pt 56

supplies. The reason was, that during the closure of metal mines in Southwestern Wisconsin, the groundwater became polluted. Substantial personal inconveniences and economic harm have to the residents in the vicinity of the closed mines.

Third, in the city of Montreal, Iron County, Wisconsin, the local baseball field began to collapse as old mining shafts caved in. Protective fencing had to be erected to prevent personal injury.

The purpose of these examples is not to suggest that metal mining should not occur in Wisconsin. Rather, these examples illustrate that there is risk in permitting metal mining activity, and the people of the state of Wisconsin must be diligent in insuring that these risks are minimized to every extent possible.

I am confident that Wisconsin has come a long way towards accomplishing the minimization of that risk.

A List Of Accomplishments

Wisconsin has reacted in a comprehensive and creative way in preparing itself for a new era of metal mining. We have devised a program which will provide more information, more public participation opportunities, more environmental insurance programs, and more comprehensive standards for decision-making than for any other activity in the state, public or private, industrial or agricultural. A few examples of these programs are worth noting.

First, we have established a metallic Mining Investment and Local Impact Fund Board, which provides funds in at least four significant areas: 1) it pays towns and tribal communities monies for them to hire attorneys and technical consultants to help them to evaluate whether a given mining project is environmentally sound; 2) it provides monies so that the community can organize itself and can afford to send citizens to meetings and to participate in the political and legal decisions involved with mining; 3) it has helped pay for damages caused to individual citizens by mining-related activities; and 4) it is providing monies for economic and social studies necessary to better understand whether a given mining activity will, or will not, benefit a local community.

It should be emphasized that we have no such other impact board in the state of Wisconsin for any other industry. In addition, three mining companies and various local units of government, along with environmental advocates, are urging the Wisconsin Legislature to pass enabling legislation to permit potentially-impacted towns to receive substantial bloc grants from mining companies on an annual basis, beginning immediately, to provide them with more monies to effectively organize their communities, hire the necessary legal talent, and provide for consultants and other studies so that the citizens in these towns can effectively participate in the "go" or no-go" decision on mining. These funds would be available so that towns with as few as 400 people, and Indian tribes with as few as 185 people, and help control their own destinies.

Second, Wisconsin has adopted a long-term liability legislation package. This legislation provides up to $150,000 per claim for a private injury to person or property based on a finding of strict liability. The claimant need only prove before a state agency that he/she was injured and that it was caused by mining. There need be no showing that the company acted in negligence. The second part of the program provides that if Wisconsin does provide such remedy the state government can then go against the mining company to collect the damages. State government need not concern itself with the corporate structure, either at the time of mining or after mining. The parent corporation, or its successor, will be responsible. Again, it is noteworthy that such a program exists from an environmental prospective, for no other industry other than mining.

Third, Wisconsin's metal mining and reclamation laws have been completely rewritten. There are two concepts in those laws that are critical to the environment and to local units of government: 1) The standards for grant or denial of the permits are clearly articulated—they are balanced standards; 2) The statutes and draft rules provide an open and effective hearing process for citizens to help the state decide whether to permit, or not to permit, mining. The master hearing process contained in the law is not duplicated in any other

environmental legislation. The regulatory agency and the developer will able to railroad the process over the objections of a citizen intervenor.

Fourth, the draft rules for mining contain a provision which permits any of those rules to be made stricter on a case specific basis for any proposed mining project. There are no other environmental rules in the state of Wisconsin, nor anywhere else in the country, which specifically permit an agency to make its rules stricter on a case specific basis if the environment warrants such protection. Many of our current environmental statutes have a variance program in them. However, all of the variance programs are designed to give breaks to the industry and developer. This rules program will allow the citizen for the department to urge the rules be made tougher if the environment needs such protection.

Fifth, the draft mining rules will require the mining companies to study, and under some circumstances require the marketing of the mining waste in lieu of perpetual storage in the north woods of Wisconsin. In short, it won't create tailings piles or waste rock areas for these materials can be utilized in the free marketplace. This policy initiative is yet unmatched for any other industry in Wisconsin.

Sixth, we all know that agriculture requires permits to divert water from streams for irrigation. The only non-agriculture enterprise requiring permits to divert surface water will be mining companies. In addition, we do not currently regulate groundwater quantity use. A comprehensive groundwater quantity use regulatory program has been adopted by the state Legislature and is embodied in the draft rules.

Finally, we have established a specific funding mechanism to provide individual rural Wisconsin citizens with monies and waters for damage caused to domestic or agricultural water supplies from mining activities. This program is in addition to, and supplements, long-term liability legislation.

These seven examples I have provided above are but the beginning of a long list of accomplishments that have occurred in Wisconsin to protect Wisconsin's environment from mining. It must be emphasized that some of these accomplishments are preliminary and are not completely locked-in place. It is anticipated that these protection measures can be adopted by April, 1982.

Politics Of Consensus

The Wisconsin Public Intervenor is often asked why so much has been accomplished in protecting Wisconsin's environment from mining activity. More specifically, the question is asked, Why is it that we seem to be able to develop creative environmental regulatory programs for mining that may be absent relative to other industries or agricultural development? There are several reasons for the environment success.

First, the progressive political heritage of Northern Wisconsin has been exemplified by the vigorous political leadership of the local community governments. The citizens in the Town of Grant, Town of Nashville, and Town of Lincoln, and the Sokaogon-Chippewa Community and the Forest County Potawatomi Community, have actively sought to protect their own interests. The original work of the residents of the Town of Grant provided that catalyst for all of Northern Wisconsin.

Second, the singular legislative skills of Representative Mary Lou Munts has provided political leadership throughout this process. If there is a single founder, practitioner and supporter for the consensus process, for reaching environmental decisions, it is clearly Mary Lou Munts. The work of former Legislators Harvey Dueholm, Henry Dorman and Michele Radesovich, along with current State Senator Tim Cullen, have all helped to make the system go.

Third, the environmental legal team of Kathy Falk and Susan Steingass of Madison, Kevin Lyons of Milwaukee, and Don Zuidmulder of Green Bay, have contributed to the success of the effort. In addition, the original work of Frank Tuerkheimer of Madison was most helpful.

Fourth, the help of the mining companies in getting this environmental program conceptualized and, in part, adopted is most noteworthy. Industry was willing to push for change. Exxon lead the way for industry. In time, Kennecott also began to effectively and positively participate. Inland Steel has now joined with Exxon and Kennecott in supporting important environmental initiatives.

The conduct of the mining companies is easily explained. Wisconsin has not done well in providing the mining companies the kind of certainty, direction and regulatory assistance necessary to give corporate management the kind of security necessary to make wise mining development decisions in Wisconsin. The consensus process helps provide mining companies certainty. Therefore, the companies can, and do, accept programs and regulations which they would rather avoid for political and economic reasons. Since the developer knows what the rules are, and can expect them to stay in place, they are willing to except tough environmental legislation and rules that they probably could otherwise politically defeat.

Many of the representatives of the mining companies are familiar to Dane County residents. James Wimmer, Dick Olson and Steven Braden represent Kennecott Copper Corporation. Jeff Bartell represents Inland Steel. Jim Derouin represents Exxon. The hallmark of their style in dealing with the mining issues has been cooperation with environmental interests.

Two days after Kennecott saw its mining permit application hearing adjourned in November 1976, a Kennecott official told what had become painfully obvious:

> Getting into bed with environmentalists might rub raw with many of our colleagues, but in this day and age I cannot recommend a better course of action for expedition of our project.

For a few environmental activists in Northern Wisconsin I would offer this paraphrase of the Kennecott official's thoughts: Getting into bed with moderate industrialists might rub raw with many of our supporters, but in this day and age of less government fiscal conservatism, and Jim Watts, I cannot recommend a better course of action for adoption of legislation and administrative rules which will protect Wisconsin's environment.

Conclusion

The Citizens Advisory Committee to the Wisconsin Public Intervenor and the Public Intervenor are pleased with the direction Wisconsin public policy has taken on mining in the last four years. Whether one is pro-mining, anti-mining, or simply neutral on this issue, one should be encouraged by the tremendous progress that has been made. The consensus approach to policy development has played a significant role in that policy growth.

Peter A. Peshek
Wisconsin Public Intervenor

June 17, 1981

WISCONSIN'S STRATEGY FOR PREPARING FOR A NEW MINING INDUSTRY--CONSENSUS OR CONFLICT

Presented at Center For Public Resources
Task Force On Environmental Disputes
New York, New York
April 30 - May 1, 1981

Metal mining has had a central role in the political, economic and social history of the Upper Great Lakes Region. The results of mining have been uneven, ranging from prosperity and full employment to serious environmental damage and high unemployment. The Upper Great Lakes Region now has the opportunity to develop an entirely new generation of copper, zinc and nickel mines.

Minnesota is preparing itself for a new era of copper-nickel mining. A four-year, $4.3 million study has been completed about the mining of this resource in Northern Minnesota. Political and government agency review of this study is now taking place.

Wisconsin is also preparing itself for a new era of copper and zinc mining in Northern Wisconsin. I have been asked to describe this exciting and positive process of preparation. This paper will be divided into the following parts: 1) an overview of the Public Intervenor's role in Wisconsin mining issues; 2) a historical overview of new mining opportunities; and 3) political consensus--the roots of consensus on mining issues in Wisconsin, the environmental need for consensus, the risks of participating in consensus politics, accomplishments already achieved from consensus politics, and potential problems of the consensus approach.

AN OVERVIEW OF THE WISCONSIN PUBLIC INTERVENOR

The Wisconsin Public Intervenor is an Assistant Attorney General in the Wisconsin Department of Justice. The Public Intervenor office was mandated by the 1967 Wisconsin Legislature when the Wisconsin Department of Natural Resources (DNR) was created. The office was authorized at the request of the Wisconsin Wildlife Federation and other traditional conservation forces.

The Wisconsin Public Intervenor is charged by the Wisconsin Statutes with the responsibility of advocating and seeking protection of public rights in the environment. Because the public has so much to gain or lose from appropriate or inappropriate copper and zinc mining in Wisconsin, the Citizens Advisory Committee to the Public Intervenor has directed that metallic mining be the number one program priority of the Public Intervenor's office.

A HISTORICAL OVERVIEW

So far, three possible economically feasible metaliferous deposits have been discovered in Northern Wisconsin. In 1968, Kennecott Copper Corporation found a 6 million ton copper-bearing ore body in the Town of Grant, near Ladysmith, Rusk County, Wisconsin. In 1974, Noranda announced the discovery of a 2.3 million ton zinc-copper body in Oneida County. In 1976, Exxon Minerals Company, U.S.A., announced its finding of at least a 70 million ton zinc-copper ore body located in the Towns of Nashville and Lincoln, Forest County, Wisconsin.

Kennecott was the first and only one of the three companies to seek state permits to mine its ore body. When the hearing on the permits was held in November 1976, the 889 citizens of the Town of Grant stated their collective belief that it was premature to approve the permit applications.

The Town of Grant hired a well-respected trial attorney to protect its interests. It spent a substantial portion of the town's budget over the ensuing two and one-half years battling Kennecott. The Town of Grant solicited and received the support of the Natural Resources Defense Council and the Wisconsin Public Intervenor. Together, these three groups embarked on an effort to protect Wisconsin's human and natural environment from inadequately regulated mining.

All three lawyers and their clients recognized that Wisconsin, in 1976, was not then in any position to intelligently determine whether, or under what conditions, Kennecott should be permitted to mine the ore body. It was even more evident that Wisconsin did not have a comprehensive and integrated regulatory scheme for copper and zinc mining.

The legal and political fight between the Town of Grant and Kennecott was long and bitter. The mining permit hearing was indefinitely postponed in November 1976, and ultimately dismissed in September 1978. Eight legal proceedings were commenced. The approach employed by the Town of Grant and by Kennecott was one of conflict, both legal and political. The Town of Grant succeeded in all of the legal proceedings that have been completed. This sequence of events is most telling when viewed against a May 2, 1973, Wall Street Journal story, which quotes the then Kennecott president as predicting the Town of Grant mine "could be operating by 1976."

THE ROOTS OF CONSENSUS ON MINING ISSUES IN WISCONSIN

Immediately upon the adjournment of the Kennecott mining permit application hearings in November 1976, there began a political process which would propel Wisconsin into the lead of national efforts to regulate metallic mining operations. The Natural Resources Defense Council, under the guidance of Attorney Frank M. Tuerkheimer, now United States Attorney for the Western District of Wisconsin, prepared a comprehensive paper on the inadequacies of the 1973 Metallic Mine Reclamation Act and made a series of recommendations for changes. Special committees of the Legislature, which to that point had been principally concerned with taxation of mining operations, formed a special working group to evaluate the need for additional regulation of the industry.

The people of the Town of Grant came to Madison and did their own lobbying. They found that the Legislature was receptive. Industry was also willing to push for change. Exxon lead the way for industry. In time, Kennecott also began to effectively, and positively, participate as new management concluded that conflict was a sure way to no mining in Wisconsin. Two days after Kennecott saw its mining permit application hearing adjourned in November 1976, a Kennecott official told his superior what had become painfully obvious: "Getting into bed with environmentalists might rub raw with many of our colleagues, but in this day and age I cannot recommend a better course of action for expedition of our project." Inland Steel has now joined with Exxon and Kennecott in supporting important environmental initiatives.

THE ENVIRONMENT NEEDS CONSENSUS

Given the high rate of success in litigation, why is it then that the Town of Grant, the Town of Nashville and the Town of Lincoln, the Wisconsin's Environmental Decade, Inc., the Wisconsin Public Intervenor, and others, are prepared to use consensus as a vehicle to meet the legitimate needs of the environment? Consensus makes sense for the environmental movement for at least six reasons.

First, the results of a consensus approach tend to be logical. The ideas which survive the intense scrutiny in the negotation process generally prove to be sensible. The work product survives scientific and legal policy analyses with all the competitors being represented.

Second, the end results of the political and legal process are often less certain than the results of a consensus process. In the legal process, particularly, a good advocate cannot always predict the outcome. Using consensus, one is able to have a greater degree of control over the outcome or work product developed.

Third, the state of Wisconsin has neither the personnel nor the financial resources necessary to allow Northern Wisconsin communities to feel comfortable with new mining operations. The mining companies who wish to develop major mining enterprises in Northern Wisconsin can provide major personnel and cash contributions to the process. For example, I estimate that Exxon has spent well in excess of $400,000 participating in the development of administrative rules for the protection of the environment from metallic mining waste. Kennecott has also spent a considerable sum of money doing similar things. The kind of expertise, both internal and external, that Exxon, Kennecott and Inland Steel have been able to bring to bear on the process for writing appropriate regulations are not available to citizens or local and state government in the state of Wisconsin. The

consensus approach maximizes utilization of the companies' resources in helping to formulate public policy.

Fourth, there is a limit of energy and resources available to a local unit of government, or to an environmental group, to sustain over a prolonged period of time major political and legal initiatives. For a developer, who is prepared to sustain a legal or political fight for an indefinite or longer period, it is reasonable to expect that a prolonged struggle will wear down environmentalists or local citizens. Therefore, it is important that environmentalists and local units of government carefully pick their fights. If the environmental movement can secure its legitimate objectives without a fight, it should do so in order to save energy and resources for those times and places when conflict is inevitable.

Fifth, one of the significant reasons why the consensus approach to the development of mining regulations was selected was because the towns and the environmentalists needed allies to overcome the Wisconsin Department of Natural Resources' inability to decide the major issues surrounding mining in Northern Wisconsin. Exxon, later Kennecott and Inland Steel, came to recognize that mining in Northern Wisconsin would only be a reality if the state could complete its regulatory framework. For a variety of reasons—some internal to DNR, but some caused by the efforts of a mobilized consensus group—the department came around to play a major role in the development of Wisconsin's mining policy during 1980.

Sixth, the consensus approach to policy development is a sound social and political way to meet the legitimate needs of both industry and environment. It is an approach which should be encouraged, because it provides a vehicle for maximum citizen participation.

Although there are distinct advantages to the consensus approach to policy development, it should be recognized that there is room for differences of opinion and conflict. When and how such conflict will occur will depend on the good faith of those involved in the process, as well as on the complexity and difficulty of the policy issues. While consensus should be the primary tool for policy resolution, it must be recognized that conflict may still occur and that all parties reserve the right to diverge from the consensus approach, if it is believed that such a course is the only way in which the particular parties' legitimate needs can be protected.

RISKS OF PARTICIPATION IN CONSENSUS PROCESS

When participating in the consensus process for the development of public policy for metallic mining in Northern Wisconsin, environmental groups are exposed to three risks.

First, an outside observer may conclude that the environmental movement is being soft on the mining companies. This observation may be based on the fact that those participating in the consensus movement work very closely with the mining companies. There are fewer voices being heard and less antagonism is expressed to the media. While the perception of being soft on the mining companies may exist, it is not accurate. None of the parties to the consensus approach have lost sight of their individual needs. Private and public conversations and meetings are vigorous and, on occasion, even heated. Despite such conflict, however, the belief prevails that sound public policy will be developed if everyone cooperatively works with each other in an open and public process.

The second risk is the fact that consensus, to a large measure, is dependent upon the personalities responsible for representing various parties to the proceedings. If Jim Wimmer and Dick Olson from Kennecott,

Jim Derouin from Exxon, or Jeff Bartell from Inland Steel were not the representatives of those companies, different political and legal strategies might well have been developed by the mining companies. For example, in January 1979, I observed:

> This Kennecott [litigation] strategy simply depletes the resources and energies of those who should be working on ... policy items. ... This stonewalling also throws in disarray the ability of everyone else to process the policy problems in an orderly fashion. ... Those of us in Wisconsin must hope that the internal struggle that is occurring at Kennecott at this time will result in the newer progressive forces being able to take charge of mining operations in Wisconsin and that the result will be settlement of the eight legal proceedings.

Personalities do make the difference. In the case of Kennecott, the moderates within the company succeeded in convincing management that the consensus process was the way to go. As a result, Wisconsin's environmentalists, local units of government and Kennecott have all won.

Third, there is the risk that some participants will be overwhelmed by the experience, expertise and political muscle of others, particularly where the public forum which is part of the environmental movement's muscle is not used by tacit agreement. All parties to the consensus process need adequate resources to participate at arms-length.

CONSENSUS WORKS

Since the initiation of the consensus process in early 1977 by State Representative Mary Lou Munts and then State Senator Michele Radosevich, it has provided great dividends to industry, to the environment, and to the towns. I would like to list several examples where consensus played key roles in policy development for mining.

First, Wisconsin has the most comprehensive metallic mining environmental protection bill in the country. Exxon's role in the development of the legislation should be recognized. The regulatory scheme that we are now developing under that bill is many times better than anything else that exists on the state or federal levels. While detailed rules have been agreed upon between industry and environmentalists, they have not yet been adopted by the Wisconsin Department of Natural Resources.

Second, with the help of Kennecott and Exxon, the consensus group was able to agree on the establishment of a Metallic Mining Council to help write the specific regulatory rules needed to protect Northern Wisconsin from mining wastes. When these rules are completed they will include basic statements of public policy on the need for environmental protection, as well as the standards to be applied to mining operations. Also, contested case hearing procedures will be provided to assure that decisions are based on the standards, and in a fair manner.

Third, the consensus group played an instrumental role in developing a wetlands policy for mining that is based on a balanced approach to environmental protection. As an indirect result of this effort, the the Natural Resources Board adopted a conceptually similar policy for all wetlands in Wisconsin.

Fourth, the consensus group has played a key role in pointing out that Wisconsin's groundwater needs protection, and that it should be done by the Department of Natural Resources. There has been a sustained effort to get the department to write rules to protect this valuable resource.

Fifth, the Wisconsin Department of Natural Resources is better equipped to deal with the regulation of metal mining in Northern Wisconsin partially as a result of the efforts of the consensus group. The organizational problems and conceptual legal dilemmas that have long

plagued the department on the issue of regulating metal mining are in the process of being corrected. There remain significant manpower problems at the Department of Natural Resources to effectively regulate metallic mining. There is almost no staffing to conduct socioeconomic analyses. There is a shortage of geotechnical personnel in DNR in the field of metallic mining. These staff voids may prove to be significant barriers to metal mining development in Northern Wisconsin. However, substantial progress has been made; thanks, in part, to environmentalists and mining companies coming together urging that improvements be made.

Sixth, the consensus process is providing industry with clear and detailed guidelines which establish a comprehensive regulatory framework under which they must operate. A Kennecott official, in May 1977, wrote, "Wisconsin ... possesses sufficient quantities of base metal mineralization to place it in a position of being a significant metal supplier. What remains to be seen, however, is whether it is prepared to provide a reasonable and stable regulatory environment."

Wisconsin has not done well in providing the mining companies the kind of certainty, direction and regulatory assistance necessary to give corporate management the kind of security necessary to make wise mining development decisions in Wisconsin. As examples, Inland Steel operated a mine in Jackson County, Wisconsin, without necessary mining permits for six and one-half years after the law began to require such permits. As early as 1974, Kennecott was asking the Department of Natural Resources whether Wisconsin's solid waste laws were applicable to its proposed 156-acre tailings dump. The department's decision was not clearly articulated until March 1979. In another case, Exxon has had to struggle with the question of mining effects on wetlands and the regulatory standard Wisconsin would apply to those invaluable resources as it applied to mining in Northern Wisconsin.

Wisconsin has come a long way towards providing the kind of certainty, direction and regulatory staff resources necessary so that mining may occur. If we do not complete the job, two results are likely. First, mining companies may become frustrated with Wisconsin and may not choose to locate here. Second, even if the companies choose to locate here, Wisconsin will not be in a position to provide permits for mining because they cannot, and should not, be granted in the absence of a comprehensive and complete regulatory scheme. The goal of the consensus group is to put such a regulatory scheme in place.

A CORPORATE LOOK AT ENVIRONMENTALISTS

Industry does not maintain a singular view of environmentalists. While many industry representatives do not deal with environmentalists in a moderately progressive manner, others do. Some companies do not even hold a unified view when it comes to their own approach towards those who are raising environmental issues.

For example, the Wisconsin Public Intervenor took discovery of a developer for a DNR permit. During the course of discovery, documents were uncovered, containing the following observations by various agents or employes of the developer about the Wisconsin Public Intervenor and his activities:

> 1. The Public Intervenor "is young, aggressive and ultra-ambitious. His role in the upcoming hearings is complex, for it is a mixture of using meetings as a political platform to further his own ends ... blended with the satisfaction of fighting multi-national corporations."

2. This [environmentalist] "does not have the money, nor do the residents of the township. We must get back to the residents of the town if we are going to erode the building base of opposition which this [environmentalist] is fostering ... I do not think that it is likely that the town will come through with the funds necessary for any extensive court fight on the project."

Compare these hostile views to those of other employes of the developer who were recomending:

1. If there is to be a major rewriting of [our application], then I would hope that some way would be found to involve a citizens committee.

2. I am convinced that Peshek is an open person, one who would be willing to sit down and negotiate. He should be involved in the planning process.

3. Peshek is a bright man ... with a deep sense of duty.

4. Instead of trying to second-guess Peshek, why doesn't [our company] go to him and ask what his concern is and offer to help resolve any uncertainties he may have? Would there be gain in the long run if [our company] established dialogue and offer support as far as Peshek is willing to do so?

The two sets of quotations outlined above reflect the two options available to an industrial developer. The company can take the low road and view the adversary as an absolute enemy, whose support should be eroded and whose financial limitations should be exploited. Or the company can take the position that the environmentalist has concerns which should be publicly addressed, and that the environmentalist represents a legitimate point of view entitled to articulation.

The choice is clearly the developer's. In my opinion, the high road of full cooperation, public participation and disclosure works better for the developer, as it does for the local community and the environment.

CONCLUSION

The Citizens Advisory Committee to the Public Intervenor and the Wisconsin Public Intervenor are pleased with the direction Wisconsin public policy has taken on mining in the last four years. Whether one is pro-mining, anti-mining, or neutral on the issue, one should be encouraged by the tremendous progress that has been made. The consensus approach to policy development has played a significant role in that policy growth.

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THE WISCONSIN MODEL - A CONSENSUS APPROACH

May 1, 1981
Presented at the Task Force Conference on Environmental Disputes
Center for Public Resources
By Attorney James G. Derouin

BACKGROUND COMMENTS

It is my pleasure to talk about a topic which I believe has only of late begun to draw the attention it deserves -- the rather unusual political-legal process of "consensus" for resolving major policy issues. As Peter Peshek has described, this process has been used successfully during the past several years to negotiate mining related rules among industry, local units of government and various environmental groups. This process is not, however, as I am going to point out, unique to mining. However, because mining is much publicized, the process by which diverse parties have resolved their environmental differences in Wisconsin has drawn considerable attention -- particularly because of the complex and often times emotional nature of the issues involved.

Before talking specificially about mining issues, I want to point out that the consensus process is not a revolutionary idea. In Wisconsin, in fact, it is rather traditional -- even if not always diligently followed. For example, since unemployment compensation was enacted in Wisconsin, and we were the first state to enact such legislation more than four decades ago, only once has there been an amendment to that law that was not an "agreed" bill between business and labor. Another example of consensus is the charge of the

University of Wisconsin to "sift and winnow" from among competing and alternative opinions to arrive at the best solution to a given problem. In the environmental era, there has been no environmental law enacted in Wisconsin since 1973 that has not been the result of negotiations between diverse groups and which has not been "agreed" legislation between business, environmental groups and the Department of Natural Resources. The results of this process include:

- the creation of the Wisconsin Clean Water Act in 1973 and its amendment in 1980;
- the creation of the Wisconsin Solid Waste Recycling Authority in 1975;
- the enactment of the Polychlorinated Biphenyl Act in 1976;
- the rewriting of the Metallic Mining Reclamation Act and companion environmental legislation in 1978;
- the rewriting of the Solid Waste Act in 1978; and
- the rewriting of the Clean Air Act in 1979 and 1980.

The significant fact with respect to the above legislation is that it is excellent environmental legislation, but it is also balanced, generally understandable, at least by lawyers' standards, and livable legislation.

Where did the impetus for the consensus movement with respect to environmental legislation in the 1970's come from? I can only speak for the business community because, when I worked on all of this legislation, I was under instructions from two clients -- the Wisconsin Association of Manufacturers and Commerce (the trade association for business and industry in Wisconsin) and the Wisconsin Paper Council (the trade association for the pulp and paper

industry in Wisconsin) -- to seek livable legislation. The mandate was not to block legislation unless balanced and fair legislation could not be obtained. Lest one think that this legislation was inconsequential to Wisconsin industry, I should note that the investment required for the pulp and paper industry alone in Wisconsin as a result of this legislation has to date exceeded $400 million. This $400 million, however, significantly improved air and water quality throughout "paper country" (in Wisconsin that corresponds largley to the Wisconsin and Fox River valleys). However, as a result of this attitude on the part of the business community in Wisconsin, the Legislature and the environmental movement reciprocated with a reasoned approach to environmental issues. Further, the leadership of a few select legislators was indispensible -- people who viewed environmental protection as a group venture rather than being a negative adversarial or partisan process.

THE CONSENSUS PROCESS -- SOME OBSERVATIONS

What is consensus? I define it as a negotiating process by which people reach solutions to mutual problems. It's the democratic legislative system the way it was meant to work. Is it worth it, however, to be involved in this process and, if so, why? As a lawyer, if I acted only in my self interest, I would say that I didn't care. Like the ad says on TV -- "You can pay me now or pay me later." You can pay counsel now to practice preventive law and attempt to resolve conflicts ahead of time or you can pay counsel later when the case gets litigated or fought out to the bitter end in the Legislature because there was no willingness to negotiate along the way.

Simply put, he who thinks that litigation or a bitter fight in the Legislature is cheaper and quicker and will produce a better result is badly misleading himself. He who thinks that the only role that an attorney should play is to demean, befuddle, confuse and confound the person sitting on the opposite side of the table is not serving his client well whether he represents a company, a local unit of government, an environmental group or some other third party. As we all know, an attorney, by education and training, is taught to be an advocate for a position rather than a mediator. Tradition tells us that an attorney is not suppose to be objective -- he is suppose to be a militant advocate for whomever he represents. Militant advocacy, however, is not conducive to conflict resolution through negotiation even though this is what attorneys have been educated and trained to do.

When discussing this subject, it is interesting to look at what others think about this process. Paul Hassett, President of the Wisconsin Association of Manufacturers and Commerce, in a newsletter last year to his membership, commented that:

> . . . (I)n the past few years the most significant achievement for WMC is that we achieved compromised agreements through the "consensus approach." This is a great change from the "confrontation politics" that has existed in the past. WMC has a common interest in all those worthwhile attributes of honest government -- creating jobs and an environment for business and industrial growth, participation in local, state, federal and social programs of interest to society.

In an article in Business Week (June 30, 1980), entitled "Creating a New Sense of Teamwork," the following is found:

> The most urgent piece of business facing the nation is to reverse the economic and social attitudes that have generated its industrial decline. It is a task that must involve all elements of society: business, labor, government, minorities and public interest groups. It requires nothing less than a new social consensus, a remodeling of what the 18th century philosopher Jean Jacques Rousseau terms the "social contract" that brings individuals together to form a society . . . . (T)o start the . . . process, however, a consensus has to exist among labor, management, and other major interest groups. The climate is right for a coalition approach. If America is to be successful in meeting the challenges posed by our competitors in international and domestic markets, there is a great need to build a consensus on economic and trade policy . . . . The challenge, of course, is to develop a consensus-forming framework under which government, business, labor, and other major interest groups -- without compromising their traditional roles -- can agree on tradeoffs that would both strengthen the economy and, in the end, prove beneficial to all.

We also have the following by Henry Grunwald, Editor in Chief of Time, in his February 23, 1981 essay:

> The founding fathers recognized and denounced the "spirit of faction." That spirt has always existed in our highly contentious nation; the broad consensus that supposedly prevailed in earlier

days is largely a nostalgic illusion. We will never turn into a republic of virtue, animated by perfect brotherhood. We are too large, too varied, too free and too human for that. But in the past at least we usually managed to rule ourselves through rough accommodation, based on the recognition that while I may subdue my neighbor on one issue today, he may subdue me on another tomorrow. The founders thought of this as civic virtue, as self-interest rightly understood. That is what we must retrieve.

I cite these other examples discussing the consensus approach because not all persons believe in this method of proceeding. There are always some who prefer to see the world in brilliant blacks and whites. Witness the statement by Charles Morgan, former Southern Regional Director of the American Civil Liberties Union, who, on January 16, 1981, said at the third Annual Public Affairs Conference of the National Association of Manufacturers and Commerce: "Compromise ought to be used when you have no other option." Whereas I can understand this philosophy on the part of those who camp out on one or the other extreme end of the political spectrum, I have been surprised that the public policy objective of the Wisconsin Department of Natural Resources has been at times to "diffuse" and to "isolate" the consensus process. That was a tragic public policy objective because it constituted an intentional disruption of the negotiating process. In fact, the very heart of the legislative process is the give and take involved in the seeking of middle ground and compromise. Without compromise, we degenerate into factionalism that benefits neither the individual parties nor the body politic as a whole.

The result of the above process in Wisconsin, however, as Peter Peshek described, has been the development of an entire regulatory package negotiated by the business community on the one hand and, on the other, the local units of government, Wisconsin's Environmental Decade, the Public Intervenor, the Natural Resources Defense Council, Native American communities and the Wisconsin Center for Public Representation.

SIMILARITIES BETWEEN THE WISCONSIN MODEL AND THE NATIONAL COAL POLICY PROJECT

I have read with interest a summary of the National Coal Policy Project sponsored by the Center for Strategic and International Studies at Georgetown University. Even though we were unaware of the National Coal Policy Project, there are a number of similarities between the two efforts that I thought would be of interest to you, namely:

- There is a reference to the goal of the National Coal Policy Project being to "reach consensus, provide guidance for the resolution of . . . policy issues and articulate . . . differences in a useful way." This certainly has been the goal of participating groups in Wisconsin.
- There is reference to the project being attacked by some environmentalists, some members of industry and even by some persons within the government. This we also found to be true.
- The rationale for those choosing not to participate was that there was "little prospect of success." This we

found to be true on behalf of the business interests that did not participate.

- It is noted that a discussion of the major policy issues led to "considerable dispute"; and that it was fruitful to spend time on "specific issues." This corresponds to our experience.
- The rationale for the participating interests is explained as follows: "predictability" from the viewpoint of business and "proper safeguards" from the viewpoint of environmentalists. These rationales have likewise been the case in Wisconsin.
- It is indicated that any issue was discussed "if either side felt it was important" and that "the critical issues were designated by both sides to be topics for discussion." This was our experience also.
- The rationale for why both sides were interested in the project was that neither side was satisfied with existing systems for resolving their differences. It is indicated that "both sides found the existing adversary system more often than not to be time-consuming, expensive, and unpredictable; apparent victories often turned out to be hollow, as the confrontation moved from one arena to another . . . This adversary relationship dominates the legislative, regulatory and legal processes where the parties at issue are most likely to meet. By its nature,

the adversary system forces each side to present its case most forcefully; at the same time, the opponents' position is presented in the most negative terms." The summary then goes on to quote a representative of the Sierra Club who, in my opinion, accurately presents the traditional cynical views of each side with respect to the motives and intentions of the other side -- pointing out that both are wrong, that many environmental disputes "involve practical differences which are resolvable" and that traditional means of issue resolution "make it difficult for the parties to reveal their ultimate aims and their final bottom-line in any settlement." All of this also corresponds to our experience.

Without knowing the slightest thing, then, about the National Coal Policy Project we were involved in Wisconsin on a similar venture; and, interestingly, with many of the same experiences.

SOME PERSPECTIVES FROM THE PRIVATE SECTOR

In preparation for this conference, and having reviewed a number of the materials that have been prepared with respect to the Wisconsin model and the summaries which I have read of the National Coal Policy Project, I thought I would add some observations as an attorney in the private sector representing business interests with respect to the subject of this conference.

- In order for there to be consensus and a negotiated solution, there must be more than one party interested in resolution of the issues.
- The interested parties must frequently share their concerns.
- The interested parties must prioritize their needs and concerns and establish and communicate their legitimate "bottom lines." After all, parties to the process are involved because of their own perception of their self-interests -- and they will remain involved only as long as it appears as if their legitimate "bottom lines" can be accommodated. Experience dictates that, if rationally drawn, most of the "bottom lines" of the participating parties can be accommodated. They typcially are not mutually exclusive <u>if</u> the parties get down to talking details rather than philosophy. As a result, the definition of legitimate "bottom lines" should be encouraged, rather than discouraged, even though some people may interpret this process as resulting in the establishment of ultimatums. Bottom lines, however, must be limited, necessary, reasonable and rational.
- Enough necessary parties of interest must be involved so that the negotiating group is truly representative. No one should be turned away who legitimately has an interest and legitimately wants to participate. On the other hand,

one of the guises under which some groups seek to undercut the negotiation process, is to arbitrarily demand that all interested parties, no matter how nominal the interest and no matter how broad the negotiating group itself is, be included in the negotiations. This is neither a political, legal nor ethical necessity.

- All interested participating groups should have the ability to be represented by counsel so as to maximize the effectiveness of their involvement.
- All parties in interest can and should reserve their right to ultimately fight for their position in the absence of a complete agreement. There is nothing wrong with the reservation of such a right and, in fact, realizing ahead of time that such a right can be reserved induces many otherwise cautious parties to participate.
- Counsel for each party must have the willingness to moderate his or her advocacy for the client while still representing the client and its position.
- Participating parties must choose counsel who wish to resolve conflict and are result oriented.
- The consensus process is often the result of personalities and fortuitous circumstances rather than of a pre-existing structure or system. Interested parties, therefore, must be able to recognize the proper circumstances and personalities and be able to take advantage of them when and

where they exist. Certainly the support I received from my client, Exxon Minerals Company, and, in fact, the leadership role it assumed in the Wisconsin mining negotiations, were examples of this point.

- Corporate counsel, without unduly restricting the innovativeness and creativity of outside counsel, should be actively aware of, if not involved in, the negotiating process. Outside counsel needs to be made aware that time, to a business operation, is money and that various alternative resolutions exist that the company will consider to be "success."
- Outside counsel, within the confines of ethics and law, must represent the positions of opposing parties fairly to the client as well as to represent the client accurately to the opposition. If a client is not hostile to the opposition, hostility should not be communicated.
- Outside counsel needs to spend an adequate amount of time physically out among the opposition. To be most helpful, however, he or she needs to be, minimally, respected by the opposition and, ideally, accepted by the opposition.
- Outside counsel needs to understand business so that he or she can explain its motives and thinking processes; but he or she also needs to understand the opposition so that its motives and thinking processes can, likewise, be communicated back to the client.

- The necessary ingredients for a successfully negotiated settlement to a complex situation include:
  - the right intentions on the part of both parties;
  - the right circumstances at the time of the negotiations;
  - the choice of right counsel by both parties;
  - the right attitude on the part of both parties;
  - the right corporate support for outside counsel;
  - the right personalities; and
  - good luck.

In conclusion, the people you choose to represent you have to appreciate the good that the free enterprise system and the private sector have contributed to America while also appreciating that the "little person" -- his welfare, protection, dedication, work ethic and confidence in the "establishment" -- is what America is all about. Particularly, rural Americans can tell when people are dealing fairly with them. They will make decision when they have to, not when it is convenient for us or our clients to have them make decisions. They use common sense. They are tough negotiators, but their points are basic and typically represent a fairly rational statement of what they feel is an adequate price to compensate them for cooperation with proposed projects.

CONCLUDING COMMENTS

I realize that detractors from either extreme of the political spectrum can look upon the above as mere pablum. As far as I'm concerned, that's fine because that is what the First Amendment is all about. On the other hand, when clients come to me, their problems involve either obtaining a permit or somehow extricating them from legal problems resulting from the violation of a permit. My responsibility is to represent them to the best of my ability at the lowest possible cost, always keeping their best interests in mind. Typically, a resolution short of litigation is in that client's best interest. Interestingly, my experience is that more problems exist with government attorneys in resolving conflicts than with private sector intervenor-type attorneys. I realize that this experience may vary from state to state and may differ on the national level as compared to a particular experience in a particular state. On the other hand, government attorneys have, in my opinion, shown a particular lack of understanding of the private sector, have a particularly poor value system by which to choose which cases are important and which are not, and have shown a particular disregard for the time delays and legal costs which they impose upon private parties. With respect to those attorneys, and to people like Mr. Morgan from the American Civil Liberties Union, I guess my response is simply that if we have to fight, we will fight. Further, we will typically win. It may cost a great deal of legal fees and it may cost some time, but, as a practical matter, if a client will practice preventive law and plan and execute its strategy wisely, it will ultimately prevail.

This, then, brings us once again full circle. As I indicated in the beginning, like the ad on TV says, "You can pay me now or you can pay me later." One of the advantages of being an attorney in private practice is that, regardless of how a project proceeds, one gets paid. However, as a matter of personal philosophy, and taking the best interests of the client into account, I personally get a considerably greater amount of pleasure in being able to resolve matters during the front end of a project because that is more beneficial for the client, it is more result oriented and, I feel, I am being paid to provide a more appropriate service to the client than merely "toughing it out." There is always the danger in this process of someone believing that you are being "soft" on the opposition -- much like people being perceived as being "soft on communism" in the late 1940's and early 1950's. That's an occupational hazard that attorneys experience in representing their clients. In short, an attorney must be willing to tell a client, under appropriate circumstances, that it is better to "switch than fight"; and to tell unconvinced antagonists, such as my colleague with the ACLU, that "I'll see you in court." My own opinion, however, is that, under proper circumstances, we have to get out of courtrooms and into negotiating rooms in order to get our system functional once again.

Annually, we graduate several tens of thousands new attorneys. We train these young, crafty minds to be advocates -- that it is honorable, which it is, to fight. However, over the course of the last several decades, we have created a society that is growing evermore complex and unmanagable as we promote fighting between all elements of society and all interests of society with the greatest winner being attorneys in the private sector. This is no

particular skin off of my nose because the more people disagree, the more money private sector attorneys make. On the other hand, as attorneys, we have an overriding responsibility to society as a whole; and someplace, sometime, we have to establish procedures and structures that are result oriented and which allow society to proceed without the legal system extracting excessive tribute out of it along the way as it currently does. In short, as attorneys, we have been trained to promote the "spirit of faction" referred to by Mr. Grunwald. At some point, however, society, as he points out, must draw the line between an appropriate and inappropriate level of such "spirit of faction." In Wisconsin, at least during the 1970's, I think that we have largely drawn that line for the benefit of the state as a whole -- including industry and the various interested environmental groups. Obviously, the National Coal Policy Project likewise drew that line successfully on the national level. Whether in Wisconsin that same spirit will continue in the years ahead remains to be seen. But it certainly is reassuring to see that a group, such as this, is interested in the topic on a national scale because maybe, at last, we are talking about a topic whose time has come.

THE ROLE OF AN ATTORNEY IN A WETLANDS DESTRUCTION CASE

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X-II

THE ROLE OF AN ATTORNEY IN A WETLANDS DESTRUCTION CASE

I am the Public Intervenor for the State of Wisconsin. My responsibility is to advocate and protect public rights in the environment. In order to protect public rights in the environment, I am often compelled to sue state agencies, as well as individuals and businesses in the private sector.

The public rights the Office of Wisconsin Public Intervenor seeks to protect include public rights in wetlands. Before the white man arrived, Wisconsin had approximately 10 million acres of wetlands. Today, only 2.5 million acres remain. Of that total, 900,000 acres are in public ownership. In Wisconsin therefore, the issue is how do we protect the 1.6 million acres from destruction. It is a most difficult job since wetland loss has averaged two percent per year between 1930 and 1970.

The purpose of this paper is to discuss the role of an attorney who has been asked to protect a given wetland from destruction by a developer. I have two basic recommendations. First, the best place to win your case is early in the litigation process before testimony would ever be taken. Second, your best bet to get the decisionmaker to agree with you is to carry out a total legal, political and public education program as part of the resource protection initiative.

This paper is not meant as a comprehensive checklist of environmental litigation steps. The specific recommendations are not organized in the order you would expect in the litigation of a case. They are presented in a manner which I find most helpful in conceptually working a wetlands case. Many of the suggestions should be implemented simultaneously. Agency litigation is a very fluid process.

I will discuss the following items:

Motions Practice

Most wetlands destruction matters will come up in the context of administrative agency proceedings on application of developers to fill or drain wetlands.

Although for some agency decisionmakers, motions practice is not a commonly recognized procedure, one of the most valuable tools available to a person attempting to protect the resource from destruction is the practice of using available prehearing motions and briefing in order to have the application of the developer dismissed.

One of the most delightful litigation experiences I ever had involved the efforts of Kennecott Copper Corporation to open a copper mine in Northern Wisconsin. The environmental resource defense team was comprised of three former state and federal criminal prosecutors. We filed motion after motion prior to the hearing, attacking the application and attempting to limit the applicant's ability to get evidence into the record.

A very well-respected trial attorney represented Kennecott. He often bitterly complained that motions practice was not appropriate at an agency level proceeding such as on an application for a mining permit.

None of our motions was frivolous. Ultimately, one of the motions succeeded and the mining permit application was dismissed.

Eight legal proceedings were initiated over that application of Kennecott. The environmentalists won all eight legal proceedings. Kennecott was able to get but two witnesses on the stand to provide testimony in all eight proceedings.

Motions practice must be coordinated as part of an overall litigation strategy. It must raise the basic procedural and substantive questions. It should be done well in advance of the trial date, so as to identify separate issues and help educate the decisionmaker as to the scope and immensity of the decision. The public and the media should be made aware of the issues raised during the motions proceedings. Many of the basic public policy questions will be decided at the motions stage, rather than during the taking of testimony.

In short, it is generally advisable to start your motions practice early and make it comprehensive. Remember, the goal of motions practice is not delay. Rather, the goal is to clarify and expand issues and then, based on the clarified and expanded issues, to have the decisionmaker rule against destruction of the wetlands.

Keep in mind that it is easy to lose credibility with the decisionmaker by filing sloppy or frivolous motions. Filing motions for the primary purpose of delay is not proper in my view.

Collateral Legal Procedures

As indicated above, the usual wetlands destruction case involves a developer who files an application seeking an agency permit to destroy wetlands. The contents of the application will usually restrict the boundaries of the factual and legal issues involved. Frequently, these boundaries are far too narrow for the environmental protection attorney to be successful. Collateral legal proceedings may be necessary in order to raise all appropriate environmental issues.

For example, the agency may well have decided that a proffered regulatory theory may not be applied. In the mining case, the Wisconsin Department of Natural Resources (DNR) had historically determined Wisconsin's solid waste laws did not apply to metallic mining waste. DNR's solid waste rules prohibited siting of solid waste disposal operations in wetlands. Kennecott had planned to put its mine tailings in a wetland.

The Wisconsin Public Intervenor could have raised the issue directly during the permit proceedings and it might have received attention, or it might not have. Strategically, it appeared to be far wiser to commence a separate legal proceeding on the issue of whether Wisconsin's solid waste laws applied to mining. Therefore, we filed a petition for a declaratory ruling with DNR, asking that it declare that its solid waste rules applied to mining.

An advantage of pursuing the issue collaterally was that, if we lost the declaratory ruling proceeding at the agency level, we had a separate appeal to the courts, rather than have to wait for the unrelated permit hearing to conclude. In short, we did not need to exhaust other administrative remdies before taking the appeal on the issue.

Declaratory rulings are also useful in determining jurisdictional questions. They are useful in getting an agency's attention regarding a particular proposed development to which the agency is giving very little recognition.

In addition to declaratory rulings, one can file petitions for agency adoption of administrative rules (regulations) to full regulatory voids with respect to activities contemplated by the developer. Once the rules petition is filed, you can advance a two-pronged argument before the decisionmaker. First, you can argue a regulatory void exists with respect to the developer's plans, and that the agency has before it a rules petition asking the agency to fill that void. Second, it would be inappropriate to process the permit application until the regulations are in place. Everyone has a right to know the groundrules before the permit hearing.

This is a technique which I strongly recommend. Frequently, you can ultimately build a political coalition, including supporters of the developer, to get the administrative rules in place so that the permit application can be processed, and a "go" or "no-go" decision reached. There is a great incentive for the developer to support rule-making under these circumstances.

Discovery

Most successful litigation attorneys routinely conduct discovery prior to hearing or trial. Discovery takes place far less often during agency proceedings, and it is here where discovery may be particularly useful. There are at least four reasons why discovery is valuable on the agency level.

First, the decisionmakers are usually generalists. They are often young and fairly new to the decision-making process. The facts and details needed to persuade these decisionmakers can often only be secured through discovery.

Second, the entire decision-making process is too often willing to accept a given assertion as an accurate statement of fact. However, the complexity of wetland ecology, groundwater, science or surface water chemistry should persuade all of us that we seldom have the luxury of being certain that we have an ultimate fact or accurate description of reality before us.

The first documents prepared by the developer to justify his project are almost invariably inaccurate or, at least, incomplete. But the developer's workup will be in a fancy submittal document, and may pass the common sense test when reviewed by the agency generalist. My experience, however, has been that when the documents and alleged facts are reviewed by an adversary chapter by chapter, page by page, paragraph by paragraph, sentence by sentence, and number by number, very often there is no way that the submittal document has accurately described reality. But you can only expose the superficiality of your opponent's case through comprehensive, full scale discovery activities.

Third, the regulatory agency probably will not conduct its own discovery activities because of manpower limits and historical role playing. If the corporation's files are to be examined thoroughly, if interrogatories are to be filed and depositions taken, it will require an outside litigator to do this. Very often, "the smoking gun" that you need to win a case will exist in the developer's own files. It is a matter of getting to those files.

If the state agency, or agencies before whom you practice, do not have discovery rules codified, you should make the adoption of such rules an early priority. If your state statutes limit discovery abilities at the agency level, make the changing of those statutes an early priority. If the statutes cannot be changed, demand discovery from the agency through motions and declaratory ruling petitions as a matter of due process.

Fourth, the lawyer will need to prepare as extensively for administrative proceedings as for trials. If you lose the agency decision, the legal presumptions are against you in public review.

Finally, bigger developers will hide behind the concept of trade secrets when you are trying to get at many of their files. Such legal assertions are generally without merit. On the agency level, the general rule of discovery is that an attorney has the right to see all records which would be useful to prepare litigation. It is up to the agency to fashion protective orders so as to maintain the developer's trade secrets.

Jurisdictional Questions

One of the often overlooked vehicles available to the environmental defense attorney is an attack upon either the subject matter or personal jurisdiction of the regulatory agency. Over the years, agencies have gotten accustomed to certain administrative procedures related to notification of potential parties. Because of special interest pressures, the agencies have often truncated the jurisdictional steps required by enabling statutes. The special interest groups want the permit process to go as quickly as possible. Environmental defense attorneys should be prepared to carefully scrutinize whether all elements of the statutes have been complied with which relate to the jurisdiction of the agency. The attorney should look beyond the administrative rules to the enabling statutes. It is also important to find out who has been served with required notices.

In addition, most statutes require certain minimum submittal of data as a precondition for a hearing on the processing of an application. Developers and agencies may be sloppy and do not always comply with those statutes.

Another practice often followed by developers and agencies is to permit late filing of certain documentation, even though the statute contemplates its submission as a precondition for hearing. You should be prepared to challenge noncompliance with statutes and administrative rules when it is to your advantage.

Contested-Case Hearings versus Informational Hearings

Many agency decisions regarding protection of environmental resources occur in the context of public informational meetings or hearings. Also called "legislative" hearings, these proceedings do not allow motions practice, discovery, sworn testimony, cross-examination, and have no legal restraints prohibiting ex parte contacts with the decisionmaker.

In a very few instances, this may work to the advantage of the environmental protector. However, most of the time such proceedings will not. Most developers and their consultants have longstanding relationships with regulatory staff. That relationship provides a distinct edge to the developer who has informally worked out most of its problems with the agency long before the hearing commences, and often even before an application is filed. This informal procedure is most comfortable for the regulator and the developer.

For these reasons, the informational meeting or hearing that follows becomes a charade. The dye has been set. The environmental defense attorney's client is almost certain to lose.

I strongly advocate insisting upon contested-case hearings with full substantive and due process rights attached. If the rule or statute is silent, insist upon a contested-case hearing. If the rule or hearing process only permits the developer to secure a second chance hearing which involves contested case rights, challenge the reasonableness

of the rule or statute. In making such a challenge, cite the state's Public Trust Doctrine if the resource impacts on navigable waters. If necessary, seek statutory and rule changes so that environmental groups can obtain automatic contested-case hearings upon request.

There are those in public advocacy who insist that contested-case hearings work against the advantage of the citizen intervenor. They argue that the resources of full blown litigation will sap the strength of the person who objects to the development. I do not share that perspective. But to the extent that you have such concerns, analyze each case for comparison of resources between the developer and your side.

WEPA and Similar States' Environmental Protection Acts

The National Environmental Policy Act (NEPA) and state statutes similar to it are laws which require careful analysis by an attorney attempting to protect a wetland from destruction.

In Wisconsin, our regulatory agencies probably do less than eighteen Environmental Impact Statements (EISs) a year. However, our DNR will do over 1,800 "Type II" Environmental Assessment Screening Worksheets (EASWs). In addition to the EASW, the department is required to study, develop and describe, in writing, appropriate alternatives to the developer's proposed course of conduct.

I would stress four aspects of environmental policy act litigation to you.

First, the law requires the agency to independently analyze the environmental consequences of a project. Very often the agency will do nothing but parrot, without verification, the documents submitted by the developer. In the Kennecott case, the EIS contained thirty-three major environmental studies. DNR had conducted three of the thirty-three studies. It had verified, in one fashion or another, five of the studies. It accepted at face value the accuracy of the other twenty-five studies conducted by Kennecott. Such wholesale plagiarizing of the developer's reports does not constitute agency compliance with NEPA and similar state laws.

Second, the agency usually will not require a quality assurance program for the scientific tests, the conclusions of which will be part of the project submittal document of the developer. Also, the agency will not require "split-sampling," so that the agency can check on the reliability of the laboratories being used by the developer. The agency should have its own written verification program available prior to the time that the developer begins collection of data. As an environmental litigator, you should be prepared to ask for a contested-case hearing on the adequacy of this verification program.

Third, environmental assessments are usually impressive looking documents. They are written by government entities. There exists a temptation to accept as truth the statements contained in the documents. As an environmental litigant, it is a major mistake to succumb to this temptation.

Environmental impact statements and environmental assessment screening worksheets will often contain gross generalizations which pass the test of common sense, but when carefully analyzed, fail to comprehensively articulate reality or alternatives. When seeking to determine the validity of these environmental assessment documents, you will find it is often impossible to find out who was the author of a given conclusion or sentence. It is even more difficult to find out the qualifications of the person who wrote the assertion. During discovery, find out who wrote each of the critical sentences. Find out what the basis was for that decision. You should also find out about the qualifications of the person who made the assertion. For example, we found out in the mining case that the assertion in the EIS--that there is no written market for the by-products in copper and zinc mining--was written by a fisheries biologist, not by a Ph.D. economist who specializes in marketing. I suggest that the government can be shown that it often fails to meet its burden of independent analysis.

The fourth aspect of environmental policy act litigation to keep in mind is that agencies may attempt to bifurcate the EIS process from the permit hearings process.

As a generalization, I would argue that such bifurcation works against the best interests of the environment. As an environmental advocate, your resources are generally limited, and gearing up for two major proceedings can be very taxing. In addition, a citizens community group is usually not prepared to handle final EIS hearings, which may often occur months ahead of permit hearings. It takes a long time for an ad hoc community group to get organized. The EIS process may

take place before the community is ready.

It often happens that a community will prepare to fight a project in the permit proceeding, foregoing the EIS proceeding. Unfortunately, by the time of the permit hearing, where the community group is prepared to raise the environmental issues, they have already been decided at the environmental impact statement stage.

Specialized Environmental Defense Bar

Many of us who work to protect and advocate public rights in the environment on a regular basis come from institutions that pay us. Unfortunately, there are not many of us.

Given the volume of potential cases to protect the environment, particularly wetlands cases, it is important that there be a group of attorneys in the private bar who are qualified to handle environmental cases. By training and experience, they should be specialists in environmental law.

These attorneys must also be experienced litigators. They must have a mature relationship with their law firms which permit them to do semi-pro bono work.

A significant number of cases should be referred to these private attorneys. This permits significant fees to be generated which will partially cover the costs of training, travel and office overhead.

Finally, I believe that attorneys recruited for environmental defense work should generally come from firms of considerable size and substance. This is because major law