IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

NORTHERN STATES POWER COMPANY,

Defendant.

OPINION AND ORDER

12-cv-565-bbc

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Plaintiffs United States of America and the State of Wisconsin have moved for approval of the consent decree lodged with the court for public comment on August 8, 2012. Dkt. #8. Defendant Northern States Power Company has joined in the motion. Dkt. #10. No individual or entity has moved to intervene or for an evidentiary hearing on the decree, although the Soo Line Railroad Company and Wisconsin Central Ltd. have submitted a joint comment about the decree, as has the City of Ashland, Wisconsin. Having reviewed the comments and plaintiffs' joint motion for approval, I am prepared to grant the motion.

The consent decree applies to a superfund site located in Ashland, Wisconsin on the shore of Lake Superior. It has been contaminated by more than a century of industrial use and has been the subject of extensive study by all three parties, the United States, the state of Wisconsin and Northern States Power Company. Under the proposed settlement, defendant will perform the on-land portion of the cleanup while the parties, together with

potentially responsible parties, work out an agreement for performing and funding the cleanup of the contaminated sediments in the portion of Chequamegon Bay that is within the site. As part of the consent decree, certain lands now in private or state ownership will be the subjects of transfer and will be held for conservation in partial compensation for the natural resources that have been polluted. Defendant will convey land to the Wisconsin Department of Natural Resources and to the Bad River tribe; the DNR will transfer part of its conveyance to the Red Cliff tribe. Both of the tribal transfers are of land that is within the receiving tribe's reservation. All of the transferred land will be managed for the benefit of the natural resources.

The consent decree resolves only the on-land contamination and leaves for further negotiation the cleanup of the bay waters. The parties elected to divide the two matters so they could get the site work begun as soon as possible and because cleaning up the on-land portion will stop further discharges of contamination to the bay. Defendant remains potentially liable for the cleanup of the sediment in the bay. Plaintiffs anticipate bringing a new action to address this cleanup.

After the proposed consent decree was lodged, the United States Department of Justice published a notice of lodging in the Federal Register and solicited comments. Representatives of the United States Environmental Protection Agency and the Wisconsin Department of Natural Resources held a public hearing on the decree in Ashland on September 4, 2012. The only comments received by the United States came from the city of Ashland and the two railroads, all of whom are potentially responsible for the

contamination of the site. (Defendant has filed a complaint under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9630, against these entities for contribution to the cost of the cleanup of the on-land portion of the site.)

The City of Ashland raised three issues in its public comment: (1) asking for a requirement in the consent decree that any buildings or other structures that remain on the site after the soil removal and capping should comply with city and state requirements for design and building quality because the site is a public park on the lake shore and an amenity for the city; (2) any buildings and structures should be built on defendant's property rather than in the park to the extent this is reasonable; and (3) § 109 of the decree should be amended to protect the city from liability if it is found to be a de micromis party. The first two issues are no reasons for denying approval of the decree. CERCLA does not require local government permits for work performed exclusively on a superfund site when the work is carried out in compliance with 42 U.S.C. § 9621. § 9621(e). Rather, it recognizes the need for locating structures wherever necessary so as to "effect the expeditious and permanent cleanup" of the site. United States v. City and County of Denver, 100 F.3d 1509, 1512 (10th Cir. 1996). But the city's concerns should be ameliorated by plaintiffs' assurance that the only potentially necessary building that might have to remain in the park after remediation is complete is a pumping station for removing contaminated groundwater from the park's soil and even it can be removed once the need for pumping has passed. As to whether the city should be classified as a de micromis party, this request is barred by

statute. Under 42 U.S.C. § 9607(o)(1), a site owner, such as the city of Ashland, cannot qualify as a de micromis party.

The railroads object to the consent decree on two grounds: (1) although they were named as potentially responsible parties they were excluded from all investigations and studies of the site and the negotiations leading up to the consent decree; and (2) the significant expansion of the remedy under the decree is likely to result in substantial remediation cost increases without any significant environmental benefit, will be potentially inconsistent with existing and future land use at the site and has as its primary purpose accommodation of a remedy for the bay sediment not included in the Phase 1 Project Area.

Plaintiffs deny that the railroads were excluded from the process by which the parties studied and developed the remedy and negotiated the terms of the decree. They admit that defendant performed certain investigative work but say that the railroads and any other member of the public had an opportunity to comment on the studies and the proposed remedy before the Environmental Protection Agency made the final selection of a remedy. The EPA maintained a website to inform the public of the progress of the efforts to reach agreement and it invited the railroads to participate in a consent decree that would result in the cleanup. The railroads declined to participate, as is their right. But the EPA has its own right not to negotiate with a potentially responsible party. United States v. Cannons Engineering Corp., 899 F.2d 79, 93 (1st Cir. 1990) ("So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses."); see also United States v. Grand Rapids, Mich., 166 F. Supp. 2d 1213, 1221 (W.D. Mich. 2000).

As to the railroads' objections to the scope of the remedial work provided for in the decree, the railroads have identified a number of decisions that they think are unnecessary and too costly or classified more appropriately as bay remediation. As plaintiffs point out, these objections are premature. If, in another proceeding, the railroads are held liable for part of the costs of the cleanup, they will have an opportunity at that time to challenge the need for the costs and the reasons for choosing one remedy over another. Their objections to any work done now that may help the bay remediation are misplaced. The work has to be done at some time; the sooner it is done, the less remediation will have to be done later at an increased price.

In reviewing a consent decree, the court takes a deferential posture. Agreements negotiated by the Department of Justice on behalf of the EPA deserve a presumption of validity, given the extensive experience and knowledge of the EPA in the area of environmental protection and remediation.

The settlement in this case is fair and reasonable; it has been lodged for public comment and no one has put forward a plausible objection to the good faith of the negotiations. The objecting parties had notice of the negotiations and an opportunity to participate in the negotiations to perform the selected remedy, although they declined.

The parties' agreement is substantively fair and consistent with the purposes of CERCLA. It achieves the goal of cleaning up the site expeditiously by a responsible party, results in the transfer of about $1.9 million worth of land to benefit and preserve natural resources and leaves open the possibility of recovering further damages for past injuries to

the contaminated site from other responsible parties.

ORDER

IT IS ORDERED that the motion for approval of the consent decree filed by the United States of America and the State of Wisconsin and lodged with the court for public comment on August 8, 2012, dkt. #2, is APPROVED.

Entered this 18th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge