



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON NAVIGABILITY AND DRAINAGE
DITCHES

FROM: Rachel E. Letzing, Senior Staff Attorney; and David L. Lovell, Senior Analyst

RE: Current Law Relating to the Definition of Navigability and Agricultural Drainage

DATE: January 17, 2007

This Memo provides background information regarding the current Wisconsin law of navigability and current law regarding agricultural drainage. The section of the Memo on agricultural drainage does not address drainage districts regulated under ch. 88, Stats.

CURRENT LAW ON NAVIGABILITY OF LAKES AND STREAMS IN WISCONSIN

The determination of navigability has important consequences. In Wisconsin, navigable waters are public waters, and the public has a constitutionally guaranteed right to use these waters. Further, the right of riparian property owners (i.e., owners of land adjacent to a lake or stream) to use navigable waters is subject to paramount public rights. Once a lake or stream is determined to be navigable, almost all proposed private uses that involve structures in or changes to navigable waters must be weighed against public rights. If the proposed private use is too much in conflict with public rights, the riparian owner may be unable to secure the necessary approval for the project.

Special Committee members are cautioned that there is a great deal of law on the issue of navigability and its consequences. This Memo is far too brief to describe all aspects of this body of law. The intent of this part of the Memo is to focus on those aspects of the current law that are most relevant to the Special Committee discussion.

Early Wisconsin Court Cases and Statutes on Navigability

The phrase “navigable in fact” was first used in a decision of the Wisconsin Supreme Court in the early years of statehood. “If the stream is navigable in fact, the public have the right to use it for the

purposes of navigation, and the right of the [riparian] owner is subject to the public easement.” [*Jones v. Pettibone*, 2 Wis. 308, 320 (1853).]

The “navigable in fact” test means that navigability is determined by actual navigation, rather than by reference to some other characteristic of the waters in question (e.g., the “salt-water” test of navigability, used in some eastern states, in which navigability is determined by the highest upstream reach of tidewater).

During the remainder of the 19th Century, the Wisconsin Supreme Court used the commercial “saw log” test to determine the navigability of streams. If a stream was capable of floating logs to market during the annual period of high water, even though it was necessary to remove brush, the stream would be held navigable. [*Olson v. Merrill*, 42 Wis. 203 (1877).]

As the logging era ended during the early part of the 20th Century, the Legislature expanded the “navigable in fact” test beyond the Supreme Court’s saw log test.

SECTION 1596. (1) All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States *and all rivers and streams, meandered or non-meandered, which are navigable in fact for any purpose whatsoever* are hereby declared navigable to the extent that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the legislature.... [Chapter 652, Laws of 1911.]

The italicized portion set out above was added to the pre-existing statute. The Wisconsin Supreme Court responded to this new statutory framework and increasingly recognized public rights of recreation in navigable waters. The effect was to lay the groundwork for the present recreational definition of navigability. The court acknowledged that it was expanding the scope of navigability, but held that this was consistent with the purpose of the public trust in navigable waters:

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein. [*Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914).]

Current Statutory Definition of Navigability

The core of the current law on navigability is contained in s. 30.10 (1) and (2), Stats. The recent court cases on navigability interpret and apply this statute. In Wisconsin, “navigable” means “navigable in fact.”

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

(2) STREAMS. ... [A]ll streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.

These two subsections of the statutes also state the effect of a finding of navigability: navigable waters are public waters under the stewardship of the state and the private rights of riparian property owners in those waters are subordinate to the rights of the public.

Current Court Cases on Navigability

A *lake* is navigable if it can be traversed by shallow draft recreational craft, such as canoes and skiffs. Even though the body of water in question is a shallow, muddy marsh, it may still be held a navigable lake. [*Baker et al. v. Voss*, 217 Wis. 415, 259 N.W. 413 (1935).]

The current test of navigability for *streams* was most fully expressed in the *De Gayner* case. [*De Gayner and Co. v. DNR*, 70 Wis. 2d 936, 236 N.W.2d 217 (1975).] De Gayner and Company was a real estate developer with title to all the land bordering Five Mile Creek, a tributary of the Namakagon River in Bayfield County. De Gayner proposed to dam the creek at a point just above the Namakagon and build about 500 housing units on the new lake. If Five Mile Creek was nonnavigable, De Gayner could have carried out this plan without a permit.

A group of citizens petitioned the Department of Natural Resources (DNR) for a declaratory ruling on the navigability of Five Mile Creek. DNR staff attempted to canoe the creek, and presented evidence that although the creek flowed during the entire year, it was only navigable due to the presence of beaver dams. DNR staff testified at the hearing that if the beaver dams were removed, the creek could only be navigated during the spring runoff. The administrative hearing examiner found that the creek was navigable and this became the decision of the DNR. This decision meant that De Gayner was required to obtain a dam permit from the DNR following a public hearing. It also meant that the DNR decision on whether to issue the permit could be materially affected by testimony that public rights in the creek would be adversely affected by the dam.

Upon appeal by De Gayner, the Circuit Court for Dane County upheld the DNR decision. De Gayner then appealed to the Wisconsin Supreme Court, which upheld the circuit court and the DNR.

The Supreme Court reviewed the evidence presented by DNR at the administrative hearing and developed a comprehensive test of navigability for streams. Most of this test comes from previous

recreational and commercial tests of navigability but, as assembled by the court, the *De Gayner* test of navigability goes beyond the standard used previously by the DNR.

The *De Gayner* test of navigability may be summarized as follows:

1. Navigability is tested with the ***shallowest draft boat*** available for recreational use, i.e., a kayak or a canoe.
2. The stream does not need to be navigable at low water or even at its average flow. The navigability test may be ***performed at high water*** during spring runoff. The only limit on this aspect of the test is that the high water condition must be periodic and recurring.
3. A ***natural condition of long standing***, such as beaver dams, may make an otherwise nonnavigable stream navigable.
4. An ***artificial condition of long standing***, such as a channel, may make an otherwise nonnavigable stream navigable.

Effect of a Navigability Determination on the Riparian Property Owner

In Wisconsin, a body of water is either navigable or nonnavigable. Any use of the body of water, whether navigable or not, by a riparian property owner must be reasonable. [*Fox River Flour and Paper Co. v. Kelley*, 70 Wis. 281, 35 N.W. 744 (1887).] If the body of water is nonnavigable, court cases provide that the riparian property owner's use of the water is measured only in relation to the rights of other riparian owners. If the body of water is navigable, the use by a riparian owner is subject to public rights, as well as the rights of other riparian owners.

The navigable waters of Wisconsin are held in trust, under Wisconsin's "public trust doctrine," by the state for the public. [See *State v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71 (1957).] As a result, the state provides remedies for the public where actions of riparian owners may affect the public rights in navigable waters. These public rights are extensive and include boating, canoeing, bathing, fishing, and hunting. [See *Munninghoff v. Wisconsin Conservation Commission*, 255 Wis. 252, 38 N.W.2d 712 (1949).]

In the first instance, courts will grant injunctive relief to protect the public rights in navigable waters, even though the person affected may not be a riparian owner. For example, the Wisconsin Supreme Court has enjoined the maintenance of a fence across a lakebed. [*Baker et al. v. Ross*, 217 Wis. 415, 259 N.W. 413 (1935).] This remedy is codified in s. 30.294, Stats., which declares every unauthorized structure in navigable waters a public nuisance and allows "any person" to bring an action to abate the nuisance.

The more commonly used means to maintain the public rights in navigable waters is through administrative supervision of those waters. The DNR is the principal agency charged with administering the public trust in navigable waters. Chapters 30, 31 and 281, Stats., contain most of the authority necessary to carry out this task.

In many cases, the private use of navigable waters and the beds under them by riparian owners does not conflict with public rights, and the DNR will issue a permit for a proposed project. However, if

there is a conflict between private and public uses, the riparian owner may be unable to secure approval for the project.

The following is a list of some of the statutes that require DNR supervision of navigable waters. The DNR is empowered to issue individual or general permits for:

- Placing structures or deposits in navigable waters [s. 30.12, Stats.]. A riparian owner may be exempt from permit requirements if the placement or deposit is located in an area other than an area of special natural resource interest,¹ does not interfere with riparian rights of other riparian owners, and is included in the list of statutory exemptions, which include:
 - A sand, gravel or stone deposit that totals less than two cubic yards that is associated with an exempt activity or project,
 - A fish crib placed on the bed of navigable waters for the purpose of improving fish habitat,
 - Riprap not to exceed 100 linear feet that replaces existing riprap located in an inland lake or Great Lakes water body that includes the replacement of filter fabric or base substrate.
- Constructing or maintaining bridges or culverts in navigable waters [s. 30.123, Stats.]. A person may be exempt from permit requirements for the following types of projects:
 - Construction and maintenance of highway bridges,
 - Construction and maintenance of bridges by the DOT,
 - Construction or placement and maintenance of a culvert to replace a culvert authorized under a permit issued under s. 30.12 or 30.123, if the construction, placement, and maintenance will comply with the same conditions of the permit,
 - Construction or placement and maintenance of a culvert to replace a culvert that has an inside diameter that does not exceed 24 inches.
- Diverting water from navigable lakes and streams, explicitly including diversions for purposes of agriculture or irrigation [s. 30.18, Stats.].
- Constructing artificial waterways connecting with or located within 500 feet of navigable waters and grading or removing more than 10,000 square feet on the bank of navigable waters.² Activities that may qualify for an exemption from permit requirements include the

¹ “Area of special natural resource interest” means any of the following: a state natural area designated or dedicated under ss. 23.27 to 23.29; a surface water identified as a trout stream by the DNR; a surface water identified as an outstanding or exceptional resource water under s. 281.15; an area that possesses significant scientific value, as identified by DNR. [s. 30.01 (1am), Stats.]

² “Bank” means either of the following: (1) land area that is, in size, the greater of the following: (a) the portion of land surface that extends 75 feet landward from the ordinary high-water mark of any navigable waterway; or (b) the portion of land surface extending landward from the ordinary high-water mark of any navigable waterway to the point where the slope is less than 12%; or (2) a bank as determined by DNR administrative rule (NR 341), promulgated in accordance with the standards under s. 30.19 (1d), Stats.

construction or repair of any public highway, any agricultural use of land (as defined s. 30.40, Stats.), any activity that affects a portion of a navigable stream in a county with a population of 750,000 or more, and any work required to maintain the original dimensions of an enlargement of an artificial water body done under a permit or authorization. [s. 30.19 (1g) (a), (am), and (c).]

- Changing the course of or straightening a navigable stream [s. 30.195, Stats.].
- Dredging materials from the beds of navigable waters [s. 30.20, Stats.]. Activities that may qualify for an exemption from permit requirements include the following:
 - Removal of material from the bed of a farm drainage ditch that was not a navigable stream before ditching, but not if the removal will have long-term adverse effect on cold-water fishery resources or may destroy fish spawning beds or nursery areas. A person must notify DNR 10 days prior to dredging if the removal will have long-term adverse effect on cold-water fishery resources or may destroy fish spawning beds or nursery areas.
 - Removal of material that does not contain hazardous substances, that is not being removed from an area of special natural resource interest³ and if the removal is either necessary to place or maintain a structure that is exempt from any ch. 30 permit requirements, or the removal is by hand or hand-held devices without the use or aid of external or auxiliary power.
- Building dams in navigable streams [ss. 31.05 and 31.13, Stats.].

The declaration of navigability also has implications regarding the land surrounding the body of water, since that land is thereby subject to shoreland zoning, wetlands protection, and floodplain ordinances. [See ss. 59.692, 61.351, 62.231 and 87.30, Stats.]

AGRICULTURAL DRAINAGE

Agricultural drains generally consist of either a stream that has been modified to facilitate drainage by straightening the stream or increasing its depth, or a channel constructed in a low area of agricultural land where no stream previously existed.

Current law provides a general exemption from regulation under ch. 30, Stats., for farm drainage ditches. Section 30.10 (4) (c), Stats., declares farm drainage ditches to be “not navigable” unless it is shown that the ditches were “navigable streams” before ditching. In order for the exemption to apply, the farm drainage ditch must consist of an “artificial channel” which “drains water from lands which are used for agricultural purposes.” This exempts farm drainage ditches that meet the conditions of the

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statute from ch. 30 regulations related to the placement of structures and deposits in navigable waters and dredging or filling navigable waters.

The exemption for farm drainage ditches does not apply to the restrictions on diversions of water from lakes and streams under s. 30.18, Stats., because the statute applies to both navigable and nonnavigable waters. Under this statute, a permit is required for diversion of water for the purpose of agriculture or irrigation.

Another limit on the exception for farm drainage ditches is that the DNR may require an individual or general permit for removal of materials from the bed of a drainage ditch, which would otherwise be exempt, if the proposed removal of material may have a “long-term adverse effect on cold-water fishery resources or may destroy fish spawning beds or nursery areas.” [s. 30.20 (1g) (a) 1., Stats.]

In addition to the general drainage ditch exemption under s. 30.10, Stats., different standards for the exemption are provided for Duck Creek Drainage District No. 6 in Outagamie County under s. 30.20 (1g) (c), Stats.

Farm drainage ditches are exempt from floodplain zoning and shoreland and wetland zoning under certain circumstances. Floodplain zoning regulations do not apply to a farm drainage ditch if the ditch is not in the floodplain of a natural navigable stream, the ditch was a nonnavigable stream before ditching, and the lands are maintained in nonstructural agricultural use. [s. 87.30 (1m), Stats.] Shoreland and wetland zoning ordinances do not apply to lands adjacent to a farm drainage ditch if the lands are not adjacent to a natural navigable stream, those parts of the drainage ditch were nonnavigable streams before ditching, and the lands are maintained in nonstructural agricultural use. [s. 281.31 (2m), Stats.]

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