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## SECTION 404 ASSUMPTION PROGRAM EVALUATION UPDATE

### OVERVIEW

The Clean Water Act [Section 404(g)] gives individual states the authority to assume administration of the federal permit program regulating the discharge of dredged and fill material into wetlands. The procedures governing state assumption of the program from the Corps of Engineers are specified by the Environmental Protection Agency (EPA). In response to nationwide concern over continuing wetland loss, EPA encourages states to study assumption of 404 responsibility as one possible way to stem the losses. In June 1988, the Wisconsin Department of Natural Resources (WDNR) received a grant from the U.S. Environmental Protection Agency to "assess the Department's capability of assuming the dredge and fill permit authority." The former WDNR Bureau of Water Regulation and Zoning (since renamed as Bureau of Fisheries and Habitat Protection) was charged with evaluating jurisdictional and administrative capabilities relating to dredge and fill permit authorities in wetlands and other surface waters. The Bureau also sought to determine if assumption of Section 404 responsibilities by WDNR would improve protection of Wisconsin's wetlands and to identify what changes or improvements would be needed in state programs prerequisite to Section 404 assumption or necessary for enhancement of existing state wetlands protection programs.

After a thorough study was completed in 1991<sup>1</sup>, the Bureau's final decision was to pursue a major program overhaul, rather than assume a state Section 404 program at that time. Ten years later, the WDNR is revisiting this plan to see if its wetlands program is strong enough now to assume the responsibilities of administering Section 404 duties. The following

report contains changes to the state water regulatory program, the state mandated local zoning programs, and the Federal Section 404 program, as well as an updated comparison between State and Federal programs. Based upon these program changes and the original recommendation, the report proposes a new plan of action for pursuing a state Section 404 regulatory program. .

## **UPDATED DESCRIPTION OF PROGRAMS**

Program description information was gathered from existing statutes, codes literature and program files. EPA requires an analysis of the following state program features:

*Administrative structure*

*Geographic jurisdiction*

*Activities regulated*

*Exemptions*

*Permit procedure and criteria*

*Surveillance and enforcement*

*Staff requirements and training*

*Public information*

*Budget, staffing and workload*

All program descriptions follow this format for ease of comparison.

### **State Water Regulatory Program**

*Administrative Structure* ~~Need current numbers.~~

In addition to the Bureau of Fisheries Management and Habitat Protection with a total of 48 employees (plus 8 current vacancies) in the Madison offices there are six district offices (should we count fisheries staff?). Both district and area offices carry out the full range of departmental functions at the local level including individual permit processing. The area water management specialists make most permit decisions. The majority of the enforcement support for water regulation activities is provided by WDNR wardens (about 1 per county). The district water management supervisors are responsible for coordinating a variety of water regulation activities, including Chapter 30 & 31, Wis. Stats., permits and enforcement, local shoreland/wetland and floodplain zoning oversight, and wetland inventory updates. Program wide policy activities occur at the central office and the primary legal support for wetland/water regulation issues comes from the Bureau of Legal Services in the central office. The Bureau of Water Resources Management sets water quality standards and is responsible for areawide water quality plans. The Bureau of Wildlife Management has a program to advise property owners on managing wetlands and other habitats for wildlife. The entire agency is under the Natural Resources Board (seven members appointed by the governor) and under the direct oversight by the board-appointed Secretary.

### ***Geographic Jurisdiction***

State authority over dredge and fill activities is generally limited to navigable waters below the ordinary high water mark (OHWM), but now includes isolated wetlands. Five months after a U.S. Supreme Court ruling removed federal protection from small, isolated wetlands across the country, the State of Wisconsin passed a law (Act 6) to protect such wetlands from filling and dredging.

Navigability is the critical element that establishes public rights and, thereby, legal protection of a waterway. All navigable waters in the state of Wisconsin are under the jurisdiction of the WDNR through the authority of the water regulatory laws, Chapters 30 and 31, Wisconsin Statutes.

Section 30.10, Wis. Stats, declares all lakes, streams, sloughs, bayous, and marsh outlets which are navigable-in-fact for any purpose whatsoever to be navigable and public waters. Through their subsequent decisions, the Wisconsin Supreme Court established the test of navigability. Department staff determine such navigability from on site investigation and through navigation in fact, usually with a canoe. Generally a stream is navigable in fact if a person can propel the lightest watercraft in common use (e.g. a skiff) down the stream at some regularly recurring interval. The interval may be the occasional spring flood.

The delineation of the OHWM is the second critical element determining jurisdiction of Wisconsin water laws. The OHWM is the boundary between private uplands and areas where public rights of navigation predominate. The beds of natural lakes are publicly owned and held in trust by the state, while the beds of rivers are owned by riparians. Department field staff determine the OHWM through on-site investigation and analysis of physical and biological indicators. Although the term OHWM was used in a number of Wisconsin Supreme Court cases in the 1800's, the first definition of OHWM is found in the Wisconsin Supreme Court decision in Lawrence v. American Writing Paper Co. (1911), 144 Wis. 556, 562:

... Ordinary high-water mark, that is the point to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of vegetation, or other easily recognized characteristic.

Three years later in Diana Shooting Club v. Husting (1914), 156 Wis. 261, 272, the Supreme Court redefined and expanded the definition to that in use today:

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.

### ***Activities Regulated***

The activities which can have a significant impact on the waters and for which permit programs have been established are: dredging; pier construction; bridge and culvert construction; placement of sand, riprap or fish cribs; connection of any waterway to navigable waters; grading and pond construction adjacent to waterways; establishment of bulkhead lines; diversion of surface waters for irrigation; channel changes; placement of structures, including pipelines, on the bed of navigable waters; construction, maintenance and repair of dams; nonmetallic mining; and maintenance of level and flow of waters.

### ***Exemptions***

Wisconsin statutes exempt the following activities: cranberry growing [s. 94.26-94.35]; maintenance of existing agricultural drainage systems [s. 30.20(1)(c)] and limited road and utility construction [s. 182.017]; construction, dredging or enlarging any artificial or similar waterway where the purpose is connection with existing navigable waterway or the artificial waterway is within 500 feet of an existing navigable waterway and grading of 10,000 square feet or more of the bank of a navigable waterway when the project is for the construction and repair of public highways, agricultural uses of land, and in those portions of navigable waters within any county having a population of 750,000 or more [s. 30.19]. Department of Transportation (WDOT) projects are also exempt if interdepartmental liaison procedures set up

by a Memorandum of Understanding are followed [s. 30.12 (4), Wis. Stats., see Appendix for MOU between WDNR and WDOT.]

Submerged shorelands of Lake Michigan which have been granted by the state to a municipality are exempt from permit requirements for bulkhead lines, pierhead lines, placing structures and fills or the removal of material within the granted area (s. 30.05, Wis. Stats.).

Farm drainage ditches, defined as any artificial channel which drains water from land used for agricultural purposes, are not navigable and, so not regulated unless they were navigable streams prior to being ditched [s. 30.10(4)(c)].

### ***Permit Procedure and Criteria***

The WDNR applies a public interest test to decide whether a permit should be granted.

However, the test is basically limited to the public interest in the navigable waterway.

Elements of the public interest are: wetlands protection (NR 1.95), fish and wildlife protection, water quality maintenance and protection, commercial and recreational navigation, natural esthetics, public water supplies and related factors. Preservation of water quality is a major factor in permit decisions. Reviewers examine whether the construction and operation of the project will maintain uses of the waterbody for fishing, swimming, water supply, etc. Permits are often issued with conditions to ensure that public interest values are maintained.

Conditions may include management practices for erosion control, stabilization of affected areas, quality of backfill, removal and storage of excavated material and revegetation.

Sometimes professional staff in fisheries, wildlife, endangered resources, water quality and other areas provide specialized information used in permit review. Public hearings also generate information on how various water users will be affected by a project.

### *Surveillance and Enforcement*

Permit monitoring is carried out primarily by local conservation wardens. A copy of each issued permit is sent to the appropriate warden. Permittees are currently supposed to contact the surveillance officer (usually the warden) five days before construction begins and five days after completion. The actual process varies by district and sometimes by warden.

A database for all permits is available in area, district and central offices. The system provides immediate access to application status, site information, project description, permit decisions for land area and applicant, permit conditions, dates of surveillance, and necessity for results of enforcement. We estimate that only major projects (less than 10% of those permitted) are inspected. Complaints are the primary trigger for follow-up site visits.

WDNR's goal in enforcement is to restore damaged waterways, and to secure for future for unauthorized work. Several alternative enforcement tools are available to handle violations of water law. Enforcement can be handled by the local district attorney, through the Attorney General's office, or through administrative hearing. All violations of Chapter 30 can be handled as civil offenses; only s. 30.12, Structures and Deposits in Navigable Waters .... violations can also be handled criminally. Preliminary investigation is the responsibility of the Department's conservation wardens who are required to file an incident report for tracking purposes and to make the initial determination if a violation of Chapter 30 or 31 has occurred. Since the warden may not be an expert at OHWM determinations, navigability, or water law, the area water management specialist is often called to help collect data and to determine if a violation exists.

If a violation has occurred, the warden has the authority (Section 29.05, Wis. Stats.), to order an immediate halt to any further work being done and to issue a citation on the spot. At

the discretion of the warden, the violator may be given a period of time to restore the site and have the case dismissed if compliance follows. The warden also has the option of taking the case to the District Attorney who will determine what action must be taken. Most violations involve structures or deposits in navigable waters. Wardens typically issue citations under civil enforcement provisions (section 30.15, Wis. Stats.). The evidence required for a civil conviction is much less than for a criminal conviction. When issuing a citation, the warden usually requests restoration under section 23.79 (3) unless the activity can be authorized by an after the fact permit.

When there is little likelihood that the local judge will give a favorable decision or where the D.A. refuses to take action, the case file is submitted through the Water Regulation Section for an administrative hearing [Section 30.03(4)]. Abatement and restoration can be ordered as a result of this hearing. The warden then follows the court directions or the administrative law judge's decision to determine if all required measures have been complied with. Monitoring of restoration is part of the final disposition. Once compliance is gained, the case is closed. Should compliance not occur, the case would again be taken to the District Attorney or referred to the Attorney General's office to initiate a contempt of court proceeding. Once the case has been taken to local court, the warden is required to file a form to update the statewide law enforcement database on complaint investigations and enforcement actions.

### ***Water Quality Certification***

Section 401 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1341, authorizes States (as well as eligible Indian Tribes) to grant, deny, or condition a "water quality certification" for a federally-permitted or licensed activity that may result in a discharge to the



waters of the United States, including wetlands. The Wisconsin Department of Natural Resources (WDNR) is authorized by state statute to conduct the §401 water quality certification program for federally permitted and licensed activities which occur in state waters. The DNR §401 certification program is described in state regulations codified at Wis. Adm. Code NR 299.01 et seq.

***Scope of the §401 certification program.*** The WDNR certification program applies to any federally-permitted or licensed activity which may result in any discharge into waters of the State. "Waters of the State" are defined by statute and regulation as:

[T]hose portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface or ground water, natural or artificial, public or private, within the state or its jurisdiction.

**Applicant Requirements.** Wisconsin's regulations require submission of an application to the WDNR with a "complete description of the activity for which certification is sought", including detailed information on the proposed activity and any discharge which may result from it, a detailed description of any proposed treatment of effluents, proposed discharge monitoring methods, and a description of water dependency and practicable alternatives.

***Time frame for Review.*** Wisconsin's §401 certification regulations require, within 60 business days of receipt of a "complete application," a preliminary determination whether the certifying agency has "reasonable assurance" that the proposed activity will result in a discharge and will comply with all applicable water quality standards and requirements of state law. Wis. Adm. Code NR 299.04.' The agency must make a determination within 120 days of receipt of a "complete application" whether to deny, grant, conditionally grant, or waive certification. Wis.

Adm. Code NR 299.05(a). Most decisions to grant or conditionally grant certification do not become final until public notice, comment, and hearing opportunities have been exhausted.

**Public Participation.** Wisconsin's §401 regulations require that, for most decisions to grant or conditionally grant certification, the agency must notify the applicant, the federal permitting or licensing agency and "known interested persons." The regulations require the applicant to publish notice of the decision in a Class I newspaper, including a statement apprising the public of the right to seek a hearing. Any person whose "substantial" interests may be affected" by the agency determination may seek a contested case hearing within 30 days after publication of the notice. Wis. Adm. Code NR 299.05.

**Standards for Certification Decisions.** Wis. Adm. Code's §401 regulations state generally that it is the policy of the State to:

- (a) Deny certification for any activity where the department does not have reasonable assurance that any discharge will comply with effluent limitations or water quality related concerns or any other appropriate requirements of state law as outlined in *s. NR 299.04*;
- (b) Grant or grant conditionally certification for any activity where the department has reasonable assurance that any discharge will comply with effluent limitations or water quality related concerns or any other appropriate requirements of state law as outlined in *s. NR 299.04*; or
- (c) Waive certification for any activity which the department finds will result in no discharge, any wastewater discharge associated with an activity which will be regulated by permit authority under ch. 147, Stats., or any activity that does not fall within the purview of the department's authority.

**Wisconsin's State Water Quality Standards for Wetlands.** Wisconsin's §401 certification program has been in place for over a decade. Its §401 regulations were first promulgated in

1981. The impetus for state wetland water quality standards began in 1989, when the WDNR was directed by the Natural Resources Board to develop state wetland water quality standards. The Wisconsin Public Intervenor had also petitioned the WDNR to develop wetland standards. Finally, in 1990, EPA directed the states, as part of its 1991-1993 triennial review, to adopt minimum water quality standards for wetlands. The Wisconsin DNR received some EPA grant funds to assist in the development of its standards and for training and implementation. Wisconsin has adopted state wetland water quality standards which: (1) define wetlands as "waters of the state;" (2) designate uses that protect the structure and function of wetlands; (3) establish aesthetic narrative criteria (the "free froms") and narrative biological criteria; and (5) extend the antidegradation policy and implementation methods to wetlands, including, where appropriate, the designation of critical wetlands as "areas of special natural resource interest."

***The Effect of the Wisconsin §401 Certification Program on Current Regulatory Processes.***

As noted above, the FWPCA §401 was first enacted by Congress in 1972, and Wisconsin's §401 certification program has been in place for over a decade. Consequently, this program is not a new one. However, the effect of the new wetland water quality standards and additional staffing has been to increase the number of meaningful certification decisions in which the DNR is actually granting, denying, or conditioning its certification of federally licensed and permitted activities. Wisconsin's §401 certification program, with its new wetland water quality standards, is proving to be very effective in protecting state wetlands. The effectiveness of the program would be further improved if the Corps would expand the scope of activities it regulates under §404, and honor Wisconsin's denial of certification for certain NWPS. These changes would facilitate increased coordination between the WDNR and the Corps, thereby

improving federal and state program efficiency. The future success of the Wisconsin §401 program will depend largely on the State's continued political and financial commitment to wetlands protection. In particular, the program must be adequately staffed to conduct efficient and effective permit review.

### ***Compensatory Mitigation***

In 1999, the Wisconsin legislature authorized compensatory mitigation for unavoidable impacts to wetlands. The WDNR was given responsibility for implementing and managing a compensatory mitigation program. WDNR staff recognize the need to avoid and minimize harm to wetlands, to replace wetland functions, and to enable fair common sense regulatory decisions. Thus, the Department's program will be easy for the permit applicants to understand and will encourage them to consider the full range of wetland impacts when planning development projects.

WDNR staff have drafted rules (Chapter NR 350) for development, monitoring, and long-term maintenance of wetland compensatory mitigation projects that are approved by the department for the establishment and maintenance of mitigation banks. Comments on the draft rules were made by both the Wisconsin State Assembly Committee on Environment, chaired by Rep. Kedzie, and the State Senate Committee on Environmental Resources, chaired by Sen. Baumgart. On September 26th, 2001, the WDNR presented to the Natural Resources Board proposed changes to the package to address the legislative recommendations. If the Board approves the changes, the rule package will go back to the legislature for review. Due to standard legislative timeline requirements, the new rules will likely be in effect no earlier than

December 1, 2001. The WDNR was granted funding for 2.5 positions to oversee the compensatory mitigation program.

The follow are some of the major compensatory mitigation rules in the current version of Chapter NR 350.

- Mitigation projects can involve one or a combination of techniques including restoration, enhancement, or creation of wetlands. Restoration is the preferred technique.
- The standard compensation ratio is 1.5:1 (measured in acres).
- The total number of acres of credit at a compensation site or mitigation bank will be calculated by the department based on a comparison of baseline and post-construction conditions and the techniques used to develop the site.
- For any proposal to construct a compensation site, either for project-specific compensation or for a mitigation bank site, a compensation site plan shall be prepared by the applicant or bank sponsor and approved by the department.
- The compensation site plan shall include a construction inspection plan, a post-construction monitoring plan, and a management plan for each compensation site.
- The department may require a performance bond, irrevocable letter of credit, irrevocable escrow account, irrevocable trust account or other financial assurance to insure that a mitigation project is constructed, operated, monitored and maintained in accordance with the approvals issued by the department and other agencies involved in the approval process.
- A bank sponsor or person responsible for development of a project specific compensation site under this chapter shall grant a conservation easement under s. 700.40, Stats., to the department to ensure that the restored, enhanced or created wetland will not be destroyed or substantially degraded by any subsequent owner or holder of interest in the property on which the wetland is located. The department shall revoke the permit or other approval if the holder of the permit fails to provide the conservation easement.
- A prospective bank sponsor shall prepare a draft bank document and provide copies to both the department and the United States Army Corps of Engineers.
- The department shall maintain a registry of all mitigation banks in the state that have been approved by the department as eligible to sell credits. This registry shall provide to anyone who requests it, information on the bank sponsors, the location of bank sites, and the number of available credits determined under sub. (5).

- Violations of this chapter may be prosecuted by the department under chs. 23, 30, 31, and 281, Stats.

### ***Staff Qualifications and Training***

Water management staff are selected for their general knowledge of natural physical and ecological processes and to a larger degree their problem-solving and communication skills. Training of water management specialists is primarily through an initial period of close supervision and work with experienced water regulation staff. All new water regulation staff attend a two day introductory training session. Staff rely heavily on several handbooks for learning standards and procedures (Water Regulation Guidebook, Floodplain-Shoreland Guidebook and Dam Safety Handbook). Each staff member maintains a basic set of reference books, including wetland plant keys, delineation and assessment manuals. Staff training is continuous. Annual meetings and occasional special sessions are conducted by experienced program staff. All staff are encouraged to participate in training courses offered through outside vendors.

### ***Public Information***

A variety of brochures and audio-visual programs are available to describe the water regulation program. Three items are specific to wetlands. Area and district staff distribute materials on request or through meetings and mailings for target audiences. A list is available by writing or calling the Bureau of Fisheries Management and Habitat Protection. The Water Regulation program has a written long-term public information plan. Bureau staff prepare materials themselves as time permits and seek grants or other staff assistance to conduct major education and information projects.

### ***Budget, Staffing and Workload***

Need current numbers.

Currently the Water Regulation and Zoning program annually processes about 3,500 permit applications, 2,500 violation investigations, and 39 contested case hearings. This workload is handled by:

Administrative staff	2
Technical/field staff	35
Technical/bureau staff	7
Enforcement staff	72+ (conservation wardens)
Legal/bureau staff	1

In 1993, the Water Regulation and Zoning program budget was \$3.8 million (not including wardens or attorney). Approximately \$1.8 million of the total budget is spent on the water regulation and wetland inventory programs.

### **State Mandated local Zoning Programs**

State law (s. 59.971, s. 61.351, s. 62.231) requires counties, cities and villages to adopt zoning ordinances for wetlands within a corridor along navigable waters. Local ordinances must at least meet minimum statewide standards (NR 115, 117). The DNR assists local governments with developing appropriate zoning ordinances and has review authority over any rezoning requests. To date 70 counties (Milwaukee and Menomonee excepted) and about two-thirds of the cities and villages have adopted wetland ordinances. Eventually about 450 cities and villages will have wetland ordinances (at least all municipalities with wetlands of 5 acres).

### ***Administrative Structure***

County governments are required by the state law to designate a zoning administrator. City and villages are not required to designate a zoning administrator (859.971). Thus, zoning staff can range from a single person with multiple local government duties (clerk, building inspector, etc.) to large staffs including separate positions for inspectors, planners, permit reviewers and biologists or engineers. In addition to professional staff, zoning programs are administered by locally appointed plan commissions and boards of adjustment or appeal, as well as elected general governing councils or boards. These groups review appeals of staff decisions, decisions requiring public hearing and changes in zoning district boundaries or standards.

The WDNR has specific oversight and assistance responsibilities assigned by the state shoreland-wetland law. These are described under subsequent sections of this description. Local zoning assistance and oversight are provided by water regulation and zoning staff. WDNR reviews and formally approves local ordinances that comply with the minimum state standards. The Department must adopt an ordinance for any municipality that does not adopt its own ordinance or that adopts an ordinance less restrictive than the state standards. Local governments must administer DNR-adopted ordinances and reimburse the agency for the cost of adoption.

### ***Geographic Jurisdiction***

Local governments are required to regulate development in wetlands that have an identified boundary on the Wisconsin Wetland Inventory map, that are in the shoreland zone (300 feet of the OHWM or the floodplain of a navigable river or stream and within 1,000 feet of a navigable



lake, pond or flowage, measured from the OHWM). Local governments have the authority to regulate beyond this minimum requirement, including below the OHWM.

### *Activities Regulated*

Local governments must require some type of permit for all development under administrative rule. Development is defined in the model ordinance and most local ordinances as:

"Any man-made change to improved or unimproved real estate, including but not limited to, the construction of buildings, structures or accessory structures; the construction of additions or substantial alterations to buildings, structures or accessory structures; the placement of buildings or structures; ditching, lagooning, dredging, filling, grading, paving, excavation or drilling operations; and the deposition or extraction of earthen materials."

Local ordinances must specify a list of allowable activities. All others are prohibited. Some non-development activities are specifically allowed without a permit under certain conditions. For all other activities, a permit must be issued by either the zoning administrator or local plan committee (for conditional uses) as specified in the ordinance.

Prohibited activities can only take place in mapped wetlands through rezoning.

Rezoning can only take place if it is determined that the activity would have no significant adverse impact on any wetland function. The wetland functions to be addressed are listed in the administrative rule and in local ordinances. They are as follows:

1. Storm and floodwater storage capacity;
2. Maintenance of dry season stream flow, groundwater discharge to wetlands, groundwater recharge from wetlands or groundwater flow through wetlands;
3. Filtering or storage of sediments or other pollutants that would otherwise drain into navigable waters;
4. Protection of shorelines against erosion;

5. Fish spawning, breeding, nursery or feeding areas;
6. Wildlife habitat;
7. Areas of special recreational, scenic or scientific interest, including scarce wetland types.

Local elected governing bodies make rezoning decisions based on these criteria with DNR review. DNR has the authority to supersede local rezoning decisions. This process is described under the upcoming Permit Procedures and Criteria section of this report.

### ***Exemptions***

Many activities in wetlands are not covered by the local zoning program because of its limited jurisdiction. The only real exemptions are for Department of Transportation projects when the project is reviewed under a liaison agreement with WDNR and for nonstructural agricultural activities along farm drainage ditches. Lands along farm drainage ditches are only exempt if all three of the following conditions are met:

1. The lands are not in the shoreland of another navigable river or stream;
2. The farm ditch in question was not a navigable stream before ditching; and
3. The lands are maintained in nonstructural agricultural use (i.e., crop or pasture).

Cranberry culture is a permitted use in shoreland wetlands but activities are limited to those necessary for the production of cranberries and activities remain subject to the general shoreland zoning requirements (e.g., setbacks, filling, grading and excavating, and vegetation removal along navigable waters).

### ***Permit Procedures and Criteria***

Jurisdictional determinations and permit decisions are made by county, city and village zoning administrators along with local zoning boards and planning committees. Notices of hearings and written decisions are required to be sent to DNR for review. DNR staff provide comments for consideration at local hearings. DNR has basically the same rights as any other aggrieved party to appeal local decisions in hopes of having them reversed. Upon discovery of an improper decision, DNR must appeal either to the local zoning board (represented by DNR legal counsel) or to circuit court (by referral to the Attorney General). The rezoning process provides a mechanism for DNR adoption of a superseding amendment, with legislative review, where a rezoning is approved locally that does not meet the criteria.

### ***Surveillance and Enforcement***

The level of surveillance and enforcement activity varies between local jurisdictions based on the staff and resources available in both planning and zoning functions and legal counsel. No statewide data is available on the number of cases or other measures of the level of effort devoted to surveillance and enforcement by local governments. State surveillance and monitoring of local activity consists of reviewing local decisions, including some actions of zoning administrators, and conditional use and rezoning decisions of local boards and committees. Local decisions are reviewed by DNR Water Regulation and Zoning staff. The volume of these decisions and the current staffing level have made statewide tracking of these reviews impossible. No statewide data is available on the number of decisions reviewed or on the number of enforcement actions pursued. The number of individual appeals in progress at any point in time has typically been between six and twelve. If a municipality fails to

administer or enforce its ordinance so that the state minimum standards are met, the department must seek a court order (writ of mandamus) against the municipality. The Department cannot undelegate or take over local zoning responsibility where the local government fails to administer properly.

### ***Staff Requirements and Training***

Requirements vary greatly by locality. Zoning administrators are typically required to have some knowledge of land use planning and of zoning procedures, either through training or experience. Many Zoning administrators are certified sanitarians and soil testers. There is no uniform curriculum or certification program for the majority of zoning job areas.

DNR offers annual workshops on aspects of the state-mandated zoning programs, including wetlands. Periodic training is given to local planning and zoning committees. Detailed handbooks on zoning procedures and state-mandated program standards are provided by DNR for zoning staff as well as boards and committees. DNR's quarterly newsletter and occasional program guidance memos are the formal mechanisms for providing zoning administrators with new information. Several self-help training aids, such as videotapes and workbooks, have been produced as time and funds allowed. The voluntary Wisconsin County Code Administrators Association provides some support to DNR for production of materials.

### ***Public Information***

Many zoning administrators make presentations to groups on request. A few local governments have prepared public information materials related to wetland zoning requirements. Local governments largely depend on DNR materials for use as handouts. The

materials are generally available to zoning administrators in quantity at their request. The items currently available are the Water Regulation and Zoning publications. A list is available by calling or writing the Bureau of Fisheries Management and Habitat Protection.

### ***Budget, Staffing and Workload***

Again, tremendous variation and lack of statewide data characterize the budget, staffing and workload of local zoning offices. The Wisconsin County Code Administrators Association surveyed numbers and salary of local zoning staff in 1989. Numbers range from 1 to 13. Salaries range from \$16,500 to \$75,000. No figures for total budgets, numbers of permits or proportion of effort devoted to wetland zoning are available. Anecdotal workload data gathered in the survey of zoning administrators conducted for this study merely confirmed the high degree of variability.

### **Federal Section 404 Program**

The primary goal of the Clean Water Act (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." In keeping with this goal, section 404 seeks to regulate the discharge of dredged and fill material into waters of the United States, including wetlands, and authorizes the Chief of Engineers to issue permits (40 CFR Part 232.2q). The U.S. Army Corps of Engineers' (COE) evaluation is fundamentally different from that of the state. The Corps' philosophy and process revolve around balancing interests of the individual or group proposing the project, against the public interest. The Section 404 (b)(1) guidelines are a major factor in determining whether a permit is issued or denied. The

WDNR's regulatory approach, on the other hand, considers environmental protection of State waters as the primary determinant. The COE offers the following comment:

"It should be indicated that, for a permit to be issued, the project must comply with the 404(b)(1) guidelines and must not be contrary to the public interest. These are separate, if generally related, evaluations, and normally proceed concurrently."

The details of administration of the Section 404 program by the COE are discussed below.

### ***Geographic Jurisdiction***

The COE has authority to issue permits for activities that result in the discharge of dredged or fill material into waters of the U.S. defined as follows:

All waters which are currently used or were used in the past, or will be susceptible to use in interstate or foreign commerce, including all waters, which are subject to the ebb and flow of the tide.

All interstate waters, including interstate wetlands

All other waters such as intrastate lakes, rivers, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, play lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce.

All impoundments of waters defined as waters of the US

Tributaries to waters identified above.

The territorial sea

Wetlands adjacent to the above.

### ***Activities Regulated***

Under the Clean Water Act, the new "GP/LOP-98-WI" authorizes the U.S. Army Corps of Engineers to issue general permits (GP) and letters of permission (LOP) to the general public for development projects in aquatic and wetland habitats of Wisconsin. The Corps will process

the application using the simplest or minimum level of permitting that matches the proposed project. The Corps cannot issue a permit if the State of Wisconsin determines that the proposed discharge would be inconsistent with its federally approved coastal zone management plan or water quality standards for wetlands. Permit applicants must prove that they have:

1. taken steps to avoid any impacts to wetlands where practicable,
2. minimized potential wetland impacts, and
3. provided compensation in the form of wetland restoration or creation for any unavoidable impacts.

The following list agency responsibilities.

#### Army Corps of Engineers

- administers day-to-day program activities, including individual permit decisions and jurisdictional determinations
- develops rules and guidance
- enforces Section 404 provisions

#### Environmental Protection Agency

- develops and interprets environmental criteria for evaluating permit applications
- determines scope of geographical jurisdiction
- approves and oversees State assumption
- identifies exempt activities
- reviews and comments on individual permit applications
- has the authority to veto the Corps' permit decisions (Section 404[c])

#### United States Fish and Wildlife Service

- reviews and comments on permit applications
- provides technical assistance to protect and mitigate fish and wildlife resources

#### Wisconsin Department of Natural Resources

- issues water quality certifications
- advises the Corps when projects are inconsistent with state water quality standards

#### Wisconsin Department of Administration (Coastal Management Program)

- grants or denies coastal consistency for any federal activity affecting any coastal county

***Non-Reporting General Permit.*** No Corps application or notification is required under this permit. Project applicants may proceed with the described activity after carefully making sure that the work will meet all applicable terms and conditions of GP/LOP. Applicants should consult with the DNR concerning state permit requirements. Typical activities include scientific measurement devices, survey activities, outfall structures, stream and wetland restoration activities, bank stabilization, and boat ramps.

***Provisional General Permit.*** This permit requires that adverse impacts on water and wetland resources be avoided and minimized to the maximum extent practical. Applicants must submit a joint Federal-State form to the Corps St. Paul District office. The Corps will conduct endangered species, cultural resources, and trust responsibility reviews, and then determine the applicant's eligibility for a general permit. If the Corps decides to issue a general permit, authorization for the project is provisional upon the applicant receiving confirmation of a 401-water quality certification from the DNR. Activities include U.S. Coast Guard approved state or Federal funded bridges, temporary construction, and minor commercial, residential, industrial, agricultural, and public development.

***Provisional Letter of Permission.*** This permit applies to projects that impact more than 10,000 square feet of water or wetland area and requires compensatory mitigation (meaning the restoration, enhancement, or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts) in accordance with Federal guidelines. Applicants must submit a joint Federal-State form to the Corps St. Paul District office. The Corps will conduct endangered species, cultural resources, and trust responsibility reviews, and allow a 30-day public/interagency review process before deciding on the applicant's eligibility for a letter of



permission. All discharge activities that impact less than 2 acres and discharges for highway projects administered by the Wisconsin Department of Transportation are eligible.

***Programmatic General Permit.*** This type of general permit covers discharge activities as described below for a single and complete project that is regulated by the DNR. Applicants must submit a joint Federal-State form to the DNR, who then provides a copy to the COE St. Paul District office. The Corps will conduct endangered species, cultural resources, and trust responsibility reviews, and allow a 30-day public/interagency review process before deciding on the applicant's eligibility for a general permit. If the Corps grants a general permit, authorization for the project is valid only when the DNR permit is also granted.

In all cases, GP/LOP requires that adverse impacts on water and wetland resources be avoided and minimized to the maximum extent practical. Also, activities that would adversely affect Federal or State endangered plant and animal species or certain cultural or archaeological resources, or that would impair reserved Native American tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights, are not eligible for authorization under GP/LOP.

#### ***State Laws That Affect Section 404 Activity***

***Chapter NR 299 – Water Quality Certification.*** Chapter NR 299, "Water Quality Certification", of the Wisconsin Administrative Code (Wis. Adm. Code), establishes the procedures and criteria for the application, processing, and review of state water quality certifications required by provisions of the federal CWA. NR 299 certifications pertain to all federal permits or licenses in which discharges to waters of the state are involved. This state

*law sets the criteria and process to follow in determining whether the state must grant, grant with conditions, waive or deny water quality certification.*

*The code sets forth time requirements for review and decisions on each application (DNR must review within 60 business days of receipt of a **complete** application and must notify the applicant of its decision to grant, conditionally grant, waive or deny water quality certification within 120 days of receipt of a complete application).*

**Chapter NR 102 – Water Quality Standard for Surface Waters.** Chapter NR 102, “Water Quality Standards for Surface Waters”, Wis. Adm. Code, establishes water quality standards for surface waters pursuant to Section 281.15, Wis. Stats. NR 102 identifies the designated use categories for such waters and the water quality criteria (i.e. Water pH, clarity, and temperature) necessary to support those uses. These standards are intended to protect public rights and interest, public health and welfare, and the present and prospective uses of all waters of the state for public and private water supplies, propagation of fish and other aquatic life and wild and domestic animals, preservation of natural flora and fauna, domestic and recreational uses, and agricultural, commercial, industrial, and other uses. These standards must be met for all Corps regulated activities that are located in surface waters of the state including but not limited to dredging, filling, discharges regulated under the Wisconsin Pollution Discharge Elimination System (WPDES) permit program and any other applicable activity under NR 299, Wis. Adm. Code.

**Chapter NR 103 – Water Quality Standards for Wetlands.** Chapter NR 103, “Water Quality Standards for Wetland”, Wis. Adm. Code, became effective on August 1, 1991, establishing

*water quality standards for wetlands. In accordance with Section 281.15, Wis. Stats and NR 103.01(2), "water quality standards are intended to protect public rights and interest, public health and welfare and the present and prospective uses of all waters of the state for public and private water supplies, propagation of fish and other aquatic life and wild and domestic animals, preservation of natural flora and fauna, domestic and recreational uses, and agricultural, commercial, industrial, and other uses". These water quality standards are applicable to most DNR regulatory, planning, resource, and financial aid determinations that may impact the quality and uses of wetlands. The standards do not apply to shoreland-wetland zoning decisions, activities specifically exempted from state and federal regulations, and activities where more specific legislative direction has been given to the DNR on how wetlands should be protected, such as metallic mining activities. The wetland water quality standards are carefully geared to mesh with the Corps 404 program in a qualitative sense by incorporating the concepts of wetland dependency, practicable alternatives, and significant adverse impact to the functional value of wetlands under NR 299, Wis. Adm. Code.*

***Coastal Consistency.*** *Through the Federal Coastal Zone Management Act (CZMA) the Corps cannot issue a permit if the state determines that the proposed discharge would be inconsistent with the state's federally approved coastal zone management plan. In Wisconsin, coastal consistency determinations are generally deemed to be met if state water quality certification is granted. However, the Coastal Management Program (through the Department of Administration) may on their own grant or deny coastal consistency for any federal activity affecting any coastal county (counties adjacent to Lake Superior and Lake Michigan).*

**NR 1.95 – Wetlands Preservation, Protection, and Management.** Section NR 1.95, Wis. Adm. Code, was promulgated in 1978 to establish the DNR's policy on "wetlands preservation, protection, and management". The rule sets forth the **policy** of the Natural Resources Board that "wetlands shall be preserved, protected, and managed to maintain, enhance, or restore their values in the human environment" and requires that impacts to wetlands be considered in all DNR regulatory and management actions. NR 1.95 also includes a listing of wetland functions and values. Because, NR 1.95 is only a policy statement, it does not have the force of law. NR 1.95 was revised in 2001 to reflect the DNR's wetland strategy, "Reversing the Loss". They use NR 1.95 as a policy reference for protecting and managing Wisconsin's wetlands.

**Shoreland-Wetland Zoning: NR 115, NR 117.** Wis. Adm. Codes NR 115 and NR 117 require counties, cities, and villages to establish shoreland-wetland zoning districts. All wetlands or portions of wetlands greater than or equal to 5 acres that are within 1,000 feet of a navigable water way (i.e. lake, pond, or flowage) or within 300 feet of a floodplain of a navigable river or stream, whichever is greater, are subject to this protective zoning. Some communities have chosen to zone additional wetlands. Zoning ordinances enacted under NR 115 and NR 117 generally prohibit any drainage, dredging, filling, or flooding of wetlands. Wetland zoning allows a variety of uses including recreation, limited road and utility construction, some agricultural activities, and maintenance of existing drainage systems.

An area cannot be rezoned (changed to a non-wetland zoning district) if it would result in significant harm to wetland functional values. The functional values specified in NR 115 and NR 117 are: a) storm and floodwater capacity, b) maintenance of dry season stream flow, the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another

*area, or the flow of groundwater through a wetland, c) filtering or storage of sediments, nutrients, heavy metals, or organic compounds that would otherwise drain into navigable water, d) shoreline protection against soil erosion, e) fish spawning, breeding, nursery, or feeding grounds, f) wildlife habitat, and g) areas of special recreational, scenic, or scientific petitions prior to action by the municipal governing body. The DNR reviews rezoning decisions to make sure state standards are met and has the authority to override municipal shoreland wetland rezoning approvals if they would result in significant harm to wetland functional values.*

## **COMPARISON OF STATE AND FEDERAL PROGRAMS**

### **Geographic Jurisdiction**

State jurisdiction is generally limited to navigable-in-fact waters below the ordinary high water mark (OHWM). While specific activities above the OHWM that affect navigable waters are regulated, non-navigable waters, including contiguous and adjacent wetlands above the OHWM. However, isolated wetlands are now regulated by the state. State-mandated local zoning applies to wetlands five acres and larger within 300' or the floodplain limits of navigable streams and within 1,000' of lakes, ponds and flowages (measured from the OHWM). COE jurisdiction extends beyond the OHWM of surface waters to the limits of adjacent wetlands. The COE jurisdiction is described as "waters of the U.S." Wetland and OHWM definitions in state and federal programs are similar.

### *Activities Regulated*

The state regulates most physical alterations of navigable waterways. Both dredging and discharges of dredged fill material are regulated, as are channel changes and enclosures, diversion of water, and construction of new waterways. Fills are generally prohibited.

State-mandated local zoning prohibits most uses except for open space and wetland-related uses unless the wetland is re-zoned. The permitted uses are described earlier in this report.

Only minor filling necessary to exercise the permitted uses is allowed. Under Section 404 of the Clean Water Act, the COE regulates the discharge of dredged and fill material into waters of the U.S. While the COE permits fills, state law generally allows only structures (defined by the courts as having form, shape, and utility). By this definition, fills are not included. Some minor filling is permitted (1) behind approved bulkhead lines, and (2) in submerged shorelands along Lake Michigan which have been granted by the state legislature to a municipality.

### *Exemptions*

The state does not regulate or prohibit:

- a) the placement of structures or deposits in the submerged shorelands of Lake Michigan, the title to which has been granted by the legislature to a municipality.
- b) farm drainage ditches unless it can be shown that the ditches were navigable streams before ditching.
- c) constructing, dredging, enlarging, or connecting any natural or artificial waterway to existing navigable water or grading in excess of 10,000 sq. ft. on the bank of navigable water 1. expressly for agricultural purposes, 2. for the construction and repair of public highways or 3. within any county having a population of 750,000 or more (Milwaukee county).
- d) all cranberry activities except those which involve filling of navigable waters.
- e) maintenance of currently serviceable authorized structures.

- f) municipal highway bridge construction/reconstruction providing' specified state standards are met.
- g) DOT activities covered by interdepartmental liaison procedures.

Local zoning applies to all development except:

- a) DOT activities covered by interdepartmental liaison procedures.
- b) Federal activities on federally-owned lands.
- c) Lands adjacent to agricultural drainage ditches when the ditch was riot a navigable stream before ditching., the lands are maintained in cultivation or pasture and the land is not in the shoreland of another navigable waterway.
- d) Power plants or transmission lines if the Public Service Commission has issued a certificate of Public Conveniences and Necessity (CPCN).

The COE does not regulate or prohibit:

- a) normal farming, silviculture, forestry, and ranching activities encompassing plowing, seeding, cultivating, minor drainage, and harvesting for food, fiber, and forest products (ill of which must be an ongoing activity).
- b) maintenance, including the reconstruction of currently serviceable structures, such as dams, dikes, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures.
- c) construction or maintenance of farm livestock ponds or irrigation ditches (not including the construction, but including the maintenance of drainage ditches);
- d) construction of temporary sedimentation basins for construction sites which do not involve the placement of fill material into waters of the us.
- e) construction or maintenance of farm roads, forest roads, or temporary roads used for moving mining equipment provided that Best Management Practices (BMPS) for erosion control are used.

### ***Permit Procedures***

Flow charts for state, local and federal permit evaluation are in the program description section of this report. The key differences between the procedures are in the public notice given. The

state while having the discretion to issue a notice in any case is only required by statute to issue public notices for the following:

- a) placement of structures in navigable waters.
- b) diversion of water from lakes and streams.
- c) construction, dredging, or enlargement of any artificial waterway that is or will be connected to a navigable waterway.
- d) alteration or straightening of a navigable stream.
- e) enclosure of navigable waters.
- f) construction of dams.
- g) grading in excess of 10,000 square feet on the bank of a navigable waterway.

State public notice is provided to the clerk of each municipality in which the project is located, and to all other people required by law to receive such notice. The Department also provides a copy of the notice to the applicant, who must publish it as a Class 1 notice (ch. 985, Wis. Stats.) in an official newspaper that is likely to give adequate notice in the project area. The applicant must then file proof of publication with the WDNR. The public notice period (30 days) begins with publication.

Under local zoning, ordinance amendments, variances and conditional uses require public notice and hearing. Local governments have some flexibility to determine which of the permitted uses require a conditional use permit. Public notices are published at least two weeks in advance of hearings. The COE requires public notice for each individual permit review. On an average notice is given to about 100 parties. The notice period is not less than 15, nor more than 30 days from the date of issuance.



### ***Permit Review Criteria***

State review is limited to effects on the environment and riparian and other users' rights. Factors, such as economics that the COE considers in their review, are not used by the state except for dams and channel changes. Local decisions, like those of the state, are based on environmental and water use impacts. Standards are set in local ordinances and must be at least as restrictive as state standards. The concept of compensatory mitigation is an integral part of the COE permit evaluation process. DNR Involvement in Section 404: WDNR comments on Sec. 404 public notices as the state fish and wildlife agency through the Fish and Wildlife Coordination Act. The Corps does not have to accept or act on the comments. Through water quality certification pursuant to Section 404 of the Clean Water Act, the Department can grant, deny or waive certification that the project does not jeopardize water quality standards.

### ***Enforcement Mechanisms***

The WDNR enforcement program uses conservation wardens located locally to monitor permits and enforce regulations. Follow-up inspection is done for major projects only; surveillance for non-permitted activity occurs as part of other activities. No formal mechanism exists for discovering non-permitted activity. Violators face either civil or criminal actions, and county circuit courts may order forfeitures, abatement and restoration. There is no administrative mechanism to assess penalties, but administrative orders can be enforced by the Attorney General's office through the circuit courts.

Local zoning can be enforced by the local government through citations and by complaints filed in circuit court. While it cannot usually act directly against the violator, the



state has several avenues to ensure that local governments properly carry out shoreland-wetland zoning: appeal of zoning administrator decisions to the local zoning board; appeal of zoning board decisions to circuit court; and mandamus order from circuit court requiring local enforcement action through the Department of Justice. Penalty levels for local zoning violations vary widely, but are typically lower than the state penalties. Surveillance is not usually done because of staff limitations. Most enforcement is as a result of complaints.

Both the COE and the EPA can assess administrative penalties as well as issue cease-and-desist orders. Class I and II Administrative Penalties have a maximum limit of \$10,000 per violation, with ceilings of \$25,000 and \$125,000, respectively. Violations of § 404 provisions can also be pursued by the COE through the U.S. Attorney's office in the federal court system. The maximum penalty per violation is the same as the state's (\$10,000). Summer crews usually monitor permitted projects.

### ***Budget and Staffing***

#### *Need current numbers.*

The Corps 1993 budget for Section 404 activities in Wisconsin was approximately \$1,000,000. The WDNR budget for 1993 for all water (regulation and zoning programs was \$3.8 million. Local zoning office budgets vary widely; detailed information is not available. Currently, the COE has 15 staff assigned to Section 404 activities in Wisconsin. WDNR has 61 people program wide, of which nine are in the water regulation section in the central office and 35th the field offices working in areas comparable to Section 404. There is some additional permit review/comment and enforcement time by other agency staff (U.S. FWS, WDNR Bureaus of

Wildlife, Law Enforcement, etc.) which are not included here because they will likely continue to be involved, independent of regulatory responsibilities.

Staffing of local zoning offices varies widely. At least one person in each of the 70 counties and about 450 cities and villages has some responsibility for shoreland-wetland zoning. As an annual average for the years 1986-1989, the COE reviewed 2,552 applications each year in Wisconsin (1,912 nationwide permitted activities, 365 authorized by general permit and 575 individual permits including 3 after-the-fact projects. For the same three years, WDNR processed an average of 3,728 water regulatory permits each year. No estimate of local zoning workload was available.

### ***State-Federal Coordination Mechanisms***

The following list describes the coordination mechanisms between WDNR & the Corps:

- A joint Chapter 30-31/404 permit application is used by both agencies (See appendix). The applicant fills out one form and returns it to either agency, but primarily to WDNR.
- The COE's general permit GP-001 (See appendix) was developed jointly with WDNR to shorten the COE permit approval process for certain activities adequately covered by WDNR under Chapter 30-31. The agencies have a coordination agreement guiding the implementation of GP-001 (See appendix).
- WDNR provides the COE with determinations of whether federal activities (including Section 404 & 10 permit decisions, harbor maintenance dredging and FERC dam licensing) will meet state water quality standards; WDNR is given the responsibility to grant or deny water quality certification for Section 404 permits for certain activities and locations under Section 401(a) of the Clean Water Act and NR 299, Wis. Adm. Code.
- Section 401(a) requires any applicant for a federal permit or license to conduct an activity which may result in a discharge to navigable waters (of the U.S.) to obtain a certification/permit from the state that such discharge will comply with applicable provisions of the Federal Clean Water Act and appropriate state laws. These provisions relate to limitations on discharge of wastes, achievement of water quality standards, and protection of designated water uses. WDNR is the

state agency responsible for issuing certification within a reasonable time. Section 401 provides for automatic waiver after one year from date of application. However, a federal permit cannot be granted if state certification is denied, and any conditions of certification must become conditions of the federal permit.

- These regulations do not guide the state as to how the certification should be made. Section 401 does require the state to establish procedures for applications, and if necessary for public hearings on applications. The state must also set effluent limitations and monitoring requirements to ensure compliance with any applicable limitations and performance standards or with any other appropriate requirement of state laws. See appendix for draft standards.
- WDNR provides comments to the COE in response to public notices, especially for projects where the Department does not have water quality certification authority (i.e. above the ordinary high water mark).
- The Corps provides a monthly summary of permit actions to the WDNR.
- WDNR sends copies of Chapter 30-31 decisions to the Corps.
- Each agency sends copies of the public notices for permit applications to the other agency.
- DNR, with the State Coastal Management Program, determines whether 404 projects are consistent with the Wisconsin Coastal Management Plan. The Federal Coastal Zone Management Act requires that all federal actions comply with regulations that are part of a federally approved plan. Both state water regulations and local shoreland wetland zoning are part of Wisconsin's plan. The plan applies in the 15 counties bordering Lakes Michigan and Superior.

WDNR & US FWS also coordinate in a number of ways:

- A Memorandum of Understanding (See appendix) between the agencies guides the coordination, information exchange and resolution of differences of opinion needed to implement the federal Fish and Wildlife Coordination Act (FWCA). The FWCA requires that fish and wildlife concerns receive equal consideration with other concerns in federal actions affecting wetlands and water resources, including issuing Section 404 permits.

- Also based on the FWCA, WDNR's Bureau of Environmental Analysis & Review comments to the COE on projects other than those requiring a Section 404 permit.

With the Environmental Protection Agency (EPA) taking a more active role in Section 404, new mechanisms are being set up between WDNR and EPA:

- WDNR Section 401 water quality certification decisions for 404 permits are forwarded to EPA.
- WDNR comments on Section 404 permits are forwarded to EPA and vice versa.
- EPA and WDNR have been involved in several cooperative projects, including a special Wetland Inventory for the Green Bay area, a program information delivery system, water quality standards for wetland implementation and training and are currently involved in a monitoring surveillance project (under an EPA wetland program development grant.)

### **Current Wetland Program Funding**

The present Chapter 30/31 and local zoning oversight programs are funded by general purpose revenue and by Wisconsin Coastal Management Program grants. While permit fees (maximum of \$75/permit) are collected for most activities (placement of riprap is exempted, as are government activities), fees are deposited into the state general fund and are not used directly to support the program. Forfeitures collected for violations must be deposited, by law, in the state school fund in order to discourage excessive or inequitable rulings which would otherwise economically benefit the state. If the state assumes the Section 404 program, it is the legal responsibility of the state to adequately finance the program. Prior to assumption, the state must prove it has adequate funding to administer the program.

## ***Potential Funding Sources***

Possible funding strategies for an improved or expanded program include:

1. Federal grants

There are no funds available, nor are any grant programs being proposed for the administration of the 404 program.

2. Jurisdictional determination fees

Applicants would pay the cost of delineating wetland boundaries, conducting impact analyses, etc.

3. Permit fees

A permit fee funding policy would make applicants responsible for all costs generated by the state in processing the permit. WDNR does not currently have the necessary legislative authority for this policy.

4. Impact fees

Under an impact fee system, permits would be similar to a bank loan, but not only would the applicant pay the principal (the permit processing fee), but also the interest (mitigation costs and the impact fee).

5. Monitoring fees

Permit holders would pay for the cost of surveying or monitoring their project.

6. User fees

Surcharges would be placed on outdoor recreation licenses, fees, and taxes. Examples would include hunting and fishing licenses, taxes on the sale of outdoor recreation licenses, "stamp" programs, etc.

7. Real estate transfer fees

A special fee would be collected in the course of all real estate transfers. Much of real estate transfer occurs in developing areas where wetland protection is most urgent.

8. Fines

The state would collect fines for violations of wetland regulation. Any revenue so generated from 404 violations remains the property of the state as long as the EPA determines that such enforcement is in compliance with the 404 program and that the fines are appropriate to the violations. EPA has the absolute authority to begin its own enforcement proceedings and collect any resulting fines should it find the state negligent in its enforcement standards or levying of fines. EPA recommends that the state have statutory authority to levy administrative penalties in addition to its mandatory authority to impose civil and criminal fines.

9. General purpose revenue

State revenues from taxing would be allocated to wetland protection programs. The rationale for this funding source is that wetland protection is in the general public interest for water quality, flooding, health, and other reasons.

### **Michigan Assumption Experience**

In Michigan, as in Wisconsin, state and federal agencies had overlapping regulatory authority over dredge and fill activities. After broadening of state authority, working with the EPA and COE, the State of Michigan assumed the Section 404 program in August 1984. The state expected a reduction of time delays for issuance of permits, with a corresponding reduction in the use of funds. The risk was believed to be the loss of dual enforcement of the program.



In the years since assumption, professional staff have noticed the following results:

- The process of permit approval has become quicker, more exhaustive and in some cases more stringent. MDNR provides on-site review for every permit application, due to the extra resources allocated to the MDNR. Michigan has also managed to eliminate nearly all duplicative state and federal permits for projects on inland waters. Regulations seem more reasonable to the public and there is more perceived support for the program. Because the state has authority over more than the dredge and fill aspects of environmental impact, the overall project can be more thoroughly examined for multiple impacts.
- The greatest difficulties still arise from enforcement. The wetland program remains highly controversial. Individuals and organizations claim that they were unaware of regulations, and the MDNR has been very reluctant to enforce violations. In many cases, county prosecutors have been aggressively opposed to the Section 404 program, making enforcement all but impossible. In contrast, the COE was more isolated from state and local politics, and when pursued, its enforcement was more effective.
- The Michigan Section 404 program is still limited by funding. The wetlands inventory program lacks adequate funding, and the MDNR is forced to function without an accurate assessment of the resource they are charged with protecting.
- Isolated wetlands still are not regulated, partly due to inadequacy of mapping, but also to lack of jurisdiction over wetlands under five acres in size, some of which are important as habitat for migratory waterfowl. Interestingly, the MDNR does have authority to regulate any wetland deemed essential to the preservation of the natural resources of the state."
- The Michigan program uses a different standard for project alternatives than the Corps. In Michigan, alternatives must be "feasible and prudent." Federal regulations assume that alternatives exist for non water-dependent activities and applicants must demonstrate that no practicable alternative exists in order to receive approval. Applicants have argued successfully that if redesigning the project for another site increased costs, then location at such a site is not a prudent alternative. MDNR has not been able to adequately define the terms.

Overall the state program seems roughly as effective as the federal program at preventing wetland loss, but due to rising controversy and lack of funds, it is uncertain whether MDNR will be able to continue to administer the program effectively.

## **ORIGINAL RECOMMENDATION**

### **Do Not Assume**

Because the DNR has an established water regulatory program that is similar to the 404 program, the DNR would have little trouble meeting the regulatory components of the 404 assumption requirements. However, because the 404 jurisdiction extends significantly beyond the state's, major statutory changes would be required. A complicated and politically unattractive system of "trust" and "nontrust" waters, each with their own permutable activities would be created. Thus, jurisdictional limitations pose a serious deterrent to 404 program assumption. Federal funds are neither authorized nor appropriated for state 404 programs. Although the Clean Water Act authorizes use of other water quality program funds for 404 programs, the diversion of these funds is unattractive. The existing 404 program is complex and at times cumbersome. State assumption would include these administrative, jurisdictional and procedural complexities. Reporting requirements and additional EPA oversight and involvement would increase these burdens. Other alternatives exist that can achieve federal state-land program streamlining and consistency without losing the state and federal "backstop" of wetland permit decisions. In addition a better state wetlands program can be achieved by adopting water quality standards for wetlands (done in 1991) and pursuing new legislation and that reflect state concerns and policies.

In summary, until additional funding becomes available and jurisdictional problems are resolved, 404 program assumption remains technically and legally feasible but impractical.

## **Pursue Major Program Overhaul**

The effectiveness studies and advisory committees collectively indicate that more than just moderate changes are needed in Wisconsin's wetland protection programs. The set of initiatives described below require legislative action that is being sought. DNR has requested resources in the state budget to address some of the fundamental problems confirmed and quantified through this study. Working with the agencies and others who helped with this study, DNR will develop a strategy to carry out other highly ranked alternatives as resources can be obtained.

### ***State Regulatory Standards and Local Administration***

- 1) Expand current shoreland wetland regulatory jurisdiction to include all mapped wetlands (shoreland wetlands are less than half of total state wetland acreage).

#### Rationale:

- a) Builds on existing state/local partnership.
  - b) Zoning procedures shared with other local land use controls.
  - c) Integrates wetland decisions with other local land use decisions.
  - d) DOT exemption & liaison process would continue.
  - e) Current regulations apply to mapped shoreland wetlands five acres and greater in size. Updated wetland maps now being prepared will include those of two acres and larger. Smaller wetlands could be regulated at local option.
- 
- 2) Modify permitted uses and provide design standards to assure that activities which are allowed in wetlands individually and cumulatively have minimal long term effects on

wetland values. Allow municipalities to adopt regulations more restrictive than state standards.

Rationale:

- a) Relatively few changes required.
- b) Design standards would provide project guidelines for applicants to follow.
- c) Rezoning after a determination of insignificant wetland value would continue to be a safety valve.
- d) Current regulations prohibit local adoption of more restrictive permitted use standards.

***State Oversight Mechanisms***

- 1) DNR appeal of local wetland rezoning decisions should be to an administrative hearing examiner with subsequent judicial review of the administrative record (the administrative hearing would be a de novo hearing on the issue of compliance with rezoning criteria). The same procedure should be used for initial ordinance adoption for noncompliant municipalities. Overturning of a local decision should result in an order for restoration of any illegally altered wetland (DNR should not have to commence a separate action to compel local enforcement).

Rationale:

- a) Current quasi rule making procedure to overturn local amendment decisions involves legislative review which is unnecessarily complex, costly and time consuming and is not constrained by specific objective criteria.
- b) The legislature has never overturned a DNR amendment decision.

- 2) Local wetland decisions should be automatically void if timely notice of petitions, hearings and decisions are not provided to DNR.

Rationale:

Absent notice, DNR is prevented from meeting appeal deadlines and opportunities to advise applicants and local government of project impacts and alternatives.

*Enforcement Mechanisms*

- 1) DNR wardens should be authorized to assist local government in enforcement of local wetland regulations using civil citation procedures (as they currently do for Ch. 30). A mechanism for consultation with local zoning staff would be necessary to assure technical adequacy of complaints.

Rationale:

Expertise and assistance in civil prosecution would be provided to local government.

- 2) Full wetland restoration (acreage and function) should be a mandatory consequence of violation of wetland protection laws. Failure to obtain permits where the project could otherwise be authorized should require a monetary forfeiture.

Rationale:

Substantial disincentives are required for a credible enforcement program.

- 3) Provide for a penalty assessment to be levied as a percentage of civil forfeitures for violation of wetland regulations.

Rationale:

Revenue could be retained in a pool for distribution to local government to defer costs of program administration or for environmental education, maintaining professional standards of staff, etc.

- 4) Adopt a statewide schedule of minimum forfeitures.

Rationale:

Minimum forfeitures provide a credible disincentive and could be graduated based on wetland acres affected, prior convictions for violation of environmental laws, etc.

***Local Administration Needs***

- 1) Require minimum professional standards for local zoning administrators and training/orientation for local decision-making boards.

Rationale:

- a) Would promote professional implementation of wetland and other local land use regulations.
- b) Professional standards raise salaries which attract more professionally trained personnel.
- c) Education and technical assistance for local boards would encourage local decisions which are consistent with statewide wetland policy.

- 2) Provide grants to municipalities in support of state mandated zoning. Grants should be tied to program certification and continuing education requirements for administrators and boards. (70 counties @ \$10,000 \$700,000 & 450 cities & villages @ \$2,500 = \$1,125,000 & total of \$1,825,000/yr.). Grant amounts could be stepped based on wetland development threat. Funding sources could include real estate transfer taxes, penalty assessments on civil forfeitures for violation of environmental regulations, surcharges on state and local permit fees, et al.

Rationale:

- a) Positive fiscal incentives would help to defer local costs of administration.
  - b) Linkage to local program certification and training requirements would promote program effectiveness and consistency.
- 3) Provide mapping and study grants to local units of government administering state wetland regulations. Funding sources would include those listed for administrative grants.

Rationale:

- a) Such programs provide positive incentives.
- b) The lack of accurate mapping at appropriate scales has long been one of the problems associated with regulation of wetlands.

- 4) A uniform disclosure to accompany all land use and building permits advising applicants of environmental and other statewide regulatory requirements and appropriate contacts.

Rationale:

- a) Would promote knowledge of and compliance with wetland and other regulations.
- b) Would promote compatibility of state, county and town project approvals.

***State Program Support, Management Information and Public Education***

- 1) Provide adequate fiscal and personnel resources for administration of wetland regulatory and management programs. Nine DNR FTE's (8 CSS @ \$50,000 ea. 1st. year & \$41,000 after & 1 LC @ \$60,000/\$51,000) and 1 Dept. of Justice Environmental Unit FTE (\$60,000/\$51,000).

Rationale:

Will provide required program effectiveness monitoring, oversight, technical assistance and enforcement.

- 2) Provide full funding for updating and digitizing of Wisconsin Wetland Inventory maps.

Rationale:

Allows monitoring of wetland acreage changes and related regulatory and management decisions about program effectiveness and regional ecological consequences.

- 3) Require disclosure of mapped wetlands in real estate transactions.

Rationale:



Alerts prospective buyers to environmental limitations of property as well as regulatory constraints.

- 4) Continue to encourage environmental ethics and ecological sciences training as part of primary, secondary and university education in Wisconsin's public schools.
- 5) Wetland acquisition and management programs should afford a high priority to restoration of former wetlands.

#### ***General Wetland Protection Initiative***

- 1) Provide a property tax credit for owners of mapped wetlands.

##### Rationale:

More evenly distributes tax burden for lands that support public interest resources.

#### ***NEW RECOMMENDATION***

*Since the original evaluation was conducted in 1991?, the Department has moved away from a local administration strategy because it requires new legislation and raises the concern about unfounded mandates for local governments. Thus, the only actions towards fulfilling the recommended program overhaul have been the hiring of additional wetland regulatory and management staff, and providing full funding for updating and digitizing the Wisconsin Wetland Inventory maps (listed under the State Program Support, Management Information and Public Education section). The Department is now actively pursuing its 2001 wetland protection strategy, "Reversing the Loss: A Strategy for Protecting & Restoring Wetlands in Wisconsin." This is a 6-year strategy with specific performance measures identified to evaluate the Department's progress in meeting its goals. Recent accomplishments include:*

- *Revising the department's wetland policy, Chapter NR 1.95, Wis. Administrative Code, to reflect the themes of "Reversing the Loss."*
- *Publishing and distributing the "Wetland Restoration Handbook for Wisconsin Landowners" (written by the Wisconsin Wetlands Association). This handbook was designed to help landowners better understand, manage and enjoy their wetlands.*
- *Creating a wetland page on the DNR web site that is linked to other related websites.*

*To address the State's lack of jurisdiction over non-isolated and non-navigable wetlands, we recommend that the WDNR adopt a wetland policy that protects **all** wetlands, not just isolated ones. The Department could model its comprehensive wetland policy after Minnesota's Wetland Conservation Act (WCA) of 1991, which is administered by the Minnesota Board of Water and Soil Resources. Like Wisconsin, Minnesota's goal is to achieve no net loss of wetlands. Their general policy states that any wetland cannot be drained or filled unless the activity is exempt, or the habitat is replaced by restoring or creating wetland areas of at least equal public value. The WCA defines a wetland by the presence of hydric soils, surface or subsurface hydrology, and hydrophytic vegetation, and uses the 1987 Federal Manual to delineate wetland boundaries. The WCA applies to all wetlands, except those identified on DNR inventory of protected waters and wetlands. The local government unit (LGU) has the primary responsibility for administration of the WCA and for making key*

*determinations. Generally, the LGU is the city or county, but may be another entity such as a watershed district or soil and water conservation district. The state agency is the LGU for a project by that state agency or activity on state land.*

*In Act 6, the WDNR could simply change the words "nonfederal wetlands" to "all wetlands", delineated according to the U.S. Army Corps of Engineer's 1987 Federal manual. Once the WDNR has a comprehensive wetland policy, it should then focus its efforts on gaining sufficient funds from the legislature to assume a Section 404 program. This program must have a strong enforcement component to avoid similar difficulties encountered by the MDNR.*