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Environmental Law

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Although reports of chronic wasting disease (CWD) captured the attention of this year's popular media, it was the access, control, and quality of Wisconsin's waterways that dominated the work of judges, legislators, and administrative agencies. The Wisconsin Supreme Court struck down the "dockominium" concept, restricting the ability of a riparian land owner to transfer waterfront access to third parties using the condominium form of ownership. The Wisconsin Court of Appeals upheld the private waste system regulations promulgated by the Department of Commerce under chapter Comm 83 of the Wisconsin Administrative Code and also held that a municipal sewage district has no obligation to allow a neighboring municipality expanded access to its facilities. The legislature adopted legislation that requires a permit for the introduction and removal of aquatic plants and that sets drinking water standards for aquifer recovery systems. Finally, the Wisconsin Department of Natural Resources (DNR) promulgated rules requiring the consideration of wetland compensatory mitigation in permit decisions, as well as rules authorizing the construction of breakwaters to control erosion in several Wisconsin lakes. Perhaps most significantly, the DNR and the Department of Agriculture, Trade and Consumer Protection (DATCP) completed a major creation and rewrite of several administrative rule chapters to address runoff water pollution known as "nonpoint source" pollution.

When the Wisconsin courts, legislature, and administrative agencies weren't preoccupied with water regulations, they also made a significant impact on the regulation of Wisconsin's other natural resources. The Wisconsin Court of Appeals determined that general liability insurance does not cover the costs of complying with an order to abate a public nuisance of environmental contamination. The legislature created the Council on Forestry to advise the government on the use of Wisconsin's forests and enacted legislation that severely restricts the introduction of invasive species into the state. The DNR promulgated rules that apply national air quality standards to local paper and pulp mills, allow soil contamination to be entered into the state's Geographic Information System Registry System (GIS Registry), create a voluntary multi-pollutant reduction registry, and administer a new brownfields remediation grant program.

CASE LAW

Wisconsin Supreme Court

Riparian Rights—Dockominiums Invalid. By a 4–2 majority, the Wisconsin Supreme Court, in *ABKA Ltd. Partnership v. DNR*,[1] held that the "dockominium" form of ownership is invalid in the state of Wisconsin. A dockominium, as the court explained, is a "dockside community of privately owned boats moored in slips that are purchased for year-round living."[2] In this case, ABKA Limited Partnership (the petitioner) created a dockominium by converting an existing dock with 407 boat slips into the condominium form of ownership in which up to 407 private individuals were allowed to purchase a condominium unit consisting of a four-by-five-by-six-inch lock box.[3] According to the condominium declaration established by the petitioner, each lock box holder was entitled to the "standard riparian rights of owners of waterfront real estate . . . and the use of an assigned boat slip."[4]

The dock at issue was part of the Abbey Harbor marina, which was developed in the 1960s by dredging uplands and dry marsh abutting Lake Geneva.[5] The marina was constructed under a permit that required that the artificial waterway be maintained as a "public waterway."[6] The marina was purchased

[1] 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854, *petition for cert. filed*, 71 U.S.L.W. 3519 (U.S. Jan. 21, 2003) (No. 02-1106). Justice Wilcox did not participate in the decision.

[2] *Id.* ¶ 1 n.1.

[3] *Id.* ¶ 5.

[4] *Id.*

[5] *Id.* ¶ 3.

[6] *Id.*

in 1973 by the petitioner, who continued to rent out the boat slips to the public on a seasonal basis until 1995.[7] In 1995, the petitioner filed a condominium declaration with the county's register of deeds and applied to the DNR for a permit authorizing the conversion of the marina into a condominium.[8] The DNR received an objection that the condominium plan violated the public trust doctrine of chapter 30 of the Wisconsin Statutes,[9] which prohibits the conveyance of riparian rights other than by an access easement or a complete transfer of the underlying riparian property.[10]

A contested case hearing was held before an administrative law judge (ALJ), who held that the DNR had jurisdiction to regulate the conversion of existing slips to a dockominium.[11] The ALJ further held that a conversion of all 407 boat slips by the petitioner would "exceed its reasonable use of the riparian frontage," and ordered that 287 of the slips be maintained as rentals.[12] The circuit court affirmed the ALJ, but the court of appeals reversed, holding that the conversion of the marina to private dockominiums was the equivalent of the DNR allowing "control over navigable waters to be vested in private individuals[, which is] in violation of the public trust doctrine."[13]

In affirming the court of appeals, the Wisconsin Supreme Court agreed that dockominiums violated the public trust doctrine.[14] Unlike the decision of the court of appeals, which held that dockominiums violated the public trust because they transferred "ownership of public waters to private individuals," the supreme court held that dockominiums violated the public trust doctrine because they "attempted to convey condominium property contrary to Wis. Stat. § 30.133 (1995–96), which prohibits certain transfers of riparian rights."[15] In order to reach this conclusion, the supreme court first addressed the issue of whether a permit was required for converting a marina into a dockominium. The court of appeals had avoided this issue by holding that the petitioner "had waived the right to challenge jurisdiction by agreeing to apply for a permit."[16] Instead of using this estoppel rationale, the majority opinion of the supreme court held that the DNR had jurisdiction to regulate the conversion of the marina pursuant to the broad powers of section 30.03(4), which allows the DNR to bring an enforcement action when it learns of a "'possible violation' of the public trust doctrine."[17]

The majority then addressed the issue of whether the lock boxes constituted a valid condominium unit. The majority pointed to Wisconsin's condominium law, which requires that a condominium unit must have an "independent use."[18] The majority also indicated that the Wisconsin Legislature showed "no legislative intent to permit a boat slip to be conveyed as a condominium unit," unlike other states, such as Ohio, which expressly allow a "water slip" to be designated as a unit in a condominium declaration.[19] The majority further established that a condominium unit "cannot serve primarily as a conduit for another use."[20] Consequently, the majority agreed with the court of appeals' determination that the petitioner's dockominium was invalid, because the lock boxes were a "sham" with "no independent use" and were intended only to convey the valuable commodity of the boat slip.[21]

Because the lock boxes had no independent use, the majority held that the petitioner had not created a valid condominium unit, and without a valid condominium unit the condominium conveyance was void.[22] Without a valid condominium conveyance, the majority held that the petitioner's transfer of riparian rights to the condominium unit purchasers was unenforceable because it was not a transfer of the "right to cross the land in order to have access to the navigable water," which is the only permissible transfer of riparian rights under section 30.133.[23] The petitioner argued that the establishment of a condominium was simply a transfer of ownership whereby the "dockominium owners own riparian property in common," and that section 30.133 does not restrict the transfer of the underlying riparian property from one owner to a group of owners.[24] The majority disagreed, stating that the petitioner's transfer was invalid because the lock boxes were "phantom units" without an independent use; thus, no valid condominium unit or conveyance was established, and the condominium declaration conveyed "nothing more than riparian rights unattached to any real property interest."[25] Here, the majority distinguished invalid dockominiums from

[7] *Id.* ¶ 4.

[8] *Id.* ¶¶ 5–6.

[9] Textual references to the Wisconsin Statutes are hereinafter indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

[10] *ABKA*, 2002 WI 106, ¶¶ 2, 6, 61, 255 Wis. 2d 486 (citing Wis. Stat. § 30.133 (1995–96)). The statute cited has not been amended since the *ABKA* decision. *See* Wis. Stat. § 30.133 (2001–02).

[11] *ABKA*, 2002 WI 106, ¶ 8, 255 Wis. 2d 486.

[12] *Id.*

[13] *Id.* ¶ 9.

[14] *Id.* ¶ 2.

[15] *Id.* ¶¶ 1–2 (footnote omitted).

[16] *Id.* ¶ 9.

[17] *Id.* ¶¶ 15, 17.

[18] *Id.* ¶¶ 32–33, 36 (citing Wis. Stat. § 703.02(15) (1995–96)). The 2001–02 version of the cited statute maintains the requirement of an "independent use." *See* Wis. Stat. § 703.02(15) (2001–02).

[19] *ABKA*, 2002 WI 106, ¶¶ 48, 66, 255 Wis. 2d 486.

[20] *Id.* ¶ 51.

[21] *Id.* ¶¶ 51, 53.

[22] *Id.* ¶ 55.

[23] *Id.* ¶ 56.

[24] *Id.* ¶¶ 62–63.

[25] *Id.* ¶ 63.

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valid residential condominiums that include boat slips as an amenity, because the residential condominiums have units with the independent use of "living space for human beings."[26]

Joining the majority in his concurring opinion, Justice Bablitch wished the majority had gone further to declare dockominiums "a per se violation of the public trust doctrine," because they have a "significant detrimental effect on the public waters of this state," and they give owners a "right to construct and operate a dock or docks that no private landowner would be allowed."[27] The dissent, written by Justice Sykes and joined by Justice Prosser, criticized the majority for "obliterat[ing] the property rights of [dockominium owners]" and deciding the case "on grounds not advanced by the parties."[28] Specifically, the dissent argued that the ALJ and DNR had no jurisdiction to restrict dockominiums because "there is no statutory permit requirement for a marina condominium conversion that involves no new placement of structures or deposits in public trust."[29] The dissent accused the majority of using a circular analysis that does "significant damage to the law of condominiums, administrative agency jurisdiction, and the public trust doctrine."[30]

Wisconsin Court of Appeals

Private Wastewater/Water Quality—Wis. Admin. Code ch. Comm 83 Upheld. In *League of Wisconsin Municipalities v. Department of Commerce*,[31] the Wisconsin Court of Appeals (District IV), held that the Wisconsin Department of Commerce (Commerce) did not need to include the water quality standards found in chapter 160 when promulgating regulations for "private onsite wastewater treatment systems."[32] Instead, Commerce need only "ensure that [its] rules result in compliance with the numerical groundwater standards established under ch. 160."[33]

League of Municipalities attempts to mediate the difficult issues that arise when two agencies, whose duties overlap, pass potentially conflicting regulations. Through chapter 160, the legislature has authorized the DNR to set numerical standards for groundwater contaminants that "will become criteria for the protection of public health and welfare."[34] At the same time, the legislature has authorized Commerce to supervise the "construction, installation and maintenance of plumbing" in order to "safeguard the public health and the waters of the state."[35] In 2000, Commerce significantly revamped chapter Comm 83 of the Wisconsin Administrative Code (Comm 83), which regulates private onsite wastewater treatment systems (POWTS); however, Commerce did not specify that POWTS must comply with the existing DNR numerical standards for groundwater regulation.[36]

Several environmental and municipal organizations (collectively, "the petitioners") filed suit to invalidate Comm 83 as a retreat from the existing standards for groundwater quality set by the DNR. The conglomerate of petitioners challenged the revised Comm 83 on three grounds, all of which were rejected by both the circuit court and the court of appeals.

First, the petitioners argued that Comm 83 violated section 227.10(2), which requires that "[n]o agency may promulgate a rule which conflicts with state law."[37] The court of appeals reviewed the existing DNR regulations and determined that the regulations, in conjunction with section 227.10(2), require that Commerce "ensure that [its] rules result in compliance with the numerical groundwater standards established under ch. 160, but [does not require] that [Commerce's] rule must expressly incorporate or refer to the standards."[38] Consequently, when Commerce enforces the new Comm 83, it must ensure that POWTS comply with the DNR regulations, but Commerce is under no obligation to include the DNR's numeric standards in the written text of its own regulations.

The petitioners' second argument focused on Comm 83.24, which allowed Commerce to issue a variance for nonfailing POWTS that would allow property owners to "ask the department's recognition of an alternative method or means for complying with the intent of [Comm 83]."[39] The petitioners argued that the legislature only authorized Commerce to issue variances from state water quality standards under a restricted set of circumstances.[40] The court of appeals disagreed, stating that Commerce has "reasonable and necessary" powers to implement its regulations, including the right to issue variances to avoid "unjust or unreasonable" consequences.[41] Con-

[26] *Id.* ¶ 68.

[27] *Id.* ¶¶ 73–74 (Bablitch, J., concurring).

[28] *Id.* ¶¶ 81–82 (Sykes, J., dissenting).

[29] *Id.* ¶ 95 (Sykes, J., dissenting).

[30] *Id.* ¶ 117 (Sykes, J., dissenting).

[31] 2002 WI App 137, 256 Wis.2d 183, 647 N.W.2d 301 (review denied).

[32] *Id.* ¶¶ 2, 16.

[33] *Id.* ¶ 16.

[34] *Id.* ¶ 3 (citing Wis. Stat. § 160.001 (1999–2000)). The statute cited has not been amended since the *League of Municipalities* decision. *See* Wis. Stat. § 160.001 (2001–02).

[35] *League of Municipalities*, 2002 WI App 137, ¶ 4, 256 Wis. 2d 183 (citing Wis. Stat. § 145.02(1) (1999–2000)). The statute cited has not been amended since the *League of Municipalities* decision. *See* Wis. Stat. § 145.02(1) (2001–02).

[36] *League of Municipalities*, 2002 WI App 137, ¶¶ 2, 4–5, 256 Wis. 2d 183.

[37] *Id.* ¶ 3 (citing Wis. Stat. § 227.10(2) (1999–2000)). The statute cited has not been amended since the *League of Municipalities* decision. *See* Wis. Stat. § 227.10(2) (2001–02).

[38] *League of Municipalities*, 2002 WI App 137, ¶ 16, 256 Wis. 2d 183.

[39] *Id.* ¶ 19.

[40] *Id.* ¶ 20.

[41] *Id.* ¶ 22 (citing Wis. Stat §§ 101.02(6)(h), 145.02(3) (1999–2000)). The 2001–02 versions of the cited statutes maintain the authority of Commerce to issue variances. *See* Wis.

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sequently, the court of appeals upheld the new Comm 83 variance provisions.

Finally, the petitioners argued that section 160.255(3), which provides that Commerce can "promulgate rules that define design or management criteria for private sewage systems that permit the enforcement standard for nitrate to be attained or exceeded," is an unconstitutional delegation of power because it "contains no express or implied standard."[42] The court of appeals rejected this claim as well, stating that the legislature intended to "remove nitrates as a mandatory regulated substance as far as private sewage systems are concerned."[43] Thus, although the court of appeals' first holding required that Commerce ensure that its enforcement of Comm 83 complied with DNR numeric standards, this third holding specifically exempted any numeric standards, including nitrates, that the legislature authorized POWTS to exceed.

Insurance—Nuisance Enforcement Action not Covered. In a unanimous decision, the court of appeals (District IV), in *State v. Hydrite Chemical Co.*,[44] held that a company's comprehensive general liability insurance, which covered "sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies," did not cover the environmental cleanup obligations that were the consequence of a successful nuisance action filed by the state.[45]

In 1983, Hydrite Chemical Company (Hydrite) received a report indicating the presence of groundwater contamination and applied for a permit to accept and store hazardous waste.[46] In 1989, the permit was issued by the United States Environmental Protection Agency, but required that Hydrite implement a corrective action plan (CAP). In 1991, Hydrite submitted the costs it had incurred to implement the CAP to its insurance carrier, which denied the claim. Hydrite filed an action to recover from the insurance company, but the court of appeals rejected the action in 1998, indicating that the CAP costs were not "legal damages."[47]

In 1995, the state filed a public nuisance lawsuit against Hydrite for contaminating the state's property—namely, groundwater.[48] Hydrite notified its insurance carriers of the suit and entered into three partial settlement agreements with the state, which required Hydrite to deposit money into a settlement fund and draw from that fund to pay for remediation activities until the groundwater was restored to acceptable levels.[49] The circuit court denied Hydrite insurance coverage on the grounds that Hydrite violated the "voluntary payment" and "no action" clauses of the insurance contracts when it agreed to the CAP plan in 1989.

The court of appeals affirmed the circuit court ruling, but on other grounds. The court of appeals reiterated the holding of *City of Edgerton v. General Casualty Co. of Wisconsin*,[50] which held that "damages" in general liability insurance contracts do not cover "remediation and cleanup of the affected site" when an insured is ordered to clean up the property by a government agency.[51] In *Hydrite*, the court of appeals interpreted the state's nuisance action against Hydrite as an attempt to enforce the remediation that was required by state statute.[52] The court justified this interpretation by noting that had Hydrite "fulfilled its obligations to clean up the site [under the CAP plan, then] the costs it incurred would not have been covered under its insurance policies," and if Hydrite had successfully executed the CAP plan, then the state would not have filed the nuisance action.[53] Consequently, Hydrite was not entitled to indemnification from its insurance carriers because the remediation activities required by the nuisance suit were not "legal damages" under *Edgerton*.

A petition has been filed for the Wisconsin Supreme Court to review the *Hydrite* decision. The petition is being held in abeyance pending the court's resolution of *Johnson Controls, Inc. v. Employers Insurance of Wausau*,[54] which challenges the continued viability of *Edgerton*.[55]

Sewer Service—City Has No Obligation to Extend. The court of appeals (District II), in *Town of Neenah Sanitary District No. 2 v. City of Neenah*,[56] held that a city was not obligated to extend sewer service to new areas in an adjoining sanitary district, nor was the city under any obligation to give the sanitary district an objective explanation for the denial of the extension.[57]

In 1982, the Town of Neenah Sanitary District No. 2 (the district) entered into a Wastewater Treatment Service Contract (the 1982 contract) with the City of Neenah (the city). Pursuant to the 1982 contract, the district was al-

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Stat. §§ 101.02(6)(h), 145.02(3) (2001–02).

[42] *League of Municipalities*, 2002 WI App 137, ¶ 24, 256 Wis. 2d 183.

[43] *Id.* ¶ 25.

[44] 2002 WI App 222, 257 Wis. 2d 554, 652 N.W.2d 828 (petition for review filed and held in abeyance); *see infra* note 55.

[45] *Id.* ¶ 1.

[46] *Id.* ¶ 3.

[47] *Id.* (citing *Hydrite Chem. Co. v. Aetna Cas. & Sur. Co.*, 220 Wis. 2d 26, 582 N.W.2d 423 (Ct. App. 1998)).

[48] *Id.* ¶ 4.

[49] *Id.* ¶¶ 6–7.

[50] 184 Wis. 2d 750, 517 N.W.2d 463 (1994).

[51] *Hydrite*, 2002 WI App 222, ¶ 25, 257 Wis. 2d 554.

[52] *Id.*

[53] *Id.*

[54] 2002 WI App 30, 250 Wis. 2d 319, 640 N.W.2d 205 (review granted).

[55] Information about the current status of the *Hydrite* case is available online through the Wisconsin Supreme Court and Court of Appeals Case Access system, at http://www.courts.state.wi.us/wscca/sccatabframe.asp?txtCentury=20&txtCaseNum=010580.

[56] 2002 WI App 155, 256 Wis. 2d 296, 647 N.W.2d 913.

[57] *Id.* ¶ 1.

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lowed to use the city's facilities as a conduit to receive sanitary treatment services from the regional treatment plant and interceptor owned by the Neenah-Menasha Sewerage Commission.[58] In 1988, by separate agreement (the 1988 agreement) the city granted the district access to the city's interceptor for $295,000.[59] In 1998, the district requested permission from the city to extend the sewer system within the city's boundaries while maintaining access to the city's interceptor.[60] When the city denied the expansion, the district filed an action, claiming that (1) the city could not unreasonably deny expansion of the sewer system without an objective reason, and (2) the city maintained a monopoly, and its denial of the extension was a violation of Wisconsin's antitrust law.[61]

Both the circuit court and the court of appeals rejected the district's claims. The court of appeals noted that both the 1982 contract and the 1988 agreement required the district to obtain the city's consent before increasing the area that is serviced by the city's interceptor.[62] Because neither agreement provided that the city could not unreasonably withhold consent, the court held that the city could deny the district's request without a stated reason and that the city did not violate any implied covenant of "good faith" by remaining silent as to its reasons for the denial.[63]

The court of appeals also denied the district's antitrust claim by extending the holding of *Town of Hallie v. City of Chippewa Falls*,[64] which held that a municipality could "tie in" other services to a sewage contract and avoid antitrust liability if "the legislature intended to allow municipalities to undertake such [services]."[65] In *Town of Hallie*, Chippewa Falls avoided antitrust liability despite its requirement that a town contract with the city for a variety of non-sewage related municipal services in order for the town to obtain sewage service from the city.[66] Here, in *Town of Neenah*, the court of appeals extended this rationale to allow a city to avoid antitrust liability when it restricts the extension of a town's sewage system because the legislature has authorized a city to "fix the area outside its boundaries in which service will be provided."[67]

STATUTORY DEVELOPMENTS[68]

In July of 2002, the 2001–03 budget adjustment bill was enacted as 2001 Wisconsin Act 109 (Act 109). Nearly every significant state legislative change during 2002 in the area of environmental law was the result of Act 109.

Council on Forestry

As a compromise to an unsuccessful attempt to remove the Bureau of Forestry from DNR and create a new cabinet-level Department of Forestry, Act 109 established the Council on Forestry (the council), an advisory council representing the interests of legislators, municipalities, industry, and conservation organizations.[69] The council is responsible for advising the governor, legislature, DNR, Commerce, and other state agencies on a variety of topics, including protection of forests from fire and disease, sustainable forestry, reforestation, economic development of the forestry industry, and funding needs of forestry programs conducted by the state.[70]

The council's major responsibility is to produce a biennial report that outlines the extent, current use, and projected future demand of the state's forest resources.[71] The report must also detail the success of existing incentives that stimulate development of these resources and make recommendations for increasing the economic development of the forestry industry.[72] Finally, the report must make recommendations on how to increase the public's awareness of forestry issues.[73] In addition to advising the government on forestry issues and producing the biennial report, the council will also consult with the University of Wisconsin–Madison if the university chooses to create a faculty position for a forest landscape ecologist.[74]

Invasive Species Regulation

In 2002, the DNR was given a mandate to "establish a statewide program to control invasive species in the state."[75] Specifically, the DNR was instructed by the legislature to (1) implement a statewide management plan to control invasive species; (2) administer the "aquatic plants" program described below; (3) encourage cooperation among state agencies; (4) seek public funding for the program; (5) provide education and conduct research on invasive species; (6) promulgate rules to classify invasive species; (7) create a watercraft inspection program; and (8) submit a biennial report

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[58] *Id.* ¶ 2.

[59] *Id.* ¶ 3.

[60] *Id.* ¶ 4.

[61] *Id.* ¶¶ 1, 5 (citing Wis. Stat. § 133.03 (1999–2000)).

[62] *Id.* ¶¶ 10, 16.

[63] *Id.* ¶ 14.

[64] 105 Wis. 2d 533, 314 N.W.2d 321 (1982).

[65] *Town of Neenah*, 2002 WI App 155, ¶ 22, 256 Wis. 2d 296.

[66] *Id.* ¶ 21 (citing *Town of Hallie*, 105 Wis. 2d at 534–36).

[67] *Id.* ¶ 24 & n.7 (citing Wis. Stat. § 66.029(2)(c) (1979–80), *renumbered as* Wis. Stat. § 66.0813(3)(a) (1999–2000)).

[68] Hereinafter and unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2001–02 Wisconsin Statutes.

[69] 2001 Wis. Act 109, § 14kr (creating Wis. Stat. § 15.347(19)).

[70] Wis. Stat. § 26.02(1).

[71] Wis. Stat. § 26.02(2).

[72] *Id.*

[73] *Id.*

[74] Wis. Stat § 23.09(3)(b).

[75] 2001 Wis. Act 109, § 72t (creating Wis. Stat. § 23.22).

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to the legislature.[76] By the close of 2002, the DNR had incorporated several limitations on invasive species in many of its programs[77] and had started its watercraft inspection effort,[78] but the DNR has yet to establish the comprehensive statewide program envisioned by the legislature.

The legislature also created an Invasive Species Council (the council), which will "make recommendations to the [DNR] for a system for classifying invasive species," "conduct studies of issues related to controlling invasive species," and "make recommendations to the [DNR] on the establishment of a procedure for awarding cost-sharing grants."[79] The council will consist of seven members appointed by the governor, along with the Secretaries (or designee) of the DNR, Commerce, DATCP and the Departments of Administration, Tourism, and Transportation.[80]

Aquatic Plants—Permit Requirements

The DNR was also given a legislative mandate to "establish a program for the waters of this state" that would (1) implement efforts to protect and develop a diverse community of native aquatic plants; (2) regulate how aquatic plants are managed; and (3) regulate the issuance of aquatic plants management permits.[81] Section 23.24(3) was also enacted, which requires a permit to introduce, remove, or control aquatic plants.[82] This statute, however, exempts several entities from the permit process, including wild rice and fish farms, and gives the DNR permission to waive the permit requirement for certain practices such as controlling aquatic plants for bathing beaches or drinking water purposes.[83] Finally, the statute strictly forbids any person from distributing an "invasive aquatic plant."[84]

Pursuant to this legislative mandate, the DNR promulgated an emergency rule in May 2002.[85] However, the emergency rule expired in October 2002, and the permanent rule has not yet been promulgated.[86] The emergency rule created NR 109, which requires the submission of a detailed application for parties that wish to manually or mechanically control aquatic plants in bodies of water that are greater than 10 acres or that are not entirely confined by the property of one person.[87] The emergency rule also strictly forbids the introduction of Eurasian water milfoil, curly leaf pondweed, or purple loosestrife into waters of the state without DNR permission.[88] Finally, under the emergency rule, the DNR can attach several conditions on a permit issued under the emergency rule or the existing chapter NR 107 of the Wisconsin Administrative Code, governing aquatic plant management permits. These conditions may include limitations on the quantity and type of aquatic plants introduced, as well as the method, time, and areas of introduction.[89]

Aquifer Recovery Systems—Drinking Water Standards

Act 109 created a statutory definition of *aquifer storage and recovery well* (i.e., an aquifer recovery system) and authorized the DNR to promulgate certain rules.[90] The legislature defined an aquifer storage and recovery well as "a well through which treated drinking water is placed underground for the purpose of storing and later recovering the water through the same well for use as drinking water."[91] Under the new statute, the DNR is required to promulgate rules to ensure that aquifer recovery systems are in compliance with drinking water standards.[92] Aquifer recovery systems, however, are exempt from the preventative action limits for chloroform, bromodichloromethane, dibromochloromethane, or bromoform.[93] Finally, any operator of a municipal water well that uses an aquifer recovery system must file with the DNR a report that describes the "experience" that the operator has had with the well within five years after placing the well in operation.[94]

In compliance with this legislative mandate, the DNR has included a definition of *aquifer storage recovery* (ASR) in

[76] Wis. Stat. § 23.22(2)(b), (5)–(6).

[77] *See, e.g.*, Wis. Admin. Code § NR 120.14(19) (Sept. 2002) (prohibiting certain invasive species when conducting shoreland restoration in the priority lake grant program); Wis. Admin. Code § NR 350.09(3) (Jan. 2002) (requiring an evaluation of invasive species before qualifying for wetland compensatory mitigation credits).

[78] *See New Watercraft Inspectors Getting the Prevention Word Out*, DNR News, Nov. 19, 2002, *available at* http://www.dnr.state.wi.us/org/caer/ce/news/on/2002/ON021119.htm#art2.

[79] Wis. Stat. § 23.22(3)(a), (c).

[80] Wis. Stat. § 15.374(18).

[81] Wis. Stat. § 23.24(2)(a).

[82] Wis. Stat. § 23.24(3)(a).

[83] Wis. Stat. § 23.24(4)(b)–(c).

[84] Wis. Stat. § 23.24(5).

[85] NR Emer. Rule, Wis. Admin. Reg. No. 557 (May 31, 2002) (creating Wis. Admin. Code ch. NR 109 (creation eff. May 10, 2002; expired Oct. 7, 2002)) (hereinafter "NR Emer. Rule").

[86] The emergency rule was listed in the Wisconsin Administrative Register as "in effect" as recently as November 2002, *see* Wis. Admin. Reg. No. 562 (Oct. 31, 2002) (eff. Nov. 1, 2002); however, the rule expired in October 2002. Clearinghouse Rule 02-061, which would create a permanent chapter NR 109 of the Wisconsin Administrative Code, is currently pending in the Wisconsin Legislature; information about the status of this clearinghouse rule, along with the text of the rule itself, is available through the Web site of the Revisor of Statutes Bureau, at http://www.legis.state.wi.us/rsb/code/index.html.

[87] Wis. Admin. Code § NR 109.04, *as created by* NR Emer. Rule.

[88] Wis. Admin. Code § NR 109.08, *as created by* NR Emer. Rule.

[89] Wis. Admin. Code § NR 109.05, *as created by* NR Emer. Rule.

[90] Wis. Stat. § 160.257(1)(b), (2).

[91] Wis. Stat. § 160.257(1)(b).

[92] Wis. Stat. § 160.257(2).

[93] Wis. Stat. § 160.257(1)(d), (2).

[94] Wis. Stat. § 280.25(2).

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the existing chapter NR 811 of the Wisconsin Administrative Code, which governs the operation and design of community water systems.[95] The DNR also created Wisconsin Administrative Code sections NR 811.88–.93, which require that any ASR comply with the water quality standards of chapters NR 140 and 809 of the Wisconsin Administrative Code, except for the substances excluded by statute.[96]

ADMINISTRATIVE DEVELOPMENTS

Runoff Water Pollution Standards

Culminating a five-year effort to redesign Wisconsin's nonpoint source program, the DNR and DATCP revised and created several rules that address nonpoint source water pollution, or "runoff pollution." The rules became effective on October 1, 2002. Specifically, the DNR amended several chapters to require that certain operations minimize runoff pollution, including the runoff from livestock feeding operations[97] and runoff that is discharged by a municipal sewer system.[98] More significantly, the DNR created chapters NR 151–155 and revised chapters NR 120 and 216 of the Wisconsin Administrative Code to set runoff pollution performance standards and provide funding opportunities for municipalities to implement runoff pollution prevention techniques. The DATCP also repealed and recreated Wisconsin Administrative Code chapter ATCP 50 to require Wisconsin's counties and farm owners to develop and maintain specific conservation practices.

The key rule, chapter NR 151 of the Wisconsin Administrative Code, establishes runoff pollution performance standards for (1) agricultural facilities, (2) non-agricultural facilities, and (3) transportation facilities.[99] Although, chapter NR 151 establishes statewide guidelines for these facilities, the DNR has reserved the right to adjust these standards for targeted areas.[100]

Agricultural facilities, ranging from grain farms to commercial livestock feed lots,[101] must meet soil erosion standards set by the DNR;[102] divert water away from uphill feedlots and manure storage facilities;[103] and comply with specific manure and nutrient management standards.[104] Chapter NR 151 also identifies which property owners are subject to the cropland and livestock performance standards set by the legislature in 1999, and how these property owners can apply for cost-sharing grants from the DNR.[105]

Non-agricultural facilities—which include development commenced after March 10, 2003, that disturbs more than one acre of land[106]—must develop a written plan to achieve an 80% reduction of sediment load carried by runoff.[107] The regulation of these non-agricultural facilities extends beyond construction of the site to include the requirement of a storm water management plan (the plan) after construction. The plan must continue to minimize sediment carried by runoff, as well as meet qualitative standards for total suspended solids, peak discharge, and infiltration.[108] A municipality is eligible for grant money if it adopts the construction and storm water management regulations for non-agricultural facilities;[109] thus, the DNR promulgated two model ordinances in chapter NR 152 of the Wisconsin Administrative Code to guide cities in implementing the new runoff standards.

Chapter NR 151 of the Wisconsin Administrative Code also requires municipalities to develop a public information and education program regarding yard waste, lawn fertilizer, and the prohibition of dumping hazardous substances in to the sewer system by 2008.[110] By 2008, each municipality also must create a program to collect yard waste and limit its own use of fertilizers on municipal property with pervious surfaces of five acres or more.[111] Non-municipal owners of five or more acres of pervious surface land must also limit their use of fertilizers by 2008 if the property discharges runoff to "waters of the state."[112]

The final group of facilities that chapter NR 151 regulates is transportation facilities, which include property used for the operation of highways, railroads, mass transit, airports, or public trails.[113] Transportation facilities constructed or altered after October 1, 2002, must meet construction site performance standards similar to those of non-agricultural facilities described above.[114]

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[95] Wis. Admin. Code § NR 811.02(4) (Nov. 2002).

[96] Wis. Admin. Code ch. NR 811.

[97] Wis. Admin. Code ch. NR 243.

[98] Wis. Admin. Code § NR 216.07 (Sept. 2002).

[99] Wis. Admin. Code § NR 151.001 (Sept. 2002).

[100] Wis. Admin. Code § NR 151.004 (Sept. 2002).

[101] Wis. Admin. Code § NR 151.002(2) (Sept. 2002) (adopting definition in Wis. Stat. § 281.16(1)).

[102] Wis. Admin. Code § NR 151.02 (Sept. 2002).

[103] Wis. Admin. Code § NR 151.06 (Sept. 2002).

[104] Wis. Admin. Code §§ NR 151.07, .08 (Sept. 2002).

[105] Wis. Admin. Code §§ NR 151.09, .095 (Sept. 2002) (referring to the standards set in Wis. Stat. §§ 281.16(3), .98).

[106] Wis. Admin. Code § NR 151.11(2)(b) (Sept. 2002).

[107] Wis. Admin. Code § NR 151.11(6)(a) (Sept. 2002).

[108] Wis. Admin. Code § NR 151.12 (Sept. 2002).

[109] Wis. Admin. Code § NR 151.15 (Sept. 2002).

[110] Wis. Admin. Code § NR 151.13(1)(b)1. (Sept. 2002).

[111] Wis. Admin. Code § NR 151.13(1)(b)2.–3. (Sept. 2002).

[112] Wis. Admin. Code § NR 151.14 (Sept. 2002).

[113] Wis. Admin. Code § NR 151.002(48) (Sept. 2002).

[114] Wis. Admin. Code §§ NR 151.23–.25 (Sept. 2002).

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The DNR also promulgated several grants to assist municipalities in achieving the objectives of chapter NR 151. Chapter NR 153 of the Wisconsin Administrative Code establishes a Targeted Runoff Management Grant Program that allows municipalities and certain state agencies to obtain assistance in funding the construction of "best management practices," which are more specifically defined in chapter NR 154. Chapter NR 155 establishes an urban nonpoint source water pollution abatement and storm water management grant for which municipalities and the University of Wisconsin Board of Regents are eligible. Finally, chapter NR 120 was amended to provide further assistance to municipalities addressing runoff pollution through the existing Priority Watershed and Priority Lake Program.

The best practices required for eligibility in the chapter NR 153 and 155 programs are outlined in Wisconsin Administrative Code chapter NR 154, which lists the best practices for nearly 40 techniques used to minimize runoff pollution. Some techniques authorized for cost-sharing grants include "critical area stabilization" and "livestock fencing"; however, little detail is provided on what exactly these techniques must include.[115] Other authorized techniques provide a detailed list of specifications, such as "shoreline habitat restoration," which requires runoff to be controlled by downspout spreaders and other devices and limits fertilizer use in specified buffer zones.[116]

Finally, the revised chapter ATCP 50 of the Wisconsin Administrative Code requires both farm owners and counties to develop conservation plans to reduce runoff pollution. Wisconsin farm owners are required to implement conservation practices that "achieve compliance with DNR performance standards under [NR 151]."[117] Starting in 2005, farm owners will also be required to develop a nutrient management plan whereby nutrient applications do not exceed the amounts listed in "Soil Test Recommendations for Field, Vegetable and Fruit Crops," a publication of the University of Wisconsin Extension.[118] There are certain exceptions to this limitation for irrigated crops, organic fertilizers, starter fertilizer, and other circumstances that may justify exceeding the recommended application.[119]

Under chapter ATCP 50, county governments are required to establish and maintain a soil and water conservation program that includes creating a land and water resource management plan (management plan), as well as setting standards for soil and water conservation.[120] A county's management plan must detail existing water quality and soil erosion conditions in the county, indicate the local regulations the county plans to utilize in order to achieve its standards, and identify conservation practices needed to address key water quality and soil erosion problems.[121] Chapter ATCP 50 also provides several funding opportunities for both farmers and counties to implement the required conservation programs.[122]

Soil GIS Registry

The DNR revised chapter NR 726 of the Wisconsin Administrative Code to require an applicant for case closure from a DNR remediation order to enter residual soil contamination information in the state's Geographic Information System registry (GIS registry) of closed remediation sites.[123] The DNR has previously used the electronic GIS registry to track groundwater contamination.[124] The GIS registry is accessible by the public; thus, the DNR requirement that a public notice be made detailing the planned deed restriction has been repealed.[125] The GIS registry allows a future purchaser of a remediated property to identify the scope and extent of soil and water contamination regardless of whether a deed restriction is required.

Voluntary Multi-Pollutant Emission Reduction Registry

The DNR created chapter NR 437 of the Wisconsin Administrative Code, which allows pollution producers to register with the department the voluntary emission reduction (VER) of certain pollutants. The purpose of the registry is to ensure "that efforts undertaken voluntarily by persons in Wisconsin to reduce or avoid emissions . . . are publicly recognized and that these reductions are considered under future mandatory federal or state emission reduction programs."[126] Thus, the registry will provide a historical record of pollution reduction in the hopes that when a new law requires reduction, those entities and people who voluntarily made reduction efforts prior to the law will receive credit for their voluntary efforts.

A pollution producer can record on the registry a reduction of greenhouse gas (e.g. CO_2, methane, nitrous oxide) emissions that exceed 25 tons per year.[127] A pollution producer can also record the

[115] Wis. Admin. Code § NR 154.04(10), (17) (Sept. 2002).

[116] Wis. Admin. Code § NR 154.04(29) (Sept. 2002).

[117] Wis. Admin. Code § ATCP 50.04(1) (Sept. 2002).

[118] Wis. Admin. Code § ATCP 50.04(3)(f) (Sept. 2002).

[119] *Id.*

[120] Wis. Admin. Code § ATCP 50.10(1) (Sept. 2002).

[121] Wis. Admin. Code § ATCP 50.12(1) (Sept. 2002).

[122] Wis. Admin. Code §§ ATCP 50.26–.42 (Sept. 2002).

[123] Wis. Admin. Code § NR 726.05(2)(a)3. (July 2002).

[124] Wis. Admin. Code § NR 726.05(2)(a)2. (July 2002).

[125] Notice of Hearing, Wis. Admin. Reg. No. 551, 25 (Nov. 30, 2001) (referring to repeal of Wis. Admin. Code § NR 714.07(5)); *see also* Sections Affected by Rule Revisions and Corrections, Wis. Admin. Reg. No. 559, 30 (July 31, 2002).

[126] Wis. Admin. Code § NR 437.01(2)(b) (Oct. 2002).

[127] Wis. Admin. Code § NR 437.03(5)(c)–(d) (Oct. 2002).

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reduction of nitrogen oxides, sulfur dioxide, mercury, and other harmful substances that exceed the same global warming potential of one pound of CO_2 per year.[128] In order to record a VER, registrants must use one of the quantification protocols listed in the regulation, which include source and continuous emission testing performed in compliance with chapter NR 439 of the Wisconsin Administrative Code or certain procedures established by the U.S. Department of Energy.[129] Upon receiving a complete and satisfactory VER application, the DNR will post the VER information on the department's Web site.[130]

Erosion Control

The DNR promulgated chapter NR 328 of the Wisconsin Administrative Code, which authorizes municipalities to build breakwaters in several specified water bodies, including Lake Winnebago, to protect the shorelines of these waters from further erosion.[131] The water bodies selected by the DNR are all artificially impounded and 2,500 acres or larger and have historically lost shoreline vegetation.[132] Interested municipalities must apply for a permit from the DNR.[133] The breakwater itself must be at least 10 feet offshore,[134] be designed by a licensed engineer,[135] remain under public control,[136] and not contain any ancillary devices other than scientific measuring devices or navigational markers.[137]

Brownfields Green Space and Public Facilities Grant Program

The DNR promulgated chapter NR 173 of the Wisconsin Administrative Code, which establishes criteria for awarding a total of $1 million to municipalities and development authorities for remediation of environmentally contaminated properties. Twenty percent of the grant money is set aside for grants of $50,000 or less,[138] and no grant can exceed $200,000 in any given year.[139] Successful applicants must match 20% of funds received if the grant is $50,000 or less, match 35% for $50,000 to $100,000 grants, and match 50% for grants greater than $100,000.[140] Eligible costs include equipment, labor, and facility costs necessary for remediation, but do not include operating expenses or the costs of capital equipment.[141]

Wetland Compensatory Mitigation

Since its adoption in 1991, chapter NR 103 of the Wisconsin Administrative Code has established the water quality criteria for the permitting and regulation of activities in Wisconsin wetlands. In 2002, pursuant to a statutory mandate,[142] the DNR amended chapter NR 103 to require its staff to consider wetland compensatory mitigation when making permit and regulatory decisions that affect wetlands.[143] The standards for developing such mitigation are established in the newly promulgated Wisconsin Administrative Code chapter NR 350, which defines wetland compensatory mitigation as the "restoration, enhancement or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved."[144]

Chapter NR 350 is based on a "bank" model in which a developer unable to perform wetland mitigation on his or her own site may "purchase" the mitigation credits of a nearby land owner who has performed mitigation above and beyond what has been required by the DNR.[145] Regardless of whether the mitigation is on-site or if it uses purchased mitigation credits, the restored or created wetland must have similar plant life to the wetland that has been lost.[146] Furthermore, the mitigated wetland may not rely on structures that require active maintenance or management.[147]

Air Quality Standards—Paper and Pulp Mills

The DNR significantly revised chapter NR 464 of the Wisconsin Administrative Code, relating to hazardous air pollutant (HAP) emissions for pulp and paper mills. The DNR adjusted chapter NR 464 to incorporate into state rules the existing national emission standards under the federal Clean Air Act.[148] Specifically, chapter NR 464 regulates the HAP emissions of pulping systems at kraft, soda, semi-chemical, and sulfite processes;[149] bleaching systems;[150] and

[128] *Id.*

[129] Wis. Admin. Code § NR 437.04 (Oct. 2002).

[130] Wis. Admin. Code § NR 437.07(6)(c) (Oct. 2002).

[131] Wis. Admin. Code § NR 328.21(June 2002).

[132] *See* Wis. Admin. Code § NR 328.21(1) note (June 2002).

[133] Wis. Admin. Code § NR 328.21(2) (June 2002).

[134] Wis. Admin. Code § NR 328.22(1) (June 2002).

[135] Wis. Admin. Code § NR 328.23(2) (June 2002).

[136] Wis. Admin. Code § NR 328.24(1) (June 2002).

[137] Wis. Admin. Code § NR 328.24(2) (June 2002).

[138] Wis. Admin. Code § NR 173.07(3) (Nov. 2002).

[139] Wis. Admin. Code § NR 173.07(4) (Nov. 2002).

[140] Wis. Admin. Code § NR 173.15 (Nov. 2002).

[141] Wis. Admin. Code § NR 173.13 (Nov. 2002).

[142] Wis. Stat. § 281.37.

[143] Wis. Admin. Code § NR 103.08(4)(a)3. (Jan. 2002).

[144] Wis. Admin. Code § NR 350.03(3) (Jan. 2002).

[145] Wis. Admin. Code § NR 350.04 (Jan. 2002).

[146] *Id.*

[147] *Id.*

[148] Notice of Hearing, Wis. Admin. Reg. No. 540, 34 (Dec. 31, 2000).

[149] Wis. Admin. Code §§ NR 464.03, .04 (Mar. 2002).

[150] Wis. Admin. Code § NR 464.05 (Mar. 2002).

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closed-vent systems.[151] To track compliance with these new standards, chapter NR 464 requires each operator of a pulp or paper mill to install a continuous monitoring system,[152] prepare and follow a site-specific inspection plan,[153] and file a detailed report with the DNR every two years.[154]

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[151] Wis. Admin. Code § NR 464.08 (Mar. 2002).

[152] Wis. Admin. Code § NR 464.09 (Mar. 2002).

[153] Wis. Admin. Code § NR 464.10 (Mar. 2002).

[154] Wis. Admin. Code § NR 464.11 (Mar. 2002).

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