

# **Wisconsin's Wetland Regulatory Program**

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## **Overview**

In Wisconsin, we have over 15,000 “named” lakes and 44,000 miles of rivers and streams. We have approximately 860 miles of Great Lakes shoreline on Lakes Superior and Michigan. These waters, and their associated wetlands, are valuable amenities from an economic and ecological perspective. We have a very highly evolved state and local wetland protection program which covers all wetlands, including those that are determined to be “nonfederal” after the decisions in SWANCC, Rapanos, and Carabell. As described below, our program is based on common law “public trust doctrine” principles which have evolved from our Wisconsin Constitution, statutory provisions which have codified those principles, and on Sections 404 and 401 of the Clean Water Act.

This memorandum will provide a brief overview of the State of Wisconsin’s wetland regulatory programs.

If you are interested in Wisconsin’s program, you should go to the Wisconsin Department of Natural Resources website, the Waterways and Wetland Permits sections. The Web address to start is:  
<http://dnr.wi.gov/org/water/fhp/waterway/index.htm>

The Department’s Web site is updated regularly and will provide current information concerning rules, application forms, and the evolving State of Wisconsin wetland policy, entitled “Reversing the Loss”.

## **Highlights of the Wisconsin Program**

**1. Navigable Waters protection-** There are longstanding statutory provisions in Chapters 30 & 31, Wis. Stats., which regulate most physical alterations to all navigable surface waters and associated wetlands. The test of navigability articulated in Wisconsin’s common law is a broad one, which includes any waterway capable of navigation by a recreational craft (such as a kayak) on a regularly recurring basis, including spring freshets. The Wisconsin Constitution, Article IX, Section 1, provides that all such waterways are “common highways” and are held in trust for the citizens of the State. There is a very fully developed “Public Trust Doctrine” which has evolved through common law interpretations of this Constitutional provision.

In Just v. Marinette, 56 Wis. 2d 7 (1972), the WI Supreme Court addressed issues relating to wetlands associated with Wisconsin's navigable waters. This is one of the leading cases addressing issues relating to zoning, wetlands, regulatory takings and the public trust doctrine in WI. The case involves a taking claim by property owners who were not allowed to fill wetlands near navigable surface waters under the state's shoreland and wetland zoning regulations. 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."
- d. 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."

There is ample scientific and hydrologic evidence that filling and adversely impacting wetlands causes "harm to public rights" as discussed by the Court in Just, since such activities cause increased flooding, negatively affect water quality, and negatively impact habitat or flora and fauna and associated public resources and public uses.

The Wisconsin Supreme Court has included, as protected public rights and public trust uses:

- v Commercial Navigation
- v Boating and other incidents of navigation
- v Fishing
- v Hunting and other public uses

- v Natural Scenic Beauty
- v Fish and Wildlife Habitat
- v Water Quality and Quantity

The Wisconsin Supreme Court has, since Hixon v. PSC, 32 Wis. 2d 608(1966), has recognized the need to consider cumulative impacts when considering impacts to Wisconsin's waterways, stating:

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. Although the legislature has constitutionally permitted some structures and deposits in navigable waters, it permitted them [where it is] found that "such structure does not materially obstruct navigation... and is not detrimental to the public interest."

In our opinion, the [State of Wisconsin], 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 language on cumulative impacts has been echoed in numerous decisions since Hixon and is critical to the maintenance of an effective program to protect Wisconsin's water resources.

## **2. Water Quality Certification and State Wetland Standards**

In the early 1980's Wisconsin began to have reservations about the breadth of the Federal Nationwide Permits under Section 404 of the Clean Water Act. We began to deny water quality certification for the Nationwide Permits in 1982, and worked to develop special state general permits for activities in Wisconsin with the Corps of Engineers. The State's program for reviewing water quality certifications for wetland projects is based on Sections 404 and 401 of the Clean Water Act and the State's statutes in Chapters 281 and 283, Wis. Stats., for adopting water quality standards and for carrying out the Clean Water Act provisions.

The State of Wisconsin adopted procedures in Chapter NR 299, Wisconsin Administrative Code in 1981 for the processing of and administrative review of water quality certifications.

In 1991, we developed Chapter NR 103, Wisconsin Administrative Code, our Water Quality standards for Wetlands, to provide protection for all wetlands, including those isolated wetlands not associated with navigable waters.

These water quality standards are narrative standards to protect the functional values of wetlands, such as storm water attenuation, filtering pollutants, maintaining streamflows, providing habitat for plants and animals, and providing opportunities for recreation, research and aesthetic enjoyment.

The review process relies on a vigorous application of the sequencing process outlined in the Section 404 (b)(1) guidelines, assuring that avoidance and a full search for practicable alternatives is completed.

In Wisconsin, the Federal Nationwide Permits have been suspended. We have in place a Statewide Programmatic General Permit (SPGP) which was adopted in place of the Federal general permits beginning in April 2000. On average, 55 to 70 percent of permits that qualify for General Permits are authorized without more specific state review under the SPGP. For larger projects or for those which affect specific wetlands, there is a more rigorous state review.

Wetland acreages impacted by the issuance of permits has dropped dramatically since 1991, when an average of 1440 acres of wetlands were filled. In 2006, 55 acres of wetlands were filled through the processing of 599 permits. On average, less than 100 acres per year have been filled pursuant to permits since 2002.

From 2001 to 2006, 96% of permit applications have been approved, with 4 % denied. An average of 10 to 15% of applications are withdrawn.

There is a separate program for Department of Transportation projects in Wisconsin. An average of 150 acres of wetlands per year are filled pursuant to the DOT program. All DOT projects must be mitigated, with a system of mitigation banks and long term monitoring and care. All of these areas are protected by permanent easements.

### **3. State of Wisconsin Wetland Mitigation Program- The state's adoption of wetland mitigation legislation and rules**

During the passage of NR 103, water quality standards, in 1991, the State of Wisconsin determined that it would not include mitigation as part of its normal wetland project review.

Wisconsin's program is designed to avoid what the national reviews, such as the General Accounting Office and the National Academy of Sciences, identified as the pitfalls of the Federal and other state wetland mitigation programs. These reviews show that mitigation, including banking, usually did not effectively remedy the loss of wetland functional values.

After the passage of the NR 103, Wetland Water Quality Standards in 1991, there was much debate concerning whether a state mitigation policy should be adopted. Some interest groups argued that Wisconsin needed to have the flexibility of allowing mitigation without the strict requirements of asking an applicant to search for alternatives to avoid wetland impacts. Others argued that the state should simply tack on a requirement of mitigation to the end of the state regulatory decision process as additional penalty for filling wetlands. The Legislature passed 1999 WI Act 147 on a unanimous vote, reflecting a compromise approach to how Wisconsin would develop its mitigation policy. This bi-partisan effort created the basis for the 2001 WI Act 6 legislation (discussed below).

The resulting mitigation statute, Section 281.37, Wis. Stats., specifically requires that:

The department [of natural resources] may not consider a mitigation project in reviewing an application ... unless the applicant demonstrates that all appropriate and practicable measures will be taken to avoid and minimize adverse impacts on the wetland.

The statute further requires that the Department of Natural Resources may not consider a mitigation project "for an activity that adversely affects a wetland in an area of special natural resources interest or for an activity that adversely affects an area of special natural resource interest." Such areas are defined as areas that possess significant ecological, cultural, aesthetic, educational, recreational or scientific value...." The statute identifies

categories of such waters, including cold water systems, calcareous fens, designated natural areas, etc.

Under the mitigation statute, that State of Wisconsin has established a mitigation program and has authorized a number of mitigation bank sites (currently 6 sites around the state). Mitigation is not a major component of the State of Wisconsin's wetland program since the program continues to require a rigorous application of the sequencing process to assure that avoidance and minimization are fully considered before there can be any consideration of mitigation in most cases.

NR 103 still requires a practicable alternatives analysis for ways to avoid and minimize wetland impacts. In some cases, mitigation can be considered at the same time as avoid and minimize alternatives. In some cases, mitigation can only be considered after the hard look at avoid and minimize alternatives. And, in some cases the law does not allow DNR to consider mitigation.

The rules define cases where mitigation can be considered at the same time as the alternatives. This process can be used if the activity involves wetland impacts of less than 0.10 acre. This process is also available if each adversely impacted wetland is less than one acre in size, not located in a floodplain, and is not a certain wetland type (e.g., deep marsh, ridge and swale complex, wet prairie, certain bogs, etc.). In some situations, avoiding wetland impacts may be the best environmental decision, while in others a decision may be that a proposal to fill wetlands plus providing mitigation makes more sense.

The mitigation law expressly does not allow DNR to consider mitigation if the project will affect an "area of special natural resource interest" or for cranberry operations that already have specific federal mitigation requirements.

If mitigation is allowed, it is required that there be a mitigation plan approved by the Department of Natural Resources which includes long term monitoring and maintenance. Permanent conservation easements are required for any mitigated wetland areas created.

#### **4. Isolated Wetlands- Response to SWANCC- Adoption of 2001 WI Act 6**

Immediately after issuance of the SWANCC decision, there was movement to adopt state law to address the regulatory “gap” which was left in the wake of the decision. The estimate in the State of Wisconsin was that as many as one million acres of wetlands were left without protection under the water quality certification process after the SWANCC decision.

There was a great deal of concern about this issue from a broad spectrum of interests in both the legislature and the public. Many groups were concerned about the potential loss of wetlands, including the Wisconsin Wetlands Association, Sierra Club, Wisconsin Waterfowl Association, Rivers Alliance, and the National Wildlife Federation. They were strong proponents of the quick adoption of legislation to restore the regulatory authority in Wisconsin that had been lost due to the SWANCC decision. Other interests, including the Wisconsin Realtors Association, the Wisconsin Farm Bureau, the Wisconsin Builders Association, and the Alliance of Cities, urged caution that the State not overreact and put in place regulations that were more stringent than those that preceded the SWANCC decision.

After 5 months of debate and after numerous legislative public hearings, a special legislative session was called by the Governor to address the issue. A consensus bill was adopted unanimously by both houses of the Legislature and signed into law on May 7, 2001. The bill established direct state regulation over all wetlands and essentially restored the State of Wisconsin’s authority to review proposals that would affect “non-federal wetlands”, i.e., those wetlands that are determined to be outside the scope of the Clean Water Act by the Federal agencies due to the SWANCC decision or subsequent decisions by federal agencies or federal district or appellate courts.

During the time this legislation was pending, approximately 43 acres of wetland was lost due to unregulated filling activities.

#### **Provisions of WI Act 6**

The new law (WI Act 6, creating s. 281.36, Wis. Stats.) accomplished the following:

- a. Established, effective on May 8, 2001, DNR authority to regulate non-federal wetlands by requiring that the project proponent receive a Water Quality Certification (WQC) from DNR. The process is essentially the same as the historical process for NR 299, Wis. Adm.Code, Water Quality Certifications, except the state water quality certification is now the controlling permit document for the project. See Section 281.36(2), Stats., which provides that “No person may discharge dredge or fill material... unless the discharge is authorized by a water quality certification issued by the department....” or unless they qualify for an exemption.
- b. Grants DNR inspection authority for non-federal wetland cases. See Sub. 281.36(9), Stats. Note that there are specific requirements which must be met in this inspection process, including: a request for consent during reasonable hours; presentation of credentials; and, if access is denied, obtaining an inspection warrant under s. 66.0119, Stats.
- c. Required rules on exemptions analogous to the 404 exemptions. These are outlined in Sub. 281.36(4), and are, verbatim, from Section 404(f) of the Clean Water Act and include things like “normal farming activities”. These rules were adopted in NR 351, effective 2-1-03.
- d. Allows DNR to issue General Water Quality Certifications consistent with the federal general permits which previously existed. See Sub. 281.36(8), Stats.
- e. Provides that delineation of non-federal wetlands shall follow the COE 1987 Delineation Manual and associated guidance documents. See Sub. 281.36(1m) and (3), Stats. These rules were adopted in NR 352, effective 2-1-03.
- f. Provides that the DNR, through the WI Department of Justice, has enforcement authority for violations. Forfeitures are “not less than \$10 nor more than \$5000 for each violation.” Each day of violation is a separate violation. The state can also seek restoration or abatement as a remedy. See Sections 12 and 13 of 2001 WI Act 6.

The current regulatory process in Wisconsin, as established in s. 281.36, Stats., effectively restores the regulatory process which was in existence prior to the SWANCC decision. With the definitions of

“non-federal wetlands” we adopted, those wetlands determined to be non-jurisdictional due to the Rapanos & Carabell decisions are also protected under our state water quality certification program.

## **5. Locally Administered Shoreland-Wetland Zoning Programs**

Sections. 281.31, 59.692, 61.351, 62.231, Wisconsin Statutes, create the Shoreland Wetland Zoning program, which requires county, village and city ordinances to prohibit fill in wetlands. This is a state mandated, but locally administered, program which covers areas within 1,000 feet of lakes and 300 feet of streams or rivers. The Department of Natural Resources has review authority for these programs and can challenge permits or approvals granted by local municipalities.

Administrative rules contained in Chapters NR115 & NR117, Wisconsin Administrative Code, set minimum statewide standards for shoreland-wetland ordinances.

## **6. Wetland Mapping**

The State of Wisconsin has a wetland mapping program that has developed maps, using aerial photography, soil surveys and wetland delineations.

While the maps are a useful tool, the DNR recognizes the limitations of using remotely sensed information as the primary data source. They are to be used as a guide for planning purposes, since the maps do not provide sufficient detail to identify wetland boundaries at the scale needed to make permitting decisions.

Efforts are currently underway to update the maps using more accurate and modern mapping techniques. Maps for 59 counties are now available for viewing on the Internet. The Department of Natural Resources is currently working on developing other wetland indicator map resources to assist the public in determining if their property may contain wetlands.

## **7. New Legislative Proposals- Real Estate Notification**

The State of Wisconsin established a mechanism, at the request of development interests, to allow persons who were considering a project or purchase of a particular parcel of land, to approach the Department under Subsection NR 103.08(1), Wisconsin Administrative Code, to obtain a “preliminary assessment of the scope for an analysis of alternatives and the potential for compliance” with Wisconsin’s wetland standards.

This process has proven to be useful for the State of Wisconsin and for project proponents to assure that the developer does not expend resources for property or a project design that will not be approvable under our process and standards. We have seen a significant evolution of the types of projects that are proposed in our state. We no longer see development proposals that are designed in a way that will impact acres of wetlands, since it is very rare that such a proposal will be approved in Wisconsin.

We are currently working with the interest groups and with the Wisconsin Legislature to develop better mechanisms for disclosure, in real estate transactions, of the presence of wetlands on a property and for new mechanisms that will provide protocols for on-site inspections and identification of wetlands by the State and Federal regulators

## **8. Potential Changes in Federal Law**

Senators Feingold from Wisconsin has co-sponsored the Clean Water Restoration Act, to amend the Clean Water Act to replace the term “navigable waters” with the term “waters of the United States”, which would clarify the jurisdictional issues addressed in SWANCC. The State of Wisconsin, through the Governor and the Department of Natural Resources, support the adoption of this bill.

Even though the State of Wisconsin has the ability to regulate activities in WI wetlands due to WI Act 6, the potential impacts of decisions which result in loss of wetlands in other states are significant for WI, since waterfowl hunting and outdoor recreation are a significant part of our State’s economy. The loss of habitat in the Mississippi flyway and the prairie pothole region of the US will have negative long term impacts on these facets of our economy. The flooding and adverse impacts on water quality caused by wetland losses in neighboring states have adverse impacts on Wisconsin’s waters.

## **Conclusion**

The recent legislative activity on wetlands and Chapter 30, Stats., has maintained Wisconsin’s strong wetland protection laws. As was the case prior to the SWANCC, Rapanos & Carabell decisions, you should contact the Department of Natural Resources if you propose to undertake activities in wetlands in Wisconsin.

I hope this summary is useful as you review our wetland laws. As I indicated at the outset of this memorandum, for current information on Wisconsin programs, please check the Web site at:

<http://dnr.wi.gov/org/water/fhp/waterway/index.htm>

