

OPPORTUNITIES NOW

An Analysis of Priority Issues and Actions
for Wisconsin's Natural Resources



2022
2023

Imbalance of Power

*How Wisconsin is Failing Citizens in Conserving Natural
Resources and Protecting our Environment*

Wisconsin's Green Fire

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About this Work:

Opportunities Now is an issue paper series published by Wisconsin's Green Fire that summarizes the science and background of key conservation and environmental issues and makes policy recommendations that support pro-conservation outcomes. Each of the papers in our Opportunities Now series is the product of an analysis of current literature, interviews with agency staff and experts, and the consensus of our subject matter teams. Policy makers, conservation organizations, and concerned citizens are all welcome to use and distribute Opportunities Now papers without restrictions.

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Imbalance of Power

How Wisconsin is Failing Citizens in Conserving Natural Resources and Protecting our Environment

I. Summary

Between the 1960's and 2010, Wisconsin was recognized as a national leader in conservation and environmental protection. This reputation was built on a legacy built by icons in the conservation movement and an innovative and progressive approach to new policies and legislation. During this time Wisconsin addressed difficult environmental challenges, made sustained investments in conservation and environmental programs, and established a set of laws, policies, and norms that protected natural resources programs from undue political influence while encouraging robust public engagement.

Today Wisconsin's reputation is dramatically different. Over the past ten years we have fallen behind neighboring states, both in addressing longstanding conservation issues as well as emerging environmental threats.

Since 2011, the collective effects of state legislative actions, court rulings, and political practices have undermined democratic processes and profoundly changed the way state government operates.

One important change during this period has been a sustained shift in power from the executive branch to the legislative branch. Outcomes of this shift include failure to conserve natural resources in a range of areas including management of fish, wildlife, and forests, protection of public lands, and protection of clean air and water.

One especially acute outcome of this policy failure is the public health crisis precipitated by Wisconsin's failure to adequately prevent contamination of drinking water and degradation of surface waters as a result of industrial, agricultural, and poorly managed residential activities. While some of these problems have been years in the making, a decade-long failure to take effective actions to address them is affecting health and quality of life and creating a growing financial burden to Wisconsin residents throughout the state.

- ▶ **Nitrate contamination of water supplies in Wisconsin is a public health problem that needs to be addressed. As of 2022, more than 42,000 private wells and 300 public water systems have levels of nitrates above the current health standards established by Wisconsin Department of Health Services (WDHS).**

Elevated nitrate levels are a health risk that can lead to colon, stomach, or bladder cancer, diabetes, and thyroid conditions. Nitrates are a particular health risk for women of childbearing age as they are a known cause of birth defects including spina bifida, cleft palates, and missing limbs in newborns.

Nitrate exposure in infants is directly tied to Methemoglobinemia (aka blue baby syndrome).¹

The direct medical cost estimates for all nitrate-attributable adverse health outcomes in Wisconsin is estimated to range between \$23 million and \$80 million annually.²

- ▶ **As of June 2022, [90 unique sites in Wisconsin](#) have been identified with elevated per and polyfluoroalkyl (PFAS) levels.** Communities affected by elevated levels of PFAS to date include Adams, Eau Claire, Green Bay, La Crosse, Madison, Marinette, Marshfield, Milwaukee, Mosinee, Peshtigo, Rhineland, Rib Mountain, Wausau, and Weston.

Exposure to PFAS is tied to adverse health outcomes including decreased fertility, developmental effects in children including low birth weight, accelerated puberty, bone variations, or behavioral changes, increased risk of some cancers, including prostate, kidney, and testicular cancers, immune system impacts, and increased risk of obesity.

PFAS are a growing public health crisis affecting both urban and rural communities throughout Wisconsin. In the most heavily affected communities, local governments are supplying bottled water for cooking and drinking at taxpayer expense.

- ▶ **Wisconsin surface waters continue to decline in quality, with more waters added to the state's Impaired Waters List each year. An increasing number of water bodies have been made unsafe or unusable during more parts of the year as a result of algal blooms or the presence of toxic chemicals.**

A series of changes to state laws has limited local governments from using locally established standards for protecting shorelands from excessive development and limited the Wisconsin Department of Natural Resources (WDNR) from enforcing those standards. Shoreline development on the margins of lakes causes degraded water quality and reduced habitat quality for fish and aquatic species, which in turn reduces recreational opportunities for lake users and affects property values for all lakeshore owners.

This paper explores the changes in the balance of power in state government since 2011 that have prevented effective responses to these and other emerging environmental threats, thus putting the health and welfare of Wisconsin citizens at risk. We focus on how these changes have impacted key environmental programs. However, they also impact natural resource conservation (fish, wildlife, public lands) and other state policy arenas.

Our conclusions offer recommendations for changes to policies and practices that will allow Wisconsin to effectively address the ongoing need for conservation and environmental protection that is essential to human health and quality of life for Wisconsin Communities.



II. Background

Since the middle of the 20th Century the citizens of Wisconsin have entrusted the state with an active role protecting the water, air, forests, and public lands that support their individual and collective quality of life and livelihoods. While specific policies and practices are always subject to discussion, Wisconsin citizens, across the political spectrum, have generally accepted the need for state agencies to take actions to ensure sustainable management of natural resources and environmental protection, all guided by the best available science and robust public input.

II.1 Wisconsin's Branches of Government and Their Functions

The Wisconsin Constitution mirrors the U.S. Constitution in establishing three branches of government: Legislative, Executive, and Judicial, with defined separation of powers. Each branch has exclusive "core powers" into which other branches may not intrude, as well as authority to provide checks and balances to other branches. One purpose of this tripartite structure of government is to ensure that no one branch can dominate governance.

Wisconsin's Governing Structure

Executive Branch

The governor heads the executive branch, including overseeing state agencies such as the Department of Natural Resources, Department of Agriculture, Trade and Consumer Protection, and Department of Health Services.

The governor appoints agency secretaries and their policy boards. Every two years governors submit state budgets to the legislature that include funding for executive branch agencies.

Unlike the legislature, the governor cannot change laws, but can issue executive orders and call for state agencies to prioritize issues that they feel are important.

Judicial Branch

The judicial branch is comprised of approximately 250 circuit courts (AKA trial courts). In addition, two levels of appellate courts exist. The Court of Appeals is organized into four districts with four judges each. The Wisconsin Supreme Court has seven justices.

Unlike the federal judicial system, Wisconsin judges are elected with terms specified in statutes relative to their office.

Two of the judicial branch's checks over the legislature are its powers to decide the constitutionality of legislative enactments and to address conflicts between local, state, and federal laws.

Legislative Branch

The legislative branch in Wisconsin consists the Senate and the Assembly. The legislature sets state policy and designs state programs through enactment of laws (statutes), including development and passage of a biennial state budget.

The legislature may also pass resolutions for amendments to the state constitution. Legislative committees have broad discretion to hold hearings.

The legislature is supported by service agencies that perform auditing, fiscal and policy analysis, legal research, and bill drafting.

The set of unique roles and responsibilities enumerated by constitution and by law between branches of government create a system of checks and balances that is sometimes referred to as the “Horizontal Balance of Power”.

II.2 Executive Branch Agencies and Administrative Rules

Agencies of the executive branch exercise authority through a combination of direct statutory authority (i.e. laws passed by the legislature), and [administrative rules](#).³ Statutes usually take a broad approach while administrative rules address fine points or ambiguity in determining how a law will be implemented. Administrative rules are regulations developed by an agency through a defined (and often complex) process. They have the force and effect of law.

Administrative rules provide certainty to regulated parties, stakeholders, and the public as to how an agency will fulfill its legal responsibilities. Administrative rules can also provide detailed procedures for agency staff to administer programs and responsibilities consistent with the mandates of state or federal law and other constitutional responsibilities. In the absence of detailed procedures provided by rules, administrative agencies develop less formal guidance documents that interpret the intent of statute, but that may lack the transparency, certainty, or the level of public input provided by administrative rules.

Since its founding as a combined natural resources and environmental protection agency in 1967, the WDNR has had executive agency responsibility for the conservation of fish, wildlife, and the lands and waters of the state. Additionally, it implements a broad suite of environmental programs that protect and regulate commercial and industrial activities and protect air, water, and citizens from environmental harm. To fulfill its mission, the WDNR has developed an [extensive body of administrative rules](#) cataloged in hundreds of chapters.⁴

Collectively, the WDNR’s administrative rules reflect the wide scope of the agency’s mission and statutory responsibilities. General topics covered by natural resources rules in Wisconsin include but are not limited to: fish and wildlife management; forest management; water pollution regulation; air pollution regulation, solid waste management; hazardous waste management; drinking water supplies; remediation and redevelopment; and natural resources and environmental enforcement.

Some state administrative rules also allow for implementation of federal laws when authority is delegated to states by federal agencies. An example of federal delegation is the Environmental Protection Agency’s delegation of authority to WDNR to implement requirements of the federal Clean Water Act.

Natural resource administrative rules are developed by the WDNR, however both the governor and the legislature have authority to review and approve rules. In particular, the legislature’s Joint Committee for Review of Administrative Rules (JCRAR) is a standing committee with review, approval, and rejection authority for all administrative rule development. Wisconsin courts also have jurisdiction and can review the validity, application, and enforcement of rules on behalf of affected parties.

Changes to the longstanding balance of powers among the branches of government around agency authority is treated in subsequent sections.



Wisconsin – A Conservation Leader

The period between about 1964 and 2000 has been described by historians as a golden era for conservation and environmental protection. During those years Wisconsin was considered a national leader and innovator in conservation policy.

Progress on environmental protection and natural resources conservation during this era was led by a growing public demand, many active and influential conservation organizations, bi-partisan coalitions in congress and state legislatures, and state and federal agencies working in concert to develop and implement new programs and mandates.

Wisconsin's Governor Warren Knowles (a Republican first elected as governor in 1964) led efforts that fundamentally reshaped and reformed state government. Knowles appointed a commission charged with assessing and recommending a sweeping reorganization of state government chaired by William Kellett, former President of the Kimberly Clark Corporation. After a partisan and contentious battle, legislation that authorized reorganization of almost all of Wisconsin state government was passed in June 1967 as [Chapter 75, Laws of 1967](#).⁵

The 1967 reorganization eliminated the Department of Conservation and the Department of Resource Development and pulled their functions and most existing staff into a new "super-agency," the [Wisconsin Department of Natural Resources](#). The new Wisconsin DNR was led by a [seven-member policy board](#) made up of citizens, the Natural Resources Board (NRB). The NRB was given responsibility for programs of both former departments, including fish, wildlife, forestry, and parks, and environmental programs involving protection of air and water.⁶

In supporting the 1967 reorganization, Knowles declared that natural resources belonged to all economic classes, and to all people, and that *"The people are interested in the results, and the preservation of nature will not await partisan politics. We must have a program free from mystery and untrampled by bureaucracy or political partisanship."*

The Wisconsin legislature supported conservation programs during this era through agency budgets that included staffing and investments needed for successful programs and enabling legislation that handed decision making to agency managers, scientists and natural resources management experts. Decisions were informed by robust processes for public input that balanced interests of various stakeholders.

Examples of innovative conservation policy in this era included the Knowles Nelson Stewardship Program, wetlands, shoreland zoning, and groundwater protection legislation, and programs supporting sustainable forest management on public and private lands. The unique power of the "Wisconsin Idea," a general principle that education should influence people's lives beyond the classroom, was illustrated in cooperative efforts between scientists at the University of Wisconsin and state agency managers in natural resources and agriculture.

During this era, with bi-partisan leadership from governors and legislators, Wisconsin enjoyed a national reputation for innovative leadership and successful programs for conserving natural resources and addressing environmental challenges.

Kayaks on the Wisconsin River July 2022 Wausau Paddle and Pub Crawl. Photo Credit: Michael Tatman/ Shutterstock.com



III. What Has Changed?

Beginning in 2011, a sharp shift in philosophy over the role of government resulted in systematic changes in the longstanding balance of power within state government - expanding the power of the legislature and weakening the executive branch. Legislative actions, court rulings, and political interference combined to undermine democratic processes, impacting the ability of the executive branch to exercise its constitutional duty to enforce the laws enacted by the legislature.

While these changes have implications for all executive agencies, one of the most significant and consequential outcomes has been limiting executive agencies' abilities to protect clean air and water and conserve land for public benefits.

As a result of these changes, Wisconsin citizens have fewer opportunities to benefit from natural resources management and outdoor opportunities, and citizens are more at risk from profound threats to public health, especially risks associated with contaminated water.

The changes in legislation and practice we focus on include:

- ▶ [2011 Wisconsin Act 21](#), which gave significant new powers to the legislature and limited agency authority in reviewing and approving new administrative rules.⁷
- ▶ [2017 Wisconsin Act 57](#), which further limited agencies' ability to develop administrative rules by establishing lower thresholds for economic impact analysis and allowing legislative committees to block rules for indefinite periods of time.⁸
- ▶ [2017 Wisconsin Act 39](#), which created a 30-month deadline for development of new administrative rules and nullified all work on any rules not completed in that time frame.⁹
- ▶ A [series of legislative changes](#) between 2011 and 2018 removed local control from communities, preventing them from developing locally-based standards for environmental protection.
- ▶ Coordinated efforts between Wisconsin Senate leadership and appointees of Gov. Scott Walker's administration to prevent Governor Tony Evers from seating appointees, including seats on the Natural Resources Board.

Taken together, these changes have made it significantly more difficult for the State of Wisconsin to implement sound science-based policies to address public health and environmental protections – even when those changes are overwhelmingly supported by citizens.

Hearing of the
Assembly Committee
on Judiciary and
Ethics on Assembly
Bill 8 (Act 21),
January 25th, 2011

Photo Credit:
Wisconsin Eye



III.1 Changes to Rulemaking

A series of laws enacted between 2011 and 2017 have dramatically limited the ability of executive branch agencies to develop administrative rules and administer environmental programs.

2011 Wisconsin Act 21

Among the bills introduced during a January 2011 Special Session of the legislature, 2011 Assembly Bill 8 made changes to the process for developing agency administrative rules. The bill was passed and signed into law as 2011 Act 21, which significantly narrowed the ability and scope of authority for state agencies to develop administrative rules.⁷

2011 Act 21 has been the most significant legislative change affecting the work of state agencies in the last 50 years.

Principal Provisions of 2011 Act 21

► Agency Authority to Promulgate Rules and Implement Standards

Prior to Act 21, Wisconsin law and court precedent gave discretion to executive agencies to promulgate rules to reflect the “general interpretation of statutes enforced or administered” by that agency if the agency considered it necessary to fulfill the purpose of the statute. This broad discretion allowed agency rules to adapt to novel or emerging issues that were not or could not have been contemplated when enabling laws were written.

Under Act 21, agencies could only develop rules or take actions based on “explicit authority” provided by clear language in statutes. Act 21 also makes clear that agencies may no longer rely on statutes describing an agency’s general duties or on non-statutory language in other legislation to support a claim to rule-making authority.¹⁰

Also under Act 21, standards in rules must be no more restrictive than any standard set out in statutes, regardless of whether any evidence based on science, overwhelming public opinion, or emerging evidence of a need for policy not contemplated when the legislation was established would indicate a different standard or approach.

► Gubernatorial Approval of Statements of Scope and Final Rules

Act 21 requires that an agency submit a statement of the scope of a proposed rule to the governor. The agency may not send the scope statement to the Legislative Reference Bureau (LRB) for publication until the governor issues a written notice of approval of the statement. Act 21 also requires that an agency submit a proposed rule that is in final draft form to the governor and the governor may approve or reject the proposed rule.

► Legislative Committee Review of Proposed Rules

Act 21 gave new authority to legislative committees to object to rules and gave new power to the [Joint Committee on Review of Administrative Rules](#) (JCRAR) to approve or prevent the adoption of rules or any portions of rules.

Under longstanding law, administrative rules are circulated to relevant committees of the legislature for review. Act 21 provides that legislative committees must report the proposed rule and any objection to the rule to JCRAR. The review period for JCRAR is 30 days, during which time JCRAR may take any action on the proposed rule. JCRAR must meet and take action during that period on any rule to which a legislative committee has objected and may meet and take action during that period with respect to any proposed rule to which no committee has objected.

Act 21 prohibits an agency from finalizing a proposed rule until either JCRAR's review period has ended (known as passive review) or until it takes action to approve the rule by overruling the objection of a committee, concurring in the approval of the committee, approving the proposed rule, or waiving its jurisdiction over the proposed rule. JCRAR may also introduce separate legislation that, if passed into law, would indefinitely prevent development of a proposed rule in the future.

The changes from Act 21 mean that state agencies can spend considerable resources and many months developing rules only to have the JCRAR fail to adopt the rules, potentially causing the entire rule development effort to end and requiring the agency to begin again with a new scope statement.

► Required Economic Impact Analysis (EIA)

Under Act 21, any agency promulgating rules must conduct an economic impact analysis (EIA) that assesses the impact of the proposed rule on specific businesses and business sectors, public utility ratepayers, local governments and the state's economy as a whole. The businesses impacted by the rule are to be advisors in the preparation of the required analyses.

The EIA must identify implementation and compliance costs expected to be incurred or passed along to businesses, local government, and individuals. The EIA must also consider alternative methods for addressing the policy issue covered by the rule, including not developing the rule.

There is no requirement in Act 21 to assess and compare the environmental, health, or economic benefits of a proposed rule when assessing the costs of rule implementation. For example, the costs of environmental damage and human health impacts of air or water pollution can be substantial, as can the avoided costs to taxpayers that may be realized as a result of effective regulations, however no provision in Act 21 requires such a cost-benefit comparison.

► Venue for Judicial Review of Administrative Rules

Prior to Act 21, legal challenges related to agency actions and administrative rules were required to be filed in Dane County, the seat of state government. Act 21 allows legal challenges to agency rules to be launched in the circuit courts of any county where a party to the suit resides, or any county where the effects of the rule are germane. Effectively, this provision allows persons seeking to challenge state agency authority almost unlimited ability to select a favorable venue for their case.

2017 Wisconsin Act 39, and Act 57

In 2017, two pieces of legislation, Act 39 and Act 57, created additional hurdles for rule development and gave additional powers over rulemaking to the JCRAR.

Principal Provisions of Act 39

Act 39 established a 30-month deadline for rulemaking. Under Act 39, an agency has 30 months from the time a scope statement is approved until the time a rule must be submitted to the legislature. After 30 months the rule is considered withdrawn and the process must start over. Act 39 applies to all agency rulemaking, as well as to all scope statements that were in effect prior to the law's passage.

Principal Provisions of Act 57 (the REINS Act)

Act 57, AKA the Wisconsin REINS (Regulations from the Executive in Need of Scrutiny) Act was signed into law by Gov. Scott Walker in August 2017, making Wisconsin the first state to adopt such legislation. The Wisconsin REINS Act was modeled on federal legislation with the same name which has been introduced in Congress in multiple sessions beginning in 2011 but was never signed into law.

Act 57 created new requirements for state agencies to conduct Economic Impact Analysis (EIA), and further strengthened the power of the Joint Committee on Review of Administrative Rules (JCRAR) to review, approve, deny, and otherwise limit the development of new rules.¹¹

► Statements of Scope and Agency Rule Drafting

Act 57 created new requirements for the Department of Administration (DOA) to review each new proposed scope statement (an early step of rule development which determines the topics or scope of a proposed rule) and determine whether the agency has the authority to develop a new rule prior to the scope statement being sent to the governor.

The Act also creates a new process for notifying and allowing the JCRAR to comment and hold a separate committee hearing on any new scope statement before the agency is allowed to finalize the scope statement and begin work on the proposed rule.

► Economic Impact Analysis (EIA)

Act 57 changes requirements for EIAs by requiring agencies to determine if the cost for implementation and compliance of a proposed rule is \$10 million or more over any two year period. If the agency finds the cost of implementing the rule will exceed \$10 million, the agency may not conduct further work to develop the rules without either modification of the rule to reduce costs below \$10 million, or passage of legislation providing specific authorization for the rule.

The Act also gives power to either of the co-chairs of the JCRAR to request an independently conducted EIA, the cost of which must be paid for by the agency if the estimated cost varies by more than 15% from the agency's own EIA.

► Indefinite Objection

Act 57 allows JCRAR to indefinitely suspend a rule, preventing the agency from any further work to promulgate the rule unless or until the legislature adopts specific authorizing legislation allowing the rule to be developed. Previous to Act 57, JCRAR could only make a temporary objection to a rule.

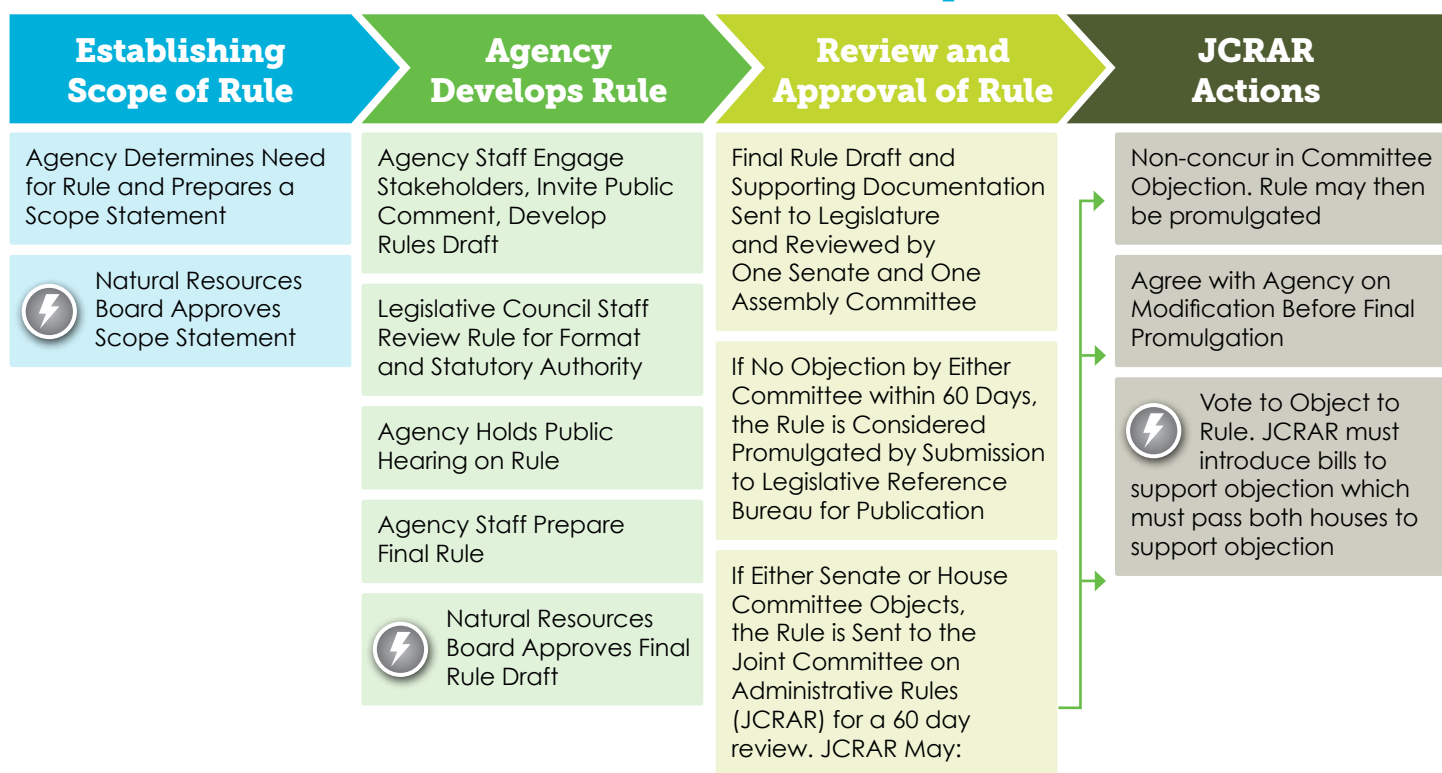
Collective Impact of Legislation on Rule Making

The combined effect of 2011 Act 21, and 2017 Act 39 and Act 57 has been to make agency rulemaking processes significantly longer, more time consuming, more expensive, and more likely to fail.

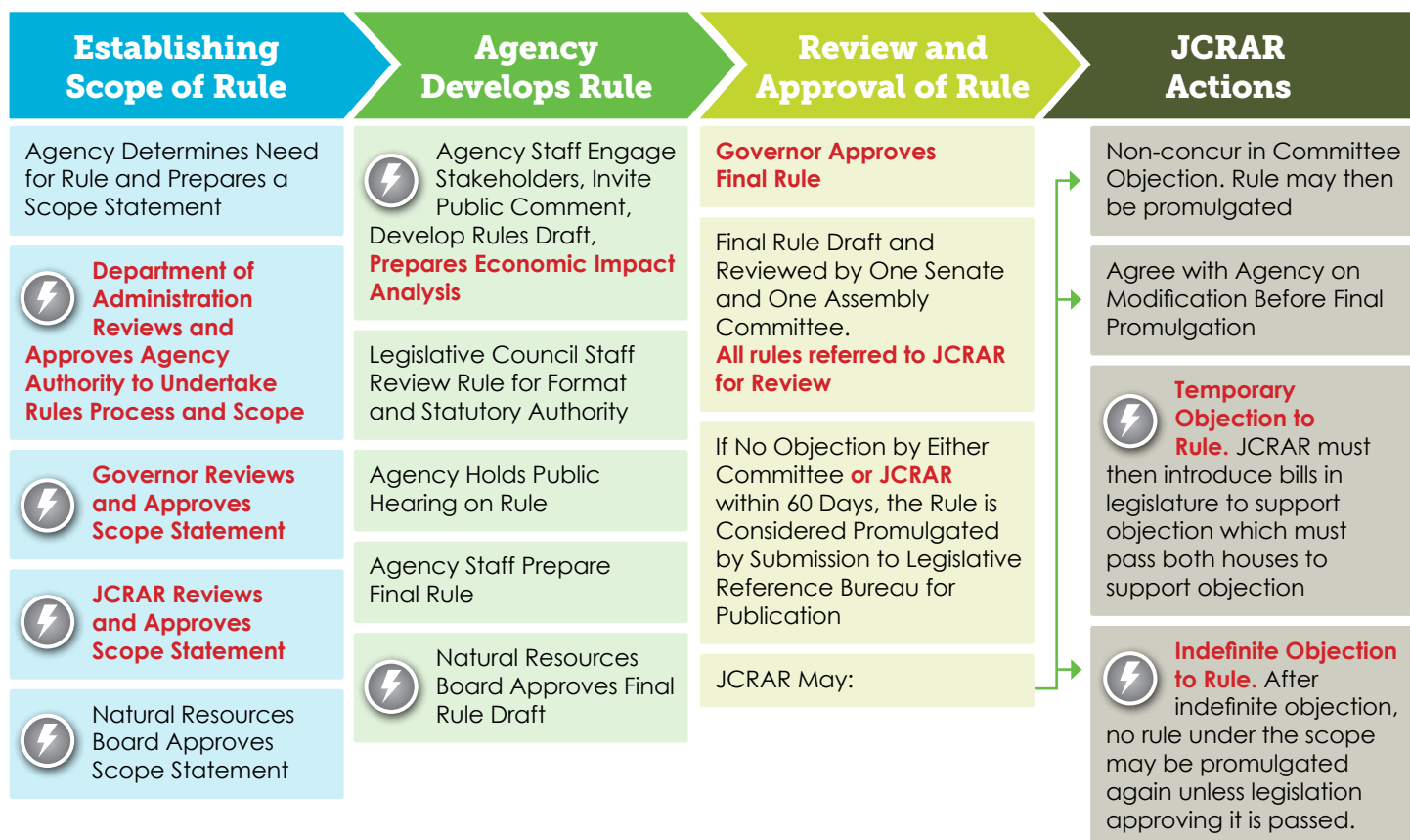
The current laws governing agency rule-making guarantee that attempts to develop agency rules result in significant extra costs that absorb large amounts of staff time, and that often result in weak or ineffective rules, or in some cases, failed processes in which no rules are adopted at all.


Failed rules waste not only thousands of hours of staff time, but also waste a significant amount of time, travel expense, and the goodwill of stakeholders who volunteer to participate in rule making processes through advisory committees or public hearings. More importantly, a failed rule process can mean failure to implement even the most important and most broadly supported actions to address urgent and emerging environmental issues.

Wisconsin Natural Resources Rules Development Process 2008



Wisconsin Natural Resources Rules Development Process 2020



 Control Point – Rule May Be Modified or Killed

Processes Added via Legislation Since 2011

III.2 The Vertical Balance of Power – State and Local Units of Government

The relationship between federal, state, and local units of government is sometimes referred to as a “vertical balance of power.” State, county, and local governments in Wisconsin all have areas of overlapping jurisdiction and sometimes competing interests.

Control over land use and the regulation and permitting of business and industrial activity are two areas that reflect continual tension and debate over the proper balance between uniform state standards and laws, and the flexibility of local units of government to adopt ordinances or standards unique and appropriate for their communities and landscapes.

The principle of local control rests with the concept that the lowest level of government is most connected to and responsive to local needs. Local control is blunted when state laws preempt local governments from creating unique standards or ordinances to fit local needs, or to reflect the weight of local public opinion.

The issue of local control does not align consistently with any political party or partisan ideology – rather positions on pre-emption versus local control are much more likely to be determined by the political implications of the issue being addressed.

Prior to 2011 it was common for state law to establish minimum environmental standards which local units of government could modify by establishing higher standards or unique requirements or prohibitions. Since 2011 however, numerous provisions in state law have established statewide maximum standards that local units of government have no authority to modify.

Examples of significant preemption of local control on environmental issues include:

► **Siting and Operation of Frac Sand Mines**

In 2011, the legislature passed [2011 Act 144](#), which prevented local units of government from adopting moratoriums on frac sand mining, with a narrowly-crafted set of exceptions that could only be applied for a 12-month period.¹²

In the following session, [2013 Senate Bill 349](#) proposed even more sweeping stripping of local authority over aspects of non-metallic mining and other industrial activities, but the bill was never advanced from committee.¹³

► **Local Standards and Ordinances for Shoreland Zoning**

Since the passage of the 1965 Water Resources Act, local units of government have had the authority to develop their own standards and ordinances to protect shorelines. [2011 Act 170](#) removed local discretion in adopting any shoreline zoning standards more restrictive than state standards.¹⁴ Shoreline zoning is addressed in more detail in Part III.

► **Siting of Confined Animal Feeding Operations**

The 2003 Wisconsin Livestock Siting Law, [2003 Act 235](#), took power away from local governments to use zoning or protective ordinances to approve, deny, or limit large livestock operations.¹⁵ The Wisconsin Department of Agriculture, Trade, and

Consumer Protection (DATCP) administrative rule on Livestock Facility Siting, ATCP 51, reflects the impact of this law.

Each of these issues present challenges in developing appropriate regulations because many of the impacts of these activities are dependent on local environmental variables such as soils, geology, or hydrology. Relying solely on state-level regulations for environmental issues, based on average conditions, often proves to be inadequate to protect the most sensitive areas or address the most extreme situations. On the other hand, in cases where state standards are sufficient to protect the most sensitive areas or address extreme situations, they may also be more onerous than needed in the majority of other less sensitive or extreme cases.

Developing locally tailored standards can also be achieved through a robust rule development process. However, as outlined in previous sections, developing appropriate and effective environmental rules is no longer consistently possible in Wisconsin, even for issues considered to be the highest priority by citizens.

III.3 Blocking Executive Branch Appointments

Precedent

Governors have authority to appoint individuals to positions in the executive branch. Gubernatorial appointments include thousands of appointments ranging from agency heads to the members of hundreds of councils and boards established in state statutes, as well as task forces and advisory bodies convened for specific purposes.

Prominent appointments are subject to confirmation by the State Senate, a longstanding example of checks and balances in state government. Positions subject to Senate confirmation include the heads and deputies of state agencies, as well as boards with significant policy making authority such as the Natural Resources Board or the University of Wisconsin Board of Regents.

Generally, persons who have been appointed to positions subject to Senate confirmation can serve in an appointee capacity even while their confirmation is pending. There has been a longstanding controversy however in interpretation of state law as it relates to obligations of appointees to state boards whose terms have expired.

An interpretation of a 1964 Wisconsin Supreme Court ruling ([State Ex Rel. Thompson V. Gibson, 1964](#)) held that individuals in certain appointed positions whose terms have expired and for which no replacement appointment had been confirmed could remain and continue to exercise authority in their expired positions – effectively preventing the seating of appointments made by a current governor if senate leadership does not schedule hearings.¹⁶

Current Practice

As of June 29, 2022, there were 127 individual appointees, to state boards and commissions made by Governor Evers, who had not received Senate confirmation, nor had Senate leaders publicly stated their intentions for these appointments. Among these confirmations and germane to this paper are one critical appointment to the Natural Resources Board.

Following the Kellett Commission recommendations in 1967, the new Natural Resources Board was established with the goal to reduce the influence of politics and allow for more thoughtful and consistent natural resource policy, balancing science, management and social concerns. Members were granted staggered six-year terms, expressly to avoid abrupt shifts in policy when elections occur.

Citing the 1964 Supreme Court ruling as precedent, then Natural Resources Board Chair Frederic Prehn announced his decision not to resign his seat at the time his appointed term expired in May 2021. As of August 2022, Prehn had remained a member of the Natural Resources Board, 14 months beyond the expiration of his term, preventing the seating of the Governor's appointed replacement Sandra Nass. As of August 2022, Senate leaders have not indicated any further plans to hold hearings on Nass, or any of the other growing number of current appointees.

Prehn's refusal to resign is not unprecedented – two other NRB members have also done so since the DNR was formed in 1967.

What is unprecedented about the current situation is that public records of communications between Dr. Prehn and Wisconsin Senate leaders make clear the existence of a coordinated plan involving Dr. Prehn's refusal to resign his seat and the Senate leadership's concurrent refusal to hear or confirm a replacement appointment.¹⁷ The effect of this coordinated action is to deny the current governor the ability to exercise one of the core powers provided by the constitution to the state's chief executive.

In August 2021, Wisconsin Attorney General Josh Kaul [filed suit in Dane County Circuit Court](#) seeking to force Prehn to be removed from his seat.¹⁸ In June 2022 the Wisconsin Supreme Court resolved the issue in a 4-3 ruling holding that individuals in certain appointed positions whose terms have expired may nevertheless remain and continue to exercise authority in their expired positions indefinitely until such time as the Senate has confirmed a replacement.

By allowing NRB member Prehn to continue serving in office indefinitely after his statutorily defined term has expired, the Supreme Court ruling relies on confusion over ambiguity in state laws to effectively strip the executive branch of its constitutionally granted power to make appointments to government bodies.

As the ongoing standoff over confirmation of appointments continues, the impact of preventing seating a growing number of executive appointments may only grow.

III.4 Cumulative Impacts

Each of the changes in policy or practice described above has a distinct effect on the ability of the state government to successfully conserve natural resources and protect our environment. Collectively however, the effect of these changes may be even more profound.

- ▶ The Wisconsin Natural Resources Board remains effectively captured by a majority of members appointed during a previous administration as a result of a holdover appointment, preventing a governor elected four years previously from seating members and implementing important aspects of his agenda.
- ▶ The Joint Committee on Review of Administration Rules in the Wisconsin Legislature holds an inordinately high-level of oversight and control over the fate of environmental and conservation programs and uses that authority to prevent actions that address recognized and broadly supported environmental initiatives.
- ▶ Developing Administrative Rules is no longer a functional process for addressing important conservation or environmental issues. Increasingly, when legislative leaders support the need, detailed standards or requirements that would have formerly been addressed in rules are instead included in legislation. When standards are established in statutes instead of through rule-making, the process generally lacks the public input, flexibility, and science-based foundation that can be achieved through a robust rules development process.
- ▶ A growing number of Wisconsin citizens are losing faith in the ability of state government and our long-established public processes for conservation governance to create solutions to our greatest environmental challenges.

The following section showcases examples of these changes and their impacts.



IV. Outcomes

The complex processes around legislation and administrative rules can seem abstract and academic to average citizens without a solid understanding of how laws and rules affect people's lives.

In this section we examine three environmental issues that have profound impact on the health and welfare of Wisconsin residents and for which the actions taken or not taken to address them have been directly influenced by the changes noted in the previous section.

- ▶ The growing crisis of **contamination of drinking water from PFAS** in Wisconsin communities
- ▶ The longstanding crisis of **nitrate contamination of groundwater** in rural Wisconsin
- ▶ The **degradation of shorelands and shoreline habitats** from poorly planned residential development on lake and riverfronts

There are many more examples of how policy changes have affected environmental and conservation policy outcomes, however the issues we profile here are among the most significant and have the widest impacts on Wisconsinites across the state, in communities both large and small.

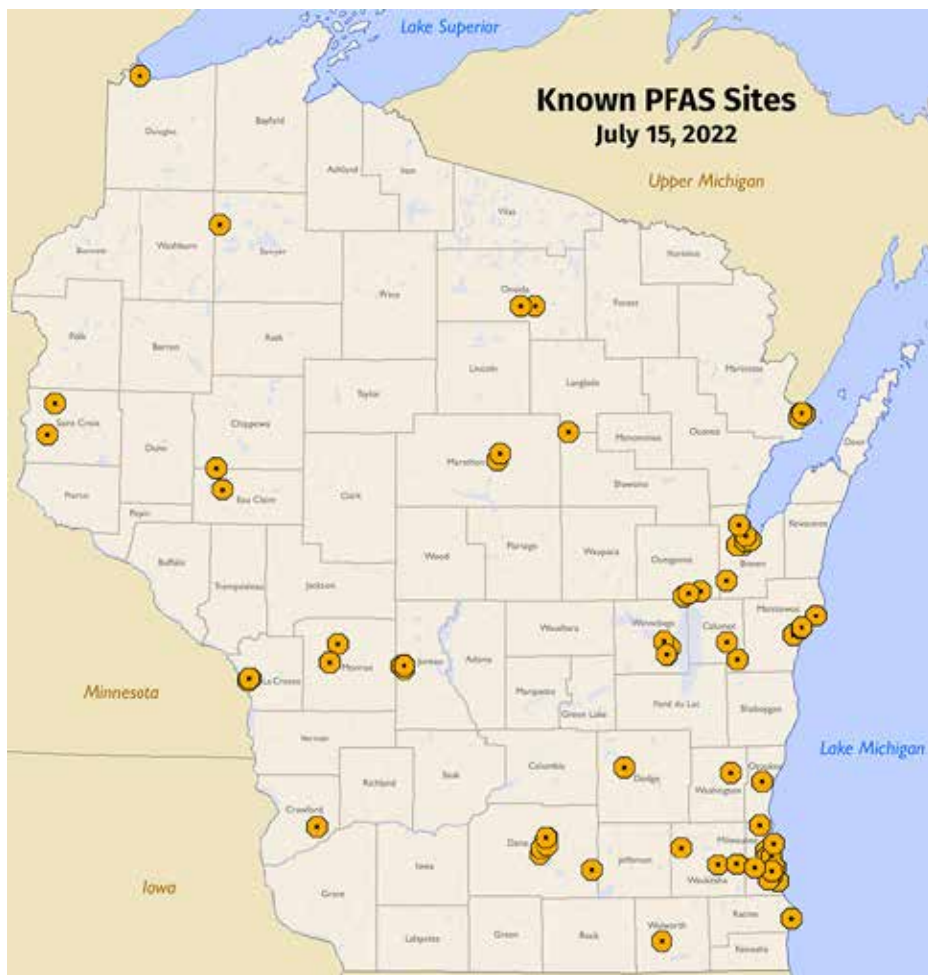
IV.1 Polyfluoroalkyl Substances (PFAS)

Background

Polyfluoroalkyl substances (PFAS) as a group includes thousands of individual chemicals, many of which have been in production and use in a wide variety of products including firefighting foam, carpeting, coated paper, chrome metal plating, non-stick cookware, dental floss, and a wide variety of food packaging products since at least the 1950s.

Due to their widespread use in so many consumer products, PFAS are now being detected in the environment and in humans, animals, and other organisms in every part of the world in groundwater, surface water, drinking water wells, biosolids, soils, and aquatic sediments. Exposure to high levels of PFAS has been linked to a myriad of human health issues including increased risk of some cancers, decreased vaccine response in children, changes in liver enzymes, and fertility and pregnancy complications in women.

The United States Environmental Protection Agency (EPA) is in the process of setting national standards for PFAS. In the current absence of a comprehensive federal approach to PFAS, Wisconsin, along with other states, is grappling with how to regulate these chemical contaminants while working to better understand their health effects.



As of August 2022, PFAS detections have been reported in at least 90 sites throughout Wisconsin. Up to date information on PFAS detections and state actions can be found at the [WDNR's PFAS Investigation and Cleanup](#) page. Credit: WDNR

Wisconsin's Green Fire produced a policy summary of PFAS in Wisconsin in our 2021 Opportunities Now paper: [PFAS – Forever Chemicals in Wisconsin](#).¹⁹

As of August 2022, PFAS detections have been reported in at least 90 sites throughout Wisconsin.

Federal Regulation

Health Advisory Levels (HALs) are considered to be safe levels established for certain chemical pollutants for which no regulatory standards exist. In 2016, the EPA issued a HAL of 70 ppt for PFAS in drinking water. Many states have subsequently adopted the 70 ppt HAL for state level drinking water standards.

In a move reflecting evolving understanding of PFAS health effects and improving PFAS detection capabilities, in June 2022 EPA released dramatically lower interim HALs for two specific PFAS compounds – PFOA and PFOS.

The new interim HALs of 0.004 parts per trillion PFOA and 0.02 parts per trillion for PFOS are some of the lowest HALs set for any pollutant. The new HALs for these chemicals effectively indicate that PFAS at any detectable level should be considered a health risk.

EPA is expected to issue a new recommended regulatory standard in the fall of 2022.

Wisconsin Rulemaking

In 2019 WDNR began three separate rule development processes for updated standards for drinking water, surface water, and groundwater after Governor Evers approved scope statements for addressing PFAS and other Cycle 10 chemicals in 2019.

The three completed rules packages were presented for consideration at the February 23rd 2022 meeting of the Wisconsin Natural Resources Board. At that date, each of the proposed rules packages were set to expire within 10 days based on the 30 month limit on rule development established in 2017 Act 39.

State Agency Action: 2019 Revisions to NR 140 – Numerical Standards for Polluting Substances in Groundwater

Proposed Rule Item: [NRB Board Order DG-15-19](#)²⁰

Significance: The groundwater rules package would have revised NR 140 to establish new numerical standards for two of the most commonly used PFAS chemicals, PFOS and PFOA, as well as 15 other complex chemical pollutants, and would have revised standards for eight other previously listed substances, commonly referred to as the “Cycle 10” group. Groundwater standards are used by various agencies to address clean ups at contaminated sites and establish design and management criteria for regulated activities. Critically, groundwater standards are the basis for homeowners to evaluate the safety of their home well water in areas not served by municipal water utilities.

Rule Outcome: At the February 23rd NRB meeting, the motion to approve the rule failed on a roll call 3-3 vote, with one NRB member abstaining.

Expected Consequences: There is no concurrent federal effort or federal authority to address contamination in groundwater, so the failure of the groundwater rule leaves no effective standard by which to address PFAS or the 23 other Cycle 10 chemicals addressed by the proposed rule in groundwater.

At particular vulnerability are the approximately 25% of Wisconsin's population who use water supplied by over 800,000 private wells and for whom no recognized standard for PFAS contamination currently exists.

As a result of the rule failure and the continual expansion of PFAS detections throughout the state WDNR will likely need to start over with a new groundwater rule-making process. Timelines imposed by WI Act 21 will result in further delays such that it would be at least three years from time of commencement before a new state rule could go into effect.

State Agency Action: 2019 Revisions to NR 809 – Maximum Contaminant Levels for the PFAS Compounds PFOA and PFOS in Drinking Water.

Proposed Rule Item: [NRB Board Order DG-24-19](#)²¹

Significance: The objective of the proposed rule was to establish drinking water standards, referred to as Maximum Contaminant Levels (MCLs), for two of the most common PFAS chemicals, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). The MCL standards for PFOS and PFOA were based on recommendations from the Wisconsin Department of Health Services (DHS) at 0.000020 mg/L (20 parts per trillion (ppt)). Importantly, the rule does not address dozens of other PFAS chemicals that are commonly detected in drinking water.

Rule Outcome: At the February 23 NRB meeting, the motion to approve the standards was amended by NRB members. The amendment increased the MCL recommended by health experts at DHS from 20 ppt to 70 ppt., mirroring the existing EPA Health Advisory Level. The final rule was passed subject to the amendment to increase the MCL to 70 ppt with a 6-1 vote.

Expected Consequences: Passage of the modified rule sets in motion mandatory sampling for water system operators and public reporting of results, which will reveal in much greater detail the extent of PFAS contamination statewide.

However, by rejecting the 20 ppt level recommended by DHS and weakening the drinking water standards suggested in the original NR 809, the NRB leaves many communities that detect PFAS in their drinking water with uncertainty and conflicting imperatives.

Communities detecting PFAS at levels less than 70 ppt but greater than the new EPA HAL of 20 ppt will lack guidance as to how or whether to advise their users to take precautions in water use, or whether or how to take remedial actions to reduce PFAS levels in their supplies.

Any further strengthening of standards or addition of other PFAS chemicals that cause health risks to the standards will require a new rule process and would take at least three years to take effect once initiated. The presumed pending development of federal regulatory standards for PFAS will eventually supersede Wisconsin standards and based on the recently released EPA's HALS, they are expected to be significantly lower than Wisconsin's 70 ppt.

State Agency Action: 2019 Revisions to NR 102, NR 105, NR 106, and NR 219 – Surface Water Quality Criteria for PFAS.

Proposed Rule Item: [NRB Board Order WY-23-19](#)²²

Significance: The proposed rule package established surface water quality standards for PFOS and PFOA. The proposed rule defined elevated levels for PFOS and PFOA in order to prevent adverse effects from exposure or consumption of surface waters, or from consuming fish. The rule would set criteria for adding water bodies to the state's Impaired Waters List based on PFAS levels. It would also serve as a basis for permitting and clean up requirements for businesses, wastewater utilities, and other entities subject to surface water regulations.

Rule Outcome: At the February 23rd NRB meeting, the Surface Water rules package passed by a 7-0 vote. The Joint Committee on Review of Administrative Rules (JCRAR) subsequently allowed the rules to be forwarded to the Governor for approval without objection.

Expected Consequences: Passage of the surface water package established important surface water quality standards and provides certainty to permitting for regulated businesses and municipalities around PFAS discharges. As a result, PFAS influent and effluent data from major dischargers will begin to become available over the next two – seven years. Significant discharge reductions can be expected from application of EPA effluent limitation guidelines to chrome plating and coated paper industries, and from decreases in the concentrations of the public water supply serving the community.

Cindy Boyle – “We have literally been drinking poison.”

Town of Peshtigo Chair Cindy Boyle is a long-time Peshtigo resident, business owner, and mother whose life and family have been directly affected by PFAS contamination. Boyle had her own thyroid removed on the advice of her physician. (Adverse effects on thyroids are one of many known health risks from PFAS exposure).

Peshtigo and the City of Marinette are one of the [earliest and most concentrated sites of PFAS contamination](#)

[in Wisconsin](#) as a result of Aqueous Film Forming Foam (AFFF) manufactured and tested at local facilities. Concentrations of PFAS in groundwater in some areas most heavily impacted exceeds 100,000 parts per trillion (ppt.). The Wisconsin DHS recommends a safe level in drinking water at 20 PPT. Currently

about 1/3 of the properties in the town are within the plum of PFAS identified in the Expanded Site Investigation Area (ESIA) defined by Wisconsin DNR. In a most recent round of testing, [79% of private wells tested](#) in the ESIA had detectable PFAS levels.

In addition to raising children and running a small business, Boyle dedicates about 30 hours per week to her role as [Town of Peshtigo Chair](#), and the majority of her effort is spent on managing the town's response to a PFAS crisis and helping navigate long-term solutions.

“My role is to provide leadership and try to help all our residents stay safe and make informed choices about this health threat that touches all of us”.

Peshtigo's population is too small to support a separate epidemiological study, but Boyle and other Peshtigo residents have plenty of evidence that PFAS

impact is real – both in terms of human health and in terms of property values.

“Physicians who have served this town for years have told me they’re alarmed by the number of endocrine and thyroid issues they are seeing in patients – far more prevalent than a typical population. And I know many residents, including people with lovely bayfront property, who have accepted dramatically lower sale prices or who have faced concerns around selling their homes at all.”



Boyle gave personal testimony before the NRB and was deeply disappointed by the NRB's failure to approve the rule creating a standard for PFAS in groundwater.

“My friends and neighbors have literally been drinking poison while some NRB members have used legal loopholes to overstay their

welcome and in doing so are knowingly obstructing public safety. Everyone in this town will be living with the impact of this contamination for years to come and it is well past time to put partisanship aside and prioritize public health over corporate profits.

Unfortunately, we have learned that because of the pressure from industry, some elected and appointed officials need to be forced to do the right thing. That is why we need aggressive testing, we need complete public transparency about that testing, we need appropriate protective standards, we need investments in solutions at scale and we need corporate accountability to deter continued conduct. Every day those things don't happen more people will fall ill, and more people will lose the value of their biggest investment – their home. And that is simply unacceptable.”

IV.2 Controlling Nonpoint Pollution from Agricultural Runoff

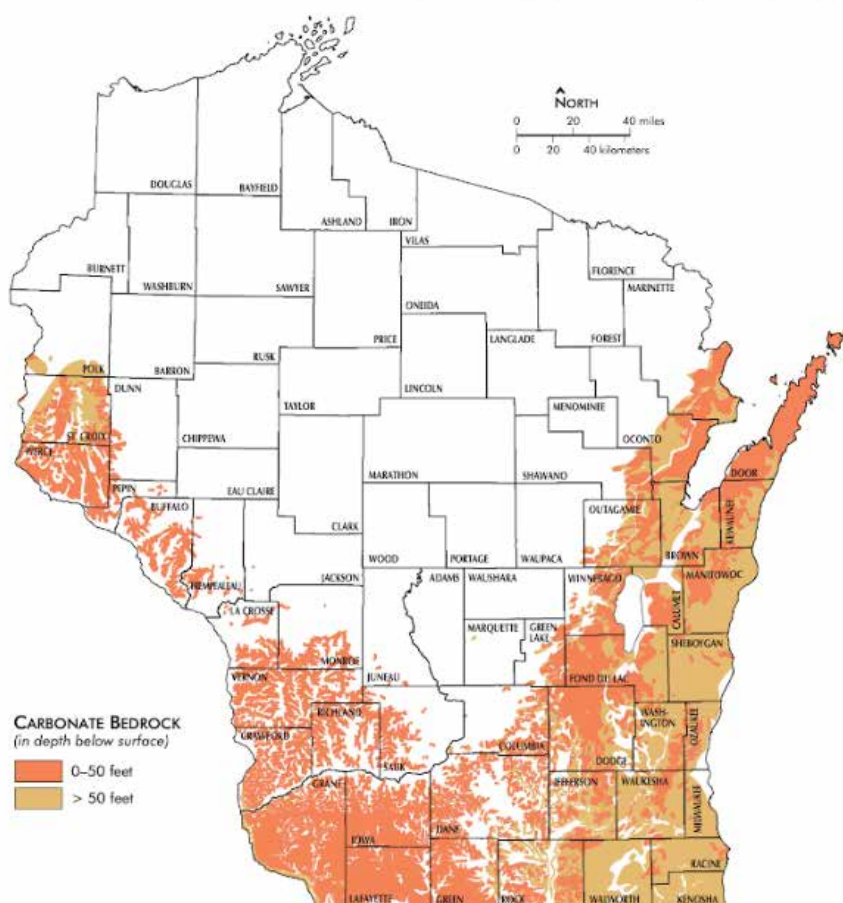
Background

Pollution caused by field based activities in agriculture, as well as forestry, construction, and rural residential development are referred to as [Nonpoint Source Pollution](#) or NPS.

The Clean Water Act of 1972 (CWA) focused mostly on point source pollution caused by specific outlets for industrial waste, wastewater treatment discharges, or stormwater discharges, but did not equally or adequately address pollution from nonpoint sources.

One of the primary sources of nonpoint pollution is caused by polluted runoff from farming/agricultural activities. Nutrients (primarily nitrogen and phosphorus from manure and synthetic fertilizers), manure-source pathogens, various agri-chemicals, and soil sediments are all valuable farming inputs that become nonpoint pollution when they enter surface waters or groundwater.

A variety of underlying factors have been contributing to increasing pollution caused by manure and nutrients spread on highly permeable soils and by nitrate contamination of groundwater. Both of these pollution sources have become more widespread and have been the subject of increasing awareness and controversy in rural communities where they affect the health and welfare of rural residents and families.



In general, agricultural conservation policy has relied much less on regulations and more heavily on incentives such as cost-sharing of practices and related price supports to incentivize actions by farmers that reduce or control nonpoint pollution. In the absence of significant federal authority under the CWA to address nonpoint pollution, WDNR and DATCP both have responsibility to administer programs that address agricultural runoff, subject to limits established by the legislature.

Areas of carbonate bedrock within 50' of soil surface are at highest risk of groundwater contamination from nitrates.

State Agency Action: 2019 Revisions to NR 151– Abating Pollution Caused by Nitrates in Sensitive Areas

Proposed Rule Item: [NRB Board Order WT-19-19](#)²⁴

Significance: 2019 was designated as “The Year of Water” by Governor Tony Evers, and as part of that effort he issued an executive order directing the WDNR to develop a rule revision addressing nitrate contamination. In 2019 Wisconsin Assembly Speaker Robin Vos also commissioned a Speaker’s Task Force on Water Quality to address a wide range of water issues for which Wisconsin citizens were demanding government response.

Nitrate contamination of groundwater is especially prevalent on areas of permeable soils throughout some parts of rural Wisconsin, where most people rely on private wells as their source of drinking water. Nitrate consumption is linked to thyroid disease and several forms of cancer and causes especially acute risks for children and pregnant women.

In Wisconsin, it’s estimated that about 90 percent of nitrate pollution is related to agricultural practices, including applying chemical fertilizer and manure to fields which run into streams or accumulate in groundwater.

According to the 2020 Wisconsin Groundwater Coordinating Council Report to the legislature, more than 42,000 private wells in the state exceed safe levels of nitrates, resulting in tens of thousands of people in the state who do not have reliable access to safe drinking water in their homes.

Building on the apparent success of the 2016 revision process using targeted standards, the scoping statement for the [WT-19-19 rule revision](#) called for establishing agricultural nonpoint source performance standards targeted to address nitrate pollution in sensitive areas with highly permeable soils susceptible to groundwater contamination where statewide standards were shown to be insufficient.²⁵ Beginning in 2019, the DATCP also began working in parallel on revisions to a companion rule to NR 151 – ATP 50.

Outcome: The rule process was affected by the requirement for an economic impact analysis (EIA) that needed to be less than \$10 Million for the rule to proceed without authorizing legislation. The WDNR’s internal EIA estimated that costs to farm producers would be \$9,726,000 over 10 years. An independent assessment by economists at the UW-Madison Renk Agribusiness Institute, [Preliminary Assessment of Potential Economic Impacts of Proposed Changes to NR 151](#), was equivocal about final cost estimates.²⁶ They estimated costs around a range of scenarios, including an estimated cost of \$27 million for growers to develop nutrient management plans (NMP), even though NMPs are already technically required of agricultural producers and the rule did not include or expand any such requirement.

Almost immediate opposition developed to the provisions proposed in the rule because of perceived costs from agricultural trade associations and agricultural producers. **Opposition from some legislators and concerns expressed by NRB members led WDNR leadership to conclude the rule was unlikely to be approved by both the NRB and the legislature’s JCRAR.**

In December 2021, in the face of concerted public opposition to any efforts to address nitrates from lobbyists, agricultural interest groups, and members of the NRB and the JCRAR, the WDNR staff made the decision to pull the rule back, ending the 30-month effort to revise the NR-151 rule without success. The revision effort thus ended after two years and thousands of hours spent by staff, stakeholders, farmers, environmentalists to address one of Wisconsin's most significant, but also most potentially manageable, environmental issues.

The failure of the 2019 NR 151 rules revision leaves nitrate contamination in Wisconsin unresolved. DATCP, WDNR, and UW-Madison agronomists are working on a nitrogen "speedometer" to provide better nutrient management tools to agricultural producers, however the application of such a tool will remain limited by the number of producers who develop and follow nutrient management plans. Currently it is estimated that less than 37% of cropped acres in Wisconsin have NMP's.



Lisa and Tor Anderson – “This is About Quality of Life”

Lisa and Tor Anderson moved to the eastern Portage County Village of Nelsonville with their three children in 2001, becoming the third owners of a quaint 100-year-old home near the Tomorrow River.

Although evidence shows that nitrates have been present in Nelsonville groundwater since at least the early 2000's, most residents have only become aware of the extent of contamination since 2018 when neighbors took the initiative to begin regular testing of their own private wells.

Almost all wells in the community that have been tested since 2018 have detectable levels of nitrates, some as high as 20-26 milligrams per litre (mg/l).

In 2019, the county source-tested 25 wells with previously detected levels to determine whether the primary causes for nitrate contamination were residential septic systems in the village, or the large Concentrated Animal feeding Operation (CAFO) and associated cropland a ½ mile away. Twenty-four of the 25 wells tested showed two or more chemical tracers indicative of agricultural nitrate sources, while four of the 25 wells had two or more domestic tracers indicating a residential septic source.

The health impacts of chronically high levels of nitrates in a very small community are difficult to assess with statistical certainty, but for residents there is no question that impacts are real. Lisa Anderson suffered from thyroid disease in 2005, as have several neighbors. A nurse midwife who serves the area reports that miscarriages and pre-term births in the community are common.

In addition to health effects, the cost to residents of water testing, in home water treatment systems, obtaining alternate water supplies, and replacing wells are significant and to date have been almost completely covered out of pocket by residents.

As Lisa Anderson reports, “One of the biggest costs for this contamination is the continual anxiety from what we call ‘water insecurity’. Anywhere we go in the village we now have to ask – ‘can we drink the water here?’”.

“I don’t want anyone thinking that if we just replace some wells that we’ll solve this problem. The costs of remediation, the health impacts, the effect on property values, and the water insecurity, these won’t all go away even if we get new wells. People will still be at risk of drinking contaminated water and this community will not survive if we’re still fighting this battle in another 20 years. This is about our quality of life.”

IV.3 Shoreland Zoning

Shorelands, or riparian zones, protect waterbodies from damage and nutrient runoff. Riparian areas help filter nutrients and toxic runoff and help maintain water quality.

Intact shorelands are critical natural assets that protect water quality and aquatic habitat. These benefits in turn support clean lakes and quality fishing and recreation opportunities for residents and visitors. This “ecosystem service” contributes to a significant part of [Wisconsin's \\$20.9 Billion tourism and recreation economy](#).²⁷

Background

As development pressures on water bodies increased, shoreland zoning was a cornerstone of our state's efforts to protect clean water. Research has shown the importance of natural shorelines, aquatic vegetation, setbacks for structures, and minimizing hard surfaces, to maintaining water quality and providing habitat for fish and wildlife. Some of the first administrative protections for shorelands were developed by WDNR in the 1960s under administrative rules [NR 115, Wis Admin. Code](#).²⁸

Between 1970 and 2010, most counties adopted stricter standards than the state minimum standards. Most citizens and lake organizations recognized that their quality of life, their property values, and their local economy would be enhanced by protecting the quality of lakes through appropriate shoreland zoning.

Section NR 115.01 provides that shoreland subdivision and zoning regulations shall “further the maintenance of safe 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.”²⁸ It requires counties to promote public health, safety, and general welfare by adopting zoning regulations for the protection of all shorelands in unincorporated areas that meet shoreland zoning minimum standards promulgated by the WDNR.

In contrast with the relatively incremental changes made since the 1960s, in 2011, the legislature began significant changes to pre-empt local control around shoreland zoning in 2011, 2013, and 2015.

[2011 Act 170](#) limited local governments from adopting more restrictive standards for nonconforming structures than what is stated in NR 115.¹⁴ Non-conforming structures are buildings that existed lawfully before current zoning standards were enacted but do not conform to current standards. Owners are usually allowed to maintain such structures, but any upgrades and changes are governed by zoning rules.

[2013 Act 80](#) then defined via statute specific statewide standards for shoreland ordinances in incorporated areas (cities and villages) with respect to building setbacks and vegetative buffers, supplanting the role of WDNR in establishing those standards via rule, and further limiting county and local units of government in developing more restrictive or appropriate local shoreland standards.³⁰

[2015 Act 55](#) (the biennial state budget) included a provision stating that counties “may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard”. As a result of these changes, local governments can no longer add increased regulations for a shoreland, even when the state standards do not effectively protect waterbody health.³¹

The effect of these changes was to limit the flexibility of both the WDNR and of local units of government to administer shoreland zoning programs and adequately protect shorelines.

When shoreland zoning was originally enacted, the legislature delegated broad authority to the WDNR to create minimum shoreland zoning standards and afforded discretion to local units of government to set more protective standards and restrictions for shoreland activities. Since 2011, the legislature has been directly writing shoreland zoning standards in statutes, codifying, superseding, and supplementing the minimum standards and nonconforming structure provisions in NR 115.

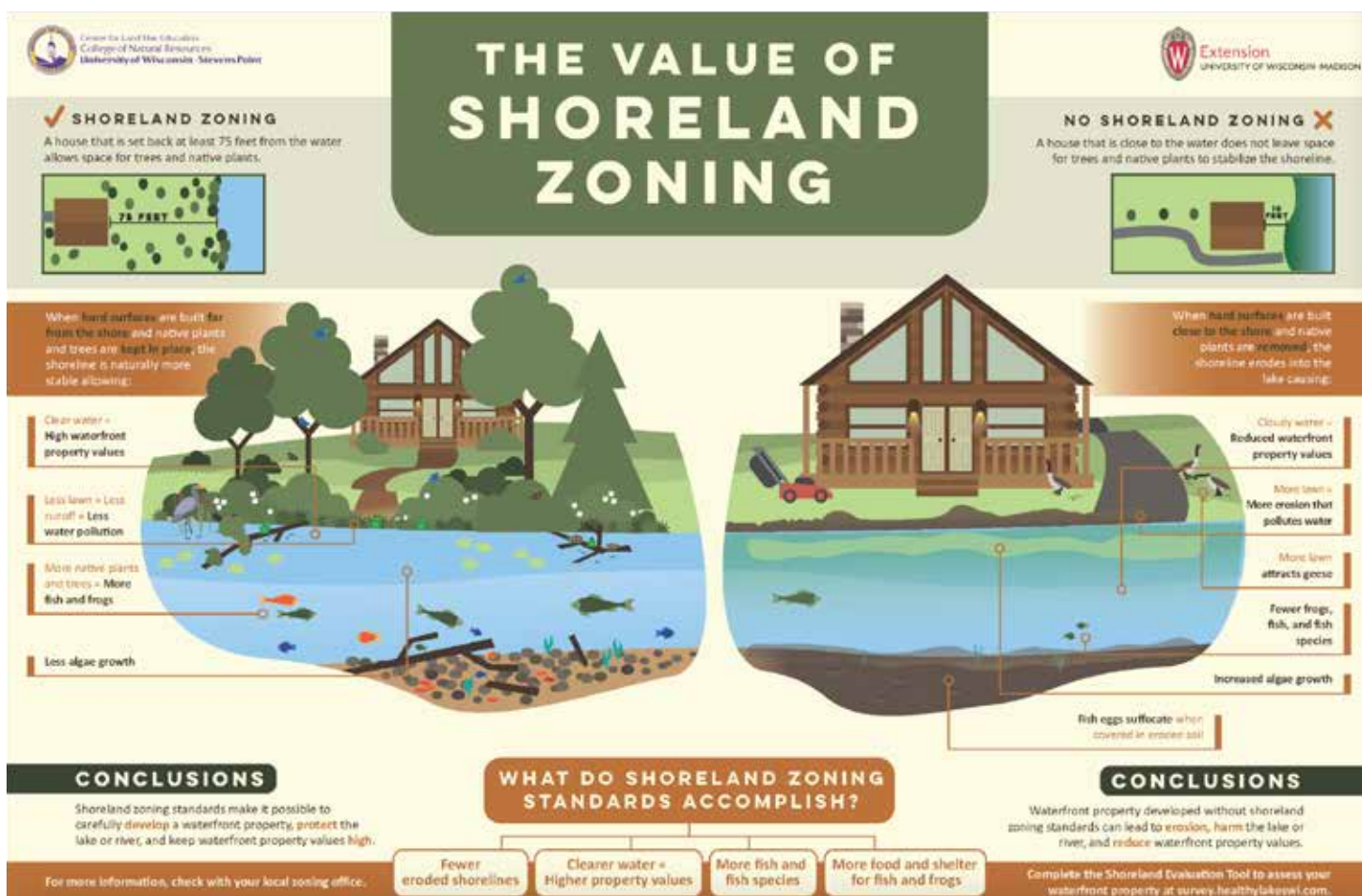




Photo Credit: Joseph Steinhage

Jay Kozlowski – “The quality and clarity of our lakes are going to be affected”

Jay Kozlowski is the Administrator for the Zoning and Conservation Department of Sawyer County, where he has served since 2009. He has seen first-hand the effects of legislative changes that stripped local control from counties around shoreland management.

“Sawyer County was always a leader in shoreline zoning protection – we were one of the stricter counties in terms of our requirements and our standards. And the quality of our lakes reflected that. 2015 Act 55 stripped away our remaining authority to require appropriate standards and this is especially a problem on our most sensitive lakes.”

In 2011 Jay served on the WDNR task force that help develop the revision to the WDNR NR115 rule that sets standards for protecting shorelands. In that rule process Jay and other county code administrators were developing what they thought were minimum standards for shoreland vegetation and development.

“We were developing standards as minimums, with the understanding based on long-practice that counties could set their own more restrictive standards

when and where they found it appropriate. We had no idea that four years later the legislature would turn the tables and make our minimum standards into maximums. Now the standards that apply to a highly developed lake like Lake Geneva apply equally to the smallest and most environmentally sensitive lakes in our county. That makes no sense.”

Ultimately, shoreland development standards translate into shoreland impacts. Since the building boom that began in the spring of 2020 Jay's office cannot keep up with the demand for permits on new construction and rebuilding, all subject to significantly weaker standards. Jay believes this boom, however long it lasts, may be the cause of degraded waters in a county that prided itself on lake stewardship.

“As a result of the increased building density and the impact of these law changes on shoreline vegetation, we expect that lake clarity and water quality are going to be degraded on many of our most used lakes. Years from now people will be wondering why and how we let that happen”



Photo Credit: Henryk Sadura/Shutterstock.com

V. Conclusion

The issues raised in this assessment are complex and multi-faceted and there is no single change in policy or legislation that will fully resolve them all. Since 2011, the collective effects of state legislative actions, court rulings, and political practices have undermined democratic processes and profoundly changed the way state government operates.

Agency rulemaking has previously been the primary mechanism for state government to adopt and implement environmental policy, however developing or revising administrative rules is no longer a functional process for addressing important conservation or environmental issues in Wisconsin.

In many cases it is easier in today's policy environment for the majority party to pass legislation in statutes than it is for agencies to develop rules. As a result, the type of detailed guidance provided in rules are instead increasingly being adopted directly into statutes.

When environmental or conservation standards are established in statutes instead of through rule-making, the process often lacks the public input, flexibility, and science-based foundation that can be achieved through a robust rules development process. The result is often either poorly drafted provisions in law informed by limited evidence or anecdotes, or conversely, sometimes highly complex laws passed with significant but often poorly understood implications, even for legislators. Such laws are often written by lobbyists and attorneys working for organizations that wield political influence.

Instead of a robust balancing of public interests among stakeholders, a small number of groups representing industry, real-estate, and some agricultural interests now exercise a high level of influence over environmental programs, with direct implications for the health and welfare of Wisconsin citizens.

As a result, both longstanding and emerging environmental issues are rising to crisis levels with little or no effective response. A growing number of Wisconsinites are losing faith in the ability of state government to address issues that it alone can effectively address.

VI. Recommendations

No single action or policy will reverse a decade-long period of policy failures for conservation in Wisconsin.

Ultimately, keeping government honest and effective requires the ongoing engagement of well-informed Wisconsinites demanding transparency, accountability, and effective actions that benefit all.

For all Wisconsin residents, we provide recommendations for ways to become engaged and raise visibility on the critical importance of a functioning government.

For Wisconsin policy makers, we provide a series of provisions that could be included in reform legislation that would address the issues described in this paper.



= Citizen Engagement



= Policy

Actions for Wisconsin Residents



Increase Citizen Involvement in the WDNR and the Natural Resources Board (NRB)

- ✓ Participate and provide comments in hearings and rule development efforts.
- ✓ Provide written or oral comment at NRB meetings on both agenda action items and in provided open forums.
- ✓ Communicate with NRB members directly on ongoing issues.
- ✓ Information on the NRB and ways to participate are available on the [Wisconsin Natural Resources Board](#) web page.



Hold Legislators Accountable for Conservation and Environmental Protection

- ✓ Communicate directly with incumbent legislators and candidates about taking effective action on conservation issues.

- ✓ Educate elected officials about critical conservation issues in their districts at public events and debates.
- ✓ Attend and testify at legislative hearings when opportunities arise.



Become Involved through Organizations Involved in Conservation Issues

- ✓ Many organizations regularly involved in conservation issues have effective advocacy operations and can also be a source of valuable information. Along with joining and working with [Wisconsin's Green Fire](#), citizens can engage with a variety of organizations. Types of organizations include:
- ✓ Statewide conservation organizations. Examples include [Wisconsin Wildlife Federation](#), [Wisconsin Conservation Voters](#), and [Clean Wisconsin](#).
- ✓ Resource specific conservation organizations. Examples include [Ducks Unlimited](#), [The River Alliance](#), [Trout Unlimited](#), and the [Wisconsin Wetland Association](#).
- ✓ Trade and producer associations. Examples include [Wisconsin Manufacturers and Commerce](#), the [Wisconsin Farm Bureau](#), [Wisconsin Farmer's Union](#), and the [Wisconsin Woodland Owners Association](#). Membership in trade associations is typically reserved for people actively involved in a given field, although many organizations allow affiliate members.
- ✓ The Wisconsin Conservation Congress (WCC). [Wisconsin Conservation Congress](#) is a statewide organization established by statute in 1934 that allows citizens to participate in advising the Natural Resources Board and the Department of Natural Resources on conservation and environmental issues. WCC holds open elections each year and any interested resident may run as a WCC county delegate.

Policy Reforms

This section lists provisions in reform legislation that would help restore a balance of power that will be a necessary condition for Wisconsin to resume our role as a conservation leader.

Legislative Changes to Restore a Reasonable Balance in Rule Development Oversight

- ✓ The Joint Committee on Review of Administrative Rules (JCRAR) must hold a public hearing and invite public testimony on any administrative rules the committee chooses to take under active review.
- ✓ A 5-day public notice before a JCRAR hearing on a rule is required. Agency staff and citizens leading advisory groups that participated in rule development must be invited to testify to JCRAR.
- ✓ JCRAR may only make temporary 60-day objections to rules by majority vote after a public hearing, to which the Agency has 60 days to respond with modifications to address issues raised.
- ✓ Permanent blocking of a rule may only occur through legislation introduced and passed in both houses.
- ✓ Change the rule development deadline from 30 to 48 months. At 48 Months a revised scope statement must be approved in order for the rule effort to continue.
- ✓ Agency staff are not precluded from working on rule development at any time an approved scope statement exists regardless of temporary holds.
- ✓ Define "explicit authority" in statute to give appropriate scope to agency actions that are still consistent with legislative intent.

Legislative Changes to Economic Impact Assessments (EIA) – Assessing Costs and Benefits of Action

- ✓ Remove any cap on the estimated cost of an EIA – JCRAR has adequate authority to act on rules for which excessive costs may be a factor without setting arbitrary limits.

- ✓ Require an EIA to place equal weight on an assessment of costs of implementation, and an assessment of the value of avoided costs or direct benefits anticipated as a result of the rule. Non-monetary or non-quantifiable environmental benefits must be included where they are relevant.
- ✓ Include statutory language recognizing that assessing long-term avoided costs or future benefits of an action is often more speculative, less certain, and less precise than assessing short-term costs of implementation, but that such comparisons are nevertheless essential as they reflect the purpose of public policy.
- ✓ EIA language should also recognize that some benefits, such as aesthetic improvements or possible benefits to future property values, or benefits to quality of life for future as yet unborn people, cannot be valued, but must be recognized.

Legislative Changes to Restore Local Control

- ✓ Allow county standards for shorelands to exceed state standards
- ✓ Allow WDNR to appeal county zoning decisions
- ✓ Allow county regulation of current shoreland structures
- ✓ Allow local / county regulation and siting of non-metallic (frac sand) mining
- ✓ Allow and broaden counties authority to site or regulate CAFOs

Legislative Changes to Executive Appointments

- ✓ Clarify in statutes that when a term of a member of an appointed body ends the seat is immediately vacated.
- ✓ The Governor may make a temporary acting appointment for up to 60 days not subject to Senate Confirmation at their discretion.
- ✓ The Senate must hold a hearing and take action on permanent appointments within 60 days of the appointment.

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