sale price for each item of the equipment:

Asset	Estimated Fair Market Value	Advertised Sale Price
Model 977L Cat Loader	$22,000.00	$30,000.00
Cat 90 Pull Scraper	2,000.00	3,950.00
Toledo Scalehead	1,000.00	4,500.00
Lincoln Wire Feeder	800.00	n/a
Accounts Receivable	-0-	n/a
Refuse Hideaway, Inc. Landfill Real Estate and Pertinent Buildings	-0-	n/a

2. The aggregate face value of the Accounts Receivable set forth above is 25,823.32. Affiant does not believe that any part of such sum is collectible.

3. In addition to the above assets, Refuse Hideaway, Inc. receives $400.00 a month in rent from Speedway Sand & Gravel, Inc.

for the lease of a portion of the landfill premises.

John W. DeBeck

Subscribed and sworn to Before Me
This 20 day of March, 1989.

Notary Public, State of Wisconsin
My Commission: 3/23/89

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Robert A. Selk
Assistant Attorney General
608/267-7163

April 4, 1989

Mr. Michael P. Dunn
Davis & Kuelthau, S.C.
Suite 1400
111 East Kilbourn Avenue
Milwaukee, Wisconsin 53202-3101

Re: State of Wisconsin v. John W. DeBeck, et al.
Case No. 88-CV-6418

Dear Mr. Dunn:

Pursuant to paragraph 3 of the Contempt Order dated March 17, 1989, the state has reviewed the affidavit of John DeBeck dated March 20, 1989. Based on the representation that the Model 977L cat loader is a 1973 model, has more than 10,000 hours of service, and that the purchase price was $30,000, the state has no objection to the $22,000 estimated fair market value. The state also does not object to the other estimated values of assets listed in paragraph 1 of the affidavit. However, we do request that the following information be provided as to accounts receivable: names and address of persons or entities owing money, amount owed, date debt incurred, and basis for the obligation.

I also request that all monies received from rental of Refuse Hideaway, Inc. property be paid in accordance with paragraphs 1 and 4 of the Order.

I look forward to the timely liquidation of the company assets. Thank you for your assistance in this matter.

Sincerely,

Robert A. Selk
Assistant Attorney General

RAS:aag

cc: Chuck Leveque
Refuse Hideaway, Inc.
John W. DeBeck

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

REFUSE HIDEAWAY, INC.
and JOHN W. DeBECK,

Petitioners,,

vs. Case No. 88-CV-5455

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

PETITIONER'S REPLY BRIEF

Two issues are raised in this Petition for Review. First, did the legislature grant authority to the DNR to redefine by rule making the terms "owner" and "operator" set forth in the solid waste laws. Second, assuming the legislature granted the DNR such authority, does NR 500.03 (92) and (93) (hereinafter "NR 500.03") fall within the scope of authority granted to the DNR, i.e., is NR 500.03 consistent and reasonable when applied to the statutory framework of the solid waste laws. Petitioner, John W. DeBeck, submits that the DNR has failed to substantiate any support for its contentions that it possessed statutory authority to promulgate NR 500.03 and that such rule fall within the scope of its authority.

I. DNR HAS FAILED TO DEMONSTRATE HOW REDEFINING THE TERMS "OWNER" AND "OPERATOR" IS NECESSARY TO IMPLEMENT THE SOLID WASTE LAWS

As noted in Petitioner's Memorandum In Support Of Petition For Review (hereinafter "Petitioner's Brief"), an agency created by the legislature has only those powers which are either expressly conferred or which are, by necessity,

to be implied from the four corners of the statute under which it operates. The effect of this general rule is that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. See, Petitioner's Brief, p. 5. The DNR apparently does not quarrel with this statement of the law but rather contends that the legislature conferred on it through sec. 144.431(1)(a), Stats., authority to redefine by rule-making the terms "owner" and "operator".

Section 144.431(1)(a) grants to the DNR authority to promulgate rules implementing and consistent with secs. 144.43 to 144.47. Since sec. 144.431(1)(a) does not expressly grant authority to define by rule making the terms "owner" and "operator", DNR must demonstrate that such authority, by necessity, is implied from the four corners of sec. 144.431(1)(a). DNR argues that "***it would seem to be an absolute necessity for the effective implementation of the solid waste laws to define to whom they apply.***" Respondent's Brief, pp. 9-10. DNR's unsubstantiated argument merely begs the question. The DNR offers nothing to show or even suggest that a further redefinition of the terms "owner" and "operator" is essential to implement the solid waste laws nor is there any evidence that such is necessary.

The terms "owner" and "operator" are commonplace, everyday terms readily recognized and comprehended by layman and experts alike. There is no basis to suggest that the legislature intended to accord to such terms any meaning other than their ordinary and commonly understood definitions. As more fully discussed in Section II of this brief, there is also no evidence that according such terms their ordinary and commonly understood meaning will in any manner frustrate the implementation or goals of the solid waste laws.

In view of the DNR's failure to demonstrate any implied necessity to accord to the terms "owner" and "operator" meanings other than their everyday and commonly understood meanings, the DNR clearly lacked statutory authority to define such terms by rule.

II. RESPONDENT'S JUSTIFICATION FOR PROMULGATION OF NR 500.03 LEAVES NO DOUBT THAT DNR EXCEEDED ITS STATUTORY AUTHORITY

Even if the DNR had authority to redefine by rule making the terms "owner" and "operator", sec. 144.431(1)(a) clearly limited such authority to the promulgation of rules consistent with the statutory framework of secs. 144.43 to 144.47. Petitioner has previously catalogued to the Court several glaring examples of how NR 500.03 is neither consistent nor reasonable when applied to the statutory framework of the solid waste laws.

NR 500.03 is derived, word for word, from sec. 144.442(9), Stats. That subsection, however, expressly states that the definitions of "owner" and "operator" set forth therein apply solely to that subsection. It is difficult to imagine how the legislature could have more clearly expressed its intent to limit the applicability of the definitions of "owner" and "operator" set forth in sec. 144.442(9).

Notwithstanding such clear legislative mandate, the DNR, without the benefit of even a single shred of legislative history for support, boldly contends that "***[T]he fact that the legislature defined "owner" and "operator" in one subsection and not for the chapter as a whole does not by necessity remove from the DNR the option to apply the same definition to the rules promulgated***

to implement the subchapter." Respondent's Brief p. 11. The DNR's own justification for the necessity of NR 500.03 demonstrates beyond doubt the futility of this argument.

DNR's justification for enacting NR 500.03 is based on erroneous assumptions that lead to results clearly inconsistent with the statutory framework of solid waste laws. According to the DNR, NR 500.03 is necessary to prevent owners and operators of landfills from reaping the benefits of the landfill and then, as closing time approaches, transferring responsibility to an entity which is under capitalized and unable to properly close the site. NR 500.03 achieves this result by making every past "owner" and "operator" of a landfill 100% liable for costs of closure and long-term care. Respondent's Brief, p. 11. The DNR's assumption is clearly erroneous in that such concerns are already addressed in sec. 144.444, Stats.

Section 144.444 governs the transfer of responsibility for ownership/operation of a landfill. Under sec. 144.444, an owner/operator of a licensed landfill is relieved of its financial responsibility only if the DNR issues a new license to the new owner/operator of the site. In order to qualify for a new license, the new owner/operator must comply with the financial responsibility requirements of sec. 144.443, which are designed to assure financial responsibility for the closure and long-term care of a site.

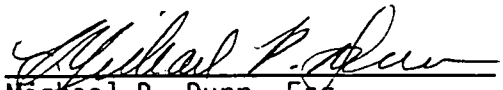
Through sec. 144.444, the legislature clearly provided a means by which financial responsibility for the continued operation and maintenance of a site may be transferred. As long as the transferee meets the specified statutory requirements, the DNR must issue a new license and thereby relieve former owner/operator of its responsibility. By making past owners and operators liable

for future costs, NR 500.03 clearly produces results at odds with the legislative intent and goals embodied in sec. 144.444. Such incongruous results as well as the other examples cataloged by Petitioner in Petitioner's Brief demonstrate beyond any doubt that the DNR, in promulgating NR 500.03, exceeded its statutory authority to promulgate rules which are consistent with and necessary to implement the statutory framework of the Wisconsin solid waste laws.

CONCLUSION

For the reasons set forth above and petitioners' brief, Petitioner, John W. DeBeck, respectfully requests that the Court enter an Order pursuant to sec. 227.57(5) setting aside the Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill (1953), dated September 6, 1988, to the extent such Order compels Petitioner to comply with the terms thereof.

Dated at Milwaukee, Wisconsin, this 30th day of June, 1989.



Michael P. Dunn, Esq.
One of the Attorneys for the
Petitioner, John W. DeBeck

P.O. ADDRESS:

DAVIS & KUELTHAU, S.C.
111 E. Kilbourn Avenue
Suite 1400
Milwaukee, WI 53202-3101
(414) 276-0200

REFUSE HIDEAWAY, INC.

LAND FILL

J. W. DE BECK

7182 HIGHWAY 14 • TELEPHONE (608) 836-1071 • MIDDLETON, WISCONSIN 53562

April 24, 1989

Robert A. Selk
Department of Justice
123 W. Washington Ave.
PO Box 7857
Madison WI 53707

Please find check endorsed to Wisconsn DNR Waste Management Fund. Check is for scale.

John DeBeck

REFUSE HIDEAWAY, INC.

LAND FILL

J. W. DE BECK

7182 HIGHWAY 14 • TELEPHONE (608) 836-1071 • MIDDLETON, WISCONSIN 53562

Robert A. Selk
Department of Justice
123 W. Washington Ave.
PO Box 7857
Madison WI 53703

Please find attached:

Check for $846.23 for rent received from Speedway for March and April, 1989 and 46.23 on accounts receivable.

Also find a bankruptcy notice from Batz Sanitation whose balance on the books is shown as $19,446.50.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

BATZ SANITATION, INC., Case No. MM11-88-00289
Debtor.

NOTICE FOR HEARING ON APPROVAL OF DISCLOSURE STATEMENT

TO THE DEBTORS, THEIR CREDITORS, AND OTHER PARTIES IN INTEREST:

A Disclosure Statement and Plan of Reorganization having been filed on March 17, 1989 under Chapter 11 of the Bankruptcy Code by Batz Sanitation, Inc., it is ordered and notice is hereby given that:

1. The hearing to consider the approval of the Disclosure Statement shall be held at U. S. Bankruptcy Court, 120 N. Henry Street, Room 350, on April 28th, 1989, at 11:30 o'clock, a .m.

2. April 21st, 1989, is fixed as the last day for filing and serving in accordance with Rule 3017(a) written objections to the Disclosure Statement.

3. Within 15 days after entry of this Notice, the debtor-in-possession shall transmit the Disclosure Statement and Plan to the debtor, trustee, each committee appointed pursuant to Sec. 1102 of the Code, and any party in interest who has requested or requests in writing a copy of the Disclosure Statement and Plan.

4. Requests for copies of the Disclosure Statement and Plan shall be mailed to the debtor-in-possession in care of Ross and Chatterton Law Offices, P.O. Box 631, Madison, Wisconsin 53701.

Dated: March 17, 1989.

ROSS AND CHATTERTON LAW OFFICES

Leslie Bradhead Griffith

Leslie Bradhead Griffith
Attorney for Debtor

Ross and Chatterton
P.O. Box 631
Madison, WI 53701
(608) 256-2355

REFUSE HIDEAWAY, INC.

LAND FILL

J. W. DE BECK

7182 HIGHWAY 14 • TELEPHONE (608) 836-1071 • MIDDLETON, WISCONSIN 53562

June 12, 1989

DNR
PO Box 7921
Madison WI 53707

Please see attached.

→ Bob Solk - DOJ

Looks as if Refuse Hideway may be #20,000 w/ intent over the next 7 years, as a second creditor. Does our existing order against him require that he pay it to us? I assume we can't participate in the Ch 11. Chuck 6/15/89

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

BATZ SANITATION, INC., Case No. MM11-88-00289

Debtor.

BALLOT FOR ACCEPTING OR REJECTING PLAN

A Plan of Reorganization and a Disclosure Statement under Chapter 11 of the Bankruptcy Code was filed on March 17, 1989 by Batz Sanitation, Inc. in the United States Bankruptcy Court for the Western District of Wisconsin.

The Plan referred to in this ballot can be confirmed by the Court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the Plan. In the event the requisite acceptances are not obtained, the Court may nevertheless confirm the Plan if the Court finds that the Plan accords fair and equitable treatment to the class rejecting it. To have your vote count you must complete and return this ballot.

(if equity security holder) The undersigned, the holder of _____ shares of _____ stock of the above-named debtor, represented by Certificate(s) No. _____, registered in the name of _____.

(if secured debt holder, bond holder, or debenture holder)

The undersigned, the holder of an unpaid principal amount of $ _____ and security interest in _____ of the above named debtor.

(if holder of general claim) The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $_____, hereby

_____Accepts

_____Rejects

the plan for the reorganization of the above-named debtor.

Dated: _____1989.

Print or type name: _____

Signed: _____

By: _____

as: _____

Address: _____

_____

Return this ballot on or before July 3, 1989

To: ROSS AND CHATTERTON
Attorneys at Law
324 S. Hamilton Street
P.O. Box 631
Madison, WI 53701

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

BATZ SANITATION, INC., Case No. MM11-88-00289

Debtor.

ORDER APPROVING DISCLOSURE STATEMENT
AND FIXING TIME FOR FILING ACCEPTANCES
OR REJECTIONS OF PLAN, COMBINED WITH NOTICE THEREOF

A Plan of Reorganization and Disclosure Statement under Chapter 11 of the Bankruptcy Code having been filed on March 17, 1989 by Batz Sanitation, Inc.; and

It having been determined after hearing on notice that:

1. The provisions of 11 USC Section 1125 et. seq. have been complied with; and

2. The Disclosure Statement contains adequate information which is material, important, necessary, and reasonably practicable to obtain so that a creditor can make an informed judgment on the Plan; and

3. The Plan has been proposed in good faith, not by any means forbidden by law, and is fair, equitable, and feasible;

IT IS ORDERED and notice is hereby given that:

A. The Disclosure Statement and Plan of Reorganization proposed by Batz Sanitation, Inc., filed on March 17, 1989 are approved.

B. July 3, 1989 is fixed as the last day for filing written acceptances or rejections of such Plan.

C. Within ten (15) days after the entry of this Order, the debtor shall transmit by mail to all creditors and other parties in interest as provided by Rule 3017, (1) the Plan or a summary thereof approved by the Court, (2) the Disclosure Statement, (3) a copy of this Notice setting forth time within which acceptances and rejections of such Plan may be filed and the date fixed for the hearing on confirmation of such Plan, and such other information as the Court may direct.

D. The hearing to consider the confirmation of the Plan shall be held at the United States Bankruptcy Court, 120 N. Henry Street, Room 350, Madison, Wisconsin on July 10, 1989 at 2:30 p.m..

E. The last date for filing claims is fixed as the last date for filing acceptances or rejections to said Plan as set forth in paragraph B hereof, namely, the 3rd day of July, 1989.

Dated May 18, 1989.

Robert D. Martin, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

BATZ SANITATION, INC. Case No. MM11-88-00289

Debtors.

DISCLOSURE STATEMENT

I. Introduction

This Disclosure Statement is submitted by Batz Sanitation, Inc., the debtor, pursuant to 11 USC Section 1125. The purpose of this Disclosure Statement is to divulge adequate information to the holders of claims or interests in this matter so that they may make an informed judgment about the Plan of Reorganization which has been filed, together with this Disclosure Statement, with the Bankruptcy Court. After notice and a hearing, the Court will determine if this Disclosure Statement contains adequate information upon which the holders of claims or interests will be able to make an informed judgment about the Plan. All creditors and interested persons should carefully inspect the contents of this Disclosure Statement and the Plan which accompanies it.

II. History

Batz Sanitation, Inc. was founded in the spring of 1968 by Tom Batz at the age of 18, as a lawn mowing and odd job service using his Dad's pick-up truck. During the summer a chain saw and a flatbed truck were added. Tree removal was added to the service list. The Dutch Elm Disease went through the area at this time making much work. In the fall a dump truck with a snow plow was added. The small business was set to work through most types of weather now.

In the spring the gas station where the trucks were kept asked to have their trash hauled to the dump. Neighborhood customers at the gas station saw this and asked to have their trash collected also. By word of mouth a small garbage route began. The business now had a steady cash flow.

Late in the summer of 1970 came the notice of Tom being drafted into the U.S. Army. The dump truck and snow plow were sold. Tom's brother, Marty, became a partner, but because he already had a steady job he only ran the garbage route, which continued to grow.

Tom was discharged in 1972 from the Army and tree removal resumed. A rubber tired loader was bought to lift the heavy tree trunks on to the truck. Another dump truck and snow plow was bought and the company was back into snow removal. The loader and dump truck also put the company into the excavating business.

In 1973 the company was incorporated as Batz Brothers, Inc. Tree removal was beginning to decline as most of the elm trees were gone, but trucking was added.

Late in 1974 rough times began. With so many services, equipment was not being used near capacity. Also some of the equipment was eating the company up in repairs. The garbage route was expanded into other areas.

The excavating equipment and dump trucks were sold off in 1975. The garbage routes continued to grow and commercial container service was added. Now the company was entirely garbage collection.

In 1979 Tom and Marty split up with much hostility.

Roll-off service was added in 1983. This gave full service to the area that the garbage routes served. The roll off service expanded much faster than expected.

Credit was tarnished by the rough times in 1974. Also financing is difficult to obtain on specialized equipment. It was very hard to operate and expand the business.

On February 16, 1988 the company filed for relief under Chapter 11 of the Bankruptcy Code because of pressure from two creditors who refused to work out any solutions to the amounts due. During the pendency of this Chapter 11 proceeding, the company has obtained legal and financial assistance and the companies position has stablized. Also during the pendency of the Chapter 11 proceeding, and at the request of the U.S. Trustee, all of the capital stock and assets of Batz Trucking Corp., were transferred to Batz Sanitation, Inc. so that its assets would also be available for this reorganization. It should further be noted that the Bank of Waunakee, holder of a first lien on all equipment and containers now owned or hereafter acquired by the debtor, has assigned its claim to Gerard R. Batz.

III. Properties

Batz Sanitation, Inc. ownes no real estate, ownes the following:

Vehicles

1979	Ford Thunderbird Automobile	$ 2,000.00
1976	Ford Pickup Truck/Stake Body & Liftgate	2,500.00
1967	Ford / 14-Yard Truxmore Sideloader-packer	3,000.00
1968	IHC / 17-Yard Leach. with Winch	7,500.00
1974	Ford / 30,000# Mid-Equipment Roll-Off	15,000.00
1979	Ford / 50,000# Huge Haul Roll-Off	40,000.00
1982	IHC / 20-Yard Pak-Mor. with Winch	35,000.00
1984	IHC / 20-Yard Pak-mor. with Winch	40,000.00
Subtotal Vehicle Asset Value		$145,000.00

Office Equipment

3 desks, 1 file cabinet, 3 adding machines, 2 typewriters, 1 card table, 1 pencil sharpener, 1 copy machine, 3 chairs, 1 typing table	$ 3,000.00

Equipment

Fuel Tanks & Pumps	1,000.00
Dumpsters and Roll-off Containers	
50 1-Yard Containers	$ 100.00
21 1 1/2-Yard Containers	175.00
72 2-Yard Containers	200.00
4 2-Yard Containers	150.00
7 3-Yard Containers	250.00
18 4-Yard Containers	300.00
36 6-Yard Containers	450.00
25 8-Yard Containers	650.00
3 13-Yard Containers	750.00
1 15-Yard Roll-off Containers	1,800.00
12 20-Yard Roll-off Containers	2,000.00
9 30-Yard Roll-off Containers	2,200.00
Subtotal Equipment Assets	$132,375.00

Communication Equipment

2-Way Radios & Communication Equipment	$ 4,500.00

Inventory

Tires, Oil, Fuels, Etc.	$ 4,500.00

Accounts Receivables

Accounts Receivables	$ 21,800.17

TOTAL = $311,175.17

IV. Projected Operating Statement

Attached hereto as Exhibits A and B are income and expense projections for the years 1989 through 1994.

V. Classification of Claims

CLASS 1: Post-petition debts.

CLASS 2: Claim of taxes owing to governmental units.

CLASS 3: Gerard Batz.

CLASS 4: First Wisconsin National Bank.

CLASS 5: Circle Business Credit.

CLASS 6: Hanks and Bush, Inc.

CLASS 7: Refuse Hideaway, Inc.

CLASS 8: General unsecured debts.

CLASS 9: Disputed portions of allowed debts, if any.

CLASS 10: Undersecured portions of secured debt, if any.

CLASS 11: Interest of the stockholders.

VI. TREATMENT OF UNIMPAIRED CLASSES.

The amount of Administrative Claims are not determinable at this time, allowed costs and expenses of administration including attorneys fees and expenses, accounting fees, and consulting fees shall be paid in cash or cash equivalent on the distribution date. Administrative claims include U.S. Trustee fees accrued to the date of confirmation.

VII. TREATMENT OF IMPAIRED CLASSES UNDER THE PLAN.

Class One is a post-petition debt and shall be repaid the amount of $232.50 over an eighty-four month period with a 9% interest rate at monthly payments of $3.74 beginning five months after the confirmation of the plan or in the event class one wishes to compromise its amount of indebtedness and accept $90.00 and release all claims and interests, the debtor will pay this amount within five days of confirmation of the Plan.

Class Two is the class of priority secured and priority unsecured claims and shall be treated as follows:

1. Internal Revenue Service shall be paid the amount of its fiduciary claim in the amount of $30,205.69 with interest of 8% and a monthly payment of $529.60 over a 72 month period beginning eight months after confirmation of the Plan.

2. Wisconsin Department of Revenue shall be paid the amount of its fiduciary claim in the amount of $4,330.70 with interest of 8% and a monthly payment of $75.93 over a 72 month period beginning eight months after confirmation of the Plan.

3. Department of Industry, Labor and Human Relations shall be paid the amount of its fiduciary claim in the amount of $13,890.45 with interest of 8% and a monthly payment of $243.54 over a 72 month period beginning eight months after confirmation of the Plan.

4. Wisconsin Department of Revenue has a priority secured claim in the amount of $5,719.45 and shall be paid in its entirety over an eighty-four month period with an interest rate of 9% inclusive with monthly payments of $92.02 per month beginning three months after the confirmation of the plan.

Class Three is adequately secured and shall be repaid its amount of $180,295.64 in its entirety over an eighty-four month period with a 9% interest rate at monthly payments of $2,900.79 beginning five months after the confirmation of the plan.

Class Four is adequately secured and shall be repaid in accordance with the other secured creditors the amount $7,640.36 over an eighty-four month period with a 9% interest rate with monthly payments of $122.93 beginning five months after the confirmation of the plan.

Class Five is adequately secured and shall be repaid in accordance with the other secured creditors the amount of $906.15 over an eighty-four month period with a 9% interest rate with monthly payments of $14.58 beginning five months after the confirmation of the plan, in the event class five wishes to compromise its amount of indebtedness and accept the amount of $375.00 and release all claims and interests, the debtor will pay this amount within Ten days of confirmation of the Plan.

Class Six is adequately secured and shall be repaid in accordance with the other secured creditors the amount of $736.14 over an eighty-four month period with a 9% interest rate with monthly payments of $11.84 beginning five months after the confirmation of the plan, in the event class six wishes to compromise its amount of indebtedness and accept the amount of $250.00 and release all claims and interests, the debtor will pay this amount within fifteen days of confirmation of the Plan.

Class Seven is adequately secured and shall be repaid in accordance with the other secured creditors the amount $20,232.68 over an eighty-four month period with a 9% interest rate with monthly payments of $325.53 beginning five months after the confirmation of the plan.

Class Eight represents the unsecured portion of any and all debts. Unsecured creditors shall be paid 31 percent of the total amount of their claims as determined and allowed by the Court estimated to be in total about $218,944.13 and the Class shall be paid about $67,872.68 in total. It shall be repaid on a sixty month payment schedule beginning ten months after confirmation of the Plan and continuing monthly until the pro rata percentages are paid at zero percent interest per annum until an amount equal to an estimated 31 percent of the principal amount of said debt has been paid in full. This shall fully discharge all debts in this Class.

Class Nine is the disputed portion of debts shall, upon resolution, be placed into this class, and shall be repaid in the manner determined by the Court as part of that resolution. No repayment provisions are made for such at the present time under the terms of this Plan.

Class Ten represents the under secured portion of any and all secured debts shall, upon resolution, be placed into this class, and shall be repaid in the manner determined by the Court as part of that resolution. No repayment provisions are made for such at the present time under the terms of this Plan.

Class Eleven represents the interest of the shareholders and are impaired in that they do not participate in the terms of the plan and no provision is made for them.

Dated this 17th day of March, 1989.

BATZ SANITATION, INC.

/s/
Thomas Batz, President

Ross and Chatterton
P.O. Box 631
Madison, WI 53701
(608) 256-2355

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED
MAR 1 1988

In re:

BATZ SANITATION, INC.,
Debtor.

PLAN OF REORGANIZATION

Fed. ID 39-1178670

Case No. MM11-88-00289

TO ALL CREDITORS AND SHAREHOLDERS OF BATZ SANITATION, INC.:

WHEREAS, Debtor filed a petition on February 16, 1988 for reorganization pursuant to Chapter 11 of Title 11, United States Code: and

WHEREAS, reorganization will tend to rehabilitate the financial status of the Debtor, and reorganization under Chapter 11 will be in the best interests of the creditors.

NOW THEREFORE, Debtor proposes the following plan for the purpose of effecting a reorganization of his affairs.

ARTICLE I. EFFECTIVE DATE.

The effective date shall be that date on which the order confirming the Plan becomes final and non-appealable.

ARTICLE II. CLASSIFICATION OF CLAIMS.

The following shall designate all classes of claims:

CLASS 1: Post-petition debts.

CLASS 2: Claim of taxes owing to governmental units.

CLASS 3: Gerard Batz.

CLASS 4: First Wisconsin National Bank.

CLASS 5: Circle Business Credit.

CLASS 6: Hanks and Bush, Inc.

CLASS 7: Refuse Hideaway, Inc.

CLASS 8: General unsecured debts.

CLASS 9: Disputed portions of allowed debts, if any.

CLASS 10: Undersecured portions of secured debt, if any.

CLASS 11: Interest of the stockholders.

ARTICLE III. TREATMENT OF UNIMPAIRED CLASSES.

The amount of Administrative Claims are not determinable at this time, allowed costs and expenses of administration including attorneys fees and expenses, accounting fees, and consulting fees shall be paid in cash or cash equivalent on the distribution date. Administrative claims include U.S. Trustee fees accrued to the date of confirmation.

ARTICLE IV. TREATMENT OF IMPAIRED CLASSES UNDER THE PLAN.

Class One is a post-petition debt and shall be repaid the amount of $232.50 over an eighty-four month period with a 9% interest rate at monthly payments of $3.74 beginning five months after the confirmation of the plan or in the event class one wishes to compromise its amount of indebtedness and accept $90.00 and release all claims and interests, the debtor will pay this amount within five days of confirmation of the Plan.

Class Two is the class of priority secured and priority unsecured claims and shall be treated as follows:

1.Internal Revenue Service shall be paid the amount of its fiduciary claim in the amount of $30,205.69 with interest of 8% and a monthly payment of $529.60 over a 72 month period beginning eight months after confirmation of the Plan.

2.Wisconsin Department of Revenue shall be paid the amount of its fiduciary claim in the amount of $4,330.70 with interest of 8% and a monthly payment of $75.93 over a 72 month period beginning eight months after confirmation of the Plan.

3. Department of Industry, Labor and Human Relations shall be paid the amount of its fiduciary claim in the amount of $13,890.45 with interest of 8% and a monthly payment of $243.54 over a 72 month period beginning eight months after confirmation of the Plan.

4. Wisconsin Department of Revenue has a priority secured claim in the amount of $5,719.45 and shall be paid in its entirety over an eighty-four month period with an interest rate of 9% inclusive with monthly payments of $92.02 per month beginning three months after the confirmation of the plan.

Class Three is adequately secured and shall be repaid its amount of $180,295.64 in its entirety over an eighty-four month period with a 9% interest rate at monthly payments of $2,900.79 beginning five months after the confirmation of the plan.

Class Four is adequately secured and shall be repaid in accordance with the other secured creditors the amount $7,640.36 over an eighty-four month period with a 9% interest rate with monthly payments of $122.93 beginning five months after the confirmation of the plan.

Class Five is adequately secured and shall be repaid in accordance with the other secured creditors the amount of

$906.15 over an eighty-four month period with a 9% interest rate with monthly payments of $14.58 beginning five months after the confirmation of the plan, in the event class five wishes to compromise its amount of indebtedness and accept the amount of $375.00 and release all claims and interests, the debtor will pay this amount within Ten days of confirmation of the Plan.

Class Six is adequately secured and shall be repaid in accordance with the other secured creditors the amount of $736.14 over an eighty-four month period with a 9% interest rate with monthly payments of $11.84 beginning five months after the confirmation of the plan, in the event class six wishes to compromise its amount of indebtedness and accept the amount of $250.00 and release all claims and interests, the debtor will pay this amount within fifteen days of confirmation of the Plan.

Class Seven is adequately secured and shall be repaid in accordance with the other secured creditors the amount $20,232.68 over an eighty-four month period with a 9% interest rate with monthly payments of $325.53 beginning five months after the confirmation of the plan.

Class Eight represents the unsecured portion of any and all debts. Unsecured creditors shall be paid 31 percent of the total amount of their claims as determined and allowed by the Court estimated to be in total about $218,944.13 and the Class shall be paid about $67,872.68 in total. It shall be repaid on a sixty month payment schedule beginning ten months after confirmation of the Plan and continuing monthly until the pro rata percentages are paid at zero percent interest per annum until an amount equal to an estimated 31 percent of the principal amount of said debt has been paid in full. This shall fully discharge all debts in this Class.

Class Nine is the disputed portion of debts shall, upon resolution, be placed into this class, and shall be repaid in the manner determined by the Court as part of that resolution. No repayment provisions are made for such at the present time under the terms of this Plan.

Class Ten represents the under secured portion of any and all secured debts shall, upon resolution, be placed into this class, and shall be repaid in the manner determined by the Court as part of that resolution. No repayment provisions are made for such at the present time under the terms of this Plan.

Class Eleven represents the interest of the shareholders and are impaired in that they do not participate in the terms of the plan and no provision is made for them.

ARTICLE V. MANNER OF FINANCIAL MANAGEMENT

The Debtor shall continue in operation of the business itself and in control of its material assets located in its present locations, to enable business as a "going concern". Attached hereto as Exhibits A, B, and C are income and expense projections for 1989 through 1994 and a summary of debt service.

The Debtor shall be bound by the terms of Title 11 USC and all sections therein. He shall make reports to any and all parties requesting same upon reasonable notice, in writing or in person, at reasonable intervals.

The Debtor may amend or modify this Plan at any time prior to its confirmation by the Court, with leave of the Court upon notice to any party in interest. After confirmation of the Plan, the Debtor may, with approval of the Court, and as long as it does not materially or adversely affect the interests of the creditors or of the estate, remedy any defect or omission, or reconcile any inconsistencies in the Plan or in the Order of Confirmation, in such manner as may be necessary to carry out the purposes and effect of the Plan.

The Debtor may continue to utilize the services of parties supportive to his efforts at reorganization and rehabilitation, such special counsel, accountants, tax preparers and so forth, for purposes not inconsistent with the Plan of Reorganization in this case, without further leave of or application to the Court.

Debtor also retains and reserves the right to pursue claims against others which are of value and benefit to the estate hereunder.

Debtor retains the right to allow monthly payments of small amounts to accumulate to a total of $50.00 prior to payment without being in default to minimize costs to the Estate.

ARTICLE VI MISCELLANEOUS PROVISIONS.

The Debtor is of the opinion and belief that this Plan will not be followed by a further need for reorganization or by a need for liquidation.

Title to all Debtor's property shall vest in Debtor upon confirmation of the Plan.

All creditors shall retain liens and security interests as set forth in this Plan.

REPRESENTATIONS LIMITED

NO REPRESENTATIONS CONCERNING THE DEBTOR, PARTICULARLY REGARDING FUTURE BUSINESS OPERATIONS OR THE VALUE OF THE DEBTOR'S ASSETS, HAVE BEEN AUTHORIZED THE DEBTOR EXCEPT AS SET FORTH IN THIS STATEMENT. YOU SHOULD NOT RELY ON ANY OTHER REPRESENTATIONS OR INDUCEMENTS PROFFERED TO YOU TO SECURE YOUR ACCEPTANCE IN ARRIVING AT YOUR DECISION IN VOTING ON THE PLAN. ANY PERSON MAKING REPRESENTATIONS OR INDUCEMENTS CONCERNING ACCEPTANCE OR REJECTION OF THE PLAN SHOULD BE REPORTED TO COUNSEL FOR THE DEBTOR. FOR VARIOUS REASONS, THE RECORDS OF THE DEBTOR PRIOR TO THE PREPARATION OF THIS PLAN HAVE NOT ALWAYS

BEEN COMPLETE AND THE ACCURACY OF THE INFORMATION SUBMITTED WITH THIS STATEMENT DEPENDENT UPON ACCOUNTING PERFORMED BY THE DEBTOR AND ITS ACCOUNTANTS. WHILE EVERY EFFORT HAS BEEN MADE TO PROVIDE THE MOST ACCURATE INFORMATION AVAILABLE, THE DEBTOR IS UNABLE TO WARRANT OR REPRESENT THAT ALL INFORMATION IS WITHOUT INACCURACY. NO KNOWN INACCURACIES ARE INCURRED. FURTHER, MUCH OF THE INFORMATION CONTAINED HEREIN CONSISTS OF PROJECTIONS OF FUTURE PERFORMANCE OF A VERY COMPLICATED AND UNCERTAIN BUSINESS. WHILE EVERY EFFORT HAS BEEN MADE TO INSURE THAT THE ASSUMPTIONS ARE VALID AND THAT THE PROJECTIONS ARE AS ACCURATE AS CAN BE UNDER THE CIRCUMSTANCES, NEITHER THE DEBTOR, NOT ITS ACCOUNTANTS UNDERTAKE TO CERTIFY OR WARRANT THE ABSOLUTE ACCURACY OF THE PROJECTIONS.

CONCLUSION

It is respectfully submitted that Debtors have given every thought to the complex problems confronting them and with the assistance of their counsel and business consultant, have devised and formulated this Plan with the hope that the equitableness and fairness of the Plan will be considered by the parties in interest whose consent is necessary to perfect. It is sincerely hoped that all creditors will join in the consent to this Plan, so that they, as well as the Debtor, will receive the maximum results.

Dated this 17th day of March, 1989.

S

Thomas Batz, President

Batz Sanitation

Leslie Brodhead Griffith
Ross and Chatterton
Attorneys for Debtor
P.O. Box 631
Madison, WI 53701
(608) 256-2355

PRO FORMA STATEMENT OF PROJECTED OPERATING INCOME AND EXPENSES FOR:

BATZ SANITATION, INC.

	TOTAL FOR PLAN	FIRST 8 MON.	SECOND 12 MON.	THIRD 12 MON.	FOURTH 12 MON.	FIFTH 12 MON.	BALANCE 4 MON.
TOTAL INCOME	2,816,670	355,201	550,118	567,997	586,457	605,517	151,379
E X P E N S E S:							
Administrative:							
Accounting	5,250	1,000	1,000	1,000	1,000	1,000	250
Consul/Taxes	20,500	6,000	5,000	4,000	3,000	2,000	500
Legal	24,500	8,000	6,000	5,000	3,000	2,000	500
Management	147,500	20,000	30,000	30,000	30,000	30,000	7,500
TOTAL	197,750	35,000	42,000	40,000	37,000	35,000	8,750
On-Going Expenses:							
Dumping Fees	484,279	58,126	92,651	97,284	102,148	107,256	26,814
Employ. Bene.	39,882	4,838	7,619	8,000	8,400	8,820	2,205
Fuel	267,215	32,324	51,069	53,622	56,303	59,118	14,780
Insurance	158,079	19,174	30,200	31,710	33,295	34,960	8,740
Liscence	23,227	3,984	4,184	4,393	4,613	4,843	1,211
Ofc Supplies	16,776	2,035	3,205	3,365	3,533	3,710	928
Payroll	362,748	44,000	69,300	72,765	76,403	80,223	20,056
Pay. Tax	83,432	10,120	15,939	16,736	17,573	18,451	4,613
Radio Repair	13,625	3,000	2,500	2,500	2,500	2,500	625
Rent	30,861	3,743	5,896	6,191	6,500	6,825	1,706
Repairs	456,905	68,139	84,523	88,749	93,187	97,846	24,461
Shop Supplies	20,941	2,540	4,001	4,201	4,411	4,631	1,158
Tires	89,030	10,799	17,008	17,859	18,752	19,689	4,922
Trav/Ent.	1,575	300	300	300	300	300	75
Utilities	62,237	7,549	11,890	12,484	13,109	13,764	3,441
TOTAL	2,048,576	270,672	400,284	420,158	441,026	462,938	115,734
NET OP'NG EXP	2,246,326	305,672	442,284	460,158	478,026	497,938	124,484
NET OP'NG REV	570,344	49,529	107,834	107,839	108,431	107,579	26,895
Equip Replace	128,000	5,000	34,000	25,000	24,000	40,000	0
NET AVAIL	380,107	44,529	73,834	82,839	84,431	67,579	26,895
D E B T S E R V I C E :							
PRIORITY SECURED:							
WI Rev.	5,521	736	1,104	1,104	1,104	1,104	368
SECURED:							
Gerald Batz	174,047	23,206	34,809	34,809	34,809	34,809	11,603
Da.Co.Tel.	224	30	45	45	45	45	15
1st Wis Bk	7,376	983	1,475	1,475	1,475	1,475	492
CrBusCredt	875	117	175	175	175	175	58
HanksBush	711	95	142	142	142	142	47
BK Lodi	6,392	852	1,278	1,278	1,278	1,278	426
Refuse H.	19,532	2,604	3,906	3,906	3,906	3,906	1,302
TOTAL	209,156	27,888	41,831	41,831	41,831	41,831	13,944

Exhibit A

PRO FORMA STATEMENT OF PROJECTED OPERATING INCOME AND EXPENSES FOR:

BATZ SANITATION, INC.

	TOTAL FOR PLAN	FIRST 8 MON.	SECOND 12 MON.	THIRD 12 MON.	FOURTH 12 MON.	FIFTH 12 MON.	BALANCE 4 MON.
PRIORITY UNSECURED:							
IRS	31,776	4,237	6,355	6,355	6,355	6,355	2,118
WI Revenue	4,556	607	911	911	911	911	304
DIHLR	14,613	1,948	2,923	2,923	2,923	2,923	974
TOTAL	50,945	6,793	10,189	10,189	10,189	10,189	3,396
UNSECURED:							
G. Batz	50,225	6,697	10,045	10,045	10,045	10,045	3,348
HanksBush	7,013	935	1,403	1,403	1,403	1,403	468
IRS	2,102	280	420	420	420	420	140
Mobil Oil	1,785	238	357	357	357	357	119
Kayser	1,411	188	282	282	282	282	94
Waistainer	967	129	193	193	193	193	64
Belda Ins.	850	113	170	170	170	170	57
O'Donnells	619	83	124	124	124	124	41
HarmGrv.Tk	500	67	100	100	100	100	33
Firestone	372	50	74	74	74	74	25
Statz	370	49	74	74	74	74	25
GTE	357	48	71	71	71	71	24
GillomenTk	310	41	62	62	62	62	21
Wau Tribune	167	22	33	33	33	33	11
MononaTire	140	19	28	28	28	28	9
DaCoTel	124	17	25	25	25	25	8
Cred Monroe	92	12	18	18	18	18	6
Lensen Mar.	71	9	14	14	14	14	5
Gron.Dir.	81	11	16	16	16	16	5
PitneyBowes	74	10	15	15	15	15	5
RS&J	62	8	12	12	12	12	4
CenWisDirec	45	6	9	9	9	9	3
Wes Sand	41	5	8	8	8	8	3
Deal Rite	34	5	7	7	7	7	2
BusSampler	31	4	6	6	6	6	2
DS Mark	31	4	6	6	6	6	2
TOTAL	67,873	9,050	13,575	13,575	13,575	13,575	4,525
NET	46,612	63	7,135	16,140	17,732	880	4,662

Exhibit B

****

PRO FORMA STATEMENT OF PROJECTED OPERATING INCOME AND EXPENSES FOR:

****

BATZ SANITATION, INC.

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		AMOUNT OWED	AMOUNT PAID	PAID THRU PLAN	MONTHLY PAYMENT AMOUNT	FIRST 8 MON.	SECOND 12 MON.	THIRD 12 MON.	FOURTH 12 MON.	FIFTH 12 MON.	BALANCE 4 MON.
	PRIORITY SECURED:										
1	WI Rev.	5,719.45	5,719.45	5,521	92.02	736	1,104	1,104	1,104	1,104	368
	SECURED:										
2	Gerald Batz	180,295.64	180,295.64	174,047	2,900.79	23,206	34,809	34,809	34,809	34,809	11,603
3	Da.Co.Tel.	232.50	232.50	224	3.74	30	45	45	45	45	15
4	1st Wis Bk	7,640.36	7,640.36	7,376	122.93	983	1,475	1,475	1,475	1,475	492
5	CrBusCredt	906.15	906.15	875	14.58	117	175	175	175	175	58
6	BanksBush	736.14	736.14	711	11.84	95	142	142	142	142	47
8	Refuse H.	20,232.68	20,232.68	19,532	325.53	2,604	3,906	3,906	3,906	3,906	1,302
	TOTAL	210,043.47	210,043.47	202,764	3,379.41	27,035	40,553	40,553	40,553	40,553	13,518
	PRIORITY UNSECURED:										
9	IRS	30,205.69	30,205.69	31,776	529.60	4,237	6,355	6,355	6,355	6,355	2,118
10	WI Revenue	4,330.70	4,330.70	4,556	75.93	607	911	911	911	911	304
11	DIELR	13,890.45	13,890.45	14,613	243.54	1,948	2,923	2,923	2,923	2,923	974
	TOTAL	48,426.84	48,426.84	50,945	849.08	6,793	10,189	10,189	10,189	10,189	3,396
	UNSECURED:										
12	G. Batz	162,017.00	50,225.27	50,225	837.09	6,697	10,045	10,045	10,045	10,045	3,348
13	BanksBush	22,622.86	7,013.09	7,013	116.88	935	1,403	1,403	1,403	1,403	468
14	IRS	6,780.46	2,101.94	2,102	35.03	280	420	420	420	420	140
15	Mobil Oil	5,756.89	1,785.26	1,785	29.75	238	357	357	357	357	119
16	Kayser	4,551.01	1,410.81	1,411	23.51	188	282	282	282	282	94
17	Waistainer	3,120.43	967.33	967	16.12	129	193	193	193	193	64
18	Belda Ins.	2,740.72	849.62	850	14.16	113	170	170	170	170	57
19	O'Donnells	1,997.62	619.26	619	10.32	83	124	124	124	124	41
20	BarnGrn.Tk	1,612.72	499.94	500	8.33	67	100	100	100	100	33
21	Firestone	1,200.00	372.00	372	6.20	50	74	74	74	74	25
22	Statz	1,192.45	369.66	370	6.16	49	74	74	74	74	25
23	GTE	1,152.00	357.12	357	5.95	48	71	71	71	71	24
24	GillomenTk	1,000.00	310.00	310	5.17	41	62	62	62	62	21
25	Wau Tribune	539.31	167.19	167	2.79	22	33	33	33	33	11
26	MononaTire	450.71	139.72	140	2.33	19	28	28	28	28	9
27	DaCoTel	400.00	124.00	124	2.07	17	25	25	25	25	8
28	Cred Monroe	295.20	91.51	92	1.53	12	18	18	18	18	6
29	Lensen Mar.	228.00	70.68	71	1.18	9	14	14	14	14	5
30	Gron.Dir.	260.78	80.84	81	1.35	11	16	16	16	16	5
31	PitneyBowes	239.40	74.21	74	1.24	10	15	15	15	15	5
32	RS&J	199.76	61.93	62	1.03	8	12	12	12	12	4
33	CenWisDirec	144.00	44.64	45	0.74	6	9	9	9	9	3
34	Wes Sand	131.12	40.65	41	0.68	5	8	8	8	8	3
35	Deal Rite	109.69	34.00	34	0.57	5	7	7	7	7	2
36	BusSampler	100.00	31.00	31	0.52	4	6	6	6	6	2
37	DS Mark	100.00	31.00	31	0.52	4	6	6	6	6	2
38	Krall	2500.00	775.00	775	12.92	103	155	155	155	155	52
	TOTAL	218,844.13	62,872.68	65,648	1,144.13	9,153	13,730	13,730	13,730	13,730	4,577

Revised Ex. C

BATZ SANITATION, INC.
Case No. MM11-88-00289

LIQUIDATION ANALYSIS

ASSETS

Vehicles	$145,000.00
Office equipment	3,000.00
Equipment	132,375.00
Communications equipment	4,500.00
Inventory	4,500.00
Accounts Receivable	21,800.00
TOTAL ASSETS:	$311,175.00

LIABILITIES

Taxes	$ 54,146.29
Secured creditors	159,810.97
Unsecured creditors	212,452.09
TOTAL LIABILITIES:	$426,409.35

Assets	$311,175.00
Costs of sale and administrative expenses (10%)	31,117.50
	$280,057.50
Taxes	54,146.29
Secured debt	159,810.97
Funds remaining for unsecureds	$ 66,100.24

$\frac{66,100.24}{212,452.09} = 0.31$ or 31% to unsecureds

Using the claims as filed and assuming administrative expenses of 10 percent and assuming the assets would sell for $311,175.00, unsecureds are receiving the same percentage as they would upon liquidation.

Exhibit D

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

REFUSE HIDEAWAY, INC., and JOHN W. DeBECK,

Plaintiffs,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendant.

ORDER TO REMAND

Case No. 88 CV 5455

In both petitioner's January 31, 1989, brief and in its June 30, 1989, reply brief, the major issue petitioners raised was whether the Wisconsin Department of Natural Resources (hereinafter "DNR") had the authority to promulgate rules defining "owner" and "operator" as used in Wisconsin's solid waste law, and if such authority existed, whether the definitions of "owner" and "operator" in Wis. Admin. Code Sections NR 500.03(92) and (94) are invalid.

While the instant action is an administrative review of DNR's September 6, 1988, Administrative Order, the questions involved embody a challenge to NR 500.03(92) and (94). When an administrative rule is challenged, the Joint Committee for Review of Administrative Rules (hereinafter JCRAR) must be notified. Sec. 227.40(5), Stats. Richards v. Young, 150 Wis. 2d 549, 558 (1989). In the instant case, petitioner failed to serve JCRAR within 60 days of the filing of the petition, and ordinarily this court would be deprived of

jurisdiction under Richards.

However, in the instant case, DNR failed to inform petitioners that it was relying on NR 500.03. Under sec. 227.47, Stats., the DNR was required to set forth in writing, as findings of fact and conclusions of law, the facts and the law it relied upon in issuing the Order.

As a matter of due process and sound administrative procedure, parties adversely affected by an administrative decision are entitled to be informed of the ultimate facts and law which support an agency's decision. State ex. rel. Harris v. Annuity Pension Board, 87 Wis. 2d 646, 660 (1979). While an agency need not provide an elaborate opinion, the findings of fact and conclusions of law must be specific enough to inform the parties and the courts on appeal of the basis of the decision. Wisconsin Environmental Decade, Ltd. v. Public Service Commission of Wisconsin, 98 Wis. 2d 682, 701 (Ct. App. 1980).

In the instant case, the Order makes no reference to NR 500.05 as the basis of the relief that DNR seeks. This is especially inadequate in view of the fact that DNR only announced its reliance on NR 500.05 after it was too late for petitioners to petition JCRAR. Therefore, in order to prevent this court from losing jurisdiction under Richards, petitioners would have had to notify the JCRAR that it was challenging NR 550-520 in its entirety, or they would have had to guess which section the agency was relying on. Obviously the present situation constitutes inadequate

notice under Wisconsin Environmental Decade, Ltd. v. Public Service Commission of Wisconsin, 98 Wis. 2d 682, 701 (Ct. App. 1980).

Because the DNR failed to indicate its reliance on 500.03, it would be inappropriate for this court to dismiss the case. Therefore the Order is remanded to DNR, which is to set forth sufficient written findings of fact and conclusions of law to support the relief it seeks against petitioners in order to facilitate a meaningful judicial review.

Dated this 30th day of January, 1990.

BY THE COURT:

Angela B. Bartell
Circuit Judge

cc: Atty Michael P. Dunn
111 E. Kilbourn Ave., Suite 1400
Milwaukee, WI 53202-3101

AAG Robert A. Selk
P.O. Box 7857
Madison, WI 53707-7857

Ch file

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny
Secretary

BOX 7921
MADISON, WISCONSIN 53707

February 21, 1989

The Honorable Donald Hanaway
Attorney General of Wisconsin
CAPITOL

SUBJECT: John W. DeBeck vs. Wisconsin Department of Natural Resources
Case #89CV0960

Dear Mr. Hanaway:

Please find enclosed a Petition for Review in the above-entitled matter which was served on the Department of Natural Resources on February 16, 1989.

Under the authority of s. 165.25, Stats., the Department refers this matter to your office. Attorney Charles Leveque will serve as Department liaison on this matter.

Sincerely,

C.D. Besadny
Secretary

Enclosure

bcc: Chuck Leveque - LC/5
Paul Didier - SW/3

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

MARK A. FRANKEL
Circuit Court Br. 12

JOHN W. DeBECK,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

State of Wisconsin
County of Dane
I hereby certify this is a true copy of the original Summons and Petition, filed in my office
Attest. _____
Clerk of Courts
by Deputy Clerk

PETITION FOR REVIEW

Case No. 89CV0960

RECEIVED
FEB 16 1989
OFFICE OF THE SECRETARY

Petitioner John W. DeBeck, by his attorneys, Davis & Kuelthau, S.C., by Michael P. Dunn, hereby petitions this Court for review of the Decision of the Wisconsin Department of Natural Resources (WDNR) dated January 17, 1989, entitled "Condition Closure Plan Approval Modification for the Refuse Hideaway Landfill (# 1953)", hereinafter "January 17 Modification," a copy of which is attached hereto as Exhibit A.

1. Petitioner John W. DeBeck resides at 2114 Sunnyside Crescent, City of Madison, Dane County, and is the President and a shareholder of Refuse Hideaway, Inc., a Wisconsin corporation which owns and operated a non-hazardous solid waste facility known as Refuse Hideaway Landfill located in the Town of Middleton, Dane County, Wisconsin.

2. The Wisconsin Department of Natural Resources, hereinafter "WDNR", is an agency of the State of Wisconsin within the meaning of §227.01(1), Wis. Stats., and has responsibility for the licensing and regulation of solid waste disposal facilities such as Refuse Hideaway Landfill pursuant to authority granted by applicable Wisconsin statutes.

3. Prior to April 7, 1987, Refuse Hideaway, Inc. submitted to WDNR a proposed Closure Plan for review and approval by the WDNR. On April 7, 1987, the WDNR issued a "Closure Plan Approval." A copy of the approval is attached as Exhibit B. The Closure Plan Approval directed Refuse Hideaway, Inc., the owner and operator of the Refuse Hideaway Landfill, to perform certain acts deemed necessary for proper closure of the landfill.

4. On May 2, 1988, as a result of contamination found in private water supply wells near the Refuse Hideaway Landfill, Refuse Hideaway, Inc. and John DeBeck agreed to enter a Consent Order with the WDNR which, among other things, provided for the early closure of Refuse Hideaway Landfill and prescribed certain steps to be taken to assess the environmental damage which may have been caused by the Refuse Hideaway Landfill. In the Consent Order Refuse Hideaway, Inc. and DeBeck also agreed to submit a proposed closure plan modification to contain revisions of the April 7, 1987 Closure Plan Approval. A copy of the Consent Order, SOD-88-02A, is attached hereto as Exhibit C.

5. On June 1, 1988, as required by the Consent Order, a proposed closure plan modification was submitted to the WDNR on behalf of Refuse Hideaway, Inc. Pursuant to the request of the WDNR, the proposed modification was amended on June 8, 1988.

6. On September 6, 1988, in response to Refuse Hideaway, Inc.'s proposed plan modification, the WDNR issued a "Conditional Closure Plan Approval Modification For The Refuse Hideaway Landfill

(# 1935)" (hereinafter "September 6 Modification"), a copy of which is attached as Exhibit D. The September 6 Modification purports to expand the scope of the April 7, 1987 Closure Plan Approval to encompass John DeBeck as well as Refuse Hideaway, Inc.

7. On October 6, 1988, John DeBeck and Refuse Hideaway, Inc. filed in Dane County Circuit Court a Petition for Review of the September 6 Modification pursuant to Chapter 227 of the Wisconsin Statutes. The Petition for Review is currently pending before the Honorable George Northrup as Case No. 88-CV-5455. Among other issues, the Petition for Review seeks review of the WDNR decision to order John DeBeck personally to comply with the September 6 Modification.

8. The January 17 Modification which is the subject of this Petition for Review, like the September 6 Modification, also seeks to impose further conditions and responsibilities on John DeBeck in connection with the closure of the Refuse Hideaway Landfill.

9. Petitioner John W. DeBeck is an aggrieved party within the meaning of §227.53, Stats., since, although he is not the owner, operator or licensee of the Refuse Hideaway Landfill, the January 17 Modification seeks to obligate him to satisfy the conditions of the January 17 Modification individually, thereby exposing him to substantial personal liability for the lawful activities of a corporation.

10. As grounds for review within the meaning of §227.57, Petitioner alleges as follows:

A. WDNR has exceeded its authority by seeking to impose upon John DeBeck individual responsibility to satisfy the conditions of the January 17 Modification.

B. The WDNR has abused its discretion in that the tasks set forth in the January 17 Modification cannot all be accomplished within the time periods provided therein.

C. The WDNR has abused its discretion in that the time periods specified for performance of the tasks set forth therein are unreasonably short.

D. The WDNR has no basis in law or fact for requiring in ¶4(e) that condensate produced by the gas extraction system be treated as leachate.

E. The WDNR has abused its discretion by requiring in ¶3 and 5 that gas extraction wells be installed at a depth of no less than three (3) feet into the base soils beneath the refuse. Such activity poses the risk of puncturing the landfill's liner and releasing leachate directly into the groundwaters.

F. The WDNR has abused its discretion in that ¶¶8 and 9, and 11 and 12 cannot be performed simultaneously as required by the January 17 Modification.

WHEREFORE, Petitioner John W. DeBeck requests that the Court grant the following relief pursuant to §§227.52 and 227.57, Stats.:

A. Remanding the matter to the WDNR with an Order to direct any modification and/or conditions of modification of the Closure

Plan Approval for the Refuse Hideaway Landfill to Refuse Hideaway, Inc. solely, and not John W. DeBeck;

B. Alternatively and in the event John W. DeBeck is held personally responsible to comply with the January 17 Modification, for an Order:

(1) Reversing the January 17 Modification, or alternatively;

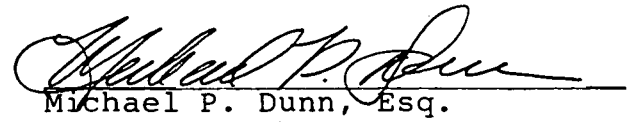
(2) Revising the deadlines so as to provide John DeBeck a reasonable period of time to accomplish the tasks set forth therein;

C. For an Order staying enforcement of the January 17 Modification pending the resolution of this Petition for Review;

D. Enjoining the WDNR from taking other action inconsistent with the Court's Order in this case; and

E. Such other and further relief as the Court deems appropriate.

Dated this 15th day of February, 1989.



Michael P. Dunn, Esq.
Attorneys for John W. DeBeck

P.O. ADDRESS

DAVIS & KUELTHAU, S.C.
111 E. Kilbourn Avenue
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Milwaukee, WI 53202-3101
(414) 276-0200

file

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny
Secretary

JAN 17 1989

File Ref:

4430

Mr. John DeBeck
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Remedial Action Report For the Refuse Hideaway Landfill
Consent Order SOD-88-02A

Dear Mr. DeBeck:

The Bureau of Solid and Hazardous Waste Management, Wisconsin Department of Natural Resources, has completed its review of the November, 1988, Remedial Actions Report submitted under Consent Order SOD-88-02A. While the report begins to address many of the issues surrounding the landfill, it is apparent that further work is necessary in the form of both additional investigations and remedial action design and implementation. The Department is issuing a conditional modification to your closure plan approval detailing the additional work which is needed to be performed. The Plan Modification is attached and is final. The date of this letter is the effective starting date for requirements scheduled in the Plan Modification.

The Remedial Action Report adequately addresses many of the requirements of the Consent Order. RMT Inc., should be commended for their work on several aspects of the investigation, particularly their evaluation of contaminant migration pathways. However, the conditions of the consent order regarding proposed remedial actions have not been adequately addressed. The enclosed Closure Plan Modification addresses these shortcomings and requires that a number of activities be completed, within specific time frames. This includes the following:

1. Analyzing landfill leachate for the Target Compound List within 45 days, and signing a leachate treatment agreement within 60 days.

2. Installing a partial gas and leachate extraction system consisting of at least 3 gas and leachate extraction wells. The system shall be operational within 90 days. A final detailed design for construction of a full gas and leachate extraction system shall be submitted to the Department within 180 days. This requirement supersedes conditions 2 and 3 of the closure plan approval modification, dated September 6, 1988.

3. An investigation into alternatives for providing a safe, permanent water source for the three private residences that have been affected by groundwater contamination. This includes a hydrogeologic evaluation to locate potentially uncontaminated zones within the sandstone aquifer, an evaluation of the use of point-of-entry

EXHIBIT A

filtration devices to remove contaminants, and an investigation into providing the affected residences with a permanent alternate source of potable water off of their properties.

4. The installation and sampling of additional monitoring wells at greater distances from the landfill to define the degree and extent of contamination. This includes constructing iso-concentration maps, an analysis of the effect of Black Earth Creek in the groundwater flow system, and any environmental impacts upon the Creek.

5. An investigation and comprehensive remedial design for the implementation of a groundwater pumping, treatment and discharge system.

6. Sampling of all private wells within a 1 mile radius of the site.

Please call Paul Huebner at (608) 267-7573 or Ray Tierney at (608) 267-2465 if you have any questions regarding this approval.

Sincerely,

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section
Bureau of Solid & Hazardous Waste Management

cc: Joe Brusca - SOD
Marie Stewart - MA
Chuck Leveque - LC/5
Paul Huebner - SW/3
Mark Giesfeldt - ERR/3
Dave Neeb - Davis & Kuehlyon, S.C.
Bob Selk - DOJ
Lee Bartlett - RMT
Bob Anders - Dane Co. Board of Supervisors
Rep. Dave Travis
Rep. Russ Feingold
PSS - SW/3

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL MODIFICATION FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. Refuse Hideaway Inc., owns and operated, and John DeBeck owned and operated the Refuse Hideaway solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin.

2. The Department issued a conditional closure plan approval for the facility on April 7, 1987.

3. The Department issued special consent order SOD-88-02A on May 2, 1988. Provision 3 of the order required John DeBeck and Refuse Hideaway, Inc., to submit a plan to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants. Provision 9 of the order required John DeBeck and Refuse Hideaway, Inc., to submit by October 1, 1988 a remedial action report for Department review and approval.

4. On July 1, 1988, RMT, Inc., on behalf of Refuse Hideaway, Inc., and John DeBeck, submitted a report to the Department proposing a conceptual plan for gas management and summarizing monitoring well construction to date. The Department issued a conditional closure plan approval for gas monitoring and a gas collection system on September 6, 1988.

5. On November 2, 1988, RMT, Inc., on behalf of Refuse Hideaway, Inc., and John DeBeck, submitted a remedial action report to the Department for review and approval. The report contained information relating to the local and regional groundwater flow directions and the degree and extent of groundwater contamination around the Refuse Hideaway landfill; the nature, persistence and likely fate of any contaminants; the existing or potential environmental and health effects of the contamination; a proposal for remedial measures which are technically and economically feasible for renovating or restoring ground/surface water quality; and a proposal for long-term environmental monitoring which would evaluate the effects of any remedial action on the continued performance of the landfill.

6. The remedial action report includes the following: a letter, the report, 16 appendices and 8 plan sheets submitted by RMT, Inc., dated November 1, 1988 and received by the Department on November 2, 1988.

7. Additional documents considered in connection with this closure plan approval modification includes the following:

   a. Special consent order SOD-88-02A.

   b. The September 6, 1988 closure plan modification.

   c. Various technical documents on file with the Wisconsin Department of Natural Resources, Solid Waste Management Section.

   d. Wisconsin Department of Natural Resources files.

8. Additional facts relevant to the review of the remedial action report include the following:

   a. Municipal refuse disposed at the Refuse Hideaway landfill produces methane gas. The clay cap and frozen ground conditions will inhibit release of the methane gas to the atmosphere and may cause methane gas to migrate off-site.

   b. NR 506.08(6), Wis. Adm. Code requires that a Department approved system to efficiently collect and combust hazardous air contaminants be installed at the landfill within 18 months of February 1, 1988.

   c. Municipal refuse and infiltration of precipitation into the refuse at the Refuse Hideaway landfill produces leachate. A leachate mound has formed within the landfill and leachate is flowing radially outward from the landfill. Contaminants from the leachate have migrated into unconsolidated soils and the bedrock aquifer used for a domestic water supplies by a number of homeowners. As a result, several private wells in the area have shown elevated concentrations of certain contaminants, including vinyl chloride.

   d. A number of groundwater monitoring wells have been installed at and in the vicinity of the landfill. Results obtained from these wells document that the landfill has caused a detrimental effect on groundwater quality. Evaluation of available groundwater quality information documents that the landfill has caused the attainment and exceedance of groundwater quality standards established under ch. NR 140, Wis. Adm. Code. Exceedances of preventative action limits for indicator parameters and substances of health or welfare concern, as well as enforcement standards for substances of health or welfare concern have been caused by leachate leaking from the landfill.

   e. These groundwater impacts will continue for some time in the future. However, efficient extraction and treatment of gas and leachate will significantly limit additional contaminant loading to the environment.

9. Based upon an assessment of the factors identified in NR 140.24 and NR 140.26, Wis. Adm. Code, the special conditions set forth below are needed to achieve compliance with groundwater standards, and to assure that public health, safety, and welfare is protected. If the special

conditions are complied with, the required modifications will not inhibit compliance with the standards set forth in NR 500-520, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44, Stats., to modify a plan approval if the modification is needed to achieve compliance with the groundwater standards in ch. NR 140, Wis. Adm. Code, and to assure that public health, safety and welfare is protected.

2. In accordance with the foregoing, the Department has authority under s. 144.44 Stats., to issue the following conditional plan approval modification.

CONDITIONAL CLOSURE PLAN APPROVAL MODIFICATION

The Department hereby modifies the closure plan approval issued to Refuse Hideaway, Inc., and John DeBeck for the Refuse Hideaway landfill, by adding the following conditions:

1. Within 45 days of the effective date of this closure plan approval modification a leachate sample shall be collected from two of the leachate head wells at the Refuse Hideaway landfill and be analyzed for the parameters listed in the Federal Target Compound List (formerly the Hazardous Substance List).

2. Within 45 days of the effective date of this closure plan approval modification a draft leachate treatment agreement shall be submitted to the Department for review. A signed leachate treatment agreement shall be submitted to the Department within 60 days of the effective date of this closure plan approval modification.

3. Within 90 days of the effective date of this closure plan approval modification a partial gas and leachate extraction system consisting of at least 3 gas and leachate extraction wells shall be constructed and begin operating. The extraction wells shall be installed a minimum of 3 feet into the base soils beneath the refuse. The well borings shall be a minimum of 12 inches in diameter and the well casing shall be 6-inch diameter Schedule 80 PVC slotted over the lower two-thirds of its length. The submersible pump to be placed in each extraction well shall be set to activate whenever a leachate head of no greater than 3 feet accumulates within the well. A temporary leachate storage tank sized to provide a minimum of 4-days storage at greatest expected condensate or leachate extraction rates shall also be installed and connected to the partial leachate extraction system.

4. Based on the results of the partial gas and leachate extraction system, within 180 days of the effective date of this closure plan approval modification a final detailed plan for construction of a full gas and

leachate extraction system shall be submitted to the Department for review and approval. The submittal shall consist of a bound report and associated engineering drawings which, in addition to an in-depth presentation of the chosen design and supporting rationale, shall also include:

a. An identification and thorough discussion of all construction tasks and their phasing, as well as a proposed time schedule for completion of each task.

b. A proposed comprehensive construction documentation program for the gas and leachate extraction system.

c. An identification of all elements of a proposed construction documentation report to be submitted to the Department for review and approval.

d. A detailed proposal for operation, monitoring and regular maintenance of all aspects of the gas and leachate extraction system. This shall include a method of documenting the observed areas of influence for each gas and leachate extraction point.

5. The final detailed plan for the landfill gas and leachate extraction system shall incorporate the following design concepts:

a. Extension of all extraction wells to a depth of 3 feet below the base of the refuse. If, at any locations, the base of the refuse cannot be readily determined, the wells shall be extended to 3 feet below the estimated grades for the base of the landfill as depicted in the November, 1988 remedial action report. Unless otherwise demonstrated to the satisfaction of the Department, the well borings shall be a minimum of 12 inches in diameter and the well casing shall be 6-inch diameter Schedule 80 PVC slotted over the lower two-thirds of its length.

b. Overlapping radii of influence of at least 0.5 feet of drawdown for all extraction wells to cover the entire area of the landfill where solid waste has been disposed. Unless otherwise demonstrated to the satisfaction of the Department, the gas and leachate extraction wells shall be located based upon a maximum assumed horizontal radius of influence of 125 feet for each well. A submersible pump is to be placed in each extraction well and shall be activated whenever leachate rises to a set height in the well. The set height shall be no greater than 3 feet.

c. Location of all header piping for the gas and leachate extraction system shall be proposed to be placed no greater than 5 feet below the final landfill surface.

d. Convenient performance of the following procedures from the final landfill surface:

1) Measurement of vacuum levels and gas concentrations at each

extraction well and in header line sections immediately adjacent to each extraction well.

2) Gas flow rate adjustments at each extraction well.

3) Accurate measurement of gas flow rates and concentrations in at least every major branch of the extraction system.

4) Measurement of leachate head levels and leachate extraction rates from each extraction well.

e. Collection of all condensate produced by the gas extraction system and treatment of the condensate as leachate.

f. Provisions for secondary containment and leak detection in any condensate or leachate storage tanks which prove to be necessary. Each tank shall be sized to provide a minimum of 4-days storage at the highest condensate or leachate extraction rates experienced.

g. Incineration of all landfill gas extracted in an environmentally acceptable fashion. Venting of any quantities of landfill gas is not an acceptable management strategy unless it can be demonstrated that the extracted gas does not exceed any hazardous air contaminant limitation for those substances contained in s. NR 445.03, Wis. Adm. Code.

h. Protection of all aspects of the gas and leachate extraction system from vandalism.

6. The following specific information shall be included as part of the design submittal for the full gas and leachate extraction system:

a. Calculations justifying the size and type of the chosen gas blower and any flare station(s).

b. Calculations justifying the sizes and types of submersible pumps chosen for the extraction wells and the sizes of any condensate or leachate storage tanks.

c. Location and design of each gas and leachate extraction well and of each gas and leachate monitoring well, including all leachate head monitoring wells.

7. Within 60 days of the effective date of this closure plan approval modification a geologic investigation of the potential for restoration of potable groundwater for the Schultz, Stoppleworth, and Wallin properties shall be performed and a bound report containing a detailed discussion of the investigation and results shall be submitted to the Department. The investigation shall include the following:

a. Downhole geophysical logging, testing to determine the integrity of the casing, packer testing of the open borehole in 10-foot increments, and any other tests deemed appropriate of the Stoppleworth well to identify contaminated zones within the sandstone

and to evaluate the potential for isolating zones within the sandstone unaffected by volatile organic compounds (VOCs).

b. An evaluation of the feasibility of a point of entry filtration system for the private residences that would meet the specifications of the Department of Industry, Labor and Human Relations and the Bureau of Water Supply.

c. An evaluation of the feasibility of providing a permanent alternative source of potable water off of the Schultz, Stoppleworth, and Swanson properties.

8. Within 120 days of the effective date of this closure plan approval modification monitoring wells shall be installed and developed at the locations proposed in the November, 1988 remedial action report, and restated below, in accordance with NR 508, Wis. Adm. Code. The exact locations and depths of the required monitoring wells shall be approved by Department staff prior to installation. The monitoring wells shall be placed at the following locations to define the extent of groundwater contamination, groundwater flow directions, and hydraulic properties of the aquifer(s):

a. A well nest (water table observation well and piezometer) approximately 1,000 feet north of the landfill between the Summers private well and the northwest corner of the landfill property boundary.

b. Two well nests (one on each side of Black Earth Creek each consisting of a water table observation well and two piezometers) approximately 3,600 feet and 4,300 feet, respectively southwest of the southwest corner of the landfill property boundary.

c. A well nest approximately 950 feet south of the landfill along State Trunk Highway (STH) "14" between the Roberts private wells and the southern landfill property boundary.

d. A well nest approximately 1,700 feet east of the eastern property boundary of the landfill.

e. A water table observation well approximately 750 feet north of the northern landfill property boundary.

f. A well nest approximately 1,000 feet west of the western landfill property boundary.

During installation, the piezometers required above shall be sampled continuously in maximum 10 foot intervals using a field gas chromatograph (GC) for the purpose of detecting the presence of contamination with depth in the aquifer. This information shall be used to properly locate the screened interval of the piezometers.

9. Within 120 days of the effective date of this closure plan approval modification, the newly required wells in condition 8, above and all of the existing monitoring wells for the Refuse Hideaway landfill shall be

sampled and analyzed on a quarterly basis. In addition, two initial rounds of sampling shall be performed on the newly installed wells required in condition 8, above with a minimum of 30 days between samples. All new and existing wells shall be sampled for the following parameters:

a. Field pH, field temperature, field specific conductance (corrected to 25 degrees centigrade), COD, alkalinity, total hardness, dissolved iron, chloride, sodium, magnesium, calcium, sulfate, notation of color, odor and turbidity at the time of sampling, and measurement of water elevation prior to purging the wells.

b. A GC-MS volatile organic compound scan with quantification. These analyses shall be performed using the test methods specified in NR 508.20(5)(e), Wis. Adm. Code.

10. Within 30 days of the effective date of this closure plan approval modification a GC-MS volatile organic compound scan with quantification shall be performed on a quarterly basis on a sample from all private wells within a one-mile radius of the Refuse Hideaway landfill property boundary. These analyses shall also be performed using the test methods specified in NR 508.20(5)(e), Wis. Adm. Code.

11. Within 180 days of the effective date of this closure plan approval modification an investigation to further assess the remedial alternative of groundwater pumping, treatment, and disposal of the treated groundwater, shall be performed and a bound report containing a detailed discussion of the investigation and results shall be submitted to the Department for review. The investigation shall at a minimum include the following:

a. Pump tests on pumping wells installed east, south, southeast and west of the landfill to determine the aquifer(s) characteristics needed to design the groundwater pumping system. The pumping tests shall be conducted according to accepted field methods and shall determine the cone of depressions of the wells by measuring drawdown in adjacent monitoring wells for varying rates of discharge that are approved by the Department prior to testing.

b. An analysis of groundwater samples from selected monitoring wells approved by the Department at or within the design management zone for the Refuse Hideaway landfill for the parameters in the Federal Target Compound List to determine the treatability of the contaminated groundwater.

c. Identification of the discharge limits, or the need for a permit, that will be required by the Bureau of Air Management for discharge of VOCs to the atmosphere and identification of the discharge limits and permits that will be required by the Bureau of Wastewater for discharge of the treated groundwater.

d. Identification of an appropriate means of discharging the treated groundwater. No direct discharge of treated groundwater into Black Earth Creek is acceptable.

12. Based on the results of the investigation required in condition 11, within 180 days of the effective date of this closure plan modification a final detailed design for a groundwater pumping and treatment system which will achieve compliance with the groundwater standards in ch. NR 140, Wis. Adm. Code at the design management zone for the Refuse Hideaway landfill shall be submitted to the Department for review and approval.

13. Within 180 days of the effective date of this closure plan modification based on a reassessment of the degree and extent of groundwater contamination and the hydrogeology in the vicinity of the Refuse Hideaway landfill, the following additional information shall be submitted to the Department for review:

    a. A table of the water level measurements taken at the new and existing groundwater monitoring wells. At least one water table contour map and one bedrock potentiometric surface map shall be constructed on 24 x 36 inch plan sheets in accordance with NR 508.20(6)(c), Wis. Adm. Code. Vertical hydraulic gradients at each well nest and horizontal hydraulic gradients across the area shall be calculated and tabulated.

    b. Iso-concentration maps of contaminants of concern drawn on 24 x 36 inch plan sheets as outlined in NR 508.20(6)(d), Wis. Adm. Code for the parameters which most accurately depict the degree and extent of contamination. An iso-concentration map for total VOCs shall be included.

    c. An evaluation of the potential for Black Earth Creek as a discharge point for groundwater that has been contaminated as a result of the Refuse Hideaway landfill, including an assessment of any environmental impacts on the flora and fauna of the creek.

    c. An updated 24 x 36 inch site map constructed according to NR 508.20(6)(a), Wis. Adm. Code. An updated 8-1/2 x 11 inch map constructed according to NR 508.20(7), Wis. Adm. Code.

    d. Geologic cross-sections drawn on 24 x 36 inch plan sheets through all existing and newly required wells in accordance with NR 508.20(6)(b), Wis. Adm. Code.

The Department retains the right to require the submittal of additional information and to further modify this Closure Plan Approval Modification at any time if, in the Department's opinion further modifications are necessary. Unless specifically noted, the conditions of this closure plan approval modification do not supersede or replace any previous conditions of approval for this facility. Please note, condition 2 which specifies the submittal to the Department of a final detailed plan for construction of a gas extraction system and condition 3 which specifies installation of an approved gas extraction system of the September 6, 1988 Closure Plan Approval Modification are hereby superseded by conditions in this closure plan approval modification.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition to the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: JAN 17 1989

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section

Paul M. Huebner

Paul M. Huebner, C.P.G.S., Site Evaluation Leader
Solid Waste Management Section

Raymond Tierney

Ray Tierney, Hydrogeologist
Environmental Response and Repair Section

Paul M. Huebner / for Susan Fisher

Susan M. Fisher, Environmental Engineer
Solid Waste Management Section

pmh:
cc: Joe Brusca - SOD
Marie Stewart - MA
Chuck Leveque - LC/5
Mark Giesfeldt - ERR/3
Dave Neeb - Davis & Kuehlyon, S.C.
Bob Selk - DOJ
Lee Bartlett - RMT
Bob Anders - Dane Co. Board of Supervisors
Rep. Dave Travis
Rep. Russ Feingold
PSS - SW/3

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny
Secretary

BOX 7921
MADISON, WISCONSIN 53707

APR 0 7 1987

IN REPLY REFER TO: 4410-2

Mr. John DeBeck, President
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Closure Plan Approval, Refuse Hideaway Landfill, License #1953, Dane County

Dear Mr. DeBeck:

I am pleased to inform you that your Closure Plan has been reviewed and approved. The Department believes that the proposed Closure Plan will not have an adverse affect on the performance of your landfill provided the conditions in the enclosed conditional Closure Plan Approval are fulfilled. You should attach this conditional Closure Plan Approval directly to the Plan Approval issued on November 12, 1974.

We have reviewed the letter, calculations, and plans submitted by Creative Resource Ventures (CRV) on October 31, 1986, and the report and plans submitted by CRV on November 24, 1986. These reports were submitted in response to our Plan Modification approval dated November 21, 1986. We consider the information in those two reports to partially fulfill the Closure Plan requirements. A review fee of $600 was received on March 30, 1987. An addendum report is required to address items that were not addressed by the two previous submittals. Our comments on how each condition of the Closure Plan was addressed, and requirements for changes or additional work follow.

CLOSURE PLAN REVIEW

This section directly addresses each point and the conditions of the Department's November 21, 1986 Plan Modification letter.

1. We consider the October 31, 1986 letter and plans and the November 24, 1986 report and plans to comprise the Closure Plan that was required by the plan modification letter.

   a. Updated plan sheets showing the proposed closure grades, the approved 1974 closure grades, and existing grades were provided. However, the existing grades were based primarily on a 1985 survey, with limited spot elevations taken in 1986. Cross sections showing the relationship between the three sets of grades were included.

EXHIBIT 3

In a conversation between Robert Glebs (CRV) and Daniel Carey (DNR) on December 10, 1986, Mr. Glebs stated that an updated contour map had been completed, the locations of the leachate headwells were revised, and the actual ditch elevations were surveyed. He would like the contour map and information to be submitted as an addendum to the Closure Plan. It must also include the north-south and east-west grid systems, and the grid origin, as well as the existing cross-section locations. We expect that the plan will consist of an updated drawing of plan sheet #1 (November 21, 1986) and will show all the phasing and drainage information for closure.

b. The redesigned topslope grades are approved. We noted that the volume calculations provided in the October 31 report compared the volume remaining under the final grades in the 1974 plans to the volume remaining under the final grades in the 1986 revision. However, the remaining volume (194,990 cubic yards) was referenced to the 1985 existing grades, and does not represent the current volume remaining at the site.

We are requiring that volume calculations be performed on the updated survey grades and the 1986 Closure Plan grades to determine the remaining site volume. The remaining site life shall be estimated by using the latest refuse loading rate (from at least the last half of 1986) and the remaining site volume. This information will be required as part of the addendum.

c. The cross sections drawn for the existing east-west grid lines were satisfactory; cross sections were not drawn for the north-south grid lines requested.

The north-south cross section can be submitted with the infield conditions report. The locations may be changed to be within 3+00N to 4+00N, 5+00N to 6+40N, and 8+00N to 9+00N. The exact locations of the cross sections may be chosen by your consultant to correspond with the leachate headwell locations, new groundwater monitoring wells, and known base soil information.

d. Only some of the detailed drawings requested were provided. For the present this is satisfactory. Additional drawings may be needed for other provisions in the infield conditions report.

2. The Closure Plan is considered to be the report and letters mentioned in #1 of this letter.

a. Progressive closure of the site, in Phases I through IV and the revised runoff routing plan are approved.

b. Calculations for runoff volume and velocity will have to be performed and provided. Specifications for the rip-rap and the drainage swales are needed. We are particularly concerned with the design of the southwest corner drainage swale which is quite long and steep. If the initial construction of the swale and rip-rap is not satisfactory, severe erosion is likely to occur.

c. The proposed gas probe system needs revisions. The location of G-3 and G-1 are satisfactory. Probe G-2 should be moved north to approximately 4+00 N, 12+00 W. Two (2) shallow gas probes shall be placed in the southern berm to assess gas migration and vegetative stress. A combination groundwater monitoring well and gas probe could be constructed at the location for P-18 and P-17/G-3.

The multi-level gas probe (Detail 5/5) may not be an appropriate type of probe construction for all the proposed locations. A gas probe with a continuous monitoring interval over its entire length, and a separate short probe interval at its base, may be better for G-3 and G-2. Detail 5/5 may be more appropriate for G-1 and probes located in the south berm.

As part of the addendum, please submit specific gas probe locations, and proposed depths and construction details prior to installation. The type of construction applicable may change after the subsurface soil and bedrock conditions are known. Please describe what conditions may be expected at each probe location, and how the probe construction would change if different conditions are encountered.

d. The gas control and venting system proposal may be submitted as part of the infield conditions report. The provisions of this condition shall remain unchanged.

e. We do not agree with the reasoning used for not proposing construction of additional leachate headwells. Although LH-1 is actually located further west than originally shown, both leachate headwells are located on the southern end of the site. The main mass of refuse is further north, in the center of the site, and leachate head levels may be greater at that location. There is no evidence that the leachate heads in LH-1 and 2 would be the maximum head level in the site; this would imply horizontal flow over the base of the site, which is unlikely since there is no granular drainage blanket or appreciable base slope. A section in the Closure Plan addendum report with the following information is required:

1) A table giving all leachate head levels obtained to date. The sampling dates and measured elevations of the levels at LH-1 and LH-2, and the estimated depth of leachate above the base of the site for those locations must be provided. Boring logs and well construction diagrams for LH-1 and LH-2 must be included.

2) A proposal to locate at least one additional headwell approximately in the center of the site. The proposed construction and date of installation shall be included. This well shall be installed and sampled at the same frequency as LH-1 and LH-2.

Sampling information for all three headwells shall be included in the infield conditions report. The information will be used as a part of the analysis of site conditions.

f. The following groundwater monitoring wells shall be sampled according to the schedule below:

Existing wells: P1S, P1D, P3, P4, P8, P9S

Proposed wells: Piezometer P9D, Water Table wells P16, P17, P18, P19, P20

Additional new wells:

Type	Location
Water table, piezometer	approximately 150' north of P4
Piezometer, bedrock piezometer	at location of P8
Piezometer	at location of proposed P16
Piezometer	at location of proposed P19

Schedule/parameters:

Three sampling rounds (at least a month apart) at each well, analyzed for the following parameters:

Field, specific conductance, field pH, COD, dissolved iron, total iron, hardness, chloride, alkalinity, sodium, sulfate, total dissolved solids, dissolved manganese, and total manganese.

Two rounds (at least a month apart) at each well, analyzed for the following parameters:

Volatile Organic Compound scan with quantification. Any VOCs detected shall be quantified in the following round of sampling at that well.

g. All wells shall be constructed according to the Bureau of Solid Waste Management's April, 1985, "Guidelines for Monitoring Well Design and Installation."

h. A hydrogeologist or other person qualified to perform the duties of a hydrogeologist shall observe and direct the drilling of all borings, the installation of all wells, visually describe and classify all geologic samples and prepare a boring log for each new well. Each log shall include soil descriptions (based upon undisturbed samples collected from each major soil unit at maximum 5-foot increments), method of sampling, depth of sampling, date of boring, water level measurements, and date of water level measurements. All new wells

should be installed without the use of drilling fluids which may affect future water quality analyses. All new wells should be installed without the use of drilling fluids which may affect future water quality analyses. All new wells shall be installed with factory slotted screens, appropriately sized filter pack and threaded joints. Soil boring information for all wells shall be recorded to the depth of the bottom of the well screen. Soil boring information and well construction reports shall be submitted in the in-field conditions report.

i. The soil sample collected at the depth of any subsequently placed monitoring well screen shall be analyzed for grain size distribution by sieve and hydrometer tests, and Atterberg limits, as appropriate for the particular soil type. Each soil sample shall be described according to its physical texture, color, geologic origin, and classified according to the Unified Soil Classification System.

j. Slug or baildown tests shall be conducted on each well required in the monitoring program to determine in-situ hydraulic conductivity.

k. All new wells shall be thoroughly developed soon after installation.

l. A well information form (WIF) shall be completed for all wells required in the monitoring program. One line for the WIF must be completed for each new well installed and submitted to the Department with the in-field conditions report.

m. A water table contour map and potentiometric surface map (reflecting current conditions at the site) shall be submitted with the in-field conditions report.

n. The in-field conditions report shall contain a proposal for long term groundwater monitoring at the site.

o. The requirement for the infield conditions report shall remain. The report will be due 120 days after the date of this approval letter. The following items shall be included with the report.

1-5) As originally stated in the November 24, 1986 plan modification approval letter.

6) The north-south gridline cross sections, as outlined in l.c. of this letter.

7) Detailed drawings as needed for the different sections of the report.

8) A proposed methane gas control venting system as outlined in 2.d. of this letter.

Mr. John DeBeckAPR 0 7 1987

Please call Jodi Feld at (608) 267-3532, or Daniel Carey at (608) 267-7572 if you have any questions regarding this approval.

Sincerely,

Richard G. Schuff, P.E., Chief
Residuals Management & Land Disposal Section
Bureau of Solid Waste Management

RGS:DC:cn/7549R

cc: Marie Stewart - Madison Area
Joe Brusca - SD
Systems Management Section - SW/3
Robert Glebs - CRV, Ltd.

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. Refuse Hideaway, Inc. owns and operates a nonhazardous solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T7N, R8E, Town of Middleton, Dane County, Wisconsin.

2. A conditional Plan Approval was issued by the Department for the facility on November 12, 1974.

3. On November 21, 1986, Creative Resource Ventures, Ltd. on behalf of Refuse Hideaway, Inc. submitted a request to the Department for changes to the conditional Modification to the Plan Approval, dated November 21, 1986. The proposed changes include revised grades for closure of the landfill, revised surface water runoff routing, changes to the groundwater monitoring plan, and a proposed methane gas monitoring plan.

4. The information submitted in connection with the changes requested includes the following:

   a. A cover letter from Creative Resource Ventures, Ltd. (CRV), dated October 31, 1986, and a set of volume calculations and computer drawn cross sections by Residuals Management Technology, Inc. (RMT) and a set of six plan sheets by RMT.

   b. A cover letter from CRV dated November 21, 1986 and received on November 24, 1986, and a report entitled "Additional Information for the Closure of the Refuse Hideaway Landfill" prepared by RMT, with two plan sheets included in the report.

5. Additional documents considered in connection with the modification request include the following:

   a. The Department's "Modification to The Plan Approval" dated November 21, 1986.

   b. Various documents, plans, and letters contained in the correspondence and plan files for the landfill at the Department office.

6. Additional facts relevant to the review of the Plan of Operation approval modification request include the following:

   The two letters and associated reports from CRV did not completely address every condition for the Closure Plan submittals as required in the Department's November 21, 1986 approval

7. The special conditions set forth below are needed to assure that all the conditions of the Department's November 21, 1986 approval are complied with, and the methane gas and groundwater monitoring networks are able to detect potential impacts from the site. If the special conditions are complied with, the proposed modifications will not inhibit compliance with the standards set forth in NR 140 and NR 180.13, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44(3), Stats., to modify a Plan Approval if the modification would not inhibit compliance with chapter NR 140 and NR 180, Wis. Adm. Code.

2. The Department has authority to approve a Closure Plan with special conditions if the conditions are needed to ensure compliance with chapter NR 180, Wis. Adm. Code.

3. The conditions of approval set forth below are needed to ensure compliance with NR 180.13, Wis. Adm. Code.

4. In accordance with the foregoing, the Department has authority under s. 144.44, Stats., to issue the following conditional Closure Plan Approval.

CONDITIONAL CLOSURE PLAN APPROVAL

The Department hereby approves the Closure Plan for the Refuse Hideaway Landfill, subject to the following conditions:

1. An addendum to the Closure Plan shall be submitted within 30 days of the date of this letter. The addendum shall contain the following information:

   a. An updated plan showing the existing grades, an estimate of the remaining site volume and an estimate of the remaining site life as noted in section 1.a. and b. of the cover letter.

   b. Calculations for runoff volume and velocity, and specifications for swale design and rip-rap as noted in section 2.b. of the cover letter.

   c. Revised gas probe locations, proposed construction details for each location, proposed depth of the probes, and a proposed monitoring schedule as noted in section 2.c. of the cover letter.

   d. An update on all monitoring data obtained to date from the leachate headwells, and a proposal to install at least one additional leachate headwell as noted in section 2.e. of the cover letter.

2. An infield conditions report as required in the November 21, 1986 letter, shall be submitted within 120 days of the date of this letter and shall contain the additional items noted in sections 2.f. through 2.o. of the cover letter.

The Department retains the jurisdiction either to require the submittal of additional information or to modify this approval at any time if, in the

Department's opinion, further modifications are necessary. Unless specifically noted, the conditions of this approval do not supercede or replace any previous conditions of approval for this facility.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: _____

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Richard G. Schuff, P.E., Chief
Residuals Management & Land Disposal Section

Jodi Feld, Hydrogeologist
Residuals Management & Land Disposal Section

Daniel Carey, Environmental Engineer
Residuals Management & Land Disposal Section

7549R
4/1/87

CONSENT ORDER

The Department, therefore, orders:

1. John DeBeck and Refuse Hideaway, Inc., shall, by no later than May 16, 1988, cease all solid waste disposal operations at the Refuse Hideaway landfill.

2. John DeBeck and Refuse Hideaway, Inc., shall, by no later than June 1, 1988, submit a proposed closure plan modification to the Department for approval. This submittal shall contain:

   a. An updated topographic survey with a maximum 2 foot contour interval of the 40 acre landfill property.

   b. Revised final grades with slopes of at least 3%, but no greater than 33%.

   c. A drainage system meeting the requirements of NR 506.08(3)(b), Wis. Adm. Code.

   d. A final cover system design that meets the requirements of NR 504.07, Wis. Adm. Code.

   e. Documentation of a clay borrow source or sources for sufficient quantities of clay to cap the entire area of the landfill where solid waste has been disposed. The soils shall meet the requirements of NR 504.07(4), Wis. Adm. Code and have a minimum Plasticity Index (PI) of 10 and an average PI of 12 and a minimum Liquid Limit (LL) of 20 and an average LL of 25.

3. John DeBeck and Refuse Hideaway Inc., shall, by no later than July 1, 1988, submit a plan to the Department for approval to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants.

4. John DeBeck and Refuse Hideaway Inc., shall, by no later than August 15, 1988, install the 2 foot thick clay capping layer of the approved final cover system over the entire area of the landfill where solid waste has been disposed, and shall, by no later than September 15, 1988 complete placement of the cover layer as well as topsoiling, seeding, fertilizing, and mulching of the approved final cover system.

5. John DeBeck and Refuse Hideaway, Inc., shall construct and develop 5 of the following 10 wells by May 16, 1988 and the remaining 5 wells by June 1, 1988, in accordance with NR 508, Wis. Adm. Code at the locations specified below :

   a. The upper well (P-23S) of a well nest located between the landfill and well P-20S, approximately 200 feet east of the eastern property boundary of the landfill.

EXHIBIT C

b. The upper (P-25S) well of a 3 point well nest located approximately 300 feet south of the southeastern corner of the property boundary of the landfill.

c. A well nest (P-26S and P-26D) located approximately 300 feet northwest of the northwestern corner of the property boundary of the landfill.

d. The upper well (P-27S) of a well nest located approximately 200 feet west of the southwestern corner of the property boundary of the landfill.

e. A water table observation well (P-28S) located in the north eastern corner of the property boundary of the landfill.

f. The upper well (4c) of a well nest located approximately 1,750 feet southwest of the southwestern corner of the property boundary of the landfill.

g. A well nest (4e) approximately 50 feet south of the southern property boundary of the landfill at approximate western coordinates of B-24.

h. A bedrock piezometer (P-21BR) at the location of P-21S.

6. John DeBeck and Refuse Hideaway, Inc., shall by July 1, 1988 construct and develop the following additional wells installed into the bedrock in accordance with NR 508, Wis. Adm. Code at the locations specified below:

a. The lower well (P-23D) of the well nest listed in 5a., above.

b. The intermediate well (P-25D) and bedrock piezometer (P-25BR) of the 3 point well nest listed in 5b., above.

c. The piezometer (P-27D) of the well nest listed in 5d., above.

d. The piezometer (4c) of the well nest listed in 5f., above.

During installation, wells installed under this paragraph shall be sampled continuously in maximum 10 foot intervals using a field gas chromatograph (GC) for the purpose of detecting the presence of contamination with depth in the aquifer. This information shall be used to properly locate the screened interval of the monitoring well. [The exact locations and depths of the required monitoring wells shall be approved by Department staff prior to installation].

7. As part of the groundwater investigation, all existing and proposed monitoring wells shall be sampled twice with a minimum of 15 days between sampling dates. Each well shall be sampled and analyzed for the following parameters:

a. Field pH, field temperature, field specific conductance (corrected to 25 degrees centigrade), COD, total alkalinity, total hardness, notation of color, odor and turbidity at the time of sampling, and measurement of water elevation prior to purging the wells.

b. Public health and welfare parameters:

Chloride, copper, dissolved iron, manganese, sulfate, total dissolved solids, zinc, arsenic, barium, cadmium, chromium, fluoride, lead, mercury, nitrate plus nitrite-nitrogen, selenium, and silver. The metals analyses shall be performed using a method which is capable of detecting and quantifying values at or below the preventive action limit for each parameter, except selenium.

c. A GC-MS volatile organic compound scan with quantification shall be run on both sampling rounds. These analyses shall be performed according to EPA SW-846 method 8240 or EPA wastewater method 624. As an alternative, the VOC analyses shall be performed according to EPA SW-846 methods 8010/8020 or EPA wastewater methods 601/602. The Department shall be notified and approve of detection limits for the volatile organic compound scans prior to the first sampling date.

8. John DeBeck and Refuse Hideaway, Inc., shall, by August 1, 1988 submit, a phase 1 groundwater investigation report for Department review and approval. The report shall include documentation of the well installations in accordance with NR 508.11, Wis. Adm. Code, a water table contour map and the results of the field GC sampling.

9. John DeBeck, and Refuse Hideaway, Inc., shall, by October 1, 1988, submit a remedial action report for Department review and approval. The report shall include:

a. An evaluation of the local and regional groundwater flow directions and the degree and extent of groundwater contamination around the site; the nature, persistence and likely fate of any contaminants; the existing or potential environmental and health effects of the contamination.

b. A proposal for remedial measures which are technically and economically feasible for renovating or restoring ground/surface water quality. The report shall include:

i. An evaluation of the technical and economical feasibility for extracting and lowering the existing leachate mound within the landfill.

ii. An evaluation of the technical and economical feasibility for pumping and treating contaminated groundwater around the landfill for the purpose of preventing the further migration of contamination, and to restore the contaminated groundwater to compliance with state groundwater standards listed in NR 140.10-.12, Wis. Adm. Code.

c. A proposal for long-term environmental monitoring which would evaluate the effects of any remedial action on the continued performance of the landfill.

The report shall also include justification of why remedies other than those proposed are not technically or economically feasible to implement.

10. Nothing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose other than for action taken for failure to comply with the terms of this order.

The Department reserves the right to require the submittal of additional information or modify this order if conditions warrant in which case John DeBeck and Refuse Hideaway, Inc., will have full right under the law to contest any modification of this order.

Waiver and Stipulation

John DeBeck, individually and as president of Refuse Hideaway, Inc., hereby waives further notice and all statutory rights to demand a hearing before the Department of Natural Resources and to commence any judicial action regarding the foregoing Findings of Fact, Conclusions of Law, and Consent Order under Sections 144.431, 144.44(8), 227.42, 227.52 and 227.53, Wisconsin Statutes, or any other provision of law. John DeBeck, individually and as president of Refuse Hideaway, Inc., 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 Sections 144.98 and 144.99, Wisconsin Statutes. The undersigned certifies that he is authorized by Refuse Hideaway, Inc., to execute such Consent Order, Waiver, and Stipulation.

STATE DEPARTMENT OF NATURAL RESOURCES

by Kathryn A. Curtner — May 3, 1988
Kathryn A. Curtner — Date
Assistant Administrator
Division of Enforcement

John DeBeck — 5-2-88
John DeBeck — Dated

SPECIAL CONSENT ORDER

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Closure of the Refuse Hideaway Landfill, License Number 01953, Town of Middleton, Dane County, Wisconsin	))))	Special Consent Order No. SOD-88-02A

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND CONSENT ORDER

FINDINGS OF FACT

1. John DeBeck and Refuse Hideaway, Inc., own and operate the Refuse Hideaway Landfill, which is located in the Town of Middleton, Dane County, Wisconsin. The landfill initially was licensed by the Department during 1974 and has been in operation since that time. The landfill has received approximately 1.3 million cubic yards of solid waste.

2. The Refuse Hideaway Landfill is a licensed landfill which is classified as a "Nonapproved facility" as defined by sec. 144.441(1)(c), Stats. However, there is an April 7, 1987, approved closure plan for the landfill.

3. The Refuse Hideaway Landfill has been developed as a natural attenuation landfill. The natural attenuation design concept was a common design alternative at the time the site was initially licensed. As such, the site was constructed without substantial engineering modifications such as a clay liner and leachate collection system.

4. Unconsolidated soils in the vicinity of the landfill consist of lake derived sediments over glacial till. Soils deposits of over 100 feet in depth are present south of the landfill while bedrock is at the ground surface north of the landfill. The water table is located approximately 10 feet below the base of the landfill. Downward vertical gradients were measured in areas around the perimeter of the landfill showing that there is the potential for migration of contaminants downward into the bedrock aquifer.

5. Because of mounded leachate within the landfill, there may be flows of leachate radially outward from the landfill. Additional investigation should be done to determine if this is the case and to what extent flow is affected by the leachate mound. However, it is clear that one component of the groundwater flows southernly toward Black Earth Creek, which is a local groundwater discharge area. Black Earth Creek is a Class I trout stream.

6. Groundwater in the vicinity of the landfill is utilized as a domestic water supply by a number of homeowners. Several private wells in the area have shown elevated concentrations of certain contaminants, including vinyl chloride. However, the source of the contamination in these wells cannot be definitely established at this time without further investigation.

7. A number of groundwater monitoring wells have been installed at and in the vicinity of the landfill. Results obtained from some of these wells indicate that disposal operations at the landfill have caused a detrimental affect on groundwater quality. Evaluation of available groundwater quality information indicates that disposal operations have caused the attainment and exceedance of groundwater quality standards established under ch. NR 140, Wis. Adm. Code. Exceedances of preventative action limits for indicator parameters and substances of health or welfare concern, as well as enforcement standards for substances of health or welfare concern have been caused by operation of the landfill.

8. These groundwater impacts will continue for some time in the future. However, termination of waste filling operations will prevent additional contaminants from being introduced into the landfill and additional contaminants from being introduced into the groundwater system from those wastes. Installation of a final cover system over the fill area will reduce the rate at which leachate is generated within the landfill.

9. The Department has considered the range of responses to groundwater standard exceedances listed in secs. NR 140.24 and 140.26, Wis. Adm. Code. Based upon this evaluation, termination of disposal operations and closure of the landfill, and further investigation to determine the scope and extent of groundwater impacts, and any necessary remedial action, is reasonable and necessary to achieve compliance with groundwater standards, and to protect public health, safety, and welfare.

CONCLUSIONS OF LAW

1. The Department has authority under secs. 144.44(8) and 144.431, Stats., to order necessary corrective action at a landfill where minimum standards established under ch. NR 504, Wis. Adm. Code, have not been complied with.

2. The Refuse Hideaway Landfill is being operated and maintained in violation of sec. NR 504.04(4)(d), Wis. Adm. Code, and the groundwater standards established in ch. NR 140, Wis. Adm. Code.

3. Based upon the foregoing, the Department has authority to issue the following order.

MICHAEL BEST & FRIEDRICH
Attorneys at Law

One South Pinckney Street
P.O. Box 1806
Madison, Wisconsin 53701-1806
FAX (608) 283-2275
Telephone (608) 257-3501

Milwaukee Office
100 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4108
FAX (414) 277-0656
Telephone (414) 271-6560

February 27, 1990

Attorney General Donald J. Hanaway
State of Wisconsin
Department of Justice
114 E. State Capitol
Madison, WI 53702

Carroll D. Besadny, Secretary
Wisconsin Department of Natural Resources
101 S. Webster Street
Madison, WI 53703

Re: State ex rel. Stoppleworth v. Refuse Hideway, Inc., et al., Case No. 88 CV 3421
State ex rel. Schultz v. Refuse Hideaway, Inc., et al., Case No. 88 CV 3434

Dear Sirs:

Enclosed is a motion to intervene the Wisconsin Department of Natural Resources in private litigation seeking, as part of the relief, an order for cleanup of the Refuse Hideaway, Inc. landfill, Town of Middleton, Dane County, Wisconsin.

Assistant Attorney General Robert Selk is familiar with this motion and its intended purpose.

Sincerely yours,

MICHAEL, BEST & FRIEDRICH

Arvid A. Sather

AAS/elb:2281h
Enclosure
cc: Assistant Attorney General Robert Selk (w/encl.)

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE ex rel.
ALBERT and CAROLYN STOPPLEWORTH,
and ALBERT and CAROLYN STOPPLEWORTH,
individually
Plaintiffs,
v.

Case No. 88 CV 3421

REFUSE HIDEAWAY, INC.;
et al.
Defendants.

STATE, ex. rel.
CRAIG A. SCHULTZ and
ANITA SCHULTZ, and
CRAIG A. SCHULTZ and
ANITA SCHULTZ, individually,

Plaintiffs,

v.

Case No. 88-CV-3434

REFUSE HIDEAWAY, INC.;
et al.
Defendants.

NOTICE OF MOTION AND MOTION
TO AMEND COMPLAINT

PLEASE TAKE NOTICE that on Tuesday, March 6, 1990 at 3:00 p.m., or as soon thereafter as counsel can be heard before the Honorable Jack Aulik, Circuit Court Judge, Branch 4, at the Dane County Courthouse, 210 Martin Luther King, Jr. Blvd., Madison, WI 53709, the plaintiffs Albert and Carolyn Stoppleworth will move the Court to file a second amended complaint, pursuant to section 802.09, Wis. Stats., a copy of which is attached hereto and incorporated herewith; and for leave to commence and prosecute an action against the defendants to enjoin and abate a public nuisance, pursuant to section 823.02, Wis. Stats.; and to join, pursuant to section 803.03(1)(a), as a party plaintiff to

this action the Wisconsin Department of Natural Resources.

The plaintiffs will further move the Court that the granting of leave to file the second amended complaint, and its filing shall not constitute a waiver by the plaintiffs of objection they may have to any portion of the Court's decisions on RMT's motion to dismiss and motion to make more definite and certain nor constitute a waiver of any rights to review of said decision under section 809.10, Wis. Stats.

In support of this motion, the plaintiffs will rely upon the Court's Decision on Motion to Dismiss and Decision on Motion to Make More Definite and Certain, pleadings, depositions, transcripts, written interrogatories and responses thereto, briefs, and the plaintiffs' statement in support of this motion.

Dated this 27th day of February, 1990.

ALBERT AND CAROLYN STOPPLEWORTH
Plaintiffs

By: /s/
CALLAWAY, DUNN & MEEKER, S.C.
One of Their Attorneys

By: _____
MICHAEL, BEST & FRIEDRICH
One of Their Attorneys

Richard J. Callaway, Esq.
CALLAWAY, DUNN & MEEKER, S.C.
306 East Wilson Street
Madison, WI 53703
Telephone: 608-257-7663

Arvid A. Sather, Esq.
900 First Wisconsin Plaza
One South Pinckney Street
Post Office Box 1806
Madison, WI 53701
Telephone: 608-257-3501

ATTORNEYS FOR PLAINTIFFS

2266h

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE ex rel.
ALBERT and CAROLYN STOPPLEWORTH,
and ALBERT and CAROLYN STOPPLEWORTH,
individually

Plaintiffs,

v.

Case No. 88 CV 3421

REFUSE HIDEAWAY, INC.,
et al.,

SECOND AMENDED COMPLAINT

Defendants.

STATE, ex. rel.
CRAIG A. SCHULTZ and
ANITA SCHULTZ, and
CRAIG A. SCHULTZ and
ANITA SCHULTZ, individually,

Plaintiffs,

v.

Case No. 88-CV-3434

REFUSE HIDEAWAY, INC.;
et al.

Defendants.

NOW COME the Plaintiffs, Albert and Carolyn Stoppleworth, by their attorneys, Richard J. Callaway and Michael, Best & Friedrich, and for claims for relief against the Defendants respectfully allege and show the Court as follows:

1. Plaintiffs, Albert and Carolyn Stoppleworth, husband and wife, are adults who at all times relevant to this action have owned property and resided in the Town of Middleton, Dane County, Wisconsin, at the address 750 Highway 14, Middleton, Wisconsin 53562.

2. The Defendant, Refuse Hideaway, Inc. ("Refuse Hideaway"), is a domestic corporation whose registered agent for

service is John W. DeBeck, 6629 Gettysburg Drive, Madison, Wisconsin 53705. Refuse Hideaway has owned and operated the Refuse Hideaway Landfill (the "Landfill") since the date of its incorporation on March 1, 1982.

3. The Defendant, John W. DeBeck, is an adult resident of the State of Wisconsin, who address is 2114 Sunnyside Crescent, Madison, Wisconsin 53704. John DeBeck was an original incorporator of Refuse Hideaway, Inc. and is engaged in the ownership and operation of landfills. John DeBeck has been, during all times relevant to this action, engaged in the development, ownership and operation of landfills in Dane County, Wisconsin.

4. The Defendant, Thomas G. DeBeck, is an adult resident of the State of Wisconsin, whose address is 5413 Matthews Road, Middleton, Wisconsin 53562. Thomas G. DeBeck was an original incorporator of Refuse Hideaway, Inc. and is engaged in the ownership and operation of landfills.

5. RMT, Inc. ("RMT") is a domestic corporation whose registered agent for service is Brooks Becker, 1406 E. Washington Avenue, Madison, WI 53703. It is a wholly-owned subsidiary of WP&L Holding, Inc. RMT is in the business of providing engineering and environmental consulting services. Its corporate headquarters are located at 1406 East Washington Avenue in Madison, Wisconsin, and it presently employs approximately 300 employees.

6. Starting in about July 1972, the Defendants, John W. DeBeck and Thomas G. DeBeck ("DeBecks"), operated a partnership known as Land Disposal Companies, which was principally involved in the ownership and operation of the Mazo-Land Disposal at Mazomanie, Wisconsin and eventually the Refuse Hideaway Landfill in the town of Middleton, Dane County, Wisconsin. This partnership continued until about February 1982, when DeBecks incorporated Refuse Hideaway, Inc., which thereafter continued the ownership and operation of the Refuse Hideaway Landfill. The DeBecks served as officers and principal shareholders of this corporation.

7. John DeBeck, during the period from about 1970 to 1972 conferred on several occasion with the Wisconsin Department of Natural Resources ("DNR") concerning the development and operation of a landfill in the Town of Middleton. During 1972, John DeBeck submitted plans and specifications for the landfill which were approved by the DNR, and a Solid Waste Disposal Operation License was issued by DNR on November 2, 1972 to John DeBeck.

8. During 1972, a group of citizens, including the plaintiff, Albert Stoppleworth, initiated a lawsuit against the DNR and John DeBeck opposing the licensing of the landfill in the Town of Middleton, contending it was not environmentally sound and would result in groundwater contamination. On December 14, 1972, the parties to the litigation stipulated that

DNR would prepare an Environmental Impact Report regarding its licensing of the landfill.

9. The proposed landfill was designed as a natural attenuation landfill and did not contain a clay liner or leachate collection system. The DNR issued its Final Environmental Impact Statement in August 1974. This statement concluded that:

> Leachate production is believed to be inevitable in a sanitary landfill, however, its production and movement may be controlled to the extent that it will not create a water pollution problem by preventing water from entering the fill to the greatest extent practicable. It is anticipated that the operating plan and geologic conditions at the DeBeck site will provide for satisfactory attenuation of leachate without impairment of the regional groundwater system or existing private water supplies in the site vicinity.

The citizen group, including the plaintiff Albert Stoppleworth, objected to and disagreed with this determination by the DNR.

10. On November 12, 1974, John R. Reinhardt, Chief, Solid Waste Management Section, DNR, notified John DeBeck of approval of the final plans and specifications for the landfill, subject to DNR operating recommendations. These recommendations and conditions of operations were set forth in the Report dated November 12, 1974 by Robert T. Glebs, Engineer, Solid Waste Management Section, and John Reinhardt, Section Chief. Among others, the recommendations and conditions required that:

> - Surface water division swales and drainage ditches shall be maintained at all times to protect the operation of the site from surface water runoff.

- Water quality samples were to be taken quarterly from monitoring wells, for which the location was to be specified by the DNR.

- Solid waste was not to be deposited within 10 feet of the sandstone bedrock.

By letter dated December 13, 1974, under the signatures of Robert Glebs and John Reinhardt, a Solid Waste Disposal Operation License was issued by the DNR for the operation of the Refuse Hideaway Landfill.

11. During the period from 1975 to 1977, Robert Glebs and David Nichols, Solid Waste Management Section, DNR, periodically inspected the Refuse Hideaway Landfill and observed numerous deficiencies, including deficiencies relating to improper surface water drainage, inadequate compaction and covering of waste and failure to carry out the water quality sampling program. On September 19, 1977, Robert Glebs recommended in a memorandum to John Reinhardt: "Each year Mr. DeBeck has been operating, problems have come about and rather than getting better Mr. DeBeck has made efforts but has only been in partial compliance since the operation has begun. At this point in time, it appears the items of noncompliance with the plans and operational aspects of this landfill are serious enough in nature to warrant this enforcement action."

12. During early 1978, John Reinhardt resigned from DNR to participate in the formation of RMT as vice-president of the company. Dave Nichols resigned from DNR in about September 1978 to join the RMT staff as senior hydrologist, and Robert Glebs

left DNR and joined RMT in mid-November, 1978 as the sixth member of the RMT staff.

13. Several weeks after leaving DNR, Robert Glebs, on December 4, 1978, met with John DeBeck and proposed that RMT provide comprehensive consulting services to the DeBecks for the operation of Refuse Hideaway Landfill, the potential expansion of that landfill, and development of new landfills. By letter dated December 20, 1978, Glebs submitted a project proposal to be performed by RMT for the DeBecks regarding the Refuse Hideaway Landfill, which included:

> 2. Prepare a report on water quality in and around the existing land disposal in Section 8. This is to include evaluation of exiting data . . . a discussion of the existing program's ability to detect contamination; and provide recommendations for additional wells, modifications to the current program and overall adequacy of the program with respect to the ability of the current wells to detect potential groundwater problems."

On March 6, 1979, RMT and John DeBeck contracted for RMT to perform item 2 of the December 2, 1978 proposal relating to a report on the water quality aspects of the landfill operation.

14. Stephen Johannsen, hydrologist with RMT, during 1979, pursuant to the agreement between John DeBeck and RMT, prepared the RMT "Evaluation of Water Quality Results and Water Quality Monitoring Program". In conjunction with this study, Johannsen determined that "questionable well placement and poor monitoring technique make the current data practically meaningless. It is possible that any contaminant plume that exists has been missed." The RMT report recommended that new monitoring wells

be added to monitor potential leachate generation and to monitor potential for deep flow of leachate and toxic pollutants to groundwater.

15. Robert Glebs transmitted the RMT report to John DeBeck on July 31, 1979 with the overall conclusion:

> The report basically indicates that the current groundwater quality monitoring program at your Middleton landfill has detected no significant changes in the quality of groundwater. This indicates that landfill has not affected the quality of groundwater at this time. The report, however, does indicate that the current groundwater monitoring system would be more [a]ffective if several wells (strategically located) are added to the overall monitoring system.

16. The new monitoring wells and in particular the leachate head and deep wells recommended in the RMT report were not installed.

17. RMT from about 1979 to 1986 carried out the quarterly groundwater monitoring program for the DeBecks at the landfill site. This principally consisted of obtaining water samples from the monitoring wells evaluating certain parameters of the samples through laboratory analysis and advising the DeBecks and the DNR on behalf of the DeBecks of the results and conclusions arrived at from the monitoring activity. From 1979 to 1986, RMT repeatedly advised on a quarterly frequency that the water quality data it obtained indicated "no significant changes from previous results" and therefore concluded that "no groundwater degradation near the site" was occurring.

18. At no time prior to at least 1986 did RMT advise the

DeBecks, the plaintiffs or any other interested party, or the DNR that it had determined that the monitoring system was significantly defective in that a contaminant plume from the landfill could pollute the groundwater aquifer at the site and go undetected by the existing groundwater monitoring system. Furthermore, RMT consistently rendered its opinion from 1979 to 1987 that there was "no groundwater degradation near the site" without noting the limitations of such conclusions because of the inadequacy of the monitoring system.

19. During the summer of 1985, DNR identified a number of leachate seeps from the landfill. RMT installed a leachate head well in February 1986 and detected about 15 feet of leachate at the bottom of the landfill. Upon receipt of this information, DNR in July 1986 initiated a review of the leachate/groundwater monitoring at the site.

20. DNR in October 1986, issued a proposed Plan Approval Modification for the landfill, which, among others, required revision of the monitoring program and the preparation of an In-Field Conditions Report.

21. The DNR, in conjunction with its November 21, 1986 Plan modification letter and its April 7, 1987 Closure Plan Approval for the landfill required that the groundwater monitoring system be revised and that groundwater samples be analyzed for Volatile Organic Chemicals ("VOCs").

22. During June and July 1987, RMT sampled the monitoring

wells at the landfill site, including the site's perimeter wells, for VOCs and detected VOCs in excess of the state enforcement standards for such chemicals as benzene, 1,2 dichloroethane, tetrachloroethylene, vinyl chloride, and xylene in twelve of the fourteen monitoring wells. In an internal report dated August 28, 1987, RMT concluded: "Should concentrations of NR 140 public health be found in excess of the ES [enforcement standard] off the landfill property, WDNR could shut down the operation. This problem is the most immediate concern."

23. Despite the close proximity of the plaintiffs' drinking water well to the landfill, the defendants did not notify the plaintiffs of the potential contamination of their well, analyze the plaintiffs well water for contaminants, nor recommend such an analysis upon the defendants' learning of the pervasive nature of the groundwater contamination emanating from the landfill. Although it was apparent to RMT, upon learning of the VOC groundwater contamination, that the plaintiffs' well should be monitored and such a recommendation was set forth in RMT's internal document prior to October 1987, it was not until RMT submitted its In-Field Condition Report to DNR in January 1988 that the recommendation was made to DNR that the plaintiffs' drinking water well be tested. RMT did not test the plaintiffs' well until February 29, 1988, and it was not until March 10, 1988 that RMT informed the plaintiffs that their well

water was contaminated with VOCs and recommended they stop drinking the water.

24. On March 24, 1988, the DNR requested that the Refuse Hideaway Landfill be closed. Not until May 16, 1988 did the landfill cease to accept waste materials.

25. As a direct result of the defendants' acts relating to the operation of the Refuse Hideaway Landfill, leachate and other toxic pollutants emanated from the landfill and polluted the soils, bedrock and groundwater under, around and in the vicinity of the landfill. These toxic pollutants were transported through the aquifer in the area of the landfill, contaminating the soils, bedrock and groundwater on the plaintiffs' property; and further as a result of the defendants' acts, these pollutants contaminated the plaintiffs' drinking water well, and through the use of this well water for drinking, cooking, bathing and otherwise, the plaintiffs were exposed to the toxic pollutants and contaminants emanating from the Refuse Hideaway Landfill, including but not limited to the chemicals 1, 1, 1-trichloroethane, 1,1-dichloroethane, trans-1,2-dicholoroethylene, fluorotrichloromethane, tetrachloroethlyene, trichloroethylene, and vinyl chloride, some of which chemicals are carcinogenic; and that such contamination continues to persist on the plaintiffs' property.

26. The Stoppleworths, as innocent victims of the defendants' acts, have been severely damaged, including but not limited to:

a. The plaintiffs, from exposure to toxic pollutants including carcinogens, suffer a substantially increased risk of affliction by disease, including cancer.

b. The plaintiffs suffer from the continual fear and emotional distress resulting from the increased risk of disease resulting from exposure to toxic pollutants;

c. The plaintiffs will incur the additional expense of future health monitoring in order to detect in a timely manner any diseased condition, including cancer, which results from exposure to toxic pollutants.

d. The plaintiffs have suffered and will continue to suffer a deterioration of the quality of their life, including the inconvenience and harassment of not being capable of obtaining quality drinking water from their well or house water system.

e. The saleability and fair market value of their home and property have been destroyed in that the property cannot by law be sold as a residence, and persons are unwilling to purchase property which is afflicted by substantial toxic pollutant contamination.

f. The plaintiffs have suffered and will continue to suffer loss of the enjoyment of their property.

FIRST CAUSE OF ACTION

27. Plaintiffs allege and reallege paragraphs 1 through 26 above and incorporate them by reference.

28. As a result of the defendants' negligent acts, they breached the duty of care they owed to the Stoppleworths and, as a direct and proximate result, the Stoppleworths' property and well have been contaminated and continue to be contaminated by toxic pollutants, to which the plaintiffs have been exposed, all of which have caused and continue to cause severe personal injury and damages to the Stoppleworths.

29. That the negligent acts of the defendants John DeBeck, Tom DeBeck, d/b/a Land Disposal Companies, a partnership, and Refuse Hideaway, Inc. include the following:

a. Failure to maintain and operate the landfill in a reasonable manner consistent with then-existing law and, in particular, failure to provide and maintain proper drainage to prevent surface water from entering the fill areas; failure to provide adequate cover over wastes deposited in the landfill, particularly for the purpose of minimizing the accumulation and production of ~~leachate in the fill area.~~

b. Failure to adequately or reasonably monitor the condition of the landfill and, in particular, the amount of leachate accumulating in the fill areas; and failure to remove excessive leachate from the fill area as necessary to preclude the mounding of the leachate with resulting hydraulic pressures which forces the leachate and toxic pollutants from the landfill into the groundwater and fractured bedrock underlying and surrounding the landfill.

c. Failure to maintain an adequate and reasonable separation between the deposited waste and the bedrock and water table underlying and surrounding the fill areas of the landfill.

d. Failure to adequately and reasonably monitor the impact of the landfills and the pollutants emanating from the landfill upon the groundwater, bedrock and soils in the vicinity of the landfill.

e. Acceptance of liquids, sludges and materials which contained hazardous constituents for disposal as refuse and waste at the landfill, when the nature of the design, construction and operation of the landfill rendered the landfill an unsuitable and unreasonable facility for the permanent disposal of such waste.

f. Failure to inform the plaintiffs in a timely manner of the toxic pollutants emanating from the landfill and to assess whether such toxic pollutants had impacted and polluted the plaintiffs' ~~well, thus posing a health hazard to~~ the plaintiffs.

30. That the negligent acts of the defendant RMT include:

a. Failure to adequately and reasonably advise the DeBecks as owners and operators of the landfill that the groundwater monitoring system implemented and utilized by the DeBecks was severely inadequate.

b. Negligently concluding and advising the DeBecks and the DNR periodically and consistently during the period from

1979 to 1986 that the monitoring results obtained by RMT showed that the landfill was not affecting the groundwater in the vicinity of the landfill.

c. Failure to inform the plaintiffs in a timely manner of the toxic pollutants emanating from the landfill and to assess whether such toxic pollutants had impacted and polluted the plaintiffs' well thus posing a health hazard to the plaintiffs.

31. As a result of these negligent acts of the defendants, the plaintiffs have sustained and will continue to sustain personal injury and damages for which the defendants are jointly and severally liable, including punitive damages for such outrageous conduct.

SECOND CAUSE OF ACTION

32. Plaintiffs allege and reallege paragraphs 1 through 31 and incorporate them herein by reference.

33. The defendants jointly participated in and exercised control over the operation of the landfill.

34. As a direct and proximate cause from the operation of the landfill, there occurred contamination of the groundwater, aquifer, soils and bedrock with toxic pollutants at and in the vicinity of the landfill, including the plaintiffs' drinking water well and property, all of which has constituted and constitutes a continuing public nuisance within the meaning of Chapter 823, Stats., which has caused injury to the plaintiffs.

34. As a result of the acts of the defendants which have caused or constituted substantial factors in causing the public nuisance, the defendants are jointly and severally liable for damages sustained by the plaintiffs, including punitive damages and to abate the public nuisance.

THIRD CAUSE OF ACTION

35. As and for a third cause of action, plaintiffs reallege paragraphs 1 through 34 and incorporate them herein by reference.

36. That the defendant RMT entered into contracts with the DeBecks and Refuse Hideaway, Inc., by which RMT agreed to provide professional engineering and environmental consulting services in the operation of the landfill, including compliance with certain environmental laws and regulations of the federal and state government, particularly with respect to the regulations and orders of the DNR. These contracts were for the additional purpose of assuring the operation of the landfill in an environmentally sound manner to preclude citizens, such as the plaintiffs, from asserting claims against the DeBecks and Refuse Hideaway, Inc. A primary purpose for obtaining the services of RMT was to protect the citizens residing in proximity to the landfill. As such, the plaintiffs are third-party beneficiaries to these contracts, and RMT owed a duty to the plaintiffs in the performance of these contracts.

37. That RMT breached its duty under the contract by

intentionally and knowingly misrepresenting the adequacy of the landfill monitoring system to John DeBeck; by intentionally and knowingly misrepresenting to John DeBeck and the DNR the significance of the results of the quarterly groundwater monitoring information as it related to an evaluation of the impact of the landfill on groundwater; and intentionally and knowingly delaying a determination to what extent, if any, toxic pollutants had impacted the plaintiffs' drinking water well, when RMT identified significant VOC contamination in the monitoring wells on the landfill site in June 1987.

38. The foregoing breach of RMT's contractual duty was a direct result and proximate cause of the plaintiffs' personal injury and damages from the contamination of their drinking water well and property. Defendant RMT is liable to plaintiffs for the damages, including punitive damages, caused to the plaintiffs as a result of the breach of their contract obligations.

FOURTH CAUSE OF ACTION

39. As and for an fourth cause of action, plaintiffs reallege paragraphs 1 through 38 above and incorporate them herein by reference.

40. That RMT fraudulently misrepresented and concealed, and the DeBecks and Refuse Hideaway, Inc. fraudulently misrepresented and concealed through the acts of their agents, RMT, material facts, which facts were the direct and proximate

cause of the plaintiffs' exposure to and their property's contamination by toxic pollutants.

41. That RMT knowingly and fraudulently misrepresented and concealed material facts which established that the landfill monitoring system was significantly defective, and knowingly and fraudulently represented repeatedly that the quarterly monitoring data showed no groundwater degradation was occurring at the landfill site, when RMT was fully aware of the inadequacy and severe limitations of the monitoring system to detect groundwater contamination, and thus, that the statements and conclusions submitted by RMT to the DeBecks and the DNR constituted intentional misrepresentations and concealment. A principal purpose for the monitoring system and the periodic monitoring of the groundwater as ordered by DNR was to assure that the groundwater at and in the vicinity of the landfill was not becoming contaminated by toxic pollutants emanating from the landfill; said toxic pollutants were not impacting ~~private~~ drinking water wells in the vicinity of the landfill, including the plaintiffs' well; that the plaintiff were cognizant of and relied upon the fraudulent statements and conclusions submitted by RMT and the DeBecks to DNR, and that said reliance was to the plaintiffs' detriment and a cause of injury, property damage, and damages sustained by the plaintiffs. As a result of these acts, by RMT, the plaintiffs have sustained and will continue to sustain personal injury, property damage, and damages for which

the defendant RMT is liable, including punitive damages for such outrageous conduct.

42. That the foregoing misrepresentation and concealment were motivated by RMT's desire to obtain and retain the DeBecks as clients. RMT, during 1979 and early 1980, was a fledgling consulting business. The DeBecks constituted a desirable client in that they operated two landfills, planned to expand Refuse Hideaway Landfill, and planned to develop several new landfills. RMT was in competition with Warzyn Engineering, Inc. and others for the DeBeck business. RMT, in 1979, was touting to the DeBecks its experience and competence based upon the experience of Reinhardt, Glebs, Nichols, and others, particularly in light of their prior experience as employees of DNR. Since the existing monitoring system at the landfill required by DNR in 1974 was ordered by these RMT officials when they worked for DNR, a determination that the monitoring system was seriously flawed would undermine the RMT sales approach with the DeBecks. Additionally, if RMT insisted that $30,000 worth of additional monitoring wells must be installed to provide an effective system, DeBecks would likely be encouraged to turn to a competitive consulting firm for services.

43. That RMT, in conjunction with its responsibility to perform monitoring at and in the vicinity of the landfill, knowingly and fraudulently, and the DeBecks, by their agent RMT, concealed from the plaintiffs and others the pervasive nature of

VOC groundwater contamination found by RMT in VOC sampling performed by RMT at the landfill site in June and July 1987, that the plaintiffs relied upon monitoring results and upon appropriate action being taken in a timely manner if said monitoring results showed the potential or likelihood that their drinking water well was contaminated or about to be contaminated by pollutants emanating from the landfill, and that the plaintiffs so relied to their detriment and their injury. RMT intentionally delayed approximately eight months the testing of the plaintiffs' drinking water well to late February 1988, at which time RMT testing disclosed substantial contamination of the plaintiffs' well water by toxic VOC pollutants which had emanated from the landfill. During this eight-month period, the plaintiffs were exposed to these toxic VOC pollutants by drinking and otherwise ingesting water as a direct result and proximate cause of RMT's intentionally and knowingly concealing from the plaintiffs and others the existence of serious toxic pollutants which RMT had found in June 1987 to have been emanating from the landfill into the groundwater. As a result of these acts of RMT, the plaintiffs have sustained and will continue to sustain personal injury, property damage, and damages for which the defendants are liable, including punitive damages for such outrageous conduct.

44. That the foregoing concealment and handling by RMT of the toxic pollutant information were motivated by RMT to avoid a

shutdown of the landfill operations by the DNR; that RMT and the DeBecks, through their agent RMT, intentionally and unreasonably refused to submit to DNR in a timely manner a plan for investigation of the groundwater in the vicinity of the landfill, including the drinking water of the plaintiffs, which plan had been requested by the DNR. Each month RMT delayed investigation of groundwater contamination caused by the landfill, additional time was provided for the continued operation and receipt of additional profits derived from the operation of the landfill.

WHEREFORE, plaintiffs demand judgment against the defendants, jointly and severally, as follows:

1. Substantial damages resulting from the defendants' conduct for past and future deterioration of quality of life; annoyance and inconvenience; past and future personal injuries; continuing medical surveillance; property damage; and loss of present enjoyment of property;

2. Punitive damages;

3. For an Order of this Court requiring the defendants to abate the public nuisance consisting of groundwater, aquifer, soils and bedrock contaminated by toxic pollutants in the vicinity of the Refuse Hideaway Landfill, including the groundwater, aquifer, soils and bedrock on the plaintiffs' property, and requiring the defendants to take the required action to prevent further toxic pollutants from emanating from

the landfill into the groundwater, aquifer, soils and bedrock;

4. Actual costs, disbursements, and actual attorneys' fees; and

5. Such other relief as the Court deems just and proper.

Dated this _____ day of February, 1990.

ALBERT AND CAROLYN STOPPLEWORTH,
Plaintiffs

By:_____
Richard J. Callaway, Esq.

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306 East Wilson Street
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By:_____
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May 23, 1990

Charles Leveque, Esq.
Wisconsin Department of Natural Resource
101 S. Webster Street
Madison, WI 53703

Re: Stoppleworth v. John DeBeck, RMT, et al.

Dear Chuck:

This is to confirm the message I received on May 18, 1990 from Bob Selk that we will interview Joe Brusca at the DNR Southern District office on Thursday, June 7, 1990.

At this time, I expect Attorneys Dick Callaway and Jim Olson to be present for the interview. Dick Callaway and I are co-counsel representing the Stoppleworths, and Jim Olson represents the co-plaintiffs, the Schultzes, in the above-entitled action.

After I have confirmed whether or not these individuals will also attend, I will contact you prior to June 7th.

I am also in the process of reviewing DNR records relating to this matter. A number of these will be used in the interview with Joe Brusca, and in order to expedite the time required for the interview, I will submit to you prior to June 7th a copy of a number of the records which I will probably plan on reviewing with Joe. If he had an opportunity to at least review these briefly prior to interview, it should expedite the entire process.

I also discussed with Bob Selk an opportunity to interview Marie Stewart and Mike Netzer. Since Joe appeared to be more principally involved for a longer period of time, we felt it would be more efficient to interview him first, thus limiting the number of areas on which we may need to question other employees. Would it be possible to set a time for interviewing them during the week of June 11th? My guess at this point is that each interview would take no more than three hours. I would like to schedule time at this juncture to avoid potential conflicts in the future.

MICHAEL BEST & FRIEDRICH
Attorneys at Law

Thank you for your attention to this matter.

Sincerely yours,

MICHAEL, BEST & FRIEDRICH

Arvid A. Sather

AAS/elb:2434h
cc: Assistant Attorney General Robert Selk
Richard Callaway, Esq.
James Olson, Esq.

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12845 W. Burleigh Rd.
Brookfield, WI 53005-3100

Re: Stoppleworth, ex rel., Schultz, ex rel. v. Refuse Hideaway, Inc., et al.
Case Nos. 88-CV-3421 and 88-CV-3434

Dear Counsel:

Pursuant to the court's instruction, the plaintiffs Albert and Carolyn Stoppleworth and Craig and Anita Schultz give notice that the following persons are believed to have relevant information with respect to the issues presented in this action, and may be called by the plaintiffs to testify at the trial of the case.

John and Thomas DeBeck
Robert Anders
Wayne Rounds
Robert Glebs
John Reinhardt
David Nichols
Steve Johannsen
Lee Bartlett
Scott Peters
Mark Smith
Brooks Becker
Tom Koontz
Donald Paulson
Joe Brusca
Marie Stewart
Mike Netzer
Robert Selk
Theresa Evanson
Ray Tierney
William Kottke, deceased, by deposition
Janet Besadny
Russell Feingold

The plaintiffs further give notice that they may call other employees, agents, or representatives of RMT, Inc. and the Wisconsin Department of Natural Resources which further discovery in this case discloses participated in activities and transactions involving evaluation, investigation, and regulatory activities relating to Refuse Hideaway, Inc., or otherwise have direct knowledge relating to the issues presented in this case.

The plaintiffs further reserve the right to call as witnesses any other persons identified by other parties in this proceeding as persons who may be called as lay witnesses, based upon knowledge and information they have relating to the issues in this case.

Finally, the plaintiffs reserve the right to call as witnesses in the proceeding any other persons which further discovery in this case discloses have relevant direct knowledge of factual information relating to the issues in this proceeding.

In the event the plaintiffs determine that any persons not named above have relevant knowledge relating to the issues in this proceeding, and that plaintiffs may call said persons to testify in the trial of the case, the plaintiffs will give notice of such persons and the potential that they may be called

to testify immediately upon such determination.

Sincerely yours,

MICHAEL, BEST & FRIEDRICH
Attorneys for Albert and
Carolyn Stoppleworth

By: _____
Arvid A. Sather

LAWTON & CATES
Attorneys for Craig and
Anita Schultz

By: _____
James A. Olson

AAS/elb:2451h
cc: Hon. Jack Aulik

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny, Secretary
Box 7921
Madison, Wisconsin 53707
DNR TELEFAX NO. 608-267-3579
TDD NO. 608-267-6897
SOLID WASTE TELEFAX NO. 608-267-2768

June 1, 1990

IN REPLY REFER TO: 4440

Mr. James A. Olson
Lawton & Cates, S.C.
214 West Mifflin Street
Madison, WI 53703-2594

SUBJECT: May 25, 1990 Letter Regarding Point of Entry Treatment Units

Dear Mr. Olson:

This is in response to your letter dated May 25, 1990 addressed to Joel Schittone of Warzyn Engineering Inc. You requested all file information in connection with the point of entry treatment units installed at the Craig and Anita Schultz residence and all cost estimates connected with the system.

I am assuming that our meeting on May 31, 1990 covered all the information you needed in this regard. If it did not, please call me at 266-0941 and I will be happy to provide any additional information you need.

Sincerely,

Terry Evanson, Hydrogeologist
Environmental Response and Repair Section
Bureau of Solid and Hazardous Waste Management

cc: Chuck Leveque - LC/5
Joel Schittone - Warzyn Engineering

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 4

ALBERT and CAROLYN STOPPLEWORTH,

Plaintiffs,

v.

REFUSE HIDEAWAY, INC.; JOHN W. DeBECK; THOMAS G. DeBECK; and RMT, INC.,

Defendants.

and

Case No. 88-CV-3421

RMT, INC.,

Defendant and Third-Party Plaintiff,

v.

SECURITY INSURANCE COMPANY OF HARTFORD, a foreign corporation,

Third-Party Defendant.

CRAIG A. SCHULTZ and ANITA SCHULTZ,

Plaintiffs,

v.

REFUSE HIDEAWAY, INC., JOHN W. DEBECK and THOMAS G. DEBECK d/b/a LAND DISPOSAL COMPANIES; RMT, INC., and BITUMINOUS FIRE & MARINE INSURANCE CO.,

Defendants.

and

Case No. 88-CV-3434

RMT, INC.,

Defendant and
Third-Party Plaintiff,

v.

SECURITY INSURANCE COMPANY OF
HARTFORD, a foreign corporation,

Third-Party Defendant.

BRIEF IN SUPPORT OF RMT, INC.'S MOTION
FOR SUMMARY JUDGMENT

Earl H. Munson
Timothy J. Muldowney
Linda M. Clifford
LA FOLLETTE & SINYKIN
Suite 500, One East Main Street
Post Office Box 2719
Madison, Wisconsin 53701-2719
(608) 257-3911

INTRODUCTION

In analyzing this case, it is helpful first to examine the claimed damages. The Stoppleworths and Schultzes all concede that they have no personal or physical injuries (Stoppleworths' Amended Answer to Interrogatory No. 52; Craig Schultz Dep., p. 36).[1] This then is a claim premised on alleged property damage measured by a temporary loss of value of plaintiffs' homes.

The plaintiffs, however, plead this case as if it were a personal injury case and then attempt to bootstrap their argument to cover property damages. An injured person might complain about the failure of a tornado warning device; that same failure, however, could not be responsible for damage to a house.

> A failure to have a life boat ready is not a cause of the death of a person who sinks without trace immediately upon falling into the ocean, though taking the person out to sea was a cause. The failure to install a proper fire escape on a hotel is no cause of the death of a man suffocated in bed by smoke. The omission of crossing signals by an approaching train is of no significance when an automobile driver runs into the sixty-eighth car. The presence of a railroad

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[1]ANSWER: The plaintiffs have testified that to date there is no manifest physical illness which they attribute to exposure to chemicals ... emanating from their drinking water well and to which they have been exposed.

(Stoppleworths' Answer to Interrogatory 52). The extremely minute amounts of VOC's found in the well water is an insufficient basis for any serious risk of cancer. In the highly unlikely event that any plaintiff contracts an illness in later years, our "discovery" statute of limitations permits a suit at that time for a real and identifiable injury.

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> embankment may be no cause of the inundation of the plaintiff's land by a cloud burst which would have flooded it in any case.

Prosser and Keeton on Torts, § 41 at 265-66 (5th ed. 1984).

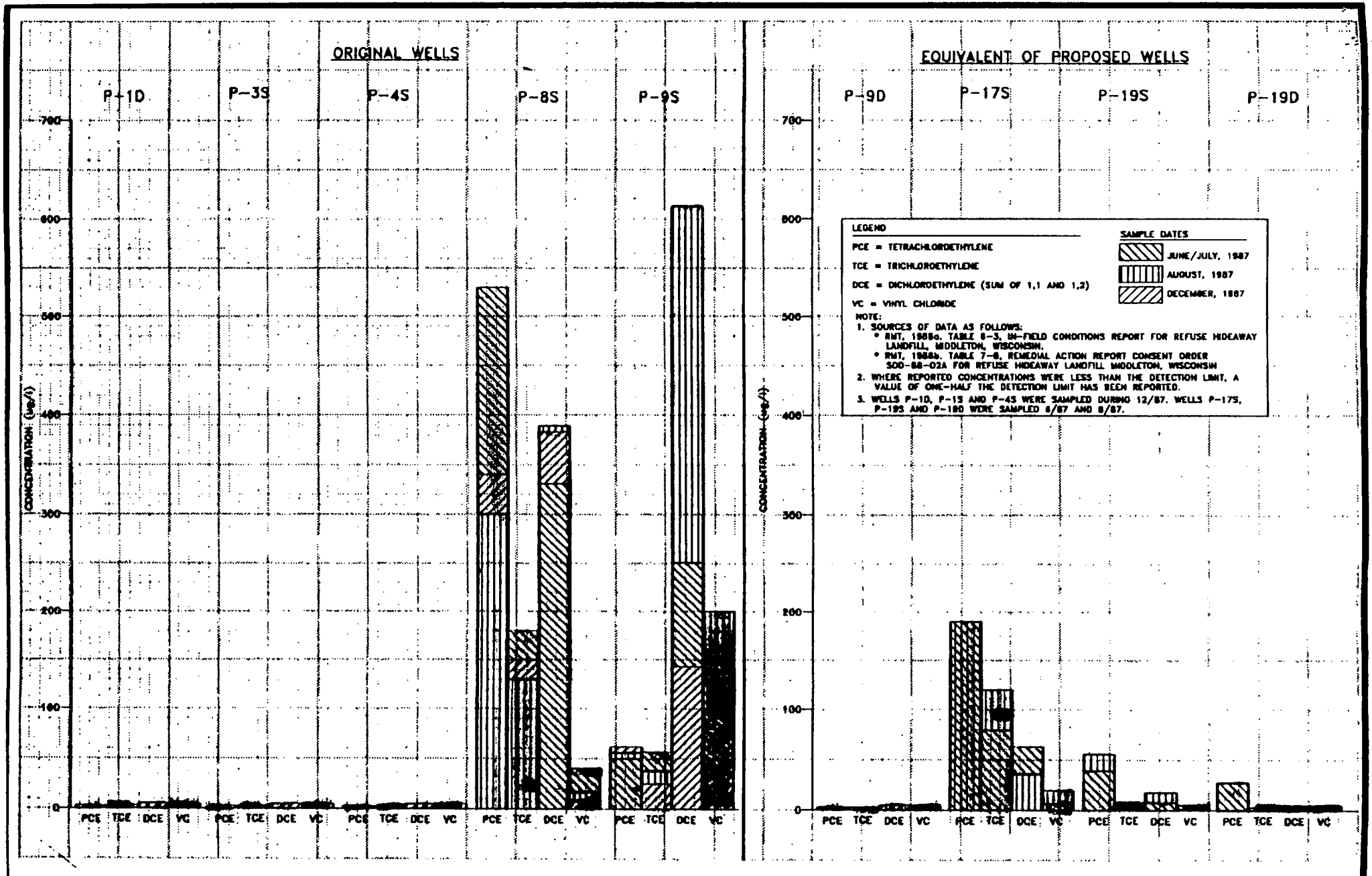
Plaintiffs' property damage claim is unique, because the "damage" is invisible: there was no fire, no flood, no observable damage. Damages here are defined solely by the property's diminished value in the marketplace. Yet, that diminished value would have occurred whether or not VOC's actually contaminated the plaintiffs' wells so long as it was predicted -- as the plaintiffs themselves did -- that the wells eventually would become contaminated.

Most important, the plaintiffs have constructed an entire case around an erroneous factual proposition. In 1979, RMT recommended that additional wells be added to the monitoring system. An RMT junior hydrogeologist who had worked for RMT but a few short weeks after graduation from the university and who had not yet even visited the landfill wrote a memo criticizing the monitoring system.

> Questionable well placement and poor monitoring technique make the current data practically meaningless. It is possible that any contaminant plume that exists has been missed.

Exhibit 517. Based on that "possibility" plaintiffs complain that RMT should have withdrawn as a consultant when the wells it recommended were not installed. Further, according to the plaintiffs, RMT should have qualified its correct chemical analysis of the water by repeatedly suggesting additional wells.

However, the monitoring system was not flawed in 1979. The addition of the wells RMT recommended would not have improved the monitoring. Exhibit 538 (shown on the next page) compares the performance of the "original" monitoring wells -- those in place in 1979 -- with "equivalent" wells -- actual wells in the approximate locations recommended by RMT. It tells the story of how the original system adequately performed; how it detected, as well and better than the recommended wells, the existence of the VOC's found in the plaintiffs' private wells. See Johannsen Aff., ¶¶ 25-33.



3A

533

1987

RMT INC.

Nor can the plaintiffs prove that RMT shirked its responsibility once it discovered VOC's in 1987. DNR and RMT discovered VOC's at the same time. See Johannsen Aff., ¶¶ 36-39. DNR then told DeBeck and RMT in a letter from Marie Stewart that "[w]e will notify you as to our intended course of action after the results have been evaluated." (Munson Aff. III, ¶ 2; Ex. 536.) There is simply no legal basis on these facts to suggest that RMT had a duty to inform private citizens of the monitoring results when the state agency charged with environmental protection was fully aware of the situation.

This summary judgment brief establishes that RMT had no duty to the plaintiffs, did nothing wrong and nothing they did, right or wrong, had any effect on the plaintiffs.

HISTORY

We begin this brief with a short history of the regulation and licensing of the landfill and the contacts RMT has had with it.

1972 Approval

In the summer of 1970, John W. DeBeck applied to the DNR for a permit to construct a landfill at a 40-acre Middleton site which he subsequently purchased in 1971. (DeBeck, pp. 29-30, Ex. 500).[2] DeBeck employed Arnold and O'Sheridan, consulting

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[2]All exhibits referred to in this brief have been bound in chronological order and numbered 500 through 542 for the purpose of this motion. The affidavits filed in support of the motion refer to exhibits by using that numbering system. The Index to Exhibits identifies and cross-references exhibits used at a deposition and identified with a different number. For instance, Ex. 501 is a part of Paulson Deposition Exhibit 7.

engineers, to provide the information required by DNR, to develop original elevations and proposed finished elevations and to check out soil conditions. (DeBeck, pp. 36-37). Refuse Hideaway was the first landfill site designed or constructed by Arnold and O'Sheridan. (Paulson, p. 20). DeBeck also used Soils and Engineering, Inc. (Earl Reichel) to do other work in preparation for the landfill. (DeBeck, pp. 41-42). As part of its design efforts, Arnold and O'Sheridan arranged for Soils and Engineering, Inc. to do some 35 soil borings at the site. (Paulson, pp. 26, 30).

The Town of Middleton and The Dane County Agricultural Zoning Planning and Water Resources Committee approved the site in June and July, 1972 (Exs. 501, 503, "History of Project"). The Department of Natural Resources approved the site on August 14, 1972. (Ex. 501). DeBeck began operating shortly thereafter. (DeBeck, p. 35).

The Environmental Impact Statement

In late 1972, a citizen group, including the Stoppleworths, sued to enjoin operation of the landfill demanding that the DNR prepare an Environmental Impact Statement (EIS) for the site. On December 13, 1972, the parties agreed that DeBeck would stop using the site until an EIS was prepared. The EIS was completed in August of 1974 with a conclusion favorable to the site: it

found that leachate production was, of course, inevitable but that,

> the operating plan and geologic conditions at the DeBeck site will provide for satisfactory attenuation of leachate without impairment of regional ground water system or existing private water supplies in the site vicinity.

(Ex. 503, p. 29). In commenting on the EIS, the Wisconsin Department of Justice noted that there were 34 soil boring locations which were well in excess of the 12 borings per 50-acre site required by the Code and that, "Such detail should serve as a model for future solid waste site developers." (Ex. 503, Justice Letter 2/27/74).

1974 Re-Approval

Once the EIS gave the site a green light, Arnold and O'Sheridan submitted additional drawings and calculations to the DNR and expressed its opinion that, "the excavation as shown on the cross sections would provide the protection for the rock and ground water." (Ex. 504).

On November 12, 1974, DNR approved the landfill and established the "conditions of operation." (Ex. 505). On December 12, 1974, L. P. Voigt, Secretary of the Department of Natural Resources, executed the license for John W. DeBeck to operate the landfill. (Ex. 506). The license was conditioned, among other things, on DeBeck testing and reporting quarterly on the following parameters: ph, conductivity, chemical oxygen demand (COD), total hardness, dissolved iron and chloride. (Ex. 505).

Soils and Engineering Services, Inc. installed two additional wells (P-8S and P-9S) in 1976. (Ex. 508). As the landfill was filled with rubbish, Arnold and O'Sheridan prepared changes in the profile of the site and reported them to DNR. (DeBeck, pp. 78-79). On December 13, 1977, DeBeck and his engineer, Paulson, met with Glebs, of DNR, to discuss additional borings and re-engineering of the site. (Ex. 509). That was accomplished. (Ex. 510).

1979 RMT Study

RMT was formed in early 1978 and Glebs left DNR in November of 1978 to work for RMT. (Glebs Aff., ¶ 2). In December, DeBeck contacted Glebs to inquire about services that RMT might perform for Refuse Hideaway and, on December 20, 1978, RMT submitted a written proposal for a complete and thorough evaluation and work plan to identify the need for further work on water quality, water quality monitoring, another re-engineering of the site, etc. (Glebs Aff., ¶¶ 4, 5; Ex. 512). DeBeck declined to engage RMT for such complete and thorough services, but, on March 23, 1979, he did retain the company to evaluate the water quality monitoring system. (Ex. 513). RMT performed its first water quality test and reported the results to DNR on April 19, 1979, advising DNR that it also was evaluating the entire monitoring program:

> RMT is evaluating the water quality monitoring program at the Middleton site. Upon completion of this study, we will be making recommendations regarding possible changes in the program.

(Ex. 516).

In July 1979, RMT submitted those recommendations to DeBeck in its report on his water quality monitoring program. (Ex. 518). The report recommended that he change water quality monitoring procedures and that he install four additional wells. (Ex. 519, p. 7; Figures 2, 4; pp. 15-16). Before 1979, monitoring was performed by DeBeck's employees taking the water samples and having them tested by a company known as Aqua-Tech, Inc.

RMT Contact With Refuse Hideaway Between July 1979 and 1986

In its letter enclosing the July 1979 report, RMT urged DeBeck to meet to discuss the report's findings, conclusions and recommendations. (Ex. 518). On November 6, 1979, Glebs again urged DeBeck to discuss the report: "[W]e are awaiting your review or comments on our earlier report on your Middleton site." (Ex. 520). He discussed it again with DeBeck during a telephone conversation on December 4, 1979. (Ex. 521). On March 28, 1980, Glebs and DeBeck again discussed the wells. (Ex. 522). On May 5, 1980, Glebs wrote to DeBeck on another matter, and again he cautioned DeBeck: "... I can only suggest that for your own protection you follow the recommendation in our late 1979 report...." (Ex. 523).

DeBeck never agreed to install new wells until 1986 and 1987 when a number of additional wells were installed in preparation

for closure. During the period from July 1979 to 1986, RMT's involvement with the Refuse Hideaway landfill essentially was limited to the quarterly water quality monitoring. (Glebs Aff., ¶¶ 16-17). Arnold and O'Sheridan continued to provide engineering services.

DNR's Supervision Of Water Quality Monitoring

On October 16, 1978, Mr. Netzer, a DNR hydrogeologist, responded to an inquiry from Assemblyman Loftus with respect to the Refuse Hideaway site. Mr. Netzer made a detailed study of the water quality monitoring at the site and concluded as follows:

> As far as the adequacy of the testing procedures are concerned, I am somewhat confused by the question. If you are concerned about the number of monitoring points; yes, I think the number of monitoring wells are sufficient. If your concern is the actual procedure of taking the sample itself; no, I do not think that it has been adequate in the past but I do feel it is adequate now.
>
> * * *
>
> [T]he results of his [DeBeck's] testing program thus far appears to indicate that the site design is good and that little or no adverse effect on groundwater or surface water has resulted from the landfill operation.

(Ex. 511, p. 2). A copy of this report was sent to DeBeck.

DNR conducted another thorough review of Refuse Hideaway in the spring of 1979. By memorandum dated April 11, 1979, Mr. Ackman of DNR again analyzed the water quality testing results at the landfill. Ackman took the additional precaution

of calling Mark Anderson of the Water Chemistry Department at the University of Wisconsin for a second opinion as to the various test results. Ackman concluded:

> The present monitoring program should, if carried out fully, provide for the detection of leachates from the landfill. One additional well could be installed further away from the landfill and screened in the bedrock to determine possible bedrock contamination.

(Ex. 514, p. 5).

On April 16, 1979, five days after receiving the Ackman memorandum, Netzer instructed DeBeck as follows:

> [S]o far the water quality sampling program appears to be sufficient at this time. One change the Department will make is in the sampling for iron.

(Ex. 515, ¶ 10). Despite DNR's thorough review, including consideration of at least one additional well, it did not request that DeBeck install additional monitoring wells.

In July 1980, DNR hydrogeologist Netzer again studied the water quality at Refuse Hideaway. In a letter to Mr. Robert Anders, Netzer concluded:

> In summary, then the Bureau feels that the natural attenuation concept under which the approval for this site was granted is still a valid concept at this time. The Department will continue to monitor water quality results in this area, and if needed, we will require that remedial action be taken in the form of engineering modifications if such action is warranted.

(Ex. 524, p. 3).

Not only did DNR carefully monitor the water quality testing, it also made decisions about what refuse could be deposited at the landfill. For instance, on September 17, 1984, DNR permitted disposal at Refuse Hideaway of soil recovered from a "methylene chloride/acetone spill." (Ex. 525). These chemicals, of course, contain some of the VOC's at issue in this case.

Decision In Fall 1986 To Test For VOC's

For the first 15 years the site was operated, DNR never required DeBeck to sample for VOC's. In September of 1985, DNR promulgated what is known as NR 140 of the Wisconsin Administrative Code. NR 140 established for the first time standards for determining whether or not substances detected in ground water -- including many VOC's -- would require action by the Department and at what level of concentration such action was required.

On April 1, 1986, Radcliffe of RMT called Connley of DNR to make sure that RMT properly complied with NR 140 in its monitoring reports. "Anything RMT can send you so that DNR doesn't send the owners NOV's [Notice of Violation?]." DNR did not request a report on VOC's. (Ex. 526).

As of September of 1986, site closure was estimated to be about one year away. At that time, RMT began preparing plans to address site closure. (Ex. 528, pp. 1-2). On October 1, 1986, DNR required DeBeck to submit a Closure Plan addressing a number of issues raised by DNR in a proposed order modifying the plan

approval which was attached to the letter.[3] (Ex. 527). Glebs responded in part on October 31, 1986 (Ex. 528), and attended meetings with DNR to discuss the proposed order. For instance, on November 17, 1986, "LSO" of RMT discussed with Connelly of DNR whether Teflon was required for wells to be monitored for VOC's. (Ex. 529).

On November 21, 1986, DNR issued a formal order modifying the plan approval. (Ex. 530). Almost simultaneously, RMT submitted "Additional Information For The Closure of The Refuse Hideaway Landfill, November 21, 1986," proposing that new monitoring wells be installed and that monitoring include additional compounds, such as VOC's. (Ex. 531, pp. 6852-6853). When Glebs telephoned Carey at DNR on December 10, 1986 to check on DNR's review, Carey advised him to do nothing until DNR completed its review of the proposal. (Ex. 532).

On April 7, 1987, DNR approved the Closure Plan. Under the plan, DeBeck was required to submit an In-Field Conditions Report and to simultaneously sample existing and proposed new wells at the landfill during three sampling rounds at least one month apart, with two of those rounds for VOC's. (Ex. 533, p. 4).

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[3]The letter is dated October 1, 1986 but the attached "Draft" proposal was dated 30 days in the future.

Detection of VOC's

No VOC tests were conducted at the landfill until DNR required VOC testing in 1987. The Stoppleworths, however, recall that their well was tested in 1986 and found to be free of VOC's.

The new DNR-required wells were installed at the landfill by the end of June 1987, and the first round of sampling took place on June 29, June 30 and July 9, 1987. Those samples were tested at RMT's laboratory and the results, detecting certain VOC's, were available on August 13, 1987. (See Ex. 534, VOC Analysis for Well P-9). The second round of sampling in July, as specified by the DNR, tested only for inorganic compounds, not VOC's. The third round of sampling took place on August 17 and 18, 1987. At this time, DNR employees "split samples" with RMT employees. (Johannsen Aff., ¶ 26). That is, DNR employees also took samples of various wells and submitted them to the state laboratory for evaluation. (Johannsen Aff., ¶ 37). RMT, for its part, submitted its second round of samples to an independent laboratory, Hazelton Laboratory, for analysis. The state lab reported its results on September 8, 1987, (see Ex. 536, reports attached), and Hazelton reported its results to RMT on September 17, 1987 (see, for example, Ex. 535, Hazelton Report of Well P-9). Marie Stewart of DNR wrote to DeBeck on September 23, 1987 advising him that VOC's had been detected in every well they sampled. She concluded, "we will notify you as to our intended course of action after the results have been evaluated." (Ex. 536).

DNR took no action. RMT obtained an additional round of samples in December of 1987 and again detected VOC's. (See Johannsen Aff., ¶ 28; Ex. 540). In January 1988, RMT filed its In-Field Conditions Report with DNR recommending that private wells in the vicinity of the landfill be sampled and tested.

Since DNR had taken no action after its letter of September 23, 1987, Glebs advised DeBeck in January of 1988 that he should authorize RMT to test the private wells if permitted by the landowner. DeBeck agreed, and this was done. The Schultz and Stoppleworth wells were tested in February and March of 1988 and, on March 10, 1988, the Schultzes and the Stoppleworths were advised by Glebs that VOC's were found in their wells and they were advised to use bottled water.

THE ISSUES

The plaintiffs' entire case against RMT, Inc. ("RMT") depends on three assertions, two factual and one legal. The factual assertions are:

1. In 1979 RMT recommended additional monitoring wells be installed at the site. Its failure to convince DeBeck to do so until 1986 and its failure to qualify its quarterly reports by noting the 1979 recommendations caused the contamination of plaintiffs' wells.

2. RMT controlled the operation of the landfill.

The legal assertion on which plaintiffs' case depends is:

3. RMT had a duty to immediately inform the public of the August 1987 test results detecting VOC's in several monitoring wells at the landfill and a duty to immediately test the plaintiffs' wells.

Plaintiffs' negligence, third-party beneficiary, nuisance and misrepresentation claims all depend upon assertions 1 and 3. The nuisance claim also depends on assertion 2. All three are unsupportable.

With respect to the monitoring system, the question is whether installation of the additional monitoring wells would have prevented VOC's in plaintiffs' wells. Leaving aside the question of whether the presence or absence of monitoring wells can cause anything, the undisputed evidence shows that the old wells provided a better gauge of ground water quality than the proposed new wells. Even if the proposed wells had been installed in 1979, they would not have detected VOC's any sooner than did the old wells. With that, plaintiffs' house of cards falls.

With respect to the delay between discovery of VOC's at the landfill and testing plaintiffs' wells, it is undisputed that the chief enforcement agency of the State of Wisconsin did its own independent analysis of VOC's at the same time and told DeBeck (and RMT) that it was going to take action. In spite of that, plaintiffs appear to argue that the law creates a duty on DeBeck and his consultant to second-guess a law enforcement agency. Transferring their logic to stories about a recent fire in Madison: if the firemen refused to rescue the children, the owner may have had a duty to do so.

There is no evidence of control. Plaintiffs seem to contend that any consultant - lawyer, engineer, accountant, surveyor,

well digger, etc. - "participates in" the landfill and is, therefore, liable in nuisance. That is nonsense.

Legally and factually, this case is ripe for summary judgment.

I. SUMMARY JUDGMENT IS APPROPRIATE WHEN THE FACTS AND LAW ARE OBVIOUS.

In Grahms v. Boss, 97 Wis. 2d 332, 294 N.W.2d 473 (1980), the Wisconsin Supreme Court announced the standards to be used in reviewing a motion for summary judgment brought under sec. 802.08(2), Stats.

> The court must initially examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving parties (in this case the defendants) affidavits or other proof to determine whether the moving party has made a prima facia case for summary judgment under § 802.08(2). To make a prima facia case for summary judgment, a moving defendnat must show a defense which would defeat the plaintiff. If the moving party has made a prima facia case for summary judgment, the court must examine the affidavits and other proof of the opposing party (plaintiffs in this case) to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.

97 Wis. 2d at 338.

The purpose of a motion for summary judgment is to obviate the need for a trial where there is no genuine issue as to any material facts. Heck & Paetow Claim Service, Inc. v. Heck, 93

Wis. 2d 349, 355, 286 N.W.2d 831 (1980). The summary judgment procedure permits a decision based upon the depositions, affidavits and other records brought to the court's attention. Alonge v. Rodriguez, 89 Wis. 2d 544, 553, 279 N.W.2d 207 (1979). If there is no genuine issue of material fact, the trial court should grant the motion for summary judgment. Wright v. Hasley, 86 Wis. 2d 572, 578-79, 273 N.W.2d 319 (1979). Summary judgment is appropriate when, as here, the material facts are not in dispute and the inferences which may reasonably be drawn from the facts are not doubtful and lead only to one conclusion. Radlein v. Industrial Fire & Casualty Ins. Co., 117 Wis. 2d 605, 609, 345 N.W.2d 874 (1984).

II. THERE WAS NOTHING INADEQUATE ABOUT THE MONITORING SYSTEM'S CAPABILITY TO DETECT VOC'S.

Remarkably, there is no allegation in plaintiffs' complaint that the monitoring system was defective. They merely allege that one person at RMT speculated that it might be defective but the plaintiffs do not allege that it was defective.

Central to the plaintiffs' claims of negligence, contract and misrepresentation is their assertion that RMT's conduct is actionable because of its failure to inform them and others of an inadequate monitoring system. Specifically, they allege that RMT failed to "adequately and reasonably advise the [landfill owners and operators] that the ground water monitoring system implemented and utilized by [the owners and operators] was

severely inadequate." Second Amended Complaint, ¶ 30a. Plaintiffs also allege RMT was negligent in "concluding and advising the DeBecks and the DNR periodically and consistently during the period from 1979 to 1986 that the monitoring results obtained by RMT showed that the landfill was not affecting the ground water in the vicinity of the landfill." Second Amended Complaint, ¶ 30b. Although the chemical tests show just that, plaintiffs contend that the reports should have been qualified by a statement that the monitoring system was possible inadequate.

Each of these claims depends, of course, on the assumption that the ground water monitoring system at the landfill in 1979 was in fact defective in detecting VOC's. If it was not, any failure by RMT to inform the DeBecks or others, such as the DNR, of its recommendations about the system cannot be the basis for a claim of negligence, breach of contract or misrepresentation. In short, if the system was adequate, there would be no basis for plaintiffs' claim that RMT did anything wrong.

The undisputed facts show that the system was adequate to detect contaminants. The ground water monitoring system in place when RMT did its 1979 report -- the "old wells" -- were located on the southern edge of the landfill. These are wells 1S, 3S, 4S, 8S, 9S. (Johannsen Aff., ¶¶ 8-9). RMT's 1979 report recommended enhancement of the monitoring network with four additional wells ("proposed wells"). These wells are shown on

Exhibit 537 as green squares. (See Johannsen Aff., ¶ 10, Exs. 519, 537).

RMT's 1979 report concluded that the ground water monitoring well system in place at the landfill was adequate but could be enhanced through the addition of more wells. According to the report, the "current monitoring network is adequate to monitor the shallow ground water flow system and water quality downgradient of the fill." (Johannsen Aff., ¶ 8; Report, p. 6 at ¶ 3).

The owner made the decision not to install the wells recommended in 1979. By June 1987, though, the owner installed wells in the approximate locations and depths RMT had originally recommended ("equivalent wells" P-9D, P-17S, P-19D, P-19S). Exhibit 537 shows in red the wells installed before RMT's 1979 report. It shows in green the 1979 proposed wells. It shows in yellow the equivalent wells installed in 1986 and 1987. Thus, we can look to the performance of the equivalent wells to see how the proposed wells would have worked.

Exhibit 538 graphically compares the 1987 VOC tests at the old wells with the 1987 VOC tests at the equivalent wells.

> 30. I had Ex. 538 prepared using the test results for VOCs in order to compare the performance of the old wells sampled to the new wells equivalent to those proposed by RMT in its 1979 report. That exhibit shows those organic constituents which appeared in 1988 in plaintiffs' wells at levels beyond the preventive action limit (PAL) of Wis. Admin. Code NR 140.10 and which also appeared in the ground water monitoring wells near the landfill when tested earlier in 1987.

(Johannsen Aff., ¶ 30). The graph shows that old wells P-8S and P-9S (green) detected the VOC concentration in greater amounts than did the equivalent wells (P-9D, P-17S, P-19D and P-19S). (Johannsen Aff., ¶¶ 31-32).

> 33. Based on this data, the new wells added to the ground water monitoring network in 1987 performed no better than the original monitoring well network RMT had reviewed in 1979. The old wells detected the VOC parameters when tested for. In addition, the concentrations of VOCs detected in the old wells were generally greater than or at least equal to the concentrations found in the new wells.

(Johannsen Aff., ¶ 33). Thus, the absence of the proposed wells added nothing to the fact that VOC's were being detected outside of the landfill.

In fact, the old monitoring wells detected VOC's well beyond the applicable state ground water enforcement standards. (See Johannsen Aff., ¶ 31; Exs. 539, 540). Since the attainment or exceedance of a preventive action limit in any one well for any one constituent is enough to allow DNR to take action, the old wells' performance was just as adequate as any of the proposed wells. (Johannsen Aff., ¶ 34; see also Wis. Admin. Code NR 140.24).

RMT and DNR first discussed monitoring for VOC's in the fall of 1986 and DNR ordered VOC tests for the first time upon installation of the additional monitoring wells in June, 1987. Although we know that there were no VOC's in the Stoppleworths'

well in 1986, it would be speculation to guess when the VOC's were first at the monitoring wells -- 1987, 1986, 1985, etc. The undisputed evidence, however, is that the old wells did not miss the contaminants.

Plaintiffs may argue, however, that DNR did not require monitoring for VOC's. From 1974 through 1987, DNR required monitoring for chloride, chemical oxygen demand (COD), total hardness, dissolved iron, pH and specific conductivity -- the "inorganic" parameters. (Johannsen Aff., ¶ 21). These, too, were tested in the old and equivalent wells. (Id. at 22). Again, the concentrations of inorganic parameters in the old wells were generally equal to or greater than concentrations in the new wells. (Johannsen Aff., ¶ 23).

> 24. Based on the data and by comparing the performance of the old wells and the new wells, the new wells did not provide any better indication of landfill leakage than the old wells -- the ones in place in 1979.

(Johannsen Aff., ¶ 24).

The plaintiffs claim that VOC's polluted their well water because the original monitoring system was "inadequate" and unable to properly detect them.

> In the end, my speculation about the monitoring system missing a contaminant plume was not borne out as shown by the results of ground water quality monitoring which occurred in 1987.

(Johannsen Aff., ¶ 13).

III. THERE IS NO DUTY TO PUBLISH CHEMICAL TESTS TO THE GENERAL PUBLIC.

Plaintiffs' negligence claim is premised on two slim threads. We have already disposed of one -- the adequacy of the monitoring system -- because the monitoring system actually was adequate and because it had nothing to do with damages to plaintiffs' property.

The remaining thread of plaintiffs' negligence claim -- the alleged duty to advise the general public that there were VOC's in the monitoring wells -- also had nothing to do with the damages to plaintiffs' property. Contamination already was an accomplished irreversible fact.

In any event, RMT had no duty to publicize the finding since DNR, our governmental representative, already knew it.[4] The

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[4]The plaintiffs have not played fair on this issue. Exhibit 536, provided to RMT in response to a document demand, evidences DNR's knowledge of VOC's and its intent to take action. It carries plaintiffs' Bates stamp no. 00000297, so they were aware of it. Yet, in our recent interrogatories, we asked:

> 39. Do you agree that DNR employees had ground water samples from Refuse Hideaway tested for VOC's in the summer of 1987 and detected VOC's in excess of State enforcement standards?
>
> Answer to Interrogatory No. 39.
>
> d. No

(Stoppleworths' Amended Answer to Interrogatory 39).

Plaintiff's unfortunate attempt to bury this fact underscores its fatal effect on the plaintiffs' remaining thread.

facts are undisputed: Both DNR and RMT knew about VOC's in the monitoring wells. (Ex. 536). Neither made any notifications to the public until March 1988.

There is no need for a trial in order to decide a legal issue on undisputed facts. In fact, the legislature already has decided it. Section 144.025, Stats., is a sweeping grant of exclusive authority to DNR to protect the waters of the State.

> (1) STATEMENT OF POLICY AND PURPOSE. The department of natural resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.... The purpose of this section is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private....
>
> (2) POWERS AND DUTIES. (a) The department shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter.

(Sec. 144.025(1)(2), Stats.)

* * *

> 144.72 Imminent danger. (1) NOTICE REQUIRED. If the department receives evidence that the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial danger to health or the environment, the department shall do all of the following:
>
> (a) Provide immediate notice of the danger to each affected municipality.

> (b) Promptly post notice of the danger at the site at which the danger exists, or order a person responsible for the danger to post such notice.

(Sec. 144.72, Stats. See also sec. 144.76(2)(a) (requiring reports of hazardous spills to the DNR, not the public.)

The legislature decided that public policy decisions on solid and hazardous waste should be made by DNR. If the policy were otherwise, every person who discovers a hazardous substance in ground water -- whether he or she be farmer, well digger, plumber, technician or hydrogeologist -- would have the duty of notifying both DNR and the general public. It would be impossible to control or define that duty. Every newspaper in the country would carry advertisements warning everyone of every remote possibility. Lawyers would have a field day designing all-inclusive, standardized warnings which, because of their number and legalese, would be meaningless.

Here, for instance, who should decide whether to risk starting a panic in Cross Plains and Middleton: RMT or DNR? If wells are to be tested, who decides how many? Notification to the general public creates as much danger from panic as from whatever contamination there might be.

In Wisconsin, a plaintiff making a fraudulent or negligent concealment claim must show that the defendant had a duty to disclose. E.g., In Matter of Estate of Lecic, 104 Wis. 2d 592, 604, 312 N.W.2d 773 (1983). Whether such a duty exists presents

a question of law for the court to resolve. Estate of Lecic, 104 Wis. 2d at 605. Whenever the court resolves the question of legal duty, it is "making a policy determination." Ollerman, 94 Wis. 2d at 27. "Duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff." Keaton, Prosser, The Law of Torts, § 53 (5th ed. 1984).

Even in cases where a fiduciary relationship or business relationship clearly exists between parties, our Supreme Court has refused to liberally impose duties of disclosure on individuals. For example, in Estate of Lecic, the court determined that the personal representative of an estate owed no duty to personally disclose to its creditors the deadline for filing claims and the effect of a failure to file, even though it recognized that "a personal representative like a special administrator owes fiduciary duties to the creditors as well as the beneficiaries of the estate." Estate of Lecic, 104 Wis. 2d at 611-12. See also Southard v. Occidental Life Ins. Co., 31 Wis. 2d 351, 358-59, 142 N.W.2d 844 (1966) (seriously ill life insurance applicant held to have no duty to provide health information beyond the scope of questions asked).

Here there is no fiduciary relationship between RMT and the plaintiffs. There is no transaction to which RMT and the plaintiffs are parties. Production Credit Ass'n. v. Croft, 143 Wis. 2d 746, 423 N.W.2d 544 (1988). In fact, there is no relationship of any kind between these plaintiffs and RMT.

The plaintiffs contend that RMT was responsible and answerable to the public at large. Clearly it was not. RMT was a consultant hired by the landfill owner. In carrying out its work in 1987 on the In-Field Condition Report, RMT was in regular contact with the DNR. The DNR - the regulatory body charged with protection of the environment and the public - required the In-Field Conditions Report, substantially directed RMT's activities, and participated in the 1987 ground water testing and monitoring. The DNR was well aware of the test results shortly after the samples were taken. (Johannsen Aff., ¶¶ 36-39).

Accepting plaintiffs' argument would hold a consultant's duty to be boundless. It would make new law, placing an unreasonable burden on entire professions, at odds with the more conservative approach our appellate courts have taken in negligence and fraudulent concealment cases. See Green Spring Farm v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987) (seller's attorney in real estate transaction has no duty to buyers who claimed he was negligent); see also Rendler v. Markos, ___ Wis. 2d ___, 453 N.W.2d 202 (Ct. App. 1990), petition for review denied, ___ Wis. 2d ___ (1990) (attorney has no duty to limited partners who claimed he was negligent in setting up limited partnership).

It would be ironic indeed if a private consultant working hand-in-hand with a public regulatory agency on a study required by that agency was held to have a duty to disclose to the public the very same information the agency possesses but has not yet

disclosed. An incident in this very case puts the argument in perspective. One of the plaintiffs, Mrs. Schultz, was an employee of DNR in 1988. She testified as follows:

> A ... Everyone I talked to was rather surprised and concerned. When I finally got ahold, got in touch with Marie Stewart, that was the first day I found out that she was the person within DNR that oversaw the landfill, she was livid.
>
> Q Why was she livid?
>
> A She was livid because we had been told directly by RMT that our well was contaminated when DNR had not confirmed the test results. Possibly RMT was getting us upset for no reason.
>
> Q Did she say what they would have done or what they were going to do before they would come out and do it?
>
> A She said the test results on the landfill had been bad the previous fall but they didn't feel that the testing wells were adequate, and they had ordered the landfill to put in different testing wells, and they were waiting for more test results on it and also waiting for RMT to come up with a plan of action.
>
> * * *
>
> A Of the water at the landfill. DNR was livid because they had not been told the private wells were going to be tested. They were livid because they had not been told that the test results gained were bad. One of the reasons was because private companies do not necessarily have as good of labs for processing as the DNR uses. The DNR uses the State Lab of Hygiene.
>
> So the first thing DNR wanted to do was split tests. They explained the process would be that RMT would take a test, a water sample, and they would split

the sample with RMT and then each would run it through their own labs or through the state lab and through RMT's lab, and then they would compare test results to see if RMT's lab was in sync.

* * *

A ... I know that DNR wanted different testing wells put in. They didn't feel that the testing wells were adequate to determine what was actually going on.

Q And they wanted to do that before they went out and tested any private wells, is that it?

A They wanted to evaluate what was going on before they --

Q Got everyone excited?

A Right.

Q This is what Marie Stewart said to you?

A Yes.

Q Okay. She was angry then when you talked to her because RMT had gone out and tested private wells before they had determined what was necessary to do, is that fair?

A That's fair. I believe that that was why her reaction was what it was.

(Anita Schultz Dep., pp. 68-71) (emphasis added).

RMT reported to DNR the detection of VOC's at the landfill in the summer of 1987 and recommended to DNR in its 1988 In-Field Conditions Report that private wells be tested. (Johannsen Aff., ¶ 39; Ex. 542). DNR ignored the findings and recommendations, waiting for additional information and clarification. RMT is

criticized by the plaintiffs on one side for not testing and notifying soon enough and criticized by the DNR on the other side for testing and notifying at all. "Damned if you do and damned if you don't."

This is not what the legislature intended when it made DNR the chief watchdog over the state's ground water quality. Whatever duty RMT had was fulfilled when it conveyed its recommendations and results to the DNR and was advised "we will notify you as to our intended course of action after the results have been evaluated." (Ex. 536).

IV. IT IS UNDISPUTED THAT RMT DID NOT CONTROL THE INSTRUMENTALITY OF THE NUISANCE AND IT IS ENTITLED TO SUMMARY JUDGMENT ON THE NUISANCE CLAIM.

In their first Complaint, the Stoppleworths alleged that Refuse Hideaway, Inc. and the DeBecks owned and operated the landfill (Stoppleworth Complaint 6/15/88, ¶¶ 2, 4, 5). Their June 29, 1989 Amended Complaint alleged the same (¶¶ 2-4) and described RMT as a consultant (¶ 5). The Schultzes' allegations in their June 16, 1988 Complaint (¶¶ 3-5), May 4, 1989 Amended Complaint (¶¶ 3-5), and July 26, 1989 Second Amended Complaint (¶¶ 3-5b) are the same. After RMT's motion to dismiss raised the issue of control, the Stoppleworths filed a Second Amended Complaint dated March 8, 1990, simply adding the allegation that the defendants "jointly participated in and exercised control over the operation of the landfill." (¶ 33).

The plaintiffs were right the first time. There is no basis for an allegation that RMT controlled the landfill. Despite their new allegation, the plaintiffs still are unable to make a nuisance case against RMT. There are no record facts to prove or support a claim that RMT exercised control over the nuisance. Rather, the undisputed record facts show that RMT never exercised any control over any aspect of the ownership or operation of the landfill.

A. An Essential Element Of A Claim For Nuisance Is That The Defendant Exercised Control Over The Instrumentality Of The Nuisance.

"A nuisance is an unreasonable activity or use of property that interferes substantially with the comfortable enjoyment of life, health, safety of another or others." State v. Quality Egg Farm, 104 Wis. 2d 506, 517, 311 N.W.2d 640 (1981). The "activity or use of property" alleged to constitute the nuisance in this case is the operation of the landfill, which the plaintiffs now allege -- but cannot prove -- that RMT controlled.

The parties earlier argued the issue of control in their briefs on RMT's motion to dismiss. The plaintiffs failed to cite one case in which a consultant was deemed liable for a nuisance maintained or created by a client or customer. Although this court allowed the nuisance claim to proceed, it stated, "... this court concludes that one necessary element to maintain an action for public nuisance is control, in some form, over the nuisance. Whether such is present in this case cannot and should

not be determined at this juncture of the case." (Decision on Motion to Dismiss, p. 4.) The issue is ready for determination now, however.

> While ... property ownership is generally not a prerequisite to nuisance liability ... the test of liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise, and it has been said that liability for damage caused by a nuisance may only be imposed on defendants with such control over the nuisance....
>
> In lieu of a rule of general application, a functional test has been applied to determine whether the defendant "uses" property in a manner sufficient to subject him to liability for nuisance. A critical factor in this test is whether the defendant exercises control over the property that is the source of the nuisance. Thus, liability of a possessor of land is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others.

58 Am. Jur. 2d Nuisances, secs. 117, 123 (1989) (emphasis added); see also 66 C.J.S. Nuisances, sec. 88, n. 80 (1950).

The case most closely on point is State of Connecticut v. Tippetts-Abbett-McCarthy-Stratton, 204 Conn. 177, 527 A.2d 688 (1987). There, Connecticut sued an architectural firm that designed and supervised the construction of a bridge that eventually collapsed into the Mianus River. The state pleaded claims in negligence, public nuisance, and indemnification and

sought to recover the expense of reconstructing the bridge. The trial court dismissed the nuisance claim. On appeal from that decision, the appellate court agreed that nuisance liability rested on an unlawful or unreasonable use of property, and that the test to determine whether a party was a "user" of property was a functional test that included the "critical" factor of "control."

> [E]ven if the pleadings and evidence are considered in the light most favorable to the plaintiff, there is nothing to suggest that the defendants ever assumed control of the subject property. It is undisputed that at all times relevant to these appeals, the bridge, and the highway right of way in which the bridge was included, was exclusively the property of the plaintiff. While, as discussed previously, ownership is not essential to nuisance liability, nothing in the evidence suggests that the plaintiff ever relinquished its authority over the bridge to the defendants. To the contrary, the legislative enactment which authorized the construction of the Connecticut Turnpike, of which the bridge was an integral component, vested ultimate and exclusive responsibility for planning and constructing the expressway in the plaintiffs' highway commissioner.

Id. at 692. The court looked specifically at the parties' contract for any evidence that the state had relinquished control over the bridge. It found none.

> While, pursuant to the contract, the plaintiff delegated to the defendants some of its immediate authority over the design and construction of the bridge, this delegation was narrowly circumscribed by the terms of the contract. Under the contract, the defendant assumed responsibility for the surveying, testing, planning and design of the bridge. The defendants were required, however, to allow the plaintiffs' highway commissioner and

> his representatives 'to review, at any time, the design work and construction in its various stages, and to make any revisions as may be directed by the Commissioner...' These and other terms of the contract permitted the plaintiff to maintain strict control over the planning and construction of the bridge, while relinquishing only limited responsibility for the project's execution to the defendants.
>
> Our review of the circumstances of this case leads us to the conclusion that the defendants did not exercise sufficient control over the bridge, or the property to which it was affixed, to render them subject to nuisance liability.

Id. See also Stemen v. Coffman, 92 Mich. App. 595, 285 N.W.2d 305 (1979); Coburn v. Public Service Commission, 104 Mich. App. 322, 304 N.W.2d 570 (1981); Mitchell v. Michigan Department of Corrections, 113 Mich. App. 739, 318 N.W.2d 507 (1982); Disappearing Lakes Association v. Department of Natural Resources, 121 Mich. App. 61, 328 N.W.2d 570 (1982); Attorney General v. Ankersen, 148 Mich. App. 524, 385 N.W.2d 658 (1986); Brunsfeld v. Mineola Hotel and Restaurant, 119 Ill. App. 3d 337, 456 N.E.2d 351, 364, 367 (1983); and St. Louis, I.M. & S.R. Co. v. Commercial Union Ins. Corp., 139 U.S. 223 (1891).

The plaintiffs may or may not have a nuisance claim against Refuse Hideaway which owned, operated, and controlled the landfill. Their nuisance claim against RMT, though, when put to its proof, must fail for lack of proof of control. The facts about RMT's lack of control over the landfill are undisputed and show clearly that RMT is entitled to summary judgment.

B. The Facts Are Undisputed That RMT Exercised No Control.

RMT's testing did not create the nuisance. Its reporting did not create the nuisance. Only dumping solid waste in the landfill created the nuisance. RMT never dumped solid waste, nor did it ever exercise control over that activity or the premises. Glebs Aff.

RMT had a contractual duty to conduct ground water sampling and to make recommendations on modifications or additions to the original monitoring system at Refuse Hideaway. Like the defendants in the "control" cases cited above, however, RMT did nothing to create the nuisance; it never owned or controlled the landfill; it never employed anyone it knew would create a nuisance. (See Glebs Aff. ¶ 2, 25). It is not subject, then, to nuisance liability. Nuisance liability must stem from more than an advisory role. The connection between a mere consultancy and the creation and maintenance of the landfill is far too "attenuated." See Steman, 285 N.W.2d at 306. Nuisance liability depends upon control, and RMT exercised no control over any conduct or activity at the landfill.

V. NOT ONLY WAS THERE NO CONTRACT FOR THE BENEFIT OF THIRD PARTIES, THERE WAS NO BREACH OF THE NON-EXISTENT CONTRACT.

A description of the RMT-DeBeck contracts appears in the "History" portion of this brief. One Contract was for the evaluation of the monitoring system in 1979. RMT did that. The

other was to monitor and report water quality test results. RMT accurately reported the results of each quarterly test. Plaintiffs can point to no contractual duty to advise the Stoppleworths or the Schultzes, or any other segment of the public that VOC's were detected in 1987 in the monitoring wells. That was uniquely a DNR function. Further, the old monitoring system proved to be more than adequate. Thus, any contract breach allegations fall for the same reason that the negligence allegations fall: there was no breach; there was no cause.

In addition, there is a third reason that the contract claim should be dismissed: as a matter of law, this was not a third-party beneficiary contract and the plaintiffs have no standing to enforce it.

Generally, the only persons with standing to sue for breach of contract are the parties to the contract. Yet, when RMT sought to dismiss this claim on this basis, the court deemed their allegations sufficient. "Under Wisconsin notice pleadings the court concludes plaintiffs Complaint is sufficient to state a claim against RMT under the theory of third-party beneficiary. This conclusion is based primarily on the allegation <u>one of the purposes</u> of obtaining RMT's services was to protect the citizens residing in the proximity of the landfill." Decision on Motion to Dismiss, p. 6 (emphasis added).

It is not enough, though, that "one of the purposes" of the contract was to protect citizens.

> To entitle [a] third person to recover upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but the contract must have been entered into directly and primarily for [the third-party's] benefit.

Mercado v. Mitchell, 83 Wis. 2d 17, 28, 264 N.W.2d 532 (1978) (emphasis added); Winnebago Homes, Inc. v. Sheldon, 29 Wis. 2d 692, 699, 139 N.W.2d 606 (1966). Once again, the plaintiffs cannot meet their burden because they cannot show that DeBeck and RMT intended their contract to be primarily and directly (as opposed to indirectly) for the plaintiffs' benefit.

In determining third-party beneficiary status, the court first must address the contracting parties' intent. The parties (both) must intend that the promisor be legally obligated to the third party. Certainly, parties cannot be contractually obligated to third parties unless they themselves contract to do so. "We consider the true rule to be that there must not only be an intent to secure some benefit to the third party, but there must be a promise, legally enforceable." State Department of Public Welfare v. Schmidt, 255 Wis. 452, 455, 39 N.W.2d 392 (1949), citing Electric Appliance Co. v. U.S. Fidelity & Guaranty Co., 110 Wis. 434, 439, 85 N.W. 648 (1901); see also Hardware Center, Inc. v. Parkedge Corp., 618 S.W.2d 689, 693 (Mo. App. 1981) ("purpose or intent necessary to create a donee beneficiary is the promisee's intent that the promisor assume a direct obligation to [beneficiary] ... [t]he mere desire to

confer a benefit on the third party or to advance his interests or promote his welfare is not sufficient"); Colonial Discount Co. v. Avon Motors, 137 Conn. 196, 75 A.2d 507, 510 (1950) ("[i]n the final analysis, however, the real test to be applied to all contracts is ... whether the intent of the parties was to create a direct obligation from the promisor to the third party").

It would exceed the contracting parties' intentions and it would be bad public policy to permit any non-contracting member of the public to assert contractual remedies in all cases where the public may indirectly benefit from others' contracts. Under the plaintiffs' theory, a breach of any contract that could provide some indirect benefit to the public would be enforceable by any member of the public. Such a rule most certainly would disturb the expectations and bargaining positions of contracting parties. An unforeseeable, infinite class of possible litigants can be a "crushing burden." H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896, 897-98 (1928). Fundamental fairness prohibits imposing that kind of burden on a contracting party where it is clear that the party never bargained to assume such a burden.

The Wisconsin courts have never permitted a member of the public to enforce a contract as a third-party beneficiary on the mere inference that the public would benefit indirectly from the contract. In fact, the courts repeatedly have warned against such suits. See e.g., Britton v. Green Bay and Fort Howard

Water Works Co., 82 Wis. 48, 57, 51 N.W. 84 (1892), the plaintiffs' property was destroyed by a fire he could not put out because the water company breached its contract with Green Bay to supply water. He attempted to sue the water company for breach of its contract. The court dismissed for lack of standing, stating:

> Could the defendant have reasonably supposed that by this contract with the city it was contracting with or incurring liability with each one of its inhabitants, and that it might be sued by each one individually and separately?
>
> ... There would be no end to such liability.

Id. at 57; see also Highway Trailer Co. v. Janesville Electric Co., 187 Wis. 161, 204 N.W.2d 773 (1925); Columbia County v. Wisconsin Retirement Fund, 17 Wis. 2d 310, 116 N.W.2d 142 (1962).

> If carried to its logical conclusion ... [the taxpayer's position] would allow any taxpayer to contest the modification or change in any contract between a municipality and a third person. Such contracts, when they do exist, are not third-party beneficiary contracts for taxpayers....

(17 Wis. 2d at 332-333).

The courts clearly recognize the subtle but important distinction between an indirect benefit to the public -- which probably can be found in most contracts for professional services -- and an intent to provide actionable rights. Other jurisdictions recognize this critical distinction, too. See e.g., D'Amato v. Wisconsin Gas Company, 760 F.2d 1474, 1479 (7th Cir. 1985) (handicapped person had no standing to enforce

affirmative action provisions of its governmental procurement contract). See also Martinez v. Socoma Companies, Inc., 11 Cal. 3d 394, 113 Cal. Rptr. 585, 521 P.2d 841 (1974) (minority disadvantaged person had no actionable right to enforce a minority training contract where the contract manifested no intent that third parties could enforce the contract).

To be enforceable by a third party, the contract must be made specifically for the benefit of third persons, not just incidentally for their benefit. State Department of Public Welfare v. Schmidt, 255 Wis. 452, 39 N.W.2d 392 (1949).

> To entitle such a stranger to the contract to recover there must be and exist an express promise to that effect, either by simple contract or a covenant under seal....
>
> "[T]here must not only be an intent to secure some benefit to such third person, but the contract must have been entered into directly and primarily for his benefit. We consider the true rule to be that there must not only be an intent to secure some benefit to the third party, but there must be a promise, legally enforceable. The [agreement] in this case fail[s] to meet these requirements. The situation presented shows a want of any intent to secure a benefit to third parties."

Id. at 455 (emphasis added) (citations omitted); see also Schell v. Knickelbein, 77 Wis. 2d 344, 252 N.W.2d 921 (1977).

> A third party cannot maintain an action as a third party beneficiary if under the contract his was only a 'indirect benefit, merely incidental to the contract between the parties."

Id. at 338-50 (citations omitted).

There is no evidence that the DeBecks and RMT intended to enter into their contracts directly and primarily for the plaintiffs' benefit. There is no language in the parties' written proposal or in the memorialization letter that third parties should be entitled to benefit from or enforce the contract. There is nothing in the contract that contemplates notifying individual members of the public about test results, reports, studies, or recommendations. The evidence shows that the parties never conceived of such an obligation and never would have agreed to such a thing if proposed. (Glebs Aff., ¶ 23, 24).

The court may well infer that members of the public would benefit indirectly from professional ground water monitoring and testing. But such an inference is a far cry from imposing a direct contractual obligation to members of the public or finding an express contractual commitment that third parties could enforce contract breaches. RMT is entitled to summary judgment on this claim.

VI. THE MISREPRESENTATION CLAIM IS UNSUPPORTED BY BOTH FACTS AND LAW.

After abandoning what appeared to be a claim for fraudulent misrepresentation at the motion to dismiss stage, plaintiffs resorted to a misrepresentation claim based on strict responsibility. Our Supreme Court has pointed out that all theories of misrepresentation -- those based on intent, negligence and strict liability -- share at least three common elements:

> (1) The representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue; and (3) the plaintiff must believe such representation to be true and rely thereon to his damage.

Gauerke v. Rozga, 112 Wis. 2d 271, 277, 332 N.W.2d 804 (1983) at n. 3. Here, the undisputed facts prevent plaintiffs from proving any of these elements.

A. The Facts Fail To Show Any Misrepresentation.

In their brief opposing RMT's motion to dismiss, the plaintiffs set forth what they believed to be the basis for their claims against RMT. Plaintiffs' Response Brief to RMT's Motion to Dismiss, p. 3. The adequacy of the 1979 ground water monitoring system at the landfill is at the heart of their case.

> As a result of [the 1979] evaluation, RMT determined that the existing monitoring system was seriously inadequate in that a contaminant plume emanating from the landfill could go undetected. RMT recommended several additional monitoring wells for monitoring the system. However, it purposefully presented these recommendations as "desirable" improvements of the monitoring system and failed to disclose to DeBecks the serious inadequacy of the monitoring system. From 1979 through 1986, RMT, pursuant to DNR requirements, on behalf of the DeBecks using current monitoring system data, consistently advised the DNR (and the DeBecks) of its conclusion that no ground water degradation was resulting from the landfill. However, in reaching these conclusions, RMT never informed DNR of the serious inadequacy of the ground water monitoring system. Further, RMT never qualified its conclusion and presented its conclusions of no landfill impact, knowing they could be in error. (Complaint, ¶¶ 13-18).

Plaintiffs' Response Brief, pp. 3-4 (emphasis added).

The undisputed facts show that the "old" ground water monitoring system performed adequately when compared with the wells RMT proposed to be added to that system in 1979.

There is, then, no foundation on which to rest plaintiffs' misrepresentation claim. The results of RMT's 1979 work were properly communicated to its client; the recommendations it made, though not fully accepted by its client, did not cause an inadequate monitoring system to exist; and, accordingly, any statements made to anyone thereafter about what the monitoring system showed were not factually untrue or incomplete because the adequacy of the monitoring system is simply not at issue.

B. The Undisputed Facts Show That The Plaintiffs Never Relied on RMT's Statements.

In their Second Amended Complaint, plaintiffs baldly assert that they "were cognizant of and relied upon fraudulent statements and conclusions submitted by RMT and the DeBecks to DNR...." (Complaint, ¶ 41). Not only were the statements not fraudulent, the plaintiffs even never saw much less relied on them.

> Q Did you make any inquiry within DNR about that landfill at that point in time? [Purchase of house in 1985]
>
> A No.
>
> * * *
>
> Q Did you have any contact with DNR in terms of the landfill after you bought the house up to the time that Mr. Glebs made his visit to you? [1988]

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>
> A No.
>
> * * *
>
> Q Did you have any contact with DNR in terms of the landfill after you bought the house up to the time that Mr. Glebs made his visit to you? [1988]

A No.

Q Nobody at DNR with respect to that landfill?

A No. I worked at the time in an entirely different area of DNR or section of DNR, which had absolutely nothing to do with that, so I had no reason even to run into the environmental people.

* * *

Q Did you at any time obtain documents from DNR, any of their records or files relating to the --

A The only documents we have are letters that were directly addressed to us that we've received the originals of.

* * *

A My understanding is that in Wisconsin to have a licensed operating landfill you have to submit engineering reports to the DNR. My understanding is that most, if not all, landfills in Wisconsin contract out for these engineering reports, that it's expensive to maintain an engineering staff at a landfill.

My understanding is that RMT then was the company that was contracted to do the tests and to provide the reports to DNR.

Q And those reports you understand dealt with what?

A I don't know. Things that engineers need to know. I don't know. I really don't feel like I can answer this. I feel it's more appropriate for somebody who works with this at DNR to answer, somebody in the Bureau of Solid Waste that knows how a landfill operates or knows what the requirements are for the engineering firms.

(Anita Schultz Dep., pp. 15, 58-59, 117, 122-23).

Q Over the years from the time that they did install the landfill to the time that you received a visit from Mr. Glebs, did you check the monitoring at all?

A No.

Q Monitoring reports or anything like that?

A No. We were -- I guess we were trusting. We were assuming that if the RMT and/or DNR were retained to monitor that, you know -- in fact, we didn't know who to check with hor how to check it.

Q So you made no contacts during that period of time with DNR to see what was going on, that things were good or bad or indifferent?

A I can't say no contact, but I can't recall any specific contact. I think we were -- you know, we may have been in contact with them for not being properly covered or something like that, but I can't recall dates and times on that. We didn't contact them specifically in relationship to the monitoring, no.

(Albert Stoppleworth Dep., pp. 25-26).

Reliance, of course, is a necessary element of a claim for strict responsibility for misrepresentation. See Gauerke, 112 Wis. 2d at 272, n.3. Though plaintiffs allege reliance, they cannot prove it. Therefore, plaintiffs' misrepresentation claims fail.

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CONCLUSION

Based upon the foregoing, we respectfully request that the court grant RMT's Motion for Summary Judgment.

Dated at Madison, Wisconsin this 25th day of May, 1990.

LA FOLLETTE & SINYKIN

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE EX REL.
CRAIG A. SCHULTZ and ANITA SCHULTZ, and
CRAIG A. SCHULTZ and ANITA SCHULTZ,
individually,

Plaintiffs,

vs. Case No. 88-CV-3434

REFUSE HIDEAWAY, INC.,
JOHN W. DEBECK, THOMAS G. DEBECK,
d/b/a LAND DISPOSAL COMPANIES; and
RMT, INC., and
BITUMINOUS FIRE & MARINE INSURANCE CO.,

Defendants.

STATE EX REL.
ALBERT and CAROLYN STOPPLEWORTH, and
ALBERT and CAROLYN STOPPLEWORTH,
individually,

Plaintiffs,

vs. Case No. 88-CV-3421

REFUSE HIDEAWAY, INC.,
JOHN W. DEBECK, THOMAS G. DEBECK,
d/b/a LAND DISPOSAL COMPANIES; and
RMT, INC.,
Defendants.

AFFIDAVIT OF JOSEPH W. BRUSCA

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Joseph W. Brusca, being first duly sworn, on oath, states that:

1. I reside at 2101 Westchester Road, Madison, Wisconsin. I am an environmental program supervisor and I am employed by the State

of Wisconsin Department of Natural Resources (DNR) located at 3911 Fish Hatchery Road, Fitchburg, Wisconsin 53711. I have been employed by DNR since May 1973. Currently, I am the Solid Waste Program Supervisor and I have worked in that capacity since March 1984.

2. I earned a baccalaureate degree in resource management from UW-Stevens Point in 1973. Since that time, I have taken courses in hydrogeology, biology, geology and courses provided by the DNR.

3. I have personally been on-site at the Refuse Hideaway, Inc. sanitary landfill several times, and I investigated that site for DNR from July 1975 to March 1984.

4. In on or about the year 1978, DNR had information that the son-in-law of John H. DeBeck was the person who was taking samples from the Refuse Hideaway, Inc. sanitary landfill for monitoring purposes. Subsequent to learning that information, Mr. DeBeck was informed by DNR that it would be in his best interest to hire a competent firm to sample and analyze groundwater monitoring data to provide an accurate representation of groundwater quality. Thereafter, Mr. DeBeck retained RMT as the consultant for Refuse Hideaway, Inc.

5. RMT held an excellent reputation in the professional community as having a number of sophisticated experts concerning the proper design and monitoring of sanitary landfills.

6. RMT submitted a report to the DNR central office, to the attention of hydrogeologist Mike Netzer, on April 19, 1979. In that document, RMT reported that it was in the process of studying the design of the Refuse Hideaway, Inc. sanitary landfill monitoring system and that it may have recommendations concerning modifications or improvements to that system.

7. Based on the report submitted by RMT to DNR on April 19, 1979, I assumed that RMT would submit an addendum report if, after concluding its study, RMT either:

a) found problems in the ability of the Refuse Hideaway, Inc. monitoring system to detect contaminants in the groundwater, or

b) recommended modifications or improvements to such monitoring system.

At no time did RMT submit an addendum report to DNR. I believe that an addendum report was never submitted to DNR by RMT because if it had been, I would have received it and forwarded it to the central DNR office and had the central office received such an addendum report, that office would have routed it to me.

8. Had RMT submitted an addendum report in which it identified problems in the ability of the Refuse Hideaway, Inc. monitoring system to detect contaminants in the groundwater, or in which modifications or improvements to the monitoring system were recommended, DNR would have classified Refuse Hideaway, Inc. as a high priority landfill.

9. DNR relies on the monitoring results (i.e. indicator parameters) of sanitary landfill monitoring consultants because DNR cannot possibly oversee each and every sanitary landfill on a routine basis due to staffing and funding limitations. Consequently, DNR must prioritize those landfills that report problems or that are known to impose emergency conditions upon the environment.

10. The DNR relied on RMT to accurately report the monitoring results (i.e. indicator parameters) it obtained at the Refuse Hideaway sanitary landfill. DNR relied on such parameters reported by RMT to determine if DNR would request or demand additional information concerning the sanitary landfill or to determine if DNR must classify the landfill as a high priority landfill.

11. The monitoring results (i.e. indicator parameters) associated with the Refuse Hideaway sanitary landfill, as reported by RMT between the years 1979 (when RMT first began its role as the monitoring consultant for Refuse Hideaway) and 1987, did not indicate any problem with plumes of leachate emanating from the landfill.

12. DNR relied on the reports submitted by RMT concerning the monitoring results obtained at Refuse Hideaway, Inc. Because of the excellent reputation RMT enjoyed in the professional community and because RMT consistently and continually reported that there were no problems associated with the Refuse Hideaway sanitary landfill, DNR assumed the landfill was working as it was designed to function; and therefore, DNR did not examine or investigate it more

closely.

13. DNR did not learn that there were surface leachate seeps emanating from the Refuse Hideaway sanitary landfill, and that such leachate could be contaminating groundwater resources and flowing in unpredicted directions from the landfill, until 1986. When DNR learned such information, it immediately classified Refuse Hideaway as a high priority landfill.

14. By the early 1980s, it was common knowledge among experts involved in the design and monitoring of sanitary landfills that Volatile Organic Compounds (VOCs) imposed a substantial health risk to persons exposed to them and that, as a result, it was becoming increasingly important to monitor for VOCs in and around sanitary landfill sites.

15. By the year 1984, VOCs were known to exist in landfill sites and to pose substantial risks to the public. As a result, DNR revised its reporting form in such a way as to include a space on which a sanitary landfill monitoring consultant could report VOC levels found in samples obtained at a given landfill site.

16. It is my understanding that RMT did not begin to sample for VOCs at the Refuse Hideaway, Inc. sanitary landfill until on or about June, 1987 and RMT did not report finding contaminants in the landfill until on or about August, 1987.

17. It is my understanding that RMT did not begin to sample for VOCs in the water supplies of neighboring areas to the Refuse

Hideaway, Inc. sanitary landfill until on or about February, 1988.

Dated this _____ day of June, 1990.

_____
Joseph W. Brusca

Subscribed and sworn to before me
this ___ day of June, 1990.

_____
H. Arleen Wolek, Notary Public
State of Wisconsin
My Commission is Permanent.

SUBPOENA

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

THE STATE OF WISCONSIN

To: Joseph W. Brusca
2101 Westchester Road
Madison, Wisconsin

Business: Wisconsin Department of Natural Resources
3911 Fish Hatchery Road
Fitchburg, Wisconsin

Pursuant to sec. 805.07 of the Wisconsin Statutes, you are hereby commanded to appear in person before a notary public, at the offices of LaFollette & Sinykin, Suite 500, One East Main Street, Madison, Wisconsin, on the 5th day of July, 1990, at 9:00 o'clock A.M., to give evidence in actions entitled, Albert and Carolyn Stoppleworth v. Refuse Hideaway, Inc., et al., Case No. 88-CV-3421, and Craig and Anita Schultz v. Refuse Hideaway, Inc., et al., Case No. 88-CV-3434.

Failure to appear may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions.

Issued this 26th day of June, 1990.

Earl H. Munson
Attorney for RMT, Inc.
Suite 500, One East Main Street
P. O. Box 2719
Madison, WI 53701
(608) 257-3911

Witness fees tendered herewith. $21.20 ck # 0035777 signed over to WI DNR & Joe Brusca.

1/ja(M20):SUB

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 4

ALBERT and CAROLYN STOPPLEWORTH,

Plaintiffs,

v.

REFUSE HIDEAWAY, INC.; JOHN W. DeBECK; THOMAS G. DeBECK; and RMT, INC.,

Defendants.

and

Case No. 88-CV-3421

RMT, INC.,

Defendant and Third-Party Plaintiff,

v.

SECURITY INSURANCE COMPANY OF HARTFORD, a foreign corporation,

Third-Party Defendant.

CRAIG A. SCHULTZ and ANITA SCHULTZ,

Plaintiffs,

v.

REFUSE HIDEAWAY, INC., JOHN W. DEBECK and THOMAS G. DEBECK d/b/a LAND DISPOSAL COMPANIES; RMT, INC., and BITUMINOUS FIRE & MARINE INSURANCE CO.,

Defendants.

and

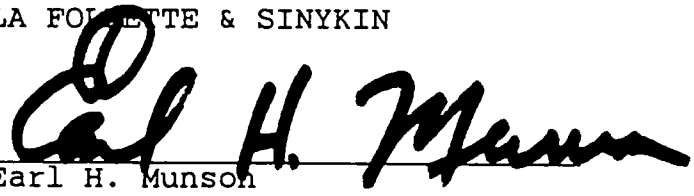
Case No. 88-CV-3434

parties, the defendant, RMT, Inc., will take the deposition of Joseph W. Brusca pursuant to Wis. Stat. § 804.05. This deposition will be subject to continuance until completed.

Said deposition shall be on oral examination before a notary public, duly authorized to administer the oath according to the laws of the State of Wisconsin.

Dated at Madison, Wisconsin this 26th day of June, 1990.

LA FOLLETTE & SINYKIN

By 
Earl H. Munson
Attorneys for RMT, Inc.

Earl H. Munson
Timothy J. Muldowney
Linda M. Clifford
LaFollette & Sinykin
Suite 500
One East Main Street
P. O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

1/ja(M21):ND-C

SUBPOENA

THE STATE OF WISCONSIN, TO: Theresa A. Evanson
Wisconsin Department of Natural Resources
101 S. Webster Street, SW/3
Madison, WI 53703

Pursuant to Section 805.07 of the Wisconsin Statutes;

YOU ARE HEREBY COMMANDED to appear in person before the Honorable Jack Aulik, Dane County Circuit Court, Branch 4, City-County Building, 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin 53709, on Tuesday, August 21, 1990, at 9:00 a.m., to give testimony in the above-entitled action.

FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT WHICH MAY INCLUDE MONETARY PENALTIES, IMPRISONMENT AND OTHER SANCTIONS.

Issued this 2nd day of August, 1990.

MICHAEL, BEST & FRIEDRICH
Attorneys for Albert and Jean Stoppleworth

By: _____
Arvid A. Sather

900 First Wisconsin Plaza
One South Pinckney Street
Post Office Box 1806
Madison, WI 53701
Telephone: 608-257-3501

2547h

CORRESPONDENCE / MEMORANDUM

STATE OF WISCONSIN

September 19, 1977 File Ref: 4410

To: Files

From: Robert T. Glebs RG

Subject: Inspection of the John Debeck-Middleton Landfill on September 1, 1977 by Robert T. Glebs, accompanied by David Nichols and Joe Brusca

On September 1, 1977 I was requested to inspect the Debeck landfill to observe operational and plan implementation problems at the facility. Based on that inspection, I developed a sketch of the landfill dated September 1, 1977 (attached) indicating certain of the problems at the facility. After the inspection, I reviewed the plan and plan approval from November of 1974. Based on that review and the site inspection, the following things were observed:

1. The site access off of Highway 14 was supposed to be paved for an approximate 100-foot distance. This has not been done. The road has now stabilized in that area and this should be required to be done as soon as possible.

2. The southeast portion of the facility was to be brought to grade prior to the operation moving westerly, and that area was to be properly abandoned. That had not been done and a rather extensive area of the facility remains in an unabandoned state. Operations should move back to the southeast area immediately and that area should be filled to final grade and properly abandoned.

3. The earthen berms on the outside of the facility which have been constructed, in particular along the east and southern half of the facility have not been properly topsoiled. Seeding is sparse on the slopes and much erosion has occurred. The erosion should be corrected immediately and surface water drainage properly routed around or down the slope so to limit erosion. The slopes should then be topsoiled and seeded with a proper vegetation established to ensure the slopes are stabilized and erosion is minimized.

4. The berm along the southern edge of the property in the westerly half was to be constructed of earth and be contiguous with the southern berm in the eastern half of the facility. That berm has not been placed and waste is exposed along the entire edge of the southwest portion of the facility. That waste should be removed and earthen berms constructed properly in accordance with the plans as required.

9-20-77

AD-75

5. Sludge has been dumped at the facility and it appears that it was from Oscar Mayer. It appears to be a biological sludge with a high moisture content. This sludge should no longer be accepted at the facility because of the excess moisture.

6. Although the area in the central portion of the facility appears to be fairly well graded and sloped to drain, the drainage appears to be directed into the active areas. This drainage should be handled properly by the installation of a berm with surface water diversion being routed towards the south off of the facility rather than through the active area.

7. The area in the westerly half of the facility is not graded very well nor is it covered properly. In particular, as can be seen on the attached sketch, numerous areas have exposed waste in them. These areas have either been covered with shredded waste which is not adequate daily cover or they have been covered inadequately with earth and waste is exposed.

8. With respect to the active area, it appears that inadequate equipment is available for an operation of this size. On September 1, 1977 the active area was very large and extensive, waste was backing up, and all-in-all the active area was inadequately controlled. In particular, it appears that part of the problem is related to the active salvaging operation of cardboard in the active area. Piles of waste appear to back up while employees salvage cardboard out of the waste. This operation, in my opinion, although valuable for recycling cardboard, is affecting the overall disposal operation and should be required to be ceased.

9. On the westerly edge of the facility, drainage has been routed between the active area and the unexcavated area as required. That area to the far west should begin to be excavated and sloped from elevation 934 up to the edge of the facility at no greater than a 2:1 slope. Drainage should then be routed as filling progresses up the slope in a terraced manner on the slope over the earthen berm at the southern end of the facility as required. However, as filling is done in the proper sequence in the areas presently being filled and brought to final grade prior to proceeding further westerly or northerly, this area will not be used for a long time.

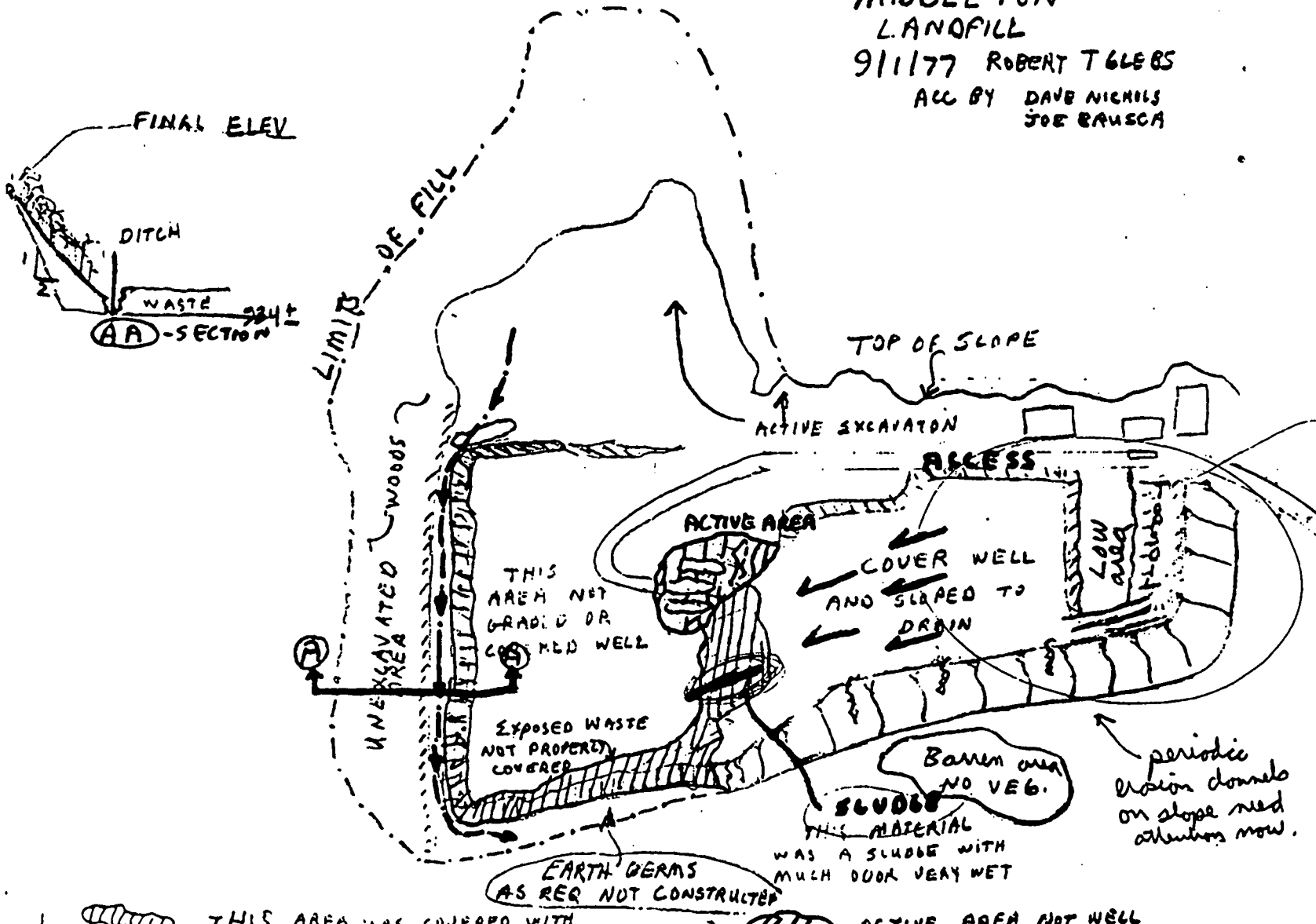
10. The active excavation for cover material has exposed bedrock in particular just north of the access road in numerous places. Active filling should not be allowed in those areas.

11. A topographic map was suppose to be submitted after two years of operation on or about December 1, 1976. It has not been submitted.

In summary, I was highly disappointed in the inspection of September 1, 1977. It appears Mr. Debeck is randomly filling the facility in nonconformance with the plans and specifications, operating the facility in nonconformance with NR 151. In my opinion, immediate enforcement action is necessary to bring Mr. Debeck into compliance. Each year Mr. Debeck has been operating, problems have come about and rather than getting better, Mr. Debeck has made efforts but has only been in partial compliance since the operation has begun. At this point in time, it appears the items in noncompliance with the plans and operational aspects of this landfill are serious enough in nature to warrant this enforcement action. Also, in my opinion, in reviewing the plans and specifications, because Mr. Debeck has not complied with these plans and specifications, new engineering plans should be required delineating more clearly for Mr. Debeck exactly what, when, and where construction items are suppose to take place, cover material is suppose to come from, etc. It is suggested that this memorandum be used as a basis for meeting with Mr. Debeck and enforcement action in the form of an order injunction requesting immediate relief, mini-hearing or direct referral be utilized to specify time dates by which Mr. Debeck will be in compliance.

RTG:bb
cc: J. Brusca - SD
J. Reinhardt

DEBECK
MIDDLETON
LANDFILL
9/1/77 ROBERT TOLLES
ACC BY DAVE NICHOLS
JOE RAUSCA



1. THIS AREA WAS COVERED WITH LANDSPREADER WASTE UNSUITABLE AS COVER SOIL
2.
3. ACTIVE AREA NOT WELL RUN TOO LITTLE EQUIP FOR OPERATION OF THIS SIZE.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Madison Area Headquarters
3070 Fish Hatchery Road
Fitchburg, Wisconsin 53713

Carroll D. Besadny
Secretary

November 20, 1985 4410-2

Mr. John DeBeck, President
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

Dear Mr. DeBeck:

Re: August and November Landfill Inspections,
Refuse Hideaway, License #1953

Enclosed are three inspection forms for the inspections I conducted in August and November of this year at Refuse Hideaway.

As we discussed at the site, covering and surface water drainage/leachate seeps continue to be problems. An examination of the file for this facility indicates violations of covering requirements and surface water drainage/leachate problems from almost the day this site was licensed as follows:

Department of Natural Resources Inspections on:

06/27/75	05/19/81	03/29/82	09/07/84
09/19/75	09/01/81	03/02/83	08/28/85
10/10/75	10/22/81	08/01/83	11/07/85
11/12/75	12/17/81	06/15/84	06/17/85

All indicate a total lack of or very poor covering of waste at the site.

Inspections on: 03/02/83, 04/15/83, 10/26/83 and 02/07/84 indicated marginal covering at the site, and inspections on 04/07/81, 06/24/82, 07/03/82, 06/08/83 and 06/18/83 indicated covering was adequate. Therefore, out of 25 inspections 20 indicated violations of covering requirements.

Surface water drainage and leachate seeps have also been a continuing problem at the site as indicated by the following inspections:

06/27/75	03/29/82	04/15/83	09/07/84
10/10/75	06/24/82	10/26/83	11/07/85
09/19/77	03/02/83	02/07/84	11/15/85
05/19/81			

It is apparent to me that operations at this site have been in chronic violation of requirements to adequately cover and grade the site. This has contributed to leachate production and surface water contamination problems.

These poor operational practices can no longer be tolerated by the Department. I have requested, therefore, that our Enforcement Specialist, Ronald Curtis, contact you with a Notice of Violation based on your continuous failure to properly cover refuse at the site. You should be receiving this notice in the near future. The notice will request your response to these problems.

Please call me if you have any questions on the above information at (608) 273-5972.

Sincerely,

Marie Stewart

Marie Stewart
Area Solid Waste Investigator

MS:jw

Enc.

cc: Jon Warren - MAD
Joseph Brusca - SD
Ronald Curtis - SD

MARIE STEWART
SCHULTZ VS. REFUSE HIDEAWAY TRIAL
AUGUST 20, 1990--11:00 A.M.
CIRCUIT COURT FOR DANE COUNTY, HON. JACK AULIK

I. Background

A. Education

B. Training

C. Work at DNR

1. Positions

2. Duties

II. Role of DNR vs. Landfill operator

A. Operator has responsibility for safe operation.

B. Role of DNR as regulator

C. Situation in 1985

1) Number of sites to monitor

2) Staff to monitor

III. Condition of Refuse Hideaway Site in 1985

A. Real disaster

B. Had been insufficient staff to closely watch

C. Lack of cover

D. Inaccurate grades

E. Late reports

F. Leachate seeps

1. When she noticed 5/86

2. Significance of seeps

3. Immediate actions by her (priority site)

4. Relationship to closure

IV. Johannsen Report

A. When did she first see it. 7/3/90

B. Was it customary for DNR to see consultant's reports concerning the operation of landfills.

C. What was the customary practice fo DNR concerning reports from consultants to landfill operators?

D. Had you seen the report when you took over the site what would you have done?

E. Had DNR seen the report in 1979 what would they have required as far as monitoring wells?

V. Test results

A. DNR results of Schultz and Stoppleworth wells

B. DNR records of results of monitoring wells?

VI. Amounts paid Refuse Hideaway

CONFERENCE WITH MARIE STEWART 7/3/90.

Hasn't worked on this for 2 years.
Took almost 6 years for DNR to learn the contamination because never got the July '79 report. Had to pull teeth with DeBeck to get more wells out at site 6 years later.

1st came to DNR in Dec. '76
Started S. Dis. in March '85 as solid waste investigator.
1st got involved at this site in '85.

DNR did sampling - didn't find anything in wells. 1 year later, RMT found probs and told Schultz shouldn't drink water - hadn't told DNR.

When 1st started, hadn't inspected landfills. Took 9 mos. for Marie to get up to snuff and her position had been vacant for 6 mos., so no one with knowledge was involved in landfill for 1 1/2 years. She immediately red flagged it. He never covered the waste. Puddles of leachate seeped and got in sedimentation pond.

Checked leachate seeps - highly contaminated with VOCs organics. "You could smell it". Made him pump it out and haul it to Madison Sewage district.

'86: berm supposed to be 60 feet wide and leachate was coming through the berm. Got scared must be huge berm. She and Joe felt possible leakage from site that wasn't picked up in monitoring wells. Found out there was no upgradient well. Insisted on one. Thought it was going underneath the wells and that proved true.

Met with Bureau people regarding this. Had hard time convincing it was a problem and no evidence because of the monitoring probs.

Asked DeBeck to put in head wells. She called RMT and one well was installed. Asked what leachate was. She was told 35 feet but the report filed said 17 feet. Then they maintained she misheard 35 feet.

A site that large, that's a fair amount of leachate.

Mtg. - Marie, Bureau of Hydro, Jody Feld, Mtg. minutes in file. Doesn't remember who was there for RMT.

RMT submitted quarterly reports. She reviewed the reports. Because of surface leachate observed, she looked at reports. they showed hardness halo that you'd expect from this type of site.

1st time DNR tested for VOC was June '86 - Required '87.

Trng in hydrogeology: degree in resource development. Courses in geology of soils, No tech background in hydrogeology.

Wells were shallow, so should know there's a probability if 60 ft. berm. So, obvious something had to be going under the wells if wells didn't pick something up.

Chloride is very mobile in the environment and that causes probs when you're monitoring because often hard to figure out where chloride comes from.

This was her gut reaction based on her tech. background and education, but her knowledge is great next to layman but not hydrogeology. The plume is not where the monitoring wells were.

What DNR was looking for was out there, but DNR wasn't getting it.

Schuf sent letter to DeBeck asking for more wells. Glibs became indignant.

There was no closure plan for landfill and DNR wanted them to do one so that DNR could legally require them to follow plan.

Also wanted closure plan because regs. didn't allow them to require steps unless a plan was approved.

Talked to Glibs a few times and told him he was full of hot air. RMT didn't want to do anything out there. John took in a bunch of $ and never spent anything at landfill.

Went to a couple of meetings with Bureau people.

Jody Feld was the hydrogeologist. She's no longer in WI. Glibs: "If old wells aren't good, why should we use them to monitor?
Then, just required monitor new wells.
Split samples and tested for VOCs.

Usually takes few weeks to realize haven't gotten reports. Call them. They say they're in the process and it's coming. Then few more weeks go by. Call.... Didn't get in their Aug. '87 finding til Jan. Took almost 6 mos. before RMT sent in that in-field conditions report. It was so overdue.

Didn't know RMT sampled Schultz's and Stoppleworth's. It wasn't required but it was in RMT's proposal.
Anita sent Marie copies of what she'd been given and DNR had had never previously received such reports.

Standard lab proc.: take 2nd sample if 1st shows VOCs.
BUT- should have told Schultzs' VOCs exceeding drinking water standards showed up in 1st sample, recommend bottled water and plan was to recheck 2nd sample.

Started sampling VOCs at landfills in '86.

*Would be the role of a hydrogeologist to keep up on the literature and info on VOCs and when reasonable to monitor for them. She's not hydrogeologist.

She was involved with closure. She inspected site a few time. She worked on trying to close it down before everything happened. He'd shoot the grades at the landfill and he'd report the same stuff even though he took in gobs of stuff. She was afraid it would fill up. He'd file reports saying it was lower than the report 6 mos. ago--that's ridiculous.

Rule 1: cap the site to prevent leakage from flowing. So started working on that. John kept trying to remain open till all the contaminants became known.

Glebs kept saying if site could stay open, they could make enough to close it properly. Glebs was John's mouthpiece on behalf of Refuse Hideaway.

RMT Tech people did sampling but Glebs was the contact person. John took care of the grades himself with Arnold and O'Sheridan shooting the grades when RMT did everything else.

DeBeck relied on his consultants. He didn't sneak things in even though many people think John's an awful person.

Neighbors c/o probs with drainage. If got real gully washer, there could be drng swell. Only prob was where it abutted bedrock. Drng was more of a prob early on. John improved it a bit, so less problematic later on.

Hydros still haven't rationalized how leachate got over to Schultzs and Stoppleworths. Some theories: 1) fx bedrock; 2) no clay liner; 3) it went down under wells and didn't go where people thought it would go (i.e. Black Earth creek, wetlands....)

It was a disaster site. Probably never should have been built there.

She worked for Environmental Impact for 6 years before she started job at DNR.

If people meet regs. then DNR must approve it. Envir. Impact studies does great job delaying the inevitable.

She will be here in Aug.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny, Secretary
Box 7921
Madison, Wisconsin 53707
TELEFAX NO. 608-267-3579
TDD NO. 608-267-6897
SOLID WASTE TELEFAX NO. 608-267-2768

July 25, 1990

IN REPLY REFER TO: 4440

Theresa Evanson
Wisconsin DNR - SW/3
P.O. Box 7921
Madison, WI 53707

SUBJECT: Emergency Erosion Control at the Refuse Hideaway Landfill

Dear Concerned Citizen:

During the July 10, 1990 public meeting regarding the Refuse Hideaway Landfill, we discussed erosion problems that have developed at the landfill due to the heavy storms that have occurred this spring and summer. This letter is to inform you of the actions that are being taken to address the erosion situation.

We requested bids from three contractors to perform emergency erosion soil control work at the landfill. Terra Engineering and Construction Corporation was awarded the job. The work to be performed, for a cost of $10,500, includes placing heavy rock riprap (called ditch checks) across most erosion areas and staking straw bales in a few areas. The erosion control efforts will concentrate on the southwestern slope, discrete areas of the southern slope (facing Hwy 14), the central swale that runs through the middle of the landfill, and the southeastern ditch that carries water to the sedimentation pond. This work will not include placing topsoil or seeding the eroded areas. We are hopeful that restoration of the eroded areas can take place in 1991.

The emergency soil erosion control work should be performed during the week of July 30, 1990. I would be happy to answer any questions you might have about this or other actions being taken at Refuse Hideaway. My phone number is 266-0941 and I am in the office weekday mornings.

Sincerely,

Theresa A. Evanson, Hydrogeologist
Environmental Response and Repair Section
Bureau of Solid & Hazardous Waste Management

TAE:tae/erosion.pub

cc. Ray Tierney - SW/3
Marie Stewart - SW/3

LETTER SENT to 130 people on RHL mailing list

STATE OF WISCONSIN CIRCUIT COURT Branch 4 DANE COUNTY

STATE EX REL.
CRAIG A. SCHULTZ & ANITA SCHULTZ, and
CRAIG A. SCHULTZ & ANITA SCHULTZ,
individually,

VERDICT

Case No. 88 CV 3434

Plaintiffs,

vs.

REFUSE HIDEAWAY, INC., JOHN W. DEBECK,
THOMAS G. DEBECK, d/b/a LAND DISPOSAL
COMPANIES; AND RMT, INC., and
BITUMINOUS FIRE & MARINE INSURANCE CO.,

AUG 24 1990

Defendants.

STATE EX REL.
ALBERT & CAROLYN STOPPELWORTH, and
ALBERT & CAROLYN STOPPELWORTH,
individually,

Plaintiffs,

vs.

Case No. 88 CV 3421

REFUSE HIDEAWAY, INC., JOHN W. DEBECK,
THOMAS G. DEBECK, d/b/a LAND DISPOSAL
COMPANIES; and RMT, INC.,

We, the jury, duly impaneled and sworn to try the issues in the above-entitled action, do hereby make answers to questions propounded by the Court as follows:

QUESTION NO. 1: Was Refuse Hideaway, Inc., negligent in the manner and method in which it operated the Refuse Hideaway landfill?

Answered by the Court: YES

QUESTION NO. 2: Was such negligence a cause of damage

to the plaintiffs?

Answered by the Court: YES

QUESTION NO. 3: Were John DeBeck and Thomas DeBeck negligent in the manner and method in which they operated the Refuse Hideaway landfill?

Answered by the Court: YES

QUESTION NO. 4: Was such negligence a cause of damage to the plaintiffs?

Answered by the Court: YES

QUESTION NO. 5: Was the landfill site maintained by Refuse Hideaway, Inc. a nuisance?

Answered by the Court: YES

QUESTION NO. 6: Was such nuisance a cause of damage to the plaintiffs?

Answered by the Court: YES

QUESTION NO. 7: Was the Refuse Hideaway landfill maintained by John and Thomas DeBeck a nuisance?

Answered by the Court: YES

QUESTION NO. 8: Was such nuisance a cause of damage to the plaintiffs?

Answered by the Court: YES

QUESTION NO. 9: What amount of money, if any, will reasonably compensate the plaintiffs Craig and Anita Schultz with respect to the loss of market value of their home?

Answer: $ 70,000

QUESTION NO. 10: What amount of money, if any, will reasonable compensate the plaintiffs, Albert and Carolyn Jean Stoppelworth with respect to the loss of market value of their home?

Answer: $ 143,000

QUESTION NO. 11: What amount of money, if any, will reasonably compensate the plaintiff Craig and Anita Schultz with respect to loss of enjoyment of property?

Answer: $ 25,000

QUESTION NO. 12: What amount of money, if any, will reasonably compensate the plaintiff Albert and Carolyn Jean Stoppelworth with respect to loss of enjoyment of property?

Answer: $ 25,000

QUESTION NO. 13: What amount of money, if any, will reasonably compensate the plaintiff Craig Schultz with respect to fear of cancer?

Answer: $ 5,000

QUESTION NO. 14: What amount of money, if any, will reasonably compensate the plaintiff Anita Schultz with respect to fear of cancer?

Answer: $ 10,000

QUESTION NO. 15: What amount of money, if any, will reasonably compensate the plaintiff Albert Stoppelworth with respect to fear of cancer?

Answer: $ 50,000

QUESTION NO. 16: What amount of money, if any, will

reasonably compensate the plaintiff Carolyn Jean Stoppelworth with respect to fear of cancer?

Answer: $ 60,000

QUESTION NO. 17: What amount of money, if any, will reasonably compensate the plaintiff Craig Schultz with respect to future medical monitoring:

Answer: $ 13,500

QUESTION NO. 18: What amount of money, if any, will reasonably compensate the plaintiff Anita Schultz with respect to future medical monitoring?

Answer: $ 15,000

QUESTION NO. 19: What amount of money, if any, will reasonably compensate the plaintiff Albert Stoppelworth with respect to future medical monitoring?

Answer: $ 7,000

QUESTION NO. 20: What amount of money, if any, will reasonably compensate the plaintiff Carolyn Jean Stoppelworth with respect to future medical monitoring?

Answer: $ 11,000

QUESTION NO. 21: What amount of money, if any, will reasonably compensate the plaintiffs Craig and Anita Schultz for the expenses of relocating?

Answer: $ 10,000

QUESTION NO. 22: What amount of money, if any, will reasonably compensate the plaintiffs Albert and Carolyn Jean Stoppelworth for the expenses of relocating?

Answer: $ 10,000

QUESTION NO. 23: Was John DeBeck's conduct outrageous?

Answer: YES

(yes or no)

QUESTION NO. 24: If you answered the preceding question "yes", answer this question: What sum, if any, do you assess against John DeBeck as punitive damages?

Answer: $ 150,000

QUESTION NO. 25: Was Refuse Hideaway, Inc.'s conduct outrageous?

Answer: YES

(yes or no)

QUESTION NO. 26: If you answered the preceding question "yes", answer this question: What sum, if any, do you assess against Refuse Hideaway, Inc. as punitive damages?

Answer: $ 1,000,000

#1,602,500

Dated at Madison, Wisconsin this 24 day of August, 1990.

Donald G. Hartman
Foreperson

Dissenting Jurors:

Tracy Swenson

Don Schlaver

Question(s) dissented to:

(26)

One's verdict was in favor of a higher award for punitive damages for Question (26) one Favored a lower verdict for monetary award for question (26)

STATE OF WISCONSIN
REPLY MESSAGE
FORM AD-16

INSTRUCTIONS TO SENDER:
REMOVE YELLOW COPY FOR YOUR FILE.
SEND REMAINDER OF FORM INTACT WITH CARBONS TO PERSON ADDRESSED.

TO: Joe Brusca - SD Hdqrs.

FROM: Carol Turner - DNR Legal Services

SUBJECT—MESSAGE

— Joe —

Do you have any summary information that has been put together on Refuse Hideaway that can be used to answer this claim?

If you have any questions, give me a call at 266-1959.

Thanks.

REPLY TOK

SIGNED Carol Turner DATE 10/31/90

=> Marie Stewart

Marie, I called Carol & told her to contact Lemque & Terry Evanson. Also relic. was not part operations. J.B.

SIGNED _____ DATE _____

NOTICE OF CLAIM TRANSMITTAL FORM

CLAIM NUMBER 90N0543 DOJ DOCKET NUMBER D90101517

CASE NAME STOPPLEWORTH, JOHN & JACQUELINE, IN THE

DATE OF INCIDENT 071090 SERVICE CERTIFIED MAIL 000000
SERVICE (OTHER) 101290
STATUTE OF LIMITATIONS 03 YEARS

DOJ ATTY/PARA KRUSE, BETTY

AGENCY 1 NATURAL RESOURCES, DEPARTMENT OF
AGENCY 2

SUBJECT NOTICE OF CLAIMS UNDER 893.82
INFO LANDFILL/CANCER

SENT TO TURNER, CAROL --DNR
5TH FLOOR GEF 2
101 S WEBSTER
MADISON, WI

SENT TO RIGGS, MARY K.
STATE RISK MANAGEMENT
7TH FLOOR GEF 2
MADISON, WI

SENT TO

DATE SENT 101890

** PLEASE INVESTIGATE THE ATTACHED CLAIM AND SUBMIT YOUR FINDINGS TO THE PARALEGAL OR ATTORNEY LISTED ABOVE **

PLEASE RESPOND TO THE FOLLOWING ADDRESS:

DEPARTMENT OF JUSTICE

PO 7857

MADISON WI 53707-7857

90N0543

October 12, 1990

OCT 12 1990

TO: Attorney General Donald J. Hanaway
114 E. State Capitol
Madison, WI 53702

(Hand-Delivered)

NOTICE OF INJURY PURSUANT TO
SECTION 893.82, WISCONSIN STATUTES

John and Jacqueline Stoppleworth ("Mr. and Mrs. Stoppleworth") are adult residents residing at 6634 Century Avenue, Middleton, Wisconsin 53562. Mr. and Mrs. Stoppleworth, by their attorneys, Michael, Best & Friedrich, One S. Pinckney Street, Suite 900, Madison, Wisconsin 53703, hereby file a Notice of Injury Pursuant to Section 893.82(4), Wisconsin Statutes.

Mr. and Mrs. Stoppleworth learned on about March 10, 1988 that the well providing water to their parents' well, Albert and Carolyn Stoppleworth, was contaminated with hazardous chemicals, including, but not limited to, dichloroethane, trichloroethane, trans-1,2-dichloroethylene, tetrachloroethylene, tricholorethylene, and vinyl chloride. Their parents' residence is located at 7750 Highway 14, Middleton, Wisconsin 53562.

The contamination was caused by a landfill located in the Town of Middleton, Dane County, Wisconsin, and operated by

Receipt of copy of the within acknowledged
the 12 day of October
19 90
Attorney General of Wisconsin
By [signature]
Attorney General

Refuse Hideaway, Inc. ("Refuse Hideaway"). As a result of exposure to this contamination, John Stoppleworth has sustained injuries, including, but not limited to, cancer, fear of long-term carcinogenic risk, and genetic damage and neurological impairment. John Stoppleworth was advised by a treating physician on July 10, 1990 that exposure to the contaminated water constituted a substantial factor in causing his cancer. Jacqueline Stoppleworth has sustained a loss of consortium. Both John and Jacqueline Stoppleworth have been damaged in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) and other damages in accordance with law.

Mr. and Mrs. Stoppleworth further believe that the actions of the employees of the Wisconsin Department of Natural Resources ("DNR"), including, but not limited to, Lester P. Voight, C.D. Besadny, Robert Glebs, John Reinhardt, and David G. Nichols, contributed to and caused the injuries described above. In 1974, the DNR granted a permit to Refuse Hideaway landfill. This was done despite DNR's knowledge that the Refuse Hideaway landfill was not properly designed to handle the materials contemplated to be placed therein. DNR further failed pursuant to State law and regulations to adequately investigate the operation prior to its periodic licensing of the landfill. Such investigations would have prevented the injuries sustained by Mr. and Mrs. Stoppleworth, in that the landfill would not have been permitted to operate as a nuisance and endanger the public health.

Mr. and Mrs. Stoppleworth hereby give notice of their injuries as a result of the above-named State of Wisconsin Department of Natural Resources employees' acts growing out of and committed in the course of their duties.

Dated this 12 day of October, 1990.

MICHAEL, BEST & FRIEDRICH

Arvid A. Sather
Attorneys for John and
Jacqueline Stoppleworth
900 First Wisconsin Plaza
One S. Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

On this 12th day of October, 1990, Arvid A. Sather, to me personally known and being first duly sworn, acknowledged that he signed the above document for the purposes recited therein.

Notary Public, State of Wisconsin
My Commission expires 3/24/91

2638h

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Maryann Sumi
Assistant Attorney General
608/266-3861

October 19, 1990

The Honorable Mark A. Frankel
Circuit Judge, Branch 12
Dane County Courthouse
210 Martin Luther King Jr. Boulevard
Madison, Wisconsin 53709

Re: John W. DeBeck v. Wisconsin Department of Natural Resources
Consolidated Case Nos. 89-CV-960 and 90-CV-1267

Dear Judge Frankel:

Enclosed for filing please find the Brief of Respondent, Wisconsin Department of Natural Resources. Opposing counsel is being served by mail today.

Thank you for your consideration in this matter.

Sincerely,

Maryann Sumi
Assistant Attorney General

MS:LGP

Enclosure

cc: Michael P. Dunn

bcc: Chuck Leveque

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOHN W. DEBECK,

Petitioner,

v. Consolidated Case Nos. 89-CV-960 and 90-CV-1267

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

BRIEF OF RESPONDENT, WISCONSIN DEPARTMENT OF NATURAL RESOURCES

INTRODUCTION

These consolidated cases challenge two decisions of the Department of Natural Resources, hereinafter "DNR" or "Department," which modify the closure plan approval issued to Refuse Hideaway, Inc., and its former owner and operator, petitioner John DeBeck. The Department issued these landfill closure plan modifications pursuant to sec. 144.44(3), Stats., and Wis. Admin. Code chs. NR 506, 508 and 514 (R. vii; ii). These closure plan approval modifications concern the gas migration monitoring and control system required as a landfill closure condition. The purpose of these requirements is to prevent the migration of explosive gases.

Petitioner John DeBeck was the undisputed owner and operator of the Refuse Hideaway Landfill from 1972 to 1982. In his 1982 application for a license renewal, John DeBeck changed the authorized contact in the application to, "John W. DeBeck, President, Refuse Hideaway, Inc." (R. 17.) From October 1, 1984, to September 30, 1988, the license was reissued to Refuse Hideaway,

Inc. In his 1985 application, John DeBeck was listed as the property owner and facility operator (R. 15).

The origin of the plan approval and modifications at issue in this case is a "Special Consent Order" between the Department, John DeBeck and Refuse Hideaway, Inc., entered on May 2, 1988 (R. 59-65). By the terms of the consent order, John DeBeck and Refuse Hideaway, Inc. both agreed to "submit a plan to the Department for approval to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants." (R. 62.) Petitioner's consultant had earlier reported to the Department that preliminary gas monitoring results showed explosive gas concentrations higher than the "lower explosive limit" for methane. "This is an indication that gas is migrating away from the landfill to the northwest, west, east and southeast edges of the landfill." (R. 120.) Petitioner's consultant's report recommended both monitoring for explosive gases and a gas venting system to dissipate landfill gases (R. 114.)

Most significantly for purposes of this judicial review, the consent order specifically binds both John DeBeck and Refuse Hideaway, Inc. to its terms; John DeBeck signed the consent order, waived any hearing rights and stipulated that the consent order "is effective and enforceable upon being signed by both parties . . ." (R. 65). Moreover, the May 2, 1988, consent order contains the following provision:

> Nothing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose

other than for action taken for failure to comply with the terms of this order.

(R. 65; emphasis added.) The decisions before this court on review are a direct consequence of the requirements of the special consent order.

Accordingly, on July 1, 1988, as required by the consent order, petitioner submitted a gas management plan to the Department (R. 129.) On September 6, 1988, the Department approved the plan. The approved plan calls for the installation of gas monitoring probes, regular monitoring for explosive gases, the submission of a detailed plan for a gas extraction system and other requirements. The Department's September 6, 1988, decision was remanded by the Dane County Circuit Court, Judge Angela B. Bartell, because of the Department's failure to provide adequate findings of fact and conclusions of law (R. x-xii.) Case No. 90-CV-1267 seeks review of the Department's February 21, 1990, corrected decision following remand (R. ii-viii). Case No. 89-CV-960 challenges the Department's January 17, 1989, decision providing further modification of the conditional closure plan for the landfill (Petitioner's Exhibit A.)[1]

By order dated August 21, 1990, these cases were consolidated because both cases raise but one legal issue: whether Wisconsin

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[1]The court's record includes an administrative record for each of the two decisions on review. The record for Case No. 90-CV-1267, filed August 31, 1990, consists of 285 numbered pages, preceded by 12 pages (R. i-xii) reflecting the Department's decision following remand. The record for Case No. 89-CV-960, filed March 17, 1989, is unnumbered and includes numerous maps and technical documents. All references in this brief are to the numbered record for Case No. 90-CV-1267.

Admin. Code §§ NR 500.03(92) and (94), defining "owner" and "operator," are valid administrative rules.

ARGUMENT

I. THE DEPARTMENT ACTED WITHIN ITS STATUTORY AUTHORITY IN DEFINING BY RULE "OWNERS" AND "OPERATORS" OF SOLID WASTE FACILITIES.

The administrative rules at issue, Wis. Admin. Code §§ NR 500.03(92) and (94) adopt, for purposes of solid waste facility regulations, the statutory definition of owners and operators contained in sec. 144.442(9), Stats. Petitioner concedes at page 3 of his brief that the rule definition is "sufficiently broad so as to encompass a past owner or licensed operator of a landfill." John DeBeck was the undisputed owner and operator of the Refuse Hideaway Landfill from 1972 through 1982. The effect of the rule, reflected in both decisions on review, is to hold John DeBeck jointly liable with Refuse Hideaway, Inc., for the environmentally safe closure of the landfill.

Petitioner DeBeck advances two reasons to disregard the plain applicability of the administrative rules defining DeBeck as an owner or operator. First, he argues that the agency lacks authority to define owners and operators by rule. Secondly, petitioner DeBeck argues that the administrative definitions are inconsistent with Wisconsin's solid waste laws (brief at 3-4.)

A. The power to define terms is fundamental to agency rulemaking power.

Section 227.11(2)(a), Stats., provides:

> Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

In this case, sec. 144.44, Stats., and administrative rules implementing it provide comprehensive cradle-to-grave regulation of solid waste facilities. The rules' enabling statute, sec. 144.431(1)(a), Stats., directs the Department to promulgate rules "implementing and consistent with ss. 144.43 to 144.47." The solid waste statutes, secs. 144.43 through 144.47, Stats., do not separately define owners and operators, except as they are defined in sec. 144.442(9), Stats.[2]

Inherent in any regulation is the power to define one's terms. In the absence of statutory definition, a regulation defining to whom it applies is the only way a regulated person may know he or she is being regulated. In State v. Grayson, 5 Wis. 2d 203, 92 N.W.2d 272 (1958), our supreme court observed that the power to promulgate rules necessarily includes the power to define. In that case, concerning the powers of the Chiropractic Board of Examiners, the court stated: "It is difficult for us to conceive of any rule more necessary for such board to adopt, in effectuating the purpose of the chiropractic licensing statute, than one which defines the

---

[2]Section 144.01(9), Stats., defines "owner" for purposes of ch. 144, Stats., as any entity or "individual owning or operating any water supply, sewage or water system or sewage and refuse disposal plant." This definition does not shed much light on the controversy before this court.

term 'chiropractic.'" Grayson, 5 Wis. 2d at 210-11. In the absence of an alternative statutory definition, the Department was obligated to promulgate a definition. In this case, the Department adopted the only definition of owners and operators appearing in the solid waste facility regulatory statutes.

B. The rule definitions of owner and operator carry out the legislative purposes of the solid waste laws.

Petitioner's primary complaint is that the rule definitions were copied from the statutory definitions of "owner" and "operator" at sec. 144.442(9), Stats. The definitions are as follows:

> (9) RECOVERY OF EXPENDITURES. (a) Definitions. In this subsection:
>
> 1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
>
> 2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
>
> 3. "Subsidiary or parent corporation" means any business entity, including a subsidiary, parent corporation or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility.

These definitions apply to actions by the state to recover costs expended under the Environmental Repair Fund. Petitioner states that the definitions are expressly limited to subsec. 144.442(9), Stats., and thus manifest a legislative intent that some other definition of owner and operator must have been intended to apply to the terms when used elsewhere.

This reasoning has little merit. The fact that the Legislature defined owner and operator in one subsection and not for the chapter as a whole does not remove DNR's option to apply the same definition to rules promulgated to implement the subchapter. On the contrary, the use of the same definitions carries out the legislative policy, expressed in sec. 144.442, that persons who have benefited from a landfill operation must also shoulder its obligations.

To do otherwise would permit landfill owners and operators to reap the benefits in the first years of the landfill operation and then, as closing time approaches and receipts diminish, transfer the landfill to an entity that is undercapitalized and unable to properly close and maintain the landfill. It is this result that the definitions seek to discourage and which are necessary to effectively implement these solid waste laws.

The supreme court has stated that, although administrative agencies may only exercise those powers expressly delegated, agencies are also permitted to exercise "power which arises by fair implication from the express powers." Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975.) And, in construing an administrative rule, "great consideration should

be given to the harm which the rule seeks to remedy or prevent and the purpose sought to be accomplished." State ex rel. Staples v. DHSS, 115 Wis. 2d 363, 368-69, 340 N.W.2d 194 (1983).

In our case, the administrative rules in Wis. Admin. Code chs. NR 500-520 implement the environmental protection purposes of the solid waste statutes in ch. 144, Stats. These solid waste statutes were first enacted in 1967, and the Legislature's prefatory statement of policy emphasized the need to grant powers necessary to halt improper solid waste disposal:

> SECTION 1. STATEMENT OF POLICY AND PURPOSES. (1) The high level of production required to meet the varied needs of an expanding population and high standard of living has resulted in a sharp rise in the amount of waste materials discarded annually.
>
> (2) Inefficient and improper methods of waste disposal have caused an ever increasing pollution of our vital air, land and water resources threatening the utility of our resources and the quality of the environment in which we live. The problems of waste disposal endanger the public health, safety and welfare, create public nuisances, result in scenic blight and adversely affect land values.
>
> . . . .
>
> (4) It is the purpose of this act to grant the necessary powers to organize a comprehensive program to enhance the quality, management and protection of the state's air and land resources. . . .

1967 Wis. Laws ch. 83.

Since the purpose of the solid waste statutes was to grant the necessary powers to protect land and water from pollution, it would frustrate legislative intent if one could absolve oneself of responsibility for landfill closure by simple conveyance. Moreover, it would be an absurd result if former owners and operators could escape closure responsibilities aimed at preventing

pollution, while facing clear statutory liability for cleanup costs after pollution occurs under sec. 144.442(9), Stats.

Petitioners further contend (brief at 7) that the rule definition would require all shareholders of a corporation that owned or operated a landfill to comply with the solid waste rules. This is not the case. The obligations of John DeBeck arise from his undisputed past ownership and control over the operation of the landfill during the majority of its life. The DNR does not read the definition as applicable to mere shareholders and nothing in the language of the definition compels this result.

Petitioner also asserts that the adopted definitions are "incongruous" in that they permit the DNR to compel a party to expend funds that, under sec. 144.442(9), Stats., the Legislature did not intend (Brief at 7-8.) Basically, petitioner alleges that cost recovery by the state for environmental repair fund expenditures is very restricted and that the broad definitions in the rule permit the DNR to avoid these restrictions and compel parties to carry out work at solid waste facilities that they would otherwise not have to do.

This argument is misplaced. Section 144.442, Stats., by itself does not create an obligation upon owners and operators to comply with solid and hazardous waste laws. Petitioner seeks to convert a statute that was intended to expand financial liability (by creating a cause of action to recover costs) into a restriction on the DNR's authority to effectively implement the solid waste

laws. The Legislature plainly intended no such restriction. Section 144.442(11), Stats., provides:

> No common law liability, and no statutory liability which is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

The above section leaves little doubt but that the liability of parties in a cost recovery action under sec. 144.442(9)(d), Stats., is in addition to any obligation an owner or operator may incur under other statutes.

Petitioner further contends, at pages 8-9 of his brief, that the Legislature did not intend the expansive definitions promulgated by DNR because they conflict with the statutory framework of the solid waste laws. As evidence, petitioner sites two statutes that require owners and operators of solid and hazardous waste facilities to collect and pay certain fees to the Department. The petitioner's arguments assume that these provisions will be applied unreasonably. Plainly, they require either the owner or operator who accepts the waste to pay the fees. If past owners or operators have obligations to pay these fees, they cannot avoid them by transferring ownership to someone else. There is every reason to expect that DNR will enforce this obligation on those who were in charge of the landfill at the time the fees were collected or the obligation to pay was incurred.

Moreover, evidence of legislative support for the Department's rule is found in the method by which it defined "owner" and "operator." The Department chose to do so through the rulemaking

process rather than on a case-by-case basis. Thus, the rule was subjected to the legislative oversight process and could have been suspended or set aside by the Legislature. Sec. 227.19, Stats. It was not suspended or set aside, and this is evidence that the Legislature has acquiesced in the Department's interpretation of the terms. American Motors Corp. v. ILHR Dept., 101 Wis. 2d 337, 355, 305 N.W.2d 62 (1981).

Finally, petitioner argues (brief at 9-10) that the administrative rule definitions conflict with sec. 144.444(1), Stats., which allows the transfer of facility licenses. That statute is not applicable here. First, the statute by its terms does not absolve prior owners of closure responsibility. Second, the statute requires that the previous licensee be "no longer connected with the operation of the facility." Sec. 144.444(1), Stats. In its February 21, 1990, supplemental decision, the Department found that the licensee, Refuse Hideaway, Inc., is a corporation owned and controlled by DeBeck and his son (R. ii). Thus, DeBeck does not fit within the terms of sec. 144.444, Stats.

Accordingly, petitioner's contention that the solid waste laws apply only to current owners and operators is untenable. There is no statutory language that limits the definition to the current owner and operator. Such a restriction would seriously weaken the state's ability to protect public health and the environment by requiring all who have benefited from a landfill to also share in its burdens. The DNR is charged with the awesome burden of regulating all of the waste generated in this throwaway society. This case illustrates, as well as any possibly could, the need to

hold all owners and operators responsible for proper landfill closure.

II. THE RULE DEFINITIONS APPLY TO JOHN DEBECK AS BOTH A PAST AND PRESENT OWNER AND OPERATOR.

At pages 11-12 of his brief, DeBeck argues that although he may be a present owner of the landfill, only Refuse Hideaway, Inc., is a present operator. The plain wording of the rules suggest otherwise. "Operator" includes any person who "permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs." Sec. 144.442(9), Stats., incorporated by reference in Wis. Admin. Code § NR 500.03(92). This purposely broad definition includes John DeBeck, since he operated the facility when environmental pollution first occurred.

Petitioner further notes that the initial closure plan approval issued in 1987 (not before this court on review) was directed only to Refuse Hideaway, Inc. This approval, however, predated the May 2, 1988, consent order which required DeBeck and Refuse Hideaway, Inc. to submit a gas migration plan. Again, it is the gas monitoring and migration control plan that is the subject of these judicial reviews.

III. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

As noted earlier, the two decisions being reviewed modify a closure plan approval. They do not deny or revoke an operating

license, nor do they seek to modify conditions of the initial construction of the solid waste site. Nevertheless, petitioner argues at pages 12-14 of his brief that he has due process rights attending these plan modifications.

Petitioner's entire due process argument must fail because it is founded upon legal principles which have been uniformly rejected, in the context of solid waste facilities, by the Wisconsin Supreme Court. Specifically, petitioner's case rests upon the erroneous premise that any DNR decision affecting a solid waste site license impairs a constitutionally protected property interest.

The question of what procedural guarantees attached to solid waste regulatory decisions was first addressed by the supreme court in Waste Management of Wisconsin v. DNR, 128 Wis. 2d 59, 381 N.W.2d 318 (1986) (Waste Management I). In that case, the regulatory decision at issue was a modification of an approved plan of operation. The court first observed that a landfill operator has no protected property interest in an approved plan of operation. 128 Wis. 2d at 80. The court went on to rule that the operator's property interest in its license is implicated only if the plan modification affects a condition of construction that was a precondition to licensure. The court added that, in the event the modification does affect pre-license construction requirements, due process is satisfied by the ongoing interaction between the parties, coupled with the opportunity for judicial review.

These same issues were considered again by the supreme court in Waste Management of Wisconsin v. DNR, 149 Wis. 2d 817, 440

N.W.2d 337 (1989) (Waste Management II). In that case, Waste Management attempted to extend the court's ruling in Waste Management I to protect any plan modification which requires construction or the expenditure of money. This argument was again rejected. Specifically, the court held that a plan modification imposing additional monitoring and corrective action requirements did not impair Waste Management's interest in its license, as it did not affect "construction requirements which were a condition for licensure . . . ." 149 Wis. 2d at 825.

The closure plan modifications at issue in this case cannot possibly impair DeBeck's interest in his license, for the closure plan modification does not affect any "condition for licensure." The requirements to monitor and prevent gas migration are not conditions of licensure. Therefore, the closure plan approval modification does not affect any protected property interest in DeBeck's license. Without a protected property interest, petitioner's due process arguments must be rejected in their entirety.

Finally, it should be noted that even if there were a protected property interest, DeBeck waived hearing rights in the May 2, 1988, consent order (R. 65). The procedures in sec. 144.44(8) are thus inapplicable. Even so, DeBeck was given the opportunity to meet with the Department's staff concerning the gas migration plan and did so on June 17, 1988 (R. 127-28). Petitioner has not been deprived of due process of law.

CONCLUSION

This case presents solely the validity of administrative rules defining "owner" and "operator" of solid waste facilities. The construction of an administrative rule is a question of law, State v. Bucheger, 149 Wis. 2d 502, 506-07, 440 N.W.2d 366 (Ct. App. 1989). In this case, it is appropriate to give due weight to the Department's interpretation of its authority and its expertise on solid waste issues. Holtz & Krause, Inc. v. DNR, 85 Wis. 2d 198, 209, 213, 270 N.W.2d 409 (1978). In Sanitary Transfer & Landfill, Inc. v. DNR, 85 Wis. 2d 1, 13, 270 N.W.2d 144 (1978), the court emphasized the importance of DNR's solid waste site closure responsibilities: "it must be remembered that the DNR has been asked to oversee and to safeguard Wisconsin's water quality not only for today's generation but also for tomorrow's. The agency cannot afford to be shortsighted."

Accordingly, the January 17, 1989, and February 21, 1990, decisions of the Department of Natural Resources, imposing joint

liability for closure of the Refuse Hideaway Landfill on John DeBeck and Refuse Hideaway, Inc., should be affirmed.

Dated this 19th day of October, 1990.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General

MARYANN SUMI
Assistant Attorney General

Attorneys for Respondent, Wisconsin Department of Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3861

T2637BR

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY

JOHN W. DeBECK,

PETITIONER,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT,

036

Consolidated Case No. 89CV960
91CV1267

MEMORANDUM DECISION AND ORDER

This is an action for judicial review of two administrative orders issued by the respondent, Department of Natural Resources (DNR). The orders concern the closing of a solid waste landfill presently owned by Refuse Hideaway, Inc., a corporation for which the petitioner, John W. DeBeck, is president. The orders require both Refuse Hideaway Inc. and John W. DeBeck to take certain actions toward the closure of the landfill. In his petitions for review, DeBeck requests that the administrative orders be partially vacated or modified because DNR lacks the authority to impose personal responsibility upon him to comply with the orders. In the alternative, DeBeck requests that the orders be remanded to comply with procedures dictated by either sec. 144.44(8), Wis. Stats., or the federal due process clause.[1] DNR responds that the orders are valid because DNR has the authority to hold DeBeck personally responsible pursuant to Wis. Admin. Code, NR 500.03(92) and

[1]In his petition for review, DeBeck requests a remand with instructions to issue the orders to Refuse Hideaway, Inc. only. In his final brief, DeBeck also requests a remand to comply with statutory and federal due process procedures.

NR 500.03(94). DNR also responds that the orders should not be remanded because DeBeck waived his hearing rights under sec. 144.44(8), Wis. Stats., and has no protected interest under the federal due process clause.

The primary question presented in this administrative review is whether DNR had the authority under Chapter 144 to promulgate the administrative definitions found in NR 500.03(92) and (94). For reasons stated below, I determine that DNR lacked the authority and therefore remand the orders with instructions.

FACTS

In 1972, John DeBeck was approved by the Department of Natural Resources as an owner and operator of a landfill located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin. In 1982, DeBeck conveyed the landfill to Refuse Hideaway, Inc., a corporation for which DeBeck was and continues to be president.[2]

In 1987, DeBeck and DNR began discussing the terms for the landfill's closure and on April 17, 1987, DNR tentatively approved a closure plan. That approval was in the form of an administrative order which was based on the premise that "Refuse Hideaway Inc. owns and operates a nonhazardous solid waste disposal facility . . . " The order specified actions

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[2]From the record, it appears that DNR was not required to approve and did not officially approve of DeBeck's conveyance of the landfill to Refuse Hideaway, Inc. Instead, after the conveyance, DNR began to issue most of the landfill's annual operating licenses to Refuse Hideaway, Inc. as the "owner" and John DeBeck as either the "operator" or the "responsible person." In some years after 1982, Refuse Hideaway, Inc. was listed as both the "owner" and the "operator" whereas in other years John DeBeck was listed as either the "owner," "operator" or "responsible person." Each operating license in the record is different and it appears that their issuance was irregular with regard to the naming of parties.

to be taken by Refuse Hideaway, Inc. toward the closure of the landfill but also stated that DNR reserved the right to modify the plan or require Refuse Hideaway, Inc. to take additional actions before closure was fully approved.

In May 1988, after contamination was found in private water wells near the landfill, DNR and DeBeck entered a special consent order which contained additional conditions for the landfill's closure. The order required DeBeck to cease operation of the landfill, install clay capping and cover layers, construct numerous wells, and submit various reports and plans to DNR, including an additional closure plan proposal. In addition, DeBeck agreed to personally comply with the conditions set forth in the order. Both DNR and DeBeck signed the document. DNR again reserved its right to modify the consent order and DeBeck reserved his right to challenge those modifications. In addition, paragraph ten of the consent order stated that "(n)othing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc. for any purpose other than for action taken for failure to comply with the terms of this order."

Pursuant to the May, 1988 consent order, DeBeck submitted a closure plan proposal to DNR on July 1, 1988. On September 6, 1988, DNR issued an order tentatively approving DeBeck's closure plan. Although the order was a tentative approval, it also contained conditions to be met before the landfill closure was official. These conditions were in addition to those contained in the April 7, 1987 and the May 2, 1988 orders. DeBeck challenged the September 6, 1988 order by petitioning for judicial review. DeBeck challenged the September, 1988 order because it attempted to hold him personally liable for complying with the additional terms contained therein. The order stated that both "John

DeBeck and Refuse Hideaway Inc., own and formerly operated a nonhazardous solid waste disposal facility . . ." DeBeck, in his petition for review, contends that he is not a current owner and operator of the landfill and that DNR therefore cannot hold him personally liable to comply with the order. DeBeck noted in his brief that this was the first time DNR had attempted to hold him personally liable for the entire closure of the landfill. The petition for review was assigned to Judge Angela Bartell. Refuse Hideaway, Inc. et. al. v. Wisconsin Department of Natural Resources, Dane County Circuit Court Case No. 88 CV 5455.

In January, 1990, Judge Bartell remanded the September, 1988 order to DNR for further findings of fact and law. Judge Bartell reasoned that DNR had failed to make adequate findings regarding its intent and authority to impose personal liability on DeBeck for the landfill's closure. Subsequently on February 21, 1990, DNR issued additional findings, asserting that it did indeed seek to impose personal liability on DeBeck for the landfill's closure. In its finding of law, DNR asserted that it had the authority to impose personal liability on DeBeck because he is an owner and operator of the landfill under the definitions of NR 500.03(92) and NR 500.03(94). In the action sub judice, DeBeck challenges the validity of those definitions.

While the above action was pending, DNR issued another closure order to DeBeck on January 17, 1989. Similar to the contents of the September 8, 1988 order, the January 17 order seeks to hold DeBeck personally responsible for additional conditions and time deadlines for the landfill's closure. DeBeck again petitioned for review, asserting again that DNR lacks the authority to impose personal liability on him because he is not an owner and

operator of the landfill.[3] The current action is a consolidation of the petitions for review of the September, 1988 and January, 1989 DNR orders.

This Court grants leave pursuant to sec. 227.53(1)(b), Wis. Stats., to allow an amendment of the petition to challenge NR 500.03(92) and (94) on the merits.

STANDARD OF REVIEW

Chapter 144 of the Wisconsin Statutes regulates water, sewage, refuse, mining and air pollution. When the Legislature enacted Chapter 144, it designated the Department of Natural Resources (DNR) as the enforcement agency. As the enforcement agency, DNR is empowered to, inter alia, promulgate regulations, codify standards, and issues orders.

Pursuant to its authority, DNR has promulgated rules and regulations in order to enforce the Solid Waste provisions of Chapter 144. DNR's authority is found in sec. 144.431, Wis. Stats., which provides in relevant part that: "The department shall: (a) Promulgate rules implementing and consistent with ss. 144.43 to 144.47." DNR, therefore, has authority to promulgate rules to enforce the Solid Waste provisions of Chapter 144, as long as those rules are consistent with the statutory provisions. DNR also relied on sec. 227.11(2)(a), Wis. Stats., to promulgate the rules at issue. (Respondent's brief at 5). That section confers rule-making authority on an agency to interpret the provisions of any statute enforced or administered by it, if necessary to enforce the statute.

Consequently, DNR interpreted the Solid Waste provisions in order to promulgate NR 500.01 et seq. and this action is a direct challenge to DNR's interpretation of the

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[3]In his final brief, petitioner did not challenge the substantive requirements imposed by the administrative orders.

authorizing statutes. The question presented is, therefore, one of law. When a court reviews an administrative agency's interpretation of statutory provisions, "(t)he black letter rule is that a court is not bound by an agency's conclusion of law." West Bend Education Ass'n v. WERC, 121 Wis.2d. 1, 11, 357 N.W.2d 534 (1984). Courts in Wisconsin, however, have in the past given "great" or "due" weight to the agency's interpretation of its own authority. Holtz & Krause, Inc. v. DNR, 85 Wis.2d 198, 270 N.W.2d 409 (1978).

Recently, our Supreme Court clarified the standard of review to be used in these cases. In Drivers Local No. 695 v. LIRC, 154 Wis.2d 75, 452 N.W.2d 368 (1990), the Supreme Court held that, absent factors not present here, de novo review is the correct standard when reviewing an agency's interpretation of a statute.[4] In Drivers Local No. 695, the agency's interpretation of a statute was one of first impression and involved no agency expertise. The Supreme Court stated that "(w)here a legal question is concerned and there is no evidence of any special expertise or experience, the weight to be afforded an agency interpretation is no weight at all." Id. at 84.

As in Drivers Local No. 695, the administrative agency here acted based on its interpretation of a statute. DNR defined "owner" and "operator" in NR 500.03(92) and NR 500.03(94) based on its interpretation of Chapter 144. This is also a question of first impression because DeBeck is apparently the first to challenge the agency's definitions. And lastly, the agency's interpretation does not involve agency technological or practical experience. In fact, DNR does not have a long-standing, consistent practice of defining "owner" and "operator." Consequently, the standard of review for DNR's action in this case

[4]See also Chapman v. LIRC, 156 Wis. 2d 286, 456 N.W.2d 637 (Ct. App. 1990).

is a de novo review of a question of law.

OPINION

A. DNR'S STATUTORY AUTHORITY

Chapter NR 500 of the Wisconsin Administrative Code provides regulations for the Solid Waste Management provisions of Chapter 144, Wis. Stats. The definitions found at NR 500.03(92) and (94) took effect in February, 1988 and provide the following:

(92) "Operator" has the meaning specified in s. 144.442(9), Stats.

(94) "Owner" has the meaning specified in s. 144.442(9), Stats.

The definitions found in NR 500.03(92) & (94), therefore, define owner and operator by directly incorporating the definitions in sec. 144.442(9), Wis. Stats. With some exceptions, these definitions apply to all solid waste facilities as defined in sec. 144.43(5), Wis. Stats., N.R. 500.02(1). The question arises whether the definitions found in sec. 144.442 were intended to apply to only that subsection, or whether the Legislature intended these definitions to apply more broadly to the entire regulatory scheme of regulating solid waste landfills found in secs. 144.43 - 144.79, Wis. Stats. DNR has taken the latter position.

In sec. 144.442, Wis. Stats., the legislature set up a special mechanism for funding and responding to environmental damage created by disposal facilities. The section is entitled "Environmental Repair." Under its provisions, the state is permitted to take action against all "responsible persons . . . if an expenditure is made for environmental repair at the site or facility." Sec. 144.442(9)(d). Subsection (9) is the definitional section for the cost-recovery mechanism and as such defines "responsible person," "owner" and "operator."

Because DNR incorporated the entire subsection (9) in the administrative definitions

found at NR 500.03, sec. 144.442(9) is reprinted below in relevant parts.

"Operator" and "owner" are defined in 144.442(9)(a) as follows:

1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

A "responsible person" is defined as follows:

(c) *Persons responsible.* 1. An owner or operator is responsible for conditions at a site or facility which presents a substantial danger to public health or welfare or the environment if the person knew or should have known at the time the disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner which would cause a danger to public health or welfare or to the environment.

2. Any person, including an owner or operator and including a subsidiary or parent corporation which is related to the person, is responsible for conditions at a site or facility which present a substantial danger to public health or welfare or the environment if:

a. The person violated any applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation caused or contributed to the condition at the site or facility; or

b. The person's action related to the disposal caused or contributed to the condition at the site or facility and would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for that person at the time the disposal occurred.

The definitions of operator and owner found in NR 500.03(92) & (94) are therefore

broad and encompass many individuals, including former as well as current owners and operators. Both the petitioner and respondent in this action agree that the definitions under NR 500.03 encompass the petitioner, John DeBeck, as an administratively defined owner and operator of the Refuse Hideaway Landfill. (Petitioner's brief at 3, Respondent's brief at 4). DNR therefore considers DeBeck a responsible "owner and operator" for all regulatory and enforcement provisions imposed on the Refuse Hideaway Landfill. DeBeck argues that he should not be held personally responsible for the landfill because DNR lacked the statutory authority to define owner and operator so broadly. The challenge to the administrative action in this case is therefore an attack on the agency's statutory authority to promulgate the rules defining owner and operator. This is a valid basis for challenge. Liberty Homes, Inc. v. Department of Industry, Labor & Human Relations, 136 Wis.2d 368, 401 N.W.2d 805 (1987).

In analyzing such a challenge, Wisconsin courts have traditionally undertaken a two-step inquiry: (1) Did the agency have express or implied authority from the legislature to act? and (2) If so, did the agency act within the proper bounds of that authority?

1. Did DNR Have Express Or Implied Authority To Promulgate NR 500.03 (92) and (94)?

Petitioner DeBeck argues that DNR lacked statutory authority to define the terms "owner" and "operator." (Petitioner's brief at 3-4). DNR responds that it had the authority to define these terms because "(t)he power to define terms is fundamental to agency rulemaking power." (Respondent's brief at 5).

It is a general rule in Wisconsin that an administrative agency may not issue a rule that is not expressly or impliedly authorized by the legislature. Peterson v. National

Resources Board, 94 Wis.2d 587, 593, 288 N.W.2d 845 (1980). The agency has express authority if its actions are provided for in the plain language of the statute. The agency has implied authority if its actions are deemed "necessary to carry out an express power or to perform an express duty." Racine Fire & Police Commission v. Stanfield, 70 Wis.2d 395, 402, 234 N.W.2d 307 (1975).

The first question, therefore, is whether DNR had either express or implied authority to promulgate the definitions of "owner" and "operator" found at NR 500 (92) and (94). In promulgating the definitions, DNR relied upon secs. 227.11(2) and 144.431, Wis. Stats. Section 227.11(2) provides:

> (2) Rule-making authority is expressly conferred as follows:
>
> > (a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

Section 144.431 provides:

> (1) The department shall:
>
> > (a) Promulgate rules implementing and consistent with ss. 144.443 to 144.447.[5]

By the terms of these authorizing sections, it is clear that the Legislature did not expressly authorize DNR to independently define owner and operator. There is no express authority because the statute does not provide specific direction for the agency to follow in promulgating the particular rule. Wisconsin Hospital Ass'n v. Natural Resources Board, 156

[5]See also sec. 227.10(2), Wis. Stats.

Wis.2d 688, 705-06, 457 N.W.2d 879 (1989). No such specific statutory elements exist in this case compelling these definitions.

It is less clear whether the Legislature impliedly authorized DNR to promulgate the definitions of owner and operator. Implied authority is defined as authority that is "implied from the four corners of the statute" and is "necessary to carry out an express power or to perform an express duty." Racine Fire, 70 Wis.2d at 399, 402. An example of implied authority is seen in State v. Grayson, 5 Wis. 2d 203, 92 N.W.2d 272 (1958). In Grayson, the Supreme Court held that the Chiropractic Board of Examiners had an implied power to define "chiropractic." The Court reasoned that in order to issue licenses and regulate chiropractors, it was "necessary" for the Board to define the term chiropractic. Id. at 210-11.

In the case sub judice, the Legislature granted DNR the authority to promulgate rules "implementing and consistent with ss. 144.43 and 144.47." Sec. 144.431(1)(a). In addition, the Legislature granted all agencies generally the authority to promulgate rules that interpret their enforcement statutes if the agency considers it necessary to effectuate the purpose of the statute. Sec. 227.11(2)(a).

Pursuant to this authority, DNR promulgated Chapter NR 500 of the Administrative Code in order to "provide definitions, submittal requirements, exemptions and other general information relating to solid waste facilities." Wis. Admin. Code, NR 500.01. As part of these regulations, DNR promulgated over 150 definitions to be used in solid waste enforcement. Wis. Admin. Code, NR 500.03. The definitions of owner and operator are two such definitions.

I find that the Legislature did impliedly authorize DNR to promulgate these

definitions pursuant to the solid waste statutes. First, as the Court found in Grayson and as respondent argues in its brief, it is important for the agency to be able to define its terms if it is to enforce statutory provisions. (Grayson at 211, Respondent's brief at 5). And secondly, the Legislature granted DNR a broad brush of authority in sec. 144.432(1)(a). The Legislature limited DNR's authority only by requiring that any rule promulgated be consistent with the solid waste provisions. Therefore, DNR did have the implied authority to define its own terms in the administrative code as long as those terms were consistent with the solid waste provisions.

2. Did DNR Act within the Proper Bounds of Its Implied Authority when It Enacted NR 500.03(92) and (94)?

Petitioner DeBeck urges that even if DNR had the authority to define "owner" and "operator," the definitions found in NR 500.03(92) and (94) are invalid because they are inconsistent with the statutory framework of the solid waste laws. (Petitioner's brief at 4). DNR responds that, contrary to DeBeck's assertions, the definitions found in NR 500.03(92) and (94) carry out the legislative purpose of the solid waste laws. (Respondent's brief at 6).

The next question then is whether DNR acted within "the bounds of correct interpretation" of its authority under the solid waste laws. Grayson, 5 Wis.2d at 211. Should there be any reasonable doubt that the agency acted without implied authority or exceeded the bounds of that authority, the question should be resolved against the exercise of the agency's authority. State ex rel. Farrell v. Schubert, 52 Wis.2d 351, 358, 190 N.W.2d 529 (1971); Kimberly-Clark Corp. v. P.S.C., 110 Wis.2d 455, 462, 329 N.W.2d 143 (1983).

I find that DNR acted outside the proper bounds of its implied authority when it defined "owner" and "operator" in NR 500.03(92) and NR 500.03(94). DNR acted outside

its authority because the broad definitions of "owner" and "operator" significantly expand Chapter 144 and are contrary to several of its definitional and operative provisions. I therefore agree with petitioner's assertion that because the definitions are inconsistent with sec. 144.43 to 144.47, DNR acted beyond its statutory authority. The reasons for this conclusion are set forth below.

(a) The administrative definitions are inconsistent with the text of Chapter 144.

In his assertion that DNR acted outside its statutory authority, DeBeck cites statutory text that limits the definitions of "owner" and "operator" within the solid waste statute. (Petitioner's brief at 6). In construing a statute, the entire section and related sections are to be considered in its interpretation. State v. Clausen, 105 Wis.2d 231, 244, 313 N.W.2d 819 (1982). Further, statutes relating to the same subject are to be construed together and harmonized. Hanson Storage Co. v. Wis. Transp. Comm., 87 Wis.2d 385, 391, 275 N.W.2d 360 (Ct. App. 1918).

As discussed, DNR promulgated the administrative definitions of owner and operator by directly incorporating them from subsection 144.442(9), Wis. Stats. In so doing, DNR has, in effect, applied the broad definitions in subsection (9) to all regulatory and enforcement mechanisms throughout Chapter 144. Chapter 144, however, has its own definition of "owner" found at Sec. 144.01(9). That definition provides that owner "means the state, county, town, town sanitary district, city village, . . . or individual owning or operating any water supply, sewerage or water system or sewage and refuse disposal plant." Consequently, the Legislature created two separate definitions of "owner": one found in the specific subsection of sec. 144.442(9), which DNR incorporated, and the other found in the

introductory general definition section of Chapter 144. Although the general definition quoted above may not, as the respondent asserts, "shed much light on the controversy before this court,"[6] the Legislature must have intended it to have general applicability. DNR, however, incorporated the definitions from a particular subsection and applied them to administrative regulations covering the entire statute despite the fact that the Legislature had already created a generally applicable definition of one of the terms. DNR's incorporated definitions are therefore at odds with the text of Chapter 144. See Kimberly-Clark Corp. v. P.S.C., 110 Wis.2d 455, 463-64, 329 N.W.2d 143 (1983).

This conclusion is also supported by a closer examination of the particular statutes. Most significant is the introduction to the two sections. Section 144.01, the general definition section for Chapter 144, begins as follows:

144.01. Definitions

> In this chapter, unless the context requires otherwise:
> (9) "Owner" means . . . (emphasis added).

Whereas sec. 144.442, incorporated by DNR in its definition of owner and operator, begins as follows:

144.442. Environmental repair

> (9) Recovery of expenditures. (a) Definitions. In this subsection:
> 2. "Owner" means . . . (emphasis added).

It is evident that the Legislature intended different definitions for different uses within Chapter 144. In the first subsection, the Legislature defined "owner" generally in order to apply to all of Chapter 144. In the second subsection, the Legislature defined

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[6]Respondent's brief at 5, n.2.

owner and operator specifically for the purposes required in subsection 144.442.

Furthermore, in light of the purposes underlying subsection 144.442, these specific definitions of owner and operator are reasonable. As noted earlier, the subsection is entitled "Cost Recovery" and is intended to grant DNR powers to prosecute and recover expended costs from environmental damage. The definitions of owner and operator are broad in this subsection so that DNR may recover costs from diverse landfill participants, whether presently or historically involved. The Legislature apparently decided that once the State had expended money to repair environmental damage, it was imperative to impose liability on most landfill participants. The Legislature did not decide to impose this broad reach on all enforcement provisions of Chapter 144, as evidenced by limiting the definition to "(i)n this subsection."

Although the text and purposes of sec. 144.442 limits the broad definitions to the particular subsection, DNR argues that the definitions should nonetheless apply to former owners and operators of solid waste facilities. DNR asserts that the cost recovery subsection should not limit its power to define its terms. (Respondent's brief at 9-10). To support this argument, DNR reasons that 144.442(11) makes clear that cost recovery powers do not affect other liabilities or powers found in either the common law or other statutory provisions. That argument, however, does not address the issue before the Court. The argument does not explain (1) why the Legislature provided different definitions of owner for different provisions in the statute and (2) what authority, either common law or statutory, authorizes DNR to define owner and operator so broadly, thereby increasing the liability of landfill participants beyond that found in Chapter 144 generally.

(b) The administrative definitions are inconsistent with other substantive provisions of Chapter 144.

DeBeck argues that the definitions of "owner" and "operator" are also at odds with a statutory provision governing the transference of landfill responsibility. (Petitioner's brief at 9-10). DNR argues that the transference provision does not apply to this case. (Respondent's brief at 11).

I find that DNR's definitions are inconsistent with the statutory provision that allows for transfer of solid waste responsibilities. Section 144.444, Wis. Stats., provides the following:

> **Transference of Responsibility.** (1) Any person acquiring rights of ownership, possession or cooperation in a licensed solid or hazardous waste facility at anytime after the facility begins to accept waste is subject to all the requirements of the license approved for the facility including any requirements relating to long-term care of the facility . . . Upon acquisition of the rights, the department shall issue a new operating license if the previous licensee is no longer connected with the operation of the facility, if the new licensee meets all requirements specified in the previous licensee, the plan of operation, if any, and the rule promulgated under 144.62, if applicable.

Under this section, once DNR has issued a new operating license to a successor-owner, that individual acquires the responsibilities associated with the landfill. This section therefore allows for the transfer of responsibility from one owner to another. The administrative definitions of owner and operator in NR 500.03, however, would negate this transfer of responsibility and therefore are inconsistent with the apparent purposes of sec. 144.444(1), Wis. Stats.

DNR nonetheless asserts that the administrative orders are consistent with sec. 144.444, Wis. Stats. DNR reasons that sec. 144.444 does not apply here because DeBeck is still connected with the operation of the facility whereas the statute provides that transfer

is not permitted if the previous licensee is still connected to the operation of the facility. (Respondent's brief at 11). DNR, however, has not argued in its brief that the statute and definition are valid as applied, but, instead, has argued that this case raises "but one legal issue: whether Wisconsin Admin. Code Secs. NR 500.03(92) and (94), defining 'owner' and 'operator,' are valid administrative rules." (Respondent's brief at 3-4).

In determining the validity of administrative rules, this Court must examine statutory intent such as that found in sec. 144.444. The section demonstrates that the Legislature intended an owner/operator to have the ability to convey responsibility to another owner/operator.[7] DNR's need to inspect and approve the successor licensee is largely undermined if the original licensee remains liable for all purposes under the Administrative Code. The broad definitions of owner/operator found in the administrative regulations, on the other hand, would not allow this transfer and therefore are not consistent with legislative intent.

(c) The administrative definitions create an additional enforcement mechanism not authorized by Chapter 144.

DeBeck argues that he is not personally responsible for the closure of the Refuse Hideaway Landfill. He reasons that the definitions of "owner" and "operator" are invalid as a tool to impose personal liability upon him. (Petitioner's brief at 6). DNR responds that the definitions are a valid use of its administrative duty to enforce the solid waste laws. (Respondent's brief at 15).

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[7]In order to convey responsibility under this section, DNR must first approve the new owner/operator by agreeing to issue a new license to the landfill. Sec. 144.44(3)(c), Wis. Stats.

Chapter 144 requires owners and operators of solid waste facilities to follow particular guidelines in order to assure the safe disposal of Wisconsin's refuse. To enforce the guidelines, Chapter 144 provides DNR with particular enforcement mechanisms.

In the case at hand, for example, DNR may take several courses of action to enforce compliance with a landfill closure plan. Under sec. 144.44(3), DNR may enforce compliance by initiating an action under sec. 144.47 or 144.73. Under sec. 144.44(8), DNR may enforce compliance by initiating action under sec. 144.72, referring the matter to the department of justice under sec. 144.98, or issuing an order pursuant to various procedural requirements outlined in the section.

Not only are these mechanisms available to DNR, DNR has relied on some of them to issue and modify the closure requirements for the Refuse Hideaway Landfill. DNR relied on sec. 144.44(3) to issue the initial closure plan approval of April 7, 1987 and the modifications to the closure plan on September 6, 1988. And DNR relied on sec. 144.44(8) to issue the special consent order of May 2, 1988.

Perhaps dissatisfied with these enforcement procedures, DNR has chosen to use the administrative definitions of owner and operator to, in essence, create an additional enforcement mechanism against DeBeck. The definitions create an additional enforcement mechanism because they allow DNR to hold a broad range of individuals personally responsible for any action required of an owner or operator under the solid waste laws. DNR's implicit authority to define its terms does not include the authority to create an independent enforcement mechanism not provided for by the Legislature. Where the Legislature has established sanctions, a court is not free to impose additional sanctions

solely because those sanctions may appear meager. Park Bank-West v. Mueller, 151 Wis.2d 476, 484, 444 N.W.2d 754 (Ct. App. 1989).

A similar analysis lead the Supreme Court to find that DILHR exceeded its implied authority in State (Dept. of Administration) v. Dept. of Industry, Labor and Human Relations, 77 Wis.2d 126, 252 N.W.2d 353 (1977). In that case, DILHR had enacted an absolute job preference mechanism to enforce its mandate to hire more minorities. Holding that this mechanism exceeded DILHR's authority, the Supreme Court stated: "Other statutory statements cast significant doubt upon the view that the legislature impliedly authorized absolute preferences, and also the drastic nature of absolute preferences would indicate that had the legislature intended to grant the power for their implementation, it would not have done so in such an indefinite manner." Id. at 138. Following this analysis, it seems logical that if the Legislature had intended DNR to hold a vast array of individuals personally liable for numerous statutory requirements, it would have done so in a more definite manner.

The Legislature has specifically provided DNR with a variety of enforcement options under Chapter 144. I conclude that DNR cannot use its rulemaking power to define its terms to create, in essence, an additional enforcement mechanism against DeBeck. Nothing in this opinion precludes DNR from using those mechanisms to enforce its orders or to assert that DeBeck is personally liable for the closure costs under sec. 144.442(9).

(d) Policy considerations do not outweigh the statutory contradictions created by the administrative definitions.

DNR argues that the policy and purpose of the solid waste laws would be frustrated if it is denied the power to define "owner" and "operator" as it has done in NR 500.03(92)

and (94). (Respondent's brief at 7-8).

DNR's policy arguments in support of the administrative definitions do not outweigh the legislative mandates of Chapter 144, as outlined above. DNR claims that if it cannot hold DeBeck personally liable via administrative orders, landfill owners will escape liability by conveying ownership to corporate forms. This policy concern, however, has been addressed by the Legislature in secs. 144.441, 144.443 and 144.444. Those sections provide for an elaborate screening by DNR of an applicant's financial responsibility, both at the time of application and for a time period of up to or exceeding 40 years after the landfill is closed.

In essence, the complexity of this case arises from the fact that the Refuse Hideaway Landfill is an older facility not subject to the more stringent regulatory restrictions enacted recently by the Legislature. For example, from the record it appears that neither DeBeck nor Refuse Hideaway, Inc. underwent the financial responsibility tests required of new operators or had a plan of operation that imposed 30 to 40 year responsibility, as is now done for operator's seeking to construct or purchase a landfill.[8]

To impose these restriction on DeBeck now, however, by issuing an administrative order, would violate the Legislature's intent. Although the Legislature has imposed more rigorous restriction on newer facilities, it has declined to impose those restrictions on older facilities. A majority of provisions in the Solid Waste sections differentiate newer and older facilities in one way or another. The Legislature expressly applied the provisions only to

[8]Secs. 144.441 and 144.443, Wis. Stats.

newer facilities.[9]

This Court appreciates the importance of DNR's responsibilities in safeguarding Wisconsin's water quality. In doing so, however, DNR must stay within the bounds of the legislative authority which circumscribes its rulemaking power. It has not done so here because NR 500.03(92)&(94) are only valid if the Legislature intended past owners/ operators to be strictly liable for on-going operations of a landfill ad infinitum. As discussed above, the Legislature did not express such a broad intent and, therefore, the administrative regulations in question are not valid.

B. DEBECK'S STATUS AS AN "OPERATOR"

Petitioner DeBeck contends separately that even if he is considered a current owner, he is not a current operator of the Refuse Hideaway Landfill. (Petitioner's brief at 11-12). DNR responds that under the definition of "operator" found in NR 500.03(2), Wis. Admin. Code, DeBeck is clearly an operator of the Refuse Hideaway Landfill. (Respondent's brief at 12).

I cannot dispose of this question. Firstly, in its argument that DeBeck is a current operator, DNR relies on the administrative definition of "operator" this Court has ruled invalid. Consequently, DNR has not had an opportunity to rely on valid law to refute DeBeck's contention. And secondly, the record before me does not provide sufficient facts to determine DeBeck's legal and practical status as an operator of the Refuse Hideaway Landfill.

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[9]Secs. 144.441 and 144.44(3),(8), Wis. Stats.

C. DEBECK'S PERSONAL LIABILITY FROM THE MAY CONSENT ORDER

DNR argues that the May 2, 1988 consent order imposes personal liability on DeBeck to comply with the September 6, 1988 and January 17, 1989 orders. (Respondent's brief at 2). DNR asserts that DeBeck is liable because he signed the May 2, 1988 consent order and agreed to be personally responsible for the terms of the order. The consent order provides that DeBeck perform specific tasks and submit various reports to DNR. DNR has not asserted that DeBeck failed to perform those tasks or that DeBeck failed to submit the required reports. Instead, DNR argues that DeBeck is liable for modifications made to the consent order. In the consent order, however, DeBeck reserved his full statutory rights to challenge any modifications DNR made to those tasks in the future. The underlying consent order itself, therefore, does not impose liability on DeBeck to personally comply with the September, 1988 and the January, 1989 orders. In addition, sec. 144.42(11)(b) supports this conclusion because it states that if a person takes remedial action, with or without an agreement, no admission of liability will be inferred.

D. DUE PROCESS AND STATUTORY REQUIREMENTS

In his alternative requests for relief, petitioner DeBeck requests that the administrative orders be remanded in order to provide additional federal due process procedural protection and statutory procedural protection under sec. 144.44(8). (Petitioner's brief at 12). These due process or statutory questions need not be addressed in light of the relief afforded in the remand order.

ORDER

For the above stated reasons, the petitioner's request for remand with instructions to reissue the September 6, 1988 and January 17, 1989 orders is hereby **GRANTED.** Respondent shall reissue the orders that were the subject of this action to Refuse Hideaway, Inc., solely, and not include the petitioner personally. The orders must be reissued because they rely on administrative regulations that exceed DNR's statutory authority under Chapter 144.

BY THE COURT,

Mark G. Frankel

MARK A. FRANKEL
CIRCUIT JUDGE

Dated: May 1, 1991

Refuse Hideaway 11312010

COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1992

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-1434

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOHN W. DEBECK,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane county: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

DYKMAN, J. This is an appeal from an order partially vacating two administrative orders of the Department of Natural Resources (DNR). The circuit court vacated the orders because it concluded that the DNR had based the orders on

an administrative rule which conflicted with a statute. We agree with the trial court and therefore affirm.

In 1972, after obtaining approval from the DNR, John DeBeck opened a landfill in the town of Middleton, Dane county. In 1982, he transferred the landfill to Refuse Hideaway, Inc., a corporation of which DeBeck is president. In 1987, the DNR tentatively approved a closure plan for the landfill. In early 1988, several wells near the landfill tested positive for contaminants. DeBeck and the DNR entered a special consent order which required closure of the landfill. The order reserved to the DNR the right to modify the order and provided that "[n]othing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose ...."

On September 6, 1988, the DNR issued an order tentatively approving the landfill closure plan. But the order also stated that both "John DeBeck and Refuse Hideaway, Inc., own and formerly operated a [landfill]." DeBeck petitioned for judicial review of this order, contending that he could not be held personally responsible to comply with the order. After a remand for further findings, the DNR issued an additional order on February 21, 1990, in which it asserted that it intended to impose personal liability on DeBeck. It grounded its authority to do so on Wis. Adm. Code sec. NR 500.03, which provides in part:

(92) "Operator" has the meaning specified in s. 144.442(9), Stats.

(94) "Owner" has the meaning specified in s. 144.442(9), Stats.

DeBeck petitioned for judicial review of the September 6, 1988 order and the February 21, 1990 order. The circuit court agreed with DeBeck's assertion that the dispositive definition of a landfill "owner" was found in sec. 144.01(9), Stats. That section provides: "Owner means the state, county, town, town sanitary district, city, village, metropolitan sewerage district, corporation, firm, company, institution or individual owning or operating any water supply, sewerage or water system or sewage and refuse disposal plant." The court recognized that sec. 144.442(9), Stats., entitled "RECOVERY OF EXPENDITURES," contained more expansive definitions of "owner" and "operator" which would include DeBeck personally. But the court concluded that those definitions were applicable only to sec. 144.442(9), because that subsection provides: "(a) *Definitions*. ***In this subsection***: 1. 'Operator' means .... 2. 'Owner' means ...." (Emphasis added.)

The circuit court reasoned that the legislature was well aware of the two definitions of an "owner" of a landfill, and had reserved the more extensive version for actions to recover expenses for environmental repair. Therefore, the DNR's attempt to apply the more extensive version to all of ch. 144, Stats., conflicted with the legislature's decision to apply that version only to actions to recover expenditures. The court concluded that the DNR lacked authority to hold DeBeck personally

responsible for complying with the terms of the September 6, 1988 and February 21, 1990 orders.

STANDARD OF REVIEW

Section 227.40(4)(a), Stats., provides three bases which a court may use to declare an administrative rule invalid: (1) if the rule violates the constitution; (2) if it exceeds the statutory authority of the agency adopting it; or (3) if it was adopted without compliance with statutory rulemaking procedures. ***LeClair v. Natural Resources Bd.***, 168 Wis.2d 227, 233, 483 N.W.2d 278, 281 (Ct. App. 1992). DeBeck's attack on Wis. Adm. Code sec. NR 500.03(92) and (94) falls under the "exceeds the statutory authority of the agency" part of sec. 227.40(4)(a).

The DNR asserts that Wisconsin law does not precisely define the appropriate standard of review for "exceeds statutory authority" challenges. It argues that we should use the standard used for the "violates constitutional provisions" portion of sec. 227.40(4)(a), Stats. The supreme court discussed that standard in ***Liberty Homes, Inc. v. DILHR***, 136 Wis.2d 368, 375, 401 N.W.2d 805, 808, (1987). At least in a substantive due process challenge of a rule, the standard of review we are to use is whether the rule bears a reasonable relation to a legitimate governmental objective. ***Id.***

In ***State v. McManus***, 152 Wis.2d 113, 447 N.W.2d 654 (1989), the supreme court did not discuss the standard of review it would use in a statute-rule

conflict. However, it is clear that it used a *de novo* standard. In ***Wisconsin Hosp. Ass'n v. Natural Resources Bd.***, 156 Wis.2d 688, 705, 457 N.W.2d 879, 886 (Ct. App. 1990), we concluded that "exceeds statutory authority" questions are matters of statutory interpretation or construction, and therefore our review was *de novo*. In ***Wisconsin Hosp. Ass'n***, the DNR argued that we should defer to its practical interpretation of the enabling statute. We declined to decide whether this was an appropriate standard of review. The DNR has now abandoned this argument in its attempt to apply its rules to DeBeck. We conclude that a *de novo* standard of review should be used in "exceeds statutory authority" cases under sec. 227.40(4)(a), Stats.

DECISION

The question we face is whether the DNR's definitions of "operator" and "owner," found in Wis. Adm. Code sec. NR 500.03(92) and (94) conflict with the definition of "owner" found in sec. 144.01(9), Stats.

To determine whether an administrative agency has exceeded its statutory authority in promulgating a rule, we must look to the enabling statute to determine whether there is express or implied authorization for the rule. ***In Interest of A.L.W.***, 153 Wis.2d 412, 417, 451 N.W.2d 416, 418 (1990). The DNR identifies secs. 144.431(1)(a) and 144.435(1), Stats., as the enabling statutes upon which it relies.

Section 144.431, Stats., provides in relevant part:

> (1) The department shall:
>
> (a) Promulgate rules implementing and consistent with ss. 144.43 to 144.47.

Section 144.435, Stats., provides in relevant part:

> (1) The department shall promulgate rules establishing minimum standards for the location, design, construction, sanitation, operation, monitoring and maintenance of solid waste facilities. Following a public hearing, the department shall promulgate rules relating to the operation and maintenance of solid waste facilities as it deems necessary to ensure compliance and consistency with the purposes of and standards established under the resource conservation and recovery act ....

DeBeck agrees that the trial court correctly determined that these statutes impliedly authorized the DNR to promulgate Wis. Adm. Code sec. NR 500.03(92) and (94). Thus the question becomes whether those rules, defining "operator" and "owner," conflict with the legislative definition of "owner" found in sec. 144.01(9), Stats.

"[A]ny doubts as to the implied power of an agency are to be resolved against the existence of authority." ***Trojan v. Board of Regents of Univ. of Wis. Sys.***, 128 Wis.2d 270, 277, 382 N.W.2d 75, 78 (Ct. App. 1985). The DNR objects to this rule because, in its view, when we use this rule, we ignore the presumption that administrative rules have the same force of law as statutes. We disagree.

Administrative rules are equal to statutes in their power to regulate behavior. But administrative agencies do not have powers superior to those of the legislature. When a conflict occurs between a statute and a rule, the statute prevails. ***Richland School Dist. v. DILHR,*** 166 Wis.2d 262, 278, 479 N.W.2d 579, 586 (Ct. App. 1991), *review granted*, No. 90-1750 (Apr. 7, 1992). "An agency charged with administering a law may not substitute its own policy for that of the legislature." ***Niagara of Wis. Paper Corp. v. DNR***, 84 Wis.2d 32, 48, 268 N.W.2d 153, 160 (1978). Though the DNR attempts to equate rules with statutes and then analyze this case as a conflict between statutes, that analysis must fail because ***Richland*** and ***Niagara*** would be meaningless under such an analysis.

Section 144.01(9), Stats., applicable to all of ch. 144, Stats., defines "owner" in the present tense. Though the present tense of a verb includes the future, sec. 990.001(3), Stats., the legislature has not provided that the use of the present tense in the statutes includes the past. Thus, sec. 144.01(9) does not include past owners of landfills.

We find further support for this position in sec. 144.442(9)(a)1. and 2., Stats. We do not rely on the fact that subsecs. (92) and (94) of Wis. Adm. Code sec. NR 500.03 were adopted verbatim from sec. 144.442(9)(a)1. and 2. That is merely evidence that the DNR was aware that these sections are more inclusive in their definitions of "operator" and "owner" than sec. 144.01(9), Stats. We consider the former definitions because they show that the legislature was aware of the difference

between the sec. 144.01(9) definition of "owner" and the definition found in sec. 144.442(9)(a)1. and 2. We so conclude because the legislature specifically limited the more expansive use of the definitions to "In this subsection," i.e., sec. 144.442(9), Stats. That subsection pertains to recovery of expenditures, a topic which the DNR admits is not the subject of this lawsuit. We are to resolve doubts as to the implied power of an agency against the existence of authority. ***Trojan***, 128 Wis.2d at 277, 382 N.W.2d at 78.

The DNR argues that even if our analysis is correct, common law nuisance law provides the remedy it seeks against DeBeck. It cites ***State v. Mauthe***, 123 Wis.2d 288, 366 N.W.2d 871 (1985), and ***State v. Rollfink***, 162 Wis.2d 121, 469 N.W.2d 398 (1991), as examples of cases where the court imposed common law liability on appropriate corporate officers. We disagree. ***Mauthe*** held that a person (not a corporate officer) who owned land was liable for a hazardous substance spill that occurred on the land because sec. 144.76(3), Stats., provides:

> A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

Mauthe was decided by interpreting a statute. The applicable statute in that case bears no resemblance to sec. 144.01(9), Stats. ***Mauthe*** does not support the DNR's assertions.

Rollfink involved the question whether, under the definition of "operator" found in former Wis. Adm. Code sec. NR 181.04(70), a corporate officer could be assessed forfeitures for violations of ch. 144, Stats. That rule defined "operator" as: "the person who is responsible for the overall operation of a hazardous waste facility or recycling facility, or part of a hazardous waste facility or recycling facility." ***Rollfink***, like ***Mauthe***, involved a question of statutory (or rule) interpretation. The rule involved was unlike sec. 144.01(9), Stats. The supreme court did not discuss the effect of sec. 144.01(9), nor did it need to, for the issue was not a conflict between rule and statute, but the interpretation of a rule. ***Rollfink*** does not support the DNR's assertions.

The DNR's final argument is that, "regrettably," the financial responsibility provisions of ch. 144, Stats., provide only for routine, predictable, long-term-care expenses of closed landfills, such as soil cover and erosion prevention. Policy considerations, therefore, should provide the basis for a reversal of the trial court's order. But it is the legislature's responsibility to balance the environmental danger of landfills against the need for their existence. Courts should respect the line drawn by the legislature, and not substitute their view of the better place to draw that line. The DNR may ask the legislature to pass laws, consistent with our constitutions, which will permit the DNR to impose liability on a greater number of persons. That is a resolution which is better suited to a political system based on separation of powers.

By the Court.--Order affirmed.

Recommended for publication in the official reports.

1/31/2010
SW/ENF

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 91-1434

JOHN W. DEBECK,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW OF A NOVEMBER 12, 1992, DECISION BY THE COURT OF APPEALS, DISTRICT IV

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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 91-1434

JOHN W. DEBECK,

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v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW OF A NOVEMBER 12, 1992, DECISION BY THE COURT OF APPEALS, DISTRICT IV

The respondent-appellant-petitioner Department of Natural Resources (DNR) by its counsel, Attorney General James E. Doyle and Assistant Attorney General JoAnne F. Kloppenburg, respectfully petitions this court for review of an adverse decision of the court of appeals issued on November 12, 1992 (Pet-Ap. 100-109), which affirmed the trial court's decision vacating two administrative orders issued by respondent DNR. The orders hold petitioner-respondent John W. DeBeck, former owner and operator of a leaking landfill and owner and president of the corporation that currently owns the property on which the landfill is located, responsible along with that corporation for undertaking measures to address the migration of explosive gases generated by the landfill, pursuant to a

consent order signed by the department, Mr. DeBeck, and his corporation.

The trial and appellate courts vacated the orders as issued to Mr. DeBeck because the orders were based on regulatory definitions of "owner" and "operator" that the lower courts interpreted to conflict with a statutory definition of "owner." The trial and appellate courts determined that the Department of Natural Resources lacks authority to promulgate its administrative rule definitions of "owner" and "operator" for purposes of regulating solid waste disposal facilities.

Without this court's review of the court of appeals' decision in this case, a judicially-created gap in the legislative scheme for sound and safe solid waste management will allow landfill operators to escape liability for environmental damage caused by their closed facilities and result in more leaking "landfill orphans" for the taxpayers to clean up. Indeed, the court of appeals' decision encourages such evasion by taking the teeth out of consent agreements that bind the signatories to future remedial action once the landfills are no longer in operation. If left standing, the court of appeals' decision will also frustrate legislative mandates by inappropriately restraining the rule-making of state agencies delegated broad authority by the Legislature to promulgate rules to implement those mandates.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the Department of Natural Resources exceed its authority in promulgating Wis. Admin. Code §§ NR 500.03(92) and (94), defining "operator" and "owner" for purposes of solid waste regulatory actions?

Court of appeals answered: yes.

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STATEMENT OF THE CASE AND THE FACTS

This petition brings up for review two consolidated proceedings for judicial review challenging Department of Natural Resources orders which modify the solid waste facility closure plan approval issued to John DeBeck, former owner and operator of the facility, and Refuse Hideaway, Inc., the corporation to whom DeBeck transferred ownership of the property on which the facility is located, and of which DeBeck is president.

The department had issued these closure plan modification orders pursuant to sec. 144.44(3), Stats., and Wis. Admin. Code §§ NR 500.03(92) and (94) (R. 6:2, 7; Ap. 150, 155). The closure plan approval orders concern the gas migration monitoring and control system required as a condition of closure of the Refuse Hideaway landfill. The purpose of these requirements is to prevent the migration of explosive gases.

Petitioner-respondent John DeBeck was the undisputed owner and operator of the Refuse Hideaway Landfill in the Town of Middleton, Dane County, from 1974 to 1982. In 1982, John DeBeck and his son conveyed fee title to the landfill property to Refuse Hideaway, Inc. Refuse Hideaway, Inc., is a corporation owned and controlled by DeBeck and his son (Pet-Ap. 150). In his 1982 application for a license renewal, John DeBeck changed the authorized contact in the application to "John W. DeBeck, President, Refuse Hideaway, Inc."

(R. 3:996).[1] From October 1, 1984, to September 30, 1988, the license was reissued to Refuse Hideaway, Inc. In his 1985 application, John DeBeck was listed as the property owner and facility operator (R. 3:994). John DeBeck controlled the operations of the landfill at all times during the period from 1974 to 1988, when operations were terminated and the first closure orders were issued (Pet-Ap. 150).

The origin of the closure plan approval and modification at issue in this case is a "Special Consent Order" between the DNR, John DeBeck, and Refuse Hideaway, Inc., entered on May 2, 1988 (R. 3:1038-1044; Pet-Ap. 133-139). By the terms of the consent order, DeBeck and Refuse Hideaway, Inc., both agreed to "submit a plan to the Department for approval to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants" (R. 3:1041; Pet-Ap. 136). DeBeck's consultant had earlier reported to the Department that preliminary gas monitoring results showed explosive gas concentrations higher than the "[l]ower [e]xplosive [l]imit" (LEL) for methane. "This is an indication that gas is migrating away from the landfill to the northwest, west, east and southeast edges of the landfill" (R. 3:1099). The consultant's report recommended both monitoring for explosive

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[1] The administrative record for both consolidated cases consists of 1,418 pages, separately boxed and denominated "R. 3" in the appellate record. References to the administrative record in this petition appear as R. 3:____.

gases and a gas venting system to dissipate landfill gases (R. 3:1093).

The consent order specifically binds both John DeBeck and Refuse Hideaway, Inc., to its terms; John DeBeck signed the consent order, waived any hearing rights and stipulated that the consent order "is effective and enforceable upon being signed by both parties . . . " (R. 3:1044; Ap. 139). The May 2, 1988, consent order also contains the following provision:

> Nothing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose other than for action taken for failure to comply with the terms of this order.

(R. 3:1044; Ap. 139; emphasis added.) The DNR orders before this court on review are a direct consequence of the requirements of the special consent order.

On July 1, 1988, as required by the consent order, DeBeck submitted a gas management plan to DNR (R. 3:1108). On September 6, 1988, the department approved the plan. The approved plan calls for the installation of gas monitoring probes, regular monitoring for explosive gases, the submission of a detailed plan for a gas extraction system and other requirements.

On judicial review of the September 6, 1988, plan approval order, the Dane County Circuit Court remanded the order to the department because of the order's failure to provide adequate findings of fact and conclusions of law (R. 6:10-12). On February 21, 1990, the department issued its corrected

decision and order, one of the two consolidated cases now before this court (R. 6:2-8; Pet-Ap. 150-156). The companion judicial review challenges the department's January 17, 1989, decision and order providing further modification of the conditional closure plan for the landfill (R. 3:1311-1320; Pet-Ap. 140-149). Both cases raise the single legal issue whether, by virtue of the definitions of "owner" and "operator" in Wis. Admin. Code §§ NR 500.03(92) and (94), the closure plan orders bind John DeBeck.

Wisconsin Administrative Code §§ NR 500.03(92) and (94) adopt the definitions of owner and operator set forth in sec. 144.442(9), Stats. These definitions are as follows:

> 1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
>
> 2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

Viewing the case as a challenge to the validity of the administrative rule definitions themselves, the Dane County Circuit Court, the Honorable Mark A. Frankel presiding, held invalid the administrative rule definitions of "operator" and "owner." In its May 1, 1991, decision and order, the circuit court held that although the Department of Natural Resources

possesses implied statutory authority to define its terms, the definitions promulgated are inconsistent with other solid waste regulatory statutes (R. 13:11-13; Pet-Ap. 120-122). The court remanded the orders to the department with instructions to "reissue the orders that were the subject of this action to Refuse Hideaway, Inc., solely, and not include the petitioner personally" (R. 13:23; Pet-Ap. 147). The Department of Natural Resources appealed.

In a decision dated November 12, 1992 (Pet-Ap. 100-109), the court of appeals agreed with the trial court and affirmed, based primarily on the narrow parsing and expansive application of a statutory definition of owner. The court reasoned that the operative definition of owners and operators throughout Ch. 144, Stats., is the definition of owner in sec. 144.01(9), Stats., that that definition does not include past owners, and that the DNR regulations found at Wis. Admin. Code §§ NR 500.03(93) and (94) which define "owner" to include past owners and which separately define "operator" to include past operators conflict with the sec. 144.01(9), Stats., definition and so are invalid.

The Department of Natural Resources now respectfully petitions this court to review the decision of the court of appeals in order to establish for state courts the parameters of the department's regulation of solid waste facilities consistent with its broad legislative mandate, and to preserve the legal enforceability of agreed upon obligations to clean up leaking landfills when and after they close.

STATEMENT OF CRITERIA FOR REVIEW

The issue of the validity of the administrative rule defining owners and operators of solid waste facilities for purposes of regulation of those facilities falls squarely within the statutory criteria for supreme court review set forth in sec. 809.62(1)(c)2. and 3., Stats. This issue is one of first impression with statewide implications for all landfills and for all substantive areas in which state agencies have legislatively delegated regulatory obligations.

From the narrowest but most pressing perspective, resolution of this issue determines whether the Department of Natural Resources may enforce otherwise valid orders to take remedial action at closed landfills against the parties who used to own or operate the landfills.[2] This question is significant both as a matter of fact, inasmuch as landfills, both open and closed, dot the landscape across the state, and as a matter of law, in terms of judicial interpretation of the complex and multi-faceted legislative scheme for solid waste management set forth in subchapter IV of Ch. 144, Stats.

More broadly, the issue of the validity of the administrative definitions of owner and operator implicates the presumption in favor of the legitimacy of agency actions

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[2]As is argued in the sections to follow, there will by definition never be a present operator for a closed landfill, and the court of appeals' decision will encourage owners to make arrangements so that there will never be a present owner either. Absent explicit language in the statutes condoning this gap in the department's regulatory authority, the court of appeals' decision allowing such an illogical result based solely on the stage of a landfill's life should be reversed.

and the need for a definitive decision from this court under sec. 809.62(1)(c)3., Stats. There is no case law on point, and the court of appeals' interpretation that restricts the department's authority to fulfill its legislative mandate to regulate solid waste facilities and that imposes on the statutory scheme a judicially-created escape route from leaking landfill liability, must be reversed.

ARGUMENT

I. THE COURT OF APPEALS' PROTECTION OF PAST OWNERS AND OPERATORS OF CLOSED LANDFILLS WILL ADVERSELY IMPACT BOTH THE LEGISLATIVE SCHEME FOR SAFE SOLID WASTE MANAGEMENT AND THE STATE AGENCY IMPLEMENTATION OF LEGISLATIVE MANDATES.

As discussed in section II below, the statutory language itself makes it clear that the Department of Natural Resources' administrative rule defining owner and operator for purposes of regulating solid waste facilities neither exceeds it statutory authority nor conflicts with any statutory provision. The court of appeals' holding to the contrary has serious adverse implications for the public and state agencies.

A. The court of appeals' decision will expose the public to greater risk and expense contrary to the balance struck by statute.

Like necessary evils, landfills are to be licensed but subjected to standards to minimize the risk they pose to their neighbors and the environment, and the Department of Natural Resources has been authorized both to set and to enforce those

standards. Secs. 144.431 and 144.435(1), Stats. The court of appeals' decision precludes the department from enforcing standards at the last stage over which the department has any control--closure--thereby exposing the public to risks that the department is statutorily mandated to protect the public against, risks that are beyond those the statutes provide the public should bear.

Nor should the public bear a greater share of the expense of complying with the standards designed to protect them than the statutes provide. It is in the first instance the obligation of those owning, operating, profiting from and eventually closing the landfills who are to pay for compliance with statutory and regulatory standards, from design to closure. The court of appeals' decision transfers to the public the burden of closure costs, solely because of the time at which they occur, without express statutory language differentiating standards and remediation imposed at closure from standards and remediation required earlier in a landfill's life.

B. The court of appeals' decision will encroach on state agency enforcement and discourage state rule making.

The court of appeals' decision establishes a distinction between closure orders and other orders governing the operation of landfills that is not found in the enforcement provision, sec. 144.47, Stats. Yet, the court of appeals' decision strips closure cleanup orders of their legal

enforceability. Even where former owners and operators have agreed to help fund closure-related remediation actions, only moral obligation will compel co-funded cleanups at those sites. The court of appeals' decision diminishes the role and value of the department's enforcement authority.

The court of appeals' decision is also likely to have an adverse impact on state administrative rules themselves. If the administrative definitions at issue are held to be inconsistent with the agency's statutory mandate despite the breadth of that mandate and the consistency of the definitions with the statutory scheme, effective rule making by all administrative agencies will be chilled.

II. THE COURT OF APPEALS ERRED IN FINDING THAT THE ADMINISTRATIVE RULES DEFINING OWNER AND OPERATOR CONFLICT WITH AN AMBIGUOUS STATUTORY DEFINITION OF OWNER WHERE THE DEFINITION OF OPERATOR IS LEFT OPEN AND THE ADMINISTRATIVE DEFINITIONS OF OWNER AND OPERATOR ARE CONSISTENT WITH MORE DIRECTLY RELATED STATUTORY PROVISIONS.

The court of appeals rested its decision on a conflict between the administrative definitions of owner and operator and the definition of owner at sec. 144.01(9), Stats. That section states:

> "Owner" means the state, county, town, town sanitary district, city, village, metropolitan sewerage district, corporation, firm, company, institution or individual owning or operating any water supply, sewerage or water system or sewage and refuse disposal plant.

The court of appeals found that this definition does not include past owners of landfills, and therefore invalidates

the administrative definitions that include both past owners and past and present operators. That finding subverts the purpose of the solid waste statutes and contravenes the language both of that section and other statutory provisions.

Closure orders may differ from other landfill design, construction and operation orders in that at closure the landfill has stopped operating, but that difference does not warrant, and is not recognized in the statutes as justifying, any difference in the enforceability of closure from that of other orders. Sections 144.431(2)(a) and (b), Stats., authorize the department to hold hearings and issue orders relating to any aspect of the administration of the solid waste statutes, to effectuate the purpose of those statutes, from siting to closure without distinction. Similarly, sec. 144.442(6)(b), Stats., authorizes the department to take any action to protect the public and the environment, again without distinction between operation and closure.

The statutes pertaining to older facilities, like Refuse Hideaway, confirm the continuing responsibility of past owners and operators. Section 144.441(2)(c) and (e), Stats., which provide that an owner's responsibility for older landfills can continue for as long as forty years after closure, establishes that the Legislature contemplates not the abrupt cessation of owner responsibility for landfills implicit in the court of appeals' decision, but ongoing responsibility to ensure environmental protection. And transfer of ownership does not necessarily relieve the past owner of that responsibility, if,

as here, the past owner was the past licensee who upon transfer remained connected with the operation of the facility. Sec. 144.444(1), Stats.

The language of the statutory definition itself negates the court of appeals' finding of conflict. The definition being only of "owner" on its face leaves the Department of Natural Resources free to define operator for purposes of secs. 144.43-144.47, Stats., consistent with its mandate in secs. 144.431 and 144.435, Stats. This is confirmed by the definition of "operator" in sec. 144.81(9), Stats., for the subchapter on mining. In the absence of a statutory definition for operator for secs. 144.43-144.47, Stats., it is left open for the agency to provide a definition to serve the purposes of those sections. Moreover, the qualifying phrase "owning and operating" in sec. 144.01(9), Stats., is ambiguous as to time, inasmuch as it could mean at any time rather than just at the present time.

Because the generic definition of owner preserves to the department the promulgation of more specific definitions consistent with its statutory mandate, the court should defer to the department's interpretation, in keeping with the deference due any agency's experienced interpretation of the statutes it is charged to apply and enforce. See Plumbers Local No. 75 v. Coughlin, 166 Wis. 2d 971, 984, 481 N.W.2d 297 (Ct. App. 1992), School Dist. of Drummond v. WERC, 121 Wis. 2d 126, 132-33, 358 N.W.2d 285 (1984); Environmental Decade v. ILHR Dept., 104 Wis. 2d 640, 644, 312 N.W.2d 749 (1981).

The fact that the Legislature defined owner and operator in one section, sec. 144.442(9), Stats., and not for the solid waste regulatory subchapter as a whole, secs. 144.43-144.47, Stats., does not remove DNR's option to apply the same definition to rules promulgated to implement the subchapter. On the contrary, the use of the same definitions carries out the legislative policy, expressed in sec. 144.442, Stats., that persons who have benefitted from a landfill operation must also shoulder its obligations.

To provide otherwise would permit landfill owners and operators to reap economic benefits in the first years of the landfill operation and then, as closing time approaches and receipts diminish, transfer the landfill to an entity that is undercapitalized and unable to properly close and maintain the landfill. It is this result that the definitions seek to discourage. That even without such subterfuge there cannot be a present operator once the landfill is closed establishes that these definitions are also necessary to effectively implement these solid waste regulatory laws. These definitions effectuate the legislative policy to prevent landfill disasters by requiring effective landfill closure.

The administrative rules to which the definitions of owner and operator apply, Wis. Admin. Code chs. NR 500-520, implement the environmental protection purposes of the solid waste statutes in Ch. 144, Stats. These solid waste statutes were first enacted in 1967, and the Legislature's prefatory

statement of policy emphasized the need to grant powers necessary to halt improper solid waste disposal:

> SECTION 1. STATEMENT OF POLICY AND PURPOSES. (1) The high level of production required to meet the varied needs of an expanding population and high standard of living has resulted in a sharp rise in the amount of waste materials discarded annually.
>
> (2) Inefficient and improper methods of waste disposal have caused an ever increasing pollution of our vital air, land and water resources threatening the utility of our resources and the quality of the environment in which we live. The problems of waste disposal endanger the public health, safety and welfare, create public nuisances, result in scenic blight and adversely affect land values.
>
> . . . .
>
> (4) It is the purpose of this act to grant the necessary powers to organize a comprehensive program to enhance the quality, management and protection of the state's air and land resources.

Ch. 83, Laws of 1967.

Since the purpose of the solid waste statutes was to grant the necessary powers to protect land and water from pollution, it would frustrate legislative intent if one could absolve oneself of responsibility for landfill closure simply because the landfill is no longer in operation or by conveyance. Moreover, it would be an absurd result if former owners and operators, or owners and operators up to closure, could escape closure responsibilities aimed at preventing pollution, while facing clear statutory liability for cleanup costs after pollution occurs under sec. 144.442(9), Stats.

Nor do the administrative definitions render the qualifications in sec. 144.442(9)(c), Stats., mere surplusage,

as argued by DeBeck on appeal. Knowledge of a dangerous release may well be required where the owner or operator was following the terms of an operation or closure order but the release occurred anyway, but here the result of the court of appeals' decision is that the department cannot even require that the closure order, issued to prevent any such release, be followed in the first instance. Such a result is particularly perverse in this case, where the Department of Natural Resources is prevented from enforcing the closure order against the party who accepted responsibility for compliance in the underlying consent order that he signed for himself and the corporation he controls.

Ironically, the effect of the court of appeals' decision is to convert a statute that was intended to expand financial liability (by creating a cause of action to recover costs) into a substantive restriction on the Department of Natural Resources' authority to fully implement the solid waste laws. The Legislature plainly intended no such restriction. Section 144.442(11)(a), Stats., provides:

> No common law liability, and no statutory liability which is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

The above section leaves little doubt but that the liability of parties in a cost recovery action under sec. 144.442(9), Stats., is in addition to any obligation an owner or operator may incur under other statutes or the common

law. The definitions of owner and operator in sec. 144.442(9), Stats., should not defeat the department's authority to implement, by rule, effective solid waste site regulation in Wisconsin.

This court has observed that the department bears significant solid waste site enforcement responsibilities: "it must be remembered that the DNR has been asked to oversee and to safeguard Wisconsin's water quality not only for today's generation but also for tomorrow's. The agency cannot afford to be shortsighted." Sanitary Transfer & Landfill, Inc. v. DNR, 85 Wis. 2d 1, 13, 270 N.W.2d 144 (1978). Because DNR has these enforcement responsibilities, its interpretation of the enabling statute to permit a broad definition of owner and operator is entitled to "great weight," Kimberly-Clark Corp. v. Public Service Comm., 110 Wis. 2d 455, 462, 329 N.W.2d 143 (1983); its interpretation "will not be reversed where it is '"one among several reasonable interpretations that can be made, equally consistent with the purpose of the statute."'" 110 Wis. 2d at 466.

For the reasons stated above, this court should reverse the court of appeals and find that the administrative rules defining owner and operator do not conflict with the statute that impliedly authorizes the promulgation of those rules. At the least, this court should reverse the court of appeals and not allow John DeBeck to extricate himself from a consent order than binds him.

CONCLUSION

This court should reverse the court of appeals' decision and find that the department acted within its statutory authority in promulgating Wis. Admin. Code §§ NR 500.03(92) and (93), in order to resolve the pressing issue of liability for leaking landfills consistent with the legislative mandate in secs. 144.43-144.47, Stats.

Respectfully submitted this 14th day of December, 1992.

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COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1992

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-1434

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOHN W. DEBECK,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane county: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

DYKMAN, J. This is an appeal from an order partially vacating two administrative orders of the Department of Natural Resources (DNR). The circuit court vacated the orders because it concluded that the DNR had based the orders on

an administrative rule which conflicted with a statute. We agree with the trial court and therefore affirm.

In 1972, after obtaining approval from the DNR, John DeBeck opened a landfill in the town of Middleton, Dane county. In 1982, he transferred the landfill to Refuse Hideaway, Inc., a corporation of which DeBeck is president. In 1987, the DNR tentatively approved a closure plan for the landfill. In early 1988, several wells near the landfill tested positive for contaminants. DeBeck and the DNR entered a special consent order which required closure of the landfill. The order reserved to the DNR the right to modify the order and provided that "[n]othing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose ...."

On September 6, 1988, the DNR issued an order tentatively approving the landfill closure plan. But the order also stated that both "John DeBeck and Refuse Hideaway, Inc., own and formerly operated a [landfill]." DeBeck petitioned for judicial review of this order, contending that he could not be held personally responsible to comply with the order. After a remand for further findings, the DNR issued an additional order on February 21, 1990, in which it asserted that it intended to impose personal liability on DeBeck. It grounded its authority to do so on Wis. Adm. Code sec. NR 500.03, which provides in part:

(92) "Operator" has the meaning specified in s. 144.442(9), Stats.

(94) "Owner" has the meaning specified in s. 144.442(9), Stats.

DeBeck petitioned for judicial review of the September 6, 1988 order and the February 21, 1990 order. The circuit court agreed with DeBeck's assertion that the dispositive definition of a landfill "owner" was found in sec. 144.01(9), Stats. That section provides: "Owner means the state, county, town, town sanitary district, city, village, metropolitan sewerage district, corporation, firm, company, institution or individual owning or operating any water supply, sewerage or water system or sewage and refuse disposal plant." The court recognized that sec. 144.442(9), Stats., entitled "RECOVERY OF EXPENDITURES," contained more expansive definitions of "owner" and "operator" which would include DeBeck personally. But the court concluded that those definitions were applicable only to sec. 144.442(9), because that subsection provides: "(a) *Definitions*. ***In this subsection***: 1. 'Operator' means .... 2. 'Owner' means ...." (Emphasis added.)

The circuit court reasoned that the legislature was well aware of the two definitions of an "owner" of a landfill, and had reserved the more extensive version for actions to recover expenses for environmental repair. Therefore, the DNR's attempt to apply the more extensive version to all of ch. 144, Stats., conflicted with the legislature's decision to apply that version only to actions to recover expenditures. The court concluded that the DNR lacked authority to hold DeBeck personally

responsible for complying with the terms of the September 6, 1988 and February 21, 1990 orders.

STANDARD OF REVIEW

Section 227.40(4)(a), Stats., provides three bases which a court may use to declare an administrative rule invalid: (1) if the rule violates the constitution; (2) if it exceeds the statutory authority of the agency adopting it; or (3) if it was adopted without compliance with statutory rulemaking procedures. ***LeClair v. Natural Resources Bd.***, 168 Wis.2d 227, 233, 483 N.W.2d 278, 281 (Ct. App. 1992). DeBeck's attack on Wis. Adm. Code sec. NR 500.03(92) and (94) falls under the "exceeds the statutory authority of the agency" part of sec. 227.40(4)(a).

The DNR asserts that Wisconsin law does not precisely define the appropriate standard of review for "exceeds statutory authority" challenges. It argues that we should use the standard used for the "violates constitutional provisions" portion of sec. 227.40(4)(a), Stats. The supreme court discussed that standard in ***Liberty Homes, Inc. v. DILHR***, 136 Wis.2d 368, 375, 401 N.W.2d 805, 808, (1987). At least in a substantive due process challenge of a rule, the standard of review we are to use is whether the rule bears a reasonable relation to a legitimate governmental objective. ***Id.***

In ***State v. McManus***, 152 Wis.2d 113, 447 N.W.2d 654 (1989), the supreme court did not discuss the standard of review it would use in a statute-rule

conflict. However, it is clear that it used a *de novo* standard. In ***Wisconsin Hosp. Ass'n v. Natural Resources Bd.***, 156 Wis.2d 688, 705, 457 N.W.2d 879, 886 (Ct. App. 1990), we concluded that "exceeds statutory authority" questions are matters of statutory interpretation or construction, and therefore our review was *de novo*. In ***Wisconsin Hosp. Ass'n***, the DNR argued that we should defer to its practical interpretation of the enabling statute. We declined to decide whether this was an appropriate standard of review. The DNR has now abandoned this argument in its attempt to apply its rules to DeBeck. We conclude that a *de novo* standard of review should be used in "exceeds statutory authority" cases under sec. 227.40(4)(a), Stats.

DECISION

The question we face is whether the DNR's definitions of "operator" and "owner," found in Wis. Adm. Code sec. NR 500.03(92) and (94) conflict with the definition of "owner" found in sec. 144.01(9), Stats.

To determine whether an administrative agency has exceeded its statutory authority in promulgating a rule, we must look to the enabling statute to determine whether there is express or implied authorization for the rule. ***In Interest of A.L.W.***, 153 Wis.2d 412, 417, 451 N.W.2d 416, 418 (1990). The DNR identifies secs. 144.431(1)(a) and 144.435(1), Stats., as the enabling statutes upon which it relies.

Section 144.431, Stats., provides in relevant part:

> (1) The department shall:
>
> (a) Promulgate rules implementing and consistent with ss. 144.43 to 144.47.

Section 144.435, Stats., provides in relevant part:

> (1) The department shall promulgate rules establishing minimum standards for the location, design, construction, sanitation, operation, monitoring and maintenance of solid waste facilities. Following a public hearing, the department shall promulgate rules relating to the operation and maintenance of solid waste facilities as it deems necessary to ensure compliance and consistency with the purposes of and standards established under the resource conservation and recovery act ....

DeBeck agrees that the trial court correctly determined that these statutes impliedly authorized the DNR to promulgate Wis. Adm. Code sec. NR 500.03(92) and (94). Thus the question becomes whether those rules, defining "operator" and "owner," conflict with the legislative definition of "owner" found in sec. 144.01(9), Stats.

"[A]ny doubts as to the implied power of an agency are to be resolved against the existence of authority." ***Trojan v. Board of Regents of Univ. of Wis. Sys.***, 128 Wis.2d 270, 277, 382 N.W.2d 75, 78 (Ct. App. 1985). The DNR objects to this rule because, in its view, when we use this rule, we ignore the presumption that administrative rules have the same force of law as statutes. We disagree.

Administrative rules are equal to statutes in their power to regulate behavior. But administrative agencies do not have powers superior to those of the legislature. When a conflict occurs between a statute and a rule, the statute prevails. ***Richland School Dist. v. DILHR,*** 166 Wis.2d 262, 278, 479 N.W.2d 579, 586 (Ct. App. 1991), *review granted*, No. 90-1750 (Apr. 7, 1992). "An agency charged with administering a law may not substitute its own policy for that of the legislature." ***Niagara of Wis. Paper Corp. v. DNR***, 84 Wis.2d 32, 48, 268 N.W.2d 153, 160 (1978). Though the DNR attempts to equate rules with statutes and then analyze this case as a conflict between statutes, that analysis must fail because ***Richland*** and ***Niagara*** would be meaningless under such an analysis.

Section 144.01(9), Stats., applicable to all of ch. 144, Stats., defines "owner" in the present tense. Though the present tense of a verb includes the future, sec. 990.001(3), Stats., the legislature has not provided that the use of the present tense in the statutes includes the past. Thus, sec. 144.01(9) does not include past owners of landfills.

We find further support for this position in sec. 144.442(9)(a)1. and 2., Stats. We do not rely on the fact that subsecs. (92) and (94) of Wis. Adm. Code sec. NR 500.03 were adopted verbatim from sec. 144.442(9)(a)1. and 2. That is merely evidence that the DNR was aware that these sections are more inclusive in their definitions of "operator" and "owner" than sec. 144.01(9), Stats. We consider the former definitions because they show that the legislature was aware of the difference

between the sec. 144.01(9) definition of "owner" and the definition found in sec. 144.442(9)(a)1. and 2. We so conclude because the legislature specifically limited the more expansive use of the definitions to "In this subsection," i.e., sec. 144.442(9), Stats. That subsection pertains to recovery of expenditures, a topic which the DNR admits is not the subject of this lawsuit. We are to resolve doubts as to the implied power of an agency against the existence of authority. ***Trojan***, 128 Wis.2d at 277, 382 N.W.2d at 78.

The DNR argues that even if our analysis is correct, common law nuisance law provides the remedy it seeks against DeBeck. It cites ***State v. Mauthe***, 123 Wis.2d 288, 366 N.W.2d 871 (1985), and ***State v. Rollfink***, 162 Wis.2d 121, 469 N.W.2d 398 (1991), as examples of cases where the court imposed common law liability on appropriate corporate officers. We disagree. ***Mauthe*** held that a person (not a corporate officer) who owned land was liable for a hazardous substance spill that occurred on the land because sec. 144.76(3), Stats., provides:

> A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

Mauthe was decided by interpreting a statute. The applicable statute in that case bears no resemblance to sec. 144.01(9), Stats. ***Mauthe*** does not support the DNR's assertions.

Rollfink involved the question whether, under the definition of "operator" found in former Wis. Adm. Code sec. NR 181.04(70), a corporate officer could be assessed forfeitures for violations of ch. 144, Stats. That rule defined "operator" as: "the person who is responsible for the overall operation of a hazardous waste facility or recycling facility, or part of a hazardous waste facility or recycling facility." ***Rollfink***, like ***Mauthe***, involved a question of statutory (or rule) interpretation. The rule involved was unlike sec. 144.01(9), Stats. The supreme court did not discuss the effect of sec. 144.01(9), nor did it need to, for the issue was not a conflict between rule and statute, but the interpretation of a rule. ***Rollfink*** does not support the DNR's assertions.

The DNR's final argument is that, "regrettably," the financial responsibility provisions of ch. 144, Stats., provide only for routine, predictable, long-term-care expenses of closed landfills, such as soil cover and erosion prevention. Policy considerations, therefore, should provide the basis for a reversal of the trial court's order. But it is the legislature's responsibility to balance the environmental danger of landfills against the need for their existence. Courts should respect the line drawn by the legislature, and not substitute their view of the better place to draw that line. The DNR may ask the legislature to pass laws, consistent with our constitutions, which will permit the DNR to impose liability on a greater number of persons. That is a resolution which is better suited to a political system based on separation of powers.

By the Court.--Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

JOHN W. DeBECK,

PETITIONER,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT,

036

Consolidated Case No. 89CV960
91CV1267

MEMORANDUM DECISION AND ORDER

This is an action for judicial review of two administrative orders issued by the respondent, Department of Natural Resources (DNR). The orders concern the closing of a solid waste landfill presently owned by Refuse Hideaway, Inc., a corporation for which the petitioner, John W. DeBeck, is president. The orders require both Refuse Hideaway Inc. and John W. DeBeck to take certain actions toward the closure of the landfill. In his petitions for review, DeBeck requests that the administrative orders be partially vacated or modified because DNR lacks the authority to impose personal responsibility upon him to comply with the orders. In the alternative, DeBeck requests that the orders be remanded to comply with procedures dictated by either sec. 144.44(8), Wis. Stats., or the federal due process clause.[1] DNR responds that the orders are valid because DNR has the authority to hold DeBeck personally responsible pursuant to Wis. Admin. Code, NR 500.03(92) and

[1]In his petition for review, DeBeck requests a remand with instructions to issue the orders to Refuse Hideaway, Inc. only. In his final brief, DeBeck also requests a remand to comply with statutory and federal due process procedures.

NR 500.03(94). DNR also responds that the orders should not be remanded because DeBeck waived his hearing rights under sec. 144.44(8), Wis. Stats., and has no protected interest under the federal due process clause.

The primary question presented in this administrative review is whether DNR had the authority under Chapter 144 to promulgate the administrative definitions found in NR 500.03(92) and (94). For reasons stated below, I determine that DNR lacked the authority and therefore remand the orders with instructions.

FACTS

In 1972, John DeBeck was approved by the Department of Natural Resources as an owner and operator of a landfill located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin. In 1982, DeBeck conveyed the landfill to Refuse Hideaway, Inc., a corporation for which DeBeck was and continues to be president.[2]

In 1987, DeBeck and DNR began discussing the terms for the landfill's closure and on April 17, 1987, DNR tentatively approved a closure plan. That approval was in the form of an administrative order which was based on the premise that "Refuse Hideaway Inc. owns and operates a nonhazardous solid waste disposal facility . . . " The order specified actions

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[2]From the record, it appears that DNR was not required to approve and did not officially approve of DeBeck's conveyance of the landfill to Refuse Hideaway, Inc. Instead, after the conveyance, DNR began to issue most of the landfill's annual operating licenses to Refuse Hideaway, Inc. as the "owner" and John DeBeck as either the "operator" or the "responsible person." In some years after 1982, Refuse Hideaway, Inc. was listed as both the "owner" and the "operator" whereas in other years John DeBeck was listed as either the "owner," "operator" or "responsible person." Each operating license in the record is different and it appears that their issuance was irregular with regard to the naming of parties.

to be taken by Refuse Hideaway, Inc. toward the closure of the landfill but also stated that DNR reserved the right to modify the plan or require Refuse Hideaway, Inc. to take additional actions before closure was fully approved.

In May 1988, after contamination was found in private water wells near the landfill, DNR and DeBeck entered a special consent order which contained additional conditions for the landfill's closure. The order required DeBeck to cease operation of the landfill, install clay capping and cover layers, construct numerous wells, and submit various reports and plans to DNR, including an additional closure plan proposal. In addition, DeBeck agreed to personally comply with the conditions set forth in the order. Both DNR and DeBeck signed the document. DNR again reserved its right to modify the consent order and DeBeck reserved his right to challenge those modifications. In addition, paragraph ten of the consent order stated that "(n)othing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc. for any purpose other than for action taken for failure to comply with the terms of this order."

Pursuant to the May, 1988 consent order, DeBeck submitted a closure plan proposal to DNR on July 1, 1988. On September 6, 1988, DNR issued an order tentatively approving DeBeck's closure plan. Although the order was a tentative approval, it also contained conditions to be met before the landfill closure was official. These conditions were in addition to those contained in the April 7, 1987 and the May 2, 1988 orders. DeBeck challenged the September 6, 1988 order by petitioning for judicial review. DeBeck challenged the September, 1988 order because it attempted to hold him personally liable for complying with the additional terms contained therein. The order stated that both "John

DeBeck and Refuse Hideaway Inc., own and formerly operated a nonhazardous solid waste disposal facility . . ." DeBeck, in his petition for review, contends that he is not a current owner and operator of the landfill and that DNR therefore cannot hold him personally liable to comply with the order. DeBeck noted in his brief that this was the first time DNR had attempted to hold him personally liable for the entire closure of the landfill. The petition for review was assigned to Judge Angela Bartell. Refuse Hideaway, Inc. et. al. v. Wisconsin Department of Natural Resources, Dane County Circuit Court Case No. 88 CV 5455.

In January, 1990, Judge Bartell remanded the September, 1988 order to DNR for further findings of fact and law. Judge Bartell reasoned that DNR had failed to make adequate findings regarding its intent and authority to impose personal liability on DeBeck for the landfill's closure. Subsequently on February 21, 1990, DNR issued additional findings, asserting that it did indeed seek to impose personal liability on DeBeck for the landfill's closure. In its finding of law, DNR asserted that it had the authority to impose personal liability on DeBeck because he is an owner and operator of the landfill under the definitions of NR 500.03(92) and NR 500.03(94). In the action sub judice, DeBeck challenges the validity of those definitions.

While the above action was pending, DNR issued another closure order to DeBeck on January 17, 1989. Similar to the contents of the September 8, 1988 order, the January 17 order seeks to hold DeBeck personally responsible for additional conditions and time deadlines for the landfill's closure. DeBeck again petitioned for review, asserting again that DNR lacks the authority to impose personal liability on him because he is not an owner and

operator of the landfill.[3] The current action is a consolidation of the petitions for review of the September, 1988 and January, 1989 DNR orders.

This Court grants leave pursuant to sec. 227.53(1)(b), Wis. Stats., to allow an amendment of the petition to challenge NR 500.03(92) and (94) on the merits.

STANDARD OF REVIEW

Chapter 144 of the Wisconsin Statutes regulates water, sewage, refuse, mining and air pollution. When the Legislature enacted Chapter 144, it designated the Department of Natural Resources (DNR) as the enforcement agency. As the enforcement agency, DNR is empowered to, inter alia, promulgate regulations, codify standards, and issues orders.

Pursuant to its authority, DNR has promulgated rules and regulations in order to enforce the Solid Waste provisions of Chapter 144. DNR's authority is found in sec. 144.431, Wis. Stats., which provides in relevant part that: "The department shall: (a) Promulgate rules implementing and consistent with ss. 144.43 to 144.47." DNR, therefore, has authority to promulgate rules to enforce the Solid Waste provisions of Chapter 144, as long as those rules are consistent with the statutory provisions. DNR also relied on sec. 227.11(2)(a), Wis. Stats., to promulgate the rules at issue. (Respondent's brief at 5). That section confers rule-making authority on an agency to interpret the provisions of any statute enforced or administered by it, if necessary to enforce the statute.

Consequently, DNR interpreted the Solid Waste provisions in order to promulgate NR 500.01 et seq. and this action is a direct challenge to DNR's interpretation of the

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[3]In his final brief, petitioner did not challenge the substantive requirements imposed by the administrative orders.

authorizing statutes. The question presented is, therefore, one of law. When a court reviews an administrative agency's interpretation of statutory provisions, "(t)he black letter rule is that a court is not bound by an agency's conclusion of law." West Bend Education Ass'n v. WERC, 121 Wis.2d. 1, 11, 357 N.W.2d 534 (1984). Courts in Wisconsin, however, have in the past given "great" or "due" weight to the agency's interpretation of its own authority. Holtz & Krause, Inc. v. DNR, 85 Wis.2d 198, 270 N.W.2d 409 (1978).

Recently, our Supreme Court clarified the standard of review to be used in these cases. In Drivers Local No. 695 v. LIRC, 154 Wis.2d 75, 452 N.W.2d 368 (1990), the Supreme Court held that, absent factors not present here, de novo review is the correct standard when reviewing an agency's interpretation of a statute.[4] In Drivers Local No. 695, the agency's interpretation of a statute was one of first impression and involved no agency expertise. The Supreme Court stated that "(w)here a legal question is concerned and there is no evidence of any special expertise or experience, the weight to be afforded an agency interpretation is no weight at all." Id. at 84.

As in Drivers Local No. 695, the administrative agency here acted based on its interpretation of a statute. DNR defined "owner" and "operator" in NR 500.03(92) and NR 500.03(94) based on its interpretation of Chapter 144. This is also a question of first impression because DeBeck is apparently the first to challenge the agency's definitions. And lastly, the agency's interpretation does not involve agency technological or practical experience. In fact, DNR does not have a long-standing, consistent practice of defining "owner" and "operator." Consequently, the standard of review for DNR's action in this case

[4]See also Chapman v. LIRC, 156 Wis. 2d 286, 456 N.W.2d 637 (Ct. App. 1990).

is a de novo review of a question of law.

OPINION

A. DNR'S STATUTORY AUTHORITY

Chapter NR 500 of the Wisconsin Administrative Code provides regulations for the Solid Waste Management provisions of Chapter 144, Wis. Stats. The definitions found at NR 500.03(92) and (94) took effect in February, 1988 and provide the following:

(92) "Operator" has the meaning specified in s. 144.442(9), Stats.

(94) "Owner" has the meaning specified in s. 144.442(9), Stats.

The definitions found in NR 500.03(92) & (94), therefore, define owner and operator by directly incorporating the definitions in sec. 144.442(9), Wis. Stats. With some exceptions, these definitions apply to all solid waste facilities as defined in sec. 144.43(5), Wis. Stats., N.R. 500.02(1). The question arises whether the definitions found in sec. 144.442 were intended to apply to only that subsection, or whether the Legislature intended these definitions to apply more broadly to the entire regulatory scheme of regulating solid waste landfills found in secs. 144.43 - 144.79, Wis. Stats. DNR has taken the latter position.

In sec. 144.442, Wis. Stats., the legislature set up a special mechanism for funding and responding to environmental damage created by disposal facilities. The section is entitled "Environmental Repair." Under its provisions, the state is permitted to take action against all "responsible persons . . . if an expenditure is made for environmental repair at the site or facility." Sec. 144.442(9)(d). Subsection (9) is the definitional section for the cost-recovery mechanism and as such defines "responsible person," "owner" and "operator."

Because DNR incorporated the entire subsection (9) in the administrative definitions

found at NR 500.03, sec. 144.442(9) is reprinted below in relevant parts.

"Operator" and "owner" are defined in 144.442(9)(a) as follows:

1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

A "responsible person" is defined as follows:

(c) *Persons responsible.* 1. An owner or operator is responsible for conditions at a site or facility which presents a substantial danger to public health or welfare or the environment if the person knew or should have known at the time the disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner which would cause a danger to public health or welfare or to the environment.

2. Any person, including an owner or operator and including a subsidiary or parent corporation which is related to the person, is responsible for conditions at a site or facility which present a substantial danger to public health or welfare or the environment if:

a. The person violated any applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation caused or contributed to the condition at the site or facility; or

b. The person's action related to the disposal caused or contributed to the condition at the site or facility and would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for that person at the time the disposal occurred.

The definitions of operator and owner found in NR 500.03(92) & (94) are therefore

broad and encompass many individuals, including former as well as current owners and operators. Both the petitioner and respondent in this action agree that the definitions under NR 500.03 encompass the petitioner, John DeBeck, as an administratively defined owner and operator of the Refuse Hideaway Landfill. (Petitioner's brief at 3, Respondent's brief at 4). DNR therefore considers DeBeck a responsible "owner and operator" for all regulatory and enforcement provisions imposed on the Refuse Hideaway Landfill. DeBeck argues that he should not be held personally responsible for the landfill because DNR lacked the statutory authority to define owner and operator so broadly. The challenge to the administrative action in this case is therefore an attack on the agency's statutory authority to promulgate the rules defining owner and operator. This is a valid basis for challenge. Liberty Homes, Inc. v. Department of Industry, Labor & Human Relations, 136 Wis.2d 368, 401 N.W.2d 805 (1987).

In analyzing such a challenge, Wisconsin courts have traditionally undertaken a two-step inquiry: (1) Did the agency have express or implied authority from the legislature to act? and (2) If so, did the agency act within the proper bounds of that authority?

1. Did DNR Have Express Or Implied Authority To Promulgate NR 500.03 (92) and (94)?

Petitioner DeBeck argues that DNR lacked statutory authority to define the terms "owner" and "operator." (Petitioner's brief at 3-4). DNR responds that it had the authority to define these terms because "(t)he power to define terms is fundamental to agency rulemaking power." (Respondent's brief at 5).

It is a general rule in Wisconsin that an administrative agency may not issue a rule that is not expressly or impliedly authorized by the legislature. Peterson v. National

Resources Board, 94 Wis.2d 587, 593, 288 N.W.2d 845 (1980). The agency has express authority if its actions are provided for in the plain language of the statute. The agency has implied authority if its actions are deemed "necessary to carry out an express power or to perform an express duty." Racine Fire & Police Commission v. Stanfield, 70 Wis.2d 395, 402, 234 N.W.2d 307 (1975).

The first question, therefore, is whether DNR had either express or implied authority to promulgate the definitions of "owner" and "operator" found at NR 500 (92) and (94). In promulgating the definitions, DNR relied upon secs. 227.11(2) and 144.431, Wis. Stats. Section 227.11(2) provides:

> (2) Rule-making authority is expressly conferred as follows:
>
> > (a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

Section 144.431 provides:

> (1) The department shall:
>
> > (a) Promulgate rules implementing and consistent with ss. 144.443 to 144.447.[5]

By the terms of these authorizing sections, it is clear that the Legislature did not expressly authorize DNR to independently define owner and operator. There is no express authority because the statute does not provide specific direction for the agency to follow in promulgating the particular rule. Wisconsin Hospital Ass'n v. Natural Resources Board, 156

[5]See also sec. 227.10(2), Wis. Stats.

Wis.2d 688, 705-06, 457 N.W.2d 879 (1989). No such specific statutory elements exist in this case compelling these definitions.

It is less clear whether the Legislature impliedly authorized DNR to promulgate the definitions of owner and operator. Implied authority is defined as authority that is "implied from the four corners of the statute" and is "necessary to carry out an express power or to perform an express duty." Racine Fire, 70 Wis.2d at 399, 402. An example of implied authority is seen in State v. Grayson, 5 Wis. 2d 203, 92 N.W.2d 272 (1958). In Grayson, the Supreme Court held that the Chiropractic Board of Examiners had an implied power to define "chiropractic." The Court reasoned that in order to issue licenses and regulate chiropractors, it was "necessary" for the Board to define the term chiropractic. Id. at 210-11.

In the case sub judice, the Legislature granted DNR the authority to promulgate rules "implementing and consistent with ss. 144.43 and 144.47." Sec. 144.431(1)(a). In addition, the Legislature granted all agencies generally the authority to promulgate rules that interpret their enforcement statutes if the agency considers it necessary to effectuate the purpose of the statute. Sec. 227.11(2)(a).

Pursuant to this authority, DNR promulgated Chapter NR 500 of the Administrative Code in order to "provide definitions, submittal requirements, exemptions and other general information relating to solid waste facilities." Wis. Admin. Code, NR 500.01. As part of these regulations, DNR promulgated over 150 definitions to be used in solid waste enforcement. Wis. Admin. Code, NR 500.03. The definitions of owner and operator are two such definitions.

I find that the Legislature did impliedly authorize DNR to promulgate these

definitions pursuant to the solid waste statutes. First, as the Court found in Grayson and as respondent argues in its brief, it is important for the agency to be able to define its terms if it is to enforce statutory provisions. (Grayson at 211, Respondent's brief at 5). And secondly, the Legislature granted DNR a broad brush of authority in sec. 144.432(1)(a). The Legislature limited DNR's authority only by requiring that any rule promulgated be consistent with the solid waste provisions. Therefore, DNR did have the implied authority to define its own terms in the administrative code as long as those terms were consistent with the solid waste provisions.

2. Did DNR Act within the Proper Bounds of Its Implied Authority when It Enacted NR 500.03(92) and (94)?

Petitioner DeBeck urges that even if DNR had the authority to define "owner" and "operator," the definitions found in NR 500.03(92) and (94) are invalid because they are inconsistent with the statutory framework of the solid waste laws. (Petitioner's brief at 4). DNR responds that, contrary to DeBeck's assertions, the definitions found in NR 500.03(92) and (94) carry out the legislative purpose of the solid waste laws. (Respondent's brief at 6).

The next question then is whether DNR acted within "the bounds of correct interpretation" of its authority under the solid waste laws. Grayson, 5 Wis.2d at 211. Should there be any reasonable doubt that the agency acted without implied authority or exceeded the bounds of that authority, the question should be resolved against the exercise of the agency's authority. State ex rel. Farrell v. Schubert, 52 Wis.2d 351, 358, 190 N.W.2d 529 (1971); Kimberly-Clark Corp. v. P.S.C., 110 Wis.2d 455, 462, 329 N.W.2d 143 (1983).

I find that DNR acted outside the proper bounds of its implied authority when it defined "owner" and "operator" in NR 500.03(92) and NR 500.03(94). DNR acted outside

its authority because the broad definitions of "owner" and "operator" significantly expand Chapter 144 and are contrary to several of its definitional and operative provisions. I therefore agree with petitioner's assertion that because the definitions are inconsistent with sec. 144.43 to 144.47, DNR acted beyond its statutory authority. The reasons for this conclusion are set forth below.

(a) The administrative definitions are inconsistent with the text of Chapter 144.

In his assertion that DNR acted outside its statutory authority, DeBeck cites statutory text that limits the definitions of "owner" and "operator" within the solid waste statute. (Petitioner's brief at 6). In construing a statute, the entire section and related sections are to be considered in its interpretation. State v. Clausen, 105 Wis.2d 231, 244, 313 N.W.2d 819 (1982). Further, statutes relating to the same subject are to be construed together and harmonized. Hanson Storage Co. v. Wis. Transp. Comm., 87 Wis.2d 385, 391, 275 N.W.2d 360 (Ct. App. 1918).

As discussed, DNR promulgated the administrative definitions of owner and operator by directly incorporating them from subsection 144.442(9), Wis. Stats. In so doing, DNR has, in effect, applied the broad definitions in subsection (9) to all regulatory and enforcement mechanisms throughout Chapter 144. Chapter 144, however, has its own definition of "owner" found at Sec. 144.01(9). That definition provides that owner "means the state, county, town, town sanitary district, city village, . . . or individual owning or operating any water supply, sewerage or water system or sewage and refuse disposal plant." Consequently, the Legislature created two separate definitions of "owner": one found in the specific subsection of sec. 144.442(9), which DNR incorporated, and the other found in the

introductory general definition section of Chapter 144. Although the general definition quoted above may not, as the respondent asserts, "shed much light on the controversy before this court,"[6] the Legislature must have intended it to have general applicability. DNR, however, incorporated the definitions from a particular subsection and applied them to administrative regulations covering the entire statute despite the fact that the Legislature had already created a generally applicable definition of one of the terms. DNR's incorporated definitions are therefore at odds with the text of Chapter 144. See Kimberly-Clark Corp. v. P.S.C., 110 Wis.2d 455, 463-64, 329 N.W.2d 143 (1983).

This conclusion is also supported by a closer examination of the particular statutes. Most significant is the introduction to the two sections. Section 144.01, the general definition section for Chapter 144, begins as follows:

144.01. Definitions

> In this chapter, unless the context requires otherwise:
> (9) "Owner" means . . . (emphasis added).

Whereas sec. 144.442, incorporated by DNR in its definition of owner and operator, begins as follows:

144.442. Environmental repair

> (9) Recovery of expenditures. (a) Definitions. In this subsection:
> 2. "Owner" means . . . (emphasis added).

It is evident that the Legislature intended different definitions for different uses within Chapter 144. In the first subsection, the Legislature defined "owner" generally in order to apply to all of Chapter 144. In the second subsection, the Legislature defined

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[6]Respondent's brief at 5, n.2.

owner and operator specifically for the purposes required in subsection 144.442.

Furthermore, in light of the purposes underlying subsection 144.442, these specific definitions of owner and operator are reasonable. As noted earlier, the subsection is entitled "Cost Recovery" and is intended to grant DNR powers to prosecute and recover expended costs from environmental damage. The definitions of owner and operator are broad in this subsection so that DNR may recover costs from diverse landfill participants, whether presently or historically involved. The Legislature apparently decided that once the State had expended money to repair environmental damage, it was imperative to impose liability on most landfill participants. The Legislature did not decide to impose this broad reach on all enforcement provisions of Chapter 144, as evidenced by limiting the definition to "(i)n this subsection."

Although the text and purposes of sec. 144.442 limits the broad definitions to the particular subsection, DNR argues that the definitions should nonetheless apply to former owners and operators of solid waste facilities. DNR asserts that the cost recovery subsection should not limit its power to define its terms. (Respondent's brief at 9-10). To support this argument, DNR reasons that 144.442(11) makes clear that cost recovery powers do not affect other liabilities or powers found in either the common law or other statutory provisions. That argument, however, does not address the issue before the Court. The argument does not explain (1) why the Legislature provided different definitions of owner for different provisions in the statute and (2) what authority, either common law or statutory, authorizes DNR to define owner and operator so broadly, thereby increasing the liability of landfill participants beyond that found in Chapter 144 generally.

(b) The administrative definitions are inconsistent with other substantive provisions of Chapter 144.

DeBeck argues that the definitions of "owner" and "operator" are also at odds with a statutory provision governing the transference of landfill responsibility. (Petitioner's brief at 9-10). DNR argues that the transference provision does not apply to this case. (Respondent's brief at 11).

I find that DNR's definitions are inconsistent with the statutory provision that allows for transfer of solid waste responsibilities. Section 144.444, Wis. Stats., provides the following:

> **Transference of Responsibility.** (1) Any person acquiring rights of ownership, possession or cooperation in a licensed solid or hazardous waste facility at anytime after the facility begins to accept waste is subject to all the requirements of the license approved for the facility including any requirements relating to long-term care of the facility . . . Upon acquisition of the rights, the department shall issue a new operating license if the previous licensee is no longer connected with the operation of the facility, if the new licensee meets all requirements specified in the previous licensee, the plan of operation, if any, and the rule promulgated under 144.62, if applicable.

Under this section, once DNR has issued a new operating license to a successor-owner, that individual acquires the responsibilities associated with the landfill. This section therefore allows for the transfer of responsibility from one owner to another. The administrative definitions of owner and operator in NR 500.03, however, would negate this transfer of responsibility and therefore are inconsistent with the apparent purposes of sec. 144.444(1), Wis. Stats.

DNR nonetheless asserts that the administrative orders are consistent with sec. 144.444, Wis. Stats. DNR reasons that sec. 144.444 does not apply here because DeBeck is still connected with the operation of the facility whereas the statute provides that transfer

is not permitted if the previous licensee is still connected to the operation of the facility. (Respondent's brief at 11). DNR, however, has not argued in its brief that the statute and definition are valid as applied, but, instead, has argued that this case raises "but one legal issue: whether Wisconsin Admin. Code Secs. NR 500.03(92) and (94), defining 'owner' and 'operator,' are valid administrative rules." (Respondent's brief at 3-4).

In determining the validity of administrative rules, this Court must examine statutory intent such as that found in sec. 144.444. The section demonstrates that the Legislature intended an owner/operator to have the ability to convey responsibility to another owner/operator.[7] DNR's need to inspect and approve the successor licensee is largely undermined if the original licensee remains liable for all purposes under the Administrative Code. The broad definitions of owner/operator found in the administrative regulations, on the other hand, would not allow this transfer and therefore are not consistent with legislative intent.

(c) The administrative definitions create an additional enforcement mechanism not authorized by Chapter 144.

DeBeck argues that he is not personally responsible for the closure of the Refuse Hideaway Landfill. He reasons that the definitions of "owner" and "operator" are invalid as a tool to impose personal liability upon him. (Petitioner's brief at 6). DNR responds that the definitions are a valid use of its administrative duty to enforce the solid waste laws. (Respondent's brief at 15).

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[7]In order to convey responsibility under this section, DNR must first approve the new owner/operator by agreeing to issue a new license to the landfill. Sec. 144.44(3)(c), Wis. Stats.

Chapter 144 requires owners and operators of solid waste facilities to follow particular guidelines in order to assure the safe disposal of Wisconsin's refuse. To enforce the guidelines, Chapter 144 provides DNR with particular enforcement mechanisms.

In the case at hand, for example, DNR may take several courses of action to enforce compliance with a landfill closure plan. Under sec. 144.44(3), DNR may enforce compliance by initiating an action under sec. 144.47 or 144.73. Under sec. 144.44(8), DNR may enforce compliance by initiating action under sec. 144.72, referring the matter to the department of justice under sec. 144.98, or issuing an order pursuant to various procedural requirements outlined in the section.

Not only are these mechanisms available to DNR, DNR has relied on some of them to issue and modify the closure requirements for the Refuse Hideaway Landfill. DNR relied on sec. 144.44(3) to issue the initial closure plan approval of April 7, 1987 and the modifications to the closure plan on September 6, 1988. And DNR relied on sec. 144.44(8) to issue the special consent order of May 2, 1988.

Perhaps dissatisfied with these enforcement procedures, DNR has chosen to use the administrative definitions of owner and operator to, in essence, create an additional enforcement mechanism against DeBeck. The definitions create an additional enforcement mechanism because they allow DNR to hold a broad range of individuals personally responsible for any action required of an owner or operator under the solid waste laws. DNR's implicit authority to define its terms does not include the authority to create an independent enforcement mechanism not provided for by the Legislature. Where the Legislature has established sanctions, a court is not free to impose additional sanctions

solely because those sanctions may appear meager. Park Bank-West v. Mueller, 151 Wis.2d 476, 484, 444 N.W.2d 754 (Ct. App. 1989).

A similar analysis lead the Supreme Court to find that DILHR exceeded its implied authority in State (Dept. of Administration) v. Dept. of Industry, Labor and Human Relations, 77 Wis.2d 126, 252 N.W.2d 353 (1977). In that case, DILHR had enacted an absolute job preference mechanism to enforce its mandate to hire more minorities. Holding that this mechanism exceeded DILHR's authority, the Supreme Court stated: "Other statutory statements cast significant doubt upon the view that the legislature impliedly authorized absolute preferences, and also the drastic nature of absolute preferences would indicate that had the legislature intended to grant the power for their implementation, it would not have done so in such an indefinite manner." Id. at 138. Following this analysis, it seems logical that if the Legislature had intended DNR to hold a vast array of individuals personally liable for numerous statutory requirements, it would have done so in a more definite manner.

The Legislature has specifically provided DNR with a variety of enforcement options under Chapter 144. I conclude that DNR cannot use its rulemaking power to define its terms to create, in essence, an additional enforcement mechanism against DeBeck. Nothing in this opinion precludes DNR from using those mechanisms to enforce its orders or to assert that DeBeck is personally liable for the closure costs under sec. 144.442(9).

(d) Policy considerations do not outweigh the statutory contradictions created by the administrative definitions.

DNR argues that the policy and purpose of the solid waste laws would be frustrated if it is denied the power to define "owner" and "operator" as it has done in NR 500.03(92).

and (94). (Respondent's brief at 7-8).

DNR's policy arguments in support of the administrative definitions do not outweigh the legislative mandates of Chapter 144, as outlined above. DNR claims that if it cannot hold DeBeck personally liable via administrative orders, landfill owners will escape liability by conveying ownership to corporate forms. This policy concern, however, has been addressed by the Legislature in secs. 144.441, 144.443 and 144.444. Those sections provide for an elaborate screening by DNR of an applicant's financial responsibility, both at the time of application and for a time period of up to or exceeding 40 years after the landfill is closed.

In essence, the complexity of this case arises from the fact that the Refuse Hideaway Landfill is an older facility not subject to the more stringent regulatory restrictions enacted recently by the Legislature. For example, from the record it appears that neither DeBeck nor Refuse Hideaway, Inc. underwent the financial responsibility tests required of new operators or had a plan of operation that imposed 30 to 40 year responsibility, as is now done for operator's seeking to construct or purchase a landfill.[8]

To impose these restriction on DeBeck now, however, by issuing an administrative order, would violate the Legislature's intent. Although the Legislature has imposed more rigorous restriction on newer facilities, it has declined to impose those restrictions on older facilities. A majority of provisions in the Solid Waste sections differentiate newer and older facilities in one way or another. The Legislature expressly applied the provisions only to

[8]Secs. 144.441 and 144.443, Wis. Stats.

newer facilities.[9]

This Court appreciates the importance of DNR's responsibilities in safeguarding Wisconsin's water quality. In doing so, however, DNR must stay within the bounds of the legislative authority which circumscribes its rulemaking power. It has not done so here because NR 500.03(92)&(94) are only valid if the Legislature intended past owners/ operators to be strictly liable for on-going operations of a landfill ad infinitum. As discussed above, the Legislature did not express such a broad intent and, therefore, the administrative regulations in question are not valid.

B. DEBECK'S STATUS AS AN "OPERATOR"

Petitioner DeBeck contends separately that even if he is considered a current owner, he is not a current operator of the Refuse Hideaway Landfill. (Petitioner's brief at 11-12). DNR responds that under the definition of "operator" found in NR 500.03(2), Wis. Admin. Code, DeBeck is clearly an operator of the Refuse Hideaway Landfill. (Respondent's brief at 12).

I cannot dispose of this question. Firstly, in its argument that DeBeck is a current operator, DNR relies on the administrative definition of "operator" this Court has ruled invalid. Consequently, DNR has not had an opportunity to rely on valid law to refute DeBeck's contention. And secondly, the record before me does not provide sufficient facts to determine DeBeck's legal and practical status as an operator of the Refuse Hideaway Landfill.

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[9]Secs. 144.441 and 144.44(3),(8), Wis. Stats.

C. DEBECK'S PERSONAL LIABILITY FROM THE MAY CONSENT ORDER

DNR argues that the May 2, 1988 consent order imposes personal liability on DeBeck to comply with the September 6, 1988 and January 17, 1989 orders. (Respondent's brief at 2). DNR asserts that DeBeck is liable because he signed the May 2, 1988 consent order and agreed to be personally responsible for the terms of the order. The consent order provides that DeBeck perform specific tasks and submit various reports to DNR. DNR has not asserted that DeBeck failed to perform those tasks or that DeBeck failed to submit the required reports. Instead, DNR argues that DeBeck is liable for modifications made to the consent order. In the consent order, however, DeBeck reserved his full statutory rights to challenge any modifications DNR made to those tasks in the future. The underlying consent order itself, therefore, does not impose liability on DeBeck to personally comply with the September, 1988 and the January, 1989 orders. In addition, sec. 144.42(11)(b) supports this conclusion because it states that if a person takes remedial action, with or without an agreement, no admission of liability will be inferred.

D. DUE PROCESS AND STATUTORY REQUIREMENTS

In his alternative requests for relief, petitioner DeBeck requests that the administrative orders be remanded in order to provide additional federal due process procedural protection and statutory procedural protection under sec. 144.44(8). (Petitioner's brief at 12). These due process or statutory questions need not be addressed in light of the relief afforded in the remand order.

ORDER

For the above stated reasons, the petitioner's request for remand with instructions to reissue the September 6, 1988 and January 17, 1989 orders is hereby **GRANTED**. Respondent shall reissue the orders that were the subject of this action to Refuse Hideaway, Inc., solely, and not include the petitioner personally. The orders must be reissued because they rely on administrative regulations that exceed DNR's statutory authority under Chapter 144.

BY THE COURT,

Mark A. Frankel

MARK A. FRANKEL
CIRCUIT JUDGE

Dated: May 1, 1991

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
Carroll D. Besadny
Secretary

BOX 7921
MADISON, WISCONSIN 53707

File Ref: 4190

May 2, 1988

Mr. John DeBeck
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

Re: Special Consent Order SOD-88-02A

Dear Mr. DeBeck:

Attached are two copies of a special consent order relating to the closure and monitoring of the Refuse Hideaway Landfill, License number 01953. The landfill is located in the W½ of the SW¼ of the NW¼, Section 8, T7N, R8E, Town of Middleton, Dane County, Wisconsin. The consent order is based upon a finding that the site or facility does not meet minimum solid waste standards promulgated under section 144.43, Stats. This consent order would supercede the proposed special order (number SOD-88-02) issued on April 6, 1988.

Please sign both copies of the special consent order and return them to me by the end of the business day today May 2, 1988. A signed copy of the order will be returned to you for your records.

The Bureau of Solid and Hazardous Waste Management will designate staff members to expedite the approval process. If you have any questions or do not intend to sign this order, please call Charles Leveque at (608) 266-0228.

Sincerely,

Kathryn A. Curtner
Assistant Administrator
Division of Enforcement

Encs:
cc: SW/3
C. Leveque - LC/5
J. Brusca - SD
David W. Neeb, Davis and Kuelthan, S.C.
Bob Selk - DOJ

SPECIAL CONSENT ORDER

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Closure of the Refuse Hideaway Landfill, License Number 01953, Town of Middleton, Dane County, Wisconsin	))))	Special Consent Order No. SOD-88-02A

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND CONSENT ORDER

FINDINGS OF FACT

1. John DeBeck and Refuse Hideaway, Inc., own and operate the Refuse Hideaway Landfill, which is located in the Town of Middleton, Dane County, Wisconsin. The landfill initially was licensed by the Department during 1974 and has been in operation since that time. The landfill has received approximately 1.3 million cubic yards of solid waste.

2. The Refuse Hideaway Landfill is a licensed landfill which is classified as a "Nonapproved facility" as defined by sec. 144.441(1)(c), Stats. However, there is an April 7, 1987, approved closure plan for the landfill.

3. The Refuse Hideaway Landfill has been developed as a natural attenuation landfill. The natural attenuation design concept was a common design alternative at the time the site was initially licensed. As such, the site was constructed without substantial engineering modifications, such as a clay liner and leachate collection system.

4. Unconsolidated soils in the vicinity of the landfill consist of lake derived sediments over glacial till. Soils deposits of over 100 feet in depth are present south of the landfill while bedrock is at the ground surface north of the landfill. The water table is located approximately 10 feet below the base of the landfill. Downward vertical gradients were measured in areas around the perimeter of the landfill showing that there is the potential for migration of contaminants downward into the bedrock aquifer.

5. Because of mounded leachate within the landfill, there may be flows of leachate radially outward from the landfill. Additional investigation should be done to determine if this is the case and to what extent flow is affected by the leachate mound. However, it is clear that one component of the groundwater flows southernly toward Black Earth Creek, which is a local groundwater discharge area. Black Earth Creek is a Class I trout stream.

6. Groundwater in the vicinity of the landfill is utilized as a domestic water supply by a number of homeowners. Several private wells in the area have shown elevated concentrations of certain contaminants, including vinyl chloride. However, the source of the contamination in these wells cannot be definitely established at this time without further investigation.

7. A number of groundwater monitoring wells have been installed at and in the vicinity of the landfill. Results obtained from some of these wells indicate that disposal operations at the landfill have caused a detrimental affect on groundwater quality. Evaluation of available groundwater quality information indicates that disposal operations have caused the attainment and exceedance of groundwater quality standards established under ch. NR 140, Wis. Adm. Code. Exceedances of preventative action limits for indicator parameters and substances of health or welfare concern, as well as enforcement standards for substances of health or welfare concern have been caused by operation of the landfill.

8. These groundwater impacts will continue for some time in the future. However, termination of waste filling operations will prevent additional contaminants from being introduced into the landfill and additional contaminants from being introduced into the groundwater system from those wastes. Installation of a final cover system over the fill area will reduce the rate at which leachate is generated within the landfill.

9. The Department has considered the range of responses to groundwater standard exceedances listed in secs. NR 140.24 and 140.26, Wis. Adm. Code. Based upon this evaluation, termination of disposal operations and closure of the landfill, and further investigation to determine the scope and extent of groundwater impacts, and any necessary remedial action, is reasonable and necessary to achieve compliance with groundwater standards, and to protect public health, safety, and welfare.

CONCLUSIONS OF LAW

1. The Department has authority under secs. 144.44(8) and 144.431, Stats., to order necessary corrective action at a landfill where minimum standards established under ch. NR 504, Wis. Adm. Code, have not been complied with.

2. The Refuse Hideaway Landfill is being operated and maintained in violation of sec. NR 504.04(4)(d), Wis. Adm. Code, and the groundwater standards established in ch. NR 140, Wis. Adm. Code.

3. Based upon the foregoing, the Department has authority to issue the following order.

The Department, therefore, orders:

1. John DeBeck and Refuse Hideaway, Inc., shall, by no later than May 16, 1988, cease all solid waste disposal operations at the Refuse Hideaway landfill.

2. John DeBeck and Refuse Hideaway, Inc., shall, by no later than June 1, 1988, submit a proposed closure plan modification to the Department for approval. This submittal shall contain:

   a. An updated topographic survey with a maximum 2 foot contour interval of the 40 acre landfill property.

   b. Revised final grades with slopes of at least 3%, but no greater than 33%.

   c. A drainage system meeting the requirements of NR 506.08(3)(b), Wis. Adm. Code.

   d. A final cover system design that meets the requirements of NR 504.07, Wis. Adm. Code.

   e. Documentation of a clay borrow source or sources for sufficient quantities of clay to cap the entire area of the landfill where solid waste has been disposed. The soils shall meet the requirements of NR 504.07(4), Wis. Adm. Code and have a minimum Plasticity Index (PI) of 10 and an average PI of 12 and a minimum Liquid Limit (LL) of 20 and an average LL of 25.

3. John DeBeck and Refuse Hideaway Inc., shall, by no later than July 1, 1988, submit a plan to the Department for approval to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants.

4. John DeBeck and Refuse Hideaway Inc., shall, by no later than August 15, 1988, install the 2 foot thick clay capping layer of the approved final cover system over the entire area of the landfill where solid waste has been disposed, and shall, by no later than September 15, 1988 complete placement of the cover layer as well as topsoiling, seeding, fertilizing, and mulching of the approved final cover system.

5. John DeBeck and Refuse Hideaway, Inc., shall construct and develop 5 of the following 10 wells by May 16, 1988, and the remaining 5 wells by June 1, 1988, in accordance with NR 508, Wis. Adm. Code at the locations specified below :

   a. The upper well (P-23S) of a well nest located between the landfill and well P-20S, approximately 200 feet east of the eastern property boundary of the landfill.

b. The upper (P-25S) well of a 3 point well nest located approximately 300 feet south of the southeastern corner of the property boundary of the landfill.

c. A well nest (P-26S and P-26D) located approximately 300 feet northwest of the northwestern corner of the property boundary of the landfill.

d. The upper well (P-27S) of a well nest located approximately 200 feet west of the southwestern corner of the property boundary of the landfill.

e. A water table observation well (P-28S) located in the north eastern corner of the property boundary of the landfill.

f. The upper well (4c) of a well nest located approximately 1,750 feet southwest of the southwestern corner of the property boundary of the landfill.

g. A well nest (4e) approximately 50 feet south of the southern property boundary of the landfill at approximate western coordinates of B-24.

h. A bedrock piezometer (P-21BR) at the location of P-21S.

6. John DeBeck and Refuse Hideaway, Inc., shall by July 1, 1988 construct and develop the following additional wells installed into the bedrock in accordance with NR 508, Wis. Adm. Code at the locations specified below:

a. The lower well (P-23D) of the well nest listed in 5a., above.

b. The intermediate well (P-25D) and bedrock piezometer (P-25BR) of the 3 point well nest listed in 5b., above.

c. The piezometer (P-27D) of the well nest listed in 5d., above.

d. The piezometer (4c) of the well nest listed in 5f., above.

During installation, wells installed under this paragraph shall be sampled continuously in maximum 10 foot intervals using a field gas chromatograph (GC) for the purpose of detecting the presence of contamination with depth in the aquifer. This information shall be used to properly locate the screened interval of the monitoring well. [The exact locations and depths of the required monitoring wells shall be approved by Department staff prior to installation].

7. As part of the groundwater investigation, all existing and proposed monitoring wells shall be sampled twice with a minimum of 15 days between sampling dates. Each well shall be sampled and analyzed for the following parameters:

a. Field pH, field temperature, field specific conductance (corrected to 25 degrees centigrade), COD, total alkalinity, total hardness, notation of color, odor and turbidity at the time of sampling, and measurement of water elevation prior to purging the wells.

b. Public health and welfare parameters:

Chloride, copper, dissolved iron, manganese, sulfate, total dissolved solids, zinc, arsenic, barium, cadmium, chromium, fluoride, lead, mercury, nitrate plus nitrite-nitrogen, selenium, and silver. The metals analyses shall be performed using a method which is capable of detecting and quantifying values at or below the preventive action limit for each parameter, except selenium.

c. A GC-MS volatile organic compound scan with quantification shall be run on both sampling rounds. These analyses shall be performed according to EPA SW-846 method 8240 or EPA wastewater method 624. As an alternative, the VOC analyses shall be performed according to EPA SW-846 methods 8010/8020 or EPA wastewater methods 601/602. The Department shall be notified and approve of detection limits for the volatile organic compound scans prior to the first sampling date.

8. John DeBeck and Refuse Hideaway, Inc., shall, by August 1, 1988 submit, a phase 1 groundwater investigation report for Department review and approval. The report shall include documentation of the well installations in accordance with NR 508.11, Wis. Adm. Code, a water table contour map and the results of the field GC sampling.

9. John DeBeck, and Refuse Hideaway, Inc., shall, by October 1, 1988, submit a remedial action report for Department review and approval. The report shall include:

a. An evaluation of the local and regional groundwater flow directions and the degree and extent of groundwater contamination around the site; the nature, persistence and likely fate of any contaminants; the existing or potential environmental and health effects of the contamination.

b. A proposal for remedial measures which are technically and economically feasible for renovating or restoring ground/surface water quality. The report shall include:

i. An evaluation of the technical and economical feasibility for extracting and lowering the existing leachate mound within the landfill.

ii. An evaluation of the technical and economical feasibility for pumping and treating contaminated groundwater around the landfill for the purpose of preventing the further migration of contamination, and to restore the contaminated groundwater to compliance with state groundwater standards listed in NR 140.10-.12, Wis. Adm. Code.

c. A proposal for long-term environmental monitoring which would evaluate the effects of any remedial action on the continued performance of the landfill.

The report shall also include justification of why remedies other than those proposed are not technically or economically feasible to implement.

10. Nothing in this order shall be construed as an admission of liability on the part of John DeBeck personally, or Refuse Hideaway, Inc., for any purpose other than for action taken for failure to comply with the terms of this order.

The Department reserves the right to require the submittal of additional information or modify this order if conditions warrant in which case John DeBeck and Refuse Hideaway, Inc., will have full right under the law to contest any modification of this order.

Waiver and Stipulation

John DeBeck, individually and as president of Refuse Hideaway, Inc., hereby waives further notice and all statutory rights to demand a hearing before the Department of Natural Resources and to commence any judicial action regarding the foregoing Findings of Fact, Conclusions of Law, and Consent Order under Sections 144.431, 144.44(8), 227.42, 227.52 and 227.53, Wisconsin Statutes, or any other provision of law. John DeBeck, individually and as president of Refuse Hideaway, Inc., 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 Sections 144.98 and 144.99, Wisconsin Statutes. The undersigned certifies that he is authorized by Refuse Hideaway, Inc., to execute such Consent Order, Waiver, and Stipulation.

STATE DEPARTMENT OF NATURAL RESOURCES

by Kathryn A Cuntner — May 3, 1988
Kathryn A. Cuntner — Date
Assistant Administrator
Division of Enforcement

John W DeBeck — 5-2-88
John DeBeck — Dated

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Carroll D. Besadny
Secretary

JAN 17 1989

File Ref.

Mr. John DeBeck
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

4430

SUBJECT: Remedial Action Report For the Refuse Hideaway Landfill
Consent Order SOD-88-02A

Dear Mr. DeBeck:

The Bureau of Solid and Hazardous Waste Management, Wisconsin Department of Natural Resources, has completed its review of the November, 1988, Remedial Actions Report submitted under Consent Order SOD-88-02A. While the report begins to address many of the issues surrounding the landfill, it is apparent that further work is necessary in the form of both additional investigations and remedial action design and implementation. The Department is issuing a conditional modification to your closure plan approval detailing the additional work which is needed to be performed. The Plan Modification is attached and is final. The date of this letter is the effective starting date for requirements scheduled in the Plan Modification.

The Remedial Action Report adequately addresses many of the requirements of the Consent Order. RMT Inc., should be commended for their work on several aspects of the investigation, particularly their evaluation of contaminant migration pathways. However, the conditions of the consent order regarding proposed remedial actions have not been adequately addressed. The enclosed Closure Plan Modification addresses these shortcomings and requires that a number of activities be completed, within specific time frames. This includes the following:

1. Analyzing landfill leachate for the Target Compound List within 45 days, and signing a leachate treatment agreement within 60 days.

2. Installing a partial gas and leachate extraction system consisting of at least 3 gas and leachate extraction wells. The system shall be operational within 90 days. A final detailed design for construction of a full gas and leachate extraction system shall be submitted to the Department within 180 days. This requirement supersedes conditions 2 and 3 of the closure plan approval modification, dated September 6, 1988.

3. An investigation into alternatives for providing a safe, permanent water source for the three private residences that have been affected by groundwater contamination. This includes a hydrogeologic evaluation to locate potentially uncontaminated zones within the sandstone aquifer, an evaluation of the use of point-of-entry

filtration devices to remove contaminants, and an investigation into providing the affected residences with a permanent alternate source of potable water off of their properties.

4. The installation and sampling of additional monitoring wells at greater distances from the landfill to define the degree and extent of contamination. This includes constructing iso-concentration maps, an analysis of the effect of Black Earth Creek in the groundwater flow system, and any environmental impacts upon the Creek.

5. An investigation and comprehensive remedial design for the implementation of a groundwater pumping, treatment and discharge system.

6. Sampling of all private wells within a 1 mile radius of the site.

Please call Paul Huebner at (608) 267-7573 or Ray Tierney at (608) 267-2465 if you have any questions regarding this approval.

Sincerely,

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section
Bureau of Solid & Hazardous Waste Management

cc: Joe Brusca - SOD
Marie Stewart - MA
Chuck Leveque - LC/5
Paul Huebner - SW/3
Mark Giesfeldt - ERR/3
Dave Neeb - Davis & Kuehlyon, S.C.
Bob Selk - DOJ
Lee Bartlett - RMT
Bob Anders - Dane Co. Board of Supervisors
Rep. Dave Travis
Rep. Russ Feingold
PSS - SW/3

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL MODIFICATION FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. Refuse Hideaway Inc., owns and operated, and John DeBeck owned and operated the Refuse Hideaway solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin.

2. The Department issued a conditional closure plan approval for the facility on April 7, 1987.

3. The Department issued special consent order SOD-88-02A on May 2, 1988. Provision 3 of the order required John DeBeck and Refuse Hideaway, Inc., to submit a plan to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants. Provision 9 of the order required John DeBeck and Refuse Hideaway, Inc., to submit by October 1, 1988 a remedial action report for Department review and approval.

4. On July 1, 1988, RMT, Inc., on behalf of Refuse Hideaway, Inc., and John DeBeck, submitted a report to the Department proposing a conceptual plan for gas management and summarizing monitoring well construction to date. The Department issued a conditional closure plan approval for gas monitoring and a gas collection system on September 6, 1988.

5. On November 2, 1988, RMT, Inc., on behalf of Refuse Hideaway, Inc., and John DeBeck, submitted a remedial action report to the Department for review and approval. The report contained information relating to the local and regional groundwater flow directions and the degree and extent of groundwater contamination around the Refuse Hideaway landfill; the nature, persistence and likely fate of any contaminants; the existing or potential environmental and health effects of the contamination; a proposal for remedial measures which are technically and economically feasible for renovating or restoring ground/surface water quality; and a proposal for long-term environmental monitoring which would evaluate the effects of any remedial action on the continued performance of the landfill.

6. The remedial action report includes the following: a letter, the report, 16 appendices and 8 plan sheets submitted by RMT, Inc., dated November 1, 1988 and received by the Department on November 2, 1988.

7. Additional documents considered in connection with this closure plan approval modification includes the following:

   a. Special consent order SOD-88-02A.

   b. The September 6, 1988 closure plan modification.

   c. Various technical documents on file with the Wisconsin Department of Natural Resources, Solid Waste Management Section.

   d. Wisconsin Department of Natural Resources files.

8. Additional facts relevant to the review of the remedial action report include the following:

   a. Municipal refuse disposed at the Refuse Hideaway landfill produces methane gas. The clay cap and frozen ground conditions will inhibit release of the methane gas to the atmosphere and may cause methane gas to migrate off-site.

   b. NR 506.08(6), Wis. Adm. Code requires that a Department approved system to efficiently collect and combust hazardous air contaminants be installed at the landfill within 18 months of February 1, 1988.

   c. Municipal refuse and infiltration of precipitation into the refuse at the Refuse Hideaway landfill produces leachate. A leachate mound has formed within the landfill and leachate is flowing radially outward from the landfill. Contaminants from the leachate have migrated into unconsolidated soils and the bedrock aquifer used for a domestic water supplies by a number of homeowners. As a result, several private wells in the area have shown elevated concentrations of certain contaminants, including vinyl chloride.

   d. A number of groundwater monitoring wells have been installed at and in the vicinity of the landfill. Results obtained from these wells document that the landfill has caused a detrimental effect on groundwater quality. Evaluation of available groundwater quality information documents that the landfill has caused the attainment and exceedance of groundwater quality standards established under ch. NR 140, Wis. Adm. Code. Exceedances of preventative action limits for indicator parameters and substances of health or welfare concern, as well as enforcement standards for substances of health or welfare concern have been caused by leachate leaking from the landfill.

   e. These groundwater impacts will continue for some time in the future. However, efficient extraction and treatment of gas and leachate will significantly limit additional contaminant loading to the environment.

9. Based upon an assessment of the factors identified in NR 140.24 and NR 140.26, Wis. Adm. Code, the special conditions set forth below are needed to achieve compliance with groundwater standards, and to assure that public health, safety, and welfare is protected. If the special

conditions are complied with, the required modifications will not inhibit compliance with the standards set forth in NR 500-520, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44, Stats., to modify a plan approval if the modification is needed to achieve compliance with the groundwater standards in ch. NR 140, Wis. Adm. Code, and to assure that public health, safety and welfare is protected.

2. In accordance with the foregoing, the Department has authority under s. 144.44 Stats., to issue the following conditional plan approval modification.

CONDITIONAL CLOSURE PLAN APPROVAL MODIFICATION

The Department hereby modifies the closure plan approval issued to Refuse Hideaway, Inc., and John DeBeck for the Refuse Hideaway landfill, by adding the following conditions:

1. Within 45 days of the effective date of this closure plan approval modification a leachate sample shall be collected from two of the leachate head wells at the Refuse Hideaway landfill and be analyzed for the parameters listed in the Federal Target Compound List (formerly the Hazardous Substance List).

2. Within 45 days of the effective date of this closure plan approval modification a draft leachate treatment agreement shall be submitted to the Department for review. A signed leachate treatment agreement shall be submitted to the Department within 60 days of the effective date of this closure plan approval modification.

3. Within 90 days of the effective date of this closure plan approval modification a partial gas and leachate extraction system consisting of at least 3 gas and leachate extraction wells shall be constructed and begin operating. The extraction wells shall be installed a minimum of 3 feet into the base soils beneath the refuse. The well borings shall be a minimum of 12 inches in diameter and the well casing shall be 6-inch diameter Schedule 80 PVC slotted over the lower two-thirds of its length. The submersible pump to be placed in each extraction well shall be set to activate whenever a leachate head of no greater than 3 feet accumulates within the well. A temporary leachate storage tank sized to provide a minimum of 4-days storage at greatest expected condensate or leachate extraction rates shall also be installed and connected to the partial leachate extraction system.

4. Based on the results of the partial gas and leachate extraction system, within 180 days of the effective date of this closure plan approval modification a final detailed plan for construction of a full gas and

leachate extraction system shall be submitted to the Department for review and approval. The submittal shall consist of a bound report and associated engineering drawings which, in addition to an in-depth presentation of the chosen design and supporting rationale, shall also include:

a. An identification and thorough discussion of all construction tasks and their phasing, as well as a proposed time schedule for completion of each task.

b. A proposed comprehensive construction documentation program for the gas and leachate extraction system.

c. An identification of all elements of a proposed construction documentation report to be submitted to the Department for review and approval.

d. A detailed proposal for operation, monitoring and regular maintenance of all aspects of the gas and leachate extraction system. This shall include a method of documenting the observed areas of influence for each gas and leachate extraction point.

5. The final detailed plan for the landfill gas and leachate extraction system shall incorporate the following design concepts:

a. Extension of all extraction wells to a depth of 3 feet below the base of the refuse. If, at any locations, the base of the refuse cannot be readily determined, the wells shall be extended to 3 feet below the estimated grades for the base of the landfill as depicted in the November, 1988 remedial action report. Unless otherwise demonstrated to the satisfaction of the Department, the well borings shall be a minimum of 12 inches in diameter and the well casing shall be 6-inch diameter Schedule 80 PVC slotted over the lower two-thirds of its length.

b. Overlapping radii of influence of at least 0.5 feet of drawdown for all extraction wells to cover the entire area of the landfill where solid waste has been disposed. Unless otherwise demonstrated to the satisfaction of the Department, the gas and leachate extraction wells shall be located based upon a maximum assumed horizontal radius of influence of 125 feet for each well. A submersible pump is to be placed in each extraction well and shall be activated whenever leachate rises to a set height in the well. The set height shall be no greater than 3 feet.

c. Location of all header piping for the gas and leachate extraction system shall be proposed to be placed no greater than 5 feet below the final landfill surface.

d. Convenient performance of the following procedures from the final landfill surface:

1) Measurement of vacuum levels and gas concentrations at each

extraction well and in header line sections immediately adjacent to each extraction well.

2) Gas flow rate adjustments at each extraction well.

3) Accurate measurement of gas flow rates and concentrations in at least every major branch of the extraction system.

4) Measurement of leachate head levels and leachate extraction rates from each extraction well.

e. Collection of all condensate produced by the gas extraction system and treatment of the condensate as leachate.

f. Provisions for secondary containment and leak detection in any condensate or leachate storage tanks which prove to be necessary. Each tank shall be sized to provide a minimum of 4-days storage at the highest condensate or leachate extraction rates experienced.

g. Incineration of all landfill gas extracted in an environmentally acceptable fashion. Venting of any quantities of landfill gas is not an acceptable management strategy unless it can be demonstrated that the extracted gas does not exceed any hazardous air contaminant limitation for those substances contained in s. NR 445.03, Wis. Adm. Code.

h. Protection of all aspects of the gas and leachate extraction system from vandalism.

6. The following specific information shall be included as part of the design submittal for the full gas and leachate extraction system:

a. Calculations justifying the size and type of the chosen gas blower and any flare station(s).

b. Calculations justifying the sizes and types of submersible pumps chosen for the extraction wells and the sizes of any condensate or leachate storage tanks.

c. Location and design of each gas and leachate extraction well and of each gas and leachate monitoring well, including all leachate head monitoring wells.

7. Within 60 days of the effective date of this closure plan approval modification a geologic investigation of the potential for restoration of potable groundwater for the Schultz, Stoppleworth, and Wallin properties shall be performed and a bound report containing a detailed discussion of the investigation and results shall be submitted to the Department. The investigation shall include the following:

a. Downhole geophysical logging, testing to determine the integrity of the casing, packer testing of the open borehole in 10-foot increments, and any other tests deemed appropriate of the Stoppleworth well to identify contaminated zones within the sandstone

and to evaluate the potential for isolating zones within the sandstone unaffected by volatile organic compounds (VOCs).

b. An evaluation of the feasibility of a point of entry filtration system for the private residences that would meet the specifications of the Department of Industry, Labor and Human Relations and the Bureau of Water Supply.

c. An evaluation of the feasibility of providing a permanent alternative source of potable water off of the Schultz, Stoppleworth, and Swanson properties.

8. Within 120 days of the effective date of this closure plan approval modification monitoring wells shall be installed and developed at the locations proposed in the November, 1988 remedial action report, and restated below, in accordance with NR 508, Wis. Adm. Code. The exact locations and depths of the required monitoring wells shall be approved by Department staff prior to installation. The monitoring wells shall be placed at the following locations to define the extent of groundwater contamination, groundwater flow directions, and hydraulic properties of the aquifer(s):

a. A well nest (water table observation well and piezometer) approximately 1,000 feet north of the landfill between the Summers private well and the northwest corner of the landfill property boundary.

b. Two well nests (one on each side of Black Earth Creek each consisting of a water table observation well and two piezometers) approximately 3,600 feet and 4,300 feet, respectively southwest of the southwest corner of the landfill property boundary.

c. A well nest approximately 950 feet south of the landfill along State Trunk Highway (STH) "14" between the Roberts private wells and the southern landfill property boundary.

d. A well nest approximately 1,700 feet east of the eastern property boundary of the landfill.

e. A water table observation well approximately 750 feet north of the northern landfill property boundary.

f. A well nest approximately 1,000 feet west of the western landfill property boundary.

During installation, the piezometers required above shall be sampled continuously in maximum 10 foot intervals using a field gas chromatograph (GC) for the purpose of detecting the presence of contamination with depth in the aquifer. This information shall be used to properly locate the screened interval of the piezometers.

9. Within 120 days of the effective date of this closure plan approval modification, the newly required wells in condition 8, above and all of the existing monitoring wells for the Refuse Hideaway landfill shall be

sampled and analyzed on a quarterly basis. In addition, two initial rounds of sampling shall be performed on the newly installed wells required in condition 8, above with a minimum of 30 days between samples. All new and existing wells shall be sampled for the following parameters:

a. Field pH, field temperature, field specific conductance (corrected to 25 degrees centigrade), COD, alkalinity, total hardness, dissolved iron, chloride, sodium, magnesium, calcium, sulfate, notation of color, odor and turbidity at the time of sampling, and measurement of water elevation prior to purging the wells.

b. A GC-MS volatile organic compound scan with quantification. These analyses shall be performed using the test methods specified in NR 508.20(5)(e), Wis. Adm. Code.

10. Within 30 days of the effective date of this closure plan approval modification a GC-MS volatile organic compound scan with quantification shall be performed on a quarterly basis on a sample from all private wells within a one-mile radius of the Refuse Hideaway landfill property boundary. These analyses shall also be performed using the test methods specified in NR 508.20(5)(e), Wis. Adm. Code.

11. Within 180 days of the effective date of this closure plan approval modification an investigation to further assess the remedial alternative of groundwater pumping, treatment, and disposal of the treated groundwater, shall be performed and a bound report containing a detailed discussion of the investigation and results shall be submitted to the Department for review. The investigation shall at a minimum include the following:

a. Pump tests on pumping wells installed east, south, southeast and west of the landfill to determine the aquifer(s) characteristics needed to design the groundwater pumping system. The pumping tests shall be conducted according to accepted field methods and shall determine the cone of depressions of the wells by measuring drawdown in adjacent monitoring wells for varying rates of discharge that are approved by the Department prior to testing.

b. An analysis of groundwater samples from selected monitoring wells approved by the Department at or within the design management zone for the Refuse Hideaway landfill for the parameters in the Federal Target Compound List to determine the treatability of the contaminated groundwater.

c. Identification of the discharge limits, or the need for a permit, that will be required by the Bureau of Air Management for discharge of VOCs to the atmosphere and identification of the discharge limits and permits that will be required by the Bureau of Wastewater for discharge of the treated groundwater.

d. Identification of an appropriate means of discharging the treated groundwater. No direct discharge of treated groundwater into Black Earth Creek is acceptable.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition to the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: JAN 17 1989

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section

Paul M. Huebner

Paul M. Huebner, C.P.G.S., Site Evaluation Leader
Solid Waste Management Section

Ray Tierney

Ray Tierney, Hydrogeologist
Environmental Response and Repair Section

Paul M. Huebner / for Susan Fisher

Susan M. Fisher, Environmental Engineer
Solid Waste Management Section

pmh:
cc: Joe Brusca - SOD
Marie Stewart - MA
Chuck Leveque - LC/5
Mark Giesfeldt - ERR/3
Dave Neeb - Davis & Kuehlyon, S.C.
Bob Selk - DOJ
Lee Bartlett - RMT
Bob Anders - Dane Co. Board of Supervisors
Rep. Dave Travis
Rep. Russ Feingold
PSS - SW/3

Mailed to DeBe 1st Class & Atty D.E.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
Carroll D. Besadny, Secretary
Box 7921
Madison, Wisconsin 53707
TELEFAX NO. 608-267-3579
TDD NO. 608-267-6897

February 21, 1990

IN REPLY REFER TO: 8300

Mr. John DeBeck
Refuse Hideaway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Supplemental Finding of Fact and Conclusion of Law
Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill

Dear Mr. DeBeck:

In accordance with the Order to Remand issued in Refuse Hideaway, Inc. et. al. v. Wisconsin Department Natural Resources, Dane County Circuit Court Case No. 88 CV 5455, dated January 30, 1990, the Department hereby issues the following supplemental Finding of Fact and Conclusion of Law.

The Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill, issued by the Department on September 6, 1988, a copy of which is attached, is hereby amended as follows.

Add the following Finding of Fact:

John DeBeck held fee title and the operating license for the landfill in his own name during the period from 1974 to approximately 1982. During 1982, John DeBeck and his son, Thomas DeBeck, conveyed fee title to the landfill property to Refuse Hideaway, Inc., which is a corporation owned and controlled by them. Thereafter, the operating license for the landfill was held by Refuse Hideaway, Inc. John DeBeck controlled the operations of the landfill at all times during the period from 1974 to 1988, when operations were terminated.

Add the following Conclusion of Law:

The Department has authority to require owners and operators of landfills to take action pursuant to Chapters NR 506, 508, and 514, Wis. Adm. Code. John DeBeck and Refuse Hideaway, Inc., are owners and operators of the Refuse Hideaway Landfill, pursuant to sections NR 500.03(92) and NR 500.03(94), Wis. Adm. Code, and the law of this state.

In all other respects, the Findings of Fact, Conclusions of Law, and Conditional Closure Plan Approval Modification for the Refuse Hideaway Landfill, dated September 6, 1988, remains in full force and effect.

NOTICE OF APPEAL RIGHTS

If you believe you have the right to challenge this decision, you should know that Wisconsin Statutes and Administrative Rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resource as the respondent.

This notice is provided pursuant section 227.48(2), Stats.

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D, P.E., Chief
Solid Waste Management Section

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cc: Bob Selk - DOJ
Joe Brusca - SD
Attorney Michael Dunn

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
Carroll D. Besadny
Secretary
BOX 7921
MADISON, WISCONSIN 53707

IN REPLY REFER TO: 4410-2

SEP 0 6 1988

Mr. John DeBeck
Refuse Hideway Landfill
4808 Highway 12
Middleton, WI 53562

SUBJECT: Modification to the Closure Plan Approval, Gas Monitoring and Collection System, Refuse Hideaway Landfill #1953, Dane County

Dear Mr. DeBeck:

I am pleased to inform you that your requested modifications to your closure plan approval have been revieved and conditionally approved. The Department believes that the proposed modifications will not have an adverse effect on the performance of your landfill provided the conditions in the enclosed conditional closure plan approval modification are fulfilled. You should attach this conditional closure plan approval modification directly to the closure plan approval issued on April 7, 1987.

The report contained a proposed gas migration monitoring system, a proposed conceptual plan for gas management, and a summary on the progress of groundwater monitoring well construction.

The report implies that an active gas system which controls hazardous air contaminants is not required. Consent order SOD-88-02A requires a system which prevents the migration of explosive gases and efficiently collects and combust hazardous air contaminants. The requirements of Consent Order SOD-88-62A are in addition to the requirements of NR 500-520, Wis. Adm. Code.

As discussed on June 24, 1988, the proposal to place the waste removed during gas well construction back into the landfill is acceptable provided the area of waste placement is initially final covered with the remainder of the landfill. The gas well construction waste must be placed in the area stated in condition 4 of the August 15, 1988 closure plan modification. The final cover must be removed prior to construction waste placement and the final cover must be immediately replaced and redocumented following waste placement.

NR 506.08(6), Wis. Adm. Code requires the gas collection system to be installed by August 1, 1989. We are extending this date to September 30, 1989 due to the length of time needed to perform testing prior to gas system installation in order to determine an efficient design for the gas collection system.

Mr. John DeBeck

Please call Susan Fisher at (608) 267-9387 or Mark Gordon at (608) 267-7567 if you have any questions regarding this approval.

Sincerely,

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section
Bureau of Solid & Hazardous Waste Management

LS:SF:so32
8810\SW97747M.SMF

cc: Joe Brusca - SD
Marie Stewart - Madison Area
Chuck Leveque - LC/5
Dave Neeb - Davis & Kuehlton, S.C.
Bob Selk - DOJ
Lee Bartlett - RMT
PSS - SW/3

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

CONDITIONAL CLOSURE PLAN
APPROVAL MODIFICATION FOR THE
REFUSE HIDEAWAY LANDFILL (#1953)

FINDINGS OF FACT

The Department finds that:

1. John DeBeck and Refuse Hideaway, Inc., own and formerly operated a ~~nonhazardous~~ solid waste disposal facility located in the SW 1/4 of the NW 1/4 of Section 8, T17N, R8E, Town of Middleton, Dane County, Wisconsin.

2. The Department issued a conditional closure plan approval for the facility on April 7, 1987.

3. The Department issued special consent order SOD-88-02A on May 2, 1988. Condition 3 of the order required John DeBeck and Refuse Hideaway, Inc., to submit a plan to effectively monitor for and prevent the migration of explosive gases generated by the landfill and to efficiently collect and combust hazardous air contaminants.

4. On July 1, 1988, RMT, Inc., submitted a report to the Department proposing a conceptual plan for gas management and summarizing monitoring well construction to date.

5. The information submitted in connection with the modification request includes the following: a letter, two appendices and one plan sheet submitted by RMT, Inc., dated July 1, 1988 and received by the Department on July 1, 1988.

6. Additional documents considered in connection with the modification request include the following:

   a. Special consent order SOD-88-02A

   b. Various technical documents on file with the Solid Waste Management Section.

7. Additional facts relevant to the review of the closure plan modification request include the following:

   a. Municipal refuse produces methane gas. The clay cap and frozen ground conditions will inhibit release of the methane gas to the atmosphere and methane gas may migrate off site.

   b. NR 506.08(6) requires that a Department approved system to efficiently collect and combust hazardous air contaminants be installed within 18 months of February 1, 1988.

8. The special conditions set forth below are needed to assure that human health and the environmental are adequately protected. If the special conditions are complied with, the proposed modifications will not inhibit compliance with the standards set forth in NR 500-520, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Department has authority under s. 144.44(3), Stats., to modify a plan approval if the modification would not inhibit compliance with chapters NR 500-520, Wis. Adm. Code.

2. The Department has authority to approve a closure plan modification with special conditions if the conditions are needed to ensure compliance with chapter NR 500-520, Wis. Adm. Code.

3. The conditions set forth below are needed to ensure compliance with NR 500-520, Wis. Adm. Code.

4. In accordance with the foregoing, the Department has authority under s. 144.44 Stats., to issue the following conditional closure plan approval modification.

CONDITIONAL CLOSURE PLAN APPROVAL MODIFICATION

The Department hereby modifies the closure plan approval for the Refuse Hideaway landfill, subject to the following conditions:

1. The 24 gas monitoring probes shall be installed by October 31, 1988. Documentation of the gas probe installation including a gas probe diagram for each probe showing the probe depth and a plan sheet showing the location of all probes shall be submitted to the Department within 30 days of completing gas probe installation.

2. A final detailed plan for construction of a gas extraction system to prevent the migration of explosive gases and efficiently collect and combust hazardous air contaminants shall be submitted to the Department by January 1, 1989.

3. A Department approved gas extraction system shall be installed and made operational by September 30, 1989.

4. The final cover over the area used for disposal of gas well construction waste shall be completed within 60 days following completion of drilling of the final gas well.

5. The final cover over areas disturbed for gas well construction waste placement shall consist of the approved cover and shall be documented as follows:

   a. Dry density and as-placed moisture content on an approximate 50-foot grid patter for each one-foot thickness of clay placed.

   b. One moisture density curve developed for every 5,000 cubic yards or less of clay placed and for each major soil type utilized.

   c. A plan sheet documenting the final landfill surface following topsoil placement. A table showing as constructed grades at specific location on maximum 50 foot centers for the grading layer, clay capping layer, cover layer and topsoil layer shall be included on the plan sheet.

d. A plan review showing the location of all tests performed (this may be included with the final surface plan sheet).

6. The gas probes shall be monitored on a weekly basis for one month during initial ground freeze-up this winter. If the methane level at all probes does not exceed 25% of the lower explosive limit the gas probe monitoring may be reduced to a monthly basis. Based on the results of the above required methane monitoring, a proposed long term monitoring program may be submitted to the Department following construction of the gas extraction system. All results shall be submitted to the Department.

The Department retains the right to require the submittal of additional information and to further modify this Plan of Operation approval at any time if, in the Department's opinion, further modifications are necessary. Unless specifically noted, the conditions of this approval modification do not supercede or replace any previous conditions of approval for this facility.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats.

Dated: SEP 0 6 1988

DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lakshmi Sridharan

Lakshmi Sridharan, Ph.D., P.E., Chief
Solid Waste Management Section

Paul M. Huebner / for RT

Ray Tierney, Hydrogeologist
Solid Waste Management Section

Susan M. Fisher

Susan M. Fisher, Environmental Engineer
Solid Waste Management Section

cc: Program Services Section - SW/3

32\8810\SW97747M.SMF

STATE OF WISCONSIN

Circuit Court for Dane County

JOHN W. DeBECK

Plaintiff

89CV960 & 90CV1267

vs.

WISCONSIN DEPT OF NATURAL RESOURCES,

Defendant

I, Judith A. Coleman, Clerk of the Circuit Court for Dane County, Wisconsin, do hereby make return to the WI DNR Commission of Wisconsin of the record on file in the office of clerk of circuit court for Dane County, Wisconsin, in the above entitled action, in accordance with the Revised Statutes of Wisconsin.

Dated this 26th day of January, 1993.

Judith A. Coleman
Clerk.
by Janice Morgan
Deputy Clerk

(Seal)

CIRCUIT COURT DANE COUNTY WISCONSIN

<6010>

COURT OF APPEALS
OF WISCONSIN
P. O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 4

REMITTITUR

JOHN W. DEBECK,
PETITIONER-RESPONDENT,
V.
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
RESPONDENT-APPELLANT.

APPEAL NO. 91-1434

T.Ct. NO. 89CV960 & 90CV 1267

THIS CAUSE WAS AN APPEAL TO REVIEW THE ORDER OF THE CIRCUIT COURT OF DANE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON NOVEMBER 12, 1992, THAT:

Order affirmed.

CPD Wrote Decision/Opinion
PANEL: HON. PAUL C GARTZKE
HON. CHARLES P DYKMAN
HON. WILLIAM EICH

JAN 20 3 04 PM '93
DANE COUNTY, WI
CIRCUIT COURT

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR DANE COUNTY.

CIRCUIT COURT DANE COUNTY WISCONSIN

State of Wisconsin
County of Dane
This document is a full, true and Correct copy of the original on file and of record in my office and has been compared by me.
Attest Jan. 26, 1993
JUDITH A. COLEMAN
Clerk of Courts
By Janice Morgan
Deputy Clerk

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
JANUARY 13, 1993.

Marilyn L. Graves

MARILYN L. GRAVES
CLERK, COURT OF APPEALS

File
Refuse Hide-a-

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
COUNTY OF DANE

AFFIDAVIT OF JOSEPH W. BRUSCA

I, Joseph Brusca, being first duly sworn on oath, deposes and states:

1. I am an employee of the Department of Natural Resources (DNR) located at 3911 Fish Hatchery Road, Fitchburg, Wisconsin 53711. I am the Solid and Hazardous Waste Program Supervisor for the Southern District of Wisconsin.

2. I earned a baccalaureate degree in resource management from the University of Wisconsin-Stevens Point in 1973. Since that time, I have taken courses in hydrogeology, biology, geology and courses provided by the DNR and the University of Wisconsin-Madison.

3. I am familiar with the Refuse Hideaway Landfill site located in the Town of Middleton, Dane County, Wisconsin as I was previously the principal investigator of that site from July, 1975 to March, 1984.

4. During the 1970s, many landfills sites were built as natural attenuation sites. The theory of a natural attenuation landfill is that as contaminants are leeched out, they will bond with the soil particles and largely be prevented from entering the groundwater in the vicinity of the landfill.

5. The approved design of the Robert DeBeck Landfill compled with standard practice of the day for a natural attenuation site.

6. The release of Volatile Organic Chemicals (VOCs) from landfills had not been closely monitored until the mid 1980s. At that time, the Department became aware that VOCs from municipal/commercial landfills could have adverse impacts on groundwater resources.

7. One of the requirements for a landfill is that daily cover be placed over the landfill. Daily cover is required to be placed over the landfill to control odor, to prevent birds and other animals from disturbing the garbage, to prevent wind blown refuse from leaving the site, and to prevent (to some degree) leeching of the landfill site.

8. Even if John DeBeck and Refuse Hideaway, Inc. had placed daily cover on the site, and complied with all other regulations pertaining to landfills, some contamination of the groundwater may have occurred because the landfill was a natural attenuation site. However, improper construction and operation would have contributed to groundwater contamination .

Dated this 9 day of February, 1993.

Joseph W. Brusca

Joseph W. Brusca

Subscribed and sworn to before me
this 9th day of February, 1993.

Janet Stokes

Notary Public, State of Wisconsin
My Commission Expires on
5-8-94.

Refuse Hideaway, Inc., John W. DeBeck and Thomas G. DeBeck, d/b/a Land Disposal Company, The Bituminous Fire and Marine Insurance Company, Mount Holly Insurance Company, and RLI Insurance Company.

Dane County Case No. 91 CV 4264

D\SWM\DEBECK.AFF

SUBPOENA DUCES TECUM

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 91 CV 4264

THE STATE OF WISCONSIN

TO: Theresa A. Evanson
Wisconsin Department of Natural Resources
101 South Webster
P. O. Box 7921
Madison, WI 53707

PURSUANT TO SECTION 804.05 of the Wisconsin Statutes, you are hereby commanded to appear in person before the Honorable Daniel R. Moeser, Branch 11, at the City-County Building, 210 Martin Luther King, Jr., Boulevard, Madison, Wisconsin, on Tuesday, May 18, 1993, at 8:30 a.m., and on Wednesday, May 19, 1993, at 8:30 a.m. in the forenoon, to give evidence in an action between Sunnyside Seed Farms, Inc., plaintiff, and Refuse Hideaway, Inc., et al., defendants, in Case No. 91 CV 4264.

YOU ARE FURTHER COMMANDED TO BRING WITH YOU THE FOLLOWING:

All records in the possession of Wisconsin Department of Natural Resources related to the Refuse Hideaway Landfill.

FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT.

Issued this 26 day of April, 1993.

KAY & ECKBLAD, S.C.
Robert J. Kay
Randall J. Andersen
State Bar Number: 01012266

Randall J. Andersen
Attorneys for Plaintiff
Sunnyside Seed Farms, Inc.

Post Office Address:

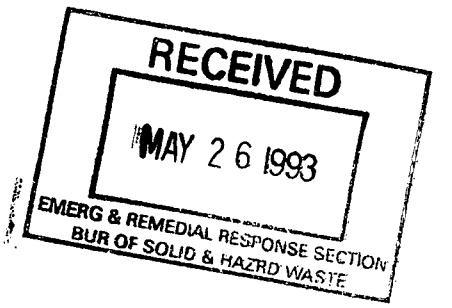
One Point Place, Suite 201
Madison, Wisconsin 53719
Telephone: (608) 833-0077

LAW OFFICES OF
KAY & ECKBLAD, S.C.
SUITE 201
ONE POINT PLACE, MADISON, WISCONSIN 53719
TELEPHONE: (608) 833-0077
FAX: (608) 833-3901

ROBERT J. KAY*
JAMES D. ECKBLAD
RANDALL J. ANDERSEN
EDITH M. PETERSEN

*ALSO LICENSED IN MINNESOTA

JAMES C. GEISLER
OF COUNSEL



May 26, 1993

Ms. Theresa A. Evanson
Wisconsin Department of Natural Resources
101 South Webster
P. O. Box 7921
Madison, Wisconsin 53707

RE: Sunnyside Seed Farms, Inc. vs.
Refuse Hideaway, Inc., et al.

Dear Ms. Evanson:

Enclosed please find a replacement subpoena for the new trial date.

I would appreciate your signing the enclosed admission of service and return it to me in the provided envelope.

As the week of trial approaches, I will advise you as to the day and time of your testimony, and will do my best to limit the amount of time you need to spend at the Courthouse. I will also let you know which documents, if any, you need to bring with you to the trial. Thank you for your cooperation.

Sincerely,

KAY & ECKBLAD, S.C.

Randall J. Andersen

RJA:emf

Enclosures

SUBPOENA DUCES TECUM

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 91 CV 4264

THE STATE OF WISCONSIN

TO: Theresa A. Evanson
Wisconsin Department of Natural Resources
101 South Webster
P. O. Box 7921
Madison, WI 53707

PURSUANT TO SECTION 804.05 of the Wisconsin Statutes, you are hereby commanded to appear in person before the Honorable Daniel R. Moeser, Branch 11, at the City-County Building, 210 Martin Luther King, Jr., Boulevard, Madison, Wisconsin, on Tuesday, June 22, 1993, at 8:30 a.m., and on Wednesday, June 23, 1993, at 8:30 a.m. in the forenoon, to give evidence in an action between Sunnyside Seed Farms, Inc., plaintiff, and Refuse Hideaway, Inc., et al., defendants, in Case No. 91 CV 4264.

YOU ARE FURTHER COMMANDED TO BRING WITH YOU THE FOLLOWING:

All records in the possession of Wisconsin Department of Natural Resources related to the Refuse Hideaway Landfill.

FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT.

Issued this 26 day of May, 1993.

KAY & ECKBLAD, S.C.
Robert J. Kay
Randall J. Andersen
State Bar Number: 01012266

Randall J. Andersen
Attorneys for Plaintiff
Sunnyside Seed Farms, Inc.

Post Office Address:

One Point Place, Suite 201
Madison, Wisconsin 53719
Telephone: (608) 833-0077

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 11

SUNNYSIDE SEED FARMS, INC.,

Plaintiff,

v.

Case No. 91 CV 4264

REFUSE HIDEAWAY, INC., JOHN W. DeBECK and THOMAS G. DeBECK d/b/a LAND DISPOSAL COMPANIES, MT. HAWLEY INSURANCE COMPANY, and RLI INSURANCE COMPANY,

Property Damage
30201

Defendants.

SUBPOENA

THE STATE OF WISCONSIN TO: Teresa A. Evanson
101 South Webster Street
Madison, WI

Pursuant to Sec. 805.07 of the Wisconsin Statutes, you are hereby commanded to appear in person before Hon. Gerald Latton, on June 25, 1993, at 10:00 a.m. at Dane County Courthouse, 210 Martin Luther King, Jr., Blvd., Madison, Wisconsin, to give evidence in the above action.

Failure to appear may result in punishment for contempt, which may include monetary penalties, imprisonment, and other sanctions.

Issued this 24th day of June, 1993.

BELL, METZNER, GIERHART & MOORE S.C.

Barrett J. Corneille
Attorneys for Defendants

P.O. Box 1807
Madison, WI 53701
(608) 257-3764

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

RR/3 Burneatta Hauser Terry/Dave Conquest

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

JoAnne F. Kloppenburg
Assistant Attorney General
608/266-9227
FAX 608/267-2223
TTY 608/267-8902

September 17, 1996

Ms. Maryann Sumi
Department of Natural Resources
Post Office Box 7921
Madison, WI 53707-7921

Re: **State v. Refuse Hideaway**

Dear Maryann:

This is to acknowledge receipt of the above-entitled referral. It has been assigned to Cynthia R. Hirsch for review and, if appropriate, prosecution.

Sincerely,

JoAnne F. Kloppenburg

JoAnne F. Kloppenburg
Assistant Attorney General

JFK:drm

c: Linda Meyer

RECEIVED
SEP 26 1996
EMERG & REMEDIAL RESPONSE SECTION
BUR OF SOLID & HAZRD WASTE

RECEIVED
SEP 19 1996
OFFICE OF THE SECRETARY