

The Public Trust Doctrine: Regulatory Reform, Climate Disruption, and Unintended Consequences

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Fifty years ago, Wisconsin was one of a handful of states Professor Joseph Sax examined in his seminal article on the public trust doctrine because “the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state.”¹ Because Wisconsin has been on the forefront of developing the legal doctrine, an empirical study of how Wisconsin’s trustees are implementing the law illustrates the tensions and structures that impede or enhance public trust protections and may be relevant to those facing similar situations in other states.

This Article provides legal and policy analysis, coupled with qualitative research interviews with the Wisconsin Department of Natural Resources’ (DNR) water managers. As the third set of interviews with agency trustees of the state’s waters conducted over the past two decades, this latest round of research is set within the context of significant legislative loosening of state water laws and reforms in state administrative law.

Throughout the United States, there have been numerous efforts to reform the administrative state. Reform efforts have focused on streamlining legislative and executive branch processes and reducing burdens on the regulated community. Such a reform effort gathered steam in Wisconsin, culminating in the passage of Act 21 in the state’s 2011–12 legislative session. With close to a decade of application of this law, there have been divergent interpretations of its

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1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970).

meaning by two of Wisconsin's attorneys general and several court decisions. In 2021, the Wisconsin Supreme Court settled that Act 21 did not eliminate the DNR's ability to implement its explicit public trust duties, despite being very broad; however, the research interviews show that Act 21 has had a substantial impact on the DNR. From this fuller understanding of the law's impact, one can assess and craft administrative reforms that are narrowly tailored to accomplish goals set by the political branches.

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INTRODUCTION

Since the Kellett Reorganization Act of 1967 formed the Wisconsin Department of Natural Resources (DNR) and charged it to act as a trustee of the state's public trust waters, there has been an ongoing need for the administrative agency to navigate the boundary between public and private property.² The contested and ambulatory area where waters rise and fall along the shoreline has been the subject of many disputes, most of which are resolved at the agency level, while a few rise through the courts to become part of the state's case law. The legal doctrine that informs this area of law is known as the public trust doctrine. At its most fundamental, the public trust doctrine is the concept that the state is the trustee of navigable waters and manages them to benefit everyone in their exercise of public rights. Historic public rights include navigation, fishing, and commerce, but courts have expanded rights to recreation, natural scenic beauty, and water quality.

Academic articles on the public trust doctrine—as articulated in constitutional provisions, judicial opinions, statutes, and regulations—have been replete in legal literature starting around 1970.³ Yet, few law review articles discuss the actual implementation of the doctrine, and none are informed by qualitative research interviews with trustees at administrative agencies. This research explores this missing dimension. The interviews conducted as part of this research shed light on how the public trust doctrine is understood and implemented by the agency water managers, none of whom are lawyers. From this fuller understanding, one can assess and craft administrative reforms that are narrowly tailored to accomplish goals set by the political branches.⁴

This is a unique time-series research project I have conducted approximately once each decade since 1998. Berkeley's *Ecology Law Quarterly*

2. The statute also established the DNR would be headed by a Natural Resources Board (clarified in Chapter 327). From 1915 until this point, various aspects of natural resource management were handled by the Conservation Commission. WISCONSIN BLUE BOOK 448 (1968), available at <https://images.library.wisc.edu/WI/EFacs/WIBlueBks/BlueBks/WIBlueBk1968/reference/wi.wibluebk1968.i0010.pdf>. (The DNR's function included managing "public trust lands" and organizing "a comprehensive program for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private, as well as other vital environmental factors such as . . . protections of shorelines, flood plains and open spaces.") *Id.* at 449.

3. See, e.g., Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J. L. REFORM 861, 870–77 (2007); Mary Christina Wood, *The Nature's Trust Paradigm for a Sustaining Economy*, in *LAW AND POLICY FOR A NEW ECONOMY: SUSTAINABLE, JUST, AND DEMOCRATIC* 97–116 (Melissa K. Scanlan ed., 2017).

4. For instance, if a legislative goal is to allow lakefront landowners greater freedom in selecting where to build dwellings, the interviews explain the consequences (some unintended) of that goal.

published the results of the first two studies in 2000⁵ and 2012.⁶ Because case law only represents a small fraction of the decisions that impact how shared waters are managed, this research fills in the lacuna—the missing parts of the story. The use of the same administrative agency as the subject of the research, separated by a decade of time for each set of interviews, offers a rich time-lapse dimension allowing for comparison as leaders of different political parties hold the governor’s office and majorities in the legislature. For this third set of interviews, the intervening decade has brought significant weakening of water laws and administrative reforms. Notably, the earlier two research points of contact with the DNR predated any impacts from Act 21, which the Legislature passed as part of the 2011–12 session. That law aimed to shift the balance of power between the legislative and executive branches and retain more authority in the political branches. For instance, Act 21 required the governor’s approval at two steps of the rulemaking process and gave the legislature final authority over administrative rules.

Wisconsin’s legal framework has been an example of a cutting-edge articulation of the public trust doctrine.⁷ Because Wisconsin has been at the forefront of developing the legal doctrine, and its water managers face budgetary constraints and conflicts between public rights and private property rights mirrored across the nation, this empirical study illustrates tensions and structures affecting public trust protections that may be relevant to other states.

Additionally, this research examines how water trustees function when there are competing interpretations from the Wisconsin attorney general regarding the scope of agency authority to regulate public trust waters and litigation over contested meanings of the law, as there were for Act 21. Through this research, one can assess the Act 21 regulatory reform and whether it is accomplishing the goals set by the political branches. The research probes whether this reform has streamlined the work of legislative or executive branches as it relates to water management. It assesses whether Act 21 has impacted

5. Melissa K. Scanlan, Comment, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 *ECOLOGY L. Q.* 135 (2000) (received Harmon Award for best student environmental law writing at University of California, Berkeley, cited in Wisconsin Legislative Reference Bureau, Constitutional Highlights, Vol. IV, No. 4 (October 2004), cited in *Dilley v. Johnson*, No. 10-CV-1285, at 5 (Wis. Cir. Ct. Dane Cnty. March 28, 2012), cited in *Rock-Koshkonong Lake Dist. v. Wis. Dep’t of Nat. Res.*, 833 N.W.2d 800, 817 n.26 (Wis. 2013), cited in *Rock-Koshkonong Lake Dist.*, 833 N.W.2d at 840 n.4 (Crooks, J., dissenting)).

6. Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees’ World*, 39 *ECOLOGY L. Q.* 123 (2012) (cited in *Rock-Koshkonong Lake Dist.*, 833 N.W.2d at 840 n.4 (Crooks, J., dissenting)).

7. Fifty years ago, Wisconsin was one of a handful of states Professor Joseph Sax examined in his seminal article on the public trust doctrine because “[t]he Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state.” Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471, 509 (1970).

agency behavior as it relates to water management, and if so, in what ways. Although Act 21 is specific to one state, this research explores themes that are universal across the states and at the federal level. These themes include efficiency or streamlining of regulatory processes, separation of powers, delegation of power to agencies, and the complex dynamics between the political branches, the judiciary, and administrative agencies in the context of managing the state's public trust waters.⁸

Part I builds on the seven core concepts of Wisconsin's public trust doctrine that I framed in the 2012 law review article.⁹ It assesses how the public trust doctrine has evolved during the past decade by reviewing new state supreme court opinions from 2012 through 2022. Part II assesses the application of these core public trust doctrine concepts to the management of public trust waters. I identify and discuss how the DNR water managers faced challenges presented by climate disruption and the COVID-19 pandemic on top of chronic issues of inadequate budgets, staffing levels, and the tug of war between the agency and the legislature over the regulatory reach of the DNR. Part II also highlights how existing and emerging management issues function to divorce administration of the trust from the core tenants of the legal doctrine outlined in Part I. Finally, Part III considers the implications of these findings and the story they tell about Act 21's overarching regulatory reforms to agency action.

I. EVOLVING LEGAL DOCTRINE (2012–2022)

In my 2012 article, *Implementing the Public Trust Doctrine*, I offered a framework to understand Wisconsin's public trust doctrine.¹⁰ There I distilled the state's case law from the late 1800s to 2011 into seven core concepts:

1. Like a financial trust, the public trust in water involves identifiable trustees, beneficiaries, and trust property;
2. Wisconsin law imposes a duty on trustees to protect public rights in Wisconsin's navigable water;
3. Trustees have a supervisory duty that requires adaptive management;

8. The tension between the scope of administrative agencies' authority and what the political branches have authorized surfaces in interpretations of statutes that delegate authority to agencies. In a case with enormous implications for the coal industry and a livable climate, the U.S. Supreme Court decided in favor of the coal industry in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The case involved whether the Clean Air Act authorized the EPA to decarbonize electricity generation through administrative rules. The Court held that this "extraordinary" case and the "breadth of the authority" the EPA asserted required "clear congressional authorization"—invoking a "major question doctrine" for this level of scrutiny. *Id.* at 2605, 2608–10.

9. Scanlan, *supra* note 5.

10. *Id.* at 128–146.

4. The public trust is a fluid doctrine that expands, as needed, to protect the water commons and public rights;
5. The legislature may grant lakebed title to entities other than the state, but only under certain limited conditions;
6. Private riparian property must be used in a way that does not encroach on public rights in navigable waters; and
7. A healthy public trust requires active enforcement by the trustees and the beneficiaries.¹¹

These core concepts offer a way to sort court opinions and interpret emerging conflicts over the use of the public water commons. Since 2012, Wisconsin's courts have decided several significant public trust cases that further shed light on these concepts. New cases have expanded on core concepts two, six, and seven.

Core concept number two is that Wisconsin law imposes a duty on trustees to protect public rights in Wisconsin's navigable water. The legislature granted the DNR "necessary powers . . . to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private" in Wisconsin Statutes section 281.11 and gave the DNR general supervision and control over the "waters of the state" in Wisconsin Statutes section 281.12.¹²

The Wisconsin Supreme Court in *Lake Beulah Management District v. State Department of Natural Resources* interpreted the meaning of that delegation of authority.¹³ In 2008, the Lake Beulah Management District and the Lake Beulah Protective and Improvement Association (collectively "the conservancies"), challenged the DNR's high capacity groundwater well permit to the Village of East Troy.¹⁴ The conservancies claimed the DNR failed to consider the well's potential impact on nearby Lake Beulah, a navigable water, in violation of the public trust doctrine and Wisconsin Statutes chapter 281.¹⁵ The DNR defended its action by claiming the public trust duty and authority did not require the DNR to complete its own environmental analysis or to deny the permit.¹⁶ The Wisconsin Supreme Court held that "pursuant to Wisconsin

11. *Id.*

12. WIS. STAT. §§ 281.11, 281.12; *Rock-Koshkonong Lake Dist. v. Wis. Dep't of Nat. Res.*, 833 N.W.2d 800, 826 (Wis. 2013) ("'Waters of the state' includes those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface or ground water, natural or artificial, public or private, within the state or its jurisdiction.").

13. 799 N.W.2d 73, 86–88 (Wis. 2011).

14. *Id.* at 76. The high capacity well statute DNR was applying was Wisconsin Statutes sections 281.34–.35 (2019–20).

15. *See id.* at 76.

16. *Id.* at 82.

Statutes sections 281.11, 281.12, 281.34, and 281.35, along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state."¹⁷

The *Lake Beulah* case clarified that the DNR's public trust responsibilities extend to groundwater hydrologically connected to surface waters. This general duty is a highly fact specific matter and requires the DNR to consider potential harm to waters of the state, but only when such duty is triggered.¹⁸ In determining whether the duty is triggered, the DNR must consider the environmental impact of wells when presented with "sufficient concrete, scientific evidence of potential harm to waters of the state."¹⁹ This case affirmed the general public trust duty of the DNR, established by Wisconsin's Constitution, statutes, and case law, to consider potential harm to waters of the state when reviewing high-capacity well permit applications to withdraw groundwater.²⁰ While the Wisconsin Supreme Court afforded the DNR discretion, it remanded for a presentation of the evidence.²¹

In 2021, Wisconsin's Supreme Court was called upon again to consider the extent of the DNR's public trust duty over groundwater considering administrative reforms advanced by Act 21 a decade earlier. In *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, the court confirmed that *Lake Beulah* remained good law and that the DNR's public trust duty, although broad, was explicit enough to require environmental protection even with regards to groundwater, as will be further explained in Part III.²²

Wisconsin's courts have also reexamined core concept six. The concept is that private riparian property must be used in a way that does not encroach on public rights in navigable waters. One area where private and public rights intersect is in the placement of piers. There has been a tug of war over this topic over the past decade, with riparian private property owners pulling in the direction of individual freedom and the DNR seeking to protect the broader public interest in an entire lake or river. Like other areas of water regulation described in Part II, the legislature has granted greater freedom to private riparian owners over piers, and simultaneously restricted local control and the ability of the DNR to protect the public interest. In 2020, in *Oneida County v. Sunflower Prop II, LLC*, the Wisconsin Court of Appeals held that piers that are exempt from permits under Wisconsin Statutes section 30.12(1g)(f) are not subject to more stringent municipal regulations adopted pursuant to Wisconsin Statutes

17. *Id.* at 92.

18. *Id.*

19. *Id.*

20. *See id.* at 75–93.

21. *Id.* at 93.

22. *See generally* 961 N.W.2d 611 (Wis. 2021) (*Clean Wis., Inc. I*).

section 30.13(2).²³ The decision deprived local governments of the power to implement stricter pier regulations to protect prized waterbodies from overuse and congestion.

The prior year, in 2019, in *Myers v. Wisconsin Department of Natural Resources*, the Wisconsin Supreme Court also found the DNR did not have authority to amend a pier permit, despite a condition in the permit allowing for amendment if the solid pier materially obstructed navigation or was detrimental to the public interest.²⁴ The court concluded the plain language of Wisconsin Statutes section 30.12(3m)(d)2 did not provide the DNR with the authority to condition a permit, nor did Wisconsin Statutes section 30.2095 provide the DNR with the authority to modify or rescind a permit for “good cause.”²⁵ In so holding, the court reasoned that “an administrative agency has only those powers expressly conferred or necessarily implied by the statutory provisions under which it operates.”²⁶

The combination of court-endorsed legislative changes has exempted piers from regulation, restricted the DNR from conditioning or modifying permits, prevented local control that would regulate more stringently, and constrained agencies to act only where there is explicit authority. Together, these changes favor private waterfront property owners’ exercise of riparian rights to place piers over public trust land and waters, even at the expense of preserving the water commons.

This could be seen as a continuation of a thread of jurisprudence, wary of the public trust doctrine, tied back to the Wisconsin Supreme Court’s 2013 decision in *Rock-Koshkonong Lake District v. State Department of Natural Resources*.²⁷ The dispute pitted lakefront property owners against the DNR over the agency’s setting of a lake level and its impact on adjacent non-navigable wetlands above the ordinary high water mark (OHWM). Rock-Koshkonong Lake is a natural widening of the Rock River, whose water levels are affected by the Indianford Dam.²⁸ The Wisconsin Supreme Court narrowly held that when the DNR set water levels under Wisconsin Statutes section 31.02(1), the agency could consider the impact of water levels on privately owned wetlands adjacent to a navigable lake and located above the OHWM.²⁹ However, the court opined that the DNR erred when it argued that it was acting pursuant to the public trust

23. “We reject the County’s assertion that it has authority under WIS. STAT. §§ 281.31 and 59.692 to regulate piers that qualify for the WIS. STAT. § 30.12(1g)(f) permit exemption.” *Oneida Cnty. v. Sunflower Prop II, LLC*, 944 N.W.2d 52, 58 (Wis. Ct. App. 2020) (remanding for factual inquiry about whether Sunflower’s pier qualified for exemption).

24. *Myers v. Wis. Dep’t of Nat. Res.*, 922 N.W.2d 47, 52–53, 56 (Wis. 2019).

25. *Id.* at 55–56.

26. *Id.* at 52–53.

27. 833 N.W.2d 800 (Wis. 2013).

28. *Id.* at 805–06.

29. *Id.* at 818–19, 822.

doctrine to protect non-navigable land and wetlands above the OHWM because its authority to do so derived from a statute enacted pursuant to the police power of the state.³⁰

To situate the decision, recall the Wisconsin Supreme Court's famous 1972 decision in *Just v. Marinette County*, which concluded that lands adjacent to or near navigable waters exist in a special relationship to the state such that private activities on those non-navigable wetlands and shorelands can be regulated to protect the public trust in navigable waters.³¹ Then in the *Lake Beulah* case, the state supreme court extended this concept to groundwater.³² *Rock-Koshkonong Lake Dist.* did not explicitly overrule these precedents. As astutely pointed out by the late Justice Patrick Crooks in his dissenting opinion, the holding that the DNR can regulate impacts to non-navigable wetlands when setting a lake level relied on an interpretation of statutory language.³³ The majority's opining about the basis for the statute being founded on the police power of the state or the public trust doctrine was wholly unnecessary to the determination.³⁴ As this reasoning was unnecessary to the outcome of the decision, it can be properly characterized as *dicta* that future courts are not bound to follow.

Finally, lawsuits in the past decade have also shed light on core concept seven, which asserts that a healthy public trust requires active enforcement by the trustees and the beneficiaries. Wisconsin's legislature established that "every violation of [Wis. Stat. ch. 30] is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person."³⁵ In 2012, in *Pappas v. County of Milwaukee*, the court of appeals followed Wisconsin Supreme Court precedent that this language allows private citizens to sue a private party to abate a public nuisance *if* the plaintiff also alleges a substantive violation of Chapter 30.³⁶ Pro se litigant Pappas alleged the DNR violated Wisconsin Statutes section 30.03(4) by failing to enforce public rights in navigable waters when it learned of a lease between Milwaukee County and South Shore Yacht Club that would restrict public use of filled lakebed.³⁷

30. *Id.* at 825, 835.

31. *See* 201 N.W.2d 761, 768 (Wis. 1972).

32. *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 799 N.W.2d 73, 92–93 (Wis. 2011).

33. *See Rock-Koshkonong Lake Dist.*, *supra* note 27 at 800, 835–36 (Crooks, J., dissenting).

34. *Id.*

35. WIS. STAT. § 30.294 (2019-20).

36. *Pappas v. Cnty. of Milwaukee*, 819 N.W.2d 562, at ¶ 13 (Wis. Ct. App. Jun. 19, 2012) (citing *Gillen v. City of Neenah*, 219 Wis. 2d 806, 831–32 (Wis. 1998)).

37. *Id.*; WIS. STAT. § 30.03(4) (2019–20). ("If the [DNR] learns of a possible violation of . . . or a possible infringement of the public rights relating to navigable waters, and the [DNR] determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the [DNR] *may* proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law. The [DNR] *may* order a hearing under [WIS. STAT.] ch. 227 concerning the possible violation or infringement, and *may* request the hearing examiner to issue an order directing the responsible parties to

However, the enforcement section of the statute stated that the DNR “may” take enforcement action, language that indicated that action was permissive instead of mandatory.³⁸ Thus, the court held the DNR had discretion to decide if and when it would enforce an alleged violation of the public trust doctrine.³⁹ As will be seen in Part II, the DNR has very limited staff capacity for compliance and enforcement and by necessity must weigh multiple considerations when exercising its enforcement discretion. The role of private litigants is critical to enforcing public rights in the state’s waters.

II. IMPLEMENTING THE PUBLIC TRUST DOCTRINE

The public trust doctrine is grounded in Wisconsin’s Constitution and a rich history of court opinions. The legislature, as the primary trustee for the state’s water resources, codified part of the common law public trust doctrine and delegated primary responsibility over the trust to the DNR.⁴⁰ The agency employs a range of staff, from fish biologists to permit writers, who play a role in managing the state’s waters. Most of their decisions go unnoticed except by those directly involved unless they are controversial enough to be reviewed by an administrative law judge or a state court.

To evaluate the utility of the public trust doctrine’s protections, it is valuable to understand how these three institutions—the legislature, the DNR, and the judiciary—interact. Scholars extensively review court decisions and legislation, but the literature lacks much discussion of how state water managers view and protect the public trust. This information is harder to access, as it is buried in the minds of the water managers and others with whom they interact. Here, I continue my multi-decadal assessment of the DNR’s implementation of the doctrine. This Part illustrates how the DNR applies the law, providing the reader with a vantage point to better understand the doctrine’s utility to protect water resources.

Part II.A explains the rationale and research methodology of this study. Part II.B introduces the primary decision makers, whose duty it is to protect the waters of the state. Part II.C discusses legislative and institutional structures that influence the DNR trustees. Part II.D describes how core concept seven—enforcement of the public trust doctrine—has been influenced by political forces

perform or refrain from performing acts in order to . . . fully protect the interests of the public in the navigable waters. If any person fails or neglects to obey an order, the [DNR] may request the attorney general to institute proceedings for the enforcement of the [DNR]’s order in the name of the state.”) (emphasis added).

38. See WIS. STAT. § 30.03(4); *Pappas*, 819 N.W.2d 562, at ¶ 13–17.

39. *Pappas*, 819 N.W.2d 562, at ¶ 13–17.

40. *Lake Beulah Mgmt. Dist. v. Wis. Dep’t of Nat. Res.*, 799 N.W.2d 73, 92 (Wis. 2011). The court concluded that the legislature accomplished this delegation through Wisconsin Statutes sections 281.11 and 281.12.

and DNR leadership. Finally, Part II.E identifies the ongoing and systemic problem of excessive political interference with regulatory decisions.

A. Research Rationale and Methodology

Regulators make thousands of decisions every year about the public trust that never reach a court of law. While all DNR staff who are involved with managing the waters of the state are trustees, those with the most immediate and regular impact are Water Regulation and Zoning Specialists or Water Management Specialists (Water Specialists). Recall, the legislature delegated trust authority to the DNR and partly codified the public trust and riparian rights in Chapters 30 and 31 of Wisconsin Statutes.⁴¹ Water Specialists carry out these statutes and the common law public trust mandates daily by making decisions, including whether to issue a permit allowing a private riparian's exercise of rights, determining what management strategies will best balance competing uses of water, and weighing when to initiate an enforcement action to stop private encroachment onto public trust property.

One must understand the Water Specialists' perspectives, the influences on their decisions, and the systems in which they work to assess the impact of the public trust doctrine on contemporary water management issues. I use social science research methods in this series of qualitative research interviews with the DNR's Water Specialists, key upper management personnel, and lawyers, some of whom are retired.⁴² Through qualitative research interviews with the trustees, one can discern how Water Specialists regularly make decisions regarding the trust and the impediments to implementing the legal doctrine.⁴³

In the prior interviews, published in 2012 and 2000, I selected interviewees from each region. For the current set, regional representation is less meaningful because many Water Specialists now cover half or the entirety of the state's geography. Based on a list of waterways program staff and supervisors the DNR provided, I invited all forty-seven to participate in the research.⁴⁴ Of that pool, I interviewed the sixteen DNR staff and supervisors who chose to participate.

I maintained the confidentiality of interviewees by omitting names of DNR employees and uniformly using the male pronoun. Two upper-level managers, former Deputy Secretary Todd Ambs and former Bureau Director Michael Thompson, are notable exceptions to this procedure. An analysis of the data

41. WIS. STAT. §§ 30–31; *see also* §§ 281.11–.12 (creating the DNR).

42. This Article largely reflects the perspective of the field staff and their managers. There will always be a variety of perspectives on events, and no one person holds the truth. For the most controversial narratives, I include two or more perspectives on the situation. My primary purpose in focusing on the DNR staff's views is to show their motivations and influences in their decisions.

43. This type of research aims to describe themes in the interviewee's world. *See* STEINER KVALE, INTERVIEWS: AN INTRODUCTION TO QUALITATIVE RESEARCH INTERVIEWING 54 (1st ed. 1996).

44. WIS. DEP'T OF NAT. RES., WATERWAYS STAFF AND SUPERVISORS (2021) (on file with author).

shows how the DNR applied the public trust doctrine to manage the waters of the state and the factors that influenced its ability to manage and protect shared public rights in the water commons.

B. Who are the DNR Water Trustees?

1. Personal Passions for Protecting Ecology Motivated Staff to Join the DNR

DNR Water Specialists share personal passions for water and protecting ecology that motivated them to join the DNR. One declared, “I loved to fish and be on water, even before I could ride a bike!”⁴⁵ They merge their personal interests born from early experiences into their professional training and orientation. Most of them have a desire to make a positive impact on environmental protection and a bachelors or masters in something related to environmental or water science.⁴⁶ They are mission-oriented and mission-driven.⁴⁷ One staff member referred to the job as “a calling” to “make a difference” and be challenged.⁴⁸ He said he knew this position was one of the most difficult because of the interactions with the public, but also one of the most important to protect the waters of the state.⁴⁹ Similarly, another staff member was drawn to the idea of doing “something bigger” than himself and “answering to the public instead of a private interest.”⁵⁰

One Water Specialist reported that he pursued a water resources degree within the University of Wisconsin system to help protect natural resources and not just enjoy them, which led him to the DNR.⁵¹ Similarly, another expressed that he had been “passionate about lakes and water his whole life.”⁵² So, when a water job at the DNR opened, he “jumped” at it.⁵³ A third Water Specialist highlighted he wanted to pass a legacy of water protections on to his descendants.⁵⁴ Finally, another recalled positive and fun early childhood experiences banding ducks as a volunteer alongside DNR biologists. For him, working for the DNR was “always a dream job.”⁵⁵

45. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

46. *E.g.*, Interview with Confidential Interviewee No. Four (July 1, 2021) (on file with author).

47. *Id.*; see also DEP’T OF NAT. RES., WATERWAYS ENGAGEMENT TEAM REPORT 5 (2021) (on file with author).

48. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

49. *Id.*

50. Interview with Confidential Interviewee No. Six (July 26, 2021) (on file with author).

51. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

52. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

53. *Id.*

54. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

55. Interview with Confidential Interviewee No. Twelve (July 30, 2021) (on file with author).

Water Specialists interact extensively with county zoning offices, and several employees from county zoning transitioned to become DNR Water Specialists. Some cited a series of positive experiences with the DNR when they worked for the county as a draw to work for a mission-oriented agency and get away from county-level politics.⁵⁶

Being a Water Specialist involves problem-solving and the ability to work with multiple stakeholders. One Water Specialist colorfully expressed:

Like the Lorax, I feel awesome about being the voice of the resource on behalf of the state. Everyone has a different view about how they want to use the resources. I feel honored to be a representative of the resource and to help people compromise. I'm a public servant and I need to find a balance for everyone.⁵⁷

He added, "I work with municipalities, individuals, and businesses, to find middle ground that fits within the regulatory framework and see positive development for people to fulfill their projects."⁵⁸

2. *Water Specialists Experience a Disconnect between Original Motivation and On-The-Job Reality*

There are tensions between the staff's mission orientation and their day-to-day realities. Because they are passionate about water resources, it is difficult to come to terms with their frequent inability to spend the time needed to adequately protect the state's waters. For instance, instead of individual permit reviews, Water Specialists rely on shifting projects into categories that require little if any review by the DNR; many general permits and exemptions simply involve the applicants self-certifying their compliance.⁵⁹ Although DNR staff are aware that a site visit and a conversation with the applicant could prevent harm, the workload often exceeds staff hours.⁶⁰

One Water Specialist said he does not issue very many permits because so many projects are exempt, even projects he saw as presenting significant impacts on the Great Lakes.⁶¹ Another recent hire said he thought the DNR would be more structured and focused on upholding the regulations but has not found this to be the case.⁶²

One Water Specialist recalled that when he started over a decade ago the Water Division was known as the "no" program—meaning they had latitude then

56. *E.g.*, Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

57. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

58. *Id.*

59. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

60. *Id.*

61. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

62. Interview with Confidential Interviewee No. Fourteen (July 27, 2021) (on file with author).

to say no.⁶³ He said, “previously Water Specialists were seen as experts and if they got confirmation from fisheries that a project would be detrimental, it was not contentious to deny it.”⁶⁴ He continued, “now, it is a totally different program. If we say no, we need to full on expect to get sued. This is a shift in the mindset of the entire water program.”⁶⁵ He heard from an upper-level manager who came up through the ranks that a lot changed when the legislature reworked the wetland laws and wrote in many exemptions.⁶⁶ The staff understood the manager to mean that if the DNR denies permits, it would lose authority. The staff were supposed to “be really careful because action on an individual project can have a program wide impact.”⁶⁷ This is the “reality of not having a friendly legislature,” he learned.⁶⁸

The expansion of exemptions and restricted ability of the DNR to issue individual permits did not sit well with some of the more experienced Water Specialists.⁶⁹ Several faced reprimands and formal disciplinary actions from their supervisors, even though the Water Specialists believed that they were carrying out their job to protect the public trust.⁷⁰

Field staff implement the law and used to be very involved in informing agency policy making, such as guidance documents and rules. However, staff complained that upper management, who may have little history with the program, now make policy without that field-level input.⁷¹ A Water Specialist described it as “a big struggle” to get the program back on track to protect the public trust.⁷² “We should be able to say no to big business, farmers, and others when they are violating the public trust,” he added.⁷³

The interviews revealed another disconnect between the need for clean and healthy ecosystems in water resources and landowners’ understanding of their impact on those resources. For instance, one staff member highlighted that diffuse runoff from non-point pollution was a statewide challenge to water resources.⁷⁴ He stated that he regularly observed mowed, fertilized grass at the edges of creeks and lakes.⁷⁵ He added, “I see so many impaired waterways, but we can’t get people to buy into changing their behavior and planting buffer strips

63. Interview with Confidential Interviewee No. Twelve (July 30, 2021) (on file with author).

64. *Id.*

65. *Id.*

66. *See infra* Part II.C.2.b (explaining legislative changes to wetland management).

67. Interview with Confidential Interviewee No. Twelve (July 30, 2021) (on file with author).

68. *Id.*

69. *E.g.*, Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

70. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

71. *Id.*

72. *Id.*

73. *Id.*

74. Interview with Confidential Interviewee No. Twelve (July 30, 2021) (on file with author).

75. *Id.*

of native species.”⁷⁶ On the contrary, he reported seeing an “uptick of self-centeredness” where landowners felt the DNR could not tell them what to do.⁷⁷ He succinctly stated, “everyone’s the good guy in their own story. If you ask the fish though, it isn’t an improvement to add too many nutrients, too many piers, and massive sand blankets to their homes.”⁷⁸

The Water Specialist reflected that it was difficult to convey this to landowners who do not readily see the impact of their actions spilling out into shared waters.⁷⁹ He attempted to address this issue by trying to educate riparian landowners about adverse impacts for the lake or river.⁸⁰ In particular, he tried to explain that below the OHWM (towards and into the water), a landowner cannot act purely upon his unilateral interests, but must also consider what’s good for the public interest in these shared waters.⁸¹ With the reduction in field staff visiting sites, personal interactions to educate landowners become ever more rare.

When DNR staff were asked to describe the morale of the Water Specialists, there were two camps. Those working on the habitat restoration team who tended to interact with conservation organizations, such as Ducks Unlimited, instead of individual waterfront property owners, had high morale.⁸² They described things as going well and felt self-motivated in these positions, a quality that is especially important with remote work brought on by the COVID-19 pandemic.⁸³

The other camp, which consisted of the majority of the Water Specialists, expressed low morale and an inability to keep up with the workload.⁸⁴ An experienced Water Specialist observed that staff were leaving the program for multiple reasons, including “work load, frivolous disciplinary actions, toxic leadership, not getting transparency from leadership, supervisors developing policy without field staff involvement, and lack of trust between field staff and upper management.”⁸⁵ A newer Water Specialist concurred that morale was low in his office.⁸⁶

Yet, for those Water Specialists who remained, their mission-oriented spirit shined through even amidst these difficulties. One Water Specialist said, “passion keeps us together and doing what we love. We do not have enough staff and workload is very taxing, but our love for the natural resources keeps us going

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *E.g.*, Interview with Confidential Interviewee No. Four (July 1, 2021) (on file with author).

83. *Id.*

84. *E.g.*, Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

85. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

86. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

and getting the job done, just not in a timely manner.”⁸⁷ He added that it was difficult but “we use empathy and our passion” to treat everyone equally and educate them, explain to them the “why not” and not just “no.”⁸⁸ He asserted, “as a trustee, I feel like we are the only line of defense for the state’s natural resources.”⁸⁹ Another Water Specialist reflected that he had a good small team. He added, “we have our reasons that are bigger than us, and we ignore the negativity from upper managers.”⁹⁰

C. Institutional and Statutory Influences on the Trustees

My research published in 2012 found that “DNR Water Specialists are restricted from acting to the full extent of their legal charge. A variety of systemic factors constrain the Water Specialists, including budget cuts that reduce staff, cause high turnover, result in lack of training, and limit field work; and statutory changes that narrow DNR jurisdiction.”⁹¹ Ten years later, the current interviews echo these same themes, yet reveal several additional management challenges. Internally, the trustees are impacted by the elimination of the Water Division, budget cuts and staff turnover, concerns about supervisors not following the law, and the “specialization” approach to workload management. Externally, the trustees are impacted by legislative changes that reduced their regulatory authority and restricted their ability to update administrative codes due to Act 21. In addition, the DNR faced external challenges related to increased use of northern lakes due to the COVID-19 pandemic and baby boomer retirements, and climate-disrupted water cycles. Each of these issues are discussed below.

1. Institutional Hurdles

a. Where is the Water Division?

In the 2011 series of research interviews, Todd Ambs led the DNR’s Water Division, which had all the water-related staff under one umbrella. However, in the years following, DNR Secretary Cathy Stepp of the Scott Walker Administration dissolved the Water Division and separated the water-related staff into different units. Fisheries, water pollution permits, and waterways staff were placed in different supervisory divisions. The Waterways Program, which is responsible for waterway and wetlands regulations under Chapters 30 and 31,

87. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

88. *Id.*

89. *Id.*

90. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

91. Scanlan, *supra* note 5, at 152.

and the locus of this research, was moved to a division dedicated to customer service and assistance to small business, called the External Services Division.⁹²

The Waterways Program manages waterways, wetlands, dams, floodplains, GIS mapping, and shoreland management.⁹³ Chapter 30 regulates activities on water, such as placing structures, culverts, piers, changing waterways, and restoring wetlands.⁹⁴ Chapter 31 regulates activities on water, such as dams, bridges, and water flow.⁹⁵ According to its bureau director in 2021, Michael Thompson, the program deals with controversial projects, dream homes, family cottages, and economic development.⁹⁶ Thompson said, “DNR does their best” despite “occupying a space where people disagree with their decisions.”⁹⁷

Thompson stated that he was “a firm believer” in the public trust doctrine and emphasized the need for the DNR to prevent illegal structures on lakebeds because it is very difficult to address the issue afterwards and have a structure removed.⁹⁸ He gave the example of the Pieces of Eight restaurant in Milwaukee, which he said would not be permitted today on lakebed fill, but will not be removed because it has been there so long.⁹⁹

The elimination of the Water Division and placement of the Waterways Program in a division for customer service have not fixed prior problems related to implementation of the public trust doctrine. Many of the concerns expressed by DNR Water Specialists and supervisors in these 2021 interviews echo those expressed one and two decades earlier. These include worries about disgruntled waterfront property owners, political pressure, staff reductions, turnover, lack of training, and more work than staff hours in the day.¹⁰⁰

b. Budget Constraints, Staff Reductions, High Turnover, and Unfilled Vacancies

Budget constraints, staff reductions, high turnover, and unfilled vacancies are chronic problems that erode the trustees’ ability to effectively protect state

92. Interview with Todd Ambs, former Deputy Sec’y, Wis. Dep’t of Nat. Res. (June 28, 2021) (on file with author).

93. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

94. WIS. STAT. § 30 (2019–20).

95. *Id.* § 31.

96. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

97. *Id.*

98. *Id.*

99. *Id.*

100. The DNR’s internal survey of staff corroborates and adds to these findings. “The Program continues to meet program objectives while experiencing numerous stressors such as high workloads, a recent reorganization, staff and supervisory vacancies, hiring freezes and budget lapses, loss of positions, competing expectations from external stakeholders, and working remotely and work restrictions during a pandemic.” WATERWAYS ENGAGEMENT TEAM REPORT, *supra* note 47, at 2.

waters. Deputy Secretary Todd Ambs was in his second stint as an upper manager at the DNR when interviewed for this research. He reflected that twenty years ago, when he led the Water Division, they had double the Water Specialists as compared to today's number.¹⁰¹ He noted the precarious funding for these water trustee positions. To make the point, he explained that over the decades, there have been no fee increases for any of the water permits.¹⁰² He said that the Joint Committee on Finance in the Wisconsin Legislature had just approved a waterfowl stamp increase in 2021, for the first time in twenty-four years.¹⁰³ He also noted that he had seen the legislature stripping away General Program Revenue (GPR), and that the Chapter 30 water program carried out by Water Specialists was the "only program that still has a decent chunk" of this revenue.¹⁰⁴

According to Bureau Director Michael Thompson, in 2021, the Waterways Program had an annual budget of \$7.6 million, about fifty percent of which came from GPR.¹⁰⁵ The rest of the budget came from federal funding and program revenue from permit fees.¹⁰⁶ According to Thompson, most of the budget goes to pay staff.¹⁰⁷ These staff were primarily responsible for processing permit applications and working face-to-face with "customers," he said.¹⁰⁸ In 2020, staff processed 3500 wetland and waterway permits, 325 wetland exemptions, and 312 wetland confirmations, Thompson added.¹⁰⁹

The view that the legislature would not fund more positions for Water Specialists despite the obvious need was repeated throughout the DNR interviews.¹¹⁰ A familiar refrain throughout the interviews was that high workload and wide geographic coverage caused Water Specialists to burn out. One Water Specialist put a finer point on this subject:

I've been talking with regulators in Michigan. . . and learned that where DNR has four people working on Great Lakes coastlines, Michigan has thirty-two. These coastal areas are high priorities for resource protection, but Wisconsin's staffing doesn't reflect that. The legislature sets the number of positions at a level that is not enough to really operate the program.¹¹¹

101. Interview with Todd Ambs, former Deputy Sec'y, Wis. Dep't of Nat. Res. (June 28, 2021) (on file with author).

102. *Id.*

103. *Id.*

104. *Id.*

105. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep't of Nat. Res. (July 23, 2021) (on file with author).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *E.g.*, Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

111. *Id.*

This sentiment has data behind it. Over the course of interviews, Michael Thompson provided data showing authorized DNR positions over a decade, between 2012 and 2021.¹¹² One staffer familiar with the data interpreted, “it appears we are down thirteen full time Water Specialists in 2021 compared to ten years ago.”¹¹³ Thompson explained the authorized budget is larger than the actual budget, as the DNR does not have the funding for all the positions.¹¹⁴ For instance, he said, they were authorized to collect \$1.4 million in program revenue from permit fees, but in reality, they collected far less in 2021, \$800,000.¹¹⁵ The reduction in fees is a result of an increasing number of projects that were shifted into general permits or exempt categories due to legislative changes.¹¹⁶ The number of people actually serving as Water Specialists in 2021 was twenty-seven, with three more working as coordinators.¹¹⁷ By contrast, the number of authorized Water Specialists in 2021 was forty-nine.¹¹⁸

Many Water Specialists expressed frustration with the volume of work they were asked to complete with less resources.¹¹⁹ One Water Specialist observed that morale was driven down because there was no legislative support for additional DNR positions in the state budget even after the DNR had requested the extra positions.¹²⁰ This chronic underfunding has persisted over the last decade at the agency.¹²¹ The Water Specialist added, “we’re doing the best we can with what we have.”¹²² However, the inability to keep up with the workload “cuts against our personal grain—we feel like we aren’t protecting the environment. We care about upholding the public trust and if we can’t, it

112. WIS. DEP’T OF NAT. RES., TABLE OF AUTHORIZED POSITIONS IN WATER REGULATION AND ZONING FROM 2012–2021 (on file with author).

113. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

114. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

115. *Id.*

116. WATERWAYS ENGAGEMENT TEAM REPORT, *supra* note 47, at 6.

117. WIS. DEP’T OF NAT. RES., WATERWAYS STAFF AND SUPERVISORS, (2021) (on file with author). On June 18, 2021, twenty-seven people had the title “Water Reg/Zoning Specialist”, three had the title “NR Program Coordinator”, ten had the title “Water Reg/Zoning Engineer”, six had titles of supervisor, manager, or director, and one deputy secretary.

118. WIS. DEP’T OF NAT. RES., AUTHORIZED POSITIONS, WATER REGULATION AND ZONING CLASSIFICATIONS, 2012 TO 2021 (2021) (on file with author). In this document, in 2021 there were thirteen limited term employees (LTEs) with titles “Water Reg & Zoning Spec” or “Water Reg & Zoning Spec-Senior”, there was one permanent with title “Water Reg & Zoning Spec”, six permanent with title “Water Reg & Zoning Spec-Adv”, and 29 permanent with title “Water Reg & Zoning Spec-Senior.”

119. *E.g.*, Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

120. *Id.*

121. *Id.*

122. *Id.*

hurts.”¹²³ He concluded, “this isn’t just a job to most people. That isn’t to say we are implementing biased decision making but to say we care.”¹²⁴

One Water Specialist reflected that he joined the DNR at the beginning of the Walker Administration when there was a lot of turnover and staff burnout.¹²⁵ Instead of a warning sign to seek work elsewhere, he saw it as an opportunity to get into the agency and apply his advanced science degrees.¹²⁶ His workload between 2014 and 2021 exemplified how the DNR modified its approach to cover more geographic area with less people. He reported that he originally covered about nineteen counties in 2014, twenty-four counties in 2015–2016, thirty counties in 2018, and by 2021 he covered all of the state’s seventy-two counties.¹²⁷ He is now the singular full time staff member in his specialty where in 2014 he was one of four.¹²⁸ If this were not enough, he went on to describe the many teams at the DNR on which he participates due to short staffing that involve a variety of contentious and time-consuming issues.¹²⁹ Many interviewees, including the newest hires, reported taking on additional duties to cover staff vacancies.¹³⁰

Over the past decade the legislature and the governor have changed waterways and wetlands statutes to reduce the number of activities that require an individual permit and place more activities under general permits or exemptions.¹³¹ One might assume that fewer individual permit applications requiring site visits or cumulative impact analyses would equate to less work for DNR. However, an interviewee in a leadership position described a different situation. He said the DNR staff always have the public interest in the back of their minds when they work with applicants to find opportunities to modify proposed projects so they fit into a general permit or exempt category.¹³² Because these categories are typically for projects with smaller risks and harms to the environment, staff see these preliminary conversations as a way to shape a project and avoid actual impacts to water resources.¹³³ However, this preliminary work is time intensive. With a smaller work force, the staff are unable to always devote the time that is necessary to avoid resource impacts and help applicants fit projects into a general permit or exempt category.¹³⁴

123. *Id.*

124. *Id.*

125. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *E.g.*, Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

131. *See infra* Part II.C.2 (explaining legislative changes to waterway and wetland management).

132. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

133. *Id.*

134. *Id.*

High turnover undermines the agency's ability to deftly walk that line between protecting public trust resources and working well with waterfront property owners. A Water Specialist with more than a decade of experience reflected that staff develop skills over time to figure out the landowner's goals and how to get on the same page.¹³⁵ He added, "if we cannot agree on project modifications to reduce the harm to fisheries or other trust resources, we can at least understand each other's perspective."¹³⁶

High turnover is also disruptive to working together effectively as a team. Over the course of the interviews, one Water Specialist, who originally said he was on a team of five, learned that two of his colleagues were leaving.¹³⁷ In response to the news, he said, "we had grown together so much as a team so losing these members hurts."¹³⁸ However, he noted, "they left for higher paying jobs doing similar work so there's no way to retain people in this program when people who are good at their jobs can get paid more elsewhere."¹³⁹ The DNR's 2021 internal survey of program staff revealed nearly half of those interviewed said they were considering leaving the program for another job.¹⁴⁰

A newer Water Specialist observed that it took a long time to fill vacancies at the management level, and that several positions had been open for a year.¹⁴¹ As a result, many people were in "acting" management roles.¹⁴² He wondered if addressing the management vacancies would improve workload for staff.¹⁴³ Another newer staffer concurred with these ideas and said he was appointed to an "acting supervisor" role even though he had only recently joined the DNR.¹⁴⁴

The vacancies are in key areas. One of the newer Water Specialists noted that the DNR has been without a team leader (also called a coordinator) for enforcement and compliance for over one year.¹⁴⁵ Moreover, two of the top-level managers interviewed for this research vacated their positions within six months of their interviews. One supervisor was covering an additional region of the state on top of his regular geography due to a management vacancy.¹⁴⁶ Another supervisor was similarly in an acting role covering an additional vacant position.¹⁴⁷

135. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

136. *Id.*

137. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

138. *Id.*

139. *Id.*

140. WATERWAYS ENGAGEMENT TEAM REPORT, *supra* note 47, at 4.

141. Interview with Confidential Interviewee No. Four (July 1, 2021) (on file with author).

142. *Id.*

143. *Id.*

144. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

145. *Id.*

146. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

147. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

c. Staffs' Concerns about Program Management and Following the Law

Understaffing leads to triage measures to offer timely responses to requests for permits and enforcement needs. While necessity can be the mother of invention, many interviewees raised concerns about the failure of middle- and upper-level managers to follow established administrative law and internal procedures.¹⁴⁸

Self-certification offers an example of the unfortunate consequences that may arise from attempts to streamline. A Water Specialist explained that upper managers started encouraging self-certification for “low priority” permit decisions as early as 2009 as a response to vacancies and budget cuts.¹⁴⁹ Since then, the budget and staffing issues worsened, and the DNR expanded its reliance on permit applicants self-certifying compliance.¹⁵⁰ Although the legislature established permitting processes for waterways and wetlands in Chapters 30 and 31, processes which include categorizing activities into different levels of review from individual and general permits to exemptions, the legislature has not authorized self-certifications.¹⁵¹ One seasoned Water Specialist worried that self-certification was not legal and further opined it was not efficient because any time saved on the permit side is lost when the DNR must respond to and investigate compliance issues.¹⁵²

Despite the lack of statutory basis for self-certification, interviewees responsible for divergent aspects of water management reported that the practice was in use. According to a Water Specialist, “since about 2016, we’ve been shifting to self-certification for a vast majority of general permits. So rather than reviewing every project, we’re supposed to trust the applicant to self-certify that it meets the requirements of the general permit.”¹⁵³ This means relying on applicants to know and comply with the complexity of the state’s water laws. The Water Specialist added that wetland restoration involves complicated layers and “I’m not comfortable that Mr. Backyard Pond is able to protect the resources with their project.”¹⁵⁴ He noted that site visits are crucial because the DNR cannot always see what’s there from aerial photos, and staff may need to work with landowners to modify plans to make sure things are approvable.¹⁵⁵

Another Water Specialist reported concerns that the DNR was abandoning its legal duties under Wisconsin’s Environmental Policy Act (WEPA) to go

148. *E.g.*, Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Interview with Confidential Interviewee No. Twelve (July 30, 2021) (on file with author).

154. *Id.*

155. *Id.*

through an environmental review process on certain permits.¹⁵⁶ He recounted that the waterways team coordinator told staff not to use the WEPA environmental review form in order to reduce workload.¹⁵⁷ The Water Specialist said, “they told us to instead just enter the information on the permit; but I haven’t seen a change to the permit template to include the WEPA language. Nothing has changed with WEPA so how is this allowable?”¹⁵⁸ Prior leadership had created the WEPA form to ensure staff complied with the environmental review process and document the decision making.¹⁵⁹ The Water Specialist has reportedly ignored the directive and continued to fill out the WEPA form, reasoning, “if it is too much work” to follow what the law requires for environmental review, “we should be making the case for hiring more staff.”¹⁶⁰

A Water Specialist questioned whether he would be supported by management if he made decisions based on facts and law. He worried about inconsistencies in decisions because managers had given verbal directives that conflicted with the law.¹⁶¹ He reported that over the past five years there has been a lot of added stress on Water Specialists who are left to figure out “management’s personal agendas and reconcile how it conflicts with case law and program history.”¹⁶² He wondered, “how can staff do a responsible job in this context? Am I going to be disciplined? What happens when I tell someone to remove fill and restore a site and then get bulldozed by an upper manager who bashes the staff’s credibility and fails to protect the resource?”¹⁶³ Similarly, a newer Water Specialist described frustration due to “butting heads” with coordinators and upper management, although he generally felt the field staff worked well together.¹⁶⁴

Deputy Secretary Todd Ambs reflected that some concerns about specific individual managers had merit while others were related to overall workload being too heavy.¹⁶⁵ In discussing one of the concerns of “merit,” Ambs acknowledged that the DNR needed to remove a supervisor from the program who told staff to issue permits and ignored the nuances of the staff’s concerns about a particular project.¹⁶⁶ Ambs had been the director of water during the

156. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author); WIS. ADMIN. CODE DNR §150 (2020).

157. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Interview with Confidential Interviewee No. Fourteen (July 27, 2021) (on file with author).

165. Interview with Todd Ambs, former Deputy Sec’y, Wis. Dep’t of Nat. Res. (June 28, 2021) (on file with author).

166. *Id.*

Doyle Administration, and learned from that experience about the problems that can arise when there's interference with field staff decisions. Water Specialists are the field staff with crucial understanding of the facts about a project. Ambs was aware of a variety of examples where upper managers stepped in to issue a permit that a Water Specialist thought violated the law and should be denied.¹⁶⁷ So, when Ambs returned as deputy secretary in the Evers Administration, he refused to overrule decisions on permits.¹⁶⁸ He stated that overruling the decisions of the field staff was a "slippery slope."¹⁶⁹

To document and start to address concerns about the water program and its management, staff formed an employee engagement team. One person on this team explained why the group was necessary.¹⁷⁰ "Staff are afraid and there is a lack of trust of DNR management," he said, especially if the managers lack experience in the program.¹⁷¹ He was cautiously optimistic that the engagement team could help turn this around.¹⁷²

d. Specialization

Water Specialists used to work in small geographic areas and conduct a broad range of activities, from issuing waterways and wetlands permits, to enforcement. They needed to be familiar with a wide variety of laws to do the job well, and with experience, often became more efficient.¹⁷³ However, with the high turnover rate and reduced staffing levels, managers turned to a new approach, called "specialization."

At the time of the interviews, the DNR had been using the new system of specialization for about two years.¹⁷⁴ Under specialization, there are five subject matter teams, each of which is supposed to have a coordinator who typically does not write any permits.¹⁷⁵ For instance, there's a team that focuses on enforcement and another that focuses on wetlands. Water Specialists are assigned to a specialized team covering the entire state or a large part of it, so they have an expanded geographic area to cover. The idea is that instead of needing to know everything about wetlands, dams, piers and more, Water Specialists become experts on the specific regulated activities of the team. Despite the focused

167. See discussion of Meteor Timber, Kohler, and Shawano sea wall *infra* section II(E).

168. Interview with Todd Ambs, former Deputy Sec'y, Wis. Dep't of Nat. Res. (June 28, 2021) (on file with author).

169. *Id.*

170. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

171. *Id.*

172. *Id.*

173. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

174. *Id.*

175. *Id.*

design, due to short staffing, even the least experienced staff reported serving on more than one team.¹⁷⁶

One of the architects of specialization explained that when he joined as the director of the waterways program in 2018, staff had a variety of concerns related to high workloads, program direction, management oversight, and DNR leadership.¹⁷⁷ Michael Thompson observed the eclectic nature of the Water Specialist's job before specialization: Monday interacting with a homeowner; Tuesday with a big box store; Wednesday working on a request for a pier; Thursday handling compliance and enforcement complaints; and Friday spending a day in the office trying to get through communications.¹⁷⁸ Shifting to specialized teams allowed staff to have a subject-matter focus (i.e., just on wetlands, habitat, or enforcement), work with colleagues with the same focus, and become experts in their specialty, explained Thompson.¹⁷⁹ He gave an example of compliance and enforcement as an area where specialization could help staff gain confidence and work efficiently.¹⁸⁰

A member of the wetlands specialized team saw an upside to the team approach in jointly reviewing all practical alternative analyses for individual wetland permits and making tough calls together as a team.¹⁸¹ One Water Specialist reported that his team heard from the people they regulate that they appreciate the consistency they have seen on wetland decisions since the DNR implemented specialization.¹⁸² The downside for wetlands is that the team covers the entire state where previously a staffer was responsible for only a small part of the state. This impairs the specialists' ability to know the geography and develop relationships with local communities.¹⁸³

One Water Specialist with more than a decade of experience said specialization and the expansion of coverage to the entire state has resulted in an "exponential increase in work."¹⁸⁴ He lamented that there were not enough staff to carry out the public trust doctrine, enforce the state's environmental laws,

176. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

177. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep't of Nat. Res. (July 23, 2021) (on file with author).

178. *Id.*

179. *Id.*

180. *Id.*

181. WIS. STAT. § 281.36(3m)(b) (2019–20). ("An applicant shall include in an application submitted under par. (a) an analysis of the practicable alternatives that will avoid and minimize the adverse impacts of the discharge on wetland functional values and that will not result in any other significant adverse environmental consequences, subject to the limitations in sub. (3n)(a)."); Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

182. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

183. *Id.*

184. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

provide enough support to municipal partners, or train new DNR and municipal staff.¹⁸⁵

Another experienced Water Specialist opined that specialization “doesn’t make sense to staff or others.” He explained that it is a “huge disservice to customers because it is so confusing. One county has four people that might need to be involved to answer questions related to [a] project and previously it was just him as the main point of contact.”¹⁸⁶ He worried that this approach takes a controversial program and makes it worse and less efficient for regulated entities.¹⁸⁷

A third, very seasoned Water Specialist who worked through several changes in leadership, expressed his frustration with specialization: “specialization was shoved down our throats. . . and it has been a colossal failure.”¹⁸⁸ He said he used to cover four to five counties where he knew all the contractors and external partners in government.¹⁸⁹ He knew the basins. The counties had similar forest cover and land uses. All the DNR staff in fisheries or lake biology worked on the same geographic area, so it was easy to work together. “When you know all the people, it is easier to partner on coming up with workable solutions on the ground,” he observed.¹⁹⁰ Moreover, he recalled that previously he could advise people in advance of construction projects about waterbodies with special protections.¹⁹¹ This allowed him to help people adjust their projects to protect the public interest and receive a permit.¹⁹²

The same Water Specialist continued to explain that under specialization all the people are different, and all the resource impacts are different.¹⁹³ He stated that he often does not know the contacts he needs and is always establishing new relationships: “there’s a lot of time wasted redoing this every time you start a new project.”¹⁹⁴ He explained that specialization makes his work more difficult because “you don’t know if you can trust the contractor, whether they abide by the law, and whether they’ve got a history of non-compliance, and then you’re doing paper reviews on waterbodies you have never seen.”¹⁹⁵ From the “customer” side, he said he’s always getting calls from people who need help, but that he cannot just run out to the site and assist them because they may be six

185. *Id.*

186. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

187. *Id.*; *see also* Interview with Confidential Interviewee No. Four (July 1, 2021) (on file with author).

188. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

hours away and the project may involve several DNR staff members instead of one Water Specialist.¹⁹⁶ He worried that the inefficiency of the specialization approach frustrates people to the point that they just go ahead and do the project without DNR approval.¹⁹⁷

Michael Thompson is aware that two years into specialization the results have been mixed. He explained that the number of requests for service still exceed staff's capacity to deliver.¹⁹⁸ Other less than ideal repercussions from specialization are that covering vast geographies makes it difficult to travel to field sites and form relationships. Thompson conceded that some staff now feel siloed in their specialization and that some "customers" may want a single point of contact for answers to make it less confusing.¹⁹⁹ He concluded that the DNR is aspiring to be transparent, listen, and do the best it can to triage the work.²⁰⁰

e. Jack of All Trades: Education and Training for Water Managers

When considering the public trust impact of a project, Water Specialists need to be a jack of all trades, able to assess multiple potential public interest factors. Water Specialists have little in-depth knowledge about each component and need to work with fisheries biologists or other DNR scientists to be effective resource managers.²⁰¹ This breadth of knowledge is needed because Wisconsin courts have defined public rights in water so broadly. Public rights protected by the public trust doctrine include access to resources, impacts on fisheries, water quality, navigation, recreation, and natural beauty. Evaluating public rights may require an understanding of a project's impact on wildlife habitat, flood-flow capacity, water quality and quantity, and other hydrological and ecological factors.

To process a request for an individual permit, several Water Specialists explained that they look for historic or archeological issues, endangered or protected species, and public interest factors.²⁰² They then consult with DNR staff in those areas and incorporate any special conditions to uphold the public interest.²⁰³ Typically, the Water Specialists stay current on the law by relying on

196. *Id.*

197. *Id.*

198. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep't of Nat. Res. (July 23, 2021) (on file with author).

199. *Id.* The DNR internal survey corroborated the findings regarding staff perceptions about specialization. WATERWAYS ENGAGEMENT TEAM REPORT, *supra* note 47, at 6, 8–9.

200. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep't of Nat. Res. (July 23, 2021) (on file with author).

201. *E.g.*, Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

202. *E.g.*, Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author); Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

203. *E.g., id.*

DNR attorneys who train the staff and update them on the meaning of new court opinions or statutes.²⁰⁴

Given the complex legal and scientific nature of the Water Specialists' work, initial orientation, and ongoing training and mentoring, established written procedures and guidelines are essential to high quality water management.

Water Specialists who joined the DNR a decade or more ago reported having significantly more professional development than more recent hires. One who started over two decades ago recounted that the Water Specialists previously had four trainings per year, with each lasting three days.²⁰⁵ Today staff are "barely trained," and instead complete self-paced PowerPoint modules.²⁰⁶ This switch to online modules was apparently made from necessity when people started working remotely due to COVID-19. One Water Specialist added that he's optimistic that in 2021 they will finally conduct a hybrid of online and field training.²⁰⁷

The limited training now available may be bolstered by ongoing mentoring where there's an experienced supervisor. For example, a supervisor described a system of one-on-one mentoring in the field but noted that not all supervisors consistently mentor this way.²⁰⁸ Several staff mentioned how important mentoring has been and how much they value input from the few Water Specialists who have more than twenty years of experience.²⁰⁹

One of the newer Water Specialists described how he was "thrown into the program" without any "formal training."²¹⁰ He added, "I didn't know much about wetlands or the public trust doctrine when I started and considering how important the public trust doctrine is to what we do, the lack of training seems inappropriate."²¹¹ Consistent with findings from the interviews, the DNR's internal survey highlighted training as a key issue for improvement. It recommended that the DNR "develop and enhance" training to improve program consistency related to "implementation of the broad public trust standards."²¹²

Many Water Specialists mentioned using the DNR's Waterways and Wetlands Handbook to learn about expectations related to administrative procedures and policies.²¹³ The handbook includes descriptions of how the DNR

204. *E.g.*, Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

205. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

206. *Id.*; Interview with Confidential Interviewee No. Four (July 1, 2021) (on file with author).

207. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

208. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

209. *E.g.*, Interview with Confidential Interviewee No. Six (July 26, 2021) (on file with author).

210. *Id.*

211. *Id.*

212. WATERWAYS ENGAGEMENT TEAM REPORT, *supra* note 47, at 14.

213. *E.g.*, Interview with Confidential Interviewee No. Fourteen (July 27, 2021) (on file with author).

has handled different activities over time.²¹⁴ One supervisor said the handbook was a “very important” resource.²¹⁵ However, another supervisor noted that the handbook is outdated.²¹⁶ “With all the statutory changes, along with outdated administrative rules that have not been updated due to the cumbersome process under Act 21, the handbook lags,” he noted.²¹⁷

As a result of insufficient training and resources, Water Specialists face a daunting situation where they’re required to be a jack of all trades to protect the public interest, but without consistent orientation and ongoing support. To ensure that Wisconsin’s water resources are adequately protected, Water Specialists need to be trained, mentored, and supported with an up-to-date handbook on how to manage the waters of the state.

2. Legislative Actions

a. Legislative Revisions to Shoreland Zoning Laws

The Wisconsin Legislature used the 2015 Budget Bill to rewrite the state’s shoreland zoning laws, causing large ripple effects across Wisconsin’s coastal areas.²¹⁸ Shoreland zoning controls the placement of structures and types of activities that are permitted in the coastal zone. A Water Specialist reported that he received a lot of complaints about filling and grading in the shoreland zone because runoff associated with these activities impairs public trust resources.²¹⁹ Several Water Specialists highlighted that Act 55, which was passed as part of the 2015 Budget Bill, “drastically” changed shoreland zoning.²²⁰ The fact that it was accomplished in a budget bill meant that it did not receive a public hearing or other processes that would have allowed for debate on the substance of the changes. A Water Specialist recalled that the counties, which are responsible for carrying out shoreland zoning, did not have a chance to participate and the dramatic changes were put into place “abruptly.”²²¹

A Water Specialist explained that Act 55 “really shifted the whole philosophy.”²²² He noted that prior to 2015, state statute established shoreland

214. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

215. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

216. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

217. *Id.*

218. See 2015 Wis. Act 55 (altering county authority to adopt shoreland zoning ordinances under Wisconsin Statutes section 59.692). Act 55 added language to the Wisconsin Statutes that states a county shoreland zoning ordinance adopted under Wisconsin Statutes section 59.692 “may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard.” WIS. STAT. § 59.692(1d) (2019–20).

219. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

220. *E.g., id.*

221. *Id.*

222. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

zoning through state-wide minimum standards, rather than a one-size-fits-all approach as under Act 55.²²³ The prior law recognized that different parts of the state faced varying degrees of development pressure, and some local governments needed the ability to impose more restrictions on development to protect shared values.²²⁴ This gave local governments the power to implement more stringent zoning regulations than the state minimum. With Act 55, however, the legislature abandoned the minimum state standard approach and restricted local governments to a state-wide uniform maximum standard for shoreland zoning. As an illustration of the change, a state shoreland zoning standard that requires a building to be set back seventy-five feet from the OHWM is now the maximum standard, whereas previously local governments could have required a larger set back to protect a special resource.²²⁵ A DNR staffer reflected a lot of frustration about this:

All the years of lakes classifications at the local level got thrown out the window. There was then a major scramble within DNR to get something out to the counties. The legislative authors didn't know what they were doing and never reached out to DNR prior to making these changes. Those working within county government were devastated to see all the years of their hard work to protect resources taken away by the legislature in one fell swoop.²²⁶

One Water Specialist said these legal changes were focused on making the ordinances less protective of water quality.²²⁷ Despite this, he reflected that “less restrictive to some is a positive and to others it means less protective; my job is to make sure the law is followed even if I don't agree.”²²⁸ Another staff member added that in parts of the state that had done very little with shoreland zoning, Act 55 was more restrictive; but in the northern region where the state has prized forests and water resources, Act 55 loosened restrictions and erased county systems of classifying lakes that had greater protections.²²⁹

Of course, the Legislature could not have anticipated that a few years after they passed Act 55 there would be a global pandemic with COVID-19, which would result in an enormous uptick in people fleeing urban areas to develop water-adjacent properties and use public lands in the northern lakes region. The loosening of development controls right before an increase in population pressures put tremendous strain on water resources. Michael Thompson reflected that with COVID-19 and the rise of remote work, baby boomers retiring, and low

223. *Id.*

224. *Id.*

225. WIS. ADMIN. CODE DNR §115.05(1)(b)(1); BRIAN OHM, PERSPECTIVES ON PLANNING: 2015 LEGISLATIVE CHANGES AFFECTING WISCONSIN'S SHORELAND (2015), available at <https://dpla.wisc.edu/wp-content/uploads/sites/1021/2017/06/2015-shoreland-zoning-changes.pdf>.

226. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

227. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

228. *Id.*

229. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

interest rates, more people were living and working in rural areas on the water.²³⁰ He described a surge of population growth and construction on the waterways to turn cottages into four-season dream homes or to build new homes where none existed previously.²³¹ “We need to make defensible permit decisions, but we also need a strategic look ahead so DNR can play our role amidst these population pressures and keep special places special,” Thompson added.²³²

Increased development along shorelands aided by weaker legal protections is a primary threat to water resources, according to several Water Specialists.²³³ The DNR’s model shoreland zoning ordinance identifies the purpose of shoreland zoning to protect the public interest, especially from cumulative impacts.²³⁴ This zoning is directly tied to implementing the public trust doctrine. However, one Water Specialist reported that waterfront property owners are increasingly rebuilding nonconforming structures; failing to reestablish

230. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

231. *Id.*

232. *Id.*

233. *E.g.*, Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

234. The purposes of shoreland zoning in Wisconsin are to:

(1) *Further the Maintenance of Safe and Healthful Conditions and Prevent and Control Water Pollution Through:*

- (a) Limiting structures to those areas where soil and geological conditions will provide a safe foundation.
- (b) Establishing minimum lot sizes to provide adequate area for private on-site waste treatment systems (POWTS).
- (c) Controlling filling and grading to prevent soil erosion problems.
- (d) Limiting impervious surfaces to control runoff which carries pollutants.

(2) *Protect Spawning Grounds, Fish and Aquatic Life Through:*

- (a) Preserving wetlands and other fish and aquatic habitat.
- (b) Regulating pollution sources.
- (c) Controlling shoreline alterations, dredging and lagooning.

(3) *Control Building Sites, Placement of Structures and Land Uses Through:*

- (a) Prohibiting certain uses detrimental to the shoreland-wetlands.
- (b) Setting minimum lot sizes and widths.
- (c) Setting minimum building setbacks from waterways.
- (d) Setting the maximum height of near shore structures.

(4) *Preserve and Restore Shoreland Vegetation and Natural Scenic Beauty Through:*

- (a) Restricting the removal of natural shoreland cover.
- (b) Preventing shoreline encroachment by structures.
- (c) Controlling shoreland excavation and other earth moving activities.
- (d) Regulating the use and placement of boathouses and other structures.

BURNETT COUNTY, WIS., CODE OF ORDINANCES ch. 45, § 45-3 (2017) (excerpt from Model Shoreland Ordinance DNR provides to counties that restates the purposes of shoreland zoning, based on the purposes of shoreland zoning as defined in WIS. STAT. § 281.31(1), also referenced in WIS. STAT. § 59.692(1c), and as administered under Wis. Admin. Code NR § 115.01).

vegetative buffers; and installing riprap on shorelines, which modifies vegetation and habitat.²³⁵ The political branches in Wisconsin have made all of these activities legal by weakening shoreland zoning protections.²³⁶ Another staff member who had prior experience working for a county on zoning concurred, “this is the largest change to impact the public trust on waterways and wetlands.”²³⁷

Even with a uniform maximum standard for shoreline zoning, implementation of the law remains challenging. A Water Specialist explained, “some of the new rules about non-conforming structures are so complicated that it is very difficult to enforce.”²³⁸ This perspective was further explained by another staff. He said that prior to Act 55, nonconforming structures (i.e., those placed too close to the water’s edge, according to current shoreland zoning standards) were restricted from expanding during reconstruction.²³⁹ Some counties prohibited any expansion unless the owner could meet the zoning setback with the expansion. However, Act 55 removed the requirement of county authorization to reconstruct a nonconforming structure within its existing footprint and allowed the owner to increase the height of a principal structure by thirty-five feet.²⁴⁰ According to one Water Specialist:

The practical impact of this legal change is that a small cottage built in 1950 that is ten feet from the water can now be rebuilt and expanded upward thirty-five feet without ever going through county zoning. Now we have these newly renovated homes right next to the water. With water levels going up so high on the Great Lakes in recent years, this leads to a greater demand by that property owner to armor the coast to protect the structure built too close to the water.²⁴¹

The legislature established the DNR’s role in the shoreland zoning scheme as a helper for counties, but the counties have primary authority to enforce the law, explained a Water Specialist who had worked for a county zoning office.²⁴² The DNR trains county staff about the statute and regulations, offers a model ordinance, and reviews county ordinances and variances. Despite the breadth of work, there are only one or two DNR staff to cover all the counties in the state

235. WIS. ADMIN. CODE DNR § 328.03(22) (2014) (defining “riprap” as “a layer or layers of rock, including filter material, placed on the bed and bank of a navigable waterway to prevent erosion, scour or sloughing of the existing bank.”); Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

236. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

237. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

238. *Id.*

239. *See* WIS. STAT. §§ 59.69(10e)(a)(2), 59.692(1k)(c).

240. *See id.* §§ 59.69(10e)(a)(2), 59.692(1k)(4).

241. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

242. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

on shoreland zoning.²⁴³ “I wish we had more staff to help” the counties, a Water Specialist said.²⁴⁴ “We need to strengthen shoreland zoning at DNR. The counties come to DNR daily with technical questions about shoreland zoning. The DNR issues certificates of compliance for 72 counties,” he explained.²⁴⁵

Another problematic aspect of the 2015 shoreland zoning law is that it removed the DNR’s ability to protect the public trust in court when a county allows an activity in the shoreland-wetland zone that violates the public trust doctrine or other state standards.²⁴⁶ A Water Specialist explained that the DNR used to have the power to appeal a county’s zoning decision in court.²⁴⁷ He said, “if there is a really bad local decision, DNR can no longer bring a legal challenge to correct it.”²⁴⁸ This hinders the DNR’s ability to act as a trustee. For instance, a developer can go before a county board of adjustment and obtain a variance from shoreland zoning to build a new million-dollar home twenty feet from the OHWM instead of the required seventy-five feet setback, and the DNR cannot appeal this decision to a court.²⁴⁹ Previously, the DNR litigated dubious local decisions that threatened public rights in trust resources, and often won in cases reviewed by the judicial branch.²⁵⁰ Now the trustees have no access to the courts in these situations.

b. Legislative Revisions to Wetlands

Over the past decade Wisconsin’s legislature and governor have revised wetlands protections in ways that have allowed more development and damage to wetlands. Wisconsin had been one of only a few states in which the DNR regulated so-called “isolated wetlands”: those that are not covered by federal law because they are not connected to other waterways. Wisconsin has an estimated one million acres of isolated wetlands and an estimated four million additional acres of wetlands that are connected to navigable waterways, and as such are covered by federal law.²⁵¹ These isolated wetlands lost some state protections in 2018 when the legislature enacted Wisconsin Act 183, or AB 547. The new Wisconsin Statutes sections 281.36(4n)(b–d) provide general exemptions for

243. *Id.*

244. *Id.*

245. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

246. *See* WIS. STAT. § 59.692(4)(b) (2019–20).

247. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

248. *Id.*

249. *Id.*

250. *See, e.g.,* Wis. v. Ozaukee Cnty. Bd. of Adjustment, 449 N.W.2d 47 (Wis. Ct. App. 1989).

251. Lee Bergquist & Partick Marley, *Assembly Approves Bill to Allow More Development of Wetlands Under State Control*, MILWAUKEE J. SENTINEL (Feb. 16, 2018), <https://www.jsonline.com/story/news/politics/2018/02/15/assembly-take-up-bill-allow-more-development-wetlands-under-state-control/338495002/>.

discharges or fills of certain “nonfederal wetlands” and “artificial wetlands,” categories with statutory definitions.²⁵²

Protecting wetlands is increasingly important as greenhouse gases continue to exacerbate climate change, because wetlands have the capacity to handle intense rainfall and reduce flooding of the built environment.²⁵³ A wide variety of municipalities are now experiencing intense storms that historically hit only once every five hundred or one thousand years, observed a Water Specialist.²⁵⁴

In 2021, the DNR managed the state’s wetlands with a specialized team of staff and a team coordinator.²⁵⁵ One Water Specialist shared that he thinks staff need to prioritize regulating in some instances and putting on blinders in others; sometimes pushing hard to protect a small, degraded resource is not the best option in the long run because of socio-political factors.²⁵⁶ He saw the legislative roll back of wetland protections as a response to a DNR that “tipped the fulcrum too far on the side of the public interest.”²⁵⁷ He added, “now we’re losing a lot of wetlands that are no longer regulated under state statute.”²⁵⁸

Under Wisconsin statutes, activities in wetlands fall into three categories: exemptions, general permits, or individual permits.²⁵⁹ These categories should logically involve an increasing level of DNR scrutiny, with exemptions requiring the least amount of staff time because they are activities deemed exempt from regulation and individual permits requiring the most amount of staff time and public processes. However, one staff member observed that the rise in wetland application exemption requests did not improve efficiency because DNR needs to spend two to eight hours per exemption request: “there’s a lot of review for exemptions, and some are similar to individual permits to process.”²⁶⁰

Wisconsin statutes exempt discharges into wetlands from a wide variety of sources, such as farming, farm ponds, stormwater basins, and drainage district activities.²⁶¹ Discharges that impact certain nonfederal or artificial wetlands are also exempt.²⁶² The legislature’s recent inclusion of stormwater basins in exempt activity is directly counter to a longstanding DNR policy against using wetlands to create stormwater ponds. The DNR’s prior approach had been that

252. WIS. STAT. §§ 281.36(4n)(b)–(d) (2019).

253. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. WIS. STAT. § 281.36(4), (4m), (4n), (4r) (2019–20).

260. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

261. WIS. STAT. § 281.36(4), (4m), (4n), (4r).

262. *Id.* § 281.36(4n).

wetlands naturally serve the function of absorbing rainfall and do not need to be degraded by inundation with directed stormwater.²⁶³

Under Wisconsin's laws, naturally occurring wetlands have greater legal protections than those that humans artificially create; the latter are now exempt from needing a permit to alter.²⁶⁴ However, the statute requires people to provide the DNR with fifteen day notice before commencing projects that would result in discharges into nonfederal or artificial wetlands.²⁶⁵ According to a Water Specialist, many exemption requests are for commercial development projects, such as warehouses for storage lockers, and others are for residential developments of subdivisions.²⁶⁶ The Water Specialist explained that for an artificial wetland exemption request, the applicant does not need to provide the full details of the project or conduct a site investigation with a wetland delineation, as is required for an individual or general permit.²⁶⁷ Instead, applicants simply use Wisconsin's wetland inventory. He recalled a request from a municipality to get forty-four acres of artificial wetland exempted to attract future development of big box stores.²⁶⁸ The municipality told the DNR that utility corridors had been realigned and formed the artificial wetlands. Although the DNR typically would not go to the site, staff visited this one because of the large acreage involved and found the area was ineligible for an exemption because there was definitive evidence of a historic mosaic wetland with a lot of micro-topography.²⁶⁹ According to a staffer involved, the municipality "didn't respond well."²⁷⁰ Ultimately, instead of applying for an individual permit, the municipality opted to withdraw the application.²⁷¹ With the limited number of wetland staff working to serve the entire geography of the state, those kinds of site visits, valuable as they are to verify claims of applicants, are very rare.

Finally, a seasoned Water Specialist expressed "big concerns" about the wetland program and its apparent disregard of the practical alternatives analysis required by law.²⁷² He opined that "if any program is finding a way to say yes

263. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

264. WIS. STAT. § 281.36(4n)(a)(1) defines certain exempt nonfederal and artificial wetlands as "[A] landscape feature where hydrophitic vegetation may be present as a result of human modification to the landscape or hydrology and for which the department has no definitive evidence showing a prior wetland or stream history that existed before August 1, 1991, but does not include any of the following: (a) A wetland that serves as a fish spawning area or a passage to a fish spawning area. (b) A wetland created as a result of a mitigation requirement under sub. (3r)."

265. *Id.* § 281.36(4n)(e)(1).

266. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

to applicants, it is the wetland program.”²⁷³ He suggested a program audit to see how many acres of wetland have been filled each year, how the practical alternatives are being assessed, and whether the DNR is defining wetlands as “artificial” to exempt them and avoid a permit denial.²⁷⁴

c. Legislative Revisions to Waterways

Over the past decade the legislature weakened the DNR’s authority to regulate waterways. For instance, the legislature grandfathered and exempted many piers from needing a permit;²⁷⁵ exempted riprap placement and repair along shorelines from permit requirements, unless located in an Area of Special Natural Resource Interest (ASNRI);²⁷⁶ and limited the DNR’s ability to designate a waterbody as an ASNRI,²⁷⁷ explained in the next section. The impact of these changes will become more apparent on water resources over time and as more people flock to Wisconsin’s 15,000 lakes and 84,000 miles of rivers and streams.²⁷⁸

In the first year of the COVID-19 global pandemic, people began spending more time enjoying the state’s natural resources. The DNR saw an uptick in permit requests to increase the number of slips and piers for boats.²⁷⁹ Recreational boat sales and RV sales went up, and the DNR saw that ripple into an increase of recreational use of state parks, forests, lakes, and rivers.²⁸⁰ Many people bought waterfront properties and wanted to make that their escape home in the midst of quarantining and the rise of remote work.²⁸¹ Waterfront property owners were seeking to live in ways that were more resource intensive, as one might in a city or suburb, instead of a less frequently used camp or cottage.²⁸² A Water Specialist said, “we’re doing our best to minimize the footprints of these proposals where we can, and trying to give people realistic expectations,” but there are limited tools and staff to mitigate the increased human pressure on natural resources.²⁸³

With the increased use of the state’s lakes and rivers, the DNR heard growing concerns about boat congestion. However, one Water Specialist noted

273. *Id.*

274. *Id.*

275. WIS. STAT. §§ 30.12(1g)(f), (1k) (2019–20).

276. *Id.* §§ 30.12(1g)(i), (j), (jm).

277. *See* WIS. LEGISLATIVE REFERENCE BUREAU, SUMMARY OF THE 2015–16 LEGISLATIVE SESSION ACTS 1 TO 392, at 37–38 (2016) (summarizing Act 387).

278. *River Facts and Resources*, WIS. DEP’T OF NAT. RES., <https://dnr.wisconsin.gov/topic/Rivers/FactsResources.html> (last visited Nov. 15, 2022).

279. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

the legislature had not given the DNR the authority to regulate the number of boats on a particular waterbody.²⁸⁴ Instead, the only tool the DNR had to address the issue was its regulation of piers. With public and private boat launches, the number of piers is not really a good measure of the number of boats allowed on a waterbody. Additionally, the DNR currently regulates piers largely in theory and rarely in practice. Staff reported that around 2012, the legislature passed a law that grandfathered and exempted many piers from regulation.²⁸⁵ As a result, the DNR is often unable to regulate boat congestion through this rough proxy of pier permits.²⁸⁶

DNR's jurisdiction has changed substantially over the past decade in more than just pier regulations. One Water Specialist explained that the legislature and governor created a new statute that exempted riprap on the shores of the Great Lakes, inland lakes, and certain rivers, unless they are designated as an ASNRI.²⁸⁷ Prior to this statutory change, proposals to install riprap were common general permit applications. The riprap exemption reduces workload for the DNR because it eliminates the need for a permit. With less regulatory authority over these sites, the DNR is seeing rock riprap installed in places that likely do not warrant it.²⁸⁸ Because an exemption is undocumented—with no need to notify DNR—landowners simply self-verify that the riprap meets the exemption, explained a Water Specialist.²⁸⁹ While individuals often call the DNR in advance of placing riprap under the exemption, without a site visit, it is hard to understand the scope of use and the cumulative impacts on the shorelines.²⁹⁰

d. Legislative Revisions to Areas of Special Natural Resource Interest

During the 2015–2016 legislative session, Wisconsin's legislature and governor restricted the use of ASNRI to protect the state's waters.²⁹¹ Wisconsin law categorizes certain waterbodies as ASNRI, a designation that affords special protections and provides the DNR greater regulatory control over activities that impact them.²⁹² ASNRI designation preserves permitting requirements for activities along the shores that in other parts of the state the legislature has exempted from regulations, such as placing biological shore erosion control

284. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

285. *Id.*; see Part I for two pier cases.

286. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

287. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author); see WIS. STAT. § 30.12(1g) (2019–20).

288. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

289. *Id.*; see WIS. ADMIN. CODE DNR §§ 310.04–.05 (2017).

290. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

291. See WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 277, at 37–38 (summarizing Act 387).

292. See WIS. STAT. § 30.01(1am).

structures or repairing or replacing riprap.²⁹³ Further, the DNR may impose additional conditions on permits to place seawalls on properties in ASNRI.²⁹⁴ The legislature approved changes to ASNRI criteria, which limited the DNR's ability to designate a waterbody as an ASNRI.²⁹⁵

According to one Water Specialist, a lot of the shoreline of Lake Superior is not designated ASNRI so the exemption for riprap applies there. He said, "to not have a permit process on a large part of a Great Lakes shoreline up north blows my mind."²⁹⁶ He continued:

So, most of the work on riprap and other shoreline modification permits centers on Lake Michigan because a lot of that is still ASNRI. We used to have a lot more miles designated, but a few years ago the Legislature changed the criteria for designation, and this reduced areas with this protective designation that requires permits.²⁹⁷

The result was opening more coastline to alterations that are exempt from DNR oversight.²⁹⁸

Another example staff gave of the impact of the legislation change to ASNRI was the Wolf River. According to one Water Specialist, "the Wolf has lots of state listed species and isn't designated as ASNRI today, although it used to be before the legislation."²⁹⁹ Pursuant to section 30.01(1am)(c) of the now repealed Wisconsin Statute, the DNR administrative rules listed waterbodies with ASNRI status to include "those with endangered/threatened species."³⁰⁰ However, in the new statute, the legislature notably omitted waters containing threatened or endangered species identified in the Wisconsin Natural Heritage Inventory.³⁰¹ Areas containing any of the identified species will no longer benefit from ASNRI protections unless they meet other designation criteria.

The revised legislation also expanded the definition of ASNRI to include portions of waters that the DNR identifies to contain "sensitive areas."³⁰² Wisconsin Statute section 30.01(6b) defines "sensitive areas" as regions of

293. See WIS. ADMIN. CODE DNR § 328.04(3)(a) (2014). Activities not exempted in ASNRI include deposits less than two cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; dry hydrants; pilings; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power; and culvert replacements. Note to WIS. ADMIN. CODE DNR § 1.05(2) (2022).

294. WIS. STAT. § 30.12(3)(a)(13).

295. See WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 277, at 37–38 (summarizing Act 387).

296. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

297. *Id.*

298. *Id.*

299. *Id.*

300. See WIS. ADMIN. CODE DNR § 1.05(4)(a) (2013) (showing the language of WIS. STAT. § 30.01(1am)(c), which was later repealed by 2015 Wis. Act. 387).

301. WIS. STAT. § 30.01(1am)(a)–(h) (2019–20).

302. *Id.*

aquatic vegetation that offer “critical or unique fish and wildlife habitat”³⁰³ The DNR could potentially interpret this to cover threatened or endangered species. However, it would have to update its administrative rules, and due to the difficulties imposed on that process by Act 21, which essentially gives the governor and the legislature veto power over administrative rules, that is unlikely.

3. *Climate-Disrupted Water Cycles*

The former deputy secretary, Todd Ambs, expressed concern that climate change is intensifying disruptions in water cycles, leading to extremes of droughts and floods. Lake levels and even groundwater levels are fluctuating more dramatically in areas throughout the state.³⁰⁴ The former bureau director for waterways, Michael Thompson, also noted that he observed more frequent and intense precipitation events in 2018.³⁰⁵ Given statewide flooding, Thompson wondered whether the DNR was up to speed on dam inspections and flood emergency response.³⁰⁶

On the inland lakes, a Water Specialist reported seeing structures under water because the seepage lakes were flooding and the groundwater tables were high, making the lakes like “an overflowing bathtub with no drain.”³⁰⁷ Property owners looked to the DNR to fix the problem, and the DNR received proposals to dewater one lake into another. He observed that dewatering can get complicated and controversial if invasive species are introduced from one lake into the other.³⁰⁸

Lake Superior’s water levels have fluctuated significantly in recent years, presenting new challenges for the DNR.³⁰⁹ A less experienced Water Specialist described a situation where contractors sought exemptions to drive on the bed of Lake Superior and deposit riprap along the shoreline to counter erosion from high lake levels.³¹⁰ He explained that if the riprap is on the mainland of Lake Superior, as opposed to an area designated as ASNRI or an outlet of a stream, there is a statutory exemption for three hundred linear feet of riprap.³¹¹ In one building season, this Water Specialist reported receiving “maybe forty” exemption notices

303. *Id.*

304. Interview with Todd Ambs, former Deputy Sec’y, Wis. Dep’t of Nat. Res. (June 28, 2021) (on file with author).

305. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

306. *Id.*

307. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

308. *Id.*

309. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

310. *Id.*

311. *Id.*; see WIS. STAT. § 30.12(1g)(jm) (2019–20).

from contractors.³¹² He explained that he tried to get contractors to use biodegradable oils when driving on the bed of Lake Superior but failed because it was “too expensive.”³¹³ The agency funneled all the requests to him, he thought, because more experienced staff tried to bring an enforcement action against a contractor for driving on the bed of Lake Superior.³¹⁴

The fluctuation of lake levels has been especially pronounced on Lake Michigan. In 2019 and 2020, the DNR saw distressed homeowners responding to coastal erosion from high waters and houses falling into the water, according to Thompson.³¹⁵ Climate disruption is especially challenging for water management because the DNR has fewer staff to deal with the complexities of the issue, according to Ambs.³¹⁶ He thinks what happened with the Lake Michigan shoreline over the past few years is a cautionary tale about the difficulties of having only a few staff available to respond to climate extremes.³¹⁷ Ambs recalled that an upper level manager came up with a triage approach to high water on Lake Michigan because he knew they were not going to be able to review the flood of requests from lakefront property owners.³¹⁸

One Water Specialist observed that people want to build closer to the shore of Lake Michigan than is safe for their homes.³¹⁹ He described a range of attitudes among lakefront property owners along Lake Michigan and Green Bay:

The ones who have been there for a long time, say forty years or more, understand that the lake levels fluctuate. The newer people, however, do not understand the water fluctuation issues, the need for setbacks, and the importance of stabilizing banks. They have trouble realizing the shoreline is ambulatory.³²⁰

He continued, “being able to see and adapt to change on the landscape is really tough for people,” especially for those who have little experience with Lake Michigan’s coastal zone.³²¹ The Water Specialist noted that climate change was also difficult for the old-timers: “we have more frequent and intense storms and more impervious surface, so the experience on the landscape for the landowner is very different from what may have occurred in the mid-80s or prior

312. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

313. *Id.*

314. *Id.*

315. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

316. Interview with Todd Ambs, former Deputy Sec’y, Wis. Dep’t of Nat. Res. (June 28, 2021) (on file with author).

317. *Id.*

318. *Id.*

319. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

320. *Id.*

321. *Id.*

memories.”³²² He commented, “it is protective for the owners to have setbacks in shoreland zoning, not a taking of property.”³²³

However, as explained in Part II.C.2.a, the legislature weakened the state’s shoreland zoning law in 2015. High waters threaten structures that are built close to the shoreline. The new shoreland zoning law allows owners to rebuild a grandfathered non-conforming primary structure within its existing footprint and expand thirty-five feet upward.³²⁴ It also removed the DNR’s ability to bring a legal challenge when a county gives a variance and allows new construction within seventy-five feet of the OHWM.³²⁵ Those changes compounded the problems with extremely high water levels along Lake Michigan, according to a Water Specialist.³²⁶ He reported, “we’re seeing some of the ‘emergency’ situations are structures that were non-conforming because they were built too close to the shoreline.”³²⁷

The DNR began implementing its “specialization” management approach when Lake Michigan’s water levels started rapidly rising. The combination of high water and intense storms yields stronger wave action, which means more shoreline erosion than during past cyclical high water.³²⁸ Many owners felt this threatened their structures that were built close to the water’s edge. In 2019, property owners started contacting the DNR saying they had an emergency need to armor the coast to protect their homes.³²⁹

Thompson recalled that the number of distressed property owners contacting the DNR exceeded the staff’s capacity to keep up.³³⁰ He said that if a property owner wanted to install riprap or another structure on the bed of the Great Lakes, the statute required an individual permit with public notice and possibly a hearing, a process that can take 120 days.³³¹ Thompson made a decision with the management team to move more quickly. He saw a mismatch between the urgency of water threatening houses and the statute requiring owners to wait for an individual permit to protect their homes.³³² He explained, “we have an awareness of political expectations that state government is supposed to

322. *Id.*

323. *Id.*

324. *See* WIS. STAT. §§ 59.69(10e)(a)(2), 59.692(1k)(c) (2019–20).

325. *See id.* §§ 59.692(1n), (4)(b).

326. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

327. *Id.*

328. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

329. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

330. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

331. *Id.*

332. *Id.*

be efficient and helpful to people; so, we implemented a process where emergency erosion could be addressed by applicants simply notifying DNR.”³³³

The DNR formed a specialized team, called the Coastal Emergency Riprap sub-team, for reviewing and approving emergency applications in coastal counties.³³⁴ The interviewees for this research included many of the eight Water Specialists on this sub-team and management.³³⁵ A Water Specialist recounted that due to the high volume of permit requests to install riprap, the DNR management came up with an emergency process whereby owners could go ahead with armoring the shoreline but would need to follow up and apply for an after-the-fact individual permit.³³⁶

Another Water Specialist highlighted the emergency process as an example of management playing fast and loose with the laws on the books.³³⁷ He recalled that in October 2019, the then deputy bureau director (since retired) and two other managers spoke with staff on the phone and gave a verbal directive to “not enforce the law requiring permits for coastal armoring.”³³⁸ He said, “they told us not to question the contractors.”³³⁹ He recounted that some projects did not meet permit criteria, but the “supervisors told us to rubber stamp everything.”³⁴⁰ His understanding was that if a responsible party said they fit within an exemption, the DNR would not review this.³⁴¹

About 500 people used the emergency process to notify the DNR between 2019 and 2020, with most on the Door Peninsula, according to Thompson.³⁴² He was aware that some staff did not like the emergency procedure and that the DNR did not have the authority to allow people to proceed without a permit. “I didn’t feel great about homeowners proceeding with expensive shoreline work without the certainty of a permit, but felt the circumstances warranted this response . . . [as the] best we could do,” he said.³⁴³ He also explained that the DNR would eventually get all emergency actions covered by individual permits.³⁴⁴

A Water Specialist who was processing the increase in requests from lakefront property owners and contractors offered a window into the problems associated with the emergency procedure. He said their supervisor told them to

333. *Id.*

334. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

335. *Id.* The DNR Website formerly had a webpage explaining the emergency procedure. *Id.*

336. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

337. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

343. *Id.*

344. *Id.*

respond to a permit request within twenty-four hours and to approve projects despite not seeing any plans.³⁴⁵ They were told the site address and linear feet of riprap, but had no plans, photos, or ways of knowing it was an emergency.³⁴⁶ He reflected, “we knew it was wrong.”³⁴⁷ He explained that because approving everything with no review was obviously wrong, the staff came up with a self-certification process for emergency requests, which laid out standards and need for a permit.³⁴⁸ Unfortunately, even the self-certification was a “total catastrophe,” according to the Water Specialist, and the high water issue persisted for longer than anticipated.³⁴⁹ He added that people abused the process, so staff again organized and pressured management to reform this approach too.³⁵⁰

One Water Specialist worried that going ahead with a project without DNR review was inconsistent with the DNR’s goals of protecting coastal resources and property owners from being scammed.³⁵¹ He said that lots of contractors “came out of the woodwork and charged large sums for riprap that wouldn’t be successful. With one storm, the riprap is washed away because the contractor used an inappropriate stone size. The lack of review by [the] DNR was a disservice to the property owners.”³⁵²

During the period without DNR review in 2019 and 2020, “people filled in lakebed and we’re now going to have to work on fixing this with enforcement,” according to a Water Specialist.³⁵³ He added, “we have facts showing most of these projects were not truly an emergency because the structures were not threatened.”³⁵⁴ Another staff member said he saw pictures from wardens that “showed the abuse with crazy structures being placed on lakebed.”³⁵⁵

Similar allegations of abuse were echoed by other DNR staff. According to a Water Specialist, “we saw people taking advantage of the emergency process, and we had concerns that projects were not being done in compliance with standards. Those of us who wanted to reform the emergency procedure emphasized that the DNR need[ed] to be able to identify when someone truly has an emergency.”³⁵⁶ In 2021, the DNR did a flyover to review the situation on the Lake Michigan and Green Bay coastlines. One staff member reported that they

345. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

352. *Id.*

353. *Id.*

354. *Id.*

355. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

356. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

saw a lot of “unique” riprap designs; contractors did things that veered from design regulations and “they should have known better because they’ve worked with DNR before.”³⁵⁷

Thompson explained they received information regarding potential noncompliant structures from DNR wardens out on the water and an aerial inspection of the Door Peninsula in April 2021.³⁵⁸ He reported these inspections produced a “soft number” of about forty properties that required additional follow up in the form of seeking more information, seeking voluntary compliance, or pursuing enforcement on unauthorized lakebed fills that need to be corrected.³⁵⁹ Notification about an emergency to protect a house was understandable, but people who put in fill to extend their upland area—even with notification—were not acting in a way that was permissible, said Thompson.³⁶⁰

The emergency process damaged public trust resources in a variety of ways. According to enforcement staff, the emergency process resulted in an extension of private property onto public lakebed by placing fill; use of inappropriate material including building debris, old sidewalks and foundations, and rocks that were not properly sized; excavators up to the cab in four feet of water; bulldozers on beaches below the OHWM; oil and grease contaminants leaching into the lake; and unauthorized seawalls.³⁶¹ “We now have 100 enforcement actions in Door County and the west shore of the Bay of Oconto,” he reported.³⁶² “Management’s verbal directives [to allow shoreline armoring without DNR review or permits] put off the inevitable,” and they are dealing with the problems of abuse of the lenient process after the fact, he said.³⁶³

The lax oversight has impacted the DNR’s reputation. “People with drones put images of these alterations of the shoreline out on Facebook, and it looked terrible that DNR was doing nothing to stop it,” one Water Specialist noticed.³⁶⁴ He quipped, “it looked like DNR was neutered.”³⁶⁵ An effect of the lack of review was the alienation of law enforcement partners. “Wardens were convinced the water regulation staff wouldn’t follow up, so why waste time on these?” questioned one Water Specialist.³⁶⁶ Another effect was harm to other lakefront property owners. One staff member said, “people are unhappy with DNR’s lack of response to complaints. Adjacent property owners see sediment

357. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

358. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

359. *Id.*

360. *Id.*

361. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

coming across their riparian zone. The sedimentation and resuspension of material increases algae growth.”³⁶⁷

Some of the Water Specialists disagreed strongly with the “emergency” approach and worked hard to modify it, which they accomplished in mid-2021.³⁶⁸ One drew a line in the sand: “we’re not going to literally decide I’m not going to follow the law for this and this,” because managers have told us to ignore the law.³⁶⁹ “If we start just ignoring the black and white in statute and code, where is that going to take us?” he queried.³⁷⁰ Another Water Specialist explained that the staff “couldn’t stomach [the emergency procedure] and continued to question it as they saw sediment plumes and lakebed fills.”³⁷¹ The staff pushed for over a year and finally got a new process in place, he added.³⁷²

One Water Specialist reported that the new approach is to return to requiring an individual permit for riprap on coastline designated ASNRI, and if someone has an emergency, the process now requires documentation of the emergency.³⁷³ Another explained, the new process is that the applicant needs to send photos and show that a primary structure within seventy-five feet of the OHWM is in imminent danger from high water; once they prove that, they need to submit a plan for approval.³⁷⁴ In this way, the new procedure narrowed the scope of what can qualify as an emergency.³⁷⁵ The reining in of the emergency process seemed to be in response to staff engagement and was led by the most experienced staff members who remain in the program. One who was involved in the reform efforts recounted that Water Specialists came together after learning that management had taken disciplinary actions against staff who seemed to be simply carrying out their legal responsibilities to protect the public trust doctrine.³⁷⁶ He added, “once we shared our experiences and learned we weren’t alone, we banded together and started speaking up more against the upper level managers who were creating problems” and a sense of lawlessness.³⁷⁷

D. Enforcement

Enforcement of the public trust doctrine is critical to preserving Wisconsin’s aquatic resources and protecting property owners. This Part

367. *Id.*

368. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

369. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

370. *Id.*

371. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

372. *Id.*

373. Interview with Confidential Interviewee No. Eight (July 27, 2021) (on file with author).

374. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

375. *Id.*

376. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

377. *Id.*

describes how enforcement has changed over the last decade and impacted public rights in wetlands, lakes, and rivers. Enforcement and compliance involve a variety of steps. One manager in a leadership position said he advises staff to try to solve the problem with voluntary compliance because formal enforcement actions are quite complex and resource intensive.³⁷⁸ He instructs field staff on how to assess the degree of egregiousness with violations they are seeing on the waterways and wetlands. He noted that enforcement is a time-consuming process: either you work internally, go through stepped enforcement, and issue a notice of violation or a DNR warden issues a citation.³⁷⁹ If there is a warden and citation, the district attorney for that area needs to be cooperative and willing to prosecute, he explained.³⁸⁰

Under the specialization management system described in Part II.C.1.d, there is a team dedicated entirely to compliance and enforcement. According to one team member, in 2020, there were five people to cover the entire state and that year they received over 1,200 complaints to investigate.³⁸¹ In the summer of 2021, the team lost members and was down to only three people for the state, two of whom were relatively new staff.³⁸² The team receives complaints about potential violations of the state's water laws through a variety of channels including wardens, other DNR staff, and community members. Complaints are then prioritized based on the potential impacts to the public trust, natural resources broadly, sensitive areas, human health, and property.³⁸³ A team member explained his systematic approach to researching a complaint. He described preparing a defensible decision with documentation and references by reviewing the statute and code, consulting records for similar cases, and asking a lot of questions.³⁸⁴

One of the team members said he covered enforcement in twenty-one counties.³⁸⁵ He noted that because of the broad geography, he did not have strong relationships with DNR staff in all those counties, a shortcoming that hindered some investigations.³⁸⁶ He explained that some of the scientists on staff do not want to be called to testify in an enforcement action and, therefore, may be reluctant to discuss the ecological harm a particular violation has caused.³⁸⁷ For example, when the team member was investigating a complaint about a pond someone dug right next to a high quality trout stream, he wanted to better

378. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

379. *Id.*

380. *Id.*

381. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

382. Interview with Confidential Interviewee No. Six (July 26, 2021) (on file with author).

383. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

384. Interview with Confidential Interviewee No. Three (June 30, 2021) (on file with author).

385. Interview with Confidential Interviewee No. Six (July 26, 2021) (on file with author).

386. *Id.*

387. *Id.*

understand the ecological impact so he could explain it clearly to the landowner.³⁸⁸ However, he said it was a “huge fight” to get any feedback from the DNR scientists because they did not want to get entangled in an enforcement action, even one led by their agency.³⁸⁹

A team member who had only been at the DNR for a few years said he had resolved all issues through voluntary compliance, so he had not yet worked a case through stepped enforcement.³⁹⁰ In his conversations with violators, he observed, “some people feel terrible and didn’t know they were breaking the law. There are a lot of out-of-state landowners who don’t know the rules.”³⁹¹ However, he also reported dealing with “belligerent property owners who get angry when they discover a regulation impacts their private property,” which he described as “just their stress response.”³⁹² In order to be successful with voluntary enforcement in these heated situations, he emphasized the necessity of “a human connection” and being “fair, listening to the property owners’ side of things and their needs” to get a fuller picture of what is going on with the situation.³⁹³ An example he gave was a complaint he investigated about someone who had graded over 10,000 square feet of a wetland within the shoreland zone, during an active salmon run. The property owner who did this was very upset and “used profanity” as he accused the DNR of “regulating puddles.”³⁹⁴ However, by the end of the conversation, the owner apologized and then voluntarily removed the wetland fill. The Water Specialist added that he then marked wetlands for the property owner to avoid future harm.³⁹⁵

Voluntary compliance is not necessarily as toothless as it sounds. In Kewaunee County, the state has a high concentration of livestock factories known under the Clean Water Act as Concentrated Animal Feeding Operations (CAFOs). Neighbors living downstream of a CAFO complained about seeing grey water in the stream and expressed water quality concerns.³⁹⁶ A Water Specialist involved in the investigation said lots of CAFOs rework streams and disassociate them with attached wetlands, which harms wildlife, fisheries, and water quality.³⁹⁷ The CAFOs have a lot of money and the machinery on site to undertake alterations, and some are doing this without DNR review and permits, he explained.³⁹⁸ In this situation, he discovered the CAFO’s feedlot was right

388. *Id.*

389. *Id.*

390. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

397. *Id.*

398. *Id.*

next to a stream and it was having trouble meeting water quality limits under its Wisconsin Pollutant Discharge Elimination System permit, the Wisconsin version of a National Pollutant Discharge Elimination System permit under the Clean Water Act.³⁹⁹ The CAFO thought it could solve its compliance problem by rerouting the stream and did so without a permit. According to the Water Specialist, this illegal action caused sedimentation problems downstream and violated the public trust doctrine “because you cannot just enclose a stream and remove access for fishing.”⁴⁰⁰ He reported that the CAFO needed to move the stream back to its original channel and restore the wetland.⁴⁰¹ With the DNR’s involvement, they ran the stream through a culvert next to the feedlot to resolve the original water pollution problem. The staff described this as an enforcement success, although it never went through a formal stepped enforcement.⁴⁰²

An additional category of violators are contractors and municipalities. These are the repeat players “who should know better,” a Water Specialist said.⁴⁰³ And yet, the DNR sees blatant violations of the state’s water laws from these actors.⁴⁰⁴ Another staff member gave a couple of examples. He said a “major threat” to public trust resources comes from municipalities “cleaning out” navigable streams by dredging, straightening, and tampering with the banks.⁴⁰⁵ He also gave an example of a company that delineated wetlands in a highly visible place adjacent to Interstate 94 between Milwaukee and Chicago and then proceeded to fill more than 10,000 square feet of the wetland without a permit.⁴⁰⁶

A Water Specialist shared a story about a wetlands enforcement case he worked on in a city that had experienced two or three five-hundred-year storms in rapid succession, which resulted in lots of flooding damage.⁴⁰⁷ As noted, wetlands play a critical role in reducing flooding by absorbing excess rainfall. Yet, a homeowner with property ten miles upstream from this municipality, filled, without a permit, part of a more than five-hundred-acre contiguous wetland complex.⁴⁰⁸ He explained that the direct impacts were small because the landowner only filled 0.33 acres; however, there were substantial secondary and cumulative impacts. Worse yet, he said, all these impacts could have been avoided because the landowner had an alternative upland site that did not involve wetlands.⁴⁰⁹ The staffer worked on enforcing the law and won before an

399. *Id.*

400. *Id.*

401. *Id.*

402. Interview with Confidential Interviewee No. Thirteen (July 26, 2021) (on file with author).

403. Interview with Confidential Interviewee No. Seven (July 7, 2021) (on file with author).

404. *Id.*

405. Interview with Confidential Interviewee No. Six (July 26, 2021) (on file with author).

406. *Id.*

407. Interview with Confidential Interviewee No. Fifteen (July 30, 2021) (on file with author).

408. *Id.*

409. *Id.*

administrative law judge after a contested case hearing.⁴¹⁰ He recalled the intense amount of effort it took to protect this wetland. They had multiple staff involved, and he had to be on the stand for about nine hours of a four-day hearing.⁴¹¹ In the end, the judge upheld the DNR's decision to deny an after-the-fact permit, and the DNR secretary supported the staff.⁴¹² Wetlands enforcement actions, while critical to ensuring wetlands are protected as envisioned by the law, are not very common, he noted, declaring this was the first wetlands permit the DNR had denied in five years.⁴¹³

Externally and internally publicized enforcement success stories can be used to deter violations and train DNR staff to highlight best practices. However, these efforts are sometimes hampered by upper management at the DNR who seemingly discourage enforcement. A Water Specialist reported that he had gone through a successful enforcement case involving a citation for illegal dredging.⁴¹⁴ The person was required to restore the site he had damaged.⁴¹⁵ The Water Specialist thought the case preparation and result would be shared with the other water staff, however he perceived that upper-level managers were embarrassed about the successful enforcement.⁴¹⁶ Seeing that response from management he concluded, "the field staff who are focused on protecting the public trust fear getting a disciplinary letter from human resources and being discredited and undermined by supervisors. This is a low point for us."⁴¹⁷

E. Political Influence

The Parts above on legislative actions show the power of the political branches to formally shape water management. While one may disagree with the values and priorities embodied in statutes, the bicameral process in the legislature and presentment to the governor for signature is a constitutionally prescribed process for politics to impact water management. More opaque and controversial are the informal avenues for political influence over water management. As will be shown below, the interviews for this research revealed that political influence wears a variety of disguises, but all are aimed towards exercising power. It may take the form of a legislator showing up and not saying a word at a public hearing, or a legislator never appearing publicly, but instead calling the governor or the DNR secretary's office to express support for or opposition to a specific project. It could appear as a legislator contacting a Water Specialist directly to weigh in

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. Interview with Confidential Interviewee No. Five (July 27, 2021) (on file with author).

415. *Id.*

416. *Id.*

417. *Id.*

on a proposed project or make direct threats to change the law if the DNR does not take a particular action. The last scenario carries a particular punch currently because over the past decade the legislature has effectively passed several laws that have eroded the DNR's jurisdiction and regulatory role.

Political pressure may also come from public interest groups or business groups, such as Wisconsin Manufacturers & Commerce. Interest groups bring members to speak at public hearings, make statements to the media, and take the DNR to court. The totality of the pressure coming from a variety of directions means the job of managing trust waters can be highly public and scrutinized.

The threat that a disgruntled legislator will lead a campaign to change the law if the DNR does not do what the legislator wants on a particular project in their district is not hypothetical. Over the past decade, there has been a steady erosion of statutory protections for the state's water resources in favor of greater freedom for waterfront property owners and businesses. In one case, a Water Specialist described a fish hatchery in Langlade County that was diverting water for its operations and dewatered a stretch of a trout stream.⁴¹⁸ The hatchery, he said, undertook a variety of actions in violation of state law without permits.⁴¹⁹ Despite obvious violations, the hatchery, working with leadership from a prominent Republican legislator, changed Chapter 31 to allow the damaging activities to continue, said the Water Specialist.⁴²⁰

While political influence is not unexpected, it is suspect when it undermines equal protection under the law. Given constitutional protections, the public has come to expect agencies should treat individuals in the same manner as others in similar circumstances when applying statutes and rules. If one's status in the community or connections to a powerful politician result in bending or ignoring the laws that apply to everyone else, it diminishes the legitimacy of government. A newer Water Specialist speculated that "politics is the biggest threat to water resources."⁴²¹ He described investigating a complaint about wetland fill adjacent to a stream. Although he learned about the violation from a municipality, when he arrived on the site, he said a representative from the municipality pulled him aside to tell him the landowner was the president of the local chamber of commerce. He observed a clear wetland fill violation and when he stated this to the landowner, the owner was "nasty" and responded that he had "friends at the DNR."⁴²² The Water Specialist felt his program "had his back, so [he] wasn't worried, but that isn't how it worked out."⁴²³ What happened next, according to the staff, was that his supervisor told him to "back off" without offering a

418. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

419. *Id.*

420. *Id.*

421. Interview with Confidential Interviewee No. Six (July 26, 2021) (on file with author).

422. *Id.*

423. *Id.*

rationale.⁴²⁴ He said he asked the supervisor for some time to think about this situation, and when he talked to the supervisor again two days later, he learned someone else at the DNR had already informed the landowner that they would be taking no further enforcement action.⁴²⁵ The supervisor who allegedly made this decision is no longer at the DNR; however, this staff reported experiencing similar types of behavior from the current supervisors.⁴²⁶ A Water Specialist with more than two decades of experience explained, “the political pressure [described in the author’s two prior studies of the DNR] has shifted from legislators to internal pressures to find a way to [say] yes.”⁴²⁷

Former Waterways Director Michael Thompson put it another way—he wanted to avoid “the long no.”⁴²⁸ He said he did not want to be involved in individual permit decisions; however, sometimes he asked questions about specific permits.⁴²⁹ He reflected that the DNR needed to follow the law and science to make tough decisions with satisfactory explanations. While Water Specialists’ work should not consist of political decisions, Thompson said, the DNR should “be aware of the broader politics and do their work in ways that aren’t surprising people.” The DNR should “be strategic in approach to controversial issues,” he added.⁴³⁰ For instance, in advance of an election cycle, Thompson asked Water Specialists about turnaround times on permits. He explained, “we don’t want the perception of the long no. If the decision is no, just do it rather than dragging it out.”⁴³¹

Another Water Specialist described a controversial proposal to fill more than thirty acres of wetland for speculative development. The idea was to fill the wetland and build something later. These types of speculative projects are impossible for the DNR to go through a required practical alternatives analysis because there is no building plan to evaluate, he explained.⁴³² The state legislator who represented this district came to a couple of meetings and contacted the DNR secretary’s office.⁴³³ Still, the Water Specialist felt he received full support from Secretary Stepp when he told the applicant that he would deny the permit. The developer withdrew the application to avoid this failure in the public eye.⁴³⁴

424. *Id.*

425. *Id.*

426. *Id.*

427. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

428. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

429. *Id.*

430. *Id.*

431. *Id.*

432. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

433. *Id.*

434. *Id.*

Others reported that they did not feel supported by Secretary Stepp. A Water Specialist shared an experience when the DNR secretary undermined his enforcement action. In that case, the Water Specialist denied a permit to expand a historic boathouse, but his decision was later undermined by the secretary's office.⁴³⁵ Boathouses can be found throughout Wisconsin, some on the edges of waterways and others built over the water. A Wisconsin statute prohibits new boathouses built after 1979.⁴³⁶ It is, however, quite common to see improved structures at the sites of pre-1979 boathouses and some have even gone so far as to build residences.⁴³⁷ In this situation, the DNR refused to allow a boathouse on the historic register to expand beyond its original footprint.⁴³⁸ There was a contested case hearing and the administrative law judge ruled in favor of the DNR's permit denial.⁴³⁹ However, after winning the enforcement action, the Water Specialist recounted that DNR Secretary Stepp and legal services pushed for settling and allowing the expansion.⁴⁴⁰ He reported being dismayed at this turn of events, considering he had felt supported all the way through this process until the secretary's office got involved.⁴⁴¹ In the end, the owners of the boathouse built the expansion.⁴⁴²

In another part of the state, three Water Specialists described how political factors influenced the DNR to permit additional seawalls on Shawano Lake. One explained that for the past twenty years, the DNR did not allow new sea walls to be built on Shawano Lake, which already had thirty percent of its shoreline covered in concrete.⁴⁴³ The DNR successfully defended its position through four contested cases in which they proved concrete seawalls have cumulative adverse environmental impacts on Shawano Lake. He declared, "we have all the facts and history."⁴⁴⁴ A second Water Specialist added, "we have a lot of science showing waves hit seawalls and bounce back with a lot of energy, so eventually the seawall will tip forward from erosion."⁴⁴⁵ He continued, "DNR gave a new staff person an application for a seawall on this lake that should have been a clear denial."⁴⁴⁶

435. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

436. WIS. STAT. § 30.121(2) (2019–20).

437. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author). The threat of a seawall exemption started during the Walker administration, and the DNR issued the permit before the confirmation of Governor Evers's new DNR secretary. *Id.*

444. *Id.*

445. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

446. *Id.*

Yet, during the Walker administration, when a group of property owners threatened to go to Senator Robert Cowles to push for a legislative exemption that would allow seawalls on the lake, the first Water Specialist recounted that upper managers “caved” and issued a permit for a new seawall.⁴⁴⁷ He was outraged and said, “if they want to change the law, let’s have them do it, and not do it for them by issuing a permit that doesn’t comply with the law.”⁴⁴⁸ “They’re going to make Shawano Lake a paved bathtub,” he opined.⁴⁴⁹

A third Water Specialist corroborated this narrative but added another perspective. He said he was assigned to handle the seawall permit application shortly after he was hired, which he thought was odd because the file had been removed from a more experienced Water Specialist.⁴⁵⁰ His early experience at the DNR involved a meeting with upper managers in which he suggested denying the seawall application based on the facts and the law.⁴⁵¹ The supervisors disagreed and gave “loose reasons” to approve the permit, he said.⁴⁵² He was not comfortable and refused to sign the permit.⁴⁵³ He said, “we had more than enough justification to deny the permit. I never understood why it was such a big deal to say no and why they were afraid to go to court.”⁴⁵⁴ Someone else ultimately signed the permit and the Water Specialist reported that he now receives many calls from people on Shawano Lake asking for the “standard seawall design” to copy what the DNR approved.⁴⁵⁵

Finally, Thompson offered an alternative view of the Shawano Lake permit situation. He explained that some staff may have felt like he was telling them what to do when he asked how safety was considered in decision making.⁴⁵⁶ “At the end of the day, the program has to make a decision, which we did [when the DNR permitted the seawall],” he said.⁴⁵⁷ Unlike the next two examples, no one brought a legal challenge to the Shawano Lake seawall, so the courts were never called upon to assess the legality of the permit.

In 2021, environmental organizations sued and successfully blocked the DNR from issuing controversial wetland and other permits for Meteor Timber’s frac sand mine and Kohler Company’s proposed golf course along the shores of

447. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author). The threat of a seawall exemption started during the Walker administration, and the DNR issued the permit before the confirmation of Governor Evers’s new DNR secretary. *Id.*

448. *Id.*

449. *Id.*

450. Interview with Confidential Interviewee No. Fourteen (July 27, 2021) (on file with author).

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. Interview with Michael Thompson, former Bureau Dir. for Waterways Program, Wis. Dep’t of Nat. Res. (July 23, 2021) (on file with author).

457. *Id.*

Lake Michigan.⁴⁵⁸ Both controversies involved large proposals to fill and alter wetlands, and the DNR had not gathered enough data on the potential impact of the projects to meet the statutory requirements.⁴⁵⁹ The statute required the DNR to determine whether a planned development would result in a significant impact to wetland functional values, a significant adverse impact to water quality, or other significant environmental consequences.⁴⁶⁰ To meet this standard, the DNR needed definitive plans and complete documents from the applicant, but the administrative law judge reviewing the Kohler file found only “speculation and promises.”⁴⁶¹

The Kohler Company proposed to fill wetlands to develop a golf course on a 274-acre parcel along the shores of Lake Michigan, adjacent to a prized lakefront state park.⁴⁶² The lakeshore property included rare and high-quality wetlands.⁴⁶³ The proposed golf course involved fertilizing the grounds, and the permit noted the nutrient loading would cause “permanent and irreversible impacts” on the wetland.⁴⁶⁴

To pursue its frac sand mine, Meteor Timber proposed to fill 16.25 acres of wetlands, including 13.37 acres of rare white pine-red maple wetlands of exceptional quality.⁴⁶⁵ The permit “allowed wetland impacts on [a] globally rare wetland type,” according to a Water Specialist.⁴⁶⁶ Similar to the handling of Kohler’s proposal, the DNR issued a permit and later an amended permit that relied on gathering vital data about future environmental impacts.⁴⁶⁷ The administrative law judge found the DNR did not have the necessary information to determine the net positive or net negative environmental impact.⁴⁶⁸ Further, the permit contained a finding that the direct loss of more than thirteen acres of exceptional wetlands “is expected to be irreversible and has high significance.”⁴⁶⁹ Ultimately, the Wisconsin Court of Appeals affirmed the

458. *Meteor Timber, LLC v. Wis. Div. of Hearings and Appeals*, 969 N.W.2d 746, 749–51 (Wis. Ct. App. 2021); *Kohler Co. v. Wis. Dep’t of Nat. Res. and Friends of the Black River Forest*, No. 2019CV199, at 1–4, 37–38 (Wis. Cir. Ct. Sheboygan Cnty. May 28, 2021) (pending further decision in Wis. Court of Appeals).

459. *See Meteor Timber*, 969 N.W.2d at 769; *Kohler Co.*, No. 2019CV199, at 2–4, 36.

460. *Kohler Co.*, No. 2019CV199, at 6–8.

461. *Id.* at 21.

462. *Id.* at 2.

463. *Id.* at 23.

464. *Id.* at 29.

465. *Meteor Timber, LLC v. Wis. Div. of Hearings and Appeals*, 969 N.W.2d 746, 751 (Wis. Ct. App. 2021).

466. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

467. *See Meteor Timber*, 969 N.W.2d at 751.

468. *Id.* at 757.

469. *Id.*

entirety of the administrative law judge's decision finding that the DNR failed to comply with statutory standards.⁴⁷⁰

A very seasoned water management specialist observed that legislators get involved to varying degrees with big projects in their districts.⁴⁷¹ He thought that staff with less experience may feel pressured by this even when there is no direct pressure exerted beyond the elected official appearing at meetings.⁴⁷² He also noted there is pressure to follow the law from environmental groups.⁴⁷³ "We are being watched very closely on big projects," and this advocacy is a counterbalance.⁴⁷⁴ He raised the example of Meteor Timber as one reason the DNR needs to say no to certain proposals.⁴⁷⁵

According to another Water Specialist, "everyone at the DNR staff level agreed permits shouldn't be issued on Meteor and Kohler, but there was the threat of legislative change."⁴⁷⁶ Upper management thought there would be economic gain for the applicant and pushed the staff to approve it, he recalled.⁴⁷⁷ He told other staff, "whatever you do, be ready to appear on the stand."⁴⁷⁸

A third Water Specialist similarly drew a connection between the DNR's handling of Meteor Timber and the Kohler golf course, noting there was "nothing to support either decision," and the courts ultimately rejected the permits when environmental groups sued.⁴⁷⁹ He reported being "punished" by the DNR over his work on the proposed Kohler golf course in Sheboygan County.⁴⁸⁰ He said he told Kohler that the wetlands were "very significant and they weren't going to get a permit."⁴⁸¹ He noted that the plans for the project by a famous designer were "very conceptual so it was impossible to figure out what the design was and how to review it."⁴⁸² He recounted that Kohler complained and his supervisors responded by removing him from the project.⁴⁸³

When the next Water Specialist also refused to sign off on filling wetlands for the golf course, a supervisor signed the permit and later had to defend that decision before an administrative law judge.⁴⁸⁴ The administrative law judge rejected the permit as a violation of state law, and the reviewing circuit court

470. *Id.* at 769.

471. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

476. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

477. *Id.*

478. *Id.*

479. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

agreed and held the DNR erred in issuing Kohler an individual permit under section 281.36 of the Wisconsin Statutes to fill wetlands.⁴⁸⁵

The court interpreted section 281.36 of the Wisconsin Statutes and section 103.03 of the Wisconsin Administrative Code as creating mandatory duties, noting they “establish the standards that the DNR must consider in determining the type of impacts to the wetland functional values that may result from the issuance of any permit requested.”⁴⁸⁶ According to section 281.36(3n)(b) of the Wisconsin Statutes, the DNR “shall” consider the project’s direct and secondary impacts to wetland functional values, cumulative impacts based on past or reasonably anticipated impacts, the functional value impact from mitigation, and the project’s net environmental impact.⁴⁸⁷ In interpreting this statute, the administrative law judge considered facts related to rare plant species on land, migratory bird habitat surrounding the wetlands, and land grading required to complete the golf course, all of which are not within the physical boundaries of the regulated wetlands.⁴⁸⁸ The administrative law judge based this analysis on the determination that these all have “direct impacts of the project on wetland functional values” and are within the scope of the permit analysis.⁴⁸⁹

The court held that the plain language of section 281.36 expands the scope of inquiry to these non-wetland areas when it directs the agency to consider the “net positive or negative environmental impact of the proposed project” during an individual permit review.⁴⁹⁰ Further, statutory language that requires a review of cumulative impacts, secondary impacts, and mitigation support such a determination.⁴⁹¹

The administrative law judge found the management plans for the golf course were incomplete, unavailable, and included errors at the time the DNR originally issued the permit.⁴⁹² The administrative law judge concluded the permit was “not based on scientific facts and definitive plans, but speculation and promises.”⁴⁹³ There was also evidence that the project would impact “rare, high-quality wetlands” cumulatively over time.⁴⁹⁴ Ultimately, the Wisconsin Court of Appeals upheld the administrative law judge’s decision to overrule the

485. *Kohler Co. v. Wis. Dep’t of Nat. Res.*, No. 2019CV199, at 2–4, 38 (Wis. Cir. Ct. Sheboygan Cnty. May 28, 2021) (pending further decision in Wis. Court of Appeals).

486. *Kohler Co.*, No. 2019CV199, at 6; WIS. STAT. § 281.36 (2019–20); Wis. Admin. Code NR § 103.03 (2019).

487. *Kohler Co.*, No. 2019CV199, at 13–14; WIS. STAT. § 281.36(3n)(b).

488. *Kohler Co.*, No. 2019CV199, at 13–14.

489. *Id.*

490. *Id.* (interpreting plain language of WIS. STAT. §§ 281.36(3n)(b), (c)).

491. *Id.*

492. *Id.* at 20.

493. *Id.* at 21.

494. *Id.* at 23–24.

DNR's issuance of the permit because the DNR's decision was based on incomplete and inaccurate information.⁴⁹⁵

The court's decision to affirm the administrative law judge is a reminder to the DNR and applicants to provide full and complete details about the entire project at the permit application stage because the defects will not be cured with a rewrite of the permit if an administrative law judge finds that it lacks key information.⁴⁹⁶ The legislature was clear when it created mandatory duties for the DNR—when processing individual wetland permit applications the DNR must consider direct, secondary, and cumulative impacts of a proposed project.⁴⁹⁷

Those with a longer history at the agency describe a sea change with the Evers administration. One Water Specialist said he now feels supported from the secretary's office to make field-level decisions on projects without interference.⁴⁹⁸ He recalled that when permit applicants went to the secretary's office under prior governors, there was often more direct influence from that office involving higher tier management.⁴⁹⁹ Today, he sees those permit applicants still trying to wield influence through relationships with high-ranking government officials but being redirected back down to the field staff and team coordinators.⁵⁰⁰

When Secretary Stepp left at the end of Governor Walker's term, "the governor's influence on DNR changed 180 degrees," described a Water Specialist with over a decade of experience.⁵⁰¹ "Governor Walker was very problematic," he said.⁵⁰² He added, "with Walker, we expected the Governor's Office would influence DNR decisions; it was horrible . . . there was always the threat that if we don't do something, the governor and legislature will do it for us so the DNR was running scared."⁵⁰³ With the Evers administration there has not been governor or legislative interference on specific projects, he observed. Likewise, in enforcement and compliance, the Water Specialist stated that he had not seen any "meddling" by Governor Evers.⁵⁰⁴ Unlike other administrations from the last two decades, which involved themselves in specific permits or enforcement cases, Governor Evers has a markedly different approach.

495. *Id.* at 23–24, 32, 36, 38.

496. *See id.* at 36–38.

497. *Id.* at 6.

498. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

499. *Id.*

500. *Id.*

501. Interview with Confidential Interviewee No. Ten (July 28, 2021) (on file with author).

502. *Id.*

503. *Id.*

504. *Id.*

III. IMPACT OF ACT 21 ON THE DNR'S PUBLIC TRUST IMPLEMENTATION

In the 2011–12 session, the Wisconsin Legislature passed Act 21, which hampered the DNR's implementation of the public trust doctrine. This Part discusses the ways Act 21 has burdened agency rulemaking, how the DNR has responded to confusing and conflicting interpretations of the new law from the Wisconsin attorneys general, and the issues the Wisconsin Supreme Court has clarified in recent holdings. Act 21 aimed to shift the balance of power between administrative agencies and the legislative and executive branches to retain more authority in the political branches. Some of Act 21's key features are that it: (1) prohibits agencies from enforcing requirements not explicitly authorized by statute, (2) gives the legislature approval authority over administrative rules, (3) requires agencies to conduct economic impact analysis on changes to rules, and (4) mandates approval from the governor at two steps in the rulemaking process.⁵⁰⁵

A decade after enacting Act 21, the Wisconsin Supreme Court ruled that the new law did not undermine the DNR's long-standing trustee duty to protect waters of the state.⁵⁰⁶ Prior to that ruling, however, there had been two attorneys general who offered divergent written opinions on the meaning of Act 21 and its implications for the DNR's water management. The research interviews offer a vantage point to see how the implementation of Act 21 and the uncertainty surrounding its meaning led the DNR to be more cautious and restrained in acting as a trustee over the state's waters.

The first cases to interpret Act 21 involved other agencies but answered several fundamental questions about administrative law. Like federal administrative law, the Wisconsin Constitution vests legislative power in the legislative branch, but the Wisconsin Supreme Court has allowed the legislature to delegate rulemaking authority to administrative agencies.⁵⁰⁷ Unlike the federal level, however, Act 21 carved out a much larger role for the political branches to control agency rulemaking. The Wisconsin Supreme Court held that the legislature maintains the right to review rules promulgated under the delegated power.⁵⁰⁸ In addition, the court found that Act 21 “narrows state agencies’ rulemaking authority, gives the governor new powers to approve or prevent the adoption of rules, [and] expands the economic impact analysis requirement to all agencies . . .”⁵⁰⁹

505. 2011 Wis. Act 21.

506. See *Clean Wis., Inc. v. Wis. Dep't of Nat. Res.*, 961 N.W.2d 346, 358 (Wis. 2021) [hereinafter *Clean Wis., Inc II*].

507. *Gilbert v. State Med. Examining Bd.*, 349 N.W.2d 68, 75 (Wis. 1984).

508. *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 478 N.W.2d 582, 586 (Wis. 1992).

509. *Wis. Realtors Ass'n v. Pub. Serv. Comm'n of Wis.*, 867 N.W.2d 364, 371 (Wis. 2015).

Act 21 made rulemaking in Wisconsin more cumbersome than legislating. A statute requires a majority vote of the legislature and the governor's signature, or a legislative override of a veto. Rulemaking after Act 21 requires agencies to submit a proposed rule to a legislative committee for approval. It also requires gubernatorial approval both before drafting and before submitting a final version of a proposed rule to the legislature. Prior to Act 21, an agency would submit a "statement of scope," which included a rule's objectives, supporting resources and a declaration of the agency's authority, to the Legislative Reference Bureau for publication.⁵¹⁰ In addition, the scope statement would be sent to those with "policy-making powers over the subject matter of a proposed rule" for approval.⁵¹¹ Following the enactment of Act 21, agencies were required to submit the scope statement to obtain the governor's approval before the Legislative Reference Bureau and then need gubernatorial approval of the final proposed rule.⁵¹² The Wisconsin Supreme Court upheld these provisions as constitutional.⁵¹³

The 2017 enactment of Wisconsin Act 57, known as the "REINS Act," added the requirement that agencies also submit scope statements for rulemaking to the Department of Administration (DOA).⁵¹⁴ Thus, there are now four institutions that review environmental rules beyond the DNR: (1) the Natural Resources Board, (2) the governor (twice), (3) the DOA, and (4) the legislature. The cumbersome rulemaking process and additional layers of institutional review has impacted agency behavior at the DNR.

The research interviews offered a window into how these administrative law changes combined with substantive statutory changes to water law have created a water management quagmire. The shared use of the state's waters is controlled by statutes and rules that impact activities related to adding piers, stabilizing shoreline with riprap, building within the shoreland zone, filling wetlands, and dredging. This Article detailed a variety of new legislation that reduced the DNR's regulatory authority over water management.⁵¹⁵

Typically, new legislation requires agencies to update their administrative rules. However, with the added difficulties of rulemaking under the new procedures of Act 21 and the REINS Act, many rules have not been updated. A water manager who had been working on waterways for the past decade reflected on how his work changed over that time. He explained that the legislature and governor made statutory changes to water law, but because the rulemaking process is now so difficult to navigate, the new statutes have "created a mess

510. *Koschkee v. Taylor*, 929 N.W.2d 600, 603 (Wis. 2019).

511. *Id.*

512. *Id.*

513. *Id.* at 602 (involving Department of Public Instruction).

514. *Id.* at 603.

515. *See supra* notes 275–76 and accompanying text.

with the administrative rules,” with some parts of the rules out of date.⁵¹⁶ That perspective was echoed by others at the DNR who were more involved in policy making. Even though the codes needed to be updated because of conflicts with newer statutes, “we’re concerned about opening a rule to legislative review,” said one DNR staffer.⁵¹⁷ This situation also creates confusion for anyone trying to understand the law because there are now many administrative rules that conflict with statutes.

The research interviews revealed that the new cumbersome rulemaking process has resulted in a different form of agency policy making. DNR leadership avoids going through emergency rulemaking procedures and instead relies on verbal directives (see Part II.C.3 on Climate-Disrupted Water Cycles, which explains the Lake Michigan emergency procedure) or informal guidance, explained a Water Specialist.⁵¹⁸ He added that supervisors advise staff about what rules to ignore if they are inconsistent with new statutes.⁵¹⁹ This informal guidance makes navigating the law by anyone outside the agency an extremely confusing task.

In an interview with staff who work on updating statewide general permits for water, one conveyed the DNR’s approach since the enactment of Act 21. Because updating administrative rules for general permits had become too cumbersome, he reflected that “for about eight or nine years during the Walker Administration, the DNR didn’t update the codes” because they “didn’t have the staff or time” to go through the process.⁵²⁰ Instead, he said they developed a workaround where they created stand-alone statewide general permits that related back to the statute and not the administrative codes.⁵²¹ “These are much more flexible. If we see a problem or gap in the permit, we can update these general permits in six to eight months,” the Water Specialist added.⁵²² However, since statutes do not contain the same level of scientific and technical detail that DNR rules contain, a permit that only references the statute may be lacking in protections for public rights.

Even when proper rulemaking procedures are followed, Act 21 has limited the DNR’s ability to make rules in certain areas where the DNR previously had authority. When the DNR wanted to update the administrative code related to wetland restoration, they submitted a proposal for review by the DOA, according to a Water Specialist.⁵²³ However, the Water Specialist said the DOA redirected

516. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

517. Interview with Confidential Interviewee No. Eleven (July 28, 2021) (on file with author).

518. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

519. *Id.*

520. Interview with Confidential Interviewee No. Twelve (July 30, 2021) (on file with author).

521. *Id.*

522. *Id.*

523. *Id.* (referring to NR 353).

the DNR and conveyed that because of Act 21, the DNR no longer had the authority to update that particular administrative code—their options were to use outdated rules or refer directly to the statute.⁵²⁴ The Water Specialist noted that an update to wetland restoration provisions would need to come out of the legislature.⁵²⁵ Act 21 has the practical impact of shifting decision-making authority back to the legislature. However, given the need for science and engineering to inform standards for waterways and wetland management, the political branch may not be best suited for crafting this level of detail.

Some observers think the DNR engaged in the emergency process on Lake Michigan, described in Part II.C.3, because they did not want to deal with going through the legislature to update the codes.⁵²⁶ Not only is the process cumbersome, but nearly every time the legislature has taken up a waterways or wetlands issue in the past decade, the DNR has lost regulatory authority.⁵²⁷ The impact of using the emergency procedure showed the DNR was between a rock and a hard place, adversely impacting the public trust as well as waterfront property owners because it lacked the staff to do more in a crisis. A Water Specialist with more than two decades of experience observed that when the DNR ignores set standards in the statutes and codes and starts saying “yes” to lakefront property owners, “you don’t know where to stop and that is a very slippery slope.”⁵²⁸ He added, “we’ve lost the vision of following the rules and instead are bending them.”⁵²⁹

In addition, the provisions of Act 21 that require explicit statutory authority for agency action created uncertainty that further limited the ability of the DNR to implement the public trust doctrine. One Water Specialist said that Act 21 requires explicit statutory authority for anything the DNR puts into a permit. He observed that this pushed the DNR to be very careful to not broadly interpret their authority. Whereas prior to the enactment of Act 21, the DNR might have reviewed a waterway project based on broad public interest factors under the public trust doctrine, now he says the agency does not consider these factors unless there is direct authority in the statute.⁵³⁰ The DNR reflected that reticence when it granted two water permits, which the Wisconsin Supreme Court ultimately rejected in the summer of 2021 in two court decisions, both titled *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*.⁵³¹

524. *Id.* (referring to NR 353).

525. *Id.*

526. *E.g.*, Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

527. *See, e.g., supra* Climate-Disrupted Water Cycles.

528. Interview with Confidential Interviewee No. Two (June 28, 2021) (on file with author).

529. *Id.*

530. Interview with Confidential Interviewee No. One (July 1, 2021) (on file with author).

531. *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 961 N.W.2d 346, 358 (Wis. 2021) [hereinafter *Clean Wis., Inc. II*]; *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 961 N.W.2d 611, 611 (Wis. 2021) [hereinafter *Clean Wis., Inc. I*].

Like the examples above with Meteor Timber and Kohler, these two lawsuits arose when conservation groups sued the DNR, arguing that the agency was not using its legal authority to protect public waters. On the other side, industry groups and the Republican-led state legislature, which intervened, argued that the DNR could not impose certain permit conditions unless the legislature had specifically authorized it, per Act 21.⁵³² The attorney general, as the DNR's top legal representative, offered conflicting interpretations of Act 21 after an election caused the office to change leadership.⁵³³ Thus, the state supreme court's settling of the question in 2021 was critical to quieting the uncertainty. The court made clear that the DNR can exercise "explicit but broad" authority to impose permit conditions, even if the conditions do not appear directly in a statute.⁵³⁴

The details of the cases shed light on the meaning of this important holding. In one case, the DNR approved a water pollution or Wisconsin Pollutant Discharge Elimination System permit for Kinnard Farms to add an additional site and over three thousand dairy cows to their concentrated animal feeding operation (CAFO).⁵³⁵ Despite extensive drinking water contamination, which the administrative law judge described as "a groundwater contamination crisis," the DNR did not require the CAFO to monitor off-site groundwater or impose limits on the farm's cow population.⁵³⁶ The administrative law judge found that the permit "represent[ed] a massive regulatory failure."⁵³⁷ The attorney general told the DNR secretary in a letter that the agency did not have the "explicit authority" required by Act 21 to impose an animal unit limit or off-site groundwater monitoring, so the secretary reversed the decision of the administrative law judge.⁵³⁸ In 2021, the state supreme court reviewed the prior decisions and held the DNR had the authority to impose animal unit maximums and off-site groundwater monitoring.⁵³⁹ In reaching the decision, the court examined the language Act 21 added to section 227.10(2m) of the Wisconsin Statutes:

[n]o agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter.⁵⁴⁰

532. *Clean Wis., Inc. II*, 961 N.W.2d at 354; *Clean Wis., Inc. I*, 961 N.W.2d at 613.

533. *See Clean Wis., Inc. I*, 961 N.W.2d at 624; 2 Wis. Att'y Gen. Op. No. 04-20 (Oct. 27, 2020).

534. *Clean Wis., Inc. II*, 961 N.W.2d at 354–55.

535. *Id.* at 348–49.

536. *Id.* at 350.

537. *Id.*

538. *See Clean Wis., Inc. I*, 961 N.W.2d at 624.

539. *Clean Wis., Inc. II*, 961 N.W.2d at 350.

540. *Id.* at 354.

The CAFO and the legislative intervenors argued this language means the DNR cannot impose a condition in a Wisconsin Pollutant Discharge Elimination System permit unless it is “listed verbatim in a statute or the administrative code.”⁵⁴¹ The court rejected this argument and concluded “an agency may rely upon a grant of authority that is explicit but broad . . .”⁵⁴² The court held the DNR had the “explicit authority” to impose the limits and require monitoring under sections 283.31(3)–(5) of the Wisconsin Statutes and related regulations, which are broad in scope.⁵⁴³ The court also found the DNR had broad authority to craft permit conditions based on fact-specific determinations aimed at avoiding potential hazards from mismanaging manure, which it did in this case.⁵⁴⁴

In the other case, the Wisconsin Supreme Court rejected the DNR’s approval of multiple high-capacity well permits.⁵⁴⁵ Wisconsin’s attorney general, Brad Schimel, formally interpreted Act 21 to preclude any type of environmental review for groundwater wells outside of limited types of wells and argued that *Lake Beulah* was no longer controlling, and the DNR argued the same before the lower court.⁵⁴⁶ However, in 2020, the newly elected attorney general, Josh Kaul, sent an opinion letter to the newly elected governor, Tony Evers, in which he challenged the former administration’s interpretation of Act 21: “the fact that the legislature mandates a specific standard in one statute does not, in itself, alter the agency’s ability to promulgate, enforce, or administer a different standard enacted pursuant to a second statutory source of rulemaking authority.”⁵⁴⁷

The Wisconsin Supreme Court explained that although under the applicable statute the eight well applications did not require a formal environmental review, the DNR had information that the wells would negatively impact the environment and still approved the permits because the agency thought it lacked authority to deny them.⁵⁴⁸ The court noted that until Act 21 was enacted, the DNR’s common practice was to review environmental impact information for most high capacity wells, regardless of whether section 281.34(4)(a) of the Wisconsin Statutes specifically required the review, and would condition or deny

541. *Id.*

542. *Id.* at 354–55.

543. *Id.* at 358.

544. *Id.* at 356.

545. *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 961 N.W.2d 611, 621 (Wis. 2021) [hereinafter *Clean Wis., Inc. I*].

546. *Id.* at 612–13.

547. 2 Wis. Att’y Gen. Op. No. 04-20 (Oct. 27, 2020).

548. *Clean Wis., Inc. I*, 961 N.W.2d at 612.

the permit where wells would cause adverse environmental impacts.⁵⁴⁹ The court firmly rejected the argument that Act 21 disallows this practice.⁵⁵⁰

The court started its analysis with the state's constitutional provisions related to the public trust doctrine, stating, "We have long interpreted this provision broadly and consistent with its sweeping scope, explaining that it protects more than strictly navigable waters or related commercial navigation rights."⁵⁵¹ The court went on to recount the legislative delegation of trust authority to the DNR in sections 281.11 and 281.12 of the Wisconsin Statutes.⁵⁵² The court found that "[a]ll high capacity wells must be approved by the DNR through a *discretionary* permit process" and added that DNR "is never obligated to give its approval."⁵⁵³

The court reaffirmed its key finding from *Lake Beulah*, explaining "a permit application for a high capacity well triggers the DNR to act on its public-trust duty, under which it cannot ignore 'concrete, scientific evidence of potential harm to waters of the state.'"⁵⁵⁴ The court held that to rule that the DNR should grant a permit that meets statutory requirements even when the DNR knows it will cause harm to the waters of the state would be an "absurd result."⁵⁵⁵ Accordingly, the court held that Act 21's provision requiring "explicit" statutory authority for agency action, per section 227.10(2m) of the Wisconsin Statutes, did not alter the court's analysis or conclusion in *Lake Beulah*.⁵⁵⁶ The legislature "expressly granted"⁵⁵⁷ the DNR "broad but explicit authority" to consider environmental impacts of a high capacity well through its broad delegation of public trust responsibilities.⁵⁵⁸

A decade of experience with Act 21 has impacted the DNR's willingness to update administrative rules and to insert permit terms to protect the state's waters unless those terms are clearly in a statute. Since the legislature and governor also made several substantive changes to the state's water laws after enacting Act 21, some of the DNR's rules are out of date with the newer standards. This makes understanding the law much more difficult. The DNR's resorting to verbal directives from a small group of managers to change the law highlights how cumbersome rulemaking procedures have become. The shortcomings of Act 21 were on display when the DNR implemented the emergency procedure for Lake Michigan and the self-certification process for compliance with water permits.

549. *Id.* at 613.

550. *Id.* at 619–20.

551. *Id.* at 616.

552. *Id.*

553. *Id.* at 617 (emphasis added).

554. *Id.* at 617.

555. *Id.* at 618.

556. *Id.*

557. *Id.* at 620.

558. *Id.* at 619; *see also* WIS. STAT. § 281.11–.12 (2019–20).

These examples show when rulemaking is as cumbersome as it is in Wisconsin, the agency finds solutions that are even less subject to democratic control by the political branches.

One of the main supporters of Act 21 reflected that the purposes of Act 21 were: (1) transparency, (2) to ensure that agencies did not exceed their statutory delegations, and (3) to involve the governor in approving agency rules.⁵⁵⁹ This Article shows some of the less desirable consequences of Act 21. In particular, the rulemaking process is now more cumbersome than streamlined and efficient. Additionally, the DNR's hesitancy to include permit terms to protect the public trust is a regulatory failure that the judiciary has identified and attempted to correct.⁵⁶⁰

CONCLUSION

In 2021, Wisconsin's supreme court rejected the notion that Act 21 alters the DNR's broad and explicit statutory charge to act as a trustee of the state's waters, as written into sections 281.11 and 281.12 of the Wisconsin Statutes.⁵⁶¹ The interviews with Water Specialists and their supervisors demonstrate that these mission-orientated staff are ready to protect public rights in water, but that their ability to do so is limited by a lack of sufficient resources and authority. Passionate people in key positions are not enough to protect public rights in the state's waters; agencies need sufficient staff, time to conduct site visits, and statutory authority to regulate in ways that fulfill trustee obligations.

The combination of legislation that limited the DNR's control over activities that impact public trust waters, Act 21's rulemaking hurdles, and inadequate funding for enough Water Specialist positions undermine the trustee's ability to protect Wisconsin's waters. While the legislature sought to take back some of the authority it delegated to agencies, it operates too slowly to effectively protect water resources, especially when faced with emergencies posed by climate disruption. The legislature is not staffed with the engineering and scientific expertise needed to develop effective water management rules. Regulatory reforms and new water management legislation have had a variety of unfavorable consequences by making the law harder to understand due to outdated codes and failing to protect riparian property owners from climate threats.

559. See Congressperson Tom Tiffany, Keynote Address at Legislative Power Over Administrative Agencies: A Retrospective on 2011 Wisconsin Act 21, conference hosted by Tommy G. Thompson Center on Public Leadership (April 8, 2021), available at <https://thompsoncenter.wisc.edu/event/legislative-power-over-administrative-agencies/>.

560. *Clean Wis., Inc. I*, 961 N.W.2d at 619–20.

561. *See id.*

Leadership matters. The combination of internal and external pressures on Water Specialists harms their ability to make decisions based on law and science. Unlike prior governors from both parties, Governor Evers has avoided asserting his influence on project-level decisions made by Water Specialists and left program decisions to DNR upper managers. Apart from the specialized teams working on habitat and enforcement, the Water Specialists work best when not siloed into specialties and spread across large regions where they lack context and relationships. They need consistent and reliable systems for mentoring and one-on-one training in the field to develop their confidence and expertise. As the recent Wisconsin Supreme Court decisions show, the DNR still has enduring statutory authority that it should act on to protect the public trust. Water Specialists need support from supervisors to deftly exercise their broad duties to balance public and private rights in water.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.