



---

---

## WISCONSIN LEGISLATIVE COUNCIL

---

---

### NAVIGABILITY AND DRAINAGE DITCHES

Room 225 Northwest, State Capitol  
Madison, Wisconsin

January 23, 2007  
10:00 a.m. – 2:30 p.m.

[The following is a summary of the January 23, 2007 meeting of the Special Committee on Navigability and Drainage Ditches. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc>.]

---

#### Call to Order and Roll Call

Chair Lasee called the meeting to order. The roll was called and it was determined that a quorum was present.

COMMITTEE MEMBERS PRESENT: Sen. Alan Lasee, Chair; Sen. Glenn Grothman; Reps. Sheryl Albers and Eugene Hahn; and Public Members John Ainsworth, Jerry Bradley, David Gollon, George Meyer, and Scott Storlid.

COMMITTEE MEMBERS EXCUSED: Rep. Barbara Gronemus.

COUNCIL STAFF PRESENT: Rachel E. Letzing, Senior Staff Attorney; and David L. Lovell, Senior Analyst.

APPEARANCES: Terry C. Anderson, Director, Legislative Council; Mary Ellen Vollbrecht, Section Chief, Waterways Protection, Department of Natural Resources (DNR); and Michael Cain, Attorney, DNR.

<p><b>*ATTENTION:</b> This was the final meeting of the Special Committee on Navigability and Drainage Ditches. Committee members are requested to send any corrections regarding these Minutes to the Legislative Council staff. After the incorporation of any corrections, these Minutes will be considered approved by the committee.</p>
---

## **Opening Remarks**

**Terry C. Anderson**, Director of the Legislative Council, welcomed the members to the first meeting of the Special Committee. Mr. Anderson thanked the members for serving on the committee, stressed the importance of citizen involvement in the legislative process, and reviewed some procedural and administrative matters.

## **Introduction of Committee Members**

Chair Lasee introduced himself and asked committee members to introduce themselves and explain their interest in serving on the committee. Chair Lasee then shared his perspective on the issues before the Special Committee.

## **Invited Speaker**

**Mary Ellen Vollbrecht, Section Chief, Waterways Protection, DNR**, provided an overview of the statutory and common law definitions of navigable waters and the evolution of the “navigable in fact” test. Ms. Vollbrecht noted that an additional component of the navigability test for streams is that the water must be periodic and recurring and also that the water flow occurs long enough for a bank to exist. She noted that under s. 30.10, Stats., artificial channels that drain water from land and that are used for agricultural purposes are not navigable unless it is shown they were navigable streams before ditching. Ms. Vollbrecht explained the methods DNR staff use to determine navigability, which include consulting the database of previous permit applications, using U.S.G.S. topographic maps, soil survey maps, aerial photography, and original government land surveys. She added that if these methods are not sufficiently conclusive, DNR staff visit the site and determine the stream width and depth at the site and upstream, the bed and bank substrate, and will perform a float test if necessary using a commercially available canoe or kayak. Ms. Vollbrecht stated that in order to make navigability determinations for farm drainage ditches, DNR uses information in addition to the standard methods to determine navigability of a stream, including direct observation of agricultural activity.

In response to several questions from committee members, Ms. Vollbrecht provided the following information:

- Water management specialists must go through a training program, have a mentor, and are unable to issue final decisions without going through this training. In addition, a program review provides additional oversight and guidance for specialists. A citizen may call a supervisor to request their involvement in a navigability determination.
- Inconsistencies in navigability determinations across the state may be due to the fact that the amount of water in a location may change over time.
- The DNR has created a general permit under s. 30.123, Stats., which provides standards for the replacement and placement of culverts.
- The Department of Transportation (DOT) is subject to different procedural requirements in ch. 30, Stats., which requires DOT to consult with DNR regarding construction projects that

may affect waters of the state, but DOT applications are subject to the same standards as others.

- Nothing in the definition and application of navigability precludes the maintenance of drains.
- Typically, once a determination of navigability is made, that is the final decision of the department. However, situations exist where because of stormwater management, flow may be redirected or infiltrated such that a waterway is no longer navigable.
- Drainage district boards may apply for a dredging permit; however, the property owner must be the applicant for a permit for placement of a structure.

Representative Albers stated that the Swampland Act of 1850 requires the maintenance of levees, dikes and drains and is included in land abstracts. She then distributed a handout containing proposed draft language regarding applicability of the Swampland Act to committee members. Representative Albers asked why the DNR does not recognize the mandate in the Act. Ms. Vollbrecht responded that nothing in the state's definition or applicability of navigability precludes the maintenance of drains and that DNR routinely issues permits to do that. Mr. Cain noted that the federal Clean Water Act requires that if dredging occurs that results in a deposit of material, it must comply with the Act; however, some exemptions for maintenance of currently serviceable ditches are included, which DNR also factors into their analysis. He further noted that there have been changes in federal and state law since the Swampland Act was enacted, and stated that this issue would need to be researched further before being considered by the committee.

### **Committee Discussion**

At the conclusion of Ms. Vollbrecht's testimony, Chair Lasee explained the pictures displayed in the room. One of the pictures was of a ditch created when a quarry pumped water onto an adjacent property. Chair Lasee noted that DNR has since determined that this ditch is navigable and noted that constituent problems often occur when DNR has determined that a ditch is navigable even when there is no water flowing through or standing in it. Chair Lasee then asked how the DNR determines permit fees. Ms. Vollbrecht responded that ch. 30 permit fees are set by statute and may be changed by administrative rule.

Mr. Lovell then led the committee through a discussion of WLC: 0065/1. Committee members expressed a variety of concerns regarding the creation of a navigability review committee in SECTION 1 of the draft, including the unanimous vote requirement, expertise of committee members, authorizing only persons who have an interest in land to come before the committee, and the geographical representation of committee members. Representative Albers further recommended adding drainage district boards to the list of required committee members.

Committee members then discussed the draft's provision requiring the DNR to develop and make available maps and data showing the results of navigability determinations and to create administrative rules specifying procedures and standards it follows to determine navigability. Committee members agreed that providing updated maps would allow the public to know where navigable streams are located. Ms. Vollbrecht noted that DNR staff currently enter informal navigability determinations into a database and DNR has recently begun requesting GPS information, if

available, on application forms. Ms. Vollbrecht further explained that this provision, similar to a rule-making provision in 2005 Assembly Bill 500, requires DNR to set forth current common law and methods of determining navigability in administrative rule, rather than authorizing DNR to change these standards.

The committee then engaged in a lengthy discussion regarding the distribution of maps and a DNR fact sheet advising landowners to consult the navigable streams database before engaging in any activity that may be subject to regulation, and a method of notifying landowners that wetlands or navigable waterways may be present on their property. The committee discussed alternatives to the provision in WLC: 0056/1 which requires the county clerks to ensure that a DNR fact sheet on regulation of activities affecting navigable streams is distributed to applicants for building permits and zoning variances. Mr. Gollon noted that DNR should not be involved too early in the process and that it may be preferable to direct persons to a private consultant first. Mr. Storlid stated that an official at the county level should be responsible for providing information regarding any development constraints on a property. Ms. Vollbrecht noted that the timing of getting information to landowners is important and that currently the offer to purchase form only includes a provision where the seller can warrant he or she has no knowledge of wetlands on the property, but that often sellers are not in the best position to know.

At the conclusion of the committee's discussion, Chair Lasee offered the following proposal to the committee:

- Remove SECTION 1 of the draft creating a navigability review committee and in the alternative specify that a DNR determination of navigability be made under the current declaratory judgment statute, s. 227.41, Stats., and that a declaratory judgment regarding a navigability determination is appealable to the circuit court in the county where the land is located. Under this provision, a person who wants to challenge a determination of navigability would be entitled to an informational hearing held by DNR, and would be able to appeal the DNR decision straight to circuit court in the county where the land is located instead of going through a contested case hearing held by an administrative law judge.
- Require DNR to prepare maps of navigable streams. Further require DNR to add streams to a mapping database as it makes navigability determinations, and to incorporate information from earlier determinations of navigability as resources allow. Also require DNR to create administrative rules that describe the standards in common law and statutes for determining whether a body of water is a lake or stream, the methods used by DNR for making determinations of whether a lake or stream is navigable, and the kinds of scientific evidence that may be used to show that a farm drainage ditch was a navigable or non-navigable stream before ditching.
- Require DNR to create and periodically update a digital navigable streams database and make the database available to the general public on the Internet.
- Require that forms used for an offer to purchase real property include a statement that the presence of wetlands or navigable waterways on or adjacent to the property could affect the purchaser's use of the property and that the buyer is advised to consult DNR or a private professional consultant regarding the possibility that wetlands or navigable waterways are on or adjacent to the property.

- Require that applications for building permits include a statement that the presence of wetlands or navigable waterways on or adjacent to the construction site could result in the need to get authorization from DNR for the proposed project, and that the applicant is advised to consult DNR or a private professional consultant and the local zoning authority for information about possible wetlands or navigable waterways on or adjacent to the construction site. This requirement will have a delayed effective date in order to allow local governments to exhaust their current supply of building application forms.

The committee then briefly discussed the provision in 2005 Assembly Bill 500 which maintains the current statutory exemption from ch. 30 regulation for farm drainage ditches, but clarifies that a project for an agricultural purpose located in or adjacent to a farm drainage ditch is exempt from ch. 30 permit requirements unless the farm drainage ditch was a navigable stream before ditching. This clarification specifies that the exemption applies to a project for an agricultural purpose, not to the farm drainage ditch itself. Representative Albers stated that this provision restates current law and does not go far enough.

*Chair Lasee then moved, seconded by Mr. Meyer, that this provision be included in the committee's recommendations. The motion passed on a roll call vote of Ayes, 8 (Sens. Lasee and Grothman; Rep. Hahn; and Public Members Ainsworth, Bradley, Gollon, Meyer, and Storlid); Noes, 1 (Rep. Albers); and Absent, 1 (Gronemus).*

The committee agreed that Legislative Council staff will draft a bill containing these proposals, and a separate bill based on a proposal from Representative Albers, regarding drainage district board orders. Legislative Council staff will then send the two bill drafts to committee members to vote on by mail ballot.

### **Adjournment**

The meeting was adjourned at 2:30 p.m.

REL:jal