WISCONSIN LEGISLATIVE COUNCIL
REPORT TO THE LEGISLATURE

SPECIAL COMMITTEE ON NAVIGABLE WATERS RECODIFICATION

September 19, 2003

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REPORT TO THE LEGISLATURE

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PART I

KEY PROVISIONS OF COMMITTEE RECOMMENDATION

2003 ASSEMBLY BILL 514, RELATING TO RECODIFICATION OF CH. 30, STATS.

This part of the Special Committee's report highlights the key provisions of Assembly Bill 514. The bill contains many provisions beyond those listed here, and the bill has comprehensive section notes that describe the bill in detail. Part III of this report contains an overview of the bill. A more detailed list of key provisions is included in the prefatory note to the bill.

Navigable Waters Regulation

The bill:

- Reorganizes all of the statutes that provide for permits or approvals under subch. II of ch. 30, and modifies them so that these statutes, where appropriate, are in a consistent format, use consistent terminology and have consistent decision-making standards.

- Requires the Department of Natural Resources (DNR) to develop and make publicly available maps and data that show the results of its determinations of navigability.

- Directs the DNR to develop rules that describe the methods it uses for making determinations of navigability and that describe the public interest and public rights and the rights of riparian owners for purposes of decisions to approve or deny permits and approvals affecting navigable waters.

- Codifies the supreme court cases that set forth the kinds of evidence that can be used to determine if a lake or stream is navigable.

- Modifies provisions regarding farm drainage ditches to provide an exemption from regulation, rather than an exemption from the definition of "navigable," and clarifies the exemption so that it applies only to projects for an agricultural purpose.

- Modifies the current notice and hearing process by allowing the DNR to issue a denial directly after receiving a complete permit or contract application.

- Requires a person who wishes to challenge a permit or contract in a contested case hearing to make a more detailed showing of the facts and legal standards that support the objection and requires DNR to find that those facts raise a reasonable doubt that the project, as proposed, complies with the applicable standards in subch. II.

- Authorizes voluntary mediation between the applicant, persons with an interest in a permit or contract, and the DNR.

State Boating Regulation

The bill:

- Eliminates the authority of DNR to change statutory regulations by administrative rule in order to conform to federal regulations and requires DNR to submit legislation to conform statutes to federal regulations.

- Updates federal cross-references that are incorrect and adds federal cross-references where current statutes have a nonspecific reference to federal law.

- Consolidates and makes consistent the provisions regarding equipment and operation of patrol boats.

- Updates descriptions of activities that involve being towed behind a boat.

- Creates a statutory exemption from the requirement to carry a personal flotation device for racing shells, sculls, kayaks and canoes, to duplicate the current exemption in federal law.

- Permits operation of a boat within 100 feet from a skin diver's flag or swimmer if there is not sufficient room beyond 100 feet from the flag to maneuver, but boat operation may not exceed slow-no-wake speed.

Local Boating Regulation

The bill:

- Authorizes a town, village or city to enact boating ordinances of clearly local concern, even if another local governmental unit (county, lake district or town sanitary district) has adopted an ordinance applicable to the same lake or stream.

- Expands county authority so that a county may enact boating ordinances for an inland lake if authorized to do so by the towns, villages or cities surrounding the lake or if those towns, villages or cities do not enact a boating ordinance.

- Lists state boating regulations that require strict conformity in local ordinances and sets standards for other local ordinances which are required by statute to be consistent with state regulations.

- Authorizes a sheriff or a town, village or city to issue emergency regulations applicable to boating.

PART II

COMMITTEE ACTIVITY

ASSIGNMENT

The Joint Legislative Council established the Special Committee on Navigable Waters Recodification and its co-chairs by a June 13, 2000 mail ballot and members by an August 14, 2000 mail ballot. The Special Committee was directed to conduct a recodification and review of ch. 30, Stats. The recodification is to update language and make technical corrections to the chapter. The Special Committee was also authorized to advise the Joint Legislative Council of any substantive policy questions requiring further review.

Membership of the Special Committee consisted of two Senators, five Representatives and nine public members. A list of the committee membership is set forth in **Appendix 3**.

SUMMARY OF MEETINGS

The Special Committee held 14 meetings in Madison on the following dates:

September 21, 2000. The Special Committee heard presentations by 10 invited speakers and engaged in a brief discussion of the substance of its assignment.

Roger Cliff, Wisconsin Farm Bureau Federation, gave a general overview of the various types of contacts his organization receives on a daily basis from farmers regarding ch. 30, Stats. Some of those questions pertain to what is or is not "navigable" water, frustration with the many layers of regulations in ch. 30, urban run-off and riparian rights. Some of his suggestions for recodifying ch. 30 were a clearer statutory definition of navigable waters, prior designation and mapping of navigable waters, streamlining the regulatory process under ch. 30 and clarifying the role of the DNR versus the role of the Department of Agriculture, Trade and Consumer Protection (DATCP) in navigable waters regulation.

Thomas M. Radtke, President, Radtke Contractors, Inc., described how he deals with ch. 30 regulations on a day-to-day basis. He stated two fundamental concerns with the way DNR has implemented ch. 30: lack of clear standards and the time and expense associated with the permit process.

Paul Kent, Attorney, Davis & Kuelthau, said that the majority of his practice is devoted to water regulatory issues, and that he was speaking to present his personal views on ch. 30. He stated that there are at least three fundamental changes necessary to modernize ch. 30. First, there is a need for defined standards in statute and administrative rules. The second fundamental change is the need for program integration, as many projects can often be subject to overlapping and inconsistent standards by the DNR and local governments. The last fundamental change is the need for workable procedures for issuing permits and establishing thresholds below which permits are not needed in order to make the program work more efficiently.

Caryl Terrell, Legislative Coordinator, Sierra Club, John Muir Chapter, emphasized to the committee that she supports the effort of recodifying ch. 30 by reorganizing and clarifying it only, not rewriting the law to make major substantive changes. She stated that the Sierra Club strongly believes in the Wisconsin Public Trust Doctrine and that the doctrine is tied directly to navigability.

William O'Connor, Attorney, Wheeler, Van Sickle & Anderson, recommended three areas for the committee's attention. First, he stated that the procedures for notifying the public that permits under ch. 30 have been applied for should be modified. Second, he said that additional regulation of piers and other near shore structures needs to be made to recognize the impact of high density structures in navigable waters. Third, he stated that the statutes on boating should be modified to ameliorate recreational use conflicts on lakes and streams.

Jerry Deschane, Wisconsin Builders Association, spoke to the committee on behalf of builders and developers. He made a number of suggestions for possible improvements to ch. 30. Specifically, he stated that the definition of "navigable" should be examined; that the public hearing and notice requirements should be deleted from s. 30.19, relating to grading near navigable waters; and that DNR should promulgate its guidelines for reviewing applications for activities regulated under ch. 30 as administrative rules.

David Gollon, Jr., co-owner and operator, Gollon Bait and Fish Farm, and President, Wisconsin Aquaculture Association, spoke regarding his frustrations with the permit process. Mr. Gollon suggested that the committee revise ch. 30 to put time limits on DNR review of permit applications for activities under ch. 30. Mr. Gollon also said that the DNR guidelines should be clarified and promulgated as administrative rules. Mr. Gollon was joined by Mr. Ray Roder, an attorney who represents him in matters pertaining to aquaculture. Mr. Roder made a number of suggestions for improvements to ch. 30.

Todd Ambs, Executive Director, Wisconsin River Alliance, said that ch. 30 needs to be updated and that questions of clarity, effectiveness, program integration and said that a transparent and understandable process are legitimate goals of the recodification of ch. 30. However, Mr. Ambs stated that the opinion of the Wisconsin River Alliance is that current ch. 30 strikes a decent balance in protecting the rights of the public and riparians in navigable waters.

Mary Ellen Vollbrecht and Michael Cain, DNR, discussed how the DNR administers ch. 30. Ms. Vollbrecht said that the purpose of ch. 30 is to establish the future of our lakes and streams, to establish the paramount public rights in applicable waters and create a day-to-day decision process for reviewing activities regulated under ch. 30. Ms. Vollbrecht stated that when the DNR reviews applications for permits under ch. 30, it applies a consistent set of factors to the thousands of circumstances that may be relevant to the particular application.

Mr. Cain responded to some of the earlier testimony suggesting that the DNR promulgate its guidelines for reviewing applications under ch. 30 as administrative rules. Mr. Cain said that substantial portions of the DNR's administrative code are devoted to issues pertaining to navigable waters. Mr. Cain also recounted controversy among members of the

Natural Resources Board over issues addressed in the DNR's "pier planner." The pier planner is a set of guidelines DNR employees use when reviewing applications to place piers and other structures in navigable waters.

October 24, 2000. The Special Committee heard a presentation by Ms. Vollbrecht, DNR. Ms. Vollbrecht briefly explained and answered questions with regard to the items she had prepared in response to questions from the committee at the prior meeting. The committee also heard a presentation by Kevin Stange, Zoning Administrator, Sheboygan County, and Kathi Kramasz and Susan Schumacher, DNR, regarding a comprehensive survey of navigable waterways in Sheboygan County done by the DNR Water Management staff and the Sheboygan County Planning and Resources Department. The purpose of the study was to identify all waterways in the unincorporated areas of Sheboygan County and classify them as: (1) navigable; (2) not navigable due to current agricultural land use; and (3) not navigable. The committee concluded the meeting with an extensive discussion of issues in Memo No. 3, *Suggestions for Recodifying Ch. 30, Stats., Made by Invited Speakers at the September 21, 2000 Meeting*. Specific issues for discussion included the definition of navigability, the potential costs of prior designation and mapping navigable waters, the exemption for farm drainage ditches from regulation under ch. 30 and the potential to require the DNR to provide additional assistance to applicants for permits under ch. 30.

November 29, 2000. The Special Committee heard a presentation by Ben Brancel, Secretary, DATCP, and John Malchine, Chair, Agriculture, Trade and Consumer Protection Board. In an extended discussion with committee members, Secretary Brancel and Mr. Malchine discussed the nature of the current concerns in the agricultural community regarding the regulation of agricultural drainage, the cost to the agricultural sector of complying with the regulatory process, the potential for mapping to address some of the concerns about drainage and the distinctions between existing drained land and new drainage.

The committee also heard a presentation by Ms. Vollbrecht, DNR, and Jim Kurtz, Director of Legal Services, DNR. They discussed the potential for a long-term permit for drainage ditch maintenance, which can now be obtained under current regulations. The committee then discussed Memo No. 6, *Agricultural Drainage*, to complete its discussion of issues related to the drainage of land. The committee concluded the meeting with a discussion of the alternatives in Memo No. 4, *Alternatives for Consideration by the Special Committee: The Definition of Navigability and Related Issues*, and Special Committee members suggested additional alternatives.

December 21, 2000. The Special Committee focused its attention on matters related to the local regulation of waterways and boating. The Special Committee heard a presentation by Michael Lutz and John Lacenski, DNR, who discussed suggestions for modifications to s. 30.77, Stats. The Special Committee also heard a presentation by Roger Walsh and Donna Sefton, Wisconsin Association of Lakes. Mr. Walsh made suggestions regarding changes to s. 30.77, Stats., and several other boating statutes. Special Committee members discussed the issues raised by the speakers and instructed staff to provide further information on a number of subjects. The Special Committee concluded the meeting with a discussion of Memo No. 7, *Local Government Regulation of Waterways*.

February 7, 2001. The Special Committee spent the majority of the meeting in discussion of WLC: 0077/1, the first draft of a proposed bill draft to recodify subch. II of ch. 30. The committee commenced with the discussion of the permit provisions and, in the course of the meeting, was able to complete discussion of most of the portions of the draft related to the permits. Staff prepared two memoranda for background information: Memo No. 8, *Outline of Proposed Organization of Subch. II of Ch. 30, Stats.*, and Memo No. 9, *Summary of Contents of the Six Permit Provisions in Subch. II of Ch. 30, Stats*.

March 23, 2001. The Special Committee heard presentations by Richard Purinton, Owner and Operator of the Washington Island Ferry; Paul Burton, Village President, Village of Ephraim, and Craig Friar, Door County shorefront property owner, regarding issues they have encountered in the process of obtaining authorization to upgrade harbor facilities and to construct piers. These individuals emphasized the need for standards to be established in advance, clarity and simplicity in those standards and consistent application of the standards. The Special Committee then continued its discussion, commenced at the previous meeting, of subch. II of ch. 30.

April 20, 2001. The Special Committee continued its discussion, commenced at earlier meetings, of the permit provisions in WLC: 0077/1. The committee discussed comments included in the bill draft by staff, gave instructions to staff for redrafting and requested additional information. The Special Committee concluded the meeting with a discussion of provisions in WLC: 0077/1, related to matters other than permits.

June 4, 2001. The Special Committee engaged in a thorough discussion of a bill draft to recodify statutes related to boating equipment and operation. The committee completed its discussion of this bill draft and, in the process, gave staff a number of directives to make changes to the bill draft and requested additional information on a number of topics.

July 9, 2001. The Special Committee continued its discussion of boating issues. Having completed its discussion of the boating regulatory statutes at the previous meeting, the Special Committee turned its attention to a bill draft relating to local regulation of boating. This bill draft is intended to facilitate local regulation of boating, both by clarifying the statutory procedures and by filling in statutory gaps in local regulatory authority.

August 27, 2001. The Special Committee heard a presentation by Representative Kreuser, together with Scott Bartosh, Kenosha Country Club, regarding individuals who fish on a stream that runs through the country club property and, in many cases, trespass on country club property. The Special Committee then commenced its discussion of bill drafts with the parts of WLC: 0077/1 that had not yet been discussed in a line-by-line review. The Special Committee had an extensive discussion of issues surrounding the definition of "navigability." There was a consensus of committee members to include a definition of "navigability" in the statutes that replicates all of the current elements of that definition, but does not change the effect of the current definition. The Special Committee also requested, in the redraft of WLC: 0077/1, the use of a term other than "navigability," such as "public waters" or some other similar phrase. Finally, the Special Committee agreed that maps of navigable streams should be prepared by the DNR on an incremental basis, reflecting DNR determinations of navigability and that these maps should be publicly available.

September 25, 2001. The Special Committee commenced with a discussion of the second draft of a bill regarding state regulation of boating. The Special Committee discussed rule-making authority both on a general level, regarding DNR authority for promulgation of rules relating to all issues in subch. V, and specifically relating to such issues as rules to adopt new federal requirements related to navigation. The committee then resumed discussion, commenced at previous meetings, of local boating regulations. The Special Committee discussed several concerns, including the standards for consistency between local and state regulations and the jurisdiction of local governmental units, particularly counties, to enact local ordinances. The committee concluded the meeting with a discussion of potentially changing the term "navigable" in the statutes.

October 17, 2001. The Special Committee continued its discussion, commenced at earlier meetings, of issues regarding the local regulation of boating in WLC: 0163/4. The committee agreed to give counties the authority to enact ordinances on outlying waters and that the modifications to s. 30.77 will apply prospectively to ordinances enacted after the effective date of the bill and to ordinances amended after the effective date of the bill. The Special Committee then turned its attention to farm drainage ditches. The committee discussed whether to include an exemption for an "agricultural purpose" rather than for the drainage ditch itself and whether an "agricultural purpose" may include structural agricultural use. The committee concluded the meeting with an extensive discussion of the notice and hearing procedure outlined in WLC: 0077/2. Specifically, the committee discussed whether to authorize the DNR to issue a decision to deny a ch. 30 permit application, whether to allow the DNR to offer an informational hearing at an early stage in the permit process and whether formal mediation should be offered as an alternative to an applicant who does not want a contested case hearing.

November 13, 2001. The Special Committee began with a discussion of a revised draft relating to farm drainage ditches. Next, the committee discussed a draft requiring the DNR to develop publicly available maps that show the results of navigability determinations by the DNR. After further discussion, it was the consensus of the committee to approve this draft. The Special Committee then watched a videotape of a DNR employee conducting a navigability test. This prompted a lively discussion of a bill draft, relating to navigability, and whether to standardize the methodology the DNR uses to determine navigability. After an extended discussion of the notice and hearing process, the committee agreed that offering mediation as an alternative to a contested case hearing, if all parties agree, would be appropriate in most cases.

January 8, 2002. The committee considered all of the individual bill drafts prepared for the committee and several memos prepared by staff. After substantial discussion, the committee by consensus gave instructions to staff for various minor technical and substantive changes to provisions in the drafts. These proposals were included in the final draft for approval by mail ballot.

PART III

RECOMMENDATION INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

This part of the report provides background information on, and a description of, the bill recommended by the Special Committee on Navigable Waters Recodification and introduced in the 2003-04 Session of the Legislature by the Joint Legislative Council.

2003 ASSEMBLY BILL 514, RELATING TO RECODIFICATION OF CH. 30, STATS.

BACKGROUND

The Joint Legislative Council directed the Special Committee on Navigable Waters Recodification to recodify ch. 30. Recodification of a body of statutory law usually includes some combination of the following elements:

- Reorganizing statutes in a manner that is logical and makes them as easy to use as possible.
- Modernizing statutory language to reflect current drafting style and word usage.
- Resolving ambiguities in the language of current law.
- Reconciling conflicts in the current law.
- Filling gaps in specific substantive areas where the law is silent.
- Eliminating archaic, anachronistic, unnecessary or unconstitutional provisions of the law.
- Codifying relevant decisions of the supreme court and court of appeals and past Attorney General opinions interpreting the laws in question.
- Making substantive changes deemed necessary or desirable.

The word "recodification" often conveys the notion of nonsubstantive change. Substantial portions of the Special Committee's recommendation are nonsubstantive. However, in practice, it is difficult to recodify a large body of statutory law without making substantive changes. For example, deciding **what** current law can be discarded, deciding **how** to resolve ambiguities and reconcile conflicts and deciding what constitutes a **gap** in current law (and how to fill the gap) all involve substantive decisions.

Examples of recent recodifications can be found that range from comprehensive reorganization of a group of statutes, with no substantive changes whatever (e.g., the reorganization of the environmental statutes in the 1995 session) to the complete rewriting of

a body of statutory law with extensive substantive changes (e.g., the property tax collection statutes in the 1987 session).

The Special Committee on Navigable Waters Recodification has taken a middle course in its proposed recodification of ch. 30. The Special Committee has recommended substantial reorganization of subchs. II and V of ch. 30 and has produced draft legislation with many substantive changes. However, the substantive changes that are proposed by the committee focus primarily on issues of clarity, consistency and administrative efficiency. The Special Committee has not made major changes to the scope of regulation under subch. II (i.e., which streams are deemed navigable and which are not) or in the substantive regulations imposed as part of the permit or contract process (i.e., the statutory standards that protect public and riparian rights pursuant to the permits or contracts).

CONTENTS OF CURRENT CH. 30

The Special Committee determined that the following portions of ch. 30 should be recodified:

- Subch. I (General provisions)
- Subch. II (Regulation of structures, deposits, dredging and other activities that affect navigable waters)
- Subch. V (Boating)

The remainder of this section of the report contains a description of the contents of current subchs. I, II and V of ch. 30, as background for the description of the bill in the following section of the report.

It is important to note that the majority of the provisions of ch. 30 that are described below are reorganized in the bill but are not changed in any significant way. The substantive changes in the bill focus on those specific parts of ch. 30 that the Special Committee believes are in need of recodification.

General Provisions–Current Subch. I

Subchapter I begins with definitions of terms used in ch. 30.

A procedure is established for a notice and hearing if one is required, in the permit statutes, prior to issuance of a permit or approval by the DNR. This procedure also applies when there is no statutory requirement for a hearing, but DNR determines that there is a need for one.

Subchapter I also establishes regulatory requirements applicable to the entire chapter, including the standards for determining whether a lake or stream is navigable and the time limit for completion of a project after a permit under ch. 30 is issued.

An enforcement provision in this subchapter provides for imposition of forfeitures and abatement of nuisances and is applicable to ch. 30 generally. In addition, the DNR is authorized to order a hearing and request the hearing examiner to issue an order to protect navigable waters.

Navigable Waters Regulation–Current Subch. II

Regulatory Method

Current subch. II contains a variety of methods to regulate activities that modify or affect navigable waters or the shore or bed of navigable waters. The DNR is the primary regulatory agency. Generally, activities that have a greater effect on navigable waters require a public hearing and a permit, and activities that have a lesser effect on navigable waters may be undertaken either with a permit but no notice and hearing, or without a permit, but subject to standards. In addition to permits, regulations under subch. II include contracts and general permits issued by the DNR to authorize a class of activities without individual permits.

Structures or actions that violate the statutes are deemed a public nuisance that may be abated by the DNR or a local unit of government. Municipalities and individuals may report violations of navigable waters regulations to the department.

The DNR is required to charge a fee for permits or approvals under subch. II. The amount of the fee is established partly by statute and partly by DNR rule.

Structures and Actions That are Subject to Regulation

A substantial number of specifically described actions or structures related to navigable waters are subject to regulation under current subch. II. These regulations apply to the following:

- Municipal actions to establish bulkhead lines, build highway bridges or enclose navigable waters.

- Riparian owner's actions to place any of the following in navigable waters: structures, deposits, wharves, piers, swimming rafts and water ski platforms and jumps; or to change the course of a stream.

- Actions of an individual, whether a riparian owner or not, to maintain boathouses or fixed houseboats, construct bridges, cut aquatic vegetation, divert water from lakes or streams or enlarge and protect waterways.

- Department of Transportation bridge and highway construction.

- Public utility improvement of harbors and use of the beds of the Great Lakes.

- Miscellaneous activities in specifically identified bodies of water, including the following: structures and deposits in the Duck Creek drainage district, fishing

rafts on the Wolf River, dredge disposal in the Mississippi River, a project on Lake Winnebago and the high-water mark of Big Silver Lake.

General Statewide Regulations

Current subch. II establishes several regulations that apply to navigable waters throughout the state. These include the following: a prohibition on the conveyance of riparian rights to a nonriparian, authorization for limited public use of certain shore areas of streams and a prohibition on operation of motor vehicles that are not watercraft in the water.

Protection of Certain Bodies of Water

Current subch. II provides specific protections to the Lower St. Croix River through a zoning program and the Wolf River through a ban on dredging portions of the river. The statutes also create a wild rivers program that protects the Pike River in Marinette County, the Pine River and the Popple River.

Local Regulations

Local units of government are currently authorized to impose certain regulations on wharves, piers and swimming rafts. Local units of government can establish pierhead lines. Local units of government are authorized to remove obstructions to navigation.

Regulation of Boating–Current Subch. V

Boat Equipment and Specifications

The current statutes contain a variety of specific requirements applicable to boat equipment. In general, these statutes specify the equipment that a boat must have and determine when and how the equipment must be used. These statutes apply to lighting, mufflers, personal flotation devices, engine cutoff switches, fire extinguishers, bilge and engine compartment ventilators, battery covers and sealed crankcases.

Boat Operation

Current subch. V establishes "traffic rules" for boat operation. These rules are primarily intended to determine right-of-way and avoid collisions and are a much-simplified version of the federal navigation rules. The statutes also contain a variety of restrictions on boat operation, such as speed restrictions under certain circumstances, methods for display of a distress signal flag, operation of boats by minors and creating a hazardous wake.

Most of the restrictions on methods of boat operation apply equally to all types of boats. However, personal watercraft are subject to additional specific regulations regarding methods of operation. Also, certain types of water-related activities are subject to specific regulation, such as water skiing and skin diving.

Local Regulations

Local units of government are currently authorized to enact boating ordinances on waters within their jurisdiction. This authority applies to counties, cities, villages, towns, public inland lake protection and rehabilitation districts and town sanitary districts. Local units of government are authorized to enact ordinances that are in strict conformity with the state statutes. Local units of government are also authorized to enact ordinances that are "not contrary to or inconsistent with the state statutes." Any local ordinance is subject to advisory review by the DNR and challenge in a hearing before an administrative law judge.

DESCRIPTION OF ASSEMBLY BILL 514

Portions of Ch. 30 Recommended for Recodification

Assembly Bill 514 recodifies subchs. I, II and V of ch. 30. These are the subchapters related to general provisions for the entire chapter (subch. I), structures, deposits and activities in navigable waters (subch. II) and boating (subch. V).

The Special Committee decided not to make any changes to the statutes related to harbors, in subch. III, other than renumbering them. These statutes are old and somewhat out-of-date, but the audience for these statutes is small (i.e., municipal harbor commissions) and inquiries by the Special Committee did not reveal any significant concerns about the contents of these statutes. The Special Committee also decided not to undertake any recodification of the statutes related to the Lower Wisconsin State Riverway (subch. IV) because these statutes were enacted recently and are well-crafted.

The three subchapters that are recodified in Assembly Bill 514 currently contain a number of provisions that apply to the entire chapter. Therefore, the committee created subch. VI for enforcement provisions, penalties and other similar chapter-wide material. The Special Committee addressed subch. I by moving all substantive provisions elsewhere and retaining in subch. I only the definitions for ch. 30.

The Special Committee took a different approach in the recodification of subch. II (navigable waters regulation) than it did with the recodification of subch. V (boating). This report sets forth below a description of how the committee approached its task, what were some of its goals in the recodification and how the bill draft attempts to achieve those goals.

Navigable Waters Regulation–Organization of Subch. II in Assembly Bill 514

It was apparent to the Special Committee that subch. II requires extensive reorganization. These statutes have grown substantially since they were last recodified in the 1959 Legislative Session. In 1959, ch. 30 consisted of 52 separate statutory sections taking up 24 pages of the statutes. In the 1999-2000 statutes, ch. 30 had grown to 148 statutory sections that filled 57 pages of the statutes. Much of this growth occurred in subch. II.

As new provisions are added to existing statutes, it becomes increasingly difficult for the drafters to maintain a coherent organization. For example, DNR is directly responsible for the administration of a number of programs, such as the scenic urban waterways program.

Although these provisions all relate to DNR duties for program administration, they are scattered throughout subch. II. Also, penalty provisions are not located together, making them difficult to find. The Special Committee has proposed a complete reorganization of subch. II so that these provisions, and other provisions that have similar characteristics, will be grouped together.

Most of the reorganization requires the renumbering of individual statute sections. However, the Special Committee was able to keep the current numbering system for all of the permits in ss. 30.12 to 30.20, Stats. This will be a substantial advantage for anyone who is familiar with the current statutory numbering. Also, references to these statutes in court cases, administrative rules and other written materials will continue to be valid.

Navigable Waters Regulation–Goals of the Special Committee in Assembly Bill 514

The Special Committee heard a substantial amount of testimony about state regulation of navigable waters. The testimony related primarily to how the current statutes apply and what effect they have specific situations, and included many recommendations on how current statutes should be changed. In addition, the Special Committee members, both legislators and public members, brought to the table a wide range of experience related to navigable waters regulation and Special Committee members contributed many suggestions for modifications to these statutes.

One of the ongoing debates in the Special Committee was where to draw the line between statutory amendments that could be recommended in the context of a recodification (as reflected in the charge to the Special Committee), and statutory amendments that were beyond the scope of recodification. The Special Committee strove for consensus on this point, and Assembly Bill 514 is the product of that consensus.

Many suggestions for amendments to subch. II were proposed and discussed extensively, in some cases at several committee meetings, before the Special Committee determined whether to include the suggestion in its final recommendation. The issue that received the most discussion was the issue of how "navigability" should be defined in the statutes. This is one of the core issues in subch. II, as well as in many other statutes, because it determines the applicability of state regulations. If a lake or stream is navigable, it is subject to state regulation. If a lake or stream is nonnavigable, only a few state regulations apply, and the primary legal issues relate only to the relations among riparian owners with respect to the nonnavigable waters. In other words, a change in the definition of navigability would change the scope of regulation under subch. II. In the end, the Special Committee decided not to change the definition of navigability, but did make important changes that will clarify how navigability is defined in statutes and rules and describe in rules how the DNR makes determinations of navigability.

In those statutes that the Special Committee decided to modify, there were consistent themes that can be expressed as goals of the recodification. Not all of the changes recommended by the Special Committee relate to one or more of these themes, but most of the changes do. The explanatory notes throughout Assembly Bill 514 describe the specific changes that are recommended and, in many cases, the rationale for those changes. The

following are primary goals that motivated the Special Committee's recommendations with respect to subch. II:

General Goals of the Special Committee in Recodification of Subch. II

- Statutes and the administrative rules that implement them should be more understandable to those who are subject to regulation.

The Special Committee was consistently concerned that an individual should be able to read the statutes and rules with reasonable diligence and to understand how the statutes and rules apply to a specific project that the individual wishes to undertake in or near navigable waters. The definition of "navigability" typifies the Special Committee's response to this goal. The current definition of navigability is contained in court cases and in brief statutes. The Special Committee recommends a statutory restatement of the current legal definition of navigability to be supplemented later by DNR rules that describe the standards for determining if a body of water is a lake or stream (i.e., what constitutes a bed and banks) and the methods used by the DNR to determine if a stream is navigable. This portion of Assembly Bill 514 is discussed at length in a comprehensive note following s. 30.035 (3) and (4), which are created by the bill draft.

- The statutes and rules should have a more predictable regulatory result.

The standards and procedures for DNR decisions under the current statutes are brief and the Special Committee believes that a great deal of discretion in individual cases is exercised by the DNR. The Special Committee's recommendation is intended to include more details for DNR decision-making in statutes and rules, so that individuals subject to state regulations regarding navigable waters have a better sense of the likely regulatory outcome. One way the Special Committee addresses this goal is to require DNR rules that flesh out the statutory standards. The bill draft directs DNR to promulgate rules that describe what are the public interests and public rights in navigable waters, the methods for evaluating how an activity may promote or be detrimental to the public interest or public rights in navigable waters and methods for evaluating how a project may obstruct navigation or reduce the flood flow capacity of a stream. All of these matters relate to the decisions to grant or deny permits under subch. II.

Goals for Regulatory Standards in Subch. II

- Standards for DNR decision-making should be made consistent where appropriate.

As an example, some of the permit provisions require that the project may not be "detrimental to the public interest," while others require that the project may not "injure public rights." There does not appear to be any substantive difference between these standards, and Assembly Bill 514 modifies all of the permit provisions that use the "injury to public rights" standard by substituting the requirement that the project may not be detrimental to the public interest.

- The statutes should not preclude projects or activities if there is no sound reason for doing so.

For example, current s. 30.12, Stats., authorizes structures in navigable waters by permit, but does not authorize the issuance of a permit for the deposit of materials (such as sand or gravel) on the bed of navigable waters. The Special Committee recommends a limited authorization for deposits in navigable waters only if the deposit is for the purpose of improving habitat or maintaining littoral drift and the project meets an additional standard, that it promotes public rights and interests in navigable waters.

- Clearly obsolete material or material that does not appear to have any legal effect should be eliminated from the statutes.

An example of this is found in current s. 30.195 (4), Stats., which states that no common law liability for damages resulting from the change in the course of a stream or straightening a stream is affected by this statute. However, nothing in current s. 30.195 can be construed as an exemption from liability, so this provision is deleted.

Another example is current s. 30.123 (5), Stats., which requires bridges constructed over navigable streams to be maintained in a safe condition, as determined by the DNR. The DNR does not have the expertise to review bridge safety and maintenance, so this requirement is deleted.

- The standards established for the regulation of navigable waters should apply uniformly, and exemptions without any substantive basis in the protection of public rights or the physical characteristics of navigable waters should generally be eliminated.

As an example, exemptions for navigable waters within Milwaukee County are included in ss. 30.19 and 30.195, Stats. These exemptions are proposed to be repealed.

- Provisions of doubtful constitutional validity should be eliminated or modified to reduce the constitutional concerns.

As an example, current s. 30.18 (7), Stats., allows an applicant for a permit to "enter any land through which it is proposed to divert water" after the permit application is filed in order to conduct surveys. This raises serious concerns about private property rights and is therefore recommended to be replaced by a requirement for the applicant to obtain permission or authority to enter the land and to include evidence of that permission or authority in the permit application.

Goals for Procedures in Subch. II

- The level of procedural review should correspond with the nature of the project.

On one hand, the procedural burden should not be heavier than necessary. For example, the Special Committee recommends that certain intake or outfall structures placed in navigable waters (a minor and routine project) should not require notice or the opportunity for

a contested case hearing. On the other hand, an opportunity for public input should be available for major projects. For example, the current statutes do not require notice and the opportunity for a public hearing for any removal of material (i.e., dredging) from the bed of navigable waters. The Special Committee recommends that a project for the removal of 3,000 cubic yards or more of material, except when restoring the original dimensions of an area legally dredged during the prior 10 years, should require notice and the opportunity for a contested case hearing.

- When a person wishes to challenge a permit application, that challenge should be based on issues that have merit in relation to the permit application.

The current statutes allow the DNR to reject a request for a contested case hearing if the request does not constitute a "substantive written objection." The current statutes require the person requesting a hearing to give specific reasons why a proposed project may violate statutory standards. The Special Committee recommends that the person requesting a hearing should be required to provide more detail concerning the nature of the objection with respect to both legal issues and the facts. The DNR is authorized in the bill draft to request additional information from the person requesting a hearing. The DNR is required to determine if the objection is based on facts that appear to be substantially true and if the facts described by the objector raise reasonable doubts as to whether the project, as proposed, complies with applicable statutes. If the request meets these requirements, the DNR must grant the request for a contested case hearing.

- Procedures for the challenge of permit applications should be as efficient as possible.

The Special Committee determined that many challenges to permit applications may not necessarily relate to statutory standards for the protection of public rights in navigable waters, but may nevertheless relate to issues that are important to the individual objecting to the permit application. Also, the Special Committee determined that some individuals may wish to raise objections to the permit application, but may not be willing to commit substantial resources to the challenge, particularly the cost of hiring legal counsel to participate in a contested case hearing. The Special Committee therefore recommends a mediation process which may be conducted in either lieu of or prior to a contested case hearing.

- Opportunities to review major decisions by the DNR should be made consistently available.

Current s. 30.07 (2), Stats., allows the DNR to modify or rescind any permit or contract issued under subch. II. However, this statute does not provide an opportunity to challenge the DNR's decision. The Special Committee's recommendation supplies a procedure for the holder of a permit or contract to request a contested case hearing on the DNR's decision.

Boating Regulations–Subch. V in Assembly Bill 514

The Special Committee's approach to the boating regulations in subch. V was substantially different than its approach to subch. II. The boating regulations are reasonably well organized. The bill shifts a few provisions for better organization, but most of the statutes remain in their present places. The Special Committee's recommendation relates primarily to changes that update the language in subch. V, fill regulatory gaps, clarify language and improve consistency. The following are some examples of the changes that are recommended by the Special Committee:

- Obsolete descriptions of activities on the water are updated.

For example, subch. V refers a number of times to "water skiing, aquaplaning or a similar activity." These references are clearly meant to be broad in scope. The bill provides a definition of "water skiing or a similar activity" that applies to any kind of activity in which a person is towed behind or alongside of a boat and includes, as examples, barefoot skiing, aquaplaning, kneeboarding or being towed on an inflatable device.

- Inconsistencies are eliminated where possible.

As an example, scattered statutes address the operation and equipment of patrol boats and the restriction of boat operation near patrol boats. These statutes contain a number of inconsistencies. These statutes are harmonized to create a single set of regulations for patrol boats.

- Errors in the current statutes are corrected by the bill.

There are a number of federal cross-references throughout subch. V and many of them are incorrect. The bill updates all of these references.

- Statutes that apply regulations inconsistently are made consistent where possible.

For example, the current statutes prohibit the retail sale, in this state, of a boat that is manufactured in this state if it does not comply with statutory noise limits. This prohibition is extended to apply also to the retail sale in this state of boats made elsewhere.

- Statutes that do not account for reasonable likely situations are clarified.

For example, the current statutes prohibit operation of a boat nearer than 100 feet to a skin diver's flag. However, this does not account for the situation where there may not be sufficient room to pass farther than 100 feet from the flag, such as in a narrow channel. The bill authorizes operation of a boat within 100 feet of the skin diver's flag under these circumstances, but requires that such operation be at slow-no-wake speed.

Local Regulation of Boating–Part of Subch. V in Assembly Bill 514

In the boating statutes, the biggest change recommended by the Special Committee is the complete rewriting of s. 30.77, Stats., which relates to local regulation of boating. This is

already a complex statute, and the bill adds substantially to the scope and regulatory detail of this statute, while attempting to clarify the statute. It is difficult to describe the changes in s. 30.77 in a brief summary, and the section notes in the bill should be consulted for complete information regarding these changes.

The purpose of s. 30.77, Stats., both in the current statutes and as recommended by the Special Committee, is to allow boating to be regulated by local ordinances, to set constraints for those ordinances, and to provide a process for review of the ordinances. Section 30.77 declares that state boating regulations (i.e., statutes and rules) are to be uniform in operation throughout the state. Local units of government are permitted to enact ordinances, subject to two different limitations. The first limitation is that a series of specifically listed state statutes require that any local ordinance on those subjects be identical to the statutes or rules. The second limitation is that local ordinances on any other subject of state regulation must be "consistent with" state regulation rather than identical to it. The Special Committee recommends new standards for the determination of whether local ordinances are consistent with state standards.

The current statute provides that the town, village or city is the primary entity responsible for local boating regulation. However, the current statute has a role for counties, town sanitary districts and lake districts, which is expanded under the bill. In the bill, towns, villages and cities can delegate regulatory authority to the county or to a town sanitary district or lake district. Also, a county may enact ordinances if the towns, villages or cities do not do so. The bill provides a detailed structure for these delegations of authority, actions to rescind the delegations of authority and the priorities that avoid overlap among local boating ordinances.

APPENDIX 1

Committee and Joint Legislative Council Votes

The bill described in this report was first approved by the Joint Legislative Council for introduction. However, because the 2001-02 Session of the Legislature ended soon after the Council approved the proposal for introduction, it was not introduced in the 2001-02 Session. On March 12, 2003, the Joint Legislative Council voted unanimously to reintroduce the proposal into the 2003-04 Legislature. The votes by the Special Committee and by the Joint Legislative Council for introduction of the proposal are listed below.

SPECIAL COMMITTEE VOTES

By a mail ballot, the Special Committee voted to recommend WLC: 0243/1, relating to recodification of ch. 30, Stats., for introduction in the 2001-02 Session of the Legislature.

JOINT LEGISLATIVE COUNCIL VOTES

At its March 6, 2002 meeting, the Joint Legislative Council voted to introduce WLC: 0243/1 in the 2001-02 Session of the Legislature. The vote on the draft was as follows:

> Ayes, 15 (Reps. Rhoades, Black, Bock, Foti, Freese, Jensen, Lehman, Meyerhofer and Stone; and Sens. Risser, Baumgart, Grobschmidt, Panzer, Robson and Zien); Noes, 1 (Sen. Welch); and Absent, 6 (Reps. Gard and Huber; and Sens. Burke, Chvala, Darling and George).
>
> [Sen. Zien asked that the record reflect that he voted in favor of this bill with the understanding that Rep. Gard will have subsequent amendments to the bill.]

At its March 12, 2003 meeting, the Joint Legislative Council voted unanimously to reintroduce WLC: 0243/1 into the 2003-04 Session of the Legislature.

> [Sen. Welch asked that the record reflect that he voted "no" on WLC: 0243/1, recodification of navigable waters.]

APPENDIX 2

JOINT LEGISLATIVE COUNCIL

s. 13.81, Stats.

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This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed, as are members of standing committees.

APPENDIX 3

NAVIGABLE WATERS RECODIFICATION, SPECIAL COMMITTEE ON

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STUDY ASSIGNMENT: The Committee will conduct a recodification and review of ch. 30, Stats. The recodification is to update language and make technical corrections to the chapter. The Committee may advise the Council of any substantive policy questions requiring further review. The Special Committee shall report its recommendations to the Joint Legislative Council by January 1, 2001.

Established and Cochairs appointed by a June 13, 2000 mail ballot; members appointed by an August 14, 2000 mail ballot.

16 MEMBERS: 2 Senators; 5 Representatives and 9 Public Members.

LEGISLATIVE COUNCIL STAFF: Mark Patronsky, Senior Staff Attorney; Rachel Letzing, Staff Attorney; and Kelly Mautz, Support Staff.

APPENDIX 4

Committee Materials List

September 21, 2000 Meeting

Chapter 30, Wisconsin Statutes, Navigable Waters, Harbors and Navigation

Memo No. 1, Introduction to the Recodification of Chapter 30, Stats. (9-12-00)

Memo No. 2, Contents and History of Chapter 30, Stats. (9-14-00)

Letter from Senator James Baumgart and Representative Scott Gunderson, Cochairs, Special Committee on Navigable Waters Recodification (9-13-00)

Testimony of Thomas Radtke, Radtke Contractors (9-21-00)

Testimony of Todd Ambs, Executive Director, River Alliance of Wisconsin (9-21-00)

Testimony of Paul Kent, Attorney, Davis & Kuelthau (9-21-00)

Presentation of Mary Ellen Vollbrecht and Michael Cain, Department of Natural Resources (9-21-00)

Written remarks of Mary Ellen Vollbrecht, Department of Natural Resources (9-25-00)

Testimony of Raymond Roder, Wisconsin Aquaculture Association (9-21-00)

October 24, 2000 Meeting

Memo No. 3, Suggestions for Recodifying Ch. 30, Stats., Made by Invited Speakers at the September 21, 2000 Meeting (10-16-00)

Preliminary agenda for the October 24, 2000 meeting

Letter from George Meyer, Secretary, Department of Natural Resources (10-10-00)

Memorandum from Mary Ellen Vollbrecht and Michael Cain, Department of Natural Resources (10-17-00)

November 29, 2000 Meeting

Memo No. 4, Alternatives for Consideration by the Special Committee: The Definition of Navigability and Other Related Issues (11-20-00)

Memo No. 5, Permits for Projects in Navigable Waters Under Ch. 30, Stats. (11-20-00)

Memo No. 6, Agricultural Drainage (11-20-00)

Preliminary agenda for the November 29, 2000 meeting

Presentation, Ben Brancel, Secretary of Agriculture, Trade and Consumer Protection

Testimony, John L. Malchine, Chairperson, Board of Agriculture, Trade and Consumer Protection.

December 21, 2000 Meeting

Memo No. 7, Local Government Regulation of Waterways (12-14-00)

Recodification of Ch. 30: Potential points to address in effort, submitted by Committee Member Jeff Krueger (11-30-00)

Memo from Mike Lutz and John Lacenski, Department of Natural Resources, regarding s. 30.77, Stats., modifications

Statement, Roger Walsh, Wisconsin Association of Lakes

Preliminary agenda for the December 21, 2000 meeting of the Special Committee

February 7, 2001 Meeting

Memo No. 8, Outline of Proposed Organization of Subch. II of Ch. 30, Stats. (1-30-01)

Memo No. 9, Summary of Contents of the Six Permit Provisions in Subch. II of Ch. 30, Stats. (1-30-01)

WLC: 0077/1 (working draft), relating to recodification of subch. II of ch. 30

Preliminary agenda for the February 7, 2001 meeting of the Special Committee

March 23, 2001 Meeting

Preliminary agenda for the March 23, 2001 meeting of the Special Committee

Testimony of Paul Burton, Village President, Village of Ephraim

Testimony of Craig Frier, private landowner, applicant for a ch. 30 "structure" permit

Testimony of Richard Purinton, General Manager, Washington Island Ferry Lind, Inc.

April 20, 2001 Meeting

Preliminary agenda for the April 20, 2001 meeting of the Special Committee

June 4, 2001 Meeting

Preliminary agenda for the June 4, 2001 meeting of the Special Committee

WLC: 0156/1, relating to subch. V of ch. 30, Stats.

Memo No. 10, Distance Requirements in Subch. V of ch. 30, Stats. (6-1-01)

WLC: 0163/1, relating to local regulation of boating, seaplanes and icebound waters

Letter from William P. O'Connor, Attorney, Wheeler, Van Sickle & Anderson, S.C., on behalf of the Wisconsin Association of Lakes (5-18-01)

July 9, 2001 Meeting

Preliminary agenda for the July 9, 2001 meeting of the Special Committee

WLC: 0163/2, relating to local regulation of boating, seaplanes and icebound waters. [Note: This is the draft that restructures s. 30.77, Stats., related to local regulation of boating. It replaces WLC: 0163/1, which was previously sent to the Special Committee. The Special Committee will commence the July 9 meeting with a discussion of this draft.]

Memorandum, Modifications to s. 30.79, Stats., authorizing local boat patrols, from Michael A. Lutz, Department of Natural Resources (DNR) (6-4-01)

Memorandum, Department of Natural Resources Comments on Recodification of Subchapter V of Chapter 30 Stats., in WLC 0156/1 dated May 23, 2001, from John Lacenski, DNR (6-4-01)

Memorandum, Department of Natural Resources Comments on the Recodification of s. 30.77, Stats., in WLC 0163/2 dated June 29, 2001, from Michael A. Lutz, Department of Natural Resources (7-5-01)

Memorandum, Navigable Waterways Recodification, from Jeff Krueger, Mercury (7-9-01)

Letter from William P. O'Connor, Attorney, Wheeler, Van Sickle & Anderson, S.C., on behalf of the Wisconsin Association of Lakes (7-8-01)

August 27, 2001 Meeting

Preliminary agenda for the August 27, 2001 meeting of the Special Committee

WLC: 0156/2, relating to recodification of part of subch. V of ch. 30

WLC: 0163/3, relating to local regulation of boating, seaplanes and icebound waters

Handout, Water Regulations Guidebook (8-7-01)

September 25, 2001 Meeting

Preliminary agenda for the September 25, 2001 meeting of the Special Committee

WLC: 0077/2, relating to recodification of subch. II of ch. 30

WLC: 0189/P1, relating to changing the term "navigable" in the statutes

WLC: 0190/1, relating to definitions in ch. 30

Memorandum, Comments on Draft WLC: 0077/2 (9/17/2001), from Mary Ellen Vollbrecht and Michael Cain, Department of Natural Resources (9-25-01)

Memorandum, Department of Natural Resources Comments on Recodification of Boating Regulations in WLC: 0156/2, dated August 16, 2001, from Michael A. Lutz, Department of Natural Resources (9-24-01)

Memorandum, Department of Natural Resources Comments on the Recodification of s. 30.77, Stats., in WLC 0163/3, dated August 16, 2001, from Michael A. Lutz, Department of Natural Resources (9-24-01)

Letter from Jerry Deschane, Wisconsin Builders Association (9-24-01)

Letter from William P. O'Connor, Attorney, Wheeler, Van Sickle & Anderson, S.C., on behalf of the Wisconsin Association of Lakes (9-21-01)

October 17, 2001 Meeting

Preliminary agenda for the October 17, 2001 meeting

Memo No. 11, Summary of Written Materials and Committee Discussions Related to the Issue of Navigability (10-9-01)

Memo No. 12, Issues for Discussion in WLC: 0077/2, Relating to Recodification of Subch. II of Ch. 30 (10-9-01)

WLC: 0205/1, an amendment to WLC: 0077/2

November 13, 2001 Meeting

Memo No. 13, Progress Report of the Special Committee on Navigable Waters Recodification (11-6-01)

WLC: 0156/3, relating to recodification of part of subch. V of ch. 30

WLC: 0163/5, relating to local regulation of boating and seaplanes

WLC: 0204/1, an amendment to WLC: 0077/2, relating to mapping

WLC: 0205/2, an amendment to WLC: 0077/2, relating to farm drainage ditches

WLC: 0214/1, an amendment to WLC: 0077/2, relating to navigability

WLC: 0216/1, an amendment to WLC: 0077/2, relating to notice and hearing

Preliminary agenda for the November 13, 2001 meeting of the Special Committee

Memorandum, Amendments to WLC: 0077/2, from Mary Ellen Vollbrecht and Michael Cain, Department of Natural Resources (11-15-01)

Memorandum, 5th Draft Revision of Sec. 30.77, Relating to Local Regulation of Boating (WLC: 0163/5), from Curt Witynski, League of Wisconsin Municipalities (11-12-01)

January 8, 2002 Meeting

Letter, from Scott A. Swid, Daubert Law Firm (11-16-01)

Memo No. 14, Issues Regarding Bill Drafts Distributed to the Special Committee (12-21-01)

Memo No. 15, Penalties in Subch. II of Ch. 30, Stats. (1-2-02)

Memo No. 16, Organization of Subchs. II and VI of Ch. 30, Stats., in WLC: 0077/3 (1-2-02)

WLC: 0077/3, relating to recodification of subch. II of ch. 3

WLC: 0156/4, relating to recodification of part of subch. V of ch. 30

WLC: 0163/6, relating to local regulation of boating and seaplanes

WLC: 0240/1, an amendment to WLC: 0163/6.

WLC: 0189/1, relating to changing the term "navigable waters" to "public trust waters" in the statutes

WLC: 0190/2, relating to definitions in ch. 30

WLC: 0221/1, relating to recodification of subch. III of ch. 30

WLC: 0241/1WLC: 0241/1, relating to cross-references to ch. 30

Preliminary agenda for the January 8, 2002 meeting of the Special Committee

Letter from Roger E. Walsh, President-Elect, Wisconsin Association of Lakes (1-8-02)

Letter from Public Member Daniel P. Gustafson (1-8-02)

Letter of Paul Kent, Attorney, Davis & Kuelthau (1-8-02)