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☞ Exhibits/comments submitted by Tilton. RE: DNR study regarding Lower St. Croix ordinary high water mark.

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate Select

(Assembly, Senate or joint)

Committee on ... DNR (SSC-DNRRR)

COMMITTEE NOTICES ...

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

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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

* Contents organized for archiving by: Mike Barman (LRB) (July/2012)

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November 14, 2005

TO BE DELIVERED VIA FEDEX

Mr. Dale Simon
DNR OF WISCONSIN
101 South Webster Street
P.O. Box 7921
Madison, WI 53703

Re: Public Comment on (a) Ordinary High Water Mark (OHWM) Determination for Tilton Property, Troy Township, St. Croix County and (b) OHWM determination for the Lower St. Croix Valley in General

Dear Mr. Simon:

For an objective study of the Ordinary High Water Mark for my property and relating to the Lower St. Croix, I refer you, not to the DNR 'study' in front of you, but rather to the multiple studies that I have had to pay for, by Ogden Engineering, Barr Engineering, Graham Environmental, University of Minnesota Biology Professor David Biesboer and others. Their opinion letters and exhibits are attached hereto and speak for themselves. In addition, they and I provide you with scientific and photographic evidence that not only contradicts the 681.5' OHWM conclusion made by certain DNR employees on this issue, but supports an OHWM determination of 676 to 677 feet. I also refer you to the comments made in my letter of August 8, 2005 to the DNR Robert Baczynski, the many photographs I submit here and other information in the Exhibits A-L included with this letter and incorporated into my comments.

I have been asking the DNR for an Ordinary High Water Mark (OHWM) for my property in Troy Township in St. Croix County along the St. Croix River since 1999. Now, six years later, the DNR purports to have made an OHWM for my property without actually doing any investigation whatsoever on my property. Rather, it purports to make a scientific declaration of conditions on my property based upon conditions which it claims to have found on property which is at least five miles away from mine. Astounding! Being involved in this process has caused me to fully realize (a) that for all these years the DNR has been enforcing Ordinary High Water Mark levels for the St. Croix valley for which it knew or should have known there was no scientific basis in fact and (b) that the nearly finished year-long 'study' of the issue by DNR staff is not simply irrelevant to my property; rather, in addition, it is inept and contains strong suggestions of investigator bias, of disregard for the scientific method and of result-oriented fact gathering.

I note preliminarily that the purpose of the study seems to have gone far afield from its original purpose – As recited by the DNR, it supposedly undertook this endeavor because Wisconsin citizens were upset at the unfairness in treatment they receive on the issue of from where setback is measured for purposes of various zoning and building purposes along the St. Croix. As I understand it, it seems that for years Minnesota residents have had setback measured from the 675' water elevation line, while Wisconsin residents have had setback measured from a variety of much higher elevation lines, ranging from 682' to 688' and other lines, all of which has made Wisconsin citizens feel treated inequitably. Supposedly it was to correct that setback inequity which motivated the DNR study here. However, this 'study' has never addressed that setback inequity issue directly, because (and the WI DNR study material fails even to point this out) in Minnesota the setback line of 675' is determined by statute and has nothing to do with any setting for any OHWM (which I have come to realize has many different definitions in different jurisdictions). So the WI DNR has spent a year or more on an endeavor which entirely dodges the reason it supposedly was undertaken – to address inequitable setback lines between the two states. And not only does this study ignore the very (legislative) issue which supposedly precipitated the study, it then goes on to 'study' the issue of OHWM in a haphazard, slipshod, non-scientific and misleading manner, and then the 'study' investigator(s) make conclusions which are not supported by the poor data which they collected themselves nor by the actual facts on the ground as determined by multiple independent experts (and as can be seen by anyone with common sense).

In studying the OHWM issue, the WI DNR study not only uses the wrong criteria, but is unclear and misleading as to what criteria it actually uses. Of course the 'study' authors pay lip service to the Wisconsin Supreme Court definition of the Ordinary High Water Mark as defined in Diana, State v. Trudeau and other cases. And it pays a bit of lip service to the materials collected in Chapter 40 which presumably were created for guidance in interpreting the Supreme Court's "terrestrial" versus "aquatic" distinction for purposes of setting the Ordinary High Water Mark at a place where there is an "easily recognizable characteristic" that a prudent person could see and understand.

To a reasonable person, this Diana, et. seq. definition of the OHWM would necessarily fall somewhere between (a) the tree line at the edge of the mature forest along the shore and (b) the sandy beach at the edge of low water. Presumably, the guidance about moss, lichen, elbow roots and the like found in Chapter 40 is designed to help one fine-tune the OHWM determination between the low water mark and the tree line.

But the body of the present DNR "study" virtually ignores issues such as "destruction of terrestrial vegetation or other easily recognized characteristic," and becomes an arcane, misdirected, result-oriented collection of data (and I use the word data advisedly, since the amount and type of information the investigators did not collect is probably more important than what they collected) is used to justify an Ordinary High Water Mark which cannot survive the

most minimal independent testing of its validity and applicability to the Supreme Court definition of an OHWM.

Since I am not well-versed in these subjects, it was only after scores of hours of wading through these materials and expensive consulting with others that I began to realize that some unnamed DNR staff here has secretly substituted its own preference for a "wetlands" versus "uplands" demarcation, rather than the pre-existing and much simpler Supreme Court requirement of a "terrestrial" versus "aquatic" delineation. In the beginning I spent hours scratching my head as to why the authors of this study never once attempted to define terrestrial or aquatic either in other language used by the Supreme Court or from a simple dictionary. Instead, the authors focused on things that appeared to be irrelevant (such as whether a vegetation was "water dependent," a peculiar issue given that, as far as I know, all vegetation in the St. Croix Valley is water dependent). I worried over words like hydric and hydrophytic and such, and how that related to the Diana, Trudeau, etc., criteria. Then someone finally pointed out to me that these were issues that arise in wetland regulation.

I had (naively) assumed that a trained scientist in the DNR understands that a terrestrial versus aquatic issue ("or other easily recognizable characteristic" as stated a hundred years ago by the Wisconsin Supreme Court) is far different from a wetland versus non-wetland issue. But a review of the DNR's materials from this "study" clearly show that the DNR investigator(s) has either confused the two issues or purposely substituted their own preference for wetlands issues over the dictates of the Wisconsin Supreme Court. And they/she does this without stating to the public what is occurring, *i.e.*, that new or expanded criteria are being applied.

I had also naively assumed that a DNR investigator would be conscientious in gathering data. But then I noticed numerous examples to the contrary. For example, it was a bit of a shock to see that the DNR investigator(s) make a point of measuring the TOP elevation of mosses at a few locations. These measurements of the TOP of the moss are the only times the DNR investigators pay attention to moss in the entire study, it seems, despite Chapter 40's recommendation on the issue, despite its mention a year ago by Barr Engineering in Barr's OHWM analysis (an analysis rejected in its entirety by Eunice Post supposedly because Barr had failed to identify the species of the moss, although the moss was clearly terrestrial from all other indices and no one in the DNR made any attempt whatsoever to determine the species; a species which I've now had to pay Dr. Biesboer to identify as clearly terrestrial) and despite the frequent occurrence of (terrestrial) moss in the valley. I have trouble imagining that this was simply an accidental occurrence, measuring the elevation of the top of moss rather than its lowermost elevation. Rather it seems that the investigators wanted to pay lip service to the issue but chose to do so in an irrelevant or entirely misleading way. I have moss on the top of the roof of my house. Perhaps the DNR should use the peak of my roof as an indicator of the OHWM? On the day Ms. Post was on Bob Rolle's property, we pointed out to her that there was a great deal of moss at and below the water line (we pointed out that they were really unable to do a decent investigation

that day because the water was too high; but that idea was ignored not only at the Rolle site, but at at least two other sites as well), but it appears Ms. Post did not want to highlight that fact in her data collection because the moss was at a lower elevation than the conclusion she wanted to reach.

The situation gets even foggier when one closely examines the report and realizes that the DNR investigator(s) and author(s) have chosen to place tremendous weight on water stain data from remote sites, water stains caused by unknown water events at unknown times, and has chosen to use those water stains as definitive evidence of an Ordinary High Water Mark even for areas of the river miles away. There is a Laurel and Hardy aspect to a photo of DNR employees intently viewing a photograph of water stains on a two-foot thick tree as if those water stains were important to the Supreme Court's terrestrial versus aquatic distinction, despite the fact that these stains were several feet up the trunk of a very thick tree, and despite the fact that the tree itself is obviously terrestrial and therefore the Ordinary High Water Mark must be at or below the level of the base of the tree! Perhaps your DNR scientists, or at least Ms. Post, would like to view the water stain on my interior wall left over from the 1965 flood? It is permanent and predominant, words which Ms. Post and company seem to think are more important than "terrestrial" or "aquatic" or "easily recognizable." Another example of how she/they paid lip service to the Supreme Court's language, then went on to ignore that language and do as they wish.

How could any reasonable person for a moment think that the Diana Court, in instructing that the Ordinary High Water Mark be determined by "destruction of terrestrial vegetation or other easily recognizable characteristic," would assume that investigators should not once attempt to delineate the altitude of the edge of the tree line or forest for 25 miles and should altogether ignore the existence of 50-year-old trees and instead should base an OHWM determination upon water stains found on barge dolphins and concrete walls? It's like Dorothy in The Wizard of Oz being told to ignore that man behind the curtain. Here the DNR is telling the public to ignore an easily-recognized characteristic like a moss line or a forest line along the shore and instead trust the DNR's ability to divine which of many contradictory water stains is indicative of an OHWM. I would suggest that on this record the DNR investigators do not deserve such trust. They might as well be reading tea leaves.

I have personally interviewed the person who I think is most responsible for this misguided study and its proposed misguided conclusion, Ms. Eunice Post. I have also personally interviewed Mr. Gary Lepak, who I believe was an important investigator for this study. I have had both of them on my property at a time when they were represented to be there for purposes of investigating the OHWM. I have asked both of them how they define the OHWM and what they would look to on my property for determination of the OHWM. Mr. Lepak (at that time and previously) affirmatively begged off on the issue, saying that his expertise was in floodway / floodfringe sorts of areas and not regarding the OHWM. In short, he admitted his incompetence on the issue.

Mr. Dale Simon

Re: OHWM Determination for Tilton Property, Troy Township, St. Croix County/Lower St. Croix Valley
November 14, 2005

Page 5

Ms. Post did not admit incompetence, but readily displayed it. For example, she simply was unable to tell me what indices there were of an OHWM on my property. More than that, even though she was there on November 11, 2004 and my property still had stakes placed by Barr Engineering and Ogden Engineering the previous month as part of its scientific determination of the OHWM, she altogether refused to even look at the physical and biological evidence which was found to be important by other investigators. And she was entirely unable to articulate what OHWM indicators could be observed on my property at that time, instead suggesting my property was too 'disturbed' for an OHWM determination (she pointed to a 5' diameter fire pit made by my teenagers and to a few stone steps which were put in about 40 years ago; this was the same day she refused to walk down my 300+ feet of totally undisturbed beach to look at the items staked by the Barr/Ogden investigators; compare the photos of my property with sites later chosen by Ms. Post for inclusion in the study and determine for yourself which are more disturbed) and mumbled something about hydric soil testing needing to be done. Then a year later in this "study" the DNR claims it did not have time to do an investigation of my property. I believe that statement to be untrue. Rather, the facts suggest that Ms. Post and her DNR colleagues had six years to do an OHWM determination on my property, but she/they affirmatively chose not to do so because they decided that they did not want to cooperate in any way with me and did not want to find evidence which would contradict the conclusion which they wanted to reach.

I firmly believe that these investigators wanted to reach a conclusion about an OHWM which would come close to the 682 foot figure that they had been enforcing for years along the river. If you look at the DNR record closely, you will see that these "public servants" have variously enforced levels such as 688, 685, 682 and other levels, virtually every one of these levels having no scientific support according to this record. Therefore, when the DNR decided to do a "study," and it chose to assign the field work for that study to the very people who had been enforcing a false level for many years, it should not be a surprise that these investigators would look for their study to make a conclusion close to the OHWM level that they had been enforcing all these years. For them to do otherwise would be for them to admit that the facts contradicted the claims they had been making to the public for all these many years. Given this perspective, the DNR cannot pretend have done an objective study of these facts.

As I said at the beginning of this letter, for an objective study of these facts I refer Mr. Simon to the multiple studies that I have had to pay for, by Ogden Engineering, Barr Engineering, Graham Environmental Services, Inc., University of Minnesota Biology Professor David Biesboer and others. Their opinion letters and exhibits are attached hereto and speak for themselves. In addition, they and I provide you with scientific and photographic evidence that not only contradicts the 681.5' OHWM conclusion made by certain DNR employees on this issue, but supports an OHWM determination in the area of 676 to 677 feet.

Mr. Dale Simon

Re: OHWM Determination for Tilton Property, Troy Township, St. Croix County/Lower St. Croix Valley
November 14, 2005

Page 6

Please note that if the DNR continues in this years-long pattern of preferring expanded police power over science, I will litigate this to the fullest extent possible and make every effort to recover from the State of Wisconsin every possible cost. I hope that you will make that unnecessary.

Yours very truly,

A handwritten signature in cursive script that reads "William L. Tilton". The signature is written in dark ink and includes a circled initial "WLT" at the end.

William L. Tilton

WLT/km

cc: Francis Ogden , Ogden Engineering
Other Interested Citizens



WISCONSIN STATE LEGISLATURE



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January 13, 2006

Senate Select Committee
on DNR Regulatory Reform
% The Honorable Alan J. Lasee,
Senate President
State Senator District One
Room 219 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Re: Obstacles Faced in Attempting to Work with the Wisconsin Department of Natural Resources

Dear Senator Lasee,

I am sorry that at this time I am unable to appear personally in front of your committee, but if you hold additional hearings near Hudson, Wisconsin, I may be able to attend. I own a home and several acres along the St. Croix River, including over 400 feet of shoreline. This is in St. Croix County just a few miles south of Hudson. Because of my home's proximity to the River, I am subject to a number of regulatory schemes, including shoreland, wetland, and wild and scenic river. Accordingly, I have needed to have regular contact with the DNR.

Enclosed with this letter you will find volumes of data which I believe show that the DNR's exercise of its police power in the St. Croix River Valley has been evasive and lazy at best, probably incompetent and at times purposefully dishonest. These materials specifically relate to the question of the "Ordinary High Water Mark" (OHWM) determination for the St. Croix River and also have implications regarding DNR actions on other issues.

Since the OHWM is the starting point for determining "setback" from the river, and since the setback distance is extremely important to defining what a property owner may do with his property, this issue has been particularly important to me. Therefore, I have made years worth of requests (dating back to 1999 I believe) for the DNR to make an OHWM determination for my property, which I have been repeatedly told has been my right under the law. But the DNR has repeatedly refused to do so. In the course of my frustrated attempts to get cooperation from them I have discovered that the DNR for many years had a virtual absence of data to support any OHWM determination for the St. Croix River. But I've also learned that that has not prevented

the DNR from inventing numbers for the OHWM. I guess it shouldn't be a surprise that they have invented OHWM numbers at water elevations that are so high that it gives them police power hundreds of feet further from the shoreline than the law intended and at elevations considerably higher than similar laws enforced on the Minnesota side of the river.

For example, Minnesota has always used a water elevation of 675 feet for purposes of defining the shoreline from which setback measurements are made. The Wisconsin DNR on the other hand has enforced a variety of levels at various places along the river, most of which have had no connection with reality. The Wisconsin DNR has at various times and at various places along the St. Croix used OHWM elevations of 688 feet, 684 feet, 682 feet, and probably more. What is shocking is that, upon investigation, the record discloses that the DNR has never done a proper study of the issue before exercising its police power at these various levels. In fact, despite my years' worth of entreaties to the DNR on this issue, they have been unwilling even to share with me the existence of Chapter 40 of the DNR's Waterways and Wetland Handbook entitled "Ordinary High Water Mark Determinations." This internal DNR handbook gives many pages of guidance as to how the DNR is supposed to make the OHWM determination. I believe that the reason that the DNR has failed to share the Chapter 40 guidelines with me and other members of the public (I received it from one of my independent experts at Barr Engineering) is that, if one looks at the DNR's own stated criteria, in the context of the Wisconsin Supreme Court decisions defining the OHWM, one quickly begins to see that there is no connection whatsoever between the elevations enforced by the Wisconsin DNR for the OHWM in comparison to the Supreme Court and handbook criteria for determining the OHWM.

Because of public outcry about the unfairness of this situation, in mid 2004 the DNR did pretend to undertake a "study" of the OHWM on the St. Croix. As I think the enclosed materials will illustrate, this has been one of the poorest excuses for a scientific study that I have seen since my children were in junior high school. The "study" materials, which are enclosed herewith, are laughable in their obvious attempts to avoid any data collection which would contradict the foregone conclusion by the DNR as to what the OHWM should be. In fact, rumor was widely circulating in the valley before the study even began that the OHWM determination would be at about 682 feet, which is within 6 inches of the final recommendation made by DNR staff. You will see that my enclosed materials are my public comments protesting the staff "study" findings about the St. Croix OHWM.

Because the DNR repeatedly refused to come upon my property and give me an OHWM determination, I on my own hired a multiplicity of experts, including civil engineers, surveyors, architects, environmental specialists, a professor of biology and more, at a cost of some \$10,000 or more. Most of this material was available to the DNR before it began its so-called study of the OHWM issue. However, the DNR summarily refused to consider any of this information or these conclusions proffered by outside experts. The DNR's stated reasons for doing so are rankly dishonest.

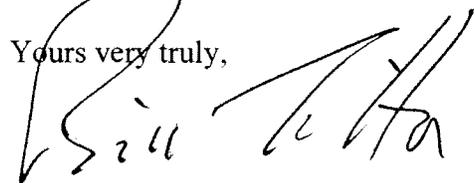
Prior to the beginning of the study and since then I have presented to the DNR a multiplicity of facts showing the inaccuracy in the way that they have defined their own significant police power here. Unfortunately, the DNR has continued to totally ignore the facts on this issue and to mislead the public and misuse its power.

Shockingly, when you read the DNR OHWM "study" and recommendation you will note a most outrageous example of DNR evasiveness (I call it dishonesty) – the DNR, without saying so, has apparently chosen to simply ignore both the relevant Wisconsin Supreme Court language defining the OHWM and its own Chapter 40 criteria. See the enclosed letter for a precise detailing of how the DNR has ignored Supreme Court and Handbook definitions in order to expand its police power. The DNR in the St. Croix Valley clearly has chosen to simply ignore the law as it exists and to explore the law as the DNR wishes it to be.

If the microcosm of DNR activity which I have witnessed and documented on my issues along the St. Croix River is any indication of its tendencies in other areas, I believe that Wisconsin is in a dire situation with a police authority that is unfettered in its self-definition of its own powers.

If you have any questions about the enclosed materials, I will be happy to cooperate.

Yours very truly,

A handwritten signature in black ink, appearing to read "Bill Tilton", written over the typed name below.

William L. Tilton

WLT/km
Enclosures