



WISCONSIN LEGISLATIVE COUNCIL
PROPOSED REPORT TO THE LEGISLATURE

SPECIAL COMMITTEE ON
NAVIGABILITY AND
DRAINAGE DITCHES

March 5, 2007

PRL 2007-06

Special Committee on Navigability and Drainage Ditches

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PART I

KEY PROVISIONS OF COMMITTEE RECOMMENDATIONS

The Special Committee on Navigability and Drainage Ditches recommends the following proposals to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature.

WLC: 0065/2, Relating to Appeals From the Determination That a Stream is Navigable, Mapping of Navigable Streams, the Exemption for Certain Drainage Ditches From Certain Permit Requirements, and Notices in Forms for Building Permit Applications and for Offers to Purchase Real Property Regarding Wetlands and Navigable Streams and Requiring Rule-Making

WLC: 0065/2 does all of the following:

- Specifies the administrative procedure the Department of Natural Resources (DNR) must use in making determinations that a waterway is navigable.
- Directs the DNR to promulgate administrative rules that describe the methods it uses for making determinations of navigability.
- Specifies that appeals of determinations of navigability are made directly to the circuit court in the county in which the affected land is located.
- Requires the DNR to develop and make publicly available maps and data that show the results of its determinations of navigability.
- Renumbers and modifies the current statutory exemption for farm drainage ditches to provide an exemption from regulation, rather than an exemption from the definition of “navigable,” and clarifies the exemption so that it applies only to projects for an agricultural purpose.
- Requires that forms for building permit applications and offers to purchase real property include notices regarding potential implications of any wetlands or navigable waters that may be present on the building site or real property.

WLC: 0091/1, Relating to Creating a Presumption of Reasonableness for Drainage District Board Orders

WLC: 0091/1 requires that if a drainage district board has issued an order requiring maintenance or repair of a drain in the district, and the order is challenged, the hearing examiner or circuit court must presume that drainage district board order is reasonable.

PART II

COMMITTEE ACTIVITY

Assignment

The Joint Legislative Council established the Special Committee on Navigability and Drainage Ditches and appointed the chairperson by a June 9, 2006 mail ballot. The committee was directed to review methods to clarify “navigability” as defined in statutes and administrative rules, with a focus on how the definition of navigability impacts the regulation of drainage ditches and ditches with no stream history. The committee was also directed to review the methods the DNR uses to determine navigability.

Membership of the Special Committee, appointed by an August 1, 2006 mail ballot, consisted of two Senators, three Representatives, and five public members. A list of committee members is included as *Appendix 3* to this report.

Summary of Meetings

The Special Committee held one meeting in the State Capitol in Madison on January 23, 2007.

At the January 23, 2007 meeting, the committee heard testimony from Mary Ellen Vollbrecht, Section Chief, Waterways Protection, DNR, regarding the statutory and common law definitions of navigable waters and the "navigable in fact" test, and the current law exemption for farm drainage ditches under s. 30.10, Stats. After Ms. Vollbrecht's presentation, the committee engaged in a discussion of WLC: 0065/1, relating to appeals from the determination that a stream is navigable, and the mapping of navigable streams, and possible methods of notifying landowners that wetlands or navigable waterways may be present on or adjacent to their property. After a lengthy discussion, Chair Lasee offered a proposal to modify WLC: 0065/1. During the subsequent committee discussion of Chair Lasee's proposal, the committee also briefly discussed including a provision in the bill draft which would maintain but clarify the current statutory exemption for farm drainage ditches, and voted to include this item in the draft. After discussing all of the proposed modifications to WLC: 0065/1, there was consensus that WLC: 0065/1, as amended, should be placed in a mail ballot for a committee vote. Representative Albers requested that Legislative Council staff draft a separate bill to address her concerns regarding the deference given to drainage district board orders. There was a consensus of the committee to include this additional draft in a mail ballot for a committee vote.

PART III

RECOMMENDATIONS INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

This part of the report provides background information on, and a description of, the drafts as recommended by the Special Committee on Navigability and Drainage Ditches.

WLC: 0065/2

Background

The determination of navigability has important consequences. In Wisconsin, navigable waters are public waters, and the public has a constitutionally guaranteed right to use these waters. Further, the right of riparian property owners (i.e., owners of land adjacent to a lake or stream) to use navigable waters is subject to paramount public rights. Once a lake or stream is determined to be navigable, almost all proposed private uses that involve structures in or changes to navigable waters must be weighed against public rights. If the proposed private use is too much in conflict with public rights, the riparian owner may be unable to secure the necessary approval for the project.

The definition of “navigability” has developed over the history of the state through common law, i.e., court decisions. The core of the current law on navigability is now contained in s. 30.10 (1) and (2), Stats., which declares lakes and streams that are “navigable in fact” to be public waters. Recent court cases on navigability interpret and apply this statute. In Wisconsin, “navigable” means “navigable in fact.” The status of farm drainage ditches is addressed in s. 30.10 (4) (c), Stats., which states that a farm drainage ditch is not navigable unless it was a navigable stream before ditching.

The DNR determines whether waters are navigable on a case-by-case basis, in the context of reviewing applications for permits or investigating activities done without permits. With regard to waterways that are not obviously “navigable in fact,” the DNR consults a number of information sources and considers a number of factors in determining whether the stream is navigable. It will review previous permit applications related to the same waterway and consult information sources such as U.S. Geological Survey topographic maps, soil survey maps, aerial photography, original government public land surveys, and more recent property border surveys. If this information is inconclusive, DNR staff will make a site visit and observe stream width and depth, stream bed and bank substrate, and weather conditions during and preceding the visit, and may conduct a “float test” with a commercially available canoe or kayak.

Two administrative procedures exist under which the DNR makes determinations of navigability. In instances in which the DNR is reviewing a permit application, the determination of navigability would be made in that review process. That process involves a contested case hearing prior to the DNR’s determination, which may be followed by appeals. The first level of appeal is before an administrative law judge, the results of which can be further appealed to the Circuit Court for Dane County (the county in which the determination was made).

Where no permit application is pending, a person can request a declaratory ruling by the DNR regarding the navigability of a waterway. Rulings under this process require only an informational hearing, and may be appealed directly to circuit court.

Description

This draft has two principal prongs. The first is to enhance a landowner's ability to seek judicial review of a determination by the DNR that a waterway is navigable. The second is to create mechanisms to alert landowners that navigable waters or wetlands on or adjacent to their land could affect their ability to conduct certain activities on the land.

With regard to the first prong, the draft specifies that the DNR must use the declaratory ruling process in making determinations that a waterway is navigable. It further specifies that appeals of such determinations are made to the circuit court for the county in which the affected land is located.

With regard to the second prong, the draft requires that forms for building permit applications and for offers to purchase real property include notices stating that the presence of any wetlands or navigable waters on or adjacent to the property could result in the need for a permit from the DNR for certain activities, and advising the applicant or potential buyer to consult the DNR, a private professional consultant or the local zoning authorities regarding the possibility that navigable waters or wetlands are on or adjacent to the property. The draft further provides that local governments may exhaust their existing supply of building permit application forms before they are required to use forms with the new notice.

The draft contains two additional provisions. First, it renumbers and revises the current statute that exempts farm drainage ditches with no prior history of navigability from certain permit requirements under ch. 30, subch. II, Stats. The revised wording specifies that the exemption applies to a project for an agricultural purpose, not to the farm drainage ditch itself. Consequently, a project for a nonagricultural purpose would require a permit, even though the drainage ditch was originally constructed as and continues to be used as a farm drainage ditch. It also specifies the kinds of evidence that may be used to show stream history.

Second, the draft directs the DNR to promulgate rules regarding:

- The standards in common law and statutes for determining whether a body of water is a lake or a stream;
- The methods used by the DNR for making determinations 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 stream before ditching.

Note that this provision does *not* give the DNR authority to change the common law and statutory standards; in this rule-making, it can only restate those standards, in addition to the other information required.

WLC: 0091/1

Background

The current practice of many administrative law judges and courts is to presume that drainage district board decisions are reasonable and consistent with drainage district boards' responsibilities under ch. 88, Stats.

Section 903.01, Stats, specifies that once a presumption is established, the burden of production and persuasion shifts to the party opposing the presumption. Therefore, the party relying on the presumption is not required to prove the basic facts underlying the presumption. However, the party challenging the presumption has the burden of proving that the nonexistence of the presumed fact

is more probable than its existence. For example, under WLC: 0091/1, which creates a formally recognized presumption, if a drainage district board issues an order requiring the maintenance or repair of a drain in the district, the order is presumed to be reasonable. A party challenging the work performed under the order may provide evidence that the order is unreasonable. Unless the hearing examiner or court finds that it is more probable that the order is unreasonable, it must find that the drainage district board order is reasonable.

Description

WLC: 0091/1 codifies current practice in order to ensure that drainage district board orders are treated consistently throughout the state and creates a formally recognized statutory presumption. The draft specifies that if a drainage district board issues an order requiring the maintenance or repair of a drain in the district, and the work performed pursuant to the order is challenged, a hearing examiner or circuit court must presume that the order is reasonable.

Appendix 1

Committee and Joint Legislative Council Votes

WLC: 0065/2 and WLC: 0091/1 were recommended by the Special Committee on Navigability and Drainage Ditches to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature.

Special Committee Vote

The Special Committee voted to recommend WLC: 0065/2 to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature. The vote on the draft was as follows:

- WLC: 0065/2, relating to appeals from the determination that a stream is navigable, mapping of navigable streams, the exemption for certain drainage ditches from certain permit requirements, and notices in forms for building permit applications and for offers to purchase real property regarding wetlands and navigable streams and requiring rule-making: Ayes, 10 (Sens. Lasee and Grothman; Reps. Albers, Gronemus, and Hahn; and Public Members Ainsworth, Bradley, Gollon, Meyer, and Storlid); Noes, 0; and Not Voting, 0.

The Special Committee voted to recommend WLC: 0091/1 to the Joint Legislative Council for introduction in the 2007-08 Session of the Legislature. The vote on the draft was as follows:

- WLC: 0091/1, relating to relating to creating a presumption of reasonableness for drainage district board orders: Ayes, 9 (Sens. Lasee and Grothman; Reps. Albers, Gronemus, and Hahn; and Public Members Ainsworth, Bradley, Gollon, and Storlid); Noes, 1 (Public Member Meyer); and Not Voting, 0.

Appendix 2

Joint Legislative Council

[Joint Legislative Council Members Who Selected and Appointed Committee and Its Membership]

Co-Chair

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This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

Joint Legislative Council

[Current Joint Legislative Council Members Receiving Committee Report]

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This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

Navigability and Drainage Ditches

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STUDY ASSIGNMENT: The current definition of navigability is a combination of statutes and Wisconsin court decisions. Some elements of the current test of navigability are quantitative or are based on factual observations by the DNR. The special committee is directed to review methods to clarify “navigability” as defined in statutes and administrative rules, with a focus on how the definition of navigability impacts the regulation of drainage ditches and ditches with no stream history. The committee is to review the methods the DNR uses to determine navigability.

10 MEMBERS: 2 Senators, 3 Representatives, and 5 Public Members.

LEGISLATIVE COUNCIL STAFF: David L. Lovell, Senior Analyst; Rachel Letzing, Senior Staff Attorney; and Julie Learned, Support Staff.

Committee Materials List
 (Copies of documents are available at www.legis.state.wi.us/lc)

February 19, 2007 Mail Ballot				
<ul style="list-style-type: none"> • WLC: 0065/2, relating to appeals from the determination that a stream is navigable, mapping of navigable streams, the exemption for certain drainage ditches from certain permit requirements, and notices in forms for building permit applications and for offers to purchase real property regarding wetlands and navigable streams and requiring rule-making • WLC: 0091/1, relating to creating a presumption of reasonableness for drainage district board orders 				
January 23, 2007 Meeting	Notice	Agenda	Audio	Minutes
<ul style="list-style-type: none"> • Memo No. 1, <i>Current Law Relating to the Definition of Navigability and Agricultural Drainage</i> (January 17, 2007) • WLC: 0065/1, relating to appeals from the determination that a stream is navigable and the mapping of navigable streams • Draft language distributed by Representative Sheryl Albers • Draft language distributed by Representative Sheryl Albers 				