

November 26, 2013

Public Comments on IP-NO-2013-16-00193

Steven LaValley & Wisconsin Department of Natural Resources

Please accept these Public Comments on Elkhorn Industries request for DNR water division permit applications for the following permit: IP-NO-2013-16-00193 miscellaneous structure (dock wall).

My name is Peter Bormuth and I am a Pagan Druid currently living in Jackson, Michigan. Every year I make a pilgrimage to the shoreline of Lake Superior to do ceremony and to honor the greatest living body of fresh water on this planet. Sometimes I journey to Pictured Rocks and sometimes to Minnesota's North Shore. I spent two years living in Ely, Minnesota and one year living in Duluth, Minnesota and thus I have some familiarity with the Superior, Wisconsin area.

The permit open for comments, IP-NO-2013-16-00193, and the permit for dredging (IP-NO-2013-16-0001) are both part of a project to construct an oil tanker loading dock to ship crude oil on Lake Superior by oil tanker and oil barge through Lake Superior and the Great Lakes to eastern U.S. refineries and markets.

The permits for this project located in the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 11, Township 49 north, Range 14 West, City of Superior, Douglas County must be denied by the DNR because this project will be detrimental to the public interest, to fish and wildlife, to natural scenic beauty, to water quality, to Lake Superior, and to the strategic interests of the United States.

The Wisconsin Constitution, Article IX, Section 1 establishes the Public Trust Doctrine in the State of Wisconsin (see *State v. Bleck*, 338 N.W.2d 492, 497 (Wis. 1983)). This trust is extended to all citizens of the United States per the language of the Northwest Ordinance and Article IV, Section 2 of the U.S. Constitution.

The Public Trust Doctrine embodies the time-honored concept that Wisconsin holds all navigable waters in trust for the public. The State is the trustee, every member of the public is the beneficiary, and the waters are the trust property (see *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892) see also *Diana Shooting Club v. Husting*, 145 N.W. 816, 819-20 (Wis. 1914)).

Wisconsin law imposes a duty on trustees to protect public rights in Wisconsin's navigable water. The state and the DNR to whom the legislature delegated trustee responsibilities cannot forgo this duty. The trust reposed in the state is not a passive trust; it is governmental, active

and administrative. The Constitutional mandate places a duty on trustees to protect public waters, not just to refrain from harming them. (see *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) see also *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res.* 799 N.W.2d 73, 84 (Wis. 2011)).

Individuals, and citizens from every state, have legally protected public rights to use and enjoy trust resources The public trust is a fluid doctrine that expands as needed to protect the water commons and public rights. A corollary of this concept is that any member of the public may bring a legal action to protect public rights if the state fails to carry out its trustee duties (see *Gillen v. City of Neenah*, 580 N.W.2d 628, 633, 637-38 (Wis.1998)).

The Wisconsin Department of Natural Resources was created by the legislature in 1965 as an agency with the “necessary powers” to protect Wisconsin’s waters. The legislature directed the DNR to create “a comprehensive action program...to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, agricultural and other uses of water” (see *Reuter v. Dep't. of Natural Res.* 168 N.W.2d 860, 861 (Wis. 1969). The legislature further mandated that “all rules and orders promulgated under this subchapter shall be liberally construed in favor of [these] policy objectives...” (citing 1965 Wis. Sess. Laws 614 codified at WIS STAT Section 144.025 (1965); WIS STAT Section 281.11 (2011)).

Chapters 30, 31, and 281 of the Wisconsin Statutes authorize the DNR to issue permits and to supervise and control riparian activities to ensure they are not detrimental to the public interest (see *ABKA Ltd. P'ship v. Wis Dep't of Natural Res.* 648 N.W.2d 854, 858-59 (Wis. 2002). Riparian rights, such as held by the owners and lessors of the Elkhorn property, are always subordinate to public rights (see *Hilton v. Dep't of Natural Res.* 717 N.W.2d 166, 178 (Wis. 2006) see also *Willow River Club v. Wade*, 76 N.W. 273, 277; see also *Nekoosa Edwards Paper Co. v. R.R. Comm'n* 229 N.W. 631, 632 (Wis. 1930)).

The public interest in trust resources provides the bottom line basis for the DNR to choose among competing uses and to deny or modify projects to minimize harm to public trust resources (see *R.W. Dock & Slips v. Dep't of Natural Res.* 628 N.W.2d 781, 788-89 (Wis. 2001)).

Agreements made between Great Lakes States and Canadian Provinces also uphold and give priority to the public trust doctrine. The Great Lakes Charter of 1985 declares that “The water resources of the Great lakes basin are precious public natural resources, shared and held in trust by the Great lake States and Provinces.” The Great Lakes Charter Annex of 2001 reaffirms the public trust doctrine: “The Great Lakes are a bi-national public treasure and are held in trust by the Great Lakes States and Provinces.” The Great Lakes Compact reiterates this doctrine (The Great Lakes Basin waters are “precious public natural resources shared and held in trust”) and outlines the obligation this places on the States and Provinces: “As trustees of the Basin’s natural resources, The Great Lakes States and Provinces have a shared duty to protect, conserve, and manage the renewable but finite waters of the basin for the use, benefit and enjoyment of all their citizens, including generations yet to come.”

Having explained the legal framework under which this permit application must be considered, I do declare that it must be denied by the DNR as a violation of the public trust as this project is detrimental to the public interest, to fish and wildlife, to natural scenic beauty, to water quality, to Lake Superior, and to the strategic interests of the United States for the following reasons:

Lake Superior is the largest body of fresh water in the world. It contains almost 3,000 cubic miles of water with an average depth approaching 500 feet. The Lake stretches approximately 350 miles from west to east and 160 miles from north to south, with a shoreline almost 2,800 miles long. The drainage basin, totaling 49,300 square miles, encompasses parts of Michigan, Minnesota, Wisconsin, and Ontario.

Water scarcity already affects every continent on this planet. Around 1.2 billion people (1/5 of the world's population) live in areas of physical scarcity and another 500 million are approaching this situation. People living in the Great Lakes Basin remain unaware of this water crisis because of the natural abundance that surrounds us. But many areas of the United States are also experiencing water shortages and many more will face future water issues. By 2050 economists estimate that water will be a more valuable resource than oil is today. That the DNR would even consider threatening Lake Superior for the private benefit and profit of two companies is completely insane.

16 communities draw their drinking water directly from Lake Superior: Ashland, Baraga, Beaver Bay, Cloquet (as backup water supply), Duluth, Grand Portage, Grand Marais, L'Anse, Marquette, Rossport, Silver bay, Sault Ste. Marie, Superior, Terrace Bay, Thunder Bay & Two Harbors. The drinking water of all these communities is threatened by this project. A major oil spill in Lake Superior would require all these communities to find an alternative source of drinking water for public consumption.

Minor spills occurring while loading of tankers and barges takes place at this facility will threaten the water supply of Superior and Duluth. Small and medium sized oil spills account for 95% of all incidents reported and 40% of these spills of 7 tonnes or less occurred during loading or discharging operations at ports or oil terminals according to the International Tanker Owners Pollution Federation Limited. While large spills have greatly declined over the years and now account for only 5% of all reported incidents, they still occur. Of the 1,350 reported large spills of 7 to 700 tonnes between 1970 and 2012, 390 occurred while loading or discharging. There have also been 41 spills of more than 700 tonnes during loading/discharging operations during the same period. There is an almost 100% certainty that there will be a spill at this Elkhorn facility, if the DNR permits this project.

The U.S. Coast Guard, Oil Spill Compendium 2000 reports that there were 9,038 total spills in 1995, 9,335 in 1996, 8,624 in 1997, 8,315 in 1998, 8,539 in 1999, and 8,354 in 2000. These figures include open water, inland & restricted water, and loading/discharging incidents. While the volume of gallons spilled has declined greatly over the years due to increased regulations

and safety requirements including double hulls, the number of spills has remained steady. This is because **80% of total oil discharges are caused by human error**. There is an almost 100% certainty that there will be a spill at this Elkhorn facility, if the DNR permits this project.

It is also apparent that the double hull requirement mandated by the Oil Pollution Act of 1990 which has successfully reduced the volume of oil spills, has created issues that will impact this project. The two main issues are stress levels and corrosion. Double hulled tankers and barges operate with stress levels 30% higher than single hull vessels. This is compounded by the extensive use of high tensile steel in double hulled designs which also increases stress levels in a vessel. Fatigue cracks are commonly found during inspections of double hull vessels, ranging from nuisance cracks to cracks severe enough to cause leaks or structural failure. In violent waters, these increased stress levels more than double the risk of buckling failure. As everyone familiar with Lake Superior knows, violent storms are common and can appear quickly.

Corrosion is the second issue affecting double hull ships. Corrosion can also lead to leaks and structural failure. The Oil Companies International Marine Forum identified corrosion as a serious concern. The normal rate of corrosion of uncoated cargo tank bottom plating is 0.10mm or less per year. However, annual wastage rates as high as 4.0mm have been reported on double hull ships less than 3 years old. The average steel thickness of tank walls is only 20.0mm. In addition, accelerated general corrosion up to 0.24mm per year has been found in vapor spaces. This accelerated corrosion rate, which is approximately 2 to 3 times that which would normally be anticipated, has been attributed to microbial induced processes accelerated by the "thermos effect" in double hulled vessels. Coatings also have a reduced service lifetime at more elevated temperatures as they lose elasticity. At the temperatures that are common in double hulled tanker designs, the time to embrittlement of the coating is approximately halved. Corrosion is essentially an inspection issue and since funds and staff for all forms of environmental inspections are being cut at both the state and federal level, this is a serious concern.

This commenter would also point out that some of the oil being shipped from this proposed facility will be diluted bitumen piped to the loading dock from the Enbridge terminal in Superior. Calumet LLC states that this proposed facility will ship up to 13 million barrels of crude per year, and while some oil might come by rail from North Dakota, most of the oil will be diluted bitumen oil, or dilbit, pumped to Superior by Enbridge in Line 67, the so-called Alberta Clipper. As we in Michigan so tragically found out after the Kalamazoo River spill near Marshall Michigan, dilbit is a completely different product than regular oil. After the emulsifiers that allowed dilbit to flow through the pipeline evaporated, dilbit sank to the bottom of the river creating the most costly inland oil spill cleanup in U.S. history. Traditional techniques, such as clean up booms and surface skimmers were completely ineffective. A spill in the Duluth harbor would destroy the water quality of the harbor for decades and the Coast Guard's Marine Safety office in Duluth has zero ability to handle such an emergency if booms and skimmers are useless when employed.

The safety record of the companies associated with this project should also be considered by the DNR. Since the year 2000, Enbridge has spilled over 192,715 barrels of oil into the environment. In 2000 Enbridge reported 48 pipeline spills and leaks totaling 7,513 barrels. In 2001 Enbridge reported 34 pipeline spills and leaks totaling 25,980 barrels. In 2002 Enbridge reported 48 spills and leaks totaling 14,683 barrels. In 2003 Enbridge reported 62 spills and leaks totaling 6,410 barrels. In 2004 Enbridge reported 69 spills totaling 3,252 barrels. In 2005 Enbridge reported 70 spills totaling 9,825 barrels. In 2006 Enbridge reported 61 pipeline spills totaling 5,363 barrels. In 2007 Enbridge reported 65 pipeline spills and leaks totaling 13,777 barrels. In 2008 Enbridge reported 80 pipeline spills and leaks totaling 2,682 barrels. In 2009 Enbridge reported 103 pipeline spills and leaks totaling 8,441 barrels. In 2010 Enbridge reported 80 pipeline spills totaling 114,122 barrels including the 80,000 barrels of tar sands dilbit they spilled into the Kalamazoo river less than 20 miles from my residence. Last August the PHMSA ordered Enbridge to submit comprehensive plans to improve the safety record of its entire 1,900-mile pipeline system which extends into 16 states. PHMSA officials cited multiple recent pipeline failures and system inadequacies. This company cannot be trusted to protect Lake Superior water quality, the public health, and the public trust.

Calumet LLC, the company which would be operating this proposed oil transfer loading dock just completed a new railcar oil-loading terminal last year, adding 18,000 feet of new track in a \$10 million project that allows them to fill 100-car unit trains with oil headed to eastern refineries. The commenter notes that there is absolutely no compelling public interest to endanger Lake Superior when this company has already invested in infrastructure to move oil to the east coast by rail. Two years ago, there was concern that several east coast refineries might shut down: the then Sunoco-owned refineries in Marcus Hook and Philadelphia, Pennsylvania, and the then Conoco-Phillips-owned refinery in Trainer, Pennsylvania. Hess and partner PDVSA also shut down their refinery on St. Croix which exported 350,000 b/d to the U.S. Atlantic Coast. But Philadelphia Energy Solutions took over the Philadelphia refinery while Delta Airlines runs the Trainer facility. These refineries are now seeing cheap domestic crude (North Dakota Bakken & Alberta heavy crude) shipped to them by rail as are the PBF refineries in Paulsboro, New Jersey and Delaware City, Delaware. Merchant terminal operators Global partners LP and Buckeye partners LP both own separate terminals in Albany, New York where crude is delivered by rail and shipped out by barge down the Hudson River. The Phillips 66 Bayway refinery in Linden, New Jersey is already processing Bakken crude shipped to the refinery by rail & barge. These rail shipments have transformed the eastern market and East Coast Crude Oil production is currently up 32.38% from a year ago. By the end of 2012 the number of U.S. trains moving oil soared to 233,811 carloads, up from 9,500 carloads just five years ago. In 2013 oil producers in Alberta shipped an estimated 200,000 barrels of oil per day to the east coast by rail, up from 120,000 bpd in 2012. Such additional rail capacity already in place, together with planned expansions like the Enbridge Eddystone Rail Company, make this Calumet project completely unnecessary.

Separately, TransCanada has announced plans to move ahead with their \$12 billion pipeline from Alberta to the port of St. John on Canada's east coast. This planned 2,700 mile pipeline

makes the Calumet LLC project to ship oil by tanker and barge over the Great Lakes obsolete, before it is even constructed.

What these christian scum at Calumet LLC are asking the DNR to do is to permit a facility that economically unnecessary, detrimental to the public interest, detrimental to fish and wildlife, detrimental to natural scenic beauty, detrimental to water quality, and detrimental to Lake Superior and the other Great Lakes.

Should the Wisconsin DNR issue this permit, I will immediately challenge it in the Wisconsin Courts. And since federal agency approval is required, I will file a Federal action on national security and religious (RFRA) grounds.

Therefore, I ask that the WDNR consider their responsibility to the public trust and their legal duty to protect the public interest in navigable waters and deny this permit.

Sincerely,

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