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August 4, 2000

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

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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



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', written in a cursive style.

Philip Edw. Albert
Acting Secretary



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!