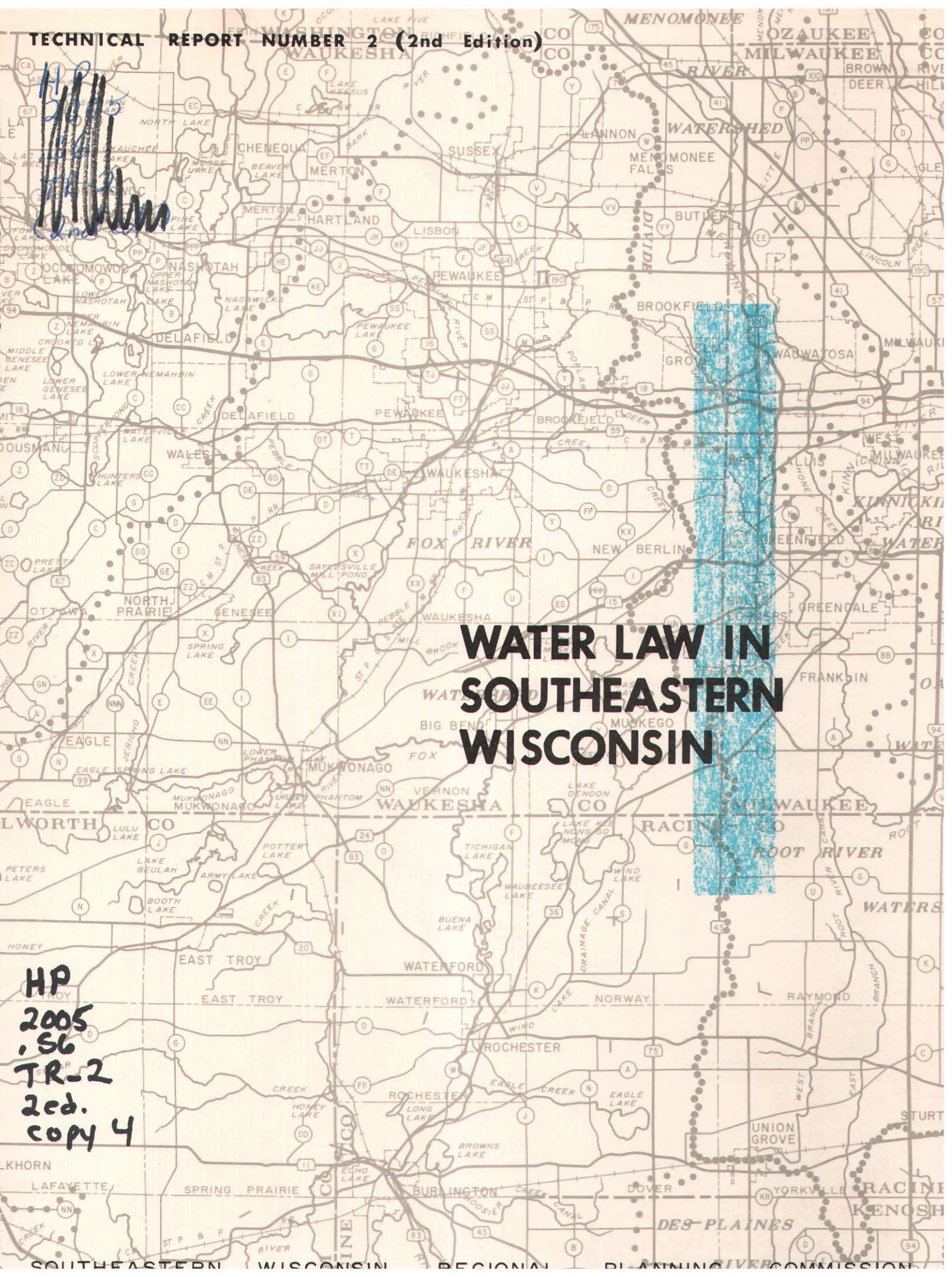


WATER LAW IN SOUTHEASTERN WISCONSIN

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Special acknowledgment is due Mr. Peter V. McAvoy, Attorney at Law, who
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NUMBER 2
(Second Edition)

WATER LAW IN SOUTHEASTERN WISCONSIN

Prepared by the
Southeastern Wisconsin Regional Planning Commission
P. O. Box 769
Old Courthouse
916 N. East Avenue
Waukesha, Wisconsin
53186

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SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION

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STATEMENT OF THE EXECUTIVE DIRECTOR

In any sound planning and engineering effort, it is necessary to investigate the legal as well as the physical and economic factors affecting the problem under consideration. Because of the many and often conflicting interests involved, this is particularly true in the area of water resources. The law can be as important as the hydrology of a river basin or the costs and benefits of proposed water control facilities in determining the ultimate feasibility of a given water resource-related plan. If the legal constraints bearing upon the planning or engineering problem are ignored during plan formulation, serious obstacles may be encountered during plan implementation.

In recognition of this importance of the law, the Commission in September 1965 published SEWRPC Technical Report Number 2, Water Law in Southeastern Wisconsin. This report was authored by the late Professor Jacob H. Beuscher of the University of Wisconsin Law School and served as a manual of water law for the Commission staff in preparation of water resource-related elements of the evolving comprehensive plan for the development of the Southeastern Wisconsin Region. It was observed in that report that water law was not a static entity but rather was in a constant state of flux due to statutory amendments and court decisions; and that, therefore, it would be necessary to continue to monitor developments in this important but transitory area of the law.

Because of a number of important changes that have taken place in the body of water law since publication of SEWRPC Technical Report Number 2, the Commission staff in 1975 undertook preparation of a revised edition of this report. The revised edition was authored by Mr. Peter V. McAvoy, Attorney at Law, and is presented herein as the second edition of SEWRPC Technical Report Number 2. The major substantive areas discussed in the original edition by Professor Beuscher are again discussed herein. Where the original material remains relevant and valid, it has been retained. The report has, however, been reorganized and expanded in scope, these changes being a reflection of recent developments in the law itself.

In using this report, it should again be noted that water law is not a static entity but is in a constant state of flux. The users of the report are, therefore, cautioned to consult with the Commission staff, appropriate officials of state and federal agencies, and practitioners of law regarding the effects of new laws and court actions in modifying the findings and conclusions presented here.

Respectfully submitted,



Kurt W. Bauer
Executive Director

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Peter V. McAvoy

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Chapter I

INTRODUCTION

Water in streams, lakes, and ponds and water underground is one of the most valuable natural resources of southeastern Wisconsin. Demands for its use have led increasingly to conflicts. In turn, these conflicts have led to an increasing and everchanging body of water law. This report consists of a summary presentation of that law, including a discussion of the legal rules and institutions important to the achievement of sound planning for, and wise use and management of, this valuable resource.

The report analyzes both common—or “judge-made”—law, and statutory—or “legislator-made”—law and includes a discussion of selected specific legal considerations involving the use of water. Chapter II provides an overview of the legal divisions of water and the principal divisions of water law, with corresponding definitions. Chapters III, IV, and V discuss in greater detail these divisions of water law. More specifically, Chapter III discusses the right to use water, including public and private rights; the riparian doctrine; the natural flow doctrine; and the reasonable use doctrine. Chapter IV presents a discussion on various aspects of groundwater law, including the recent adoption in Wisconsin of the American rule of groundwater law. Chapter V presents a discussion of diffused surface water law, including the recent adoption in Wisconsin of the reasonable use rule for diffused surface water.

Chapters VI and VII present discussions on legislative enactments at the federal and state levels, respectively, which affect water resources. Legislative bodies at both the federal and state levels have in recent years become dominant forces in the area of water law. This legislative action has been concerned primarily with attempts to fashion policies which will improve the condition of the waters. This legislative role promises to become even more dominant in the future by further defining which water uses are permissible, and in turn the priorities of the permissible uses. The controls which are associated

with these efforts probably will not be limited merely to activities which use or consume water, but will include important constraints on land uses which directly or indirectly affect the waters as well. Chapter VI provides an analysis of those federal statutes having the broadest impact on water use. This chapter includes a discussion of the following federal statutes: The Federal Water Pollution Control Act Amendments of 1972 (FWPCA), the National Environmental Policy Act, the Coastal Zone Management Act, the Flood Disaster Protection Act of 1973, and the Safe Drinking Water Act. Chapter VII extends this type of discussion to cover statutory developments in Wisconsin affecting the use of water. Among the topics discussed are the following: Wisconsin's pollutant discharge elimination system, shoreland and floodplain zoning, Wisconsin's Environmental Policy Act, and Wisconsin's inland lake rehabilitation program. The breadth of both the federal and Wisconsin statutes and their recent vintage should alert all individuals with an interest in this area to pay careful attention to legislative enactments and the programs and regulations adopted pursuant to such legislation.

The remaining chapters of this technical report deal with specific issues relating to water use in southeastern Wisconsin. In Chapter VIII the legal implications of temporarily backing flood waters into drainage districts are examined, along with a discussion of legal rights, remedies, and damages as a result of such activities. Chapter IX presents a discussion of the concept of inter-basin water diversion, with an attendant inquiry into private property rights in relation to such a diversion. Chapter X sets forth a discussion of private mill dams and the effect of maintenance of these dams by private parties or the state. Finally, in Chapter XI the organization of local governments to construct water control facilities covering an entire watershed is examined. This chapter includes an analysis of various alternative institutional ways in which water control facilities can be constructed, including the use of special districts and metropolitan sewerage commissions.

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Chapter II

SOURCES OF WATER AND LEGAL DIVISIONS OF WATER

INTRODUCTION

Southeastern Wisconsin enjoys an abundant supply of water, and future growth and development of the Region are closely related to this abundant but indispensable resource. As a background for the presentation of the law relating to water resources, a summary description of the sources of water supply is provided.

The original source of all surface and ground water is precipitation. Water within the Region originates from precipitation falling either within its boundaries or within the catchment areas of watercourses or groundwater reservoirs which lead into the Region. The Region lies in a humid area where average annual precipitation is generally greater than average annual evapotranspiration. In other words, precipitation in the Region generally exceeds the potential withdrawal of water by solar energy from the composite area of land and water surfaces and vegetation.¹

Average annual rainfall within the Region is about 30 inches.² About two-thirds of this amount falls between April 1 and September 30, the season when most vegetative growth takes place and frost-free ground is most capable of absorbing the rainfall. For the sake of simplicity, it can be said that precipitation which reaches the earth either runs off, is retained on, or is absorbed into the ground. That part which flows off into the streams is termed "runoff." The physical properties of the ground surface largely determine the amount of such runoff. Heavy runoff is likely in areas where the surface consists of impermeable material which prevents the water from readily entering the subsurface. The degree of slope and the amount of antecedent moisture present also will be major contributing factors to heavy runoff. Given favorable ground conditions, however, a substantial portion of the precipitation will be absorbed.

LEGAL DIVISIONS OF WATER

As will be seen, the Wisconsin Supreme Court has adopted the common law legal classification of water, and the State Legislature has traditionally used this classification in enacting water regulatory laws. Five distinct "classes" of water are so defined:

1. Surface water in natural surface watercourses—water occurring or flowing in lakes, ponds, rivers, and natural streams, the limits of which are generally marked during normal water conditions by banks or natural levees.
2. Diffused surface water—water which is diffused over the ground from falling rain or melting snow and occurring or flowing in places other than natural watercourses; that is, not confined by banks.
3. Groundwater in underground streams—water flowing in a well-defined underground channel, the course of which can be distinctly traced. It is doubtful, however, that such identifiable underground channels exist within the Region.
4. Percolating groundwater—water which seeps, filters, or percolates through underground porous strata or earth or rock, but without a definite channel.
5. Springs—natural discharge points for groundwater from either an underground stream or percolating water.

It must be emphasized that these are somewhat unnatural divisions of water based upon where water happens to occur momentarily.

PRINCIPAL DIVISIONS OF WATER LAW

There are three principal divisions of water law: riparian and public rights law, groundwater law, and diffused surface water law.

Riparian and public rights laws are the principal laws that apply to lakes, streams, and ponds, including the following water bodies:

1. Water in watercourses. A watercourse has a source, a channel, and an outlet. The term includes not only streams, but also those lakes and ponds which have natural inlet and outlet channels.
2. Water in those lakes and ponds which, because they have no inlet or outlet, cannot technically be classified as watercourses.³

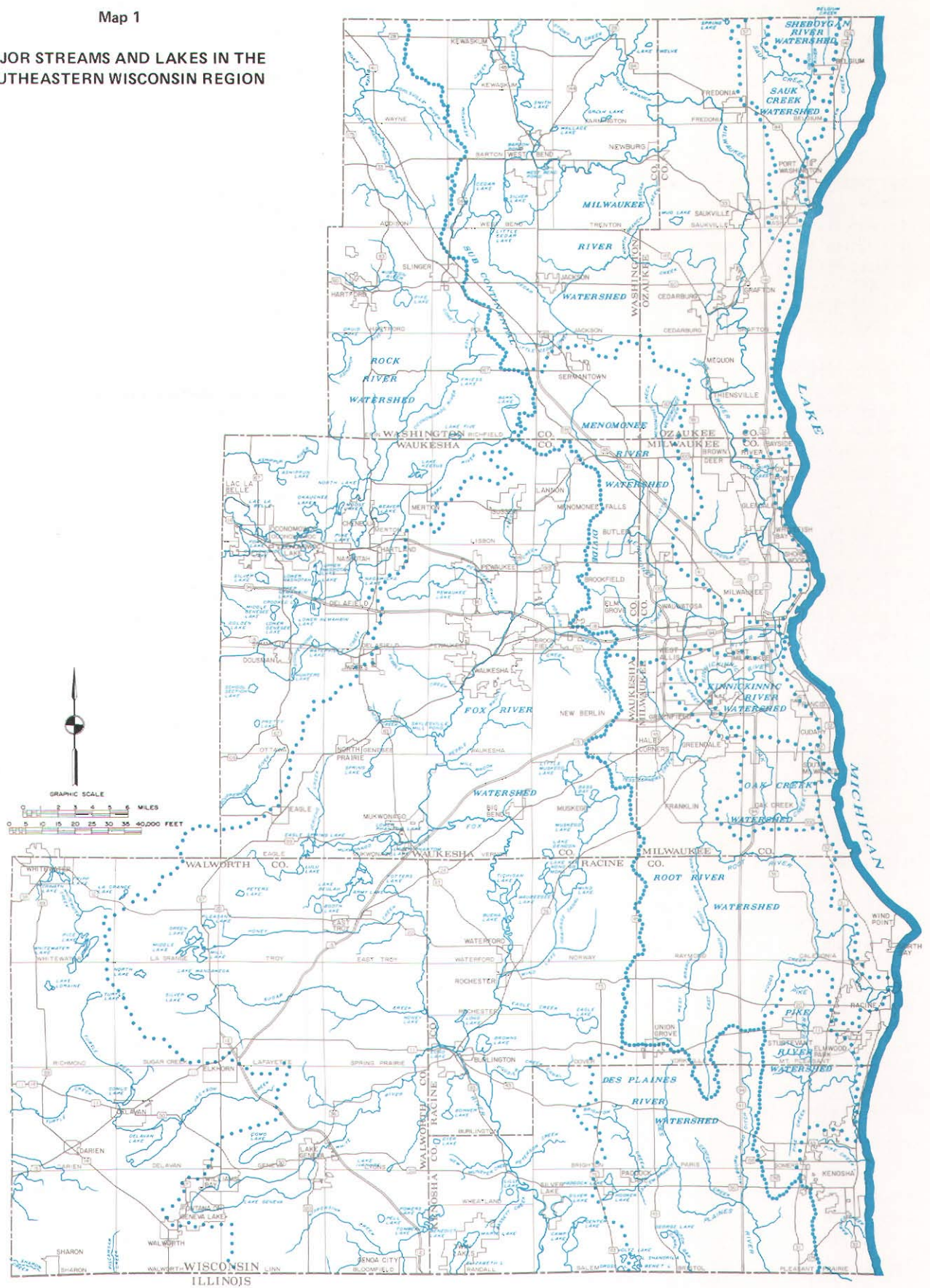
¹ This applies to average annual values only. During most years, and especially during the growing season when plant water requirements are high, there are periods in which evapotranspiration exceeds precipitation.

² SEWRPC Planning Report No. 5, The Natural Resources of Southeastern Wisconsin, June 1963.

³ J. H. Beuscher, "Wisconsin's Law of Water Use." The Wisconsin Bar Bulletin, 31:30-50, October 1958.

Map 1

MAJOR STREAMS AND LAKES IN THE
SOUTHEASTERN WISCONSIN REGION



Source: SEWRPC.

Water in lakes, streams, and ponds also is classified as navigable and non-navigable. This division, as will be seen later, has great legal significance.

Riparian law has evolved as common law based not only upon the decisions of the courts but also upon the customs and usages of the people. This common law base has been augmented by legislation delineating "public rights" in those watercourses which are navigable.

Groundwater law applies to water in the saturated zone below the so-called water table. Here again the law has a common law base. As will be seen, the major common law doctrine applicable in this area of water law has recently been changed by the Wisconsin Supreme Court.

Diffused surface water law applies to water draining over the surface of the land. This law in Wisconsin relates not to water use but to conflicts which arise in trying to get rid of this surface water. The Wisconsin Supreme Court has developed many of these rules, case by case, over

a long period of time, and has recently adopted a new standard of conduct with respect to the handling of diffused surface water.

The impact in recent years of laws enacted by the Legislature has also been significant in all three of these areas of law and must be delineated. In addition, reference must also be made to the administrative law made by state agencies in the day-to-day administration of state water statutes.

This report follows these classifications, for the Wisconsin Court and Legislature have formulated rules of law unique to the various classifications. These water use rules framed by the Wisconsin Court and Legislature, however, often ignore the physical interrelationships which exist between the different sources of water supply. In a practical sense, for example, it is often difficult to differentiate between diffused surface waters and water in a non-navigable watercourse, and between non-navigable watercourses and navigable watercourses.

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Chapter III

RIGHTS TO THE USE OF WATER

INTRODUCTION

The increasing demands by commercial, domestic, and recreational interests for the use of water have been documented repeatedly and, as will be seen in later chapters, regulations of these uses by statute have increased correspondingly. The underlying principles on which many of the statutes enacted are based have had their roots, however, in the common law. And, where legislative action has failed to emerge with respect to specific sectors within the water law area, the common law is still controlling. Consequently, a discussion follows on the most important doctrines governing the use of water as reflected in the evolving case law.

PUBLIC RIGHTS VS. PRIVATE RIGHTS AND THEIR RELATEDNESS

The distinctions between the rights of water users remain primarily classified as public or private. An illustration of the former would be recreational activity, while an example of the latter might be water for industrial cooling. The lines between these two categories, however, are usually not so apparent where, for example, a riparian owner may exercise a public and a private right to fish. While the task of solving this conceptual dichotomy is inherently difficult, once having resolved it, another problem is immediately confronted. This involves the determination as to which right to the use of water is superior or more reasonable than the other. Examples of conflict which may necessitate such a choice are swimming versus power boating or industrial discharges versus fishing. As the frequency of uses mounts, so too will incompatibility; the importance of determining what constitutes a superior or reasonable use, therefore, becomes paramount.

THE RIPARIAN DOCTRINE

The riparian doctrine forms the primary basis of the laws governing the use of natural surface watercourses in Wisconsin and all other states east of the Mississippi together with the humid states bordering that river on the west. Unless otherwise indicated, the following is a discussion of general rules of law uncomplicated by contractual agreements, legislation, prescriptive rights, the exercise of eminent domain powers, or various other complicating factors.

In general, the riparian doctrine provides that owners of lands that adjoin a natural body of water have rights to co-share in the use of the water, so long as each riparian is "reasonable" in his use. Moreover, as will be discussed later, riparians are subject to certain public rights in navigable waters under the trust doctrine. Before proceeding with a statement of the riparian doctrine as applied to Wisconsin, some definition should be given of surface watercourses and land to which riparian rights attach.

Surface Watercourses

The Wisconsin Supreme Court requires that in order to constitute a watercourse there must be:

A stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water.¹

Although, as will be seen later, riparian rights are sometimes conceived to attach to artificial watercourses, usually they are restricted to watercourses which are natural in origin. The term "watercourse" comprehends springs, lakes, or marshes in which the stream originates or through which it flows.² Clearly the rivers of southeastern Wisconsin meet the definitional requirements of a watercourse, and riparian law applies to them. Riparian law also applies to natural lakes and ponds in the Region.

Riparian Land

The Wisconsin Court has never defined the term "riparian land" with precision. It is clear, however, that to be riparian, land must adjoin the watercourse,³ and probably it must lie within the watershed of the watercourse. Also,

¹*Hoyt v. City of Hudson*, 27 Wis. 656, 661 (1871). A lengthy definition distinguishing watercourses from diffused surface waters is contained in *Fryer v. Warne*, 29 Wis. 511 (1872). The Wisconsin Court has held that the existence of a watercourse is a question of fact for the jury. *Eulrich v. Richter*, 37 Wis. 226 (1875). In an equity case, the question of fact would be for the court.

²*Restatement, Law of Torts* (1939) 841. This definition remains unchanged in tentative draft No. 17, *Restatement, Law of Torts* (1971), adopted in principle by tentative draft No. 18 (1972).

³*Slauson v. Goodrich Transportation Company*, 94 Wis. 642, 69 N.W. 990 (1897). It is possible, of course, for a riparian owner to separate the ownership of a stream bed from the lands adjacent to a stream and thereby reserve certain rights which will be discussed subsequently; Cf. note 78 *infra* and accompanying text.

it is held in Wisconsin that riparian rights rest upon ownership of the bank or shore in lateral contact with the water, not upon title to the soil under the water.⁴

How much of the land owned by a particular riparian within the watershed is "riparian land?" The court has never had occasion to pass upon the question of the precise outer boundaries of riparian land. The Wisconsin Public Service Commission, in administering the issuance of permits to irrigators, under Wisconsin Statutes 30.18, had limited "riparian land" to that land bordering a lake or stream which has been in the same ownership in an uninterrupted chain of title from the original government patent.⁵ This is similar to the so-called "source of title" test. Under it, conveyance by "A" of a back parcel of his riparian land to "B" renders the transferred parcel nonriparian, unless the deed provides otherwise; and it remains so even though "A" subsequently repurchases it.⁶

Presumably, also, if "B" having first purchased the back parcel, later also buys the tract touching the water, the back parcel continues nonriparian. Thus, a riparian cannot "assemble" nonriparian land and make it riparian; a nonriparian cannot convert his land to riparian status by

⁴ *Hermansen v. Lake Geneva*, 272 Wis. 293, 75 N.W. 2d 439 (1956); *Colson v. Salzman*, 272 Wis. 397, 75 N.W. 2d 421 (1956); and *Diedrich v. The Northwestern Union Railway Company*, 42 Wis. 248 (1877). In *Mayer v. Greuber*, 29 Wis. 2d 168, 174 38 N.W. 2d 197, (1965) "... riparian rights include the right to use a body of water for 'bathing, swimming and boating purposes'... (and) (i)t is clear in Wisconsin that the mere fact that one owns property abutting a natural body of water presumptively confers certain rights."

⁵ The Wisconsin Department of Natural Resources now has the responsibility for administering the irrigation permit program and follows precedent on this matter.

⁶ But the Public Service Commission apparently did not recognize this possible exception that has usually been recognized in other states. See Oakey, "Public Service Commission Activities Under the Present Water Law," pp. 2-3, Subcommittee on Water Use Legislation, April 12, 1957, cited in 1959 Wisconsin Law Review 293, note 41.

The California Supreme Court has said it would allow such a contrary intention to be shown not only in a deed but also from other circumstances, such as prior use of water on, or canals leading to, the severed parcel of land. *Hudson v. Dailey*, 156 California 617, 624-625 (1909), discussed in Hutchins, W. A., *The California Law of Water Rights*, State of California Printing Division (1956), pp. 195-196.

Courts in some states have held or said that, if land is separated from a watercourse by a public road, it is not riparian land unless the landowner holds fee title to the road (see American Jurisdiction, *Waters*, Section 280), at least unless riparian rights have been expressly reserved.

buying a riparian tract. Under this rule there is a continual dwindling of riparian land. The broader "unity of ownership" test, which is followed in some states, permits the assembling of land so as to create a larger riparian tract than was originally present. This "unity" test regards all land under single ownership as riparian if it is contiguous to a tract of land under the same ownership which abuts a watercourse.⁷

Nonriparian Use

"Nonriparian use" occurs when a riparian uses an excessive quantity of water beyond his reasonable co-share or when he uses water on nonriparian land which he owns or controls. A typical case of nonriparian use is that by a nonriparian who takes water from a watercourse (usually with permission or by grant from a riparian) for use on nonriparian land. Problems emanating from such nonriparian use are not likely to occur in view of the Region's abundant supply of water. If the present supply of water was severely diminished, however, then problems may arise where 1) a municipality takes water from a surface source and distributes it to many nonriparian users, or 2) an industry or business with permission draws water from a watercourse and uses it at a distance on nonriparian land, or 3) an irrigator takes water from such a source and uses it on nonriparian land.

Are such uses illegal, regardless of consequences to downstream or lakeshore riparians? Or must downstream or lakeshore landowners show that they have sustained actual damages before a court will intervene to enjoin the nonriparian use?

Wisconsin case law is not particularly helpful in answering these questions. One case where the court did speak to the issue of nonriparian use was *Munninghoff v. Wisconsin Conservation Commission* (1949).⁸ However, the real questions in that case were concerned with a riparian owner's entitlement to a muskrat farming license involving a navigable stream and whether he had exclusive trapping privileges to the licensed area. But the court in addressing those issues added:

It is not within the power of the state to deprive the owner of submerged land of the right to make use of the water which passes over his land, or to grant the use of it to a nonriparian. The riparian's exclusive right to use the water arises directly from the fact that nonriparians have no access to the stream without trespass upon riparian lands.⁹

⁷ See 56 Am. Jur., *Waters*, sec. 277, 93 C.J.S., *Waters*, sec. 8.

⁸ 255 Wis. 252, 38 N.W. 2d 712 (1949).

⁹ *Id.*, at 259. For a more extensive discussion of the case and the court's handling of the matter see Ellis, Beuscher, Howard, and Debraal, *Water-Use Law and Administration in Wisconsin* (1970), at pp. 18-20, cited henceforth as *Water-Use Law and Administration in Wisconsin*.

The court went on to say that nonriparians did have rights to use navigable streams, for example, in recreation pursuits, but those rights derived from their being members of the public.

In addition to this opinion by the Wisconsin Court on the matter, there is a statute previously mentioned that deals with nonriparian use of waters.¹⁰ Basically, the statute requires permits for diversion of water used for irrigation, agriculture, and those waters used to bringing back or maintaining the normal level in streams and lakes. Subsequently the Wisconsin Legislature has amended the statute to provide that:

a riparian permittee is authorized to withdraw a stated flow of water, he may use that water on any other land contiguous to his riparian land (apparently whether it is owned or rented), but he may not withdraw more water than he did prior to August 1, 1957.¹¹

Further discussion of the act and recent case law interpreting the effect of the legislative language will follow below.¹²

THE NATURAL FLOW DOCTRINE

Simply stated, this doctrine provides that a riparian owner has a right to the natural flow of the watercourse across his land without material diminution or alteration. There are some early Wisconsin cases which use such language; however, strict adherence to such a rule would preclude effective use of the water for other than domestic wants.¹³ Consequently, the natural flow doctrine has not been followed leading to an opinion by the State Attorney General that the rule of reasonable use qualifies or completely cancels the natural flow theory in Wisconsin.¹⁴

¹⁰ Wis. Stats. 30.18 et seq. (1973).

¹¹ *Id.*, 30.18(5), the Department of Natural Resources has the responsibility of annually reviewing each of the permits and may revoke any permit upon finding that the withdrawal is detrimental to other riparians or to the stream or lake or where a designated trout stream is involved.

¹² See footnotes 82-96 *infra* and accompanying text.

¹³ See, e.g., *Mohr v. Gault*, 10 Wis. 455, 461 (1860); *McEvoy v. Ballagher*, 107 Wis. 331, 83 N.W. 633 (1900); and *Kimberly & Clark Co. v. Hewitt*, 75 Wis. 371, 44 N.W. 303 (1890).

¹⁴ 39 OP. Atty. Gen. 564, 566 (1950), "... no riparian owner has an absolute right to the flow of all the water in its natural state, but instead his right is limited by the right of the upper owner to make a reasonable use (the opinion lists factors to consider in determining what is a reasonable use)."

THE REASONABLE USE DOCTRINE

In Wisconsin the reasonable use doctrine qualifies the strict right to the natural flow of a stream or the natural level of a lake. This use right is not a right in the sense that a riparian proprietor "owns the water running by or over his land—it is a right called 'usufructuary' in that the riparian may make a reasonable use of the water as it moves past."¹⁵ However, if and when water is captured as it falls or is physically removed from a lake or stream and isolated (completely separated from the original body or source of supply) and placed in a reservoir, ditch, tank, drum, or bottle, it then becomes the personal property of the person who so reduced the water to his possession. Separation and control are the key factors here. Though one cannot establish a proprietary interest in a thing which perpetually exists in nature (in this case the flow of a lake or stream), he can reduce a finite quantity of water to private ownership by capturing (separating) it and establishing absolute control over it. This includes the right to subsequently dispose of this water in any way he (the now owner) sees fit. Legal terminology would say that one who captures and controls a quantity of water establishes a "property" in the water.

The relative nature of the riparian right in Wisconsin is aptly described by the Wisconsin Court in *Fox River Flour & Paper Co. v. Kelley*,¹⁶ in the following language:

This case involves questions relating to riparian rights; and it may be well, at the outset, to refer to some elementary doctrine which defines or states what these rights are. In *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9-23, Mr. Justice Gray says: "The right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power inherent in the fall of the stream and the force of the current to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back." In *Bates v. Weymouth Iron Co.*, 8 Cush. 548-552, Chief Justice Shaw says:

¹⁵ *Lawson v. Mowry*, 52 Wis. 219, 9 N.W. 280 (1881) and *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N.W. 257 (1894). When water is captured in ditches or artificial structures and isolated, it is held in private ownership as personal property until released. *Munninghoff v. Wisconsin Conservation Comm.*, 255 Wis. 252, 38 N.W. 2d 712 (1949).

¹⁶ 70 Wis. 287, 35 N.W. 744 (1887). This was an action to restrain defendants from diverting and using water which flowed in a raceway through defendant's land.

"The relative rights of landowners and mill-owners are founded on the established rule of the common law that every proprietor through whose territory a current of water flows in its course towards the sea, has an equal right to the use of it for all reasonable and beneficial purposes, including the power of such stream for driving mills, subject to a like reasonable and beneficial use by the proprietors above him and below him on the same stream. Consequently, no one can deprive another of his equal right and beneficial use by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially so as to cause it to flow back on the land of the proprietor above."

The term "reasonable use" implies that a question of fact must be resolved in each case, and the Wisconsin Court has recognized the concept as a flexible one. In conceding that no rule can be stated to cover all possible eventualities, the Court has said that in determining what is a reasonable use:

Regard must be had to the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so also the size of the stream, the fall of the water, its volume, velocity and prospective rise and fall, are important elements to be considered.¹⁷

Thus it is concluded that a user's utilization of water must be reasonable under all the circumstances;¹⁸ and a user may meet this test despite substantial interference with the natural flow of a watercourse, for it is recognized that any rule preventing all or almost all interference with the flow would needlessly deprive riparian proprietors of much of the value of a stream and prevent utilization for purposes such as power development and other beneficial uses.¹⁹

To give a more realistic feel for how the Wisconsin Court works with the factual variables in determining which uses are reasonable and which are unreasonable, the following cases are summarized:

¹⁷ *Timm v. Bear*, 29 Wis. 254, 265 (1871). This was an action by a lower riparian mill owner against his upper counterpart for detaining a stream for power purposes and releasing it in an unreasonable manner.

¹⁸ *Mabie v. Matteson*, 17 Wis. 1, 8-9 (1863).

¹⁹ *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652, 657, 43 N.W. 660, 661 (1889).

Coldwell v. Sanderson was an action by a lower mill owner against an upper mill owner who held back the flow of a stream and manipulated it for the use of his mill.²⁰ The Court stated:

Very few streams would be of any use for hydraulic machinery without dams and ponds or reservoirs, and the law, as well as common usage, recognizes the right of the riparian owner to construct a dam, and temporarily stop the natural flow of the stream, to fill up such a pond or reservoir, or area reasonably consistent with the size and volume of the stream. This principle is well declared in the charge of the learned judge in this case, as follows: "There may be a diminution in quantity or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right." And, again: "It is a reasonable use of the stream, by one proprietor, to detain the water for such a time as is necessary to fill a pond, when built or when repaired, when used in connection with machinery, which the power of the stream in its ordinary stages is adequate to propel."

Hazeltine v. Case was an action by a lower riparian to recover damages alleged to have resulted from the maintenance by the defendant, upon his upper riparian premises, of a hog pen and a hog yard.²¹ The plaintiff complained that he and his family had been using the small spring-fed stream flowing past his and the defendant's land for culinary and domestic purposes for many years, that the water in its natural state was pure and cool, but that, since the defendant had constructed his hog pen on his land adjoining the plaintiff's and had kept the hogs in the pen and in the stream, the water was unfit for use for any purpose.

The jury verdict was for the plaintiff, and the defendant appealed from the judgment. The judgment was affirmed, the Supreme Court approving, among other things, the following instructions:

Each riparian proprietor was entitled to the use and enjoyment of the stream in its natural flow, subject to its reasonable use by other proprietors; that each proprietor had an equal right to the use of the stream for the ordinary purposes of his house and farm, and for the purpose of watering his stock, even though such use might, in some degree, lessen the volume of the stream or affect the purity of the water; that the lower proprietor had no superior right in this regard over a proprietor

²⁰ 69 Wis. 52, 28 N.W. 232, 33 N.W. 591 (1887).

²¹ 46 Wis. 391, 1 N.W. 66 (1879).

higher up on the stream, because each was entitled to make a beneficial and reasonable use of the stream in its natural state, that if, in its natural state, the stream was useful both for domestic or household purposes and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to more valuable use; but that its reasonable use for all purposes should be preserved, if possible. And the jury were told that they must determine from all the facts proven, taking into account the size, nature and condition of the stream, whether the defendant made a reasonable and proper use of it by keeping a large number of hogs confined near it, or permitting such animals to go into the stream and wallow in the water.

It should be noted that the defendant's use for watering stock in this case was not called a domestic use as that term is often defined by the courts.²² Had the defendant not been permitting his swine to wallow in the brook, but merely been diverting water from it for purposes of watering them, the Court indicates that a jury could reasonably prefer his use for "ordinary stock purposes" over the competing use for "domestic purposes." It is generally held in other states that a domestic use may include both household use and at least some stock watering and may be indulged in even though it exhausts the supply available; but the Wisconsin Supreme Court has never specifically ruled to that effect.

Uses other than those discussed which the Wisconsin Court has indicated might be reasonable in appropriate cases as illustrated by the following language in Munninghoff v. Wisconsin Conservation Commission, the muskrat trapping case mentioned earlier:²³

For instance, he (the riparian) may erect a pier for navigation; he may pump part of the water out of the stream to irrigate his crops; his cattle

may be permitted to drink of it; and his muskrats may use it to gather vegetation for the construction of muskrat houses or for food.

Other major private uses of water in Wisconsin include use for paper manufacturing, malting, metal working and fabrication, brewing, meat packing, dairy products processing, food canning and processing, cold storage, ice manufacture, and laundries. These uses might be characterized as industrial and commercial; and since they operate within the framework of the riparian system, they are most certainly allowable if exercised reasonably.

In addition to the foregoing, if water is to be diverted for agricultural and irrigation purposes, it must comply with Wisconsin Statutes 30.18. A recent case, State ex. rel. Chain O'Lakes Protective Assn v. Moses analyzed the statute with respect to the common law doctrine of reasonable use.²⁴ The major issue raised was whether the Wisconsin Department of Veteran Affairs was required to secure a permit from the Wisconsin Department of Natural Resources for diversion of water for a new treatment plant at one of its facilities. The Wisconsin Court in addressing this point stated:

The established rule of the common law was that every riparian owner of stream or lake-shore property had an equal right to the use of it for all reasonable and beneficial purposes . . . (such right being) subject to a trust doctrine concept that sees all natural resources in the state as impressed with a trust for usage and conservation as a state resource.²⁵

The Court noted that the common law rule was established prior to enactment of the irrigation permit statute, thus it would construe the statute on narrow grounds since it was clearly in "derogation of the common law."²⁶ It went on to hold in the case that the statute did not apply nor was a permit needed by the Veterans Administration and that as a riparian owner, the respondent can utilize lake water as a source of supply for the water plant at the veterans' home providing such use is a reasonable one.²⁷

Two years later in the important case of Omernik v. State the same irrigation permit statute was in question,²⁸ except that in this instance the diversion was from the Flume and Klondike Creeks in Portage County by an individual for irrigation of his private land. Here the Court stated that the sections of the statute were to be strictly con-

²² See 93 C.J.S. Waters, sec. 12, p. 614.

²³ Munninghoff v. Wisconsin Conservation Comm., 255 Wis. 252, 259, 38 N.W. 2d 712, 715 (1949) ("... he may pump part of the water out of the stream to irrigate his crops . . .") and Doemel v. Jantz, 180 Wis. 225, 230, 193 N.W. 393, 396 (1923) ("... a riparian owner . . . has the right to use the waters for domestic and agricultural purposes . . ."). It is generally considered that irrigation is a proper use of water: "they (English, Eastern and Western decisions) all agree; namely, that the use for irrigation is proper within the limit that it must not unreasonably prevent the possibility of equal use by the other riparian proprietors." 1 Wiel, Water Rights in the Western States, 3rd Ed. (1911), sec. 748.

²⁴ 53 Wis. 2d 579, 193 N.W. 2d 708 (1972).

²⁵ Id., at 582.

²⁶ Id., at 583.

²⁷ Id., at 584.

²⁸ 64 Wis. 2d 6, 218 N.W. 2d 734 (1974).

strued but not so strictly as to defeat the intent of the Legislature.²⁹ The Court then went on to affirm the conviction and fine of Omernik for not having obtained the necessary permit.³⁰

Thus, with the exception of statutory law, the rules developed by the Wisconsin Court in determining the reasonable use doctrine still apply. And where, for example, manipulation of flow for a sufficient time to accumulate a lead of water to flow logs and operate machinery was permitted, the allegations of riparian owners that they had a right to unobstructed stream-flows never defeated that privilege. Or where such uses were involved as the construction of dams and utilization of water to drive wheels and generate power, irrigation reservoirs causing loss of water due to evaporation and seepage are almost always recognized as proper.³¹

Over time there has been some "firming up" of rights otherwise based on these vague court-administered standards. For example, a riparian who desires to build or enlarge a dam or pier across or into a navigable stream no longer is required to take the full risk that his structure may later be declared to be unreasonable. Instead, he applies for a Department of Natural Resources Permit under Wisconsin Statutes, Chapter 31, and after notice and hearing the Department determines whether a permit is to be issued or not. Where he obtains a permit and builds according to it, his co-riparians will be hard put to prove that his use is unreasonable. Similarly, where the Department of Natural Resources at the request of one or more riparians, and after notice and hearing, fixes the level of a lake, other riparians will have a difficult time later establishing that the level is unreasonable. In addition, riparians have frequently "firmed up" water uses by contracts with co-riparians. Sometimes a water user will acquire a firm right to a specific quantity of water by adverse use (prescription) over a period of time, usually 20 years. Presumably to acquire such a right, the user must have been using the water throughout the period under circumstances such that one or more riparians could have effectively sued to stop him. It is the fact that they did not sue and that their claims were barred by a 20-year statute of limitation which explains the phenomenon of "prescription."³²

²⁹ *Id.*, at 15, 16.

³⁰ This case is important for its handling of several major issues, e.g., permits for use of diverted waters from non-navigable streams, the taking issue, equal protection, etc., and will be discussed *infra* at notes 89-96 and accompanying text.

³¹ And see, *Appelbacker v. State* 167 Wis. 233, 167 N.W. 244 (1918), where the court describes the balancing test between the reasonable use for the individual riparian as measured against the capacity and extent of the stream and the other riparian owners on the same stream; see also *Timm v. Bear*, 29 Wis. 254 and *Lawrence v. American W. P. Co.*, 144 Wis. 556, 563, 128 N.W. 440 (1911).

Rights in Navigable and Non-Navigable Watercourses

It has been explained that Wisconsin riparians enjoy a right of "reasonable use" of water in natural surface watercourses, except as that right is qualified by the irrigation permit statute and other statutes relating to the construction of dams, piers, and other obstructions and the fixing of lake levels.³³

In the case of a non-navigable stream or lake, the extent of a riparian's reasonable use is also measured by the relationship of the use to the rights of other riparians on the same watercourse. When a riparian uses navigable water, however, those rights are also subject to public rights in the water.

Private water use is often completely consistent with the exercise of public rights in navigable streams and lakes, but serious conflicts may arise between private riparians and those seeking to exercise public use of a given watercourse; and, in that event, in Wisconsin the public rights will likely prevail.

This does not mean that certain riparian rights may be taken or substantially abridged without compensation, for in Wisconsin it has been long recognized that such rights are property rights which cannot be taken for a private purpose or for a public purpose without compensation. The exercise of water use rights, however, might be substantially impaired by exercise of public rights without compensation. This simply means that public rights operate as a "burden" on riparian land in the sense that a riparian may be prevented from exercising rights which conflict with the public use of the watercourse.

On the issue of taking a riparian right without compensation, the Court said in *Omernik v. State* that the State's

³² *Cf.*, *Harrsberger, Prescriptive Water Rights in Wisconsin* 1961 Wis. L. Rev. 47.

³³ *Cf.*, *Omernik v. State* 64 Wis. 2d 6, 218 N.W. 2d 734, which discusses the necessity of obtaining a permit even for non-navigable waters when the use falls into one of the categories as defined by Wis. Stats. 30.18, discussion of the courts holding *infra*, notes 89-96 and accompanying text. See also the discussion in Chapter 6 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), where the United States Congress has exercised authority over all waters of the nation, dropping the navigability requirements. Presumably Chapter 147 Wis. Stats. enacted pursuant to the FWPCA requirements found in sec. 402 of the FWPCA would permit the State of Wisconsin to exercise similar authority over non-navigable waters and to regulate discharges into them. However, the test of navigability in Wisconsin is already very liberal as subsequent discussion in the main text will indicate, and the FWPCA Amendments and the enactment of Chapter 147 may have little practical effect in Wisconsin with respect to State jurisdiction over certain waters.

requirement of permits for certain uses with the possibility of restriction under Wisconsin Statutes 30.18 was an:

exercise of its police power to protect public rights and to prevent harm to the public by uncontrolled diversion of water from lakes and streams. While the statute does not secure for the state a benefit not presently enjoyed by its citizens, it does seek to prevent the public harm of dry riverbeds replacing flowing streams [and the court quoting herein from *Just v. Marinette*, 56 Wis. 2d 7, went on to say] the statute 'does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.'

In the valid exercise of the police power reasonably restricting the use of property '... the damage suffered by the owner is said to be incidental' It is only where the police-power restriction is so great that '... the land-owner ought not to bear such a burden for the public good, [that] the restriction has been held to be a constructive taking.'³⁴

The Court, in upholding the restrictions imposed on riparians through the police power in both of the cases cited, leaves little doubt of the importance that it places on the dominance of the public trust doctrine.

One of the important riparian rights attaching to land bordering navigable lakes and streams is the right of access to the water. It is recognized in Wisconsin that a riparian has a right of access from the front of his land to the navigable part of the stream or lake and the right to build a landing, wharf, or pier, subject to legislative control.³⁵ Moreover, as the recent decision in *State v. McFarren* points out:

a riparian owner has a qualified right to the land between the actual water level and the ordinary high water mark; he may exclude the public therefrom but he may not interfere with the rights of the public for navigable purposes.³⁶

But those qualifications upon riparian rights as noted in the *Just* and *Omernik* cases may be substantial.³⁷

Definition of Navigable Waters

Other than the possible exceptions such as the right to protect wildlife, navigability is the critical element for the public rights to attach. Even where certain uses of non-navigable waters may require a permit, it is as a result of the potentially adverse impacts on navigable waters

that the restrictions are permitted.³⁸ Thus the determination of navigability becomes the controlling factor in most instances of whether certain requirements may be imposed on rivers, major perennial streams, and natural lakes.

It is well to distinguish between the general court-made test of navigability by which we answer our question and tests for purposes of determining whether certain regulatory provisions of Wisconsin Statutes, Chapters 30 and 31 apply. Section 30.10 of Wisconsin Statutes, for example, declares navigable all lakes which are "navigable in part" and all streams, sloughs, bayous, and marsh outlets, which are navigable in part for any purpose whatsoever.³⁹

³⁷ Another example of where further qualifications may arise is under Wis. Stats. 29.02 which provides that the State is vested with the legal title to all wild animals, which includes fish, so that it may regulate the enjoyment, use, disposition, and conservation thereof. Such authority would seem to empower the State to regulate the use of waters of the State whether they be navigable or non-navigable in fulfilling the mandate. However, in *Department of Natural Resources v. Clintonville*, 53 Wis. 2d 1, 191 N.W. 2d 866 (1971), the State was unsuccessful in recovering damages for the killing of thousands of fish by the City which had lowered the level of a pond without the permission of the DNR. The court would not grant such damages under the civil action section of Chapter 29, Wis. Stats. (specifically 29.65) unless they were acts expressly prohibited by the section. The court did say that redress was possible under 31.23(2), 23.095, and 31.25 Wis. Stats., but the argument as presented did not rest on any one of these grounds, so the court would not consider them. And, see *Water-Use Law and Administration in Wisconsin* *supra* note 9, at 36, where the authors also raise the issue of whether public rights in navigable watercourses may include public water supply—although they question the viability of this theory, at 37-39. Also see *supra*, note 33, for comments on Chapter 147 Wis. Stats.

³⁸ Cf. Wis. Stats. 30.18 *et seq.* and *Omernik v. State*, *infra* notes 89-96 and accompanying text.

³⁹ The Wisconsin shoreland/floodplain zoning act, which was enacted to fulfill the State's role as trustee of its navigable waters, provides that navigable waters mean Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages, and other waters within the territorial limits of this State, including the Wisconsin portion of boundary waters, which are navigable under the laws of the State, Wis. Stats. 144.26(2)(d); other sections of the act are 59.971 and 87.30; further discussion of this legislation can be found in Chapter 7. It should be noted that authority exists for the U. S. Congress under the Commerce Clause to regulate activities over and on the waterways of the nations and, where there is a conflict between state and federal law, the latter will take precedence, *Gibbons v. Ogden* 22 U. S. (9 Wheat) 1 (1824). And see Chapter 6 for a discussion of the Federal Water Pollution Control Act Amendments of 1972.

³⁴ *Supra*, note 28 at 21 and for further discussion of the taking issue see *Omernik*, *infra* notes at 96 and accompanying text and an analysis of *Just v. Marinette*, *infra* Chapter 7, and notes 72-78.

³⁵ *Yates v. City of Milwaukee*, 10 Wall. 497 (U. S. 1870).

³⁶ 62 Wis. 2d 492, 498, 499, 215 N.W. 2d 459 (1974).

The Wisconsin Court's test of navigability has moved from one of commercial transport only to include suitability for recreational boating. Earlier the question was whether the stream or lake could be used to float products of the country to market for a significant period during the year. The principal product floated to market in those days was the sawlog—hence, the so-called “sawlog” test of navigability. More recently, in 1952 the Wisconsin Court said: “. . . any stream is ‘navigable in fact’ which is capable of floating any boat, skiff, or canoes of the shallowest draft used for recreation purposes.”⁴⁰

The above quoted test of navigability does not require that the stream, pond, or lake be capable of floating a product to market or of floating a boat, skiff, or canoe every day of the year or every rod of its length or surface area. Thus, under the recreational boating test, the majority of natural ponds and all natural lakes are “navigable.” And therefore, the beds are owned by the State and public rights attach. Streams of even modest size may be navigable by the recreational boating test. Almost all watercourses within the Region are navigable vis-a-vis the recreational boating test.⁴¹ One of the significant results for southeastern Wisconsin is that public recreational boating and canoeing on such streams are protected against privately erected fences or barriers. This has major recreational significance.

Differences with Respect to Streams, Lakes, and Ponds

The doctrine of riparian rights and public rights in navigable waters, as modified by statute, usually governs the use of lakes and ponds as well as streams. However, there are some differences.

In 1897 the Wisconsin Court decided the classification of a watercourse called “Mud Lake,” for the purpose of determining the ownership of its bed. The evidence at the trial showed that the waters of a small stream spread into Mud Lake, 1,925 to 3,575 yards in width and three miles in length, and then reappeared as a stream; that Mud Lake was covered with water in spring, fall, and after heavy rains; that in the summer it was marshy and partially dry; that it was filled with rushes and wild rice; and that sometimes it could be navigated by small skiffs and canoes. Although Mud Lake was not navigable by any

kind of boat and there was neither defined channel nor current during the greater part of the year, it had been “meandered” by government surveyors during the conduct of the U. S. Public Land Survey. The Court determined Mud Lake was a lake within the legal definition of that term and stated:

While it might, with entire propriety and accuracy, be called a marsh or swamp, the name by which it shall be designated is not controlling upon the question. . . . It has very little, if any, movement of its head towards its outlet during the greater part of the year. It is said that even the large lakes have such a current. The trial court found that this was not a stream or watercourse, but was a “shallow, muddy lake or marsh.” Such it is clearly shown to be by the evidence.⁴²

At this time the Wisconsin Court has not been called upon to distinguish a lake from a pond.⁴³

Ownership of Stream and Lake Beds

Determination of ownership of a stream or lake bed may have various consequences. Wisconsin holds that the beds of streams, whether navigable or non-navigable, are owned by the owners of the shore lands; beds of natural navigable lakes are owned by the State. If the bed is publicly owned, removal of material must be sanctioned by the State.⁴⁴ If the bed is privately owned, removal of material from the bed is presumably authorized. However, private ownership of the bed of a navigable stream has

⁴⁰ *Muench v. Public Service Comm.*, 261 Wis. 492, 53 N.W. 2d 514 (1952), and, as was pointed out in this decision, Wisconsin had since 1911 defined navigable waters as: those which are navigable in fact for any purpose whatsoever, at 506, and see *Whisler v. Wildinsson*, 22 Wis. 527 (1868); *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652, 43 N.W. 660 (1889); and *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914).

⁴¹ For example, the Root, Fox-Illinois, Milwaukee, Des Plaines, Pike, Honey Creek, Kinnickinnic, Menomonee, Little Menomonee, Oak Creek, Cedar Creek, Mukwonago, White, Bark, Oconomowoc, Rubicon, Ashippun, and Pewaukee all are clearly navigable.

⁴² *Ne-Pee-Nauk Club v. Wislon*, 96 Wis. 290 295, 71 N.W. 661, 662 (1897); see also *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914).

⁴³ However, in sec. 144.26(2)(d) which defines navigable waters this distinction may in fact be made, between natural inland lakes and all other waters including ponds, in which case an “artificial pond” may for example come under certain regulations such as Wisconsin’s Shoreland Zoning Act sec. 59.971 while artificial lakes would not; for a discussion of a related matter (drainage ditches) see Chapter 7, notes 63-64 and accompanying text.

⁴⁴ See Wis. Stats. 30.20 and *Angelo v. Railroad Comm.*, 194 Wis. 543, 219 N.W. 570 (1928); and *Reuter v. Department of Natural Resources*, 43 Wis. 2d 272, 168 N.W. 2d 860 (1969). The court pointed out in *Hixon v. Public Service Comm.* 32 Wis. 2d 608, 146 N.W. 2d 608 (1966), while upholding a PSC denial of a permit, that “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,” at 631, 632.

always been subject to the overriding public servitude of navigation and to other public rights that adhere to navigable waters. The legal situation has been not unlike the case of a public highway easement over private land. The Wisconsin Court has repeatedly used strong language to underline its support of the public rights in navigable streams as has been shown throughout.

With these general comments in mind, we turn now to a more detailed analysis of the pertinent Wisconsin cases on bed ownership.

Recall that riparian rights in Wisconsin exist by virtue of ownership of the bank or shore in contact with the water and not by title to the soil under the water.⁴⁵

Title to submerged soil, consequently, does not ordinarily determine whether a riparian owner has water rights.⁴⁶ Where, however, by the terms of a grant, the low water stream shoreline was the boundary, the Court held that the owner of the uplands above the privately owned submerged stream bed did not have a right to cut and remove ice without becoming a trespasser to the owner of the bed.⁴⁷

Private proprietors whose lands make lateral contact with the waters of beds underlying navigable lakes, ownership of which is in the State, enjoy the exclusive right to access for private use;⁴⁸ and the general public can exercise its rights only if access to the water can be gained by them

without trespassing over private property. Recently the Supreme Court of Wisconsin reiterated this position in the previously cited case of State v. McFarren.⁴⁹

Although the water use rights of a riparian landowner ordinarily are based upon his title to the uplands abutting the water, a Wisconsin riparian owns the bed to the middle or thread of the stream.⁵⁰ This is true regardless of whether the stream is navigable or non-navigable, except in the former event his title to the bed of the stream is qualified by the public easement and right of navigation with all its incidents.⁵¹ In some cases, the Court has suggested that the State also has a qualified title in the stream bed for such purposes. In a case involving a navigable river, the Court said:

The respondents do not challenge the paramount title of the state to the river bed and concede that the legislature may, in the future, revoke the right of the riparian owners to retain structures up to the bulkhead line under Section 30.11(4), Stats. 1959. It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount and the rights of others are subject to revocation at the pleasure of the legislature.⁵²

The Court was speaking of possible revocation of rights to retain structures up to the bulkhead⁵³ lines established by the Public Service Commission and not necessarily the possible revocation of the riparian's title to the bed. The Court cited Muench v. Public Service Commission in regard to the State's trusteeship. In that case, the Court said that "the state holds the beds underlying navigable waters in trust for all of its citizens, subject only to the qualification that a riparian owner . . . has a qualified title in the stream bed to the center thereof."⁵⁴ The Court added, quoting from Franzini v. Layland, that:

⁴⁹ *Supra*, note 36.

⁵⁰ James v. Pettibone, 2 Wis. 509 (1863); Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61 (1872); Delaplaine v. Chicago & Northwestern Ry. Co., 42 Wis. 214 (1877); and Chandos v. Mack, 77 Wis. 573, 46 N.W. 803 (1890).

⁵¹ Munninghoff v. Wisconsin Conservation Comm., 255 Wis. 252, 38 N.W. 2d 712 (1949).

⁵² Town of Aswaubenon v. Public Service Comm., 22 Wis. 2d 38, 125 N.W. 2d 647, 653 (1963).

⁵³ A bulkhead line, up to which structures and fill in conformance with local ordinances may be built and deposited and beyond which (close to the actual body of water) no structures may be built or fill deposited, may be established along the shore of any navigable waters by local ordinance, subject to Department of Natural Resources approval pursuant to Wis. Stats. 30.11.

⁵⁴ Muench v. Public Service Commission, 261 Wis. 492, 501, 502, 53 N.W. 2d 514 (1952).

⁴⁵ Hermansen v. City of Lake Geneva, 272 Wis. 293, 75 N.W. 2d 439 (1956); Colson v. Salzman, 272 Wis. 397, 75 N.W. 2d 421 (1956); and Diedrich v. Northwestern Union Ry. Co., 42 Wis. 248 (1877) (involving a lake).

⁴⁶ Delaplaine v. Chicago & Northwestern Ry. Co., 42 Wis. 214, 227, (1877) (Riparian rights "may and do exist though the fee in the bed of the river or lake be in the state. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact.") But bed ownership does carry with it rights to cut ice and trap in navigable streams. And in, Allen v. Weber, 80 Wis. 531, 538, 50 N.W. 514 (1891). The court added: "From the language of the description of the defendants' strip of land itself, it is perfectly clear that low-water mark was made a fixed and permanent boundary. If the situation of the strip on the pond is consulted, that would evince the same intention. It was contiguous to a very old mill-dam, belonging to the grantors. . . . It was not likely that it was intended to give the grantees of this strip any interest in the waters of the pond, or any control over the waterpower, or interference with it"

⁴⁷ *Id.*

⁴⁸ Delaplaine v. Chicago & Northwestern Ry. Co., 42 Wis. 214 (1877); accord Lyon v. Fishmonger's Co., L.R. 1 Ap. Cas. 662 (1876).

the title of a riparian proprietor upon a navigable stream goes not by force of his patent . . . but by the mere favor or concession of the state to the center of the stream, subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in it in trust for their use.⁵⁵

These statements do not negate the Court's earlier holdings that the riparian owner holds title to the bed; but they do make it clear that the riparian owner holds only a qualified title, subject to the public trust.⁵⁶ On the other hand, the State's title, if any, to the beds of navigable streams likewise is a qualified title, as the public may be excluded from making certain uses which have been held to be the exclusive right of the riparian owner.

One who owns both banks of a navigable or non-navigable Wisconsin stream has title to the entire bed of the stream between the boundaries of his land. An interesting exception to the rule that a riparian proprietor owns to the thread or middle of the stream occurs on the Mississippi River. Since that river forms the Minnesota-Wisconsin boundary, and the actual boundary line is the centerline of the main channel of the river,⁵⁷ a Wisconsin riparian does not own the bed to the thread of the river, but to the centerline of the main navigable channel.⁵⁸ The middle of the main navigable channel may be very close to the Wisconsin shore at points and equally close to the Minnesota shore at other points. Consequently, the extent of Wisconsin residents' riparian ownership of the bed would vary, depending on the location of their abutting land. Bed ownership of Lake Michigan as a natural lake is, of course, in the bordering states, the boundary being that line equidistant from each of the respective shorelines as demarcated by high water marks.⁵⁹

Significance of Ownership of Stream Beds: In a decision involving an artificially created, navigable watercourse, created by damming a non-navigable stream and over-flowing private land, the Wisconsin Court concluded that only the private owner of the overflowed land could legally cut the ice formed on the overlying water.⁶⁰ This result, of course, would not follow if the flowage easement agreement provided otherwise. One writer suggests that in Wisconsin, if a watercourse is a naturally navigable stream, the riparian owner has the exclusive privilege to cut ice.⁶¹

⁵⁵ *Franzini v. Layland*, 120 Wis. 73, 81 (1903).

⁵⁶ *Supra*, note 36, *State v. McFarren*, 62 Wis. 2d 492, 215 N.W. 2d 459 (1974).

⁵⁷ Wis. Const. Art. 2, sec. 1. The source of the boundary is the enabling act admitting Wisconsin to the Union. 9 U. S. Stats., Chapter 89, p. 56.

⁵⁸ *Franzini v. Layland*, 120 Wis. 72, 97 N.W. 499 (1903).

A riparian on a stream may be licensed under a Wisconsin statute to breed and propagate muskrats.⁶² The exclusive right to do so lies within the owner of the stream bed.⁶³ *Munninghoff v. Wisconsin Conservation Commission* is a case in point.⁶⁴ There the Court declared that, while the owner of the navigable stream bed does not own the overlying water, he does enjoy the exclusive right to make certain reasonable uses of the water; and among such

⁵⁹ By ordinary high water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *State v. McFarren*, 62 Wis. 2d 492, 498, 215 N.W. 2d 459 (1974) and *State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 176, 118 N.W. 2d 252 (1962). In a recent federal action involving lands to be included in the Upper Mississippi Wildlife and Fish Refuge, the United States Government sought to quiet title in itself. The Circuit Court sustained the title in the United States finding that unsurveyed land existing at the time of statehood remained the property of the United States. *United States v. Seversen* 447 F. 2d 631, 635 reh. den. (CA 7) (1971). For further discussion on federal law regarding ownership of streambeds and lakebeds see *Water-Use Law and Administration*, sec. 3.10 pp. 53-70, *supra*, note 9.

⁶⁰ *Haase v. Kingston Cooperative Creamery Association* 212 Wis. 585, 250 N.W. 444 (1933). In *Mayer v. Gruber*, 29 Wis. 2d 168, 138 N.W. 2d 197 (1965), the Court discussed *Haase* and added, at 176, "In the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land. An artificial lake located wholly on the property of a single owner is his to use as he sees fit, provided, of course, that the use is lawful. He may if he wishes reserve to himself or his assigns the exclusive use of the lake or water rights."

⁶¹ Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 Wis. L. Rev. 335. The presumption is based on Wisconsin decisions. But in *Water-Use Law and Administration supra* note 9, the authors feel that, "if a naturally non-navigable stream has been dammed so as to create a navigable lake, the public may be able to acquire, by implied deduction, rights to use the entire lake after using it for 20 years or more; and it appears that if the stream was already navigable before it was dammed, public rights to use the lake may arise immediately." Similarly, where a channel is created by straightening or otherwise altering a natural, navigable watercourse, the public may soon acquire rights in the artificial channel as though it were a natural watercourse, *Id.*, at p. 95, see also pp. 94, 189-192.

⁶² Wis. Stats. 29.575 (1961).

⁶³ 15 Op. Wis. Atty. Gen. 531 (1926).

⁶⁴ 255 Wis. 252. 38 N.W. 2d 712 (1949).

reasonable uses is the right to allow his muskrats to gather vegetation from the water for food or for the construction of houses.

Coincidental with the riparian's right of access to the navigable part of a stream is his right to construct landings, wharves, or piers for his use, subject to legislative regulation designed to protect public rights.⁶⁵ This right is subject to State consent and the right of the State to improve the stream in aid of navigation.⁶⁶

Significance of Ownership of Lake Beds: As indicated, the Wisconsin Court has held that the State owns the beds underlying natural navigable lakes and ponds.⁶⁷ By the Court's generous recreational boating test of "navigability," this includes virtually all natural lakes and ponds in the State. Although the language of early Wisconsin cases did not specifically designate the State's ownership as a trust title, later decisions describe the State's ownership as sovereign and in trust for the people for navigation and its various incidents, including recreational use of overlying water.⁶⁸

This trust arising out of the incidents of navigation not only permits public use where access is available but also allows the State to regulate the types of activity that may occur on the surfaces of the water. The Wisconsin legislature, for example, has enacted a provision that permits any town, village, or city to adopt ordinances to regulate the use and operation of boats.⁶⁹ The ordinances are subject to advisory review by the Department of Natural Resources.⁷⁰

⁶⁵ *Town of Aswaubenon v. Public Service Comm.*, 22 Wis. 2d 38, 125 N.W. 2d 653 (1964).

⁶⁶ *S. S. Kresge Co. v. Railroad Comm.*, 204 Wis. 479, 236 N.W. 667 (1931).

⁶⁷ *State v. Public Service Comm.*, 275 Wis. 112, 81 N.W. 2d 71 (1957); *Colson v. Salzman*, 272 Wis. 397, 75 N.W. 2d 421 (1956); *Baker v. Voss*, 217 Wis. 415, 259 N.W. 413 (1935); *Madison v. Wisowaty*, 211 Wis. 23, 247 N.W. 527 (1933); *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N.W. 144 (1930), 229 N.W. 531, *aff'd*, 283 U.S. 787 (1930); *Angelo v. Railroad Comm.*, 194 Wis. 543, 217 N.W. 570 (1928); *Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927); *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839 (1902); and *Diedrich v. The N. W. U. Ry. Co.*, 42 Wis. 248 (1877).

⁶⁸ *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923) and *Colson v. Salzman*, 272 Wis. 397, 75 N.W. 2d 421 (1956); the trust language is now extended to privately owned stream beds in the sense that the Court, in dictum, has declared a public trust over privately owned beds in the form of an easement.

⁶⁹ Wis. Stats. 30.77.

⁷⁰ Wis. Stats. 30.77, amended by Chapter 302, Laws of 1973.

As ordinance subsequently passed into law pursuant to the authority granted in the statute was attacked by a powerboat owner in *Menzer v. Elkhart Lake*.⁷¹ The owner sought to have the ordinance prohibiting the use of powerboats at certain hours on certain days declared unconstitutional. His contention was that the statute permitted an unconstitutional delegation of the State's trust powers over the navigable waters to the local units of government. The Court disagreed and found that it was:

an attempt to further the trust by permitting a limited regulation of competing water uses in the interest of public health and safety, where such regulation is necessitated by the local conditions which prevail.⁷²

This type of ordinance regulating the methods and degree of use on navigable waters will undoubtedly become more prevalent as the demand for recreation continues to increase.⁷³

The ownership of beds underlying man-made lakes or reservoirs caused by damming a stream or otherwise impounding a natural flow of water remains in the hands of the abutting landowner.⁷⁴ In other words, though a lake now exists, bed ownership is determined as though the prior existing stream still remained. This prevents a divesting of bed ownership at the time the impoundment is created and revesting of bed ownership should the dam or obstruction be removed and the natural stream reestablished. Although the bed ownership of a man-made lake is in the abutting landowners, the public has full use rights as it does in the case of streams.⁷⁵

The Wisconsin Court's divergent treatment of the ownership of navigable stream and lake beds results in some differences with on water rights enjoyed by private riparians and the public. For example, apparently only the private streambed owner may cut ice on a Wisconsin stream. In contrast, the Wisconsin Court has declared that any member of the public has the right to cut ice formed on a navigable lake.⁷⁶

⁷¹ 51 Wis. 2d 70, 186 N.W. 2d 290 (1971).

⁷² *Id.*, at 83.

⁷³ Cf., *Kusler, Carrying Capacity Controls for Recreation Water Uses*, 1973, Wis. L. Rev. 1, particularly pp. 7-12, 30-36, on the problems and possibilities of regulating water surface use.

⁷⁴ *Supra*, note 60, *Mayer v. Gruber*.

⁷⁵ *Supra*, note 9, *Water-Use Law and Administration in Wisconsin*.

⁷⁶ *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839 (1902).

As the riparian owner is vested with the right of access to the navigable part of a stream or lake, he may, at common law, erect structures on the bed of a navigable lake so long as he does not interfere with public rights.⁷⁷

Other Matters Related to Ownership of Stream and Lake Beds: It is settled in Wisconsin that riparian owners may separate the ownership of the stream bed from the ownership of the abutting lands and convey each to different persons, or maintain the rights to one or the other in themselves. A common example where this might arise is a situation where a landowner's property was bisected by a stream and the owner conveys one side of the parcel while retaining ownership to the entire bed. The new owner in this case would have no right of access, unless the conveyance expressly or implicitly grants it.⁷⁸

Among other incidents of riparian ownership, and to preserve the riparian's access to the water, is the right to the land formed by gradual and natural accretions and relictions.⁷⁹ This is true even though the riparian does not have title to the bed of a meandered lake.⁸⁰

⁷⁷ See, *Requirements for a Permit from the DNR under sec. 30.12 Wis. Stats. For certain structures and deposits on the bed of such waters, a riparian may, however, erect a free floating pier of reasonable length and not be subject to the permit requirements. In Capt. Soma Boat Line Inc. v. Wisconsin Dells*, 56 Wis. 2d 838, 203 N.W. 2d 369 (1973), plaintiffs brought an action against the City of Wisconsin Dells to abate the City's maintenance of a bridge as a public nuisance. The court denied the plaintiff's (boat line) motion on grounds of improper pleading in the case. However, the court did state that "the legislative authority to construct and maintain a bridge carries no implication of authority to create or maintain a nuisance. The state has authorized only the construction and maintenance of municipal bridges that do not obstruct the navigable waters. Such a delegation does not violate the state's trust of the navigable waters. The state has the power to prohibit the erection of or maintenance of any dam, bridge, or other structure within or over any navigable stream which may obstruct or impede the free navigation thereof," at pp. 847, 848.

⁷⁸ The Wisconsin Supreme Court in addressing this issue in *Mayer v. Gruber*, *supra*, note 60, quoted the general rule directly from *Burby*, *Real Property*, p. 18, "that the owner of the upland is presumed to possess riparian rights . . . such rights are freely alienable and may be separated from upland ownership. Whether or not riparian rights are conveyed along with the grant of the uplands depends largely upon the interest of the grantor, with particular reference to the language in the deed," at 175.

⁷⁹ *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923). Sudden disruption or avulsion does not give the riparian a right to the newly formed land. *Attorney General Ex. Rel. Becker v. Bay Boom Wild Rice and Fur Co.*, 172 Wis. 363, 178 N.W. 569 (1920). The effect of accretion is to vest title to the accreted soil in the riparian owner, *Baldwin v. Andersen*, 40 Wis. 2d 33, 45, 161 N.W. 2d 553 (1968).

Statutes Affecting the Use of Surface Watercourses

In addition to statutes such as those that defined the test of navigability described earlier, many Wisconsin statutes affect and modify the common law riparian rights of reasonable use and the public rights to use navigable watercourses. These include statutes which delegate to the Department of Natural Resources the authority to issue permits for irrigation and mining purposes; for hydroelectric power dams and other dams; and for the construction of piers, docks, and other shoreline improvements along navigable watercourses. The Department also has the responsibility for administering the new Wisconsin pollutant discharge elimination system. Additionally, the local units of government have zoning and other statutory powers that may affect the exercise of riparian and public rights with the shoreland/floodplain zoning program. Some of these statutes are discussed in detail later. The following is a description and brief discussion of two such statutes to illustrate some of the effects they have on the exercise of riparian rights.

The Irrigation Permit Statute: Diversion of water from streams for purposes of irrigation and agriculture or for bringing back or maintaining the normal water level in a stream or lake is governed by a permit statute in Wisconsin which dates from 1935.⁸¹ The statute specifically requires that in filing an application for a permit that certain information be supplied, such as the volume of water to be diverted, where the diversion is to occur, the course it will take, the time, etc.⁸² The determination of whether the permit should be granted is lodged with the Wisconsin Department of Natural Resources, which maintains continuing jurisdiction over any permit issued.⁸³ Provision is made for a public hearing to be held on the application with proper notice being given to affected parties.⁸⁴

⁸⁰ *Roberts v. Rust*, 104 Wis. 619, 80 N.W. 914 (1899); *Boorman v. Sunnuchs*, 42 Wis. 223 (1877).

⁸¹ Wis. Stats. 30.18 et seq. (1973). Provides in part (1)(a), "it is lawful to temporarily divert the surplus water of any stream for the purpose of bringing back or maintaining the normal level of any navigable lake or for maintaining the normal flow of water in any navigable stream, regardless of whether such navigable lake or stream is located within the watershed of the stream from which the surplus water is diverted." Sub. (b), "water other than surplus water may be diverted with the consent of riparian owners damaged thereby for the purpose of agriculture or irrigation but no water shall be so diverted to the injury of public rights in the stream or to the injury of any riparian located on the stream, unless such riparians consent thereto."

⁸² Wis. Stats. 30.18(3).

⁸³ *Id.*, 30.18(6).

⁸⁴ *Id.*, 30.18(4).

In the analysis of whether the permit should be issued certain conditions must be met.⁸⁵ Where an applicant, for example, seeks to divert water for restoring or maintaining the normal level of any navigable lake or stream, the diversion may come only from surplus waters. Surplus waters are defined as any water of a stream which is not being beneficially used. The decision as to that fact is made by the Department of Natural Resources.⁸⁶ In the event that no surplus is available, then riparians adversely affected by a diversion must give their consent, and under the latter circumstances the water may only be used for irrigation or agricultural purposes.⁸⁷

Two recent cases, previously cited, have discussed certain provisions of this statute. In the first, State ex. rel. Chain O'Lakes Protective Association v. Moses, the Court held that the statute applied only to:

granting permits for the diversion of surplus water and in the case of waters determined by it to be non-surplus, only for agriculture and irrigation purposes when the riparian owners beneficially using such non-surplus water have consented to such diversion.⁸⁸

Two years later the Wisconsin Court in Omernik v. State handed down a major decision.⁸⁹ There the Court addressed several critical issues. The first issue revolved around the question of whether the statute applied to diversion of waters from non-navigable streams. In the case the facts did not indicate if the Flume and Klondike Creeks from which the water had been diverted were navigable. The court held that the requirement of a permit did apply to non-navigable as well as navigable streams.⁹⁰ And, to the arguments that it was unconstitutional to apply this act to non-navigable waters, the court found support for its position under Article IX Section 1 of the Wisconsin Constitution,⁹¹ which it interpreted as:

a limitation upon the legislature to protect public rights in navigable waters from dissipation or diminution by acts of the legislature as trustee of such waters.⁹²

The Court reasoned that, if the reverse were to be true, then "non-navigable tributaries upstream could be diverted or dissipated (with the result that) there might be a rather dry riverbed downstream."⁹³

⁸⁵ *Id.*, 30.18(5).

⁸⁶ *Id.*, 30.18(2).

⁸⁷ In the Nekoosa-Edwards Paper Co. v. Public Service Commission case, 8 Wis. 2d 582, 99 N.W. 2d 821 (1959), the Supreme Court said such consent had to be obtained where the downstream riparians were making beneficial use of the full flow of the stream.

⁸⁸ *Supra*, note 24, at 583.

⁸⁹ *Supra*, note 28, Omernik v. State.

⁹⁰ *Id.*, at 12.

The next issue taken up in Omernik centered on the question of whether the permit requirements were limited to stream to stream diversions. The justices found that they were not. The problem arose out of the fact that Wisconsin Statutes 30.18(1) was split into two subparts when it was amended. This raised the issue of whether a permit was needed for "agricultural or irrigation withdrawals from the stream, the level of which was raised by such a stream to stream diversion?"⁹⁴ The Court took the more liberal posture in interpreting the legislative language, thereby requiring permits for diversions from any streams.

The third major question raised by Omernik focused on the requirements of permits for diversion of surplus waters for irrigation. The Court felt that permits were required. In so deciding, it cited Subsections (5) and (6) of Wisconsin Statutes 30.18 as establishing the intent of the Legislature that a permit would be required for these uses, even though they were drawing upon surplus water.

Finally, the last two important issues involved the defendant's claim that the statute denied him two fundamental rights protected by the Constitution. His contention on the first was that the statute, by not requiring a permit from industrial users, discriminated against him and in favor of such uses and therefore denied equal protection of the law. But the Court found that the classification scheme employed by the State Legislature which restricted only the three main categories as having a reasonable basis and therefore equal protection of the laws had not been denied.⁹⁵ The other major contention raised by the defendant was that the statute operated so as to deprive him of property without just compensation. But here, as before, the justices were not persuaded

⁹¹ Article IX sec. 1, Wis. Const. provides: "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same, and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, import or duty therefor."

⁹² *Supra*, note 28, Omernik v. State, at 13 and 14.

⁹³ *Id.*

⁹⁴ *Id.*, at 14 and 15, the Court was quoting here from Water-Use Law and Administration in Wisconsin, at pp. 234, 235, *supra*, note 9.

⁹⁵ *Supra*, note 28, Omernik v. State, at 20. The reasonable basis the court found was that all three uses regulated have in common their increased demand for water in times of drought when ground and surface waters are lowest. . . . and this common denominator affords a reasonable basis for the classification, *Id.*

by Omernik's arguments. They found Wisconsin Statutes 30.18 as a legitimate exercise of the State's police power "to protect public rights and to prevent harm to the public by uncontrollable diversion from lakes and streams" and therefore compensation was not necessary.⁹⁶

In summarizing this very important case of Omernik v. State, the following are the major points that the Wisconsin Court decided on in interpreting the Irrigation Permit Statute and the three uses of diverted water that it seeks to regulate, i.e., irrigation, agriculture, and maintaining the normal level of any navigable lake or stream:

1. That a permit was required for diversions from non-navigable as well as navigable streams and that there was support for this position in the Wisconsin Constitution Article IX, Section 1.
2. That permits were required for diversions from all streams, not just those that have had their levels raised or supplemented by stream to stream diversion.
3. That a permit was required for diversion of surplus water for irrigation use—not just for non-surplus waters.
4. That the classification scheme found in the statute (i.e., the three categories of use) was reasonable and that a rational basis existed for so classifying and therefore there was not a denial of equal protection.
5. That there had not been a "taking" of private property rights without compensation, since the statute was a proper exercise of the State police power.

The Statute Enabling Ore Development: The 1959 Legislature created a statute establishing a permit system for diversion of water to or from ore mines. In doing so, the Legislature declared its policy to be:

... that the development of the iron ore resources of the state and the diversion or consumptive use of the waters of the state in connection therewith is in the public interest, for the public welfare and fulfills a public purpose.⁹⁷

The real significance of the statute is reflected in the provision permitting the person preparing to engage in mining or processing ore to request a permit "to

divert waters from any surface water upon which he is riparian or to use and consume said waters and underground waters in his ore processing operations on any land owned or leased by him on the same procedure and subject to the same conditions including, without limitation, the right to control, store, dam or impound said waters in connection therewith.⁹⁸ Since this clearly permits diversion of water for use on nonriparian land, it may be a definite liberalization of Wisconsin water use law.

Another liberalization contained in the statute makes it unnecessary to obtain the consent of downstream riparians who may sustain damage from the proposed diversion, although they must be given notice and opportunity to be heard. Provision is made for the acquisition of injured private riparians' rights by purchase or condemnation.⁹⁹

A permit granted under the provisions of the statute is of a duration necessary to permit the mining or processing of ore to exhaustion. It may be suspended or cancelled, however, if the conditions of the permit are breached or any law pertaining to the permit has been violated, but not without giving the permittee an opportunity for hearing and a reasonable time to correct or remedy the breach of condition or violation of law.¹⁰⁰

The iron ore development statute should be read in conjunction with the recently enacted Metallic Mining Reclamation Act.¹⁰¹ "The purpose of this act is to provide that the air, lands, waters, plants, fish and wildlife affected by prospecting or mining in this state will receive the greatest practicable degree of protection and reclamation."¹⁰²

The reclamation act authorizes the Department of Natural Resources to adopt minimum standards for prospecting, mining, and reclamation to insure that the activities will be conducted in a manner consistent with the legislative objectives.¹⁰³ While all of the categories enumerated by the Legislature for which such standards should be adopted will have a bearing on the water resources of the State, a few with direct impact on the iron ore development act and water uses are: adequate diversion and drainage of water from the project site; adequate

⁹⁶ *Id.*, at 21, for the distinction between eminent domain and police power see the previous discussion *supra*, note 34 and accompanying text.

⁹⁷ Wis. Stats. 107.05(3).

⁹⁸ *Id.*, 107.05(2).

⁹⁹ *Id.*, 107.05(2) and 107.05(5).

¹⁰⁰ *Id.*, 107.05(6) and 107.05(6a).

¹⁰¹ Chapter 318, Laws of 1973, which added secs. 144.80-144.94 of Wis. Stats.

¹⁰² Wis. Stats. 144.80(2).

¹⁰³ Wis. Stats. 144.83.

vegetative cover; and water impoundment.¹⁰⁴ Furthermore, the Act provides that no person may engage in prospecting or mining without first obtaining a permit from the Department.¹⁰⁵ Also, it requires the posting of bond, and where the Department finds a violation of law at a project site, or where there is lack of compliance with the reclamation plan, it may issue an order to the operator to comply within a specified time. Failure to

comply with such an order will result in the Department cancelling the mining permit and a loss of the posted bond.¹⁰⁶

Some of the other more far-reaching legislative enactments affecting the use of Wisconsin watercourses will be discussed in subsequent chapters.

¹⁰⁴ *Id.*

¹⁰⁵ *Wis. Stats. 144.84 and 144.85.*

¹⁰⁶ *Wis. Stats. 144.91.*

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Chapter IV

GROUNDWATER LAW¹

INTRODUCTION

Recently the common law rule affecting percolating groundwater which the Wisconsin Supreme Court adopted in the old and much criticized case of Huber v. Merkel was overruled.² The outmoded rule in Huber permitted the possessor of land to use the captured waters found beneath the surface with impunity. The new American Rule adopted by the Wisconsin Court in State v. Michels Pipeline Construction, Inc., (henceforth Michels) provides specific protection to certain users of groundwater.³

THE SETTING FOR OVERRULING HUBER

The challenge to the existing doctrine found in Huber arose over the following circumstances.

Michels Pipeline Construction, Inc., had contracted with the Metropolitan Sewerage Commission of the County of Milwaukee to install a five foot diameter sewer line beneath the Root River Parkway in the City of Greenfield. The Parkway was owned by Milwaukee County. The County had granted a 20 foot construction easement to the Sewerage Commission for the specific purpose of constructing the sewer line. All three parties—Michels Pipeline, Milwaukee County, and the Sewerage Commission—were joined as defendants in this action brought by the State.⁴

¹ The following discussion is directed at percolating groundwater and not to underground streams in definable channels. Percolating waters are defined as "those which ooze, seep, filter, or percolate through the ground under the surface, without a definite channel, or in a course that is uncertain or unknown, 56 Am. Jur. Waters sec. 111 (1956), and Id. at 357. However, the presumption as to the nature of underground waters is that they are percolating and the burden of establishing that a permanent channel exists falls on the persons asserting it; 93 C.J.S., Waters sec. 87 (1956). Moreover, the court in Huber v. Merkel (Note 1 *infra*) did not distinguish between percolating and artesian waters, treating them as the same; this is not the general rule. Cf. 93 C.J.S. Waters sec. 92 (1956), which states that the rule vesting the ownership of percolating waters in the owner of the land does not apply to the waters of an artesian basin underlying the lands of several owners.

² 117 Wis. 355, 94 N.W. 2d 354 (1903).

³ 63 Wis. 2d 278, N.W. 2d 339 and 219 N.W. 308 (1974).

⁴ They were joined, in addition, by the Metropolitan Sewerage District of the County of Milwaukee and Sewerage Commission of the City of Milwaukee.

Constructing or installing sewer lines such as that involved in Michels necessitates tunneling, sometimes at rather substantial depths—in this instance 40 feet. The presence of groundwater creates difficulties for the tunnel construction. Consequently, it is the practice during tunnel construction to lower the level of the groundwater in the construction area by pumping water from wells driven along the route of the tunnel. This is called dewatering. The effect is to greatly expedite the process of digging the tunnel and installing the sewer line by both stabilizing the soil and eliminating the inflow of groundwater into the works. The sewer construction costs are thereby considerably reduced. The effects of this dewatering process, however, are not, and cannot be, confined to the immediate course of the tunnel. A drawdown or lowering of the water level may also occur in wells in the surrounding area, causing these wells in effect to become dry and in some cases causing a subsidence of the soil.

In the Michels case the State alleged that a number of citizens in the area had in fact suffered these injuries as a direct result of the defendant Michels pumping groundwater at a rate of 5,500 gallons per minute to dewater the soil to a depth sufficient to permit tunneling. The relief sought by the State, however, was not to see the project halted but rather to see the injuries it was causing eliminated. Its argument was founded on the principle that there would be costs generated no matter what course of action the defendants pursued, and that the higher costs resulting from different construction techniques would result in their being incurred by all persons benefiting from the sewerage system, rather than effectively placing these costs upon a few adjacent landowners.

The trial court, in adhering to the existing rule of law enunciated in Huber, found that the State of Wisconsin complaint did not state sufficient facts to constitute a cause of action.⁵ Thus, it dismissed the State's complaint on the grounds that "there was no cause of action on the part of an injured person concerning his water table."⁶

The State appealed from the lower court's dismissal and the Supreme Court of Wisconsin in entertaining the appeal addressed two substantive issues. The first concerned whether a public nuisance in fact existed; if none did, the Supreme Court would sustain the lower court's decision. The respondents (i.e., Michels et al) argued that

⁵ Supra, note 3 at 282, the defendants had demurred to the complaint and the demurrer was granted.

⁶ Id., the doctrine found in Huber v. Merkel had been reaffirmed in the companion cases of Fond du Lac v. Empire, 273 Wis. 333, 77 N.W. 2d 699 (1956) and Menne v. Fond du Lac, 273 Wis. 341, 77 N.W. 2d 703 (1956).

on the basis of the nature and scope of conduct and its consequences no public nuisance as differentiated from a private nuisance existed.⁷ The Supreme Court found otherwise. It reiterated the statements of State v. H. Samuels Company, saying “. . . if the public is injured in its civil or property rights or privileges or in respect to public health to any degree that is sufficient to constitute a public nuisance; the degree of harm goes to whether or not the nuisance should be enjoined”⁸ and added “. . . the public does not have to include all the persons of the community but only a sufficiently large number of persons, as alleged here.”⁹ Thus the Court found that the requirements for a public nuisance had been met by the State’s alleging that the neighborhood surrounding the sewer project had been adversely affected by the dewatering process.

Thus the Court found that the requirements for a public nuisance had been met by the State’s alleging that the neighborhood surrounding the sewer project had been adversely affected by the dewatering process.

Having resolved that issue, the Court then addressed the major issue of the case—namely, whether the facts were sufficient to constitute a cause of action. If the Court were to accept the State of Wisconsin’s position, then it would have to overrule Huber v. Merkel. In weighing the consequences of such a decision, it explored the rationale behind the doctrine found in Huber.

The basis of the English or common law rule which gives absolute ownership to the one who captured percolating groundwater was that the forces which controlled the movement of underground water were mysterious and unpredictable. As a result, it was much easier and more practical to fashion a rule of absolute possession with no liability for injury rather than attempting to regulate an unknown entity. The effect was to preclude a cause of action for interference with groundwater.

But in Michels, the Court took notice of the fact that the “state of the art” in the field of groundwater hydrology had progressed to such an extent that it was foolish to adhere to this archaic position. The Court emphasized that water systems are interdependent and that sophisticated means were available to measure the impact of drawing upon underground water, and its effect upon the water table.¹⁰ Moreover, the Court added, there is little justification for property rights in groundwater to

⁷ Respondents’ Joint Brief, at p. 10, State v. Michels Pipeline Inc., *supra* note 2, they pointed out that from the State’s complaint it could not be discerned whether the injury alleged impacted on 2,200, or 24,000 people.

⁸ 60 Wis. 2d 631, 638, 211 N.W. 2d 417 (1973) and *supra* note 3, at 288.

⁹ *Supra*, note 3, at 288.

¹⁰ *Id.*, at 292.

be considered absolute, while rights in surface streams are subject to a doctrine of reasonable use.¹¹ As a result, the Court felt compelled to overrule Huber v. Merkel.¹²

THE PROCESS OF ADOPTING THE AMERICAN RULE FOR PERCOLATING GROUNDWATER LAW

In seeking to find a suitable rule to replace that of Huber, the Wisconsin Supreme Court analyzed several doctrines. To better understand the “American rule” which was finally adopted, it is helpful to follow the Court’s analysis and balancing of the respective merits of each of the four rules which have been used against what it felt were the vital interests of the commonwealth.

The English Rule or Common Law of Absolute Ownership

Under the English rule the landowner has complete freedom to draw upon the underground water at will and the owner need not apportion the water among competing users or even use it beneficially, specifically:

It [the doctrine] is based on the premise that ground water is the absolute property of the owner of the freehold, like the rocks, soil and minerals which compose it, so that he is free to withdraw it at will and to do with it as he pleases, regardless of the effect the withdrawal may have upon his neighbors.¹³

The only exception to the rule is that the landowner would be liable if it could be shown that withdrawal was motivated by malicious intent, whereas under application of the Huber rule, even malicious action would not bring liability.¹⁴

¹¹ *Id.*

¹² *Id.* Establishing that a scientific base did in fact exist the Court also addressed the issue of Stare decisis (i.e., the adherence to previously decided cases), but found that it was “not an inflexible restraint but merely a cautionary rule,” *Id.* at 294; and specifically it found no law requiring that the doctrine “must be adhered to wherever a change would affect property rights, at 296. And, in deflating the argument that the change in the law should be made by the legislature, the justices pointed out that this Court had made other dramatic changes in common-law rules even though earlier cases had refused to do so, saying such change was up to the legislature, at 294. It added that such a change affecting property (here groundwater) was not a taking but merely bringing this in line with limitations placed on other property, at 296.

¹³ Restatement Second Torts sec. 858A, Tentative Draft No. 17, April 26, 1971, at p. 153, which also states that the landowner overlying the groundwater may sell and grant his right to withdraw the water to others; and *Id.*, at 298, 299; and 93 C.J.S. Waters sec. 93(c)(3) (1956).

¹⁴ The Wisconsin Court in Michels, *supra*, note 2, pointed out the fact that the rule in Huber attaching no liability even with malicious action was probably a misstatement of the “English rule,” at 290.

Reasonable Use Doctrine

In Corpus Juris Secundum, from which the Court quoted directly, the reasonable use doctrine was defined as:

limiting the right of a landowner to percolating water in his land to such an amount of water as may be necessary for some useful or beneficial purpose in connection with the land from which it is taken, not restricting his right to use the water for any useful purpose on his own land, and not restricting his right to use it elsewhere in the absence of proof of injury to adjoining landowners.¹⁵

The term "reasonable" as used in this context, however, has a very limited or restricted meaning.¹⁶ If the water withdrawn is used in connection with the overlying land it is a reasonable use even if harm is caused. Only a wasteful use of water that actually causes harm is unreasonable. Furthermore, the transporting of water to be used beneficially other than on lands overlying the source is unreasonable only if it causes harm.¹⁷ The practical effect of the rule as pointed out by the Court in Michels is that it:

only affords protection from cities withdrawing large quantities of water for municipal utilities However, under the rule there is no apportionment of water as between adjoining landowners, [therefore] . . . the rule gives partial protection to small wells against cities or water companies, but not protection from a large factory or apartment building on the neighboring land.¹⁸

Correlative Rights Doctrine

Basically, this doctrine calls for apportionment of underground water. Each owner's share is determined by the amount of water available that may be reasonably used under the circumstances. It differs from the "reasonable use" doctrine which permits the owner of the overlying land to take all that is necessary or reasonably beneficial to his own land even if harm is caused in that under the "correlative rights" doctrine the landowner is only entitled to a reasonable share, if there is not enough to supply all.¹⁹ The doctrine is summarized in Corpus Juris Secundum as follows:

¹⁵ Supra, note 3, at 299 and 93 C.J.S. Waters sec. 93(c)(3).

¹⁶ See supra, note 13. Restatement Second, at 153.

¹⁷ The Court provided an example where "one may sink a well for domestic use or other use in his land without liability to his neighbors for affecting their wells, as long as he acts without malice and is not wasting water to their detriment," supra, note 2, at 301.

¹⁸ Id., and see, Water-Use Law and Administration in Wisconsin, at 91.

¹⁹ 93 C.J.S. Waters, sec. 93(3)(4) (1956).

Those rights of all landowners over a common basin saturated strata, or underground reservoir are coequal or correlative, and one cannot extract more than his share of the water, even for use on his own land, where others' rights are injured thereby.²⁰

The Wisconsin Supreme Court found such a rule was not appropriate for the State on two grounds, the first that water conditions within Wisconsin were not limited as to require the apportionment and, secondly, that the administrative machinery was not available to adequately apportion the resource.²¹ The Court, not being satisfied with the three doctrines discussed above, adopted instead the rule formulated by the reporters of the Restatement of the Law Second Torts²²—the "American rule."

THE AMERICAN RULE

In adopting this principle the Wisconsin Supreme Court reiterated the remarks and analysis of the reporters who formulated it. From the outset it is very important to note the distinction between the new rule and the "reasonable use" doctrine discussed above.²³ The rule now to be applied in Wisconsin broadens and extends the protections found in the old rule against harms done by large withdrawals for operations on overlying lands as well as water used elsewhere.²⁴ The section of the Restatement Second which was adopted is:

Section 858A. Nonliability for use of groundwater—exceptions.

A possessor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

- (a) the withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure, or
- (b) The groundwater forms an underground stream in which case the rules stated in sections 850A to 857 apply (sections 850A to 857 restate the reasonable use doctrine as it applies to surface water-courses.) or

²⁰ Id.

²¹ Supra, note 3, at 300.

²² Proposed for the American Law Institute, Tentative Draft No. 17, April 26, 1971.

²³ Supra, notes 15-18 and accompanying text.

²⁴ Supra, note 21, at 155.

- (c) the withdrawal of water has a direct and substantial effect upon the water of a water-course or lake, in which case the rules stated in sections 850A to 857 apply.²⁵

The presumption of the rule, therefore, is that so long as groundwater remains plentiful, a privilege exists to use the waters beneath the land, but this privilege does not represent an unqualified property right in groundwater.²⁶ The focus then shifts to the problem of allocating costs when injury occurs, e.g., deepening prior wells, installing pumps, or paying increased pumping costs.²⁷ Under the common law of Huber these added costs were to be borne by each user, while under the “reasonable use” rule, with its narrow interpretation, persons using existing wells were protected only if the water was taken off the land to be used at some other location. Application of the newly adopted American rule follows the “reasonable use” doctrine which applies to surface streams, i.e., the traditional meaning of reasonable use, in determining who shall bear the burden of costs. Comments by the reporters of Restatement Second indicate:

that it is usually reasonable to give equal treatment to persons similarly situated and to subject each to similar burdens The choice of where to place the burden may depend upon the relative position of the parties and their capacity to bear the burden. Later users with superior economic capacities should not be allowed to impose costs upon smaller water users that are beyond their economic reach.²⁸

An example supplied by the reporters and the Court illustrating the mechanics of the process is where a farmer sinks a well which initially is sufficient for irrigation but subsequently becomes inadequate because of other farmers using groundwater from the same source for irrigation. The cost for deepening the first farmer’s well (i.e., the prior user) under the new rule would be assumed by the first farmer, since in this instance all the farmers are in a similar situation. On the other hand, a municipality’s use of the groundwater for domestic purposes or another farmer using it for stock watering may well constitute an unreasonable use, thereby placing the liability on them as subsequent users for the injury. Thus, the utilization of underground water for wholly new purposes will subject the new user to liability if the prior users suffer injury. While it is not specifi-

cally addressed in the Michels case, the reporters of the Restatement indicate that a corresponding liability will attach to the new user if the magnitude of withdrawal appreciably differs from that of the prior user.²⁹

On a motion for rehearing it was decided that the American rule would be applied prospectively except as to the parties in the Michels and a companion case. Thus liability for actions arising under the new rule would commence as of May 7, 1974.³⁰

A Perspective

Given the paucity of legal actions involving situations such as presented in Michels over the last 70 years—only three cases including this one reached the Supreme Court in this time—the option that the Court chose in expressly overruling the archaic doctrine of Huber v. Merkel is significant. It may have been a much more simplified process if only the private nuisance action had been allowed and the State had not been involved (the private parties involved in Michels were readily identifiable and their injuries were relatively easy to discern). Instead, it is apparent the Wisconsin Supreme Court, as in other recent decisions, has shown a willingness to forge on its own, or actively support, efforts that seek to protect one of the State’s most valuable resources.

As a result of the decision there may be a dampening effect on construction procedures of this type. But, if it forces, as the language of the case seems clearly to intend, greater precautions to be taken and more adequate planning to be initiated prior to construction—such as providing an alternative source of water—then it will be a notable achievement. The result of these additional precautions will be manifested in higher construction costs; however, if proper apportionment of the additional costs is made, a more equitable sharing of the costs by those who actually benefit from these improvements will result.

An important caveat, however, to the new American rule should be recognized. The Court’s rejection of the concept of apportionment under the “correlative rights” doctrine on the basis that groundwater conditions in Wisconsin are adequate may be rather shortsighted if current patterns prevail. While it is true that apportionment of water is a practice found for the most part only in the arid western states, increasing demands for water, especially in southeastern Wisconsin, may substantially tax the existing supply beyond its recharge capacity. Increased consumption by industry, nuclear power plants in their cooling processes, or domestic water use may all contribute to this depletion. The present American rule is designed to compensate for such uses if they are deviants from the norm, but when the source for all practical purposes is no longer available a totally different problem emerges, which is not met by this rule. Also, as in the example noted in applying the rule, users similarly situated will not receive compensation. The cumulative

²⁵ *Id.*, at 156.

²⁶ *The Court’s position in Michels has been reaffirmed in the more recent case of Village of Sussex v. Department of Natural Resources*, 68 Wis. 2d 187, 228 N.W. 2d 173 (1975), at 197.

²⁷ *Supra*, note 3, at 303.

²⁸ *Supra*, note 22, at 158; and also quoted in *Michels*, *supra*, note 2, at 303.

²⁹ *Supra*, note 22, at 195.

³⁰ *Supra*, note 3, at 303a and 303b.

effect of many small users, all for the same purpose, may have the same result as the major consumers, but in this situation compensation will not be forthcoming. Regulations and restrictions on use along with allocation programs, according to some defined criteria, may well be the only answer, and present law does not meet that possibility.

STATUTES AFFECTING THE USE OF GROUNDWATER

Despite the magnitude of the problems which surround the use of groundwater, the Wisconsin Legislature has

enacted only one statute which directly regulates the withdrawal of water from wells. That statute, section 144.025(2)(e), Wisconsin Statutes, regulates the withdrawal of water from all wells exceeding 100,000 gallons a day. Approval of all such withdrawals in excess of that amount must be obtained from the Wisconsin Department of Natural Resources. The statute, however, is severely restricted in its application. The Department is limited in its determination as to whether the withdrawal "will adversely affect or reduce the availability of water to any public utility in furnishing water to or for the public."³¹ Interference with a nonpublic utility well is not grounds for denial of a permit.³²

³¹ Wis. Stats. 144.025(2)(e).

³² For a history of the act and the permit program when it was being administered under the State Board of Health, see Water-Use Law and Administration in Wisconsin, pp. 321-340. Also Chapter 147 Wis. Stats. which authorizes the Wisconsin Pollutant Discharge System specifically defines groundwater in sec. 147.015(13) which presumably grants authority for state regulations of pollutant discharges into ground waters. For further discussion of Chapter 147 see Chapter 7 infra.

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DIFFUSED SURFACE WATER LAW

INTRODUCTION

Diffused surface water law takes on added significance as increased developmental activity changes and reshapes the natural terrain. In southeastern Wisconsin extensive new residential commercial and industrial developments dramatically influence local drainage patterns. Furthermore the construction of highways and of storm water drainage and flood control facilities designed to serve and protect such developments also may have a marked effect. Consequently, an understanding of the laws pertaining to diffused surface waters is particularly important.

GENERAL RULES WITH RESPECT TO DISCHARGE OF DIFFUSED SURFACE WATER

The Wisconsin Supreme Court has defined diffused surface waters (more commonly known as "storm" waters) as:

... waters from rains, springs, or melting snow which lie or flow on the surface of the earth but which do not form part of a watercourse or lake.¹

A ravine which was usually dry except in times of heavy rains or spring freshets was held by the Court not to be a watercourse, and the water in it was held to be diffused surface water.²

Riparian law which is addressed to allocation of water for use from lakes, streams, or ponds does not apply to diffused surface water. Instead, the law that does apply deals with conflicts, not about water use, but about attempts to dispose of water.³

REFLECTING ON AN OLD DOCTRINE

Until late 1974 Wisconsin had followed the "common enemy" doctrine in determining the propriety of interfering with diffused surface waters. Basically that rule permitted persons such as private landowners who were

seeking to improve their land to fight as a "common enemy" the diffused surface water in a particular drainage shed. Such action could be carried out regardless of the harm caused to others as long as it did not involve tapping a new drainage shed.⁴ The basis for permitting such a doctrine, developed in the mid-nineteenth and early-twentieth centuries, was primarily to facilitate the expansionist policy of this country's development.⁵ As to be expected, these allowable practices created severe injury to those who had the misfortune of being recipients of the new drainage patterns. The injury was compounded when no recovery was permitted.⁶

While it is questionable that the "common enemy" doctrine had merit even during the earlier developing years of the country, the Wisconsin Court felt that it certainly was not a realistic rule for contemporary times. Thus, in *State v. Deetz*, the Court elected to abandon the doctrine in favor of the American Law Institute's "reasonable use" rule.⁷ Perhaps the most significant aspect of this decision is the fact that it once again illustrates the present Court's firm determination to have the common law in harmony with the modern views and needs of society.⁸

⁴ *Manteufel v. Wetzel*, 133 Wis. 619, 114 N.W. 91 (1907); *Watters v. National Drive-In*, 266 Wis. 432, 63 N.W. 2d 708 (1954).

⁵ *State v. Deetz*, 66 Wis. 2d 1, 224 N.W. 2d 407 (1974). The Court discussed the origins of the rule as documented in an article written by Kinyon and McClure, "Interference With Surface Waters," 24 Minn. L. Rev. 891 (1970), at pp. 14-15.

⁶ *Shaw v. Ward*, 131 Wis. 646, 658, 111 N.W. 671 (1907). The Court here found that in defending against surface waters the landowners may rid their land of surface water by natural or artificial means "if consequential damages, from the exercise of such right occur . . . (to others), they are remediless except by the exercise of the same right, so far as conditions render that feasible, upon their own premises."

⁷ 66 Wis. 2d 1, 224 N.W. 2d 407 (1974). The "reasonable use" rule is found in *Restatement of the Laws, Second, Torts, Tentative Draft No. 17*, April 26, 1971, sec. 822 et seq. *Restatement of the Laws, Second, Torts, Tentative Draft No. 18*, April 26, 1972, presented to the ALI in May 1972, reported that the material in No. 17 had been approved in principle.

⁸ The Court went so far as to say: "Our conclusion is consistent, perhaps mandated, by our decision in *State v. Michels Pipeline Construction Inc.*," *Id.*, at 18, and discussed, *supra*, Chapter 4.

¹ *Thompson v. Public Service Comm.*, 241 Wis. 243, 5 N.W. 2d 769 (1942). The definition was quoted by the Court from the *Restatement on Torts*, sec. 846 comment b (1939).

² *Hoyt v. City of Hudson*, 27 Wis. 656 (1871).

³ Diffused surface waters which flow into a watercourse and become a part of that watercourse lose their original character and become subject to the riparian doctrine. Conversely, waters which overflow a watercourse and "permanently escape" from that watercourse become diffused surface waters not subject to the riparian doctrine.

The Specific Conduct in Question

The Wisconsin Supreme Court's decision to redefine the common law as it applied to diffused surface water arose over the following circumstances. In Deetz the State of Wisconsin brought an action against a property developer and others for the purposes of enjoining the defendants from permitting the deposit of material on an adjacent road and in Lake Wisconsin. The State also sought forfeitures from the defendants under Wis. Stats 30.15(1) and 30.15(3) which provide for penalties for unlawful obstruction of navigable waters.⁹ The Deetzes and other individuals had purchased lands on a bluff overlooking Lake Wisconsin and had developed the lands for residential use. Prior to this development the lands had been primarily used for agricultural purposes, with a minimal amount of erosion and runoff occurring. The residential development, however, created a substantial increase in the amount of soil being carried from the bluff by diffused surface waters. The result, according to testimony at the trial, was that sand deltas of 6,000 square feet and 8,000 square feet were formed in the lake, and the road at the base of the bluff was covered by sand, at some points up to eight inches deep.

Evidence produced at the trial also showed that the public was no longer able to use the lake in the vicinity for boating, fishing, or swimming, and that vegetation had commenced growing in the silted areas. Furthermore, the evidence firmly established a direct link between the construction of the roads at the new residential development on top of the bluff and the subsequent increase in surface water runoff and formation of the deltas in the lake.

The property owners who lived at the base of the bluff had complained to Deetz about the runoff and siltation but he stated that there was nothing that he could do about the problem. Consequently, the State of Wisconsin brought an action to abate the disposal of surface waters as a public nuisance.¹⁰

The "Subsidiary Issues"

In addition to public nuisance, the State also argued in a separate action that the results of the developmental activity violated statutes which prohibit unlawful obstruction of navigable waters and forfeitures, as well as Wis. Stats. 29.29(3).¹¹ The latter prohibits the deposit of deleterious substances on the ice or waters within the jurisdiction of the State.¹² The State had jurisdiction under the provisions of the statute since Lake Wisconsin was navigable and therefore it owned the bed of the Lake.

⁹Sec. 30.15 provides for a \$50 forfeiture for every offense, with each day being considered a separate violation.

¹⁰The action was brought under Wis. Stats. 280.02, which provides that an injunction may be sought by the Attorney General.

But the trial judge dismissed the State's complaint; he concluded that the statutes used by the State in bringing its causes of action were irrelevant. The rationale supporting this position was that the defendant had not "deposited" material into the Lake, thereby obstructing it, but rather the deposit had settled there as a result of the flow of surface water. And, that since the damage which occurred had been the result of the property owner's exercise of a legally sanctioned right to fight surface water, i.e., the "common enemy," recovery was not allowed.

On appeal the Supreme Court addressed the application of these statutes to the specific facts of the case. The Court, in interpreting the intent of the statutes, affirmed the trial court's conclusions as to their irrelevancy.¹³

Prior to discussing the major issue involved in the Deetz case, two further points made by the Wisconsin Court pertaining to the statutes discussed above, should be noted. The first is that if the defendants' continuous course of conduct here had in fact violated either one or both of the statutes, then "the repeated violations of the criminal statutes (would have) constituted per se a public nuisance."¹⁴ Since Deetz's actions were not covered by these statutes, however, the rule was not applicable. The other matter that the Court dealt with was the means by which the State may effectively curb indirect pollution. It felt that other methods were available such as zoning and subdivision controls to prevent the degradation of the waters.¹⁵ Specifically, the Court

¹¹In addition to the forfeiture, 30.15(4) provides that "obstructions are public nuisances. Every obstruction constructed or maintained in or over any navigable waters of the State in violation of the chapter and every violation of sec. 30.12 or 30.13 is declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the State or any citizen thereof."

The State in its brief to the Court, attempted to have the Court read the statutes liberally, wherever an ambiguity may have existed. By so doing, it was argued, the injury suffered here would constitute violation of the statute. The State based its argument for a liberal interpretation from the Court's decision in Reuter v. DNR 43 Wis. 2d 272, 168 N.W. 2d 860 (1969), which found that Chapter 30 of the Wis. Stats. should be read in light of the legislative intent when it enacted Chapter 144, A Comprehensive Act to Protect the State's Waters. The Attorney General felt that the Legislature "clearly recognized the possibility that misuse of natural drainage systems can cause pollution" and therefore if the Court should again analyze and read Chapter 30 with the intent and purpose encompassed in Chapter 144, the violations of each of the statutes could be established, at p. 5, Reply Brief for State v. Deetz, *supra*, note 7.

¹²*Supra*, note 9.

mentioned Wis. Stats. 144.26 as one such mechanism. But the Court said it would not use the public purposes which those statutes were designed to promote to interpret section 29(3) or 30.12 and thereby extend the effect of those criminal statutes to cover indirect pollution.¹⁶

FASHIONING RELIEF FROM DISCHARGES OF DIFFUSED SURFACE WATER

The process leading directly to the decision to overturn the “common enemy” doctrine focused on nuisance law in Wisconsin and a discussion of the public trust doctrine and what that exemplifies. As indicated above, one of the courses of action brought in the case by the Attorney General was for an injunction to abate a public nuisance under Wis. Stats. 280.02.¹⁷ It had been established at trial that damages had been sustained and were continuing from the deposit of sand both in the Lake and on the

¹³ *With respect to sec. 30.12, which regulates the structures and deposits in navigable waters, the critical element missing from Deetz’s conduct was that he did not deliberately fill in Lake Wisconsin. The interpretation of the statute by the Court is that it only prohibits “deliberate fills” and that indirect or unintentional deposits are not violations of the statute, supra, note 7 at 22.*

The State in its arguments at trial indicated in addition that the defendants had violated sec. 29.29(3) which prohibits the depositing of deleterious substances in the waters of the State. The Supreme Court, however, found that the actions of Deetz and the other defendants were distinguishable from those found precluded by this section of the statutes. The Court found that the statute was concerned only with “the discharge into navigable waters and the control of refuse arising from manufacturing activities” (emphasis added) Id., at 23. The Court placed great reliance on the fact that the Legislature had denominated the types of contamination which constituted “deleterious substances” and that discharges of diffused surface waters into a navigable stream were not one of the prohibited items. The Court did point out, however, that the State was correct in concluding that the statute did not require willfulness on the part of the violator, but that negligence may bring the conduct within the proscriptions of the statute.

¹⁴ *Id.*, at 21. The Court was reiterating a rule previously handed down in *State v. H. Samuels Co.*, 60 Wis. 2d. 631, 637, 211 N.W. 2d 420 (1973).

¹⁵ *The Wisconsin Supreme Court referred to an article by Jon Kusler, Water Quality Protection for Inland Lands in Wisconsin: A Comprehensive Approach to Water Pollution*, 1970 Wis. L. Rev. 35, which discusses the use of local floodplain and shoreland zoning ordinances to cope with indirect sources of pollution, *Id.*, at 23.

¹⁶ *Id.* The State did not allege in its complaint or on appeal of the Deetz case that regulations adopted under sec. 144.26 were at issue.

road. But the Supreme Court found that the trial court judge had been correct in his application of the “common enemy” rule. The property owners, Deetz and the other defendants, acting under the rule, were exercising, therefore, a legally sanctioned right or privilege in fighting surface waters and, consequently, a nuisance action could not be maintained.¹⁸ In an effort to circumvent this bar to its complaint, the State argued that there was a cause of action per se arising from the public trust doctrine. Basically the State’s reasoning was that the interference with the navigable waters, here by the formation of sand deltas, was an infringement of the public’s rights in the waters and that as such a legal right was violated, thereby meeting the requisite elements for a cause of action. The Wisconsin Court did not agree; it concluded that the:

[public trust] doctrine merely gives the state standing as trustee to vindicate any rights that are infringed upon by existing law.¹⁹

In other words, the State, through the Attorney General, would be a proper party to bring such an action as alleged here, but merely gaining access to the Court was not enough. Legal liability for unlawful acts arising out of either the statutes or case law must also be established. And since the “common enemy” rule still governed, it afforded protection for such acts and no cause of action was available even though injury occurred.

As a last resort, therefore, in this many faceted argument, the State placed in issue the usefulness of the “common enemy” doctrine itself, arguing that it should be over-

¹⁷ *This statute is strictly construed as to who may bring such actions. The interpretative commentary on sec. 280.01 discussing nuisance states: “The act of omission which is the basis of either a public or private nuisance is: (1) an intentional tort, (2) negligence or (3) an act of omission for which there is absolute liability. A public nuisance is an offense against the state, while a private nuisance is a tort to a private person. The same act may constitute both a private and a public nuisance.”*

¹⁸ *On the appeal the Supreme Court pointed out that “although the defendants do not dispute that a public nuisance would have been created if the dispersal of the surface waters constituted a tortious act, their argument is that they committed no wrong because they were acting within the rights of a landowner seeking to cope with surface water, at supra, note 7, at 8, and this was proper under the existing rule.”*

¹⁹ *Id.*, at 11. The Court did, however, provide a short synopsis on the doctrine indicating its great flexibility, pointing out, for example, that it may be used both by citizens and by the State to prevent certain State action from taking place or limiting it. It may also be used affirmatively as where the doctrine formed the cornerstone in the legislative enactment to regulate the shorelands and floodplains of the State.

ruled. The Wisconsin Supreme Court agreed, finding that the doctrine no longer comported with the realities of contemporary society.

ADOPTING THE "REASONABLE USE" RULE FOR DIFFUSED SURFACE WATERS

Having decided to overrule the "common enemy" rule the Court, as it had in Michels, went to the American Law Institute's Restatement of the Laws, Second Torts for the new "reasonable use" rule.²⁰ The appropriate section 822, found in the American Law Institute's tentative draft, incorporates damage occasioned by surface waters, and the language adopted by the Court reads as follows:

Section 822

That One Is Subject To Liability As A Result
Of The Non-Trespassory Invasion When The
Invasion Is Either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.²¹

The Wisconsin Court emphasized that the new rule as intended by the reporters of the Restatement of the Laws would apply to public nuisances as well as private nuisances.²²

The critical determination, and one of fact, then centers on the unreasonableness of the intentional act. The methodology in making that determination is set out below.

²⁰ Supra, note 7, Tentative Drafts No. 17 and 18.

²¹ Id. Intentional invasions are defined in sec. 825 of the Restatement: "an invasion of another's interest in the use and enjoyment of land is intentional when the actor

- (a) acts for the purpose of causing it; or
- (b) knows that it is resulting or is substantially certain to result from his conduct."

The reports of the first Restatement indicate that it is the mere knowledge which goes to providing intent, the invasion need not be inspired by malice or illwill, see comment (a) to sec. 825.

In distinguishing sub(a) in sec. 822, the reporters point out that in determining the reasonableness of unintentional invasions "it is the risk of harm which makes the conduct unreasonable." When the harm is intended, on the other hand, it is necessary to look only at the gravity of the harm which was suffered, at p. 2 Tentative Draft No. 18.

The Process of Determining the Unreasonableness of Invasion The Restatement provides the following:

Section 826 Unreasonableness of Invasion

An Intentional Invasion Of Another's Interest In The Use And Enjoyment Of Land Is Unreasonable Under The Rule Stated In Section 822.²³ If

- (a) the gravity of the harm outweighs the utility of the actor's conduct, or
- (b) the harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct.²⁴

The factors involved of weighing the gravity of the harm versus the utility of the actor's conduct, as found within sub(a) above are as follows:

THE EQUATION FOR DETERMINING WHETHER THE GRAVITY OF HARM EXCEEDS THE UTILITY OF CONDUCT²⁵

Factors Involved In Determining The Gravity
Of Harm, section 827.

²² Supra, note 7, Deetz at 16 and found in comment (a) to sec. 822 of the Restatement.

²³ The reporters in Tentative Draft No. 17 envision the following broad test in the analysis of whether actions are unreasonable: "The question is not whether a reasonable person in the plaintiff's or defendant's position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Regard must be had not only for the interests of the person harmed but also for the interests of the actor and for the interests of the community as a whole." Secs. 827 and 828 discussed in the main text provide the factors for this deliberation.

²⁴ Supra, note 2, p. 2 Tentative Draft No. 18. The reporters make the following distinction as between (a) and (b) that "the formula which referred to social utility of the conduct in general, was regarded as appropriate in a suit for injunction, but not in a damage action, which does not require that the conduct be discontinued," at p. 3 of Tentative Draft No. 18. It was as a result of this apparent dichotomy that sub(b) was added and further enumerated in sec. 829A of Draft No. 18, which provides that, although there is utility derived from the conduct and it should not be enjoined, the substantial harm which results from the invasion is entitled to some compensation.

²⁵ The Wisconsin Court in State v. Deetz, supra, note 7 at 17 and 18 quoted these factors as developed in the Restatement Tentative Draft No. 18.

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:²⁶

- (a) the extent of the harm involved;²⁷
- (b) the character of the harm involved;²⁸
- (c) the social value which the law attaches to the type of use or enjoyment invaded;²⁹
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality;³⁰
- (e) the burden on the person harmed of avoiding the harm.³¹

Factors Involved In Determining The Utility Of Conduct, section 828.

In determining the utility of conduct which causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important.³²

- (a) the social value which the law attaches to the primary purpose of the conduct;³³

- (b) the suitability of the conduct to the character of the locality;³⁴
- (c) whether it is impracticable to prevent or avoid the invasion, if the activity is maintained;³⁵
- (d) whether it is impracticable to maintain the activity if it is required to bear the cost of compensating for the invasion.³⁶

Application of the Rule to Deetz

The Wisconsin Supreme Court, having adopted this new rule to replace the "common enemy" doctrine, moved to apply it to the conduct of Deetz. The Court concluded that the land development activity on the bluff overlooking Lake Wisconsin had in fact caused the damage to the public trust.³⁷ And furthermore, since Deetz continued the development project after having knowledge of the consequences, the element of an intentional invasion was met.³⁸ The next step was to evaluate the evidence from the trial record in light of the factors set out in section 827. The language and qualitative nature of the factors to be used in the weighing and balancing process, however, makes this a difficult task, particularly where precedent is lacking.³⁹ It is useful, therefore, to illustrate the Court's

²⁶ The list of factors here is not meant to be exhaustive according to the reporters, and the relative weight of each factor will vary depending upon the facts, Tentative Draft No. 17, p. 36.

²⁷ Comments on this clause indicate that consideration may be given to risks of other harms that might be incurred by the complaining party, Id., at 38.

²⁸ It was felt here that if physical damage resulted, the gravity of harm would be treated as great even though the extent of harm was small but where the invasion involved personal discomfort the harm is regarded as slight unless the invasion is substantial and continuing, Id.

²⁹ Here the test is: "How much social value a particular type of use has in common with other types of use depends upon the extent to which that type of use advances or protects the general public good, Id., at 39.

³⁰ The suitability of the particular use is determined as of the time of the invasion and not when the use began, the rationale being that the character of the locality may have significantly changed in the interval, Id., at 40.

³¹ The intent of this clause is "that persons living in society must make a reasonable effort to adjust their uses of land to those of their fellow men before complaining that they are being unreasonably interfered with, Id., at 41.

³² The standards in measuring the utility of conduct are those present in the community at the time and place of the conduct and, in addition, what the courts themselves have regarded as the social value for certain types of human activity. It's very important to note that "it is only when the conduct has utility from the standpoint of all factors that its merit is ever sufficient to outweigh the gravity of harm it causes," Id., at 42.

³³ Primary purpose refers to the main objective of the actor in doing the act, Id.

³⁴ That is, the type of activity which predominates within the community, Id., at 45.

³⁵ An invasion would be practicably avoidable if the actor, by some means, can substantially reduce the harm without incurring prohibitive expense or hardship, Id., at 46.

³⁶ The Court in considering this factor must not only consider the compensation for harm in the suit before it but also potential compensation to others who may also be injured. In this situation the reporters indicate the review is much stricter, i.e., corresponding to that in a suit for an injunction, Id., at 47.

³⁷ State v. Deetz 66 Wis. 2d 1, at 19 (1974).

³⁸ Id. For a definition of an intentional invasion which was not discussed by the Court except impliedly, see supra, note 21.

³⁹ An indication of this difficulty is the fact that the Wisconsin Court went to a New Hampshire case over a century old to show where similar factors were used in evaluating the reasonableness of conduct. But, the Wisconsin Court doesn't seem to have narrowed the focus or incorporated greater specificity, in quoting from Swett v. Cutts 50 N.H. 439, 496 (1870) which said: "In determining this question all the circumstances of the case would of course be considered, and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen," 66 Wis. 2d, at 18.

findings in order to provide some indication—insofar as the facts will permit—of the Court's understanding of what it believes is encompassed by each of the factors.

On the evidence contained within the record the Justices felt that the following was shown:

“(a) the extent of the harm involved”: Extensive deltas have been formed, the erosion is continuing, and as the result of the erosion and the consequent silting, portions of the lakefront and the adjacent waters can no longer be used for swimming, fishing, and boating.

“(b) the character of the harm involved”: The physical damage to the lake, to the roadway, and to the below-bluff lands.

“(c) the social value which the law attaches to the type of use or enjoyment invaded”: Substantial portions of the lake dedicated to the public for recreational and navigational purposes, uses on which the State of Wisconsin places a high priority, have been impaired.

“(d) the suitability of the particular use or enjoyment invaded to the character of the locality”: The use for which Lake Wisconsin is most suitable, water recreation, has been impaired.

“(e) the burden on the person harmed of avoiding the harm”: The burden on the injured parties, the State of Wisconsin, as the trustee of the public trust, and on the private landowners to avoid the harm occasioned by the erosion is substantial.⁴⁰

This evaluation, however, forms only one side of the equation in the process of ascertaining whether Deetz's actions were reasonable. While the evidence supported the State's case that substantial harm had occurred, no evidence was available to measure the social utility of the action. This resulted from the fact that Deetz had been successful in obtaining a dismissal of the case at the trial level. Consequently, Deetz had not been required to come forward with evidence that might establish the merits of the residential development project that he had undertaken. In recognition of this fact the Supreme Court remanded the case back to the lower court to allow the defendants this opportunity to argue the merits of their actions and to establish whether the invasion of the interests of the State were unreasonable.⁴¹

⁴⁰ 66 Wis. 2d 1, at 19 and 20.

⁴¹ The defendant Deetz elected not to pursue further court action and has initiated corrective actions. Additional judicial clarification of the factors used in determining the utility of the conduct must await future litigation.

In deciding the case the Wisconsin Court did expound on its interpretation of the “reasonable use” rule. It indicated that land development activity would still be a high priority in any evaluative process as it had under the old “common enemy” doctrine. But, the Court further indicated that this policy and its economic ramifications would not be given the great weight and importance that it amassed during the nineteenth century when it impinged on the public trust doctrine.⁴²

Considerations on Prospective Application of the “Reasonable Use” Rule⁴³

Apparently the distinctions drawn by the Court in its opinion would still leave a very heavy burden on a private individual injured under relatively similar facts when arguing a private nuisance action. While this is not a formal ruling by the Court since the question was not at issue, it would seem to be a very strong limitation on the new rule if this reasoning is adhered to in the future: where, for example, a private landowner abutted a nonnavigable body of water which was subsequently silted in by actions of a private party similar to those found in *Deetz*. The presumptions in this situation in favor of the social utility of land development would weigh heavily against the injured party's attempts for an injunction or even compensation.⁴⁴

⁴² The Court here specifically mentioned the *Just v. Marinette* case 56 Wis. 2d 7, 201 N.W. 2d 761 (1972), in order it would seem to reaffirm the public policies that it recognized as being of such importance to the State and its citizens.

⁴³ It should not be inferred from the following discussion that land development per se is “bad.” Rather, the concern here is with the type and location of development, neither of which may be effectively analyzed if only local norms or customs are the guiding criteria as envisioned by this process. And, the presumption in favor of such action prior to even invoking the evaluation process weakens it even more.

⁴⁴ The question of compensation emerges from the comments of the reporters of the *Restatement* to clause (d) of sec. 828, “whether it is impracticable to maintain the activity if it is required to bear the cost of compensation for the invasion,” at 46 and 47. If land development has utility, as it seemingly must, given the presumption in favor of it by the Court, then, following the comments by the reporters, certain persons who have less inconvenience than others (which involves another evaluative process not discussed by them) may have to forego compensation in order to allow the land development activity to continue. In other words, the operation is not economically feasible if it has to compensate for all the injury that it causes. Thus certain social costs or externalities will never be internalized and such presumptions as made here may effectively negate a true determination of what is reasonable. It should be pointed out, however, that such arguments may be countered by the fact that sec. 826(b) specifically provides compensation for injury; see *supra*, note 24. For additional comment see notes 48 and 49 and accompanying text *infra*.

It should be emphasized at this point that, while the decision arrived at in *Deetz* has the effect of removing the substantive defense that the "common enemy" doctrine had provided, it does not remove other procedural or substantive defenses that may exist in the law.⁴⁵ With this caveat in mind, the following hypothetical situations are presented which alter the fact situation found in *Deetz* and which raise certain questions concerning its prospective application.

What happens, for instance, when a development is undertaken whose primary purpose is directed to benefit the public, as for example, in the construction of a building to be used by the public or a utility line which may affect the flow of surface water? It can be assumed that the social utility in these instances would rate very high under normal circumstances using the present scheme of evaluation adopted in *Deetz*.⁴⁶ But what if injury is sustained from such action to the public interest as here in *Deetz*? Presumably following the rationale as set out by the Court in *Just v. Marinette* and *Deetz*, private citizens as well as the State itself or any of its local units of government could challenge the action under the public trust doctrine in conjunction with the "reasonable use" rule.⁴⁷ In that event the equation for weighing the harm versus utility of the reasonableness of the conduct may

approach its most equal balance, since the analysis would be of actions designed to benefit the public directly versus the injury to the public interest.⁴⁸

And what happens if the reverse of *Deetz* occurred? Where would the heaviest burden lie; that is, where the land development's major purpose was for the public which subsequently causes injury only to private interests? The implication of the "reasonable use" rule would seem to clearly favor the public enterprise. The social utility of the public development would conceivably be rated at the upper end of the scale, but the invasion of private interests, without the support of the public trust arguments, would be in a weak position in attempting to obtain injunctive relief.⁴⁹

As awareness continues to increase over the short- and long-term effects of private and public development, the situations posed above can be expected to become more prevalent. The necessity of having accurate forecasts based on reliable geologic, hydrologic, soil, and engineering data will become even more crucial if the newly adopted process which is encompassed within the "reasonable use" rule is to work.

One further observation about the new rule should be noted. The reporters of the rule, commenting on the factors to be used in analyzing the social utility, weigh them in favor of those actions which coincide with the predominating activities or norms of the community where it is taking place.⁵⁰ This emphasis in favor of non-deviant action prevails for the first two factors in sec. 828 "(a) Social Value which the law attaches to the primary purpose of the conduct," and "(b) Suitability of the conduct to the character of the locality." On its face this would seem to be a sensible policy of maintaining the integrity of an existing community. However, it may well

⁴⁵ Cf. *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) which removed the governmental immunity for tortious acts by the State or any of the legal units of government, but the Court was careful to point out that a suit brought against the State for such acts must still meet the procedural requirements set out in the statutes. And the common law in Wisconsin has been quite explicit in not allowing damages where a municipality was involved in constructing streets, sewers and gutters, going beyond even the "common enemy" doctrine by allowing the municipality to tap new watersheds, which affect the flow of surface waters. Cf. *Peck v. Baraboo*, 141 Wis. 48, 56, 122 N.W. 740 (1909) where the Court said: "A Municipal corporation cannot be held in damages by a landowner for changing the natural flow of and increasing the volume of surface water by construction of streets and gutters, nor because the sewer was inadequate by reason of negligence in adopting plans in the first place nor by reason of negligently failing to maintain the sewer in good working order thereafter to carry off the surface water so accumulating as fast as it accumulated." And in *Tiedman v. Middleton* 25 Wis. 2d 443 (1964) it said: "By constructing streets and gutters within its limits, a city may change the natural watercourse so as to increase the flow of water upon private land."

⁴⁶ For example, the reporters in commenting on clause (a) of sec. 828, utility of conduct (i.e., measure of social value) would rate actions with direct public benefit higher on social value than those primarily benefiting the individual, at 44 Tentative Draft No. 17, *supra*, note 7.

⁴⁷ See note 19, *supra*, which discusses the Court's documenting of the various parties who may use the "trust" doctrine in fostering or precluding particular actions affecting the public trust in waters.

⁴⁸ That possibility almost presented itself in *Deetz* as the Town of Dekorra was named in the complaint as a defendant, but the cause of action was dismissed from the lawsuit when parties on both sides agreed that the Town was not at fault in causing the siltation; the issue therefore was never reached.

⁴⁹ Other alternatives may be available to the party seeking redress for the damages where, for example, the injury may be so severe as to create an inverse condemnation situation, and establishing that fact would entitle compensation.

⁵⁰ They say for example: "On the whole, the activities which are customary and usual in the community have relatively greater social value than those which are not," *supra*, note 7, Tentative Draft No. 17, at 44.

lead to continued local entrenchment and fractionalized thinking towards development activity. If so, this policy will only serve to exacerbate current problems where local decisionmaking has so often failed to account for the external costs that accompany such enterprises. Only in this instance it would be receiving encouragement from members of another branch of government—the judiciary.

In conclusion, the “reasonable use” rule adopted by the Wisconsin Supreme Court is somewhat of an improvement over the “common enemy” doctrine, but it may prove difficult to apply as new fact situations arise. The variable factors encompassed in the new rule, while reflecting some time honored concepts of the law, tend to be quite “soft” and nonviable when taken on a collective basis and subjected to a probing analysis. Hopefully, greater reliance will be placed on economic indicators, where possible, to give additional clarity to the effects of altering diffused surface water patterns. And where information is available showing the “spin-off” effects of the development, both in benefits and costs to outlying communities, it should be incorporated as a matter of course. Obviously, not all the elements of determining the social utility of conduct or the harm of an invasion are quantifiable, including some of the most important ones. But total reliance on the present indicators or factors heavily influenced towards the status quo may prove to be very misleading and costly with time.

STATUTES AFFECTING DIFFUSED SURFACE WATER

The State Legislature, in recognizing that the construction of highways and railroad grades will inevitably affect the natural flowage patterns of surface waters, enacted Wis. Stats. 88.87. The purpose of this act is designed to regulate and control such projects to protect property owners who may be affected by these developments. The

legislation also imposes similar regulations upon landowners and users of land from affecting highways and railroad grades through their own actions.

Basically, the test employed by the statute is whether the action taken which affects surface waters is reasonable and “consistent with sound engineering practices.”⁵¹

In a fairly recent case interpreting the statute, *Novak v. Agenda*, the landowner Novak brought an inverse condemnation action against the town for flooding a portion of her lands.⁵² She had alleged that the town’s construction of a culvert and landfill for a road improvement effectively precluded her from using these lands. The trial court found, however, that the town’s installation of the culvert and the construction of the landfill had not altered the surface water drainage patterns. The Wisconsin Supreme Court upheld this decision finding that there was enough evidentiary support for the trial court’s position.⁵³

Another section of the Statutes which also has some bearing on diffused surface waters is Wis. Stats. 88.94. The statute is directed at drainage of agricultural lands. The procedure outlined in the statute works in the following manner. If an owner desires to drain not more than 80 acres, and there is no suitable outlet for the water on the owner’s land, then the owner may petition the county drainage board, or if there is none, the town board where the land is located. If after hearing, the board finds that the benefits exceed the cost, “they shall order” that the drain be constructed across lands of others upon payment of damages. Such a drain then becomes a “public drain.”⁵⁴

⁵¹ The statute provides in part (2)(a): “Whenever any county, town, city, village railroad company or the highway commission has heretofore constructed and now maintains or hereafter constructs and maintains any highway or railroad grade in or across any marsh, lowland, natural depression, natural watercourse, natural or man-made channel or drainage course, it shall not impede the general flow of surface water or stream water in any unreasonable manner so as to cause either an unnecessary accumulation of waters flooding or water-soaking uplands or an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands. All such highways and railroad grades shall be constructed with adequate ditches, culverts, and other facilities as may be desirable, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage. This paragraph does not apply to highways or railroad grades used to hold and retain water for cranberry or conservation management purposes.

⁵² 44 Wis. 2d 644, 172 N.W. 2d 38 (1969).

⁵³ *Id.*, at 650 and 652.

⁵⁴ For further comment on this statute and sec. 88.87 see *Water-Use Law and Administration in Wisconsin*, pp. 81-83.

FEDERAL STATUTORY DEVELOPMENTS AFFECTING WATER RESOURCES

INTRODUCTION

The U. S. Congress in recent years has assumed a leading position in initiating major regulatory activity that affects the waters of the nation. This particular congressional power to regulate is derived from the commerce clause of the U. S. Constitution which permits Congress to regulate commerce among the several states.¹ Originally the application of this congressional power to the waters of the country was tied to the test of navigability, i.e., where the waters could be used for commercial transport. However, with the 1972 amendments to the Federal Water Pollution Control Act, the requirement of navigability was intentionally dropped.² The effect of this deletion is that all waters of the United States are under the jurisdiction of Congress. Presumably this would mean intrastate as well as nonnavigable waters and as of this date judicial interpretation of the Act has upheld the congressional expansion of jurisdiction.³

The federal legislation highlighted here has had and may be expected to continue to have substantial economic and environmental impact for the State of Wisconsin. In many instances it has stimulated parallel enactments at the State level (as it was intended to do) and so an understanding of this federal involvement will provide a foundation for the discussion of the State acts and programs immediately following this chapter.

Specifically, five pieces of legislation are analyzed within this chapter. The first is the Federal Water Pollution Control Act Amendments of 1972 (FWPCA). The analysis of that Act covers over a third of the chapter primarily because of the comprehensiveness of the legislation and its potentially far-reaching effects. That analysis will be

¹Article 1, sec. 8 of the United States Constitution. In the landmark case of *Gibbons v. Ogden* 22 U. S. (9 Wheat.) 1 (1824); the Court interpreted the power of Congress to so regulate, finding that it would only be limited to matters entirely within a state and with no effects on other states, at 195. The interpretation of what constitutes an effect on commerce has been so broadened that today Congress has practically unlimited power where it is acting to regulate in this area, cf. *Perez v. United States*, 402 U. S. 146 (1971). And for a more indepth analysis of this power see Soper, *The Constitutional Framework of Environmental Law*, Federal Environmental Law, Environmental Law Institute (1974), at 22-27.

²33 USCA sec. 1251 et seq., 86 Stat. 816. See sec. 502(7) where it states: "the term navigable waters means the waters of the United States."

followed by a discussion of the National Environmental Policy Act, the Coastal Zone Management Act, the Flood Disaster Protection Act of 1973, and the Safe Drinking Water Act. While each receives separate attention, one should be continually aware of the linkages between all. For example, certain provisions of the Coastal Zone Management Act require environmental impact statements to be filed in compliance with the National Environmental Policy Act. Furthermore, some requirements of the FWPCA will be incorporated into Coastal Zone Management Programs. And the objectives of the Safe Drinking Water Act will be aided considerably by effective programs carried out under the mandate of the FWPCA. Finally, while the thrust of the FWPCA is to eliminate pollution from the waters of the nation, this objective also will be advanced significantly if the Flood Disaster Protection Act's goal of discouraging development in floodland areas is met.

THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (FWPCA)

The original FWPCA was enacted into law in 1948, but in 1972 it underwent significant alteration through a series of comprehensive amendments.⁴ In instituting these changes to the Act, Congress set as its objective:

³In *U. S. v. Holland*, 373 F. Supp. 665 (M.O. Fla. 1974), the United States brought an action to enjoin allegedly unlawful landfill operations on lands above the mean high water mark which were subject to periodic inundation by nonnavigable waters. The defendant had not obtained a permit under the FWPCA, and the Court found that, even though these intertidal wetlands were above the mean high water line, they were subject to the requirements of the Act. The Court went on to say "that Congress has wisely determined that federal authority over water pollution properly rests on the Commerce Clause and not on past interpretations of an act designed to protect navigation," at 676 *Id.*, 373 F. Supp. at 676. And for a similar conclusion see *U. S. v. Ashland Oil and Transportation Co.*, 364 F. Supp. 349 (W. D. Ky. 1973). And, in the most recent case of *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.C. D.C. 1975) the Court found that the U. S. Congress in defining navigable waters "to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act (FWPCA), the term is not limited to the traditional tests of navigability," *Id.*, 392 F. Supp. at 686.

⁴*Supra*, note 2.

To restore and maintain the chemical, physical and biological integrity of the nation's waters.⁵

In seeking to fulfill that objective it set as a national goal the elimination of all discharges of pollutants into the nation's waters by 1985, and it provided through an elaborate scheme under five broad titles the mechanisms and incentives for reaching this ambitious goal.⁶ The first of these titles contains the goals and objectives, along with provisions for grants for various research and related programs. Title II provides for assistance to the individual states and their local units of government in developing and implementing waste treatment management plans and practices, and it authorizes federal grants for the construction of treatment works. Title III enumerates various procedures and time deadlines for the establishment of water quality standards and effluent limitations. It additionally requires various review and monitoring processes for the program and provides the basis for federal enforcement. Title IV deals with permits and licenses, setting in place the National Pollutant Discharge Elimination System, which is the primary control mechanism and vehicle for implementing the entire Act. Authorization is also given here for the individual states to administer the permit program if the State program is approved.⁷ Wisconsin has had its permit program approved and a discussion of the procedures under the State program will follow in the subsequent chapter.⁸ And finally, Title V contains general provisions for administrative and judicial review.

The central focus of this analysis will be on the mandatory requirements of the FWPCA and the authority vested in the Environmental Protection Agency (EPA) for ensuring compliance with the Act.

Point Source Discharges

The regulatory framework contained within the FWPCA is designed to impact on two major classes of point source dischargers; a point source is defined as:

Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.⁹

⁵ Sec. 101(a).

⁶ Sec. 101 a(1).

⁷ Approval is given by the Environmental Protection Agency and it is contingent upon meeting that Agency's guidelines; see sec. 402(b).

⁸ Complete federal control is not abdicated, however, and where it is retained it will be noted in the analysis of the FWPCA.

The distinctions between the two classes are those persons who discharge directly into navigable waters and those who discharge into publicly owned treatment works.

Standards Applicable to Direct Dischargers:

Water Quality Standards: The requirements for water quality standards are set out in Section 303 of the FWPCA; they basically establish the minimum standards of water quality needed for specific uses, for example, domestic water supply or recreation. This section incorporates previously adopted state water quality standards for interstate waters which had been approved by the EPA prior to the 1972 amendments.¹⁰

Effluent Limitations: The limitations are set by the EPA for each point source and they restrict the amount of pollutants that each may discharge.¹¹ These effluent limitations are designed to meet the water quality standards for that body of water where the discharge is taking place. The EPA arrives at the effluent limitation figure by considering a number of factors including sophistication of pollution control technology.¹² In order to meet the goal of restoring the chemical, physical, and biological integrity of the nation's waters, Congress has set two important deadlines. The first of these is July 1, 1977. On that date all dischargers for all point sources of water pollution, except for the publicly owned treatment works, must meet the "best practicable control technology currently available" as determined by the EPA.¹³ The publicly owned treatment works in existence on July 1, 1977, must provide at least secondary treatment.

⁹ Sec. 502(14); examples of nonpoint sources of pollution are runoff from construction sites or fertilizer from agricultural lands; nonpoint source pollution will be discussed *infra*, note 69.

¹⁰ Sec. 303(a)(1).

¹¹ Sec. 301(1)(A).

¹² Other factors taken into account which also assist in determining the "best practicable control technology currently available" are age of equipment, facilities involved, process employed and process changes, engineering aspects of control techniques, and environmental impacts apart from water quality, including energy requirements. See sec. 304(b) and sec. 301(1)(A) and *Toward Cleaner Water*, U. S. Environmental Protection Agency, May 1974 at p. 3, and see *infra*, note 13. Review of both the substance of such limitations and the procedures utilized in their establishment may be obtained directly by the Court of Appeals pursuant to sec. 509(b) (1)(E); for an interpretation see *E. I. DuPont de Nemours and Company v. Train* 383 F. Supp. 1244 (W. D. Va. 1974). By so providing, Congress sought to establish expeditious and consistent application of limitations along with strict time limitations, at 1253.

¹³ The EPA determination uses those factors found in note 12, *Id.*, and the sections cited there.

The second stage of the effluent limitations has as its deadline July 1, 1983. It is on that date that certain categories and classes of point sources will be required to have the "best available technology economically achievable for such category or class" in order to meet the ultimate goal of no pollution by 1985.¹⁴ The standard to be applied to the publicly owned treatment works is that they have "the best practicable waste treatment technology over the life of the works in place by this date."¹⁵

If it is determined that the effluent limitations imposed to meet the requirements above will not meet the water quality standards, then Congress has provided that the EPA administrator may set more stringent requirements in order to assure the maintenance of such water quality.¹⁶ Congress had recognized that reliance on certain technologies for specific discharges in certain bodies of water may not achieve the goals of the Act so they granted this additional authority to the Administrator.¹⁷ In addition, if any other federal law or regulation or if any state law or regulation requires stricter standards than those set pursuant to this Act, then the stricter standards must be met.

National Standards of Performance: Section 306 of the FWPCA is designed to control new sources of pollution within defined industrial categories, by setting standards of performance for the entire nation. A new source is defined as:

¹⁴ Sec. 301(2)(A). The technology needed to meet this standard is the highest degree of technology proved to be designable for plant scale generation so that costs for this treatment may be much higher than for treatment by best practicable technology. *Supra*, note 12, Toward Cleaner Water, and see sec. 304(b).

¹⁵ Sec. 201(g)(2)(A). Construction grants from the federal government are conditioned upon the public work meeting this requirement.

¹⁶ Sec. 302(a) provides in part that "whenever in the judgment of the Administrator . . . effluent limitations . . . would interfere with the attainment or maintenance of water quality in a specific portion of the navigable waters which shall assure protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreation activities in and on the waters, effluent limitations (including alternative effluent control strategies) for such point sources or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality."

¹⁷ This section does provide that if a person affected by such additional limitations can establish that "there is no reasonable relationship between the economic and social costs and the benefits to be obtained, such limitations shall not become effective," at 302(b)(2).

any source the construction of which is commenced after the publication of proposed regulations presenting a standard of performance under this section which will be applicable to such source.¹⁸

The EPA is responsible for proposing and publishing the regulations which set the standards for the new sources within each category.¹⁹ The standards promulgated by the EPA will be those which will effectuate the greatest reduction in effluent discharges.²⁰

The objective of setting these national standards of performance is to preclude potential polluters from seeking water sources that may have the capacity for assimilating greater pollution loads. Under this section any new industrial construction would be faced with the same standards anywhere in the nation. This section also permits the individual states to enforce the national standards if their procedure for enforcement is approved by the EPA Administration.²¹

Pretreatment Effluent Standards for Discharges into Publicly Owned Treatment Works: While the foregoing standards are to be applied to direct point source discharges, they do not affect discharges into publicly owned treatment works. Section 307(b)(1), therefore, authorized the EPA to set pretreatment effluent standards in order to prevent the introduction of pollutants into treatment works which are incapable of being adequately treated by the plants or which would interfere with their effective operation. The main objectives of this section, therefore, are to ensure against the public treatment works being overly taxed, and to retain control over indirect dischargers who are not subject to obtaining

¹⁸ 306(a)(2).

¹⁹ 306(b)(1)(B). This section provides further that "the Administrator shall afford interested persons an opportunity for written comments on such proposed regulations. . . . the Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by the subsection for promulgation of such standards."

²⁰ The determination will be made by the Administrator and will reflect best available demonstrated control technology.

²¹ Sec. 306(c). A general exception is provided by sec. 316 of the FWPCA to both sec. 306 (National Standards) and 301 (Effluent Limitations) in the case of thermal discharges. But "only if the owner or operator of any such source can demonstrate to the Administrator that the proposed effluent limitation for that plant and the thermal component of that discharge may be set which (taking into account the interaction of such thermal component with other pollutants) . . . will assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on that body of water."

permits nor meeting the standards in the foregoing sections since they are sending their wastes through the publicly owned works.

Section 307 also calls for the regulation of toxic pollutants,²² with standards being established which will reflect:

the toxicity of the pollutant, its persistence, degradability, (and) the usual or potential presence of the affected organisms in any waters.²³

Prior to the final promulgation of standards for both toxic pollutants and discharges into publicly owned treatment works, the EPA must hold public hearings.²⁴

Permit System: Title IV of the FWPCA contains the framework for the granting of permits and licenses, and section 402 is the key to the entire process because it supplies the primary mechanism of translating the previously discussed sections involving the promulgation of standards into reality. This section calls for the implementation of a National Pollutant Discharge Elimination System (NPDES). It mandates that permits be issued for the discharge of any pollutant or combination of pollutants after an opportunity of a public hearing has been afforded.²⁵ Each permit will have certain prescribed conditions attached, to assure compliance with the standards established under the foregoing sections.²⁶ And it demands of each discharger specific requirements including deadlines for adopting the requisite technological improvements in order to meet the national goal of eliminating pollution. In essence the permit is a contract between the government and the discharger and, once issued, the discharger is deemed in compliance with the standard sections set out above.²⁷

²² Toxic pollutant is defined in sec. 502(13) "as those pollutants or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring."

²³ Sec. 307(a)(1). A commentator on the FWPCA, Robert Zener, *The Federal Law of Water Pollution Control, Federal Environmental Law*, Environmental Law Institute (1974), has some reservations about the toxic standards since the statutory language does not answer the question of how an effluent standard can be based on ambient effects which vary from location to location, at 712. He presumes that some models will have to be developed for the size and characteristics of the receiving water and number of discharges into the water to formulate the standards creating in various situations overprotection and in others underprotection, *Id.*

Under the provisions of the FWPCA the permit process may be administered by a state if its program for eliminating pollutants is approved by the EPA Administrator. Some of the conditions necessary for approval are: that the state have adequate legal authority to carry out the program; that adequate procedures for giving notice to the public and any other state that may be affected by the permit be in place; that the EPA Administrator receive notice of each application for a permit; and that sufficient enforcement is available including civil and criminal penalties to abate violations of the permits.²⁸ The State of Wisconsin has met these conditions and had its permit program approved; a discussion of the State's permit process will follow in Chapter VII.²⁹

Two major areas of federal control over the permit process have been retained. The first allows the EPA within 90 days of its notification of the application for a permit, or within 90 days of the date of transmittal of the proposed permit itself, to object in writing to the issuance of such permit. If the EPA Administrator elects that course of action, no permit shall issue.³⁰ The second

²⁴ The hearings will be held on the proposed standards; however, a modification of the toxic pollutant standards will only be warranted if there is preponderance of evidence gathered at the hearings to support the change, sec. 307a(2) and (3).

²⁵ Sec. 402(a)(1). In *NRDC V Train* 7 E.R.C. 1881 - F. Supp. - (D.C. D.C. 1975) the question arose as to whether the FWPCA allows the Administrator to exempt entire classes of point sources from the NPDES permit requirements. EPA had contended that certain categories of point sources were ill suited to the permit program and should be exempted. The Court pointed out, however, that where certain exemptions were permitted, as with nonpoint sources, the U. S. Congress had exempted them expressly; therefore, finding no such exemption for point source discharges the Court held that the EPA could not exclude them from the requirements of the NPDES and granted summary judgment for the plaintiffs.

²⁶ The respective sections whose requirements the permits must meet are 301, 302, 306, 307, all discussed *supra*, and 308 which defines the inspection and monitoring to be carried out in the process, discussed *infra*, note 40 and accompanying text, and 403 which establishes ocean discharge criteria.

²⁷ The only exception is to standards imposed under sec. 307 when a toxic pollutant is injurious to human health, sec. 402(k).

²⁸ Sec. 402(B)(1) et seq.

²⁹ Chapter 147, Wis. Stats., encompasses the State authority for the Wisconsin Pollution Discharge Elimination System.

³⁰ Sec. 402(d)(1) and (2).

checkoff of the state permit program, and the more serious one, is when the EPA Administrator after a public hearing determines that the state is not fulfilling its obligations in administering the program, in which case the state shall be notified. If corrective action is not taken within 90 days, then approval of the state program shall be withdrawn.³¹ Federal government control over the state programs is also retained in specific instances under the enforcement portions of the FWPCA and they are discussed next.

Enforcement: The major enforcement provisions of the FWPCA are found in section 309. That section provides in part that:

whenever, on the basis of information available to him the Administrator finds that any person is in violation of sections 301, 302, 306, 307, or 308 of the Act or is in violation of any permit conditions or limitations implementing any of such sections in a permit issued under section 402 of this Act by him or by a state, he shall issue an order requiring such person to comply with such sections or requirement.³²

An individual who violates an order of the Administrator will be subject to a civil penalty not to exceed \$10,000 per day of violation.³³

The alternative to the issuance of an order is to seek permanent or temporary injunctive relief for any violations of the listed sections above. Separate penalties of not less than \$2,500 nor more than \$25,000 per day of violation or imprisonment for up to a year may be imposed if any person willfully or negligently violates permit conditions or limitations.³⁴

Civil actions may also be brought by any citizen against any person including the United States or any other governmental instrumentality (as permitted by the eleventh amendment to the Constitution) who is in violation of an effluent standard or limitation, an order issued by the Administrator, or where the Administrator has failed to perform a nondiscretionary duty.³⁵ In Montgomery Environmental Coalition v. Fri, for example,

³¹ Sec. 402(c)(1).

³² Sec. 309(a)(3).

³³ Sec. 309(d).

³⁴ The enforcement section specifically includes within the definition of person any responsible corporate officer, sec. 309(c)(3) and sec. 502(5). In People Ex. Rel. Cal. Reg. W.Q.C.Bd. v. Department of Navy, 371 F. Supp. 82 (N.D. Calif. 1973) the Court interpreted the FWPCA as permitting only compensatory damages, however, and not punitive. The actions may be brought in the District Court of the United States where the defendant is located or doing business, sec. 309(b).

a group of citizens sought injunctive relief to prevent the Water Resources Administration of Maryland from authorizing sewer hookup permits which would affect the water quality of the Potomac River.³⁶ Defendants had argued that the citizens did not have sufficient standing to seek this relief, since they had failed to allege that they used the Potomac or that they would be adversely affected by the new sewer connections, but the Court found that:

Plaintiffs are groups of citizens who claim to live within the environs of the natural object they seek to protect . . . [i.e. the Potomac] [and] it would be an unjustified presumption on the Court's part to think that none of the aesthetic and recreational values of the plaintiff will be lessened by increased pollution of the Potomac River.³⁷

Limitations or exceptions to private citizens bringing such action do exist, however, as when the EPA or the state has already commenced and is diligently prosecuting an action.³⁸ In that situation, a citizen group may not bring its own private action but it does have the right to intervene. In addition, a civil action may not be commenced by a citizen until 60 days have elapsed after having given notice to the EPA, the state, and to any alleged violator.³⁹

Inspections and Monitoring: In order to assist in meeting the objectives of the Act and the development of any of the previously discussed standards and also in order to ascertain whether any person is in violation of the standards, the owner or operator of any point source discharge may be required to implement certain monitoring processes. The owner or operator may also be required to keep certain records and specific information on the operation.⁴⁰ In addition, this section of the FWPCA

³⁵ Sec. 505. The U. S. District Court under sec. 505(a) shall have jurisdiction irrespective of the amount in controversy or citizenship of the parties, to enforce the provisions of this section.

³⁶ 366 F. Supp. 261 (D.C. D.C. 1973).

³⁷ Id., 366 F. Supp. at 264.

³⁸ Sec. 505(b)(1)(B).

³⁹ Sec. 505(b)(1)(A). In Stream Pollution Control Bd. of Ind. v. U. S. Steel Inc., F.R.D. 31 (1974) private citizens were not allowed to intervene since they had failed to allege that the State Attorney General was inadequate in his performance.

⁴⁰ In Committee for Con. of Jones Falls Sewage System v. Train, 375 F. Supp. 1148 (D. Md. 1974) the Court found the owner or operator would not be in violation of this section unless an order had been issued by the Administrator, Id., 375 F. Supp. at 1152.

permits the EPA Administrator, or authorized representative, the right to enter and inspect premises where an effluent source is located. Furthermore, each state has similar rights under the Act if the Administrator finds that its procedures for monitoring, inspection, and entry are comparable to those of the EPA.⁴¹

The Planning and Management Process:

The Continuing Planning Process: State assumption of the discharge permit program is contingent upon the EPA approving a continuing planning process for all navigable waters within the state which would result in water quality management plans that include at least the following:

1. Effluent limitations and schedules of compliance to meet applicable water use objectives and supporting water quality standards.
2. The incorporation of all elements of any applicable areawide waste management plan prepared for metropolitan areas under section 208 of the Act.⁴²
3. The total maximum daily load for pollutants for all waters identified by the state where the effluent limitations required by section 301 of the Act are not stringent enough to implement water use objectives and supporting water quality standards, together with the total maximum daily load of pollutants for all other waters, taking into account seasonal variations and margins of safety.
4. Adequate procedures for revision of plans.
5. Adequate authority for intergovernmental cooperation.
6. Adequate steps for implementation, including schedules of compliance, of any water use objectives and supporting water quality standards.
7. Adequate control over the disposition of all residual waste from any water treatment processing.
8. An inventory and ranking in order of priority of needs for the construction of waste treatment works within the state.⁴³

This planning process will in effect integrate the various basin, watershed, and regional planning elements prepared throughout the state by federal, state, regional, and local units of government.⁴⁴

⁴¹ Sec. 308(c).

⁴² Discussed in following subpart of main text.

⁴³ Sec. 303(e)(3).

Areawide Wastewater Treatment Plans—Sec. 208: To achieve the maximum efficiency and effectiveness of the construction grants for treatment work and to ensure proper use of lands adjacent to the waters, the United States Congress has required that a planning and management process be initiated. That process requires that the Governor of each state identify specific areas which, as a result of urban industrial concentrations or other factors, have substantial water quality control problems.⁴⁵ After having identified these areas, the Governor is to designate an agency for the purpose of developing area-wide waste treatment management plans. A regional planning agency such as the Southeastern Wisconsin Regional Planning Commission may be such an agency.⁴⁶

Any areawide plan prepared under this section must incorporate certain specific elements, which involve the identification and development of procedures and methods designed to implement the plan. Examples are:

1. The identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a 20-year period.
2. The identification of measures necessary to carry out the plan (including financing); the period of time necessary to carry out the plan; the economic, social, and environmental impact of carrying out the plan.
3. The identification of nonpoint sources of pollution, including runoff from manure disposal areas and from land used for livestock and crop production, and the setting forth of procedures and methods (indicating land use requirements) to control to the extent feasible such sources.
4. The identification of mine-related sources of pollution and the setting forth of procedures and methods (including land use requirements) to control to the extent feasible such sources.
5. The identification of construction activity-related sources of pollution and the setting forth of procedures and methods (including land use requirements) to control to the extent feasible such sources.⁴⁷

⁴⁴ Cf., *Regional Sanitary Sewerage System Plan for Southeastern Wisconsin*, Planning Report No. 16, Southeastern Wisconsin Regional Planning Commission, and discussion at p. 296.

⁴⁵ Sec. 208(a)(2).

⁴⁶ For an example of how this planning process may involve an ongoing or preexisting plan see SEWRPC Planning Report No. 16 *supra*, note 44, at pp. 296-299.

⁴⁷ Sec. 208(b)(2) *et seq.*

The initial plan prepared in accordance with the process as dictated by section 208 must then be approved by the Governor and presented to and approved by the EPA Administrator. Thereafter any grant for construction of treatment works must be in conformity with this plan.⁴⁸

Control of Oil Spills and Hazardous Substances and Permits for Dredging: Two substantive areas that are addressed by the Act, but which operate outside its major procedural framework, are regulations for oil and hazardous substance spills and the separate permit systems for dredged or fill material.

Oil Spills and Hazardous Substances: In reacting to spectacular oil spills in recent years the following policy was passed into law:

That there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.⁴⁹

In an effort to prevent the occurrence of such discharges the Act authorizes the President of the United States to issue regulations that establish procedures, methods, and other requirements for equipment to preclude discharges from vessels, and onshore and offshore facilities.⁵⁰ In the event that a spill does take place from any of these sources, any person in charge is required by law to immediately notify the U. S. Coast Guard.⁵¹ If the discharge or spill has occurred in violation of the provisions of the Act the violator shall be assessed a civil penalty by the Coast Guard.⁵²

Also section 311 in some of its strongest language states that:

except where the owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) the negligence on part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent . . . (such violator shall) be liable to the United States Government for the actual costs (involved in the clean up operations).⁵³

⁴⁸ Sec. 208(d).

⁴⁹ Sec. 311(b)(1). Hazardous substances other than oil are defined in sec. 311(2)(A) as "elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines and beaches."

⁵⁰ Sec. 311(j)(1)(c).

Permits for Dredged or Fill Material: One other major exception outside the procedural framework for controlling discharges into the waters of the nation is the separate permit system administered by the U. S. Army, Corps of Engineers.⁵⁴ The Act delegates to the Secretary of the Army acting through the Chief of Engineers the authority to issue permits after having given notice and holding a public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites. The disposal sites chosen must meet certain guidelines established by the Administrator of EPA who will consider among other things the effect on human health, on marine life, and on aesthetic, recreational and economic values.⁵⁵

⁵¹ The United States Coast Guard has designated the appropriate offices to receive such notice of spills in 33 C.F.R. pt. 153, subpart B(1972).

⁵² Sec. 311(b)(6). A discharger's liability, however, may not be limited merely to the sanctions found in sec. 311. In *Askew v. American Waterways Operators, Inc.*, 93 S. Ct. 1590, 411 U. S. 325, 36 L.Ed. 2d 280 (1973) reh'g den. 93 S. Ct. 2746, 412 U. S. 933, 37 L.Ed. 2d 162, the shipowners and operators of oil terminals sought to have an injunction imposed against the Florida Oil Spill Prevention and Pollution Control Act F.S.A. sec. 376.011 et seq. which provided for liability without fault in spills. The U. S. Supreme Court held that the FWPCA did not: "preempt the states from establishing either any requirement or liability respecting oil spills (in order to protect their interests, and the Florida Act therefore would not be enjoined)" *Id.*, 411 U. S. at 336. And in *Illinois v. City of Milwaukee*, 406 U. S. 91, 92 S. Ct. 1385, 31 L.Ed. 2d 712 (1972) an action brought by Illinois against several Wisconsin municipalities to enjoin pollution of Lake Michigan, the Supreme Court said: "... the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned. When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . the application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act.'" (citations omitted), *Id.*, 406 U. S. at 103-104. See also, *U. S. v. Ira S. Bushey and Sons Inc. et al* 363 F. Supp. 110 (D. C. Vt. 1973), *affd.* 487 F 2d 1393.

⁵³ Sec. 311(f)(1). And see the *Askew Case*, cited in note 52, where the state may impose additional liabilities above and beyond the clean up costs required here.

⁵⁴ Sec. 404. *Scenic Hudson Preservation Conference v. Callaway*, 499 F. 2d 127 (CA 2 1974), dumping of rock and fill material into the Hudson River required a permit from the Corps under sec. 404 but not under sec. 10 of the Rivers and Harbors Act of 1899, at 128.

⁵⁵ Secs. 404(b) and 403(c).

The linkage with the EPA is further solidified by the Act providing that final approval for a specified disposal site will reside in the EPA.⁵⁶ That approval may be denied if it is determined that:

the discharge of such material . . . would have an adverse effect on municipal water supplies. Shellfish beds and fishing areas (including spawning and breeding areas), wildlife or recreation areas.⁵⁷

Before the Administrator makes this determination, however, section 404(c) requires that the Secretary of the Army be consulted and, furthermore, that the Administrator set forth in writing the reasons for the final determination.⁵⁸

In responding to the requirement for issuance of permits under this section, the Corps of Engineers has published interim final regulations designed to meet its mandate under the FWPCA.⁵⁹ The new regulations extend the Corp's regulation of dredging and filling activity to waters over which it had not previously exercised control. This is due to the Congressional decision to assert federal jurisdiction over all waters of the United States⁶⁰ For example, permits will now be required under section 404 for discharges of dredged or fill material in waters entirely within one state if those waters are utilized by interstate travelers for recreational purposes, or for the removal of fish that are sold in interstate commerce,

or for industrial purposes by industries engaging in interstate commerce, or for the production of agricultural commodities sold or transported in interstate commerce.⁶¹ In addition, permits will be required for discharges on freshwater wetlands which include by definition marshes, shallows, swamps, and similar areas that are contiguous to those waters now subject to the provisions of the FWPCA.⁶²

While these regulations are still susceptible to some modification, their overall thrust and the Corps' significantly enlarged mandate to regulate the discharges of dredged or fill material in the nation's waters will clearly remain. Moreover, the FWPCA provides a checkoff to the individual states over the permits issued by the Corps for discharges of dredged or fill material. Under section 401 of the FWPCA no permits may be issued unless the state has also granted a water quality certification.

JUDICIAL REVIEW

The FWPCA provides that, upon the application of an interested person, review may be obtained in Circuit Court of Appeals of the United States for the federal district in which such person resides or transacts business.⁶³ The Circuit Courts have jurisdiction over all administrative actions in setting standards and the issuance or denial of permits.

The extent of review will also determine in large part the formality of the adjudicatory proceedings carried on by the EPA. Under section 311, for example, the administrative imposition of fines for oil and hazardous substance spills, de novo review will be exercised by the Court of Appeals. In that instance an informal proceeding may be

⁵⁶ Sec. 404(c).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Fed. Reg. Vol. 40 No. 144, July 25, 1975, sec. 209.120, there is a 90 day public comment period on the regulations from the date shown. In addition the Corps was addressing a decision made in the *NRDC v. Callaway* case *supra*, note 3, which specifically ordered the Corps to develop appropriate regulations given the new requirements under the FWPCA.

⁶⁰ *Supra*, notes 1-3. Within the regulations the Corps has developed a process of phasing in the requirements of permits for discharges of dredged or fill material into the nation's waters. Sec. (e)(2)(a)-(c) of the regulations, *supra* note 59, provides the following schedule. Phase one becomes immediately operative and permits are required, for example, for all discharges in inland waters and freshwater wetlands which the Corps is presently regulating. The second phase which begins on July 1, 1976, will regulate in addition all discharges of material into primary tributaries and freshwater wetlands contiguous to primary tributaries. And finally, phase three regulates any discharge of dredged material into any navigable waters after July 1, 1977.

⁶¹ *Id.*, at sec. 209.120(d)(2)(g). The Corps may also regulate similar activity along manmade channels used for recreational or navigational purposes.

⁶² *Id.*, at sec. 209.120(d)(2)(h), freshwater wetlands are further defined to mean those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

⁶³ Sec. 509(b)(1), the FWPCA does not define interested person, presumably it means any individual or governmental or private entity who is or may be adversely affected by a decision of the Administrator of the EPA. Effluent limitations established by the Administrator pursuant to secs. 301(b) and 304(b) and the substance of such limitations and the procedures for establishing them is exclusively within the Court of Appeals, *Du Pont de Nemours and Co. v. Train*, 383 F. Supp. 1244, 1256 (W.D. Va. 1974). By so doing Congress sought to establish expeditious and consistent application of limitations, *Id.* at 1253.

expected. If the opportunity for de novo review is not available to the court, however, as with the federal permit program under section 402, then more formal adjudicatory proceedings with cross-examination can be expected.⁶⁴

The Relationship of the FWPCA to Other Federal Law

The Rivers and Harbors Act of 1899 (The "Refuse Act"):⁶⁵ The Refuse Act of 1899 prohibited all discharges into the navigable waters of the United States without a permit. That permit system is now integrated into the National Pollutant Discharge Elimination System of the FWPCA. The 1972 amendments of the FWPCA state that all permits issued under the Refuse Act shall be deemed permits under section 402 and will be given the same force.⁶⁶ Moreover, no permits under the Refuse Act will be issued as of the effective date of the FWPCA, thus effectively relieving that Act of its major importance.

The National Environmental Policy Act (NEPA): Actions taken pursuant to the FWPCA are specifically exempted from the requirement of filing an environmental impact statement under NEPA, with two major exceptions. Those exceptions which do require environmental impact statements to be filed are for the construction of the publicly owned treatment works where financial assistance is received from the federal government and the issuance of permits for new sources of pollution.⁶⁷ However, there is a controversy over the language chosen by the authors of the FWPCA in exempting it from the requirements of NEPA.⁶⁸ The language in question is:

No action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act.⁶⁹ (emphasis added)

⁶⁴ For comments on this see Zener, *supra*, note 23 at 762-765. He also indicates that most of the regulations can be expected to be issued pursuant to informal rule-making procedures, but the standards for toxic substances will necessitate formal procedures, *Id.* at 762. Furthermore, he notes that there may be a problem with public participation in the entire process outlined by the Act, since the extent of involvement of the public is couched in vague terms under sec. 101(e). He wonders, for example, whether the public should be involved prior to the proposed rules being published in the *Federal Register*, *Id.* at 764. If public participation is severely limited, then judicial review will also be inhibited since a record may not contain wide ranging viewpoints.

⁶⁵ 33 U.S.C.A. sec. 407.

⁶⁶ Secs. 402(a)(4) and 511(b).

⁶⁷ Sec. 511(c)(1). Sec. 201 governs the federal assistance for publicly owned treatment works and sec. 402 is the relevant section governing discharge of new sources of pollution, "new sources" being defined in sec. 306, *supra*, notes 18-21 and accompanying text.

The emphasized portion was taken from section 102(2)(c) of NEPA which requires that an environmental impact statement be filed and, if read narrowly as some Congressmen feel that it should be, then the exemption of the FWPCA from NEPA would only be from the impact statement process. In following this reasoning, the Environmental Protection Agency would still be under the mandate of the other sections of NEPA and, for example, be required to develop appropriate alternatives to any action that involves conflict over natural resource use such as the lands that would be directly and indirectly affected by the permit process.⁷⁰ On the other hand the proponents of a blanket exemption argue that EPA's efforts in cleaning up the waters of the United States would be greatly delayed if strict compliance with other sections of NEPA were mandated.⁷¹ Secondly, they point out that the basic thrust of NEPA was to force agencies without an environmental mandate to incorporate a concern for the environment in their decisionmaking process, but the major purpose of the FWPCA is towards that end and therefore the substantive requirements of NEPA should not be extended to EPA's decisions.⁷²

Nonpoint Source Pollution—

A Potential Problem Area for the FWPCA

The earlier discussion on section 208 of the Act indicated that the plans for areawide waste treatment facilities must include certain procedures and methods for controlling nonpoint sources of pollution, such as agricultural runoff. However, some commentators are rather dubious about the effect such a mandate will have, since very little federal leverage can be exercised over the quality of control and monitoring needed to curtail nonpoint source discharges.⁷³ Thus the lack of uniformity here may well result in certain states or localities having strict restrictions over nonpoint source pollution, while others may be lax in their efforts. Obviously what will be needed, even assuming a good faith effort on the part of the states, is a shared intergovernmental responsibility

⁶⁸ The controversy stems in part from the legislative history of this section of the Act and what various Congressmen felt was its intent; see 118 Cong. Rec. at 16885-16890 (daily ed. Oct. 4, 1972), and the comments and divisiveness on the issue by Frederick Andersen, *The National Environmental Policy Act, Federal Environmental Law*, the Environmental Law Institute at 257-260, and Zener, *supra*, note 23, at 774-781.

⁶⁹ Sec. 511(c)(1).

⁷⁰ Sec. 102(2)(D) of NEPA requires this and see comments by Andersen, *supra*, note 64, at 259.

⁷¹ *Id.*

⁷² Cf., Zener, *supra*, note 23, at 775.

⁷³ *Id.*, at 768-770.

for implementing a combination of controls and monitoring of nonpoint source pollution. Examples are sound soil conservation practices to prevent erosion and shoreland and floodplain zoning to prevent major developments from encroaching on wetlands and floodplains. If such measures are not adequately introduced, the desired effects of the FWPCA may be largely circumvented.⁷⁴

Concluding Remarks—FWPCA

In summarizing, the FWPCA it is clear that it is one of the most ambitious and complex environmental enactments ever passed by Congress, and as can be expected from such an undertaking there are immediate problems and some others on the horizon. Already the system is experiencing some difficulty in meeting certain deadlines, and there is the potential problem of nonpoint source pollutants severely detracting from point source control effects. Moreover, the issue of when and to what extent public participation is to take place under the various programs is not adequately spelled out. Some of these problems will undoubtedly be resolved with litigation and/or modification of the Act by Congress, or by state legislatures where there are state-authorized programs. But the eventual success of the Act will depend in large measure on the quality of the planning efforts, such as the section 208 plans; on the willingness of the regulatory agencies and local units of government to implement the plans; and the backing of the citizens who ultimately must pay for all plan implementation measures.

THE NATIONAL ENVIRONMENTAL POLICY ACT

A major legislative enactment at the federal level which attempts to understand and measure what development portends for the environment in specific instances is the National Environmental Policy Act (NEPA).⁷⁵ The Act took effect on January 1, 1970, and its major objective was to establish a national policy

which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality.⁷⁶

⁷⁴ Further discussion of sec. 208 planning can be found in Technical Report No. 6 (Rev.) of SEWRPC entitled *Planning Law in Southeastern Wisconsin*. The Commission has been designated as the agency to formulate the areawide waste treatment management plans for the Southeastern Region of Wisconsin.

⁷⁵ 42 U.S.C.A. sec. 4321 et seq. and 83 U. S. Stat. 852.

⁷⁶ *Id.*, at sec. 2, the following citations will reference those of the U. S. Statutes since those are the ones most commonly used by various commentators of NEPA.

The passage of NEPA was a recognition on the part of Congress of the significant impacts that human activity and technological advances have had on the environment, and that restoration and maintenance of the environmental quality is essential to this country's overall welfare and development.

The action provisions of NEPA differentiate this Act from the usual delegation of congressional authority to a single agency and for specific matters in that it requires administering by all agencies of the government that take major actions significantly affecting the quality of the environment.⁷⁷ The major vehicle for carrying out this mandate when such major actions are proposed is the environmental impact statement (EIS). The EIS of the proposed development is to contain in part:

1. any adverse environmental effects which cannot be avoided should the proposal be implemented;
2. alternatives to the proposed action;
3. the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
4. any irreversible and irretrievable commitments of resources which would be involved in the proposed actions should it be implemented.⁷⁸

Also, Congress directed that the procedures formulated by the various agencies in performing this function were required to utilize a "systematic and interdisciplinary approach" in their decisionmaking and ensure that presently unquantified environmental amenities and values be given appropriate consideration.⁷⁹ In a leading case involving an interpretation of NEPA these procedures were strictly enforced. In *Calvert Cliffs Coord. Com. v. U. S. Atomic Energy Commission* the court stated that a balancing process must be invoked which utilizes this interdisciplinary approach and which considers

unquantified environmental amenities . . . along with economic and technical considerations In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and systematic balancing analysis in each instance.⁸⁰

⁷⁷ Sec. 102.

⁷⁸ Sec. 102(2)(c).

⁷⁹ Sec. 102(A)(B).

⁸⁰ 449 F. 2d 1109 (D.C. Cir. 1971), at 1113.

To ensure that these functions would be carried out, Congress created within the Executive Office of the President the Council on Environmental Quality.⁸¹ Pursuant to this authorization the Council has developed guidelines for the federal agencies in their preparation of the environmental impact statements.⁸² These guidelines flesh out considerably the broad areas of concern enumerated in the legislation. In addition, they illuminate more fully the substantive and procedural requirements of the impact statements. Of particular importance is the Council's emphasis that the entire formulation and consideration of environmental impacts be incorporated into the agency's decisionmaking process; in other words it is not to be conducted on an ad hoc basis.⁸³ And furthermore there is an insistence that each agency develop formal procedures which will identify major actions that will significantly affect the environment and the requirement that these procedures and the information and review processes be published in the Federal Register.⁸⁴

Identifying "Major Federal Actions Which Significantly Affect the Human Environment"

Within its published guidelines the Council has attempted to embellish these critical words of the Act. The phrase has been broken down in order that each agency may develop specific criteria and procedures that will delineate the following:

1. "Major Action." Examples of what constitute a "major action," therefore requiring an EIS, are: impacts that may be entirely local but still have a significant effect on the environment; or a cumulative impact from the proposed project when taken in conjunction with other related federal actions and projects in the area, the net result of which would be a "major action"; or a particular proposed action in and of itself that may not be a major action but that forms one segment in a series of actions which, taken collectively, may be of major consequence, and this too would require an EIS.⁸⁵
2. "Significant Effects." In determining what is "significant" agencies are to include both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.⁸⁶ Significant impacts are also to include secondary effects from the proposed development.

⁸⁴ Sec. 1500.3.

⁸⁵ *In Scherr v. Volpe* 336 F. Supp. 886 (W.D. Wis. 1971), the Wisconsin Department of Transportation and the Federal Highway Administration had joined in the conclusion that a 12-mile reconstruction of highway was not a "major action" under the meaning of that word as found in NEPA. The District Court disagreed and granted a preliminary injunction. The Court found that the agency had given no explanation for its decision and it found this untenable, *Id.*, 336 F. Supp. at 888-889. And while the Court had taken notice of the fact that two or more of the contractors had suffered substantial financial loss and that residents of the area wished to see the project completed, it felt that the possibility of irreparable harm occurring to the aesthetics, conservational, and recreational interests of the plaintiff was sufficient to grant the injunction. This decision was affirmed, at 466 F. 2d 1027 (CA 7 1972). The Court of Appeals reiterated much of the District Court's findings and added that the construction would cause: "damage to the natural habitat of various wild animals; stripping of forested land with attendant erosion problems; increased levels of noise and water pollution; impingement upon the aesthetic natural beauty and recreational value of the area (and this was) enough to justify the affirmance of the injunction," *Id.*, 466 F. 2d at 1033.

⁸⁶ Sec. 1500.3 and sec. 101(B) of NEPA provide in part that the range of consideration of the impact of development include, for example, preservation of important historic, cultural, and natural aspects of our national heritage; achieve a balance between population and resource use; approach the maximum attainable recycling of depletable resources, and similar effects.

⁸¹ Sec. 202 and sec. 204(3) provide that the Council is to review and appraise the various programs and activities of the Federal Government in light of the policy set forth in Title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.

⁸² They are found in 40 C.F.R. sec. 1500 *et seq.*; this Authority was also supplemented by Executive Order 11514. Henceforth all section numbers found through footnote 108 *supra* are in reference to this title of the Code.

⁸³ *Id.*, sec. 1500.1. And see *Calvert Cliffs*, *supra*, note 80, where the court said: "perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates, at 1112. The court also pointed out that "compliance to the fullest possible extent would seem to demand that environmental issues be considered at every important stage in the decisionmaking process concerning a particular action," at 1118. While this decision preceded the development of the guidelines by the C.E.Q., it probably emboldened that agency more than any other decision to adopt the guidelines that it did.

Here the guidelines point out that oftentimes the investment of federal money in projects such as highways, sewer systems, or water resource projects "stimulate or induce secondary investments and changed patterns of social and economic activities" and consequently they have secondary effects which in themselves are significant.⁸⁷

If the proposed action has met what the Council has called the "threshold" of analysis, i.e., it is both a major action and one which significantly affects the environment, then it must also constitute a federal action.⁸⁸

3. "Federal Action." When there is sufficient federal control and responsibility present, then there is "federal action."⁸⁹ An example given where federal action is not present is the distribution of funds under general revenue sharing. Barta v. Brinegar was an example where there was federal action.⁹⁰ That suit involved the Secretary of Transportation for the United States and it arose over the completion of a highway. The court had granted standing to certain individuals whose aesthetic, conservation, and recreation

interests would be injured by the highway construction. And it found that the proposed highway was designed to pass through a marsh and wetland area which provided shelter for waterfowl, and it was in the vicinity of many homes, thereby constituting a major federal action significantly affecting the environment. The construction was therefore enjoined until an EIS was properly filed.⁹¹

Public Exposure and Review

The guidelines emphasize the necessity of getting information out to the public at the earliest possible time on a particular agency's initial consideration of a proposed action.⁹² The importance of this was accented in the decision of State of Wisconsin v. Callaway, which involved the U. S. Army Corps of Engineer's dredging activity in the Mississippi River and its proposal to deposit the material on the Wisconsin shoreline.⁹³ The Corps had argued that it would only dredge at particular sites if an emergency arose, but the federal District Court granted an order to enjoin the Corp's activity until it had complied fully with the Council's guidelines. The Court said:

in the National Environmental Policy Act (NEPA) Congress imposed upon the defendants and other federal agencies a grave obligation, not to refrain from any major actions which might significantly affect the quality of the human environment, but to lay their cards on the table in full view, and then to proceed only after obtaining and giving serious consideration to the responses from all interested agencies, organizations and individuals.⁹⁴

⁸⁷ Sec. 1500.8(a)(3)(ii). An example of these "secondary" effects or spinoffs is found in Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Org. 1971), the court granted an injunction until an EIS was filed since a HUD-financially-assisted highrise building proposal had not considered the cumulative effects of the development such as concentrating populations in one area, the reduction in views for neighboring properties, and an increase in automotive traffic, Id., 334 F. Supp. at 879. And see Scherr v. Volpe, *supra*, note 85.

⁸⁸ Even at that threshold when the agency makes a decision that an EIS is not necessary, it must make clear its rationale for that decision, i.e., that it is not major and/or significant and the means that the agency took to arrive at that decision. Cf., Citizens For Clean Air Inc. v. U. S. Army Corps of Eng., 349 F. Supp. 696 (S.D. N.Y. 1972) at 707, and Henly v. Mitchell, 450 F. 2d 412 (CA 2 1972) where a listing of agency conclusions was found to be an inadequate record to support a threshold decision. An example where a proper threshold decision was made and found to have a sufficient record was First National Bank of Chicago v. Richardsen 484 F. 2d 1369 (CA 7 1973).

⁸⁹ Sec. 1500.6(c). In addition, the action must affect the "quality of the human environment" which is defined as directly affecting human beings or indirectly affecting humans through adverse effects on the environment. Of course, the latter is of little assistance since we are all a part of the environment and anything affecting the environment will affect us.

⁹⁰ 358 F. Supp. 1025 (W.D. Wis. 1973).

⁹¹ Another example of federal action is where a federal agency grants permission for a project or development to occur as, for example, in the siting of an atomic power plant.

⁹² Cf., sec. 1500.6(e).

⁹³ 371 F. Supp. 807 (W.D. Wis. 1974).

⁹⁴ Id., 371 F. Supp. at 812, and the Court went on to say that it was too easy for an agency like the Corps "to argue that the court must now engage in a balancing function which is in truth the very function which the defendants were obliged by law to perform, after full public disclosure of the implications of its anticipated project. . . . If this requires defendants to expend additional funds and engage in extraordinary procedures in order to avoid environmental damage while still maintaining navigation, this is a consequence which defendants must accept," Id.

Public hearings and review are also required for all draft environmental statements, with drafts being issued to the public 15 days prior to the hearing.⁹⁵ The draft EIS must also be sent to appropriate federal and state agencies for their review and comments.⁹⁶ Final review of authority is vested in the Council on Environmental Quality which makes the determination of which programs will further the policies of NEPA and makes recommendations to the President accordingly. In the event that the adequacy of a proposed development is challenged, the courts have exhibited a willingness to give deference to the Council's viewpoint.⁹⁷

Where an agency in following its procedures and criteria determines that a proposed action is not a major action which significantly affects the environment, when it ordinarily would be under the agency's own standards, or when the Council has requested that the agency file an impact statement and it declines to do so, then the agency must provide a rationale for its decision.⁹⁸ That rationale shall consist of a record which sets forth the agency's reasons for that determination and it must be made public.⁹⁹

The Content of Environmental Statements

The guidelines as set forth by the Council also develop more fully the congressional requirements for impact statements filed by the agencies.¹⁰⁰ The statements, for example, must discuss the relationship between the proposed action and existing land use plans and policies of the federal, state, and local governments including those developed under the Federal Water Pollution Control Act of 1972.¹⁰¹ When the proposed development may create an adverse environmental impact, such as water or air pollution, undesirable land use patterns, damage to life systems, or urban congestion, it must indicate that fact.¹⁰² And perhaps the most important requirement of the EIS process, if not NEPA itself, is the necessity that agencies provide alternative courses of action to the one that they propose, thus setting in place a significant embellishment of the substantive, as well as the procedural, requirements of NEPA.

⁹⁵ E.g., secs. 1500.7(d)(2), 1500.9(d). In *Union of Concerned Scientists v. Atomic Energy Com'n*, 499 F. 2d 1069 (CA D.C. 1974), the Court found that opposing views must be aired and publicized and opinions from relevant federal, state and local agencies solicited: "In this way the officials making the ultimate decision, whether within or outside the agency are aided in making a responsible choice That policy could also extend, we think to responsible views presented by a member of the public," *Id.*, 499 F. Supp. at 1083. Adding to this, however, the Court noted that it did not mean that an executive agency staff could not speak with one voice and that a minority report from dissidents on a staff was neither required nor practical, *Id.* And see *Calvert Cliffs*, *supra*, note 80, at 117-118.

In the development of alternatives the Council was careful to point out that an agency proposing the action would not be limited to alternatives strictly within its own purview but that it should consider alternatives outside its existing authority as well. This position is supported by case law such as that found in *Natural Resources Defense Council Inc. v. Morton*.¹⁰³ The deci-

⁹⁶ These agencies are listed according to their relative areas of expertise for specific environmental sectors, e.g., water quality, weather modification, air quality, and similar sectors. Where water quality is affected, review would be conducted by the Environmental Protection Agency, Army Corps of Engineers, Atomic Energy Commission, Bureau of Sports Fisheries and Wildlife, or other appropriate agency; see Appendix II, 40 C.F.R. 1500 et seq. for the listings.

⁹⁷ In *Warm Springs Dam Task Force v. Gribble*, 417 U. S. 1301, 94 S.Ct. 2542 (1974), plaintiffs sought a stay on the construction of a dam by the Corps of Engineers pending review by the U. S. Court of Appeals, on the basis that the EIS filed by the Corps did not comply with NEPA. There was evidence to show the possibility of earthquake damage and water poisoning. The federal District Court felt, however, that the Corps had adequately addressed these problems, but on appeal Mr. Justice Douglas sitting as Circuit Justice for the Ninth Circuit took notice of the Council's expressed views that irreparable harm may be done unless the project was halted and further studies were made. The Council, moreover, expressed its alarm that if the Warm Springs EIS were allowed to stand without having considered opposing scientific opinions and critical comments, then the Council's guidelines would be continually flouted, *Id.*, 417 U. S. at 1307. Mr. Justice Douglas agreed and granted the stay finding that great weight should be given to the agency with ultimate responsibility for administering NEPA, where it has taken the unequivocal position that the statement in the case was deficient, 417 U. S. at 1310. The Court added that the tendency for agencies to use shortcuts to certain ends by presenting impact statements after a project had been started or having a contractor who would profit from the project draw up the EIS must also cease if the congressional mandate was to be meaningful, *Id.*, 417 U. S. at 1309.

⁹⁸ Sec. 1500.6(e).

⁹⁹ *Id.*

¹⁰⁰ For the statutory language of NEPA and the elements required in an EIS see *supra*, note 78 and accompanying text.

¹⁰¹ Sec. 1500.8(a)(2).

¹⁰² Sec. 1500.8(a)(5).

¹⁰³ 458 F. 2d 827 (D.C. Cir. 1972).

sion in that case involved oil and gas leases off the coast of Louisiana; it was found that although the elimination of oil impact quotas as an alternative was entirely outside the field of expertise of the Department of Interior, the Department was still bound to gather in one place and discuss the relative environmental impacts of various alternatives since it was the lead agency.¹⁰⁴ The other alternatives involved highly complex matters of economics, foreign relations and national security, but the court interpreted the mandate of NEPA to require compliance even if it meant going beyond the agency's own bailiwick.¹⁰⁵ Furthermore, in the process of considering these alternatives, the agencies must provide a rigorous and objective evaluation of the environmental impacts of reasonable alternative actions, and it may not delegate these functions to a recipient of federal aid nor to any other federal agency if it is the lead agency.¹⁰⁶ Examples of alternatives that should be considered are:

1. The alternative of taking no action or of postponing action pending further study;
2. Alternatives requiring action of a significantly different nature which would provide similar benefits with different environmental impacts

¹⁰⁴ *Id.*, 458 F. 2d at 834.

¹⁰⁵ *Id.*, 458 F. 2d at 835. The court did agree, however, that only those alternatives reasonably available need be discussed but that when a proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened, *Id.*

¹⁰⁶ Sec. 1500.8(4). Cf., *Northside Tenants Rights Coalition v. Volpe*, 346 F. Supp. 244 (E.D. Wis. 1972) which involved construction of a freeway. The court would not accept the defendants' arguments that Wisconsin had already developed an environmental impact statement of the Park Freeway-West. The court in granting an injunction on construction said: "NEPA's requirement attaches to the federal agency, not to the recipient of the federal aid, and it is the federal agency which must prepare the impact statement and balance the project's worth in light of the environmental consequences," *Id.*, 346 F. Supp. at 248. And in *Calvert Cliffs*, supra, note 75, at 1128, the court found that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damages. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. Furthermore, the court pointed out, it must consider these alternatives at the earliest possible stages so as not to foreclose the environmental protection desired by Congress, *Id.*

(e.g., nonstructural alternatives to flood control programs, or mass transit alternatives to highway construction);

3. Alternatives related to different designs or details of the proposed action which would present different environmental impacts (e.g., cooling ponds versus cooling towers for a power plant or alternatives that will significantly conserve energy).¹⁰⁷

Additionally, the guidelines highlight the fact that a strong effort should be made in the development of the total EIS, that it be done succinctly and in a form easily understood.¹⁰⁸

Since the enactment of NEPA, there have been literally thousands of environmental impact statements filed.¹⁰⁹ Many of these proposed developments have had or would have had a direct influence on the waters of the nation. There has been and will continue to be a great deal of tension in the public and private sectors over the implementation of the Act. Some of that tension will only be relieved undoubtedly in the political arena, as with the trans-Alaska pipeline. But having withstood the initial challenges and agency noncompliance, it would seem that NEPA has the opportunity of evolving into an integral feature of the decisionmaking processes which determine the use of the natural resources.¹¹⁰ It has already served as an example for similar legislation within a number of states, Wisconsin being one, and there is increased hope that the executive and judicial branches of government will continue to support its stated goals.¹¹¹

¹⁰⁷ Sec. 1500.8(4).

¹⁰⁸ Sec. 1500.8(b).

¹⁰⁹ By mid-1974, 5,430 EIS's had been prepared and of those 3,344 had been completed as final impact statements, 5 E.L.R. 50010, quoting the Fifth Annual Report of the C.E.Q. (1974).

¹¹⁰ *Id.*, at 50020. Cf., Andersen, *The National Environmental Policy Act, Federal Environmental Law*, The Environmental Law Institute (1974), where he discusses the various courts holding the agencies to each procedural step as set out in the Act, at pp. 278-283. And that in scrutinizing agency compliance with the Act, the courts are apt to do it more closely given the policy of full disclosure and the fact that they are aware of the natural fact that if the agencies are left alone to do it their EIS preparation may wind up being cursory and self-serving, at 282.

¹¹¹ Wisconsin's Environmental Policy Act can be found at Wis. Stats. 1.11 et seq., and it will be discussed in Chapter 7.

THE COASTAL ZONE MANAGEMENT ACT

On October 27, 1972, the Coastal Zone Management Act (CZMA) was signed into law.¹¹² It was passed in recognition of the fact that there was a variety of competing demands upon the coastal lands and the waters that they bordered and that institutional arrangements for planned uses of the lands were critical. Consequently, the United States Congress created a policy which for the most part encourages the individual states to exercise their authority over the coastal areas "to preserve, protect, develop and where possible to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations."¹¹³ Participation by the states is strictly voluntary; the major incentive is that the federal government will supply funding for those states that participate in the development and administration of management programs for their coastal areas.¹¹⁴

There are three major categories which are entitled to funding under the Act. They are:

1. Federal grants for the development of a land use management program;¹¹⁵
2. Grants for administering federally approved management programs;¹¹⁶ and
3. Funds for acquiring estuarine sanctuaries.¹¹⁷

¹¹²86 Stat. 1280, 16 U.S.C.A. secs. 1451-1464 (1972). Henceforth these sections with a 300 number are in reference to 86 Stat. 1280, up through footnote 146. Those with a 900 number see *infra*, note 121. The lands bordering on the Great Lakes are included in the CZMA. For an excellent discussion of the history behind the Act and the political maneuvering that went into its final formulation see Zile, "A Legislative-Political History of the Coastal Zone Management Act of 1972," 1 *Coastal Zone Management Journal* 235 (1974); the author discusses among other things the various interest groups that played a major role in the Act's rather shaky beginning.

¹¹³Sec. 303.

¹¹⁴By early 1975 all 30 states eligible for federal monies and three of the four eligible territories were participating in the program, *Report of Senate Committee on Commerce*, July 11, 1975, at p. 7.

¹¹⁵The grants for management programs are limited to 66 2/3 percent of the cost of the program for one year and other federal money may not be used to match this, sec. 305. There are certain requirements for obtaining this money, as with all federal grant in aid programs; this will be discussed, *infra*, notes 122-131 and accompanying text.

¹¹⁶Administrative grants are authorized under sec. 306; they have a limit of 66 2/3 percent federal assistance as well. Requirements for these grants will be discussed, *infra*, notes 123-132 and accompanying text.

The administration of the CZMA is being conducted from the Office of Coastal Zone Management which is located within the National Oceanic and Atmospheric Administration, United States Department of Commerce.

Coordination and Cooperation

The development and administration of the program pursuant to the CZMA envisions a strong intergovernmental sharing of responsibility.¹¹⁸ The Act provides that the Secretary of Commerce shall not approve a state management program unless that state has considered the views of federal agencies principally affected by that program. Nor may the state funnel federal funds received under the Act to local governments unless they are in compliance with the state's coastal management program. There is also a requirement that the state in its development of a management program describe the organizational structure designed to implement the program "including the responsibilities and interrelationships of local, state, regional, and interstate agencies in the management process."¹¹⁹ However, section 307(e) of the CZMA creates some major ambiguities as to how the Act will interface with other federal and state law by providing:

Nothing in this title shall be construed—

1. to diminish either federal or state jurisdiction, responsibility or rights in the field of planning, development, or control of water resources, submerged lands or navigable waters, nor to displace, supercede, limit, or modify any interstate compact . . . ;
2. as superceding, modifying or repealing existing laws applicable to the various federal agencies.

The ambiguities caused by this language will invariably place a great burden on the coordinative and cooperative aspects of the Act. And, absent a strong statutory mandate, they may well disrupt or diminish the objectives of a state management program in its inability to mesh with other federal and state programs impacting on the coastal area.

¹¹⁷The federal government is authorized to provide 50 percent of the costs of acquisition, development, and operation of estuarine sanctuaries—the federal share, however, is not to exceed \$2,000,000 for any one sanctuary, sec. 312.

¹¹⁸Sec. 307, entitled *Interagency Coordination and Cooperation*, is the section which deals directly with the attempts to encourage this sharing of responsibility.

¹¹⁹Sec. 305(b)(6) discussed, *infra*, notes 121-122 and accompanying text. Moreover, the guidelines developed under the Act indicate that the organization will provide for continuing coordination between the management agency (which will be designated by the state's governor for administering the program), local governments, and regional and interstate agencies.

The Substantive Areas for
Implementing Congressional Policy

Two substantive areas—the formulation of a management program and grants for administering the program—contain the CZMA's major provisions for setting in motion the congressional policy of enhancing the resources of the coastal zone.

Formulation of a State Management Program: Under section 305 of the CZMA certain basic elements are to be included in any state management program.¹²⁰ These elements are strongly intertwined and should be considered collectively. They are:

- a. An identification of the boundaries of the coastal zone subject to the management program.

The guidelines developed under the authority of the Act explain that the inland boundaries of the management unit will be dictated primarily by the uses of shorelands which have a direct and significant impact on the coastal waters.¹²¹ Federal lands are specifically excluded from the state coastal zone management program.

- b. A definition of what within the coastal zone shall constitute permissible land and water uses which have a direct and significant impact on the coastal waters.

There is a direct correlation between the first and second elements since it is the type of use and its potential impact which will determine whether or not the use warrants being included in the management process. As a first step in the analytical process of determining what uses are permissible, the guidelines suggest developing indices which will determine their environmental and economic impact.¹²² These uses are to be cognizant of the needs of "industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish."¹²³

¹²⁰ Under sec. 305 the states in essence are studying the ramifications of each of the elements, which are subsequently outlined in the main text; from this process, if a state so chooses, will come the state management program.

¹²¹ The guidelines are found in 15 C.F.R. sec. 920 et seq. See 920.11(b); hereafter the sections numbered 900 are in reference to this title of the Code. The guidelines also provide that the program must consider current developmental, political, and administrative realities as well as biophysical processes that may be external to the restricted zone eventually selected for direct management control, at 920.11(a).

- c. An inventory and designation of areas of particular concern within the coastal zone.

This designation refers to geographical areas, and it is anticipated that the inventory carried out under the first element (a) would uncover these areas as well.¹²⁴ Examples given for criteria that may be used in classifying areas of particular concern are: areas which may be transitional or intensely developed; areas of unique, scarce, fragile, or vulnerable natural habitat; areas of high natural productivity; areas of substantial recreational value; and areas of urban concentration where shoreline utilization and water uses are highly competitive.¹²⁵

- d. An identification of the means by which the state proposes to exert control over the land and water uses (referred to in the second element above (b)) including a list of relevant constitutional provisions, legislative enactments, regulations, and judicial decisions.

This element not only expects that a listing be developed of existing state laws which may be used to implement a comprehensive management program, but that legislative and executive initiatives be prepared that would ensure the effectiveness of the program if existing law is not sufficient.¹²⁶ Nor do the guidelines anticipate regulations and restrictions being enforced exclusively at any one level of government; they recognize the strong historical roots of regulating the uses of land at the local level of government and, therefore, leave up to the state the decision of where to lodge the authority and enforcement for the program.¹²⁷

¹²² Sec. 920.12. The guidelines provide further that the management of the uses are to give full consideration to ecological, cultural, historic, and aesthetic values as well as to needs for economic development. And some of the factors suggested in determining permissible uses are location, magnitude, the nature of impact upon existing natural or man-made environments, economic, commercial and other "triggering" impacts and land and water uses of regional benefit, *Id.*

¹²³ *Id.*

¹²⁴ Sec. 920.13.

¹²⁵ *Id.*

¹²⁶ Sec. 920.14.

¹²⁷ Ultimate responsibility for enforcement will, of course, remain with the state even though it may choose to delegate certain authority to regulate the various uses of land to local units of government, see *infra*, notes 135-140 and accompanying text.

e. Broad guidelines on priority of uses in particular areas, including specifically those uses of lowest priority.

The determination of preferred uses will be tied closely to the process of identifying "permissible uses" (element (b)) and designating areas of "particular concern" (element (c)).¹²⁸ The reasoning here is that, in following the methodology of isolating what uses are permissible and which areas are of "particular concern," certain priorities of uses will emerge for specific areas in the coastal zone.

f. A description of the organizational structure proposed to implement the management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.

Again, it is recognized that the fulfillment of the previous elements will fashion to a great extent the necessary institutional structures, since the critical contacts made in those earlier steps should be institutionalized to assure successful implementation of the state's program. The guidelines also require that the designated lead state agency must have the authority to correlate the various units of government and have appropriate access to the Governor.¹²⁹

The Request for Administrative Grants—Section 306 of the CZMA

After a state has completed the formulation of its management program under section 305, it may apply for federal grants to administer that program. It is not required to do so; but approval of the state management program by the Secretary of Commerce is the condition for federal financial assistance. Section 306 of the Act and the guidelines developed pursuant to that section set in place the criteria and procedures which the Secretary will follow in conducting the review of the state's program. Since a major objective of the CZMA is to protect the natural systems in the coastal zone, all reviews will give high priority to features within state programs that advance that congressional intent.¹³⁰ Furthermore, the review will entail a close scrutiny of the coordinative aspects of the management program to ensure full participation by relevant parties and units of government in its development and ongoing stages.¹³¹ Moreover, the

Secretary of Commerce will prepare and circulate an environmental impact statement, in accordance with the National Environmental Policy Act, for each state program.¹³² Other elements not previously discussed or found in section 305 but required nonetheless under section 306 are:

[that] the management program provides for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature.¹³³

Some examples provided in the guidelines of functions whose siting constitutes a national interest are: energy production, recreation (of an interstate nature), mineral extraction, and interstate transportation.¹³⁴

Another condition that the management program must fulfill for approval is the necessity of having state machinery in place for administrative review and enforcement. Congress has supplied various techniques or combinations of techniques to facilitate these functions. One alternative is having local implementation of the program, but it must be done in accordance with state standards and criteria.¹³⁵ A second is to have direct state land and water use planning and regulation which would preempt the traditional local zoning processes.¹³⁶ And the third technique which the states may employ to gain adequate review and enforcement is:

state administrative review for consistency with the management program of all development plans, projects, or land and water use regulations including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.¹³⁷

This final technique allows the local units to adopt regulations free from state standards and criteria, but subjects certain actions to automatic review. Zoning ordinances and regulations, as well as variances, would be examples of actions subject to state review.¹³⁸ And

¹²⁸ Sec. 920.15.

¹²⁹ Sec. 920.19(d).

¹³⁰ *Fed. Reg.* Vol. 40 No. 6, January 9, 1975, sec. 923.4 (comment).

¹³¹ *Id.*, subpart D—Coordination of secs. 923.30, 923.31, and 923.32.

¹³² Sec. 920.10(c).

¹³³ Sec. 306(c)(8) of the CZMA.

¹³⁴ A more complete table can be found in sec. 923.15 of the guidelines.

¹³⁵ Sec. 306(e)(1)(A).

¹³⁶ Sec. 306(e)(1)(B).

¹³⁷ Sec. 306(e)(1)(C).

¹³⁸ Sec. 923.26(b)(3).

private development plans would also be submitted for review, except for those minor development projects lacking significant impact.¹³⁹

As previously indicated, the state is not locked into any one of the alternatives; it may use various combinations and at different time intervals. The federal guidelines have recognized that different techniques of controlling land and water uses may work best only for certain parcels of land and at specific times.¹⁴⁰

Application of the CZMA to Wisconsin

The State of Wisconsin has 620 miles of shoreline bordering on the Great Lakes of Michigan and Superior which legally may be included in the Coastal Zone Management Program.¹⁴¹ This shoreline is contained within 15 of the State's counties which in turn form part of three regional planning commissions, one of which is the Southeastern Wisconsin Regional Planning Commission.¹⁴² At the present time Wisconsin is developing its management program in conformance with section 305 requirements of the CZMA. The program is coordinated by the Wisconsin Department of Administration, State Planning Office, the designated lead state agency.

Wisconsin's efforts in meeting these requirements have to date involved a shared responsibility among the State, areawide, and local units and agencies of government in developing guidelines for balancing appropriate uses of the coastal zone. The State emphasizes that the program will not result in state zoning nor will it attempt to implement a State master plan for the coastal shorelines. But it does envision supplying the localities with information and criteria to assist them in choosing the wisest uses for the coastal regions.¹⁴³

¹³⁹ *Id.* The Secretary of Commerce in the guidelines offers examples of minor projects such as small residences or commercial establishments. And the guidelines provide further: that state review is for consistency with the management program, not for review of the merits or of the facts on which the local decision is based, at sec. 923.26(b)(4).

¹⁴⁰ Sec. 923.26(b)(5).

¹⁴¹ Coastal Zone Management in Wisconsin, brochure, Department of Administration, 1 W. Wilson Street., Madison, Wisconsin (1974).

¹⁴² The other two are Northwestern Wisconsin Regional Planning and Development Commission, a portion of whose territory borders on Lake Superior, and the Bay-Lake Regional Planning Commission which forms the northern portion of the shoreline along Lake Michigan.

¹⁴³ *Supra*, note 141.

While the CZMA program is only in its formative stages in Wisconsin as elsewhere and its concern for the misuse of our coastal areas is well founded, it is laboring under two major handicaps. One of the most obvious hindrances is the lack of sufficient federal funding which is necessary to carry out the integral steps if the congressional objectives are to be met.¹⁴⁴ The other is that Congress in adopting the Act has not provided adequate substantive and procedural checkoffs to insure that its policies would ever be met. This loophole is derived principally from its failure to link other federal programs or state and local programs receiving federal assistance with the CZMA, nor does it call for such action on the part of the individual states.¹⁴⁵ In short, the Act lacks the finality and enforcement provisions included in other federal legislation, such as the Federal Water Pollution Control Act of 1972 (FWPCA), even though the constitutional authority under the Commerce Clause as used in the FWPCA could reasonably have been applied.¹⁴⁶ These shortcomings could be overcome with amendments to the CZMA or even with other enactments, but for the present time State programs must attempt to compensate for these weaknesses while facing powerful interests whose objectives are often diametrically opposed to those of the CZMA.

THE FLOOD DISASTER PROTECTION ACT OF 1973

Periodically the various communities and states of this nation have experienced severe losses to human life and property caused by flooding and erosion of shorelines. In 1968 the United States Congress passed the National Flood Insurance Act in an effort to protect against future flood losses and to discourage development in floodprone areas; that Act was subsequently amended by the Flood Disaster Protection Act of 1973.¹⁴⁷ The impetus for the

¹⁴⁴ For example, only \$48,000,000 is authorized for the entire program over a four-year period, and only \$6,000,000 of that is authorized for estuarine acquisition. While this initial amount of money is not significant monetarily, it does represent a federal stimulus for land use planning.

¹⁴⁵ However, the United States Department of Commerce, through its Office of Coastal Zone Management, is considering adopting new guidelines which may provide some closing of these loopholes by requiring more definitive checkoffs and coordination of programs than presently exist under the general language of the statute and guidelines. This further tightening up on management requirements would occur as a prerequisite to funding of state programs under sec. 306 of the Act: interview, Ms. Caryl Terrell, staff member, State Planning Office, Wisconsin Department of Administration.

¹⁴⁶ Cf., Mr. Zile's notation of these and other inadequacies of the Act, *supra*, note 112, at 236.

¹⁴⁷ 42 U.S.C.A. sec. 4001 et seq. 82 Stat. 572. And 42 U.S.C.A. sec. 4001 et seq., as amended by Pub. L. 93-234 Title I sec. 108(a); December 31, 1973, 87 Stat. 979.

federal government to enter into the flood disaster programs came from the realization that, even though it had spent nine billion dollars on flood protection works since 1936, enormous losses were still occurring and it was economically unfeasible for the private insurance industry to provide protection on reasonable terms for flood losses.¹⁴⁸ Consequently, the United States government through these acts has authorized the Secretary of Housing and Urban Development to embark upon a cooperative venture with the private insurance industry in providing insurance at reasonable rates by pooling risks and distributing the costs among those who would be protected as well as the general public.¹⁴⁹ Losses suffered from mudslides, erosion, and undermining of shorelines by waves or currents in lakes are also extended coverage under the flood insurance program, and all three are potential hazards for southeastern Wisconsin.¹⁵⁰

Discouragement of Development in Hazardous Areas

Other than making available insurance at reasonable rates, the Act also intends to discourage all development in areas that are subject to these hazards, and over the long term this may offer the greatest benefit of the program it has fostered. The 1973 amendments provided a major stimulus to this objective in reformulating the requirements of the Act and providing more sanctions for nonparticipation in the program. This new initiative resulted from the additional congressional findings that annual flood damage losses were increasing significantly as a result of continued development and concentration of populations in these hazardous areas. Moreover, it was found that federal assistance in the form of mortgage loan insurance, grants, and guarantees were actually exacerbating the problem and frustrating the original intent of Congress.¹⁵¹ To ameliorate this situation additional requirements were added, two of which were to:

1. require states or local communities, as a condition of future federal financial assistance, to participate in the flood insurance program and

to adopt adequate floodplain ordinances with effective enforcement provisions consistent with federal standards to reduce or avoid future losses; and

2. require the purchase of flood insurance by property owners who are being assisted by federal programs or by federally supervised, regulated, or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards.¹⁵²

These additional requirements are supported by specific deadlines and more explicit language found in three additional sections added by the amendment. The first provides that after March 2, 1974:

no federal officer or agency shall approve any financial assistance for acquisition or construction purposes for use in any area that has been identified by the Secretary (Housing and Urban Development) as an area having special flood hazards (and is located within a community currently participating in the Flood Insurance program unless the property to which such federal assistance relates is covered by flood insurance).¹⁵³

The second closes the loophole of community participation in the National Flood Insurance Program by July 1, 1975. After that date no federal assistance will be forwarded for acquisition or construction purposes in areas having special flood hazards unless the community is a participant in the program.¹⁵⁴ And the third calls for expiration of the program on June 30, 1977. Thereafter no new contract for flood insurance will be entered into.¹⁵⁵

¹⁴⁸ 42 U.S.C.A. sec. 4001(b). The 1973 amendments substantially increased the limits of both subsidized and unsubsidized flood insurance coverage.

¹⁴⁹ 42 U.S.C.A. sec. 4001(d). The Federal Insurance Administrator located within the Department of Housing and Urban Development has been delegated the responsibility for administering the program 34 F.R. 2680-81, Feb. 27, 1969. The program operates under an insurance industry pool called the National Flood Insurers Association. The federal subsidy makes up the difference between the actuarial rates and the rates actually charged. The federal guidelines point out that the federal subsidy often amounts to more than 90 percent of the cost of insurance, 24 CFR 1909.2(a).

¹⁵⁰ 42 U.S.C.A. sec. 4001(g), the erosion of shorelines is that caused by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels, *Id.*

¹⁵¹ 42 U.S.C.A. Sec. 4002(a)(2) and (3).

¹⁵² 42 U.S.C.A. sec. 4002(b)(3) and (4). State owned property is specifically exempt if it is covered under an adequate state policy or self-insurance which is deemed satisfactory by the Secretary, 42 USCA 4012 a (c).

¹⁵³ 42 U.S.C.A. sec. 4012a, the insurance is for the anticipated economic or useful life of the project and in an amount at least equal to its development or project cost (less estimated land cost).

¹⁵⁴ 42 U.S.C.A. sec. 4106. A community means any state or political subdivision thereof with authority to adopt and enforce land use and control measures for the areas within the jurisdiction, 24 CFR 1909.1.

¹⁵⁵ 42 U.S.C.A. sec. 4026.

Conditions for Participating in the Flood Insurance Program

Eligibility of a community in the federal insurance program is contingent upon fulfilling the following requirements:

1. Obtain and review application forms from the U. S. Department of Housing and Urban Development, Wisconsin Department of Natural Resources, or SEWRPC.
2. Fill out the form and designate a local employee, normally the manager, engineer, building inspector, or the clerk, as the flood insurance program coordinator for the community and provide estimates of the number of buildings and population residing in the entire community and in flood-prone areas.
3. Prepare and adopt a resolution by the local governing body formally requesting participation in the flood insurance program.
4. Attach to the application a copy of the community's zoning ordinance and floodplain regulations, together with any other applicable land use control regulations. If floodplain zoning regulations have not yet been adopted by the community, attach instead a copy of a resolution adopted by the local governing body indicating an intent to recognize flood hazards in the administration of land use control ordinances in effect at the present time, and further indicating an intent to adopt floodplain zoning regulations that would meet the state and federal standards.
5. Submit the materials either directly to the U. S. Department of Housing and Urban Development, Federal Insurance Administration, or to the Wisconsin Department of Natural Resources with a request that the Department review and forward the application on behalf of the community to the Federal Insurance Administration.¹⁵⁶

Once a community has made itself eligible for flood insurance, the Federal Insurance Administration will authorize that a study be conducted designating the flood-prone areas. Also to be determined as part of the study are the actuarial rates for the community which will reflect the flood hazards of a particular area.¹⁵⁷ In the Southeastern Region of Wisconsin flood hazard information is supplied by a variety of federal and state agencies, a principal one being the Southeastern Wis-

consin Regional Planning Commission. The Commission supplies definitive data on these areas as part of its comprehensive watershed studies.¹⁵⁸ Upon the completion and acceptance of these studies, a community is required to adopt land use control measures that meet the federal and state standards for floodplain protection and development.

Requirements for Land Use Control Measures

The State of Wisconsin in passing Chapter 614, Laws of 1965, required floodplain zoning several years in advance of the Flood Disaster Protection Act. Communities which adopt ordinances in conformity with the State standards will satisfy the general requirements of the federal Act (analysis of that Act will follow in Chapter VII).¹⁵⁹ However, this compliance does not alleviate the necessity for each community meeting the specific steps and conditions for eligibility under the federal program outlined above. In addition further understanding of the program and the various avenues for contesting the federal findings and standards is provided here since the two programs are also distinguishable on this matter.

Having accepted the floodplain studies, a community must adopt adequate land use control measures which meet the standards of the Secretary and which are consistent with the following criteria for management of hazardous areas:

1. Constrict the development of land which is exposed to flood damage where appropriate;
2. Guide the development of proposed construction away from locations which are threatened by flood hazards;
3. Assist in reducing damages caused by floods; and

¹⁵⁷ Stricker, *Flood Insurance, Wisconsin Conservation Bulletin* (May-June 1975), at 13. A total of 169 communities and 47 counties in Wisconsin are eligible for insurance at this writing, *Id.*

¹⁵⁸ For specific information contact SEWRPC, P. O. Box 769, Waukesha, Wisconsin 53186. The present practice when the federal government is conducting the studies, however, is limited to delineating the flood hazard areas only to those in the community itself rather than an entire watershed. An excellent discussion of the Flood Insurance Program with an analysis of community participation in the southeastern Region is provided in the SEWRPC *Newsletter* of March-April, Vol. 14, No. 2 (1974).

¹⁵⁹ The Wisconsin law requiring floodplain zoning is generally thought to be more strict in its requirements than those under the federal act.

¹⁵⁶ The HUD address is 451 Seventh Street, Washington, D.C. 20410. The DNR address is Box 450, Madison, Wisconsin 53701. The SEWRPC staff will assist, upon request in preparing drafts of the necessary local governing body resolutions and assist the community in compiling all of the data necessary to complete the application form.

4. Otherwise improve the long-range land management and use of floodprone areas.¹⁶⁰

The guidelines promulgated in accordance with the statutory criteria require the adoption of land use control measures which are dependent on and determined by a scientific base supplied by the Federal Insurance Administrator.¹⁶¹ When that technical data base changes, the minimum requirements of the land use control measures must reflect the change. For example, when the Administrator has identified floodplain areas having special floodplain hazards, the communities must require building permits for all proposed construction in the hazardous areas and a review of all building permits for new construction, substantial improvement, and the location of all public utilities to assure that the proposed construction is protected against flood damage. But when the Administrator supplies information on the surface elevation of a 100-year flood in addition to that of floodplain areas having special flood hazards, then the requirements correspondingly change. Thus in the latter situation, when the information has become somewhat more sophisticated, all new construction and substantial improvements of residential properties must have their lowest floors (including the basement) elevated above the level of a 100-year flood. And all new construction or substantial improvements of nonresidential structures, including utility and sanitary facilities, must be flood-proofed up to the level of the 100-year flood.¹⁶²

¹⁶⁰ 42 U.S.C.A. sec. 4022 is the specific section requiring land use controls be adopted. The section had been amended in 1969 by Pub. L. 91-152 to read that federal flood insurance may not be entered into after December 31, 1971 in communities not in compliance with these programs, and sec. 4102 provides the broad criteria listed above.

¹⁶¹ 24 Code of Federal Regulations, 1910.3 and for mudslide areas 1910.4. The Federal Administrator means the Federal Insurance Administrator, to whom the Secretary of HUD has delegated the administration of the program, *supra*, note 151.

¹⁶² 24 C.F.R. 1910.3. A similar strategy using a different data base is applied to areas prone to mudslides, at 1910.4. The 100-year standard represents the flood level that on the average will have a 1 percent chance of being equalled or exceeded in any given year and can also be referred to as the minimum safety flood, 1973 U. S. Code Cong. and Adm. News p. 3220-3221. Actually, as pointed out in a statement prepared by the Federal Insurance Administration, the 100-year flood is an intermediate flood and it does not imply that such a flood will happen only once every 100 years. In 1972, for example, it was pointed out that half of the 45 Presidentially declared flood disasters of 1972 exceeded or were equal to the 100-year flood, 1973 U. S. Code and Cong. and Adm. News, at 3222.

Exceptions to these standards will be permitted due to certain local conditions. In those situations where a community adopts land use controls that vary from the standard, however, the nature and extent of the variance must be supplied and supported by economic, topographic, hydrologic, and other technical data.¹⁶³

Moreover, the statute permits private persons to contest the federal agency's findings and standards (the technical data base) by submitting appropriate data to the chief executive officer of the community or to a designated agency. The community is then required to review and consolidate all such appeals and determine whether it should bring an appeal on behalf of these private persons to the Secretary. In any event all private appeals would be forwarded to the Secretary who must make a determination on whether to modify the standards and findings on the basis of the data submitted.¹⁶⁴

The Act further provides that judicial review may be obtained by any individual or community of the Secretary's final determination in the United States District Court of the jurisdiction where the community is located.¹⁶⁵

Goals for Community Planning

The guidelines developed in accordance with the statute describe certain goals for consideration by the communities in planning for these hazardous areas; among these are:

1. The possibility of reserving flood-prone areas for open space purposes;
2. The need for flood warning and emergency preparedness plans;
3. The requirements of state and local water pollution programs.¹⁶⁶

¹⁶³ 24 C.F.R. 1910.5(c), and Subpart (a) also recognize that the composition of 100-year flood standards as well as other standards may cause economic disruption or be premature for a particular community, and the Administrator has the discretion of mandating full compliance.

¹⁶⁴ 42 U.S.C.A. sec. 4104(c). There is also a provision made for specifically contesting the flood evaluation figures as set by the Secretary and, if shown to be scientifically or technically incorrect, the relief will be solely in the modification of the Secretary's proposed determination, at sec. 4104(b).

¹⁶⁵ The scope of review is that provided in Chapter 7 of Title 5 U.S.C.A. i.e., the Administrative Procedure Act. The statutory authority authorizing judicial review here is 42 U.S.C.A. 4104(f).

¹⁶⁶ 24 C.F.R. 1910.23(b)(2)(5) and (11).

However, these and other goals are offered to "encourage" the adoption of comprehensive management plans for hazardous areas and as such lack the teeth of the previous mandatory requirements.¹⁶⁷

An Executive Policy for Wisconsin to Minimize Flood Loss

On November 26, 1973, the Governor of Wisconsin issued Executive Order No. 67 which supports in many respects the objectives and goals found in the Flood Disaster Protection Act of 1973. The Executive Order is designed to encourage a unified effort to prevent uneconomic use of the floodplains and a reduction in flood losses. It specifically requires that all State agencies responsible for construction of State facilities, the administration of grants and loans, reviewing and approving applications for subdivision plats, buildings and other facilities, and land use planning must evaluate existing and potential flood hazards and preclude, where permitted by law, such activity in these areas, unless necessary precautions are taken. Moreover, the Executive Order requires the Real Estate Examining Board in reviewing licenses of real estate brokers for revocation and suspension to consider the failure of a broker in not properly informing a potential purchaser of property of potential flood hazards. Such failure would constitute "substantial misrepresentation," a "false promise of character," or "incompetence to act as a broker."

These provisions will be instrumental in assuring that the State agencies of Wisconsin and private individuals will be aware of the information on flood hazards in their decisionmaking, thus minimizing state and private contributions to ill-planned development, while complementing the federal legislation with similar objectives.

Concluding Remarks—Federal Flood Insurance

The Flood Disaster Protection Act of 1973 as well as its predecessor, the National Flood Insurance Act of 1968, represents an attempt to reduce the enormous losses to human life and property but through alternative means that downgrade attempts to channel the natural movements of water. In effect, the Act represents a shifting of federal subsidies towards insurance programs that will in time be phased out and a reliance on programs that will discourage developments in floodplains and coastal areas which are subject to flooding, erosion, and mudslides. Following this policy may not have the immediate effect of constructing a dam or levee but, with time and sensible implementation of land use plans, it will likely prove to be more beneficial in saving lives, money, and natural habitats.

The regulations promulgated under authority of the federal Flood Insurance Program set out minimum standards which must be met in the conduct of flood insurance studies and the enactment of local floodplain zoning ordinances. Several problems are related to the application of these minimum standards in southeastern Wisconsin and are discussed in Chapter XII of this report.

THE SAFE DRINKING WATER ACT

A bill enacted into law in late 1974 which may parallel in some aspects the far ranging impacts of the Federal Water Pollution Control Act of 1972 is the Safe Drinking Water Act.¹⁶⁸ Under the provisions of the Act the Environmental Protection Agency (EPA) and those states with federally approved programs are vested with the authority to regulate contaminants which may have an adverse effect on the health of persons who use public water systems.¹⁶⁹ In addition, the Act, through a second program, provides a regulatory framework to prevent the degradation of underground sources of water.

The Public Water System

The regulations imposed by the Act will apply to all "public water systems"; however, the terminology includes privately owned as well as publicly owned systems which provide piped water to the public for human consumption.¹⁷⁰ The additional requirements are that the system have at least 15 service connections or regularly serve at least 25 individuals.¹⁷¹ There are certain exceptions from the federal regulations for those operations which merely store or pass on water from a public water system to the consumer.¹⁷² But the legislation does intend, for example, that the regulations should apply to those systems such as restaurants, motels, trailer parks, and businesses which maintain their own well or water

¹⁶⁹ Contaminant is defined as any physical, chemical, biological, or radiological substance or matter in water, sec. 300f(6). This would include radioactive material originating from the Atomic Energy Commission, 1974 U. S. Code Cong. and Adm. News, at 6469. The term public water system is defined in the main text.

¹⁷⁰ Sec. 300f(4).

¹⁷¹ *Id.*

¹⁷² The listed statutory exceptions are for a system: "1) which consists only of distribution and storage facilities (and does not have any collection and treatment facilities); 2) which obtains all of its water from, but is not owned or operated by, a public water system to which such regulations apply; 3) which does not sell water to any person; and 4) which is not a carrier which conveys passengers in interstate commerce." All four elements must be met for the exception to take effect, see sec. 300g.

¹⁶⁷ 24 C.F.R. 1910.21.

¹⁶⁸ 42 U.S.C.A. sec. 300f et seq., 88 Stat. 1661, Pub. L. 93-523 sec. 2(2) Dec. 16, 1974. The statutory citations provided herein will be those of the U. S. Code annotated.

supply.¹⁷³ If a system falls within the defined category of a "public water system," it will be subject to the following regulatory and enforcement process.

Primary Drinking Water Regulations

The regulations promulgated by the EPA are based on standards set by the agency for maximum levels of contaminants in the drinking water.¹⁷⁴ The choice of which contaminants are to be regulated is left up to the judgment of the EPA and are those which it determines may affect the health of the individuals using the water system.¹⁷⁵ A discussion of the legislative history of the Act indicates that the drafters of the bill were acutely aware of the immense numbers of potential contaminants and the limited amounts of knowledge concerning their effects. Consequently, they did not intend that a contaminant must cause adverse health effects in order to be regulated. Rather, they were of the opinion that it be left up to the discretion of the EPA as to which contaminants presented a potentially adverse effect.¹⁷⁶

The first phase in the establishment of the primary drinking water regulations is the requirement that the EPA provide within six months of the Act's enactment interim standards for contaminant levels of drinking water.¹⁷⁷ Eighteen months after the interim standards have been promulgated they will take effect.¹⁷⁸

The second and more comprehensive phase in the regulatory process is the establishment of revised national primary drinking water regulations. This phase, however, given the nature of the task and the time frame provided by Congress, is likely to exceed four years before its implementation. The end result will be the establishment of maximum contaminant levels or the use of treatment techniques for each contaminant of the drinking water which may effect the health of the consuming public.¹⁷⁹ The process to reach that objective is as follows:

1. Congress has authorized the EPA to enter into an agreement with the National Academy of Sciences (NAS) or some other independent scientific organization to conduct a study over a two-year period to recommend the maximum contaminant levels.¹⁸⁰
2. Within 10 days of the report having been submitted to Congress, the EPA will publish the results for comment.¹⁸¹
3. Ninety days after publishing the results of the report, EPA is to publish recommended maximum contaminant levels which, in EPA's judgment, and based on the NAS report, will be set at such levels which provide an adequate margin of safety from all anticipated adverse effects.¹⁸²
4. On the same date of publication found in No. 3, the EPA will publish proposed revised national drinking water regulations which will specify the maximum contaminant level or treatment technique for each contaminant for which a recommended level has been set.
5. Within six months of the proposed regulations set in No. 4, the EPA will promulgate revised drinking water regulations.
6. Finally, two years after the recommended maximum contaminant levels were published and 18 months after having promulgated revised drinking water regulations, the entire regulatory process will take effect.¹⁸³

¹⁷⁹ *Maximum contaminant level means the maximum permissible level of a contaminant in the water which is delivered to any user of a public water system, sec. 300f(3).*

¹⁸⁰ *Sec. 300g-1(e)(1) and (2). Congress also set out certain areas that the study should pursue, e.g., the existence of groups or individuals in the population which are more susceptible to adverse effects than the normal healthy adult, synergistic effects resulting from exposure to or interaction by two or more contaminants, etc., Id., at (e)(3).*

¹⁸¹ *Sec. 300g-1(b)(1)A.*

¹⁸² *Sec. 300g-1(b)(1)(B).*

¹⁸³ *Sec. 300g-1(b)(2), (3), and (5). The Act also provides for the establishment of national secondary drinking water regulations within a year of the enactment of the Act. They will apply to public water systems as well, and such regulations may apply to any contaminant in drinking water which may adversely affect the odor or appearance of such water and consequently may cause a substantial number of the persons served by the public water system providing such water to discontinue its use, or which may otherwise adversely affect the public welfare, sec. 300f(2).*

¹⁷³ 1974 U. S. Code Cong. and Adm. News, at 6470.

¹⁷⁴ *Sec. 300f(1)(c).*

¹⁷⁵ *Sec. 300f(1)(B).*

¹⁷⁶ 1974 U. S. Code Cong. and Adm. News, at 6463. It goes on to state that "the contaminant need not have the adverse effect directly in order for the Administrator (EPA) to regulate it as a primary contaminant. If it is a precursor to a contaminant which may have such effect or if it may contribute to such effect, the contaminant should be controlled under primary regulations."

¹⁷⁷ *Sec. 300g-1(a)(1).*

¹⁷⁸ *Sec. 300g-1(a)(3). They are to be dictated by technology, treatment techniques and other means, which the EPA determines are generally available (taking costs into consideration) on December 16, 1974, sec. 300g-1(a)(2).*

State Enforcement Responsibility

As with several of the previously discussed federal enactments, the Safe Drinking Water Act envisions the states as having primary enforcement responsibility. In order for a state to obtain this responsibility it must adopt regulations that are as stringent as those posited by the EPA. In addition, it must exhibit the capability for adequately implementing and enforcing those regulations to the satisfaction of the EPA.¹⁸⁴

Failure on the part of the state to properly enforce the drinking water regulations may permit the EPA or any person to commence a civil action in the appropriate U. S. District Court to require compliance with a national primary drinking water regulation.¹⁸⁵ If the District Court finds a willful violation of a regulation or other requirements it may impose on the violator a fine up to \$5,000 for each day and for each violation.¹⁸⁶

The procedures for the EPA to follow prior to taking this corrective action are specified in the Act.

First, the EPA must give notice to a state that has the primary responsibility for enforcement that it is not in compliance with the regulations or requirements mandated by the Act.¹⁸⁷ With the notification, the EPA must offer advice and technical assistance that would bring the system into compliance.

Second, if after 30 days the state has not complied, then the EPA will give public notice of the noncompliance and request that the state report within 15 days of the public notice what steps are being taken to comply.¹⁸⁸

Third, if after an additional 15 days (a total of 60 days having elapsed from the original notice to the state) noncompliance remains and the

report has not been filed by the state or if it has and the state has failed to implement adequate procedures to bring the system into compliance and no alternatives are provided for another safe drinking water source, then the EPA may file the civil action.¹⁸⁹

It should be emphasized that the state must only come up with procedures designed to meet compliance, not that the system itself be in conformance within 60 days. That factor and the steps that the EPA must follow prior to commencing an action are rather clear indicators that Congress did not intend that the control of the program be easily removed from the states.

Variances and Exemptions Permitted Under the Program:

Variances from primary drinking water regulations may be granted by states which have primary enforcement responsibility when the characteristics of the raw water sources are such that contaminant levels will be exceeded even if the best technology or treatment techniques are employed;¹⁹⁰ or, if the owner or operator of a public water system can demonstrate to the state that a specific treatment technique is not necessary to protect the public's health because of the raw water source.¹⁹¹ Where a variance has been granted under the former situation, i.e., where the best technology cannot bring the raw water source within the maximum contaminant levels, then the state shall condition the variance on a prescribed schedule of compliance.¹⁹² The EPA will review the variances granted by the states and their schedules of compliance.¹⁹³ If a state is found to have abused its discretion in a number of instances and corrective action has not been undertaken, the EPA may in appropriate situations propose revocation of specific variances or

¹⁸⁴ Sec. 300g-2.

¹⁸⁵ Sec. 300g-3(b). As with the FWPCA of 1972, this Act also provides for any person to bring a civil action on his or her behalf against any person, including the United States and any other governmental entity permitted by the eleventh amendment, who is alleged to be in violation of any requirement. However, no action may be commenced until 60 days have elapsed from the plaintiff's giving notice to the EPA, the state, and any alleged violator, or if the EPA, the U. S. Attorney General, or state is diligently prosecuting a civil action to require compliance, sec. 300j-8.

¹⁸⁶ Sec. 300g-3(b)(2), the court is to consider the seriousness of the violation, the population at risk, and other factors in determining the penalty.

¹⁸⁷ Sec. 300g-3(a)(1)(A).

¹⁸⁸ Sec. 300g-3(a)(1)(B).

¹⁸⁹ *Id.*

¹⁹⁰ Sec. 300g-4(a)(1)(A). The state must find the variance will not result in an unreasonable risk to health.

¹⁹¹ Sec. 300g-4(a)(1)(B). A treatment technique means a requirement in a national primary drinking water regulation which specifies each technique known to the EPA which will lead to a reduction in the level of each contaminant to meet the primary drinking water regulation, sec. 300g-4(a)(2)(d).

¹⁹² Sec. 300g-4(a)(1)(A). The schedule of compliance is to contain increments of progress by the public water system, each contaminant level requirement, and implementation by the public water system of such control measures as the state may require. Before a schedule prescribed by a state may take effect, it must give notice and provide for a public hearing on the schedule, *Id.* Notice of all variances granted by the state must also be furnished to the EPA, sec. 300g-4(a)(1)(c).

¹⁹³ Sec. 300g-4(a)(1)(F).

revision of the schedule.¹⁹⁴ Where primary enforcement responsibility is not exercised by a state, similar authority to grant variances resides with the EPA.¹⁹⁵

In a process comparable to the granting of variances from primary drinking water regulations, a state may exempt a public water system from similar requirements.¹⁹⁶ However, such exemptions may be granted only to those public water systems upon the findings that:

1. the system was in operation on the effective date that the contaminant level and treatment technique requirements were established;
2. there are compelling factors such as economic reasons, and
3. an unreasonable risk to health will not result.¹⁹⁷

All new public water systems, therefore, would not qualify for an exemption. And while the statutory language is silent on the possible application of this subsection to expansion of existing facilities, one interpretation is that, if sufficient funds are available to finance a major expansion, then they should first be applied to insuring the quality of the water presently being supplied before allowing the expansion to take place.¹⁹⁸

As with the variance procedures, the state must devise schedules of compliance. The difference is that there are final dates by which compliance is mandatory for all public water systems operating under an exemption. Where exemptions are granted for contaminant levels or treatment techniques prescribed under interim national primary drinking water regulations, the date is 1981. If the exemption is granted from revised national primary drinking water regulations, then it is seven years from the date such regulation takes effect.¹⁹⁹ Where the public water system has entered into an enforceable agreement to become part of a regional public water system, the schedule of compliance is allowed two additional years before compliance is mandated under the respective regulatory categories.²⁰⁰

¹⁹⁴ Sec. 300g-4(a)(1)(b).

¹⁹⁵ Sec. 300g-4(a)(2).

¹⁹⁶ Sec. 300g-5(a).

¹⁹⁷ Sec. 300g-5(a)(2).

¹⁹⁸ 1974 U. S. Code Cong. and Adm. News, at 6480.

¹⁹⁹ Sec. 300g-5(b)(2)(A) and (B).

²⁰⁰ Sec. 300g-5(b)(2)(B). This incentive is provided in hope of obtaining more efficient systems through economies of scale.

Giving Notice of Violations: A unique feature of the Safe Drinking Water Act is the requirement that an owner or operator of a public water system which is in noncompliance with any standard or regulation promulgated in accordance with the Act must give public notice of that fact.²⁰¹ This requirement also extends to public water systems which have been granted an exemption or variance. The notice must be given as soon as practicable after the violation has been discovered, and not less than once every three months thereafter as long as the violation continues. The form and manner of the notice will be prescribed by the EPA and it must be published in newspapers and given to other communications media of the area.²⁰²

The effect of the notice provisions may not only educate the general public to potential health hazards but also be instrumental in applying sufficient pressure on a public water system to comply with the regulations. Moreover, it may give added impetus to arguments for additional taxes or bonds to improve water systems that are publicly owned.

A Regulatory Program to Protect Underground Sources of Drinking Water

In enacting the Safe Drinking Water Act, Congress has also provided for the creation of an underground injection program which is designed to complement the public water system program by preventing the subsurface emplacement of fluids which may contaminate the public drinking water supply.²⁰³ As with the public water system program, the intent of the legislators was that the states implement and enforce the underground injection program.

The Permit Process: In order for a state to achieve primary responsibility, its primary task is to institute a program for the issuance of permits for all underground

²⁰¹ Sec. 300g-3(a)(2)(c).

²⁰² *Id.*; and if water bills are issued by the public water system then such notice will also be included with the water bill at least once every three months or at least as often as the bills are issued if it is less than once every three months. Any person who willfully violates this subsection may be fined up to \$5,000.

²⁰³ Sec. 300h. Underground injection means the subsurface emplacement of fluids by well injection. Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons, sec. 300h(c)(1)(d).

injections which meets certain regulations established by the EPA.²⁰⁴ By December 16, 1977, all underground injections will be prohibited unless they are operating with a permit issued under such a program.²⁰⁵

Prior to granting a permit, an applicant must provide that the injection will not endanger drinking water sources to the satisfaction of the state. However, if the Governor of the state which issues permits applies to the EPA for a waiver of the conditions, temporary permits may be issued for the injection up to December 16, 1978, if certain situations are present.²⁰⁶ Some of those situations necessary for such a waiver are if the EPA finds the state unable to reasonably process all permit applications, or the adverse effects on the environment of the temporary permit are not unwarranted. Temporary permits for a similar period of time and following the same application process for a waiver may be granted on a more limited basis for particular injections, in those instances the controlling factor is the lack of appropriate technology.

The state permit program once approved would apply to all underground injections including those by federal agencies and injections on property owned or leased by the United States.²⁰⁷ A major exception to the control program is that involving injection systems utilized in the extraction of oil and gas. This exception is similar to that found in the Federal Water Pollution Control Act of 1972, but under this program an injection may be stopped if it can be shown that it will endanger the drinking water.²⁰⁸

The processes for state enforcement, EPA review, and actions brought by private parties seeking proper enforcement are similar to those found in the public water system program; however, there is a notable difference when the state has failed to assure enforcement of its program. In that situation, the underground injection program requires the EPA to take the same procedural steps that evolve over a 60 day period (e.g., notice, state submission of a report, and review), as in the public water system program, but if compliance under this program has not been effectuated within the 60 days then the EPA may commence a civil action,²⁰⁹ whereas under the public water system process the EPA cannot begin an action if adequate procedures are formulated by the state that would eventually ensure compliance.

Interim Regulations: In the interval between the passage of the Act and the institutionalization of the state permit program any person may petition the EPA to "designate"

an area of a state where all injections would be prohibited unless a permit is issued by the EPA. The EPA may only designate such an area if it finds:

that the area has one aquifer which is the sole or principal drinking water source for the area and which if contaminated would create a significant hazard to public health.²¹⁰

Provision is also made for the EPA to designate an area on its own initiative.²¹¹ And if an area is so designated no federal financial assistance for any project, contract, or loan may be provided that many contaminate such aquifer.²¹² Furthermore, a permit may be issued for the area only if the EPA determines that injections will not cause contamination of the aquifer.²¹³

Judicial Review as Prescribed by the Act

Judicial review in the appropriate jurisdiction is determined by the type of action and promulgated regulations involved.²¹⁴ Petition for review of EPA actions concerning a national primary drinking water regulation, the regulations developed by the EPA by which a state may apply for primary enforcement responsibility, regulations established of the form and manner for giving notice by owners and operators of public water systems in noncompliance, and all regulations for state underground injection control programs may only be filed in the United States Court of Appeals for the District of Columbia Circuit. All other petitions concerning EPA regulations shall be filed in the United States Court of Appeals for the appropriate circuit.²¹⁵ Furthermore, this subsection provides that the United States District Court has jurisdiction over

²⁰⁶ Sec. 300h(c)(1).

²⁰⁷ Sec. 300h(b)(1)(D). *This may be waived upon the request of the Secretary of Defense and upon a determination of the President that the waiver is necessary for national security, sec. 300j-6(b).*

²⁰⁸ Sec. 300h(b)(2), and FWPCA of 1972, at sec. 502(6).

²⁰⁹ Sec. 300h-2(a)(1), and see *supra*, notes 189-191, and accompanying text.

²¹⁰ See 300h-3(a)(1). *All petitions must be published and written views and arguments will be taken concerning them.*

²¹¹ Sec. 300h-3(e).

²¹² *Id.*

²¹³ Sec. 300h-3(b)(1)(3).

²¹⁴ Sec. 300j-7.

²¹⁵ Sec. 300j-7(a). *All petitions must be filed within a 45-day period beginning on the date of promulgation of the regulation or issuance of the order.*

²⁰⁴ Sec. 300h(a)(1). *Other requirements for EPA approval are that the state's program have a monitoring process and appropriate record keeping in place, sec. 300h(b)(1)(C).*

²⁰⁵ Sec. 300h(b)(1)(A).

actions brought to review the granting or refusal to grant variances and exemptions under the public water system program.²¹⁶

Monitoring and Sampling Problems for Wisconsin

It is not yet certain that the State of Wisconsin will attempt to take over the primary enforcement responsibility for the Safe Drinking Water Act. The major problem that the Act poses for the State of Wisconsin lies not with the federal standards for contaminant levels, since the State of Wisconsin's present standards generally match the anticipated requirements. Rather the problem rests with the federal definition of what is a public water system.²¹⁷ At the present time the Department of Natural Resources has the responsibility of sampling and monitoring 650 "public supplies," whereas in following the definition of "public water systems" under the federal program it is estimated 22,000 systems would have to be monitored.²¹⁸ Obviously the State is not at this time capable of undertaking such a vast increase in responsibility without a major reordering of budgetary policy.

However, it was also pointed out that various alternatives may exist for the EPA to allow some leeway to the present mandate. One such alternative is the redefining of the "public water system" into subcategories. For example, municipal systems may form one type, while water provided by hotels and restaurants another, and certain monitoring requirements could be established for each. Moreover, the emphasis of the federal program could be shifted at least somewhat to concentrate more on the location and construction of a particular system and the magnitude of the population it served. Thus, if a system were in a relatively remote area of the State with a location not subject to pesticide influence, e.g., away from a farming region, and the construction of the system was sound, then the monitoring would still be carried out, but conceivably at more widely spaced intervals.²¹⁹

Invariably as the present federal requirements now stand, the systems serving relatively small numbers of persons will be the ones most affected, the State through the DNR having already initiated regular monitoring programs for the larger public systems. The question then being raised by State officials is not with the general goals and this new thrust of the federal program, but whether it is

practical to have the anticipated frequency or rate of sampling scheme which has little relationship to the varied characteristics of each public water system.

Concluding Remarks—Safe Drinking Water Act

The success of the Safe Drinking Water Act will depend in large part on the eventual setting of the maximum contaminant levels and upon the ability to monitor for those levels. As it now stands, the State of Wisconsin does not have the fiscal capability and the necessary personnel and equipment to assume the primary enforcement responsibility, and it may fall to the EPA. If the EPA redefines certain subcategories within the context of a public water system with a corresponding change for sampling requirement and Wisconsin allocates sufficient funds to take on this responsibility, then that position will conceivably change.

SUMMARY

The analysis of the five recently enacted statutes covered in this chapter was designed to illustrate some of the critical substantive and procedural features of important federal legislation affecting water law in Wisconsin. The FWPCA through its phased restrictions on pollutant discharges and NEPA's requirements for impact statements have already significantly affected programs and projects within the public and private sectors. Prospectively these Acts, along with the Flood Disaster Protection Act, the CZMA, and the Safe Drinking Water Act, promise to have an enormous influence over the quality and use of waters and future community development patterns within Wisconsin. It can be expected as the programs develop and are systematically applied to specific uses or parcels of property that modifications of the Acts and the Regulations will occur, either through amendments or litigation. But, undoubtedly they will all play an instrumental role in the evolving water law of Wisconsin, and for that reason they have formed a portion of this report. The next chapter will focus on similar legislative efforts at the State level, some of which were specifically designed in reaction to the federal legislation. In other instances the State efforts were undertaken entirely upon Wisconsin's own initiative. In any event, all were passed out of concern for improving and maintaining the quality of the waters for its citizens.

²¹⁶ Sec. 300j-7(b). This also has a 45-day period in which to bring an action; the period commences from the date the action sought to be reviewed is taken.

²¹⁷ *Supra*, notes 170-173, for definition of "public water system." The two areas where the standards differ are on levels of arsenic and pesticides. The state standards are found in NR 111 Wisconsin Administrative Code.

²¹⁸ Mr. Robert Baumeister, Chief of Public Water Supply Section, within the Department of Natural Resources, Bureau of Water Quality, provided these comments on July 1, 1975.

²¹⁹ Mr. Baumeister also pointed out that different standards for sampling could be designed for transient systems, e.g., where the incidence of intake by individuals would be minimal. He offered as an example the water supply at State roadside rest areas, where if individuals consumed this water at a certain quality level on a continual basis they may physically be harmed but that it may be possible to show that infrequent intake would have no adverse effects on humans, and the standards might reflect that.

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WISCONSIN STATUTORY DEVELOPMENTS AFFECTING WATER RESOURCES

INTRODUCTION

Within the past several years State legislative enactments profoundly changed the substantive areas of water law. The analysis here will tend to center on the more significant legislation which has or is expected to have wide ranging import for all levels of government and the private sector. It will begin with a discussion of statutory law designed to eliminate pollution from the State's waters, and it will follow with a description of other statutes that have more of an indirect approach but nonetheless strong influences over the use and eventual quality of the waters. This new legislative mandate stems to some degree from the preceding federal statutory material and it gathers support from the common law; thus this chapter must be read in conjunction with the earlier ones.

Under Chapter 614, Laws of 1965, the Wisconsin Department of Natural Resources was vested with the primary authority to protect, maintain, and improve the quality and management of the waters of the State. Where appropriate, the rules that the Department has developed pursuant to that authority will be noted.

One further point should be emphasized. Almost invariably the statutes and programs which are commented on below rely heavily on strong and direct participation by the local units of government. Moreover, it is at that level of government where the legislation's ultimate success is determined and, as a result of implementation enforcement and challenges, it takes on added clarity and new dimensions.

PUBLIC AND PRIVATE EFFORTS
TO IMPROVE WATER QUALITYWisconsin's Pollutant Discharge Elimination System

In 1973 the State Legislature of Wisconsin enacted into law an act to eliminate the discharge of all pollutants into the waters of the State by 1985 and to meet all the requirements of the Federal Water Pollution Control Act of 1972.¹ The Wisconsin Department of Natural Resources (DNR) was granted the authority to establish and maintain the Wisconsin Pollutant Discharge Elimination System (WPDES). The new system, as called for under section 402 of the FWPCA, establishes a permit process for all discharges of pollutants from point sources into the State's waters, excepting only those waters which are entirely confined and retained upon the property of a person.² This permit process represents a shift in mechanisms to effectuate a State policy of enhancing the quality of its waters. Previously, reliance was placed on the DNR's issuance of orders under Chapter 144, Wis. Stats. to accomplish this goal.

The remainder of the discussion on the WPDES will emphasize the enforcement, review, and procedural aspects of the program. For the most part the major substantive requirements of the WPDES parallel those found in the earlier analysis of the FWPCA. A table of cross references of the appropriate sections of the FWPCA, Wis. Stats., and the Wisconsin Administrative Code is provided on the following page (see Table 1).

¹Wis. Stats. sec. 147.01 et seq. (1973). The act repealed sec. 144.555 and amended secs. 15.34 and 165.07. See discussion of FWPCA in Chapter 6. Specifically sec. 147.021 provides that all rules adopted by the DNR must comply with and not exceed the requirements of the FWPCA of 1972 (Chapter 6) as they relate to point source discharges, effluent limitations, water quality related limitations, municipal monitoring requirements, standards of performance and toxic and pretreatment effluent standards.

All citations hereinafter, unless otherwise noted, will be to sections within the Wisconsin Statutes or to Volume 6, Natural Resources (NR), of the Wisconsin Administrative Code.

²Certain classes or categories of vessels are exempted from the requirement of obtaining permits as are discharges to publicly owned treatment works; for the list of exempted discharges, see NR 200.03. As under the FWPCA, Wisconsin regulates the entrance of pollutants into publicly owned treatment works. The DNR will set standards for such pollutants; see NR 211. Moreover sec. 147.15 provides for service charges for each user based on the proportionate share of the cost of operating and maintaining the treatment works.

The requirement of navigability is dropped as under the FWPCA and specifically the Statute includes all artificial bodies as well as natural bodies of water, and surface and ground waters, sec. 147.015(13). And see NR 200.01 where the Administrative Code also provides that permits are required for discharges from point sources to surface waters of the State and additionally to land areas where pollutants may percolate, or seep to, or be leached to groundwaters.

Sec. 147.25 of the Statutes also mandates a continuing planning process which shall result in plans for all waters of the State. These plans will include such elements as adequate effluent limitations and schedules of compliance and incorporation of applicable areawide waste management plans, basin plans, and statewide land use plans.

Table 1

**CROSS REFERENCE CITATIONS FOR THE
POLLUTANT DISCHARGE ELIMINATION SYSTEM**

Federal Water Pollution Control Act Section		Wisconsin Statutes	Administrative Code NR
204(b)	System of Effluent Charges for Users of Publicly Owned Treatment Works	147.15	
208	Areawide Waste Treatment Plans	147.02(d) 147.025(2)	
301	Effluent Limitations	147.04 147.04(5) Interim Standards	210 217 and 219 220-296 for Categories and Classes of Point Sources
302	Water Quality Related Effluent Limitations	147.05	102 103 104
304 (h) (1) and (2)	Requirements of Uniform Application Forms	147.025	200.10 et seq.
	Notice and Hearing	147.13 147.09	3.01-3.13
	Monitoring and Reporting Requirements	147.08 147.14	200.07 219
306	Federal Standards of Performance for New Sources	147.06	110
307	Toxic and Pretreatment Effluent Standards	147.07	211
308	Inspections Monitoring and Agency Entry to Premises	147.08 147.08(3) 144.54	101 and 219
402b	State Permit Program	147.025	200 201 202
	Review of Administrative Decisions to Revoke, Modify Suspend Permits	147.03(2) and (2m) 147.20	3.04-3.13 3.15-3.20 and chapter 2

Source: Federal Water Pollution Control Act, Wisconsin Statutes, Wisconsin Department of Natural Resources Administrative Code.

The Permit Process: The DNR may issue permits for pollutant discharges only upon the conditions that such discharges will meet federal or State water quality standards and the terms attached to the permit or schedules of compliance.³ Each permit must specify maximum levels of discharge which will be derived from the permittee's foreseeable production increases or process modifications.⁴ Any discharge exceeding established limits will constitute a violation of the permit and must be reported to the DNR.⁵ Under no circumstances, however, may a permit be issued for:

1. Any radiological, chemical, or biological warfare agent or high level radioactive waste;
2. Any discharge objected to in writing by the U. S. Environmental Protection Agency (EPA), any objection by the U. S. Army Corps of Engineers to impairment of anchorage and navigation.
3. Any discharge from a point source which is in conflict with any existing areawide waste treatment plan approved by the DNR.⁶

³Sec. 147.02(3). A permit will be issued only if the discharge will meet all of the following: effluent limitations; standards of performance for new sources; effluent standards, effluent prohibitions and pretreatment standards; and any more stringent limitations including those necessary to meet federal or State water quality standards or schedules of compliance established by the Department; or those limitations necessary to comply with any applicable federal law or regulation; or those necessary to avoid exceeding total maximum daily loads established pursuant to a continuing planning process developed under sec. 147.25 (*supra*, note 2); or any more stringent legally applicable requirements necessary to comply with an approved areawide waste treatment management plan.

The law provides that no permit issued by the DNR will exceed a term of five years, sec. 147.03(1), and any permittee who wishes to continue to discharge after the expiration date of his permit is required to file an application for reissuance at least 180 days prior to its expiration, at sec. 147.03(3)(a).

⁴Sec. 147.02(5). And the Statutes provide at sec. 147.03(3)(e) that any "new source" the construction of which is commenced after October 18, 1972 (and which meets the standards of sec. 147.06) shall not be subject to any more stringent standards of performance during either the 10 year period beginning on the date of completion of such construction or the period of depreciation or amortization of such facility, for the purposes of sec. 167 or 169 of the Internal Revenue Code of 1954, as amended, whichever period comes first.

⁵Sec. 147.02(4)(a).

Application for Permits: The DNR was authorized by statute to promulgate rules for the various filing requirements for permit applications. All existing discharges requiring permits must have been filed on or before January 17, 1974.⁷ All new point source discharges requiring permits which commenced after July 22, 1973, must file a completed application for a permit 180 days prior to the intended date of discharge.⁸ The data submitted in the application will be used by the DNR in constructing the various conditions of the permit to be issued.⁹ All information contained in the application may be available for public inspection upon request, with certain provisions being made to safeguard confidential answers.¹⁰

Application forms corresponding to the various types of pollutant discharges have been designed by the EPA and are provided by the DNR. The various forms and their descriptions can be found in the Wisconsin Administrative Code.¹¹

Public Notice and Hearing: Upon completion of an application for a permit, section 147.09 of the Wis. Stats. requires the circulation of public notice to the greatest

⁶Sec. 147.02(2), an areawide waste treatment management plan, however, may not require the abandonment of existing waste treatment facilities which meet the requirements of this Chapter unless it can be shown that the abandonment of the facilities is the most cost-effective method for waste treatment in the entire planning area.

⁷Sec. 147.025. The exceptions are found in NR 200.04 and 200.03 and see *supra*, note 2.

⁸NR 200.04(5).

⁹And sec. 147.025(4) provides that, when the permit application is for publicly owned treatment works, each person discharging into the works who is subject to sec. 144.54 (i.e., the requirement for reporting discharges of industrial wastes, toxic and hazardous substances) shall submit a report to the owner or operator of the works of current discharges and projected discharges into the system for the next five years. Those reports will form part of the application for a permit by the owner or operator of publicly owned treatment works.

¹⁰NR 200.06. And sec. 147.08(2)(c) provides: any records or other information, except effluent data, provided to the Department may be treated as confidential upon a showing to the Secretary (DNR) that said records or information is entitled to protection as a trade secret. However, such information may be disclosed to the EPA or its authorized representative as provided, in sec. 147.12(3).

¹¹See NR 200.10 and NR 200.11-200.16 provides the descriptions.

number of interested or potentially interested members of the public.¹² The notice will define the applicant's activities or operations, the name and location on the waterway where the discharges will take place, and a tentative determination by the DNR on whether the permit will be issued or denied. A period of 30 days following the date of the public notice is provided for the submission of written views on the application by interested persons.¹³ All comments elicited during this period will be retained by the Department and considered in its final determination of the permit application.

In addition, the DNR is required to give notice to the Federal EPA, U. S. Army Corps of Engineers, other states potentially affected by the proposed discharge, and any other unit of government interested in the proposed discharge. Ninety days are provided for their review and comments.¹⁴ Completed application forms, fact sheets, draft permits, public comments, and other information will be made available to the EPA, and the DNR will make available for inspection and copying all such information to the public.¹⁵

Public informational hearings are also provided for by Statute on the application for a permit to discharge.¹⁶ All requests for public hearings must be made within 30 days after the issuance of a public notice of the DNR's receipt of a completed application form. The DNR shall hold public hearings if requested by:

1. The U. S. Environmental Protection Agency;
2. Any state affected by the discharge;
3. A petition received from and signed by five or more persons; or
4. If the Department determines that there is significant public interest in the permit application.¹⁷

The hearings held for public information pursuant to the Statute will not be contested cases.¹⁸ The DNR will give notice of its final determination to issue or deny a permit to the applicant, to all participants of the hearing, to any person who had submitted written comments on the application, to designated federal agencies, local units of government where the discharge will occur, and regional planning commissions. The statement will contain a description of the terms and conditions of the permit, any significant changes in the permit and a description of procedures to be followed for adjudicative review.¹⁹

Review of Permits:

Section 147.20 Review: Under this section of the Statutes, seven conditions are provided by which any permit applicant, permittee, affected state, or five or more persons may petition the DNR for administrative review. These conditions are:

permit denial, modification, suspension or revocation, the reasonableness of or necessity for any term or condition of any issued or modified permit, any proposed thermal effluent limitation . . . or any proposed water quality related limitation.²⁰

If within 60 days after notice has been given by the DNR concerning any of these conditions a verified petition is filed with the Department setting forth the issues to be reviewed, the interests of the petitioner, and why a hear-

¹² *The appropriate rules within the Administrative Code for giving notice are found at NR 3.02-3.03.*

¹³ *Interested persons here is not used in a legal sense as, for example, in establishing the requisite standing to litigate an issue; rather the term here is used in the "lay" sense whereby any party expressing an interest may participate. This is in keeping with an overall legislative intent found in Chapter 147 of encouraging wide public intervention in the decisionmaking involved with the permit process.*

¹⁴ *Also sec. 164.07 which defines the responsibilities and powers of an Assistant Attorney General acting as public intervenor was amended to require notices to be sent to the designated intervenor of all Chapter 147 proceedings.*

¹⁵ *Sec. 147.12. For every discharge exceeding 500,000 gallons on any day of the year the DNR, after giving public notice, must send upon request of any person a fact sheet detailing the location and quantitative descriptions of the discharges. If it determines that it will issue a permit for such discharge, the Department must, among other requirements, supply the effluent limitations for those pollutants proposed to be limited, sec. 147.10 and see NR 201.*

¹⁶ *Sec. 147.13.*

¹⁷ *NR 3.05. The DNR has the discretion of holding public hearings for other agencies or persons not contained within this list. The Administrative Code also provides for: the form of request for a hearing, NR 3.05(3); the content of the notice of the public information hearing, NR 3.06; location of the hearing, NR 3.07; persons entitled to participate, NR 3.08; changes in time or place of hearing, 3.09; and the conduct of and procedures for the hearing, NR 3.10.*

¹⁸ *Sec. 147.13(c) and NR 3.10. Transcripts of all hearings will be made available to interested persons upon request and for a reasonable cost, NR 3.11.*

¹⁹ *NR 3.13.*

²⁰ *Sec. 147.20(1).*

ing is warranted, then an adjudicatory hearing must be held.²¹ Upon receiving a petition, the DNR will circulate a notice of public hearing at least 10 days before the public hearing designating its time and place.²² All interested parties will be afforded an opportunity to present facts and arguments, and cross-examination will be permitted.²³ The DNR will issue a decision on the matters raised by the petitioner within 90 days after the close of the hearing and that decision is subject to judicial review under sections 227.15-227.21, Wis. Stats.

Another Approach to Modifying Permits: After already having had an opportunity to challenge permit conditions either in a public informational hearing or an adjudicatory hearing under section 147.20, another possible avenue exists for modification of a permit. Section 147.03(2), Wis. Stats. provides that, on the basis of certain information made available to it, the DNR may modify, suspend, or revoke a permit for cause.²⁴ A modification could require either a tighter restriction on a discharge or a relaxation of the requirements. If the DNR makes a determination that a modification is not warranted, then a request will be denied with reason.²⁵ If a determination is made that a modification is warranted, then it must notify the permittee, EPA, U. S. Army Corps of Engineers, any affected state, interested agency of the State, and any interested person of its intent to modify and the terms of the modification. Thirty days are provided for comment on the proposed modification. A public informational hearing may be held at the discretion of the Department or upon the petition of five or more persons. Such hearing would not be a contested case.²⁶ The DNR at the end of the notice period or hearing will then make a final decision on whether to modify the permit, notifying the appropriate parties. A review of the process outlined above may be obtained under section 147.20 within 60 days of the administrative decision.

²¹ The administrative rules governing who may petition; the form and content of the petition and adjudicatory hearing are found in NR 3.15-3.20.

²² The location of the hearing will usually be held in the area affected by the proposed discharge, NR 3.07.

²³ The proceedings and practice outlined in NR 2.01 et seq. will be followed except where they may conflict with the procedures outlined in NR 3.16-3.20.

²⁴ Sec. 147.03(2)(b). Sources of such information will in some instances come from the regular reports of owners and operators on the volume of the effluent discharged from each point source. This requirement is part of sec. 147.08 which mandates the monitoring of pollutant discharges by operators and owners. And sec. 147.14 requires that, in the event that there is an expansion of a facility or production increase which results in new or increased discharges of pollutants exceeding the permit, a report in the form of a new permit application must be filed with the DNR. And even where the increased discharge does not exceed the effluent limitations of the permit, notice must still be given to the DNR.

The chapter also provides that the DNR may revise or modify a schedule of compliance for an issued permit upon the request of the permittee if, in the discretion of the agency, it "is necessary because of the happening of an event over which the permittee has little or no control."²⁸ In that instance, the DNR may hold a public informational hearing if it deems the public interest warrants one or if petitioned by five or more persons.²⁹

Enforcement: Whenever the DNR receives information that any person is violating any section of the chapter or a rule adopted pursuant to it, the Department is to refer the matter to the Wisconsin Department of Justice.³⁰ The Attorney General will then initiate the legal actions within 30 days of the request. Final disposition of the case will be made by the Attorney General after having consulted with the DNR for its views. If the Attorney General decides to take a legal course of action different from that requested by the DNR, notice of that fact will be given to DNR.

²⁵ The Department has interpreted this section to include requests from permittees for such modifications although the language of the statute does not specifically state that: interview with Ms. Linda Bochert, Attorney, Division of Enforcement, Wisconsin Department of Natural Resources. A denial does provide opportunity for a hearing at the agency level.

²⁶ Sec. 147.03(2)(d) and NR 3.10.

²⁷ Review may only be obtained for one of the seven conditions provided in the Statute, see *supra*, note 20 and accompanying text.

²⁸ Sec. 147.03(2m).

²⁹ Therefore the DNR's decision to hold a hearing under sec. 147.03(2m) i.e., to modify a schedule of compliance, is entirely discretionary. This is one of the features, other than the subject matter involved, which distinguishes this from the procedure established by sec. 147.20 (review of permits) and sec. 147.03(2) (modification of permits by the DNR for cause). And, as pointed out in *State of Wisconsin v. Nekoosa Edwards Paper Company Inc.* No. 143-309 (Cir. Ct. of Dane County, November 13, 1974), such a decision (involving a sec. 147.03(2m) request) is arguably reviewable by the Circuit Court under sec. 227.15, at p. 2. However, as the Court indicated, there is a 30 day period for filing a petition for judicial review.

³⁰ Sec. 147.29. At the time of this writing 13 Chapter 147 actions have been referred to the Justice Department; six of these have been settled prior to trial; and each of the settlements has resulted in forfeitures ranging from \$5,000-\$17,500; the other actions are still pending; interview Ms. Linda Bochert, Attorney, Division of Enforcement, Wisconsin Department of Natural Resources.

Under this chapter certain civil and criminal remedies are provided when persons violate its provisions or rules promulgated according to it. Among these are: civil actions for temporary or permanent injunctions; forfeitures of up to \$10,000 per day of violation; fines ranging up to \$50,000 per day of violation; and imprisonment of up to one year in a county jail depending on the nature of the violation and the conduct of the individual and whether a previous conviction existed.³¹

Relationship of Chapter 147 to Other Wisconsin Statutes: Several sections within the chapter have specific ties to other State statutes, some of which have already been cited. Two others are noted here.

- a. Exemption from the Wisconsin Environmental Protection Act. The DNR when acting to regulate or eliminate pollutant discharges under the WPDES program is not required to file an environmental impact statement in order to meet the provisions under section 1.11, Wis. Stats. This exemption, however, does not extend to federal assistance for publicly owned treatment works, State assistance for pollution control facilities, or the issuance of permits for new sources of pollution.³²
- b. The Designing of Publicly Owned Treatment Works. Plans submitted for new treatment works under section 144.04, Wis. Stats. or proposals to modify existing municipal water systems which may be eligible for State construction grants under section 144.21, Wis. Stats. must now establish that the works or modifications are the most cost-effective method of meeting limitations or standards. They must also provide an alternative plan for the disposal of pollutants on land rather than in the air or water.³³

State Delegation to Other Units of Government to Effectuate Cleaner Waters

The recent and notable efforts by the State of Wisconsin and the federal government to create systems to eliminate pollution reflect a consistent effort to achieve uniformity in regulating effluent discharges into the waters. Various subunits of the State, however, have been authorized for many years to perform certain functions to protect the health, safety, and welfare of communities. The discussion which follows will focus on some of the delegated powers and machinery available to the local units of government, and in particular those powers relating to sanitary sewerage systems. It is the local level of government which has the primary responsibility for implementing programs mandated by the new federal and State legislation.

³¹ Sec. 147.21.

³² Sec. 147.30.

³³ Sec. 147.26.

The Metropolitan Sewerage Commission of the County of Milwaukee: The Metropolitan Sewerage Commission of the County of Milwaukee, under Wis. Stats. 59.96., has a wide range of powers which permit the carrying out of programs for pollution control and maintenance of water quality standards. The broad mandate to the Commission, as found in subparagraph (6)(a) states that:

the Metropolitan Sewerage Commission shall project, plan and construct in such county outside of the city limits of such city of the first class but within the metropolitan sewerage district, main sewers, pumping and temporary disposal works for the collection and transmission of house, industrial, and other sanitary sewage to and into the intercepting sewerage system of such district, and may improve any watercourse within the district by deepening and widening or otherwise changing the same where in the judgment of the Commission it may be necessary in order to carry off surface or drainage waters . . .

The enabling legislation of section 59.96, Wis. Stats. contemplated that the countywide Metropolitan Sewerage Commission would work closely with the already existing "city of the first class" (City of Milwaukee) sewerage commission organized pursuant to Chapter 608, Laws of 1913. The older sewerage commission of the City of Milwaukee also has broad regulative powers similar to those stated above.³⁴

To assist the Metropolitan Sewerage Commission of the County of Milwaukee in carrying out its functions, the legislation provided that the Commission may require any local unit of government outside the City of Milwaukee and within the County, which is discharging effluents into any river or canal, to change or rebuild its outlets to link up with the sewers of a city, town, or village as determined by the Commission.³⁵ Moreover, the legislation authorizes the Commission to promulgate and enforce rules necessary for the protection, management, and use of the sewerage system as it deems expedient.³⁶ The full scope of these regulatory and rule making powers was set out in Chapter 336, Laws of 1957:

³⁴ Chapter 608, Laws of 1913, sec. 5, noting particularly subsections (c) and (h). For further discussion on the relationship between the two commissions and their powers see the Southeastern Wisconsin Regional Planning Commission report, *A Regional Sanitary Sewerage System Plan for Southeastern Wisconsin*, Planning Report No. 16 at pp. 321-322. This report also highlights the role of SEWRPC as it relates to federal and State laws and the powers of special districts and other units of government pertaining to pollutant discharges, at pp. 290-327.

³⁵ Sec. 59.96(6)(c).

³⁶ Sec. 59.96(6)(i).

Such rules may prohibit discharge into the sewerage system herein provided for, either directly or indirectly, of any liquid, gaseous, or solid wastes deemed detrimental to such system or to its employees, or to the process of sewage treatment or disposal, or prescribe the conditions upon which such wastes may be discharged; and may prescribe standards of sewer design, construction, operation, alteration, and maintenance applicable to any sewerage system connecting with or using the system herein provided for and the conditions upon and the manner in which connections to main sewers and intercepting sewers and replacement of existing sewers shall be made; provided, that this enumeration shall not be construed as limiting to any degree the scope of the general rule-making powers hereinbefore conferred upon said commission. Such rules shall be applicable throughout the territory served by the sewerage system herein provided for, and shall have precedence over any conflicting ordinance, code, or regulations of or permit issued by any town, village, or city within the territory served by such sewerage system.

Provision for Metropolitan Sewerage Districts Outside Milwaukee County: In the decision of *In re Fond du Lac Metropolitan Sewerage District* the Wisconsin Supreme Court found an unconstitutional delegation of legislative power to the judiciary for the creation of metropolitan sewerage districts. In response to the Court's opinion the Legislature passed Chapter 276, Laws of 1971.³⁷ The new act provides that the process for creating such a district begins with the adoption of a resolution of the governing body of any municipality (except those created under section 59.96) describing the territory and facilities to be included in such a district.³⁸ The resolution will be transmitted to the Wisconsin Department of Natural Resources which will conduct a public hearing and collect informa-

tion and reports from the regional planning commission and other agencies to help it determine whether an order should be issued creating the district.³⁹ Among the statutory criteria that must be met if a district is to be formed are these:

the formation of the district will promote sewerage management policies and operation and will be consistent with adopted plans of municipal, regional and state agencies; and the formation of the district will promote the public health and welfare and will effect efficiency and economy in sewerage management, based upon current generally accepted engineering standards regarding prevention and abatement of environmental pollution and federal and state rules and policies in furtherance thereof⁴⁰

If the criteria are met, the DNR will issue an order creating a district, the order being subject to judicial review under Chapter 227, Wis. Stats. No territory of a city or village owning or operating a sewerage collection and disposal system may be included in the district unless there is a resolution of its governing body consenting to inclusion of such territory.⁴¹

Once a district is formed, it will be governed by a five-member commission. The commissioners will be appointed for staggered five year terms by the county board of the county in which the district is located or, where all the cities, villages, and towns comprising the sewerage district agree to the provisions of the district, then the governing bodies of those municipalities may make the initial appointments.⁴² The commission is directed by statute to plan, project, construct, and maintain sewers within the district for the collection and transmission of sewage, and ensure that it will be treated or recycled.⁴³ Any

³⁷ 42 Wis. 2d 323, 166 N.W. 2d 225 (1969). This act repealed secs. 66.22-66.209, the metropolitan sewerage district law, putting in place thereof secs. 66.20-66.26. Prior to repeal, Chapter 132, Laws of 1969, had validated all existing districts which had attempted to organize under Chapter 422, Laws of 1972. The 1969 act was a curative statute and was interpreted to cure any defect in existing metropolitan sewerage districts, 58 OAG 205, December 22, 1969. And see *Madison Metropolitan Sewerage Dist. v. Stein*, 47 Wis. 2d 349, 177 N.W. 2d 131 (1970) where the issue was raised of whether the curative act was a "general" or "special" law; if it were the latter, then it would have been unconstitutional under Art. IV sec. 31 of the Wisconsin Constitution. However, the court found that it was a general law and as such valid under the Wisconsin Constitution.

³⁸ See *supra*, notes 34-36, and accompanying text for a discussion of sec. 59.96 and the Metropolitan Sewerage Commission of the County of Milwaukee.

³⁹ It must make the determination within 90 days.

⁴⁰ Sec. 66.22(4)(b) and (c).

⁴¹ Sec. 66.22(5).

⁴² Under the latter situation, once the initial commissioners have been appointed by the cities, villages, and towns, then their replacements will be appointed by the respective county board, sec. 66.23(11)(a) and (b). If the district contains territory of more than one county, the county boards of the counties not having the greatest population in the district shall appoint one commissioner each, and the county board of the county having the greatest population in the district shall appoint the remainder, sec. 66.23(1).

⁴³ Sec. 66.24(2).

commission plans developed pursuant to this mandate must be consistent with those plans adopted by a regional planning commission organized under section 66.945, Wis. Stats.⁴⁴

In order to supervise and manage its systems and facilities a commission may adopt certain rules which restrict or limit utility service to lands which are described in master plans or development plans as not being fit for urban or suburban development.⁴⁵ Moreover, a commission may require any person or municipality in the district to provide for the discharge of its sewage into the district system whenever a reasonable opportunity is provided. A special assessment against property may be levied for financing the construction of such facilities.⁴⁶

Provision is also made in the statute for the addition of territory not originally part of a metropolitan sewerage district under two situations. The first is when a city or village located entirely within an original district annexes territory. In that situation the new territory will become a part of the sewerage district upon the commission receiving official notice from the city or village of the municipal annexation. The second arises when a municipal governing body initiates a petition to be added or the commission adopts a motion to add the territory. In either event the commission must hold a public hearing on the annexation, and it may approve the annexation only if the standards as outlined for the creation of the original district itself are met.⁴⁷ The commission in this instance, not the DNR, makes the determination, and annexed areas under both situations may be required to participate in paying the cost of existing or proposed district facilities.

Commission actions under this section are specifically subject to judicial review.

⁴⁴ Sec. 66.24(1)(b).

⁴⁵ Sec. 66.24(1)(d). Such rules are enforceable under sec. 280.02, and any violation of any rule or order of the commission is a public nuisance under the statute.

⁴⁶ The powers of the commission to assess property are found in sec. 66.25. However in *Green Bay Metropolitan Sewerage District v. Vocational Technical and Adult Educational District*, 58 Wis. 2d 628, 207 N.W. 2d 623 (1973), the Court found that a school district did not fall within the meaning of a municipality, therefore the sewerage district could not levy a direct assessment upon the school district. The city in this situation would be liable for the cost of services and it could, if it so desired, impose an assessment charge on the school district.

⁴⁷ Sec. 66.26 is the section in which the requirements for additions are established; the criteria by which the commission determines whether to annex are found *supra*, note 39, and accompanying text.

Other Local Government Statutory Machinery for Controlling Effluent Discharges: All counties, towns, villages, and cities in Wisconsin have, as part of the broad grant of authority by which they exist, sufficient police power to regulate by ordinance any condition or set of circumstances bearing upon the health, safety, and welfare of the community.⁴⁸ In addition there is statutory authority elsewhere for the creation of town sanitary districts. Sections 60.30 and 66.072, Wis. Stats., permit towns, villages, and cities of the third and fourth class to create utility districts which may as one of their functions provide sanitary sewer service. And section 144.07 of the Wisconsin Statutes also authorizes joint sewerage systems when two or more governmental units, including cities, villages, town sanitary districts or town utility districts decide to:

jointly construct, operate and maintain a joint sewerage system, inclusive of the necessary intercepting sewers and sewerage treatment works.

The powers here are relatively similar to those described for metropolitan sewerage districts.⁴⁹

State financial assistance is made available to municipalities under section 144.21, Wis. Stats. for the construction and financing of pollution prevention and abatement facilities.⁵⁰

Riparian and Nonriparian Rights to Control Pollution

Riparian Right to Bring a Cause of Action: Each of the previously discussed methods of pollution control depends upon an agency of government taking action within the framework of statutorily delegated powers. Any number of factors may intervene to frustrate such controls; for example, time lags, inability to act, or unwillingness to act. Attempts to control pollution by the direct action of a riparian in the courts may not only be the quickest but also the most effective device available.

A common law cause of action arises against the offending party whenever a riparian proprietor is unreasonably deprived of his use of the water or the quality of water as it reaches him is unreasonably impure and thus unfit

⁴⁸ Cf. secs. 61.34 and 61.36 on village powers to regulate and sec. 62.11(5) on the powers of cities.

⁴⁹ And see SEWRPC Report No. 16, *supra*, note 34, where a discussion of the various districts and their powers is provided, at 322-325.

⁵⁰ That Statute was subsequently upheld as being constitutional in *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 147 N.W. 2d 304 (1967), which found that it was not in violation of the public debt and internal improvement sections of the Wisconsin Constitution.

for any useful purpose.⁵¹ The standard of reasonableness is a variable. The question of what is reasonable or what is unreasonable is one of fact to be determined in the context of each particular case as it arises by the finder of fact; that is, the judge or jury.

In many cases this involves a balancing of interests. The utility of the defendant's activity is weighed against the extent of the plaintiff's damage within the framework of reasonable alternatives open to both. It is not enough for a riparian proprietor seeking an injunction to show simply that an upper riparian is polluting the stream and thus he, the lower riparian, is being damaged.⁵² Courts will often inquire about the nature and extent of the defendant's activity, its worth to the community, its suitability to the area, and his present attempts, if any, to treat wastes. On the plaintiff's side, they will inquire into the size and scope of his operations, the degree of water purity that he requires, and the extent of his damages.

⁵¹ The actions brought here usually seek to have the activity enjoined as a nuisance or in the alternative to recover damages for the injury caused. For a discussion of certain portions of a recent attorney general opinion dealing with these remedies see *infra*, notes 54-56, and accompanying text.

⁵² It should be emphasized, however, that the relief discussed in the main text is one of abatement. As the court pointed out in *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W. 2d 647 (1969), which relied on the much older case of *Pennoyer v. Allen* 56 Wis. 502, 14 N.W. 609 (1883), in an action for damages from nuisance, Wisconsin does not employ the doctrine of comparative injury and utility, i.e., the balancing of the utility of the offending conduct against the gravity of the injury inflicted. The court in *Jost* said that injuries caused by a nuisance must be compensated irrespective of the utility of the offending conduct as compared to the injury, at 45 Wis. 2d 177. Moreover, while the issue of abatement was not addressed in *Jost*, the court pointed out that a different rule would not necessarily be applied, i.e., even though an injunction was sought against an activity, the balancing of interests may not be employed. They went on to say that the rule established in *Dolata v. Berthelet Fuel & Supply Co.*, 254 Wis. 194, 36 N.W. 2d 97 (1947) was still the law, at 45 Wis. 2d 177. That rule in effect is that, while an activity is socially and economically useful, it may be abated if it caused substantial damage, at 45 Wis. 2d 174. Of course, a court in an abatement action is still forced to explore whether the damages are in fact substantial and also if the activity is socially and/or economically useful; whereas; to reiterate, if a party is merely seeking damages as in *Jost* and injury is found, then compensation is required.

This approach may cause the court to conclude that the plaintiff is entitled to a judicial remedy. Whether this remedy will be an injunction or merely an award of damages depends on a balancing of hardships and equities. For example, where a municipal treatment plant or industry is involved, a court recognizing equities on both sides might not grant an injunction stopping the defendant's activity but will compensate the plaintiff in damages. In addition, the court may order the defendant to install certain equipment or take certain measures designed to minimize the future polluting effects of his waste disposal.⁵³

In a 1972 opinion the Wisconsin Attorney General provides a compilation of numerous citations in which Wisconsin law protects riparian owners.⁵⁴ There the opinion notes the liberality with which the Wisconsin Supreme Court receives suits brought by riparian owners. And, in answering a question on whether damages can be recovered from polluters for reduced property values, increased health hazards, reduced water quality and generally impaired use of the lakes, the Attorney General replied:

Damages certainly can be recovered for the aspects of injury you have mentioned, although most likely the recovery will be in the name of reduced property values. This is logical, for, if a waterway has become unhealthful, odorous, or just unpleasant to look at, the value of the adjoining land will drop accordingly.⁵⁵

The opinion notes further, however, that it is not essential to characterize the damages as a decrease in property value; in addition the riparian may recover for

the value of any personal discomfort or inconvenience which the plaintiff has suffered, or of any injury to health or other personal injury

⁵³ It is not correct to characterize this balancing as simply a test of economic strengths. If it were simply a weighing of dollars and cents, the rights of small riparians would never receive protection. This factor was highlighted by the Wisconsin Supreme Court decision in *Jost v. Dairyland Power Cooperative*, *Id.*, where the Court said: "We know of no acceptable rule of jurisprudence that permits those who are engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance. Even the government or other entities, including public utilities . . . are obliged to pay a fair market value for what is taken or damaged," at 45 Wis. 2d 176, 177.

⁵⁴ 61 OAG 101.

⁵⁵ *Id.*, at 107.

sustained by the plaintiff, or by members of his family so far as they affect his own enjoyment of the premises, as well as any reasonable expenses which he has incurred on account of the nuisance.⁵⁶

The point being made and worthy of reemphasis is that riparians in Wisconsin are not foreclosed by the existence of State or local pollution control efforts from attempting to assert their common law rights in the courts.

Nonriparian Rights to Control Pollution Through Court or Other Action: A potentially far-reaching conclusion favoring nonriparian relief from pollution was reached in Muench v. Public Service Commission where the court said:

the rights of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given financial rights.⁵⁷

In this case the nonriparian citizen (Muench) was appealing a decision of a State agency ruling. His right to do so was recognized in language which is somewhat broader than was necessary to meet Muench's immediate problem. It cannot be concluded from this, however, that the appellate outcome would have been the same if Muench's case had begun as an original action in a lower trial court, instead of springing as it did from an administrative proceeding in which Muench was statutorily permitted to participate.⁵⁸

It also should be noted that section 144.537, Wis. Stats., provides for a public hearing by the DNR on alleged or potential environmental pollution upon the verified complaint of six or more citizens. After holding a hearing the DNR must make and file findings of fact and conclusions of law, and issue an order which shall be subject to judicial review under Chapter 227, Wis. Stats. Moreover, as discussed in the foregoing section on the Wisconsin Pollutant Discharge Elimination System (WPDES), five or more persons may seek review of DNR actions concerning the terms or conditions of permits which allow discharge of pollutants into the waters of the State.⁵⁹ And as also previously noted, the Federal

Water Pollution Control Act of 1972 under section 505 permits civil actions to be brought by citizens for violation of that Act.⁶⁰

Concluding Remarks—Water Quality

With the enactment of the WPDES, this State has undertaken a massive effort to improve and maintain the quality of its waters. It represents a comprehensive and unified approach to water quality control that heretofore had been lacking, although it does not include regulation of nonpoint sources of pollution. The restrictions that it imposes in order to achieve the ultimate goal of eradicating pollution, as required by federal law, may be rather ambitious in light of the time frame allotted and the impracticality of ever eliminating pollution completely. Moreover, the program and the degree of its success will be determined largely by the facilities and controls implemented by the local entities and their use of other delegated powers and machinery made available to them in legislation similar to that which sanctions metropolitan sewerage districts. A major handicap to the ambitious WPDES program will undoubtedly be a shortage of funding. Presumably the enforcement and review carried out pursuant to the program will recognize this and other factors. But any significant slippage affecting the stated goal of the Act to cleanse the State's waters can expect to be severely challenged by riparians and nonriparians as provided by law.

⁵⁸ In the recent case of *Wisconsin Environmental Decade Inc. v. P.S.C.*, 69 Wis. 2d 1, 230 N.W. 2d 243 (1975), which involved the establishment of a priority system for placing restrictions on the end use of natural gas, it was found that petitioner, an environmental organization, would have standing to contest the PSC order if it could satisfy Wisconsin's two pronged test for standing. The first element required that one or more of the members be adversely affected in an individual capacity by the PSC order; the Wisconsin Environmental Decade had alleged that it had been. The second test was whether the interest asserted is recognized by law. On the second requirement, the court recognized that the Wisconsin Environmental Protection Act does recognize an interest sufficient to give a person standing to question compliance with its conditions, when it is alleged that the agency's action will harm the environment in the area where the person resides, at 69 Wis. 2d 19. Wisconsin's Environmental Protection Act (WEPA) sec. 1.11, Wis. Stats. will be discussed *infra*, notes 85-89, and accompanying text. Thus, where harm to the environment is alleged from the actions of a State agency, nonriparians have an alternative route to sue under Chapter 227 where the basis is non-compliance with sec. 1.11, Wis. Stats. (WEPA).

⁵⁹ Sec. 147.20. This section also provides for judicial review under Chapter 227.

⁶⁰ See Chapter 6, *supra*.

⁵⁶ *Id.* The opinion here was quoting from Prosser, *Law of Torts*, 4th edition, at 602, 603. Peter N. Davis in *Theories of Water Pollution Litigation*, 1971 Wis. L. Rev. 738, however, distinguishes riparian rights and nuisance. His research also indicated a declining use of the common law in seeking abatement of water pollution. He argues, though, that greater use could be made of the common law in conjunction with State regulation, at 780.

⁵⁷ 261 Wis. 492, 53 N.W. 2d 514 (1952).

SHORELAND AND FLOODPLAIN ZONING IN WISCONSIN

The Water Resources Act of 1966, Chapter 614, Laws of 1965, was passed by the Legislature in recognition of the adverse effects that water pollution had on the public health and general welfare of the citizens of the State. It set in motion a comprehensive program to:

protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water.⁶¹

The Act attempts to achieve these objectives by mobilizing efforts and resources at all levels of government to enhance the quality of all the waters of the State.⁶² Towards that end the State Legislature authorized the zoning of floodplains and shorelands.⁶³

From the outset it should be noted that the Legislature differentiates between the regulation of shorelands and floodplains and they will be addressed accordingly. Where there are linkages between the two—and there are—they will be discussed.⁶⁴

Shoreland Regulation

Section 59.971, Wis. Stats., requires the counties of the State to enact ordinances to regulate all shorelands which may include floodplains within the unincorporated areas of the counties.⁶⁵ The regulations will apply to strips of land 1,000 feet from a lake, pond, or flowage and 300 feet from a river or stream or to the landward side of the floodplain, whichever distance is greater.⁶⁶ A county

ordinance is not subject to approval by town boards for full effect and it will supercede all other ordinances related to the shorelands, unless the previously enacted ordinance is more restrictive.⁶⁷ The statute provides that an ordinance must meet reasonable minimum standards in accomplishing the shoreland protection objectives of section 144.26(1), Wis. Stats. The standards and criteria for the ordinances are set out under NR 115.03 of the Administrative Code. They include restrictions on lot sizes, building setbacks, filling, grading, dredging, and sanitary regulations.⁶⁸ The county must keep its regulations current and effective in order to remain in compliance with the statutes and minimum standards established by the DNR. In the event the county fails to adopt an ordinance or the ordinance fails to meet the established standards, the DNR will adopt an ordinance.⁶⁹

⁶⁷ In an opinion by the Attorney General, OAG 20-74, March 27, 1974 the question was addressed of whether the extraterritorial zoning jurisdiction of cities or villages as set forth in sec. 62.23(7a) would supercede a county shoreland zoning ordinance. The Attorney General concluded that the Legislature in passing secs. 59.971 and 144.26 did not intend that the county ordinance would be superceded, but that municipal extraterritorial zoning within shorelands would be effective so long as it was consistent with or more restrictive than the county ordinance. One of the reasons offered for this interpretation was that, if the extraterritorial zoning were allowed to prevail, it would in effect return control to the towns over those ordinances which had been expressly removed under sec. 59.971(2)(a).

⁶⁸ This section provides that variances and appeals regarding shorelands within the county will be brought before the board of adjustment of the county and will follow the procedures as outlined under sec. 59.99. And under NR 115.04(f) notice must be given to the DNR of such variances, special exceptions, or amendments. Moreover, NR 115.03(4)(h) requires the county to prosecute all violations of shoreland zoning ordinances. Some counties, however, according to a recent study, have not fulfilled their obligation as to these and other requirements set out in the Administrative Code, see Weber and Peroff, *Rural Land Use Management in Wisconsin Counties: The Response of Local Government to the Shoreland Protection Act*, Institute for Environmental Studies, University of Wisconsin, Madison (1974).

⁶⁹ The deadline for county compliance was January 1, 1968, sec. 59.971. The methodology employed by the DNR for insuring compliance is found at NR 115.04, and sec. 59.971 provides that sec. 87.30 shall apply to the DNR's process of determination. This will be discussed below. However, there is no provision for the DNR to directly administer county ordinances. Presumably the State would need a court order to require a county to enforce its own ordinances if it had been derelict in its duty under the Act.

⁶¹ Sec. 1 of Chapter 614, Laws of 1965.

⁶² *Id.*

⁶³ The relevant Wisconsin Statute sections are 144.26, 59.971, and 87.30.

⁶⁴ Although floodplains may in part be included within the shoreland zone, the delineation of lands subject to periodic flooding may be found in NR 116.03 of the Administrative Code. A discussion of floodplain zoning will follow.

⁶⁵ Cities and villages under sec. 62.23(7) are also permitted to adopt such regulation for shoreland areas; see sec. 144.26(2)(e). The purposes for which ordinances are adopted pursuant to sec. 59.971 are deemed to embrace all of those as found in Chapter 144, 60 OAG 209, June 3, 1971.

⁶⁶ Under the Administrative Code NR 115.02(2) it further states: "To comply with the Water Resources Act, it is necessary for a county to enact shoreland regulations, including zoning provisions, land division controls, sanitary regulations and administrative provisions ensuring enforcement of the regulations."

Application to Drainage Ditches: In a recent opinion by the Wisconsin Attorney General, county ordinances adopted pursuant to the shoreland zoning statute were found to apply to lands within 300 feet of a drainage ditch that is navigable and attached to natural navigable lakes or streams.⁷⁰ Support for that position was found in the legislative language of section 144.26(2)(d) which defines the term “navigable” to include “other waters” within the territory of the State, thus encompassing artificial streams or water running in a drainage ditch. The opinion further noted that a distinction should not be drawn

between navigable drainage ditches that originally were navigable streams before ditching, navigable drainage ditches that originally were nonnavigable streams before ditching and navigable drainage ditches that had no previous stream history.⁷¹

Furthermore the interpretation of the statutory language to allow application was bolstered on the grounds that it would be consistent with the overall intent of the statute in maintaining safe and healthful conditions and preventing and controlling the pollution of the State’s waters.⁷²

Floodplain Protection

Within the enabling legislation of the Water Resources Act, provision was also made for the regulation of floodplains.⁷³ The delineation of the floodplains and the minimum criteria that the regulations must meet are set out in NR 116.03 of the Administrative Code.⁷⁴ The statutes mandated that the floodplain ordinances be adopted by the appropriate jurisdiction (county, city, or village) as of January 1, 1968. When a city, village, or county fails to adopt such an ordinance, the DNR upon its own motion or the petition of a municipality, of 12 or more freeholders, or of another State agency will hold a public hearing and fix the limits of any floodplains, an action that will have the same effect as if adopted by the jurisdiction.⁷⁵ Modification of any ordinance will require written approval by the DNR. All decisions by the Department are subject to judicial review.

⁷⁰ OAG 17-74, March 6, 1974.

⁷¹ *Id.*, at 1, and see in OAG 117-74, October 7, 1974, where this position is reiterated in a discussion concerning the DNR’s jurisdiction and requirements for permits for work done on and maintenance of drainage ditches and artificial lakes under Chapters 30 and 31 and sec. 87.30 (floodplain zoning) Wis. Stats., particularly, at OAG 117-74 pp. 5-6. The opinion emphasizes that it is necessary for the drainage ditches and artificial bodies of water to connect with natural navigable bodies of water in order to invoke the mandate of these statutes, otherwise they will be treated as the equivalent of private artificial lakes, at OAG 117-74, p. 6.

⁷² *Id.*, at p. 3.

When a violation of any ordinance occurs through the construction of a structure, fill, or development in the floodplain, it will constitute a public nuisance and as such may be enjoined through an action by a municipality, the State, or any of its citizens.⁷⁶

State intervention under floodplain zoning, however, should be distinguished from that under enabling legislation for shoreland zoning. Under floodplain zoning, if it is determined that an ordinance has not been adopted or it has failed to meet the established standards, the State may intervene under the process outlined above, whether the land is within a city or village or unincorporated area. However, if a violation occurs under shoreland zoning, intervention is permissible only for unincorporated areas. Moreover, certain commentators emphasize that the standards by which the State may intervene also differ. They point out that the standards in floodplains could be interpreted

to require more than just the adoption of a local ordinance with adequate provisions [as with the shoreland zoning]. It [floodplain standard] seems also to require a check on the effectiveness of the administration of the provisions.⁷⁷

⁷³ Sec. 87.30.

⁷⁴ See also NR 116.05.

⁷⁵ Sec. 87.30. *Thirty days’ notice for such determination or zoning must be given by the DNR to the county, city, or village. The statute states specifically that failure of a county, city, or village to adopt a floodplain zoning ordinance for an area where appreciable damage from floods is likely to occur or to adopt an ordinance which will result in a practical minimum of flood damage in an area shall be prima facie of necessity for action specified herein by the Department. The Department shall make a decision in writing of insufficiency of any county, city, or village floodplain zoning ordinance before adopting an ordinance superceding such county, village, or city ordinance. And see 62 OAG 264, November 28, 1973, where the Attorney General concluded that if the DNR adopts a floodplain zoning ordinance for a county pursuant to sec. 87.30, town board approval is not required for the ordinance to take effect in all unincorporated areas, at 62 OAG 266. In this opinion the Attorney General also notes the close relationship between shoreland and floodplain zoning, *Id.*, at 62 OAG 268.*

⁷⁶ Sec. 87.30(2). Any person who maintains such a structure or development or fills in the floodplain will be subject to a \$50 fine per day, for each day the violation exists.

⁷⁷ See Water-Use Law and Administration in Wisconsin, *supra*, Chapter III, at pp. 412-413, and for background to the Water Resources Act and shoreland floodplain zoning legislation, see pp. 410-419.

A Constitutional Challenge to Shoreland Zoning

In the landmark decision of *Just v. Marinette* a direct challenge was advanced to the constitutionality of the Marinette County zoning ordinance adopted pursuant to the shoreland zoning enabling legislation.⁷⁸ The property involved contained wetlands which were within 1,000 feet of the normal highwater mark of Lake Noquebay. Consequently this land was included in a conservancy district as part of Marinette County's fulfillment of the statutory requirement under the shoreland zoning program. Six months after the ordinance became effective, Ronald Just in order to "improve" his property began filling in the wetlands with sand. The amount of fill exceeded that permitted under the county ordinance and thus required a conditional use permit. Just failed to obtain this permit, so violating the ordinance and subjecting himself to a \$10 to \$200 fine for each day of violation. He challenged this on the legal grounds that restricting his use of the property constituted a constructive taking of the land without compensation and was therefore unconstitutional. Marinette County and the State of Wisconsin on the other hand argued that it was a proper exercise of the police power of the State and it did not so severely restrict the use or depreciate the value of the property to amount to a taking. In rephrasing this classic confrontation Chief Justice Hallows stated:

It is a conflict between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes.⁷⁹

The opinion went on to illustrate the differences between the use of eminent domain, i.e., the taking of property because it is useful to the public, and State use of the police power, i.e., property is taken or uses are restricted because of potential harm to the public.⁸⁰ In the former, compensation is required while, under the police power which reasonably restricts the use of property, it is not. But, when the police power imposes such restrictions on the use of land as to effectively negate the reasonable use of the land, it will generally be deemed a "constructive taking" even though the actual ownership has not been transferred to the State. Under that situation, compensation would have to be made or the restrictions lifted.

⁷⁸ 56 Wis. 2d 7, 201 N.W. 2d 761 (1972). The case was previously discussed in this report, *supra*, Chapter III, in the section concerning the public trust doctrine. As a result of the issue of constitutionality, the State of Wisconsin intervened as a party-respondent pursuant to sec. 274.12(6).

⁷⁹ *Id.*, at 56 Wis. 2d 14, 15.

⁸⁰ *Id.*, at 56 Wis. 2d 16.

The court then proceeded in its analysis of the case to touch on several very important factors. It emphasized that the State had an affirmative responsibility in protecting the waters of the State not just for navigation but for fishing, recreation, and scenic beauty as well.⁸¹ Moreover, it recognized that the lands adjacent to the navigable waters were integrally related in maintaining the purity of the water. And from here the analysis of the Chief Justice and the court takes on a rather unique posture. It was stated that the waters of Wisconsin in their natural state were unpolluted and it is only through man's efforts that their quality was degraded. And, having already recognized the important interrelationship between wetlands, swamps, marshes, and other land areas adjacent to the waters, the court reasoned that the State's efforts to restrict uses on such lands did not constitute improvements to the public sector but only preserved nature from unrestricted activities of humans.⁸² The court said:

It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public.⁸³

Furthermore, in responding to the Justs' arguments that their property had been severely depreciated in value by the restrictions the court found:

this depreciation of value is not based on the use of the land in its natural state but on what the land could be worth if it would be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of

⁸¹ *Id.*, at 56 Wis. 2d 18.

⁸² *Id.*, at 56 Wis. 2d 23, 24. And for one commentator's view of broadly applying this new valuation process on a wide scale see Large, *This Land Is Whose Land? Changing Concepts Of Land As Property*, 1973 Wis. L. Rev. 1039, at 1074-1083. The possibility of wide application, however, as the author himself admits, at 1079 would seem to be unfounded since presumably the court would limit this reasoning to lands which have unique environmental characteristics and lands which also have been so designated by the Legislature. The court's continued emphasis on the importance of wetlands to navigable waters, for example, would seem to bear this out.

⁸³ *Supra*, note 78, at 56 Wis. 2d 22.

the land at the expense of harm to public rights is not an essential factor or controlling (emphasis added).⁸⁴

Thus the court concluded that the public's right to pure waters within the State was a present right and one that would be protected constitutionally by regulating adjacent land with shoreland zoning and therefore the police power and not the power of eminent domain was involved. Also, since the value of the lands were to be determined as they presently existed in their natural state, and not on speculative value after improvement, that value had not depreciated and a constructive taking had not occurred and the restrictions under the ordinance would remain in place.

WISCONSIN'S ENVIRONMENTAL POLICY ACT

The Wisconsin Environmental Policy Act of 1972 (WEPA), which is patterned after the National Environmental Policy Act (NEPA), establishes a State policy to encourage harmony between human activity and the environment, to promote efforts to reduce damage to the environment and to stimulate understanding of important ecological systems.⁸⁵ WEPA requires the preparation and wide circulation of environmental impact statements on major actions of State agencies which may significantly affect the human environment. The guidelines governing the preparation and content of the environmental impact statements substantially follow those issued by the Council on Environmental Quality for NEPA.⁸⁶ And, each detailed statement must explore:

1. The environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

⁸⁴ *Supra*, note 78, at 56 Wis. 2d 23. This represents a significant departure from traditional legal and economic positions of incorporating such speculative value into the present worth or value of the land.

⁸⁵ Sec. 1.11, Wis. Stats. was created by Chapter 274 Laws of 1971; it became effective on April 29, 1972 and it was subsequently amended by Chapter 204, Laws of 1973 (May 18, 1974). For a discussion of NEPA see *supra*, Chapter 6.

6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages of the proposal.⁸⁷

Prior to the formulation of a detailed statement an agency must consult with and receive comments on its proposal from other agencies which have jurisdiction or special expertise with respect to the environmental impact involved. Copies of the comments must be made available to the public, the Governor, and the DNR. Furthermore, a public hearing must be held on every proposal, other than those for legislation, before a final decision is made.⁸⁸

Perhaps the most significant aspect of WEPA and the one with the greatest potential for enhancing the water resources of the State is that a broader forum now exists for the consideration of the State proposals and alternatives to them.⁸⁹ This factor should illuminate more clearly the tradeoffs being made between the water resources of the State and decisions involving, for example, fish management practices, dredging and filling actions, the siting of utilities, or State facility construction near waterways. And, it may help to mitigate the adverse spillover effects that many proposals would inflict on the quality of the water.

⁸⁶ By Executive Order No. 69 Governor Patrick J. Lucey issued Guidelines for the Implementation of the Wisconsin Environmental Policy Act (December 1973). Following an 18 month trial period, the Governor also requested a report by the Interagency WEPA Coordinating Committee on necessary revisions to these guidelines. The committee includes representatives of the 30 State agencies, boards and attached commissions listed in Chapter 15, Wis. Stats. The Committee was originally established by the Governor in 1972 to develop guidelines to implement WEPA and to provide an interagency forum to resolve procedural problems raised by members and environmental groups. Revisions are currently being prepared for submission to the Governor. Copies of the Guidelines for the implementation of WEPA are available from the State Planning Office, Wisconsin Department of Administration, Room B130, 1 West Wilson Street, Madison, Wisconsin 53702. This information was supplied by Ms. Caryl Terrell, staff member, State Planning Office.

⁸⁷ Sec. 1.11, Wis. Stats.

⁸⁸ Holding a public hearing as required by another Statute will satisfy the requirement of sec. 1.11. Class I notice must be given 15 days prior to the hearing in the area affected; if the proposal has statewide significance it must be published in the official state newspaper.

⁸⁹ And WEPA as now interpreted by the Wisconsin Court in *Wisconsin Environmental Decade Inc. v. P.S.C.*, *supra*, note 58, permits aggrieved parties to seek judicial review where environmental harm is alleged.

A PROGRAM TO PROTECT
AND REHABILITATE
WISCONSIN'S INLAND LAKES

In recognition of the serious deterioration of many of Wisconsin's lakes and the detrimental effects those conditions have had on the recreational usage of those waters the Legislature enacted into law Chapter 301, Laws of 1973, in order to fulfill its duty as trustee of the State's waters and to enhance and restore the potential of the public inland lakes.⁹⁰ The program emanating from this legislation envisions a State/local management effort to improve the condition of the inland waters.

At the State level the act creates within the DNR an Inland Lakes Protection and Rehabilitation Council, whose membership represents both the governmental and private sectors.⁹¹ Its duties are to provide counsel and recommendations to the Department on numerous matters, including a classification system for the selection of eligible lakes, then priority of treatment, and the amount and types of available funds to be expended on the treatment. On the local level inland lake districts are authorized to be formed for undertaking the programs to rehabilitate and protect the lakes. These districts may be formed under a variety of circumstances. One method is for 51 percent of the landowners within a proposed district, or the owners of 51 percent of the land, to petition the appropriate county board, within whose jurisdiction the district would be situated, to form a district. The county board would then arrange for a public hearing to determine whether a district should be formed. If in its judgement, and following specified criteria, it finds that a district is necessary it may declare by formal order the organization of a district and its boundaries.⁹² Another avenue by which a district may be formed is through the adoption of a resolution by the governing

body of a municipality to establish a public inland lake protection and rehabilitation district. This approach may be taken only if the municipality encompasses all the frontage of a lake within its boundaries.⁹³

In accordance with the statute the management of the district will be performed by a board of commissioners whose primary powers are to adopt and carry out lake protection and rehabilitation plans and to control the fiscal matters of the district.⁹⁴ An organized district has broad authority to carry forth the objectives of this legislation. Among its powers are: the right to sue and be sued; to borrow money; issue bonds; enter into contracts; and hold property, and special assessments may be levied by the commissioners to carry out rehabilitation projects.⁹⁵

If the district applies for state funding of a project as permitted under the act, then it must adhere to a three step process.⁹⁶ First, a feasibility study will be conducted which will gather data and analyze the information on an interdisciplinary basis.⁹⁷ The DNR will then formulate suggested alternative methods including costs for rehabilitating the lake under each method. The second step requires the board of commissioners of the district, having received the DNR recommended alternatives, to

⁹⁰ The Act amends sec. 66.30(1); and creates secs. 15.347(8), 20.285(1), 20.370(5)(e) and (em) and Chapter 33 of the Wis. Stats. A public inland lake is defined as a lake, reservoir, or flowage within the boundaries of the state that is accessible to the public via contiguous public lands or easements giving public access, at sec. 33.04(8).

⁹¹ Sec. 15.347(8), the council will consist of: "a) Four public members appointed by the governor, and with the advice and consent of the senate, appointed for staggered 4-year terms; b) the director of the University of Wisconsin-Madison water resources center or his designated representative; c) the chairman of the board of soil and water conservation districts; and d) three members representing the following departments and serving at the pleasure of the appointing authority: 1) the department of natural resources, appointed by the secretary thereof; 2) the department of agriculture, appointed by the secretary thereof; and 3) the department of local affairs and development, appointed by the secretary thereof."

⁹² The actual process as provided in sec. 33.26(1) and (3) is for the county board to appoint a committee to hold the hearings; after the committee has held the hearing, it will report to the county board. The county board must then determine if the petition was signed by the requisite owners and, that the proposed district is necessary, that the public health, comfort, convenience, necessity or public welfare will be promoted by the establishment of the district, that the property to be included in the district will be benefited by the establishment thereof, and that formation of the proposed district will not cause or contribute to long-range environmental pollution as defined in sec. 140.30(9), the board will then declare its findings.

⁹³ Sec. 33.23 and if the frontage was within several municipalities they may contract to manage the lake within their boundaries under sec. 66.30. Town boards may approve the formation of a district coterminous with the boundaries of town sanitary district which is in existence on the effective date of this act.

⁹⁴ Sec. 33.29.

⁹⁵ Secs. 33.22 and 33.27.

⁹⁶ See secs. 33.11-33.17; these provisions are not applicable if a district does not seek state assistance.

⁹⁷ The requirements for the feasibility study are set out in NR 60.03 of the Wisconsin Administrative Code.

develop a proposed plan based upon the recommendations. Prior to the board's adoption of a plan it must send a copy of a proposed plan to the DNR and to the appropriate soil and water conservation districts and regional planning agencies of the area for their comments. The DNR will then hold a hearing on the plan and consider the comments by the respective agencies and ascertain whether an environmental impact statement should be filed. Sixty days after the hearing, the DNR by order may approve, approve with modification or disapprove the plan and it will rule concurrently on whether State financial aid will be forthcoming.⁹⁸ Finally, the third step in the process involves the implementation of an approved plan in accordance with the DNR recommendations. Those rehabilitation plans may consist of but not be limited to techniques which involve: aeration; nutrient diversion; nutrient removal or inactivation; erosion control; sediment manipulation, including dredging; and bottom treatments.⁹⁹

⁹⁸ Sec. 33.17 provides that where there is a lack of funds an approved plan shall remain eligible for future assistance, the district may also implement the plan on its own without state funds. Guidelines developed by the Department's Office of Inland Lake Renewal for determining priority for eligibility for financial assistance include: "1) the preservation of public rights, 2) the protection and enhancement of environmental values, 3) cost effectiveness, 4) local involvement and commitment of future management, and 5) the urgency of need for lake protection and rehabilitation." In order to quantify these policy guidelines to indicate the priority listing the office has developed certain other factors among which are: "1) public access usability and suitability, 2) potential accessibility, 3) regional water resource needs, 4) the adequacy of controls over future sources of lake degradation, 5) the degree of permanency in abating the sources of degradation using the best available technology, 6) lake condition index and phosphorus loadings, and 7) organizational and jurisdictional considerations, such as financial viability of the lake district, past management record, by-laws, and local ordinances." Information supplied by Mr. Don Winter, member of the staff of the Office of Lake Renewal, Department of Natural Resources, July 1, 1975. For further elaboration on financial assistance for project implementation see NR 60.11, Wisconsin Administrative Code.

⁹⁹ Sec. 33.15. And in a inter-departmental memorandum of the DNR June 14, 1974 from Mr. T. G. Frangos to all supervisory personnel, it was noted that: "the law implies that 'cosmetic' approaches such as the application of herbicides which deal only with the symptoms rather than the causes of lake problems would not be eligible for state technical and financial assistance."

If State financial assistance is available it may be made available up to 90 percent of the cost of the project and where the project is considered a high risk experiment 100 percent funding may be provided. However, the law prohibits State assistance in excess of 10 percent of any one year's budget for the program.

Within the initial 10 months of the program 26 inland lake districts had received offers of 80 percent cost sharing to conduct the required feasibility studies.¹⁰⁰

SUMMARY OF OTHER LAWS AND CONCLUSIONS TO STATUTORY DEVELOPMENT AFFECTING THE USE OF WATER

While extensive Wisconsin authority has already been cited in this and preceding chapters, the focus has been on more recently enacted laws which have had or could have major impact on the waters of the State. But other important authority exists with the State to regulate activities and uses below, above, and adjoining the waters within its jurisdiction. For example, the Wisconsin Department of Natural Resources has the authority to regulate: the deposit of materials upon a bed of a navigable body of water;¹⁰¹ the straightening or altering of stream courses;¹⁰² dredging of material from the bed of a lake or river;¹⁰³ the enlargement of any navigable water-

¹⁰⁰ Within this period a total of 34 lake protection and rehabilitation districts were formed encompassing 43 lakes. Of these, 29 districts had applied to the Office of Lake Renewal for technical assistance in designing feasibility studies. Information supplied by Mr. Don Winter, member of the staff of Office of Lake Renewal, Department of Natural Resources, July 1, 1975.

¹⁰¹ Sec. 30.12. For an interpretation of this statute see Chapter 5 *supra*, notes 11-15, and accompanying text.

¹⁰² Sec. 30.195. The Department of Natural Resources may grant a permit for altering a navigable stream if it determines that alteration "will improve the economic or aesthetic value of the owner's land and will not adversely affect the flood flow capacity of the stream or otherwise be detrimental to public rights or to the rights of other riparians located on the stream." Sec. 30.195(3).

¹⁰³ Sec. 30.20. This section allows the removal of material from beds of navigable waters if it is determined that the removal will be consistent with the public rights and a permit has been issued by the DNR. It also envisions a contractual process wherein certain conditions will be imposed on the party seeking to dredge, in order to protect the public interest, the interests of the State, as well as fixing a fee for compensation to the State for the material removed.

way;¹⁰⁴ and diversions from any body of water.¹⁰⁵ The Department may also order a community to construct facilities for an adequate public water supply when conditions create a menace to health,¹⁰⁶ it may prohibit the installation or use of septic tanks when it would impair water quality,¹⁰⁷ and it has the authority to supervise the treatment or suppression of aquatic nuisances.¹⁰⁸ Furthermore, Chapter 31 of the Wisconsin Statutes, certain sections of which will be discussed in succeeding chapters, vests within the DNR the authority to regulate dams and bridges over navigable waters. In short, it should not be inferred that these and other statutes not analyzed here are unimportant; for specific legal issues they may well be the controlling law for a particular subject matter.

The inescapable conclusions to be drawn from the analysis is that the statutory framework now in place forms a vast interdependent network of laws, not always in proper mesh, but designed to improve or maintain the conditions of the waters in Wisconsin. And it is clear, that the significant impetus in Wisconsin for enhancing the overall quality of the water resources is being increasingly shaped and prodded by the State and federal legislative bodies. This influence shows little signs of weakening as the importance of water resources to the State's future is continually underscored. Moreover, the increasing legislative role is finding consistent support from the State's highest court.

¹⁰⁴Sec. 30.19. *This statute is primarily concerned with the creation and congestion of artificial waterways with navigable bodies of water. In addition, sec. 30.19 regulates the removal of top soil from the banks of any navigable body of water. The DNR also regulates such activity through a permit process wherein it considers the potential harm to the public interest in the waters, fish and game habitat, and environmental pollution. The statute provides that all artificial waterways constructed under the section will be public waterways, sec. 30.19(5). This section of the statutes, however, specifically exempts the construction and repair of public highways, agricultural uses of land and actions involving navigable bodies of water within Milwaukee County, at sec. 30.19(1)(d).*

¹⁰⁵Sec. 30.18. *For a discussion and case interpretation of this statute see Chapters 3 and 9.*

¹⁰⁶Sec. 144.025(2)(r), and see *Village of Sussex v. Department of Natural Resources*, 68 Wis. 2d 187, (1975) *supra*, Chapter 4, and 60 OAG 523, December 31, 1971.

¹⁰⁷Sec. 144.025(2)(q).

¹⁰⁸Sec. 144.025(2)(i), and see OAG 72-74, July 19, 1974.

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Chapter VIII

LEGAL IMPLICATIONS OF TEMPORARILY BACKING FLOOD WATERS INTO FARM DRAINAGE SYSTEMS

INTRODUCTION

While in the past several years federal and state legislation has been enacted to eliminate or at least reduce development in and along low lying areas which are prone to flooding (e.g., the Flood Disaster Protection Act of 1973, Chapter VI, and the Shoreland/Floodplain Zoning Act, Chapter VII), another alternative to insure protection against flooding is the construction of floodwater retention reservoirs. Reservoirs could be constructed to reduce peak flows through reservoir expansion during periods of high water. Later much of this water could be released as stream flows return to normal. By reducing the peak flow, which occurs during a relatively short period of time, a substantial amount of flood damage could be avoided. In addition, such reservoirs could be used for recreational purposes and low flow augmentation.

While retention reservoirs provide a practical physical approach to flood and related flood abatement problems, the construction of such reservoirs presents certain legal problems which must be recognized and considered before a final selection can be intelligently made. The ponding of water in a retention reservoir may cover a substantial area with the possibility of affecting existing drainage improvements. Furthermore, effective control of peak flood flows through the use of reservoirs will probably mean temporarily flooding a much larger area. This raises questions concerning the legal implications of temporarily backing floodwaters onto open lands or into farm drainage systems and in the process damaging or nullifying the effect of farm drainage ditches and tiles.

CAN A DRAINAGE DISTRICT ENJOIN THE CONSTRUCTION AND/OR USE OF RETENTION RESERVOIRS?

An action by a drainage district to enjoin the diversion of water from another watershed into the drainage district provides a good starting point for an analysis of the legal problems involved. In this case, Cranberry Creek Drainage District v. Elm Lake Cranberry Co.,¹ the defendants were granted the right to build a canal from Hemlock Creek to Cranberry Creek by the Legislature. However, the canal was only constructed part way, with the result that water from the canal was discharged into the plaintiff's drainage ditches, which in turn emptied into Cranberry Creek. The plaintiffs alleged that their ditches were damaged by this increased flow of water and that they were without an

adequate remedy at law. As a defense, the cranberry company argued that the statutes granted the owners of cranberry lands certain rights with respect to construction of canals; but, in sustaining the plaintiff's injunction, the court had this to say about the "cranberry law":

(c)onceding the law is valid as against private persons or private interests, it does not follow that it can be successfully invoked as against public interests. As before stated, plaintiff's drainage is for the promotion of the public health or welfare, and it is clear that whatever rights were granted to the owners of lands adapted to cranberry culture they were not paramount to rights involving the public health or welfare but subordinate thereto.²

Statutes under which drainage districts are organized required then, as they do today, "... that the public health or public welfare ... be promoted by the drainage."³

Clearly, the Cranberry Creek case stands for the proposition that, where there is a conflict in authorized activities, that which is concerned with the public interest will prevail over activity in which the public interest is absent or minimal. Consequently, if drainage districts find themselves damaged by the construction of retention reservoirs which served purely private interests, their right to have them removed seems unquestionable. Obviously, retention reservoirs for flood control purposes also involve the public health, safety, and welfare. In such a situation, could a drainage district still compel the removal of a dam?

Wisconsin drainage law is embodied in Wis. Stats. Chapter 88. This Chapter represents a revision by the 1963 Legislature, effective January 1, 1965, in which Chapters 88⁴ and 89⁵ were combined into a new Chapter 88, entitled "Drainage of Lands."⁶ Wis. Stats. 88.72, "removal of dams or other obstructions in drainage districts," is directly in point with the issue here being considered and sheds light on the problem of conflicting public interests. Subsection (1) provides:

² *Id.* at p. 367.

³ Wis. Stats. 88.28(1)(b).

⁴ *Farm Drainage Law.*

⁵ *Drainage District Law.*

⁶ Wis. Laws 1963, Chapter 572.

¹ 170 Wis. 362, 174 N.W. 554 (1920).

The board or the owners of more than 1/10 of the lands within a district may file with the court a petition setting forth: a) That the drains constructed within such district do not afford an adequate outlet for drainage; b) That it is necessary in order to give adequate outlet to remove certain dams or other obstructions from waters or streams or to deepen, straighten or widen the same either within or beyond the boundaries of such district; and c) That the public health and welfare will be promoted by such work and that the navigability of such waters or streams and other public rights therein will not be materially impaired.

The key words in this statute are “. . . that the public health and welfare will be promoted by such work . . .” Thus, the statutory test would appear to be that the paramount public interest will prevail.⁷

Regional Planning Commission studies of past flood damage in the Region indicate that much of the historic flood damage has been inflicted upon residential and commercial property.⁸ Agricultural land has remained relatively free of damage, except that caused by severe summer rains. While it is true that retention reservoirs could increase agricultural flood damage, it is doubtful that such damage would exceed the damage avoided to commercial and residential property. Moreover, severe spring floods are more frequent than summer floods; and their damage to agricultural property is slight. As a result, should a drainage district go into court under the provisions of Wis. Stats. 88.72 to compel removal of a dam, the district would probably be unable to show a paramount public interest.⁹ Moreover, the Statute places the burden of proof on the drainage district, a burden which could not be easily met. The conclusion thus appears certain that the equitable remedy of injunction would be unavailable to the drainage district, which must look instead to its legal remedies for damages.

WHAT ARE THE LEGAL REMEDIES AVAILABLE TO DRAINAGE DISTRICTS?

General Powers to Redress Damages

The general powers of drainage boards under the revised statutes are set forth in Wis. Stats. 88.21. Of particular importance are subsections (2), (3), and (4), which read, respectively, as follows:

- (2) Sue and be sued and compromise suits and controversies.
- (3) Bring all necessary actions for the collection of moneys and forfeitures belonging to a district under its jurisdiction and for the protection and preservation of all works and property thereof.
- (4) Obtain injunctions to prevent unlawful interference with the performance of its duties or exercise of any of its powers.

As already indicated, the injunction power under subsection (4) would probably not be of any use to the drainage board. On the other hand, subsections (2) and (3) would give the drainage board the power to sue and recover for damages to a drainage district. However, this power, in turn, raises the problem of what constitutes damage.

Damage is any actual damage that the owner of property can prove.¹⁰ If the damage is permanent and in the nature of a “taking,” the injured party may elect to sue in inverse condemnation as a means of recovery. The court in Benka v. Consolidated Water Power Co., has this to say about what constitutes a taking:

⁸ See *SEWRPC Planning Reports No. 9, 12, 13, and 26.*

⁹ This position assumes a dam or structure is in place; however, under sec. 30.12 a permit is required from the DNR for any new structures, and the considerations the DNR must make prior to issuing a permit are set out in part at sec. 30.12(2)(a) which states: The Department may, upon application and after notice and hearing, grant to any riparian owner a permit to build or maintain for his own use a structure otherwise prohibited by statute, provided such structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest (emphasis added). Also see *State v. McFarren* 62 Wis. 2d 492, 215 N.W. 2d 459 (1974), at 507 and 508. Thus, it would seem that where commercial and residential property owners' reliance was not on existing structures already in place but rather on the fate of a major flood not occurring, and that they were the ones seeking the protection of a new dam or reservoir, the balancing process would not be so heavily weighted in their favor. The effect is to provide stronger support for arguments against the erection of a structure which decreases the drainage capacity of the regional lands.

Moreover under sec. 31.02(7) the DNR has an affirmative duty to consult with each drainage district on the formation of policies for the operation and maintenance of dams.

¹⁰ Wis. Stats. 94.27, for example, sets out liability for damages by cranberry owners where damage may result from their operations.

⁷ This section is also linked with sec. 88.31 which requires certain procedures to be followed by the drainage districts, one of which is requiring a permit from the DNR for removal of a dam or obstruction in navigable waters. The Department must determine whether the public health and welfare will be promoted by the proposed removal of the dam, sec. 88.31(4)(a). And see OAG 117-74 p. 5, October 7, 1974, where the Attorney General discusses this requirement for obtaining a permit from the DNR as well as other broad powers of the DNR over drainage ditches.

Plaintiffs, whose real estate was submerged or undermined by the ponding of the water in defendant's dam . . . were deprived of a substantial use of the lands or sustained a substantial interference with their rights of possession. Such claimed damages, if properly chargeable to the backwater in defendant's dam, was a taking of the property rights of plaintiffs . . . within the meaning of that term in the statutes regulating condemnation proceedings.¹¹

This language suggests that interference with surface drainage constitutes a taking.¹² A similar taking may occur by interfering with underground drainage.¹³ If substantial interference with surface or underground drainage can constitute a taking for inverse condemnation purposes, certainly a lesser but provable interference would, at the very least, be compensable.

As urbanization in the various watersheds increases, storm water runoff will become intensified, so that the frequencies of flood occurrence can be expected to increase. If the injury to a drainage district is temporary but recurring in nature, there is a right to successive actions.¹⁴ However, unless the damage is fairly significant, bringing successive actions may not be economically justifiable. As a consequence, drainage ditches, through their drainage boards, may decide to avoid this approach.

Negotiation of a Flowage Right

If the governmental unit constructing the retention reservoir decides to acquire a flowage right, the drainage board could enter into a contract for such a sale. Negotiation is a required procedure under eminent domain law found in Wis. Stats. 32. Wis. Stats. 32.05(2a) says:

Before making the jurisdictional offer provided in sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative of the property sought to be taken for the purchase of same. In such negotiation the condemnor is authorized to contract to pay the items of compensation enumerated in secs. 32.09 and 32.19 as may be applicable to the property in one or more installments on such conditions as the condemnor and property owners may agree.

Negotiation of a flowage right is certainly a preferable means of recovering for damage, since it is simple and highly expedient. Should negotiations fail for any reason, recourse can always be made to condemnation.

Condemnation Proceedings

Condemnation proceedings usually are initiated by the taker pursuant to statutory authorization.¹⁵ Nevertheless, if the taker refuses to initiate proceedings, the injured party can himself initiate condemnation (so-called inverse condemnation). This point was clearly brought out in the Benka case,¹⁶ wherein the plaintiff owned farmland on an island in the Wisconsin River and alleged damage to his crops because of the ponding of water behind the defendant's dam. The defendant contended that the ponding was not the cause of damage and refused to initiate condemnation proceedings. Referring to the eminent domain statutes, the court said:

. . . sec. 32.04 stats. which provides two distinct methods for commencing of condemnation proceedings; one by the corporation seeking to condemn, and the other by the owner of the lands claimed to be taken.

. . . There being such a statutory remedy furnished to plaintiffs in just such a position as here presented, namely, one where a defendant denies that there is any such taking and for that reason refuses to commence condemnation proceedings, then it is clearly the legislative purpose to permit the owner of the lands to institute proceedings to once and for all recover the damages consequent upon such taking.¹⁷

This right of condemnation can be an important remedy for drainage districts where the government unit feels there has been no injury and the drainage district believes it uneconomical or inconvenient to sue repeatedly to recover for temporary but recurring injuries. Moreover, it is worthwhile noting that an inverse condemnation proceeding is conducted at the expense of the taker.¹⁸ While this useful remedy is available to the

¹⁵ Wis. Stats. 32.02.

¹⁶ Supra, note 10, and note 11, Novak v. Town of Agenda.

¹⁷ Id. at p. 474.

¹⁸ Konard v. State, 4 Wis. 2d 532, 91 N.W. 2d 203 (1957).

¹¹ 198 Wis. 472, 224 N.W. 718 (1929).

¹² In Novak v. Town of Agenda, 44 Wis. 2d 644, 172 N.W. 2d 38 (1969) the issue of inverse condemnation was also raised, but by a private landowner. In this case, however, the Town of Agenda, the defendant, was able to show to the satisfaction of the court that its installation of a culvert and landfill did not disrupt the drainage pattern of the area and therefore it was not liable to the plaintiff in the flooding of her lands, and compensation was not awarded. Moreover, as seen in the discussion of State v. Deetz, 66 Wis. 2d 1, 244 N.W. 2d 407 (1974), concerning diffused surface waters (*supra*, Chapter V), a possibility may exist for bringing a legal action under the new rule postulated there.

¹³ Blumer v. Wisconsin River Power Co., 6 Wis. 2d 138, 94 N.W. 2d 149 (1958). The court sustained the plaintiff's contention that, as a result of raising the level in the defendant's reservoir, the water table level was raised on that land causing drainage to be interfered with and rendering areas wet and useless.

¹⁴ Petersen v. Wisconsin River Power Co., 264 Wis. 84, 58 N.W. 2d 287 (1952), citing 1 Am. Jur., Actions, p. 299, sec. 118.

drainage districts, a difficult problem may be encountered in trying to prove that there has been a taking.

The plaintiff in an inverse condemnation action must introduce evidence proving that his property has been injured. An award will not rest on mere speculation where the injury may or may not have been caused by the defendant's damming of water.¹⁹ On the other hand, the proof does not necessarily have to come from expert witnesses. As the court stated in Blumer v. Wisconsin River Power Co.:

This court has held in two situations that testimony of laymen that they observed land before and after the building of a dike or dam and that it was wetter afterward than it had been before is sufficient to sustain a jury finding that the change was caused by the structure. Krcmar v. Wisconsin River Power Co., 270 Wis. 640, 72 N.W. 2d 328 (1955) and Konard v. State 4 Wis. 2d 532, 91 N.W. 2d 203 (1957). Of course, such testimony must be, as it was in those decisions, considered in the light of all the other circumstances shown.²⁰

In this case the plaintiffs contended that, because of the raising of the water level behind the defendant's dam, the water table level was raised on their land. As a result, drainage was interfered with—a remarkably similar situation to that which could arise through construction of retention reservoirs in the southeastern Region.

After injury has been proven and condemnation of the damaged land compelled, the final problem is the measure of damages. Where there has been partial inundation of property by percolating water or seepage from a reservoir created by a dam, the measure is usually the difference between the value of the land before and the value afterwards.²¹ In the Blumer case, the same criterion was approved to measure damages caused by the raising of the water table through operation of a dam. Applying this rule to drainage districts in the Southeastern Wisconsin Region, one can visualize that compensable injury might be present.

SUMMARY AND CONCLUSIONS

In summary, it would appear that a drainage district will have a cause of action if it can prove injury resulting from the backing of floodwaters into its drainage system. The

legal remedy of damages can be employed even though the equitable remedy of injunction will not be available to prevent construction or use of retention reservoirs. From the standpoint of expediency and simplicity, the drainage district might negotiate the sale of a flowage right through its drainage board. If this is not feasible, an action can be brought each time that temporary injury causing provable damage occurs; or if the damage is permanent, that is, a taking, inverse condemnation proceedings can be initiated.

On the other hand, the governmental unit constructing the retention reservoirs has probably two general approaches available. One of these might be called "active." Here the purchase of a flowage right is sought or condemnation proceedings commenced. An active approach has the advantage of doing today what might prove considerably more expensive if done at a later date. Furthermore, if any liability appears imminent, it should be fixed and limited in advance rather than left open and uncertain as to amount.

The other general approach is just the opposite, an "inactive" or "do-nothing" approach. This approach is cognizant of the fact that, as urbanization increases, the activity of drainage district can be expected to decline even further, perhaps cease altogether. In addition, owing to the infrequency, short duration, and the usually early spring occurrence of flooding, injury to existing drainage districts may be slight and difficult to prove. Thus, pursuing this alternative may be the least costly and simplest way or proceeding.²²

However, in light of the increased pressure from programs recently initiated, such as those under the federal Flood Disaster Protection Act of 1973 or Wisconsin's Shoreland/Floodplain Zoning Act, along with the requirements for environmental impact statements at both levels of government, the trend seems to be clearly away from disrupting the natural drainage patterns of any region, at least on any substantial scale. Thus, instead of starting the predictable cycle of building in lowlands and then constructing dams and retention reservoirs to protect development there, the wiser course would seem to be embodied in the newer legislation and efforts of planning bodies such as SEWRPC to delineate floodplain areas and encourage development elsewhere.

¹⁹ Application of Gehrke, 176 Wis. 452, 186 N.W. 1020 (1922); Rader v. Union Falls Power Co., 212 Wis. 37, 248 N.W. 769 (1933).

²⁰ 6 Wis. 2d 138, 94 N.W. 2d 149 (1958).

²¹ Zombrowski v. Wisconsin River Power Co., 267 Wis. 77, 64 N.W. 2d 236 (1953); State v. Adelmeyer, 221 Wis. 246, 265 N.W. 838 (1936); Fritz v. Southern Wisconsin Power Co., 181 Wis. 437, 195 N.W. 321 (1923).

²² Throughout this Chapter, reference has been made to individual drainage districts suing and acting through the district board on behalf of their constituent interests. However, this does not mean that individual farmers are prevented from suing or acting on their own behalf either in law or in equity proceedings. In fact, this may be the only alternative if all of the drainage districts in the Region become inactive.

INTERBASIN WATER DIVERSION

INTRODUCTION

One of the more important legal problems encountered in water resources planning is that of interbasin water diversion. The traditional common law riparian doctrine, which for the most part is still in effect today in Wisconsin, forbade the transfer of water between watersheds. This was regarded as a nonriparian use of water and often gave rise to a *per se* violation.¹ It must be recognized, however, that states via legislative action can and have created exceptions to this general doctrine. Major interbasin diversions have on occasion taken place in the Great Lakes area. A prominent example is the diversion of water from the Lake Michigan-St. Lawrence River drainage basin to the Mississippi River drainage basin via the Chicago and Illinois Rivers, commonly known as the "Chicago diversion."

ASSERTION OF PRIVATE PROPERTY RIGHTS AGAINST DIVERSION

Such diversions are not made, however, without great legal difficulty. Two major groups of individuals may be in a position, depending upon the quantity of water involved and the duration of the diversion, to assert their private property rights against the private or municipal agencies carrying out the diversion.

The first group are those riparians along the stream from which the diversion is made. If the diversion is total, that is, if the entire flow is permanently terminated, courts would have little difficulty finding that a "taking" of private property had occurred. A buying out of these property interests would then almost certainly be required regardless of the public benefits which might accrue from such a diversion. If less than the entire flow is diverted or if the entire flow is diverted but for only limited and determinable periods of time, then the question of reasonableness enters in. If, under all the circumstances of a particular case, the diversion is unreasonable, then compensation will probably have to be paid. If, too, the plaintiff can show damages as a direct result of either the less than total flow diversion or the total flow diversion which occurs only periodically, he may be able to recover these damages even though the diversions are otherwise deemed reasonable.

The second group of individuals who may be in a position to assert legal rights are those whose lands abut the stream or lakeshore into which the diversion is made. The diverter is liable to these riparians for land taken or damages caused as a consequence of the unnaturally increased flow. If the increased flow is permanent and overflows property beyond the normal lake or stream high water mark, a compensable "taking" of this newly overflowed property will have occurred. If the increased flow is minimal or occurs only occasionally, the question of reasonableness, to be determined in the context of all of the relevant facts in each particular case, is again present. If found unreasonable, compensation will have to be paid. Also, if the plaintiff can show damages, he will probably be compensated though in other respects the increased flow may be deemed reasonable.

Obviously, if the diversion is of any major proportion, the number of people in either or both of these two groups of riparians may be very large. Consequently, the amount of land involved and the total cost of compensation for land taken and/or for damages caused may be great. This can be and, in fact, is a major factor in preventing such stream diversions.

Consent of State Agencies

Another problem arises in Wisconsin with regard to stream diversions. Under section 30.18, Wis. Stats., which deals with water diversion, it is stipulated that:

1. When Diversion Lawful

- a) It is lawful to temporarily divert the surplus water of any stream for the purpose of bringing back or maintaining the normal level of any navigable lake or for maintaining the normal flow of water in any navigable stream, regardless of whether such navigable lake or stream is located within the watershed of the stream from which the surplus water is diverted.
- b) Water other than surplus water may be diverted with the consent of riparian owners damaged thereby for the purpose of agriculture or irrigation but no water shall be so diverted to the injury of public rights in the stream or to the injury of any riparian located on the stream, unless such riparians consent thereto.²

¹ *There is language in Munninghoff v. Wisconsin Conservation Comm.*, 255 Wis. 252, 38 N.W. 2d 712 (1949), subsequently interpreted by the Attorney General 39 Opinions of Attorney General 567 (1950), which could be interpreted to mean that interwatershed diversions may still be a *per se* violation of the law in Wisconsin.

² *Surplus water as used in this Chapter means any water of a stream which is not being beneficially used. The Department of Natural Resources may determine how much of the flowing water at any point in a stream is surplus water, at sec. 30.18(2).*

If a proposed use falls into one of the statutorily defined categories, then an application for a permit to divert the water must be made to the Wisconsin Department of Natural Resources. The Department then must hold a public hearing to determine if in fact surplus waters exist or, if not, that all the riparians injured by the diversion have consented before issuing a permit.³ Moreover in the recent and important case of Omernik v. State, which was previously analyzed in Chapter III, the Wisconsin Court found that this Statute and its requirements applied to nonnavigable streams from which water was diverted as well as navigable streams.⁴

However, if the anticipated use of diverted water is other than for one of the categories stipulated under section 30.18, Wis. Stats. then the common law test of a "reasonable use" will be invoked. This situation arose in another recent case of State ex rel. Chain O'Lakes P. Asso. v. Moses where it was stated:

What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource.⁵

Thus, what is "reasonable" is a question of fact, but the diversion of any major quantity of water would be difficult and must be considered unlikely.

INTERSTATE LITIGATION

A last but important factor mitigating against interwatershed stream diversions which in any way affect interstate or international waters, as might well be the case in southeastern Wisconsin, is the long-standing litigation between Wisconsin and Illinois in the Supreme Court of the United States concerning the "Chicago diversion" and developments arising therefrom.⁶ A central point in Wisconsin's argument before the Court is that interwatershed diversions, especially of the magnitude involved, which reduce or alter the level or flow of waters in one state or country in favor of another state or country are illegal. Wisconsin's long-held tactical position in this litigation would be seriously weakened if it per-

mitted a stream diversion within the Region which altered in Wisconsin's favor the natural flow of waters between Wisconsin and Illinois. The advantages that such a diversion within the Region would have to the Region and to the State as a whole would have to be most carefully weighed against the long-standing and deeply felt issues involved in this United States Supreme Court litigation.

It should be noted, however, that continuing jurisdiction is being asserted by the Supreme Court. Any future modifications to this decree will come about as a result of this open ended approach. In addition, this continuing jurisdiction serves notice that the decree is subject to modification upon a finding by the Supreme Court that such an action is proper.

SUMMARY

A number of major obstacles appear in the way of any large-scale interwatershed stream diversion project which might be contemplated in the Region. They include the rights of two major groups of riparians—those from whom and those to whom water would be diverted; the problems of state consent; injury to "public rights" in navigable waters; and the narrow language of Wis. Stats. 30.18; and lastly, the tactical legal climate in which Wisconsin finds itself vis-a-vis this issue and the "Chicago diversion." This is not to suggest that large multipurpose interwatershed stream and/or lake diversions can never occur, but at present in Wisconsin they must be considered most improbable from a practical and legal standpoint.

³ Sec. 30.18(4) of the Wis. Stats.

⁴ 64 Wis. 2d 6, 218 N.W. 2d 734 (1974), at 12 and 13 and see *supra*, notes 79-94 in Chapter III. The court also found that permits are required for irrigation and agricultural uses whether the water is surplus or nonsurplus, *Id.*, at 17.

⁵ 53 Wis. 2d 579, 582, 193 N.W. 2d 708 (1972).

⁶ Wisconsin et al. v. Illinois, 388 U.S. 426 (1966). The United States Supreme Court has retained jurisdiction over this case which involves all the states bordering the Great Lakes, "[f]or the purpose of making any order or direction or modification of this decree, or any supplemental decree which it may deem at any time to be proper in relation to the subject matter in controversy," at 430. At that time, the Supreme Court enjoined the Cities of Chicago, Evanston, Highland Park, Highwood, and Lake Forest and the Villages of Wilmette, Kenilworth, Winnetka, and Glencoe, the Elmhurst-Village Park-Lombard Water Commission, the Chicago Park District, and the Metropolitan Sanitary District of Greater Chicago "from diverting any of the waters of Lake Michigan or its watershed into the Illinois waterway whether by way of domestic pumpage from the lake, the sewage effluent derived from which reaches the Illinois waterway, or by way of storm runoff from the Lake Michigan watershed which is diverted into the sanitary and ship canal, or by way of direct diversion from the lake into the canal, in excess of an average for all of them combined of 3,200 cubic feet per second," at 427. This decree is subject to future modification as part of the Supreme Court's continuing jurisdiction.

Chapter X

PRIVATE MILL DAMS

INTRODUCTION

One of the problems encountered in the Southeastern Wisconsin Region is the disposition of existing mill dams. Under the situation in question, the dam has created a flowage or impoundment, and landowners whose lands abut the flowage have "relied" over a period of time on the artificial condition created by the dam. This reliance is evidenced by home and recreational facility construction in close proximity to, and because of, the stored water.

MAINTENANCE ENFORCED BY OWNERS ABUTTING FLOWAGE

In Tiedeman v. Middleton the Supreme Court stated the applicable law:

If an artificial body of water is created, landowners incidentally benefited are entitled to injunctive relief to prevent disturbance of the new state of the water. Wisconsin prescriptive-rights cases involve proprietors of lands which border bodies of waters, who in some way relied on the new water level which was maintained by another's dam. These cases hold that when the artificial level of the water is continued for a considerable period of time, usually twenty years, it becomes a natural condition.¹

So in the case of a dam which created a flowage more than 20 years old, owners on the flowage seemingly are able to compel the owner of the dam to continue to maintain it.

MAINTENANCE ENFORCED BY STATE

Can a similar duty be enforced by the State of Wisconsin or by a local unit of government? The Legislative Council studied this problem in 1959.² It concluded that the Wisconsin Supreme Court apparently never has been confronted squarely with the issue of whether the owner of a dam may be prevented from abandoning it because of the public rights in the waters impounded by the dam.

The Court, however, has commented on this problem in deciding related issues. In Haase v. Kingston Cooperative Cremery, the problem was to determine the ownership of the ice on a body of navigable water created by a mill dam.³ To solve this problem, it was first necessary to decide who owned the land under the water. After deciding that the State did not obtain title to the land underlying navigable water created by artificial means, the Court went on to comment as follows on the public rights which had attached to the waters:

. . . it does not seem necessary, in order to secure to the public the rights which the public has enjoyed for a period of time equal to that required by the statute of limitations, that the title to the land beneath the waters should be held to have thereby passed from private ownership to the ownership of the state. The public is fully protected in its rights by the remedy applied in Smith v. Youmans, 96 Wis. 103, 70 N.W. 115 (1897), where the owner of the dam was restrained from tearing it down at the suit of riparian owners abutting on the lake. While a dam is a fairly permanent institution, it is by no means an agency of perpetual existence. It will decay and wear away in time, and, when it does, the waters will recede to their natural level. While the owner of the dam may be restrained from affirmatively interfering with the artificial level which he has created, it is not at all clear how he could be coerced to make the repairs necessary for its perpetual existence, especially when the proprietor of the dam becomes bankrupt, as occasionally happens.

There are cases in which the Court has stated that the trust doctrine would prevent the State from changing all or a substantial part of a lake into dry land, but these cases have involved natural lakes rather than man-made ones, and the act involved was the positive one of filling portions of a lake rather than the negative one of abandoning a dam.⁴ It is, of course, a matter of conjecture of how a case which squarely presents the public rights

¹ 25 Wis. 2d 443 (1964).

² Staff Report, SR-61-2, "Problems Relating to Abandonment of Dams," (December 1959).

³ 212 Wis. 585, 250 N.W. 444 (1933).

⁴ State v. Public Service Commission, 275 Wis. 112, 81 N.W. 2d 71 (1957); Madison v. State, 1 Wis. 2d 252, 83 N.W. 2d 674 (1957).

issue would be decided if it should arise; but it seems probable that it would at the most be only one of the factors to be considered in a dam abandonment proceeding rather than an absolute bar to abandonment.⁵

However, in the case of dams built under permits issued by the Railroad Commission, Public Service Commission, and now the Department of Natural Resources, it may be that a specific term of the permit would govern. Under sections 31.14 and 31.18, Wis. Stats., permits may impose certain obligations and duties on maintaining a dam which are enforceable by the DNR.⁶

The 1961 legislature created section 31.185, Wis. Stats., which provides in part:

No owner of any dam shall abandon or remove or alter or transfer ownership of such dam without first obtaining a permit therefor from the department.

The procedure for granting or denying a permit was subsequently amended by Chapter 90, Laws of 1973. Under the new provisions the DNR may hold a hearing on the application or it may have notice published of its intent to process the application without a public hearing.⁷ If a hearing is not requested, the DNR may waive this requirement and proceed to make its determination. In either event the sole statutory standard governing the Department's determination to grant a permit to abandon a mill dam is very general and it provides:

⁵ Under sec. 31.19 the DNR does have the authority to issue orders compelling dam owners to maintain and repair dams which pose a danger. This presumes again that the owner can be found and is solvent. Moreover, under this section the DNR itself may cause a drawdown to protect persons or property.

⁶ For example, sec. 31.14(2)(a) provides that a special assessment district under secs. 31.38 and 66.60 may be established to maintain the dam, or the applicant must furnish evidence in some other form that will reasonably assure the DNR that the dam will be maintained for a reasonable period of time not less than 10 years. In *Daly v. Natural Resources Board*, 60 Wis. 2d 208, 208 N.W. 2d 839 (1973) a trust fund was established and the Town and County of Menominee accepted title to the dam agreeing to help maintain the dam and the court found this sufficient.

Furthermore it should be noted that the DNR is given jurisdiction over dams constructed on nonnavigable waters under sec. 31.33 as well as dams on existing nonnavigable waterways that affect navigable bodies of water; see OAG 117-74, October 7, 1974, at 6 and 7. However, permits are not required for their operation under sec. 31.33. But under that section as well as sec. 31.12, DNR approval of construction plans is required.

the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

Another alternative to the actions described above in maintaining the dams is the possibility of using State funds such as those in the Outdoor Recreational Aids Program (ORAP). A recent opinion by the Wisconsin Attorney General stated that, if a public recreational use was evident, then the DNR may pursue this approach.⁸ However, the Department was advised to purchase the entire area to be used for implementing the program. The opinion also noted that the broad language creating the ORAP program may enable funds to be used merely on repairing or maintaining a dam itself. This would result, in all probability, that less monies would be expended but it would necessitate either that the flowage created was navigable and that there was a dedication to or prescription by the public, or that the waters were navigable prior to construction of the dam.⁹ For preserving public interest in such waters over a long period of time this latter approach may be the most viable.

SUMMARY

In short, riparians abutting the flowage created by a dam seem best able to compel the maintenance and upkeep of the dam. A local unit of government or the State itself has only limited powers to compel such upkeep; and these powers are based on some combination of arguments involving the preservation of public rights in the flowage created; public safety, health, and welfare; or the specific terms and inferences which may be found in dam permits issued pursuant to statute by the Railroad Commission, the Public Service Commission, or the Department of Natural Resources. The other option is for the State to allocate funds, such as those in the ORAP program, for the repair and maintenance of a dam where a public recreational use can be established.

⁷ Sec. 31.06(1), as amended by Chapter 90, Laws of 1973. However, since sec. 31.06 is not incorporated into sec. 31.33, it is not required to go through the hearing process under sec. 31.06 if the dam is over a nonnavigable body of water. A hearing may be required if an environmental impact statement is filed under sec. 1.11.

⁸ OAG 68-74, July 2, 1974.

⁹ *Id.* The opinion cited as authority on these points the cases of *Mendota Club v. Anderson*, 101 Wis. 479, 493 (1899) and *Haase v. Kingston Cooperative Creamery Association*, 212 Wis. 585, 250 N.W. 444 (1933). Furthermore State funds may be used to maintain or replace a dam under sec. 29.04(2) if the conservation of any species or variety of wildlife may be preserved if the dam is located wholly upon State lands. Also, secs. 20.245 and 44.02 authorize the State Historical Society to appropriate funds in conjunction with the ORAP program if a public use is involved, *supra*, note 8, at 7 and 8.

Chapter XI

ORGANIZATION OF LOCAL GOVERNMENTS TO CONSTRUCT WATER CONTROL FACILITIES COVERING AN ENTIRE WATERSHED

INTRODUCTION

An important question which arises in watershed plan implementation is: How may local governments organize to construct water control facilities covering an entire watershed? This question arises from the fact that a watershed covers a land area delineated by a series of natural topographic features. Sound physical planning principles dictate that such a watershed be studied in its entirety if practical solutions are to be found for water-related problems and that plans and plan implementation programs be formulated which deal with the interrelated problems of the watershed as a whole. A watershed, however, typically is cut in a most haphazard fashion by mixture of man-made political boundary lines—county, city, village, and town. When public water control facility projects covering and serving an entire watershed are being contemplated, these artificial demarcations become important because they limit the jurisdiction, the physical area, within which any one particular arm of local government may act.

ALTERNATIVE MACHINERY FOR THE CONSTRUCTION OF WATER CONTROL FACILITIES

The question may well be asked then: How is even an entire watershed study possible by anything less than a federal or state agency? Such a study might be beyond the legal powers of any one local governing body unless the watershed is entirely within the jurisdictional confines of that governing body—an unlikely event. However, Wis. Stats. section 66.945, allows local units of government to create, for purposes of research and study, a regional planning commission.¹ A watershed, therefore, lying wholly within the jurisdictional area of the SEWRPC, which was created pursuant to this statute, is capable of being studied in its entirety by the Commission. But, section 66.945, Wis. Stats., does not delegate implementation or enforcement powers to regional planning commissions, thus it would seem that SEWRPC may not assume the role of implementing agent in watershed improvement projects.² The Wisconsin Statutes do allow for other local government entities to undertake comprehensive public works projects within an entire watershed.

THE USE OF SPECIAL DISTRICTS

Present legislation, Chapter 92, Wis. Stats., authorizes the creation of soil and water conservation districts, the boundaries of which are coterminous with county lines.

These districts to date have had a strong agricultural orientation. In southeastern Wisconsin efforts have focused on inducing individual farmers to use modern soil management and conservation techniques. Respective county board agricultural committee members are ex officio the board of supervisors of the soil and water conservation districts. Of major practical significance is the fact that these districts have no taxing, special assessment, or bonding power. They are completely dependent upon county funds and/or the United States Department of Agriculture for their finances. Federal money under Public Law 83-566 can be obtained for the construction of flood control projects only if a number of fairly stringent preconditions are met.³ These include: 1) land necessary for the project must be acquired by the local district at its cost; 2) the district must agree to operate and maintain the structure at its cost; 3) agreements to carry out recommended soil conservation measures and proper farm plans must have been obtained from owners of not less than 50 percent of the lands situated in the drainage area above the project; 4) the project must show a favorable cost-benefit ratio; and 5) the total watershed area affected may not exceed 250,000 acres, and no single flood control structure may have more than a 5,000 acre foot floodwater detention capacity.⁴

However, if it is thought that any proposed water control facility within the Region would meet these requirements, these districts may serve as a conduit for federal financing of the project. The possibility exists, moreover, for soil

²In the past some arguments have been advanced that the SEWRPC or other regional planning agencies may have the authority under sec. 66.30 and acting as a municipality to enter into a valid intergovernmental contract which would lead to the construction of comprehensive public works projects. However sec. 66.945(8)(a) specifically states that the role of regional planning commissions is strictly advisory to the local governments. Furthermore in 61 OAG 313, August 20, 1971 the Attorney General expressed the opinion that a municipality operating under sec. 66.30 may only perform to the extent that it could under its own statutory authority, at 314 and see *infra*, notes 12 and 13 for further analysis.

³16 USCA, sec. 1001 et seq.

⁴16 USCA, secs. 1002-1004.

¹Sec. 66.945(8)(a).

and water conservation districts to forge agreements with one another in undertaking projects of this nature under section 92.13, Wis. Stats.⁵

In addition to soil and water conservation districts, Wisconsin law provides for the formation of drainage districts under Chapter 88, Wis. Stats. These districts may

purchase, construct, maintain and operate all levees, bulkheads, reservoirs, silt basins, holding basins, floodways, floodgates and pumping machinery necessary to the successful drainage or protection of any district or of any considerable area thereof, whether located within or outside the district.⁶

This Chapter also fosters a linkage between the Board of Soil and Water Conservation Districts and drainage districts by requiring under section 88.22, Wis. Stats., that the Board give its consent for the drainage district to enter into a contract with the United States Government to receive federal benefits or funding for "flood protection or the conservation, development, utilization and disposal of water.

Chapter 87, Wis. Stats. also provides for organizing flood control boards to abate or diminish flood conditions.⁷ A board established under this Chapter may contract to build improvements to reduce flooding according to the plans and specifications prescribed by the Wisconsin Department of Natural Resources.⁸ These projects may be financed through the municipalities that are

⁵The State Legislature also has specifically mandated that there be uniformity and coherence in comprehensive plans drawn by the districts for the conservation of soil and water resources. Sec. 92.08(4), Wis. Stats., requires that all plans developed by the district conform to plans adopted by the respective regional planning commissions, if the county in which the district is located is included in a regional planning commission.

⁶Sec. 88.21, Wis. Stats., and see the discussion on drainage board powers in Chapter VIII.

⁷Sec. 87.12.

⁸Sec. 87.12(5). Wisconsin Statute 87.03 also provides other than by the DNR's initiative that "any 25 owners of lands which have been recurrently flooded by the waters of any designated stream, lake, or pond or any tributaries thereof, or any public corporation within whose boundaries are located any lands subject to such overflow, may file with the department a written petition setting forth: 1) (t)he necessity for the construction of such works of improvement as will abate or substantially diminish the overflow of such lands, together with a statement that the construction of such works is required by the public health, safety, convenience or welfare."

benefited by the projects by means of levying special assessments,⁹ borrowing money and issuing bonds,¹⁰ by grants and donations, and by exercise of the general power of taxation.¹¹

The same statutory authority that provides for formation of flood control boards also stipulates that the boards will be composed of three members appointed by the Governor, with the additional qualification: "(a) that one member be certified by the board of supervisors of the county in which the major part of the proposed improvement is located; (b) one member to be certified by the board of supervisors of the county in which the largest amount of property to be benefited is located; and (c) one member to be chosen by the governor from the drainage area."¹²

GOVERNMENTAL COORDINATION UNDER SECTION 66.30, WIS. STATS.

Of more immediate and practical concern are devices and means presently available to units of government within the Region to enable them jointly to construct public works projects. If it is assumed that the benefits of water control facilities accrue in some rough proportion to all of the municipal units involved and that the self-interest and sense of propriety of each would impel them all to be parties to a contract, then the contractual provisions of Wis. Stats., section 66.30, seem completely capable of dealing with the problem. A commission, separate and distinct from SEWRPC, might be set up to administer the contract; or any other administrative device mutually agreed upon might be set up to carry out the agreement.¹³ In this situation SEWRPC could offer its good offices as a broker to help effectuate a section 66.30 contractual agreement since under the enabling legislation for regional planning commissions it is authorized to:

⁹As provided under sec. 66.60.

¹⁰As provided in Chapter 67.

¹¹Sec. 87.076. In addition, the flood control board may acquire the necessary lands in furtherance of such projects, and it has the power of eminent domain, as well as the legislative authorization to borrow money for the construction of a reservoir, secs. 87.12(5) and (6).

¹²Secs. 87.12(1)(a) and (b) and (c).

¹³However, a caveat noted in 60 OAG 314, August 20, 1971, is that any municipality involved in such a cooperative venture may contract only to the degree or extent that it alone could perform the functions involved in the cooperative contract. Thus, the extent to which any group of municipalities may join together in a given enterprise under sec. 66.30 is limited to the powers possessed by the least of them.

enter into a contract with any local unit within the Region under section 66.30 to make studies and offer advice on: 1) land use, thoroughfares, community facilities, and public improvements; 2) encouragement of economic and other developments.¹⁴

Of particular interest, if Wis. Stats. 66.30 is used, is the legislative grant of bonding authority to commissions established under its provisions to help effectuate a Wis. Stats. 66.30 contractual arrangement to finance the "acquisition, development, remodeling, construction and equipment of land, buildings, and facilities for regional projects."¹⁵

METROPOLITAN SEWERAGE COMMISSIONS

If some of the requisite municipal units within a particular watershed are unwilling contractually to bind themselves for the purposes outlined, it seems likely that metropolitan sewerage commissions formed under sections 66.22 and 59.96, Wis. Stats., could carry out public works improvements. The powers and duties of these commissions were analyzed in Chapter VII but pertinent provisions of their enabling legislation would seem to indicate that they would carry out these projects. For example, under section 59.96(6)(a), Wis. Stats., it is provided:

The metropolitan sewerage commission (of the County of Milwaukee) . . . may improve any watercourse within the district by deepening and widening or otherwise changing the same where in the judgment of the commission it may be necessary in order to carry off surface or drainage water, and such power may be exercised outside of the district in any case

¹⁴ Sec. 66.945(12). And sec. 66.30(1) itself specifically includes regional planning commissions as municipalities having the authority to provide such services.

In the opinion by the Attorney General, supra, note 13, Id., it was further noted in comparing the intent and authority contained within secs. 66.945 vis-a-vis 66.30 that: sec. 66.945 would be used when the activities are limited to general planning, affecting a substantial number of political subdivisions with varying interests; and that sec. 66.30 would be utilized to plan and carry out specific projects in which a small number of municipalities have a common interest, at 317. The projects of constructing water control facilities would seem to be narrow enough in its objective to permit a coordinative effort under sec. 66.30, although SEWRPC would provide an existing and experienced vehicle to effectuate such a coordinated project, having authority to do so under both secs. 66.30(1) and 66.945(12).

¹⁵ Sec. 66.30(3m), Wis. Stats.

where any such watercourse flows from within the district to a point outside the district and then returns to the district, and such power may be exercised outside the district in any case where any such watercourse flows from a point within the district to a point outside the district.¹⁶

For those counties not having a population in excess of 500,000 the statutes provide that a metropolitan sewerage commission may:

construct, enlarge, improve, replace, repair, maintain, and operate any works determined by the commission to be necessary or convenient for the performance of the functions assigned to the commission;¹⁷ and

the commission may plan, project, construct and maintain storm sewers, works and facilities for the collection, transmission, treatment, disposal or recycling of storm water effluent to the extent such is permitted for sewage.¹⁸

Thus, where a large volume of water is to be controlled within a district or becomes a flood threat as a result of commission works, courts may allow a metropolitan sewerage commission to construct improvements designed to alleviate this hazard.¹⁹

SUMMARY

Inasmuch as the practical solutions for construction of water control facilities covering an entire watershed will usually involve a multitude of jurisdictions, a principal problem will involve coordinating the various governmental units and their efforts. Perhaps the best approach is provided by the Wisconsin Statutes in section 66.30 which enables local governmental units to apply their authorized functions together in an effort to solve common problems which often exceed their jurisdictional boundaries. Furthermore, these local governmental units may draw upon the expertise and assistance of the SEWRPC, since the planning and construction of such facilities will often be regional in scope and certainly in impact, and the Commission is familiar with the problems of coordinating such undertakings.

¹⁶ However, the commission may not divert surplus or flood waters into another watershed, sec. 59.96(6)(a).

¹⁷ Sec. 66.24(5)(a).

¹⁸ Sec. 66.24(7).

¹⁹ Presumably if a potential hazard is created outside the district by projects undertaken by a commission, the courts would allow them to take precautions if necessary outside the district to mitigate this potential problem.