



WISCONSIN LEGISLATIVE COUNCIL  
REPORT TO THE LEGISLATURE

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SPECIAL COMMITTEE ON  
NAVIGABILITY AND  
DRAINAGE DITCHES

[2007 SENATE BILLS 235 AND 236]

July 19, 2007

RL 2007-06



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# Special Committee on Navigability and Drainage Ditches

Prepared by:  
David L. Lovell, Senior Analyst, and Rachel Letzing, Senior Staff Attorney  
July 19, 2007

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# PART I

## KEY PROVISIONS OF COMMITTEE RECOMMENDATIONS

The Joint Legislative Council has introduced the following legislation in the 2007-08 Session of the Legislature at the recommendation of the Special Committee on Navigability and Drainage Ditches.

### **2007 Senate Bill 235, Relating to Appeals From the Determination That a Body of Water is Navigable, Mapping of Navigable Streams, the Exemption for Certain Drainage Ditches From Certain Permit Requirements, Notices in Forms for Building Permit Applications and for Offers to Purchase Real Property Regarding Wetlands and Navigable Streams, and Requiring the Exercise of Rule-Making Authority**

2007 Senate Bill 235 does all of the following:

- Specifies the administrative procedure the Department of Natural Resources (DNR) must use in making determinations that a waterway is navigable.
- Directs the DNR to promulgate administrative rules that describe the methods it uses for making determinations of navigability.
- Specifies that appeals of determinations of navigability are made directly to the circuit court in the county in which the affected land is located.
- Requires the DNR to develop and make publicly available maps and data that show the results of its determinations of navigability.
- Renumbers and modifies the current statutory exemption for farm drainage ditches to provide an exemption from regulation, rather than an exemption from the definition of “navigable,” and clarifies the exemption so that it applies only to projects for an agricultural purpose.
- Requires that forms for building permit applications and offers to purchase real property include notices regarding potential implications of any wetlands or navigable waters that may be present on the building site or real property.

### **2007 Senate Bill 236, Relating to Creating a Presumption of Reasonableness for Certain Drainage Board Orders**

2007 Senate Bill 236 requires that if a drainage district board has issued an order requiring maintenance or repair of a drain in the district, and the order is challenged, the hearing examiner or circuit court must presume that drainage district board order is reasonable.



## PART II

### COMMITTEE ACTIVITY

#### Assignment

The Joint Legislative Council established the Special Committee on Navigability and Drainage Ditches and appointed the chairperson by a June 9, 2006 mail ballot. The committee was directed to review methods to clarify “navigability” as defined in statutes and administrative rules, with a focus on how the definition of navigability impacts the regulation of drainage ditches and ditches with no stream history. The committee was also directed to review the methods the DNR uses to determine navigability.

Membership of the Special Committee, appointed by an August 1, 2006 mail ballot, consisted of two Senators, three Representatives, and five public members. A list of committee members is included as *Appendix 3* to this report.

#### Summary of Meetings

The Special Committee held one meeting in the State Capitol in Madison on January 23, 2007.

At the January 23, 2007 meeting, the committee heard testimony from Mary Ellen Vollbrecht, Section Chief, Waterways Protection, DNR, regarding the statutory and common law definitions of navigable waters and the "navigable in fact" test, and the current law exemption for farm drainage ditches under s. 30.10, Stats. After Ms. Vollbrecht's presentation, the committee engaged in a discussion of WLC: 0065/1, relating to appeals from the determination that a stream is navigable, the mapping of navigable streams, and possible methods of notifying landowners that wetlands or navigable waterways may be present on or adjacent to their property. After a lengthy discussion, Chair Lasee offered a proposal to modify WLC: 0065/1. During the subsequent committee discussion of Chair Lasee's proposal, the committee also briefly discussed including a provision in the bill draft which would maintain but clarify the current statutory exemption for farm drainage ditches, and voted to include this item in the draft. After discussing all of the proposed modifications to WLC: 0065/1, there was consensus that WLC: 0065/1, as amended, should be placed in a mail ballot for a committee vote. Representative Albers requested that Legislative Council staff draft a separate bill to address her concerns regarding the deference given to drainage district board orders. There was a consensus of the committee to include this additional draft in a mail ballot for a committee vote.





# PART III

## RECOMMENDATIONS INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

This part of the report provides background information on, and a description of, the bills as recommended by the Special Committee on Navigability and Drainage Ditches.

### 2007 Senate Bill 235

#### Background

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.

The definition of “navigability” has developed over the history of the state through common law, i.e., court decisions. The core of the current law on navigability is now contained in s. 30.10 (1) and (2), Stats., which declares lakes and streams that are “navigable in fact” to be public waters. Recent court cases on navigability interpret and apply this statute. In Wisconsin, “navigable” means “navigable in fact.” The status of farm drainage ditches is addressed in s. 30.10 (4) (c), Stats., which states that a farm drainage ditch is not navigable unless it was a navigable stream before ditching.

The DNR determines whether waters are navigable on a case-by-case basis, in the context of reviewing applications for permits or investigating activities done without permits. With regard to waterways that are not obviously “navigable in fact,” the DNR consults a number of information sources and considers a number of factors in determining whether the stream is navigable. It will review previous permit applications related to the same waterway and consult information sources such as U.S. Geological Survey topographic maps, soil survey maps, aerial photography, original government public land surveys, and more recent property border surveys. If this information is inconclusive, DNR staff will make a site visit and observe stream width and depth, stream bed and bank substrate, and weather conditions during and preceding the visit, and may conduct a “float test” with a commercially available canoe or kayak.

Two administrative procedures exist under which the DNR makes determinations of navigability. In instances in which the DNR is reviewing a permit application, the determination of navigability would be made in that review process. That process involves a contested case hearing prior to the DNR’s determination, which may be followed by appeals. The first level of appeal is before an administrative law judge, the results of which can be further appealed to the Circuit Court for Dane County (the county in which the determination was made).

Where no permit application is pending, a person can request a declaratory ruling by the DNR regarding the navigability of a waterway. Rulings under this process require only an informational hearing, and may be appealed directly to circuit court.

## Description

This bill has two principal prongs. The first is to enhance a landowner's ability to seek judicial review of a determination by the DNR that a waterway is navigable. The second is to create mechanisms to alert landowners that navigable waters or wetlands on or adjacent to their land could affect their ability to conduct certain activities on the land.

With regard to the first prong, the bill specifies that the DNR must use the declaratory ruling process in making determinations that a waterway is navigable. It further specifies that appeals of such determinations are made to the circuit court for the county in which the affected land is located.

With regard to the second prong, the bill requires that forms for building permit applications and for offers to purchase real property include notices stating that the presence of any wetlands or navigable waters on or adjacent to the property could result in the need for a permit from the DNR for certain activities, and advising the applicant or potential buyer to consult the DNR, a private professional consultant or the local zoning authorities regarding the possibility that navigable waters or wetlands are on or adjacent to the property. The bill further provides that local governments may exhaust their existing supply of building permit application forms before they are required to use forms with the new notice.

The bill contains two additional provisions. First, it renumbers and revises the current statute that exempts farm drainage ditches with no prior history of navigability from certain permit requirements under ch. 30, subch. II, Stats. The revised wording specifies that the exemption applies to a project for an agricultural purpose, not to the farm drainage ditch itself. Consequently, a project for a nonagricultural purpose would require a permit, even though the drainage ditch was originally constructed as and continues to be used as a farm drainage ditch. It also specifies the kinds of evidence that may be used to show stream history.

Second, the bill directs the DNR to promulgate rules regarding:

- The standards in common law and statutes for determining whether a body of water is a lake or a stream;
- The methods used by the DNR for making determinations whether a lake or stream is navigable; and
- The kinds of scientific evidence that may be used to show that a farm drainage ditch was a navigable stream before ditching.

Note that this provision does *not* give the DNR authority to change the common law and statutory standards; in this rule-making, it can only restate those standards, in addition to the other information required.

## 2007 Senate Bill 236

### Background

The current practice of many administrative law judges and courts is to presume that drainage district board decisions are reasonable and consistent with drainage district boards' responsibilities under ch. 88, Stats.

Section 903.01, Stats, specifies that once a presumption is established, the burden of production and persuasion shifts to the party opposing the presumption. Therefore, the party relying on the presumption is not required to prove the basic facts underlying the presumption. However, the party challenging the presumption has the burden of proving that the nonexistence of the presumed fact

is more probable than its existence. For example, under Senate Bill 236, which creates a formally recognized statutory presumption, if a drainage district board issues an order requiring the maintenance or repair of a drain in the district, the order is presumed to be reasonable. A party challenging the work performed under the order may provide evidence that the order is unreasonable. Unless the hearing examiner or court finds that it is more probable that the order is unreasonable, it must find that the drainage district board order is reasonable.

## **Description**

2007 Senate Bill 236 codifies current practice in order to ensure that drainage district board orders are treated consistently throughout the state and creates a formally recognized statutory presumption. The bill specifies that if a drainage district board issues an order requiring the maintenance or repair of a drain in the district, and the work performed pursuant to the order is challenged, a hearing examiner or circuit court must presume that the order is reasonable.



### Committee and Joint Legislative Council Votes

WLC: 0065/2 and WLC: 0091/1 were recommended by the Special Committee on Navigability and Drainage Ditches to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature.

#### Special Committee Votes

The Special Committee voted to recommend WLC: 0065/2 to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature. The vote on the draft was as follows:

- WLC: 0065/2, relating to appeals from the determination that a stream is navigable, mapping of navigable streams, the exemption for certain drainage ditches from certain permit requirements, and notices in forms for building permit applications and for offers to purchase real property regarding wetlands and navigable streams and requiring rule-making: Ayes, 10 (Sens. Lasee and Grothman; Reps. Albers, Gronemus, and Hahn; and Public Members Ainsworth, Bradley, Gollon, Meyer, and Storlid); Noes, 0; and Not Voting, 0.

The Special Committee voted to recommend WLC: 0091/1 to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature. The vote on the draft was as follows:

- WLC: 0091/1, relating to relating to creating a presumption of reasonableness for drainage district board orders: Ayes, 9 (Sens. Lasee and Grothman; Reps. Albers, Gronemus, and Hahn; and Public Members Ainsworth, Bradley, Gollon, and Storlid); Noes, 1 (Public Member Meyer); and Not Voting, 0.

#### Joint Legislative Council Votes

At its March 14, 2007 meeting, the Joint Legislative Council voted as follows on the recommendation of the Special Committee:

*Sen. Risser moved, seconded by Sen. Carpenter, that WLC: 0065/2, relating to appeals from the determination that a stream is navigable, mapping of navigable streams, the exemption for certain drainage ditches from certain permit requirements, and notices in forms for building permit applications and for offers to purchase real property regarding wetlands and navigable streams and requiring rule-making, be introduced by the Joint Legislative Council. The motion passed on a roll call vote as follows: Ayes, 13 (Reps. Wieckert, Ballweg, Berceau, Fitzgerald, and Schneider; and Sens. Risser, Carpenter, Coggs, Darling, Fitzgerald, Harsdorf, Lasee, and Robson); Noes, 3 (Reps. Gottlieb and Rhoades; and Sen. Miller); and Absent, 6 (Reps. Huebsch, Kaufert, Kreuser, and Pocan; and Sens. Breske and Decker).*

*[Rep. Kaufert and Sen. Decker would have voted Aye had they been present.]*

*Sen. Lasee moved, seconded by Sen. Carpenter, that WLC: 0091/1, relating to creating a presumption of reasonableness for drainage district board orders, be introduced by the Joint Legislative Council.*

*The motion failed on a roll call vote as follows: Ayes, 10 (Reps. Wieckert, Ballweg, Fitzgerald, Gottlieb, Rhoades, and Schneider; and Sens. Darling, Fitzgerald, Harsdorf, and Lasee); Noes, 6 (Rep. Berceau; and Sens. Risser, Carpenter, Coggs, Miller, and Robson); and Absent, 6 (Reps. Huebsch, Kaufert, Kreuser, and Pocan; and Sens. Breske and Decker).*

*[Rep. Kaufert would have voted Aye had he been present. Sen. Decker would have voted No had he been present.]*

WLC: 0091/1 failed to get the necessary votes required for introduction by the Joint Legislative Council. Subsequent to the meeting, a petition for reconsideration, signed by 12 Council members, was submitted to the Council on the proposal.

At its May 10, 2007 meeting, the Joint Legislative Council voted as follows on the recommendation of the Special Committee:

*Sen. Risser moved, seconded by Rep. Wieckert, that WLC: 0091/1, relating to creating a presumption of reasonableness for drainage district board orders, recommended by the Special Committee on Navigability and Drainage Ditches, be introduced by the Joint Legislative Council. The motion passed on a roll call vote as follows: Ayes, 12 (Sens. Breske, Darling, Fitzgerald, and Harsdorf; and Reps. Wieckert, Ballweg, Fitzgerald, Gottlieb, Huebsch, Kaufert, Rhoades, and Schneider); Noes, 8 (Sens. Risser, Carpenter, Coggs, Miller, and Robson; and Reps. Berceau, Kreuser, and Pocan); and Absent, 2 (Sens. Decker and Lasee).*

## Appendix 2

### Joint Legislative Council

*[Joint Legislative Council Members Who Selected and Appointed Committee and Its Membership]*

#### Co-Chair

**ALAN LASEE**  
*Senate President*  
2259 Lasee Road  
De Pere, WI 54115

#### Co-Chair

**STEVE WIECKERT**  
*Representative*  
1 Weatherstone Drive  
Appleton, WI 54914

#### SENATORS

**RONALD W. BROWN**  
1112 Violet Avenue  
Eau Claire, WI 54701

**DAN KAPANKE**  
1610 Lakeshore Drive  
La Crosse, WI 54603

**DALE SCHULTZ**  
*Majority Leader*  
515 N. Central Avenue  
Richland Center, WI 53581

**RUSSELL DECKER**  
6803 Lora Lee Lane  
Schofield, WI 54476

**MARK MILLER**  
4903 Roigan Terrace  
Monona, WI 53716

**DAVID ZIEN**  
*President Pro Tempore*  
1716 63<sup>rd</sup> Street  
Eau Claire, WI 54703

**SCOTT FITZGERALD**  
N4692 Maple Road  
Juneau, WI 53039

**FRED A. RISSER**  
5008 Risser Road  
Madison, WI 53705

**GLENN GROTHMAN**  
111 South 6<sup>th</sup> Avenue  
West Bend, WI 53095

**JUDY ROBSON**  
*Minority Leader*  
2411 E. Ridge Road  
Beloit, WI 53511

#### REPRESENTATIVES

**JOHN AINSWORTH**  
W6382 Waukechon Road  
Shawano, WI 54166

**MICHAEL HUEBSCH**  
*Majority Leader*  
419 West Franklin  
West Salem, WI 54669

**MARLIN D. SCHNEIDER**  
3820 Southbrook Lane  
Wisconsin Rapids, WI 54494

**PEDRO COLON**  
338 West Walker Street  
Milwaukee, WI 53204

**DEAN KAUFERT**  
1360 Alpine Lane  
Neenah, WI 54956

**DAVID TRAVIS**  
5440 Willow Road  
Waunakee, WI 53597

**STEPHEN J. FREESE**  
*Speaker Pro Tempore*  
310 East North Street  
Dodgeville, WI 53533

**JIM KREUSER**  
*Minority Leader*  
3505 14th Place  
Kenosha, WI 53144

**JOHN GARD**  
*Speaker*  
481 Aubin Street, P.O. Box 119  
Peshtigo, WI 54157

**ANN NISCHKE**  
202 W. College Avenue  
Waukesha, WI 53186

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

## Joint Legislative Council

*[Current Joint Legislative Council Members Receiving Committee Report]*

### Co-Chair

#### **FRED RISSER**

*Senate President*  
5008 Risser Road  
Madison, WI 53705

### Co-Chair

#### **STEVE WIECKERT**

*Representative*  
1 Weatherstone Drive  
Appleton, WI 54914

### SENATORS

#### **ROGER BRESKE**

8800 Hwy. 29  
Eland, WI 54427

#### **TIM CARPENTER**

*President Pro Tempore*  
2957 South 38<sup>th</sup> Street  
Milwaukee, WI 53215

#### **G. SPENCER COGGS**

3732 North 40<sup>th</sup> Street  
Milwaukee, WI 53216

#### **ALBERTA DARLING**

1325 West Dean Road  
River Hills, WI 53217

#### **RUSSELL DECKER**

6803 Lora Lee Lane  
Weston, WI 54476

#### **SCOTT FITZGERALD**

*Minority Leader*  
N4692 Maple Road  
Juneau, WI 53039

#### **SHEILA HARSDORF**

N6627 County Road E  
River Falls, WI 54022

#### **ALAN LASEE**

2259 Lasee Road  
De Pere, WI 54115

#### **MARK MILLER**

4903 Roigan Terrace  
Monona, WI 53716

#### **JUDY ROBSON**

*Majority Leader*  
2411 E. Ridge Road  
Beloit, WI 53511

### REPRESENTATIVES

#### **JOAN BALLWEG**

170 W. Summit Street  
Markesan, WI 53946

#### **TERESE BERCEAU**

4326 Somerset Lane  
Madison, WI 53711

#### **JEFF FITZGERALD**

*Majority Leader*  
910 Sunset  
Horicon, WI 53032

#### **MARK GOTTLIEB**

*Speaker Pro Tempore*  
1205 Noridge Trail  
Port Washington, WI 53074

#### **MICHAEL HUEBSCH**

*Speaker*  
419 West Franklin  
West Salem, WI 54669

#### **DEAN KAUFERT**

1360 Alpine Lane  
Neenah, WI 54956

#### **JIM KREUSER**

*Minority Leader*  
3505 14th Place  
Kenosha, WI 53144

#### **MARK POCAN**

309 N. Baldwin Street  
Madison, WI 53703

#### **KITTY RHOADES**

708 4th Street  
Hudson, WI 54016

#### **MARLIN SCHNEIDER**

3820 Southbrook Lane  
Wisconsin Rapids, WI 54494

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.



## Navigability and Drainage Ditches

Senator Alan J. Lasee, Chair  
2259 Lasee Road  
De Pere, WI 54115

Representative Barbara Gronemus  
36301 West Street  
P.O. Box 676  
Whitehall, WI 54773

Representative Eugene Hahn  
W3198 Old B Road  
Cambria, WI 53923

Jerry Bradley  
5209 County Road N  
Sun Prairie, WI 53590

George Meyer  
201 Randolph Drive  
Madison, WI 53717

Representative Sheryl Albers  
339 Golf Course Road  
Reedsburg, WI 53959

Senator Glenn Grothman  
111 South 6th Avenue  
West Bend, WI 53095

John H. Ainsworth  
W6382 Waukechon Road  
Shawano, WI 54166

David Gollon  
Gollon Bait & Fish Farm  
5117 State Road 191  
Dodgeville, WI 53533

Scott Storlid  
Natural Resources Consulting  
P.O. Box 128  
Cottage Grove, WI 53527

**STUDY ASSIGNMENT:** The current definition of navigability is a combination of statutes and Wisconsin court decisions. Some elements of the current test of navigability are quantitative or are based on factual observations by the DNR. The special committee is directed to review methods to clarify “navigability” as defined in statutes and administrative rules, with a focus on how the definition of navigability impacts the regulation of drainage ditches and ditches with no stream history. The committee is to review the methods the DNR uses to determine navigability.

**10 MEMBERS:** 2 Senators, 3 Representatives, and 5 Public Members.

**LEGISLATIVE COUNCIL STAFF:** David L. Lovell, Senior Analyst; Rachel Letzing, Senior Staff Attorney; and Julie Learned, Support Staff.



**Committee Materials List**  
 (Copies of documents are available at [www.legis.state.wi.us/lc](http://www.legis.state.wi.us/lc))

Recommendations to the Joint Legislative Council (March 14, 2007)					
<ul style="list-style-type: none"> <li>• <a href="#">Results</a> of JLC Meeting</li> <li>• Proposed <a href="#">Report</a> to the Legislature</li> <li>• <a href="#">WLC: 0065/2</a>, relating to appeals from the determination that a stream is navigable, mapping of navigable streams, the exemption for certain drainage ditches from certain permit requirements, and notices in forms for building permit applications and for offers to purchase real property regarding wetlands and navigable streams and requiring rule-making</li> <li>• <a href="#">WLC: 0091/1</a>, relating to creating a presumption of reasonableness for drainage district board orders</li> </ul>					
February 19, 2007 Mail Ballot					
<ul style="list-style-type: none"> <li>• <a href="#">WLC: 0065/2</a>, relating to appeals from the determination that a stream is navigable, mapping of navigable streams, the exemption for certain drainage ditches from certain permit requirements, and notices in forms for building permit applications and for offers to purchase real property regarding wetlands and navigable streams and requiring rule-making</li> <li>• <a href="#">WLC: 0091/1</a>, relating to creating a presumption of reasonableness for drainage district board orders</li> </ul>					
January 23, 2007 Meeting		<a href="#">Notice</a>	<a href="#">Agenda</a>	<a href="#">Audio</a>	<a href="#">Minutes</a>
<ul style="list-style-type: none"> <li>• <a href="#">Memo No. 1</a>, <i>Current Law Relating to the Definition of Navigability and Agricultural Drainage</i> (January 17, 2007)</li> <li>• <a href="#">WLC: 0065/1</a>, relating to appeals from the determination that a stream is navigable and the mapping of navigable streams</li> <li>• <a href="#">Draft</a> language distributed by Representative Sheryl Albers</li> <li>• <a href="#">Draft</a> language distributed by Representative Sheryl Albers</li> </ul>					