

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

In the Matter of Proposed Rules Covering and Procedures for
Confidential Treatment of Records

1-AC-201

**ORDER ADOPTING RULES AT THE DIRECTION OF THE JOINT COMMITTEE
FOR REVIEW OF ADMINISTRATIVE RULES**

At the direction of the Joint Committee for Review of Administrative Rules under
s. 227.26(2)(b), Stats., the Commission adopts a rule to create s. PSC 2.06, Wis. Adm. Code,
relating to procedures for the confidential treatment of records.

Analysis by the Public Service Commission of Wisconsin

Statutory authority: ss. 196.02(1) and (3), 227.11, 227.24 and 227.26, Stats.

Statutes interpreted: ss. 196.14, 196.72 and 196.795(9), Stats.

On August 15, 2000, the Commission voted to promulgate administrative rules on
requests for confidential handling of documents filed with the Commission. On September 20,
2000, the Joint Committee for Review of Administrative Rules directed the Commission to adopt
a rule on the subject under s. 227.26(2)(b), Stats. This rule creates a process for obtaining a
designation of confidential status. Under the rule, a determination on whether information
be treated confidentially shall be made at the time the information is given to the Cor
Under previous Commission procedures, if a person filing a document sought
treatment of information in the document, the filer could do so by id
which confidentiality could be granted. The Commission would acce

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acceptance did not constitute a determination that public access to the information would not be permitted. The Commission would determine if confidential status should be granted when a request for that information was made by another person.

Under this rule, a person who wishes the Commission to keep confidential information in the possession of the Commission, or requested by the Commission, must make an application for confidential status. The application must identify the information for which confidential treatment is sought and identify the authority under which confidential status should be granted. Within 21 days after receiving an application, the Commission may seek additional information from the applicant, if needed, to make a confidentiality determination. The applicant must respond within 30 days to the information request.

The Commission will make a determination on a confidentiality request within 30 days of receiving the additional information or within 30 days of the filing of the application if no additional information is needed. The determination will specify what, if any, information is given confidential treatment and the basis for that determination.

The Commission will give the applicant written notice of its determination. The Commission shall post all determinations regarding confidentiality on its website and may give other appropriate notice. If an applicant is authorized to file information confidentially in the context of a Commission proceeding, the applicant shall serve a copy of the determination on all persons listed on the service list for that proceeding.

Fiscal Estimate

A fiscal estimate is attached to this order.

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Order Adopting Rules

Pursuant to ss. 196.02(1) and (3), 227.11, 227.24 and 227.26, Stats., the Commission creates s. PSC 2.06, Wis. Adm. Code, as shown in Attachment 1. The attached rule takes effect upon publication.

Dated at Madison, Wisconsin, October 19, 2000

By the Commission:



Lynda L. Dorr
Secretary to the Commission

LLD:JL:mem:G:Order Pending\1-AC-201 JCRAR-Ordered Rules

1 SECTION 1. PSC 2.06 is created to read:

2

3 **PSC 2.06 Confidential status.**

4

5 (1) **APPLICABILITY.** This section applies to requests made to the commission to treat as
6 confidential information in possession of the commission or being requested by the commission.

7

8 (2) **RESPONSIBILITY FOR ESTABLISHING CONFIDENTIALITY.** The burden of establishing the need
9 for confidential treatment of any information shall be on the person requesting confidential
10 treatment of the information.

11

12 (3) **APPLICATION FOR CONFIDENTIAL STATUS.** Any person seeking confidential treatment of
13 information shall file with the commission a written application for confidential status containing
14 in affidavit form all of the following:

15

16 (a) The name and address of the applicant.

17

18 (b) The name and position of the individual filing the application.

19

20 (c) The specific type of information for which confidential status is sought.

21

22 (d) The facts and supporting legal authority believed to constitute a basis for obtaining
23 confidential treatment of the information.

1 (4) ADDITIONAL INFORMATION. (a) Within 21 days after receiving a complete application, the
2 commission shall mail to the applicant a list of written interrogatories the answers to which are
3 necessary for a determination under this section. If a confidentiality determination can be made
4 solely on the basis of information appearing in the application, the commission may waive
5 written interrogatories.

6
7 (b) If an extension has not been granted and if the applicant fails to answer all the interrogatories
8 within 30 days after the date the commission mails the interrogatories, the commission shall
9 deny the application. The commission may also deny the application if the applicant fails to
10 provide the information requested in the interrogatories.

11
12 (c) The responses to the interrogatories shall be treated as confidential if the applicant submits a
13 request for confidential treatment of the responses.

14
15 (5) DETERMINATION. (a) Within 30 days after receiving a complete application if interrogatories
16 are waived, or within 30 days after receiving the information requested in the interrogatories, the
17 commission shall issue a written determination on the request for confidentiality. The
18 determination shall include all of the following:

- 19
20 1. A finding which identifies the type of information sought to be assigned confidential status.
21
22 2. A determination of whether the commission has the authority to compel submittal of the
23 information if the commission requested the information.

1 3. If the authority exists, a determination of whether the commission is authorized by law to
2 assign confidential status to the type of information at issue.

3

4 4. The decision to deny or to grant the request in whole or in part.

5

6 (b) A determination to assign confidential status shall be made pursuant to one or more of the
7 following:

8

9 1. Section 196.14, Stats.

10

11 2. Section 196.72, Stats.

12

13 3. Section 196.795(9), Stats.

14

15 4. Upon a finding consistent with the ruling in *State ex rel. Youmans v. Owens*, 28 Wis.2d 672,
16 (1965) that confidential treatment of the information is in the public interest.

17

18 5. Other specific statutory or common law right to confidential treatment of information.

19

20 (c) A determination made pursuant to par. (b)4. shall also include answers to all of the following
21 questions:

22

1 1. How many people have knowledge of the supposedly "secret" information? Will disclosure
2 increase that number to a significant degree?

3
4 2. Does the contested information have any value to the possessor? To a competitor? Is that
5 value substantial?

6
7 3. What damage, if any, would the possessor of the secret suffer from its disclosure? What
8 advantages would its competitors reap from disclosure?

9
10 4. What benefits are likely to flow from disclosure? To whom? Are they significant? In this
11 connection, what is the public "need" for disclosure? Can it be satisfied in any other way?

12
13 (d) 1. The commission shall notify the applicant in writing of the determination. The
14 commission post on its internet website a list of all determinations made under this section and
15 may provide any other notice it considers to be appropriate.

16
17 2. If information that is granted confidential status is filed in conjunction with a commission
18 proceeding, the applicant shall serve a copy of the determination on all persons listed on the
19 service list for the proceeding, and shall file proof of service with the commission.

20
21 (6) INTERIM CONFIDENTIAL STATUS. Information for which confidential status is requested shall
22 not be open to public scrutiny until 40 days after issuance of the determination.

23

1 (7) CONTESTED CASES. In any contested case hearing before the commission, the administrative
2 law judge, in determining the merits of a request for confidential treatment of information which
3 arises during the course of the hearing, may render a ruling on the request only after receiving
4 answers to the questions appearing in sub. (5) (c) 1. to 4.

5

6 SECTION 2. INITIAL APPLICABILITY.

7 The treatment of section PSC 2.06 the Wisconsin Administrative Code first applies to a request
8 for confidential treatment made to the commission on the effective date of this rule.

9

10 SECTION 3. EFFECTIVE DATE.

11 As provided in s. 227.24(1)(c), Stats., the treatment of section PSC 2.06 of the Wisconsin
12 Administrative Code takes effect upon publication in the official state newspaper.

13

14 (end)

FISCAL ESTIMATE

DOA-2048 N(R10/96)

- ORIGINAL UPDATED
- CORRECTED SUPPLEMENTAL

Subject

Create a Process for Determining Confidentiality of Records

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation Increase Existing Revenues
- Decrease Existing Appropriation Decrease Existing Revenues
- Create New Appropriation

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 - Permissive Mandatory
- 2. Decrease Costs
 - Permissive Mandatory

- 3. Increase Revenues
 - Permissive Mandatory
- 4. Decrease Revenues
 - Permissive Mandatory

5. Types of Local Governmental Units Affected:
- Towns Villages Cities
 - Counties Others _____
 - School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

20.155(l)(g)

Assumptions Used in Arriving at Fiscal Estimate

PSC 2.06 creates a process for determining the confidentiality of records submitted by public utilities to the Commission. The process the rule prescribes requires the PSC to make a determination of confidentiality and notify the applicant. The PSC processed 1,280 requests for confidential treatment of data in calendar year 1999 and has processed 975 requests so far in calendar year 2000. This proposed rule will not have a fiscal impact on the PSC or local government.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)
PSC/Gordon Grant 267-9086

Authorized Signature/Telephone No.

Date
10/17/00

OCT 20 2000



Public Service Commission of Wisconsin

Ave M. Bie, Chairperson
Joseph P. Mettner, Commissioner
John H. Farrow, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

The Honorable Judy Robson, Co-chairman
Joint Committee for Review of Administrative Rules
15 South, State Capitol
Madison, WI 53703

The Honorable Glenn Grothman, Co-chairman
Joint Committee for Review of Administrative Rules
125 West, State Capitol
Madison, WI 53703

Re: In the Matter of Proposed Rules Covering and Procedures for
Confidential Treatment of Records

1-AC-201

Dear Senator Robson and Representative Grothman:

At its open meeting on October 19, 2000, the Public Service Commission adopted a rule at the direction of the Joint Committee for Review of Administrative Rules under s. 227.26(2)(b), Stats., relating to the handling of confidential information. Enclosed please find copies of a certificate, Commission order with attached JCRAR-directed rule, and fiscal estimate regarding this emergency rule. If you have questions or concerns, please contact Commission attorney Mr. John Lorence at (608) 266-8128.

Dated at Madison, Wisconsin, October 20, 2000

By the Commission:

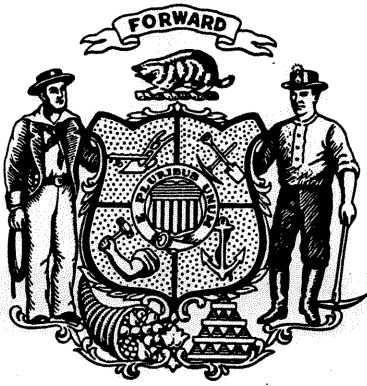
Lynda L. Dorr
Secretary to the Commission

LLD:JLL:mcm:L:\Rulemaking\1-AC-201\Notice to the Legislature

Enclosures

cc: Chief Clerks of the Senate and Assembly
Legislative Members

END



END

ORDER OF THE DEPARTMENT
OF VETERANS AFFAIRS
ADOPTING EMERGENCY RULES

The Wisconsin Department of Veterans Affairs adopts an order to amend VA 2.01(2)(b)2., relating to the expenditure limitation for dentures under the health care aid grant program.

Analysis prepared by the Department of Veterans Affairs.

Statutory authority: s.45.35(3), Stats.

Statute interpreted: s.45.351(1j), Stats.

The amendment of VA 2.01(2)(b)2. will enable the Department to expend additional funds for dentures under the health care aid grant program. The Joint Committee on Finance, at its September 24, 1998 meeting, authorized additional appropriation authority to meet the demand for dentures under this program. The current \$50,000 cap has already been met. The amendment will permit the department to immediately accept and approve applications for dentures rather than wait until July 1, 1999.

Text of the Rule

VA 2.01(2)(b)2. is amended to read:

2. Dental care. Health care aid for dental care shall be limited to extractions, fillings, dentures and denture repairs, unless related to health care provided as a result of accidental injury. The department shall expend not more than \$35,000 in fiscal year 1991-92 and not more than \$50,000 25% of the total amount appropriated for the health care aid grant program in any subsequent fiscal year for the payment of all claims for dentures under ~~s.45.351(1)(a)~~ s.45.351(1j), Stats.

Finding of Emergency

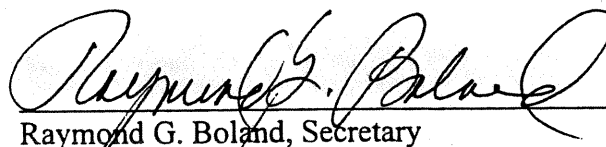
The Department of Veterans Affairs finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The Department provides payment to dental providers for dentures under the health care aid grant program for needy veterans and their dependents. Under s. VA 2.01(2)(b)2., Wis. Adm. Code, the Department is restricted to a \$50,000 cap per fiscal year for the payment of claims for dentures. As the result of a significant increase in the use of the health care aid grant program for dentures, the Department has received requests for approval of treatment plans involving dentures which would result in expenditures in excess of the fiscal year cap. The Department was required to terminate denture coverage within the first two weeks of the most recent fiscal year. A significant number of applications were returned to veterans who were thus unable to receive coverage for dentures.

The treatment plans submitted with the applications typically encompass the removal of teeth with a resulting need for dentures. Failure to provide dentures could have a negative impact upon an individual's health. It is necessary that the Department has sufficient expenditure authority to meet the significant demand for this health care benefit. The emergency rule cap will accomplish this goal.

This rule shall take effect on the date of publication in the official state newspaper, as provided in s.227.24(1)(c), Stats.

Dated at Madison, Wisconsin, October 2, 1998 .



Raymond G. Boland, Secretary
State of Wisconsin
Department of Veterans Affairs



P.O. Box 7882
MADISON, WI 53707-7882
(608) 266-2253

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

Emergency Rule Extension Motion Form

Last Modified January 1999

February 25, 1999
411 South, State Capitol

Moved by Grothman, Seconded by Gunderson

THAT, pursuant to s. 227.24(2)(a), stats., the Joint Committee for Review of Administrative Rules extend the effective period of emergency rule VA 2.01 (2)(b)2 by 60 days, at the request of the Department of Veteran Affairs.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON	✓		
2. Senator GROBSCHMIDT	✓		
3. Senator SHIBLISKI			
4. Senator WELCH	✓		
5. Senator DARLING			
6. Representative GROTHMAN	✓		
7. Representative GUNDERSON	✓		
8. Representative SERATTI	✓		
9. Representative KREUSER	✓		
10. Representative BLACK	✓		
Totals			

Motion Carried

Motion Failed



STATE OF WISCONSIN
DEPARTMENT OF VETERANS AFFAIRS



30 West Mifflin Street, P.O. Box 7843, Madison, WI 53707-7843
(608) 266-1311 FAX (608) 267-0403
1-800-947-8387 (WIS VETS)
Tommy G. Thompson, Governor
Raymond G. Boland, Secretary

FEB 12 1999

February 9, 1999

Judy Robson

Senator Richard Grobsechmidt, Co-chairperson
Joint Committee For Review Of Administrative Rules
100 N Hamilton, Room 404
Madison WI 53703

Representative Glenn Grothman, Co-chairperson
Joint Committee For Review Of Administrative Rules
Room 125W, Capitol Building
Madison WI 53702

Re: Extension Of Emergency Rule

Dear Senator Grobschmidt and Representative Grothman:

The purpose of this letter is to request a 60 day extension of the enclosed emergency rule. The emergency rule will expire on March 11, 1999. The permanent rule was submitted for review by the appropriate legislative committees on January 4, 1999. I expect that the permanent rule will be effective by April 1, 1999.

The joint committee on finance, at its September 24, 1998 meeting, authorized the department to increase expenditures for the health care aid grant program from \$885,900 to \$1,200,000. The program is funded by the veterans trust fund. The emergency rule was enacted on October 12, 1998 to permit the department to expend up to 25% of the annual expenditure authority (\$300,000) for dentures. The current permanent rule limits expenditures for dentures to \$50,000 annually. Extension of the emergency rule will permit the department to continue to pay for dentures during this fiscal year up to the \$300,000 maximum, without interruption.

If you have any questions, please contact this department's chief legal counsel, John Rosinski, at 266-7916.

Sincerely,
DEPARTMENT OF VETERANS AFFAIRS

Raymond G. Boland
Raymond G. Boland
Secretary

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OF VETERANS AFFAIRS
ADOPTING EMERGENCY RULES

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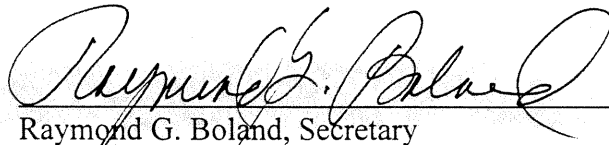
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This rule shall take effect on the date of publication in the official state newspaper, as provided in s.227.24(1)(c), Stats.

Dated at Madison, Wisconsin, October 2, 1998 .



Raymond G. Boland, Secretary
State of Wisconsin
Department of Veterans Affairs

END



END

Date: August 20, 1990

IN REPLY REFER TO: 3550

To: District Directors

PMMS Response
Insertion: Chapter 30 Water
Regulation Handbook

From: Robert Roden - WZ/6



Distribution: WRZ Program Staff

Subject: Navigability Determinations

We have been asked several questions regarding navigability determinations related to the following situation: In 1977 several Department employees determined a portion of a stream to be non-navigable. Since then the landowner channeled the stream and placed fill into adjoining wetlands and the floodplain. This action confined the flow to a channel estimated to average 3 feet deep and 3 feet wide, and observed (not proven) navigable during high water periods. This situation raises the following questions:

1). Q: May we now declare the stream navigable and assert Chapter 30 jurisdiction over future projects.

A: Two factors come into play in reaching an answer to this question. The first factor is the navigability standard in use at the time of the past determination of non-navigability. In this case the standard used is that of the most recent applicable Supreme Court Decision found in DeGayner & Company Inc., v. Department of Natural Resources, 70 Wis. 2d 936 (1975). Therefore, in this situation the question of navigability is based on the current standard and results in a proper determination that the stream was non-navigable. If, however, a past determination of non-navigability was based on pre-DeGayner standards it may be possible to prove, using DeGayner standards, that the stream is now navigable and subject to Chapter 30 jurisdiction for future projects.

The second factor to be considered is the applicability of the navigability standard based on s. 30.10, Wis. Stats. In 1981 s. 30.10, Wis. Stats. was amended to exclude "farm drainage ditches" from navigable waters unless it is shown the ditches were navigable streams before ditching occurred. Therefore, if the above situation involves an artificial channel which drains water from lands which are used for agricultural purposes and the past determination of non-navigability was based on the DeGayner standards the farm drainage ditch exclusion would apply and the stream would not be subject to our jurisdiction in the future even though it could be proven to now be navigable-in-fact. If, however, this situation does not involve a farm drainage ditch and a determination can be made using DeGayner standards that it is now navigable we could assert jurisdiction over future projects.

2). Q: What procedure should we use?

A: Normal permit and/or enforcement procedures should be used for future projects that are considered navigable using DeGayner standards and do not involve farm drainage ditches. For future projects involving farm drainage ditches we will have the additional burden of proving that there was a previous history of navigability based on DeGayner. In cases where we have advance notice of proposed projects that would be subject to our jurisdiction we should notify the project proponent in writing of our position and advise them to apply for the applicable permits.

3). Q: May we apply Chapter 30 jurisdiction to past projects?

A: Asserting jurisdiction over past projects may be possible if we can prove that the stream was navigable at the time the project was constructed using the navigability standards that were in place at that time. If the stream was considered non-navigable at the time of construction we would not have jurisdiction over past projects even though the stream is considered navigable now. However, we would have jurisdiction over future projects.

4). Q: May we assert any floodplain jurisdiction over past or future projects? The stream in this situation is not mapped.

A: Yes. Although the area in this situation is not mapped, if any future channel modifications affect other property owners appropriate legal arrangements are required. Further detailed guidance for areas that are mapped and/or studied is included in a previous program guidance listed below. For past projects in unmapped or unstudied areas where we have Chapter 30 jurisdiction as outlined above, we can also assert floodplain jurisdiction where appropriate.

Related Guidance: December 9, 1988 from Bob Roden, Chapter 80, Water Regulation Handbook and Chapter 3, Floodplain/Shoreland Guidebook

Requested by: Dale Lang- NCD

Drafted by: John Coke- WZ

Reviewed by: Scott Hausmann - WZ/6 *SH*
Larry Larson - WZ/6 *LLC*
Mike Cain - LC/5 *MC*

A: Normal permit and/or enforcement procedures should be used for future projects that are considered navigable using DeGayner standards and do not involve farm drainage ditches. For future projects involving farm drainage ditches we will have the additional burden of proving that there was a previous history of navigability based on DeGayner. In cases where we have advance notice of proposed projects that would be subject to our jurisdiction we should notify the project proponent in writing of our position and advise them to apply for the applicable permits.

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Requested by: Dale Lang- NCD

Drafted by: John Coke- WZ

Reviewed by: Scott Hausmann - WZ/6 *SH*
Larry Larson - WZ/6 *LL*
Mike Cain - LC/5 *MC*

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: April 5, 1993

FILE REF: Program Guidance

TO: District Directors

DISTRIBUTION: District Water Mgmt. Supervisors
Area Water Mgmt. Specialists
Bureau of Water Reg. and Zoning
County Zoning Administrators
City/Village Zoning Administrators
Bureau of Legal Services
Regional Planning Commissions
INSERTION: Floodplain/Shoreland Guidebook, p.
4.11; Water Regulation Handbook,
Chapter 30

FROM: Scott Hausmann - WZ/6 ~~SH~~.

SUBJECT: Applicability of Chapter 30 and Shoreland Zoning to Farm Drainage
Ditches Navigable-in-fact But Without Stream History

SUMMARY OF GUIDANCE

When use of any parcel adjacent to a ditch that is navigable-in-fact is converted from agriculture, Chapter 30 applies even if the ditch had no stream history. Shoreland zoning applies whenever a structural use is proposed, even if the structure is part of an agricultural use.

The statutory language regarding drainage ditches must be read as an exemption for a particular use of land (agriculture) rather than as an exemption for a waterway or segment of a waterway. Clearly, agricultural and nonagricultural activities can have equal impacts on waterways, but agriculture has a special status that should not interfere with protection of waters from the impacts of other uses.

STATUTORY GUIDANCE

Navigable Waters

Section 30.10(4)(c) says that farm drainage ditches without stream history are not navigable, defining farm drainage ditches as "any artificial channel which drains water from lands which are used for agricultural purposes".

The phrase in section 30.10(4)(c), "lands which are used for agricultural purposes," supports the conclusion that the exemption applies to parcels of land. Reading the statute to mean that ditches themselves are not navigable, therefore exempt, until all of the lands drained by the ditch are converted from agriculture would allow anyone (farmer or not) with land adjacent to a ditch to alter the ditch in any way they saw fit. In addition, such a reading

allows lands along a ditch to be structurally developed, before regulations would apply - resulting in impacts to the waterway and a host of nonconforming uses.

Section 144.26(2)(d) defines navigable waters as "Lake Superior, Lake Michigan, all natural inland lakes within this state and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state."

Sections 144.26 (2m) and 87.30 (1m) specify three conditions which must all be met in order for a parcel adjacent to a ditch to be exempt from shoreland zoning. One of the conditions is that the parcel remain in nonstructural agricultural use. As a result, shoreland zoning applies to any structural use adjacent to a ditch that is navigable-in-fact.

Agriculture

For Chapter 30 determinations, use the definition of agriculture in 30.40(1): "Agricultural use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming. Based on the definition above, nonstructural agricultural uses are pasture and cultivation.

PRACTICAL OUTCOMES

Administration

- o When someone inquires about local or state permits, when a local zoning decision is reviewed, or when a complaint is received, then the regulations will be applied. Proposals for activities from owners whose lands are not in agricultural use require Chapter 30 and shoreland zoning permits.* Any proposal for structural use requires a shoreland zoning permit. No tracking of land use change for this purpose is needed.
- o Without additional staff at state or local levels, we will respond to complaints and consider the same factors as we do in deciding whether to pursue enforcement for any other Chapter 30 or zoning situation.

Impacts on Waterways

Although most ditches do not receive much public recreational use, the objectives of Chapter 30 and shoreland zoning can be significantly affected by activities along ditches. Runoff carrying pollutants can readily reach natural navigable waterways through ditches. Ditches can acquire significant fish and wildlife habitat and recreational values even while in use for agricultural drainage.

* Note: Floodplain zoning regulations only apply if a ditch is mapped on the floodplain regulatory map, whether or not the ditch is navigable in fact.

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Sections 144.26 (2m) and 87.30 (1m) specify three conditions which must all be met in order for a parcel adjacent to a ditch to be exempt from shoreland zoning. One of the conditions is that the parcel remain in nonstructural agricultural use. As a result, shoreland zoning applies to any structural use adjacent to a ditch that is navigable-in-fact.

Agriculture

For Chapter 30 determinations, use the definition of agriculture in 30.40(1): "Agricultural use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming. Based on the definition above, nonstructural agricultural uses are pasture and cultivation.

PRACTICAL OUTCOMES

Administration

- o When someone inquires about local or state permits, when a local zoning decision is reviewed, or when a complaint is received, then the regulations will be applied. Proposals for activities from owners whose lands are not in agricultural use require Chapter 30 and shoreland zoning permits.* Any proposal for structural use requires a shoreland zoning permit. No tracking of land use change for this purpose is needed.
- o Without additional staff at state or local levels, we will respond to complaints and consider the same factors as we do in deciding whether to pursue enforcement for any other Chapter 30 or zoning situation.

Impacts on Waterways

Although most ditches do not receive much public recreational use, the objectives of Chapter 30 and shoreland zoning can be significantly affected by activities along ditches. Runoff carrying pollutants can readily reach natural navigable waterways through ditches. Ditches can acquire significant fish and wildlife habitat and recreational values even while in use for agricultural drainage.

*- Note: Floodplain zoning regulations only apply if a ditch is mapped on the floodplain regulatory map, whether or not the ditch is navigable in fact.

Impacts on Navigation

Under existing law as portions of these ditches are no longer legally declared nonnavigable by s. 30.10, the public gains the right to navigate in those portions. This legal requirement obviously can create a very practical problem - alternating segments of public and private water on the same waterway - until major portions if not the entire ditch is open to navigation. We would ask that staff do their best in dealing with this potential problem and to advise us of any problems which come up.

RELATED GUIDANCE

Shoreland Zoning Jurisdiction - 3/28/85

Opinions of the Attorney General - 3/6/74 and 10/7/74; 3/8/90

Mine Reclamation: Navigable Waters - 1/28/88

Navigability Determinations - 8/20/90

DRAFTED Mary Ellen Vollbrecht, SED
Scott Hausmann, WZ/6

REVIEWED Michael Cain, LC/5 *MC*
Linda Meyer, LC/5 *LM*
Robert W. Roden, WZ/6 *RW*

CORRESPONDENCE/MEMORANDUM

DATE: March 21, 1990 FILE REF: 3500

TO: Water Management Supervisors
Water Management Specialists
Water Regulation Section

FROM: Ken Johnson - WZ/6 *KJ*

SUBJECT: Agricultural uses of land relating to fish farming and forest harvesting

Several months ago Bob Roden asked the Department of Justice about the implications of the new agricultural definition found within the Lower Wisconsin river legislation. The new definition, now found within section 30.40(1), fails to include fish farming and forestry. Since recent administrative decisions use the definition within Chapter 91, use of the new definition represents a significant departure from the way we've done business.

Attached is the Attorney General's opinion in this matter which clearly states that section 30.40(1) is applicable. Agricultural use is defined as follows:

"Agricultural Use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming.

We may have some problems getting the word out to people who are in mid project. However, we ought to start asserting jurisdiction on 30.19 and 30.20 projects not covered by the above definition as soon as possible.

cc: Robert Roden - WZ/6
Scott Hausmann - WZ/6

Attachment

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL
Mark E. Musolf
Deputy Attorney General

CC = Scott ~~(KJ)~~ → ~~Bob Keating~~
CR WZ/C

COPIES TO
SECTION STAFF
PLEASE. KJ 3/14/90

114 East. State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221

March 8, 1990

I-12-90

Mr. C.D. Besadny
Secretary
Department of Natural Resources
101 South Webster
Madison, Wisconsin 53702

Dear Mr. Besadny:

You have asked whether the Department of Natural Resources must consider fish farming and forestry as "agricultural uses of land" for purposes of its permitting authority in section 30.19, Stats. Section 30.19 requires a department permit for the construction or enlargement of any artificial waterway which connects to or exists within 500 feet of a navigable waterway, but subsection (1m)(b) exempts "any agricultural uses of land" from the permit requirement. You point out that fish farming and forestry can have substantial impacts on navigable waters, and you add that the recently-enacted definition of "agricultural use" in section 30.40(1) fails to include fish farming or forestry.

For the reasons discussed in this opinion, I conclude that the department may narrowly interpret the agricultural exemption in section 30.19(1m)(b) to effectuate the resource protection purposes of chapter 30.

Prior to the enactment of section 30.40(1) (1989 Wisconsin Act 31), your department apparently concluded that its administration of the section 30.19(1m)(b) permit exemption was governed by the expansive definition of "agricultural use" contained in section 91.01(1). For purposes of farmland preservation, section 91.01(1) defines "agricultural use" as follows:

(1) "Agricultural use" means beekeeping; commercial feedlots; dairying; egg production; floriculture; fish and fur farming; forest and game management; grazing, livestock raising; orchards; plant greenhouses and nurseries; poultry raising; raising of grain, grass, mint and seed crops; raising of fruits, nuts and berries; sod farming; placing land in federal programs in return for payments in kind; owning land, at least 35 acres of which is enrolled in the conservation reserve program under USC 3831 to 3836; participating in the milk production

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OFFICE OF THE
SECRETARY

termination program under 7 USC 1446(d); and vegetable raising.

Section 30.40(1), however, defines "agricultural use" more narrowly:

(1) "Agricultural use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables; and sod farming.

The answer to your question, then, turns on whether it is appropriate for the department to utilize this most recent definition of "agricultural use" in its administration of section 30.19 permits, or whether it is bound to the broad definition in section 91.01(1).

The same word is capable of different meanings in different statutes and "[t]he ultimate scope of a term capable of a broad or narrow meaning in the abstract must be determined by its context in a particular instance." Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 528, 271 N.W.2d 69 (1978). Thus, even though a statute is not ambiguous, a word may have many meanings and "its precise meaning must be found in its context and relation to the subject matter." Empire Gen. Life Ins. Co. v. Silverman, 127 Wis. 2d 270, 277, 379 N.W.2d 853 (Ct. App. 1985). And, as noted in Suburban State Bank v. Squires, 145 Wis. 2d 445, 449, 427 N.W.2d 393 (Ct. App. 1988), "[w]hen multiple statutes are contained in the same chapter and assist in implementing a common object or policy, the statutes should be read in pari materia and harmonized."

A superficial reading of sections 30.40(1) and 30.19 would suggest that because both statutes reside in the same chapter, the section 30.40(1) definition of "agricultural use" should apply to section 30.19(lm)(b). In County of Dane v. Racine County, 118 Wis. 2d 494, 498, 347 N.W.2d 622 (Ct. App. 1984), however, the court of appeals cautioned that statutory definitions cannot simply be superimposed on other statutory sections, even if they appear in the same chapter, if the statutory definition is limited to the specific section in which it appears. Thus, we cannot automatically apply the section 30.40(1) definition to section 30.19(lm)(b) because it expressly applies to sections 30.40 to 30.49, dealing with the lower Wisconsin state riverway. Nor can we assume the applicability of section 91.01(1), as it is likewise expressly limited to chapter 91, "Farmland Preservation."

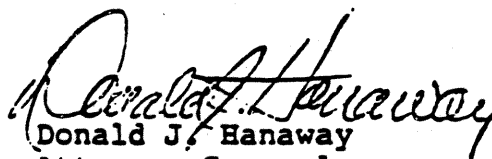
We may still, however, examine the subject matter and context of each of the definitions of "agricultural use" appearing in sections 30.40(1) and 91.01(1), to determine which definition the

department may use in its administration of section 30.19. Chapter 30 concerns the protection of the state's navigable waters. As stated in Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 597, 412 N.W.2d 505 (Ct. App. 1987), "[t]he free and unobstructed use of the state's navigable waters is a matter of statewide concern. . . . Chapter 30, Stats., regulates the area." Applying the narrow definition of "agricultural use" in section 30.40(1) to section 30.19 permit proceedings would advance the resource protection purposes of chapter 30 by making the agricultural permit exemption unavailable to entities engaged in forestry and fish farming. Conversely, the expansive definition of "agricultural use" in section 91.01(1) is intended to advance farmland preservation, the objective of chapter 91, and has little relationship to the protection of state waters.

Indeed, even in the absence of the newly created definition of "agricultural use" in section 30.40(1), I question whether the department, in light of the resource protection purposes of chapter 30, should have presumed the applicability of the section 91.01(1) definition to section 30.19. Where the Legislature has intended the section 91.01(1) definition to apply, it has expressly so stated, as in sections 71.58(3) and (4) and 30.29(3)(b). "Furthermore, if a statute contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed. Kimberly-Clark Corp. v. Public Service Commission, 110 Wis. 2d 455, 463, 329 N.W.2d 143, 147 (1983)." Maxey v. Racine Redevelopment Authority, 120 Wis. 2d 13, 24, 353 N.W.2d 812 (Ct. App. 1984). Moreover, I note that section 30.19(1m)(b) creates an exemption from the normal permit requirement for agricultural users. It is reasonable to assume that in the area of environmental protection--as in the context of tax exemptions--ambiguities in words granting an exemption are resolved against the person claiming the exemption. Kollasch v. Adamany, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981).

Accordingly, I conclude that the context of section 30.19(1m)(b), and the resource protection purposes of chapter 30, allow the department to interpret the agricultural exemption narrowly, and to apply the section 30.40(1) definition of "agricultural use" to advance those purposes.

Sincerely,


Donald J. Hanaway
Attorney General

SENATOR JUDITH B. ROBSON
 CO-CHAIR
 PO BOX 7882
 MADISON, WI 53707-7882
 (608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
 CO-CHAIR
 PO BOX 8952
 MADISON, WI 53708-8952
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**JOINT COMMITTEE FOR
 REVIEW OF ADMINISTRATIVE RULES**

Emergency Rule Extension Motion Form

Last Modified March, 1999

Date: September 22, 1999 Location: Room 201 Southeast, State Capitol

Moved by Rep. Gunderson, Seconded by Rep. Kreuser

THAT, pursuant to § 227.24(2)(a), *Wisconsin State Statutes*, the Joint Committee for the Review of Administrative Rules extend the effective period of Emergency Rule NR 303 by 60 days, at the request of the Department of Natural Resources.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON			X
2. Senator GROBSCHMIDT	✓		
3. Senator SHIBLISKI			X
4. Senator WELCH	✓		
5. Senator DARLING	✓		
6. Representative GROTHMAN		✓	
7. Representative GUNDERSON	✓		
8. Representative SERATTI	✓		
9. Representative KREUSER	✓		
10. Representative BLACK	✓		
Totals	7	1	2

* by polling

Motion Carried

Motion Failed



SENATOR JUDITH B. ROBSON
CO-CHAIR

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MADISON, WI 53707-7882
(608) 266-2253

REPRESENTATIVE GLENN GROTHMAN
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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

September 24, 1999

Mr. George Meyer
Secretary, Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Dear Secretary Meyer:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing on September 22, 1999. At that meeting, JCRAR received public testimony regarding **Emergency Rule NR 303**, relating to farm drainage ditches.

The Joint Committee for the Review of Administrative Rules met in Executive Session on September 22, 1999 and adopted the following motion:

Pursuant to §227.24(2)(a), *Stats.*, the Joint Committee for Review of Administrative Rules extend the effective date of **Emergency Rule NR 303** by 60 days, at the request of the Department of Natural Resources.

Ayes: (8) Senators Grobschmidt, Welch, and Darling*; Representatives Grothman, Seratti, Gunderson, Kreuser, and Black

Noes: (0)

Absent: (2) Senators Robson and Shibilski. *Roll held open, voted by phone.

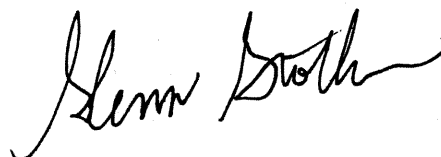
Motion Carried: Extension Granted.
8 Ayes, 0 Noes, 2 Absent.

Pursuant to §227.24(2)(c), *Stats.*, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,



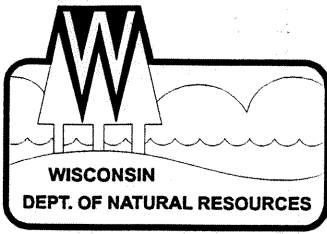
Judith B. Robson
State Senator
15th Senate District



Glenn Grothman
State Representative
59th Assembly District

JBR:da

cc: Secretary of State La Follette
Revisor of Statutes Gary Poulson



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TDD 608-267-6897

September 21, 1999

STATEMENT OF THE DEPARTMENT OF NATURAL RESOURCES REGARDING EXTENSION OF EMERGENCY RULE - NR303 NAVIGABILITY OF FARM DRAINAGE CHANNELS

The Department requests a 60-day extension of this emergency rule. The rule was promulgated in response to the December 8, 1998 motion of this committee. The rule adopted by emergency order of the Natural Resources Board on February 23, 1999 codifies the statutory direction and administrative practice of the department.

During its consideration of the order, the Natural Resources Board directed staff to conduct a complete policy development process with broad public participation so that issues raised in the emergency order process could be examined and resolved. That policy process was outlined but has not been brought back for necessary approval to proceed by the Natural Resources Board because of proposed budget bill language significantly reducing the Department's jurisdiction in these waters. It is our intent to proceed as quickly as possible with our policy development process, involving the full range of interested parties, as soon as the agency's jurisdiction is decided.

CORRESPONDENCE/MEMORANDUM

DATE: March 21, 1990 FILE REF: 3500

TO: Water Management Supervisors
Water Management Specialists
Water Regulation Section

FROM: Ken Johnson - WZ/6 *KJ*

SUBJECT: Agricultural uses of land relating to fish farming and forest harvesting

Several months ago Bob Roden asked the Department of Justice about the implications of the new agricultural definition found within the Lower Wisconsin river legislation. The new definition, now found within section 30.40(1), fails to include fish farming and forestry. Since recent administrative decisions use the definition within Chapter 91, use of the new definition represents a significant departure from the way we've done business.

Attached is the Attorney General's opinion in this matter which clearly states that section 30.40(1) is applicable. Agricultural use is defined as follows:
"Agricultural Use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming.

We may have some problems getting the word out to people who are in mid project. However, we ought to start asserting jurisdiction on 30.19 and 30.20 projects not covered by the above definition as soon as possible.

cc: Robert Roden - WZ/6
Scott Hausmann - WZ/6

Attachment

vided by s. 30.20 (2) is void unless the project is completed within 3 years after the permit or contract was issued.

(b) The department may specify a time limit of less than 3 years for a permit or contract issued under ss. 30.01 to 30.29. For good cause, the department may extend the time limit for a permit or contract issued under ss. 30.01 to 30.29 for no longer than 2 years if the grantee requests an extension prior to expiration of the initial time limit.

(2) For good cause, the department may modify or rescind any permit or contract issued under ss. 30.01 to 30.29 before its expiration.
History: 1987 a. 374.

30.10 Declarations of navigability. (1) LAKES. All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.

(2) STREAMS. Except as provided under sub. (4) (c), all streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.

(3) ENLARGEMENTS OR IMPROVEMENTS IN NAVIGABLE WATERS. All inner harbors, turning basins, waterways, slips and canals created by any municipality to be used by the public for purposes of navigation, and all outer harbors connecting interior navigation with lake navigation, are declared navigable waters and are subjected to the same control and regulation that navigable streams are subjected to as regards improvement, use and bridging.

(4) INTERPRETATION. (a) This section does not impair the powers granted by law under s. 30.123 or by other law to municipalities to construct highway bridges, arches or culverts over streams.

(b) The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to the common law so far as applicable, but in the case of a lake or stream erroneously meandered in the original U.S. government survey, the owner of title to lands adjoining the meandered lake or stream, as shown on such original survey, is conclusively presumed to own to the actual shorelines unless it is first established in a suit in equity, brought by the U.S. government for that purpose, that the government was in fact defrauded by such survey. If the proper claims of adjacent owners of riparian lots of lands between meander and actual shorelines conflict, each shall have his or her proportion of such shorelands.

(c) Notwithstanding any other provision of law, farm drainage ditches are not navigable within the meaning of this section unless it is shown that the ditches were navigable streams before ditching. For purposes of this paragraph, "farm drainage ditch" means any artificial channel which drains water from lands which are used for agricultural purposes.

History: 1977 c. 190, 272, 418; 1981 c. 339; 1991 a. 316.

Where there are 2 owners of land adjacent to a disputed parcel erroneously meandered under (4) the judge is to divide the parcel proportionately on an equitable, but not necessarily equal, basis. *Kind v. Vilas County*, 56 W (2d) 269, 201 NW (2d) 881.

The DNR properly considered the existence of beaver dams and ponds and the periods of high water caused by spring runoffs in determining the navigability of the creek, since the dams and ponds were normal and natural to the stream, and the periods of high water were of a regularly recurring annual nature. *DeGayner & Co. v. DNR*, 70 W (2d) 936, 236 NW (2d) 217.

Where error in survey results in lot on meandered lake being divided by lake, common law rule that owner of land on meandered lake takes only to the actual shoreline controls. Thus, owner does not have "proper claim" to the isolated parcel, making (4) (b) inapplicable. Parcels separated by lake are not "adjacent" under (4) (b). *Com. rs. of Bd. of Public Lands v. Thiel*, 82 W (2d) 276, 262 NW (2d) 522.

See note to Art. I, sec. 13, citing *Zinn v. State*, 112 W (2d) 417, 334 NW (2d) 67 (1983).

This chapter applies to navigable ditches that were originally navigable streams. If a navigable ditch was originally nonnavigable or had no previous stream history, the department's jurisdiction depends upon the facts of each situation. 63 Atty. Gen. 493.

Erroneously meandered lakeshore - the status of the law as it affects title and distribution. 61 MLR 515.
The Muench case: A better test of navigability. *Edwards*, 1957 WLR 486.

30.105 Determining footage of shoreline. In determining footage of shoreline for purposes of s. 30.50 (4q), 30.77 (3) (ae) and (am) and 60.782 (2), towns, villages, cities, public inland lake protection and rehabilitation districts and town sanitary districts shall measure by use of a map wheel on the U.S. geological survey 7 1/2 minute series map.
History: 1995 a. 152 s. 9; 1995 a. 349 s. 11.

SUBCHAPTER II

NAVIGABLE WATERS AND NAVIGATION IN GENERAL

30.11 Establishment of bulkhead lines. (1) WHO MAY ESTABLISH. Any municipality may, subject to the approval of the department, by ordinance establish a bulkhead line and from time to time reestablish the same along any section of the shore of any navigable waters within its boundaries.

(2) STANDARDS FOR ESTABLISHING. Bulkhead lines shall be established in the public interest and shall conform as nearly as practicable to the existing shores, except that in the case of leases under sub. (5) and s. 24.39 (4) bulkhead lines may be approved farther from the existing shoreline if they are consistent with and a part of any lease executed by the board of commissioners of public lands.

(3) HOW ESTABLISHED. Whenever any municipality proposes to establish a bulkhead line or to reestablish an existing bulkhead line, the municipality shall indicate both the existing shore and the proposed bulkhead line upon a map and shall file with the department for its approval 6 copies of the map and 6 copies of the ordinance establishing the bulkhead line. The map shall use a scale of not less than 100 feet to an inch or any other scale required by the department. The map and a metes and bounds description of the bulkhead line shall be prepared by a land surveyor registered in this state. The department may require the installation of permanent reference markers to the bulkhead line. Upon approval by the department, the municipality shall deliver the map, description and ordinance to the office of the register of deeds of the county in which the bulkhead line lies, to be recorded by the register of deeds.

(4) RIPARIAN RIGHTS PRESERVED. Establishment of a bulkhead line shall not abridge the riparian rights of riparian proprietors. Riparian proprietors may place solid structures or fill up to such line.

(5) FINDING OF PUBLIC INTEREST. (a) Prior to the execution of any lease by the board of commissioners of public lands concerning rights to submerged lands or rights to fill in submerged lands held in trust for the public under s. 24.39, the department shall determine whether the proposed physical changes in the area as a result of the execution of the lease are consistent with the public interest. Thirty days before making its determination, the department shall notify, in writing, the clerk of the county and clerk of the city, village or town in which the changes are proposed and the U.S. Army Corps of Engineers of the application for the lease. In making its finding the department shall give consideration to all reports submitted to it. The department shall not approve a lease applied for under s. 24.39 (4) (a) 2. if the department determines that the lease may threaten excessive destruction of wildlife habitat.

(b) When considering leases to allow certain initial improvements such as, but not restricted to, filling on submerged lands to create sites for further facilities, the department may determine whether such initial improvements are consistent with the public interest in the navigable waters involved even though the exact final use to which these improvements will be put is not known. The department, at the time it finds that a proposed lease would be consistent with the public interest in the navigable waters involved, may include in its findings such limitations upon the use of improvements as it considers necessary to confine their use to functions primarily related to water transportation or otherwise of

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

December 8, 1998

George Meyer, Secretary
Department of Natural Resources
101 South Webster Street
Madison, WI 53707-7921

Dear Secretary Meyer::

The Joint Committee for the Review of Administrative Rules met in Executive Session on December 8, 1998 and adopted the following motions:

DNR Guidance Documents

Relating to determinations of navigability of farm drainage ditches pursuant to s. 30.10(4)(c), stats. Placed on the agenda at the request of Rep. Glenn Grothman.

Moved by Representative Grothman, seconded by Senator Welch that, pursuant to s. 227.26(2)(b), stats., the Joint Committee for Review of Administrative Rules require that the Department of Natural Resources promulgate as an emergency rule, within 30 days, all guidance documents published by the agency that provide direction to agency staff on the determination of navigability of farm drainage ditches.

*Farm drainage ditches 40 years
was it a new light stream
prior to /*

Ayes (10): Representatives Grothman, Gunderson, Seratti, R. Young and Kreuser; Senators Welch, Darling, Huelsman, Grobschmidt, and Breske.

Noes (0): None

Absent (2): Senators Darling and Breske.

Motion Carried: DNR To Promulgate Rule in 30 Days.

Senators Darling and Breske voted by paper ballot, with the unanimous consent of the committee.

3

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board adopts an emergency order to create, and authorizes hearings on, NR 303 relating to department determinations of navigability for farm drainage ditches.

FH-12-99 (E)

Analysis Prepared by the Department of Natural Resources

Statutory authority: s. 227.26 (2) (b), Stats.
Statutes interpreted: s. 30.10 (4) (c), Stats.

This order codifies present department program guidance for staff making navigability determinations for farm drainage ditches, identifying various methods and information to be relied on when making such determinations.

SECTION 1. Chapter NR 303 is created to read:

Chapter NR 303
DEPARTMENT DETERMINATIONS OF
NAVIGABILITY FOR FARM DRAINAGE DITCHES

NR 303.01 Purpose
NR 303.02 Applicability

NR 303.03 Department determinations

NR 303.01 Purpose. These rules are developed pursuant to s. 227.26 (2) (b), Stats., to establish procedures for determining when farm drainage ditches are considered navigable waters of the state pursuant to s. 30.10 (4) (c), Stats.

NR 303.02 Applicability. This chapter is applicable to any farm drainage ditch that has the same meaning as defined in s. 30.10 (4) (c), Stats.

NR 303.03 Department determinations. (1) Department navigability determinations related to farm drainage ditches shall consider the following items when determining the navigability of farm drainage ditches:

(a) Historic landscape information that describes or documents the hydrologic condition of the area prior to the construction of the farm drainage ditch. This information may include but not be limited to historic aerial photography, notes and diagrams from the original government land survey, United States geological survey topographic maps, soils and land use surveys and any other factual information that would assist the department in its determination.

(b) Hydrologic and hydraulic methods and principles.

(2) The department shall make a finding a farm drainage ditch has prior navigable stream history when it determines, after reviewing the evidence described in sub. (1), that a watercourse with volume and frequency of flow sufficient to be navigable existed prior to the construction of the farm drainage ditch.

The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on February 24, 1999.

The rule shall take effect upon publication in the official state newspaper.

Dated at Madison, Wisconsin April 19, 1999

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By George E Meyer
George E Meyer, Secretary

(SEAL)

1997 Session

FISCAL ESTIMATE
DOA-2048 N(R10/94)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
NR 303

Amendment No. if Applicable

Subject

Department Navigability Determinations for Farm Drainage Ditches, Emergency Order FH-12-99(E)

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
- Decrease Existing Appropriation Decrease Existing Revenues
- Create New Appropriation

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 Permissive Mandatory
- 2. Decrease Costs
 Permissive Mandatory

- 3. Increase Revenues
 Permissive Mandatory
- 4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:

- Towns Villages Cities
- Counties Others _____
- School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

SUMMARY OF BILL - The Joint Committee for Review of Administrative Rules passed a motion on December 8, 1998 requiring the department to promulgate an emergency rule that provides direction to agency staff on the determination of navigability of farm drainage ditches.

FISCAL IMPACT - None

6

Long-Range Fiscal Implications

None.

Agency/Prepared by: (Name & Phone No.)

Joe Polasek, 266-2794

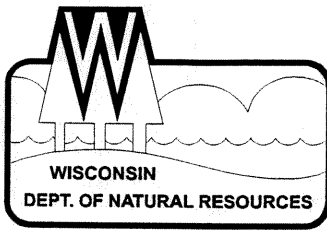
Authorized Signature/Telephone No.

Joe Polasek

266-2794

Date

1-11-98



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TDD 608-267-6897

November 18, 1999

STATEMENT OF THE DEPARTMENT OF NATURAL RESOURCES REGARDING EXTENSION OF EMERGENCY RULE - NR303 NAVIGABILITY OF FARM DRAINAGE CHANNELS

The Department requests a 60-day extension of this emergency rule. The rule was promulgated in response to the December 8, 1998 motion of this committee. The rule adopted by emergency order of the Natural Resources Board on February 23, 1999 codifies the statutory direction and administrative practice of the department with regard to jurisdiction.

During its consideration of the order, the Natural Resources Board directed staff to conduct a complete policy development process with broad public participation so that issues raised in the emergency order process could be examined and resolved. That policy process was outlined but has not begun because of proposed budget bill language significantly reducing the Department's jurisdiction in these waters. The final budget made limited changes to Department jurisdiction. We are beginning the policy development process to identify the critical issues and involve the full range of interested parties in their rapid resolution. As a result of the emergency order process and our routine work on agricultural drainage issues, we believe that a mutually agreeable protocol for efficient drainage maintenance that avoids water resource impacts can be developed. Legislative support for good drainage design is reflected in the cost sharing made available to drainage districts in the recent budget to facilitate implementation of DATCP48, the rule governing operation of drainage districts.

Based on our knowledge of existing issues, we believe that reaching sufficient agreement among diverse interests so that a useful rule could be adopted will require twelve months. We would be pleased to keep you apprised of the progress of work on this issue.

SENATOR JUDITH B. ROBSON
 Co-CHAIR
 PO Box 7882
 MADISON, WI 53707-7882
 (608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
 Co-CHAIR
 PO Box 8952
 MADISON, WI 53708-8952
 (608) 264-8486

**JOINT COMMITTEE FOR
 REVIEW OF ADMINISTRATIVE RULES**

Emergency Rule Extension Motion Form

Last Modified March, 1999

Date 11-18-99 Location Room 411 South
 Moved by Robson, Seconded by Black

THAT, pursuant to § 227.24(2)(a), *Wisconsin State Statutes*, the Joint Committee for the Review of Administrative Rules extend the effective period of Emergency Rule NR 303 by 60 days.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON	X		
2. Senator GROBSCHMIDT	X		
3. Senator SHIBLISKI	X		
4. Senator WELCH			X
5. Senator DARLING	X		
6. Representative GROTHMAN		X	
7. Representative GUNDERSON		X	
8. Representative SERATTI			X
9. Representative KREUSER			X
10. Representative BLACK	X		
Totals	5	2	3

*polled by phone
 paper ballot

Motion Carried

Motion Failed

SENATOR JUDITH B. ROBSON
CO-CHAIR
PO Box 7882
MADISON, WI 53707-7882
(608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIR
PO Box 8952
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**JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES**

November 19, 1999

Mr. George Meyer
Secretary, Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Dear Secretary Meyer:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing and executive session on November 18, 1999. At that meeting, the JCRAR took the following action:

The committee voted to extend the effective period of Emergency Rule NR 303 by 60 days.

Pursuant to §227.24(2)(c), *Stats.*, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,

Judith B. Robson
State Senator
15th Senate District

Glenn Grothman
State Representative
59th Assembly District

JBR:da

cc: Secretary of State La Follette
Revisor of Statutes Gary Poulson

SENATOR ROBERT T. WELCH
CO-CHAIRMAN



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIRMAN

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

December 8, 1998

George Meyer, Secretary
Department of Natural Resources
101 South Webster Street
Madison, WI 53707-7921

Dear Secretary Meyer::

The Joint Committee for the Review of Administrative Rules met in Executive Session on December 8, 1998 and adopted the following motions:

DNR Guidance Documents

Relating to determinations of navigability of farm drainage ditches pursuant to s. 30.10(4)(c), stats. Placed on the agenda at the request of Rep. Glenn Grothman.

Moved by Representative Grothman, seconded by Senator Welch that, pursuant to s. 227.26(2)(b), stats., the Joint Committee for Review of Administrative Rules require that the Department of Natural Resources promulgate as an emergency rule, within 30 days, all guidance documents published by the agency that provide direction to agency staff on the determination of navigability of farm drainage ditches.

Ayes (10): Representatives Grothman, Gunderson, Seratti, R. Young and Kreuser; Senators Welch, Darling, Huelsman, Grobschmidt, and Breske.

Noes (0): None

Absent (2): Senators Darling and Breske.

Motion Carried: DNR To Promulgate Rule in 30 Days.

Senators Darling and Breske voted by paper ballot, with the unanimous consent of the committee.

Pursuant to s. 227.24(2)(c) Stats, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,

Senator Robert Welch
Senate Co-Chair

Representative Glenn Grothman
Assembly Co-Chair

BW:GG:swk

cc: Secretary of State Doug LaFollette
Revisor of Statutes Gary Poulson

MARY ELLEN VOUBRETT

264-8554

(DALE SIMON)

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board adopts an emergency order to create, and authorizes hearings on, NR 303 relating to department determinations of navigability for farm drainage ditches.

FH - 12 - 99 (E)

Analysis prepared by the Department of Natural Resources

Statutory authority: s. 227.26 (2) (b), Stats.

Statutes interpreted: s. 30.10 (4) (c), Stats.

This order codifies present department program guidance for staff making navigability determinations for farm drainage ditches, identifying various methods and information to be relied on when making such determinations.

SECTION 1. Chapter NR 303 is created to read:

Chapter NR 303
DEPARTMENT DETERMINATIONS OF
NAVIGABILITY FOR FARM DRAINAGE DITCHES

NR 303.01 Purpose

~~NR 303.03 Definitions~~

NR 303.02 Applicability

NR 303.04 Department determinations

NR 303.01 Purpose. These rules are developed pursuant to s. 227.26 (2) (b), Stats., to establish procedures for determining when farm drainage ditches are considered navigable waters of the state pursuant to s. 30.10 (4) (c), Stats.

NR 303.02 Applicability. This chapter is applicable to any farm drainage ditch that has the same meaning as defined in s. 30.10 (4) (c), Stats.

~~**NR 303.0 Definitions.** (1) For purposes of this chapter, "agricultural purpose" has the same meaning as "agricultural uses" as defined under s. 30.40 (1), Stats.~~

~~(2) "Artificial channel" means a landscape feature designed for the purpose of draining water from lands used for agricultural purposes that are constructed by human modifications and are not located in, across or approximately along any previous or present natural navigable watercourse.~~

~~(3) "Farm drainage ditch" as defined in s. 30.10 (4) (c), Stats., means "any artificial channel which drains water from~~

~~lands which are used for agricultural purposes."~~

NR 303.04 3 Department determinations. (1) Department navigability determinations related to ~~artificial channels~~ farm drainage ditches shall consider the following items when determining the navigability of farm drainage ditches:

~~(a) The present or proposed use of land adjacent to the artificial channel including but not limited to observations or indicators of livestock grazing, crop production and land use designations such as agricultural, residential, commercial or industrial.~~

~~(b)~~ (a) Historic landscape information that describes or documents the hydrologic condition of the area prior to the construction of the ~~artificial channel~~ farm drainage ditch. This information may include but not be limited to historic aerial photography, notes and diagrams from the original government land survey, United States geological survey topographic maps, soils and land use surveys and any other factual information that would assist the department in its determination.

~~(c)~~ (b) Hydrologic and hydraulic methods and principles.

(2) The department shall make a finding that ~~an artificial channel is not navigable pursuant to s. 30.10 (4) (c), Stats., when it determines that the channel was constructed in an area with no prior stream history and the lands adjacent to the channel are used for agricultural purposes only~~ a farm drainage ditch has prior navigable stream history when it determines, after reviewing the evidence described in subsection (1), that a watercourse with volume and frequency of flow sufficient to be navigable existed prior to the construction of the farm drainage ditch.

OF WISCONSIN
RESOURCES BOARD
RULES

The Wisconsin Natural Resources Board adopts an emergency order to create NR 303 relating to department determinations of navigability for farm drainage ditches.

FH-12-99(E)

Analysis prepared by the Department of Natural Resources

Statutory authority: s. 227.26(2)(b), Stats.

Statutes interpreted: s. 30.10(4)(c), Stats.

This order codifies present department program guidance for department staff making navigability determinations for farm drainage ditches and identifies various methods and information to be relied upon when making navigability determinations.

SECTION 1. Chapter NR 303 is created to read:

Chapter NR 303
DEPARTMENT DETERMINATIONS OF
NAVIGABILITY FOR FARM DRAINAGE DITCHES

NR 303.01	Purpose	NR 303.03	Definitions
NR 303.02	Applicability	NR 303.04	Department determinations

NR 303.01 Purpose. These rules are developed pursuant to s. 227.26(2)(b), Stats., to establish procedures for determining when farm drainage ditches are not considered navigable waters of the state pursuant to s. 30.10(4)(c), Stats.

NR 303.02 Applicability. This chapter is applicable to any farm drainage ditch that has the same meaning as defined in s. 30.10(4)(c), Stats.

NR 303.03 Definitions. (1) For purposes of this chapter, "agricultural purposes" has the same meaning as "agricultural use" as defined under s. 30.40(1), Stats.

(2) "Artificial channel" means a landscape feature designed for the purpose of draining water from lands used for agricultural purposes that are constructed by human modifications and are not located in, across or approximately along any previous or present natural navigable watercourse.

(3) "Farm drainage ditch" as defined in s. 30.10(4)(c), Stats., means "any artificial channel which drains water from lands which are used for agricultural purposes."

NR 303.04 Department determinations. (1) Department navigability determinations related to artificial channels shall consider the following items when determining the applicability of this chapter:

(a) The present or formally proposed use of the land adjacent to the artificial channel including but not limited to observations or indicators of livestock grazing, crop production and land use zoning designations such as agriculture, residential, commercial or industrial.

(b) Historic landscape information that describes or documents the hydrologic condition of the area prior to the construction of the artificial channel. This information may include but not be limited to historic aerial photography, notes and diagrams from the original government land survey, United States geological survey topographic maps, soils and land use surveys and any other factual information that would assist the department in its determination.

(c) Hydrologic and hydraulic methods and principles.

(2) The department shall make a finding that an artificial channel is not navigable pursuant to s. 30.10(4)(c), Stats., when it determines that the channel was constructed in an area with no prior stream history and the lands adjacent to the channel are used for agricultural purposes only.