Wisconsin's Public Trust Doctrine

It's Influence on the Evolution of Wisconsin's Water Ethic

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Prepared and Presented by:

Michael J. Cain
Attorney at Law

Protecting Public Waters Under the Public Trust Doctrine

This presentation is intended to provide an outline of the Public Trust Doctrine in Wisconsin and its influence on the evolving Wisconsin water ethic.

A. Historical Context

The foundation for the State of Wisconsin's authority and responsibility to regulate activities in public navigable waters emanates from the Wisconsin Constitution.

Article IX, Section 1 or the Wisconsin Constitution provides that "…the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States.…" This language provides the basis for the Public Trust Doctrine in navigable water in Wisconsin.

2003 was designated as the Year of Water in Wisconsin by Governor Doyle to recognize and celebrate the state's remarkable water resources and to address future water challenges. As we look at these issues today, it's vital to understand and consider the history of the protections that have been put in place to assure the state's waters remain "common highways and forever free."

The "common highways and forever free" language in the Constitution can be traced back to ancient Rome, when Emperor Justinian, in 528 AD condensed prior decrees of Emperors into a code of law that included the phrase, "By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea." These same concepts were incorporated into

English law in the Magna Carta, in 1225, under which the sovereign -- the King -- owned the public lands, but held them in trust for the public, and that all citizens had the right to use and enjoy those public resources.

This same “doctrine of the public trust” was brought to colonies in America and incorporated into the laws of the original 13 states. As settlement continued to the west, it was declared in the Northwest Ordinance of 1787 that “The navigable waters leading into the Mississippi and St. Lawrence…shall be common highways and forever free….” This language was obviously adopted as part of the Wisconsin Constitution in 1848.

When Wisconsin and the other states entered the union, they did so on “equal footing” with the original colonies, and the beds of navigable waters, which had been held in trust by the federal government, were transferred to the state as trustee of those public waters.

Over the 158 years Wisconsin has been a state, the state Supreme Court, the Legislature, the Executive Branch (now through the Department of Natural Resources), and the citizens of the state have been responsible for administering this public trust established in the Constitution. The Wisconsin Supreme Court has been very active in upholding the trust doctrine and has broadly construed it. Citizens have routinely brought violations of the Public Trust Doctrine to the court seeking remedies.

Additionally, the Public Trust Doctrine has evolved as society’s understanding of the ecology of water and waterways and the uses made of our waters have changed over time. Many of these ideas have merged with the "land/water ethic"

articulated by Aldo Leopold and others in the late 1940's I will outline some of that evolution here today.

B. The Evolution of the Public Trust Doctrine in WI

I. INTRODUCTION

A. What is the "public trust doctrine" relating to Wisconsin's navigable waters?

- emanates from the Wisconsin Constitution, Article IX, Section 1

- a sizable body of common law has developed which holds that all navigable waters are held in trust by the state for the public

- the State of Wisconsin- through all branches of government- has an affirmative duty to protect and preserve these public trust waters

B. Why is it important today?

- the trust doctrine provides the foundation for preserving our aquatic natural resources for future generations

- its importance has increased as the amount of our aquatic resources has diminished and recreational and development pressures have increased

- it affects potential recreational use of all waters- major implications for the tourism and recreation industries

C. Why is the issue of defining the "public interest in navigable waters" under the public trust doctrine important?

- Wisconsin celebrated its Sesquicentennial in 1998, and it is an appropriate time for us to assess the impacts we have had to our navigable waters in the 157 years since statehood. The current amount of, and rate of, development of the lands surrounding our water resources is unprecedented in the state's history, and is having profound effects on the ecology of our lakes and rivers

- Scientific research currently being conducted demonstrates the significant impacts the development of the shoreline and the increased use of the waterways is having on our navigable waters. It is clear that the current riparian development on our waterways is having adverse impacts on the habitat for reptiles, amphibians, fish and wildlife. If we do not take action to limit these impacts on public trust waters, we will fail in our trust responsibilities to protect the "public interest" in our navigable waters.

- The State of Wisconsin, through the Legislature, the Executive Branch, and the Wisconsin Courts, has, historically, aggressively protected the state's navigable waters under the public trust doctrine. As outlined below, the Public Trust doctrine has evolved throughout the history of our statehood to reflect the "public's interest" in our waterways and to respond to the activities which have impacted our navigable waterways. With the burgeoning growth that is currently occurring, it will be a major challenge in the 21st century to assure that we can meet our responsibilities under the Public Trust Doctrine and preserve the quality of our waters for future generations.

II. HISTORICAL UNDERPINNINGS OF THE PUBLIC TRUST DOCTRINE

A. Original concepts derived from English common law - Crown held tidal waters in trust for the public. All other waters were private.

B. Northwest Ordinance of 1787 - Article IV - "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 the 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."

C. Wisconsin Constitution.

1. Adopted by the Territorial Convention, February 1848.

2. Article IX, Section 1:

> Jurisdiction on rivers and lakes; navigable waters. SECTION 1. The state shall have concurrent jurisdiction on all rivers and lakes

bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefore.

III. JUDICIAL CONSTRUCTION OF THE TRUST DOCTRINE.

A. Wisconsin Courts Have Liberally Construed the Trust Doctrine.

1. Willow River v. Wade, 100 Wis. 86 (1898) - Supreme Court recognized the right of the public to fish in navigable waters.

2. Diana Shooting Club v. Husting, 156 Wis. 261 (1914)

a) Recognition of public nature of navigable waters.

b) Need to broadly construe the trust doctrine so the "people reap the full benefit of the grant secured to them."

c) Note that the state "became a trustee of the people charged with the faithful execution of the trust created for their benefit."

d) Notes that the "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."

B. Courts Have Expanded the Trust Doctrine.

1. Recognition of Changes in Public Needs and Use.

a) Early cases recognized the need for commerce - Olson v. Merrill, 42 Wis. 203 (1877) - saw log test.

b) Willow River Club v. Wade, 100 Wis. 86 (1898) -

recognized fishing as a "right common to the public."

c) Diana Shooting Club v. Husting, supra, (1914) - recognized importance for travel, recreation and hunting and fishing.

d) Nekoosa Edwards Paper Co. v. Railroad Commission, 201 Wis. 40 (1930) - notes that many navigable waters "have" ceased to be navigable for pecuniary gain." "As population increases, these waters are used by the people for sailing, rowing, canoeing, bathing, fishing, hunting, skating, and other public purposes."

e) Muench v. PSC, supra, (1951) - enjoyment of scenic beauty is a public right.

(1) Also see Claflin v. DNR, 58 Wis. 2d 182 (1973) - where the WI Supreme Court upheld a decision ordering removal of a boathouse based on aesthetic impacts, stating, "...the natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy."

f) Reuter v. DNR, 43 Wis. 2d 272 (1969) - right to clean, unpolluted waters. In this case the Supreme Court held that before any water regulation permit could be issued, we must look at the water quality impacts.

g) DeGaynor and Co., Inc. v. DNR , 70 Wis. 2d 936 (1975) - expanded the definition of navigability. The current test is:

"... any stream is 'navigable in fact' which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes....

Navigability is not to be determined by the normal condition of the stream...The test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets.... The test is not whether the stream is navigable in a normal or natural condition, but whether it is in some sense permanently navigable, i.e., regularly recurring or of a duration sufficient to make it conducive to recreational uses." at pp. 586-

C. Many of the Common Law Limitations Have Been Codified by the Legislature

1. Examples of Statutory limitations

a. s. 30.13(1) - Wharves, Piers, Swimming Rafts
b. s. 30.12 - Structures and Deposits, including piers and boat shelters
c. s. 30.121 - Boathouses and houseboats
d. s. 30.123 - Bridges
e. s. 30.19- Grading on the bank, ponds
f. s. 30.20 – Dredging

2. Many of the statutes have been amended by 2004 WI Act 118. These will be discussed later in today's presentation. While these changes provide limited exemptions and expanded opportunities for General Permits to streamline the process, the underlying public trust precepts remain unchanged.

4. There have been delegations of shoreland and wetland zoning responsibilities to the counties and other municipalities. (NR 115, NR 116, NR 117, NR 118, Wisconsin Administrative Code.) These still involve state model ordinances and oversight

3. The Courts have also made it clear that there are limitations on all parties, including the Legislature, in allowing activities to occur in public trust waters without appropriate oversight to assess the impacts on the public trust. When the Legislature enacted a statute in the late 1800's to authorize the draining of Big Muskego Lake in Waukesha County for development purposes, the case went to the WI Supreme Court.

The Court held that the legislative Act was a violation of the public trust doctrine and that the lake must be restored, stating, in Priewe v. Wisconsin State Land and Improvement Co., 103 Wis. 537 (1899):

> "The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, 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."

Similarly, in Muench v. Public Service Commission, 261 Wis. 492(1951), there was a controversy over the placement of a dam on the Namekagon River. The Legislature granted authority to counties to make the final decision on the placement of dams on all waters except those in state parks and state forests under the "county board law", which provided:

> …but in case of a dam or flowage located outside the boundaries of a state park or state forest no permit shall be denied on the ground that the construction of such proposed dam will violate the public right to the enjoyment of fishing, hunting or scenic beauty if the county board….approves the construction of such dam. Section 31.06(3) 1947.

The WI Supreme Court noted that the issue of "public rights of hunting, fishing, and scenic beauty by the erection of a dam on a navigable stream is of statewide concern", and that the statute that precluded findings by the state regulatory agency for public trust issues (then the PSC, now the DNR) was unconstitutional. The Court stated, on re-hearing:

> The trust doctrine has become so thoroughly embodied in the jurisprudence of this state that this court should not now repudiate the same, as it applies to the rights of recreational enjoyment of our public waters….
> It is a well-recognized principle of the law of trusts that a trustee charged with the duty of administering a trust cannot delegate to agents powers vested in the trustee which involve an exercise of judgment and discretion…. The delegation of power attempted in the "county board law" permits the "public right to the enjoyment of fishing, hunting or natural scenic beauty" in a navigable stream to be seriously impaired or destroyed through the action of a county board and the Public Service Commission is rendered powerless thereby to intervene to protect these public rights. Such an attempted delegation of power by the legislature, involving as it does a complete abdication of the trust, is therefore void.
> (Emphasis added) Muench at pp. 515-l and 515-m.

The WI Courts have thus made it clear that the issues relating to impacts to navigable waters, including cumulative impacts caused by multiple small activities (see Hixon, below), that may cause the "public right to the enjoyment of fishing, hunting or natural scenic beauty" in navigable waters to be seriously impaired or destroyed, are matters of statewide concern protected under the public trust doctrine. It is clear that the State of WI cannot abdicate its trust responsibilities to local governments or to private individuals relative to these public trust impacts.

IV. EVOLUTION OF THE TRUST SINCE MUENCH- THE EXPANSION OF THE STATE'S ROLE

A. The historical cases demonstrate the importance of the public role in protecting the trust.

B. The public still plays an important role. Examples include cases like DeGayner, supra, which was based on a suit brought by the Sierra Club.

C. The Legislature, in creating DNR as an agency in 1967, also established the office of thePublic Intervenor, which was initially established specifically to protect "public rights" in waters. It's legislative mandate, and it's focus, became broader over time.

The Public Intervenor's office played an active role in the establishment of many of our regulations for nonmetallic mining, barge fleeting, wetlands, and highway projects. They were also actively involved in litigation and enforcement actions in this field.

The Public Intervenor's role was modified in the 1996 legislative session and it was re- located within the Department of Natural Resources.

The Office of the Public Intervenor was eliminated in the 1998 State Budget.

D. The State of Wisconsin, through the Public Service Commission, and currently through the Department of Natural Resources and Department of Justice, have been delegated by the Legislature the primary responsibility for protecting the trust through regulation and enforcement. The DNR's

role has expanded with the expansion of Department staff throughout the state. With state budget constraints, the DNR's role is now shrinking and local governments will play a larger role in the administration of the public trust doctrine.

V. IMPORTANT CASES SINCE MUENCH WAS DECIDED IN 1952

A. There are many, including those discussed above in part III., above. Today we will touch on a small number of these cases which touch on important issues:

1. State v. PSC, 275 Wis. 112(1956)-

a) Facts- The Legislature authorized, through a lake bed grant, the filling of approximately 4 acres of Lake Wingra in the City of Madison for park purposes. The PSC had to review and approve the proposed project if satisfied that it would not "materially obstruct navigation nor be detrimental to the public interest."

The PSC approved the project, and the Wisconsin Conservation Commission sought review of the legislation and approval.

b) Holding of the Court- The Supreme Court held that "the use of filled lake bed... for park improvement, including a parking area ...as well as alterations which will aid navigation and other enjoyment of the water, does not violate the obligations of the trust....
Factors to be considered include:

i. Public bodies will control use of the area;
ii. The area will be devoted to public purposes and open to the public;
iii. Diminution of the lake area will be small when compared with the whole lake (320 acres);
iv. None of the public uses of the lake will be destroyed or greatly impaired;
v. The disappointment of the public who may desire to boat, fish, etc., is negligible when compared with the convenience afforded to the park users.

c) Importance of the decision- Affirms the limited basis on which

the Legislature may issue grants of public trust waters. This issue continues to be a critical one in our routine administration of the trust. This case still provides the template we use in these decisions.

2. Hixon v. PSC, 32 Wis. 2d 608(1966)-

a) Facts- F.C. Hixon owned 2000 feet of frontage on Plum Lake, a 938 acre lake in Vilas County. He had a shallow sandbar in front of his property and, without a permit, dredged a channel through the sandbar and deposited the materials on the bed of the lake, creating a breakwater 120 feet long by 85 feet wide on the bed of the lake.

Hixon said he had heart trouble, had difficulty walking, and needed the channel and breakwater to allow him to operate his fishing boat.

The PSC initiated an action under s. 30.03, Stats., and ordered the removal of the breakwater. At the 30.03 hearing, Hixon said he would apply for an after the fact permit. The permit application was submitted and, after another hearing, denied.

b) Holding of the Court- The Supreme Court noted that the PSC (now the DNR) was granted the function by the legislature to weigh the impacts of this type of structure on the public trust through s. 30.12, Stats. The Court noted that "Although the legislature has decided that some deposits and structures may be permitted consistent with its duty as trustee, the PSC was given the specific job of applying the two prescribed standards [i.e.,"material obstruction to navigation" and "not detrimental to the public interest"] to every application for a permit."

The Court upheld the State's denial of the breakwater permit and order for removal. The Court noted:

> There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer

exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever. Although the legislature has constitutionally permitted some structures and deposits in navigable waters, it permitted them under sec. 30.12(2)(a), Stats., only if the Public Service Commission found that "such structure does not materially obstruct navigation... and is not detrimental to the public interest."

In our opinion, the Public Service Commission, in denying appellant's tardy application for a permit, carried out its assigned duty as protector of the overall public interest in maintaining one of Wisconsin's most important natural resources."

c) Importance of the decision- This decision notes the important role of DNR in making the daily "legislative" decisions on permits and administering the public trust. The language on cumulative impacts has been echoed in numerous decisions since Hixon and is critical to the maintenance of an effective program to protect our resources. This decision is consistently relied on by Courts and ALJ's in supporting our decisions.

d.) This decision, along with many of the decisions rendered by the WI Supreme Court through the 1960's to the early 21st century (see discussion below) incorporates the evolving ecological sciences and the land/water ethic articulated by Aldo Leopold and others beginning in the late 1040's. (See discussion below).

3. Claflin v. DNR, 58 Wis. 2d 182(1972)-

a) Facts- In 1966, Charles Claflin applied to the PSC for a permit under s. 30.12, Stats., to construct a boathouse adjacent to his property on Lake Owen, Bayfield County. After a hearing, the PSC hearing examiner recommended granting the permit. The three person Commission, however, denied the permit by a vote of 2-1 in June, 1967.

In July, 1967, Claflin filed an application for rehearing with the DNR, which had just been created and which received the water regulatory functions from the PSC on July 1, 1967. DNR granted a rehearing and held two days of hearings in September and

November, 1967. In August, 1970, the Department handed down its decision to deny the permit. Claflin again filed for rehearing, and this was not responded to by DNR. Claflin went to Circuit Court and a year later the Court vacated and reversed the order of the DNR with directions to grant the permit. DNR appealed that judgment of the Circuit Court.

b) Holding of the Court- There was significant discussion in the decision concerning the procedures involved in processing the permit application. The Court determined that Claflin did have the right to seek rehearing and review of the "decisions" that had been rendered. On the issue of whether a permit should have been granted, the Court noted that it would remand the permit to the Department for further consideration of the evidence. It was noted that there was testimony in the record from "a variety of neighbors, builders, architects, an assessor, and by Claflin himself, supporting a determination that the boathouse was well designed and maintained...did not impair natural beauty....and that the construction of a boathouse on shore would be very costly and difficult." The Court also stated that "On the other hand, there is testimony that the boathouse does impair natural beauty.

The Court remanded the case to the Department stating:

> The essential determination must be whether this particular boathouse in this precise situation is "detrimental to the public interest....
> Specific structures may be determined to be detrimental to the public
> interest on the ground they impair natural beauty. This is a proper basis for denial of a permit. The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that natural beauty should be protected as against specific structures that may be found to mar that beauty."

c) Importance of the Decision- This decision has served as the basis for much of the progress we have made in the "natural scenic beauty" and "aesthetics" area under the public trust doctrine. While cases such as Muench, supra, provided the original recognition of this as an issue, this case affirmed that impairment of natural

beauty by itself could serve as the basis for determining that a project is "detrimental to the public interest". The Court's and ALJ's have often cited this case for this proposition.

4. Just v. Marinette, 56 Wis. 2d 7 (1972) This is one of the leading cases nationally dealing with issues relating to takings issues and the public trust doctrine. The WI Supreme Court, in upholding the provisions of shoreland zoning ordinances, stated:

a. "We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man-made."

b. "Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams."

c. In upholding the statutes that establish the zoning program, the Court stated: "The active public trust duty of the State of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty."

b. The Court further stated, "Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?....An owner of land has no absolute and unlimited 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 and which injures the rights of others....It is not an unreasonable exercise of the [police power] to prevent harm to public rights by limiting the use of private property to its natural uses."

Recent decisions which continue to uphold the validity of regulations protecting navigable waters and wetlands include Zealy v. City of Waukesha, 201 Wis. 2d 365 (1996) and R.W. Docks & Slips, 2001 WI 73, 244 Wis. 2d 497.

5. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579(Ct. App.,1987)-

a) Facts of the Case- This case involved a proposal by the Village of Menomonee Falls to channelize and concrete 2.5 miles of Lilly Creek, a 3.3 mile tributary to the Menomonee River in Waukesha County, for purposes of stormwater control. Lilly Creek is a small stream which flows through an industrial park and subdivisions. It was navigated in fact by the Department and we opposed the channelization project since it would destroy the natural habitat and aesthetics remaining in the stream, was inconsistent with our long term "nonpoint" goals in the area, and would perpetuate the type of channelization and concreting which we have now recognized were detrimental to many of the rivers in the Southeast Wisconsin.

The Department opposed the permits (30.12, 30.19 and 30.195) and after a lengthy public hearing, the permits were denied. The Village of Menomonee Falls appealed, and the City of Brookfield, Villages of Sussex and North Prairie and Towns of Mukwonago, Lisbon and Brookfield joined in the appeal as "amici curiae".

b) Holding of the Court- The Court of Appeals, in a published decision, upheld the Department's determination of navigability and its denials of the permits. The major issues addressed by the Court included:

i. Navigability. The municipalities suggested that there should be a different test of navigability in urban areas and suggested that due to the limited recreational enjoyment of this small stream, it should be declared non-navigable. The Court rejected the test suggested by the Village and held that the state does not have to provide evidence of actual navigational or recreational use that but rather that the "sole test is navigability in fact, as defined in Muench and Degayner."

ii. Home Rule. The Village asserted that the Wisconsin Constitution and statutes granted the Village the authority to control activities on this small stream without DNR

permits. The Court noted that some limited authority could be granted to municipalities to control navigable waters but that these provisions could "not be construed as a blanket delegation of the state's public trust authority. Whatever bounds of such management and control may be, they cannot include the power to permanently alter the character of a navigable water without a permit from the state. Delegation of authority under the public trust doctrine is permissible when in furtherance of that trust and where delegation will not block the advancement of the paramount interests appurtenant to navigable waters."

iii. Statutory standards. The Court noted that DNR properly considered issues relating to the impacts of this project on the Milwaukee River Priority Watershed Project and its consideration of these comprehensive planning issues in its permit denial. On the issue of aesthetic impacts, the Court noted the "enjoyment of scenic beauty is one of the paramount interests appurtenant to navigable waters" and noted that the Examiner found that the "project will destroy the scenic beauty of Lilly Creek as it now exists in its natural state, substituting the sterile, barren look of a concrete or riprap channel for the aesthetic values of a meandering stream with pools and riffles, lined with natural vegetation. On the issue of wildlife habitat, the court noted that the "project would have a permanent impact on the wildlife by eliminating cover and food sources and lessening the creek's value as a travel corridor for wildlife."

c) Importance of the decision- This case reaffirms the basis for many of our public trust issues, including navigability, scenic beauty, water quality, fisheries and wildlife. It reiterated the fact that navigable waters are an issue of "statewide concern" and that there are limits to how much authority may be delegated to local governments to deal with these waterways. It recognized the need to consider our comprehensive planning processes when reviewing permits and when considering the cumulative impacts of projects.

6.State v. Trudeau, 139 Wis 2d 91 (1987)-

a) Facts of Case- This case involves the placement of a six unit

condominium building on the bed of Lake Superior on Madeline Island, Ashland County, by Marina Point Condominiums. They were advised by Duane Lahti of DNR in November, 1983, after a meeting at the site, that the area was part of the bed of Lake Superior and they could not place the condos in this area. The site is a wetland area which has been cut off from Lake Superior by road fill but is below the OHWM of the lake and is hydraulically connected by culverts under the road. The applicants withdrew their plans and the DNR did not hear about the project further until we were notified of a variance hearing before the Ashland County Board of Adjustment in January, 1984. At that time, the pilings were in, walls were up and deck floors were in place.

Ashland County granted a floodplain zoning variance for the construction in January, 1984.

The State, through the Department of Justice, filed an action against the developer, Thomas Trudeau, and the Ashland County Board of Adjustment, in August, 1984, requesting injunctive relief requiring removal of the structures found to be in violation of s. 30.12, Stats., or local zoning ordinances; the prohibition of further construction on the lakebed; and an order vacating the land use permit and floodplain zoning variance.

The Ashland County Circuit Court held that the disputed property was not lakebed because the State had failed to prove that the condominium site was navigable. The Court of Appeals, in an unpublished decision, reversed, holding that the actual navigability of the site is irrelevant if the land lies below the OHWM of Lake Superior and found that the State had produced positive, uncontradicted evidence that the site was on the bed of Lake Superior.

By the time this case was before the Supreme Court, the first six units of the condominiums had been finished and placed for sale.

b) Holding of the Court- The Supreme Court affirmed the Court of Appeals decision relating to the OHWM and the fact that the project site, while not "navigable in fact", was below the OHWM of Lake Superior and was protected public trust lakebed. The Court noted that:

> The DNR's area water management specialist …testified that he determined the lake's OHWM approximately one half mile from the site at a protected location with a clear erosion line that was free from excessive wave action. It was then determined that this site's elevation was 602 I.G.L.D. He transferred the elevation of the OHWM site to a number of points at the project site and concluded that approximately one half of the site was below Lake Superior's OHWM....
>
> [DNR] analyzed several aerial photographs of the site as it existed in 1939 and 1950, the government survey maps, the site's present configuration, and stereo photographs offering a three dimensional view of the site indicating elevation and from these sources he concluded that the project site was originally part of the basin.... The positive and uncontradicted testimony of [DNR] that the OHWM of Lake Superior is 602... and that the project site was and is hydraulically connected to and is in fact a part of Lake Superior is not discredited nor against reasonable probability. The erection of the artificial barrier, the Old Fort Road, with culverts between the site and the marina, does not remove the site as part of Lake Superior.

The Court concluded that: "Any part of the site at or below 602 feet I.G.L.D. is within the OHWM of Lake Superior and is therefore protected lakebed upon which building is prohibited."

The respondents in this case challenged the State's authority to attack the variance in this instance, arguing that our exclusive means of review of this decision was a certiorari review under s. 59.99, Stats., within 30 days of the variance decision. The Court held that the state may seek abatement of violations of floodplain zoning and may enjoin public nuisances under s. 87.30, Stats., stating:

> The board [of adjustment] did not and could not properly grant the developers a floodplain variance as to any part of the site below the OHWM of Lake Superior.... The board may grant a variance only if the grant "will not be contrary

to the public interest" and "owing to special conditions, a literal enforcement...would result in unnecessary hardship."

The Court remanded the case to the Ashland County Circuit Court with directions to remand it the board of adjustment for consideration of the lakebed and setback issues.

c) Importance of the Decision- This decision is important for a myriad of reasons. It reaffirmed much of the historic case law relating to lakebed areas, the transferability of the OHWM, and the fact that once the OHWM is established, the wetlands, marshes, and shallow areas which are not 'navigable in fact' are still protected. The case clarified the State's authority to seek review of the decision of Boards' of Adjustment. Finally, and perhaps most importantly, it resulted in the removal of a completed building on lakebed and sent a very strong message to developers that the State had both the will and the means to enforce the public trust doctrine.

7. Sterlingworth v. DNR, 205 Wis. 2d 702 (Ct. App., 1996)

a) Facts of the Case- This case involved a development on Lauderdale Lakes, Walworth County, WI, where a condominium developer purchased an existing resort and converted it to condominiums. The resort historically had 25 boat slips on Mill Lake and Sterlingworth Bay. The condominium developer proposed to place nine new boat slips since they intended to develop 34 condominium units. The Department opposed the expansion due to the resource values that would be adversely impacted by the piers and boats associated with them, including fish spawning and nursery habitat, water quality, aquatic plants (both shading and physical impacts caused by piers and boating), natural scenic beauty, and cumulative impacts.

b) Holding of the Court- The Court of Appeals, in a reported decision that has statewide precedential value, upheld the Department's denial of expanding the pier at this site. The Court spoke approvingly of the Department's consideration of resource issues and cumulative impacts. The Court noted:

1.) On cumulative impacts, the Court cited Hixon, above,

and stated that "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.

2.) Concerning the rights of a riparian owner, the Court reiterated that a riparian owner's right to place structures is limited by the public's rights in the waterway and by the "reasonable use" doctrine, which provides that the "rights" of a riparian owner are "restricted always to that which is a ...reasonable use....". What is reasonable must be determined on a case by case basis, and the Department has developed guidance on this issue.

3.) Concerning the use of our "program guidance" documents in assisting us in balancing the public versus private interests, the Court upheld our use of the guidance, stating:

"...The DNR's informal guidelines reconcile the common law "reasonable use" doctrine with the statutory limitations on a riparian owner's right to the use of a navigable water.... Even though the ...guidelines do not have the force and effect of law...and are not controlling on the courts...the guidelines illustrate DNR's experience and expertise in regulating piers....

"When an agency has particular competence or expertise on an issue, we will sustain its legal conclusions if they are reasonable."

c.) Importance of the decision. This decision is important since it provides "modern" support for the concepts of cumulative impacts and recognizes that the resource issues which have been identified by the Department (fishery

habitat, wildlife habitat, aquatic plants, invertebrates, water quality, cumulative impacts) are legitimate factors to be considered when reviewing such projects.

8. Gillen v. City of Neenah, 219 Wis. 2d 806(1998)-

a.) Facts of the Case- The City of Neenah received a lake bed grant to place fill on the bed of Little Lake Buttes des Mortes "for a public purpose in 1951. Between 1951 and 1975 sludge from the P.H. Gladfelter paper mill was placed within this area as fill material. The fill area comprised approximately 20 acres. The fill contained PCB's, and the area was thus contaminated. In 1951, 1974 and 1984 the City leased portions of the lakebed area for construction of a wastewater treatment plant, vehicular parking, and a sludge combustor.

In 1995, Minergy Corp. sought a lease to place a commercial "glass aggregate facility" on five acres of this filled lakebed. This facility incinerates papermill sludge. The DNR, after reviewing this proposal and the historical development on the five acres site, noted that this was not a "permissable public trust use", but signed an agreement authrorizing the placement of the Minergy incinerator on the footprint of the existing developed area. Numerous citizens challenged this action and questioned whether this action violated the public trust doctrine; was a public nuisance; and whether it violated other provisions of law.

The Circuit Court dismissed the claims of the citizens, holding that they did not have standing to bring this suit since DNR had entered into an agreement to permit this facility on lakebed. The central question posited by the Supreme Court was "…whether the public trust doctrine enables a citizen to directly sue a private party whom the citizen believes was inadequately regulated by the DNR."

b.) Holding of the Supreme Court- The Minergy Company argues that the "legislature has delegated to DNR the exclusive authority to decide when a public trust violation has occurred and that after DNR decides to allow a

project…all persons are barred from challenging the disputed project…". The Supreme Court, in a unanimous decision, held that citizens have an independent authority, under the public trust doctrine and the statutes, to challenge "violations of the public trust doctrine and may constitute public nuisances.

9. Hilton v. DNR, 2006 WI 84 (2006)

Involved multiple slip piers on Green Lake. The Supreme Court again upheld the public trust doctrine and reasonable use concepts. The Court reiterated the need to look at "cumulative impacts" on our navigable waters.

V. MECHANISMS FOR ENFORCEMENT OF PUBLIC TRUST

A. Civil Citations

1. Sections 23.50 to 23.99, Stats., outlines the civil citation system

a. Primary mechanism for enforcement of water regulation violations.

b. Types of violations include:

i. Illegal fill, obstruction or structures under ss. 30.12 and 30.15, Stats.

ii. Boathouses and houseboats- s. 30.121, Stats.

iii. Bridges- s. 30.123, Stats.

iv. Illegal pier structures- s. 30.13, Stats.

v. Diversion of water- s. 30.18, Stats.

vi. Grading, enlargement or ponds- s. 30.19, Stats.

vii. Changing of stream courses- s. 30.195, Stats.

viii. Dredging- s. 30.20, Stats.

ix. Unpermitted dams and violations of orders- s. 31.23, Stats.

c. Primary foci of enforcement are restoration and deterrence

i. Section 23.79(3), Stats., provides relative to judgments:

"In addition to any monetary penalties, the court may order the defendant to perform or refrain from performing such acts as may be necessary to fully protect ... the public interest. The court may order abatement of a nuisance, restoration of a natural resource, or other appropriate action designed to eliminate or minimize any environmental damage caused by the defendant."

ii. Violations of Chapters 30 and 31, Stats., are declared, by statute, to be public nuisances. See ss. 30.294 and 31.25, Stats.

iii. The project proponent and the contractor will usually be named as defendants. See provisions relating to "Parties to a Violation" under ss. 23.99, 30.292, and 31.99, Stats.

iv. Forfeitures are an important aspect of penalties for purposes of deterrence, but in many cases are a secondary consideration after restoration.

B. Civil Nuisance Actions

1. Section 30.03, Stats., provides:

"The district attorney of the appropriate county or, at the request of the department, the attorney general shall institute proceedings to recover any forfeiture imposed or to abate any nuisance committed under this chapter or chapter 31."

2. As noted above, violations of these chapters, or of permits and orders issued under these chapters, are declared nuisances. See ss. 30.294 and 31.25, Stats.

C. Administrative Enforcement Actions

1. Section 30.03(4), Stats., provides that:

> "If the department learns of a possible violation of the statutes relating to navigable waters....in lieu of or in addition to any other relief provided by law....The department may order [an administrative] hearing under chapter 227 concerning the possible violation or infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in navigable waters....".

2. The limited prosecutorial resources of the DNR limit the number of these cases which can be prosecuted. This is, however, an effective mechanism in certain complex cases.

   Prior to the adoption of the citation system under Chapter 23, Stats., this was the primary enforcement system. A long backlog of cases resulted.

D. Criminal Prosecutions

1. Most of Chapters 30 and 31, Stats., have been decriminalized

2. Section 30.12, Stats., can be prosecuted criminally under s.30.12 or under a civil citation through s. 30.15, Stats.

3. The criminal provisions are rarely used, but are available for repeat violations or especially egregious violations.

VII. SUMMARY ON PUBLIC TRUST ISSUES

- historical perspective.

- changing face of the developments we are seeing today.

- importance of maintaining the proper perspective on the term "public interest" as it relates to our navigable waters.

- We need to be cognizant of the evolving land/water ethic articulated by Aldo Leopold and others which has been

incorporated into the regulations and jurisprudence over the last 50 years. Aldo Leopold wrote, which were written over 50 years ago-

> "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 co-operate(perhaps in order that there may be a place to compete for).
>
> The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, or animals, or collectively: the land....
>
> In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow members, and also respect for the community as such."
> **A Sand County Almanac: and Sketches Here and There**, Oxford University Press, 1949.

We all need to apply this land and water ethic to our activities as they relate to our navigable waters. If we are to protect the public interest in these waters, we need to respect the other members of the ecological community which are being so seriously impacted by our activities.