

98-126 8



**MARC
DUFF**

STATE REPRESENTATIVE
Chair: Environment & Utilities
Vice Chair: Urban Education
Co-Chair: Joint Legislative Council

TO: Members, Committee on Environment

FROM: Marsha Dake, Committee Clerk

DATE: November 5, 1998

RE: Clearinghouse Rule Referral

The following Assembly Clearinghouse Rules have been referred to the Committee on Environment:

- Clearinghouse Rule 98-126: Relating to construction site erosion control
- Clearinghouse Rule 98-131: Relating to the Wisconsin environmental policy act

The deadline for committee action on these rules is December 7, 1998. If you wish to submit comments or request a hearing, please do so in advance of that date. For a copy of the rules, please contact my office (6-1190).

OFFICE: State Capital
PO. Box 8952
Madison, WI 53708-8952
608-266-1190
HOME: 1811 South Elm Grove Road
New Berlin, WI 53151
414-782-0763
TOLL-FREE HOTLINE: 1-800-362-9472
E-MAIL: USWLSA98@IBMMAIL.COM





P. O. Box 7970
Madison, Wisconsin 53707
(608) 266-1018

Tommy G. Thompson, Governor
Philip Edw. Albert, Acting Secretary

December 15, 1998

The Honorable Marc Duff, Chairperson
Assembly Environmental Committee
Room 306 North, State Capitol
Madison, WI 53708-8953

Dear Representative Duff:

This letter is to confirm testimony of Michael Corry at today's hearing held before your Assembly Environmental Committee and the intention of the Department of Commerce to submit possible germane modifications relating to the proposed rules on Construction Site Erosion Control, Chapter Comm 65 (Clearinghouse Rule No. 98-126).

The Department of Commerce will be contacting members of the Assembly Environmental Committee, as well as other interested parties, as to their input into the germane modifications.

If you have any questions regarding this matter, please contact Michael Corry, 266-1816 at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'Philip Edw. Albert'.

Philip Edw. Albert
Acting Secretary

**Department of Commerce Presentation
for
Assembly Environmental Standing Committee
on
Chapter Comm 65 Soil Erosion
December 15, 1998**

Chairperson Duff, members of the Assembly Environmental Committee, my name is Michael Corry. With me is Jim Quast, program manager for the development of Comm 65, which will regulate our commercial construction site erosion control program.

Comm 65 is written to include construction site erosion control as part of the review and inspection programs of the department and local municipalities that implement the state commercial building codes. This is parallel to the construction site erosion control program in the Uniform Dwelling Code (UDC).

In accordance with s. 101.1205, Stats., Chapter Comm 65 establishes uniform soil erosion control standards at building sites for the construction of public buildings and places of employment. As a statewide uniform code, local governments that adopt codes regulating commercial construction site erosion must adopt Comm 65. Local governments with more stringent ordinances relating to soil erosion that were in effect on January 1, 1994 may continue those programs. Otherwise, under ss. 59.69(4c), 60.627 (2), 61.354 (2) and 62.234 (2), Stats., local municipalities cannot enact erosion control ordinances or enforce erosion control activities that involve construction of a building.

For purposes of erosion control, the department's jurisdiction over the site begins when the ground is broken for footing and foundation work and ends when the site is stabilized. Local government programs for erosion control ordinances covering pre-construction and post-construction activities, and other erosion control activities are not affected by the uniform code. In addition, local governments that adopt Comm 65 can specify local permits, plan review and inspection of construction site erosion control activities, either as agents of the department or independently.

The proposed code requires that all commercial sites that disturb more than 2,000-sq. ft. of soil register with the department. An erosion control plan is to be prepared and sent either to the reviewing agency or retained at the site for review by the inspector.

There are two groups of inspectors that will conduct erosion control inspections. The first is the certified building inspector who will inspect the erosion control activities during the normal course of their visits to the construction site. The second is a certified soil erosion control inspector. This classification will permit local government to utilize an inspection force other than building inspectors for erosion control regulation.

The rules establish performance standards for erosion control measures to be based upon a 2-year, 24-hour storm event for overland flow and a 10-year, 24-hour storm event for channelized flow. The rules also establish specification standards for specific types of erosion control measures relating to issues such as the quality of products or practices or their limitations of use. The rules require that erosion control measures be designed, installed and maintained to limit soil from either being transported from the property or from entering the waters of the state or conduits to the waters of the state.

The rules establish two site classifications: Class I sites are those with more than 5 acres of soil disturbing activity; and Class II sites are less than 5 acres. The code requires that the erosion control plans for Class I sites be prepared by a person licensed by the Department of Regulation and Licensing, such as an architect or an engineer, or by a department certified erosion control planner.

The department has been in discussion with the Department of Natural Resources (DNR) concerning the addition of construction site storm water management activities to the code. While the storm water management program is a responsibility of the DNR, the addition of this requirement to Comm 65 would allow builders to deal with one department and satisfy DNR's WPDES permit requirements. If acceptable to the Committee, the department would consider a germane modification to the rules to include construction site storm water management in Comm 65. There are a number of potential complexities for the department and its agents, especially in anticipation of changes to the storm water regulations. The department would need to work out the details with the DNR and review the changes with department code advisory committees.

If you have any questions about the proposed Comm 65, Mr. Quast and I would be happy to answer them.

Cullen
Weston
Pines
& Bach

Attorneys at Law

122 West Washington Avenue
Suite 900
Madison, Wisconsin 53703
(608) 251-0101
(608) 251-2883 Fax

August 4, 2000

COPY
Lee Cullen
Lester A. Pines
Steven A. Bach
Alison TenBruggencate
Gordon E. McQuillen
Carol Grob
Linda L. Harfst

Curt F. Pawlisch
Elise Clancy Ruoho
Mary Wright
Jordan Loeb
Tamara B. Packard
Shana R. Lewis

Via Hand Delivery
Of Counsel:
Cheryl Rosen Weston

State Representative Neil Kedzie
Chairman, Assembly Environmental Committee
State Capitol—Room 307 North
Madison, WI 53702

Dear Representative Kedzie:

On behalf of the Wisconsin Land and Water Conservation Association ("WLWCA"), I write to urge you to oppose the Department of Commerce's initiative to promulgate CR98-126, the proposed construction site erosion control rule for commercial buildings. WLWCA opposes the proposed rule on procedural, policy and legal grounds.

First, with respect to procedure, it is clear that if the Department of Commerce ("DOC") is permitted to promulgate CR98-126, it will have successfully subverted the legislative review process to the detriment of the legislature and the public generally.

On December 15, 1998, the Assembly Environmental Committee held a public hearing on CR98-126. As a result of testimony and other communications which the Committee received, then Committee Chairman Representative Marc Duff requested that DOC work with the Department of Natural Resources and other interested parties to develop germane modifications to the rule. Representative Johnsrud also played a significant role in making this request. In a letter dated December 15, 1998, acting DOC Secretary Philip Albert confirmed that his department would submit possible germane modifications to the rule. Secretary Albert further stated that DOC would contact members of the Assembly Environmental Committee "as well as other interested parties, as to their input into the germane modifications." (See attached letter.) The Assembly Environmental Committee minutes reflect that the Department of Commerce had recalled its rule "for further modifications."

At the December 15, 1998 hearing, a WLWCA spokesperson testified against the rule. As detailed below, he raised a number of substantive concerns. In the nearly two years that have transpired since that hearing, the DOC has never contacted our organization to discuss possible modifications to the rule. Other organizations which registered against the rule

included the Wisconsin Counties Association, 1000 Friends of Wisconsin and the John Muir Chapter of the Sierra Club.

Notwithstanding this history, DOC apparently believes that it can ignore the record and its commitment to work with the members of your committee and with those parties who had concerns regarding CR98-126. We urge you to inform DOC that it cannot exercise such unilateral power. The legislative review process is designed to ensure that agency officials are accountable to elected officials and the public. To permit DOC to end-run this process is to allow the agency to erode the power of your committee, its members and the legislature as an institution.

Moreover, policy and legal problems continue to abound with this rule. The testimony which WLWCA gave two years ago remains true: CR98-126 would be ineffective at controlling sediment from construction sites and inconsistent with enabling legislation. Examples of the problems identified in our testimony included:

- *Erosion control plans are not required to be submitted for review and approved by the department or a county, city, village or town contrary to Wis. Stat. § 101.1205(2);
- *Inspection of construction sites is not required by DOC or a county, city, village or town contrary to Wis. Stat. § 101.1205(3);
- *Site plans are automatically certified for erosion control if they are submitted by a licensed architect who may have no applicable training or experience;
- *The rule ignores post-construction stormwater management issues and leaves local contractors caught between conflicting codes and standards;
- *Enforcement is left to building inspectors who may rarely visit a construction site and know little about erosion control concepts or the engineering practice designs for large sites;
- *Since many communities already have local ordinances, the rule creates much confusion and inconsistencies in jurisdiction and erosion control standards.

A complete copy of WLWCA's testimony is attached. We understand that DOC has two proposed modifications to CR98-126, but to date these have not been shared with our organization. Whether they are acceptable remains in doubt.

In summary, WLWCA submits that CR98-126 requires additional legislative scrutiny, the very thing that DOC seems especially anxious to avoid. Permitting DOC to promulgate its

State Representative Neil Kedzie
August 4, 2000
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Cullen, Weston, Pines & Bach

rule would allow it to succeed in its end-run of your committee and its members. The rule as drafted is contrary to its enabling statute and sound public policy. We therefore urge you to demand that DOC re-submit CR98-126 with the proposed modifications to the legislature.

Sincerely,


CULLEN, WESTON, PINES & BACH

Curt F. Pawlisch
Attorney for Wisconsin Land and Water Conservation Association

CFP/rs

Enclosures

cc: Brett Larson, WLWCA
Members of the Assembly Environmental Resources Committee
Senator Alice Clausing
Representative Glenn Grothman, Co-chair, Joint Committee for Review of
Administrative Rules
Senator Judy Robson, Co-chair, Joint Committee for Review of Administrative Rules
Craig Roberts, Wisconsin Counties Association
Caryl Terrell, John Muir Chapter, Sierra Club
David Cieslewicz, 1000 Friends of Wisconsin



Wisconsin Land & Water
Conservation Association, Inc. (WLWCA)



Wisconsin Association
of
Land Conservation Employees (WALCE)

Objections to Comm 65 - Why It's Bad For Water Quality

Submitted by: Perry Lindquist, Washington County Land Conservation Department/WLWCA/WALCE

Comm 65 is supposed to control sediment from the construction of commercial buildings. However, the current draft would relax erosion control requirements for builders and developers compared to long accepted national standards and any local ordinance. Because of this, the rule represents a significant step backward for local water pollution control efforts in urban and urbanizing areas. WLWCA and WALCE respectfully requests the Assembly Environment Committee to object to the entire rule. Below is a summary of what is wrong with COMM 65 and why it should not be approved, followed by recommendations for improvement.

The Weaknesses:

The draft rule would be very ineffective at controlling sediment from construction sites and is inconsistent with the enabling legislation. Examples include:

- ✓ Erosion control plans are not required to be submitted for review and approval by the department or a county, city, village or town as required by Section 101.1205(2) State Statute.
- ✓ Inspection of the construction site is not required by the department or a county, city, village or town as required in Section 101.1205(3) State Statute.
- ✓ Because the rule does not require compliance with any state standards for the design and installation of erosion control practices, uniformity is lost and practice failure is certain. (For example, sediment basins are necessary for large disturbed areas, but are not even mentioned in the rule.)
- ✓ Site plans are automatically certified for erosion control if they are submitted by a licensed architect, who may have no applicable training or experience.
- ✓ The rule ignores post-construction stormwater management issues and leaves local contractors caught between conflicting codes and standards.
- ✓ Enforcement is left up to building inspectors who may rarely visit the site and know little about erosion control concepts or the engineering behind practice designs for large sites.
- ✓ Since many communities already had local ordinances, this rule creates much confusion and inconsistencies in jurisdiction and erosion control standards.

Recommendations:

Given the numerous problems listed above, the committee should object to the entire proposed rule. In addition, we strongly encourage the legislature to take the following actions:

- ✓ Request an audit of how well the erosion control requirements of the Uniform Dwelling Code have been implemented statewide, as compared to local ordinances, before expanding this approach to other codes.
- ✓ Require the Department of Commerce to work cooperatively with the Department of Natural Resources and others on establishing uniform state standards for the design and installation of erosion control practices based on research, field experience and the latest technology.
- ✓ Encourage local ordinances to address the issue of construction site erosion by making Comm 65 a minimum standard. This issue is most effectively addressed at the local level.

Nonpoint pollution is a rural and urban problem. Research shows that construction sites are the largest source of sediment in our lakes and streams on a per acre basis - averaging 10 times the rate of erosion on cropland. As farm runoff regulations continue to increase, please help ensure that urban pollution is equally addressed!