Floodplain and Shoreland Management Lotes

Wisconsin Floodway Development Standards

This article will be the first in a series addressing issues related to development in the floodway. Other topics will include LOMCs, unstudied areas and road and bridge construction.

One of the primary purposes of Wisconsin's Floodplain Management Program is to prevent increases in flood heights which can cause flood damage, endanger the life, health and property of floodplain residents, and lead to litigation among affected property owners. This purpose is one of the cornerstones of a national floodplain management program which has been developed by the Association of State Floodplain Managers, entitled "No Adverse Impact."

For 20 years, the state of Wisconsin has required an engineering analysis for all proposals to develop property in the regulated floodplain (the 1% chance flood or 100-year flood). The purpose of this analysis is to determine whether the project will increase the Regional Flood Elevation (RFE) by 1/100th of a foot or more. This standard is incorporated into the state's floodway standards and prohibits any obstructions to flow, which is defined as an increase in the RFE which equals or exceeds 1/100th of a foot.

Since one of the other primary purposes of the floodplain zoning code is to protect valuable floodplain areas from unwise development, this standard has been accepted and implemented by the majority of the 505 Wisconsin communities that participate in the National Flood Insurance Program (NFIP).

One of the selling points for this approach was that some flexibility was built into the

program. If a project would not cause any increase in the RFE (defined as less than .01 ft), then removal from the floodway was approved. If a proposed project exceeded the 1/100th of a foot standard, the project could still be approved if the developer could obtain flooding easements from all affected upstream and downstream property owners. These easements conveyed the rights to flood the described property to the developer (purchaser of the easement). After receipt of the easements, the community was free to adopt the higher profile and redraw the local map, eliminating the proposed site from the floodway and then permitting construction that met the applicable development standards.

While this approach meets state standards for floodplain development, the Department has been advised by the Federal Emergency Management Agency (FEMA) that this standard is in violation of the NFIP minimum development standards as outlined in 44 CFR and adopted by communities in order to participate in the NFIP.

Specifically, when a floodway has been computed and published on a FIRM, NFIP standards allow no (zero) increase in the RFE for any floodplain development. Development in the NFIP is defined as any man-made change to improved or unimproved real estate and includes, but is not limited, to new structures, placement of fill, placement of temporary structures, fences, new roads, bridges and other public infrastructure, and any other activity which would cause any obstruction to flow such that an engineering analysis would show any increase in the RFE.



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Chapter NR 115 Update

Wisconsin's efforts to update its 38-yearold statewide shoreland protection standards entered a new phase in summer 2006. Department of Natural Resources staff finished reviewing the 12,000 citizen comments received during and after public hearings in summer 2005 and in June reconvened the citizen advisory committee that had helped design the original proposal and had been meeting since the rewrite effort began in Fall 2002.

The advisory committee heard summaries of the public comments on the original proposal to update Chapter NR 115 of the Wisconsin Administrative Code, which governs such things as how far houses need to be set back from the water, lot sizes and limits on cutting down trees and other vegetation (see "Revision Post Hearings- 2006 and Beyond" at website on page 8).

The comments roughly fell into nine main areas with several common themes. The public has indicated:

Their desire for a concise code that

- increases flexibility while guaranteeing statewide consistency and increased protections for our natural resources, and
- They want the new regulations to be the same or more protective than current regulations.

Importantly, the critical player in carrying out and enforcing the rules – an association of Wisconsin county code administrators— said the rules were too complicated and unworkable.

The DNR is clearly going to have to make changes to get rules that work on the ground. The DNR must also address other major areas identified in the comments.

The DNR's goal in coming months will be working with members of the advisory committee, the county code administrators and other key stakeholders to address areas identified in the public comments (see "Revised Timeline" and "2006 Advisory Committee Information" at the

Continued on Page 8 . . .

Floodplain and Shoreland Management Notes

"Floodplain and Shoreland Management Notes" is published by the WDNR, Bureau of Watershed Management. Its purpose is to inform local zoning officials and others concerned about state and federal floodplain management, flood insurance, shoreland and wetland management, and dam safety issues. Comments or contributions are welcome.

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Photographs in this issue were provided by DNR file photos, MMSD file photos and FEMA.

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Under the NFIP standards, flooding easements cannot alone be used to compensate for obstructions caused by new development. While engineering encroachment studies could still be employed to remove lands from the floodplain, the analysis would have to show that the encroachment of the floodway lines causes no increase in RFE.

Although more restrictive than state regulations, NFIP standards do allow a participating community to allow an increase in the RFE in limited circumstances. A community can only consider approving an increase in the RFE, due to encroachment into the floodway, after other alternatives which would not increase the RFE have been evaluated and are determined to not be feasible. Documentation for supporting the conclusion should be maintained by the community in the project file.

In addition, individual legal notice must be given by the community to all property owners where changes to the floodplain/ floodway occur. These legal notices must clearly explain the impact of the proposed development specific to their individual property. General notices in papers or form letters not specific to the individual property do not meet the individual property notice requirement. Likewise, if an adjacent community(s) is impacted by the increases in the RFE, the community must also obtain written concurrence from the affected community's Chief Executive Officer.

The community must also certify that no existing structures on *any* property are

impacted by the increases in the RFE or expansion of the floodway. Finally, all of this information, in addition to the revised engineering modeling and other documentation supporting the change, needs be submitted to FEMA under the Conditional Letter of Map Revision (CLOMR) process and approved by FEMA *before* any work begins on the proposed project. Upon completion of the project, "as-built" information must be submitted to FEMA under a Letter of Map Revision (LOMR) to ensure the new floodplain and floodway are incorporated into future floodplain maps.

While DNR Regional engineering staff can provide assistance to communities and private applicants, it is incumbent on the applicant that the proper information and forms are submitted to FEMA and the necessary approvals are issued before proceeding with a project. For more information on the FEMA CLOMR/LOMR process, please visit the following website http://www.fema.gov/hazard/map/lomc. shtm, or call 877-336-2627.

For more information on FEMA regulations, please visit the following website http://www.fema.gov/plan/prevent/flood-plain/index.shtm, or call Eric Kuklewski at 312-408-5230, or eric.kuklewski@dhs.gov.

For information on DNR regulations pertaining to these issues, please contact Dean Stitgen at 608-266-1925, or dean.stitgen@dnr.state.wi.us, or call your regional floodplain engineering specialist.



-Example of development in the floodway requiring an engineering analysis

Caveat Emptor Exemplified

The State Supreme Court ruled today public policy precluded a negligence or nuisance suit against Shell Lake and a contractor who failed in initial attempts to reduce the water level of the 2500-acre lake. In a 4-3 decision, the Court upheld the trial court's summary dismissal of the claims.

The Supreme Court said several of the six public policy factors could apply in this case, but focused on the sixth – imposing liability would enter a field that has no sensible or just stopping point – as the reason it was compelled to preclude liability.

The court said plaintiffs in the case were aware of the flooding hazard surrounding the lake, but "continued to place themselves in harm's way, often by building dwellings below the 100-year floodplain for the lake." Further, the Court asked, "When the potential for damage from the Lake's flooding was known and of an ongoing nature, should an unsatisfactory abatement effort serve as the source of recoverable damages?" Writing the majority opinion, Justice Roggensack observed, "Just as we determined in our public policy analysis in Rockweit, it is probable that absent any act by the defendants, the plaintiffs, nevertheless, would have suffered damages."

Justice Roggensack also filed a concurring opinion noting the Appeals Court based its affirming decision on application of Restatement (Second) of Torts s. 324A (1965). She said analyzing the plaintiffs' claims under Restatement would have provided more guidance to those who assert or defend a tort claim based on the breach of a contract to which the plaintiff was not a party. "When we employ public policy factors to preclude liability," Roggensack wrote. "We engage in judicial line-drawing wherein we conclude there is

a lack of sufficient cause to hold a defendant liable. In so doing, we employ a case-by-case analysis that provides little guidance for the courts, future litigants or the public who may face similar legal issues in the future."

Justice Bradley wrote the dissent for the minority, which included Chief Justice Abrahamson and Justice Butler. She said she would follow "the better practice" and decline to apply public policy factors on the summary judgment record. And, she wrote, even if she were to attempt that application, it would not justifying limiting liability at this stage of proceedings. And, thirdly, she wrote to "observe that this case illustrates why there is often an uncomfortable fit between summary judgment methodology and application of the public policy factors."



-Elevated homes during flood

Allocation of Environmental Citation Monies

With any violation of state law, there is a minimum and maximum penalty which may be imposed by the court. These amounts are set by state statute.

Most civil forfeiture violations have a predetermined penalty established by a Uniform Bond Committee which annually makes recommendations for changes or additions to the Uniform Bond Schedules. This committee is made of State and Municipal Judges. Most criminal misdemeanor or felony violations simply have an appearance bond set in the Uniform Bond Schedule.

When a citation is issued for a forfeiture violation, the officer refers to the Uniform Bond Schedule for the total penalty that will be written on the citation. This is the amount the defendant may post if they do not plan to contest the charge and simply want to pay the ticket. If there is not a penalty listed in the bond schedule for a particular violation, the bond schedule directs the officer to use a forfeiture equal to 50% of the maximum.

If the court finds the defendant guilty of the charge, it may except the penalty listed on the citation, or increase or decrease the forfeiture.

In addition to the forfeiture or fine, there will generally be additional costs added which make up the total penalty which the defendant must pay if found guilty. These additional costs (court costs and related surcharges) are also prescribed by state statute.

If a \$100 forfeiture is imposed by the court for a violation, the \$100 will be deposited into the Common School Fund in accordance with the State Constitution [Article X, Section 2].

In addition to the \$100 forfeiture, the court is required to impose a 26% Penalty Sur-

charge (used for training of Law Enforcement Officers), a 10% Environmental Surcharge (under s. 299.93) to be paid into a state environmental fund, and about \$123 in other Court Costs & Surcharges:

- s. 302.46 Jail surcharge of 1% of the fine or forfeiture imposed or \$10, whichever is greater;
- s. 165.755 Crime laboratories and drug law enforcement surcharge of \$8;
- s. 814.63 Fee for forfeiture actions of \$25;
- s. 814.85(1) Court support services surcharge of \$68;
- s. 814.86 Justice information system fee and special prosecution clerks surcharge of \$12; and if in Milwaukee County
- s. 814.86(1m) Milwaukee County Special Prosecution surcharge of \$3.50.



Flood Map Modernization Progresses

by Ted Koch, State Cartographer

Floods are the nation's most common and costly disaster posing a significant threat to life and property. Wisconsin ranks tenth in the nation in documented flood damages, where flooding has been the principal cause in 16 out of 24 Presidential Disaster Declarations in Wisconsin over the thirty-year period - 1971 through 2001.

To reduce the expense to the federal government related to flooding, Congress established the National Flood Insurance Program in 1968. This program guaranteed that flood insurance would be available to communities that agreed to adopt land-use regulations so that new development would be reasonably protected from potential food damages, and so that businesses and homes lying within a floodplain would be eligible to buy flood insurance policies.

Map Modernization Program heightens need for revised flood mapping

Early in this decade, the Federal Emergency Management Agency (FEMA) developed the Flood Map Modernization Program designed to modernize flood mapping nationwide by 2008. To support Map Modernization, Congress in 2003 infused an additional \$150 million (from \$50 million) annually into the National Flood Mapping Program.

The intended goal of the additional funding was to improve and update the woefully deficient existing flood maps. The manual cartographic processes and limited topographic information available in the 1970s and 1980s produced maps that are inadequate for the precise identification of flood hazard areas in communities and for setting flood insurance rates. Nearly two-thirds of Wisconsin's existing flood hazard maps are more than 10 years old, which reduces the accuracy and usefulness of these maps, particularly in areas where there is development pressure near the state's streams and lakes.

Over the past three years, the expanded federal funding for flood mapping has had an impact in Wisconsin. Nineteen of the state's 72 counties have undergone a variety of revised mapping processes, with preliminary revised maps due for unveiling to the public this fall. Still, the increase in funding has not been sufficient to cover all of the map uddating needs in Wisconsin and in most other states.

The catastrophic flooding following Hurricane Katrina last year demonstrated how ill prepared we as a nation were to understand and respond to serious flooding events. Poor mapping contributes to this lack of understanding the impacts of flooding. Recently, many organizations and individuals, including the Association of State Floodplain Managers (http://www.floods.org/) headquartered in Madison, have been leaning on Congress to appropriate even more money toward flood mapping. It appears that Congress may be on the verge of doing this.

Congress set to enhance Map Modernization

Currently, both the House and Senate are considering reform and modernization appropriation bills which, if passed, will expand the specifications and content of flood maps. Some of the more notable proposed changes include the provision that flood maps identify all areas with a "500-year flood potential", identify areas of residual risk located behind levees. dams, and man-made structures, and areas that could be inundated as a result of dam failure. The draft bills also specify that new ground elevations be collected utilizing the newest technologies, that data be collected on a watershed basis, that published maps be in a digital format, and that they be compliant to geospatial data standards as established by the Open Geospatial Consortium. The bills also propose to remove the requirement that states contribute 50% to the cost of

Continued on Page 7..

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the revised mapping.

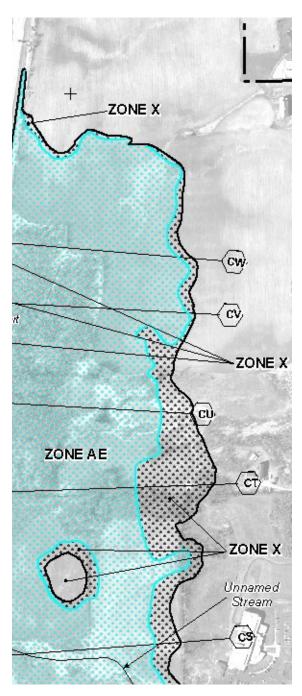
DNR coordinates flood mapping in Wisconsin

Wisconsin law requires that the state's communities enact floodplain zoning, and the statute holds the state responsible for ensuring that engineering and hydrologic studies are reasonable and accurate. Under this requirement, the WI Dept. of Natural Resources (DNR) has the responsibility for these assurances. Over the years, the DNR has developed the technical staff expertise to manage flood map modernization and other water regulatory responsibilities. This includes sixteen water management engineers working with hydrology, hydraulics, dam safety and water regulation permitting, floodplain planners and GIS staff to improve effectiveness and customer service.

The DNR is about to release its map modernization plan for 2007. Working with FEMA, the DNR plans to manage all aspects of the remapping work for eleven counties. At this time six counties have been identified: Barron, Dodge, Oconto, Outagamie, Sauk and Rusk. An additional five counties will be selected at a later time. The DNR will give highest priority to mapping counties who recently acquired detailed and comprehensive elevation data. All data and imagery used in the mapping process will be archived by FEMA.

For those mapping tasks requiring redefining and redrawing floodplain boundaries, the DNR intends to contract with Wisconsin based consulting firms. Overall, the DNR will work with local communities, counties, regional planning commissions, and other agencies to coordinate activities and encourage sharing of resources. For more information on Wisconsin flood mapping, contact Amanda Schwoegler at the DNR: 608/267-7571.

This article originally appeared in the Wisconsin Mapping Bulletin, June 2006 and was reprinted with permission. The Mapping Bulletin can be downloaded from the WI State Cartographers Office website: www.sco.wisc.edu.



-Example of a Digitized Flood Insurance Rate Map (DFIRM)

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website below). The DNR has relied on an open and participatory process for this revision. The DNR believes that this will be key to helping it find the proper balance between property owners' desires and the public's rights in Wisconsin waters.

Three technical work groups will help the DNR in this task (see "2006 Focus Groups" at website below). The first two groups will consider "impervious surfaces" and "mitigation" and try to develop options in those areas.

Impervious surfaces are surfaces that prohibit water infiltration into soils: paving, roofs, etc. The idea is that an impervious surface control standard could replace the non-conforming structure (NC) standard. Instead of regulating NC structures, it might focus on where a structure is built on a shoreland lot, connect this information with how the location impacts the water resource, and finally devise a plan that will address those impacts (see "Impervious Surface Goals" at website below).

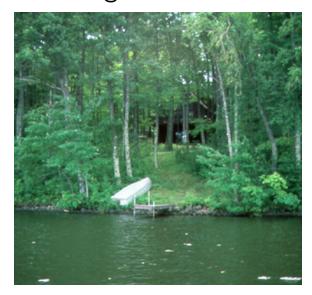
Mitigation is an action taken to minimize the impacts of development. A greater degree of flexibility can be introduced to the revision if mitigation measures are incorporated to balance the development with the impacts to the resource. The original proposal sought to let owners of grandfathered structures keep their structure indefinitely. But when the property owners decide to make major changes to their nonconforming structure, they would be required to take steps to mitigate or offset the impact of their actions on clean water and habitat in the portion of their property closest to the water. The mitigation focus group will now try to refine that concept to devise performance standards to offset impacts to water bodies by utilizing resource protection mechanisms that can realistically meet the standards over the long term. The group will focus on several types of mitigation, not just buffer restoration (see "Draft Mitigation 6-06" at website below).

Once those two groups have developed their options, a third group, comprised of county code administrators, will consider the options and make sure they are workable for the local officials who will be charged with administering and enforcing whatever final rules emerge from the revision process. Although the groups have some initial ideas to work with, this will be a work in progress over the summer and fall before final recommendations are incorporated into a new draft of NR 115.

DNR Water Division Administrator Todd Ambs has said he hopes to refine the rules to be acceptable to all parties. He anticipates taking a revised proposal back to the Natural Resources Board in several months, with public hearings on a new proposal likely sometime in 2007.

Details regarding the Focus Groups, past meetings and databases referenced above can be accessed at: http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/news.htm.

For more information contact:
Toni Herkert, Policy Coordinator,
Bureau of Watershed Management
Wisconsin Department of Natural
Resources
(608) 266-0161 or
toni.herkert@dnr.state.wi.us



The Wisconsin Association of Floodplain, Stormwater and Coastal Managers (WAF-SCM) will be holding its annual conference November 8-10, 2006 at the Holiday Inn in Stevens Point. The conference theme will be *Managing Flood Risks in a Post-Katrina World*.

The WAFSCM conference is an excellent venue to learn more about stormwater, coastal and floodplain issues at both the state and the national level. The 2006 conference will feature several speakers who will discuss their experiences along the Gulf Coast in the aftermath of Katrina. Mr. Al Goodman, Mississippi's NFIP Coordinator and Director of the Floodplain Management Bureau has been invited as the keynote speaker for the Thursday luncheon. With the large number of issues surrounding the aftermath of the

2005 hurricane season, the presentations should be timely and informative.

The conference will be attended by state, local and federal officials as well as consultants. Many participants take the opportunity to network within the relaxed atmosphere of the conference.

The conference will also feature a work-shop/training session on *Public Issues* and *Conflict Management* conducted by NOAA. An exam session for the Association of State Floodplain Managers' Certified Floodplain Manager certification will be held on Wednesday, November 8, 2006. For more information on the requirements for taking the CFM exam please go to www.floods.org and click on Certification.



4th Annual Conference

Call for Presentations

Abstract Submittal Process

Anyone wishing to present MUST submit an abstract describing the proposed presentation. Please submit all information by e-mail and limit abstracts to 200 words or less. No faxed or hard copy papers will be accepted. The abstract must be in MSWord. Authors selected as presenters will need to be paid registrants attending the conference. Presentations will generally be 20 minutes in length with time for questions afterwards. Longer or interactive presentations may be considered if conference schedule and format allows. Abstracts will be selected for fit among concurrent sessions on November 9, and possibly on November 10. Please provide the name(s) of author(s) and presentation title. The lead presenter must provide his/her title, place of employment, telephone number and e-mail address.

Deadline for abstract and bios is August 30, 2006. Abstracts submitted after this date will be included in the Conference Packet only if there is space available.

Direct your questions and email your abstract to:

Tom Ganfield, Program Co-Chair

Email: tganfield@baxterwoodman.com Telephone # (262)763-7834

Deadlines

August 30, 2006 – Abstract submittals are due. September 10, 2006 - Authors will be notified of acceptance in the program. October 16, 2006 – Provide PowerPoint presentation.

U. S. Supreme Court Wetlands Decision

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Wisconsin Attorney General Peg Lautenschlager announced her view that the recent U.S. Supreme Court decision on the breadth of U.S. Army Corps regulation of wetland filling activity should not affect wetland regulatory protections in Wisconsin.

"Wisconsin law is clear that whatever wetlands are not protected by the federal law are protected under state law," Lautenschlager said.

A divided U.S. Supreme Court split 4-4-1 on the scope of U.S. Army Corps of Engineers authority to protect wetlands adjacent to non-navigable tributaries of navigable waters, with Justice Kennedy striking a third position. Under Justice Anthony Kennedy's opinion, the Corps may regulate a wetland adjacent to non-navigable water after a case-by-case investigation shows the wetland to have a significant connection to the quality of downstream navigable water.

"Regardless of the confusing state of federal law left by the U.S. Supreme Court yesterday, no fewer wetlands will be protected in Wisconsin after today than before," Lautenschlager said.

She explained that the U.S. Supreme Court, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 167 (2001) (SWANCC), held that the Clean Water Act did not

regulate the filling of "isolated" wetlands that are not adjacent to or hydrologically connected to navigable waters. Thus, wetland habitats for wildlife and having water quality benefits previously thought to be protected by the Act were declared to be no longer protected from destructive filling activities under the federal act.

In response to *SWANCC*, however, the Wisconsin legislature enacted 2001 Wis. Act 6 in order to provide for state regulation of filling activities in wetlands held to be no longer covered by Clean Water Act Section 404, 33 U.S.C. § 1344.

Under Wis. Stat. §281.36(1m)(a), a Wisconsin wetland that was no longer covered by the federal law was defined in Act 6 as "nonfederal wetland." A "nonfederal wetland" includes a "wetland (that) is determined to be a nonnavigable, intrastate, and isolated wetland under the decision in (SWANCC) or any subsequent interpretations of that decision by a federal agency or by a federal district or federal appellate court that applies to wetlands located in this state."

The U.S. Supreme Court decision discusses and interprets the *SWANCC* decision. As a result of Act 6, wetlands that are subsequently determined by the federal courts not to be protected by the federal law are protected by the state law, Lautenschlager explained.



DNR Staff Changes

Dave O'Malley - Shoreland

Dave is leaving the DNR Shoreland Program to work as a Real Estate Specialist for the DNR South Central Region. Over the past several years, he has assisted in supporting the Shoreland Program and coordinated the NR 118 - St. Croix River rules revision process.

Greg Breese - Shoreland

Gregg has recently been appointed Shoreland Team Leader. As the former Aguatic Habitat Expert located in Eau Claire, he provided assistance with dam, floodplain, shoreland, FERC, lake and river grants and water regulation and zoning oversight for staff covering the 19 West Central Region counties. In this new position Gregg will serve as the Department contact for shoreland wetland zoning issues and assist with the current shoreland zoning rule revision efforts. Contact Information: Wisconsin Dept. of Natural Resources, 101 S Webster, PO Box 7921, Madison, WI 53707-7921, (608) 261-6430.

Tanya Meyer - Watershed Management

Tanya was recently hired as the Milwaukee River Basin Water Regulation & Zoning Engineer. She will provide dam safety, floodplain management, & engineering assistance to the Water Regulation Program in Southeast Region. Her specific area of coverage will include Kenosha, Racine, Milwaukee, and a portion of Ozaukee Counties. Contact information: Wisconsin Department of Natural Resources, 2300 N. Dr. Martin Luther King Jr. Dr., Milwaukee, WI 53212, (414) 263-8641 Tanya SE Region

Toni Herkert - Policy, Planning and Communication Unit - Bureau of Watershed Management

Toni has been recently appointed as the Bureau of Watershed Management Policy and Legislative Coordinator. Formerly she was the Shoreland Management Team Leader and guided the development, administration, and evaluation of the statewide shoreland and shorelandwetland management programs. Toni was also responsible for program implementation including enforcement and compliance monitoring of local government implementation of the shoreland programs. In addition, Toni managed the work of the Shoreland Team and was the lead in the NR 115 rule revision effort. In this new position Toni will continue to lead the NR 115 rule revision process. She will also be involved in other high level, complex policy issues; strategic planning; and legislative initiatives with the department. Contact Information: Wisconsin Dept. of Natural Resources, 101 S Webster, PO Box 7921, Madison, WI 53707-7921, (608) 266-0161 or toni.herkert@ dnr.state.wi.us.

Upcoming Events

WAFSCM Annual Conference

Holiday Inn Hotel Stevens Point, WI November 8-10, 2006

Abstracts Deadline

August 30, 2006

Contact: Tom Ganfield, Program Co-chair

tganfield@baxterwoodman.com

Sponsorship/Exhibits

Contact: Cindi DeBruine, Exhibits/Sponsir Chair

cdebruine@heyassoc.com

WAFSCM

Contact: Dan Cook, Chair

dan.cook@gasai.com

ASFPM Certified Floodplain Manager Exam Contact: Anita Larson, Certification Coodinator November 8, 2006 CFM@floods.org 11

Floodplain and Shoreland Management Notes

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