The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*

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The public trust doctrine is rooted in ancient Roman law and the Wisconsin Constitution. Ancient Roman jurists believed that the natural law concept that the waters are common to all was not subject to the changing whims of legislatures. Similarly, modern theorists assert that a constitutionally-based doctrine will be more insulated from politics. This Comment demonstrates the limits of these theories. The trust doctrine is not immutable. Based on interviews with the trustees of Wisconsin's water resources, this Comment uncovers the constraints on the trustees. It shows that trust resources are at risk due to politically-motivated decisions and lax enforcement.

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INTRODUCTION

The public trust doctrine describes the state's relationship to its water resources and to the citizens of the state. In its most basic form, it is the concept that the state holds navigable waters in trust for use by the public. The contours of these relationships and the use of the doctrine to protect natural resources have evolved along with changing uses of water. Courts have continually expanded what they recognize as the public's interest in public trust resources to include everything from the right to hunt to the right to maintain pollution-free water.

The expansion of the public trust doctrine has been a focal point for hopes that the doctrine will be used to curb the degradation of water resources and wildlife. The volume of law review articles that discuss the public trust doctrine is indicative of the high level of optimism regarding the capacity of the public trust doctrine to address threats to natural resources. That optimism, however, reflects an inflated notion of the doctrine's practical potential. In fact, the public trust doctrine's capacity to protect trust resources from contemporary threats is highly dependent on the individual natural resource managers who, as trustees, have the responsibility to implement the doctrine. The discretion exercised by those trustees significantly disconnects legal theory from implementation of the public trust doctrine. This Comment uses data from qualitative research interviews to demonstrate that natural resource managers' implementation of their public trust obligations has lagged significantly behind the courts' expansion of the legal doctrine.[1]

Although there are similarities in the evolution of the public trust doctrine across state lines, the public trust is a state-based doctrine shaped by state institutions. Some states have relied on the public trust doctrine more heavily than others to protect navigable waters and, consequently, have a more clearly and completely developed legal doctrine. This Comment focuses on Wisconsin for several reasons. Wisconsin, a state containing over 1,200 lakes and bordered on the east and the west by Lake Michigan and the Mississippi River, respectively, has a rich 150-year history of using the public trust doctrine to protect the natural heritage of the state.[2] Moreover, Wisconsin's public trust

1. Part II of this Comment is supported by narratives obtained from research interviews with the Wisconsin Department of Natural Resources (DNR) staff who administer the state laws that regulate the use of navigable waters. This type of research aims to describe themes in the interviewee's lived world. *See* STEINER KVALE, INTERVIEWS: AN INTRODUCTION TO QUALITATIVE RESEARCH INTERVIEWING 54, 187 (1996).

2. Wisconsin was one of a handful of case studies examined in Joseph Sax's seminal article on the public trust 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

doctrine is grounded in the state's constitution. Advocates for creating state constitutional amendments to protect the environment argue that "a constitutional amendment, as opposed to a statute, protects policy judgments from the ebb and flow of the political tide."[3] One would predict, based on this, that the public trust doctrine in Wisconsin is fairly insulated from political pressure. Given its history and constitutional basis, the development and implementation of Wisconsin's public trust doctrine is fertile ground for study.

In Wisconsin, three state institutions have been instrumental in defining the scope of public rights and the responsibility of the state trustee: state courts, the legislature, and the Department of Natural Resources (DNR). The courts have both resolved concrete legal disputes concerning public trust resources and have articulated the underlying legal theory. The legislature, as the primary trustee for the public's resources, has codified part of the common law public trust doctrine. It has also delegated substantial responsibility over the trust to Wisconsin's DNR. The DNR, in turn, employs natural resource managers who make daily determinations that impact public trust resources.

In order to understand the importance of the public trust doctrine, one must understand how these institutions interact and how they have historically determined the scope of public rights. Court decisions are extensively studied, but little is known about how Wisconsin's natural resource managers view and protect the public trust. These resource managers are the trustees of the navigable waters. They are the ones who determine what activities are in the public interest. They decide whether to issue a permit to allow an activity or initiate an enforcement action to stop an activity. The dearth of analysis of the trustees can be partly explained by the fact that this information is not readily available. Yet, one must understand the trustees' perspectives to fully appreciate the impact of the public trust doctrine on contemporary water management issues.

This Comment provides a comprehensive analysis of the evolution of the public trust doctrine in Wisconsin. Based on a review of major court decisions and interviews with the DNR's natural resource managers, this Comment describes the main institutional forces defining the doctrine and its implementation. The analysis of these materials shows how the DNR actually applies the doctrine and assesses the doctrine's utility to protect natural resources from degradation.

Part I of this Comment focuses on how the courts and legislature have shaped the public trust doctrine. Part I.A discusses the historical origins of the public trust doctrine, both generally and in Wisconsin, by tracing the changes in the conceptual framework that have influenced the definition of what waters

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).

3. Mathew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1170 (1997).

and lands are protected by the trust. Part I.B examines the role of two state institutions in shaping the trust doctrine and protecting trust property: the courts and the legislature. First, it discusses the court's role in protecting the trust against unconstitutional actions by the legislature and other trustees, such as attempts to alienate trust property or improperly delegate authority to trustees. Second, it discusses the state's responsibility to protect public rights. It emphasizes the importance of constitutional restrictions on the legislature, such as restrictions on the state's ability to alienate trust property, issue lakebed grants of trust property, and delegate responsibility to lesser units of government. Part I.C focuses on the expansion of public rights, the impact of the trust on riparians, the accompanying conflicts between public rights and private riparians, and the courts' resolutions of those conflicts.

Part II focuses on how the DNR trustees have implemented the public trust doctrine. This Part is based on the results of qualitative research interviews with the DNR's natural resource managers and describes how the trustees actually apply the public trust doctrine. Part II.A provides background information on the creation of Wisconsin's DNR and its role in administering the trust. It outlines the DNR's authority over key public trust issues, describes the main regulatory authority of the DNR, and identifies the primary decisionmakers who are entrusted with the duty to protect the waters of the state for the public. Part II.B outlines the primary threats to water resources in Wisconsin and analyzes the trustees' use of the public trust doctrine to protect water resources from these threats. Part II.C identifies the many pressures that the trustees face. It tests the strength of the argument that a legal doctrine based on a constitutional amendment is free from the ebbs and flows of political tides.

The Comment concludes that the Wisconsin court has given the trustees a tremendous amount of freedom to decide how to protect the trust and expand public rights in water. In cases where the trustee has acted to protect or further the trust, the court generally defers to the trustee's valuation of the public interest in water. This wide latitude, however, has not given rise to a vigorous regulatory and enforcement program to protect the navigable waters of the state. The laws currently in place do not adequately protect the trust from contemporary threats, such as shoreland development. Moreover, the regulators entrusted with the duty to implement the public trust doctrine are restricted from acting to the full extent allowed by the court. They are constrained by a variety of systemic and political factors, including the inability to deny permits, a perceived dependence on local district attorneys to prosecute violations, understaffing, and pressure from supervisors and politicians to allow riparians greater freedom to degrade trust resources.

I
EVOLUTION OF THE PUBLIC TRUST DOCTRINE

A. Historical Origins of the Public Trust Doctrine

The public trust doctrine in the United States originated from the English common law that the British Crown held title to the bed or soil beneath tidal waters.[4] The Crown was thought to have ownership of waters and the beds below them in order to control the highways of commerce and navigation for the advantage of the public; thus, the sovereign held this property in trust for the people.[5]

When the thirteen original colonies broke away from England and formed independent states, ownership of trust property passed to the sovereign governments of the states. Likewise, when the Northwest Territory was formed in 1787, trust property was reserved for all citizens of the United States.[6] Virginia ceded the Northwest Territory, of which Wisconsin was a part, on the condition that the navigable waters would be forever free for United States citizens, and the new states would be admitted as full members of the Federal Union with the same sovereignty as the original states.[7] Article IV of the Northwest Ordinance provided that:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.[8]

When Wisconsin became a state, it incorporated this language into Article IX, Section 1 of the Wisconsin Constitution. The Constitution both imposes a duty on and gives authority to the state to regulate navigable waters. It requires state action to preserve and promote the trust, and it establishes public rights to use

4. *See* Willow River Club v. Wade, 76 N.W. 273, 278-79 (Wis. 1898). English constructions of the public trust doctrine can be traced back to the influence of ancient Roman law. *See* HELEN ALTHAUS, PUBLIC TRUST RIGHTS 23 (1978). The *Corpus Juris Civilis*, compiled almost 1,500 years ago in the sixth century A.D., was a monumental codification of Roman statutes and laws. One part of the *Corpus*, the *Institutes of Justinian*, contained the origins of the public trust doctrine. This, in turn, was based on a text from the second century A.D., called the *2nd Century Institutes of Gaius*. Ancient Roman law recognized public rights in water and the seashore which were unrestricted and common to all. These rights were considered to be part of natural law. *See id*. at 1-2. "By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings . . . ." *Id*. at 2. They also recognized the right to fish as part of common rights in the sea. These public rights, since they were based on natural law, were seen as fixed and immutable. *See id*. at 3-4.

5. *See Willow River Club*, 76 N.W. at 281-82.

6. *See* Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914).

7. *See* Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 516 (Wis. 1952).

8. *Diana Shooting Club*, 145 N.W. at 818 (quoting Northwest Ordinance of 1787).

trust property.[9]

1. The Line Between Public and Private: What Water and Land Is Protected by the Public Trust Doctrine?

a. Navigable Waters

The state of Wisconsin holds title to navigable waters and their underlying beds in trust for the free use of the public. The definition of navigability is important because it determines what bodies of water are subject to public rights. Since "change is the unchanging chronicle of water jurisprudence,"[10] throughout history, navigable waters have been redefined as having the purposes for which water is used. "New needs have always generated new doctrines and, thereby, new property rights."[11]

In 1871, the United States Supreme Court clarified that the public trust doctrine is applicable to all navigable waters, tidal or fresh.[12] Previously, in English common law and states that followed it, the trust had only applied to tidal waters. However, in *The Daniel Ball*, the Court held that the test for navigability is whether the waters are "navigable in fact."[13] "[R]ivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[14]

Although Wisconsin initially followed the test established in *The Daniel Ball*, Wisconsin's test for navigability has changed over time. This evolution has been accompanied by changing public uses of water and the court's conception of public use rights. In the late 1800s and early 1900s, the test was whether the water was capable of floating the products of commerce to mill or market during a certain regularly recurrent annual period, thus reflecting the primacy of water-based commerce during that time.[15] As early as 1914, the court expanded its test of navigability to include recreational boats.[16]

Navigability now encompasses all water bodies capable of floating any recreational boat during a certain recurrent period of the year.[17] The test of

9. *See Muench*, 53 N.W.2d at 512; City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1927).

10. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 268 (1990).

11. *Id.* at 269.

12. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1871).

13. *Id.* at 563.

14. *Id.*

15. If logs or rafts of lumber could float down a stream, the stream was considered navigable. *See Diana Shooting Club*, 145 N.W. at 819; *Willow River Club*, 76 N.W. at 276; Olson v. Merrill, 42 Wis. 203, 204 (1877).

16. *See* Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952) (quoting *Diana Shooting Club*, 145 N.W. at 820).

17. *See* DeGrayner & Co. v. Department of Natural Resources, 236 N.W.2d 217, 222 (Wis. 1975); *Muench*, 53 N.W.2d at 519 (stating that a water body is navigable in fact if it is capable of floating any

navigability does not require any balancing of the public's rights and the project's benefits; that occurs only after the navigability determination is made and pertains only to whether or not the DNR should issue a permit for the project.[18] As our knowledge about the interconnectedness of hydrology has increased, the public trust has been expanded to cover shoreland and wetlands adjacent to natural navigable waters. This expansion has been justified by the need to protect navigable waters.[19] Similarly, the trust applies to artificial navigable waters that are "directly and inseparably connected with natural, navigable waters."[20] In some circumstances the trust also applies to non-navigable streams.[21]

Additionally, the DNR's determination that a waterbody is or is not navigable is not permanent and can be revised as conditions change. For example, in *Turkow v. DNR*, an artificial drainageway that one branch of the State had declared was not navigable in 1957 was later declared navigable in 1989.[22] Prior to the 1989 reassessment of the drainageway's navigability, Turkow had purchased property containing a dwelling that was twenty-five feet from the drainageway.[23] In 1994, the DNR advised Turkow that the drainageway was navigable and ordered him to remove the walkways and steel fence that covered it.[24] The court of appeals affirmed the determination that the drainageway was navigable and held that the DNR acted within its authority

"boat, skiff, or canoe, of the shallowest draft used for recreational purposes").

18. *See* Village of Menomonee Falls v. Department of Natural Resouces, 412 N.W.2d 505, 510 (Wis. Ct. App. 1987). By contrast, it is appropriate to consider public use when determining the navigability of an artificial water body. In *Klingeisen v. Department of Natural Resouces*, the court of appeals held that an artificial channel was covered by the public trust because it was a "public" waterway due to the fact that it was connected to and maintained by the City of Green Bay *and* the public actually used the waterway. 472 N.W.2d 603, 605-06 (Wis. Ct. App. 1991). Once an artificial water body is deemed a public waterway that is directly and inseparably connected to natural, navigable waters, it is covered by the public trust doctrine. *See id.* at 606.

19. *See* Just v. Marinette County, 201 N.W.2d 761, 768-69 (Wis. 1972).

20. *Klingeisen*, 472 N.W.2d at 606; *see also* State v. Village of Lake Delton, 286 N.W.2d 622 (Wis. Ct. App. 1979) (applying the trust to an artificial lake).

21. *See* Omernik v. State, 218 N.W.2d 734, 739 (Wis. 1974). In certain statutorily defined situations, the trust applies to non-navigable streams. The legislature significantly expanded its jurisdiction over trust waters when it enacted Section 30.18 of the Wisconsin Statutes to regulate diversions of water from lakes and streams. The Wisconsin Supreme Court reviewed this statute in *Omernik v. State*, and concluded that the legislature expanded the statute's application to non-navigable waters in addition to navigable waters. 218 N.W.2d at 739. The court held that this expansion was consistent with Article IX, Section 1 of the Wisconsin Constitution. *See id.* Although the Constitution only applies the public trust to navigable water bodies, this is a "limitation upon the legislature to protect public rights in navigable waters from dissipation or diminution by acts of the legislature as trustee of such waters." *Id.* Of course, the legislature can go further, as it has in Section 30.18, to extend its trust responsibilities to non-navigable streams. Moreover, this is a logical extension because it ultimately protects downstream waters that are navigable. "[I]f nonnavigable tributaries upstream could be diverted or dissipated, there might be a rather dry riverbed downstream." 218 N.W.2d at 739.

22. 576 N.W.2d 288, 290 (Wis. Ct. App. 1998).

23. *See Turkow*, 576 N.W.2d at 289.

24. *See id.*

when making its determination.[25] Despite a property owner's reliance on the DNR's determination that a waterbody is not navigable, the doctrine of equitable estoppel is inapplicable.[26] "The DNR has the authority, as well as the obligation, to determine whether the waters of the state are navigable in fact . . . ."[27] That authority does not end when a determination is made; rather, it can be reasserted at any future time.

b. Lands Underlying Navigable Waters

Historically, the states were free to determine who owned the land under navigable waters.[28] Wisconsin defined its ownership to include the "beds underlying navigable waters . . . subject only to the qualification that a riparian owner on the bank of a navigable stream has a qualified title in the stream bed to the center thereof."[29] The state has traditionally been the owner of the lakebeds up to the ordinary high water mark.[30] The ordinary high-water mark is:

> [T]he point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of the ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.[31]

Furthermore, the trust extends to areas below the ordinary high-water mark that are covered with aquatic vegetation and not navigable.[32]

As early as 1965, the legislature extended its public trust jurisdiction beyond the ordinary high-water mark when it included the regulation of shorelands as part of Wisconsin's Water Quality Act of 1965.[33] In order to fulfill the state's role as trustee of navigable waters, the legislature extended its trust responsibility to lands beyond those covered by the common law public trust doctrine to lands "lying close to navigable waters."[34] Application of the

25. *See id*. at 290.

26. *See id*.

27. *Id*.

28. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1876).

29. Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 517 (Wis. 1952).

30. *See* State v. Trudeau, 408 N.W.2d 337, 342 (Wis. 1987); Illinois Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901).

31. Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914) (internal citations omitted).

32. *See Trudeau*, 408 N.W.2d at 342.

33. *See* WIS. STAT. ANN. § 59.971 (West 1994) (renumbered as amended at WIS. STAT. ANN. § 59.692 (West 1999)); WIS. STAT. ANN. § 144.26 (West 1994) (renumbered at WIS. STAT. ANN. § 281.31 (West 1999)).

34. WIS. STAT. ANN. § 144.26(1) provides that:

> To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote

shorelands ordinance to lands within one thousand feet of the normal high-water elevation extends the state's trust responsibility.[35] The court approved this extension of jurisdiction because "[l]ands adjacent to or near navigable waters exist in a special relationship to the state."[36]

B. The Role of the Court and Legislature in Protecting the Public Trust

1. Judicial Review of the Administration of the Trust

Courts play an important role in ensuring that the trust is being administered for the public's benefit. "The final determination of whether a particular act is for a public or a private purpose must be made by the judiciary."[37] Not only does the judiciary have a responsibility to examine whether the legislature has acted within the bounds of its regulatory power, but also to determine whether the state has acted in conformity with its "special obligation to maintain the public trust."[38] This has been consistently acknowledged for over one hundred years.[39] As early as the late 1800s, the court clearly articulated its role in upholding the public trust. In *Priewe v. Wisconsin State Land Improvement Co.*, the court held that it must determine whether or not the legislature acted to benefit the public, and in making that determination, it is not bound by the legislature's statement of purpose in its conveyance of public trust land.[40] It is the role of the court to review questionable legislation to determine its constitutionality.[41]

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public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safer and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

35. *See* WIS. STAT. ANN. § 59.692(1)(a) (West 1997).

36. Just v. Marinette County, 201 N.W.2d 761, 769 (Wis. 1972); *see also* Wisconsin v. Kenosha County Bd. of Adjustment, 577 N.W.2d 813, 818 (Wis. 1998) (confirming the state's public trust jurisdiction over shorelands). See *infra* Part II.B for further discussion of shoreland zoning.

37. Sax, *supra* note 2, at 510.

38. *Id.* at 511; *see also In re* Trempealeau Drainage Dist.: Merwin v. Houghton, 131 N.W. 838, 841-42 (1911).

39. *See generally* Sax, *supra* note 2.

40. 67 N.W. 918, 922 (Wis. 1896).

41. As a practical matter, however, the courts' ability to review legislation for its constitutionality is dependent upon the existence of litigants who are able to bring a live controversy before the courts. Wisconsin's Attorney General has historically played an important role in bringing unconstitutional legislation to the attention of the courts. However, in a recent Court of Appeals decision the court abruptly stopped this practice. *See* State v. City of Oak Creek, 588 N.W.2d 380 (Wis. Ct. App. 1998). The court held that the attorney general could not challenge the constitutionality of legislation that was detrimental to the public trust. *See id.* at 381. The court reasoned that since there is no statutory provision that gives the attorney general the power to challenge the constitutionality of a law or rule of

In public trust cases, judicial review varies based on the parties and situation before the court. The court is trying to "identify and correct those situations in which it is most likely that there has been an inequality of access to, and influence with, decision makers so that there is a grave danger that the democratic processes are not working effectively."[42] When the court reviews an action by the legislature or DNR that appears inequitable or fails to benefit clearly the public interest, the court places the burden on the legislature or DNR to prove that it has acted for a public purpose. A court may decide that the public benefits of an act are "so inherently unclear that such projects should not be advanced unless it can be shown that they are in fact necessary or desirable from the perspective of the public interest."[43] In Wisconsin, the courts have generally required a public interest-based justification whenever public resources are "subordinated to a more limited set of private interests."[44]

If there is uncertainty about the impact on the public interest, courts remand the case to the appropriate entity to adduce evidence of the benefits to the public interest. The court will closely scrutinize any DNR or legislative action that appears to jeopardize the trust. Similar to the *Priewe* case, *Reuter v. DNR* involved a decision by the trustee (the DNR) to allow an incursion into trust property.[45] Rather than simply defer to the agency's policy judgment, the *Reuter* court rejected the DNR's balancing of policy factors and remanded the decision to the DNR for additional consideration of the pollution generated by the proposed project.[46]

By contrast, when the DNR faces challenges by riparians to its protection of the public trust, courts will generally defer to the agency's policy and scientific judgment. This type of case does not involve the danger that private interests have exerted undue influence on the administration of the trust so the court is not concerned with protecting democratic processes and thus accords greater deference to the agency's decision. For instance, in *Hixon v. Public Service Commission* the court deferred to the agency's policy judgment when the agency acted to protect the public trust by denying a permit to maintain a riparian owner's breakwall.[47] When a trustee acts to protect the trust, the court generally finds that it is the trustee's function to weigh all the relevant policy

Wisconsin or one of its agencies, coupled with the fact that it is the attorney general's duty to defend the constitutionality of state statutes, the attorney general cannot challenge the constitutionality of legislation. *See id.* at 383. The Wisconsin Supreme Court accepted review of this case, but as of March 1999 had not issued a final decision. In light of *State v. City of Oak Creek*, private citizens are the only parties who can challenge the constitutionality of such legislation. This insulates the legislature from challenge unless a citizen is directly injured by an unconstitutional statute and has the resources to litigate. See *infra* Part II.C for further discussion of this case and the potential for political influence over the administration of the trust.

42. Sax, *supra* note 2, at 514.

43. *Id.*

44. *Id.*

45. 168 N.W.2d 860 (Wis. 1969).

46. *See id.* at 861-63.

47. 146 N.W.2d 577, 578, 589 (Wis. 1966).

considerations: preserving natural beauty; securing the greatest public use; and accommodating the convenience of riparian owners.[48]

2. The Legislature's Role in Administering the Trust

The legislature, as trustee of the navigable waters of the state, has a significant role in administering the trust. As early as 1927, the Wisconsin Supreme Court clearly identified the legislature's duty as both restricting actions that might endanger the trust and requiring affirmative actions to protect the trust:

> The trust reposed in the state is not a passive trust; it is governmental, active and administrative. Representing the state in its legislative capacity, the legislature is fully vested with the power of control and regulation. The equitable title to those submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it. As has heretofore been shown, the condition confronting the legislature was not a theory but a fact. This condition required positive action . . . .[49]

Moreover, the Wisconsin court has outlined criteria to analyze the state's management of the trust and has held that the trust is a matter of statewide concern and "cannot be delegated by the state legislature to any group which is less broadly based."[50] The contours of these boundaries are discussed below in the context of the legislature's ability to issue lakebed grants and to delegate decisionmaking authority.

a. The Legislature Has a Limited Ability to Alienate Trust Property

Does the public trust doctrine prevent the legislature from alienating sovereign lands? Richard Epstein analogizes the public trust doctrine to the takings doctrine, arguing that both doctrines are based on the idea that property puts bounds on legislatures.[51] Accordingly, one function of the public trust doctrine is to constrain the legislature's ability to diminish trust property.[52] The Wisconsin Supreme Court recognized this over one hundred years ago. In *Priewe*, the court clearly articulated the legislature's restricted ability to alienate trust property:

> The legislature has no more authority to emancipate itself from the

48. *See id*. at 583; *see also* Sterlingworth v. Department of Natural Resources, 556 N.W.2d 791, 794-95 (Wis. 1996); Just v. Marinette County, 201 N.W.2d 761, 768-69 (Wis. 1972).

49. City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1927).

50. Sax, *supra* note 2, at 523.

51. *See* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 418-21 (1987).

52. *See* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 357-58 (1998) (citing Epstein, *supra* note 51, at 418-21).

> obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose.[53]

In one of the United States Supreme Court's most famous public trust cases, *Illinois Central Railroad v. Illinois*, it asserted that the state's control over lands underlying navigable waters cannot be abdicated and "cannot be relinquished by a transfer of the property."[54] In the more recent case of *Phillips Petroleum Co. v. Mississippi*, the Court held that although Phillips Petroleum had record title to and paid taxes on land lying beneath tidal waters, the State of Mississippi continued to own the land.[55] The Court concluded that Phillips Petroleum's expectation that it owned the trust property was unreasonable because Mississippi law had consistently recognized that the state owned the beds under tidal waters.[56]

Although Wisconsin's legislature has made grants of public trust property, this property can only be used for public purposes and does not operate to transfer the legal title from the state.[57] Further, any grant of property for purely private purposes will be void.[58]

Priewe established an early test for finding a public purpose in the grant of a lakebed. *Priewe* involved an 1891 special legislative grant of the lakebeds of two lakes to John Reynolds, who was requested to drain the lakes to protect public health. The court looked past the stated legislative purpose of the grant to the actual effects and found that Mr. Reynolds had formed a land development corporation and transferred his rights to the lakebeds to the

53. Priewe v. Wisconsin State Land and Improvement Co., 79 N.W. 780, 781 (Wis. 1899).

54. 146 U.S. 387, 452-53 (1892).

55. 484 U.S. 469, 484 (1988).

56. *See id*. at 482.

57. Further, the rights vested in grantees of trust property are extremely limited. The state is merely giving the grantee the ability to use the property, a privilege that is revocable at any time. *See* City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957). For instance, the legislature gave the City of Madison permission to use trust property to build a civic center on Lake Monona, while continuing to vest ownership and trust responsibilities in the state. Continued use of that trust property does not give Madison title to the property. Wisconsin's law is in harmony with United States Supreme Court and scholarly conceptions of property rights. Continued use of property does not give rise to anything more than usufructuary rights. *See generally* Reichelderfer v. Quinn, 287 U.S. 315, 317-19 (1932) (clarifying, in a case that did not involve the public trust, that property rights do not arise because certain expectations are formed, even if expectations are based on governmental action). "The [United States Supreme] Court's reluctance to recognize the creation of property rights by implication is founded in a concern . . . that the existence of such rights would constrain the sovereign in exercising governmental authority to achieve important public purposes." Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 948 (1993). There are, however, some limited situations where property loses its character as trust property. Only when the land under a stream no longer constitutes part of the bed of a stream because the course of the river has changed due to the forces of nature does the land lose its trust limitations. *See* Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 518 (Wis. 1952) (interpreting Angelo v. Railroad Comm'n, 217 N.W. 570, 575 (Wis. 1928)).

58. *See* Priewe v. Wisconsin State Land and Improvement Co., 67 N.W. 918, 921 (Wis. 1896).

corporation so the beds could be used for development. The Wisconsin Supreme Court reaffirmed its earlier decision and held that legislative grants of trust property are void if the purpose *and* effect of such a grant are solely to benefit a private interest.[59] Despite the incidental public health benefits from draining the lakes, the court found that this grant was void and ordered the defendant to restore the lakes to their former condition.[60]

The court later refined its analysis in *State v. Public Service Commission*, a case involving a challenge to the legislature's grant of lakebed to the City of Madison.[61] Unlike the grant in *Priewe* that benefited a private corporation, the grant to Madison was made in order to develop a lakeside public park.[62] The court introduced a five-factor analysis to determine whether a lakebed grant served a public purpose.[63] After finding that the grant did serve a public purpose because it had met all five factors, the court turned to the litigants' challenge to the Public Service Commission's issuance of a permit to place fill on the bed of Lake Wingra and a nearby lagoon. The court ultimately upheld the commission's decision to allow the City of Madison to fill part of the lake and the lagoon in order to create a parking lot, enlarge a beach, and relocate a highway.[64] The court determined that these alterations did not violate the public trust because the project would serve the public by creating a public park.[65]

In the same year, the court determined the validity of another lakebed grant to the City of Madison that involved filling six acres of Lake Monona.[66] The court applied the five-factor test, and added a sixth factor: if the purpose of the grant was local, it would be an improper use of state property.[67] The court held that filling the bed of Lake Monona for a proposed auditorium and civic center, although not a public park, did not violate the public trust because it was a recreational facility that was not purely local. The issue of using trust property to serve local as opposed to statewide interests is particularly important when considering the delegation of trust responsibility from the

59. *See* Priewe v. Wisconsin State Land and Improvement Co., 79 N.W. 780, 781-82 (Wis. 1899).

60. *See id*. at 782.

61. 81 N.W.2d 71 (Wis. 1957).

62. *See* 1953 Wis. Laws 282.

63. These five factors included: (1) public bodies will control the use of the area; (2) the area will be devoted to public purposes and open to the public; (3) the diminution of lake area will be very small when compared to the whole of the lake; (4) no one of the public uses of the lake as a lake will be destroyed or greatly impaired; and (5) the disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who will use the city park. *See* State v. Public Serv. Comm'n, 81 N.W.2d 71, 73-74 (Wis. 1957). Additionally, the court gave guidelines to determine when a lakebed grant and permit to fill would be clearly unconstitutional. The trust prevents the state from "making any substantial grant of a lake bed for a purely private purpose," and the court would not find a public purpose if the project "change[d] [the] entire lake into dry land" or destroyed "its character as a lake." *Id*. at 74.

64. *See id*. at 71-72, 73.

65. *See id*. at 75.

66. *See* City of Madison v. State, 83 N.W.2d 674 (Wis. 1957).

67. *See id*. at 678.

legislature to other units of government.

b. Restrictions on the Legislature's Delegation of Its Duty to Administer the Public Trust

The legislature has the primary power of administering the public trust. In furtherance of the state's role as trustee of navigable waters, the legislature can delegate the administration of the trust to other units of government, such as agencies, counties, and municipalities. However, the delegation must be "in furtherance of the trust and . . . not block the advancement of paramount interests."[68] In other words, the trust must be administered for the benefit of the public, and the state must retain control over those who are administering the trust.[69]

Courts closely scrutinize the delegation and administration of the public trust. They are not bound by the legislature's declaration of purpose and must independently determine whether the legislature has acted to further public rights in navigable waters.[70] In public trust cases, the court's role is to protect the public interest in the navigable waters of the state.[71]

Accordingly, whenever public trust resources are subordinated to a limited set of private interests, Wisconsin courts will require the trustees to justify their position and may invalidate the legislative action.[72] The possibility of subordinating the trust to a limited set of interests arises when the legislature delegates authority to administer the trust to local governments. Local governments are inherently more concerned with the localized impacts of their decisions and respond to a local, rather than statewide, constituency. By holding a delegation of the trust to county boards unconstitutional, the court in *Muench v. Public Service Commission* "took the position that it must protect the legislature from itself and from its temptation to succumb to pressures of purely local interests. The court required the legislature to respond to a statewide constituency—another form of judicially imposed democratization."[73]

Additionally, delegation of the trust to county boards of supervisors is restricted by Article IV, Section 22 of Wisconsin's Constitution. The legislature cannot delegate matters of statewide concern to county boards of supervisors.[74]

68. Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69, 76 (Wis. 1978).

69. *See* Muench v. Public Serv. Comm'n, 55 N.W.2d 40, 46 (Wis. 1952).

70. *Cf.* Priewe v. Wisconsin State Land and Improvement Co., 67 N.W. 918, 922 (Wis. 1896) (noting that the decision to take private land for public use is a legislative one, but that the courts reserve the right to decide whether a particular use is public or private).

71. *Cf.* Priewe v. Wisconsin State Land and Improvement Co., 79 N.W. 780, 782 (Wis. 1899) (noting that private actions may be filed against any person or corporation violating public right to navigable waters).

72. *See* Sax, *supra* note 2, at 523.

73. *Id.*

74. *See* WIS. CONST. art. IV, § 22 ("The legislature may confer upon the boards of supervisors of

Under Article IV, Section 22, the legislature may only grant powers of a local character to counties.[75] A power of local character is one that primarily affects the people of the locality, rather than one that affects all the people of the state.[76] Although there are clearly local or statewide issues, many do not fit exclusively into either category. Whether a challenged legislative enactment that delegates power to a local government involves issues of local or statewide concern is for the courts to determine.[77] In *Muench*, the court determined for the first time that the public trust was a matter of statewide concern. The court reasoned that:

> The right to fish and hunt, or to enjoy scenic beauty, as an incident to the right to navigate the navigable waters of this state . . . is an example of the type of legislation which affects the interests of the people of the entire state, as well as those of a particular county. If a particular county is permitted to take action which will lead to the impairment or the destruction of hunting, or fishing, or the right to enjoy scenic beauty on that part of a particular navigable stream lying within the limits of the county, the interests of the people of the entire state may be adversely affected thereby. . . . [T]herefore . . . the test which ought to be applied in determining the validity of delegation of legislative power in such a case is that of paramount interest.[78]

The court found evidence that public rights in navigable waters were of paramount interest in the 1929 amendments to the Water Power Law which declared that the enjoyment of natural scenic beauty is a public right.[79] Thus, the court held that the power to administer the trust fits more closely in the category of matters of statewide concern because the state holds the navigable waters and the beds beneath them in trust for the public.[80] Accordingly, the

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the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.").

75. *See id*.

76. *See generally* Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69, 74 (Wis. 1978) (explaining how courts construe "local affairs"); Muench v. Public Serv. Comm'n, 55 N.W.2d 40, 42 (Wis. 1952) (rejecting the definition of local in a territorial or geographical way).

77. *Cf*. State *ex rel*. Michalek v. LeGrand, 253 N.W.2d 505, 507 (Wis. 1977) (involving home rule amendment rather than Article IV, Section 22).

78. *Muench*, 55 N.W.2d at 43.

79. *See id*.

80. *See id*.; *see also* City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (holding that the "free and unobstructed use of the navigable waters of the state under the trust doctrine is a matter of state-wide concern"). Further, in *Wisconsin's Environmental Decade*, the court followed *Muench*, declaring that water quality in Lake Mendota and Lake Monona "has a clear non-local impact and is emphatically a matter of state-wide concern." 271 N.W.2d at 74 (holding that DNR's regulation of navigable waters preempted Madison's ability to implement conflicting regulations). Recognizing the increased amount of water-centered recreation in the state, the court reasoned that:

> [T]he continued deterioration of the quality of the waters of the state have awakened widespread interest in all Wisconsin's waters and have served to underscore the fact that maintaining pure and attractive rivers, lakes and streams is a *matter of statewide concern*.

Id. at 73 (emphasis added).

legislature cannot completely delegate power over navigable waters to counties because the state must protect its paramount interests in the water.[81]

Two decades after the *Muench* decision, in *Menzer v. Village of Elkhart Lake* the court refined its analysis and clarified that the paramount interests doctrine established in *Muench* does not go so far as to support the contention that every local regulation of lakes is invalid because it infringes on an area of statewide concern.[82] The legislature's purpose in delegating regulatory authority to local units of government is essential. *Village of Elkhart Lake* involved a local regulation that restricted the use of power boats on Lake Elkhart. The court distinguished *Village of Elkhart Lake* from *Muench* by highlighting the difference between the purpose of delegation in each case. There is a distinction between allowing localities to block the advancement of paramount interests and delegating to localities the limited authority to further public interests in water.[83] While the former was rejected in *Muench*, the latter was accepted in *Village of Lake Elkhart*. When a local government regulates to *promote* the public trust, the danger of impairing statewide interests and favoring localized interests is greatly diminished. This rationale parallels that which determines the level of scrutiny Wisconsin courts apply to public trust cases. If the trust is not threatened, the court will be less likely to closely analyze the trustee's policy judgments.

Thus, the legislature can delegate the administration of the trust, but to promote statewide public interests in trust resources, the state must delegate in a manner that allows it to maintain preeminence in the control of navigable waters.[84] The legislature must act to preserve and promote the trust even when it delegates authority, and the legislature has delegated substantial authority over water management to the DNR. Clearly, the legislature intended to establish the DNR as "'the central unit of state government' with 'general supervision and control over the waters of the state.'"[85] The legislature can also delegate its trust responsibilities to local governments, but it cannot give local governments the opportunity to impact the use of trust resources in a way that favors localized interests.[86]

The Wisconsin Supreme Court has articulated a set of rules to determine whether the legislature's delegation of the administration of the public trust is constitutional. The legislature may only delegate in the following manner: (1) it must retain substantial oversight over the delegees administration of ministerial

81. *See Muench*, 55 N.W.2d at 46; *see also* John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 109 (1994).

82. 186 N.W.2d 290, 293 (Wis. 1971).

83. *See id*. at 294-95.

84. *Cf. Wisconsin's Envtl. Decade*, 271 N.W.2d at 74 (focusing on conflict between state and local regulations).

85. *Id*. at 77 (quoting WIS. STAT. § 144.025(1), (2)(a) (1977)).

86. *See* City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (holding Madison's licensing of boats unconstitutional because the use of navigable waters is a matter of statewide concern and can only be regulated by a trustee for all people).

duties; (2) its purpose must be to advance the paramount interests of the public; and (3) it must establish clear limits and definite standards for the delegee to follow.[87]

A trustee cannot "delegate to agents powers vested in the trustee which involve an exercise of judgment and discretion, though the trustee may delegate powers which are purely ministerial."[88] A law which delegates ministerial powers and retains oversight by the state may be constitutional, provided that the delegation meets the other requirements as well. For instance, the legislature may be able to delegate to counties the power to establish dock or pier lines if it also requires the state administrative agency to review and approve the establishment of these lines before they are given legal effect. Oversight by the DNR is an essential component to ensure that the "paramount interest of the state is safeguarded."[89]

In *Muench*, the legislature's attempt to delegate the trust to counties failed because the state did not retain oversight over the delegee and the state did not limit the delegation to ministerial duties. The county board law at issue in *Muench* attempted to delegate to counties the ability to permit the construction of a dam even if it violated the public right to recreation on navigable waters. This law allowed counties to impair public rights and denied the Public Service Commission the ability to intervene to protect these rights.[90] Since this was a complete abdication of the trust, the court held that the delegation was void.[91]

A delegation of the trust that furthers the purpose of the trust, rather than limits the public right to use trust resources, may be upheld because it is not a clear abandonment of the trust.[92] However, the court must closely scrutinize all delegations of the trust to determine that the purpose of the delegation is, in fact, not an abdication of responsibility.[93] In *Village of Elkhart Lake*, the court upheld the delegation, in large part, because it furthered the public interest by restricting the use of motorboats on Lake Elkhart.[94] This regulation was characterized as one that resolved a conflict between competing uses of the lake while protecting public health and safety.

Similarly, in *Village of Menomonee Falls v. Department of Natural Resources*, the court of appeals rejected an argument that the legislature had given a blanket delegation of public trust authority to the village to alter waterways as they saw fit.[95] The Village of Menomonee Falls argued that

87. *See* Menzer v. Village of Elkhart Lake, 186 N.W.2d 290, 294-97 (Wis. 1971); *Muench*, 55 N.W.2d at 46.

88. *Muench*, 55 N.W.2d at 46.

89. *Id*.

90. *See id*.

91. *See id*.

92. *See Village of Elkhart Lake*, 186 N.W.2d at 297.

93. *See id*.

94. *Id*.

95. Village of Menomonee Falls v. Department of Natural Resources, 412 N.W.2d 505, 514 (Wis. Ct. App. 1987) (holding in favor of the state).

Sections 61.34(1) and 61.36 of the Wisconsin Statutes delegated to the village the power to manage and control village affairs, including navigable waters. Thus, the village asserted that it did not need a Chapter 30 permit to undertake its channelization project on Lilly Creek.[96] The court in *Menomonee Falls* distinguished a delegation of "limited authority or responsibility to further proper public interests" from an "assignment of a right to block advancement of paramount interests."[97] The court held that a blanket delegation of power would block the advancement of paramount interests and, as such, was invalid.[98]

Any delegation must be limited and provide definite standards for the delegee to follow.[99] The legislature neglects its duties as trustee if it does not adequately protect the public interest by providing statutory standards for administering the trust.[100] In *Village of Elkhart Lake*, the court held that the delegation was sufficiently limited and well-defined where the statute required any local regulations of boating to conform to the statute and regulate public health and safety.[101] Although the court noted that this case presented a close question because the language of the statute was not clear and unmistakable, it held that the phrase that required regulation "in the interest of public health or safety" gave local governments a definite limit and guideline to follow.[102]

The courts, legislature, and its delegees play important roles in protecting and administering the public trust. The Wisconsin court has developed a clear set of guidelines that set boundaries on the actions of trustees in an effort to ensure equality of access to decisionmaking concerning the trust.[103] The court will more closely scrutinize actions and decisions that appear to threaten the public interest in trust resources, such as decisions to issue lakebed grants, issue permits to act in a way that damages the trust, and delegations to localized decisionmaking bodies. In so doing, the court shows a clear bias toward democratizing the administration of the trust.

C. Public Rights v. Private Rights: Where is the Balance?

Part I.B discussed the role of the courts and the legislature in administering the trust. It assessed the court's function of ensuring that trustees do not abdicate their responsibilities and outlined the constitutional restrictions on the legislature and other trustees. Part I.C will now turn to focus on how the courts have consistently expanded the public trust doctrine to protect greater public rights. This expansion in public rights or the public interest in water started early in the twentieth century, but gathered steam in the 1970s after the

96. *See id*. at 512-13.
97. *Id*. at 515.
98. *See id*. at 514-16.
99. *See* Menzer v. Village of Elkhart Lake, 186 N.W.2d 290, 297 (Wis. 1971).
100. *See* Ashwaubenon v. Public Serv. Comm'n, 125 N.W.2d 647, 654 (Wis. 1963).
101. 186 N.W.2d at 298.
102. *Village of Elkhart Lake*, 186 N.W.2d at 297.
103. *See id*. at 294-97; Muench v. Public Serv. Comm'n, 55 N.W.2d 40, 46 (Wis. 1952).

DNR and the Public Intervenor's Office were created to protect the public trust and Joseph Sax published his seminal article *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.[104] With the expansion of public rights, private rights of riparians and public rights have increasingly come into conflict. Part II.C focuses on the interaction between riparian rights (rights based on property ownership) and public rights (rights based on citizenship), as mediated by the courts. Resolution of these conflicts is largely dependent on how the court defines the public interest in water and the posture of the case before the court. As demonstrated in Part I.B, in cases where the trustee has acted to uphold the trust, the court will generally defer to the agency's interpretation and valuation of the public interest.

1. Evolution of Public Rights in the Navigable Waters of Wisconsin

The public trust encompasses the idea that the public has a right to the free use of the navigable waters of the state. This right is contained in the Wisconsin Constitution and has been continually expanded and broadly interpreted by the courts. What began as a duty to promote navigation and fishing has evolved into a duty to protect and preserve Wisconsin's waters for recreation and scenic beauty.[105]

Many of the statutes that codify the public trust doctrine restrict the DNR's ability to issue permits without first determining whether the activity is in the public interest. The amorphous "public interest" concept establishes a mechanism to consider and broaden water resources protection.[106] As the public's use of navigable waters has changed, so too has the court's definition of the public's interest in water resources. The following discussion focuses on the expansion of the public interest in four areas: recreation, natural beauty,

104. Sax, *supra* note 2.

105. *See* State v. Trudeau, 408 N.W.2d 337, 343 (Wis. 1987); Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69, 74 (Wis. 1978).

106. The public interest concept has also been used by the court as a tool to balance competing uses of water. This may be particularly useful for resolving contemporary conflicts on heavily used lakes in Wisconsin. When recreational uses of water conflict with each other, preservation or restoration of a water body should be the goal that best advances public rights. The Wisconsin Supreme Court aptly stated that:

> [A] lake is many things to many people. The totality of its preciousness as a public asset or state resource is not caught in the uses to which it is put—swimming, fishing, boating (canoeing, rowboating, sailboating, power boating), skin diving, resting, relaxing, just looking and enjoying the view. While all users may concur in not wanting a lake to become an open sewer, the public concern and interest in preventing pollution goes beyond the accommodation of users, actual or potential. It extends to *what is reasonable in the preservation or restoration of a lake* as a valuable natural resource of a state and its people.

Village of Elkhart Lake, 186 N.W.2d at 292 (emphasis added). In practice, the DNR does not resolve conflicting public uses of water in this way. All of the DNR water managers interviewed for this study stated that the DNR does not have an official policy that gives priority to uses that preserve or restore the lake as a valuable natural resource. *See, e.g.*, Response from Interviewee #8 (Feb. 5, 1999) (interview responses are on file with author).

pollution, and shorelands.

a. Recreation

The public right to use navigable waters originated as the right to use the waters for the purpose of navigation and commerce. The changes in public rights over the twentieth century are largely due to changes in lifestyles and the economy. Due to increased leisure time and transportation, recreation on the state's water bodies has increased dramatically. At the turn of the twentieth century, the Wisconsin Supreme Court began expanding the public right to uses of water that were recreational and not just commercial. In 1898, Wisconsin, following both English common law and the United States Supreme Court, recognized that the public right also included the right to fish in navigable waters.[107] In *Diana Shooting Club*, the Court held that the right to hunt on navigable waters is an incident to the right of navigation.[108] "Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation."[109] Similarly, the court recognized "the public's interest in pleasure and sports" and stated that boating for pleasure is considered navigation.[110] Public rights are now broadly defined as encompassing all water-based recreation.[111]

b. Natural Beauty

The public right also includes the right to enjoy natural scenic beauty. Although this right is based in common law, it has also been codified in several statutes. As early as 1929, the Wisconsin Legislature declared in an amendment to the Water Power Law that "[t]he enjoyment of natural scenic beauty is . . . a public right."[112] The court in *Muench* posited that this amendment "was no more than legislative recognition of a previously existing public right which had always existed."[113]

Two decades after *Muench*, the Wisconsin court affirmed the view that the public right to natural beauty exists regardless of statutory codification.[114] In *Claflin v. Department of Natural Resources*, the court reviewed a statute regulating deposits or structures in navigable waters.[115] The statute specifies

107. *See* Willow River Club v. Wade, 76 N.W. 273, 281 (Wis. 1898).

108. *See* Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914).

109. *Id*. at 820.

110. Nekoosa Edwards Paper Co. v. Railroad Comm'n, 228 N.W. 144, 147 (Wis. 1929).

111. *See* Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69, 72 (Wis. 1978); Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 521 (Wis. 1952).

112. Muench v. Public Serv. Comm'n, 55 N.W.2d 40, 43 (Wis. 1952) (quoting 1929 Wis. Laws 523) (internal quotation marks omitted).

113. *Id*.

114. *See* Claflin v. Department of Natural Resources, 206 N.W.2d 392, 398 (Wis. 1973).

115. *See id*. at 397-98 (discussing WIS. STAT. § 30.12(2)(a) (1971)).

that deposits or structures must not be a "material obstruction to navigation" nor "detrimental to the public interest."[116] The court held that a structure can be detrimental to the public interest if it impairs natural beauty; thus, the public has a right to have the state's waters managed under Section 30.12(2) to protect aesthetic values.[117] "The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that natural beauty should be protected as against specific structures that may be found to impair that beauty."[118]

c. Pollution

In order for the public to exercise its rights to use the waters of the state, the waters must be managed to minimize pollution. This rule of law was first articulated in the 1969 case of *Reuter v. Department of Natural Resources*, where the court expressly limited its decision to apply only to permits for the removal of material from the beds of navigable waters.[119] However, by 1972 pollution was fully incorporated as a factor that must be considered by the state in exercising its duty over trust waters.

In *Reuter* two citizens sued the DNR when it granted a permit to another party to dredge an area in a floating bog.[120] The *Reuter* court held that the DNR is required to make a specific finding about the effect of a proposed project on water pollution because pollution makes the waters less useful for public purposes.[121] The court based its decision on the finding that the legislature intended the DNR to create a comprehensive regulatory program to protect the waters of the state, including preventing and controlling water pollution.[122] The court read this requirement in conjunction with the statutory requirement to issue permits that are consistent with the public interest, and determined that the DNR must consider the impacts of pollution on the public interest.[123] However, the court limited its holding to permits sought to remove material from lakebeds, under Section 30.20(2)(c) of the Wisconsin Statutes.[124] Thus, the court held that the DNR must consider pollution when granting a permit to remove material, but not when granting a permit to fill or add a structure to a navigable water.[125]

Three years later, however, the court dissolved that distinction in *Just v.*

116. WIS. STAT. § 30.12(2) (1997).
117. *See Claflin*, 206 N.W.2d at 398.
118. *Id.* (remanding for determination of whether or not single boathouse impairs natural beauty).
119. 168 N.W.2d 860 (Wis. 1969).
120. *See id.*
121. *See id.* at 861-63 (rejecting finding that the issuance of the permit was in the public interest).
122. *See id.* at 861.
123. *See id.*
124. *See id.* at 863.
125. *See id.*

Marinette County.[126] The case arose out of consideration of the state's regulatory authority over shoreland, but the court spoke in broad terms when it declared that the "state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters."[127] The shoreland regulations focus on preventing a riparian from harming public property, and the court clarified that pollution harms public trust property.[128] Emphasizing the significance of natural systems, the court recognized the interrelationship of wetlands, swamps, and shorelands, to the quality of water, and the importance of water quality to the exercise of public rights of navigation and recreation.[129]

Similarly, in *Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources*,[130] the court affirmed the incorporation of preventing pollution into the bundle of public rights protected by the public trust. The court noted that as water-based recreation has increased and water quality has declined, public awareness of the need to stop the deterioration of water quality has risen.[131] "Preventing pollution and protecting the quality of the waters of the state are . . . part of the state's affirmative duty under the 'public trust' doctrine."[132]

d. Shorelands

When the legislature passed the shorelands ordinance, it created a public right to protected shorelands. The court in *Just v. Marinette County* recognized that:

> The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which *the people have a present right*. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.[133]

The public's interest in shoreland and navigable waters was affirmed in the recent Wisconsin Supreme Court case of *State v. Kenosha County Board of Adjustment*.[134] The court declared that the purpose of the shoreland zoning provision requiring a uniform setback from the ordinary high-water mark was to protect the public interest.

126. 201 N.W.2d 761 (Wis. 1972).
127. *Id*. at 768.
128. *See id*.
129. *See id*.
130. 271 N.W.2d 69 (Wis. 1978).
131. *See id*. at 73.
132. *Id*. at 76.
133. 201 N.W.2d at 771 (emphasis added).
134. 577 N.W.2d 813, 819 (Wis. 1998).

2. Public Trust Limitations on the Rights of Riparians

Although Wisconsin allows a riparian to own the beds underlying navigable streams up to the middle of the stream, the riparian's title is limited by the public trust. This means that the riparian merely holds the title subject to the superior public easement for use.[135] Riparian owners take title to such lands with notice of the public trust and subject to the burdens created by it.[136] In fact, it is "beyond the power of the state to alienate [the beds of navigable waters] freed from such [public] rights."[137] The trust responsibility of the state must continue forever.[138] The Wisconsin Supreme Court clarified that, "[a]s long as the state secures for the people all the rights they would be entitled to if it owned the beds of navigable rivers, it fulfills the trust imposed upon it by the organic law which declares that all navigable waters shall be forever free."[139] The public trust doctrine also allows the state to revoke the use rights of riparian owners at any time. "It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount and the rights of others are subject to revocation at the pleasure of the legislature."[140]

Similarly, although a riparian has rights to use the water adjoining his or her property, these rights are limited by the public's right to use the water. Private property rights in water have been delineated in very limited terms: Water "rights" are subject to numerous constraints, from requirements that it be used beneficially to a recognition that the right is merely usufructuary.[141] Riparian rights include the right to use the shoreline, to reasonably use water, and to build piers for navigation.[142] When these riparian rights conflict with public rights that are protected by the public trust, the riparian rights are secondary.[143] In fact, in Wisconsin the rights of the riparian have always been limited by the public right to use navigable water. One of the earliest pronouncements of this limit can be found in *Willow River Club*, where the court stated that the private riparian "has no property in the particles of water flowing in the stream, any more than it has in the air that floats over land."[144]

135. *See* Willow River Club v. Wade, 76 N.W. 273, 280 (Wis. 1898).
136. *See* Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914).
137. *Id*. at 819.
138. *See* Illinois Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901).
139. *Diana Shooting Club*, 145 N.W. at 819.
140. Ashwaubenon v. Public Serv. Comm'n, 125 N.W.2d 647, 653 (Wis. 1963).
141. *See* Sax, *supra* note 57, at 944.
142. *See* Quick, *supra* note 81, at 116.
143. *See id*.
144. 76 N.W. 273, 277 (Wis. 1898); *see also* Nekoosa Edwards Paper Co. v. Railroad Comm'n, 229 N.W. 631, 632 (Wis. 1930) (holding that riparian cannot obstruct navigation or public use of the waters).

3. The Court's Resolution of Conflicting Rights

Given the ever-expanding notion of the public interest in water and the restricted nature of riparian rights, there is a significant tension between the interests of the public user and the private riparian. The court is routinely called upon to resolve these conflicting interests in water and has significantly refined its analysis from the broad and sweeping statement of law given by the court in *Diana Shooting Club* a century ago that the state must keep all navigable waters free for the public.[145]

Although the state cannot alienate trust property, it can permit limited incursions into trust property, such as dredging or filling part of a navigable water body. The Wisconsin Legislature has codified the concept of limited incursions in statutes that require the DNR to regulate enumerated activities that impact navigable waters. Most of the regulations require a showing that the activity is in the public interest or is not detrimental to the public interest before the DNR can issue a permit.[146] The public interest in trust resources provides the basis for the state to choose among competing uses and deny or modify projects that will have significant negative impacts.

The idea of balancing interests in water was articulated in an early twentieth century case. In *Milwaukee v. State*, the court held that the state's duty to keep the waters free did not require the state to leave the shores of Lake Michigan in the same condition they were in prior to white settlement of the territorial area of Wisconsin.[147] The court recognized that most proposed projects on navigable waters adversely impact the public trust, but protecting the public trust does not require keeping water resources in a pristine condition. More likely, the trustees must balance the impacts of proposed projects to determine whether the impacts are so great that they are detrimental to the public interest (in recreation, natural beauty, pollution, and shorelands).

145. 145 N.W. 816 (1914).

146. The DNR must consider the public interest when regulating certain electric generating facilities and high voltage transmission lines, WIS. STAT. § 30.025 (West 1998); enforcing penalties or forfeitures, *id*. § 30.03; waiving provisions of Chapter 30 to avoid duplicating the administration of navigable waters between the state and federal governments, *id*. § 30.06; establishing bulkhead lines, *id*. § 30.11; allowing structures or deposits, *id*. § 30.12; allowing construction and maintenance of bridges, *id*. § 30.123; managing waterfowl habitat, *id*. § 30.124; enlarging and protecting waterways, *id*. § 30.19; granting permits for changing stream courses, *id*. § 30.195; allowing enclosure of navigable waters, *id*. § 30.196; allowing removal of material from beds of navigable waters, *id*. § 30.20; permitting structures or fill on the beds of Lakes Winnebago, Butte de Mortes, Winneconne, and Poygan, *id*. § 30.203; and issuing a general permit for activities under Section 30.12(3)(a) and Sections 30.19(1)(a) to 30.206. This list is not exhaustive.

147. 214 N.W. 820, 831 (Wis. 1927). *But see* Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972) (requiring land to be kept in its natural state). In contrast to *Milwaukee v. State*, the *Just* decision seems to require a showing that filling will not change the natural character of the land, since the court rejected allowing developments on public trust property that changed the natural quality of the land and water. The court asserted that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Just*, 201 N.W.2d at 768.

The courts have created guidelines to either filter out the cases in which there is a clear loss to the public interest or to require the administrative agencies or legislature to provide evidence that the public interest is satisfied.[148] Some courts have required a balancing analysis by the trustee and others have not. The Wisconsin court applies a stricter standard of review to cases in which the trustee's actions appear to jeopardize the trust or show undue influence by localized or private interests over public property. In cases that involve a riparian who is contesting the denial of a permit, the court generally does not balance the competing interests, but defers to the trustees's judgment. By contrast, in cases in which the trustee's decision may threaten the public interest, courts generally require a balancing test. In these cases, however, they do not actually apply the balancing test. Rather, they remand the cases to the trustee to weigh the policy factors.

a. Cases in Which Trustees Acted to Further the Trust

Four significant cases exemplify the court's deference to the decisions of trustees when those decisions protect the public trust: *Hixon v. Public Service Commission*;[149] *Just v. Marinette County*;[150] *Sterlingworth Condominium Ass'n v. Department of Natural Resources*;[151] and *State v. Deetz*.[152] In all of these cases, the court deferred to the judgment of the agency and upheld the decision of the trustee.

In *Hixon v. Public Service Commission*, the court reviewed a controversy brought before it by an aggrieved riparian who had placed fill on the bed of Plum Lake in order to construct a breakwall. The court upheld the Public Service Commission's decision to deny a permit to maintain this breakwater.[153] In so deciding, it upheld the commission's action of merely making a finding that the structure was detrimental to the public interest, without stating the reasons why it was detrimental.[154] Thus, contrary to other rulings,[155] the court in *Hixon* did not require the DNR to explicitly balance competing interests.[156]

148. "[T]he courts have had to fashion for themselves guidelines which will permit the court either to filter out cases in which there is a rather clear loss to the public interest or to thrust back upon administrative agencies or legislatures the responsibility to adduce persuasive evidence that the public interest is not being neglected. Sometimes courts will require that a record be made and data collected in order to satisfy the court directly that every important interest is adequately considered." Sax, *supra* note 2, at 513-14.

149. 146 N.W.2d 577 (Wis. 1966).

150. 201 N.W.2d 761 (Wis. 1972).

151. 556 N.W.2d 791 (Wis. Ct. App. 1996).

152. 224 N.W.2d 407 (Wis. 1974).

153. *See Hixon*, 146 N.W.2d at 578, 589.

154. *See id.* at 586.

155. *See supra* Part I.B (discussing *Muench*).

156. Additionally, *Hixon* stands for the proposition that the state must consider the cumulative impacts of an incursion onto public trust property. The court embraced considerations of cumulative impacts because "[o]ur navigable waters are a precious natural heritage; once gone, they disappear forever." *Id.* at 589. Moreover, the court noted:

Similarly, in *Just v. Marinette County*, a case brought to enjoin the landowners from filling wetlands on their property without first obtaining a conditional use permit as required by the shoreland zoning ordinance, the court decidedly rejected using a test to balance harms and benefits.[157] Although the court recognized that the state allows some changing and filling of public resources, it found that filling is only permissible when it does not harm the public.[158] Thus, harm is not balanced against benefits to the private property owner, but rather, the existence of any harm is sufficient to reject a permit. The court deferred to the trustee's judgment that the landowners' filling activity would harm the public trust. This decision demonstrates the lengths to which the court will go to uphold decisions by the trustees to protect the public trust.[159]

In *Sterlingworth Condominium Ass'n v. Department of Natural Resources*, Sterlingworth Condominium Association (Sterlingworth) sued the DNR to contest limitations on the number of pier slips it could place along its lakeshore.[160] Sterlingworth was a riparian owner who converted an inn into condominiums. The conversion plan included pier development, for which Sterlingworth applied to the DNR for permits. Based on public interest considerations, the DNR issued a permit for twenty-five pier slips, nine less than Sterlingworth requested.[161] The court of appeals in *Sterlingworth*, following *Hixon*, upheld the DNR's consideration of the cumulative impact from an additional nine pier slips. "Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public's interest in the lakes. The potential ecological impacts include direct impacts . . . as well as . . . indirect influences on flora and fauna."[162]

Finally, the *State v. Deetz* case arose when the attorney general sued to

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

Id.

157. 201 N.W.2d 761 (Wis. 1972).

158. *See* Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972).

159. The court's position is far too broad to be a useful analysis for the trustees to use on a regular basis. *See supra* Part II.B.4 (discussing DNR's application of wetland laws). This begs the question of when filling a wetland will not harm the public and will not change the character of the lake. Presumably, if filling a wetland always harmed the public interest, there would not be a regulatory program designed to issue permits for this activity.

160. 556 N.W.2d 791 (Wis. Ct. App. 1996).

161. *See id.* at 794. In order to further the public trust, the Wisconsin Legislature declared it unlawful to place any structure on the bed of a navigable water without a permit or a legislative authorization. *See id.* at 795 (referring to WIS. STAT. § 30.12). Both Sections 30.12 and 30.13 "prohibit structures that are detrimental to the public interest." *Id.* at 796. These sections require the DNR to balance public policy values to determine the impact on the public interest, including "'the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, . . . and to provide for the convenience of riparian owners.'" *Id.* (quoting *Hixon*, 146 N.W.2d at 583).

162. *Id.* at 794.

enjoin certain construction activities that disturbed the land and caused substantial amounts of sand to run off a bluff into Lake Wisconsin.[163] Prior to *Deetz*, Wisconsin courts applied the common enemy doctrine. In sum, this doctrine gave a land owner unlimited and unrestricted legal privilege to "deal with the surface water on his [or her] land as he [or she] pleases, regardless of the harm which he [or she] may thereby cause to others."[164] The common enemy doctrine was developed during the mid-nineteenth and early-twentieth centuries, a time of national expansion. Recognizing that the doctrine no longer fit the social order of the 1970s, the Wisconsin Supreme Court explicitly rejected the doctrine and adopted the reasonable use rule.[165]

Under Section 826 of the Restatement of Torts, a defendant's conduct is unreasonable only if the harm outweighs the utility of the conduct.[166] The court found that the harm caused by Deetz's actions included creating extensive deltas, making parts of the water unusable by the public, and damaging the recreational uses for which the lake is most suitable. Rather than simply finding in favor of the trustee, the court held that it would not allow an incursion into trust property if the harms outweighed the benefits, and remanded the case for findings on the benefits of the project. The court also gave the agency some guidelines for balancing the benefits, saying that residential development should continue to be recognized for its high social utility, and that the reasonable use rule favors land "improvement and development."[167] The court tempered this with the caveat that when land development infringes on the public trust, the economic social utility of development should be given far less value.[168]

The court's decision to remand the case to obtain more information in a situation where the trustee was acting to protect the public trust is unusual but not inexplicable. Unlike other cases that involved the trustee's attempts to protect the public trust, this one involved a significant change in legal theory where the court ultimately rejected the traditional common enemy doctrine. This court may have been uneasy about allowing the state to restrict the property owner's activities without a more in-depth analysis because the law had never before been applied to control damage from non-point source pollution. Moreover, the state's suit against the Deetz's was based on the theory that any interference with navigable waters, irrespective of the cause of the interference, is a nuisance and must be abated. The court held that the public trust doctrine only provides standing for the trustee to maintain a cause of action, but in order to prevail on the cause of action there must be a violation of

163. 224 N.W.2d 407 (Wis. 1974).

164. *Id*. at 411 (quoting S.V. Kinyon & R.C. McClure, *Interferences with Surface Water*, 24 MINN. L. REV. 898 (1990)).

165. *See id*. at 413-17.

166. *See id*. at 416.

167. *Id*. at 417.

168. *See id*.

a specific statute or common law right. Unlike the decisions of the trustee at issue in *Hixon*, *Just*, and *Sterlingworth*, which involved settled areas of law, the non-point source pollution from the Deetz's property was not clearly a violation of any specific statute or common law right.

b. Cases in Which Trustees Appeared to Jeopardize the Trust

Two primary cases exemplify the court's hesitancy to accept a trustee's decision to allow a riparian to proceed with a project that could endanger the public interest in water: *Muench v. Public Service Commission*[169] and *Reuter v. Department of Natural Resources*.[170] In both of these cases, the court did not explicitly deny the ability of the riparian to proceed with his or her proposed activity, but remanded the cases back to the trustees to build a record that would more clearly show that the public interest would not be impaired.

The *Muench* controversy was brought before the court by V. J. Muench, President of the State Division of the Izaak Walton League, who sought review of the Public Service Commission's decision to authorize the Namekagon Hydro Company to construct a dam on the Namekagon River. The *Muench* Court emphasized the importance of aesthetics and remanded the case to the Public Service Commission to make specific findings about the project's impact on scenic beauty. The court required the Commission to find whether public rights to recreation outweighed public benefits from the dam.[171] It should also be noted that the balancing of rights and benefits required by the court did not involve considering the economic benefits to the Namekagon Hydro Company but the benefits to the public.[172]

Likewise, the controversy in *Reuter* was brought before the court when two citizens sued the DNR after it granted a permit to another party to dredge an area in a floating bog.[173] The court rejected the DNR's finding that the permit was consistent with the public interest and directed the DNR to make a specific finding about the impacts of the proposed project on water pollution because pollution makes the waters less useful for public purposes.[174] The court warned the DNR that it would reject the issuance of the permit if the project negatively impacted water quality. Accordingly, the court remanded the case to

169. 53 N.W.2d 514 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952).

170. 168 N.W.2d 860 (Wis. 1969).

171. *See Muench*, 53 N.W.2d at 525. This balancing test is consistent with the specific statutory requirement that the permitting agency consider both the aesthetic and economic effects of the proposal and deny the permit if the economic need for electricity is less than the value of recreation and scenic beauty. *See* WIS. STAT. § 31.06(3). Accordingly, *Muench* should not be read to require a balancing of public rights against economic benefits in all cases involving the public trust.

172. We will never know how the Public Service Commission would have balanced these competing interests in water because the project proponent withdrew its permit application on December 20, 1955. *See* Letter from Glen H. Bell, Attorney, Aberg, Bell, Blake & Conrad, to Public Service Commission of Wisconsin (Dec. 20, 1955) (on file with Department of Natural Resources).

173. 168 N.W.2d at 860.

174. *See id.* at 862-63.

the DNR to make findings on the pollution that would be generated by dredging an area of a floating bog.[175]

From this review of the case law, it appears that public rights are continually expanding, and riparian rights are extremely limited when they come into conflict with the public interest in water. Further, the court will generally support any decision by the trustee that protects the public trust and restricts riparian's activities. When the trustee appears to jeopardize the trust, courts will generally remand the case back to the agency for further development of the evidence to prove that the project will not injure the public interest.

If one read only these cases, one would think that the DNR had broad reign to regulate riparians whose projects would adversely impact the public trust. Since the DNR rarely loses a case in which it has acted to uphold the public trust, one might assume that the DNR would take these decisions as a mandate to implement an aggressive regulatory program on navigable waters. Another hypothesis is that these decisions, which broadly favor public rights, will produce a flurry of activity by private property proponents to restrain the more political branches of government (the legislature and the DNR)[176] from regulating riparians to the full extent of their authority to do so.

II

THE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN WISCONSIN

Part I focused primarily on the role of the court in defining and protecting the public trust, and the restrictions the courts place on the legislature, the DNR, and riparians. As Part I demonstrates, the DNR has broad authority to implement the regulatory program designed to protect the public interest in the navigable waters of the state. When a DNR decision to uphold the trust is challenged in court, the court generally defers to the agency's policy judgment and supports the agency's resolution of the conflict. Moreover, the public trust doctrine is based on the Wisconsin Constitution. In light of this combination of factors, one could reasonably assume that the public trust will be fairly insulated from the ebb and flow of political tides. Indeed, some may worry that the court's broad support for agency decisions protecting the trust is a recipe for agency abuse of power and infringements on private property. This Part demonstrates that this is not the case.

The shortcoming of simply analyzing court decisions is that the published opinions cannot describe how the trust is actually administered on a daily basis. Regulators make thousands of decisions every year about the trust that never reach a court of law. Thus, only through qualitative research interviews with the trustees can one discern how decisions regarding the trust are regularly

175. *See id*.

176. The DNR Secretary is a political appointee of the Governor and, unlike the judicial branch, under the direct political control of the Governor.

made.[177]

Data gathered from research interviews with the Water Management Specialists (WMSs) who are employed by the DNR show that there is a significant disconnect between legal theory and reality. In reality, the current regulations are insufficient to protect the waters of the state from the increasing impacts of shoreland development, non-point source pollution, and increasing recreational uses of lakes and rivers. Further, WMSs face numerous pressures that prevent them from implementing the type of regulatory program that has been approved by the court. The facts that the public trust doctrine is rooted in Wisconsin's Constitution and that the court generally supports agency decisions protecting the trust have not insulated the doctrine's implementation from significant political pressure.

One might argue that the agency should not be protected from political pressure, and that such pressure serves the important function of restraining the agency from infringing on private property rights. The extent to which an agency *should* be subject to political pressure is a highly debatable question that could be the subject of an entire Comment. This Comment does not answer the question of how much political influence is too much, but rather describes the important role that political pressure plays in shaping the behavior of the WMSs. This Comment asks whether the level of political pressure exerted on WMSs is a positive counterbalance on the agency or is a promotion of the type of localized and privatized interests that the court has adamantly held should not influence the administration of the trust.[178]

Part II.A outlines the general authority of the DNR to regulate navigable waters and the role of WMSs in protecting the trust. Part II.B assesses the main threats to water resources in Wisconsin, as identified by the trustees, and whether the trust doctrine is actually being used to protect the waters of the state from contemporary threats. This Section analyzes how trustees interpret their regulatory jurisdiction under current laws and their ability to use the public trust doctrine to protect public rights in the navigable waters of the state. Part II.C discusses the pressures that WMSs face in carrying out their role as

177. Part II of this Comment is based largely on narratives obtained in research interviews with the DNR staff who administer the state laws that regulate the use of navigable waters. *See supra* note 1. The author interviewed eighteen of the twenty-eight Water Management Specialists (WMSs) in Wisconsin. In order to insure confidentiality, the interviewees are not mentioned by name and details that would reveal the counties they supervise have been extracted. The author uses the masculine pronoun to refer to WMSs in order to further conceal their identity. With the exception of one interview with the Secretary of the DNR and a staff attorney, the author only interviewed WMSs and not upper-level managers. Thus, this Comment largely reflects the perspective of the field staff and does not purport to give multiple perspectives on the issues raised in it. There will always be a variety of perspectives on events, and no one person holds the truth. The author's purpose in limiting this research to the field staff was to show their beliefs and motivations, for those are what influence their decisions about how to manage our trust resources.

178. *See, e.g.*, Priewe v. Wisconsin State Land & Improvement Co., 67 N.W. 918 (Wis. 1896); City of Madison v. State, 83 N.W.2d 674 (Wis. 1957); Muench v. Public Serv. Comm'n, 55 N.W.2d 40 (1952).

trustee.

A. The Role of Wisconsin's Department of Natural Resources and Its Water Management Specialists

The Wisconsin Legislature created the DNR in 1965 to protect the waters of the state.[179] Clearly, the legislature intended to delegate broad responsibility for the administration of the trust to the DNR and establish the DNR as "'the central unit of state government' with 'general supervision and control over the waters of the state.'"[180] The legislature required the DNR to create a "comprehensive action program . . . to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water."[181]

The legislature also created a regulatory program to control certain activities that impact navigable waters and gave the DNR the authority to implement this program.[182] Among other things, it requires permits to enlarge or dredge waterways, deposit fill on a lakebed, and construct bridges.[183] Under this program, the DNR receives permit applications from riparians whose projects will impact navigable waters, and the DNR must balance all of the project's impacts and determine whether the project is consistent with the public interest in water. The DNR has a duty as trustee of the state's waters to prevent riparians from acting in ways that are detrimental to the public interest in trust resources.

The DNR employs Water Management Specialists (WMSs) to implement this regulatory program. WMSs are field staff based throughout Wisconsin who regulate incursions into the navigable waters of the state. They administer the regulatory program required under Chapters 30 and 31 and associated administrative codes, implement Section 404 of the Clean Water Act (CWA) (regulating wetlands), and provide technical assistance to counties and municipalities in their implementation of shoreland, wetland, and floodplain zoning.[184] In other words, WMSs are called upon to make daily determinations about whether a riparian's proposed activity is detrimental to the public interest.

179. *See* Reuter v. Department of Natural Resources, 168 N.W.2d 860, 861 (Wis. 1969) (citing to 1965 Wis. Laws 614 (codified at WIS. STAT. § 144.025 (1965))).

180. Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69, 77 (Wis. 1978) (quoting WIS. STAT. § 144.025(1), (2)(a)).

181. *Reuter*, 168 N.W.2d at 861 (quoting WIS. STAT. § 144.025(1)).

182. This regulatory program is found primarily in Chapters 30 and 31 of Wisconsin's Statutes.

183. *See supra* note 146.

184. The waters of the state are also regulated under other programs such as the Wisconsin Pollution Discharge Elimination System under the Clean Water Act, water oriented acquisition, and wetland restoration. However, only the WMSs, who are implementing the navigable waters protection laws, do an explicit balancing of the project against the public interest in water, such as natural beauty, recreation, etc. Accordingly, this research is limited to the WMSs and does not gather information from the other field staff who implement other water-based programs.

B. The Power of the Public Trust Doctrine to Protect Public Resources

Part II.B describes the main threats to the water resources of Wisconsin as identified by the WMSs. It then assesses whether WMSs use the public trust doctrine to protect the public interest in water against those threats. The public trust doctrine may theoretically have considerable potential to protect water resources. Yet, it is essential to understand how the doctrine is actually used by WMSs to assess whether the doctrine is a useful tool to address contemporary water management problems. A fundamental question that this Section seeks to answer is whether the WMSs see the current Wisconsin statutes and codes as useful tools to adequately protect the public trust.

1. Contemporary Threats to Water Resources[185]

Every WMS interviewed readily identified the main threats to the water resources in his or her area of supervision. Their responses suggest that there are five categories of threats, with the vast majority of interviewees citing shoreland development as the most significant threat, followed by agriculture. The threats identified by WMSs are listed in order of importance: (1) shoreland development; (2) agriculture and aquaculture; (3) private fish ponds, dams, and other structures; (4) urbanization and toxic pollution; and (5) boat traffic. This Section will identify how these activities impair water resources and the following Section will analyze how the public trust doctrine is actually employed to alleviate these impairments.

a. Shoreland Development

All but one WMS identified shoreland development as the main threat to water resources.[186] Shoreland development directly impacts the public interest in water resources because it leads to the incremental loss, degradation, and fragmentation of upland and aquatic habitat; leads to the loss of riparian corridors for terrestrial wildlife; alters or destroys wetlands; and causes non-point source[187] and point source pollution.

185. The following Section identifies and describes what the WMSs see as the main threats to water resources in Wisconsin. The author did not collect scientific data to verify whether these are indeed the greatest threats to Wisconsin's water resources, but instead deferred to the expertise of the field staff who are working with these resources every day.

186. *See* Responses from Interviewees #1-18.

187. During construction, the primary non-point source problem associated with shoreland development is run-off of sediments due to exposed soil surfaces. After construction, the problem is the increased temperature, speed, and volume of run-off due to increased impervious surfaces. Some WMSs observed that there are extensive sedimentation and erosion problems caused by contractors who are building "massive subdivisions." Response from Interviewee #14 (Jan. 29, 1999). In one region, local drainage districts typically suggest dredging to "solve the sedimentation problem." According to one WMS, the dredging is not done well and causes resedimentation. *See id.* One other WMS linked problems of sedimentation and erosion to the practice of installing riprap along the shore as well as dredging. *See* Response from Interviewee #12 (Feb. 12, 1999).

Two socioeconomic changes appear to fuel the engine behind shoreland destruction: increased disposable income and increased interest in "sanitizing" the natural environment. Increased amounts of disposable income both within Wisconsin and from people living in the neighboring cities of Minneapolis/St. Paul and Chicago have led to an increased construction of second homes, condominiums, hotels, golf courses, and marinas. Additionally, greater affluence has led to changes in recreational choices. Many people have switched from canoeing and using small fishing boats to using larger boats and owning multiple engine-powered watercrafts. Not surprisingly, people who own larger boats want to put in bigger docks, boat shelters, and seawalls.[188] This is compounded by the fact that in many areas all of the desirable waterfront properties have already been developed, so people are now trying to build houses on wetlands and back bays. These lands, which were once considered "less desirable" areas for development, are the most valuable lands for biology, wildlife, and scenic beauty.[189] Moreover, many owners of vacation homes want to recreate a familiar suburban environment in formerly natural areas. As one WMS observed, "Some lakefront property owners want a swimming pool with fish in it."[190] Another WMS passionately complained that "developers think they can alter everything—they tear out vegetation, put in seawalls, plant grass up to the edge of the shore, and fertilize the hell out of it."[191] This type of development leads to significant alterations of shore lots "to the point where you can no longer see the natural shoreline."[192]

b. Agriculture and Aquaculture

WMSs identified agriculture and aquaculture as the second greatest threat to water resources across the state. Many agricultural practices increase the amount of nutrients and sediments that run off into waterways. These non-point source pollutants degrade water quality.[193] WMSs in rural areas found that farmers treat streams as nothing more than conduits to drain water off land quickly. Although buffer strips would slow the run-off, help filter chemicals and sediments, and increase shading, very few farmers use buffer strips.[194] Many dairy farmers allow their cows to graze the stream banks and walk in streams. This increases erosion and sedimentation.[195]

188. *See* Response from Interviewee #3 (Feb. 10, 1999).

189. *See* Response from Interviewee #6 (Feb. 5, 1999).

190. *Id*.

191. Response from Interviewee #8 (Feb. 5, 1999).

192. Response from Interviewee #4 (Feb. 10, 1999).

193. *See* UNITED STATES ENVTL. PROTECTION AGENCY, CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA'S WATERS 9-10 (1998).

194. *See* FOREST SERVICE, UNITED STATES DEP'T OF AGRIC., RIPARIAN FOREST BUFFERS: FUNCTION AND DESIGN FOR PROTECTION AND ENHANCEMENT OF WATER RESOURCES 1 (1991). A buffer strip is an intact, permanently vegetated corridor on both sides of a waterway.

195. *See* Response from Interviewee #14 (Jan. 29, 1999).

Cranberry farming, in particular, can be very destructive to water resources. Cranberry growers adversely impact wetlands, water quality, and water quantity. Cranberries are grown on wetlands that have either been filled or flooded.[196] Since these farmers are exempt from Chapters 30 and 31, they are able to withdraw large quantities of water from streams without a permit.[197] When this water is discharged back into the stream, the return flow from cranberry operations contains elevated concentrations of pesticides and fertilizers, sometimes causing fish kills downstream.

Aquaculture operations similarly adversely impact water resources. These operations reduce the water level of streams by diverting significant quantities of water. Then, like cranberry farms, they discharge warmer water back into the stream that is of questionable quality.

c. Private Fish Ponds, Dams, and Other Structures

The third largest threat that WMSs identified is alterations to waterbodies to create private ponds, dams, and other structures. Requests to build private fish ponds are increasing in most regions of Wisconsin. Private parties create ponds by either damming a creek or altering a wetland.[198] Damming creeks, even those that are not navigable, can have measurable impacts on navigable waters downstream. Dams increase the temperature of the water in the impoundment. The discharge of the warmer water alters the temperature of the water in the downstream reach enough to change the fish composition in that reach.[199] One WMS observed that "we have lost a lot of cold water trout streams because farmers have dammed the headwaters."[200] Dams, whether used for creating ponds or other purposes, have caused a loss of fish and wildlife habitat.[201]

d. Urbanization and Toxic Pollution

A water resources threat that is increasing in three regions of the state is urbanization. Urbanization causes numerous adverse impacts when not adequately designed to protect water resources. A stream becomes urbanized by increasing the amount of impervious surfaces in the area and creating gutters

196. *See* Response from Interviewee #7 (Feb. 5, 1999).

197. *See* WIS. STAT. § 94.26 (1998) ("Any person owning lands adapted to the culture of cranberries may build and maintain on any land owned by the person such dams . . . or ditch as shall be necessary for the purpose of flowing such lands . . . .").

198. This is especially problematic in the driftless area of Wisconsin (areas which were not covered by glaciers in the last glacial period), where people want to dam significant springs to create private fish ponds.

199. *See* BOB DOPPELT ET AL., ENTERING THE WATERSHED: A NEW APPROACH TO SAVE AMERICA'S RIVER ECOSYSTEMS 16-18 (1993); *see also* N. LeRoy Poff et al., *The Natural Flow Regime*, 47 BIOSCI. 769 (1997).

200. Response from Interviewee #10 (Feb. 4, 1999).

201. *See* Response from Interviewee #1 (Feb. 11, 1999).

that allow storm water run-off to discharge directly into the stream. This increases stream temperature, sediment loading, and the frequency of flash floods.[202] Not only is development pressure increasing, but the long-term problems of persistent toxins are becoming more apparent. Two large toxic pollution problems that threaten the health of water resources are hot spots in Lake Superior from past industrial uses by a gasification plant on the shore of the lake[203] and widespread PCB contamination along the lower Fox River from Menasha to Green Bay.

e. Boat traffic

Although navigation for commerce and recreation is protected by the public trust, some WMSs identified increasing boat traffic as a threat to water resources. This is essentially the problem of protecting the public trust from itself. Not only are the numbers of boats increasing, but the engine sizes and speeds are also increasing on many water bodies. This increased activity erodes the shoreline of lakes and rivers, causing problems with sedimentation of public waters, as well as causing riparians to expend large amounts of money on erosion controls. Although many waterbodies are impacted by this, WMSs identified two areas that have significant problems with boat traffic. One is the Wolf River where recreational boating is only regulated on weekends.[204] The other is the Mississippi River where the use of commercial barges has expanded.

2. Is the Public Trust Doctrine Used to Control These Threats?

Public interest considerations could give WMSs the ability to fill in the regulatory gaps left by other laws designed to protect navigable waters, such as the Clean Water Act (CWA). For instance, under its public interest analysis, the DNR could consider the impact of non-point source pollution from activities regulated by Chapters 30 and 31 even though it has limited authority to regulate these impacts under the CWA. This Section will show that some WMSs have used the trust doctrine in this manner, but the trustees see significant limitations on their jurisdiction to prevent activities that jeopardize the trust.

When the WMSs were asked whether they used the public trust to protect waterbodies from the threats they had identified above, all of them quickly responded in the affirmative. This immediate "yes" does not accurately describe the situation, however, because when the interviewee was asked to provide an example of how he or she has used the public trust to counterbalance these threats, the answers centered more on where the law falls

202. *See* Ken Schreiber et al., Kinnickkinnic River Priority Watershed Surface Water Resource Appraisal Report (1998).

203. *See* Response from Interviewee #17 (Jan. 27, 1999).

204. *See* Response from Interviewee #3, *supra* note 188.

short. The following is a summary of how WMSs view the reach of the law for every threat discussed above.

a. Shoreland Development

WMSs believe that they have limited jurisdiction to control shoreland housing development despite its adverse impact on public trust resources. Building a single home or a residential development is not, per se, regulated by the WMSs unless part of the project falls into one of the statute's categories of regulated activities. Chapters 30 and 31 of the Wisconsin Statutes require permits for certain enumerated activities such as grading, dredging, or filling a water body. One WMS explained that if a subdivision developer was going to grade "a slope that drains to a navigable stream," then he would require a permit under Section 30.19 of the Wisconsin Statutes and would assess the impacts of that part of the development on the public interest.[205] If the grading project is on a slope that drains to a wetland that is connected to a navigable water, then the DNR can also control the project under its administrative rules on wetlands.[206] To require a permit for grading, however, the area to be graded must be greater than ten thousand square feet.[207]

When the DNR does have jurisdiction over a development, the public trust doctrine's persuasive value may be as important as the environmental impacts that it allows resource managers to analyze. Some WMSs have found it useful to refer to their general responsibilities as trustees of the state's waters when they are involved in confrontations with developers or politicians. They are able to use the general authority of the doctrine as a rationale for their decisions.[208]

The public trust doctrine also allows WMSs to consider the full impacts of a development. In Northern Wisconsin, one WMS uses the public trust to prevent dredging and filling of lakebeds, as well as to limit the removal of shore cover.[209] When proponents of a large marina wanted to increase the number of boat slips by 100, he was able to oppose the project based on the public trust doctrine as codified in Chapter 30. He contends that once there is a permit required under chapter 30, WMSs are able to consider all of the impacts that a development will have on the public interest in water. To undertake the expansion, the marina needed to get a Section 30.20 permit to dredge. The WMS analyzed the site and successfully opposed the project because the dredging would have removed aquatic plant bed that supported twenty-five species of fish.[210]

205. Response from Interviewee #16 (Jan. 28, 1999).
206. *See id.*; *see also* WIS. ADMIN. CODE § 103 (1999).
207. *See* Response from Interviewee #2 (Feb. 8, 1999).
208. *See* Response from Interviewee #14, *supra* note 187.
209. *See* Response from Interviewee #17, *supra* note 203.
210. *See id.*

In some areas where all of the desirable properties have already been developed, there is more pressure to develop wetlands and back bays. This is a scenario that WMSs "deal with all the time."[211] One WMS described a recent situation where an applicant bought "mucky" property that contained a unique wetland. The property owner wanted to dredge the lake, remove the vegetation and muck, and deposit sand for a beach. The WMS was able to deny the permit based on precedent found in *Just* and *Bleck* which supported the conclusion that the project was inconsistent with public rights.[212] The alterations would have made no improvement to navigation and would have destroyed water quality, natural habitat, and the fishery. The WMS also considered this project in the context of all the other impacts that were already occurring on the lake and found that the cumulative impacts would have been too great. In his opinion, "This was an unreasonable use of the property because the property owner was attempting to convert an area that was rich in species diversity into a homogeneous, sandy beach."[213] In that case, the project proponent appealed the denial and an administrative law judge, considering the undisputed expert testimony on these impacts, upheld the permit denial.[214]

In some regions, the taking of public lakebed for private structures is a recurring problem. In one of these regions, a WMS objected to a proposal to construct a 325 foot breakwall. The Hearing Examiner ultimately denied the permit, finding that the project would be detrimental to the public interest because it would adversely impact water quality, increase erosion, and destroy habitat. Thus, this was clearly "an unreasonable use of land for a private purpose."[215]

A final shoreland development pressure is the desire of riparians to build numerous boat slips and large decks over the water.[216] Some WMSs rely on the public trust in order to analyze the cumulative impacts of these projects on natural scenic beauty and public access. "We won't permit decks or excessive pier slips (that is, those beyond a reasonable use) because of the impacts on the public trust."[217]

Although WMSs use the public trust doctrine to limit the adverse impacts of shoreland development, the current statutes fall short of truly protecting the resources for public use. Many shoreland developments may comply with

211. Response from Interviewee #6, *supra* note 189.

212. *See id*. (citing State v. Bleck, 338 N.W.2d 492 (Wis. 1983), and Just v. Marinette, 201 N.W.2d 761 (Wis. 1972)). Note that the WMS was able to deny this permit because Wisconsin Statutes Section 30.20, unlike most other sections of Chapter 30, allows a WMS to deny a permit rather than leave that decision up to a Hearing Examiner. *See* WIS. STAT. § 30.02 (1998). The DNR interprets this statutory language to mean that a WMS cannot deny a permit without a hearing. *See* Response from Interviewee #20 (Mar. 16, 1999).

213. Response from Interviewee #6, *supra* note 189.

214. *See id*.

215. Response from Interviewee #15 (Jan. 29, 1999).

216. *See* Response from Interviewee #8, *supra* note 106.

217. *Id*.

Wisconsin's statutes and local ordinances, while at the same time they impair the public interest in water.[218] All of the WMSs recognized that the current law leaves tremendous gaps in their ability to protect the public trust from damage caused by shoreland development.[219] One WMS summed up their concerns, "We are distributing Band-Aids. Water quality is not improving. We are just creating a paper trail showing how the resource was destroyed."[220]

WMSs are unable to regulate a housing development that does not physically alter a water body and grades less than ten thousand square feet.[221] Most WMSs recognized, based on experience and scientific data, that these projects will adversely impact the public trust by increasing storm water run-off and destroying wildlife habitat, among other things. Furthermore, even if a project requires greater than ten thousand square feet of grading, one very experienced WMS pointed out that Section 30.19 only requires a grading permit for grading that is adjacent to or on the bank of a navigable water.[222] He went on to explain that the bank is "any continuous uninterrupted slope," and since there is no numerical distance set he is cautious about applying this Section to any riparians.[223] In his opinion, grading one thousand feet from a navigable water is "too far away" for him to require a permit.[224] Upon further discussion, he reflected that in his greater than ten years of experience he has never denied a grading permit under Section 30.19, partly due to problems with knowing when it applies and partly due to the fact that procedurally "only a Hearing Examiner can deny these permits."[225]

Confusion over the reach of the agency's jurisdiction does not only impact its administration of grading permits, it similarly plagues the administration of other statutes. For instance, although one WMS claimed that he used the public trust to limit the removal of shore cover,[226] that view was not widely held. A WMS in a different region thought that there was little he could do to limit the removal of shore cover. He asserted that removal of shore cover was only regulated by local zoning, and as long as the land owner does not clearcut, he or she is in compliance with local zoning.[227] Another WMS concurred with this. He said that he had "no regulatory authority to prevent the cutting of upland or aquatic vegetation" even though it is detrimental to the public interest because it destroys habitat and increases erosion.[228] He felt that the only approach he could take was educational, so he works with the

218. *See* Response from Interviewee #17, *supra* note 203.
219. *See, e.g.*, Response from Interviewee #13 (Feb. 1, 1999).
220. Response from Interviewee #4, *supra* note 192.
221. *See* WIS. STAT. ANN. § 30.19 (West 1998).
222. *See id.*
223. Response from Interviewee #5 (Feb. 8, 1999).
224. *Id.*
225. *Id.*
226. *See* Response from Interviewee #17, *supra* note 203.
227. *See* Response from Interviewee #2, *supra* note 207.
228. Response from Interviewee #12 (Feb. 3, 1999).

University of Wisconsin-Extension to educate land owners about the importance of buffer strips.

Moreover, one WMS explained that unless a project is larger than five acres, the DNR will not require a storm water permit.[229] Even when the project is large enough to require a storm water permit, some WMSs are concerned that there simply are not enough staffers to handle the workload, and that the standards for storm water permits do not protect the public interest. One WMS explained that the engineer in Madison who issues these permits only looks at water quality, not water quantity or the public interest.[230] Another WMS observed that the DNR has understaffed the storm water program. In his region there is one person who issues storm water permits for seventeen counties in addition to issuing CWA discharge permits for fifteen point sources, "so obviously this issue isn't getting the attention it should."[231]

When faced with shoreland development situations where WMSs do not have statutory jurisdiction, their reactions fall along a wide continuum from taking no action to finding other agencies with jurisdiction to act. Of the fourteen WMSs who were asked whether they had a responsibility as a trustee of the waters to take some action on shoreland development projects where they did not have jurisdiction, 71% answered yes and 29% answered no.[232] Of the 71% who felt a responsibility to take action, their reactions followed three general themes focusing on local zoning, education, and the jurisdiction of sister agencies.[233]

First, some WMSs advocate for the public trust on the local government zoning level. They go to zoning meetings and submit comments on the environmental consequences of the project.[234] They also encourage local governments to adopt stricter regulations.[235] Second, other WMSs make an effort to educate landowners and convince them not to take action or to choose a less environmentally destructive alternative.[236] Third, one WMS searches for another agency that has jurisdiction and informs them of the situation.[237]

By contrast, all of the WMSs who felt they did not have a responsibility to take action based their position on the rationale that they cannot do anything if the DNR does not have jurisdiction.[238] Unlike the WMSs above who rely on

229. *See* Response from Interviewee #2, *supra* note 207.

230. *See id*.

231. Response from Interviewee #4, *supra* note 192.

232. *See* Responses from all Interviewees except #1, 3, and 9.

233. *See id*.

234. *See* Response from Interviewee #14, *supra* note 195; Response from Interviewee #12, *supra* note 228; Response from Interviewee #8, *supra* note 106; Response from Interviewee #7, *supra* note 196.

235. *See* Response from Interviewee #2, *supra* note 207.

236. *See* Response from Interviewee #11 (Feb. 2, 1999); Response from Interviewee #10, *supra* note 200; Response from Interviewee #5, *supra* note 224.

237. *See* Response from Interviewee #5, *supra* note 224.

238. *See* Response from Interviewee #17, *supra* note 203; Response from Interviewee #15, *supra* note 215.

educating property owners in the absence of jurisdiction, these WMSs thought that they would "break the law" if they "did not have statutory jurisdiction and tried to tell a land owner what to do."[239] These WMSs tended to highlight divisions in jurisdiction and did not recognize the persuasive impact they could have on riparians. They felt that since shoreland zoning is a local government issue, they should not try to influence local decisions at all. Two spoke in terms that indicated that they erroneously believed that the DNR had no supervision over administration of the public trust. One said that "we [the DNR] rely on the local government to regulate the trust for the most part,"[240] while the other claimed that "there is nothing we can do" if the local governments give permits under their shoreland zoning ordinances.[241] "Citizen groups are the only entities who can stop this."[242]

b. Agriculture and Aquaculture

WMSs uniformly stated that they have very limited regulatory authority over agriculture and aquaculture. Agriculture is exempt from several laws designed to protect the public trust.[243] Under Section 30.20 of the Wisconsin Statutes, the DNR can, however, regulate dredging projects that will impact a cold water fishery or that are on waterways that are not drainage ditches.

One WMS described what he considered a "common example" of how to use the public trust to prevent natural resource damage by agriculture.[244] When he discovers that a farmer wants to dredge a water course, he checks old maps to see if the waterway has historically been mapped as a perennial stream. If it has, then the DNR has jurisdiction, and this WMS will try to persuade the farmer to withdraw his permit application because of the direct, indirect, and cumulative impacts that the dredging will have on downstream fisheries.[245]

By contrast, aquaculture is not exempt from Chapter 30. WMSs use Chapter 30 to regulate commercial aquaculture operations. In the case of aquaculture, some WMSs contend that Chapter 30 and the public trust doctrine allow the DNR to go further than the CWA. One WMS observed that DNR regulators who implement the CWA do not require discharge permits for aquaculture operations. They have interpreted the CWA to allow unpermitted discharges up to a certain level, and the discharges of many aquaculture operations are just under that level.[246] Although the DNR has not required CWA discharge permits for aquaculture, one WMS used the language in

239. Response from Interviewee #4, *supra* note 192.
240. Response from Interviewee #13, *supra* note 219.
241. Response from Interviewee #17, *supra* note 203
242. *Id*.; *see also* Part II.B.3 (discussing local zoning issues).
243. *See, e.g*., WIS. STAT. ANN. §§ 30.19, 30.20, 31.02(6)-(9), 94.26 (West 1998).
244. Response from Interviewee #1, *supra* note 201.
245. *See id*..
246. *See* Response from Interviewee #16, *supra* note 205. Contrary to this WMSs' perception, 40 C.F.R. § 122.25 (1998) actually requires states to regulate aquaculture through its NPDES program.

Section 30.19 that discusses pollution to support permit conditions requiring the project proponent to sample and report discharges.[247] This use of the public trust doctrine may be coming to a close, however. In 1999, there was a proposed bill to exempt aquaculture from Chapter 30 and to transfer all regulatory oversight over aquaculture from the DNR to the Wisconsin Department of Agriculture, Trade and Consumer Protection.[248] Ultimately, this proposal was defeated.[249]

Since agriculture is for the most part exempt from Chapters 30 and 31, most WMSs contend that non-point source pollution from farms, although classified as a main threat to water resources, could not be limited by the public trust doctrine.[250] For example, Chapter 30 does not prohibit stream grazing by dairy cows despite the negative impact that cows have on water quality.[251] Another problem is that Best Management Practices (BMPs) to reduce non-point source pollution are voluntary and are only temporary.[252] One WMS observed that farmers are able to get cost-share financing to implement BMPs, but that there is no long-term contract to ensure that a farmer continues to use the BMPs.[253]

Further, cranberry farms are exempt from Section 30 and 31 of the Wisconsin Statutes despite the fact that these farms withdraw large quantities of water and discharge water that contains elevated levels of pollutants.[254] One WMS lamented the fact that "the waste water regulators have determined that the discharge from these farms cannot be regulated as waste water."[255] Although cranberry farms are exempt from regulations of dams and water diversions, they can be regulated under the CWA if they alter wetlands. Under the CWA, when the Corps of Engineers has jurisdiction over a cranberry farm's wetland alteration, the DNR reviews the project and issues or denies a water quality certification.[256] When WMSs review the project for certification they can and do base their decisions on the public trust doctrine. One WMS said that

247. Response from Interviewee #16, *supra* note 205. The language on pollution contained in Section 30.19 has been used for other projects to allow the DNR to review the non-point source and temperature impacts of numerous proposals. This has not been used to regulate discharges from cranberry farms because cranberry farms are specifically exempted from regulation by Section 94.26 of the Wisconsin Statutes.

248. *See* Response from Interviewee #20, supra note 212.

249. See *infra* Part II.C.2.b for further discussion of political limits on the trust.

250. *See, e.g.*, Response from Interviewee #10, *supra* note 200.

251. *See id.*

252. *See* Response from Interviewee #4, *supra* note 192.

253. *See id.*

254. WIS. STAT. ANN. § 94.26 (West 1998) (exempting cranberry farmers); *see also* Tenpas v. Department of Natural Resources, 436 N.W.2d 297 (Wis. 1989) (holding laws requiring financial responsibility of dam transferees and proof of ability to maintain dams inapplicable to cranberry growers); State v. Zawistowski, 290 N.W.2d 303 (Wis. 1980) (holding that allowing water diversions by cranberry operations without a permit, but within the limits of the reasonable use doctrine, does not violate the Equal Protection Clause).

255. Response from Interviewee #7, *supra* note 196.

256. *See* Response from Interviewee #14, *supra* note 195.

he looks at the impacts of the project on the resource and tries to "protect it for the public."[257]

c. Private Fish Ponds, Dams, and Other Structures

If a party wants to dam a spring in order to create a pond, he or she must get a permit under Section 31.[258] Another WMS added that under Section 30.19 of the Wisconsin Statutes, a permit is required for anyone who wants to build a pond that "ultimately connects to navigable waters; this is a regulated enlargement."[259] Once pond building activity falls under the jurisdiction of Sections 30 and 31, WMSs are able to use the public trust doctrine to justify finding less damaging alternatives to project proposals.[260] For instance, when one WMS recently received an application to dam a spring "near an outstanding resource water," he explained to the applicant that it was his duty to look at the cumulative impacts of this project because "even though the spring is on private property, building a pond is not a private issue—the waters of the state are for everyone to enjoy."[261] The applicant returned later with an alternative proposal to change the site of the pond so it would be fed by groundwater instead of springwater.[262]

Not all interactions with people who want to build ponds are so amicable, especially when the applicant has the financial resources to fight a permit denial, and there is not a reasonable alternative like changing the pond site and water supply. One WMS is currently involved in an administrative appeal over his denial of a permit to build a pond on a non-navigable tributary or headwaters of a cold water trout stream.[263] He denied the permit because he has scientific documentation that trout spawn in this non-navigable tributary. If the applicant constructs the pond, he believes that it will eliminate trout reproduction, increase the temperature of the stream, and decrease the food supply for fish by changing the biodiversity of invertebrates. In his words, "The public trust should prevent an applicant, such as this one, from taking a public resource and converting it for private gain."[264]

The WMSs contend that if someone creates a pond by altering a wetland that is not connected to a navigable water, there are no Wisconsin statutes that give the DNR independent jurisdiction to consider the impacts of that activity

257. Response from Interviewee #7, *supra* note 196. See *infra* Part II.B.4 for further discussion of wetland issues.

258. *See* WIS. STAT. ANN. § 31 (West 1998) (regulation of dams and bridges affecting navigable waters).

259. Response from Interviewee #10, *supra* note 200.

260. *See* Response from Interviewee #11 (Feb. 2, 1999).

261. *Id*.

262. *See id*.

263. *See* Response from Interviewee #10, *supra* note 200. By contrast, another WMS thought that he did not have jurisdiction to stop the construction of a pond on the headwaters of a navigable stream. *See* Response from Interviewee #4, *supra* note 192.

264. Response from Interviewee #10, *supra* note 200.

on the public trust. The DNR only has jurisdiction when the Corps of Engineers has issued a permit under Section 404 of the CWA.[265] One WMS discussed the reach of his wetland jurisdiction. In his opinion, "If someone wants to excavate a wetland—even a pristine wetland—that is not connected to a navigable water body, the DNR does not have the ability to stop this because the Corps of Engineers no longer has jurisdiction."[266]

d. Urbanization and Toxic Pollution

None of the WMSs who cited urbanization and toxic pollution as a main threat to water resources could describe how they used the public trust doctrine to counteract this threat. Despite the fact that there is "a lot of data on the impact of storm water run-off on streams in Milwaukee County, the practices are lagging behind the science. We don't have ordinances in place that sufficiently protect these waters."[267] Another obstacle to protecting water quality is that the suggested BMPs are not updated due to political pressure. "We don't want to change the status quo because it will cost someone money."[268]

Moreover, understaffing in urban areas may decrease the effectiveness of WMSs in those areas. Most WMSs who work in urban areas assert that the DNR does not have the personnel to adequately regulate the amount of development that is occurring. A WMS in southeastern Wisconsin claimed that he "knows there are violations every day—there are a lot of illegal structures going in," but that he cannot do anything about it because "there is no way" he can tour all of the areas.[269]

Additionally, the public trust doctrine is at times limited more by the individual WMS who is interpreting it than by the actual regulations. In southern Wisconsin, at least one WMS interprets the law in a way that facilitates unregulated urbanization. This WMS does not make a navigability determination for the entire water body, but instead divides a stream into a navigable part that requires Section 30 permits and a non-navigable part that is outside his jurisdiction.[270] He said that many developers buy open fields in order to create residential housing. This WMS determined that part of the stream running across the open field was non-navigable in order to allow the developer to do whatever he or she wanted with that part of the stream—encase

265. *See* 33 U.S.C. § 1341 (1994) (DNR review authority); 33 U.S.C. § 1344 (1994) (Corps of Engineers review authority).

266. Response from Interviewee #3, *supra* note 188. See *infra* Part II.B.4 for further discussion of wetland issues.

267. Response from Interviewee #9 (Feb. 4, 1999).

268. *Id*.

269. Response from Interviewee #13, *supra* note 219.

270. This bifurcated navigability determination is unsupported by the law. *See generally* State v. Trudeau, 408 N.W.2d 337, 342 (Wis. 1987).

it, channelize it, etc.[271] For instance, after so dividing a stream, he allowed a project proponent to put detention ponds in a stream despite the negative ecological impacts of the project both locally and on the navigable part of the stream.[272]

e. Boat Traffic

In fiscal year 1999, wardens issued 5,851 citations for boating violations. This is the highest number of citations issued for any sector regulated by the DNR, yet some WMSs contend that boating is unregulated.[273] This contention rests on the WMSs' observation that the environmental aspects of boating are not being controlled by the current regulations. High-powered motor boats damage the public trust by eroding shorelines and destroying fish eggs and habitat. "The DNR has the responsibility to protect the public trust, but it does not have the legal tools to deal with harmful boating activities."[274]

3. Shoreland Zoning: Unconstitutional Abdication of Authority over Trust Resources?

Part of the WMS's job is to work with local governments to implement shoreland, wetland, and floodplain zoning. The vast majority of WMSs identified development as one of the major threats to water resources in their management area. Yet, most of the harms caused by development are not directly controlled by the DNR. For instance, a shoreland development that does not grade more than ten thousand square feet on the bank or adjacent to a navigable water or does not occupy more than five acres of land probably will not require a DNR-issued permit and considerations of the public trust.[275] Rather, local zoning boards determine the resolution of most of these shoreland development issues. These local boards are, at times, not the best guardians of the public trust. One WMS opined that "local ordinances and those who administer them reflect an overall attitude that water ways are merely conveyances of water rather than vibrant ecosystems."[276] Another seasoned WMS in a rural area that is under severe development pressure observed that zoning is no longer doing its job. "The zoning laws were drafted in the 1970s and need to be updated to better equip local governments to deal with lakeshore development."[277]

271. *See* Response from Interviewee #9 (Feb. 4, 1999) (describing "channelizing" as pouring concrete into a stream).

272. *See id*. This practice is anomalous. The DNR does not normally segment a stream for purposes of determining navigability. *See* Response from Interviewee #20 (Mar. 16, 1999).

273. Wisconsin Department of Natural Resources Law Enforcement Citations System 2 (Sept. 13, 1999) (on file with the Wisconsin Department of Natural Resources).

274. Response from Interviewee #6, *supra* note 189.

275. *See* WIS. STAT. ANN. § 30.19 (1998); *see also* Response from Interviewee #5, *supra* note 224.

276. Response from Interviewee #9, *supra* note 271.

277. Response from Interviewee #17, *supra* note 209.

There appears to be no consistent DNR policy on how to work with local governments on zoning issues. Zoning is such a high priority in some areas that there are WMSs or assistants who only handle zoning issues, while in other areas supervisors tell WMSs not to oversee any local zoning decisions.[278] Northeastern Wisconsin has a WMS who almost exclusively works on local zoning issues.[279] Similarly, in western Wisconsin a WMS worked with eighteen counties to upgrade their local zoning ordinances to protect buffer zones along water bodies. He claimed that this work has been extremely successful; twelve to fifteen counties are now working on making their zoning more stringent, and both of his counties have passed better ordinances.[280]

By contrast, a WMS in southern Wisconsin said that his supervisors told the WMSs "to cut their time spent on zoning issues."[281] He continued to say that "in [his] region the locals are granting variances all the time, so it is really awful that the DNR isn't overseeing zoning anymore."[282] Despite his supervisors' directives, he contended that he still had a duty under the public trust to oversee zoning decisions in these counties. Therefore, he still talks to the zoning administrators in his counties of supervision and tries to remind them of "the riparian's duty to protect the public trust."[283]

Somewhere between these extremes lies the law. Wisconsin Administrative Code NR 115 requires counties to give the DNR notice of every variance or conditional use permit decision.[284] Similarly, NR 117 and 118 require municipalities to give the DNR notice of decisions.[285] Despite the legal requirements for notice, there are three primary impediments to protecting the public trust. First, not all local governments give the DNR notice of their decisions. Second, even when given notice, some WMSs do not comment on variances and conditional use permits that adversely impact the public trust. Third, some local governments violate the law despite DNR input.[286]

Although many WMSs said that it was part of their job to review these notices and comment on impacts to the public trust, not all WMSs understand their legal responsibilities and jurisdiction. For instance, one WMS in southern Wisconsin did not know that municipalities and villages were required to send notices under NR 117. He noted that he rarely received notice and thought that whether he got notice of these decisions was dependent on whether he had a good relationship with the local governments.[287] In his opinion, whether or not

278. *Compare* Response from Interviewee #4, *supra* note 192, *with* Response from Interviewee #13, *supra* note 219.

279. *See* Response from Interviewee #4, *supra* note 192.

280. *See* Response from Interviewee #12, *supra* note 228.

281. Response from Interviewee #13, *supra* note 219.

282. *Id*.

283. *Id*.

284. *See* Response from Interviewee #5, *supra* note 224.

285. *See id*.

286. *See id*.

287. *See* Response from Interviewee #8, *supra* note 106.

he receives notice is based on "politics", not a legal requirement.[288] "If they liked my last comments, then they will notify me about upcoming decisions."[289] WMSs in several parts of Wisconsin described very poor relationships with local zoning administrators. Although the DNR has oversight authority for county and municipal decisions to issue variances or conditional use permits, in these areas of supervision the local governments do not send every decision to the DNR. One WMS interpreted the counties' attitudes as pro-private property rights and territorial.[290] In other words, "The counties do not want the DNR involved in local zoning decisions."[291]

As noted above, even when WMSs in southern Wisconsin get notice of decisions they may not comment due to pressure from their supervisors to focus their attention on other matters. Finally, even when local governments give proper notice and the DNR takes the time to comment, violations occur and are not adequately enforced. When asked to discuss local zoning, one WMS responded that his counties in western Wisconsin are "very diligent, the municipalities are in total compliance, and the DNR responds to all of the notices."[292] This WMS went on to say that he regularly testifies at county proceedings on the impacts that the proposed project will have on the public trust.[293] Yet, despite all of this notice and comment activity, not all of the counties comply with their shoreland zoning ordinances. This same WMS noted that two of his counties "are notorious for violating the ordinances all the time."[294] In fact, in his last audit he found 222 violations on one lake alone.[295]

As evidenced by these WMSs' experiences, the DNR is not consistently supervising the zoning decisions of local governments. Even when the DNR does oversee these entities, they do not necessarily follow the DNR's suggestions. The ability of local governments to make zoning decisions that impact navigable waters is essentially a delegation from the legislature of its trust responsibility.[296] In order to constitutionally delegate trust responsibility, the DNR must actively oversee the delegees and ensure that their activities do not infringe upon the trust. It appears that the current system of shoreland zoning does not meet these requirements.

4. Wetlands: Shortcomings of the Present Regulatory System

The DNR's Secretary Meyer asserts that Wisconsin has the best wetland protection program of any state in the country. "We were losing around 1,000

288. *See id*.
289. *Id*.
290. *See* Response from Interviewee #11, *supra* note 258.
291. *Id*.
292. Response from Interviewee #5, *supra* note 224.
293. *See id*.
294. *Id*.
295. *See id*.
296. *See supra* Part I.B (discussing delegation of power from the legislature).

acres of wetlands per year before we created NR 103 in 1991. Since 1991, we have only lost around 2,000 acres of wetlands."[297] Yet most WMSs contend that current laws give the DNR very limited power to control alterations to wetlands.[298] They believe that while the DNR has jurisdiction over some activities on wetlands that are connected to navigable waters, the Corps of Engineers administers wetland permits for all other wetlands under Section 404 of the CWA.[299] The Corps of Engineers can issue one of two types of wetland permits: individual or nationwide. The individual permits require stricter review and public notice. By contrast, the nationwide permits require no public notice and no site-specific review. One WMS estimated that 95% of the wetland permits that the Corps of Engineers issues in Wisconsin are nationwide permits.[300] In his opinion the Corps of Engineers fails to protect wetlands. "There are two problems: the Corps grants too many nationwide permits and there are many situations where the Corps should require a permit but does not."[301] If the Corps decides that it does not have jurisdiction over a wetland that is not connected to a navigable water, then the DNR does not have jurisdiction either.

Once the Corps of Engineers issues a wetland permit, the DNR then has the responsibility to review the site and grant, deny, or waive a water quality certification.[302] However, some WMSs asserted that the DNR does not have enforcement powers under this statutory scheme.[303] The DNR faces a situation where, on the one hand, they are the only agency that substantively reviews a wetland project, and on the other hand, their power is severely curtailed by their inability to enforce the law. For instance, if the DNR denies water quality certification and the project proponent proceeds with the project, the DNR must rely on the Corps of Engineers or the Environmental Protection Agency (EPA) to take an enforcement action.[304]

C. Pressures Shaping the Trustees' Water Management Decisions

1. Voices from the Field: Commitment and Frustration

In addition to the shortcomings in current regulations reviewed in Part II.B, there are numerous pressures on WMSs that impact their ability to protect water resources for the public interest. Each WMS was asked to describe their

297. *See* Interview with George Meyer, Secretary of Wisconsin's Department of Natural Resources (Nov. 18, 1999).

298. Response from all WMS interviewees.

299. 33 U.S.C. § 1344 (1994).

300. *See* Response from Interviewee #13, *supra* note 219.

301. *Id.*

302. *See* Clean Water Act, 33 U.S.C. § 1344 (1994).

303. *See* Response from Interviewee #15, *supra* note 215.

304. *See id.*

role as trustee of the public's navigable waters. The responses followed a general theme of commitment to protecting the public interest and frustration with their inability to do so. All of the WMSs recognized the importance of their role as trustee, but claimed that they cannot truly protect the public interest due to vocal opposition from riparians, politicians, and DNR upper management. The following are three statements from WMSs that reflect these general themes:

> 1) Over time I have learned that there are limited things I can do. I must pick and choose my battles. I have learned to evaluate in the field how to spend taxpayers' money in the best way, but this is difficult because I end up having to give away public property. The projects that have small impacts are allowed to go in because you need to balance things. I can't just stop all development for the sake of natural scenic beauty. This would be political suicide—it would erode public support and we could lose the entire program.[305]
>
> 2) My role as trustee hasn't changed over time. I have always seen myself as a protector of the resource. But I get more abuse for doing my job every year.[306]
>
> 3) When I started I was pretty naive. I thought I could deny permits and really protect resources. Then I learned to pick and choose the most serious cases because we don't have time to actually protect the resource and study each site. If we really were going to do it right, we would hire more people.[307]

When a WMS receives a permit application or a verbal inquiry about the feasibility of a project, each WMS follows the same general procedure: check the statute and/or handbook to see if the DNR has jurisdiction, visit the site, talk to other experts such as biologists or wildlife specialists, and issue the permit if in compliance.[308] Yet there are wide variations in this procedure with some WMSs rarely making a site visit or consulting with experts and other WMSs looking at a variety of maps (wetland maps, U.S. Department of Agriculture soil maps, topographical maps, etc.) to determine the special characteristics of the site. Additionally, as discussed below, how the WMS determines compliance with the applicable standards is subjective, and at times, subject to a variety of political pressures from sources both inside and outside the DNR.

2. The Many Faces of WMSs: Eco-Warriors, Harassed Bureaucrats, Clever Politicians

The three main obstacles preventing WMSs from implementing the public

305. Response from Interviewee #6, *supra* note 189.
306. Response from Interviewee #13, *supra* note 219.
307. Response from Interviewee #15, *supra* note 215.
308. *See, e.g.*, Response from Interviewee #2, *supra* note 207.

trust doctrine in line with Wisconsin court decisions are: (1) excessive workload, high turnover rate, and training; (2) political pressure; and (3) lack of enforcement. These issues are intertwined on a number of levels, but for purposes of clearer analysis they are reviewed separately.

a. The WMS's Workload

Workload influences the quality of decisions that WMSs make because the greater the workload, the less time a WMS has to spend analyzing and skillfully addressing the impacts of any one project. Many WMSs identified understaffing as one of the biggest obstacles to protecting the public trust.[309] As noted by one WMS, "time management is a problem. I look the other way on the small things because I just don't have the time to deal with it all."[310] Another WMS observed that "we cannot do the work the way it should be done because we are understaffed and we have a high turnover rate."[311] One indicator of workload is the number of permit decisions issued each year by each WMS.[312] There are several types of permit actions. The WMS can talk people out of applying for a permit, issue a formal permit, issue a short form permit,[313] or issue a formal denial. The following numbers are estimates given by the WMS in response to a question about the number of permits they issue every year.[314] The number of permits issued varied from a low of 22 to a high of 267, with most issuing between 140 and 200 per year.[315]

Many DNR employees (WMSs, attorneys, and supervisors) are concerned by the high turnover rate that seems to plague the WMS position. Most WMSs opined that people leave the job quickly because the workload and lack of support from management create a high stress work environment.[316] Indeed, when the author updated her list of WMSs only one month after conducting her

309. *See, e.g.*, Response from Interviewee #3, *supra* note 188.

310. Response from Interviewee #7, *supra* note 196.

311. Response from Interviewee #4, *supra* note 192.

312. Another indicator of workload is the amount of inquiries WMSs field on a daily or weekly basis. Although this is usually not tracked, one WMS in northern Wisconsin, who found his job particularly stressful, said he received between three hundred to eight hundred phone calls a month from people asking about permits. *See* Response from Interviewee #3, *supra* note 188.

313. Short form permits, called "rubber stamp" permits by some WMSs, do not require a site visit and in at least one office are issued by a customer service staffer. One WMS said that a short form permit can be issued for any of the following activities: rip rap along shoreline, ponds not connected to waterways, fish cribs, boat ramps, and pilings. *See* Response from Interviewee #6, *supra* note 189. Another WMS said that the short form permits were not for ponds and added a few other categories: rock stream crossings for vehicles and dry hydrants. *See* Response from Interviewee #7, *supra* note 196.

314. The numbers merely reflect the WMS's perception of his or her workload, and that perception may not be accurate.

315. *See* Response from all Interviewees.

316. *See* Response from Interviewee #13, *supra* note 219; Response from Interviewee #11, *supra* note 258. In the Milwaukee River Basin there have been two new WMSs since summer of 1998. *See* Response from Interviewee #9, *supra* note 271. By contrast, most of the interviewees in this study had worked as a WMS for over five years.

interviews, one WMS had announced he was transferring to another DNR position and two were interviewing for new jobs. Since 1990, 67% of all field staff positions have experienced turnover.[317] This turnover rate is a significant threat to adequate protection of the public trust. Due to the intense workload, WMSs must make decisions based on limited information. The quality of these decisions suffers when made by less experienced WMSs who are unable to foresee the potential impacts of proposed projects.

The adequacy of protections for the public trust relies on many factors, one of which is the amount of support and training each WMS receives. If a WMS does not understand the extent of his or her jurisdiction, as interpreted by the courts, the WMS is more likely to make erroneous regulatory decisions (that is, decisions that either jeopardize the public trust or that illegally restrict private property rights). Although almost all of the WMSs inform themselves about the law on a regular basis[318] and there are regular trainings, many WMSs assert that the training is insufficient and there are too many inexperienced WMSs. All of the WMSs agreed that they receive training on recent developments in the law at quarterly and statewide meetings. DNR attorneys make presentations at these meetings. This is also a forum for WMSs to exchange ideas with each other and increase the consistency of their actions across the state. Trainings and summaries of court opinions written by DNR attorneys have played a critical role in the development of WMSs' understanding of the public trust doctrine.[319]

However, many WMSs argue that the amount of training is not enough given the complexity of the WMS's job and the important interests at stake. The most senior WMSs reflected that when they started with the DNR, they received a lot of on the job training. It was very important to their professional

317. *See* DNR Fact Sheet, Waterway and Wetland Staffing Trends Since 1990 (on file with the Wisconsin Department of Natural Resources). Note that this data is not specific to the WMS position, but relates to all field staff positions in the Waterway and Wetland Programs.

318. One source of information is the Water Regulation Handbook. The Handbook is a guide to interpreting the statutes and administrative codes; it is the WMS's bible. Some rely heavily on the Handbook's interpretations of statutory intent. This helps them understand why they regulate. The newer WMSs relied on the Handbook most often because the Handbook is like a cookbook. In the words of one WMS, "It tells you what to look at for each type of application." Response from Interviewee #2, *supra* note 207. To complete this picture it is important to note that a few of the WMSs have taken the initiative to educate themselves about the law. One WMS has taken two environmental law classes in order to increase his understanding of his job responsibilities. *See* Response from Interviewee #8, *supra* note 106. Another outstanding WMS said he did a lot of outside reading to learn more about the public trust doctrine and water law in general. He reads court decisions from other states, attends the water law conference every year in Madison, searches the internet for recent information on the public trust, and reads the Wisconsin Lawyer for regular updates on the law. *See* Response from Interviewee #6, *supra* note 189.

319. *See* Response from Interviewee #3, *supra* note 188. "When I started the job, I didn't see myself as a trustee at all. I have only picked this up over time from trainings by Michael Cain, one of the DNR's attorneys. Now I know that my role is to protect the public interest in water." Response from Interviewee #4, *supra* note 192.

development to learn from other staffers and supervisors.[320] "You don't pick this stuff up over night; the newer WMSs really don't know what's going on."[321] One of these WMSs linked the changes in training to the mid-1990s reorganization of the DNR. When he started as a WMS, he received ten months of on the job training by his supervisor. Now the new WMSs no longer have such intensive training periods. Another WMS who had over five years of experience opined that "since the reorganization we have been lacking a bit on getting trainings on recent developments in the law."[322] A WMS who has been with the agency for less than a year echoed these concerns. Although he was unaware of the amount of training that his more experienced counterparts had gotten prior to the reorganization, he said that he wished he had more training on every law he was administering. As a new WMS, he felt that the training offered at their quarterly meetings was "not very formal and certainly not enough."[323]

One finding that is particularly important in light of the high turnover rate is that many WMSs who had been in their positions for three or more years said that they primarily learned how to administer and protect the public trust by experience and by advice from more experienced co-workers.[324] "My years of experience are invaluable. Knowledge is power in this job."[325] The loss of highly experienced WMSs is a loss to the public trust.

b. Political Pressure Impacting WMSs' Decisions

In 1995, the DNR underwent a structural change that altered the amount of political influence exerted on resource management decisions. The budget bill made the Secretary of the DNR a cabinet position and terminated the Public Intervenor's Office.[326] The WMSs' response to these changes has been quite profound. Their perception of the independence and integrity of the DNR has plummeted. One WMS aptly expressed the situation with the following statement: "We are a political agency now, not a natural resource agency. There is a big difference."[327] Another WMS similarly observed that:

320. *See* Response from Interviewee #16, *supra* note 205.

321. Response from Interviewee #17, *supra* note 203.

322. Response from Interviewee #12, *supra* note 228; *see also* Response from Interviewee #17, *supra* note 203.

323. Response from Interviewee #14, *supra* note 195.

324. *See* Response from Interviewee #7, *supra* note 203; Response from Interviewee #12, *supra* note 228.

325. Response from Interviewee #5, *supra* note 224.

326. 1995 Wis. Law 27 (budget bill) took away the Public Intervenor's (PI) power to sue and its independence by transferring the PI office to DNR. Two years later, in 1997 Wis. Law 27 (budget bill) the legislature completely eliminated the office. The PI office had been a cornerstone of environmental protection in Wisconsin since 1967. The PI office was created as a public watchdog on the state government to protect public rights in Wisconsin's waters and other natural resources.

327. Response from Interviewee #3, *supra* note 188. This WMS observed that "we're a lot more lax now that Tommy Thompson is our boss." *Id*.

> life as a field staffer changed dramatically due to these structural changes. All of the field staffers take their jobs very seriously, and it has been hard on all of us the way the political climate has changed. Now that the Public Intervenor is gone, the public has no way to keep the DNR in check and politicians are running rampant without a watch dog.[328]

By contrast, the DNR's Secretary, George Meyer, who has experienced life as a secretary both before and after this structural change, stated that "there has been no change in the amount of political influence exerted" over his agency since he became part of the governor's cabinet.[329] Apparently, the field staff are more sensitive to political pressure than the Secretary.

Even though the interview for this study contained no questions that explicitly asked about political influence, most WMSs mentioned political influence as a serious impediment to protecting the public interest in the water resources of the state. The vast majority of WMSs wanted to describe how politics influences their water management decisions. Even those who stated that they never personally experienced political pressure discussed friends and colleagues of theirs who had left the DNR because of politics.[330] Thus, those who were not directly pressured still felt that politics played a role in their decisions because they were aware of the harassment that others had faced. Political impediments to protecting the public trust in water resources fall into three broad categories: pressure from without, pressure from within, and pressure from a sister agency.

WMSs must defend their decisions to local and state politicians as well as applicants' attorneys on a regular basis. This may improve the accountability of WMSs and prevent rogue regulators from abusing their position of power. On the other hand, it may impede the implementation of laws passed by a democratically-elected legislature to ensure protections for the public trust. The fact that politicians are advocating for the interests of individual riparians may threaten the ability of WMSs to regulate in a manner that protects statewide rather than localized interests. The amount of direct contact a WMS has with politicians varies, yet with the exception of one WMS, most described the situation in very negative terms. One WMS in northern Wisconsin claimed that "politics plays a big role in undermining the public interest."[331] Another WMS noticed that "the political situation is getting worse and worse."[332] A third WMS lamented that "I have always been passionate about being entrusted with this responsibility, but I don't know how I can continue when I am undermined by politically-influential people."[333]

328. Response from Interviewee #11, *supra* note 258.

329. *See* Interview with George Meyer, *supra* note 297.

330. The writer does not know the veracity of the stories that follow. The narratives are used to show how WMSs perceive the pressures that they face when making a water management decision.

331. Response from Interviewee #4, *supra* note 192.

332. Response from Interviewee #13, *supra* note 219.

333. Response from Interviewee #11, *supra* note 258.

A WMS observed that "you need to have a very strong character to deal with this job because people yell at you all the time."[334] For example, he had brought an enforcement case against a Drainage Board not realizing until after he had initiated the action that the Board was well connected to the DNR's Secretary.[335] The Drainage Board retaliated against the WMS by sending "nasty" letters to the Secretary about the WMS's job performance. The Board did not stop at writing letters. They asked their state representative to join them in an unannounced visit to the WMS's office. The group harassed the WMS and tried to tell him that he was "unrealistic" for trying to require a sediment fence, a fairly standard mitigation measure that is used to prevent erosion.[336] Ultimately, one of the regional supervisors became involved in the case and negotiated a compromise to require sediment fencing in only very limited areas and matting in areas with severe erosion problems.[337]

Because of their occupation, WMSs interact with politicians on a regular basis. The frequency of the visits varies from daily contacts during contentious periods to contacts once every other month.[338] One WMS commented that although he considers politics when making a permit or enforcement decision, he weighs legal standards more heavily than politics. When asked to give an example of how he balanced these pressures, it became clear that legal standards are sometimes manipulated in order to obtain a politically acceptable outcome. For instance, on one river in his management area there is a size limit for boat shelters. Some large boats do not fit under the standard boat shelter. A politician from this area responded to the size limit enforced by the DNR by calling the WMS on behalf of his constituents and telling him to "change the

334. Response from Interviewee #14, *supra* note 195.

335. Presumably, if he had known of the connection he may not have brought the enforcement action.

336. *See* Response from Interviewee #14, *supra* note 195.

337. The WMS believed that in order to protect the public trust the DNR should have required more, but his supervisor thought they could not win in court. The Drainage District should have put in sediment fencing at the base of all of their silt piles and should have installed matting along the entire stream area that was disturbed. *See* Response from Interviewee #21 (Apr. 7, 1999) (follow-up interview with previous interviewee).

In a subsequent interview with Secretary Meyer, Meyer told the author that "I get complaint letters every day . . . and we have the responsibility to check whether or not they are being served properly . . . . Whether the letter is coming from the governor's office or from an ordinary citizen, we look at it, every one of them—that's our job." He explained the attention that the drainage district got as merely a situation where an inexperienced WMS needed on the job training. "The supervisor went out to provide an educational experience for the [WMS] employee." When asked how the Secretary knew this, he replied that "the Regional Director asked the Regional Water Leader to provide that educational mentoring to the employee." Interview with George Meyer, *supra* note 297.

338. One WMS in the western part of the state, who felt that he was under a lot of political pressure, gets six or seven calls a year from politicians. *See* Response from Interviewee #12, *supra* note 228. By contrast, another WMS in the same part of the state feels very little political pressure. *See* Response from Interviewee #5, *supra* note 224. Yet another WMS has come to view politics as "the art of changing an illegal project into something that is acceptable." Response from Interviewee #16, *supra* note 200.

standards."[339] In response to this pressure, the WMS creatively interpreted the standard to allow large boat owners to eliminate some boat slips in exchange for a permit to build a large shelter.[340] Some might support this decision as an example of the agency's customer-friendly approach to regulation. While others might say it undermines the agency's credibility because it creates the appearance that standards are arbitrary and easily changed.

Although the WMS described above engaged in a questionable interpretation of the law in order to appease a politician, his actions are understandable given the consequences of applying the letter of the law in certain circumstances. "When a regulated party does not like the WMS's decision or suggestions, the party will just call his or her politician. The politician will, in turn, call the Secretary or Governor Thompson directly and threaten to change the law."[341] Several WMSs agreed that the DNR has to be careful about its implementation of current laws because there is a lot of pressure to change the laws. These changes do not necessarily destroy entire programs. Rather they are usually small changes intended for very specialized interests. Some WMSs have the impression that legislators continually pass laws that exempt certain parcels of property from water regulations.[342] One might argue that this is merely a democratic system in action: citizens mobilize their politicians to change the laws they do not like. However, when the laws sought to be changed deal with the public trust, the Wisconsin court is highly suspicious of legislation that appears to abdicate the legislature's responsibility as trustee in favor of localized interests.[343]

One WMS described how two counties were notoriously delinquent in enforcing their shoreland zoning ordinances. "In the past fifteen years there has never been a case brought by a zoning administrator against violators of the shoreland zoning ordinance."[344] This WMS opined that "wealthy people can get variances for anything."[345] When the DNR audited one of the counties and found 222 violations on one lake, the residents responded by calling their representatives. These land owners, many of whom had violated the shoreland zoning laws, sought to pass a law prohibiting the DNR from enforcing shoreland zoning violations. Ultimately, the court ruled that this law was unconstitutional, yet the shoreland zoning violations continue unabated.[346]

One recent case exemplifies the power struggle in Wisconsin between the legislature, the DNR, and the courts. In the early 1990s the DNR tried to

339. Response from Interviewee #16, *supra* note 205.

340. *See id*.

341. Response from Interviewee #10, *supra* note 200; *see also* Response from Interviewee #13, *supra* note 219.

342. *See* Response from Interviewee #12, *supra* note 228.

343. *See, e.g*., Muench v. Public Serv. Comm'n, 55 N.W.2d 40 (Wis. 1952).

344. Response from Interviewee #5, *supra* note 224.

345. *Id*.

346. *See id*.

enforce Section 30.12 of the Wisconsin Statutes to stop the City of Oak Creek from channelizing Crawfish Creek. In 1993-94, the legislature enacted a statute attempting to exempt Crawfish Creek from the requirements of Section 30.12.[347] In 1994, the court of appeals upheld a determination by the circuit court that Crawfish Creek was a navigable waterway, that "Oak Creek's channelization of Crawfish Creek violated § 30.12, Stats., that § 30.055, Stats., 1993-94, a statute enacted by the legislature purporting to exempt Crawfish Creek from the requirements of § 30.12, was unconstitutional, and that the creek had to be restored to its pre-channelization condition."[348] After that court's decision in 1996, the legislature reenacted an identical exemption.[349] The Attorney General once again challenged the constitutionality of the statute. The court of appeals recently reviewed the new statute and, rather than directly challenge the legislature, held instead that the Attorney General could not challenge the constitutionality of a statute.[350]

Additionally, many WMSs believe that politicians have threatened to cut the DNR's budget in response to implementation and enforcement of the state's water laws. One WMS was deeply effected by one experience where, in his opinion, he had built a strong case against a private party who was clearly violating water laws and infringing upon the public trust. The enforcement team was well prepared and had a scientific study to prove the damage that was being done by this private party. Yet on the night before the court hearing, the Secretary "cut a deal," and told the enforcement team to drop the case.[351] According to this WMS, the Secretary told them that politicians had threatened to reduce the DNR budget if they did not stop the enforcement action.[352]

Likewise, the DNR's budget was threatened when a WMS simply asked a farmer to fill out an application for a project that would impact a navigable water body. Although the farmer gave no indication that he was displeased with the WMS, he later called his legislator. The WMS asserted that the legislator called the Regional Director, the Secretary, and Governor Thompson to complain about how "unreasonable" the WMS was and gave a thinly veiled threat about reducing the agency's funding. The legislator asked the DNR how they could expect to get funding when their field personnel are so obstinate.[353]

Political pressure on WMSs is not limited to pressure from legislators. WMSs say that they face an increasingly hostile work environment created by their supervisors.[354] According to most WMSs who have been in their position

347. *See* WIS. STAT. ANN. § 30.055 (West 1996).

348. City of Oak Creek v. Department of Natural Resources, 518 N.W.2d 276 (Wis. Ct. App. 1994).

349. *See* WIS. STAT. ANN. § 30.056 (West 1996); 1995 Wis. Laws 455, § 1g (West).

350. *See* State v. City of Oak Creek, 588 N.W.2d 380, 383 (Wis. Ct. App. 1998).

351. Response from Interviewee #15, *supra* note 215.

352. *See id*.

353. *See* Response from Interviewee #13, *supra* note 219.

354. *See generally* Response from Interviewee #15, *supra* note 215; Response from Interviewee #10, *supra* note 200; Response from Interviewee #9, *supra* note 267; Response from Interviewee #7,

for more than three years, the priorities of the DNR and the attitude of supervisors toward field staff has changed markedly since the Secretary of the DNR became a cabinet position.[355] Even the WMSs who have not directly experienced this state that they are aware of it and that it impacts their decisions.[356] When describing this internal pressure, some WMSs differentiated between their direct supervisor or Basin Supervisor and those higher up in the management hierarchy, saying that they felt supported by their Basin Supervisor.[357] These WMSs felt that the pressure to overturn their management decisions came from the Regional Supervisors, Regional Directors, Secretary Staff, and/or the Secretary.[358]

Although local politicians call WMSs directly, some WMSs say that they are more influenced by the thought that the Secretary will undermine their decisions. One WMS stated that when he makes a decision, he tries to make one that the Secretary will not overrule.[359] He concluded that politics make him think a lot harder about his decisions because he knows that the Secretary and the Governor can overrule it.[360] Another WMS lamented how hard it was to work in this politicized work environment. He commented that although he has always been passionate about being entrusted with the duty to protect the public trust, his supervisors devalue the WMS's job and expertise and make them feel like their job is unimportant.[361] "Supervisors used to support field staff decisions. But ever since the Secretary became a cabinet position, supervisors have supported the applicants."[362]

Similarly, others observed that it now seems routine for a disgruntled party to contact his or her politician or the Governor. "Before [the Secretary became a cabinet position,] our central office did not second-guess our decisions. Now what is happening is that our supervisors are giving away the resource. Wardens cannot enforce the laws anymore because the supervisors rarely sign off on an enforcement action."[363] One WMS further noted that he could predict almost every case where this will happen. "If you have an applicant who is contentious and threatens to call the Secretary, you know it will get messy."[364]

Several WMSs were very emotional about this issue. One claimed that his "Regional Supervisor is a real problem. If a regulated person contacts him, he

supra note 196.

355. *See* Response from Interviewee #15, *supra* note 215; Response from Interviewee #10, *supra* note 200; Response from Interviewee #9, *supra* note 271; Response from Interviewee #7, *supra* note 196.

356. *See* Response from Interviewee #4, *supra* note 192.

357. *See* Response from Interviewee #10, *supra* note 200.

358. *See id*.

359. *See* Response from Interviewee #15, *supra* note 215.

360. *See id*.

361. *See* Response from Interviewee #11, *supra* note 258.

362. Response from Interviewee #10, *supra* note 200; *see also* Response from Interviewee #7, *supra* note 196.

363. Response from Interviewee #7, *supra* note 196.

364. *Id*.

caves and sides with the outsider rather than with the DNR employee."[365] This supervisor has a controversial "touchy feely win-win"[366] attitude. This attitude is problematic for WMSs who know from experience that "a WMS is a regulator and at times regulators have to say no; everything is not win-win when it comes to managing a shared resource like water."[367] Another WMS referred to the upper management in the same region in similar terms. He said that the managers "do not want to hear bad things from applicants," and that they "want to make everyone happy."[368] This clash of resource management attitudes creates a tense work environment in which WMSs are undermined by supervisors. One WMS voiced an opinion that was common to many WMSs in this region. He observed that when he issued citations, he received "absolutely no support" from the regional supervisor. In fact, in his opinion the supervisor was actually encouraging violations by supporting the regulated community rather than supporting the expertise of the DNR field staff.[369]

This lack of support from upper management is not isolated to one region. Another WMS on the other side of the state with approximately the same number of years of experience said that "although conflicts do not happen very often, when they do, supervisors will take the side of the project proponent."[370] He thought that these conflicting methods of resource management led to sporadic, seemingly arbitrary enforcement that undermines the DNR's credibility with the public.

By contrast, one WMS claimed that "no one told him what to do," and that he has never had a supervisor second-guess his work.[371] This experience, however, is anomalous; in fact, this WMS worked in the same region as another WMS who described a highly political work environment that involved a lot of pressure from upper management. The more prevalent attitude is represented by the following comment: "Our [staffers'] actions have changed because of this [lack of support by management]. We are more sensitive to politics now."[372] For instance, when a politician complained that a WMS asked a farmer in his district to fill out an application for a waterway modification, the WMS's supervisor confronted the WMS and took the attitude that the WMS was "the one in the wrong" before hearing his side of the story.[373] Rather than support for the WMS, the supervisor's attitude in this situation exemplifies a total distrust of the expertise of the WMS.

Additionally, a WMS in a northern region described a situation where

365. Response from Interviewee #13, *supra* note 219.
366. *Id*.
367. *Id*.
368. Response from Interviewee #9, *supra* note 267.
369. *See* Response from Interviewee #13, *supra* note 219.
370. Response from Interviewee #12, *supra* note 228.
371. Response from Interviewee #5, *supra* note 224.
372. Response from Interviewee #9, *supra* note 267.
373. Response from Interviewee #13, *supra* note 219.

political power prevailed over protecting the public trust. This WMS observed that the DNR had been allowing a considerable amount of seawalls in this region despite the DNR's written policy to limit the installation of seawalls. He saw a pattern emerging in his job. When he denied seawall permit applications for contractors who did not have "political clout," there was "no problem."[374] Yet, when he denied a seawall for one particular contractor who was politically powerful he would have to face the consequences. This WMS tried to follow the DNR's scientifically-based guidance on this issue. He would tell the contractor that he could not have a seawall permit because the DNR's guidance dictates that they should only approve a seawall as a last resort for erosion control. The contractor would "get irate" and write letters to Governor Thompson and the Secretary.[375] He described sitting down with his Regional Supervisor and telling him about his safety and ecological concerns, only to be told that these concerns were "not an issue."[376] He said that he felt that his job was being threatened by his attempts to follow written guidance. It seemed to him that the unwritten political policy trumped the scientific guidance. Despite this overt supervisory pressure, this WMS refused to sign off on these permits. Although this did not stop the projects from going forward, it did force the supervisors to sign off on what he considered to be illegal permits.[377]

Apparently, this atmosphere of intimidation has been very effective. Even those who have not had negative interactions with their supervisors have changed their behavior. One WMS said that although he had not personally experienced pressure from upper management, he knows that supervisors tell other WMSs not to be so tough or restrictive. He emphatically stated, "I hate this. I see this as an unwritten policy from above that I must follow. This effects my job because I try to avoid controversy and reprimand by my supervisors."[378] This WMS admitted that he was very lenient with the regulated community.

One WMS gave a colorful answer in response to the question: Is there a hierarchy of uses that influences how you balance competing uses of water? He laughed nervously and said, "That is very political." He stated further, "I have heard of several situations that have caused me to more clearly understand how we [the DNR] prioritize uses of water. There is a hierarchy of uses and the uses of the rich and politically powerful are at the top."[379] He went on to support his statement with a few stories that took place in other WMSs' areas of supervision. He described a large golf course that was promoted by a politically-connected corporation:

The WMS responsible for that area wanted to deny the permits because of

374. Response from Interviewee #3, *supra* note 188.
375. *Id*.
376. *Id*.
377. *See id*.
378. Response from Interviewee #4, *supra* note 192.
379. Response from Interviewee #11, *supra* note 258.

> the adverse impacts the golf course would have on the public interest. Every time the staffer visited the site, the company called management and complained. The managers facilitated the company's access to the staffer by giving the company the staffer's personal cell phone number so they could reach him anytime they wanted. The company continually used the cell phone number to harass the WMS. The company also contacted the Secretary directly. Ultimately, the Secretary told staff that the DNR *will issue* a permit. Of course, the DNR did issue the permit, and the WMS left the program shortly after this incident.[380]

This WMS also believed that some positions have been written out of the state budget due to a local legislator's pressure. "One local legislator did not like the staffer who was responsible for the Lower Wisconsin River, so the legislator got that position cut out of the budget, and that staffer was relocated."[381] The message that this WMS got from these actions was loud and clear: If you have enough money to be politically powerful, your water uses come first.

Another WMS observed that large developers "get heard first" in the Southeast Region.[382] He had worked in several regions and felt he could compare them. Based on his experience, he strongly asserted that "the Southeast Region is different from others."[383] He went on to say that "it is very political and there is a lot of pressure to do jobs in an expedient manner; this does a disservice to a lot of people."[384]

In fact, what may have been an informal system of allowing large developers to receive permits faster than other applicants was formalized by the Wisconsin Legislature in 1998. The legislature passed a law that created an expedited permit process for applicants willing to pay an extra fee.[385] The concept of an expedited permit is a fairly new one.[386] Under this system, an applicant can pay an extra $2,000 in order to get the WMS to "put the permit

380. *Id*. Secretary Meyer has a different perspective on this case. He stated that he "never talked to the WMS," and that he only had limited involvement in the case. That involvement consisted of spending a day with the project applicant. "The owner of the company invited myself and the Regional Director to a meeting at their current golf course, and they laid out this project they were going to do. They wanted to give us early notice of it because it was going to be a workload issue for us and they wanted to make sure . . . that we could process it in that timeframe. . . . I suspect that they were trying to convince me that this was a good project. . . . At the end of the day I can remember the president of the company turning to me and saying, 'Well, what can you do to help us along in regards to this?' And Gloria McCutcheon, our Regional Director, was on my side and I turned to her and said, 'Gloria, this is an important project—it is time sensitive—so we need to process it . . . and as far as a final decision, it should be handled like any other case. . . . This was the last time I had any involvement in that case. . . . I had no idea that the WMS did not issue the decision and that the supervisor did." Interview with George Meyer, *supra* note 297.

381. Response from Interviewee #11, *supra* note 258.

382. Response from Interviewee #9, *supra* note 271.

383. *Id*.

384. *Id*.

385. *See* WIS. STAT. ANN. § 30.28(2r) (West 1998).

386. The legislature also allowed expedited permits for the siting of new power plants.

application on the top of his pile."[387] Unlike short form permits (which are also issued relatively quickly) for projects that are considered to have minimal impacts, the typical expedited permit is for large projects with potentially significant impacts. For example, one such permit was issued for a 486 acre golf course with 105 residential lots located near a trout stream and a high quality wetland.[388]

There is one WMS in the state who has been designated to issue expedited permits. He is located in the Southeast Region, the most heavily urbanized region in Wisconsin. The problems of a lack of training and inexperience[389] discussed above are exemplified here. The employee that the DNR hired to issue expedited permits had no prior experience as a WMS. Given the fact that most WMSs contended that they needed experience to make high quality water management decisions, it threatens the public trust to allow an inexperienced WMS to make expedited decisions on large projects.

Expedited permits must be resolved within a certain timeframe and have broad implications for other regulatory programs applicable to the project. The timeframe that the WMS follows is: 90 business days for a regular Sections 30 or 31 permit, 150 business days for a water quality certification (for alterations to wetlands), and 210 business days for permits that also require an environmental assessment under the Wisconsin Environmental Policy Act (WEPA).[390] As indicated by this timeframe, the expedited status of a permit required under Chapter 30 also carries over to other regulatory programs that are involved in the proposed project, such as environmental assessments required by WEPA.[391] All of the expedited permits issued thus far have been well within this timeframe. For instance, a water quality certification should be done within 150 business days. This timeframe is longer than that for the average permit because it requires a 30 day public notice period. Rather than taking the entire 150 days, the WMS completed one expedited water quality certification in 30 days, the time needed to give public notice.[392] Thus, the day the application was filed for the project, the WMS posted notice of his intent to issue the water quality certification. This begs the question of how much analysis this WMS is giving to the environmental impacts of these large projects.

387. Response from Interviewee #18 (Feb. 26, 1999).

388. At last count as of spring 1999, expedited permits had been issued for a golf course, an athletic center, and a sanitary sewer and water main. Expedited permits were being considered for a pier on the Milwaukee River, another golf course, wetland alterations caused by developments, and a proposal to channelize and enclose a stream. *See id*.

389. *See supra* Part II.C.2.

390. *See* WIS. STAT. ANN. § 30.28(2r) (West 1998).

391. *See id*. § 1.11.

392. *See* Response from Interviewee #18, *supra* note 387. The WMS issued the public notice and then worked out any remaining differences during the 30 day period. No one from the public commented on the project which resulted in the filling of approximately .2 acres of "low quality" wetland. *See id*.

Not only has the DNR become increasingly influenced by politics, but sister agencies with which the DNR coordinates projects have as well. Several WMSs described their frustration with the politicization of various sister agencies. This has been a recurring issue with highway projects promoted by the Wisconsin Department of Transportation (DOT) that have significant adverse environmental impacts. The Secretaries of the DNR and the DOT are appointed by the Governor. Although the DNR has a cooperative agreement with the DOT that covers the development of county and state roads, some WMSs asserted that this agreement is ineffective because it is not practically enforceable. Not only is it undesirable for an agency to bring an enforcement action against a sister agency, in many WMSs' opinions, it is also practically impossible to do so now that the two secretaries are political appointees.

In one situation this relationship forced DNR field staff to stand by and watch while the DOT filled half an acre of wetland for a railroad project. The DNR field staff conducted a lengthy investigation and wanted to bring an enforcement action against the DOT as well as a civil or criminal action against the DOT's engineer who failed to follow applicable regulations. One WMS felt that due to pressure put on the DNR's Secretary by the DOT's Secretary, the DNR field staff had to "accept the fact that their Secretary would rather approve the filling of the wetland than take on the DOT and the railroad."[393] Ultimately, the DNR's district environmental impact coordinator signed off on this project.[394]

The DNR Secretary and one staff attorney allege that the situation was more complex than that described by the WMS. The staff attorney reflected that there were clear violations of law, but it was complex because the situation involved a sister agency. The agencies ultimately worked together with the Wisconsin Department of Justice and agreed to resolve the problem by the DOT agreeing to take disciplinary action against its employee, sending a memo to all DOT employees, and taking remedial action.[395]

Yet the DNR's data on wetland loss causes one to wonder how often this scenario has arisen over the past decade. From August 1991 through April 1998, Wisconsin lost 2,053 acres of wetland due to regulated activities,[396] and "538 DOT projects resulted in a total wetland loss of 1,299.3 acres."[397] The study noted that this data on DOT-caused losses "may be included in acreage loss identified under permitted wetland losses above."[398] If true, DOT projects caused about half of the wetland losses in Wisconsin during that time period.

393. Response from Interviewee #1, *supra* note 201.

394. *See id*.

395. *See* Interview with Michael Cain, Staff Attorney for Wisconsin's Department of Natural Resources (Nov. 18, 1999) (on file with author).

396. *See* Wisconsin Wetlands, Permitted Wetland Losses 2 (on file with author).

397. *Id*. at 3 ("To compensate for the loss, the DOT wetland banking system has developed 1,903.5 acres of wetland . . . .").

398. *See id*. at 3.

WMSs interact with other agencies and units of government on a regular basis. Many see these relationships in political terms and are aware of balancing power between various government entities. One WMS discussed relationships with other agencies or local governments in quid pro quo terms. He described political considerations in very pragmatic terms:

> There are a lot of folks who the DNR depends on to get things done, such as the city, the county, the harbor commission, the builder's association, and the regional planning commission. The DNR needs these groups to support the DNR's ideas when we push the drafting of codes or when we need public support for a project. If we sour the relationship by acting in a politically unpopular way, then we won't have the support we need on other issues.[399]

WMSs try to gain greater protection for water resources by working with local governments to strengthen their zoning ordinances, but this work "is very delicate politically."[400] One seasoned WMS questions how much the DNR should get involved with restructuring zoning given the political environment in which he works. There is a strong private property movement in his area of supervision and a "good ole boys network on the zoning board."[401] In his experience the worst thing for the DNR to do is give the public the impression that the DNR is limiting private property rights. It is with this political balance in mind that he carries out his job. Thus, on zoning issues he makes himself available to provide technical assistance when it is requested but does not push his assistance as a DNR initiative.

This territorial attitude spills over when a county's ordinances are more lenient than the DNR's standards. For instance, one county in southern Wisconsin recently issued a storm water permit under its ordinance for a large development next to a cold water stream. When the developer came to the DNR for a grading permit, the DNR required a special basin to handle the storm water in order to prevent warming of the stream. The DNR's requirement has caused a lot of tension between the DNR and the county because the county contends that their ordinance is "good enough."[402]

c. Permit Denials and Enforcement Issues

In addition to political pressure and workload issues that impact WMSs' decisions, it is very difficult for a WMS to deny a permit and/or initiate an enforcement action. There are several procedural obstacles in place that deter WMSs from stopping riparians' projects. The existence of these obstacles explains why it is typically better for a WMS to negotiate with project proponents, impose permit conditions, and resolve conflicts out of court.

399. Response from Interviewee #9, *supra* note 267.
400. Response from Interviewee #17, *supra* note 203.
401. *Id*.
402. Response from Interviewee #8, *supra* note 271.

Few WMSs deny any permits. The amount of permits denied varied from zero to twenty per year, with most WMSs issuing between zero and two formal denials per year.[403] WMSs do not issue many formal permit denials because they perceive serious procedural barriers to doing so. Under Sections 30.12 and 30.19, among others, WMSs can recommend a permit denial, but a Hearing Examiner is the only person who can actually deny a permit.[404] Thus, WMSs believe that they need to have a legally-defensible case for every recommendation for permit denial that they issue. Given the WMSs' workload, it is not possible to spend the time required to bring these types of cases. This procedural barrier to allowing WMSs to deny permits effectively "makes it too difficult to deny a permit."[405]

On first glance at the lack of formal denials issued, it appears that the WMSs are administering a rubber stamp permit program where an applicant is ensured a permit by simply filling out the appropriate forms. Further investigation shows that this assessment does not accurately describe the regulatory program. Faced with a significant procedural barrier to denying permits, most WMSs concluded that talking project proponents out of their proposals avoids the problem of going to a Hearing Examiner.[406] One of the most experienced WMSs noted that he gets about twenty calls a day from people inquiring about different project proposals. He spends a significant amount of time discussing proposals with people before they even submit an application. By doing this, he can influence the shape of the project before it has gone very far. From his experience, he found that talking people out of projects in this early stage saves a lot of time because a formal denial requires a legally defensible case complete with experts and lawyers. These preapplication conversations allow him to screen the requests, resulting in many people never even asking for the permit application.[407] Although most WMSs try to talk people out of applying or pursuing permits, the frequency with which this strategy is employed ranged from a low of "not very many" to a high of two hundred per year, with the majority talking fifty or less people out of permits every year.[408]

Enforcement of the WMSs' regulatory program presents its own set of issues. Project proponents who initiate or complete a project without a permit or who violate their permit's conditions adversely impact the public trust. Obviously, the deterrence value of enforcement depends on the likelihood that an enforcement action will be taken and the extent of the penalties imposed. It

403. *See* Response from all Interviewees.

404. WIS. STAT. §§ 30.12, 30.19; *see also* WIS. STAT. § 30.03.

405. Response from Interviewee #5, *supra* note 224. Section 30.20 (dredging) is the only Section of Chapter 30 that allows a WMS to deny a permit.

406. *See* Response from Interviewee #5, *supra* note 224.

407. *See id*.

408. Response from all Interviewees. Note that these numbers are only estimates based on the WMSs' experiences because the DNR does not track application withdrawals.

appears that there is little deterrence value in Wisconsin's program because most WMSs contend that enforcement of the state's water regulations is very lax. Even when the DNR has jurisdiction to regulate a project, "The resource suffers when people do not comply with their permits" and are not penalized.[409] One WMS relayed a story about a situation where he met with a developer prior to construction along a river bank and told him how to minimize the impacts of the development. "The guy didn't listen and went ahead and just destroyed the resource. We issued a fine, but our fines are so low that it is just factored in as a cost of doing business. And can we ever restore the damage he caused?"[410]

When a WMS discovers a violation, such as an applicant starting construction activities prior to receiving a permit, he or she typically discusses enforcement options with their wardens. Some report that wardens are reluctant to issue citations to violators because of the concerns outlined below. WMSs who feel that a citation must be issued in order to obtain some degree of respect for the DNR's authority, if persuasive enough, may get a warden to issue a citation; but the warden will generally only cite an offender who is not likely to contest the issue in court.[411]

Enforcement is impeded by financial and strategic concerns. Several WMSs explained that the DNR has three possible enforcement avenues: It can ask the District Attorney to prosecute the case in state court and seek fines and restoration, it can start a contested case hearing with an administrative law judge and seek restoration, or it can issue an after-the-fact permit.[412] Many WMSs prefer to have the violator pay fines but found it very difficult to get a district attorney to prosecute any cases.[413]

One WMS explained why it is sometimes better to issue an after-the-fact

409. Response from Interviewee #4, *supra* note 192.

410. *Id*.

411. *See, e.g*., Response from Interviewee #18, *supra* note 387. The data on number of citations issued by wardens during fiscal year 1999 tends to confirm the WMSs' contentions. In the water regulation category, the category that encompasses Chapter 30, wardens issued only 393 citations. By contrast, wardens issued 5,851 citations for boating violations and 4,720 citations for fishing violations. *See* Wisconsin Dep't of Natural Resources, Law Enforcement Citations System 3 (1999).

412. *See* Response from Interviewee #5, *supra* note 224. Oddly, none of these WMSs mentioned that they had a fourth enforcement option: to refer the case to the State Attorney General. *See* WIS. STAT. ANN. § 30.03(2), (4) (West 1998). It appears that the WMSs need more information about this enforcement option. In fiscal year 1999, the DNR referred 25 cases to an ALJ. *See* Water Regulation Hearing Requests and Referrals (Nov. 19, 1999) (data interpreted by Mary Ellen Volbrecht, Chief, Rivers & Regulation, Fisheries & Habitat) (on file with author). Over the same period, the DNR accepted 16 fish habitat cases, 11 water resources cases, and 47 watershed cases. *See* Wisconsin Dep't of Natural Resources Envtl. Enforcement Casetrack System, Actions Between July 1, 1998 and July 1, 1999, at 1, 3, 6 (on file with author). Of those accepted cases, the DNR referred to the Attorney General 6 fish habitat cases, 5 water resources cases, and 12 watershed cases. *Id*. at 2, 4, 9. It is unclear from the data which of these originated with a WMS who was implementing the navigable waters protection laws.

413. *See* Response from Interviewee #5, *supra* note 224.

permit to a land owner who has altered a water body without a permit.[414] He carefully explained that they do this rather than initiate an enforcement action for three main reasons: (1) the enforcement action starts in local district court where the DNR may be unpopular; (2) many district attorneys refuse to prosecute the DNR's cases; and (3) the financial benefits of litigation do not outweigh the costs. Expanding on his last point, he added that "if the DNR wins its case, the amount of money the DNR receives from the violator is less than the fee the DNR charges to apply for an after-the-fact permit; financially, an enforcement action doesn't make sense."[415] These are not reassuring words for the public beneficiaries of the trust to hear.

The WMSs have highlighted the need for legislative reform to allow greater enforcement of the laws that have been enacted to protect and promote the public trust. Reducing the barriers to initiating enforcement actions and raising the fines and penalties awarded are necessary to improve the protection of the trust.

CONCLUSION

The public trust doctrine is rooted in ancient Roman law, English law, the Northwest Ordinance, the Wisconsin Constitution, common law, and Chapters 30 and 31 of Wisconsin's Statutes. Ancient Roman jurists believed that the basic concept that the waters are common to all was based on natural law and was not subject to the changing whims of legislatures.[416] Modern legal theorists have speculated that a constitutionally-based doctrine will be likewise more insulated from political pressure.[417]

This research has demonstrated the limits of these theories. The public trust doctrine is not immutable. Regardless of the natural or constitutional law supporting the public trust doctrine, those who administer the trust are not insulated from political pressure. WMSs face a complex regulatory environment where they are called upon to not only weigh competing interests in water, but also to weigh the most effective negotiating strategy with project proponents, which cases could result in budgetary cuts to their program or negative pressure from upper-level management, and to deter non-compliance when given limited enforcement options. The sum of these pressures lead to an anemic regulatory program that may significantly infringe on public rights in navigable waters.

Some may welcome these constraints as checks on an agency to which the courts have given far too much power over the rights of private property owners. Yet the issue is not that simple. Private property owners benefit from a rigorous system of water laws. Impairment of public trust resources is felt by

414. *See* Response from Interviewee #1, *supra* note 201.
415. *Id*.
416. *See supra* note 3.
417. *See, e.g.*, Kirsch, *supra* note 3, at 1170.

anyone in Wisconsin who fishes, swims, or boats on the navigable waters of the state, regardless of status as owner or non-owner of riparian lands. The trustees (legislators, DNR upper management, and WMSs) abdicate their responsibility to the public when they act in ways that benefit the short-term interests of a few at the expense of the public's interest in water.

In sum, protection of the public trust could be greatly improved by implementing several systemic changes:

- restore the independence of the DNR by removing the Secretary from the Governor's cabinet;
- restore the Public Intervenor's Office to counter-balance the private interests that have weighed so heavily in DNR decisionmaking;
- eliminate the procedural barriers to denying permits and initiating enforcement actions;
- increase the number of citations issued for violations of water regulations; and
- increase the monetary fines issued and penalties awarded for damaging public trust resources.