



Wisconsin Wildlife Federation

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AFFILIATED WITH NATIONAL WILDLIFE FEDERATION

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To: Members of the Wisconsin Senate and Members of the Wisconsin Assembly

From: Attorney George Meyer, Executive Director of the Wisconsin Wildlife Federation

Subject: Job Creation Act of 2003, (LRBs0295/2), Reduces Several Current Environmental Standards and Will Damage Wisconsin's Fish and Wildlife Habitat

The Wisconsin Wildlife Federation is the largest conservation organization in the state, comprised of 82 hunting, fishing and trapping organizations. **The Federation supports regulatory streamlining and job creation. However the latest version of the Jobs Creation Act of 2003, (LRBs0295/2), continues to reduce many environmental standards in Chapter 30, Wis. Stats., including, in many cases, the removal of the requirement that the state protect public rights in navigable waters, including the protection of fish and wildlife habitat.** The Wildlife Federation therefore opposes this version of the bill and asks that it be modified so that the Legislature can meet its Constitutional responsibility to protect public rights in navigable waters.

The following are some of the key portions of the bill that will result in loss of fish spawning and other fish and wildlife habitat.

1. General Permits, (DNR Notified Prior to Construction). Current section 30.206 is modified to require DNR to issue "notification general permits" for the below listed activities but removes their ability to protect public rights in navigable waterways including the protection of fish and wildlife habitat. The activities covered by the new general permits include:

- New sand blankets in waters adjacent to shores for recreational use;
- Up to 100 feet of new riprap on the beds or banks of lakes larger than 300 acres;
- Up to 300 feet of new riprap on the beds or banks of Great Lakes shoreline;
- Intake structures and pipes for dry fire hydrants;
- Pilings for deflecting ice, protecting structures, and for watercraft pivot points;
- Seawalls to replace existing permitted seawalls up to 100 feet on lakes larger than 300 acres, and 300 feet on the Great Lakes.
- Clear-span bridges providing access to "a principle structure;"

- Replacement of culverts and bridge-culverts (whether previously permitted or not) in navigable waters less than 35 feet wide;
- Dredging, grading and enlarging in and on the bank of navigable waterways within 500 feet of a navigable waterway;
- Grade or remove topsoil from the bank of a navigable waterway up to 10,000 square feet;
- Removal of materials from navigable and non-navigable waters for maintenance purposes where material has previously been removed (legally or not), and without regard to amounts previously removed;

The key sections of the new general permit statute, section 30.206, which reduces the public rights protection standard are subsections 30.206 (1) (a) and (c), (LRB s0295/2, page 41, lines 10-21.

Subsection 30.206 (1) (c), at first blush appears assure that the general permit will protect public rights in navigable waters by stating that: "To ensure that the cumulative adverse environmental impacts of the activities authorized by a general permit is insignificant and that the issuance of the general permit will not injure public rights or interests, cause environmental pollution, as defined in s. 299.01 (4) or result in material injury to the rights of any riparian owner, the department may impose any of the following conditions on the permit." However the way this section is drafted the ability to protect the public rights referred to in the early portions of the paragraph depend on the scope of the permit conditions referred to in the latter portions of the paragraph.

The permit conditions that the Department may impose on the general permit are contained in the new section 30.206 (1)(c) 1-3. (LRB s0295/2, page 41, lines 17-22. The first condition that the Department may impose is: "Construction and design requirements that are consistent with the purpose of the activity authorized under the permit." This limitation may be used to constrain the size and shape of the activity and insure that it is not overly large for the purpose of the activity but it would not prohibit an activity being conducted in a spawning area for instance. This condition clearly cannot be used to protect all current public rights in navigable waters.

The second condition that the Department may place on the general permit gets us partially there. The condition would provide: "location requirements that ensure that the activity will not materially interfered with navigation or have an adverse impact on the riparian property rights of adjacent riparian owners." One of the public rights in navigable waters includes not having navigation interfered with and this condition affords protection for that public right. However this condition clearly does not provide protection for fish and wildlife habitat, natural scenic beauty, water quality and other public rights in navigable waters.

The third condition that the Department may place on the general permit does a good job of protecting public rights in navigable waters but only for a small portion of Wisconsin's lakes and streams. The condition authorizes DNR to place "restrictions to protect areas of special natural resource interests." These areas are defined in the new section 30.01

(1am), LRBs0295?2, Pages 3 and 4, lines 17-22 and 1-2. These comprise roughly 10% of Wisconsin's lakes and streams. This condition does not protect public rights in navigable waters.

What is very instructive to show the intent of the Legislature in this draft not to have the new general permits protect public rights in navigable waters is the new section 135 of LRBs0295/2, page 41, line 23 which repeals the current section 30.206 (2). That to-be-deleted section provides that; "A general permit may include any conditions determined by the department to be reasonably necessary to prevent environmental pollution and to protect the public interest and public rights in navigable waters and the rights of other riparian owners."

To restore current environmental standards and to assure the full protection of public rights in navigable waters including fish and wildlife habitat, the Legislature must place that type of condition back into the proposed bill.

The bills proponents may argue that the public rights in navigable waters will be protected by the new section 30.206 (3r), LRBs0295/2, which authorizes the Department within the 30-day notification period to require a general permit applicant to obtain an individual permit from the DNR. The individual permits retain public rights protection.

However this "recapture" provision will not be effective since thousands of activities covered under the general permit annually will never be able to be screened through this highly cumbersome process. Picture the water management specialist in Vilas County with a thousand lakes in the county, who, on top of all his or her individual permit responsibilities, receives 100 general permit notifications in a month, has to contact absentee landowners for a site inspection, must conduct the site inspection and then issue a written directive to the applicant to submit an individual permit, all within 30 days. This process may make the proponents feel good but it totally fails to insure that all general notification permits are adequately reviewed to protect public rights in navigable waters.

2. Exempt Activities. Scattered throughout the bill are numerous activities that are totally removed from regulatory oversight by being exempted from getting any permit. These exempted activities are not required to comply with environmental standards which assure the protection of public rights in navigable waters, including fish spawning and other fish and wildlife habitat. The exempted activities include:

- Deposits of sand, gravel and stone of up to 2 cubic yards (half a dump truck);
- Any structures, regardless of size or location, placed on a seasonal basis;
- Boat shelters, hoists, and lifts placed on a seasonal basis;
- 6-foot wide piers and wharves;
- 100 feet of replacement riprap on banks, regardless of whether the existing riprap was illegal and the area should be restored;

- 1000 feet of repair riprap on banks, regardless of whether the existing riprap was illegal and the area should be restored;
- Intake and outfall pipes less than 6 feet from the water side of the ordinary high water mark and less than 25% of the width of the channel where it is placed;
- Highway bridges
- Replacement of previously authorized culverts;
- Removal of material not contaminated with hazardous substances from navigable waters for exempt structures, or where removal is made by hand-held devices.

The Department may adopt rules doing some minor regulation of the exempted activities. One example of the scope of the rules can be found at lines 17-25, page 34 of LRBs0295/2. The rules for removing materials from the beds of lakes and streams allow DNR to “establish reasonable procedures for undertaking the removal of material to minimize environmental impacts’ The key word here is minimize, if the project cannot be done in a way that causes serious harm to fish spawning or other public rights in navigable waters, it still goes forward. Since the exemption process does not involve a notification to DNR, the landowner can just proceed.

The second rule that may be placed on the exempted activity is that the DNR may “establish reasonable limitations on the location of the removal of material at the site affected by the activity.” This rule condition sounds very strong and would go a long way to protect public rights in navigable waterways, the next subsection, 30.20 (1k) (b) provides: “Notwithstanding par (a), the rules under par. (a) 1. may not establish procedures that prohibit undertaking the removal of material or that render the undertaking of the removal of material economically cost-prohibitive.” The bottom line of this section is that the DNR cannot constrain these exempted activities from causing serious damage to the environment or cause serious harm to public rights in navigable waters. Clearly exempted activities do not have to conform to existing environmental standards including the protection of public rights in navigable waters.

Once again proponents will point to the possibility that the Department can “recapture” an exempt activity by requiring an individual to apply for an individual permit. Lines 1-10 on page 35 of LRBs0295/2 are an example of such a recapture provision. **This type of recapture provision for exempted activities is useless since the landowner does not need to notify the DNR that they are about to undertake an exempted activity.**

3. Objected-to-Projects Likely to Proceed before Public Hearing. If the DNR issues an individual permit under Chapter 30, LRBs0295/2 does retain the right of an individual to challenge the permit, **but it is a hollow right.** In order for the objector to stop the project from being constructed before the public hearing to be held, new subsection 30.208 (1m), Page 48, lines 18-19 requires that the objector shows that the “stay is necessary to prevent irreversible harm to the environment”. This standard is virtually impossible for an objector to meet since virtually anything is reversible but there can still be substantial damage to the environment and public rights in the interim.

Ironically, the standard for the hearing examiner to continue the stay after the hearing process starts is far weaker. In subsection 30.208 (2) (b), page 49, line 23 through page 50, line the standard for the hearing examiner continuing the stay is weaker, i.e., whether the “continuation of the stay is necessary to prevent significant adverse impacts **or** irreversible harm to the environment.”

It appears that this last issue is a drafting error and should be corrected to include the latter standard for the stay.

In conclusion, the above three points do not reflect all of the provisions of the bill which weaken environmental standards and which will lead to the loss of public rights in navigable waters, including the protection of fish and wildlife habitat. However they do illustrate why the current version of the Jobs Creation Act of 2003 needs to be modified to protect the environment including fish and wildlife habitat. Because of this the Wisconsin Wildlife Federation continues its opposition to the bill.