

WISCONSIN'S WETLAND WATER QUALITY STANDARDS

CHAPTER NR 103, WISCONSIN ADMIN. CODE

A Template for Reasoned Environmental Planning

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Wisconsin's "Wetland Water Quality Standards", which are contained in Chapter NR 103, Wis. Adm. Code, became effective on August 1, 1991. This memorandum is intended to provide basic information concerning the rule, its history, its applicability, and the impact this rule has on projects which affect wetlands in Wisconsin.

When this rule was originally proposed and adopted, it was very controversial. There was a very vigorous public debate during the rule adoption process. Some of that history is discussed below.

In this memorandum, I will provide some information concerning the history of the rule, the content of Wisconsin's wetland water quality standards and the administration of this rule over the past 15 years. It is the Department's perspective that the rule is working well, and is providing the balance that is necessary for reasoned environmental planning and regulation.

BACKGROUND

The foundation for the rules and the concepts supporting the Department's wetland protection program are found in Wisconsin's "public trust doctrine." At statehood, a Constitutional provision was adopted (Article IX, Section 1) which provides that our navigable waters are to be held in trust for the people of the State of Wisconsin. This provision has been interpreted by the Court's over the past 159 years to establish an affirmative duty on the State of Wisconsin to protect our public navigable waters and the wetlands associated with them.

A key case is Just v. Marinette, 56 Wis. 2d 7 (1972), which was decided by the Wisconsin Supreme Court in 1972. This is one of the leading cases nationally dealing with issues relating to wetlands, zoning and the public trust doctrine. The Court in Just, stated:

- a. "We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man-made."
- b. "Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more

sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams."

- c. In upholding the statutes that establish the zoning program, the Court stated: "The active public trust duty of the State of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty."

- c. The Court further stated, "Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?....An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others....It is not an unreasonable exercise of the [police power] to prevent harm to public rights by limiting the use of private property to its natural uses."

The Court thus noted that there is an "active public trust duty" to protect our wetland resources and that reasonable regulations to protect these resources did not constitute a taking of property.

Why were these rules adopted?

Many commentators questioned the need for the adoption of these rules since Wisconsin has had water quality standards for surface waters in place for many years.¹ The existing water quality standards were focused, however, on lakes and streams and did not cover many of Wisconsin's wetlands.²

The Department of Natural Resources is required to establish water quality standards for all waters of the state pursuant to s. 281.15, Stats. The definition of "waters of the state" is very broad, including "all...ponds,...marshes, watercourses, drainage systems and other surface water or groundwater....".

The Wisconsin Public Intervenor's office and numerous environmental groups had submitted, in 1983, a petition to request rulemaking for these wetland water quality standards. This petition had been pending while the Department developed standards for other surface waters and toxic substances.

¹ NR 102, Wisconsin Administrative Code, was originally adopted in October, 1973.

² See the definition of "surface waters" in s. NR 102.03(6), Wisconsin Admin. Code

The Department has assumed primacy of the pollution discharge elimination program under the Clean Water Act. The U.S. Environmental Protection Agency is requiring all states to adopt water quality standards for all waters of the US by 1993.

How were these rules adopted?

In light of the controversial nature of the rule proposal, extensive opportunities for public participation were provided for the rule. The Department developed a draft rule and held six public informational hearings around the state (Madison, Waukesha, Green Bay, Wisconsin Rapids, Spooner and Hudson) in September, 1990, to solicit comments on the draft. Nearly 2000 people participated in these public meetings.

Based on the public input, the rule was redrafted and, in December, 1990, five formal public rule hearings were held (Madison, Waukesha, Green Bay, Rhinelander and Eau Claire).³ Written comments and testimony were received from 962 individuals and organizations. 61 % supported the rule, 27% opposed it, and 12% appeared "as interest may appear".

The rule was approved by the Natural Resources Board, passed Legislative review, and became effective on August 1, 1991. There have been a number of revisions of the rule since its initial adoption, but the overall concepts have remained unchanged. See the attached document, "Understanding the NR 103 Decisions Process (February 2002)", for an understanding of some of the changes.

SUMMARY OF THE RULE

Rule Provisions

Chapter NR 103, Wisconsin's wetland water quality standards, is divided into two sections- "Standards" and "Implementation". We modeled the rule after the U.S. EPA "404(b)(1) guidelines"⁴ which contain standards based on the functional value of wetlands and which requires a hierarchical decision making process.

The rule applies to all wetlands as defined in s. 23.32, Stats., the wetland mapping law. See NR 103.02. This broad wetlands definition has been utilized by the Wisconsin wetland mapping program since 1977.

Chapter NR 103 is applicable to "all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands". Any authorization or reauthorization (such as renewal of WPDES permits) which is "subject to the requirements of

³ The rule hearings were held in Madison, Waukesha, Green Bay, Rhinelander and Eau Claire.

⁴ 40 CFR parts 230 et.al.

statute or rules requiring a department determination concerning effects on water quality or wetlands" must be reviewed to determine consistency with these standards.⁵

Permits covered by NR 103 include:

- i. Water Regulatory permits (such as dredging, structures, or fills in navigable waters);
- ii. Solid Waste facility approvals;
- iii. Dams approvals or permits;
- iv. Highway projects which require state or federal approvals;
- v. Wetland fill projects which require Corps of Engineer's approval (DNR must review the project and do a "water quality cert" under NR 299 and 103);
- vi. WPDES permits;
- vii. Any other projects which requires DNR regulatory review or funding.
- viii. All DNR property management activities, including fishery, wildlife and parks.

Permits or approvals not covered include:

- i. Local zoning decisions;
- ii. Mining projects (which are covered by separate regulations- NR 132);
- iii. Other local approvals which do not require state or federal approvals.

The water quality standards are contained in s. NR 103.03. They are written as narrative standards as opposed to numerical standards due to the great variability of wetlands. The standards are intended to protect the "functional values" of wetlands, including such things as storm and flood water storage, hydrologic and filtration functions, and habitat values for aquatic organisms and wildlife.

Decision Making Process

In NR 103.08 we have adopted a "sequential" decision making process modeled after the Federal Clean Water Act regulations dealing with wetlands. This requires that, before we review a project to determine if it meets the standards, we determine whether the project is "water or wetland dependent", i.e., does it have to be located in a wetland, and whether there is a

⁵ NR 103.06

"practicable alternative".⁶ The definitions in the NR 103 are not identical to the federal provisions but are modeled after them.⁷

Under Chapter NR 103, the water quality standards are not met if the project is not **water dependent** and there is a **practicable alternative** to the proposed project.⁸ This is a critical part of the review of projects under this rule, and we stress to Department staff that it is imperative that they take a very hard look at these issues, especially alternatives.

Under the federal template for defining "water dependency", we must independently define what the project purpose is, e.g., the "**basic purpose**" of a proposed "waterfront restaurant" is food service and it need not be located in the water or wetlands to fulfill that "basic purpose". Similarly, a big box retail development proposed at a site has a "basic purpose" of commercial development. There are many options for commercial development which might fit on a site where the project proponent wants only a big box development.

On the issue of practicable alternatives, we are stressing that we need to look beyond the existing site owned by the applicant and, as in the federal case law, look at other upland sites available in the area as well as sites which may have been available when the applicant started planning their project. Furthermore, if a person purchased a site with wetlands on it after the Clean Water Act amendments of 1977 or after our rules went into effect in 1991, they are presumed, under the law, to have had notice of the potential limitations on the use of that property at the time of purchase.

The project proponent has the burden of proof to show they have complied with the rule. While this is the normal burden, we have stressed this in our training to assure that the program staff require the applicant to submit all information necessary to allow us to assess whether they have met these standards. These information requirements will have to be factored into our existing application or department management processes.

Only after the above analysis is completed and we determine that there are no practicable alternatives do we evaluate the impacts on the wetland to determine whether there will be a "significant adverse impact" to the functional values of the wetlands or to water quality. I have attached a flow chart in my materials in the folder which outlines the procedures.

In those cases where we evaluate the impacts of a proposed activity on a wetland, we are to use "wetland ecological evaluation methods". See s. 103.08(2) and the "Note" at the end of that section. The purpose of this is to assure objectivity in the assessment of the impacts of a project. Training has been given to Department staff on these processes.

⁶ Section NR 103.07

⁷ 40 CFR 230.10(a) for the federal definitions

⁸ Section 103.08(4)(a)

The final decision making process and the review process are determined by existing program regulations.

APPLICATION REQUIREMENTS

A. Applications Controlled by Regulatory Program

1. The specific program statutes and regulations will control the application process for projects to be reviewed under NR 103. For example, a Chapter 30 application will be processed under normal procedures. The wetland water quality standards contained in NR 103 will be factored into that review process in the same manner that the water quality standards in NR 102 are factored into the process.
2. Where NR 103 standards apply, additional information will probably be required from applicant to fulfill needs of NR 103.08.
3. It is the applicant's burden to provide the needed information.

B. What Is Required of Applicant?

1. The burden of proof is on the applicant to show that the requirements of NR 103 are met. NR 103.08(1) provides that:

The Department shall review all proposed activities subject to this chapter and shall determine whether the project proponent has shown, based on the factors in sub. (3), if the activities are in conformance with this chapter.
2. The factors which the applicant must show evidence of are outlined in NR 103.08(3), and include:
 - a. Wetland dependency of the proposal; and
 - b. Whether there are practicable alternatives; and
 - c. Impacts on the wetland water quality standards in 103.03 (as determined using a wetland ecological evaluation method accepted by the DNR and appropriate to the wetland); and
 - d. Cumulative impacts; and

- e. Potential secondary impacts: and
- f. Potential impacts on wetlands in areas of "special natural resource interest".

C. What is Required of Department Staff at Time of Application

1. **Pre-meetings.** If requested, the Department shall meet with a project proponent or other interested persons to make a preliminary analysis of the potential for compliance with NR 103. See sub. NR 103.08(1)
2. Purpose for pre-meeting is:
 - a. Screen project and, hopefully, to revise project so wetland impacts do not occur, or
 - b. Outline the information needed to fulfill application requirements outlined above.
3. The pre-application meeting provision in NR 103 was requested by a number of interests so they could screen or modify their projects at an early stage.
4. If pre-meeting indicates that the project may result in violations of NR 103, and they decide they are not going to modify the project, you will have to outline information needs. The discussion below will facilitate this.

II. PROJECT ANALYSIS/ INFORMATION NEEDS

- A. NR 103 outlines the decision making process
 1. See NR 103.08(4)
 2. See the chart- "Understanding the NR 103 Decision Process(February 2002)".
- B. Definition of Terms
 1. In order to initiate project review and decision making, you need to be familiar with certain terms used in NR 103, including:
 - a. **WATER DEPENDENCY or WETLAND DEPENDENCY** which is defined in NR 103.07(3), as meaning "the activity is of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its

basic purpose.", and;

- b. **PRACTICABLE ALTERNATIVES** which is defined in NR 103.07(2), as meaning alternatives which are "available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purposes."
2. Application of these terms is critical in the analysis of the project. These terms originated in the EPA's regulations under the Clean Water Act (commonly referred to as the "404 (b) 1. Guidelines) and have been the subject of litigation.
 3. What does "**Water dependency or wetland dependency**" really mean?
 - a. There has already been significant discussions of these issues in the federal permit process. The Department relies, in part, on the federal cases interpreting these provisions.
 - b. Examples of projects which fit in this category include:
 - i. Boat ramp
 - ii. Water intake structure
 - iii. Breakwater
 - iv. Certain marina facilities, i.e., docks, piers
 - c. An important part of this determination is the "**basic purpose**" portion of the definition. In performing the analysis, you must look at what the basic purpose of the project is. For example, someone proposing a lake side restaurant may argue that they need to be located in or adjacent to a particular lakebed area. The "basic purpose" of the project is food service. It need not be located in or adjacent to a lake or wetland. The same analysis is true of a lakefront condo (basic purpose is housing) or a regional shopping mall or big box development (basic purpose is commercial development).

Determination of the "basic purpose" is a critical element of the analysis, because it also establishes parameters for the scope of practicable alternatives.

4. What does "**practicable alternatives**" really mean?

The definition in NR 103.07(2) is:

"available and capable of being implemented after taking into

consideration cost, available technology and logistics in light of overall project purposes”

- a. As indicated above, an important first step in the "practicable alternative" analysis is defining the "**basic purpose**" of the project. If the project purpose is defined as constructing a housing development of a specific type and configuration at a specific location e.g., an 18 hole golf course with 200 condominiums and the shore of Lake Mendota, the alternatives analysis will be quite limited. If the project is defined broadly, as providing housing in a general geographic area, there will, in most cases, be many alternatives.

The Department, not the applicant, needs to determine what the basic purpose is. It should be defined broadly, so as not to limit the exploration of alternatives.

Some case examples-

Federal guidance and cases-

- agency determines the project purpose, not the applicant
- if the project is multi dimensional, e.g., housing and golf course and marina, you can look at the parts discretely. The inclusion of a marina does not make a housing project water dependent or limit the geographic scope of alternatives.

b. "available"

The term "available" is important, since it has been construed to not be limited

simply to the alternatives suggested by the applicant or those alternatives that might be currently available to the applicant. The Federal and state courts, and Wisconsin ALJ's have looked at issues such as:

- i. Temporal issues- Were there alternatives previously available to the project proponent? Examples-

-Were there other properties available at the time the project proponent started planning for the project? On the Federal level, there are reported cases dealing with a major shopping mall in Massachusetts where the courts required the Corps and the applicant to look at other land or other options that might have been available at the time, many years previously, that planning for the project began.

ii. Record of ownership-

-Did the project proponent recently (post 1977?) purchase property with wetlands that they are now trying to fill? What were their “reasonable investment backed expectations”?

-Have they already filled, developed or sold other portions of the property, creating a situation where they now are trying to fill the remaining wetland portion?

- For causeways or bridges, were there other access routes to the property historically, before lands were sold from a large block or the area was subdivided? Are there potential alternatives now, such as a Town Road (See Section 82.27, Stats., Landlocked property) which would avoid wetlands?

iii. Are there alternatives available that will allow them to achieve the basic purpose?

- Is there buildable upland land on the property which could be used for a home or a smaller commercial property? Many ALJ and judicial decisions support this proposition.

-If a City is building a bike/pedestrian path, can they build a smaller, raised path through wetlands that won't require a full sized snowplow or ambulance?

-Are there other means of addressing safety or access concerns?

-For Regional developments, be they shopping malls, power lines, power plants or airports, there are significant questions whether the needs can be met by existing facilities (at another location) or by new facilities elsewhere located outside wetlands.

c. How do you take “**into consideration cost**”?

1. This is usually a factor that requires a “**fact intensive and case specific inquiry**” based on the specific project, location, and range of alternatives. When we originally adopted this rule, we asked the Corps if they had a “cookbook” approach that would simplify this inquiry. They did not, and we do not have one today, but the State and Federal regulatory experience provides much useful guidance. Factors to consider include:

i, Again, we must return to “**basic purpose**”. Does the basic purpose allow less cost alternatives?

-If someone is building a cottage on an island, while they may desire a filled causeway and driveway, they may be able to access the residence by an elevated walkway or by boat, with parking on the

mainland.

-As indicated above, a municipality may be able to downsize a pedestrian/bike path or highway project to achieve the basic purpose of access without all of the attendant costs.

ii. We need to look at the projected costs articulated by the project proponent to determine if they are reasonable. We have had cases where the costs of the proponents preferred alternative is underestimated, while the costs stated for alternatives are seriously inflated. In a case for a SE WI City, they suggested they could install an asphalt causeway wide enough to support a large snowplow at “\$50 to 100 per foot” and the cost of an elevated path to be “\$350 per foot.” The ALJ held that they “grossly overestimated the cost of boardwalk construction” and that they had an available alternative.

There are other contested cases where the ALJ looked at the costs of bridge and causeway alternatives and determined that some of the alternatives were too costly (but ultimately approved an alternative that required substantial openings at significant cost to the project proponent).

Scrutinizing cost estimates is not always easy, and may require us to collaborate internally to find staff who can assist us. The knowledge may exist internally with other program staff, land or park managers, engineers, etc. In some difficult cases, we have conferred with other agencies (DOT), experts from the University of WI, Regional Planning, UW Extension, or municipalities who may have undertaken similar projects.

In difficult cases, we may need to develop evidence to support our assessment of the cost estimates. We usually cannot allow “unrefuted” testimony or evidence to stand in a record. There have been a couple cases where we have hired economists to help us assess the cost estimates for a project. These cases are relatively rare, but we work with you to develop the evidence if we need to.

iii.- There are factors that project proponents will assert are “**costs**” that **are not** to be considered in the cost analysis. These include:

-“Sunk costs”- if a project proponent has put costs into the project, such as purchase price, consultant’s or engineering fees, infrastructure, etc., these are not factors in the cost equation for practicable alternatives. This is related to the temporal issues discussed above.

-“Potential profits” or loss of potential profits. This will often be an argument put forth by a project proponent or a municipality. The foundation for rejecting these factors are found in the Just, M& I Bank, and Zealy cases

discussed below. The speculative value of lands or a development are not the proper basis for an analysis of a project.

The ALJ, in the Milam case, (which is the only WI judicial case reported which relates directly to these issues) stated:

“...the calculation of lost profits is not a part of the practicable alternatives analysis under NR 103....”Costs” incurred are not the same as “profits” foregone in connection with a wetland fill. Not filling a wetland area almost always involves a lower valued use of a parcel, and “lost” (or unrealizable profits as a result.”

The Court of Appeals, in upholding this decision of the ALJ, stated:

“The Milam’s argue the specialist’s profit analysis is irrevocably linked with the practicable alternatives test. We deem this irrelevant. The ALJ discounted the specialist’s profit analysis because the DNR’s rules do not allow for such an analysis.”

-Secondary economic impacts (loss of anticipated jobs, loss of anticipated increase in tax base). The WI Courts have long held that the secondary and tertiary economic impacts alleged by project proponents are not appropriate considerations when assessing the impacts of projects on wetlands and surface waters. The Federal cases and guidance are consistent with this analysis. This is an issue in the recent Lake Koshkonong water level decision which is being appealed to the Courts.

Part of this analysis is based on the rationale used by the Courts in “takings” cases dealing with “reasonable investment backed expectations”. If a project proponent has a purchased a property with wetlands (after the Clean Water Act (1977) or the development of our rules (1991)) or has held an existing property which has wetlands and buildable upland, there is not a “reasonable investment backed expectation” that they can fill in and develop those wetlands.

Again, see Just, Zealy, and M&I Bank , below, for support for these propositions.

d. How do you take into consideration “**available technology and logistics**”?

There has not been a great deal of discussion of these terms in any contested cases or reported judicial decisions. The main cases where this has been considered include:

-An ALJ decision dealing with access for fire safety purposes where the ALJ

required that an access road be reduced in size, but allowed it to remain for purposes of providing access for safety and fire protection.

- A contested case hearing where the ALJ rejected a City's proposal for a large causeway fill for a proposed bike/pedestrian path through a wetland complex. We developed testimony showing the alternatives that we have used in our parks, that other cities used to develop their facilities, etc.

-The critical element in preparing for these sorts of issues is to keep an open mind and an open line of communication with other Department staff. We will often have to confer with others (Federal agencies, state agencies, university, other programs such as Parks or Lands) to develop competent and defensible evidence on alternatives based on technology and logistics. Our experience in the City bike path case was instructive, since we discovered that there are many emerging designs and technologies for undertaking bridge/access path work that could be applied in that case.

C. Do We Have Specific Guidance to Work through These Analyses?

1. There has been significant litigation under the federal rules relating to the consideration of practicable alternatives. The Department relies, in part, on the federal case law to assist in the application of this provision.

2. The analysis of projects under these definitions is a very important part of our wetland protection program. Many of the determinations of "basic purpose" and "practicable alternatives" are straightforward and can be made easily, e.g., a proposed 100 lot subdivision with five acres of wetland may need to be reduced to 90 lot subdivision.

After NR 103 was adopted, we have seen many knowledgeable consultants and attorneys assist their clients in designing projects that avoid wetlands and thus ease their regulatory burden.

Obviously, some of the determinations of practicable alternatives are more complex and difficult. Given the broad range of project proposals we are presented with and the differing fact situations on the ground, it is not possible to develop simple templates to cover every situation. I have attached a list of questions that program staff has developed over time to assist you in analyzing these projects.

At times, you may be pressed to provide an immediate response to a complex set of facts By a consultant, land owner or attorney. You, and the Department, may not be able to provide an immediate analysis. The Courts often refer to situations under the law where there are **"fact intensive and case specific inquiries" that need to be made on a case**

by case basis. These analyses will, undoubtedly, sometimes fall into that category.

D. Project Analysis-

1. NR 103.08(4)(a) outlines the process for reviewing most projects. There are a number of special circumstances which allow different review processes, as outlined in the chart “Understanding the NR 103 Decision Process” and in the sections listed below:

Column B of the chart-

(4)(b)- projects which affect wetlands in “an area of special natural resource interest”. Note that these are different than ASNRI’s under Chapter 30;

Columns C & D of the chart-

(4)(c) projects which are:

- water dependent, or, impact less than 0.1 acre of wetland; or,
- where all wetlands impacted are less than 1 acre in size and are not one of the special types of wetlands listed (e.g., deep marsh, ridge and swale, etc.);

Column E of the chart-

(4)(d) projects related to cranberry operations.

For those projects not in these special categories, NR 103.08(4)(a), and Column A of the chart, provide that:

The department shall make a finding that the requirements of this chapter are satisfied if it determines that the project proponent has shown all of the following:

1. No practicable alternative exists which would avoid the adverse impacts to wetlands; and
2. All practicable measures have been taken to minimize adverse impacts to the functional values of wetlands; and
3. Only after you have completed the “avoid” and “minimize” steps above, you may consider potential functional values provided by mitigation that is proposed by the applicant; and

4. As the final step in the process, you must look at the “significant adverse impact” analysis outlined below.

Steps 1 through 3, above, result in the initial screening of projects. If these criteria are met, the project review then proceeds to the second stage and to the final project analysis discussed below. If these criteria are not met, the project proponent should be advised that the standards would not be met and suggest that other alternatives should be pursued.

E. Project Analysis- Detailed (Second) Level

If a project passes the "initial screening" above, then all of the factors in NR 103.08(3) (b)-(f) must be analyzed. These criteria include practicable alternatives, cumulative impacts, and secondary impacts. It should be noted that under NR 108.03(b), practicable alternatives are listed a second time in the process. The reason for this inclusion is that, even after it has been determined that there may not be an alternative available which will avoid wetland impacts, there still may be a number of alternatives to choose from which “will avoid and minimize adverse impacts to wetlands and will not result in other adverse environmental consequences.”

This step of the process allows us to assess all steps to “avoid and minimize” impacts and to consider “other adverse environmental consequences”, such as impacts to critical upland resources, in our review of the project.

F. Final Project Analysis

1. After all of the above factors have been analyzed, a determination must be made under subsections NR 103.08(4)(a), (b), (c) and (d), concerning whether the "project proponent has shown" that the activity will not result in "significant adverse impacts" to wetland functional values, water quality, or "other significant adverse environmental consequences".
 - a. BURDEN OF PROOF IS ON APPLICANT. Note that the burden of proof is on the project proponent to demonstrate compliance with the standards. Examples of information needed (based on decision factors contained in NR 103.08) include:
 - i. Practicable alternatives analysis.
 - ii. Analysis of functional values of wetland and impact of project on those values.

- iii. Wetland dependency of the proposal. We may need to look at the component parts of the project, i.e., a real estate development with a marina may have components, e.g., piers, which are water dependent, but the majority of the project may not be.
- iv. Secondary impacts analysis, e.g., Will there be secondary impacts on wetland functional values caused by this project (these could include changes in hydrology)?
- v. Does this project involve wetlands in areas of special natural resource interest as identified in NR 103.04?
- vi. Cumulative impacts analysis. What impacts may occur, based upon past or reasonably anticipated impacts on wetland functional values of similar activities in the affected area?

2. **SIGNIFICANT IMPACT ANALYSIS**. The final analysis, as indicated above, is whether the project will result in "significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences".
 - a. Some have argued that this test is vague and undefinable. It is consistent with the test contained in The Wisconsin Environmental Policy Act (WEPA), and in the federal 404 regulations. While it cannot be "defined" in the abstract to apply to all situations, it can certainly be applied in a case specific manner. This gives us the ability to recognize the different physical situations which exist across the state. At the hearings and public meetings, we noted that a wetland impact that might be very significant in Waukesha County (due to the scarcity of that type of resource) may not be a significant adverse impact in the northwest part of the state (where the same resource is abundant).
 - b. Note that the last part of the test, i.e., "other significant adverse environmental consequences", requires that we look at issues other than wetland issues. The reason for this clause is to allow us some flexibility in rare situations where the only alternatives for a project would cause other significant environmental harm. For example, if someone is building a facility which can only be located in a certain geographic area and the alternatives are to impact a wetland or impact the last remaining habitat for an endangered species, we may have to balance those impacts and allow the wetland to be the development site.

III. FINAL DECISION / REVIEW

- A. Procedure. The procedure, including public notice and opportunity for hearings, shall be controlled by the specific statutes and regulations which apply to the regulatory process involved. NR 103 does not contain specific procedural provisions and does not modify the project review other than adding an additional factor to the analysis.
- B. Form of Decision. When the final regulatory decision is made, whether it is a solid waste decision or a water regulatory decision, it should reflect in the findings of fact and conclusions of law that a review was completed in accordance with Chapter NR 103 and what the findings were. This fact is then factored into the final decision in the same manner as other water quality standards.
- C. Appeal Process. The appeal process is controlled by the specific program statutes and rules.

IV. HOW IS NR 103 WORKING?

A. "Start Up" Difficulties.

There were some "start up" problems, most of them dealing with projects which were already in the review process in August, 1991, when NR 103 became effective. This was especially difficult in the area of solid waste, since there were a number of controversial projects which were very close to a final decision which had to go back and be reviewed for compliance with NR 103. These problems are now resolved.

B. Has NR 103 had an impact on wetland projects in WI?

Before NR 103 was adopted, records show that we were losing approximately 1400 acres of wetlands per year to State and Federal permitted activities in WI.

See the attached chart, **Statewide Wetland Acres Filled/Distrubed**, which shows that since the adoption of NR 103, we are losing less than 100 acres per year of wetlands.

In addition to NR 103, WI also enacted WI Act 6 in 2001 which protects wetlands which were left unprotected under the Federal SWANCC decision. Other states (Texas, Florida, South Carolina, as examples) have lost many thousands of wetlands during this same period.

C. NR 103 Is Working Well and Results In Reasoned Decision-making.

From the Department's perspective, and from the perspective of most of the regulated community and environmental interests we deal with, NR 103 is working well. It is resulting in the "hard look" at alternatives and wetland impacts we contemplated when the rule was developed. It allows projects to move forward where there is no practicable alternative, such as expansion of existing facilities where it cannot be reasonable accomplished elsewhere.

The application of the rule has resulted in early planning and redesign of many projects through the cooperative efforts of our staff and project applicants. This is a positive result for all involved and was specifically contemplated when the rule was developed.

This rule, and the wetland program generally, has continued to be controversial, but have brought about real change in how wetland projects are designed and reviewed in Wisconsin. We have one of the best wetland protection programs in the United States.

V. WHAT IS YOUR ROLE, WHEN YOU ARE DEALING WITH A PROJECT APPLICANT, THEIR CONSULTANT OR LEGAL COUNSEL?

A. Public Education and Understanding of Wetland Regulations

The Department is striving to educate the public about this rule and related common law in Wisconsin so that they can understand the underlying basis for both the rule and the Department's policies in this area. You can play a vital role in this as you counsel applicants and consultants in their decisions to initiate a project which may impact wetlands in Wisconsin or as you purchase lands or design projects.

B. Advising Project Proponents of Common Law Limitations on Wetland Development

The Wisconsin Supreme Court has long recognized the importance of protecting the state's aquatic resources and the limitations on the use of lands in a way which affects those resources.

1. Just v. Marinette (1972)

In Just v. Marinette, 56 Wis 2d 7(1972), the Court upheld a county wetland zoning ordinance which limited filling of a wetland area for real estate development. The

owners of the property alleged a "taking" of their property by this regulation. I have outlined above, on pages 1 & 2, some of the Court's important language in this case.

This decision was based on the "public trust doctrine" which protects navigable waters, and those wetlands resources which are important to the protection of our navigable waters.

2. M&I Marshall Bank v. Town of Sommers (1987)

In M&I Marshall Bank v. Town of Sommers, 141 Wis 2d 271(1987), the Wisconsin Supreme Court decided another zoning case, and stated:

"Although this court in Just noted the state's duty under the public trust doctrine to protect shoreland areas, we conclude that the analysis outlined in Just is not limited to a situation where lands involved are connected to the state's duty under the public trust doctrine. While the public trust doctrine was a factor in the Just decision, the key to analyzing a claim that property has been taken without compensation is the determination of whether the ordinance prohibits a public harm or provides a public benefit.

"In analyzing any case in which it is claimed that land is taken without just compensation- whether the regulated land is a wetland within a shoreland area, or land within a primary environmental corridor, or an isolated swamp- the test to be applied is the same: public benefit versus public harm.

3. Zealy v City of Waukesha (1996)

Zealy involved a case where a 250 acre farm was developed over time near Waukesha, WI. When there was 10.4 acres remaining, 8.2 acres of it was determined to be wetland and was zoned conservancy. Mr. Zealy asserted a taking of his property, since he could place less development on the remainder of the parcel (1.57 acres zoned residential; .57 acres zoned commercial).

The Court found that there had not been a taking of the property, noting that when you looked at the "entire parcel", he had areas that could be developed and that the remaining area could be used for its traditional use (agriculture). The Court cited Just and M&I Bank for the principle outlined above.

4. Hixon v. PSC

The Wisconsin Supreme Court has long recognized that it is imperative that the State of Wisconsin consider the cumulative impacts of activities which affect our aquatic resources.

In Hixon v. PSC, 32 Wis 2d 381(1966), the Court upheld the State's denial of a 120 foot breakwater in 940 acre Plum Lake, Vilas County. The Court noted that this was a relatively modest intrusion into the lake, but stated:

"There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

"In our opinion, the Public Service Commission, in denying appellant's tardy application for a permit, carried out its assigned duty as protector of the overall public interest in maintaining one of Wisconsin's most important natural resources."

The DNR is the successor to the PSC in the administration of the State's regulation to protect aquatic resources.

Based on the above cases, the owners of property which contain wetlands should be advised that there are limitations on the kinds of changes they can reasonably expect to make to the "natural character of those lands".

We have not seen any diminution in the WI Supreme Court's support for these public trust and wetland protection concepts.

C. Recognition of the Cumulative Impacts of Projects

We often hear project proponents and their advocates suggest that "Yes, we understand the rationale for your regulations, but our proposed one acre or half acre wetland fill isn't significant!".

When you consider the cumulative impacts of these projects, the impacts are significant, and provide the basis for our position in many of these cases.

When you look at these impacts in a historical perspective, recognizing that we have been a state for a 159 years, it is easier to appreciate the scope of the cumulative impacts which have already occurred to our aquatic resources. The

directive of the Supreme Court in Hixon is understandable when viewed in this historical context.

While the project proponent may very well not agree with the DNR's position in a particular case, it is helpful if they have an appreciation for this perspective.

VI. SUMMARY

From the Department's perspective, NR 103 is working well and provides a model for reasoned environmental planning and decision-making. We are striving to provide consistent application across the State and, also, to utilize the flexibility which is designed into NR 103 to permit those projects where there are no "practicable alternatives" or no "significant adverse impacts" on wetland resources.