



# Van H. Wanggaard

Wisconsin State Senator

## TESTIMONY ON SENATE BILL 816

Thank you Mr. Chairman and Senators for this hearing on Senate Bill 816. I know that schedules can be difficult at this time of session, so I appreciate your willingness to act quickly before the Legislature adjourns.

This bill is all about freeing up and actually using wetland mitigation credits. Under current law, while many wetland mitigation credits are purchased through the "In-Lieu" program, too few wetland mitigations actually occur, and too few new wetlands are created. Often, there is just not a suitable site under the current parameters to release the credits.

This bill will relieve the pressure on the In-Lieu Fee Program by increasing the number of banks in the state. While well-intentioned, the current program creates barriers to current actual mitigation efforts. By expanding the area in which wetland mitigation credits can be used, we can improve wetland restoration efforts and in turn, our environment, while still fostering economic growth. Importantly, this isn't carte blanche for mitigation banks. The bill mandates financial surety to the DNR to ensure completion of the approved mitigation bank and releases credits only as a wetland is properly restored or mitigated. This isn't just a pay-and-you're-good-to-go program. We want to be sure we are acting in an environmental prudent way.

By freeing up the mitigation banks to act, we will provide additional wetland protection to the state, and free up further economic development while properly sustaining wetlands in Wisconsin.

Thank you.

February 28, 2018

**Testimony Relating to 2017 Senate Bill 816 and Potential Amendment Similar to  
Assembly Amendment 2 to Assembly Bill 956**

**Michael J. Cain, Former WI DNR Attorney, Madison, WI**

I am a former WI DNR Attorney who resides in Madison, WI. I appear representing myself as a citizen who enjoys using WI's water resources and as a person who has 34 years of experience representing the State of WI-DNR and the citizens of the State of WI in matters relating to wetlands and surface waters.

I am a lifelong WI resident, having grown up on a farm in in Southwest WI. I received a Bachelor of Science degree in Biology (with an emphasis on Aquatic Biology) from UW Stevens Point in 1972. I received a Juris Doctor from the University of WI Law School in 1976. I served as an Attorney with the WI Department of Natural Resources for 34 years. I was the primary attorney dealing with surface water and wetlands (Chapters 30 and 31, Stats.) and the Public Trust Doctrine for 31 of those 34 years. I was involved in the reviews of thousands of permits, hundreds of enforcement actions, and the development and administration of statutes and rules relating to these surface water and wetland issues. I have been a guest lecturer at Marquette and UW Law Schools and at other campuses and WI State Bar functions on the issues of water law and wetlands.

I do not object to 2017 Senate Bill 816, and based on my discussions with former DNR staff who worked extensively on the mitigation program, this bill has merit and should be adopted.

It has recently come to my attention that for the corollary to this bill in the Assembly (Assembly Bill 956) an Amendment (Assembly Amendment 2 to Assembly 956) was adopted in the Assembly in the final hours of their session which is intended to, and has the impact of, granting an exemption to allow Meteor Timber to fill 16.25 of exceptional quality wetlands, including 13.37 acres of White Pine-Red Maple Swamp in Monroe County, WI. **This type of Legislative action makes a mockery of the law and is an affront to all citizens of the State of WI who seek due process under the law.**

A permit was granted by WI DNR for this activity despite the objections of professional staff at WI DNR, in May, 2017. I reviewed this permit when I saw news reports of its issuance because of my interest and expertise in this area, having handled hundreds of these types of permits for WI DNR. It was surprising to me that a permit was issued for the filling of over 16 acres of this types of rare, forested wetland. It was clear to me that the staff findings had demonstrated that these high quality wetlands would be destroyed and that mitigation would not compensate for the loss of these exceptional quality wetlands. From the structure of the document, it was also clear that someone in the agency must have ordered issuance of a permit in spite of these Findings of Fact. A subsequent check with a DNR staff person (who had not been involved in processing the permit but had knowledge of it) by me confirmed that professional staff were uniformly opposed to the issuance of the permit as it did not meet the legal standards but that they were ordered to issue a permit.

February 28, 2018

I conferred with Midwest Environmental Advocates, who had been identified in newspaper accounts as considering appeal of the permit and I provided some suggestions to them of retired DNR staff who could assist in preparation for the litigation. I have not been personally involved in the litigation, but the Contested Case Hearing began on Monday, Feb, 26, 2018.

**Based on my knowledge of the issues, it appears highly likely that the permit would be denied by the trier of fact if the evidence is viewed objectively under the law.**

Upon hearing of Assembly Amendment 2 to Assembly Bill 956 that would exempt that project from permit requirements and allow the Meteor Timber project to go forward without the completion of the legal review which is currently underway, I was incensed and felt the need to testify and provide this information in a public forum.

WI has a long history of balancing protection of its natural resources with the need for development. The WI DNR grew out of the Kellett Commission which reviewed the organization of WI State Government in 1965-1967. Governor Warren Knowles directed the Commission, which recommended the formation of a WI Department of Natural resources. Governor Knowles embraced the idea of a WI DNR and "detailed his vision of a new Department of Natural Resources...A centralized agency (which) satisfied the "fundamental need for environmental control" and could achieve a "balance between our great natural resources and their use and abuse by man." At the first meeting of the Natural Resources Board in July, 1967, Governor Knowles boasted of the "dynamic program" that Wisconsin had set in motion. Governor Knowles contended that the agency embodied the "ecological conscience" of Aldo Leopold" and had begun a "new era in the history of resource management." See Huffman, **Protectors of Land and Water, Environmentalism in WI**, University of North Carolina Press, 1994, pages 149-160.

**The Legislative action embodied in the Assembly Amendment 2 to Assembly Bill 956 is inconsistent with the heritage of principled environmental management embodied by WI's history and tramples on the rights of all citizens who use Wisconsin's water and natural resources, not just those citizens whose due process rights are being violated by this immediate action.**

**I would urge you to reject this Amendment if it is offered in the Senate, either through this Committee or through some other mechanism.**

Thank you for the opportunity to provide comments on this potential amendment.

**Michael Cain, Retired WI DNR Attorney, Madison, WI**

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# Wisconsin's Green Fire: Voices for Conservation

## **Testimony Relating to 2017 Senate Bill 816 and Potential Amendment Similar to Assembly Amendment 2 to Assembly Bill 956**

### **Ron Grasshoff, Wisconsin's Green Fire**

I am Ron Grasshoff. I retired from the WI DNR after 20 years in the water and wetlands and Environmental Impact Analysis programs. I reside in the Town of West Point, in Columbia County Wisconsin. I appear today representing Wisconsin's Green Fire.

Wisconsin's Green Fire: Voices for Conservation (WGF) is an independent nonpartisan organization formed in 2017. WGF supports the conservation legacy of Wisconsin by promoting science-based management of its natural resources. Members represent extensive experience in natural resource management, environmental law and policy, scientific research, and education. Members have backgrounds in government, non-governmental organizations, universities and colleges and the private sector. More information about WGF can be found at [www.wigreenfire.org](http://www.wigreenfire.org).

Wisconsin's Green Fire does not have concerns about 2017 Senate Bill 816 addressing the statewide wetlands mitigation program.

However, WGF notes that Assembly Amendment 2 to Assembly Bill 956 passed on February 22, 2018, contains language to clearly exempt a single business, Meteor Timber Company, from wetland permitting requirements.

Two environmental organizations are challenging the wetland fill permit issued by the Department of Natural Resources (DNR) to Meteor Timber through a Contested Case Hearing scheduled for February 26 - March 2. A central issue is whether the decision to allow filling the rare wetlands on site meets legal standards and is supported by the facts, given the difficulty of mitigating for loss of those wetlands. The environmental groups are following the process laid out in Wisconsin law for citizens to legally challenge a permit decision.

If enacted into law, AB 956 as amended would intervene in the established review process of the permit decision to give preferential treatment to a business for which the permit is questioned by the public.

When a developer applies for a permit to fill wetlands, they must consider practical alternatives to avoid wetlands and ways to minimize impacts. For large fills, the developer must plan compensatory mitigation for the wetlands that would be lost. The DNR reviews the entire proposal along with information on the quality and functions of the wetlands that would be impacted. The DNR must consider all of those factors when evaluating a permit, and lays out the facts supporting the decision in the permit documents.

WGF opposes a potential Amendment to SB 816 similar to Assembly Amendment 2 to Assembly Bill 956.

In my experience, three disciplines: law, biology, and engineering are at a play when projects require a permit or approval for a number of activities involving our water resources including wetlands. The regulatory process works best when all three disciplines are in balance. The permit process does not function as

*Wisconsin's Green Fire: Voices for Conservation is a newly formed independent nonpartisan organization.*

# Wisconsin's Green Fire: Voices for Conservation

Intended when one element is removed. An amendment, similar to Assembly Amendment 2 would in effect circumvent the administrative review process available to citizens of Wisconsin. As a DNR retiree who has testified at several contested case hearings on behalf of the agency I can say with confidence that if projects meet legal standards they are approved as permitted or with conditions set by the Administrative Law Judge. The process works and all parties get the opportunity to make their case.

We trust that examination of the facts and conclusions consistent with the law will prevail through the permit review process. Legislative actions to intervene would deprive the public of the right for review.

Thank you



**Testimony of Amber Meyer Smith**  
**Vice President of Government Relations and Programs at Clean Wisconsin**  
**Senate Bill 816/Assembly Bill 956**  
**2/28/18**

I am here today to speak to Assembly Amendment 2 to Assembly Bill 956, the companion to Senate Bill 816. While I understand AB 956 and amendment 2 are not on the hearing notice, it's possible this will be the only legislative forum for this debate and it is important this issue gets a public vetting.

Amendment 2 was added to AB 956 on the Assembly's last day of session last week only hours before it was voted on. According to the drafting instructions, the amendment was specifically authored to "bypass" the contested case process that is currently underway for a frac sand mining facility permit to fill rare wetlands. The instructions were to "bypass this (contested case process) by saying no permit required."

The project is for Meteor Timber, which wants to build a frac sand processing and rail loading facility in Monroe County. The permit allows for filling 16.25 acres of rare white pine-red maple wetlands that are considered "imperiled" by the state. This would be the largest wetland fill for an industrial frac sand project in the state.

Clean Wisconsin and the Ho-Chunk Nation have challenged the permit because we believe it clearly violates wetland laws and was not issued with supporting facts. We believe the records show the mitigation plan is inadequate and that issuing a permit without meeting the criteria set forth in the law will open the door to development of similar large-scale filling and permanent destruction of wetlands.

While I'm disappointed to be here talking to you about this, I am not surprised, since attorneys for Meteor Timber have been threatening to introduce legislation since the case began. The administrative law hearing started Monday, and there will be 4-5 days of witnesses presenting facts and being cross-examined.

Our case is substantiated by wetland experts, including a 30-year DNR veteran in wetland permitting that worked on this particular permit. She testified on the stand just yesterday, saying:

- The wetlands in question are "among the highest quality" she had reviewed in her 30 years with the DNR where the DNR had granted a permit. She further indicated this kind of rare wetland has never been restored in Wisconsin, and even if it could be successfully replicated it could take up to 300 years, and that the mitigation plan was inadequate.

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- That DNR experts had recommended the permit be denied but were told to make sure the project was approvable no matter what. They were also limited in what information they were allowed to request from the company.
- This permit will set a negative precedent for filling rare wetlands and encourages this same kind of heavy handed process be used by applicants in the future.

It is extremely unfortunate that this company is trying to get this case litigated through a legislative process. The Administrative Law Judge will make his decision based on 4-5 days of testimony from many experts who have all been cross-examined. In fact, he has already denied Meteor's request to dismiss the case. After all testimony is presented, he will determine whether DNR had sufficient information and followed procedures outlined in state law.

With all the complicated information and facts of this case largely absent from this legislative debate, you must reject Assembly Amendment 2 to AB 956 if it comes before you, and allow the legal process to take its course. I am encouraged that it has not been added yet to SB 816, and I hope it is not added in these last days of the legislative session.

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***Wisconsin Wetlands Association Testimony on SB 816  
Presented by Brian Vigue, February 28<sup>th</sup>, 2018***

Thank you for the opportunity to offer our testimony on SB 816. I'm here on behalf of the Wisconsin Wetlands Association, a statewide, non-partisan, non-profit wetland conservation organization. We envision a state where wetlands are healthy, plentiful, and support ecological and societal needs, and where citizens care for, appreciate, and interact with these natural resources.

I'm here today to urge the committee to amend SB 816 to adopt the changes made by Assembly Amendment 1 to this bill's companion, AB 956.

As you're aware, Federal and state laws and regulations recognize and extend protections to the valuable functions that wetlands provide. In addition to habitat, two of the most important are water quality improvement and flood control. In most cases, when valuable wetland functions like these are impacted by development, there is a requirement that other wetlands be restored, enhanced, created or preserved.

However, in many development projects, this mitigation occurs far from the impacted wetland. By adopting the language in Assembly Amendment 1, SB 816 would require mitigation bank and permittee responsible projects, when possible, to take place within the same compensation search area as the impacted project. This area can include one of 22 management areas, the county in which the impacted wetland is located, or a 20-mile radius from the impacted wetland.

This is important because impacts to wetlands often have significant effects on the hydrology of the watershed in which they're located. If you compare a map of our state's impaired waters with a map of where we've lost wetlands, they match up very well. Wetlands provide local benefits for our waters and communities, and therefore mitigation for wetland loss should take place as close to the impacted site as possible.

We appreciate the opportunity to provide this testimony today. To the members of this committee, please consider us a resource and know that we are available to help you and your staff understand how we can protect and restore wetlands in a manner that allows our businesses and communities to grow.

Please don't hesitate to contact us with any additional questions or concerns you may have.

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Department of Administration  
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**Tom Barrett**  
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**Sharon Robinson**  
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Director of Intergovernmental Relations

**City of Milwaukee Testimony for Information on SB 816**  
**Senate Committee on Natural Resources and Energy**  
**February 28, 2018**

Thank you, Senator Cowles and committee members, for hearing testimony regarding this bill. The City of Milwaukee does not oppose SB 816 but submits this testimony to oppose and raise concerns regarding an amendment to the bill added by the Assembly.

The Assembly companion bill, AB 956, was considered by the Assembly during its floor session on February 20<sup>th</sup>. Late in the evening, around 10:00 p.m., Amendment 3 was offered by Representative Kuglitsch and adopted by a voice vote. Amendment 3 has nothing to do with wetlands mitigation; the amendment prohibits Milwaukee County or the City of Milwaukee from utilizing its historic preservation process to designate a historic landmark or historic district “if the landmark or district contains a pump house (sic) or municipal building built in 1931 by the city of Milwaukee.” This amendment appears to be targeted legislation for a single property and a single property owner in the City of Milwaukee and is a clear attempt to circumvent the local historic preservation process. No City officials were consulted prior to this amendment being offered. Amendment 3 is a circumvention of local control that could have future ramifications. This historic preservation issue is not a matter of statewide concern and the City is very concerned over the legislature’s willingness to bypass the authority of its local elected officials without discussion. The City would ask that the Senate decline to adopt Amendment 3 or any amendment offered with similar language in its consideration of SB 816.

For additional information, please contact: La Keisha W. Butler, (414) 286-5513; labutl@milwaukee.gov



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# RON TUSLER

STATE REPRESENTATIVE • 3<sup>rd</sup> ASSEMBLY DISTRICT

## Testimony

on

### Senate Bill 816

Senate Committee on Natural Resources & Energy

February 28, 2018

Mr. Chairman and members of the committee, thank you for hearing Senate Bill 816. This bill will incentivize the creation of wetlands in needed areas.

Currently, the release of credits from wetland mitigation banks do not match the real progress toward the creation, restoration, or preservation of mitigation banks. Further, areas with high costs to create wetlands are often developed and developing areas—areas that need wetlands the most. Alternatively, wetlands are created in lower-cost areas that are not in as great of need of the benefits wetlands provide or the In-Lieu Fee program sees greater utilization. The credit release schedule and location requirements in this bill incentivize the creation of wetlands in these developed or developing areas.

First, under current law, satisfying a mitigation requirement through the In-Lieu Fee program may be accomplished by creating or purchasing credits from a mitigation bank. The current release schedule for credits if a mitigation bank is created is back-heavy, with most credits not being released until after two years.<sup>1</sup> This bill ties the credit release schedule to benchmarks during the establishment of a mitigation bank according to the following:

- No more than 20 percent of the estimated credits after the DNR approves and executes the mitigation bank document establishing the specifications for the mitigation bank;
- No more than 65 percent of the estimated credits after the applicant or bank sponsor is issued a letter of compliance that construction and all corrective actions are complete;
- No more than 85 percent of the estimated credits after the department approves a monitoring report, but not earlier than 2 years after construction of the mitigation project;
- 100 percent of the estimated credits after the department approves the final monitoring report and determines that all performance standards applicable to the mitigation bank are met.

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<sup>1</sup> See NR 350.13 (7) (DNR may release up 10%, 20%, 30% and 100% of credits upon the completion of certain benchmarks).

These benchmarks will speed the availability of mitigation credits while also ensuring that real, concrete progress is being made toward the creation or other enhancement of wetlands.

Second, this bill encourages mitigation occur in the same area impacted by a discharge. The bill requires the purchase of credits in the same "compensation search area," of a discharge, defined as the same geographic management unit of a wetland impacted by a discharge, the county of the impacted wetland, and a 20-mile radius from the impacted wetland. If mitigation cannot be performed in that area, only then may mitigation be performed elsewhere in the state.

Additionally, the bill requires the DNR promulgate financial assurance rules. Financial surety will ensure that projects are completed if for whatever reason a mitigation bank developer decides not to compete a project.

Thank you for your time and consideration. These simple and straightforward changes will have meaningful impacts by incentivizing the creation of wetlands in needed areas and requiring, when possible, mitigation occur in the same areas as the initial disruption.