

# Wisconsin's Public Trust Doctrine

Wisconsin Lakes Convention  
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# Public Trust Doctrine

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- Emanates from the WI Constitution, Article IX, Section 1
- Sizable body of common law, which holds all navigable waters in trust by the state for all the public
- State has an affirmative duty to protect and preserve these public trust waters

# History and perspective-

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- WI has 15,000 lakes, 44,000 miles of streams, 860 miles of Great Lakes shoreline
- Understanding the ecology and importance of our waters has evolved over time
- Regulations in WI have also evolved



**Why is it important today?**



**Provides foundation for preserving aquatic natural resources for future generations.**



**Importance of the public trust doctrine has increased as aquatic resources have diminished and recreational and development pressures have increased.**



**Affects potential recreational use of all waters which has major implications for tourism and recreation industries.**



# Tourism



- \$13.1 billion spent by tourists in 2008
- 95% increase in travel expenditures from 1995 to 2005

Wisconsin Department of Tourism

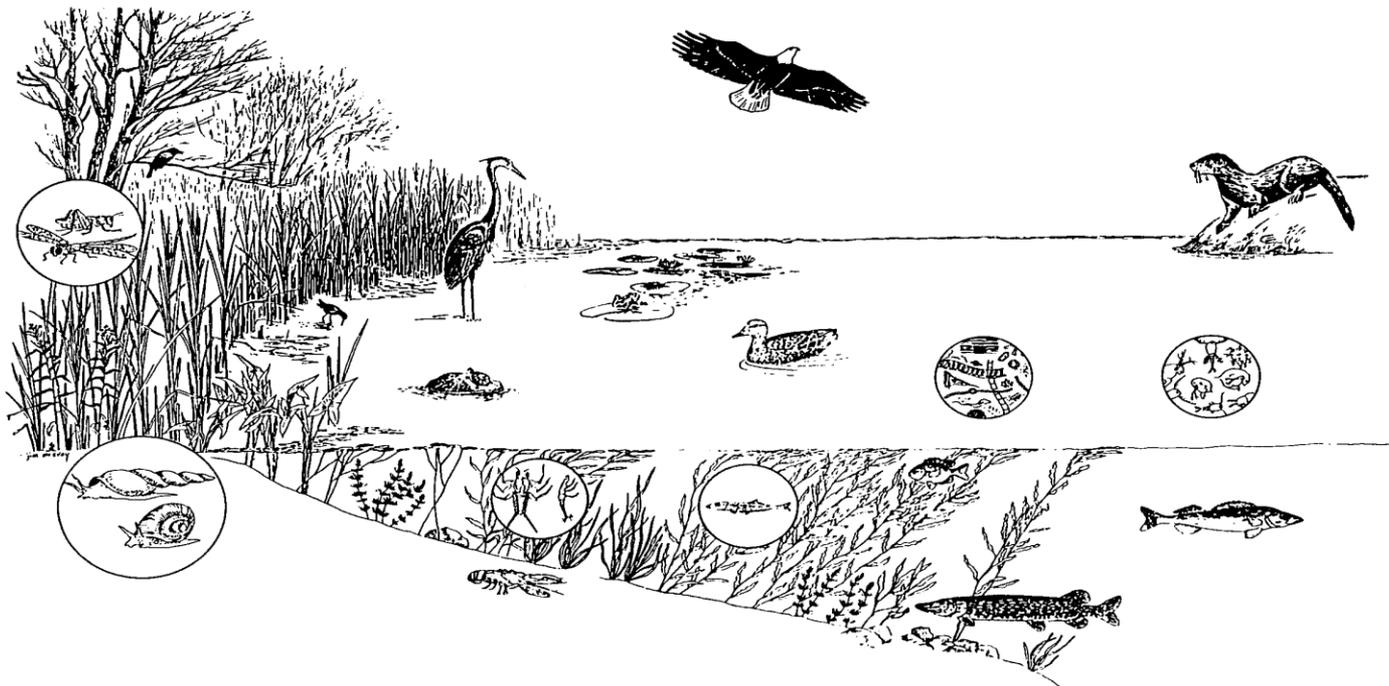
# Average percent increase in the total number of dwellings on 235 lakes from the 1960s to 1995

Lake Size in Acres	Average Increase in Number of Dwellings
10-49	202%
50-99	131%
100-199	144%
200-499	243%
500-999	796%
1,000+	228%
Total Average Increase	216%

# Competing Uses in the Littoral Zone

## General Types of Aquatic Plants

- **Emergent Plants** (from shallow water table to ~5' water depth) Includes bullrushes, cattails, arrowhead, wild rice, sedges, pickerelweed, etc.
- **Floating Leaf Plants** (1.6' to about 10' water depth) Includes water lilies, American lotus, watershield, water knotweed, some pondweeds, etc.
- **Submersed Plants** (all depths to about 33') Includes coontail, milfoil [natives and exotic], waterweed, pondweeds, buttercup, bladderwort, etc.



# Rights of Riparian Owners-

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- Owners of property on lakes and stream are called “riparians”
- They have the right to access the shore and make “reasonable use” of the shore and the waterway
- These private rights are limited, however, by the public rights in waters





“The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well as to the inhabitants of said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefore.”

Northwest Ordinance of 1787  
Article IV

# Right of the Public to Fish in Navigable Waters

Willow River v. Wade, 1898



# Diana Shooting Club v. Husting, 1914



- Recognition of the Public Nature of Navigable Waters
- Need to broadly construe the trust doctrine so that “people reap the full benefit of the grant secured to them”



- State “became a trustee charged with the faithful execution of the trust created for their benefit.”

- “Wisdom of the policy which steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited by narrow constructions.”



# Recognized Public Uses

Nekoosa Papers v. Railroad Commission, 1930





“Enjoyment of Scenic Beauty is a Public Right”

Muench v. PSC, 1951

Necessary to look at water quality impacts  
before issuing water regulation permits.

Reuter v. DNR, 1969

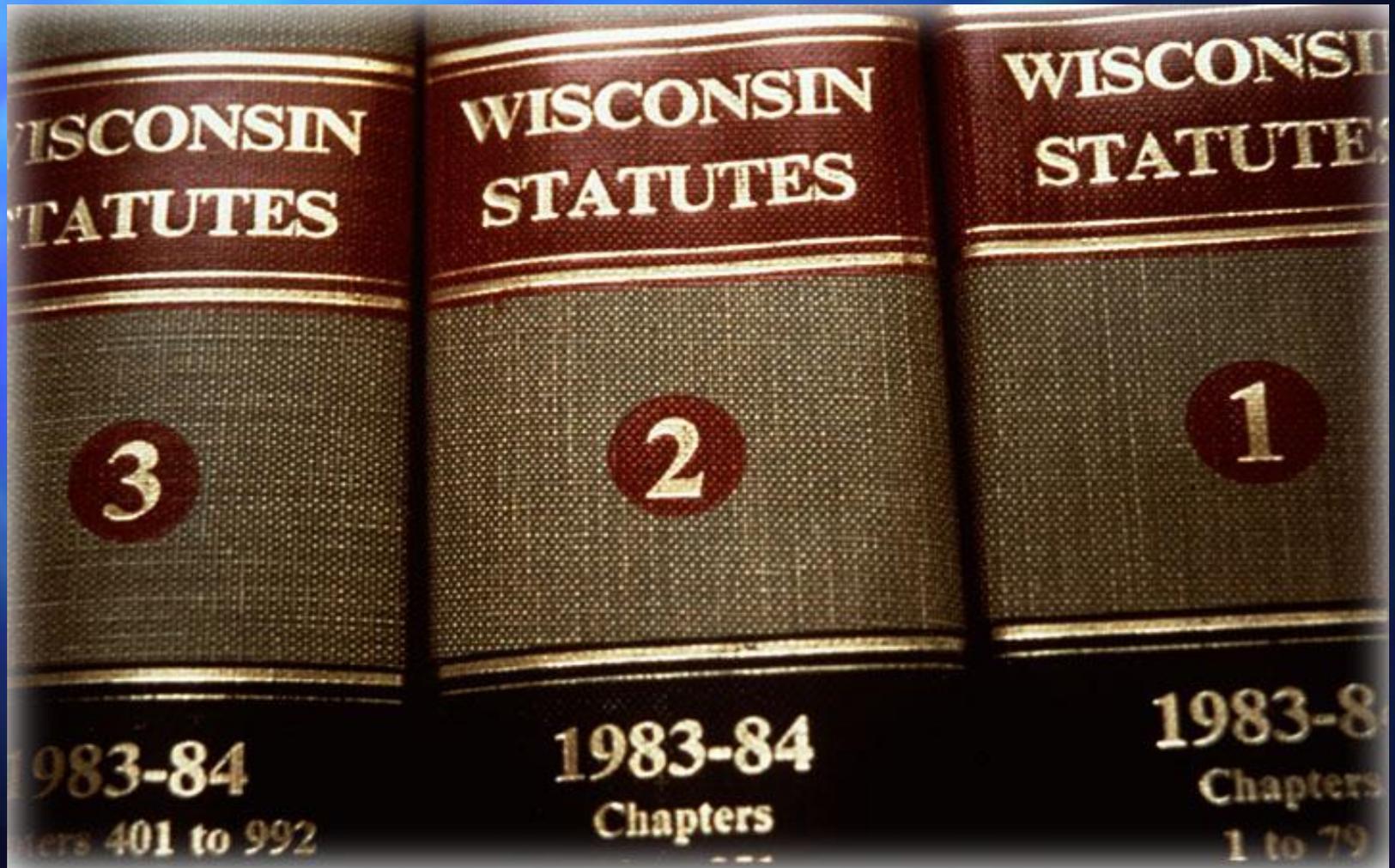


# Protected Public Trust Uses:

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- Commercial Navigation
- Boating
- Fishing
- Hunting
- Scenic Beauty
- Fish and Wildlife Habitat
- Water Quality and Quantity

# Statutory Limitations



# Statutes

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- ss. 24.39/30.11- Bulkhead lines- leases
- S. 13.097- Review of Lakebed grants
- s. 30.13(1) - Wharves, Piers, Swimming Rafts
- s. 30.12 - Structures and Deposits, including piers and boat shelters
- s. 30.232 - Boathouses and houseboats
- s. 30.123 - Bridges
- s. 30.19 - Grading on the bank, ponds
- s. 30.20 - Dredging

**“The legislature has no more authority to emancipate itself from the obligation resting upon it . . . to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. “**

**Priewe v. WI Land & Improvement Co. (1899)**



# State v. PSC, 1956



- Public bodies must control
- Devoted to public trust purposes and open to the public
- Minimal area relative to waterway

# State v. PSC

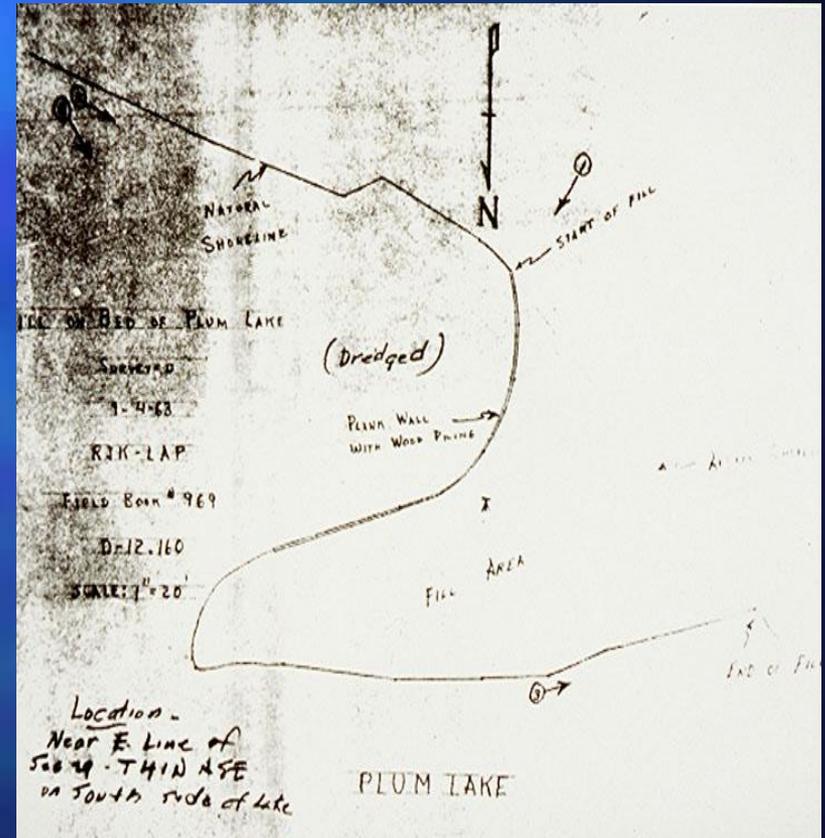


- Public uses of waterway not destroyed or greatly impaired
- Loss of public rights negligible compared to public trust benefit

# Hixon v. PSC, 1966

WI Supreme Ct- 1966

- 958 acre lake- Vilas County
- Dredged and filled to create a 120 foot long breakwater





“A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body may be eaten away until it may no longer exist. . . .”



“Our navigable waters are a precious natural heritage;  
once gone, they disappear forever.”

Hixon v. PSC

# Claflin v. DNR, 1972

“The essential determination must be whether this particular boathouse in this precise situation is ‘detrimental’ to the public interest . . . It is entirely proper that natural beauty should be protected . . . ”





Impairment of natural beauty by itself can serve as the basis for determining a project is “detrimental to the public interest.”

# Just v. Marinette, (1972)

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- Seminal case in water and wetland law
- “Swamps and wetlands were once considered wasteland, undesirable, not picturesque. But as people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, ...and are essential to the purity of the water in our lakes and streams.”

# Supreme Ct. of WI in Just, (1972), continued...

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- “Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?....
- The Supreme Court answered this rhetorical question....



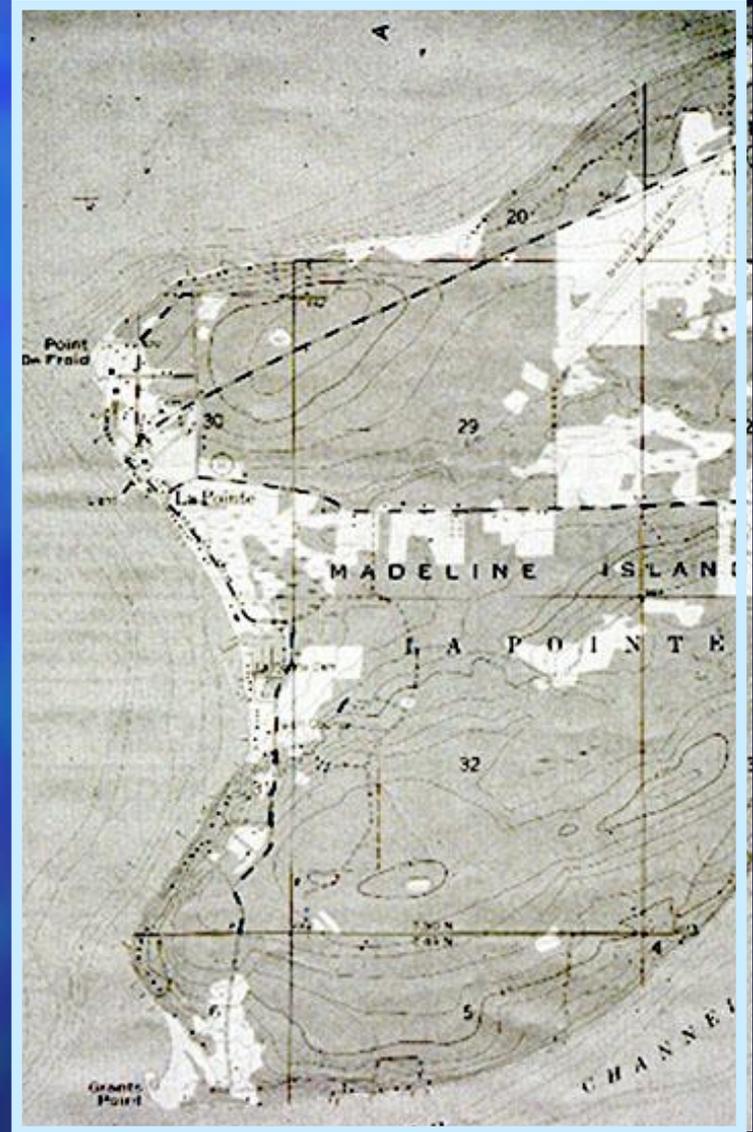
‘An owner of land has no absolute right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state.... It is not an unreasonable exercise of the police power to prevent harm to public rights’

**Just v. Marinette, (1972)**

# State v. Trudeau

WI Supreme Ct- 1987

Involved a proposal to  
place 48 condos on  
bed of Lake  
Superior- Apostle  
Islands



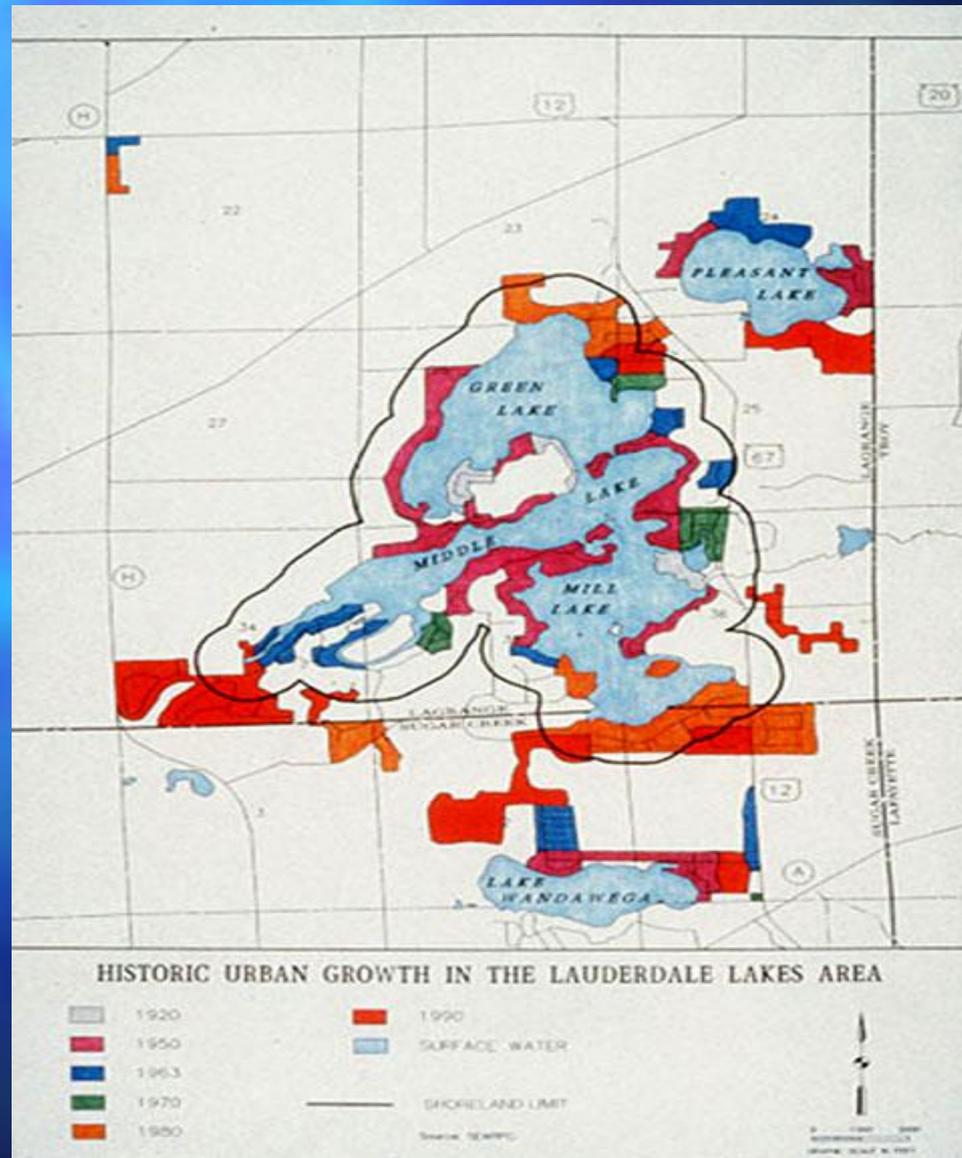




# Sterlingworth v. DNR, 1996



# Cumulative impacts- development since 1920's





“Although nine additional boat slips may seem inconsequential to a proprietor such as Sterlingworth, we approach it differently. Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public’s interest in the lakes...”



"In our opinion, the DNR, in limiting Sterlingworth's permit ... carried out its assigned duty as protector of the overall public interest in maintaining one of Wisconsin's most important natural resources."

Sterlingworth v. DNR

# Current issues-

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- Development of small lakes
- Development of 'marginal' shorelines
- Multiple slip piers- condos, keyhole
- Redevelopment of shorelines
- New uses of our waters
- Climate Change
- Shoreland Zoning Rules

# Sturgeon Bay

http://map.co.door.wi.us/Website/doorbase3/doorlio3.asp - Microsoft Internet Explorer provided by Wisconsin DNR

File Edit View Favorites Tools Help

Back Forward Stop Home Search Favorites Media Print Mail

Address http://map.co.door.wi.us/Website/doorbase3/doorlio3.asp Go Links >>

Zoom In Zoom Out Zoom Last Zoom Full Pan ID Parcel Buffer Measure Clear Map Print On/Off OV Map Help

[Door County, WI](#)  
Web Map

Parcel Search: [v]  
Zoom to Location: [v]  
Choose a Map Theme: [v]  
ID Feature: [v]

**PLSS Section**

Rec: 1  
SSTTRR: 082726

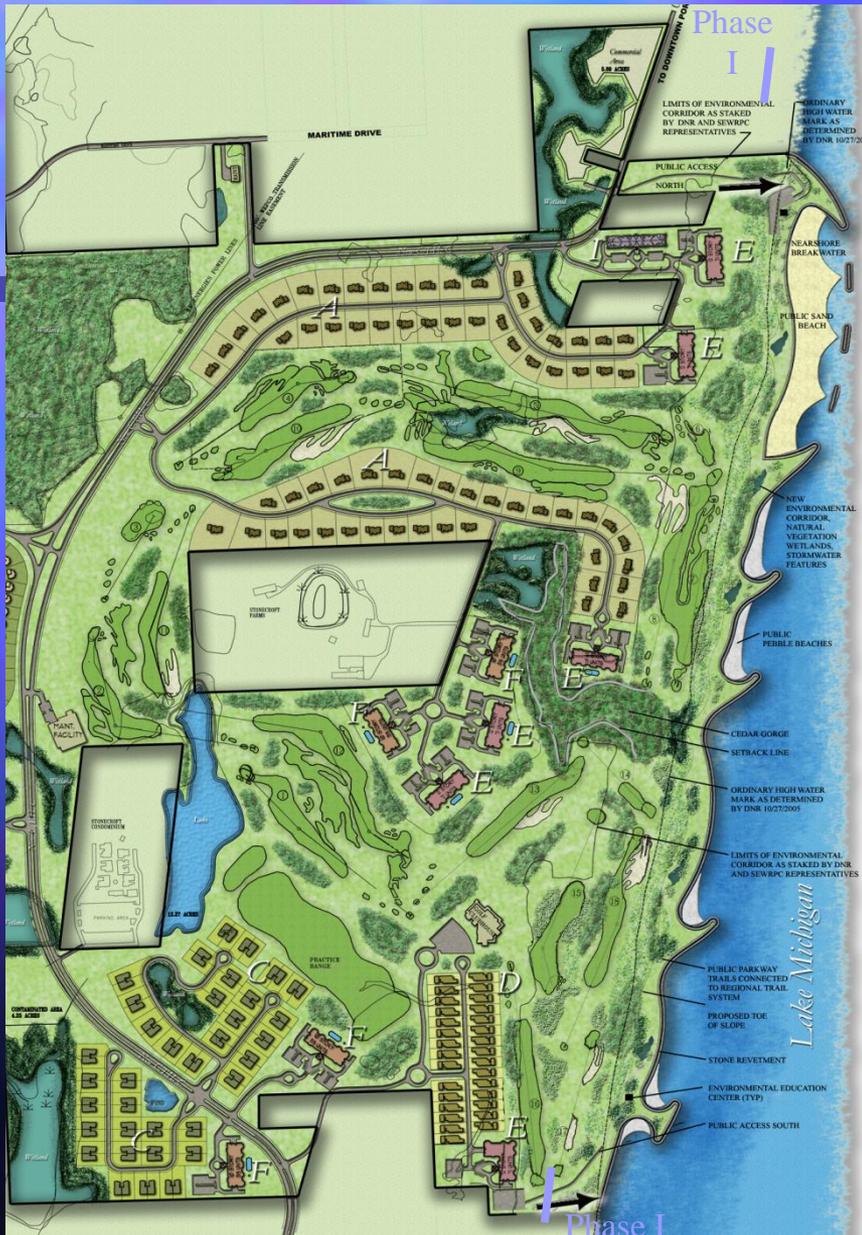
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Green Bay  
Sturgeon Bay

Courtesy of Door County Land Information Office

Map: 2649380.53 , 373798.73 -- Image: 286 , 338 -- ScaleFactor: 3.5472077633337253 Internet

Start Inb... Cal... Wa... Arc... RE... htt... htt... 11:45 AM



## Port Vincent Golf and Residential Development- Lake Michigan

- Originally- 56 acres of lakebed fill proposed
- Current proposal- slowed by recession
- Creates some public amenities- but raises significant questions re: alternatives that will not result in loss of public trust waters

# Commercial and Residential Proposals-

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- Bayfield
- Superior
- Kenosha
- Racine
- Milwaukee
- Two Rivers
- Oshkosh
- Madison

# Emerging Concerns for Environment & Economy

1. Water Quantity Concerns

2. Aquatic Invasives

2. Polluted Runoff



# Water Levels- Rock Island??

What is public land here?



# Great Lakes

## Water Levels-

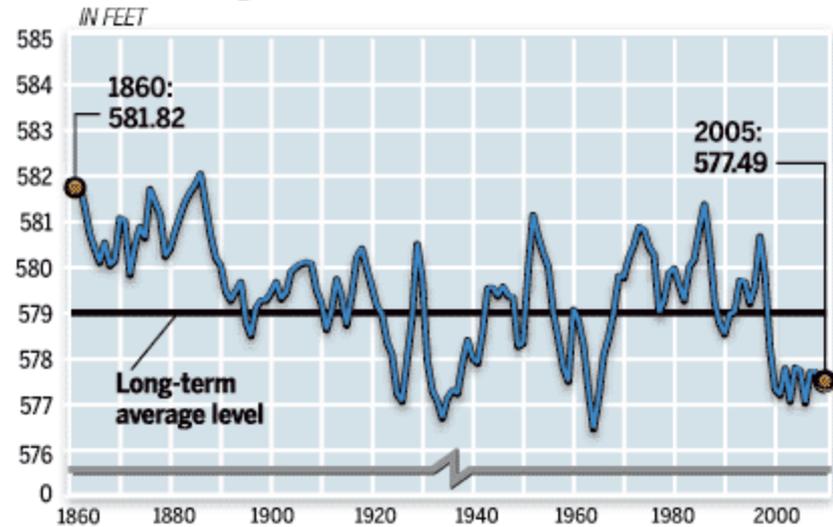
Where are they headed?

### Lake Michigan water levels

Because Lake Michigan's level can swing by as much as 6 feet over just a matter of years, the lake is rarely ever at its "normal" level. The lake is about a foot above its all-time low, but hydrologists worry that increased flows on the St. Clair River could eventually take levels to unprecedented lows.



### Lakes Michigan - Huron water levels



# Historic floods in WI- August, 2007

Climate change? Impacts to public trust waters?



Gays Mills, WI - August 19, 2007  
Photo Courtesy of Grant Co. Emergency Management

# WOW & FERC Issues

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- While reviewing potential regulatory approaches, we discovered the FERC is active in reviewing hydrokinetic energy projects (wave, tidal projects)
- They have granted 59 preliminary permits for 160,000 turbines in Mississippi River from Illinois south
- Have granted over 100 wave and tidal permits around the US

# Hydrokinetic turbines- Miss. River



# Agucadora Wave Park- Portugal



# European Wind Farms



# Cape Wind- Massachusetts

PROPOSED VIEW



# Wave Gen- Scotland



# Power Buoys- Oregon, Hawaii



# River Turbines- Europe and Australia



(a) Garman Turbine: ITDG,U.K.



(b) Tyson Turbine: Australia



(c) Rutten Company,Belgium



(d) Marlec Engineering Co. UK

# Action Steps to Combat Invasive Species

- Great Lakes Restoration Initiative (GLRI)
- Significant increase in State funding for Prevention
- State Ballast Water Permit
- Action on Asian Carp Barrier



Photo: Newscom

# Action Steps to Protect Water Quantity

- State High Capacity Well Law
- Passage of Great Lakes Compact

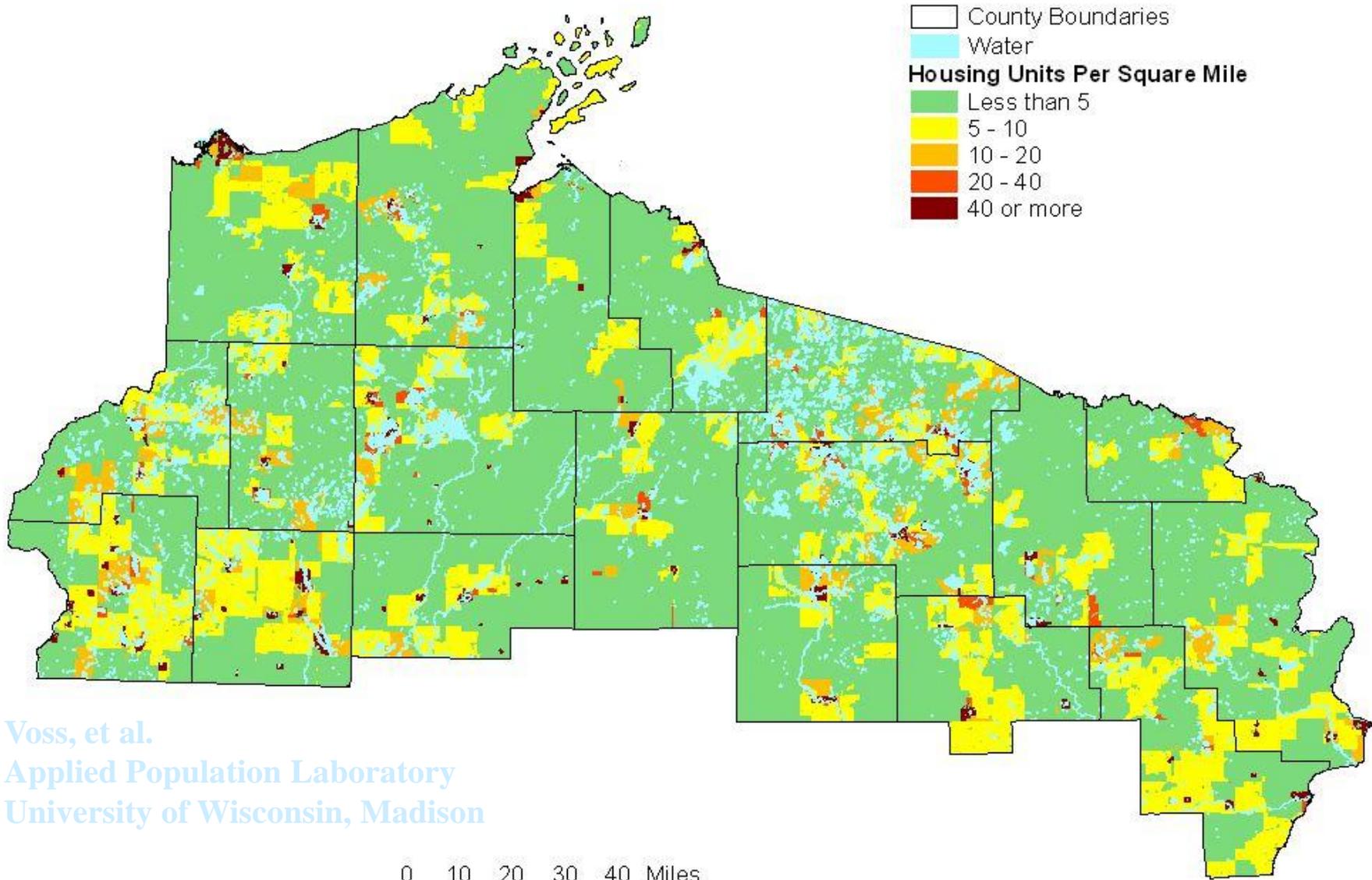


# Action Steps to Reduce Polluted Runoff

- New State Rules
- New Requirements for CAFOs
- New Stormwater Runoff Regulations
- Funding from the GLRI



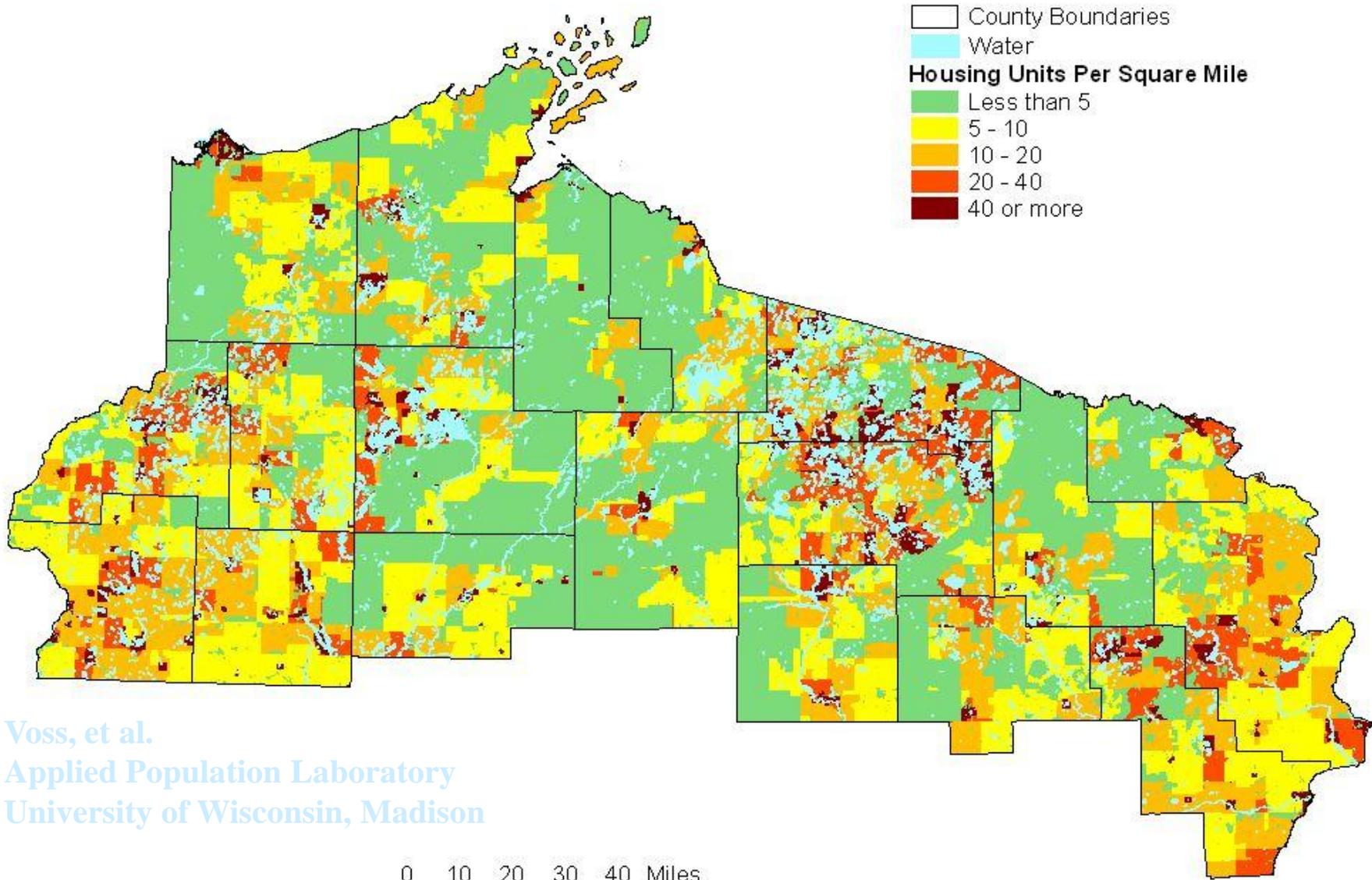
# 1940 Housing Density by Partial Block Group



Voss, et al.  
Applied Population Laboratory  
University of Wisconsin, Madison

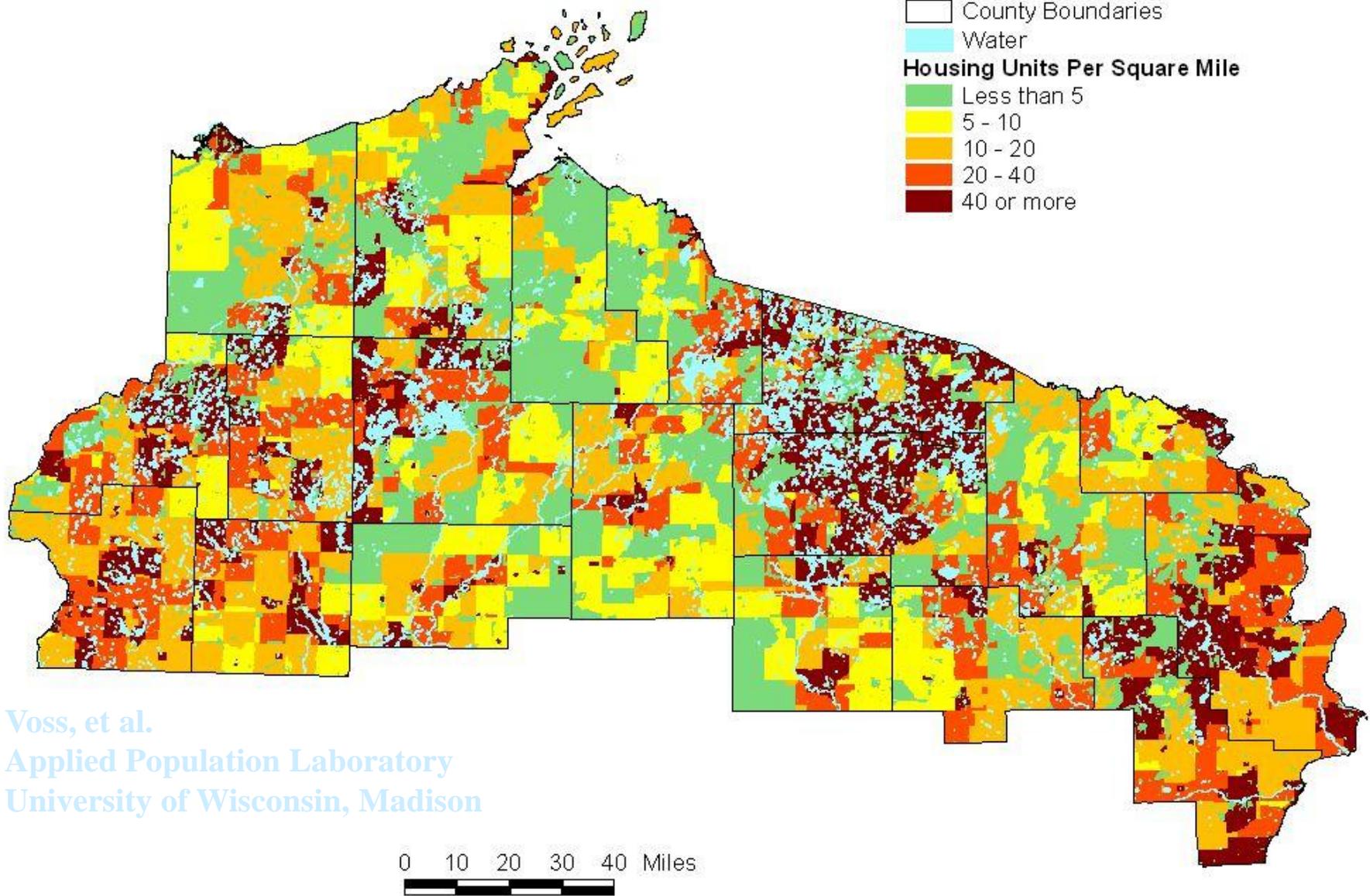


# 1990 Housing Density by Partial Block Group



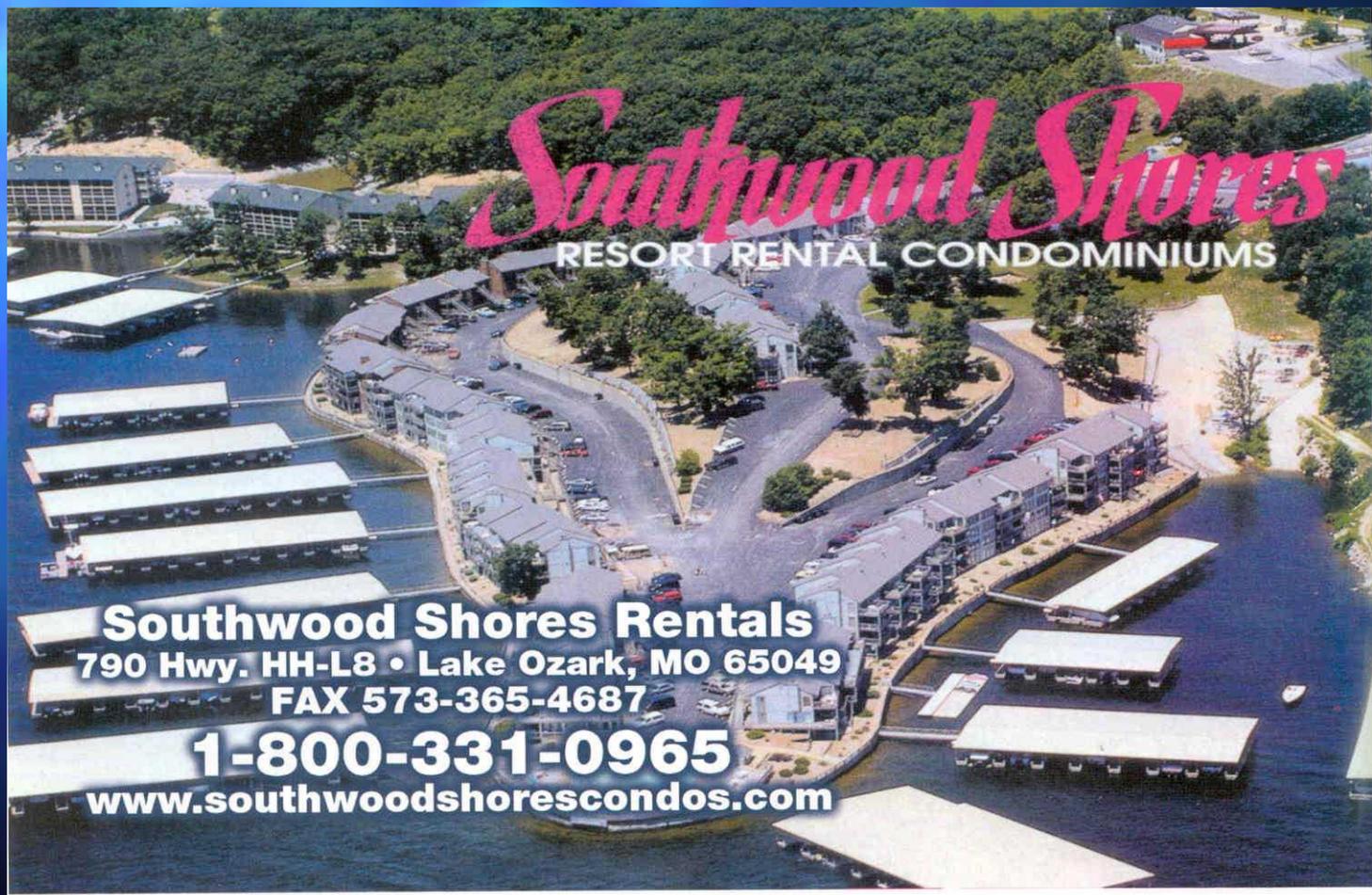
Voss, et al.  
Applied Population Laboratory  
University of Wisconsin, Madison

# 2010 Housing Density by Partial Block Group Rural Renaissance Forecast



Voss, et al.  
Applied Population Laboratory  
University of Wisconsin, Madison

WI is doing better than some!



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# What's Next for the Waters of Wisconsin?

- Should we have a Wisconsin Water Policy?
- Should we consider a Clean Water Legacy Act?



# What will the next 300 years bring?

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- The issues are complex, with many competing interests
- As trustee, the State of WI, has a solemn responsibility to all the citizens of the state
- The Courts, the Legislature, the Executive Branch will impact this future
- Citizens must be actively involved



“All ethics so far evolved rest upon a single premise; that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in that community, but his ethics prompt him also to cooperate (perhaps in order that there may be a place to compete for).”

Aldo Leopold