



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Waterway and Wetland  
Alterations Relating to the Wisconsin Electric  
Power Company Oak Creek Power Plant  
Expansion, Called the Elm Road Generating  
Station

Case Nos. 3-SE-01-41-0005-0019  
& 1456MW

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Wisconsin Electric Power Company, 231 West Michigan Street, Milwaukee, Wisconsin, 53201, applied to the Department of Natural Resources for permits to alter waterways and wetlands at and near its existing Oak Creek Power Plant, located in the City of Oak Creek with related facilities in the Town of Caledonia. The proposed activities are listed below:

On the bed of Lake Michigan under Wis. Stat. § 30.21

Place fill on the bed for the purposes of dock extension for harbor facilities and public utility structures and appurtenances, place and operate intake and discharge structures, stabilize the shoreline and dredge materials from the bed.

Navigable Waterways under Wis. Stat. §§ 30.12, 30.123 and 30.20

Place bridges and culverts over or in navigable waterways, and dredge materials from the bed, for the purposes of railroad expansion and road construction. If any construction occurs within Racine County, the Company has also submitted permit applications under 30.19 to grade more than 10,000 square feet on the banks of a navigable waterway and to construct ponds within 500 feet of a navigable waterway.

Wetland Impacts under 401 Water Quality Certification, Wis. Stat. § 281.36 and Wis. Admin. Code NR 103 and 299

Place fill and or disturb wetlands as a result of power plant expansion, road construction and railroad improvements.

The proposed Elm Road Generating Station (ERGS) will add new coal-fired generating units at the existing Oak Creek Power Plant site, as a component of the Company's *Power the Future* program. The Company applied for a Certificate of Public Convenience and Necessity (CPCN) from the Public Service Commission of Wisconsin (PSCW or PSC) under Wis. Stat. § 196.491.

On November 10, 2003 the PSCW issued a CPCN for the ERGS project in which it approved construction of two new 615 megawatt coal-fired generating units and construction of common facilities sufficient to accommodate up to 3000 megawatts of generation at the site. The site approved by the PSCW is referred to as the "North Site-CUP", and is the site for which the Company is seeking the permits to alter waterways and wetlands.

The electrical generating facilities will be located in the City of Oak Creek, Milwaukee County in the SW ¼ and NW ¼ of Section 31, T5N, R23E and the NE ¼ and SE ¼ of Section 36, T5N, R22E. Related facilities will be located in the City of Oak Creek, Milwaukee County in portions of Section 31, T5N, R23E and lakebed adjacent to Section 31. Related facilities will also be located in Section 36, T5N, R22E and in the Town of Caledonia, Racine County in portions of Section 6, T4N, R23E and Section 1, T4N, R22E. Road construction and railroad improvements will also be located in the Town of Caledonia, Racine County in portions of Section 1, T4N, R22E and Sections 6, 7 and 18 of T4N, R23E.

An Environmental Impact Statement (EIS) on the proposed project has been jointly prepared by the Public Service Commission of Wisconsin and the Wisconsin Department of Natural Resources.

The Department of Natural Resources issued a Notice of Proposed Power Plant Expansion which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. Timely objections were received. On March 25, 2004, the Department filed a Request for Hearing with the Division of Hearings and Appeals (the Division).

Pursuant to due notice hearing was held on August 23-25, 2004, at Oak Creek, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties submitted written briefs. The last brief was received on October 6, 2004.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c) the PARTIES to this proceeding are certified as follows:

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#### FINDINGS OF FACT

1. Wisconsin Electric completed filing an application with the Department for permits under Wis. Stat. §§ 30.12, 30.21, 30.123, 30.20 30.19, and for Section 401 Water Quality Certification at a project site near its existing Oak Creek Power Plant. The project is located in the City of Oak Creek and Town of Caledonia in Milwaukee and Racine County. The Department and the applicant have fulfilled all procedural requirements of Wis. Stat. § 30.02 and 30.12. Wisconsin Electric has filed an application for the following permits: (1) to place fill on the bed of Lake Michigan for the purpose of dock extension, for the placement of an intake and discharge structure and to stabilize the shoreline, (2) to remove materials from the bed of Lake Michigan, (3) to place bridges and culverts over or in navigable tributaries to Lake Michigan and remove materials from the bed of those tributaries for the purposes of railroad expansion and road construction, (4) to grade more than 10,000 square feet and to construct ponds within 500 feet of a navigable waterway in Racine County and (5) to impact wetlands under 401 Water Quality Certification, Wis. Stat. § 281.36 and Wis. Admin. Code Chapters NR 103 and 299 as a result of a power plant expansion, road construction and railroad improvement project known as the Elm Road Generating Station (ERGS).

2. The applicant owns real property located in the City of Oak Creek, Milwaukee County and the Town of Caledonia, Racine County also described as being a part of Section 1, T4N, R22E, all of Section 6, T4N, R23E, part of Section 35, T5N, R22E, all of Section 36, T5N,

R22E, part of Section 31, T5N, R23E, part of Section 12, T4N, R22E, and part of Section 7, T4N, R23E. The above-described property abuts Lake Michigan and other tributaries which are navigable in fact at the project site.

3. The applicant proposes to place fill on the bed of Lake Michigan for the purposes of dock extension, for the placement of an intake and discharge structure and to stabilize the shoreline. Further, the applicant proposes to dredge materials from the bed of Lake Michigan and to place bridges and culverts over or in navigable tributaries to Lake Michigan and dredge materials from the bed of those tributaries for the purposes of railroad expansion and road construction. The applicant proposes to grade more than 10,000 square feet and to construct ponds within 500 feet of a navigable waterway in Racine County and to impact wetlands subject to 401 Water Quality Certification, Wis. Stat. § 281.36 and Wis. Admin. Code chs. NR 103 and 299 as a result of power plant expansion, road construction and railroad improvements.

4. The purpose of this project is to construct two coal-fired electric power generating units at the existing Oak Creek Power Plant. Each unit will have a minimal full load generating capability of 615 net megawatts. The project also includes support systems including providing cooling water, a full delivery system and transmission connections.

5. On November 10, 2003, the PSC issued a CPCN and Final Order authorizing construction of ERGS at a site known as the North Site-CUP alternative. (Ex. 1) As approved, in the CPCN, the ERGS project consists of constructing two 615-megawatt supercritical pulverized coal (SCPC) generating units and associated facilities.

6. The overall construction plan is described in the prefiled direct testimony of Wisconsin Electric witnesses Scott Patulski and Gregory Kasel. Exhibit 28 is a series of drawings detailing the proposed construction. Construction of the project will entail the following:

Bluff Excavation. Approximately 6 million cubic yards of the existing bluff along Lake Michigan will be excavated to facilitate the placement of facilities near lake level so that the SCPC units may utilize a once through cooling system. The excavated material will be placed in several stock piles and berms located throughout the approximately 1,000 acres owned by Wisconsin Electric.

Water Intake Structure. A water intake system will be constructed to provide cooling water for the existing Oak Creek Power Plant and the two new SCPC units. Construction of the water intake system will require boring a 24-27 foot diameter tunnel approximately 130 feet below the bed of the lake. The tunnel will extend 7,900 feet from the shore out into Lake Michigan where the depth of the water is approximately 43 feet. Four 10-12 foot diameter downshafts will be drilled down about 130 feet from the lake bottom to the top of the tunnel. These downshafts will convey water from four manifold pipes that will be 9 foot in diameter and 112 feet long. Each manifold pipe will contain six wedge wire T-screens (24 total T-screens) for the intake of water. These T-screens will be 8 feet in diameter and approximately 32 feet long with a slot size of 9.5 millimeters and a

lakebed clearance of 5 feet. To protect the T-screens, riprap will be placed around the intake area. The total amount of lakebed occupied by the T-screens and the riprap is approximately 100 feet by 580 feet or 1.33 acres. The installation of these pipes, scour protection and downshafts will require approximately 11,500 cubic yards of materials to be dredged from the bed of Lake Michigan.

Discharge Structure. A new discharge structure will also be constructed. The new discharge structure will include a seal well and two jetties constructed of either sheet pile or consisting of a large rubble mound which extend 500 feet into Lake Michigan. The jetties will create an 80-foot wide channel that will be lined with rock and will require about 25,000 cubic yards of material to be dredged from the bed of Lake Michigan. The discharge structure will occupy about 3.1 acres of lakebed. Due to the public's interest in fishing near the discharge structure, the north jetty will be constructed to provide a public fishing pier. A separate public access and parking area associated with the fishing pier is proposed for security and safety purposes.

Dock Extension. The existing dock, built in the early 1950s as part of the existing Oak Creek Power Plant, is approximately 18 acres. As part of the project, the dock will be extended by approximately 11.7 acres; approximately 7.7 acres will be on the bed of Lake Michigan (below the ordinary high water mark) and approximately 4.0 acres will be on the upland (above the ordinary high water mark). Shoreline protection for the dock and dock extension and for the shoreline between the dock and the south jetty of the discharge structure will be provided by creation of a rubble mound containment dike that will occupy approximately 2.6 acres of lakebed. Facilities located on the existing dock and dock extension will be materials handling and processing facilities for limestone and gypsum which will be delivered to or transported from the site by barge. Coal is currently stored on the dock; it is proposed that coal storage on the dock be phased out over time.

Barge, Rail and Vehicular Access. To construct a back-up water intake system and accommodate transportation by barge of construction equipment, limestone and gypsum, about 123,500 cubic yards in the area adjacent to the existing intake channel will be dredged. Coal will be delivered by rail. Therefore, railroad improvements are needed to avoid the blockage of several local roads. An underpass will be constructed at Six Mile Road. Seven Mile Road will be closed with two cul-de-sacs. These road improvements will allow for the construction of additional railroad tracks to the existing railroad corridor and an improvement to the car unloading and maintenance systems. The railroad improvements will result in the modification of seven existing culvert crossings over four navigable waterways. There will also be new construction access roads, employee entrance roads and a public bike trail constructed as part of the project. These new or modified roads and the trail will result in six crossings over three navigable waterways.

Wetland, Stream and Environmental Corridor Impacts. The new road and railroad crossings will result in new or modified bridge/culvert crossings over navigable

waterways which are tributary to Lake Michigan and a non-navigable waterway will be impacted by the excavation of the bluff. The project will directly impact 23.47 acres of wetland (of over 100 acres delineated within the project boundary) either through the placement of fill associated with the railroad modifications and access road construction, or excavation of the bluff. Approximately 57 acres of primary environmental corridor and isolated natural resource area (of approximately 322 acres delineated within the project boundary) will be impacted by the construction activities.

7. Wisconsin Electric is the riparian owner of the property on which ERGs is proposed to be constructed. (Schubilske; Hopkins)

8. The construction, maintenance and operation of the proposed structures in Lake Michigan, including the dock extension, shoreline stabilization, cooling water intake and discharge structures, will not materially obstruct navigation. (Patulski; Kasel; Hopkins; Eggold)

9. The construction, maintenance and operation of the proposed structures in Lake Michigan, including the dock extension, shoreline stabilization, cooling water intake and discharge structures, will not result in the use of private property not owned by Wisconsin Electric. (Patulski; Schubilske; Kasel)

10. The dredging associated with construction of the proposed structures in Lake Michigan, including the dock extension, shoreline stabilization, cooling water intake and discharge structures, will not adversely affect water quality in Lake Michigan, will not increase water pollution and will not cause environmental pollution as defined in Wis. Stat. § 283.01(6m). (Klump; Helker)

11. The impacts of the construction dredging will be short-lived and minor. (Klump; Helker)

12. The Division has modified the proposed permit to limit authorized maintenance dredging to a period not to exceed five years. After this period, all future maintenance dredging shall be subject to the permitting requirements of Wis. Stat. § 30.20. This amended condition is consistent with DNR practice for maintenance dredging as described in the Waterway and Wetland Handbook, Chapter 120, p. 12.

13. The facilities proposed to be located on the dock extension are authorized by Wis. Stat. § 30.21. (Patulski; Hopkins) The dock structure is necessary to efficiently and safely handle the quantities of limestone necessary to operate air pollution control equipment for the ERGS units, and the gypsum that is produced as a by-product of wet flue gas desulfurization. (Patulski; TR pp. 26-30)

### Section 30.21 Issues

14. On September 2, 2003, the City of Oak Creek adopted a resolution under Wis. Stat. § 30.21 which granted a permit to Wisconsin Electric to construct, maintain and operate the ERGS project. (Haskin; Ex. 404)

15. The relationship between Wisconsin Electric and ERGS LLC is complicated. Wisconsin Electric created an elaborate set of lease agreements. The facility lease (Ex. 203) is one of three leases: there is also a ground lease, whereby Wisconsin Electric will lease the land to ERGS LLC, and a sublease, whereby ERGS LLC will sublease the land back to Wisconsin Electric during the term of the facility lease (*i.e.*, Wisconsin Electric's period of maintenance and operation). (TR p. 988) The facility lease for ERGS LLC, as approved by PSC, is for 30 years. WEPCO has the option to renew that lease. (Ex. 203 at ¶ 14.2) Additionally, WEPCO has the option to purchase the facility, either at the end of the lease term or in the event ERGS LLC chooses to divest. (Id. at ¶ 14.4) Taken together, these leases constitute a lease generation contract within the meaning of Wis. Stat. § 196.52(9)(a)(3). (Ex. 1, p. 35)

16. The lease agreements comport with the requirements of Chapter 196 relating to Regulation of Public Utilities. (Id. p. 43) Chapter 196 imposes eleven separate conditions for such leased generation contracts under § 196.795(5)(k)(3). (Id. p. 43) The WPSC approved the proposal of Wisconsin Electric to authorize treatment of a leased generation contract, and maintained "jurisdiction to ensure that the construction of ERGS is completed as provided in the lease generation contracts." (Id.)

17. Wisconsin Electric is a public utility as defined in Wis. Stat. § 196.01 and as that term is used in Wis. Stat. § 30.21. (Schubilski; Ex. 1) The leased generation contracts comport with Chapter 196 and do not alter the status of the applicants as a "public utility" within the meaning of Wis. Stat. § 30.21. (Id., Schubilski, TR pp. 198-199, Ex. 21)

18. The objectors established and the DNR concedes that the plain language of Wis. Stat. § 30.21 requires that no construction related to this permit shall be undertaken prior to a determination relating to the grant or denial of a WPDES permit authorizing operation of the water intake structure. (Hopkins, TR pp. 621-622) Accordingly, Permit Condition 43 is modified as follows:

You shall not construct, maintain or operate the new intake structure or the new discharge structure until the Department issues a new or reissued Wisconsin Pollutant Discharge Elimination System permit for the intake structure and discharge.

19. The facilities proposed to be located on the dock extension are authorized by Wis. Stat. § 30.21. (Patulski; Hopkins)

### Other Chapter 30 Issues

20. The placement of culverts and bridges as proposed by Wisconsin Electric will not materially obstruct navigation in any navigable waterway. (Schumacher; Hopkins).

21. The placement of culverts and bridges as proposed by Wisconsin Electric will not reduce the effective flood flow capacity of any navigable waterway. (Schumacher; Hopkins; Bruch)

22. The dredging associated with the placement of culverts and bridges as proposed by Wisconsin Electric will not adversely affect water quality in any navigable waterway, will not increase water pollution and will not cause environmental pollution as defined in Wis. Stat. § 283.01(6m). (Schumacher; Hopkins)

23. The placement of bridges and culverts as proposed by Wisconsin Electric will not be detrimental to the public interest. (Schumacher; Hopkins)

24. The grading in Racine County associated with the placement of bridges and culverts and the construction of road and railroad improvements will not injure public rights or interests, including interests in fish and game habitat, and will not cause environmental pollution. (Hopkins)

### NR 216 Issue

25. The design of the proposed stormwater ponds complies with the requirements of NR 216. Construction of these ponds and the Stormwater Pollution Prevention Plan and Erosion and Sediment Control and Stormwater Management Plan submitted by Wisconsin Electric will protect against injury to public rights or interests, including fish and game habitat, and will not cause environmental pollution. (Kasel; Hopkins; Wood).

### Wetland Issues

26. Wisconsin Electric made its first submittal for a Chapter 30 permit for ERGS in June 2002. In early 2003, DNR and Wisconsin Electric discussed the appropriate scope of the practical alternatives analysis (PAA) required by NR 103. DNR also consulted with staff of the Public Service Commission in light of the fact that both DNR and PSC have regulatory responsibilities with respect to approval of ERGS. (Lee; Hopkins)

27. In the first half of 2003 Wisconsin Electric and DNR reached an understanding that Wisconsin Electric would prepare preliminary PAA materials looking at each of the four sites being considered by PSC independently of the other sites. (Hopkins; Lee) On June 30, 2003, Wisconsin Electric submitted preliminary PAA materials containing wetland delineation and site plans for each of the four sites so that the DNR could evaluate them for the PSC. (Id.)

28. The Public Notice published in August 2003 advised the public that the PSC had two sites under consideration – the “primary” and the “alternative” sites – and would approve

one or the other, but not both, if the PSC determined the ERGS facilities were needed. The Public Notice further explained that Wisconsin Electric would need to obtain DNR permits for the site approved by the PSC, and that if a contested case hearing was held it would be scheduled to take place after the PSC made its decision so that the subject of the hearing would be Wisconsin Electric's application for DNR permits for the site approved by the PSC. (Ex. 23)

29. DNR provided testimony during the PSC proceedings that specifically identified the number of wetland acres that were expected to be impacted on each site and expressed an opinion to the PSC as to which site was the preferable site from the standpoint of impacts to wetlands. DNR would have advised the PSC if DNR considered any of the sites to be unpermittable, but did not do so because DNR did not consider any of the four sites to be unpermittable. Based on its review of the preliminary PAA materials, DNR was prepared to accept whichever of the four sites the PSC approved and to proceed with evaluating a Chapter 30 permit application, including PAA materials, for that site. (Hopkins)

30. The Department of Natural Resources Water Management Specialist Heidi Hopkins testified that the DNR decided to limit the scope of its review of practicable alternatives to the site approved by the Commission, pursuant to Wis. Admin. Code § NR 103.08(1). Hopkins noted that Wisconsin Admin. Code NR 103 specifically provides that "the Department, upon request, meet with a project proponent and other interested persons to make a preliminary assessment of the scope for an analysis of alternatives. . . ." Wis. Admin. Code § NR 103.08(1)

Hopkins offered two essential reasons for the DNR's approach to the PAA in this matter. First, the Department did not believe it was appropriate to require a full PAA for each site being considered by the PSC in the context of its review of the CPCN. (Hopkins, TR p. 570) Second, the DNR agreed to essentially defer to the PSC with respect to which sites were "available and capable of being implemented" because the PSC has a more comprehensive set of factors to consider when reviewing the siting of a power plant facility. Hopkins testified as follows: "They look at more things and have more experts than the department could ever evaluate such as modification—railroad modifications and transportation issues and the need of having that type of facility, and also they look at various alternatives regarding what type of energy should be generated and how it should be generated which the department does not have experts for or the capability of reviewing that detail of analysis or doing that evaluation." (Hopkins, TR p. 571)

31. The Department's determination to limit the scope and content of the PAA was within its regulatory discretion and authority under Wis. Admin. Code NR 103.08(1). Given the complexity of the power plant siting process, the Department's decision to limit the PAA process was reasonable under the then-existing regulatory framework.<sup>1</sup> (Hopkins)

32. As part of the CPCN process, the PSC specifically considered the Development Agreement and the conditional Use Permit that had been negotiated between the City of Oak

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<sup>1</sup> It should be noted that under the current regulatory scheme, the DNR would be required to limit the PAA as it has in this case. (See: Wis. Stat. § 30.025) While the new statute does not provide a legal authority for the Department's actions in this case, it does go to the reasonableness of the DNR's exercise of discretion under the then-existing regulatory process. (Hopkins, p. 575)

Creek and Wisconsin Electric. (Haskin, TR pp. 7-8) Consideration of local land use and development plans and environmental values are required elements of the PSC review. *See*, Wis. Stat. § 196.491(3)(d). No other site had any comparable local approval or comparable local controls. Given the extensive review of multiple factors considered by the PSC, and the fact this was the only site in which local approvals were in place, it was a reasonable exercise of discretion to limit the PAA review.

33. Following the November 10, 2003 CPCN decision in which PSC selected the North Site-CUP, rejected the three other sites and authorized Wisconsin Electric to construct two of the three proposed generating units, Wisconsin Electric provided revised PAA materials relating exclusively to the North Site-CUP. DNR reviewed those materials and in a letter dated January 27, 2004 requested additional information. The January 27, 2004 letter included a request that Wisconsin Electric review an “alternative alignment” to see if it could be implemented to eliminate some of the bluff grading and reduce wetland impacts, and other questions concerning wetland impacts at the North Site-CUP and potential ways to reduce or eliminate them. Wisconsin Electric’s February 9, 2004 response addressed all of DNR’s questions, including explanations of the environmental consequences, impacts on the scope of the construction project, impacts on the construction schedule, logistics and sequence, future operating and maintenance inefficiencies, and cost implications which made the “alternative alignment” impracticable. Wisconsin Electric’s February 9, 2004 response satisfied DNR’s request, and DNR determined that the PAA materials submitted by Wisconsin Electric complied with NR 103 and NR 299. (Lee; Hopkins; Exhibit 26)

34. Within the Project boundaries over 130 wetlands were identified and delineated by staff from the Southeastern Wisconsin Regional Planning Commission (SEWRPC), Graef, Anhalt, Schloemer and Associates (GAS) or the Department. The total acreage of wetlands delineated at this site is over 100 acres. A majority of the wetlands (over 93 percent) are two acres or less in size. However, eight of the wetlands are over 2 acres in size and account for 50 acres of wetland. The largest wetland on the site is 11.9 acres. There are various types of wetlands present including but not limited to fresh (wet) meadow, Southern wet to wet-mesic lowland hardwood forests and shallow marsh. Functional Values Assessments were completed for all of the wetlands located within the project boundaries by GAS and the Department. (Hopkins, TR p. 597)

35. Noel Cartwright testified on behalf of Wisconsin Electric that “the wetlands that will be impacted on the North Site-CUP are not unique, are relatively small and isolated in nature, many have already been disturbed and, therefore, the impacts will not result in a significant loss to the regional ecosystem.” (TR p. 383) Further, that the two highest quality wetlands, Plant Community Areas 1 and 6 discussed by Dr. Reed, will not be impacted by the project because of the site layout re-design. (Cartwright, TR p. 383) Dr. Reed conceded this point on cross-examination. (Reed, TR pp. 858-875)

36. The site configuration for ERGS proposed by Wisconsin Electric on the North Site-CUP avoids detrimental impacts to wetland functional values to the maximum extent possible. (Kasel; Lee; Hopkins)

37. Approximately 23.47 acres of wetlands are impacted by the site configuration proposed by Wisconsin Electric on the North Site-CUP. Wisconsin Electric has taken all practicable measures to minimize direct adverse impacts to the functional values of those affected wetlands. (Kasel; Hopkins)

38. Given the loss of wetlands and the significance of this resource, the applicants should submit a plan to minimize secondary detrimental impacts to wetlands not filled in conjunction with this project. (Reed; Hopkins) The plan shall include but not be limited to reducing siltation and sedimentation, preventing invasive exotic species from entering into wetland areas, and maintaining the existing hydrology and habitat values to the extent practicable during construction and operation of the proposed facilities. (Reed, TR p. 876) Further, because of the loss of the critical wetland habitat, the applicants shall take all reasonable steps to preserve valuable habitat in areas directly contiguous to remaining wetlands (TR pp. 858-875) Special care should be taken to preserve state threatened species in remaining wetland areas and directly contiguous upland areas. (TR p. 882-883)

39. Dr. Reed suggested that filling the 23.47 acres would result in a detrimental cumulative impact to wetland functional values. (TR p. 859) The Division finds that while there would be some detrimental cumulative impact, it is not sufficient to warrant denial of the water quality certification. First, power generating plant applications are complex and uncommon. It is unlikely that issuance of the Water Quality Certification will result in any significant increase in "similar activities in the affected area." (See: NR 103.08(3)(d)) Second, the most important wetlands have largely been preserved and will be protected and enhanced by the plan to minimize secondary impacts.

#### WEPA Issues

40. An environmental impact statement (EIS) on the proposed project was jointly prepared by the Public Service Commission and the Department of Natural Resources. The EIS is contained in three volumes totaling approximately 900 pages. The Public Service Commission and Department of Natural Resources held EIS scoping sessions in Oak Creek to provide the public information regarding the project and to receive the public's input. A joint draft EIS was issued on April 21, 2003 and broadly distributed. There was a 45-day comment period during which meetings were held with the public in the affected area. Following the comment period, a joint final EIS was issued which reflected comments received and new information collected. A contested case hearing was held after the final EIS was issued at which any interested person was provided an opportunity to present evidence regarding environmental impacts and cross-examine members of the Public Service Commission and Department of Natural Resources staff involved in the preparation of the EIS. Interested persons were provided further opportunities in this proceeding to address the environmental impacts of the project including any of those associated with the change in the design of the water intake structure. (Ex. 1)

41. The Department of Natural Resources issued a Record of Decision on December 17, 2003. The Record of Decision determined that the project complies with Wis. Stat. § 1.11 and Wisconsin Admin. Code Ch. NR 150.

42. The Public Service Commission in its decision authorizing construction of the project determined that it had complied with Wis. Stat. § 1.11.

43. Both the Department of Natural Resources' December 17, 2003 decision and the Public Service Commission's decision are the subject of a judicial review proceeding in Dane County Circuit Court. This review includes the issue of whether any supplementation of the EIS is appropriate.

44. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150 regarding assessment of environmental impact. (*See*: Discussion for further reasoning on this issue)

### SUMMARY

There were numerous disputed issues in this matter, but three subjects were the focus of much of the testimony. First, the objectors raised questions regarding the sufficiency of the PAA and other concerns relating to the Department's wetland review under NR 103. The Division finds that the DNR properly exercised its regulatory discretion in its limitation of the PAA under NR 103. The Division further finds that the project meets the standards of NR 103, and that the Water Quality Certification (WQC) should be issued, with one additional condition to reduce secondary impacts to remaining wetlands on the project site.

The second group of issues related to whether the applicants meet the definition of a "public utility" within the meaning of Wis. Stat. § 30.21. The Division finds that the applicant is a public utility eligible to place the intake structure under Wis. Stat. § 30.21. The fact that the project will be structured as a lawful "lease generation" contract does not impact the status of the applicants as a "public utility" within the meaning of Wis. Stat. § 30.21. A related issue under this statute is whether a WPDES operation permit is required prior to construction of the water intake structure on Lake Michigan. The Division finds that the plain language of the statute requires approval of such an operation permit prior to commencement of construction.

The third issue related to compliance with WEPA. The Division has limited authority as it relates to WEPA compliance.<sup>2</sup> The Division finds that the procedural requirements of that statute were met, and that the substantive issues relating to WEPA compliance are properly before the Circuit Court.

### SUMMARY OF PERMIT MODIFICATIONS

Based upon the Findings, and the record as a whole, the proposed permit is modified with respect to three conditions. Permit Condition #38 is modified to limit maintenance dredging to a period of five years and to require issuance of a dredging permit after this period of time. This brings the permit into compliance with standard Department practice as it relates to maintenance dredging. Permit Condition #43 is revised to make it clear that no construction on the new water

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<sup>2</sup> *See*: Ruling on Motion Limiting Issues, Division ALJ Boldt, July 2, 2004. All prior rulings are hereby incorporated by reference, including the June 4, 2004, Oral Ruling Limiting Issues.

intake structure or new discharge structure can be undertaken prior to issuance of a new or reissued WPDES permit. This brings the permit into compliance with the language of Wis. Stat. § 30.21. A new permit condition #52 has been added to require preparation of a plan to minimize secondary impacts to remaining wetlands on the subject parcel. This condition is reasonable and necessary to protect, preserve and enhance water-quality related wetland functional values and to meet the standards of NR 103.

## DISCUSSION

### Wetland Issues

The first issue is whether the practicable alternatives analysis (PAA) was sufficient as it relates to compliance with NR 103. The objectors argue that the PAA was on its face inadequate because the DNR concedes that it did not consider alternative off-site locations as part of the PAA. This indeed is the usual practice for many development projects.<sup>3</sup> The PAA issue is fairly close, but the Division concludes that the DNR properly exercised its regulatory discretion in limiting consideration of available “alternatives” in connection with this project.

Ms. Hopkins testified that the DNR “. . . decision was that the provisions of Wis. Stat. ch. 196 and the decision by the PSCW in the CPCN would limit the scope and content of the PAA to the approved facilities and site footprint.” (Hopkins Direct, TR p. 601) Further, the DNR deemed the PAA submittals of Wisconsin Electric to be sufficient for the Oak Creek site. (Id., p. 599) Both conclusions were appropriate, given the complex interplay between the PSC and the DNR regulatory review processes.

The Department’s determination to limit the PAA was within its regulatory discretion and authority under Wis. Admin. Code NR 103.08(1). That provision provides as follows:

NR 103.08 Department determinations. (1) . . . The department shall, upon request, meet with a project proponent and other interested persons to make a preliminary assessment of the scope for an analysis of alternatives and the potential for compliance with this chapter.

It was reasonable for the DNR to limit the PAA to the site chosen in the CPCN. Given the complexity of the power plant siting process, the Department’s decision to limit the PAA process was a reasonable use of the regulatory authority set forth in Wis. Admin. Code NR 103.08. The “scope for the analysis is if the alternatives” was limited to the site authorized in the PSC CPCN. Had it not been so limited, the applicants would have been required to analyze numerous alternatives that might not meet the PSC’s complex siting approval criteria.<sup>4</sup> As it

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<sup>3</sup> See: NR 299.03(2) & *Bersani v. USEPA*, 850 F.2d 36 (2<sup>nd</sup> Cir. 1988) See Also: Ruling Limiting Issues, 7/2/04, pp. 9-15) The Division denied motions by both Wisconsin Electric and S. C. Johnson to find the PAA either sufficient or inadequate as a matter of law.

<sup>4</sup> As previously noted, under the current regulatory scheme, the DNR would be required to limit the PAA as it has in this case. Wis. Stat. § 30.025. The parties agreed that this statute does not apply to this application. While the new statute does not provide a legal authority for the Department’s actions in this case, it does reinforce the reasonableness of the DNR’s exercise of its discretion under the then-existing regulatory process. The Department’s

was, the Department had already received enough information to evaluate all of the other sites sufficiently for the PSC to consider the likely impact on wetlands for purposes of its review in conjunction with the CPCN.

As Wisconsin Electric argues, the limitation of the PAA focused the DNR's regulatory oversight to two critical stages in the CPCN process. First, before the PSC made its site selection, the DNR reviewed the wetland delineation and site plans for each of the four sites under consideration by the PSC. To this extent, the DNR did consider "alternative locations" as part of its review of the project proposal even if not specifically as part of the PAA. Second, after the PSC decision Department staff met with Wisconsin Electric to modify the proposal to reduce detrimental impacts to wetlands to the extent possible. "This approach assured that the PSC would have the benefit of the DNR's assessment of the wetland sites when the PSC made its site selection decision, and that DNR would work with Wisconsin Electric to assure that the wetland impacts would be avoided and minimized to the extent practicable after a site was selected by PSC." (WE, brief p. 21) This was a reasonable exercise of its regulatory authority under Wis. Admin. Code NR 103 and NR 299.

Hopkins offered two essential reasons for the DNR's approach to the PAA in this matter. First, the Department did not believe it was appropriate to require a full PAA for each site being considered by the PSC in the context of its review of the CPCN. (Hopkins, TR p. 570) Second, the DNR agreed to essentially defer to the PSC as to what constituted available alternatives because the PSC has a more comprehensive set of factors to consider when reviewing the siting of a power plant facility. (Id.)

For example, as part of the CPCN process, the PSC specifically considered the Development Agreement and the conditional Use Permit that had been negotiated between the City of Oak Creek and Wisconsin Electric. (Haskin, TR pp. 7-8) Consideration of local land use and development plans and environmental values are required elements of the PSC review. *See*, Wis. Stat. § 196.491(3)(d). No other site had any comparable local approval or comparable local controls. It is also significant that no other alternative site would avoid detrimental impacts to wetlands.<sup>5</sup> Given the extensive review of multiple factors considered by the PSC, and the fact this was the only site in which local approvals were in place, it was a reasonable exercise of discretion to limit the PAA review. The Division finds that the DNR properly exercised its regulatory discretion in limiting the PAA.<sup>6</sup>

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action was not arbitrary or capricious but based upon a reasonable exercise of its discretion under NR 103. (Hopkins, p. 575)

<sup>5</sup> While the record does not provide a sufficient basis to conclude that the Caledonia alternative site was a "practicable alternative", it is clear that construction at that site would also result in detrimental impacts to wetlands, although perhaps wetlands of lower quality. (*See*: TR pp. 859-860)

<sup>6</sup> With respect to the PAA, it should also be noted that the USACOE has not completed its review of the wetland fill associated with this project. Approval by the USACOE is required before the WQC can take effect. (Permit Condition #4) The USACOE review includes a related PAA review that may be wider in scope than the DNR's NR 103 analysis. (Ex. 210; TR p. 624)) The USACOE process also provides for mitigation of wetland impacts and the applicant has submitted preliminary mitigation plans to the USACOE. (TR p. 148-150) Such a mitigation

The purpose of NR 103 is to set forth the conditions necessary to protect water quality related functions and values of wetlands. (NR 103.03(1)) Greg Kasel, an engineering supervisor for the Bechtel Corporation, testified that Wisconsin Electric configured the project on the north side CUP to avoid and minimize detrimental impacts to wetland functional values to the extent practicable. (TR pp. 292-300) This was borne out in the testimony of Dr. Reed, a distinguished wetland scientist employed by SEWRPC. Reed noted that an earlier iteration of the project threatened a plant community (PCA No. 1) with a high floral quality index, but that this was not the case in the latest project design as set forth in Ex. 28. (TR pp. 858-875) The DNR Area Water Management Specialist, Heidi Hopkins, testified that Water Quality Certification should issue because the project proponents had taken all practicable measures to minimize adverse impacts to the functional values of affected wetlands. (TR. pp. 598-605)

The primary opponents of these permits provided almost no testimony on wetland functions and values, focusing instead on the PAA issue. S. C. Johnson's primary witness on wetland issues, Scott Norwood, admitted that he had no training in any wetland sciences, had never delineated a wetland, had never prepared a practicable alternative analysis and had not even visited the site. (Norwood, TR pp. 1010-1011) There is surprisingly little evidence in the record relating to direct detrimental impacts on the functional values of affected wetlands. The record is more extensive as it relates to likely secondary impacts to wetland areas which are not filled as a result of this project.

The Sierra Club, relying on the testimony of Dr. Reed, argues persuasively that the DNR has not sufficiently analyzed and regulated potential secondary detrimental impacts to wetlands that are not filled in conjunction with this project. (Sierra Club, Brief p. 3) The Division has added a condition to the water quality certification that requires that the applicant submit a plan acceptable to the DNR to reduce such secondary impacts. Specifically, the plan should include further details relating to reducing sedimentation, pro-active prevention of invasion by exotic plant species, and a plan to maintain the existing hydrology and habitat values to the extent practicable in remaining wetland areas. To the extent reasonable, buffer areas directly contiguous to remaining wetlands should also be preserved. The Division is aware that the Department has already required an extensive erosion control plan and other permit conditions relating to reducing sedimentation during construction. However, the plan to reduce secondary impacts will go beyond these construction requirements to "protect, preserve and enhance" other functional values in remaining wetland areas.<sup>7</sup>

Dr. Reed concluded that loss of the 23.47 acres of wetland would have a detrimental cumulative impact on wetland functional values. (TR p. 879) This testimony was the closest the objectors came to countering the testimony of the Department that the project could be approved despite the loss of wetlands. Some relatively high quality wetlands will be filled during

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requirement is not available under Wisconsin law for projects that impact wetlands along Lake Michigan. (TR p. 611)

<sup>7</sup> It should be noted that WE has a very capable wetland scientist on staff, a former DNR Water Management Specialist, and that this provision is not unduly burdensome.

construction of the ERGS Bowl and the related destruction of the bluff along Lake Michigan. (Kasel, TR p. 295) The “bowl” is necessary to construct the ERGS units at lake level to install an “open cycle cooling system”. (*Id.*) The highest quality wetland in this area, R 22 B, will lose 2.3 acres and preserve 1.3 acres of wetland. (Reed, TR p. 884) As Dr. Reed testified, it is unlikely that any future mitigation efforts will create wetlands with the same level of functional values. (Reed, TR pp. 884-885) However, the record does not support denying Water Quality Certification solely on the basis of detrimental cumulative impacts resulting from “similar activities” in the affected area. It is unlikely that there will be many “similar activities” in the affected area. Large coal-fired electricity generating plants are quite rare, as the CPCN makes clear. Further, the applicants and the DNR have done a commendable job in reducing wetland impacts to a minimum. The initial proposal involved a plan to fill up to 60 acres of Lake Michigan lakebed and adjacent wetland areas. (TR p. 578) Many of the most valuable wetland areas have been preserved, and should continue to function at a high-value under the required plan to minimize secondary impacts.<sup>8</sup>

### Section 30.21 Issues

The second issue is whether the applicant has demonstrated compliance with Wis. Stat. § 30.21. The central issue in this context relates to the definition of a “public utility” under the statute in light of complex financing and lease arrangements. The Division finds that the financing/lease arrangements do not bar the applicant from being treated as a “public utility” under Wis. Stat. § 30.21.

Wis. Stat. § 30.21 authorizes a public utility to “construct, maintain and operate” certain structures “upon and under” the bed of a Great Lake. There is no dispute that Wisconsin Electric is a public utility. (TR p. 1006) Further, there is also no dispute that it is Wisconsin Electric that will “maintain and operate” the ERGS. (TR p. 1006) As Wisconsin Electric argues, the dispute is over a legal issue: “under the lease transactions between Wisconsin Electric and ERGS, LLC, is Wisconsin Electric “constructing” ERGS for the purposes of Wis. Stat. § 30.21?”

The Wisconsin Electric Assistant Treasurer, James Schubilske, testified that the nominal owner of the ERGS units will be ERGS, LLC. (TR p.192) ERGS, LLC is obligated to construct the ERGS units for the benefit of Wisconsin Electric under the express terms of the 30-year lease agreement. (*Id.*) This approach was authorized under recent legislation, Wis. Stat. § 196.52(9) (the “Leased Generation Law”) which permits a public utility to build generating resources through an affiliate that finances the construction. (*Id.*) Under the structure, ERGS, LLC is solely a vehicle to finance the ERGS units. (*Id.*)

Section 30.21 does not require Wisconsin Electric to “own” the structures being built on the lakebed. Rather, it requires Wisconsin Electric to “construct” those facilities. Obviously, it will seldom, if ever, be the case that a public utility itself will physically construct the type of structures authorized by § 30.21. Typically, such construction will be done by another entity

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<sup>8</sup> While mitigation is imperfect and not specifically authorized for fills along Lake Michigan, a USACOE required plan to mitigate losses would lessen concerns related to cumulative impacts. However, while likely, no such plan has yet been formally developed by the applicant, or approved by the USACOE.

acting on behalf of the public utility. In any event, as Mr. Schubilske testified, “. . . in a real sense the utility for all intents and purposes gets all the benefits of ownership and the lease is strictly a financing mechanism they use. They have all the rights to the power, they have the rights of quiet enjoyment, they can use it as they wish. They are in fact, from an economic perspective, the owner of the facility.” (TR p. 207)

More fundamentally, the state legislature recently passed the Leased Generation Law in part to provide an incentive to compensate investors for the risks associated with construction of new coal plants. (EIS, p. xix) The Leased Generation Law has been essentially authorized by various energy-related regulatory agencies, including both the WPSC and the FERC.<sup>9</sup> (TR p. 194; Ex. 1) It is simply not within the scope of the DNR review of this proposal to effectively strike down this funding mechanism that has been duly authorized by the legislature.

The Division finds that the applicant may not undertake construction until such time as it receives a permit to operate the water intake structure under the WPDES permitting process. As S. C. Johnson demonstrated, this result is mandated by the plain language of Wis. Stat. § 30.21. If a new or reissued WPDES operating permit is not granted for the intake structure, the applicant is not permitted to “operate” the structure and therefore it is not “necessary” to build it within the meaning of Wis. Stat. § 30.21. At hearing and in its brief the DNR modified its previous position and agreed with the objectors that a permit restriction preventing construction until issuance of the WPDES operating permit is appropriate and required by the plain language of Wis. Stat. § 30.21. (TR pp. 621-622; DNR brief)

#### WEPA Issues

The third issue relates to whether the WEPA process was sufficient and complete. The Division finds that the DNR has complied with the procedural requirements of WEPA. The Division’s jurisdiction over the WEPA process is very limited. Many of the same issues raised by S. C. Johnson and the other objectors are currently being considered by a circuit court that properly has jurisdiction over these issues. For purposes of the decision of the Division, the DNR has met every procedural requirement of the WEPA process. WEPA is a procedural statute and does not impose substantive requirements beyond those imposed under substantive regulatory requirements. *Larsen v. Munz Corp.*, 167 Wis. 2d 583, 482 N.W. 2d 332 (1992)

S. C. Johnson and the Sierra Club argue that the state failed to comply with WEPA because it did not produce and release for public viewing and comment a supplement to the environmental impact statement. This issue arises out of the post-environmental impact statement changes made by the Wisconsin Electric to the design and operation of the intake system. Specifically, the changes identified by S. C. Johnson and the Sierra Club are 1) replacing the timber cribs with wedge-wire screens, which changes the footprint on the lakebed from approximately 0.5 acres to 1.3 acres, 2) the alleged addition of copper to Lake Michigan and 3) the periodic operation of the existing intake as a back-up.

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<sup>9</sup> The FERC decision specifically found that a Project Company similar to ERGS is not the owner of such a facility, but “. . . acts as a passive investor and the utility, which will operate and maintain the plant, remains a regulated entity subject to FERC jurisdiction.” (TR p. 194)

The cooling water intake system is discussed at pages 203 to 208. As the DNR argues in its brief, “the first three sections are labeled Description and location of proposed water intake system, Construction methods for the water intake transport system, and Potential impacts of construction of the water intake system. Almost all of what appears there remains accurate today. (DNR response brief, p. 11)

Most of the changes are minor, and certainly nothing close to a procedural deficiency – reductions on the length and diameter of the pipes and tunnel system. The only significant change relates to the change to include wedge-wire screens rather than timber cribs as part of the cooling water intake design. The objectors make much of this change, but it does not rise to the level of a procedural defect for the EIS. The substance of the design change will be addressed in the WPDES permitting process. The EIS itself made it clear that the public should expect specific design changes to occur in conjunction with the WPDES permitting. (EIS, p. 204)

There is simply no basis to conclude that the EIS was procedurally defective.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12, 30.21, 30.123, 30.20 30.19 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to issue the permits for the construction and maintenance of the project described above subject to the conditions specified.

2. The ERGS project, as proposed by Wisconsin Electric, will comply with all applicable requirements of Wis. Stat. §§ 30.02, 30.03, 30.12, 30.123, 30.19, 30.20, 30.21, 182.017, 281.15, 281.36 and 281.37 and Wis. Admin. Code Chapters NR 102, 103, 115, 116, 117, 170, 216, 299, 320 and 347 to (1) place fill on the bed of Lake Michigan for the purpose of dock extension, for the placement of an intake and discharge structure and to stabilize the shoreline, (2) remove materials from the bed of Lake Michigan, (3) place bridges and culverts over or in navigable tributaries to Lake Michigan and remove materials from the bed of those tributaries for the purposes of railroad expansion and road construction, (4) grade more than 10,000 square feet and to construct ponds within 500 feet of a navigable waterway in Racine County and (5) impact wetlands with discharge and/or fill.

3. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12.

4. The proposed facilities described in the Findings of Fact constitute structures within the meaning of Wis. Stat. § 30.12.

5. The ERGS project as proposed by Wisconsin Electric will comply with all applicable requirements of Wis. Stat. § 30.20 with respect to dredging for activities on the bed of Lake Michigan.

6. The Department has authority to limit “the scope for an analysis of alternatives and the potential for compliance with NR 103”. § NR 103.08(1) The DNR properly exercised this regulatory discretion in its review of the PAA in this matter.

7. The Practicable Alternatives Analysis satisfies the requirements of Wis. Admin. Code NR 103. Practicable alternatives must be “available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes.” Wis. Admin. Code NR 103.07(2). The Division ruled previously that the “overall project purpose” is the construction of coal-fired generating stations to produce electricity. No practicable alternatives to the North Site-CUP site that will avoid and minimize adverse impacts to wetlands are “available” or “capable of being implemented.”

8. The wetlands described above are designated as wetlands in an area of special natural resource interest under NR 103.04(2), because they have a hydrologic connection to Lake Michigan. This factor was considered by the Department and the Division and is a basis for the requirement for the plan to minimize secondary wetland impacts.

9. The condition requiring a plan to minimize potential secondary impacts on wetland functional values is reasonable and necessary to meet the requirements of NR 103.08(3)(d-f).

10. The Department and the Division have considered all of the factors listed under NR 103.08(3), in connection with review of the WQC. The proposed project meets the standards found in NR 103 and NR 299 and issuance of Water Quality Certification is appropriate.

11. The permit as modified meets the requirements of NR 103 and NR 299.

12. The ERGS project meets the definition of a “public utility” within the meaning of Wis. Stat. § 30.21. No construction of the intake structure shall be undertaken until a WPDES “operation” permit is issued or reissued. (*Id.*)

13. The Department and the PSC prepared a joint Environmental Impact Statement (EIS) in connection with review of the project. The DNR has met the procedural requirements of Wis. Stat. § 1.11 and NR 150.

#### PERMIT

Wisconsin Electric Power Company is hereby granted under Wis. Stat. §§ 182.017, 30.02, 30.03, 30.12, 30.123, 30.19, 30.20, 30.21, 281.15, 281.36, 281.37 and Wis. Admin. Code chs. NR 102, 103, 115, 116, 117, 150, 216, 299, 320, 347, a permit to 1) place fill on the bed of Lake Michigan for the purposes of dock extension, for the placement of an intake and discharge structure and to stabilize the shoreline 2) to dredge materials from the bed of Lake Michigan 3) to place bridges and culverts over or in navigable tributaries to Lake Michigan and dredge materials from the bed of those tributaries for the purposes of railroad expansion and road construction 4) to grade more than 10,000 square feet and to construct ponds within 500

feet of a navigable waterway in Racine County and 5) to impact wetlands under 401 Water Quality Certification, Wis. Stat. § 281.36 and Wis. Admin. Code chs. NR 103 and 299 as a result of power plant expansion, road construction and railroad improvements.

The project is located in the City of Oak Creek, Milwaukee County and the Town of Caledonia, Racine County also described as being a part of Section 1, T4N, R22E, all of Section 6, T4N, R23 E, part of Section 35, T5N, R22E, all of Section 36, T5N, R22E, part of Section 31, T5N, R23E, part of Section 12, T4N, R22E, and part of Section 7, T4N, R23E subject to the following conditions:

1. You must notify the Department of Natural Resources (Department) Point of Contact at phone 262-884-2355 before starting constructing on each of the five phases of the project as identified in the introductory paragraph above and again not more than 5 days after each phase of the project is complete.
2. You must complete the project as described on or before December 31, 2011. If you will not complete the project by this date, you must submit a written request for an extension prior to the expiration date of the permit. Your request must identify the requested extension date and the reason for the extension. A permit extension may be granted, for good cause, by the Department. You may not begin or continue construction after the original permit expiration date unless the Department grants a new permit or permit extension in writing.
3. You are not authorized to do any work other than what is specifically described in the application packages and associated plans which were submitted to the Department on June 30, 2003, December 19, 2003 and February 9, 2004, and as modified by Exhibit 28 (GKK-6) and the conditions of this permit. These final Department approved plans and accompanying documents, as well as plans developed and approved pursuant to conditions of this permit are a part of and are conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.
4. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances and by the U.S. Army Corps of Engineers before starting your project.
5. Upon reasonable notice, you shall allow access to your project site during reasonable hours to any Department employee or a Department monitor who is investigating the project's construction, operation, maintenance or permit compliance.
6. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the activity is detrimental to the public interest.
7. You must post a copy of this permit at a conspicuous location on the project web site for at least five days prior to construction, and remaining at least five days after construction. You must also keep a copy of the permit and approved plan available at the project site at all times until the project is complete. All employees, consultants and contractors who are working on the

project must be made aware of the permit and its conditions and all appropriate managers and supervisors in charge of or working on construction or compliance must be provided with copies of the permit.

8. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.

9. You, your agent, and any involved contractors or consultants may be considered a party to the violation pursuant to Wis. Stat. § 30.292, for any violations of Wis. Stat. ch. 30 or this permit.

10. You and/or your contractor shall provide financial assurance mechanisms related to the performance of construction requirements of this permit. The assurance mechanism will be in an amount and form satisfactory to the Department.

11. You shall establish and implement an Environmental Compliance Monitor (ECM). This shall be an independent firm or individual, which will monitor the overall environmental compliance of the project during every phase of the construction. The ECM shall work under the direction of the Department.

12. You must submit to the Department, through the ECM(s), clear photographs once a month documenting the progress of the wetland disturbance, lakebed fill, railroad construction, bluff excavation and overall stabilization efforts.

13. Nothing in the ECM procedures or in the financial assurances mechanism(s) substitutes for or restricts the Department's statutory authority to enforce its permits or Wisconsin Laws and environmental regulations, including its authority to require the cessation of unlawful activities causing environmental harm.

14. To avoid disruption to the stocking and spawning of fish species in Lake Michigan construction on the lakebed shall not occur between March 1<sup>st</sup> and July 1<sup>st</sup> with the following exceptions: a) construction of the intake screen system; b) construction within the existing intake channel; and c) construction of the dock extension after placement of the outside containment dike.

15. To avoid disruption to spawning fish species and avoid seasonally high water levels in the navigable waterways located within the project boundaries, construction of road and railroad crossings shall not occur between April 1<sup>st</sup> and June 1<sup>st</sup>.

16. A Project Implementation Plan (PIP) shall be submitted to the Department at least 14 days prior to beginning construction on any activity regulated under this permit. Each PIP shall contain the following information:

- a) Written summary of the project methods, staging and timing.
- b) Two copies of the updated construction plans.
- c) Construction materials – type of equipment and materials to be used.

- d) Erosion Control & Turbidity Control Plans. The plans must include:
- Timing of Vegetation Removal
  - Type of best management practice or BMPs utilized during this phase
  - Location and timing of BMP placement
  - How often and who will maintain BMPs
  - Timing for final stabilization
  - Emergency Action Plan- What is the procedure if something fails?
- e) Location of dewatering and disposal areas for dredged or stockpiled materials.
- f) Contact information for this phase of the project

General Erosion Control- Applicable to all construction activities.

17. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters and as specified in the plans and procedures that are part of or approved pursuant to this permit. All erosion control measures must meet or exceed the approved Stormwater Construction Technical Standards found on the Department's Runoff Management Website <http://dnr.wi.gov/org/water/wm/nps/stormwater/techstds.htm#Construction> developed by the Department under Wis. Admin. Code chs. NR 151.31.

18. You must maintain a log of the erosion control inspections, repairs made and rain events. This must be kept on site and made available to Department personnel upon request.

19. You must follow field protocols for activities in proximity to landfills or areas known to contain contaminated material and any solid waste encountered shall be disposed of in accordance with Wis. Admin. Code ch. NR 500 or as required by any authorizations issued by the Department.

20. The removal of vegetation shall be restricted to the areas proposed for construction. Vegetation removal shall be staged so that the existing vegetative cover is not removed earlier than 48 hours before grading work is scheduled to commence for that phase of the construction. If the duration of the vegetation removal is longer than 48 hours, grading work shall begin within 48 hours after vegetation removal is completed for that phase. Except for removal of material from the bluff that is necessary to construct the powerblock sediment basin, excavation of the bluff shall take place after the powerblock sediment basin is constructed. Temporary sediment control measures shall be installed to protect against erosion until the powerblock sediment basin is completed.

21. The construction of the 3 largest stockpiles shall be staged as described in this condition. Specifically, these stockpiles are located on the Oak Creek North Landfill, the Oak Creek South Landfill and the former Spang parcel just north of 7-mile road. The Oak Creek North Landfill and the Oak Creek South Landfill will be stripped of topsoil as needed and that topsoil will be stockpiled on those sites. Fill excavated from the bluff will then be placed on these sites to reach the grade shown on the rough grading plans submitted as part of the application. When those elevations are reached, finish work will begin on these two sites to

create the parking and laydown areas necessary. At that time, fill excavated from the bluff will then be placed on the former Spang parcel just north of 7-mile road. All stockpiles and the stockpile side slopes shall be stabilized within 7 days of reaching final grade per the Surfacing plan developed by Bechtel for this project. If the stockpiles or stockpile side slopes will be left inactive for more than 30 days you shall implement methods to temporarily stabilize the stockpiles per the technical standards developed by the Department or per the Surfacing plan developed by Bechtel for this project.

22. Site stabilization between October 1<sup>st</sup> and April 15<sup>th</sup> requires sodding or seeding and mulching with a non-toxic tackifier.

23. This permit has been issued with the understanding that any construction equipment used is the right size to do the job, and can be brought to and removed from the project site without unreasonable harm to vegetative cover or fish and wildlife habitat.

24. Unless otherwise specified in this permit or approved pursuant to this permit, erosion control measures must be in place and operational at the end of each working day. All erosion control measures shall be inspected and any necessary repairs or maintenance performed after every rainfall exceeding ½ inch and at least once per week.

25. You must not deposit or store any of the dredged or graded material in any wetland, below the ordinary high water mark, or in the floodplain of any waterway unless specifically authorized by this permit or within the approved plans.

26. Other than site stabilization and erosion control activities, construction activities within navigable (inland) waterways shall be conducted during low flow periods and shall not be conducted during precipitation events exceeding ½ inch, or when excessive precipitation is anticipated within 12 hours. Construction activities on Lake Michigan shall not be conducted when weather conditions are severe and constant enough to cause wave overtopping of erosion controls that could cause a significant release of sediment to the Lake environment.

27. Any area disturbed during construction that is at the final grade or will be left inactive for a period greater than 30 days shall be stabilized within 7 days of the end of the land disturbing activities.

28. Areas where soil is exposed must be protected from erosion by seeding and mulching, sodding, diversion of surface runoff, installation of hay bales or silt screens, construction of settling basins, or similar methods as soon as possible after the removal of the original ground cover as described in the site specific erosion control plan approved by the Department or in the Stormwater Construction Technical Standards found on the Department's Runoff Management Website <http://dnr.wi.gov/org/water/wm/nps/stormwater/techstds.htm#Construction> developed by the Department under Wis. Admin. Code chs. NR 151.31.

29. Final site stabilization requires the re-establishment of vegetation and should not contain any plant species listed as invasive by the Department. A listing of what the Department

considers invasive species can be found on the Department's website  
<http://dnr.wi.gov/org/caer/ce/invasives/>

30. All construction work shall take place from either a barge, a temporary staging platform, or from an upland location. Construction equipment must not be operated on the bed (below the ordinary high water mark) of any navigable waterway.

Dewatering Activities- for all dewatering activities such as the removal of groundwater, surface water or the dewatering of dredged materials within work areas or other similar circumstances, in addition to the conditions listed above.

31. Any water pumped from pits, trenches or ponds shall be treated using a BMP found in the technical standards developed by the Department. The type of Dewatering Practice utilized at this site shall be a suitable practice listed for "Fine to Very Fine Particles" in the Dewatering Practice Selection Matrix found in the Dewatering Technical Standard. The Dewatering technical standard is found in the Stormwater Construction Technical Standards found on the Department's Runoff Management Website  
<http://dnr.wi.gov/org/water/wm/nps/stormwater/techstds.htm#Construction> developed by the Department under Wis. Admin. Code chs. NR 151.31.

32. If at any time you notice the accumulation of sediment into a wetland or waterway as a result of dewatering, or if water pumped from pits, trenches or ponds begins to discharge excess amounts of sediment to a wetland or waterway you shall immediately stop dewatering and contact the Department to determine an adequate dewatering method.

33. During bluff excavation, if at any time the bluff drainage system is undersized or incapable of capturing surface or groundwater discharges within the excavation footprint, you shall immediately stop excavation work and develop and implement a plan, which provides for an adequate dewatering system.

Water Diversion- during railroad expansion and all road crossings,  
in addition to the conditions listed above.

34. While constructing all road crossings and during railroad modifications, you shall submit to the Department for review and approval a plan showing the specific means and methods proposed for the diversion of the waterway flows around the work site. This plan may be submitted in conjunction with the PIP plan for that phase of the construction.

Dredging- for the navigational channel, discharge structure, intake structure  
and other incidental dredging, in addition to the conditions listed above.

35. Bottom materials must be removed with equipment and practices designed to minimize the amount of sediment that can escape into the water. If available a covered clam shell bucket shall be utilized during dredging operations. If a covered clam shell bucket cannot be utilized for dredging, for construction of the discharge structure and navigational channel, a silt

curtain must be installed in the lake isolating the proposed dredged area from the remainder of the lake.

36. All of the material dredged for the navigational dredging and dock expansion shall be disposed of at a Department approved landfill unless an exemption is authorized by the Department for stockpiling and beneficial reuse. Dredged materials from the discharge structure and intake structure may be placed in one of the proposed stockpiles but may not be placed in any waterway or wetland and may not be placed in the floodway of any waterway.

37. You may only dredge to the dimensions and depths as described in your permit application. Removal must not exceed 160,000 cubic yards.

38. This permit allows for the maintenance of the navigational channel at the dimensions and depths approved under this permit for a period of five years. After this period of time, you should obtain a § 30.20 dredging permit for future maintenance dredging for a period not to exceed five years. At least 5 days prior to conducting any maintenance dredging you must notify the Department of your intent to dredge.

39. You may only remove sediments within the intake channel (which is the lakebed between the south coal dock seawall and the jetty to the south, including the half circle created by the breakwall angling to the south) and may only remove sediments within these dimensions and to this bottom elevation: the bottom elevation from the Oak Creek Power Plant intake structure to the mouth of the intake channel will be maintained to an elevation of -22 low water datum, and from the mouth of the intake channel to the point of intercept it will be maintained to -18 low water datum. This is shown on Bechtel drawing 24896-000-CT-7303-00002, titled "Backup Surface Water Intake Plan". During maintenance dredging operations you must follow all of the erosion control, dewatering and dredging conditions listed in this permit. You must notify the Department at least 14 days prior to conducting any maintenance dredging. At this time you must provide the Department with the following information:

- Total Cubic Yards to be dredged
- When the dredging will take place
- Location of where the dredging will occur
- Location of where the dredge spoil will be placed.

Lake Michigan Structures- for the expansion of the dock, the discharge structure, shoreline protection and the intake structure, in addition to the conditions listed above.

40. All structures placed for the construction of dock expansion, the discharge structure, the shoreline protection and the intake structure shall be placed according to the plans approved by the Department. All material shall be appropriately sized or protected to withstand wave action and ice formation and other environmental factors common to Lake Michigan.

41. All fill materials utilized during construction of these structures shall not consist of material which is considered solid waste under Wis. Admin. Code ch. NR 500.

42. You shall regularly inspect the dock, intake structure, discharge structure and shoreline protection for accumulation of debris and structural stability. You shall remove any excessive accumulation of debris and shall maintain all structures per the approved plans.

43. You shall not construct, maintain or operate the new intake structure or the new discharge structure until the Department issues a new or reissued Wisconsin Pollutant Discharge Elimination System permit for the intake structure and discharge.

44. You shall follow all US Coast Guard requirements for informational, regulatory or warning buoys or navigational requirements during and after construction.

45. All facilities and materials located on the dock shall be for the purposes of handling and processing materials, which are delivered or transported, via Lake Michigan.

45a. In accordance with Wis. Stat. § 30.21, this approval is for the Wisconsin Electric Power Company's construction, operation and maintenance of the Elm Road Generating Station. If the land use changes to other than a public utility, the use of the lakebed for private purposes is not authorized under the approval.

Road and Railroad Crossings of Navigable Waterways- for railroad expansion, construction access roads and new or modifications to plant access roads,  
in addition to the conditions listed above.

46. All road and railroad crossings shall be installed in a manner, which does not impede the passage of fish and wildlife. All temporary culverts will be sized so as to ensure that during the 100-year flood event there will be no backwatering on properties not owned by Wisconsin Electric Power Company. All culverts shall be installed according to the plans submitted as part of the application, with the following exceptions:

- a. The culvert at navigable stream #1, as identified on the Department's January 15, 2003 navigability determination, shall be buried between 12 and 18 inches below the existing bed elevation of the waterway;
- b. The culvert at navigable stream #3, as identified on the Department's January 15, 2003 navigability determination, may be required by DNR to be buried between 12 and 18 inches below the existing bed elevation of the waterway; within 30 days of this Order, the DNR shall evaluate that culvert and advise Wisconsin Electric if the culvert must be buried.

47. You shall stage the proposed crossings so that no more than 2 crossings in a single drainage basin are being installed at any one time.

48. You must inspect bridge/culvert openings periodically for debris and within 5 days of any rainfall exceeding ½ inch, and you must remove any restriction of flow. Any debris removed from the openings must be deposited in an upland site and out of any floodplain.

49. You assume all responsibility and liability for direct or indirect damage caused or resulting from the presence of the waterway crossings and hold the State of Wisconsin and its employees harmless.

50. The temporary roads shall be removed prior to completion of the project. After the temporary roads are removed the bed and banks of the waterways and any areas disturbed by the temporary crossing shall be restored to pre-construction topographic elevations and flow regimes, unless otherwise authorized by the Department.

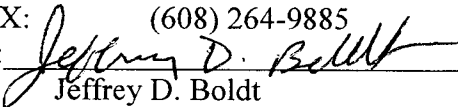
Wetland and Environmental Corridor Impacts- specific conditions in  
Addition to the general conditions above.

51. No wetlands or environmental corridors may be disturbed other than where specifically authorized in the plans approved by the Department. In areas where you will be working within or adjacent to wetlands or environmental corridors, you shall install silt fence and snow fence along the construction boundaries to prevent accidental disturbance to areas outside of the construction boundaries.

52. Prior to undertaking any construction, you shall submit a plan acceptable to the Department to minimize secondary detrimental impacts to wetland areas on the subject parcel. This plan shall include but not be limited to reducing siltation and sedimentation, preventing invasive exotic species from entering into wetland areas, and maintaining the existing hydrology and habitat values to the extent practicable during construction and operation of the proposed facilities. You shall take all reasonable steps to preserve valuable habitat in areas directly contiguous to remaining wetlands. Special care should be taken to preserve state-threatened species in remaining wetland areas and directly contiguous upland areas.

53. Construction site runoff and stormwater runoff shall be treated by an approved BMP for the removal of pollutants prior to discharge to any waterway or wetland.

Dated at Madison, Wisconsin on November 22, 2004.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 264-9885  
By:   
Jeffrey D. Boldt  
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.