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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Natural Resources and
Transportation (SC-NRT)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

- Caryl Terrell, Madison — Sierra Club - John Muir Chapter
- Gary Neu, Madison — self
- Karen Etter Hale, Madison — WI Audobon Council and Madison Audobon Society

Registrations Against

- Sandra Verhulst, Arbor Vitae — self

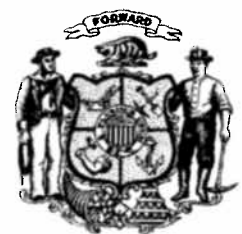
March 11, 2005

NO ACTION TAKEN

Dan Johnson
Committee Clerk



WISCONSIN STATE LEGISLATURE



Streamlining the Permit Process while Protecting Public Waters

Proposed Rule on Ponds and Artificial Waterways - NR 343

Summary of Rule Proposal

This rule establishes criteria defining those activities needing a permit for the construction, dredging and enlargement of an artificial waterbody. This rule recognizes artificial waterbodies constructed to manage stormwater for the purpose of meeting the performance standards under ch. NR 151 and allows such artificial water bodies to be eligible for a general permit under this chapter with several design standards. Also eligible for a general permit are certain landscape and wildlife ponds. This rule specifies permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner rights and property.

As part of this rule, two definitions from NR 340 are repealed to reflect statutory changes.

Why is this an issue for public waters?

In Wisconsin, nearly all waterbodies are legally defined as waters of the state. Because they are waters of the state, ponds are under the jurisdiction of the Wisconsin Department of Natural Resources (DNR) even though they may be located on private land.

Once a pond is connected to a navigable waterway by a navigable connection, it becomes a public waterway. Creating a pond by dredging, grading or constructing a dam in a navigable waterway requires DNR and Army Corps of Engineer permits.

Ponds built in close proximity to a waterway may impact sensitive ecosystems that provide critical habitat for fish and wildlife and water quality benefits to the waterway.

Previous Regulation

Prior to 2004, grading projects that came under the jurisdiction of the department received an individual permit. Permits were issued after an analysis of the impacts of the project on the water resource and any public rights features. Early in 2004, Wisconsin Act 118 was passed by the legislature and signed by the Governor to speed permit decision making while maintaining the state's long-standing level of protection for public waters. Chapter 30, Wisconsin Statutes, was revised by the act.

What's Being Proposed?

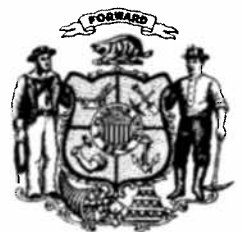
The proposed permanent rule will identify ponds that require a permit. Specifically, ponds constructed for stormwater management are identified in the rule as eligible for a general permit. Three general permits are available in this rule. They each have a set of locational conditions specific to the type of pond. The three ponds that can receive a general permit are wildlife ponds, landscape ponds and stormwater ponds. For ponds construction that does meet the conditions of one of the general permits, the rule provides for an individual permit.

Issues and Alternatives

Three general permits are currently proposed for ponds. Experience in the field has indicated that these three may not provide the necessary streamlining for landscape ponds. Currently the general permit condition requires that a landscape pond be 500 feet from a public rights feature. This requirement needs to be revisited. This rule has not yet found the balance between the number of pond applications and the use of general permits.



WISCONSIN STATE LEGISLATURE



Clearinghouse Rule 04-086

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to repeal NR 340.02(18) and (20) and to create ch. NR 343 related to regulation of construction, dredging, and enlargement of an artificial water body.

FH-45-04

Summary Prepared by the Department of Natural Resources

Statutory Authority: ss. 30.19(1g)(a) and (am), (1m),(3r)(a)(1) and (4), 30.206, and 227.11(2), Stats.

Statutes interpreted: ss. 30.19(1g)(a) and (am), (1m), (3r)(a)(1), 30.206 and 227.11(2), Stats..

Explanation of Agency Authority:

The Department has authority under ss. 30.19 and 30.206, Stats., to promulgate rules to establish general permits.

Related statute or rule:

These rules relate directly to regulation of activities in navigable waters under ch. 30, Stats., waters designations in ch. NR 1, and the NR 300 series of rules.

Plain Language Analysis:

The purpose of this rule is to establish general permits with appropriate conditions, and to establish standards for projects that may be authorized under a general or an individual permit.

This rule establishes criteria defining those activities needing a permit for the construction, dredging and enlargement of an artificial water body. This rule recognizes artificial water bodies constructed for the purpose of meeting the performance standards under ch. NR 151 and allows such artificial water bodies to be eligible for a general permit under this chapter with several design standards. This rule also specifies permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner's rights and property.

Two definitions from NR 340 are repealed to reflect statutory changes.

Federal Regulatory Analysis: Any activity that results in a discharge (including deposits and structures) into "waters of the United States" is regulated by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. An Individual Permit from the Corps is required, unless Wisconsin regulates the project in its entirety under chapter 30, Stats., in which case the project is authorized by the Corps under general permits GP-01-WI or GP-LOP-WI. Dredging or discharge into waters declared navigable under Section 10, Rivers and Harbors Act, 1899 is also regulated, and requires an Individual Permit from the Corps.

Comparison with Adjacent States:

Minnesota – Minnesota regulates ponds in wetlands if they are replacement ponds governed under the Wetland Conservation Act. The counties issue the permit, with involvement from the Board of Water and Soil Resources. They also administer the stormwater permit for construction sites of one or more acres, which would cover some pond construction outside of wetlands for erosion control. Because their permitting is limited to wetlands they are less protective for public trust concerns. If the site were one or more acres then they would meet the same stormwater requirements as Wisconsin for erosion control.

Michigan – The soil erosion permit that covers one or more acres and any construction within 500 feet will cover ponds within 500 feet of a navigable stream. If the pond is connected below the ordinary high-water mark or if it connects within 500 feet because of groundwater connections, then they also have jurisdiction. There are additional requirements for placement of dredge material if the pond is located in a wetland. Because of permit consolidation at the state level, the applicant can complete one form that will go to the three different agencies potentially involved in permitting. Where possible, permit coverage is combined. Michigan's permitting of ponds is fairly comparable to Wisconsin's.

Iowa – Iowa has permits for construction in a floodplain, for larger drainage areas, that they administer jointly with the Corps of Engineers. The pond must be connected. There may also be a requirement for a dam permit if the pond is built up rather than excavated. Unconnected ponds are not regulated. Pond permits are consolidated at the state level to cover construction, wetland and floodplain jurisdiction. Because unconnected ponds are not regulated, the protection is less in Iowa than in Wisconsin.

Illinois – While the state regulates activities in the floodway, there are no specific rules to govern ponds unless they require dams. Floodways are mapped or if unmapped, the field staff makes the determination. There is no specific recognition for wetland construction. Illinois does administer the Federal Phase II construction permit program and may capture ponds of one or more acres for erosion control. Illinois is less protective than Wisconsin.

Summary of Factual Data and Analytical Methodologies: Standards hydrologic and hydraulic methods are the basis for standards related to pond discharge. Substantial published scientific literature on fish and wildlife response to riparian zone conditions is the basis for the buffer and connection requirements. Substantial published scientific literature on wetland restoration is the basis for the standards in NR353 incorporated by reference.

Analysis and Documents supporting determination of Small Business Effect: Any person placing a structure or making similar physical modifications to public navigable waters either qualifies for an exemption or must obtain a general or individual permit under state statute. To comply, small businesses follow the same requirements as other waterfront property owners: (1) make a self-determination of exemption using web-based tools provided by the department or describe their activity on an exemption determination request form; (2) complete a general permit application; or (3) complete an individual permit application. Schedules, application steps and compliance/reporting requirements are very basic for all applicants, and most projects can be planned and conducted by individuals with no specific professional background.

Anticipated Private Sector Costs: No significant fiscal effect on the private sector is anticipated.

Effect on Small Business: Building contractors, developers of waterfront property and their technical consultants, businesses which construct and utilize ponds, and other waterfront businesses will be affected by the rule revisions. Specific standards will provide clarity and consistency in the permitting process.

Agency Contact Person: Mary Anne Lowndes, Mary.Lowndes@dnr.state.wi.us, (608) 261-6420

Place where comments are to be submitted and deadline for submission: The proposed rules may be reviewed and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. Mail to Ms. Roberta Lund, Bureau of Fisheries Management and Habitat Protection, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until September 17, 2004.

SECTION 1. NR 340.02(18) and (20) are repealed.

SECTION 2. Chapter NR 343 is created to read:

Chapter NR 343

Ponds and Artificial Waterways

NR 343.01 Purpose. The purpose of this chapter is to establish criteria defining those activities needing a permit for a pond or artificial water body as required by s. 30.19(1g)(a) and (am), Stats.; and to specify permit requirements necessary to protect public health, safety, welfare, rights and interest and to protect riparian landowner's rights and property for pond sites regulated under this chapter.

NR 343.02 Applicability. (1) POND OR ARTIFICIAL WATER BODY SITES. This chapter applies to activities regulated under s. 30.19(1g)(a) and (am), Stats. An application to construct, dredge or enlarge any part of a pond or artificial water body shall be filed with the department pursuant to ch. NR 310 by any person for any constructed portion of an artificial water body that is either:

(a) Connected to a navigable waterway.

(b) Located within 500 feet of the ordinary high water mark of an existing navigable waterway including a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events.

(2) COMPLIANCE. Any person responsible for the site regulated by this chapter shall comply with all applicable provisions of this chapter and the appropriate permit issued pursuant to this chapter.

(3) EXEMPTIONS. This chapter does not apply to:

(a) The construction or repair of any public highway.

(b) Any agricultural use of land.

(c) An activity that affects a navigable inland lake that is located wholly or partly in any county having a population of 750,000 or more.

(d) Any activity that affects a portion of Lake Michigan, Lake Superior or a navigable stream that is located within a county having a population of 750,000 or more.

(e) Any work required to maintain the original dimensions of an enlargement of an artificial water body done pursuant to a permit or legislative authorization under s. 30.19 (1g)(a) or (am), Stats., provided appropriate erosion control practices are implemented and maintained and dredge spoils are disposed of in an appropriate manner and location.

(f) An infiltration device designed to meet the performance standards of s. NR 151.12(5)(c) or to meet a local ordinance that requires volume reduction and not located in a wetland or existing perennial watercourse.

Note: The landowner of a site exempt under pars. (c) and (d) is still required to submit a notice of intent under subch. III of ch. NR 216 for land disturbing construction activity of one or more acres.

NR 343.03 Definitions. For the purposes of this chapter the following definitions are applicable:

(1) "Agricultural land use" means planting, growing, cultivating and harvesting of crops for human or livestock consumption, pasturing or yarding of livestock, sod farms and beekeeping. This definition does not include the construction of structures such as barns, manure storage facilities or barnyard runoff control systems.

Note: This definition is equivalent to the definition in s. 30.40(1), Stats., and differs from the definition in chs. NR 151 and 216 only in that beekeeping is included and tree nurseries are not included.

(2) "Area of special natural resource interest" has the meaning in s. 30.01(1am), Stats., and as identified by the department in s. NR 1.05.

Note: Section 30.01(1am), Stats., provides that "area of special natural resource interest" means any of the following:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.
- (b) A surface water identified as a trout stream by the department.
- (bm) A surface water identified as an outstanding or exceptional resource water under s.281.15.
- (c) An area that possesses significant scientific value, as identified by the department.

Information and lists can be obtained by contacting the department, or found on the department's website at www.dnr.wi.gov, under the topic "Waterway and Wetland Permits".

(3) "Artificial water body" means a proposed or existing body of water that does not have a history of being a lake or stream or of being part of a lake or stream.

(4) "Connected to a navigable waterway" means any artificial waterbody connected by means of enlargement or by a natural or artificial channel or drainage course, or an open or closed conduit, any of which tend to confine and direct flow into the existing navigable waterway.

(5) "Department" means the department of natural resources.

(6) "Grading" means the physical disturbance of the bank by the addition, removal or redistribution of soil.

(7) "Highway" or "public highway" has the meaning given it in s. 340.01(22), Stats.

(8) "Land disturbing construction activity" means any man-made alteration of the land surface resulting in a disturbance to soil or existing vegetative or non-vegetative soil cover that may result in stormwater runoff and lead to increased soil erosion and movement of sediment into waters of the state. Land disturbing construction activity includes clearing and grubbing, demolition, excavating, pit trench dewatering, filling and grading activities.

(9) "Navigable waterway" means any body of water with a defined bed and bank, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(10) "Ordinary high water mark" means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

(11) "Stormwater" means runoff from precipitation including rain, snow, ice melt or similar water that moves on the land surface via sheet or channelized flow.

(12) "Stormwater management pond" means any temporary or permanent artificial water body designed to specifications generally accepted to reduce the water quantity or water quality impacts of stormwater and to hold water for any period of time.

(13) "Storm event" means any amount of precipitation equal to or greater than 0.01 inches with a minimum interevent period of 6 hours.

NR 343. 04 Pond or artificial water body proposal. The following information shall be submitted for a pond or artificial water body proposal:

- (1) OWNERSHIP. A copy of the deed, lease, land contract or other document showing ownership.
- (2) PHOTOS. Photographs that clearly show the existing project area with a size reference.

(3) PERMISSION. Permission from landowner to enter the site.

(4) PLANS. Plan drawing sheet.

(5) DESCRIPTION. A narrative description of the pond or artificial water body proposal describing:

(a) What the project is.

(b) Methods, materials and equipment to be used.

(c) A construction schedule and sequence of work.

(d) Erosion control plan in accordance with s. NR 216.46.

(e) Site map in accordance with s. NR 343.05(2).

NR 343.05 Erosion control plan requirements. (1) SITE-SPECIFIC PLAN. Any person required to submit an application for a pond or artificial water body under this chapter shall develop a site specific erosion control plan in accordance with s. NR 216.46(1) to (4).

(2) SITE MAP REQUIREMENTS. Each pond or artificial water body site map shall include all of the following:

(a) Existing topography and drainage patterns, roads, waterways and floodplain boundaries.

(b) Location, description and elevation of a reference benchmark (permanent vertical reference).

(c) Horizontal and vertical scale and north arrow.

(d) Approximate identification of the ordinary high water mark.

(e) Area between the project site and the water body to be left undisturbed.

(f) Boundaries of the construction site, i.e., lateral extent of land disturbing construction activity.

(g) Drainage patterns and approximate slopes anticipated after major grading activities, including the existing and proposed slope of the bank and the water level of the existing waterway.

(h) Area of soil disturbance in square feet and volume of earth to be added or removed in cubic yards.

(i) Location of any disposal area for dredged or excavated materials.

(j) Location of major structural and non-structural controls identified in the erosion control plan.

(k) Location of areas where stabilization practices will be employed.

(L) Areas that will be vegetated following land disturbing construction activities.

(m) Area and location of wetland acreage on the pond or artificial water body site and locations where stormwater is discharged to a surface water or wetland within one-quarter mile downstream of the pond or artificial water body site.

(n) Areas used for infiltration of post-construction stormwater runoff.

(o) An alphanumeric or equivalent coordinate system for the entire construction site.

(3) EROSION AND SEDIMENT CONTROL BEST MANAGEMENT PRACTICES. The erosion control plan shall include a description of appropriate erosion and sediment control best management practices that will be installed and maintained at the pond or artificial water body site to prevent pollutants from reaching waters of the state. The erosion control plan shall clearly describe the appropriate erosion and sediment control best management practices for each major land disturbing construction activity and the timing during the period of land disturbing construction activity that the erosion and sediment control best management practices will be implemented. The erosion and sediment control best management practices shall be designed in accordance with s. NR 216.46(6).

NR 343.06 Construction site inspections and maintenance. Any person required to submit an application for pond or artificial water body under this chapter shall inspect and maintain practices in accordance with s. NR 216.48(4).

NR 343.07 General permit. (1) PROCEDURES. General permits shall be processed according to the procedures in ch. NR 310.

(2) APPLICABLE ACTIVITIES. A pond or artificial water body project that meets the standards in sub. (3) shall be eligible for general permit coverage under ss. 30.19(3r) and 30.206, Stats.

(3) GENERAL PERMIT STANDARDS The department may issue a general permit for the construction, dredging or enlargement of any part of a pond or artificial water body that meets standards in par. (a) and either par. (b), (c) or (d).

(a) Standards for all pond construction under general permits. 1. The site meets the construction site performance standards of s. NR 151.11 for land disturbing construction activities for non-transportation projects and s. NR 151.23 for transportation projects.

2. The pond or artificial water body is designed in accordance with best management practices required for stormwater discharge permits under ch. NR 216, or to meet a local ordinance for stormwater management.

3. The pond or artificial water body is designed to prevent fish entrapment.

4. Mining. The pond or artificial water body is not associated with any metallic or non-metallic mining project.

(b) Wildlife pond. The purpose of the pond or artificial water body is wetland conservation as determined under ch. NR 353 and all standards for construction of the ponds in ch. NR 353 will be met.

(c) Landscape pond. The pond or artificial water body is not connected to a navigable waterway and meets the standards of subs. 1. to 5.

1. Separation distance. No portion of the berm or pond shall be any closer than 35 feet from the ordinary high water mark.

2. Plan. The pond is not part of a stormwater management plan.

3. Wetland. The pond or artificial water body is not constructed, dredged or enlarged in a wetland.

4. Excavated material. Any excavated material is not temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway and is disposed of in an upland location.

5. Vegetation. The vegetation planted in areas adjacent to or disturbed during pond construction will be non-invasive, indigenous species.

(d) *Stormwater pond.* The pond or artificial water body is a stormwater management pond that does not discharge into a navigable waterway except as a result of storm events and meets the standards in subds. 1. to 8.

1. Separation distance. The crest of the berm of the pond or artificial water body is no closer than 35 feet from the ordinary high water mark.

2. Wetlands. The pond or artificial water body is not constructed, dredged or enlarged in a wetland.

3. Thermal. The pond or artificial water body is not designed to have a permanent pool of water that discharges to a trout stream or its upstream tributaries.

4. Hydraulic connection. The pond shall not be subject to inflow from the navigable waterway up to the 10-year 24-hour rainfall event.

5. Public rights features. The pond or artificial water body is not within 500 feet of the location of any public rights feature as defined in s. NR 1.06.

6. Stable outlet. The pond shall have a stable (non-erosive) connection to the navigable waterway.

7. Fish. Fish will not be reared in the stormwater pond.

8. Vegetation. The vegetation planted in areas adjacent to or disturbed during pond construction will be non-invasive, indigenous species.

9. Excavated material. Any excavated material is not temporarily or permanently placed in a wetland, floodplain or below the ordinary high water mark of a navigable waterway and is disposed of in an upland location.

(4) **INDIVIDUAL PERMIT REQUIRED.** Activities which do not meet the standards in sub. (3) or a general permit issued by the department shall require an individual permit.

NR 343.08 Implementation of conditions of the general permit. Any person receiving coverage under a general permit for pond or artificial water body is required to implement the conditions of ss. NR 343.04 to 343.07.

NR 343.09 Denial or revocation of general permit. The department may deny or revoke coverage under a general permit and require submittal of an application in accordance with ch. NR 310 for an individual permit for construction, dredging or enlargement of a pond or artificial water body, where the department has determined that the plans or site conditions do not correspond to the conditions of the general permit. The applicant of a site denied or revoked coverage under the general permit may not commence activities until an individual permit is issued.

NR 343.10 Individual permit. (1) REQUIREMENTS. The department may require the applicant of any pond or artificial water body site covered by a general permit issued pursuant to this chapter or ch. NR 310, to apply for and obtain an individual permit if the department has determined that conditions specific to the site require restrictions on the activity in order to prevent significant adverse impacts to public rights and interests, environmental pollution, as defined in s. 299.01(4), Stats., or material injury to the riparian rights of any riparian owner.

(2) **IN WRITING.** The decision by the department to require an individual permit under this section shall be in writing. If the department does not inform the applicant within 30 days that an individual permit will be required, the activity will be authorized by the general permit and the applicant may proceed without further notice, hearing, permit or approval if the activity is carried out in compliance with all of the conditions of the general permit.

(3) **OPTION.** A person proposing an activity for which a general permit has been issued under this chapter may request that the department issue an individual permit in lieu of seeking authorization under the general permit.

(4) **PROCEDURES.** Individual permits shall be processed according to the procedures in ch. NR 310.

(5) **PONDS AND ARTIFICIAL WATERWAYS.** Ponds or artificial waterways meeting the standards in s. 30.19(4), Stats., may be authorized under an individual permit.

NR 343.11 Denial or revocation of individual permit. The department may deny or revoke coverage under an individual permit for an individual pond or artificial water body if any of the following apply based on a review of the completed notice for pond or artificial water body or other relevant information:

- (1) The activity will be detrimental to the public interest.
- (2) The activity will cause environmental pollution as defined in s. 299.01(4), Stats.
- (3) Any enlargement connected to a navigable waterway does not comply with all of the laws relating to platting of land and sanitation.
- (4) Material injury will result to the riparian rights of any riparian owners of real property that abuts any water body that is affected by the activity.

NR 343.12 Requirement for public access. A permit issued under this chapter to construct a pond or artificial water body and to connect it to a navigable waterway shall require that the navigable portion of the pond or artificial water body be a navigable waterway if the connecting portion is navigable.

NR 343.13 Enforcement. (1) Noncompliance with the provisions of ss. 30.19 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture. If the activity is a general permit under s. 30.206, Stats., the failure to follow procedural requirements may not, by itself, result in abatement of the activity. Unless there is good cause shown, the department shall seek abatement of any activity in violation of ss. 30.19 and 30.206, Stats.

(2) General permits may not be issued for after-the-fact permit applications. When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(3) Any reference in ss. 30.15, 30.292, 30.294 and 30.298, Stats., to any provision of ch. 30, Stats., shall include any rules promulgated under that provision.

(4) No person may construct, dredge or enlarge any part of a pond or artificial water body connected to or within 500 feet of a navigable waterway where the activity is not authorized by a general permit or individual permit issued under this chapter, or otherwise authorized under this chapter.

SECTION 3. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

SECTION 4. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)