



State of Wisconsin | DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary
Ronald W. Kazmierczak, Regional Director

Northeast Region Headquarters
1125 N. Military Ave., P.O. Box 10448
Green Bay, Wisconsin 54307-0448
Telephone 920-492-5800
FAX 920-492-5913
TTY 920-492-5912

WASTE MANAGEMENT AND BUREAU FOR REMEDIATION AND REDEVELOPMENT

FAX TRANSMITTAL SHEET

Date: 5-12

TO

Name: Jennie Pelczar
Company/Agency: DNR - OSHKOSH

Fax Number: _____

FROM

Name: Uln
Company/Agency: NER - EE
Phone Number: _____

Pages to follow (excluding cover sheet): 4

Comments/Message: Jennie - we need to forward this to Joe to get input on their legal issues. Are we sending this to the right RP or -> PPP group. We need to resolve this before we meet!
B



43-
5-6-2004

reinhartlaw.com



May 6, 2004

Raymond M. Roder
Direct Dial: 608-229-2206
rroder@reinhartlaw.com

Mr. Bruce G. Urben
Department of Natural Resources
625 County Road Y, Suite 700
Oshkosh, WI 54901-9731

Dear Mr. Urben:

Re: Revised Ground-Water Monitoring Plan
Submittal

We are writing as attorneys for the City of Ripon (the "City") in response to your April 5, 2004 letter on the above subject and the accompanying draft "Conditional Approval of the Revised Ground-Water Monitoring Plan Submittal-Ripon Highway FF/NN Landfill, WDNR License #467." (Mr. Roder writes as the City's attorney on FF/NN Landfill matters as well as the Chairman of the FF/NN Landfill PRP Steering Committee; Mr. Wurtz writes as the City Attorney for all matters.) This letter raises several legal issues created by the draft Conditional Approval Monitoring Plan ("CAMP"); we specifically reserve comments on the technical aspects of the draft CAMP for a later submittal by GeoTrans following receipt and analysis of the results from the water quality and gas sampling that occurred in the last week of April, 2004.

Our first legal concern is that the submittal by which the Department purports to bind the City was not submitted by the City. The proposed monitoring plan to which the Department is now adding conditions was submitted by the PRPs pursuant to their contract with the Department under former § 144.442, Wis. Stats. (now § 292.31). By obligating the City only, the Department is doing two things: (i) it is voiding the § 144.442 contract; and (ii) it is deviating from the Superfund process, including in this specific instance by surreptitiously amending the record of decision ("ROD") without proper procedure. The City participated in the submittal only as, and specifically conditioned upon, its contractual status as a potentially responsible party ("PRP").

Mr. Bruce G. Urben
May 6, 2004
Page 2

Our second concern is that the draft CAMP merely expresses a hope that the non-city PRPs will "follow through" with the obligations of the CAMP. We believe this division of the City from the other FF/NN Landfill PRPs is illegal. According to the majority of the CAMP it is the City not the PRP Group which is responsible for the monitoring. Tellingly, the draft CAMP presents at page 4 the Department's request that "the PRP Group [] hold off on [the sampling of the wetland] until the July or October sampling ...": this slip of the pen merely reinforces the notion that the Department is using the CAMP to avoid the strictures of the CERCLA process. Please explain how the DNR can legally disregard that the FF/NN Landfill is a NPL site and, thus, subject to the procedures of CERCLA including the record of decision ("ROD") process.

By the CAMP the Department asserts jurisdiction over the City based on § 289.30, Wis. Stats., which applies only to "approved facilit[ies]." The FF/NN Landfill, which was first licensed in 1969, does not meet the definition of an "approved facility," as found at § 289.01(3), Wis. Stats.

Even if the division of PRPs under a single contract at an NPL site is not illegal, it has negative consequences for the Department as well as for the City and the non-city PRPs. Whether these consequences were intended or not they are real. They concern the City, as they should, the Department.

The consequences include at least the following: (i) the PRPs have no obligation to pay the Department's "oversight charges" for any of the Department's work associated with the CAMP or for any Department work on a going forward basis related to the FF/NN Landfill; and (ii) the Department is now required to reimburse the City for certain monitoring costs per § 289.31(7)(f), Wis. Stats., such as the costs of the gas probes and related analyses, analyses for indicator parameters and construction and monitoring of the new wells the Department states are "necessary." Payment under § 289.31(7)(f), Wis. Stats., will be based on the fact that the FF/NN Landfill is a "non-approved facility" for purposes of ch. 289, Wis. Stats.

The negative consequences also include the following: the City is placed in the position of losing funding from the other PRPs unless it can bargain for their approval; and, the non-city PRPs thereby lose their direct input to the Department, including

Mr. Bruce G. Urban

May 6, 2004

Page 3

their right to CERCLA and § 144.442, Wis. Stats., Contract protections, however limited those protections may be.

A further consideration is that the City has no unilateral right to allow a residence to hook up to the Alliant public water supply system without payment, even if the residence's well is contaminated. As a result, the Department's overture on behalf of the Rohdes, Baneks and Gaastras to connect them to the Alliant system (presumably without charge) is not possible, even if the City thought it was necessary or desirable. In sum, the DNR by trying to avoid the CERCLA process for this NPL listed site is creating a procedural morass. In our opinion the morass is the fruit of an illegal attempt to regulate the FF/NN Landfill without regard to its legal status under CERCLA as well as to the Department's contractual obligations with all FF/NN Landfill PRPs.

We also have concerns regarding numerous substantive matters in the draft CAMP. They include the presence of: inaccurate bases for action; and the absence of scientifically sound justifications for certain undertakings described as "necessary." The majority of these issues will be addressed by GeoTrans in a later submittal. Nonetheless, we think a few examples are appropriate at this time.

- Despite repeated corrections from GeoTrans, the Department lists as a reason for considering "active" remediation the gas sampling results of MW 104 because to the Department they represent gas migration beyond the fill area. MW 104 is located within the fill area; the Department has been so advised many times in the past but persists in associating MW 104 with conditions outside the fill.
- Despite previous analyses of the relative concentrations of indicator parameters and VOC content in groundwater showing they do not correlate with each other, the Department continues to contend that sampling for indicator parameters will be "very valuable for determining long-term ground water quality adjacent to the site." This contention in the face of real data is scientifically baseless.
- The Department describes the groundwater contaminant plume associated with the Landfill as "expanding." This descriptor is used even though there

Mr. Bruce G. Urban
May 6, 2004
Page 4

is no evidence that the plume has advanced from the farthest points of detection downgradient of the Landfill for the last several years and despite the generally static or declining contaminant concentrations at the downgradient edge of the plume.

We think the Department's attempt to require the City to shoulder solely the responsibility for the monitoring and eventually "a final remedy that addresses drinking water issues [and] restores the landfill's regulatory compliance" in order to save the Department some procedural hassles is both illegal and unwise, as explained above. Moreover, it will be unnecessarily costly. As a consequence we ask that the Department withdraw the draft CAMP insofar as it purports to obligate the City only.

The technical shortcomings of the CAMP will be addressed in a subsequent document. We prefer that the technical document follow the Department's explanations for why it believes the CAMP is legal and on what grounds it thinks dividing the PRPs is wise. We therefore request your prompt response to the matters raised by this letter.

Thank you for your consideration of the above.

Very truly yours,

By: 

Ludwig L. Wurtz

and

By: 

Raymond M. Roder