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SB37

WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2001 Senate Bill 37	Senate Substitute Amendment 1
Memo published: February 12, 2001	***Contact*: John Stolzenberg, Staff Scientist (266-2988)**

Senate Bill 37 creates a water quality certification program for wetlands in Wisconsin. Senate Substitute Amendment 1 to the bill is described below.

WATER QUALITY CERTIFICATION

The substitute amendment provides that no person may discharge dredged or fill material into a "nonfederal wetland" without first receiving a water quality certification from the Department of Natural Resources (DNR) under this statute and that no person may violate any condition of a water quality certification issued by the DNR under this statute. It specifies that the DNR may not issue a water quality certification under this statute unless it determines that the discharge will comply with all applicable water quality standards.

As used in this certification requirement, a "nonfederal wetland" is a wetland to which the federal discharge permitting process under sec. 404 of the Clean Water Act (33 U.S.C. 1344) does not apply due to the SWANCC decision by the U.S. Supreme Court, but to which such permitting process did apply on January 8, 2001.[1]

Thus, upon enactment of the substitute amendment, the DNR will be issuing wetland water quality certifications under two laws: one for nonfederal wetlands under the new statute created by the substitute amendment and the other for wetlands other than nonfederal wetlands under the Clean Water Act. The DNR will apply its water quality standards for wetlands in ch. NR 103, Wis. Adm. Code, in both certification processes.

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[1] The Supreme Court issued its decision in the SWANCC *case (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. Jan. 9, 2001)) on January 9, 2001. Additional information on this decision is available in Legislative Council Legal Memorandum LM-2001-1, *U.S. Supreme Court Case on Wetlands*, January 25, 2001.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

DELINEATION PROCEDURES

The substitute amendment establishes that, if there is a dispute between the DNR and a person who is applying for or holds a water quality certification issued under the new statute over the delineation of the boundary of a nonfederal wetland, the DNR and the person must use the procedures contained in the 1987 Wetlands Delineation Manual published by the U.S. Army Corps of Engineers (ACE) in resolving the dispute. If the ACE publishes an edition of this manual after the effective date of the provision, the DNR may, by rule, designate that the new edition be used to resolve nonfederal wetland boundary delineation disputes.

EXEMPTIONS

The substitute amendment provides two sets of exemptions from the nonfederal wetland water quality certification requirement: one based upon exemptions and limits on these exemptions set forth in sec. 404 (f) of the Clean Water Act and the other based upon exemptions in the DNR's current water quality standards for wetlands in ch. NR 103.

Clean Water Act Based Exemptions

Exemptions

The exemptions based on the Clean Water Act apply to discharges into a nonfederal wetland that is the result of any of the following activities:

- Normal farming, silviculture or ranching activities.
- Maintenance, emergency repair or reconstruction of existing structures.
- Construction and maintenance of farm ponds, stock ponds or irrigation ditches.
- Maintenance of drainage ditches.
- Construction and maintenance of farm roads, forest roads and temporary mining roads, if done in conformance with best management practices.

Limits on the Exemptions

The substitute amendment specifies that these exemptions do ***not*** apply if the discharge is incidental to an activity that would bring a wetland into a use to which it was not previously subject and if the activity may do any of the following:

- Impair the flow or circulation of any nonfederal wetland.
- Reduce the reach of any nonfederal wetland.

Implementation of the Exemptions; DNR Rule Making

The substitute amendment directs the DNR to promulgate rules to interpret and implement the exemptions and limits on the exemptions. These rules must be consistent with the corresponding provisions in the Clean Water Act and federal regulations, rules, memoranda of agreements, guidance letters and other provisions having the effect of law established by a federal agency under these Clean Water Act provisions in effect on the effective date of the substitute amendment. If any of these federal provisions are subsequently modified or amended, the DNR may, but is not required to, incorporate these amendments or modifications into the rules, but may not otherwise amend the rules.

The substitute amendment also directs the DNR to submit its final draft version of the rules to the Legislative Council Rules Clearinghouse no later than the first day of the 13th month beginning after the effective date of the substitute amendment. (In general, the DNR may not promulgate the rules until after the Rules Clearinghouse completes its review of the draft rules, the DNR holds one or more hearings on the rules, the Legislature reviews the rules and the Natural Resources Board adopts the final rules.)

Temporary Process

The substitute amendment creates a temporary process that applies between the effective date of the substitute amendment and when the DNR's rules interpreting and implementing the Clean Water Act based exemptions become effective. While the temporary process is in effect, no person may discharge dredged or fill material into a nonfederal wetland unless the person does either of the following:

- Demonstrates to the DNR's satisfaction that the activity which will result in the discharge will qualify for an exemption under the Clean Water Act.
- Receives a nonfederal wetland water quality certification issued under the new state program.

Chapter NR 103 Type Exemptions

The exemptions based on ch. NR 103 apply to artificial nonfederal wetlands in any of the following settings:

- Sedimentation and storm water detention basins.
- Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds.
- Actively maintained farm drainage and roadside ditches.
- Active nonmetallic mining operations.

A person acting under one of these exemptions must give the DNR 15 days notice of the proposed activity. The person may proceed with the activity at the end of the 15-day period without any DNR approval unless notified by the DNR that the artificial nonfederal wetland has a significant functional value as a wetland.

General Water Quality Certifications

The substitute amendment authorizes the DNR to issue general water quality certifications for types of activities that are similar in nature and that, individually and collectively, will have minimal adverse effects on the environment. General water quality certifications may have a term of no more than five years. This provision is based on a provision of the Clean Water Act.

Relation to Other DNR Regulatory Programs

The substitute amendment establishes that the new nonfederal wetland water quality certification requirements created by the substitute amendment do not affect the authority of the DNR to do any of the following:

- Regulate the discharge of dredged or fill material in a nonfederal wetland under the specified regulatory programs. These programs are the programs subject to the interdepartmental coordination of environmental protection measures between the DNR and the Department of Transportation under s. 30.12 (4), Stats.

- Issue a water quality certification under rules promulgated under ch. 281, Stats., to implement the federal water quality certification program under sec. 401 of the Clean Water Act that is applicable to wetlands other than nonfederal wetlands.

DNR Inspection Authority

The substitute amendment gives the DNR inspection authority relating to the new nonfederal water quality certification program. It authorizes an employee or representative of the DNR, upon presenting his or her credentials and subject to the requirements identified below, to do any of the following for purposes of enforcing the new program:

- Enter and inspect any property on which a nonfederal wetland is located that is subject to a water quality certification issued under the new program.

- Enter and inspect any property to investigate a discharge of dredged or fill material if a wetland is located on the property and where the DNR has reasonable suspicion that a violation of the new program has occurred or is occurring.

- Gain access to and inspect any records that the DNR requires the holder of a water quality certification to keep.

A DNR employee or representative may exercise any of these three inspection authorities only during reasonable hours and only after the DNR has provided reasonable advance notice to the person owning the property involved or to the holder of the water quality certification. In addition, a DNR employee or representative may not inspect a record kept by a holder of a water quality certification unless the holder, or the holder's designee, is present or unless the holder waives this requirement.

OTHER ENFORCEMENT PROVISIONS

The substitute amendment also applies the penalties that generally apply to ch. 281, Stats. (*Water and Sewage*) to violations of the provisions of the substitute amendment. In addition, it gives the Department of Justice (DOJ) the same role in enforcing the provisions of the substitute amendment as the DOJ has in enforcing other environmental regulations.

OTHER PROVISIONS

The substitute amendment renumbers the existing statute regarding wetland compensatory mitigation to ch. 281 and makes a minor terminology change in this program. This change replaces "owner" with "proprietor" in this program, as ch. 281 currently defines and uses the term "owner" in a manner more restrictive than the term's use in the mitigation statute.

EFFECTIVE DATE

The substitute amendment takes effect on the day after its date of publication, pursuant to s. 991.11, Stats.

Adoption of Senate Substitute Amendment 1 was recommended by the Senate Committee on Environmental Resources, Ayes, 5, Noes, 0, on February 8, 2001. Passage of Senate Bill 37, as amended, was recommended by the Senate Committee on Environmental Resources, Ayes, 5, Noes, 1, February 8, 2001.

JES:ksm

1905 HALL AVENUE
P.O. BOX 135
MARINETTE, WI 54143-0135
715-732-5120

FAX 715-732-5122
DOUG OITZINGER
MAYOR

City of Marinette

January 30, 2001

Senate Committee on Environmental Resources
Wisconsin State Senate
P.O. Box 7882
Madison, WI 53707-7882

Subject: LRB-2106/1 Restore DNR Wetlands Authority

Dear Senators:

I wish to resister my strong opposition to LRB-2106/1 in its current form. The City of Marinette has within its boarders numerous isolated wetlands of very small acreage that are not connected to or flow into navigable waterways or even ditches. This bill would continue and in some cases expand an unnecessary level of regulation, which makes it nearly impossible to plan for the orderly development of our community in accordance with our Comprehensive Plan.

I consider myself a strong environmentalist but not a purist. This past year I initiated our first "conservation" zoning designation ordinance and negotiated a "green space" around a local development. Our city is a small but none-the-less urban environment. We take great care to protect the "Shore Land Wetlands" and our river and bay frontage. But we have to do absolute head stands trying to design commercial, industrial and residential developments if small pockets of "wetlands" are in area in which we wish to grow. These can be as small as a half an acre and frequently they are not even "wet." They simply have the soil type or vegetation that qualifies them as being "wetlands." Under the current and proposed rules, you can't substitute artificial ponds for these isolated "wetlands."

This bill will perpetuate an anti-growth, anti-smart growth, anti-common sense approach to environmental issues. I urge the Committee to look at exemptions for isolated "wetlands" of two to four acres or less and I also urge that local Planning and Zoning Boards be the appropriate control over these smaller "wetlands."

I regret that I only learned of this hearing two days before it is to occur and I am unable to rearrange my schedule to testify personally. Please accept this letter as a very strong opposition to rushing this bill to a legislative vote without further refinement and public hearings.

Sincerely,

Doug Oitzinger
Mayor

Cc: Senator Dave Hanson
Representative John Gard
Wisconsin Alliance of Cities

Senate Bill 37 - Wetlands Bill

Public Hearing - February 1, 2001

Appearing at Hearing -

3rd Grade Pupils from Lincoln Elementary School
909 Sequoia Trail
Madison, WI 53713

Ben Bauch - Speaking For
Isis Bernard - Speaking For
Clifford Johnson - Speaking For
Jacki German - Speaking For
Julia Rowe - Speaking For
Kali Pruss - Speaking For
Daniel Webb - Registering For
Peter Tha - Registering For
Bounmy Vue - Registering For
Taylor Chambers - Registering For
Mireace Williams - Registering For

Teacher Rebecca Rosenberg - Registering For
Teacher Susan O'Leary - Registering For
Volunteer Barbara Rames, Registering For

Wisconsin
State
Cranberry
Growers
Association

FOUNDED 1887

February 1, 2001

To: Senate Committee on Environmental Resources

From: Tom Lochner, Executive Director

These comments are presented on behalf of the Wisconsin State Cranberry Growers Association (WSCGA). The WSCGA was formed in 1887 as an educational organization to represent Wisconsin's cranberry growers. We would like to present our views on suggested legislation for a state wetlands regulation program in response to the recent US Supreme Court decision which limited US Army Corps of Engineers authority on isolated wetlands under the Clean Water Act.

Cranberry cultivation is unique in all of Wisconsin agriculture. Cranberry growers cultivate a native wetland plant for a food crop and as a result farm in wetlands. The cultivation also requires large amounts of water to be readily available for frost protection, irrigation, winter protection and harvest. Wisconsin growers have created vast storage areas in support of their operations which has resulted in the preservation and protection of over 180,000 acres of wetlands and uplands to support the roughly 16,000 of cranberry vines harvested in the state last year. In fact, Wisconsin's cranberry growers preserve and protect more wetland acreage in the state than the Nature Conservancy and Ducks Unlimited combined at no cost to the taxpayer. These areas have been documented to provide a tremendous diversity of wildlife habitat. Our growers have long understood what wonderful areas these wetlands are.

While we enjoy wetlands we also deal with the reality of their regulation on a daily basis. The regulatory framework has been built based on the past twenty years or so of experience with the COE and since 1991 Wisconsin DNR. These regulations and their application in the field are complex and can be difficult for the regulated community to understand. Our experience has been that wetland regulations have become much stricter in the past ten years. This is due to new policies at the COE, adoption of a MOA between the federal agencies on sequencing and mitigation as well as the state's adoption of NR103.

Simply stated wetland regulation consists of two components:

1. **What area you regulate**. We do not know what the COE role will be in the future as a result of the court decision. We have heard speculation about huge amounts of wetland acreage - 1.5 to 4 million acres - that would be threatened, but have not heard from the COE on their guidance to their field offices to implement the court decision. We would suggest that before any legislation is proposed the committee determine what exactly will change in the corps regulatory program. Once all of the facts are determined legislation can be crafted as is needed. If the intent of the legislation is to retain the status quo then there will need to be changes made to the statutes. For example the state and federal definitions of what a wetland is are different. The state would need to adopt the Federal definition to retain the status quo. Any legislation needs to address this.

P.O. Box 365 • Wisconsin Rapids, WI 54495 • 715-423-2070
wiscran@wctc.net • www.wiscran.org

2. **What activities you regulate**. In the simplest view of regulation new activities require a permit from the US Army Corps of Engineers (COE) and maintenance and operational activities that are part of normal farming operations do not. We are concerned that any new legislation or rulemaking will exceed current COE regulations and require additional permitting and costs. This could happen very easily unless there is close review of any legislation. Proposed legislation has to include specific language to prohibit any expansion.

We would like to offer the following thoughts on any remedial legislation.

1. It is our understanding that the legislation is designed to restore the "status quo" specifically to make sure that wetlands regulated before the Supreme Court decision remain protected. If so language must be included to cover areas that would not be subject to regulation under COE interpretation and that language be included to make sure that there is not an additional layer of regulation on wetlands that the COE maintains jurisdiction over.

2. Under current Wisconsin law cranberry growers are granted rights to divert water and construct dams, ditches and drains without a permit from DNR. The legislation must state that the new law does not take away these rights.

3. It must recognize existing COE policies on activities. In the case of cranberries the COE spent two years reviewing their policies on the regulation of cranberry activities under section 404. This resulted in the 1995 release of its analysis that has served as the guide for the district's review of cranberry projects. We propose that these types of policy issues need to be incorporated into the legislation or in direction to the department.

4. Federal regulations allow for exemptions for minor drainage including installation of ditches or water control facilities incidental to the planting, cultivation protection or harvesting of cranberries. Discharges for regulating or manipulating the water levels or flow or the distribution of water within existing impoundments which are established for the production of cranberries are exempt as well. Again we believe that this language has to incorporated in the legislation.

5. A series of regulatory guidance letters have been issued by the COE setting policy when it comes to the regulation of activities including cranberries. While some have expired they still remain the policy of the COE until revoked. The legislation needs to direct DNR to adopt the appropriate ones for use in Wisconsin.

6. The state is in the process of adopting a limited wetland mitigation program that is not consistent with the program of the COE. Legislation would need to allow compensatory mitigation identical to the program run by the COE in order to meet the goal of not going beyond regulation prior to the court decision.

7. Administration of a wetland regulatory program will be expensive. The legislation needs to look at the most economically efficient method to regulate activities. The recent wetland mitigation legislation is estimated to cost the state $600,000 and 12 FTE to review mitigation plans for at most 300 acres of wetland impact per year. What are the additional costs to implement a statewide wetland regulation program?

8. Wisconsin DATCP has oversight of drainage districts in the state. DNR requires permits for maintenance dredging in some of the districts and authority over some of their other activities. Could this legislation place all of the responsibilities at one agency to save costs for the state as well as the drainage districts?

9. There are low function or poor quality wetlands that are currently subject to regulation. These include low spots in corn or hay fields that provide little if any wetland benefit yet are treated the same for regulatory purposes as high value fens. This legislation could provide an opportunity for the state to place priorities on protecting high value wetlands while recognizing that those with lower functions and values may not require as high a level of protection.

10. The LRB draft 2106/P1 includes language to require a conservation easement on mitigation sites. This exceeds current COE policy, which calls for a deed restriction on the property. This insures protection indefinitely but does not have the other requirements of conservation easements, which may include public access, management practices, etc. We would suggest an amendment to this section to make it consistent with federal requirements.

I have attached some of the documents that the St. Paul District and Washington offices of the EPA and COE have developed relevant to regulation of cranberries for the committee.

Cranberry growers have been subject to a high level of regulation by the COE and DNR with respect to their activities in wetlands. We are not opposed to reasonable regulation in the future. In this case we would encourage the committee to gather more information about the impacts of the Supreme Court ruling before developing any legislation. We would also respectfully ask that any such legislation not go beyond the regulations prior to the court decision. In order to make sure that this objective is met we would suggest that the regulated community be allowed to become active participants in the development of the legislation.

We appreciate the opportunity to present our views. We would be happy to participate in any process that provides for the protection of the state's wetland resources while providing our growers the opportunity to operate their farms under the same wetland rules as before the court case.

Sincerely,

Tom Lochner
Executive Director

SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION

916 N. EAST AVENUE • P.O. BOX 1607 • WAUKESHA, WISCONSIN 53187-1607 • TELEPHONE (414) 547-6721
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PROBLEM STATEMENT

NEED FOR LICENSURE TO CONDUCT WETLAND DELINEATIONS

On July 1, 1998, Chapter 470 of the Wisconsin Statutes, entitled, "Examining Board of Professional Geologists, Hydrologists and Soil Scientists," (1997 Wisconsin Act 300) was created. This chapter requires that those persons doing work in the area of geology, hydrology, and soil science be licensed by the Wisconsin Department of Regulation and Licensing. An unanticipated problem with this licensing program has arisen with respect to persons doing horticulture and wetland delineation and restoration/creation work. Typically, those persons who are qualified to conduct such horticulture and wetland related work do not meet the licensing requirements of Chapter 470 (see Chapter 470.09(3) and (4) Definitions, 470(2) and (3) License Required, 470.04 Licensure Requirements, and 470.09 Penalties).

While exceptions to the licensure requirements are made for employees of the Federal government, State and county land and water conservation employees who are certified as field engineers, public service company employees, certain employees of private companies or corporations in connection with their direct operations, construction contractors, land surveyors, teachers, well drillers, and those operating within the scope of a license, permit registration, or certification granted by this State or the Federal government, none is made for those individuals who identify, delineate, regulate, or otherwise manage wetland systems (see Chapter 470.025 Applicability). Under this rule, the only wetland related work that legally can be done are those activities carried out by a licensed geologist, hydrologist, soil scientist, certified soil tester, or professional engineer, none of whom ordinarily have the botany or horticulture backgrounds necessary for wetland plant identification.

The result of this rule as presently written is that wetland delineations and restoration/creation work will largely cease to be conducted by those who are most qualified to undertake such activities, or such activities will be conducted at significantly increased and unnecessary cost to public and private agencies and the regulated public.

To rectify this problem, the Commission suggests:

1. The State Legislature amend 1997 Wisconsin Act 300 to include a licensure program for wetland scientists; or

2. The State Legislature amend 1997 Wisconsin Act 300 to eliminate the need for licensure to perform wetland delineations under Chapter 470.02 License Required and add state, regional, county, and municipal government employees to Chapter 470.025(2); or

3. Establish a State Registry or Certification program for horticulturalists and wetland scientists, which brings them into compliance under Chapter 470.025(1); or

4. Repeal 1997 Wisconsin Act 300.

WISCONSIN REALTORS® ASSOCIATION
4801 Forest Run Road, Suite 201
Madison, WI 53704-7337
608-241-2047 ✉ 800-279-1972
Fax: 608-241-2901
E-mail: wra@wra.org
Web site: http://www.wra.org

Joan Seramur, CRB, CRS, GRI, President
E-mail: williams@newnorth.net

William Malkasian, CAE, Executive Vice President
E-mail: wem@wra.org

To: Members, Senate Environmental Resources Committee

From: Michael Theo and Thomas Larson

Date: February 1, 2001

Re: SB 37 -- Wetlands

The Wisconsin REALTORS® Association urges you to oppose SB 37, legislation that attempts to significantly expand the authority of the Wisconsin Department of Natural Resources ("DNR") and impose strict, uniform regulatory standards on all wetlands, without distinguishing between the type or functionality of the wetland.

Background
Wetlands, like other natural resources, are vital to Wisconsin's environmental landscape and our outstanding quality of life. An incredibly complex and important ecosystem, wetlands are home to a wide variety of species from microorganisms to plants, fish, amphibians, birds and many other forms of wildlife. In addition to providing a habitat for animals and vegetation, wetlands help prevent erosion and act as filters by removing pollutants from the water and by aiding in nutrient absorption. Wetlands even provide opportunities for popular recreational activities such as hiking, fishing, and boating. Without adequate regulations to protect wetlands, Wisconsin's environment and quality of life are in jeopardy.

The SWANCC Decision did not Eliminate the Corps Jurisdiction Over Isolated and Nonnavigable Wetlands in Wisconsin. Despite some claims, the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001), did not eliminate the Corps jurisdiction over isolated and nonnavigable wetlands in this state. The decision states that the Corp can no longer regulate these wetlands by way of its Migratory Bird Rule. A close reading of this decision and a written interpretation of the case by the EPA and US Army Corps of Engineers ("Corps") suggests the Corps continues to maintain virtually the same regulatory authority over these types of wetlands that it had prior to the SWANCC decision. Specifically, the Corps' memorandum states that the Corps may continue to have authority over isolated, intrastate, and nonnavigable wetlands whose "use, degradation, or destruction could affect other 'waters of the United States.'" (See Memorandum from the EPA and Corps, dated January 19, 2001, page4, sec. 5(b)(1)) Under this interpretation, it is not clean what, if any, wetlands that were regulated under the Corps' jurisdiction prior to the SWANCC decision are no longer regulated.

Creating Overlapping Authority Between DNR and the Corps Would Create An Unworkable System and May Be Preempted by Federal Law. Accordingly, any attempt to provide the DNR with additional regulatory authority would seemingly overlap with or attempt to usurp that authority currently held by the Corps. From the regulated public's perspective, overlapping jurisdiction between federal and state agencies creates an unworkable regulatory

environment that leads to "turf wars" between the agencies and uncertainty, confusion, and delays for the public. From a legal standpoint, a court may find that Congress, by expressly giving the Corps the authority to regulate such wetlands through the Clean Water Act, preempted states, like Wisconsin, from essentially nullifying federal authority through the creation of its seemingly identical, though more restrictive, regulatory framework.

Second, SB 37 is not a "status quo" bill. SB 37 has a number of significant changes that exceed the scope of authority granted to the Corps under Section 404 of the Clean Water Act.

First, Section 404 of the Clean Water Act requires a person to obtain a permit from the Corps if they are going to discharge dredged or fill material **into** "the waters of the United States." Through federal regulations, guidances, and court decisions, "the waters of the United States" has been defined generally as all **surface** waters that could affect interstate or foreign commerce. In contrast, SB 37 requires a person to obtain a permit from the DNR if they are going to discharge dredged or fill material in a manner **that may impair** "the waters of the state." See Wis. Stat. Sec. 281.36(4)(b). Section sec. 281.01(18), Wis. Stats., defines "waters of the state" to include all surface waters **and groundwater.** In other words, Sec. 404 regulates the act of discharging fill into surface waters, while SB 37 would regulate the act of discharging fill that could impact surface and groundwater. When compared to Sec. 404, SB 37 is an entirely different standard which virtually gives the DNR unlimited authority over any activity it wishes to regulate.

Second, SB 37 gives the DNR the authority to engage in illegal entries and searches of property. The Fourth Amendment of the U.S. Constitution and engage in illegal entries and searches of property. The Fourth Amendment of the U.S. Constitution protects individuals from illegal government entries and searches of their property without a warrant. However, sec. 281.36(7)(b) authorizes the DNR to "enter and inspect any property to investigate a discharge of dredged or fill material" without first obtaining a warrant. Although it is important to provide the DNR with the authority necessary to enforce wetland regulations, this authority should not come at the expense of our civil liberties.

SB 37 treats all wetlands the same. All wetlands are not created equal. Some are man-made, while others have evolved naturally over time. Wetlands vary in size, shape, location, and qualities. Each has a combination of unique soil types, topography, climate, hydrology, water chemistry, and vegetation.

SB 37, however, fails to recognize the unique properties of different wetlands. Rather, it treats all wetlands the same regardless of how that wetland functions in our environment. Whether it's the Horicon Marsh or a slight depression in a farm field that fills with water only one day per year, SB 37 imposes the same strict regulatory standards.

Conclusion
Wetlands are important natural resources that need to be protected. However, if we are going to replace the regulatory framework that is currently in place, the new regulations should:

- Classify wetlands based upon their functionality and unique characteristics;
- Establish a clearly-defined permitting process that delineates the authority of the various regulatory bodies, provides certainty to the regulated public; and
- Strongly embraces Wisconsin's wetland mitigation/banking program.

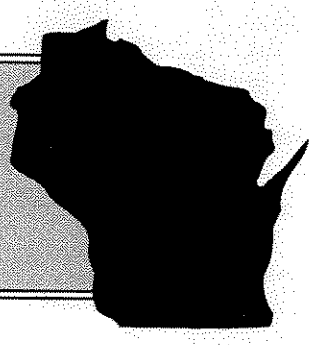
We urge you to oppose SB 37. Please feel free to contact us with any questions or comments.

DMR/rj
1/3/97
Reed.bio

Donald M. Reed is the Chief Biologist at the Southeastern Wisconsin Regional Planning Commission. He has been with the Commission since 1972. Mr. Reed has also provided consultant services concerning wetland boundary identification, wetland function and quality assessments, and/or wetland mitigation and restoration planning to various local units of government, the Wisconsin Department of Natural Resources, the U. S. Army Corps of Engineers, the U. S. Department of Justice, and law firms. Mr. Reed has a B.S. degree in Biology and Geography from Carroll College and an M.S. degree in Botany/Zoology from the University of Wisconsin-Milwaukee. Currently, he is completing a Ph.D. degree in Biological Sciences from the University of Wisconsin-Milwaukee. His area of study is wetland ecology with a soil science minor. Among other studies and reports, he is the co-author of "Wetland Plants and Plant Communities of Minnesota and Wisconsin" published by the U. S. Army Corps of Engineers. Finally, Mr. Reed is a recipient of the 1996 National Wetlands Award for Outstanding Wetlands Program Development awarded by the Environmental Law Institute and the U. S. Environmental Protection Agency.

Wisconsin Potato & Vegetable Growers Association, Inc.

P.O. Box 327 Antigo, Wisconsin 54409-0327
Telephone 715/623-7683 Fax: 715/623-3176 email: wpvga@newnorth.net



Good morning Mr. Chairman and Members of the Senate Environmental Resources Committee. My name is Mike Carter, and I am the Director of Government and Grower Relations for the Wisconsin Potato and Vegetable Growers Association. While the WPVGA has not yet taken a formal position on LRB 2106 relating to wetland water quality certification, it is important to bring before the committee initial thoughts, concerns and endorsements relating to this very new piece of legislation. Specifically, I have four areas that I would like to direct your attention to and should be considered as this bill is being discussed today. They are as follows:

I. Time frame of the legislation

While I realize that the recent Supreme Court Case has created a situation in which there is a certain amount of urgency to pass a new bill, I am somewhat concerned with the pace at which the new bill is proceeding. I think it is safe to say that no one wants to see wetlands disturbed as a result of a gap in the law, however there is a reason that the legislative process is slow and deliberate; to insure the bill that passes has time to be carefully considered, and to make sure the drafted language proposed does what the authors intend. I am not suggesting the bill doesn't accomplish the goals of the drafters, I am suggesting that everyone should get ample time to dissect and respond to the specifics of the bill.

II. Opportunity to streamline drainage district law

Under current law, drainage districts fall under both DNR and DATCP regulations in the state statutes. While the administrative rules were streamlined and clarified two years ago, some conflict still exists within the statutes. This bill might provide an opportunity to streamline government by not having two departments having jurisdiction over ditches, which are designed to drain excess water off of agricultural fields. This is the type of duplication and inefficiencies embedded in the statutes that have been rightfully identified and alleviated over the past several years.

III. Cost

The concern here is twofold. First, because a fiscal note has not been circulated the obvious question is what is the cost to the department to implement this bill? Secondly, out of which state source will the money come from to pay for the new state hired staff that will be needed to run the program which had been handled by the Army Corps of Engineers?

IV. Distinction between low spots in a field and a wetland

Again, there might be another opportunity here to make a real and definitive distinction between wetlands that are real wetlands and low spots in what most everyone would consider a wet spot on an agricultural field that has no intrinsic wetland value.

Again, I would like to commend the committee for its quick action, but caution on acting in a manner that does not allow for proper discussion and analysis. I would also like to reinforce the point that the WPVGA has not yet had a chance to take an official position on the bill, however we will relay our official position to you once we have had the time to discuss the issue in greater detail.

I would like to thank you for your time and the opportunity to speak to address the committee on LRB 2106, and would welcome any questions at this time.

WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

TO: SENATOR ROBERT L. COWLES

FROM: David L. Lovell, Senior Analyst

RE: 2001 Senate Bill 37, Relating to Water Quality Certifications for Wetlands

DATE: February 1, 2001

This memorandum, prepared at your request, describes the provisions of 2001 Senate Bill 37, relating to water quality certifications for wetlands. This draft was developed by yourself and others in response to a recent U.S. Supreme Court decision (the so-called SWANCC decision), which limited the authority of the U.S. Army Corps of Engineers (ACE) to require permits for certain activities affecting wetlands and so limited the state's ability to review those permits. The draft seeks to restore the regulatory review that the state had prior to the Supreme Court decision by creating a state version of the ACE permitting process.

BACKGROUND

This section briefly describes the permitting of activities that affect wetlands under the Clean Water Act and the effect of the Supreme Court decision. For a fuller description of these topics and information regarding other regulations that apply to activities that affect wetlands, see Wisconsin Legislative Council Legal Memorandum 2001-1, *U.S. Supreme Court Case on Wetlands* (January 25, 2001, by Rachel Letzing, Staff Attorney, and Mark Patronsky, Senior Staff Attorney).

Army Corps of Engineers Permit

Under s. 404 of the Federal Clean Water Act, a person who wishes to place or discharge dredged or fill materials into navigable waters must obtain a permit from the ACE. The geographic scope of s. 404 has been very broad and encompassed all waters of the United States, including wetlands and other waters that are not traditionally considered to be navigable. However, activities that may destroy or degrade wetlands but that do not include the placement of dredge or fill material, such as draining, excavation, flooding or burning, are not regulated under the Clean Water Act.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

State Water Quality Certification

Section 401 (a) (1) of the Clean Water Act provides states a measure of control over activities that affect wetlands. Under this section, an ACE permit under s. 404 is not valid unless the state in which the permitted activity will occur certifies that the activity will meet state water quality standards. Denial of a s. 401 water quality certification by a state, in effect, invalidates an ACE permit. In order for a state to exercise jurisdiction under this section, the state must have water quality standards that are applicable to wetlands. These rules are found in ch. NR 103, Wis. Adm. Code, and rules regarding the water quality certification process are found in ch. NR 299, Wis. Adm. Code.

Supreme Court Decision

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Supreme Court ruled that the ACE had exceeded its statutory authority by requiring a permit for an action affecting certain isolated wetlands that are not connected to any navigable water of the United States. Consequently, in the future, the ACE may not require permits for such actions. In the absence of an ACE permit, the state loses its opportunity to apply its water quality certification process to regulate these activities.

There is some question about the scope of the decision. At the minimum, the decision applies to cases that match the fact situation in the SWANCC case. Specifically, the case addresses application of the s. 404 permit process to wetlands that are isolated from navigable waters but that are tied to interstate commerce through the fact that they are used as habitat by migratory birds (the so-called migratory bird rule). However, language in the decision would allow a broader reading, prohibiting application of the s. 404 permit process to any wetlands that are isolated from navigable waters. Initial written guidance from the legal staff of the ACE and the U.S. Environmental Protection Agency implements a narrow reading of the decision. However, it is expected that the new administration of President Bush will review this issue and issue further guidance later this year.

SENATE BILL 37

Overview

Senate Bill 37 seeks to grant the Department of Natural Resources (DNR) the same degree of authority over activities affecting isolated wetlands that it had prior to the SWANCC decision. It does this by creating a requirement in Wisconsin statutes that persons engaging in activities that affect wetlands first obtain a water quality certification from the DNR. To the extent possible, the draft uses the same language as is used in s. 404 and ch. NR 103, which is intended to ensure that the new requirement will be interpreted and applied in the same manner as the s. 404 permit program was implemented prior to the SWANCC decision. In particular, the new requirement is limited to the placement of fill or dredged material in a wetland, as the s. 404 permit program is limited. The draft also reproduces the exemptions from regulation that are contained in s. 404 and additional exemptions for artificial wetlands that are contained in ch. NR 103, as well as language from s. 404 regarding general permits.

The requirement for water quality certifications applies to activities affecting any wetland, not only those affected by the SWANCC decision. The result of this is that, under the Bill, the DNR would

regulate activities affecting wetlands over which the ACE does not have permitting authority; in cases where the ACE still has jurisdiction, the DNR would perform the same function it did before the SWANCC decision. In both cases, the authorization issued by the DNR would be called a water quality certification and the review process would be the same.

Provisions of the Bill

Water Quality Certifications

The Bill provides that no person may discharge dredged or fill material into a wetland without first receiving a water quality certification from the DNR and that no person may violate any condition of a water quality certification issued by the DNR. It specifies that the DNR may not issue a water quality certification unless it determines that the discharge will comply with all applicable water quality standards. It specifies that this requirement is in addition to and is not superceded by any other regulatory requirement.

Exemptions

The Bill provides two sets of exemptions from the water quality certification requirement. The first set of exemptions apply to the following activities:

- Normal farming, silviculture or ranching activities.
- Maintenance, emergency repair or reconstruction of existing structures.
- Construction and maintenance of farm ponds, stock ponds or irrigation ditches.
- Maintenance of drainage ditches.
- Construction and maintenance of farm roads, forest roads and temporary mining roads, if done in conformance with best management practices.

The Bill specifies that these exemptions do ***not*** apply if the activity would: (a) bring a wetland into a use to which it was not previously subject; (b) impair the flow or circulation of any waters of the state; of (c) reduce the reach of any waters of the state. These exemptions and the limits on their applicability are based on provisions of the Clean Water Act.

The second set of exemptions apply to artificial wetlands in any of the following settings:

- Sedimentation and storm water detention basins.
- Active sewage lagoons, cooling ponds, waste disposal pits, fish rearing ponds and landscape ponds.
- Actively maintained farm drainage and roadside ditches.
- Active nonmetallic mining operations.

A person acting under one of these exemptions must give the DNR 15 days notice of the proposed activity. The person may proceed with the activity at the end of the 15-day period without any DNR approval unless notified by the DNR that the artificial wetland has a significant functional value as a wetland. These exemptions are based on language in ch. NR 103.

General Water Quality Certifications

The Bill authorizes the DNR to issue general water quality certifications for types of activities that are similar in nature and that, individually and collectively, will have minimal adverse effects on the environment. General water quality certifications may have a term of no more than five years. This provision is based on a provision of the Clean Water Act.

Enforcement Provisions

The Bill gives the DNR inspection authority relating to activities affecting wetlands. It authorizes a representative of the DNR, upon presenting his or her credentials, to do any of the following:

- Enter and inspect any property on which a wetland is located that is subject to a water quality certification.
- Enter and inspect any property to investigate a discharge of dredged or fill material.
- Gain access to and inspect any records that the DNR requires the holder of a water quality certification to keep.

The Bill also applies the penalties that generally apply to ch. 281, Stats. (*Water and Sewage*) to violations of the provisions of the Bill. In addition, it gives the Department of Justice (DOJ) the same role in enforcing the provisions of the Bill as the DOJ has in enforcing other environmental regulations.

Other Provisions

The Bill places the new requirements regarding wetland water quality certifications in ch. 281, Stats. In addition, it renumbers the existing statute regarding wetland compensatory mitigation to ch. 281 and makes a minor terminology change.

The Bill amends the definition of "waters of the state" in ch. 281. Currently, "waters of the state" is defined by listing the many diverse kinds of waters that make up the concept embodied in the term. This list includes marshes, but does not include other types of wetlands. The Bill substitutes the word "wetlands" for "marshes" in the definition.

DLL:wu

Senate Committee on Environmental Resources
February 1, 2001

Testimony Regarding LRB 2106/1, on Behalf of the Wisconsin Wetlands Association

by
Kirk W. McVoy

1) Heartfelt Thanks to the Committee for its prompt action in preparing this draft bill; it has the full support of the Wisconsin Wetland Association..

2) HURRY, HURRY, HURRY! Wisconsin needs not only a good Senate bill, but also an appropriate Assembly bill, as soon as it can be written.

3) According to countless rumors circulating around Madison, many attempts are already under way in Wisconsin to fill wetlands during this interim period between the termination of federal jurisdiction over isolated wetlands and the enactment of State legislation protecting them. This seems to us an ill-advised and extremely unfair activity. It is unfair to those who have not been able to obtain fill permits in the past, to those who will be denied them in the future, and certainly to the wetlands themselves. If there is any governmental device for doing so, we would like to see **a moratorium on all filling of isolated wetlands** until the legislative picture in Wisconsin becomes clear.

4) It is our understanding that the intent of this bill is to preserve the *status quo* on permitting for wetland fills---that whatever State legislation is passed be neither more nor less restrictive than the previous rules used by the Army Corps of Engineers. Whether this bill achieves this balance or not, the Wisconsin Wetlands Association takes the position that this should be the goal of any current legislation. Neither the environmental community nor those who have reasons to fill wetlands are entirely happy with those rules, but we do not believe that the current chaotic situation is an appropriate time to attempt to make changes from them. Such changes should be the result of careful study, of consultation between both sides on the issue, and of extended legislative hearings. This is a project for the future, not something which should be attempted in the present high-pressure atmosphere.

5) The entire community is well aware that those interests who apply for fill permits have substantial financial stakes involved. However, we wish to recall that there are also very considerable financial stakes which are endangered by the Supreme Court ruling. This very Committee expended a great deal of thought and effort only a year ago in setting up a careful procedure to govern mitigation of filled wetlands---all of which becomes null and void if no fill permits at all are required. In recent years, very substantial investments have been made in wetland banks, in the wetland nursery industry and in the extended community of ecological consultants who advise clients required to mitigate destroyed wetlands. Most of these investments are severely undercut by the Supreme Court decision, and can only be protected by appropriate State legislation, such as the bill under consideration here.

Wisconsin Builders Association

Dedicated to Preserving and Promoting the American Dream

Memorandum

TO: Senator Baumgart and members of the Senate Environment Committee

FROM: Jerry Deschane

DATE: February 1, 2001

RE: LRB 2106/1 Wetlands

Principles

The Wisconsin Builders Association supports the protection of valuable wetlands and the restoration of degraded wetlands. We have been very proud of our role in wetlands protection and restoration, particularly last session's landmark legislation that made mitigation a priority in the wetland permitting process. We believe that a coordinated regulatory process that includes protection and mitigation is the only way to achieve the goals set forth in Senator Burke and Representative Powers' Smart Growth legislation.

Impact of US Supreme Court Decision Limited

We are advising our members that the impact of this court decision is very limited, and that the only prudent course is to continue to work within the existing regulatory process. We base this opinion on the following:

- The Corps and the EPA have taken a very narrow interpretation of the decision, requiring staff to review each instance carefully.
- Private legal counsel are split on whether that interpretation creates any unregulated wetlands; it is very unclear, and therefore hazardous.
- Initial DNR estimates of impact included millions of acres of adjacent wetlands, which the Court specifically stated are regulated.
- Other regulatory authority, including the Endangered Species Act, Migratory Bird Treaty, Wisconsin's Chapter 30, local zoning ordinances, local environmental corridor restrictions, sewer extension regulations, WPDES permitting, and others, provide an overlapping web of protection for most, if not all, wetlands.

(continued)

NAHB

4868 High Crossing Boulevard • Madison, Wisconsin 53704-7403
(608) 242-5151 • (800) 362-9066 • Fax (608) 242-5150

Concerns

We appreciate the often-stated goal of Chairman Baumgart, which is to plug the gap that may have been created by the SWANCC decision, "nothing more and nothing less." Our concerns are that this legislation, does, in fact, significantly exceed current regulatory authority.

- The legislation applies to all wetlands, even though the SWANCC decision applies only to a narrow slice of isolated wetlands.
- It adds wetlands to the definition of "waters of the state," which is unrelated to the SWANCC decision but will have significant side affects.
- By using the state definition of wetlands in place of the federal definition, the scope of regulation is widened. The state definition is different than the federal both in language and interpretation.
- The bill's definition (and DNR's interpretation) of artificial wetlands is different than the federal definition.
- The bill is silent on adopting all of the federal interpretations and guidance. Given the DNR's and the Corps' frequent disagreements, it is reasonable to expect the DNR will not adopt those interpretations.
- The bill creates a legal separation between the federal wetland program and the state program, but property owners are still subject to both. As either program evolves, applicants will be put through two different regulatory programs, and the problem will get worse over time.
- The bill does not contain a mitigation element, something required under the federal program.
- The bill grants the DNR authority to enter onto "any property" to investigate wetland issues (subsection 281.36(7)(b)), whether the property owner is involved in a permit decision or is an innocent third party. That raises serious Constitutional questions.

We Would Support an Alternative that **Improves** Wetland Protection

This legislation demonstrates how difficult, if not impossible it may be to simply "plug the gap." If it is not possible to achieve the Chairman's goal of nothing more and nothing less, we suggest the Committee consider an alternative that improves wetlands and wetland protection throughout Wisconsin, and that continues recent years' gains in both wetland acreage and quality.

We ask the committee to lay this legislation aside, and to work on something that is better than the status quo, and we offer our pledge of support for that effort.

Testimony of Secretary George E. Meyer
Senate Environmental Resources Committee
Feb. 1, 2001

We're here today to testify in support of a bill to restore protections to valuable Wisconsin wetlands put at risk by the U.S. Supreme Court's January 9 decision.

The bill would not add any regulatory process or program at the state level. The Wisconsin Department of Natural Resources has been reviewing wetland projects and issuing water quality certifications for those projects since the adoption of wetland water quality standards in 1991. This bill would continue that program. There would be no new authority and no new exemptions. DNR would not gain or lose in the decision process used to protect wetlands. The bill would maintain the "world" as it was on January 8, the day before the Court's decision.

Citizens would follow the same application process as before to pursue projects that could potentially impact wetlands, with the exception that in some cases, they would need to deal with only one agency instead of two.

Overview of Wisconsin's wetland protection program

Wisconsin has about 5.3 million acres of wetlands today, about half the total before statehood in 1848. These remaining wetlands are vital to fish, waterfowl and amphibian production. They're also vital to preventing floods, to protecting the quality of water in our underground aquifers, in lakes and in streams, and to providing recreation and scenic beauty.

We protect these wetlands from being dredged or filled in through a web of programs that seek to work with property owners to allow them to carry out the projects they want, but in ways that avoid or minimize harm to the environment. The department, the U.S. Army Corps of Engineers and local governments currently have overlapping jurisdiction over Wisconsin's wetlands.

Wisconsin has jurisdiction to protect wetlands below the ordinary high water mark of navigable waters under current state statutes. Wetlands lying within the shoreland zone of lakes and streams are under the jurisdiction of local governments, which must enforce standards that are at least as protective as the state's minimum standards. The Army Corps of Engineers had jurisdiction over these and all other Wisconsin wetlands under Section 404 of the Clean Water Act. Section 404 gives the corps jurisdiction over navigable waters of the United States and their tributaries. The US Supreme Court decision has now limited the scope of the Corps authority over Wisconsin's wetlands.

People who want to build, or pursue some other project that could potentially impact wetlands must apply to the Corps for a permit or an exemption. Our role, under our state water quality certification process, is to review the proposed activity and provide a certification that the activity would not violate any Wisconsin water quality standard. The activity cannot significantly alter the wetland's functions, nor result in other significant adverse environmental consequences. A corps permit is not valid unless the applicant receives a water quality certification from DNR.

We have had this federally-dependent jurisdiction over all Wisconsin wetlands since 1991. Citizens petitioned the Natural Resources Board for the program because they were concerned that the Corps was permitting projects that allowed an average of 1,400 acres of wetlands to be destroyed every year. That's like filling in half of Lake Monona every year. The water quality certification program has allow DNR to slow federally permitted wetland to 330 acres per year while still allowing development.

Since the implementation of our state water quality certification program, 86 percent of the applicants have been able to get their projects done, often with modifications that minimize the damage to the environment and enable applicants to complete their projects more quickly and at lower cost.

U.S. Supreme Court decision

The January 9 U.S. Supreme Court decision affects the scope of the Corps jurisdiction under the Clean Water Act, and by default, DNR jurisdiction through the water quality certification requirement. The 5-4 majority ruled in favor of a group of northern Illinois communities that wanted to build a solid waste facility on a 533-acre site that included an abandoned sand and gravel site containing a number of ponds used by migratory birds.

The Corps of Engineers originally declined jurisdiction over the Illinois project because the ponds were not considered "wetlands." But the Corps later became aware that migratory birds used the ponds, which the Corps asserted allowed them to extend the scope of their jurisdiction to wetlands or waters used by birds protected by migratory bird treaties, or by other migratory birds. The municipalities challenged the Corps' assertion of jurisdiction but lower courts upheld it until the U.S. Supreme Court ruled against the federal agency.

The court said that the Corps of Engineers exceeded its authority under Section 404 of the federal Clean Water Act and could not assert jurisdiction over isolated wetlands and ponds. By narrowing the water and wetland area subject to federal regulation, the decision also narrows the areas and activities DNR protects through its water quality certification.

Wisconsin wetlands in the shoreland zone and wetlands below the ordinary high water mark along navigable waters continue to be protected under other state laws. There is a mosaic of other state laws, such as solid waste siting laws, that protect some of these isolated wetlands under certain limited circumstances. These laws do not, however, provide a system which protects most of our isolated wetlands from fills which will violate our state water quality standards.

Impacts

The court's decision potentially affects vast portions of Wisconsin's remaining wetlands, some of them our most valuable and most endangered wetlands. Prairie potholes, wet meadows, many forested wetlands, ephemeral wetlands, bogs and fringing wetlands along small, nonnavigable ponds, are among the major categories of wetlands now at risk.

These wetlands do not fit the typical image people have of wetlands. In fact, some may question whether they are worth saving and dismiss them as mudflats. But research well documents their value to the environment, to flood prevention, to water quality protection and to recreation. A diversity of wetland types is needed, for instance, to maintain the diversity of invertebrate populations essential to waterfowl. Seasonally wet areas provide a rich source of these invertebrates at the time nesting hens and juveniles most need a high protein diet.

39 percent of Wisconsin's 370 species of birds live in or use wetlands. Many important game birds, mammals and fish are associated with wetlands, among them waterfowl, white-tailed deer, ring-necked pheasants, northern pike and walleye.

Fully one-third of the plants and animals on Wisconsin's state endangered and threatened list depend on wetlands. That proportion is even higher (43 percent) for plant and animal species in Wisconsin that are on the federal endangered and threatened species lists.

Small isolated wetlands play a key role in the continued survival of the state-threatened Blandings turtle. Many small populations would disappear as these wetlands are lost.

The potential loss of these wetlands is expected to greatly accelerate amphibian decline. The kind of wetlands left without protection happens to be the only wetland types that most species of frogs and salamanders can use for breeding. Loss of these wetlands can completely eliminate entire populations for up to a mile away from the wetland itself. Thirty-eight of our 54 amphibians and reptiles depend on wetlands for food or for habitat.

Wisconsin wetlands protect water quality by filtering out polluted runoff and preventing flooding by storing water. Studies in the Midwest have shown that flood flows were reduced by 80 percent in basins with wetlands compared to basins without wetlands.

Wetlands can also trap pesticides, fertilizer, sediment, and other substances carried in polluted runoff. Studies have shown that wetlands may remove 80 to 90 percent of the phosphorus attached to sediments. A 1989 study has shown 70 percent removal rates of nitrogen from water entering prairie basin wetlands. In highly altered urban watersheds, however, small isolated surface water wetlands may be some of the only areas that allow water to sink in.

In addition to these benefits that wetlands provide, they also are key to the health of Wisconsin's landscape. Because Wisconsin wetlands are so interspersed with other major community types in the state - lakes, rivers, prairies, forest - they play a critical role in maintaining the overall health and functioning of the these communities. Any wetland loss detracts from the diversity of species and the ecological health of these other landscape communities.

Our initial review of the court's decision suggests that millions of acres of wetlands are no longer protected as a result of the U.S. Supreme Court decision. But the exact number of acres at risk is not the issue.

Wisconsin citizens expect wetlands to be adequately protected. If this decision allows even 1 percent of the state's remaining wetlands to be destroyed, that is not acceptable to our citizens,

nor to our governor. In a press release issued after the U.S. Supreme Court's decision, Gov. Scott McCallum said the ruling "will not result in a retreat from our long-standing commitment to protect Wisconsin wetlands. "Under no circumstances will I allow Wisconsin wetlands to be endangered by this ruling," he said.

Legislation

1 percent of Wisconsin's remaining wetlands is 53,000 acres. Even if we lost just that 1 percent, it would equal an area one-third the size of Milwaukee County. Restoring protections to any wetlands affected by the U.S. Supreme Court's ruling merely seeks to fill the gap in protection and follows that court's assertion that protecting isolated wetlands is a matter for the states, not the federal government.

Under the bill before you today, DNR's decision process would be the same one we follow today. Citizens pursuing wetland projects would apply for a water quality certification, just as they had to do before the court's decision. In some circumstances, people would not be required to get a Corps permit. They would need a decision from only one agency, not two. That is the only difference citizens would notice, and it's one they would applaud. Citizens have long complained about having to work with two agencies.

The bill would carry forward the exemptions from the federal program, as well as exemptions for certain artificial wetlands now allowed in our water quality standards. These exemptions cover many normal forestry and farming practices.

This bill is not the ultimate in a state wetland protection bill. We acknowledge that. But we feel it is critical to maintain the status quo as far as protection and process. There would be no new authority and no new exemptions. DNR would not gain or lose in the decision process that is used to protect wetlands.

Because our department has been carrying out this water quality certification review since 1991, we can continue to operate this program without new staff or revenues. If this law is adopted, however, our agency may be able to capture federal dollars for this ongoing wetland protection program. EPA headquarters in Washington, D.C., has told us that states that take steps to protect their isolated wetlands will be eligible for funding through the tribal/state wetland grant program. They are also investigating additional sources of funding for state programs.

We need to move quickly to restore protections to these isolated wetlands. In the past three weeks, DNR lawyers and wetland management specialists have received numerous calls from citizens, developers, consultants and attorneys questioning whether DNR has jurisdiction over wetlands they want to fill or dredge. Last week, we received a call from a quarry owner who was himself receiving requests from people who wanted gravel to fill in wetlands. He was calling us because he wanted a letter from us indicating that he would be doing nothing wrong if he met their requests.

Every day we wait, we risk losing more wetlands. Wisconsin Supreme Court justices addressed the consequences of such insidious losses in their landmark Hixon v. PSC ruling in 1966, where they stated,

> "A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever."

This bill seeks to restore protections to another key part of that precious natural heritage. And it would do so without adding new burdens to citizens. In fact, what has been a rather complicated web of regulations will be simplified for many citizens. And Wisconsinites will continue to enjoy the environmental, economic, and spiritual benefits these wetlands bring.

WMC
REPRESENTING WISCONSIN BUSINESS
Wisconsin Manufacturers & Commerce

Memo

TO: **Senate Environmental Resources Committee**

FROM: **Jeff Schoepke, Director, Environmental Policy**

RE: **Wetlands Legislation- LRB NUMBER -2106**

DATE: **February 1, 2001**

Thank you for the opportunity to comment on LRB 2106, legislation relating to regulation of wetlands.

WMC opposes this legislation for several reasons:

1) The problem of wetland exposure to development as a result of a recent Supreme Court decision is vastly overstated.
2) The bill as drafted goes beyond the issue of isolated wetlands as defined in the decision and is duplicative and burdensome.
3) WMC supports the development of a more comprehensive, net gain wetland policy.

WMC believes media estimates of the impact of the recent Supreme Court Decision *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) have been misleading and sometimes false. The decision speaks only to "nonnavigable, isolated, [and] intrastate" wetlands. A January 19, 2001 USEPA memo confirms this fact. Given the nature of the wetlands addressed in SWANCC, it is difficult to estimate the number of acres affected. However, data available shows suggestions of over 4 million acres are irresponsible and inaccurate.

Further, the fear that thousands of acres of wetlands will be filled in the near future is unfounded. The court decision puts these isolated wetlands in legal limbo, especially with the likelihood of wetlands legislation passing the Legislature this session. Sensible contractors and business organizations including WMC are advising clients and members to wait for clarification of the impact on Wisconsin before proceeding with any projects that impact wetlands.

WMC hopes the Senate and the legislature take a deliberate approach on the issue of wetlands protection. These are valuable resources for both our environment and economy, and WMC is committed to working with the Legislature to forge good policy. The debate on these issues deserves time and energy, and consensus rather than division. Quick passage of bad legislation does not serve environment well.

501 East Washington Avenue
P.O. Box 352
Madison, WI 53701-0352
Phone: (608) 258-3400
Fax: (608) 258-3413
www.wmc.org

The stated intent of the legislation is to "fix" or "fill the gap" created by the SWANCC decision. However, LRB 2106 gives the DNR regulatory authority significantly greater than that taken away from the Army Corps of Engineers in SWANCC.

Rather than simply giving the DNR the authority to regulate "nonnavigable, isolated, [and] intrastate" wetlands the bill creates a whole new state regulatory scheme that attempts to mirror the federal 404 process. However, in doing so, the bill creates no specific reference to the type of wetland referenced in SWANCC. Therefore, this bill would regulate not only the wetlands impacted by SWANCC, but also those wetlands currently not regulated by federal or state law. In essence, the bill creates a new class of wetlands and a new state regulatory scheme for them. Whether this is the intent of the authors or not, that is the impact of this legislation. A far simpler approach would have been simply to give DNR the authority to regulate "nonnavigable, isolated, [and] intrastate" wetlands.

Rather than focus on new regulations, WMC believes Wisconsin should establish a new net gain wetlands policy. Instead of regulating previously unregulated wetlands, we should refocus on increasing both the quality and quantity of wetlands in the state. Existing regulatory schemes hamper such opportunities, are inefficient and burdensome and applying a new 404-style scheme in Wisconsin will do little to hasten the growth of wetlands in the state. WMC believes the legislature should build on the mitigation legislation passed last session, considering additional opportunities for mitigation where appropriate. The Legislature should also consider wetland tax credits and other incentives.

In summary, WMC would urge the Senate Environmental Resources committee and the Legislature as a whole to take a measured, sensible path and work to develop a comprehensive new approach to wetland regulation. We are ready to work with you on such an approach. However, LRB 2106 does not achieve these objectives, and WMC opposes it at this time.

SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES
FEBRUARY 1, 2001
411 S STATE CAPITOL
TESTIMONY ON SENATE BILL 37 BY SENATOR COWLES and SENATOR BAUMGART

We would like to speak briefly on Senate Bill 37 relating to water quality certification for wetlands.

The introduction of this bill is in response to the January 9th Supreme Court Decision in Solid Waste Agency of Northern Cook County vs. U.S. Army crops of Engineers.

COURT CASE

- In a 5-4 decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting Clean Water Act jurisdiction over,"an abandoned sand and gravel pit in northern Illinois, which provides habitat for migratory birds."
- The Court's decision invalidates the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and adjacent wetlands.

SENATE BILL 37

- Due to the court decision, there are a significant number of wetlands left unprotected in this state. The intent of Senate Bill 37 is to provide the same level of protection for these wetlands that was in place prior to the court decision.
- Under the bill, no one may discharge dredged or fill material into a wetland unless the discharge is authorized by a certification from DNR that the discharge will meet all applicable state water quality standards.
- The language in this bill is near identical to the language in the Clean Water Act that once provided jurisdiction over these wetlands through Army Corps of Engineer permits. There have been only minor technical changes made for the purpose of transitioning federal statute into state statute.
- **All exemptions that were in place under federal law are included in this bill.**
- Some of these exemptions include:

-Normal farming, silviculture, or ranching activities

-Maintenance, emergency repair, or reconstruction or damaged parts of structures that are in use in the waters of the state.

-Construction or maintenance of farm ponds, stock ponds, or irrigation ditches.

-Maintenance of drainage ditches.

-Construction or maintenance or ram roads, forest roads or temporary mining roads that is performed in accordance with best management practices, as determined by the Department.

- We want to stress that our intent with this bill is to provide the same protection for these wetlands that was lost, no more, no less.
- This is not the time to provide more protections or weaken the protection that was in place prior to the court decision.
- Some of the issues various groups want to address related to things they did not like in the process, should be dealt with after we reinstate protection to the wetlands.
- Last session, we worked very hard with Representative Kedzie, the Builders, and environmental groups to develop wetland mitigation legislation. The bill passed and now we have a supported process in place, which allows for wetland mitigation.

SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION

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PROBLEM STATEMENT

NEED FOR LICENSURE TO CONDUCT WETLAND DELINEATIONS

On July 1, 1998, Chapter 470 of the Wisconsin Statutes, entitled, "Examining Board of Professional Geologists, Hydrologists and Soil Scientists," (1997 Wisconsin Act 300) was created. This chapter requires that those persons doing work in the area of geology, hydrology, and soil science be licensed by the Wisconsin Department of Regulation and Licensing. An unanticipated problem with this licensing program has arisen with respect to persons doing horticulture and wetland delineation and restoration/creation work. Typically, those persons who are qualified to conduct such horticulture and wetland related work do not meet the licensing requirements of Chapter 470 (see Chapter 470.09(3) and (4) Definitions, 470(2) and (3) License Required, 470.04 Licensure Requirements, and 470.09 Penalties).

While exceptions to the licensure requirements are made for employees of the Federal government, State and county land and water conservation employees who are certified as field engineers, public service company employees, certain employees of private companies or corporations in connection with their direct operations, construction contractors, land surveyors, teachers, well drillers, and those operating within the scope of a license, permit registration, or certification granted by this State or the Federal government, none is made for those individuals who identify, delineate, regulate, or otherwise manage wetland systems (see Chapter 470.025 Applicability). Under this rule, the only wetland related work that legally can be done are those activities carried out by a licensed geologist, hydrologist, soil scientist, certified soil tester, or professional engineer, none of whom ordinarily have the botany or horticulture backgrounds necessary for wetland plant identification.

The result of this rule as presently written is that wetland delineations and restoration/creation work will largely cease to be conducted by those who are most qualified to undertake such activities, or such activities will be conducted at significantly increased and unnecessary cost to public and private agencies and the regulated public.

To rectify this problem, the Commission suggests:

1. The State Legislature amend 1997 Wisconsin Act 300 to include a licensure program for wetland scientists; or

2. The State Legislature amend 1997 Wisconsin Act 300 to eliminate the need for licensure to perform wetland delineations under Chapter 470.02 License Required and add state, regional, county, and municipal government employees to Chapter 470.025(2); or

3. Establish a State Registry or Certification program for horticulturalists and wetland scientists, which brings them into compliance under Chapter 470.025(1); or

4. Repeal 1997 Wisconsin Act 300.

WISCONSIN LEGISLATIVE COUNCIL
LEGAL MEMORANDUM

U.S. Supreme Court Case on Wetlands

INTRODUCTION

A recent U.S. Supreme Court decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, No. 99-1178 (January 9, 2001), has had the effect of restricting some of the authority of the Department of Natural Resources (DNR) to regulate wetlands. This DNR authority was based on federal law that allowed it to issue water quality certification for permits to fill wetlands issued by the U.S. Army Corps of Engineers (Corps). The Corps permit was issued contingent on a favorable DNR decision on the water quality certification.

The U.S. Supreme Court struck down certain portions of the Corps regulations that defined its authority. These regulations applied Corps jurisdiction to isolated wetlands not adjacent to or connected to a navigable body of water. This restriction of Corps jurisdiction means that the state no longer has the ability to issue water quality certifications for those wetlands.

This memorandum provides a brief discussion of the Supreme Court case and its effect in Wisconsin. This memorandum focuses on the legal issues and does not address the acreage of wetlands potentially affected by the Supreme Court decision or the anticipated consequences of this decision for wetlands in Wisconsin. The DNR is currently reviewing data in an attempt to quantify the effect of the U.S. Supreme Court's decision on Wisconsin wetlands.

SITUATION PRIOR TO THE SUPREME COURT DECISION

CLEAN WATER ACT

Wetlands are subject to an intertwined set of federal, state and local requirements. This section specifically discusses the wetlands regulations affected by the recent U.S. Supreme Court decision in *SWANCC*.

In 1972, Congress passed the Federal Water Pollution Control Act amendments "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters. The Act defined "navigable waters" as "waters of the United States." [33 U.S.C. s. 1362 (7).] The subsequent history of the Act, including the Supreme Court case, turn on this definition.

SCOPE OF SECTION 404 OF THE CLEAN WATER ACT

Since its enactment, s. 404 of the Clean Water Act [33 U.S.C. s. 1344] has evolved through a series of statutory amendments, regulatory changes and court decisions into the primary federal program for the protection of wetlands. Under s. 404 (a), a person who wishes to place or discharge dredge or fill materials into navigable waters, including wetlands, must obtain a permit from the Corps.

Activities regulated under s. 404 include the placement of fill for development, water

resource projects (e.g. dams and levees), infrastructure developments (e.g. highways and airports), and conversion of wetlands to uplands for farming and forestry. However, activities that do not include the placement of dredge or fill material, such as draining, excavation, flooding or burning, are not regulated under the Clean Water Act.

EARLY STAGES AND 1970'S RULES

When the Corps issued regulations to implement s. 404 in 1974, it assumed jurisdiction of traditionally navigable waters, including adjacent wetlands, thus excluding many small waterways and wetlands.

In 1975, a federal district court directed the Corps to revise and expand its regulations to be consistent with Congressional intent, which the court determined was broader than the 1974 regulations. In 1977, the Corps issued regulations which defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation and destruction of which could affect interstate commerce." [33 C.F.R. s. 323.2 (a) (5) (1978).] This definition remains in effect today.

A subsequent series of court decisions established that, under the broad definition of "waters of the United States," Corps jurisdiction includes wetlands adjacent to navigable waters, artificially created wetlands, and waters isolated from navigable waters.

MIGRATORY BIRD RULE

In 1986, the Corps issued regulations to clarify its jurisdiction under s. 404. Under what is popularly known as the "Migratory Bird Rule," waters that are or may be used as habitat for migratory birds are an example of waters whose use, degradation, or destruction could affect interstate or foreign commerce and therefore are "waters of the United States." [33 C.F.R. s. 328.3 (a) (3).] Therefore, the Corps determined that s. 404 (a) extends to intrastate waters that are or may be used as habitat for migratory birds.

STATE WATER QUALITY CERTIFICATION

AUTHORITY IN THE CLEAN WATER ACT

In addition to s. 404, s. 401 (a) (1) of the Clean Water Act provides a measure of control over activities that affect wetlands. Under s. 401 (a) (1), states may grant or deny certification for a federally permitted or licensed activity that may result in a discharge into the waters of the United States. If the state denies certification, the Corps will not issue the permit. The decision to grant or deny certification is based on the state's determination of whether the proposed activity will meet state water quality standards. In order for a state to exercise jurisdiction under s. 401 (a) (1), the state must have water quality standards that are applicable to wetlands.

ADOPTION OF CH. NR 103

The DNR established procedures for water quality certification decisions in ch. NR 299, Wis. Adm. Code. In 1991, the DNR established water quality standards for wetlands in ch. NR 103, Wis. Adm. Code, that provide review criteria to determine whether an activity may affect wetlands.

Chapter NR 103 is applicable to all DNR regulatory, planning, management, liaison and financial aid determinations involving wetlands, and water quality certifications for s. 404 permits under ch. NR 299.

THE DECISION

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY (SWANCC) V. U.S. ARMY CORPS OF ENGINEERS

On January 9, 2001, the U.S. Supreme Court issued a decision in the case of *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. The question presented in *SWANCC* was whether the Corps, under the Clean Water Act and the Commerce Clause of the U.S. Constitution, could assert jurisdiction over ponds on an abandoned sand and gravel pit in Northern Illinois where those ponds provide habitat for migratory birds.

FACTS

SWANCC, a group of Northern Cook County municipalities, purchased the 533-acre parcel to develop a solid waste disposal site. The plan called for the filling of some of the over 200 permanent and seasonal ponds. SWANCC contacted the Corps to determine if a federal landfill permit was required under s. 404 of the Clean Water Act. The Corps originally declined jurisdiction over the site because the ponds were not considered "wetlands." However, after learning that migratory birds used the ponds, the Corps reconsidered and asserted jurisdiction over the site pursuant to the Migratory Bird Rule. SWANCC's application for a s. 404 permit was denied on that basis.

PROCEDURAL HISTORY

A U.S. District Court determined that the Corps had jurisdiction over the site. SWANCC appealed this decision and the decision was affirmed by the Seventh Circuit Court of Appeals. The Seventh Circuit concluded that "the decision to regulate isolated waters based on their actual use as habitat by migratory birds is within Congress' power under the Commerce Clause, and that it was reasonable for the Corps to interpret the [Clean Water] Act as authorizing this regulation." [191 F. 3d 845, 852 (7th Cir. 1999).]

MAJORITY HOLDING

Holding of the Court

In a 5-4 decision, the U.S. Supreme Court reversed the Seventh Circuit decision and held that the Corps exceeded its statutory authority by asserting Clean Water Act jurisdiction over the Illinois site through the Migratory Bird Rule. The Court's holding was limited to the application of Corps regulation to nonnavigable, isolated, intrastate waters based upon the use of such waters by migratory birds. The Court did not reach the question of whether Congress could exercise such authority consistent with the Commerce Clause.

Questions Regarding the Scope of the Holding

There is additional language in the opinion that raises questions about whether *SWANCC* is narrow or broader. The majority states that: "In order to rule for the [Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." [Slip op. at 7.] The dissenting opinion seems to interpret this language to preclude the Corps' assertion of jurisdiction over any water body that is not part of or "adjacent" to navigable waters. The dissent states: "In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." [Slip op., dissent at 13.]

FEDERAL AGENCY GUIDANCE

On January 22, 2001, staff of the Environmental Protection Agency (EPA) and the Corps issued a joint memorandum that supports the narrow

interpretation of SWANCC, and does not address the issue of a broader interpretation. The memorandum also provides additional guidance regarding the effect of SWANCC on specific programs.

The memorandum notes that "the Court's opinion did not specifically address what other connections with interstate commerce might support jurisdiction over nonnavigable, isolated, intrastate waters under the Clean Water Act." The memorandum states that jurisdiction over such waters should be considered on a case-by-case basis. Due to turnover in the federal administration since the memorandum's release, it is possible that this is not the final word from the Corps or the EPA about the scope of SWANCC.

STATE AND LOCAL WETLANDS REGULATION AFTER SWANCC

The DNR has authority under s. 281.15, Stats., to promulgate water quality standards for wetlands and to apply those standards in certain DNR decisions. These standards are found in ch. NR 103, Wis. Adm. Code, and apply to "all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands." [s. NR 103.06.]

The DNR has authority under s. 404 of the Clean Water Act to issue or deny water quality certifications for permits issued by the Corps. After *SWANCC*, that DNR authority still exists. However, it applies to a smaller universe of wetlands since the Court held that the Corps does not have jurisdiction under the Act to require a permit for isolated, nonnavigable, intrastate waters.

The DNR has its own regulatory authority regarding wetlands, and applies the ch. NR 103 standards in making those regulatory decisions. The DNR authority under state law is not affected by *SWANCC*. However, DNR authority does not apply to all wetlands in the state.

Much of the DNR authority applies to wetlands that are below the ordinary high-water mark of navigable waters. The ordinary high-water mark is the location of the highest effect of the waters on the shore, as evidenced by erosion, the change from aquatic to terrestrial vegetation or other similar characteristics. The remainder of the DNR authority relates to specific activities.

In addition to the DNR authority, current state law provides wetlands regulatory authority through other state agencies and local governmental units. This authority is also not affected by *SWANCC*, but is not subject to the ch. NR 103 process.

Although this list appears lengthy, most of these statutes relate to specific activities that occur infrequently, such as landfill siting. Other activities that are common, and are not below the ordinary high-water mark or subject to local shoreland/wetland zoning, may not be subject to Corps jurisdiction and, therefore, DNR regulation.

The remainder of this part of the memorandum lists and briefly describes the current state and local wetlands regulatory authority that is based on state law. There may be other regulatory authority in statute or administrative rule. Also, this list is meant to identify the programs but not to describe them fully. The cited statutes and rules should be consulted for more information.

STATE REGULATION

Chapter NR 103. The water quality standards for wetlands under ch. NR 103 apply to all regulatory and management decisions of the DNR.

Navigable Waters. The DNR regulates various activities affecting navigable waters and any

wetlands located below the ordinary high-water mark of navigable waters. [See chs. 30 and 31, Stats.]

Threatened and Endangered Species. The DNR may issue permits for taking wild animals or plants that are listed as endangered or threatened. [s. 29.604, Stats.]

Exploration, Prospecting and Mining. Exploration, prospecting and mining sites must minimize the disturbance to wetlands. [s. 293.13 (2) (c), Stats., and chs. NR 131, 132 and 182.]

Land Application of Domestic Septage. DNR rules provide that septage (holding tank and septic tank waste) may not be applied to land within 750 feet from any wetland. [s. NR 113.07 (1) (b).]

Wastewater Treatment Systems. Wastewater treatment systems, sewage collection systems and the discharges from them that require a DNR permit may not adversely affect wetlands and may not provide treatment capacity to new structures located on wetlands. [s. 110.10 (2) (b), Stats., and ss. NR 121.05 (1) (g) and 128.11 (10) (e).]

Solid and Hazardous Waste. Most solid and hazardous waste treatment, storage and disposal activities require a DNR permit and may not cause a significant adverse impact to wetlands. [ss. NR 504.04 (4) (a) and 630.18 (2).]

Remedial Actions. Remedial actions under DNR jurisdiction that involve a discharge to wetlands may not exceed the water quality standards in ch. NR 103. [s. NR 722.09 (2) (c).]

Electric Generating Facilities and Transmission Lines. The Public Service Commission (PSC) must determine that proposed large electric generating facilities and high-voltage transmission lines do not have an undue adverse impact on environmental values. The list of examples given in the statute does not specifically mention wetlands, but its applicability to wetlands can reasonably be inferred. [s. 196.491 (3) (d) 4., Stats.]

LOCAL GOVERNMENT REGULATION

Local units of government (counties, cities and villages) are required by statute to regulate wetlands. The DNR defines the scope of these regulations by rule, but administration and enforcement of the ordinances is provided by the local unit of government. The DNR does not have direct regulatory authority under these programs and ch. NR 103 does not apply. If a county, city or village fails to enforce its wetlands regulations, the DNR must bring an enforcement action against the municipality to compel it to enforce the ordinance.

County Shoreland/Wetland Zoning. Counties are required to regulate various activities affecting wetlands within the "shoreland" zone. This is the area within 300 feet from the ordinary high-water mark of a navigable stream or the landward side of the floodplain, whichever distance is greater, or 1,000 feet from the ordinary high-water mark of a navigable lake, pond or flowage. Counties are required to regulate wetlands of five acres or more. [s. 59.692, Stats., and ch. NR 115, Wis. Adm. Code.]

City and Village Wetland Zoning. The city and village wetlands regulatory program is substantially similar in its scope and effect to county wetlands zoning. [ss. 61.351 and 63.231, Stats., and ch. NR 117, Wis. Adm. Code.]

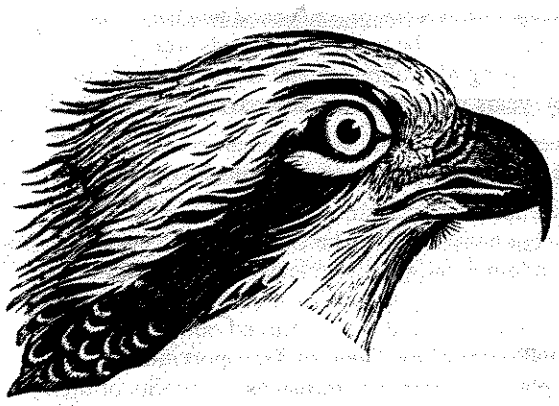
Lower St. Croix Riverway. Filling of wetlands in the Lower St. Croix Riverway is prohibited through mandated local zoning. [s. 30.27, Stats., and s. NR 118.06 (12).]

Local Comprehensive Zoning. Cities, villages, towns and counties have authority to regulate

land uses within their zoning jurisdiction. The local authority to regulate land uses includes the authority to protect wetlands beyond the minimum scope of regulation under the statutes described above. [ss. 59.69, 60.61 and 62.23, Stats.]

This memorandum was prepared on January 25, 2001, by ***Rachel E. Letzing, Staff Attorney, and Mark C. Patronsky, Senior Staff Attorney***. The information memorandum is not a policy statement of the Joint Legislative Council or its staff.

WISCONSIN LEGISLATIVE COUNCIL
One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
Telephone: (608) 266-1304 • Fax: (608) 266-3830
Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc



DNR Watch

Natural Resource Accountability Project

Inside Governor Thompson's DNR

Research Report No. 7 **February, 2000**

State Workers Demand: Take Politics Out of Environment

Survey of DNR Employees Calls for Reduced Role of Governor

Summary --- Politics override scientific evaluations and fair permit decisions, compromising our state's environmental oversight process, according to the results of a survey of all employees of Wisconsin's Department of Natural Resources (DNR). The survey, conducted by Public Employees for Environmental Responsibility (PEER), found overwhelming support for removing the Governor's power to appoint the DNR Secretary and for reestablishing the Public Interveners Office which was abolished by Governor Tommy Thompson in the 1995 Budget.

Introduction

This past December, PEER mailed out surveys to all of the 3,073 employees of the Wisconsin Department of Natural Resources (DNR). The survey consisted of questions written by employees. More than half (**1,537** individuals) answered, a very respectable response rate.

According to survey results, a strong plurality of employees registered concerns about political influence within the agency:

* Nearly half of respondents (738 employees) feel that scientific evaluations are influenced by political considerations with less than a third in disagreement.

* More than half do not trust DNR administrators "to stand up to political pressure in protecting the environment." (830 employees)

* More than two in five think that business "has undue influence on DNR decision- making." (569 staff)

* Overall, nearly half of the survey respondents agree that Wisconsin's environment is not better protected now than it was five years ago while little more than a third disagree. (737 employees)

The PEER survey also asked employees to write comments that identify and explain the "biggest problem facing the DNR." By far the most consistent answer, from more than one third of all respondents, was political interference and the role of the Governor. As one employee wrote: "Big business now runs the Wisconsin DNR. Our governor has done tremendous damage to Wisconsin's reputation as an environmental leader."

On agency structure, employee sentiment was even more definitive:

* More than nine out of ten think that the DNR Secretary should not be appointed by the Governor with more than eight in ten favoring the return of this appointment power to the Natural Resources Board. (1,399 staff)

* More than two-thirds of respondents (1,061 employees) want the Public Intervener's Office restored while less than one in ten disagree.

"DNR employees themselves are doubtful about their effectiveness in preserving Wisconsin's natural heritage," stated PEER national Field Director Eric Wingerter. "Many employees are angry and frustrated from what they perceive to be political interests obstructing sound

The Purpose of this Report

This is the 7th in a series of reports discussing Governor Thompson's political control over Wisconsin's Department of Natural Resources. (For background, see page 4)

Each report in this series explores a specific example of negative changes which have occurred within the DNR since the Governor's takeover in 1995.

Prior DNR Watch reports are summarized on page 5, and can be viewed in detail online at: www.wsn.org

science and environmental stewardship."

The survey asked employees to assess conditions within the agency:

* Nearly two-thirds believe that DNR lacks "sufficient resources to adequately perform its environmental mission." (999 employees)

* Three-fourths say employee morale is poor. (1,153 employees)

* More than one in six fear retaliation or know of instances of reprisal against employees who advocate stronger environmental protection. (277 employees)

A majority of survey respondents agreed that Secretary Meyer was doing a "good job" but similar percentages raised doubts about the performances of other top agency administrators. "Employees believe that Secretary Meyer is holding up under tremendous pressure," said Wingerter, citing another employee response which read: "The biggest problem is to 'free George Meyer' by letting the Natural Resources Board appoint the Secretary and restoring the Public Intervener's Office. This will give George Meyer all his 'teeth' back."

For more information, contact Public Employees for Environmental Responsibility, 2001 S Street, NW, Suite 570, Washington DC 20009 Tel:(202) 265-7337 Fax (202) 265-4192 info@peer.org Webpage: www.peer.org

Employees Speak Out

The following are typical responses to the question: "In my opinion, the biggest problem facing the DNR is . . ." Note: This is an abbreviated summary of responses. For a more complete listing, contact PEER above.

Political Influence From Governor Thompson

(220 responses)

"Governor 'Toxic Tommy' Thompson. Gov. Thompson has a long resume of opposing efforts to clean up and protect the environment except when there is political benefit to him personally."

"I grew up in Michigan and chose to work for the Wisconsin DNR 25 years ago because it was and has been one of the best environmental agencies in the US. That is changing now, negatively. Governor Thompson is very shrewd and makes far-reaching decision out of the public eye and with his extreme budget veto power, often completely reversing legislative intent."

"Undue influence of the Governor's office to benefit his friends—state budget and services in this state are for sale if you have the money, i.e. the Ashley Furniture deal!"

Contents

"The Governor built a major, unneeded hatchery and named it for himself. In the process, wetlands were filled, wastewater permitting not followed, and forest areas not meant to be cut for 50 years were clear cut and paved."

"The Governor is so supportive of business that the DNR is not allowed to deny easements and permits."

"The Governor of Wisconsin wields non-scientific influence over the actions of DNR. The Governor told co-workers and a division administrator not to release a mining EIS before the last gubernatorial election, for fear it could cost him votes. (EIS was not complete before then, it turned out.) Fear of criticism by DNR staff of the Dept. of Transportation 20-year road-building plan, which in turn threatens the profits of highway builders, the Governor's campaign contributors, led the DNR Secretary to remove a co-worker from his duties performing environmental impact reviews of highway plans. Political influence at its worst."

"Political pressure and lobbying by money to Governor which causes a) losing battle on land use planning/zoning --- destroying natural environment. b) loss of critical sensitive environment areas in the name of job creation when we're already short of workers. Examples: Crandon Mine approved, water bottling company in Mecan River watershed."

"Inability of a well-meaning honest Secretary (Meyer) to stand up to political pressures from Gov. Thompson and those who contribute financially to Thompson's campaign. Also, FEAR of not doing the right thing politically is causing many good conscientious employees who have no backing from the administration to leave the agency. We have a brain drain and are losing the historic perspective of an honest and integrity-filled DNR. Very, very sad for the state."

"We are dead in the water as an agency --- exactly where the Governor and his business supporters want us."

Influence From the Legislature *(40 responses)*

"The state legislature is more frequently influencing, or reversing, science-based decisions and/or policies for their own political gain."

"Increasing micro-management of the DNR by the legislature. The legislature has eliminated positions or reduced funding of programs at the DNR they disagree with. The elimination of the Lower Wisconsin Riverway coordinator is the best example of this. Eliminating that position was a clear act of retribution by a member of the state Senate."

Influence From Big Business *(62 responses)*

"I have seen project after project thwarted, denied, ignored because of monied 'interests.' Citizens never get the attention that the paper industry and road-builders do. In some cases we are required to get businesses involved in decisions where the public is ignored. Permitting decisions/rules are based on industrial management practices, not the public's or the environment's health."

"Political considerations and job-relocation threats by polluters often outweigh environmental concerns. The secretary says he has never vetoed a referral to DOJ for enforcement. He is correct. The next level of management below the secretary has that job."

"Politics" in General *(135 responses)*

"Political influence and bowing to the changing winds of the day. Good scientific studies with adequate professional

Summary of a Survey of Wisconsin Department of Natural Resources Employees

Public Employees for Environmental Responsibility (PEER) is a national nonprofit alliance of state and federal resource professionals working to promote environmental ethics and government accountability. PEER is surveying all Wisconsin Department of Natural Resources (DNR) employees on issues concerning the state of environmental affairs at the agency. These questions were developed by your colleagues. Please take a few moments to fill out this survey and mail it back. As with all contact with PEER, survey responses will be strictly confidential. PEER will tabulate and publish the survey results and make them available to you. **(1,537 DNR Employees responded)**

RESOURCES

1. The DNR has sufficient resources to adequately perform its environmental mission.
   4% strongly agree 23% agree 8% no opinion 46% disagree 19% strongly disagree
2. DNR efficiently uses the resources available to it.
   9% strongly agree 43% agree 11% no opinion 28% disagree 10% strongly disagree
3. Wisconsin's environment is better protected now by DNR than it was five years ago.
   8% strongly agree 26% agree 17% no opinion 33% disagree 15% strongly disagree

DECISION-MAKING

4. DNR administration does not allow the needs of individuals and businesses seeking permits to take precedence over serving the general public and the resource.
   6% strongly agree 31% agree 27% no opinion 27% disagree 9% strongly disagree
5. In my experience, scientific evaluations are influenced by political considerations at DNR.
   13% strongly agree 35% agree 22% no opinion 23% disagree 7% strongly disagree
6. The regulated community has undue influence on DNR decision-making.
   10% strongly agree 32% agree 27% no opinion 26% disagree 5% strongly disagree

STRUCTURE

7. The DNR Secretary should continue to be appointed by the Governor.
   1% strongly agree 3% agree 4% no opinion 21% disagree 70% strongly disagree
8. The DNR Secretary should be appointed by the Natural Resources Board.
   51% strongly agree 33% agree 8% no opinion 6% disagree 3% strongly disagree
9. The Public Intervener's Office should be re-established.
   41% strongly agree 28% agree 24% no opinion 4% disagree 3% strongly disagree

ENFORCEMENT

10. DNR administration is committed to enforcement of environmental laws.
    15% strongly agree 54% agree 16% no opinion 12% disagree 3% strongly disagree
11. I think that DNR law enforcement tends to focus disproportionately on small violators, rather than large violators.
    6% strongly agree 15% agree 34% no opinion 34% disagree 11% strongly disagree
12. I have been directed by a superior to overlook environmental violations.
    3% strongly agree 6% agree 22% no opinion 28% disagree 42% strongly disagree

LEADERSHIP

13. I trust DNR's top administrators to stand up against political pressure in protecting the environment.
    8% strongly agree 26% agree 12% no opinion 34% disagree 20% strongly disagree
14. George Meyer has done a good job as DNR Secretary.
    12% strongly agree 38% agree 18% no opinion 23% disagree 9% strongly disagree
15. At DNR, administrators are selected on who they know rather than what they know.
    15% strongly agree 30% agree 32% no opinion 19% disagree 4% strongly disagree

MORALE

16. Employee morale at DNR is good.
    1% strongly agree 17% agree 7% no opinion 43% disagree 32% strongly disagree
17. I know of a situation in which a DNR superior has retaliated against a staffer for doing his or her job "too well" on a controversial project.
    6% strongly agree 12% agree 35% no opinion 27% disagree 20% strongly disagree
18. I fear job-related retaliation for openly advocating enforcement of environmental regulations.
    4% strongly agree 11% agree 25% no opinion 34% disagree 25% strongly disagree

peer review are lacking. To sum up my frustration, I will quote you a statement made by my superior: 'We don't do science at the DNR.'"

"Many of us Old Timers (20-30 years of staff) probably wouldn't hire on with today's DNR because when we hired on our mission was to serve the general public and the resources, not the politically influential. Simple math proves the inefficiency of serving the public one at a time vs. collectively."

Agency Reorganization *(293 Responses)*

"Our new organizational structure has virtually eliminated program checks and balances, program direction, accountability and leadership at the field level. Instead of 'program-based' support at the field level, we now have only non-program-based supervisors and generic 'team' support. Resource Management is floundering and the public and resource base are the victims. Over most my 30 year career, Wisconsin DNR has been a leader in Resource Management and research— in just a few short years that's been reversed!"

"Reorganization has done exactly what our Governor wanted—cripple the DNR, hire spineless management, and let the staff/field workers take the fall. Northeast and Southeast region have the worst management—especially in the water and waste programs. We are even told, as field staff, that businesses are our customers and we need to please them and keep them happy."

"Applicants for permits may as well be asked if they want French fries with their approvals because nothing is ever denied. Working here now is barely tolerable and I'm ashamed to tell anybody that I do. By the way, I'm a manager with [over 20] years of experience."

Staffing & Funding *(230 responses)*

"Woefully insufficient number of staff positions committed to civil and criminal environmental enforcement programs. At present, there are (approx.) 15 full-time equivalent environmental enforcement positions statewide dedicated to issuing Notices of Violation, Administrative Orders, or referring cases to Dept. of Justice for litigation/prosecution. There are 7 full-time equivalent environmental warden positions statewide to conduct complex civil/criminal investigations."

"It is not uncommon to have positions vacant for a year."

Poor Leadership *(118 responses)*

"Although the political pressure is, indeed, great, DNR management itself is shooting staff down whether or not there is political pressure. Retaliation is a major, major concern. Staff who do nothing are considered good employees. Thus, after suffering the slings and arrows of management, and since staff is cannon fodder, I am now the perfect employee because I now do nothing—no decisions, write few memos or letters, and I haven't conducted an inspection in two years. DNR is morally bankrupt."

"The good news: more than half of DNR's supervisors and administrators are competent! The bad news: too many are sub-competent."

Lack of Support from the Public *(31 responses)*

"In the public's mind DNR is blamed for many many things not within its control or responsibility. The legislature controls budgets and writes all the rules. It's easy for local legislators to 'Blame it on the DNR.'"

"Wisconsin citizens still think the DNR is protecting their interests. Citizens do not realize how political the DNR has become and that DNR policy may not be protecting them or the state resources because of special interest influence through the Governor's Office and the Legislative branch."

"A public educated by the news media is the same or worse than uneducated."

Background

DNR Takeover and Intervenor Loss

As part of the 1995 Budget, with little opportunity for public awareness or input, a party line vote in the legislature gave Governor Thompson direct control over the **DNR Secretary**, and the ability to appoint top-level DNR administrators. In essence, this turned the DNR into a partisan agency, controlled by the party in power.

Previously, the Secretary had answered to an independent 7-member citizen committee called the Natural Resources Board. The citizens were appointed to 6 year staggered terms by the Governor, but once appointed, they could make independent decisions. The old system allowed some political influence, but usually the Board was a mix of people appointed by different governors and were more insulated from daily political pressures.

Now, the Governor is directly involved in the DNR's everyday activities, and it shows. For example, the Governor has used the DNR Secretary at political campaign fundraising events, and to pressure Wisconsin tribes in negotiating their gaming compacts, tasks which are clearly not his job.

Also in 1995, Gov. Thompson used the budget process to eliminate the **Wisconsin Public Intervenor Office**, which had two attorneys advocating for public rights in the natural resources of Wisconsin. The Intervenors were watchdogs over state and federal agencies to ensure compliance with environmental laws. For 26 years, thousands of citizens, even legislators, received experienced consultation and referrals through the Intervenors. Now, citizens have no public source of legal advice or assistance for environmental issues. Most citizens or groups can't afford private legal fees. Most private attorneys lack the political stature, experience, and connections which the Intervenors had. The Attorney General can't do the Intervenor's job, because the AG is required to defend the DNR. Only the Intervenors represented true "public rights" in the legal sense. Meanwhile, powerful corporations, wealthy individuals, and government bureaucrats are free to use their political power, and their large financial and legal staff resources against public interests.

It's important to recognize that lawsuits were not the main activity of the Intervenors. The Intervenors often brought opponents together to negotiate reasonable compromises. They provided legal and technical comments on proposed regulations. Just their presence prevented many bad proposals from surfacing.

Since the Intervenor Office closed, we've seen major increases in bad rule revisions and permit decisions at the DNR and other government agencies -- but citizens lack the money, time and technical or legal knowledge to challenge these rapid changes.

Downsized, Politicized, Disorganized, Demoralized

The DNR has been drasticly reorganized, beginning with the 1995 Budget. The shuffling of personnel cost 450 people their jobs, and relocated many of the remaining 3,037 employees of the department.

Many mid-level program supervisory positions were cut, eliminating the DNR's most experienced staff within specialty areas. These people were shifted to different jobs, in charge of issues new to them. Meanwhile, in their old departments, less-experienced staff had to work without clear leadership, and without benefit of old-timers' knowledge and experience. Many files were also moved, to unfamiliar locations. At the same time, many field operations and support budgets were cut --- at a time when Wisconsin's population and business growth has increased the need for careful environmental regulation. The reorganization itself cost millions, and led to many more program reductions. Many of the DNR's best staff left the agency because of frustration.

It is symptomatic that the Governor and his Secretary now refer to the DNR offices as "Customer Service Centers" and refer to polluting industries as "clients" or "customers."

Political Appointments and Cuts in Enforcement

When Governor Thompson took control of the DNR in 1995, he made appointments of political friends to key positions in DNR. One of the worst was David Meier, who previously worked as a Thompson aide, and in the Wisconsin Department of Transportation (DOT).

Thompson made Meier the Administrator of DNR's Division of Enforcement and Science, one of the most powerful DNR staff positions, though he had little experience and was unsuited to this job. In fact, when he worked at DOT, he was involved in efforts to exempt DOT from the Wisconsin Environmental Policy Act and environmental impact studies. And under Meier, the DOT tried to get an exemption from the endangered species law. Mr. Meier got his jobs without competition against qualified public servants with years of experience. While at DOT, he was only a "Limited Term Employee."

As DNR Administrator, Mr. Meier oversees highly sensitive issues, including sign-off on Environmental Impact Statements, endangered species, the Rio Algom Mine, and all enforcement actions by DNR. He also oversees research, environmental analysis, and review.

Not surprisingly, DNR law enforcement dropped significantly after Maier's appointment. The number of cases DNR has referred to the Department of Justice for prosecution dropped from 165 and 170 total cases in 1995 and 1996, to only 92 cases in 1997. In addition, the records show polluting industries are much less likely to legally challenge the strictness of their permits. These cases dropped by half. This suggests that new pollution discharge permits are weaker and polluters are more satisfied with their permits.

We've been told by several sources within DNR that DNR staff are so demoralized by the lack of enforcement, they no longer bother to gather evidence of violations to help build cases. They know it probably won't be used for proper enforcement.

Examples of Political Influence

Five **DNR Watch** reports have been issued by the Natural Resource Accountability Project to document political influence over DNR decision-making. The 6th report was a review of last year's state budget.

Report #1 --- Toxic River Pollution --- Gov. Thompson is fighting against holding paper companies accountable to clean up the PCB contaminated sediments in the Fox River and Green Bay --- one of the worst toxic hotspots in the United States and a major health threat to people and wildlife. Under 14 years of influence from the Thompson Administration, the DNR has made little progress on the issue. In 1995, just when the Public Intervenors Office was about to become involved in this issue, the Governor eliminated the office. In 1997, the Governor maneuvered the DNR into a damaging pro-industry contract with the paper industry, undermining federal Superfund and Natural Resource Damage Assessment cases to clean up the river. Even now, the contract continues to seriously weaken the DNR's enforcement of an appropriate state clean up. Between 1991 and 1997, Gov. Thompson received more than $2,933,828 in campaign contributions from the paper industry and their associates.

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Report #4 --- Public Access and Shoreland Losses --- Between 1995 and 1999, the DNR administration blatantly overrode staff findings. They allowed significant wetland and other habitat losses, and ignored clear shoreland zoning and public access violations created by the construction of the Whistling Straits Golf Course in Sheboygan County. Special interests tied to the Kohler Company, which built the golf course, donated $83,711 to the Governor's and legislative election campaigns between 1990 and 1998, and were also major

donors to national Republican campaigns at a time when Gov. Thompson considered running for national office.

Report #5 --- Cranberries and Wetland Losses

Cranberry operations account for more natural wetland losses than any other activity in Wisconsin, and they receive unusual environmental exemptions under Wisconsin law. To make matters worse, under Gov. Thompson, the DNR recently granted the cranberry industry additional special treatment under wetland protection laws despite overwhelming public opposition. Between 1991 and 1998, campaign contributions from this industry totalled at least $113,169, with 75% contributed to Gov. Thompson's campaigns specifically.

Comments from the DNR Secretary

When PEER announced its intention to survey his staff, DNR Secretary Meyer sent *three* e-mails to each of the 3,073 DNR employees in December (and had paper copies of his letters distributed by supervisors) strongly *urging* staff to respond to the survey. He asked employees to remember the fine quality of their agency and keep in mind all the enforcement actions of the DNR. In essence, Meyer's letters attempted to deflect, pre-empt, and otherwise counter concerns DNR staff might have.

When the results were released, (he was given 2 weeks advance notice), Meyer was furious and denounced the survey as biased.

In news releases, Meyer said the survey was "clearly politically driven," given that PEER released the results shortly before the legislature planned to consider a bill to make the Secretary subject to appointment by the Natural Resources Board, instead of the Governor. Yet, since such a bill proposal has been renewed and pending in the legislature for more than 4 years, it would be impossible to avoid this claim by Meyer.

Besides, why wouldn't the DNR Secretary and legislature want to know DNR employees' opinions when they're considering important legislation which impacts the agency? Does Meyer object to the legislature receiving this information?

Meyer downplayed the survey by saying 50% of the employees "voted by throwing the survey in the recycling bin." This implies that the 50% who didn't respond agreed with Meyer, disliked the survey, and were not represented at all by the 50% who did take the time and trouble to respond. Yet, there is no basis for Meyer's assumptions. (See the inset box on "Survey Validity")

At the same time that Meyer denounced the survey as biased, he trumpeted the results which he interpreted as favorable to his leadership and agency. So he gave credence to the results he liked, and dismissed the results he didn't like. (Though he admits that DNR morale is affected by heavy workload, low compensation for some staff, and concerns about the DNR reorganization.)

Now, Meyer is insisting on getting copies of the raw survey comments sent by DNR employees, claiming he needs them in order to fix problems at the agency. Meyer promises confidentiality, but PEER understandably refuses to comply, to protect DNR employees from job retribution and to keep PEER's promise of absolute confidentiality.

Survey Validity

Because the PEER survey has been criticized for its "low 51% response rate" we called two professional survey centers to get their expert opinions.

Linda Penaloza, Director of the Wisconsin Survey Research Lab at the University of Wisconsin - Extension in Madison, stated that a 40-55% response rate to an employee satisfaction survey is considered adequate and not unusual.

Penaloza added, "To throw out the results based on a 51% response rate would be very much over-reacting. The survey is still representing a majority and the attitudes of those 1,537 people who did respond."

Delia Kundin, Assistant Director of the Survey Center of St. Norbert College, had similar thoughts. "Typically, this is what we see in our survey research business. A 40-45% response is considered acceptable .... not bad for mail surveys." This allows for a 5-7% margin of error. She considered a 50% response rate "very good."

The professionals said timing of the survey could also be a factor. The PEER Survey was sent out to the DNR employees in mid-December during the holiday season, and had to be returned within a month. Penaloza said, "This is a bad time to get survey's completed. We try not to do surveys in December."

When told that only one copy of the survey was mailed once to DNR employees, Penaloza expressed surprise and said under the circumstances that a 51% response was a "very good response rate." Ordinarily, professional surveyors send 1 initial and 2 follow-up copies of the survey to ensure an adequate response.

Neither expert was able to address concerns about bias, because they hadn't seen the questions, but Kundin commented that when it comes to questions, "All questions are biased. They have to come from somewhere."

The Wisconsin Survey Research Center in Madison has 40 years of experience in this field, and is highly regarded for its professionalism. The Survey Center at St. Norbert College is similarly respected, and has 15 years of experience.

Comments from Legislators

Assembly Representative DuWayne Johnsrud (R), Assembly Natural Resources Committee Chairman, stated in a press release that the survey results were "one-track, politically motivated," "contrived and misleading," and that, "Apparently, 85% of the employees are okay with the way the environment is being protected because 50% of the employees didn't even bother to respond to this special interest survey and only 15% of those who did respond felt strongly that the environment was not protected better now than it was 5 years ago." [Note: In fact, 48%, not 15%, of survey respondents, or 737 DNR employees,felt the environment was not protected better.]

Actually, Rep. Johnsrud has been in the forefront of this issue, expressing his deep concern over DNR morale

and its effectiveness since reorganization. He was one of the last Republican legislators to agree to the original transfer of the Secretary's appointment to the Governor. This past summer he held several hearings around the state taking testimony from many groups and individuals about the same concerns expressed in this survey. Johnsrud, as Committee Chairman, has the opportunity to embrace the PEER survey findings, and bring proposed bill SB 27 to the floor of the Assembly where it can have free and open debate, and be voted on.

State Senator Dale Schultz (R) stated that the PEER survey was "make believe" and a "half-baked fraud that hurts DNR morale," and called it "a deceptive attempt by political interest groups in Wisconsin to further their partisan agenda." He added that, "This bogus survey smears the DNR workforce in its entirety and cynically adds to morale concerns. It is a disgrace and embarrassment to those behind it."

Two other legislators, Rep. Spencer Black (D) and Rep. Lee Meyerhofer (D), have each issued press releases which called for legislative response to the concerns raised by the survey. Both called for restoration of the DNR and Public Intervenor to pre-1995 conditions.

The Survey Speaks for Itself

A total of 1,537 DNR employees responded to the PEER survey. These are educated professional men and women, many with decades of fine service to the agency. It would be an insult to their intelligence to claim they were somehow misled or confused by clear questions. To ignore their concerns would be shortsighted.

In fact, only a handful of DNR respondents (just 6 people, or less than 1/2 of one percent) added comments indicating the survey was "biased." Fully half of the survey questions led with a pro-status quo approach, such as the simple statement "Employee morale at DNR is good." A resounding 75% of the respondents disagreed with this supposedly "biased" statement. Only 18% agreed, and only 1% strongly. Clearly, the employees weren't following the "bias" of the questions.

And "bias" can't explain away the hundreds of heartfelt handwritten detailed comments DNR employees wrote at the bottoms of their surveys. Many turned in additional pages of handwritten comments.

Most of the PEER survey questions were carefully written by existing and former Wisconsin DNR staff, after several steps of consideration and broad feedback.

Conclusion

It is unfortunate that the protection of Wisconsin's natural resources, which belong to everyone, is being characterized by some as a partisan battle. To dismiss as "partisan" the serious concerns of the DNR's own employees would be a disservice to those employees and to the citizens of Wisconsin who depend on them.

The fact that SB 27 passed with broad bipartisan support in the Senate, and that the Assembly bill also has Republican co-signers demonstrates that the time is ripe for correcting the misguided 1995 effort at DNR reform.

Recommendations

1) Restore the Natural Resource Board Appointed DNR Secretary

These survey results highlight the need to reverse the politicization of the DNR, now that the DNR Secretary is under direct control of the Governor. Wisconsin legislators need to restore the Department to pre-1995 budget conditions, where the DNR Secretary answered to the 7 independent citizens appointed to serve on the Natural Resources Board --- to help insulate the Department from political influence and favoritism.

A proposed legislative bill, **SB 27**, which would restore the DNR Secretary, passed the Senate last fall with an 18-to-15 bipartisan vote. The Assembly version of this bill, introduced by legislators from both parties, now sits in the Natural Resources Committee, chaired by State Representative DuWayne Johnsrud, awaiting their approval to bring it to the floor for a fair vote.

Citizen Group Statement

We, the following citizen organizations, are extremely concerned about political influence over DNR decision-making, as highlighted in the recent PEER survey. We strongly urge the Wisconsin Legislature to pass SB 27, to restore DNR Secretary appointment authority to the Natural Resources Board, and SB 72, to restore the Wisconsin Public Intervenor's Office.

Alliance for a Sustainable Earth
Citizens for a Better Environment
Clean Water Action Council
Concerned Citizens of Trempeleau County
EarthWINS
Environmental Council, UW-Stevens Point
Environmentally Concerned Citizens of the Lakeland Area
Federation of Fly Fishers - Wisconsin Council
Green Rock Audubon Society
Izaak Walton League - Western Wisconsin Chapter
Lake Superior Greens
Madison Audubon Society
Martell United for Family Farms
Midwest Environmental Advocates
Mining Impact Coalition of Wisconsin
Northern Thunder
Otter Street Fishing Club
Pheasants Forever, Wisconsin Chapters
POWR - Protect Our Wolf River
Progressive Action Network
Random Lake Association
River Alliance of Wisconsin
Sierra Club - John Muir Chapter
Twin Cities Rod & Gun Club
Wausau Bird Club
Wisconsin Council of Trout Unlimited
Wisconsin's Environmental Decade
Wisconsin Interfaith Impact
Wisconsin Public Interest Research Group
Wisconsin Rural Development Center
Wisconsin United Methodist Board of Church & Society
Wisconsin Wildlife Coalition
Wolf River Chapter, Trout Unlimited

Clean Water Action Council of N.E. Wis., Inc.
1270 Main Street, Suite 120
Green Bay, WI 54302

2) Restore the Public Intervenor Office

Before Gov. Thompson and Republicans in the legislature eliminated the Public Intervenor Office in 1995, the Intervenors were part of a carefully crafted check and balance system in Wisconsin designed to correct political pressures. The Intervenors must be restored to protect Wisconsin's natural resource base, tourism industry and quality of life.

A proposed legislative bill, **SB 72**, also passed the Senate in the 1999 session, and has broad political support in the Assembly. It also awaits committee approval.

3) Campaign Finance Reform

The political influence described in the survey by DNR employees points to a need for campaign finance reform to protect Wisconsin's natural resources. Wisconsinites who value a clean, healthful environment must demand an electoral system that pays more attention to public good than it does to private donations.

4) Investigate Potential Illegal Influence

The Attorney General or another impartial legal office needs to investigate potential cases of illegal influence over DNR decision-making. Hundreds of DNR employees said they were ordered to overlook violations of Wisconsin laws, or they feared retaliation if they enforced the law. This is an outrage.

A frightening 18% of the survey respondents (277 employees of the DNR) agreed or strongly agreed that "I know of a situation in which a DNR superior has retaliated against a staffer for doing his or her job "too well" on a controversial project."

In addition, 15% (230 employees) agreed or strongly agreed that "I fear job-related retaliation for openly advocating enforcement of environmental regulations."

Furthermore, 8% (123 employees) agreed or strongly agreed that "I have been directed by a superior to overlook environmental violations."

These numbers point to serious systematic and widespread problems with enforcement in the DNR. We don't need to see a majority response in these numbers for Wisconsin citizens to be concerned.

Natural Resource Accountability Project

Citizens for a Better Environment
Clean Water Action Council
ECCOLA (Environmentally Concerned Citizens of the Lakeland Area)
Northern Thunder
Sierra Club - John Muir Chapter
Twin City Rod & Gun Club
Wisconsin's Environmental Decade

Quarterly Report - From 01-JAN-2000 - 31-DEC-2000 (run 01/30/2001 16:07)
STATE: WI

Ben Wolgast US Army Corps of Engineers

EVALUATION SECTION: PAGE 1 OF 3

REGULATORY QUARTERLY REPORT — CY 2000

EVALUATION WORKLOAD

LAWS SEC	CARRY OVER	REC-EIVED	WITH-DRAWN	STAN-DARD	DENIAL LOP	DENIAL W/P	DENIAL WO/P	PEND-ING	REG-IONAL	NWP
10	2	9	2	4	2	0	1	2	201	52
404	31	117	34	11	58	0	6	39	1726	540
10&404	4	4	2	3	0	0	1	2	208	235
10&103	0	0	0	0	0	0	0	0	0	0
NONE	0	0	0	0	0	0	0	0	2	0
TOTAL	37	130	38	18	60	0	8	43	2137	827

EVALUATION DAYS

LAWS SEC	STANDARD	LOP	DENY W/P	DENY WO/P	REGIONAL	NWP
10	249	97	0	110	1583	731208
404	1084	2360	0	431	20805	7840
10&404	270	0	0	8	1977	3006
10&103	0	0	0	0	0	0
NONE	0	0	0	0	12	0
TOTAL	1603	2457	0	549	24377	742054

DAYS OF EVALUATION	STANDARD & DENIAL	LOP	REGIONAL	NATIONWIDE
0 - 60	10	48	2113	788
61 - 120	13	11	21	33
OVER 120	3	1	3	6
TOTAL	26	60	2137	827

TOTAL NO. OF ALL ACTIONS: 3050
TOTAL OF ACTIONS <= 60 DAYS: 2959
% OF ALL ACTIONS <= 60 DAYS: 97%
% OF STD. ACTIONS <= 120 DAYS: 88%

PRIMARY CAUSE FOR DELAY FOR STANDARD & DENIAL ACTIONS COMPLETED > 120 DAYS

APPL	401CERT	CZM	HIST	404Q/INF	404Q/FORMAL	INTERNAL	UNKNOWN	TOTAL
2	0	0	0	0	0	1	0	3

OTHER WORKLOAD ITEMS

NO PERMIT REQD	866	EIS PENDING	0	PUBLIC HEARINGS	1
APPL MODIFIED	1	EIS COMMENTED ON	0	PUBLIC INFO MEETINGS	0
PERMITS MODIFIED	4	JUR. DET. OFFICE	4272	PREAPP. CONSULTATIONS	116
SITE VISITS	112	JUR. DET. FIELD	577		

STAFFING
** NOT SUPPORTED FROM RAMS-II (USE CETAL INFO) **

Quarterly Report - From 01-JAN-2000 - 31-DEC-2000 (run 01/30/2001 16:07)
STATE: WI

OTHER INFO SECTION: PAGE 3 OF 3

REGULATORY QUARTERLY REPORT CY 2000

WITHDRAWN ACTIONS

LAWS SEC	WGP	WAPP	WNPR	WCOR
10	1	1	0	0
404	3	24	4	3
10&404	1	1	0	0
10&103	0	0	0	0
NONE	0	0	0	0
TOTALS	5	26	4	3

WETLANDS IMPACTS ACREAGES

EVALUATION:	STANDARD TIDAL	STANDARD NON-TIDAL	GENERAL TIDAL	GENERAL NON-TIDAL
REQUESTED	0.00	124.17	0.00	241.33
PERMITTED	0.00	120.13	0.00	232.05
MITIGATED	0.00	134.27	0.00	175.33

ENFORCEMENT:	STANDARD TIDAL	STANDARD NON-TIDAL
VIOLATION	0.00	54.47
RESTORED	0.00	33.30

PROVISIONAL PERMITS

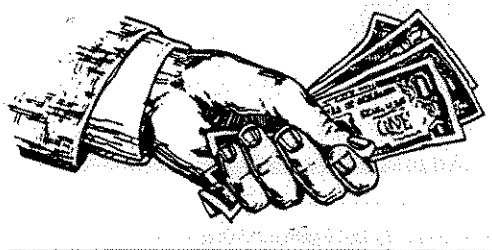
ISSUED: 13

TOTAL DAYS DELAY: 1985

Corps of Engineers Permit Actions Which Authorized Water or Wetland Filling in State of WI
Isolated Waters
For the Period 01-JAN-2000 - 31-DEC-2000

State Totals: WI Report Prepared: 30-JAN-2001

		Requested Acres	Approved Acres	Mitigated Acres
Total All Permits:	187 (292)	62.193	57.159	58.559
Total Individual Permits:	2	24.400	24.400	29.150
Total Letters of Perm.:	15	9.571	9.571	12.897
Total Nationwide Permits:	55	16.485	13.715	5.300
Total General Permits:	115	11.737	9.473	11.212



POLITICS AND THE DNR

DNR Takeover and Elimination of Public Intervenors

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This factsheet was provided by the Wisconsin Stewardship Network, Jan. 29, 1999 ---

For more information, contact Rebecca Katers, Issue Chair, Clean Water Action Council, 1270 Main Street, Suite 120, Green Bay, WI 54302 Phone: 920-437-7304, e-mail: cwac@execpc.com --- or contact Ann Finan, WSN Coordinator, c/o Wisconsin's Environmental Decade, 122 State St., Suite 200, Madison, WI 54703. Phone: 608-251-7020. e-mail: finana@itis.com DNR Watch reports can be viewed on the Wisconsin Stewardship Network's homepage: www.wsn.org

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What's Happening Now?

Two bills have been proposed:

DNR Secretary Restoration --- Senate bill SB 27 would restore only the DNR Secretaryís independence. The bill has been passed by the Senate, but not by the Assembly, where it is currently stuck in committee. Legislators can vote to pull the bill out of committee for a vote of the full Assembly. Ultimately, it must have the signature of the Governor before final approval.

Public Intervenor Office Restoration --- The Senate version, SB 72, of the bill to re-establish an Office of Public Intervenor, has yet to be scheduled for a vote. The Assembly version, AB 162, has also seen little action. It is hoped that if the DNR Secretary restoration bill moves ahead, the PIO bill will also gain ground.

What You Can Do

Please write to your elected representatives and tell them how you feel about these bills:

Gov. Tommy Thompson
Room 22 East, State Capitol
P.O. Box 7848
Madison, WI 53707-7848

State Senator _____,
P.O. Box 7882
Madison, WI 53707

State Rep. (Last Name, A thru L)
P.O. Box 8952
Madison, WI 53708

State Rep. (Last Name, Mc thru Z)
P.O. Box 8953
Madison, WI 53708

(If you don't know who your elected representatives are, call the Legislative Hotline 1-800-362-9472 on weekdays.)

Summary of Results from a Survey of Wisconsin Department of Natural Resources Employees

Public Employees for Environmental Responsibility (PEER) is a national nonprofit alliance of state and federal resource professionals working to promote environmental ethics and government accountability. PEER is surveying all Wisconsin Department of Natural Resources (DNR) employees on issues concerning the state of environmental affairs at the agency. These questions were developed by your colleagues. Please take a few moments to fill out this survey and mail it back. As with all contact with PEER, survey responses will be strictly confidential. PEER will tabulate and publish the survey results and make them available to you.

RESOURCES

1. The DNR has sufficient resources to adequately perform its environmental mission.
   4% strongly agree 23% agree 8% no opinion 46% disagree 19% strongly disagree

2. DNR efficiently uses the resources available to it.
   9% strongly agree 43% agree 11% no opinion 28% disagree 10% strongly disagree

3. Wisconsin's environment is better protected now by DNR than it was five years ago.
   8% strongly agree 26% agree 17% no opinion 33% disagree 15% strongly disagree

DECISION-MAKING

4. DNR administration does not allow the needs of individuals and businesses seeking permits to take precedence over serving the general public and the resource.
   6% strongly agree 31% agree 27% no opinion 27% disagree 9% strongly disagree

5. In my experience, scientific evaluations are influenced by political considerations at DNR.
   13% strongly agree 35% agree 22% no opinion 23% disagree 7% strongly disagree

6. The regulated community has undue influence on DNR decision-making.
   10% strongly agree 32% agree 27% no opinion 26% disagree 5% strongly disagree

STRUCTURE

7. The DNR Secretary should continue to be appointed by the Governor.
   1% strongly agree 3% agree 4% no opinion 21% disagree 70% strongly disagree

8. The DNR Secretary should be appointed by the Natural Resources Board.
   51% strongly agree 33% agree 8% no opinion 6% disagree 3% strongly disagree

9. The Public Intervener's Office should be re-established.
   41% strongly agree 28% agree 24% no opinion 4% disagree 3% strongly disagree

ENFORCEMENT

10. DNR administration is committed to enforcement of environmental laws.
    15% strongly agree 54% agree 16% no opinion 12% disagree 3% strongly disagree

11. I think that DNR law enforcement tends to focus disproportionately on small violators, rather than large violators.
    6% strongly agree 15% agree 34% no opinion 34% disagree 11% strongly disagree

12. I have been directed by a superior to overlook environmental violations.
    3% strongly agree 6% agree 22% no opinion 28% disagree 42% strongly disagree

LEADERSHIP

13. I trust DNR's top administrators to stand up against political pressure in protecting the environment.
    8% strongly agree 26% agree 12% no opinion 34% disagree 20% strongly disagree

14. George Meyer has done a good job as DNR Secretary.
    12% strongly agree 38% agree 18% no opinion 23% disagree 9% strongly disagree

15. At DNR, administrators are selected on who they know rather than what they know.
    15% strongly agree 30% agree 32% no opinion 19% disagree 4% strongly disagree

MORALE

16. Employee morale at DNR is good.
    1% strongly agree 17% agree 7% no opinion 43% disagree 32% strongly disagree

17. I know of a situation in which a DNR superior has retaliated against a staffer for doing his or her job "too well" on a controversial project.
    6% strongly agree 12% agree 35% no opinion 27% disagree 20% strongly disagree

18. I fear job-related retaliation for openly advocating enforcement of environmental regulations.
    4% strongly agree 11% agree 25% no opinion 34% disagree 25% strongly disagree

For More Information

This survey was conducted by the Public Employees for Environmental Responsibility (PEER), 2001 S Street, NW, Suite 570, Washington DC 20009 Tel:(202) 265-7337 Fax (202) 265-4192 info@peer.org

Contact PEER to receive a full copy of EMPLOYEES SPEAK OUT! Responses to the Question: "In my opinion , the biggest problem facing the DNR is. . ." You can also request a free trial membership to PEER.

Oct 31 WI State Jrnl. 1-19

Survey: DNR workers suffer low morale

■ The group that conducted the survey says employees feel politics hurt the agency.

By Scott Milfred
Legislative reporter

Morale is low at the state Department of Natural Resources because many workers feel politics are corrupting environmental decisions, a survey suggests.

"DNR employees just want to do their jobs without interference from the governor, the Legislature or big-money interest groups," said Eric Wingerter, a spokesman for the group that released the survey results Wednesday.

George Meyer, who heads the DNR, largely discounted the findings, saying the survey was worded to produce negative answers.

Meyer did, however, acknowledge a morale problem. But he attributed it to heavy workloads, ongoing contract negotiations and the perception, which he called mistaken, that politicians have more influence because Meyer is no longer appointed by a citizen board. Since 1995, the governor has appointed the DNR secretary.

Public Employees for Environmental Responsibility, a 10,000-member national group with about 200 members in Wisconsin, got 1,537 responses from the 3,073 surveys sent to state DNR employees.

Senate Majority Leader Chuck Chvala, D-Madison, said the survey shows the DNR needs more independence. The Democrat-run Senate last year passed a bill giving back to the Natural Resources Board the power to appoint the DNR secretary, but the Assembly hasn't acted on the measure.

Republican Gov. Tommy Thompson's staff said the governor's record on environmental issues is stellar. Kevin Keane, a governor's aide, said the DNR has undergone many changes recently, including a push to be more responsive to the public.

"Clearly, there are some employees in the establishment over there resistant to change," he said.

Meyer denied his department bows to political pressure.

"The bottom line is — is the environment being protected?" Meyer said. "For each of our environmental programs, it's in the high 90 percentages of companies and municipalities that are in compliance. That shows the system is working, and we're proud of it."

Highlights of the survey

■ 75 percent think morale at the DNR is not good; 18 percent disagreed.

■ 48 percent said political considerations influence scientific evaluations; 30 percent disagreed.

■ 54 percent don't trust top DNR officials to stand up against political pressure to protect the environment; 34 percent do.

■ 42 percent think businesses regulated by the DNR have undue influence over DNR decisions; 31 percent disagreed.

■ 91 percent oppose having the governor appoint the DNR secretary; 84 percent said the citizen-run Natural Resources Board should appoint the secretary instead.

Percentages don't equal 100 because some respondents offered no opinion.

North woods power lines point to Crandon

Curt Andersen
For The Green Bay News-Chronicle

Those of you trusting souls who believe that the Crandon mine boogeyman has gone away should now get another hollow feeling in the pit of your stomach.

Two recent developments are indicating that we have not yet killed this beast in spite of Gov. Tommy Thompson's rhetoric. Tommy and his sycophantic Republican Party are bound and determined to bring that mine into the state, no matter how much damage it does, no matter how many citizens oppose it.

> Tommy and his sycophantic Republicans are bound and determined to bring the Crandon mine into the state.

First, two private power companies, Green Bay's Wisconsin Public Service Corp. and Duluth's Minnesota Power, are planning a 345-kilovolt, high-voltage transmission line across the north woods, running from Duluth, Minn., to Wausau.

This 250-mile-long easement will be forced on unwilling landowners, from farmers to retirees to home and cottage owners, businesses and recreational areas.

The easement would damage roughly 4,500 acres, yet our Public Service Commission ("Thompson's Toadies") has the nerve to say this idea is "environmentally sound."

The power companies call this idea "Power Up Wisconsin." I think a more appropriate name would be "Power Down To Illinois."

Each of the proposed routes goes through private land almost exclusively, because it will gain quicker permit approval and be cheaper to condemn private property than it would be to use existing power corridors, public rights of way and public lands.

The lines will require a 150-foot-wide cleared right of way on which no buildings may be built and no trees may be grown. The towers will be from 90 to 125 feet tall, making them visible for miles.

Wisconsin does not really need this extra power. One reason for this line is to supply the Chicago area with more cheap power.

The other reason is to supply power to the Crandon mine, the first of many mines in Tommy's new north woods mining district.

The second development is a tiny phrase in the new budget bill: "Non-metallic mining reclamation program requirements. (This bill exempts) non-metallic mining conducted to obtain materials for local road projects from certain requirements related to public notice, hearings, reclamation plans and proof of financial responsibility."

Doesn't that sound innocuous?

Did you forget that Tommy has the line-item veto, with a broad definition of what that means?

There are a number of ways that Tommy's pen could change that phrase to help the mine weasels. He could scratch out the prefix "non" so that the wording would be "metallic mining."

That way, toxic mine tailings could be mixed with other materials like limestone, creating "roadbed materials." That way, Exxon and Rio Algom can go right ahead with their plans.

By taking out the word "non-metallic," Tommy can woo both the metallic miners and the stone quarry industry.

As I write this on Oct. 12, I predict that Tommy, our "environmental governor," will do something like that. I wish he could use his powers for good instead.

Andersen, whose column appears here each Wednesday, is a lifelong resident of the Green Bay area and a small-business owner. He served in the Navy during the Vietnam era. He teaches part time at Northeast Wisconsin Technical College and is president of the Clean Water Action Council. Write to him via e-mail at editorial.nc@bcpdenmark.com.

Green Bay News-Chronicle 10-20-99

Politics infects the DNR

It may be an old debate that's been settled, but Rep. Spencer Black nonetheless has introduced legislation that would once more place the state Department of Natural Resources under control of a citizen's board.

In 1995 Gov. Tommy Thompson exercised his political muscle by engineering a law change that allows the governor to appoint the DNR chief rather than having the Natural Resources Board perform the time-honored ritual.

Listening post

MITCH BLISS

Rumblings from a number of conservation groups indicate there's more than a little unhappiness with having DNR Secretary George Meyer answering directly to the governor.

The DNR head used to serve at the pleasure of the part-time citizen commission, which sets policy for the DNR. That system served Wisconsin remarkably well.

Wisconsin has been blessed with strong environmental laws and their enforcement. The propellant for all of this has been through capable, nonpolitical DNR chiefs working through the board. Any erosion of that system bodes ill for all of us. With the governor having a much stronger hand through his appointment of the DNR secretary, the opportunity to further politicize the department's functions is obvious.

Defendants of a governor-appointed DNR secretary like to emphasize that two previous Democratic governors also had favored such a setup. That fact doesn't mean it's right or in the best interests of Wisconsin residents.

"Wisconsin's system of a politically independent conservation agency made our state a national leader in protecting our environment," Black said at a state Capitol news conference last week. "That's because decisions about our outdoors were based on science, not politics."

Any time the opportunity for citizen choice is lessened, it can't be good news.

He charged that the DNR has acted as a "booster" for the mining industry, citing the DNR's lobbying against the mining moratorium bill that later became law.

A governor's spokesman said, "Spencer Black has picked an old and personal fight that has been settled."

The seven-member Natural Resources Board is governor-appointed with staggered terms. The Senate must approve the choices. That method of choosing a DNR head certainly offers a much better shake for citizens and less chance for the political pressure that a governor can place on the person holding that highly visible post.

In 1995 Thompson also attempted to bring the state Department of Public Instruction under direct control of the governor rather than having the superintendent elected by the people for a six-year term. Thompson sought to have DPI operations overhauled by creating a 10-member education commission. Thompson maintained that a revamping of DPI would make it more accountable and efficient.

Any time the opportunity for citizen choice is lessened, it can't be good news.

■ ■ ■

Dan Quayle is giving his many critics another chance to kick him around. He's kind of like Richard Nixon in that regard.

Quayle, who served a term as George Bush's vice president and spent time in the House and Senate, is well wired politically. He certainly has name recognition.

"Turn back the clock" could well be Quayle's theme song as he girds for a run at the Republican nomination for president in 2000. Alas, he seems like a relic mined from the political waste bin.

Quayle has a far-right tilt that just doesn't fit the country's needs in the threshold of a new millennium. He's a favorite son of many Christian conservatives.

Quayle, who made Indiana his home for many years but now lives in Arizona, will formally announce his candidacy Feb. 3 in Indianapolis and Feb. 4 in Phoenix. And an official kickoff will occur in April in his hometown of Huntington, Ind.

It's hard to imagine that Quayle, 51, will make any significant impact among such hopefuls headed by Texas Gov. George W. Bush and Elizabeth Dole.

■ ■ ■

Tomorrow's Super Bowl shapes up as a truly good matchup with the defending champion Denver Broncos facing the new kid on the block, the Atlanta Falcons.

Green Bay failed miserably in defending its Super Bowl title a year ago, but Denver appears to have a ravenous appetite to repeat under the ever-intense Coach Mike Shanahan.

If the Falcons, orchestrated by Coach Dan Reeves, can maintain its momentum from the sensational overtime win in Minnesota's dome of horrors, this Super Bowl should be excellent.

Atlanta's offense committed not a single penalty in the crushing noise of the Metrodome two weeks ago, which is impressive given the Packers' offense was jumping around like nervous deer in the hunting season and drew a handful of penalties in their ill-fated regular-season game at Minnesota.

After consulting with the Gazette pressroom crew, we're going with the underdog and predicting a 24-17 Atlanta win Sunday.

Mitch Bliss is the retired editor of The Janesville Gazette.

Stewardship 2000 gets boost

Land conservation plan adds $54 million to recommended 1999-01 budget

By The Associated Press
and Leader-Telegram staff

The state could spend $404 million buying and preserving land over the next 10 years under a plan approved this week by the state's budget-writing committee.

The Legislature's Joint Finance Committee voted 12-4 Tuesday to authorize up to $40.4 million a year for the state's Warren Knowles-Gaylord Nelson Stewardship 2000 program.

Of that money, $31 million a year would be earmarked to buy Wisconsin's natural lands, and $9.4 million would be used to develop land, particularly in urban areas.

The plan approved by the finance committee adds $54 million to what the Building Commission had recommended in Gov. Tommy Thompson's proposed 1999-01 budget.

Land purchases would focus on state trails, water resources, habitat areas, natural areas, Great Lakes bluffs, the Middle Kettle Moraine and Baraboo Hills.

Most of the money for land development would be spent on assistance to local governments and nonprofit conservation organizations, including grants to develop urban rivers, urban green space and local parks.

State Sen. Kevin Shibilski, D-Stevens Point, said the program would help preserve Wisconsin's biodiversity and encourage state residents to enjoy the outdoors.

"We need to find ways to reacquaint ourselves with the natural world," Shibilski said. "It's a magnificent array of biology or biodiversity that we have. ... This is an incredible state we live in. Let's just make sure we preserve the important parts of that biodiversity."

Sen. Alice Clausing, D-Menomonie, chairwoman of the Senate Agricultural and Natural Resources Committee, said the proposal is an improvement over the governor's budget.

"We're getting there. I think this is much better than what the governor proposed," she said.

The stewardship plan will be included in the budget that will go before the Legislature this summer and would go into effect in 2000.

Finance Committee co-chairman John Gard, R-Peshtigo, said he opposed the program because it is too expensive.

"This is too rich," Gard said.

But Will Fantle of Eau Claire said the $40 million per year would make the buying power of the program about what it was in 1990, when adjusted for inflation.

See PLAN, Page 2B

Willow Flowage purchase shows funds value, Fantle says

PLAN
from Page 1B

"The $40 million per year is a good start. We're optimistic the Legislature is going to pass it," said Fantle, who manages the Web site of the Wisconsin Stewardship Network, a coalition of environmental and hunting and fishing groups from around the state.

Clausing said stewardship funding should be adjusted automatically for inflation and land prices, so the buying power remains the same over the 10-year life of the program. "That's what we'll try and work for in the Senate," she said.

The Stewardship Network has made reauthorizing the state's ity, Fantle said.

The 1997 purchase of 64 miles of undeveloped shoreline on the Willow Flowage for $10 million is a good example of the value of the stewardship fund, Fantle said.

The purchase was a bargain considering current prices for lakeshore property and will preserve the wilderness nature of the flowage for future generations, he said.

The state is negotiating to buy 160,000 acres in northern Wisconsin, which is further evidence the state needs to have adequate funds to buy wild lands when the opportunity arises, he said.

33 CFR Part 323
Permits for Discharges of Dredged or Fill Material Into Waters of the United States

AUTHORITY: 33 U.S.C. 1344.

Section 323.1 - General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for DA permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (hereinafter referred to as section 404). (See 33 CFR 320.2(g).) Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A DA permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

Section 323.2 Definitions.

For the purpose of this part, the following terms are defined:

(a) The term **"waters of the United States"** and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.

(b) The term **"lake"** means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins,

cooling, or rice growing.

(c) The term **"dredged material"** means material that is excavated or dredged from waters of the United States.

(d)

(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) the addition of dredged material to a specified discharge site located in waters of the United States;

(ii) the runoff or overflow from a contained land or water disposal area; and

(iii) any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state Section 404 program.

(ii) activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system, nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii)incidental fallback

(3) Section 404 authorization is not required for the following:

(i) any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) incidental movement of dredged material occurring during normal dredging operations, as defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in

wetlands, as that term is defined at section 328.3 of this Chapter.
(iii) those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1996.
(iv) certain discharges, such as those associated with normal farming, silvicuture, and ranching activities, are not prohibited by otherwise subject to regulation under Section 404. See 33 CFR 323.4 for discharges that do not require permits.

(4) For puposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

[Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.]

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

(e) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. See Section 323.3(c)concerning the regulation of the placement of pilings in waters of the United States.

(f) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and

harvesting for the production of food, fiber, and forest products (See Section 323.4 for the definition of these terms). See Section 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(g) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(h) The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

Section 323.3 - Discharge requiring permits.

(a) General. **Except as provided in Section 323.4 of this Part, DA permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by Section 323.4 of this Part or permitted by 33 CFR Part 330, an individual or regional section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.**

(b) Activities of Federal agencies. **Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR Part 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.**

(c) Pilings

(1) Placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a

waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of awuatic functions.

(2) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in part 329 of this chapter, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see part 322 of this chapter).

Section 323.4 - Discharges not requiring permits.

(a) General. **Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:**

(1)

(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.
(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in Section 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.
(iii)

(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.
(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.
(C)

(1) Minor Drainage means:

(i) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(ii) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(iii) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(1) (ii) and (iii) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.)

(iv) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike

or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption. (4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins. (5) Any activity with respect to which a state has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4)(B) and (C). (6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired,

that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR Part 233.22(i), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;
(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;
(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;
(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;
(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;
(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;
(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;
(viii) Borrow material shall be taken from upland sources whenever feasible;
(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;
(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;
(xi) The discharge shall not be located in the proximity of a public water supply intake;
(xii) The discharge shall not occur in areas of concentrated shellfish production;
(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;
(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and
(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a)(1)-(6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)-(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States nay be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in section 404(r) of the CWA are exempt from section 404 permit requirements, but may be subject to other state or Federal requirements.

Section 323.5 - Program transfer to states.

Section 404(h) of the CWA allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the section 404 permit program for discharges into certain waters of the United States to qualified states. (The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto). See 40 CFR Parts 233 and 124 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved and in effect, the Corps of Engineers will suspend processing of section 404 applications in the applicable waters and will transfer pending applications to the state agency responsible for administering the program. District engineers will assist EPA and the states in any way practicable to effect transfer and will develop appropriate procedures to ensure orderly and expeditious transfer.

Section 323.6 - Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 404 permits. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the CWA. (see 40 CFR Part 230.) Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be

contrary to the public interest.

(b) The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with section 404(c) of the Clean Water Act. However the Corps will continue to complete the administrative processing of the application while the section 404(c) procedures are underway including completion of final coordination with EPA under 33 CFR Part 325.

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