CITY OF STOUGHTON
DEPARTMENT OF
PLANNING & DEVELOPMENT
381 East Main Street, Stoughton, WI. 53589

(608) 873-6619 www.ci.stoughton.wi.us

RODNEY J. SCHEEL
DIRECTOR

Date: November 30, 2009

To: Laurie Sullivan
Finance Committee

From: Rodney J. Scheel
Director of Planning & Development

Subject: Items for the December 8, 2009 Finance Committee Meeting.

Finance Committee Agenda:

New Business

1. **Amundson Park Landfill - Restrictive Covenants.**
   Materials are provided regarding direction to process Restrictive Covenants prepared by the United States EPA.
2. **Architectural Services Agreement - EMS Building Renovation**
   The EMS operation is planning to proceed with remodeling of their facility. Over the past several years we have worked with Strang on this project. They have provided an agreement for our consideration for the final design and construction oversight for this project.
3. **Award Janitorial Service Contract**
   The City has obtained proposals for janitorial services beginning in January 2010 to reflect the scaled back budget for this work. Staff is researching references and evaluating proposals received on December 1, 2009 and will present a recommendation at the meeting.

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RODNEY J. SCHEEL
DIRECTOR

Date: November 25, 2009

To: Steve Tone
Finance Committee Chairperson

From: Rodney J. Scheel
Director of Planning & Development

Subject: Amundson Park Superfund Landfill - Restrictive Covenants

The Consent Decree executed in 1997 included Restrictive Covenants (limiting use of the property) required to be filed by the City. EPA is actively pursuing resolution to this issue and has provided the City with a version that "reflects the most recent statutory developments and is being used by EPA for all Wisconsin Superfund sites which require restrictions on property."

City Attorney Dregne has reviewed this document and found there to be many differences from the versions found in the Consent Decree. Attached you will find a summary of his review and options to proceed.

Mayor Griffin, Finance Director Sullivan and I recommend that we work to have the current version of the restrictions filed however; we are seeking your input prior to proceeding. Even using this least involved path it appears we will need to prepare and confirm the required legal description and a title search or title commitment for the restricted property.

If you have any questions, please contact me.

Enclosure

cc. Mayor Jim Griffin
Finance Director Laurie Sullivan
Utilities Director Robert Kardasz
City Attorney Matt Dregne

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Rodney J. Scheel

From: Matthew Dregne [MDREGNE@staffordlaw.com]
Sent: Wednesday, November 18, 2009 3:56 PM
To: Rodney J. Scheel
Cc: Jim Griffin; Laurie Sullivan
Subject: Consent Decree - Landfill Superfund Site

Dear Rodney:

I spoke with Atty. John Tielsch, who represents the Environmental Protection Agency, this afternoon. I asked whether the City is required to sign the proposed new Protection Easement and Declaration of Restrictive Covenants, or whether the City may record a declaration of restrictions in the form that was approved and attached to the Consent Decree. Atty. Tielsch said the EPA would prefer that the City record the new document, because the EPA found that it had problems with the old document. He also referred to changes in state law that made the new document preferable. I asked if we could still lawfully use the form that was approved in the original consent decree. He said that if we do, we may be required to make changes when EPA does its "5 year review" of the property. He said that under the applicable federal statute, EPA reviews the site every 5 years, and could determine that the "Institutional Control Document" is deficient, because the old version was subject to failure, and somehow require the City to record something like the new document.

I mentioned that there seem to be significant differences between the old and the new document. He said that if I send him something asking about those differences, he would be willing to explain the reasons. He may or may not be willing to make changes.

The City seems to have the following options:

1. Sign and record the proposed new document.
2. Sign and record the old document that was approved as part of the consent decree, and deal with the 5 year review process if and when EPA says the document is deficient.
3. Attempt to negotiate changes to the proposed new document.

I previously sent you a draft of the documents where I highlighted the differences. I have not performed a serious review of the differences, to give the City a better understanding of the significance of the differences. I also have not done the legal research needed to know whether the City could be required to record the proposed new document as part of a 5 year review, or otherwise.

Atty. Tielsch asked that we resolve this quickly, because it has been outstanding for over 10 years.

Before I spend any further time on this, we should discuss what the City would like to do.

Thank you.

Matthew P. Dregne
Stafford Rosenbaum LLP
222 West Washington Avenue, Suite 900
P.O. Box 1784
Madison, Wisconsin 53701-1784
608.259.2618
www.staffordlaw.com
StaffordRosenbaum LLP
Attorneys

If you receive this e-mail in error, use or disclosure is prohibited. Please notify me of the error by e-mail and delete this e-mail. Thank you.

Additional notes: ① The covenants the City agreed to in the consent decree may be terminated upon completion of remedial action. This document would be effective indefinitely.

② The access agreement agreed to in the consent decree is substantially different from the access easement provided for in this document.

ENVIRONMENTAL PROTECTION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS

This Environmental Protection Easement and Declaration of Restrictive Covenants is made this ____ day of _____, 20___, by and between the CITY OF STOUGHTON, WISCONSIN, ("Grantor"), having an address of _____, and WISCONSIN DEPARTMENT OF NATURAL RESOURCES ("Grantee"), having an address of _____ _____.

WITNESSETH:

WHEREAS, Grantor is the owner of a parcel of land located in the County of Dane, State of Wisconsin, more particularly described on **Exhibit A** attached hereto and made a part hereof (the "Property");

WHEREAS, the Property is part of the City of Stoughton Landfill Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 18, 1985;

WHEREAS, in a Record of Decision dated September 30, 1991, and an Explanation of Significant Differences dated February 1996 (the "ROD"), the EPA Region Five (5) Regional Administrator selected a "remedial action" for the Site, which provides, in part, for the following actions: excavation of wastes outside the area of main waste disposal and placement of these materials under a landfill cap; placement of a solid waste landfill cover (cap) system over the waste disposal area; placement of a fence around the cap, or slightly within the edges of the cap; land use restrictions to prevent the installation of drinking water wells within 1200 feet of the Property boundary and to prevent residential development of the Property; long term groundwater monitoring; extraction and treatment of groundwater if necessary.

. The remedial action has been implemented at the Site;

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WHEREAS, the parties hereto have agreed 1) to grant a permanent right of access over the Property to the Grantee for purposes of implementing, facilitating and

monitoring the remedial action; and 2) to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment;

WHEREAS, Grantor wishes to cooperate fully with 1qthe Grantee in the implementation of all response actions at the Site;

WHEREAS, the Grantor and Grantee intend that the provisions of this Environmental Protection Easement and Declaration of Restrictive Covenants also be for the benefit of the United States, a third party beneficiary; and

WHEREAS, the Grantee, Wisconsin Department of Natural Resources, is acquiring this interest pursuant to s. 292.31(7), Wis. Stat.

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NOW, THEREFORE:

1. Grant: Grantor, on behalf of itself, its successors and assigns, in consideration of [the remedial action performed at the Site by the Grantee and the EPA under the Consent Decree in the case of United States and State of Wisconsin v. City of Stoughton, United States District Court for the Western District of Wisconsin, Docket No. 96-C-887, does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does give, grant and convey to the Grantee, and its assigns, with general warranties of title, 1) the perpetual right to enforce said use restrictions, and 2) an environmental protection easement of the nature and character, and for the purposes hereinafter set forth, with respect to the Property.

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2. Purpose: It is the purpose of this instrument to convey to the Grantee real property rights, which will run with the land, to facilitate remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to contaminants. It is also the purpose of this instrument that the EPA and its successors and assigns as Third Party Beneficiary shall have the right to enforce the terms of this instrument.

3. Third Party Beneficiary: Grantor on behalf of itself and its successors, transferees, and assigns and the Grantee on behalf of itself and its successors, transferees, and assigns hereby agree that the EPA and its successors and assigns shall be the Third Party Beneficiary under this instrument.

4. Restrictions on use: The following covenants, conditions, and restrictions apply to the use of the Property, run with the land for the benefit of the Grantee and are binding upon the Grantor including its successors, transferees, assigns or other persons acquiring an interest in the Property and their authorized agents, employees, or persons acting under their direction and control.

a. No water wells, other than monitoring wells, shall be located on the Property.

b. Grantor shall not use the Property or take any action at the Property that may interfere with the performance of remedial work required by the Consent Decree or the Record of Decision.

c. Grantor shall not take any activity on the Property which may damage or impair the effectiveness of any remedial action component constructed for or installed pursuant to the Consent Decree or the Record of Decision.

d. No buildings, wells, pipes, roads, ditches or any other structures shall be installed, constructed, removed or used within the area which is both (i) located on the Property and (ii) within the fence installed pursuant to the Record of Decision, except as approved by the EPA as consistent with the Consent Decree and the Record of Decision.

e. There shall be no recreational use of the Property within the fence installed pursuant to the ROD.

f. There shall be no residential use of the Property.

5. Modification of restrictions: Any request for modification or rescission of this instrument shall be made to the Grantee and the EPA at the address given below. This instrument may be modified or rescinded only with the prior written approval of the EPA and the Grantee . Grantor on behalf of it's successors, transferees, assigns or other persons acquiring an interest in the Property agrees to file any EPA approved and WDNR approved modification to or rescission of this Environmental Protection Easement and Declaration of Restrictive Covenants with the appropriate Registrar of Deeds and a certified copy shall be returned to the EPA and the Grantee at the addresses listed below.

6. Environmental Protection Easement: Grantor hereby grants to the Grantee for its use an irrevocable, permanent and continuing right of access at all reasonable times to the Property for purposes of:

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a) Implementing, operating and maintaining the response actions in the ROD, including but not limited to those actions generally described herein;

b) Verifying any data or information submitted to EPA or the State of Wisconsin;

c) Verifying that no action is being taken on the Property in violation of the terms of this instrument or of any federal or state environmental laws or regulations;

d) Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;

e) Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and

f) Implementing additional or new response actions that the EPA determines i) that such actions are necessary to protect public health or the environment because either the original remedial action has proven to be ineffective or because new technology has been developed which will accomplish the purposes of the remedial action in a significantly more efficient or cost effective manner; and ii) will not impose any significantly greater burden on the Property or unduly interfere with the then existing uses of the Property.

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7. Reserved rights of Grantor: Grantor hereby reserves unto itself, its successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and easements granted herein.

8. EPA Entry, Access, and Response Authority: Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take response actions under CERCLA, the NCP, or other federal law. The Grantor and Grantee consent to officers, employees, contractors, and authorized representatives of the EPA entering and having continued access to this property for the purposes described in paragraph 6.

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9. No Public Access and Use: No right of access or use by the general public to any portion of the Property is conveyed by this instrument.

10. Notice requirement: Grantor agrees to include in any future instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

> **NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL PROTECTION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS, DATED _____, 20__, RECORDED IN THE PUBLIC LAND RECORDS ON _____, 20___, IN BOOK _____, PAGE _____, IN FAVOR OF, AND ENFORCEABLE BY THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES AS GRANTEE AND THE UNITED STATES OF AMERICA AS THIRD PARTY BENEFICIARY.**

Within thirty (30) days of the date any such instrument of conveyance is executed, Grantor must provide Grantee with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference.

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11. Enforcement: The Grantee and the EPA as Third Party Beneficiary shall be entitled to enforce, individually or jointly, the terms of this instrument by resort to specific

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performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. Enforcement of the terms of this instrument shall be at the discretion of the Grantee or the EPA as Third Party Beneficiary, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee or the EPA as Third Party Beneficiary of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee or the EPA as Third Party Beneficiary under this instrument.

12. Waiver of certain defenses: Grantor hereby waives any defense of laches, estoppel, or prescription.

13. Covenants: Grantor hereby covenants to and with the Grantee and its assigns, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, except those noted on **Exhibit B** attached hereto, and that the Grantor will forever warrant and defend the title thereto and the quiet possession thereof.

14. Notices: Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

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To Grantor:

_____

_____

_____

To Grantee:

Wisconsin Dept. of Natural Resources
101 South Webster Street
Madison, WI 53703

To Third Party Beneficiary:

U.S. Environmental Protection Agency
Region Five Administrator
77 West Jackson Boulevard
Chicago, IL 60604

15. General provisions:

a) Controlling law: The interpretation and performance of this instrument shall be governed by the laws of the United States or, if there are no applicable federal laws, by the law of the state of Wisconsin.

b) Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the grant to effect the

purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

c) Severability: If any provision of this instrument, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

d) Entire Agreement: This instrument sets forth the entire agreement of the parties with respect to rights and restrictions created hereby, and supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.

e) No Forfeiture: Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

f) Joint Obligation: If there are two or more parties identified as Grantor herein, the obligations imposed by this instrument upon them shall be joint and several.

g) Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this instrument are assignable, subject to the notice provisions hereof. However, the rights of the Grantee may be assigned only to a governmental entity with authority to assume the rights and obligations of that Grantee under the Consent Decree.

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h) Termination of Rights and Obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

i) Captions: The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

j) Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

TO HAVE AND TO HOLD unto the Wisconsin Department of Natural Resources and its assigns forever.

IN WITNESS WHEREOF, Grantor has caused this ENVIRONMENTAL PROTECTION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS to be signed in its name.

Executed this _____ day of _____, 20__.

NAME OF GRANTOR

By: _____

STATE OF _____)
) ss
COUNTY OF _____)

On this __ day of _____, 20__, before me, the undersigned, a Notary Public in and for the State of _____, duly commissioned and sworn, personally appeared _____, known to be the _____ of _____, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

_____
Notary Public in and for the
State of _____

My Commission Expires: _____.

This ENVIRONMENTAL PROTECTION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS is accepted this ____ day of _____, 20__.

STATE OF _____

WISCONSIN DEPT. OF NATURAL RESOURCES

By: _____

Attachments:	EXHIBIT A	legal description of the Property
	EXHIBIT B	list of recorded title encumbrances