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Testimony – AB 411
Assembly Committee on Natural Resources and Sporting Heritage
Wednesday, July 19, 2017 – 10:00 a.m.

Mr. Chairman, members of the committee, thank you for your time today.

The 4th Amendment says:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

This provision, like every other protection set forth in the Bill of Rights, is meant to protect our liberty from unreasonable governmental inference. It's important to note at the outset of this discussion that this is not some esoteric, theoretical discussion. This bill affects the rights of every day Wisconsinites. In fact, for me, this bill began last hunting season, when the Wisconsin DNR proudly tweeted a picture of a warden crossing private property to speak with a hunter who was in his tree stand.

That tweet made me curious: First and foremost, as someone who has hunted my entire life and spends a lot of time and effort controlling scent around my hunting areas, I wondered how badly the warden screwed up the guy's hunt. But it also made me wonder if the warden had some reason to enter private property. Did he observe a violation or had someone reported a violation? Could it instead have been just that he observed an individual engaging in the perfectly lawful activity of hunting? Indeed, not just lawful: I think this is an important point. In Wisconsin, we have actually placed the activity of hunting on a pedestal higher than other activities. The Wisconsin state constitution specifically protects hunting.

So, I began a conversation with the DNR to determine if and when a warden could enter private property without reasonable suspicion, probable cause, or a warrant.

After a number of conversations, I came to the conclusion, which the DNR affirmed, that the DNR policy is that its wardens may enter private property even if there is no evidence or suspicion of a violation.

So my next step was to determine how this could possibly be so. How can this square with the 4th Amendment? Don't they need a warrant or some reasonable cause to enter private property? And the answer surprised me. The answer, it turns out, is much more uncertain than it should be, from

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the standpoint of citizens who want to know what their rights are as to their private property. In criminal cases, the U.S. Supreme Court has interpreted the 4th Amendment to allow use of any evidence found in "open fields," even when law enforcement officers have no warrant to enter that land. But that certainly does not mean that DNR wardens necessarily can trespass at will when there is no criminal investigation, and indeed no reasonable suspicion of any criminal activity at all. The fact that courts believe that the benefits of evidence in a criminal case outweighs the harm of a law enforcement officer trespassing DOES NOT mean that trespassing by DNR wardens must be tolerated in all circumstances, especially where there is no reason to suspect a crime at all. It would be a complete *non sequitur* to say that just because a criminal cannot avoid evidence found while police trespass, a law abiding property owner therefore must allow DNR wardens to trespass at will.

That's where we come in. In order to best understand our role, as legislators, it is useful to think about the constitution as a box. Within the box, we are able to legislate and the executive branch is able to operate. Outside of the box, it's unconstitutional and we may not legislate. And within the box, there is a spectrum of policy choices. Remember - we make the policy choices, for better or worse; the courts simply set the outer limits of the choices we may make.

So when it comes to the 4th Amendment, there are many choices we can make. On the one end of the spectrum, we could be ultra-vigilant by prohibiting all search and seizure of private property for any reason at all. We could make that choice. On the other end of the spectrum, we could allow DNR entry on private property the way the DNR thinks it exists today – for absolutely no reason at all (Just a quick note that after a recent WI Supreme Court case called Stietz v. State, which I will discuss later, it is not clear to me that we can actually still make that choice).

So those are the two extremes – no entry for any reason on the one end, and unlimited entry for any reason, or no reason at all, on the other end. This bill establishes a reasonable, moderate middle ground. In between no entry at all and entry for any reason, are three policy choices. The choice closest to no entry at all is the warrant. Obtaining a warrant requires probable cause, particularized facts, an application to a judge under oath, and the issuance of a warrant by the judge. Then after the warrant issues, law enforcement must execute it in a timely manner so it does not become stale. This is a fairly high bar.

Next, working down the spectrum, is probable cause. It provides a higher bar than reasonable suspicion, but is a lower bar than a warrant. And finally, we arrive at the process closest to any entry for any reason, which is reasonable suspicion. This bill lands on reasonable suspicion. This is the lowest impediment for a warden to enter your property, without simply allowing entry for no or any reason.

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No Entry **Warrant** **Probable Cause** **Reasonable Suspicion** **Entry for any reason or no reason**

So the natural question from a policy making perspective is obviously, if the DNR thinks as it has for decades that it should be allowed entry for any reason or no reason, why would we, as a legislature, move up the spectrum to reasonable suspicion? And that's a fair question that you will hear a lot about later today from those who oppose this bill. I think there will be two common themes from opponents. First, they will argue that wildlife is a public asset, even when on private property, and therefore the public good outweighs the private interest of the property owner. Second, from an environmental protection side, you will likely hear something similar, that private activity on landowner property can impair public resources like air and water and therefore we must be vigilant.

Actually, in broad principle, I don't disagree. But I think we can both protect our collective interest in shared resources, like water and wildlife, AND protect our individual liberty and private property rights. I think we can strike a better balance. In my opinion, there is no reason why we can't do what we do in the context of most other 4th Amendment areas, which is recognize that property owners have reasonable privacy expectations, while protecting public resources. In fact, we do it all the time. Think about your car trip to the state Capitol this morning. You got in, buckled up, had your driver license and insurance card with you and pulled out onto a public road. As you were driving, you may have reached speeds in excess of 55 or now even 70 miles an hour. You may have passed within just a few feet of an oncoming car while driving 55 miles per hour and you may have gone through a number of signaled intersections. Had you made a wrong choice, you could have easily caused an accident and killed someone. So in this instance, you were exercising a privilege (driving) on a public road, during which time, you could easily kill someone.

Yet, the police were not free to pull you over for no reason just to see if you had a license. They would have to have had some good reason – that is, reasonable suspicion--to pull you over. Again, even though you were on a public road, you could easily have killed someone and driving is a privilege, not a right.

At the same time, under today's law, a warden can enter your private land, just to check your hunting license or to snoop around for no reason, and unlike driving, hunting and owning private property are constitutionally protected rights. And generally, the harm we are trying to prevent is unlawful hunting or maybe poaching; proper government concerns, yes, but lower on the hierarchy than preventing injury and death to human beings on highways, for example. So preventing poaching is somehow so important that we allow DNR incursions on private property of law-abiding people for any reason under the sun or no reason at all, but when human life is at stake, when you are driving, law enforcement may not pull you over to check your license without at least reasonable suspicion that you are doing something illegal. Something is seriously out of whack here.

And, I'm not the only one who believes this. I'm going to read a couple of quotes from some folks who you would not think would agree, but they do on this important subject.

First, a quote from the great liberal Supreme Court Justice, Thurgood Marshall, who was joined by two other liberal stalwarts on the on the Court, Justice Brennan and Justice Stevens. In Oliver v. U.S., decided in 1984, the Court established the modern day framework for the Open Fields Doctrine, which again is a narrow rule that does not allow a criminal to escape evidence at a criminal trial just because the police obtained it while trespassing in open fields. But it was far from a unanimous opinion. In that case, Justice Marshall, joined by Justices Brennan and Stevens wrote a blistering dissent. A couple of their lines are worth repeating:

> *The Court's inability to reconcile its parsimonious reading of the phrase "persons, houses, papers, and effects" with our prior decisions, or even its own holding, is a symptom of a more fundamental infirmity in the Court's reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed not to prescribe with "precision" permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion.*
> *****
> *We strive, when interpreting these seminal constitutional provisions, to effectuate their purposes -- to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials. The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom "from unreasonable government intrusions into . . . legitimate expectations of privacy."*

Now, why do you think Justice Marshall believed that we should have an expectation of privacy on our property, even if our yard is 20, 40, 100 acres? He gave us that answer:

> *Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind. Our respect for the freedom of landowners to use their posted "open fields" in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces, and substantially reinforces the landowners' contention that their expectations of privacy are "reasonable."*

So, here we have three of the 20th century's leading liberals on the U.S. Supreme Court arguing that the entire doctrine of "open fields" is flawed and violates the 4th Amendment. If their position would have won the day, we wouldn't be talking about "reasonable suspicion" like this bill proposes. Instead, all law enforcement would be required to get a warrant based on probable cause—again, the strictest of all possible rules short of just barring law enforcement from ever entering private property at all. You can now see how important that spectrum is that I discussed earlier because while this bill inches us back toward a more balanced place. We don't have to

adopt the more extreme view of some constitutional scholars, which would scrap the entire business of the open fields doctrine.

But are they alone? It seems odd that a conservative Republican legislator would use the writings of liberal Supreme Court justices to argue in a favor of a bill. No, they are not alone. Conservative legal scholars are increasingly uncomfortable with the open fields doctrine, too. Just last month, the Wisconsin Supreme Court decided Stietz v. State. In that case, Mr. Stietz ended up in an armed standoff with DNR wardens when they entered his property on the last day of the gun deer season. I am going to read the facts as set forth in the court opinion because they shed light on exactly what we are dealing with here today:

> *The sun had set and it was fairly dark as 64-year-old Stietz walked his property—— alone. He had not invited anyone onto his private property and was not expecting any visitors. This property, located approximately half a mile from the public road, was surrounded by other private property, part of which belonged to Stietz's uncle. There was no formal or permanent walkway or driveway inviting visitors onto the private land.*
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> *DNR Wardens Frost and Weber entered Stietz's private land shortly after hunting hours ended on November 25, 2012, while en route to a citizen complaint in another county. While driving along the public road adjacent to privately-owned property, the wardens saw a small sedan parked on the grassy area of private property, about a quarter mile from the road. The wardens decided to circle the area, which included Stietz's private property, to check for hunters who might be hunting after hours. During this trip, the wardens listened for any audible sound and used binoculars and a scope to scour the land for hunters. They heard nothing and saw no one. Nevertheless, the wardens decided to drive onto the private property to investigate the legally parked car. There was no formal driveway, but a portion of the grassy field suggested a "field lane," which they used to reach the car. Warden Webster ran the registration on the car, which belonged to Robert and Sue Stietz, the adjacent property owners. Warden Frost got out and looked into the car's windows. He saw an empty rifle case, some buck lure, and a tree seat. The wardens decided to proceed further onto the private property to look for illegal hunters. No attempt was made to contact the owners of the private land, there was no evidence of dead or diseased wild animals on the land, there was no audible noise suggesting illegal hunting or suspicious activity, and there was no evidence that a crime had been or was about to be committed.*
>
> *While checking the fence, Stietz saw two strangers clad in orange about 20 to 30 yards away, walking on his property. When the two men approached Stietz, they turned a flashlight toward him and asked him to give them his rifle. Stietz——an armed services veteran, a citizen with no criminal record, and a hunter without violations in the past 50 years——refused to turn his weapon over to two men he did*

not know who appeared uninvited on his private land. At that point, Warden Webster physically grabbed Stietz, and the two wardens forcibly wrested the shotgun away from him. After the seizure, all three men drew their handguns, resulting in the standoff that formed the basis for the charges in this case.

The Wisconsin Supreme Court, with the court's most prominent liberal, Justice Abrahamson, writing the lead opinion, sent the case back to the trial court requiring that Mr. Stietz be able to proffer to the jury a self-defense argument. Conservative Justices Bradley, Kelly, and Roggensack joined in this result, and then added their own separate concurring opinion, written by Justice Rebecca Bradley. Think about that for a minute. Our Supreme Court rarely agrees on whether the sky is blue. But here, a liberal and a bloc of conservatives were so bothered by the DNR incursion onto private property that they joined to order a new trial in which the defendant could present a self-defense argument (the court's other liberal justice, Ann Walsh Bradley, had recused herself and did not vote on the case at all).

Conservative Justice Rebecca Bradley's concurring opinion is particularly important for purposes of this bill and today's hearing. She wrote the following, going further than liberal Justice Abrahamson was willing to go:

I also write to reaffirm that the Fourth Amendment prohibits the government from seizing a person on private property——including open fields——absent consent, a warrant, probable cause and exigent circumstances, or another lawful basis for interfering with a person's right to be free from governmental intrusion.

Stietz's attorney also sought to argue the wardens were in fact trespassers, and requested a trespass jury instruction, but the circuit court refused both requests. It concluded the wardens were not trespassing. The law, however, does not support the circuit court's decisions and instead confirms Stietz's argument that the wardens were trespassing.

Justice Bradley went on to unwind a number of arguments made by the State, some of which I think will be repeated here today by those who oppose this bill. She said:

Wisconsin Stat. § 23.58(1), which authorizes DNR wardens to conduct a Terry stop, provides that "an enforcing officer," "having identified himself or herself as an enforcing officer," "may stop a person in a ***public place*** *for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a violation" of any applicable laws or rules. (Emphasis added.) The wardens here were not in a public place and, even if Terry permitted investigatory stops on private property, the wardens did not have reasonable suspicion that Stietz was breaking the law when they drove onto private property to investigate. Reasonable suspicion exists when a law enforcement officer possesses "specific and articulable facts that warrant a reasonable belief that criminal activity*

is afoot." State v. Young, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. The DNR equivalent would require a reasonable belief that a hunting violation is afoot. A car legally parked on private property does not, alone, create reasonable suspicion of a hunting violation. A mere "hunch" that the car means someone is hunting illegally is also insufficient.

This, to me, is the most important passage that I will read today, so pay attention. Remember, here, we have three conservatives on the Wisconsin Supreme Court (and earlier, we had three liberals on the U.S. Supreme Court). Here's what the three conservatives had to say:

At oral argument in this case, the State could not identify any law authorizing the wardens to be on Stietz's land. There is none. The State asserted only that the "open fields" doctrine justified the wardens' intrusion on private property, reasoning that the doctrine made Stietz's secluded, remote land a "public place" on which the wardens were privileged to traverse. The State is wrong. The open fields doctrine does not transform private fields into public places that anyone is free to enter uninvited or without reason. Nor does it convert the act of trespassing into a lawful intrusion.

I will leave you with one last passage from Justice Rebecca Bradley because I think it nicely sums up the policies we are trying to balance here and recites how the current policy is out of balance:

The wardens in this case overlooked Stietz's right to be secure in his person under the Fourth Amendment by forcefully disarming him and seizing him and his lawfully possessed rifle with no lawful basis for doing so. The governmental interest in policing hunting violations cannot justify such an intrusion against an individual. These actions, which led to the standoff and the charges against Stietz, are swept under the rug and forgotten. But, had the wardens not trespassed and had they not forcibly wrested away Stietz's rifle, the standoff——leading to six charges——would not have occurred at all.

The people of Wisconsin entrust DNR wardens to protect the state's many natural resources, including public forests and land. In order to enable wardens to fulfill their duties, the people of Wisconsin confer powers on them. These powers are not boundless; they are circumscribed both constitutionally and statutorily and do not include free reign to trespass on private lands at will. The wardens in this case unlawfully entered private land, demanded a legally possessed rifle without explanation, and seized Stietz and his rifle when he did not comply. Whether in an open field or on a public street, the people retain their Fourth Amendment right to be free from "arbitrary and oppressive interference by enforcement officials with [their] privacy and personal security."

In short, reasonable suspicion is not too much to ask when law enforcement officers want to barge onto our private property without our permission. In truth, it is the least that free people who value privacy and liberty should ask. And it is the minimum that the Fourth

Amendment requires, because the Fourth Amendment promises that all searches and seizures will at least not be "unreasonable."

I'll take questions.

DAVID CRAIG
STATE SENATOR

Assembly Committee on Natural Resources and Sporting Heritage
Public Hearing, July 19, 2017
Assembly Bill 411
Senator David Craig, 28th Senate District

Chairman Kleefisch and Committee Members,

Thank you for taking testimony on Assembly Bill 411 regarding the authority of a conservation warden to enter private land and the admissibility of evidence.

The 4th Amendment to the Constitution of the United States provides that:

> ***"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."***

This right afforded to the people of this country is one of America's foremost protections. And this bill would safeguard these protections for citizens, landowners, and sportsmen alike.

Landowners, for a variety of reasons, may not wish to have a DNR warden simply wander onto their property whenever they wish and for whatever reason. Yet, over the last few years, we have heard numerous complaints concerning DNR wardens entering private land without a warrant, probable cause, or even reasonable suspicion. Many Wisconsin residents are surprised and concerned to learn that the DNR is apparently interpreting the law in a way that allows a conservation warden to enter private property for any reason, without a warrant, and even if they

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have no evidence that a crime has or is being committed. This cart blanche search authority by government officials is unprecedented and contrary to the very foundation of the 4th Amendment and the guaranteed right to be free against unreasonable search and seizures. This bill would restore the balance between basic 4th Amendment rights while preserving the ability of DNR wardens to enforce fish and game laws.

Specifically, AB 411 makes two important changes to current law:

(1) Prohibits a DNR conservation warden from entering private land for the purpose of enforcing the laws DNR is required to administer unless the warden has least "reasonable suspicion" that a violation of such a law has occurred or is occurring.

(2) Prohibits the admission of any evidence a DNR warden collects of such a violation if a warden enters private land to enforce a law without first having "reasonable suspicion" of a violation.

Requiring DNR wardens to have at least "reasonable suspicion" before trespassing is a minimal evidentiary bar that needs to be placed at the threshold of private property boundaries to ensure constitutional rights are secured from unwarranted government intrusion. This bill provides such a protective "bar" and strikes a reasonable balance between law enforcement's task to enforce fish and game laws and landowners' property rights and lawful expectation to be secure from unreasonable and speculative searches.

Thank you for allowing me to testify on this important update of our statutes. I am happy to take any questions from Committee members.

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Supreme Court's Treatment of Open Fields: A Comment on Oliver and Thornton

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SUPREME COURT'S TREATMENT OF OPEN FIELDS: A COMMENT ON *OLIVER* AND *THORNTON*

BARBARA ROCKHILL EDWARDS

I. INTRODUCTION

In the past term the United States Supreme Court announced its decision in *Oliver v. United States*[1] and declared that open fields[2] are not embraced by the fourth amendment's prohibition against unreasonable searches and seizures of a citizen's "effects." In so doing the Court reaffirmed its earlier conclusion, first expressed in 1924 in *Hester v. United States*,[3] that fourth amendment protection does not extend to open fields.

The return full cycle to *Hester* is not without its irony. In the sixty years separating these two landmark decisions both federal and state courts had receded from *Hester* and granted fourth amendment protection to open fields; the courts had placed reliance upon the Supreme Court's increasingly liberal interpretations of the reach of the fourth amendment. The *Oliver* decision represents a rejection of that liberal interpretative philosophy and a return to a literal, more conservative view of a narrowly defined prohibition against unreasonable searches and seizures.

The purpose of this comment is to explore the birth of the open fields doctrine and to analyze the interpretative philosophies which caused the initial expansion and subsequent regression of the doctrine. The open fields doctrine will be followed from its birth in *Hester*, through adolescence, the vital middle years, and into the senility assigned to the doctrine by today's Court.

II. THE BIRTH AND NURTURE OF THE FOURTH AMENDMENT

Britain's use of writs of assistance and general warrants during the colonial period was perceived by the colonists as an infringement of the rights of citizens and thus as an abuse of governmental power.[4] To ensure that analogous actions by their own government

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1. 104 S. Ct. 1735 (1984).

2. Essentially, open fields are exactly what one would expect them to be—outdoor areas. The controversy underlying the decisions discussed in this comment is whether the fourth amendment's protection against unreasonable searches and seizures extends to persons and effects situated in these outdoor areas.

3. 265 U.S. 57 (1924).

4. Writs of assistance were documents used in the colonies by British officers to authorize the examination of ships, vaults, cellars, and warehouses where contraband was suspected to be located. General warrants were used in Great Britain to allow the search of private homes for papers and books. *See* Olmstead v. United States, 277 U.S. 438, 463

would be foreclosed, the fourth amendment was written and adopted by the founding fathers.[5] The first draft of the amendment, which was presented by James Madison at the first congressional session, read:

> The right of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[6]

The committee which was to determine the language of the congressional proposal to the states changed the wording of the original text. Mr. Gerry, a committee member, presumed that there was an error in the wording and moved to substitute the words "and effects" for "other property."[7] What emerged from the committee is the fourth amendment in its present form:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[8]

Unfortunately, we have no method for determining what was in the minds of the committee members at the time that the amendment was drafted. Whatever distinction they perceived between the words "other property" and "effects" will probably remain a mystery.[9] This mystery becomes problematical when courts attempt to construe the amendment's content and implications in current legal disputes.

In 1886, Justice Bradley followed the "spirit" of the Constitution rather than the "letter" when he delivered the opinion of the Court

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(1928); Boyd v. United States, 116 U.S. 616, 624-30 (1886); Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection,* 43 N.Y.U. L. REV. 968, 969 n.6 (1968).

5. *See Olmstead,* 277 U.S. at 449; *Boyd,* 116 U.S. at 624-30; Note, *supra* note 4, at 969-70.

6. *Olmstead,* 277 U.S. at 450.

7. *Id.*

8. U.S. CONST. amend. IV.

9. *See Olmstead,* 277 U.S. at 450.

in *Boyd v. United States*.[10] Although the facts of the case[11] were contrary to the usually understood meaning of the terms "search and seizure," the Court nevertheless applied those terms, stating:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, . . . it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.* It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[12]

Bradley was echoing the sentiments of Chief Justice Marshall when he cautioned that a constitution, by its nature, cannot be a legal code. If a constitution attempted to be exacting, it would become unintelligible.[13] By 1925, however, the Court was ignoring the urgings of Marshall and Bradley and promoting more literal constitutional interpretations in *Carroll v. United States*.[14] Holding

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10. 116 U.S. 616 (1886). Justice Bradley stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court. . . . It is not the breaking of [the defendant's] doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property [which is objectionable].

Id. at 630.

11. In *Boyd* the concern was the constitutionality of courts compelling the production of private papers for use as evidence in noncriminal cases. The courts were authorized to order defendants to produce papers which the government alleged would prove elements of the offenses charged. Failure to comply resulted in admission of the facts which the government alleged that the papers would substantiate. *Id.* at 619-20.

12. *Id.* at 635 (emphasis added).

13. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). "Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Id.* at 407.

14. 267 U.S. 132 (1925). Federal prohibition agents, in an earlier encounter, arranged to buy liquor from the defendants. Although the arranged sale was never consummated, the agents became familiar with the car which the defendants drove. In subsequent routine highway patrols, this auto was seen traveling between Grand Rapids and Detroit and was ultimately stopped and searched. Sixty-eight bottles of liquor were found secreted behind

that both the search and the seizure were justified under the facts of the case, the Court implied that the fourth amendment was to be construed narrowly, stating that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[15]

This battle of interpretative philosophy would have been of only academic interest were it not for the decisions in *Weeks v. United States*[16] and its progeny, which gave teeth to the fourth amendment. The exclusionary rule announced in *Weeks* required that all materials seized under federal authority in violation of the fourth amendment were to be returned to the owner upon his motion and could not thereafter be used as evidence in federal court.[17] Suddenly, the determination of what did or did not constitute an unreasonable search and seizure became of paramount importance in winning federal convictions.

For a time, however, federal authorities attempted to circumvent

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the upholstering of the seats. *Id.* at 135.

15. *Id.* at 149. The kind of construction advocated by the *Carroll* Court and others to follow crystalizes the problems created by the courts' inability to understand the exact implications of the use of the word "effects" in the fourth amendment. Because there were no automobiles at the time the amendment was written, it certainly cannot be claimed that the Framers intended the specific inclusion of cars within the scope of the term; however, it is equally impossible to determine if articles analogous to automobiles were intended to be included in the word "effects," due to the lack of any record of discussion as to the meaning of the term.

16. 232 U.S. 383 (1914). The defendant was arrested at work while police officers gained entry to his home, searched it without a warrant, and seized certain papers and articles. Later the local police returned with a United States marshall, conducted an additional search, and seized additional materials. *Id.* at 386.

17. *Id.* at 398. The Court did not disallow the use of the material seized by the police in the instant case because it was not done under federal authority. *Id.*

> [T]he Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Id. at 391-92. In explaining the importance of the rule, the Court stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

the spirit of *Weeks*. In *Silverthorne Lumber v. United States*,[18] the Court held that when subpoenaes were based on earlier unconstitutional searches and seizures, evidentiary use of the subpoenaed materials in criminal proceedings against the party required to produce them was prohibited. The Court stated that "knowledge gained by the government's own wrong cannot be used by it in the way proposed."[19] Shortly thereafter, the Court held that a motion for the return of illegally seized evidence was not necessary. Its admission into evidence was error even when return of the material was not requested.[20]

Although *Weeks* had done much to restrain the unlawful activities of federal officers, local and state police had no equivalent incentive to similiarly restrict their behavior. In 1949 the Court had an opportunity to extend the exclusionary rule to nonfederal prosecutions in *Wolf v. Colorado*.[21] It was an opportunity missed, because the Court failed to make the extension. This failure seems puzzling upon examination of the rationale which the Court employed. The Court was quick to state that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[22] The Court further opined that such behavior by the police, based solely upon their own authority, was to be condemned as inconsistent

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18. 251 U.S. 385 (1920). Two corporate officers were arrested at home and detained for several hours while federal authorities searched their business offices and seized numerous documents. The originals were returned to the defendants pursuant to *Weeks*, but the government retained photographs and copies of all seized materials. Thereafter a grand jury served subpoenaes on the defendants ordering them to produce the originals.

The Court held that the government was not entitled to do in two steps that which it was prohibited from doing in one and reversed contempt convictions entered against defendants for failure to comply with the subpoenaes. The importance of this decision is that the Court expanded *Weeks* to embrace more than the actual tangible evidence illegally obtained; in so holding, the *Silverthorne* Court rejected the government's position that the fourth amendment protected physical possession without precluding any advantages which the government could otherwise gain through committing an act otherwise prohibited by the guarantee against unreasonable searches and seizures. *Id.* at 390-92.

19. *Id.* at 392. Justice Holmes stated that to prevent the fourth amendment from being reduced to a "form of words" illegally seized evidence "shall not be used at all." *Id.*

20. Gouled v. United States, 255 U.S. 298 (1921). The defendant's pretrial motion for the return of illegally seized documents was denied. On appeal he contended that the trial court erred in not inquiring into the origin of the papers at the time at which they were proffered against him. The Supreme Court held that the trial court was under a duty to entertain an objection to admission or a motion for exclusion, and in the process to determine whether the evidence had been unconstitutionally seized, notwithstanding a pretrial denial of a motion to return the evidence. *Id.* at 312-13.

21. 338 U.S. 25 (1949).

22. *Id.* at 27.

with individual rights and violative of the Constitution. Accordingly, any state which actively approved such behavior by state authorities would be in violation of the fourteenth amendment.[23] Then, paradoxically, the Court refused to apply the exclusionary rule to help assure the right which it had explicitly recognized. The Court's justification that there were other methods to insure compliance with the amendment left much to be desired.[24]

More to the point, however, was the Court's recognition of the fact that many states had considered implementing the *Weeks* rule on their own initiative, but few had done so.[25] Apparently, the Court was unwilling to force a rule upon the states, regardless of the validity of that rule, where the states had previously declined to adopt it themselves.

Ever diligent, federal authorities continued to circumvent the *Weeks* rule through offering into evidence in federal criminal prosecutions material seized in violation of the fourth amendment by nonfederal authorities. The federal courts' use of unconstitutionally seized evidence which had been gathered by state authorities, a practice commonly referred to as the "silver platter doctrine," was put to an end by the 1960 Supreme Court decision of *Elkins v. United States*.[26]

In explaining *Weeks*, the Court in *Elkins* noted that, while evidence obtained in violation of the fourth amendment was prohib-

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23. The *Wolf* Court stated that freedom from arbitrary police intrusion is

> implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, [does] not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.
>
> Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.

Id. at 27-28.

24. In the subsequent decision of Mapp v. Ohio, 367 U.S. 643, 650-56 (1961), the Court acknowledged the absurdity of the result which it had reached in *Wolf*.

For a discussion of the inadequacy of alternative methods of enforcing compliance with the fourth amendment, see Allen, *The* Wolf *Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 NW. U.L. REV. 1 (1950).

25. Forty-seven of the 49 states had considered the *Weeks* doctrine. Of those, 31 had rejected it and only 16 had chosen to follow it. Allen, *supra* note 24, at 29.

26. 364 U.S. 206 (1960) (state officers seized evidence during an unlawful search and seizure; the evidence was subsequently used against defendant in a federal prosecution). The Court stated that the purpose of this new ruling was "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217.

ited from use in federal criminal prosecutions, *Weeks* had announced a companion rule which allowed evidence seized unlawfully by local police to be used in federal prosecutions.[27] Finally, in 1961 the Court held in *Mapp v. Ohio*[28] that a violation of the fourth amendment would invoke the exclusionary rule in state as well as federal courts, for state as well as federal actions, thereby effectively overruling *Wolf*. Thus the exclusionary rule removed the benefit derived from disregarding the fourth amendment, making it more than a mere "form of words."[29]

In *Mapp* the Court was evidently unwilling to overrule itself without thoughtful consideration and well-reasoned justification. The Court first noted that the fourth and fifth amendments guaranteed personal privacy and that the courts were commissioned to watch over these constitutionally guaranteed rights.[30] Additionally, the Court noted a change in the attitude among the states toward the exclusionary rule since 1949 when *Wolf* was decided. "[I]n 1949 . . . almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite [*Wolf*], more than half of those since passing upon it, by their own legislative or judicial decision have wholly or partly adopted or adhered to the [exclusionary] rule."[31] Further, the Court observed that other rights guaranteed by the Constitution were not afforded a double standard in application, but that they were enforced equally in both state and federal courtrooms.[32] The Court commented on the paradox that

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27. *Id.* at 210. The Court noted that the problem "arose from the entirely commendable practice of state and federal agents [cooperating] with each other in the investigation and detection of criminal activity." *Id.* at 211.

28. 367 U.S. 643 (1961). Searching for a suspect and "policy paraphernalia" in an unrelated case and acting on an informant's tip, police went to the Mapp home and demanded admittance. Mapp, on advice of counsel, refused to admit them without a warrant. Three hours later, after continuous surveillance, the police forcibly gained entrance. A struggle ensued, Mapp was handcuffed, and police officers commenced a search of the entire premises. *Id.* at 644-45.

29. *See supra* note 19.

30. The Court stated that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Mapp*, 367 U.S. at 647.

31. *Id.* at 651. Recognizing the inconsistency of *Wolf* in not imposing the exclusionary rule upon the states, the Court quoted that decision: " '[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.' " *Id.* at 650 (quoting *Wolf*, 338 U.S. at 28). The Court further noted that *Wolf* granted the right to protection against unlawful searches and seizures but in reality withheld its privilege and enjoyment. *Mapp*, 367 U.S. at 656.

32. *Mapp*, 367 U.S. at 656. The Court listed the rights of free speech, free press, and

"[p]resently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may . . . ."[33]

The *Mapp* Court took note of the criticism of the exclusionary rule that " 'the criminal is to go free because the constable has blundered.' "[34] Nevertheless, the Court was swayed by countervailing considerations of judicial integrity and held that the exclusionary rule should apply in state criminal proceedings: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[35]

III. OPEN FIELDS: OUTSIDE OF THE FOURTH AMENDMENT WOMB

A. The Birth of the Doctrine

The United States Supreme Court has long recognized various exceptions to the ancillary warrant requirement of the fourth amendment's prohibition against unreasonable searches and seizures.[36] There was one situation, however, in which the Court held there was no fourth amendment protection at all—open fields.[37]

In *Hester,* revenue agents had entered the land of the defendant's father, secreted themselves, and watched while the defendant transferred a jug from the house to a car. An alarm was given, and the defendant attempted to flee, dropping the jug in the process. The jug was seized and found to contain whiskey. The Court found that the acts of the defendant had disclosed the evidence, that once something is abandoned it cannot be "seized" in a legal sense, and that the warrantless trespass into open fields was immaterial, because open fields are different from a house.[38]

The Court's terse opinion merely stated that "it is enough to say

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"the rights to notice and to a fair, public trial, including . . . the right not to be convicted by use of a coerced confession," as examples. *Id.*

33. *Id.* at 657. The Court also noted that "[i]n nonexclusionary States, federal officers, being human, were . . . invited to and did . . . step across the street to the State's attorney with their unconstitutionally seized evidence." *Id.* at 658.

34. *Id.* at 659 (quoting Justice (then Judge) Cardozo in People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

35. *Mapp,* 367 U.S. at 659.

36. *See generally* Wasserstrom, *The Incredible Shrinking Fourth Amendment,* 21 AM. CRIM. L. REV. 257 (1984).

37. Hester v. United States, 265 U.S. 57 (1924).

38. *Id.* at 58.

that, . . . the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[39] The brevity of the decision allows for little analysis.

B. *The Trespass Requirement*

The distinction between houses and open fields reached a level of critical importance in 1928 when the Court announced its decision in *Olmstead v. United States*.[40] Olmstead was convicted of violating the National Prohibition Act based upon evidence gathered by tapping his phones. The Court noted that the tapping was accomplished by the insertion of small wires along ordinary telephone lines in the basement of an office building, without a trespass upon Olmstead's property. Certiorari was granted to consider the evidentiary use of private telephone conversations intercepted by a wiretap.[41] Writing for the Court, Chief Justice Taft stated that a more liberal construction, even when used in an attempt to effectuate the purpose of the Framers in the interest of liberty, "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[42] The Court held that the clandestine tapping of a telephone to record private conversations was not a violation of the fourth amendment, absent a trespass upon the defendant's property.[43] In fact, the Court stated that a physical invasion was a prerequisite for ever finding a violation of the fourth amendment, although it alone was not determinative of a violation.[44] In so

39. *Id.* at 59.

40. 277 U.S. 438 (1928).

41. *Id.* at 455-57. The Court quoted *Carroll* in advocating a narrow, literal construction of the Constitution. " 'The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens.' " *Id.* at 465 (quoting *Carroll*, 267 U.S. at 149).

42. *Olmstead*, 277 U.S. at 465.

43. *Id.* at 464-66.

44. *Id.* Justice Taft, writing for the Court, cited numerous Supreme Court decisions in his opinion to support the holding that the tapping of telephone wires was not a violation of the fourth amendment because there had been neither a trespass nor a seizure. *Id.* at 460-65.

Hester, the Court noted, also involved a trespass, but there was no constitutional infringement because "there was no search of person, house, papers, or effects." *Id.* at 465. *Weeks* and *Silverthorne*, on the other hand, were used to evince the proposition that only the

holding, the Court dismissed the spirit of *Boyd* by concentrating on the narrow issue of compelled production. Noting that conversation is not a material thing which can be particularly described or seized, the Court implied that it could not possibly be subject to the fourth amendment, which requires such particular description.[45]

The majority saw danger in excluding otherwise admissible evidence gathered by unethical conduct on the part of the government, and decided that questionable behavior by the government was more desirable than allowing criminals to escape justice.[46]

Justice Holmes, dissenting, noted that "[c]ourts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."[47] He believed "it . . . less evil that some criminals should escape than that the Government . . . play an ignoble part."[48] Justice Brandeis, in dissent, noted that although the tapping of a telephone was an evil which could not have taken place in earlier times, the nature of a constitution was one of immortality, and it contained general principles which needed to be applied to new situations.[49] The fact that these two liberal interpretists were now in the minority indicated that a new era was firmly entrenched.

In *Hester* the Court had said that a trespass was immaterial in open fields,[50] and in *Olmstead* the Court held that there could be no violation of the fourth amendment without a trespass.[51] In addition, the *Olmstead* majority stated that an invasion of the curti-

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seizure of tangibles such as documents and books would constitute an unlawful seizure. *Id.* at 460-61.

45. *Id.* at 462-64.

46. *Id.* at 468.

47. *Id.* at 469 (Holmes, J., dissenting). Justice Holmes foreshadowed the Court's holding in Katz v. United States, 389 U.S. 347 (1967), and the more liberally disposed Court of the 1960's.

48. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting). Justice Holmes' comment was an echo of the views previously expressed by Justice Cardozo. Justice Holmes, however, was unwilling to totally commit to either the majority or dissenting opinion. He stated that "[w]hile I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . . ." *Id.* at 469.

49. *Id.* at 472-73 (Brandeis, J., dissenting). Justice Brandeis stated that the scientific progress which made this unforeseen invasion possible was unlikely to be halted. He envisioned various kinds of intrusions, such as psychic invasions, which would defeat the spirit of the fourth amendent but still circumvent the ruling of the Court. *Id.* at 474. He found the tangible/intangible distinction between a letter and phone call to be meaningless. *Id.* at 475.

50. *Hester*, 265 U.S. at 58-59.

51. *Olmstead*, 277 U.S. at 466.

lage is equivalent to an invasion of the house.[52] Thus, while talking of literal interpretation in one instance, the Court expanded the constitutional protection in another. The fourth amendment, as interpreted after these decisions, would turn on a notion of "place," for a trespass requires an invasion of some space. The question remained as to what places would be construed as being protected by the amendment.

The next fourth amendment landmark was to be *Katz v. United States*,[53] but there were nearly forty years of legal decisions in the interim which deserve inspection. The decisions which followed *Olmstead* and predated *Katz* demonstrate how the courts, confined by precedent to a literal interpretation of the fourth amendment, determined which places were to be afforded fourth amendment protection from trespass and which were not.

IV. Open Fields Under Literal Fourth Amendment Construction

A disproportionate number of the cases between *Olmstead* and *Katz* involved the illegal production of intoxicants and the efforts of the Treasury Department to curb this activity.[54] The fact patterns usually included agents entering private land and finding a still housed in a farm building of some sort. The question for the courts then became whether the agents had violated the fourth amendment with their intrusion onto the property, or, if they had entered the building where the still was operating, whether they

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52. *Id.* "[T]he Fourth Amendment [has not] been violated . . . unless there has been an official search and seizure of . . . tangible material effects, or an actual physical invasion of . . . house 'or curtilage' for the purpose of making a seizure." *Id.* It is probably the reference in *Hester* to the common law which led to the inclusion of "curtilage" within the fourth amendment's protection.

It is difficult to see how the facts of *Hester* could have occurred without a trespass upon the curtilage. Yet the Court insisted that the curtilage is included within the fourth amendment language of "persons, houses, papers and effects" and that a trespass within the house would have been a violation.

53. 389 U.S. 347 (1967).

54. *But see* United States v. Mullin, 329 F.2d 295 (4th Cir. 1964) (possession rather than production of untaxed whisky); United States v. Minker, 312 F.2d 632 (3d Cir.), *cert. denied*, 372 U.S. 953 (1963); United States v. Sorce, 325 F.2d 84 (7th Cir. 1963) (possession of stolen goods). These cases predate the burgeoning drug culture which took hold in the early 1970's. The most current open fields cases relate primarily to drugs. *See* Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); United States v. Romano, 330 F.2d 566 (2d Cir. 1964); United States v. Hassell, 336 F.2d 684 (6th Cir. 1964); Monnette v. United States, 299 F.2d 847 (5th Cir. 1962); Brock v. United States, 256 F.2d 55 (5th Cir. 1958); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957); Care v. United States, 231 F.2d 22 (10th Cir. 1956).

had made a prohibited entry. Only a few of the circuit courts of appeals indicated explicit acceptance of the expansion of the word "houses" to include the concept of "curtilage."[55] Interestingly, although the courts which explicitly embraced the concept differed somewhat in their definition of curtilage,[56] the criteria which they applied for determining which buildings were included or excluded from the concept were strikingly similar.

Generally, the court would look to the physical distance between the dwelling and the outer building,[57] whether or not the outer building was located within any enclosure which surrounded the dwelling,[58] the building's use as an adjunct to domestic activity,[59]

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55. *Rosencranz*, 356 F.2d at 313 (" 'houses' of persons, which word has been enlarged by the courts to include the 'curtilage' or ground and buildings immediately surrounding a dwelling, formerly usually enclosed"); *Minker*, 312 F.2d at 634 (trash can of apartment building not within the protected curtilage); *Hodges*, 243 F.2d at 283 (no invasion of home's immediate appurtenances forming curtilage); *Care*, 231 F.2d at 25 (fourth amendment applies to buildings within the curtilage); *cf. Hassell*, 336 F.2d at 686 (still located 250 yards from defendants house; court considered the possibility that the barn which housed the still was within the curtilage but justified the search on other grounds). *But see Romano*, 330 F.2d at 569 ("protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects,' does not extend to open fields, or to unoccupied buildings"); *Sorce*, 325 F.2d at 86 ("protection . . . does not extend to 'open fields,' . . . nor to 'enclosed or unenclosed grounds around houses' " (citations omitted)); *Monnette*, 299 F.2d at 850 (going inside a fence, onto the front porch, and around to the back of the house to peer into a window found permissible because a "trespass upon the grounds surrounding a building does not constitute an illegal search"). The *Monnette* court did suggest that peering into the window at the back of the house might have been a violation of the defendant's right to privacy but for the fact that the house was not his dwelling place and that there no evidence was gathered from the activity.

Romano, *Sorce*, and *Monnette*, dealing with an industrial complex, an open air nursery, and a nonresidence, respectively, and their rejection of the curtilage concept, indicate that the courts were not disposed towards applying the concept to such places.

56. *See Rosencranz*, 356 F.2d at 313 (curtilage consists of "ground and buildings immediately surrounding a dwelling, formerly usually enclosed"); *Mullin*, 329 F.2d at 298; *Hodges*, 243 F.2d at 283 ("included are the buildings comprising the immediate domestic establishment and which are thus the buildings 'constituting an integral part of that group of structures making up the farm home' ") (quoting Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955)).

57. *See Mullin*, 329 F.2d at 298 (smokehouse approximately 75 feet from residence); *Minker*, 312 F.2d at 634 (proximity to the dwelling); *Brock*, 256 F.2d at 57 (located some distance from residence); *Hodges*, 243 F.2d at 283 (too removed in distance from home—150-180 feet); *Care*, 231 F.2d at 25 (more than a long city block from the home).

58. *See Minker*, 312 F.2d at 634 (within enclosure surrounding home); *Brock*, 256 F.2d at 57 (separated from residence by fence and gate); *Care*, 231 F.2d at 25 (within general enclosure surrounding residence).

59. *See Rosencranz*, 356 F.2d at 313 (driveway suggests propinquity); *Minker*, 312 F.2d at 634 (use as adjunct to domestic economy); *Hodges*, 243 F.2d at 283 (buildings comprising domestic establishment making up farm home); *Care*, 231 F.2d at 25 (adjunct to domestic economy).

and whether there existed any barrier between the dwelling and the outer building.[60] Several courts also made a distinction between a "house" and a "dwelling" and declined to extend protection to houses which were not used as dwelling places.[61]

In determining whether a trespass was determinative of a fourth amendment violation, the courts generally looked at the facts of the cases to determine if the areas entered were included in their understanding of the curtilage concept. If they were, a trespass without a valid warrant was a violation of the security promised by the Framers.[62] If the areas entered were adjudged to be outside the protected area, the trespass was deemed irrelevant as to the constitutionality of the search or seizure.[63]

The application of this process and the criteria involved were quite uniform throughout these cases. Only a comparison of *United States v. Mullin*[64] and *Rosencranz v. United States*[65] reveals a contradiction in the application of the factors determining curtilage. In *Rosencranz* the First Circuit found the existence of a driveway between the house and outer building indicative of a domestic connection between the buildings,[66] while in *Mullin* the Fourth Circuit suggested that a driveway between the buildings would be a barrier.[67] All in all, however, the open fields decisions

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60. *See Rosencranz*, 356 F.2d at 313 (absence of barriers); *Mullin*, 329 F.2d at 298 (intervening barrier); *Brock*, 256 F.2d at 57 (separated by fence and gate); *Hodges*, 243 F.2d at 283 (set apart by fixed fences); *cf. Care*, 231 F.2d at 25 (in a field across the road from house).

61. *E.g., Monnette*, 299 F.2d at 850 (if the house were a dwelling, protection would vest); *Brock*, 256 F.2d at 57 (nearest residence not used as a dwelling).

62. *See Rosencranz*, 356 F.2d at 313:

> The Treasury agent who led the search said, "it was a small farm with dwelling house and barn to the left as you faced the premises." He also testified that tracks of vehicles and footprints were visible on the snow, leading to both house and barn; he decided to enter the barn first because the signs of traffic were somewhat heavier. Other witnesses said there was a driveway between the barn and the dwelling house. This suggests propinquity and absence of separating barriers.

See also Mullin, 329 F.2d at 298:

> The residence was located in a rural community and was partially surrounded in semicircular fashion by a number of outbuildings, a pattern traditionally found in the area. Perry rented the premises and was living in the residence, along with his family, at the time of his arrest. The smokehouse, from outside appearances, was typical of any normal farm smokehouse.

63. *See Mullin*, 329 F.2d at 298 (smokehouse within curtilage, hence unwarranted entry prohibited and evidence seized must be suppressed); *Monnette*, 299 F.2d at 850 (fourth amendment does not extend to the grounds).

64. 329 F.2d 295 (4th Cir. 1964).

65. 356 F.2d 310 (1st Cir. 1966).

66. *Id.* at 313.

67. "[T]here was no intervening barrier of a fence or a driveway between the two build-

exhibited a cogent consistency prior to *Katz*.

In *United States v. Minker*,[68] the court stated that the important factors in fourth amendment cases are "the nature of the individual's interest in and the extent of the claimed privacy of the premises searched."[69] These considerations foreshadowed the coming change in the Supreme Court's interpretative philosophy which was crystallized in *Katz*.

V. A RETURN TO THE DAYS OF LIBERALLY INTERPRETING THE FOURTH AMENDMENT

In 1967 the Court was presented with a situation clearly unanticipated by the Framers of the Constitution when the Court decided *Katz v. United States*.[70] In *Katz*, officers had attached a recording device to the outside of a phone booth and recorded the defendant's conversation. Until the *Katz* decision it was assumed that an individual had automatic fourth amendment protection within his home and its curtilage, but that a physical invasion of those places was a prerequisite for invoking the fourth amendment's protection. Justice Stewart, delivering the opinion of the Court, stated that a trespass was once believed a prerequisite to any fourth amendment inquiry because the courts believed that the amendment forbade only searches and seizures of tangible property; he noted, however, that this idea had been discredited.[71] In *Katz*, the defendant was not within his home or its curtilage, and there was no physical invasion of the phone booth. Nevertheless, the Court was unwilling to find that the government's acts constituted a reasonable search and seizure, as the *Olmstead* court had. Instead, the Court found that the acts of a person would evidence the type of privacy which he expected, and that this particular expectation was to be respected.[72]

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ings." *Mullin*, 329 F.2d at 298.

68. 312 F.2d 632 (3d Cir.), *cert. denied*, 372 U.S. 953 (1963).

69. *Id.* at 634 (citing Jones v. United States, 362 U.S. 257 (1960)).

70. 389 U.S. 347 (1967). Justice Stewart, writing for the majority, noted that a narrow construction of the Constitution ignores the role of the public telephone in private communication. *Id.* at 352.

Justice Harlan commented on the vital role of the telephone in today's society. He stated that the Court's prior limitations on fourth amendment protection "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* at 362 (Harlan, J., concurring).

71. *Id.* at 352-53 (citing Olmstead v. United States, 277 U.S. 438 (1928)).

72. *Katz*, 389 U.S. at 351-53.

> [O]nce it is recognized that the Fourth Amendment protects people—and not sim-

The majority rejected the use of such phrases as "constitutionally protected area" and "right to privacy" as an accurate description of that which the fourth amendment was designed to protect.[73] Justice Stewart submitted that framing the issue in terms of a constitutionally protected area diverted attention from the real problem:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[74]

The fact that Katz's activity in the phone booth was visible because the door was constructed of transparent glass was irrelevant, the Court said, because the issue was not what the officers saw through glass walls, but what they heard with an electronic listening device. The Court stated that even a person in a telephone booth is entitled to rely upon the protection of the fourth amendment. By shutting the door, one should be "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[75]

Further, the Court totally negated the requirement of a physical invasion, stating that people, not simply "areas," were protected, and that a determination of a violation of fourth amendment rights would turn neither on an intrusion nor on a trespass.[76]

The Court concluded by addressing the lack of a warrant, stating

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> ply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. . . . [T]he "trespass" doctrine . . . can no longer be regarded as controlling.

Id. at 353.

The Court noted that what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. The Court added, "[b]ut what [Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.* at 352.

73. *Id.* at 351-52. The Court saw the amendment as protecting "individual privacy against certain kinds of governmental intrusion," but, the Court noted, "its protections go further, and often have nothing to do with privacy at all." *Id.* at 350 (footnote omitted).

74. *Id.* at 351-52.

75. *Id.* at 352.

76. The reach of the amendment, the majority stated, "cannot turn upon the presence or absence of a physical intrusion . . . ." *Id.* at 353. The majority further opined that the trespass doctrine was no longer controlling. "The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.*

that although the officers showed restraint in their behavior, they needed prior judicial approval for their conduct. The safeguard of judicial review was compulsory; the Court noted that the officers probably had sufficient probable cause to justify judicial issuance of a warrant, but that nonetheless their failure to do so was fatal.[77]

Mr. Justice Harlan concurred. It is necessary to look closely at Harlan's assessment of the case, because it soon became the standard by which fourth amendment questions were resolved.[78] In replacing the notion of a "constitutionally protected area" with the concept of a constitutionally protected "expectation of privacy," Justice Harlan stated that what was protected was not a place but rather that which a person subjectively expected to remain private. Places traditionally considered private, Harlan argued, were not necessarily private.[79] Justice Harlan believed that the test to apply in determining whether a fourth amendment violation had occurred consisted of two requirements: first, a determination must be made as to whether the person had "exhibited an actual subjective expectation of privacy," and second, the court must decide if that expectation was one which society would accept as reasonable under the circumstances. Justice Harlan wrote that anything a party subjected to the "plain view" of the public was not private, because there could be no reasonable expectation of privacy under those circumstances.[80]

Harlan submitted that prior cases had established the test which he advocated. Using *Hester* as an example, Harlan explained:

> [A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[81]

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77. *Id.* at 354-59.

78. *Id.* at 360 (Harlan, J., concurring). Justice Harlan's concurring opinion is often cited by the courts as setting out the test for fourth amendment violations. *See generally* United States v. Berrong, 712 F.2d 1370, 1373 (11th Cir. 1983); Comment, *How Open Are Open Fields?* United States v. Oliver, 14 U. TOL. L. REV. 133, 143 (1982).

79. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

80. Justice Harlan interpreted the majority opinion as indicating a need for a person to have exhibited an actual subjective expectation of privacy. He concluded under the facts of the instant case that if Katz had not closed the phone booth door he could not have expected fourth amendment protection of his conversation. *Id.*

81. *Id.* (citing Hester v. United States, 265 U.S. 57 (1924)).

This should have proved to have been an easily administered two pronged test. The virtue of the test was the fact that it allowed for changes in societal standards—an adaptability which should have afforded it a long and useful life. Harlan is to be commended for taking the principles advocated by the majority and formulating a standard which the courts could easily apply to fourth amendment considerations. The majority had ruled that a trespass would no longer control fourth amendment inquiries, and that what one sought to preserve as private, if unexposed to the public, might be afforded fourth amendment protection against unreasonable searches and seizures. A more thoughtful summary than Harlan's is hard to envision.

This decision announced the beginning of another swing of the interpretative pendulum. For over forty years, the courts had been confined to a literal interpretation of the Constitution. But once again an age of philosophical jurisprudence which had been urged by earlier jurists—liberal interpretational philosophy—had returned.[82] Additionally, this decision signaled the coming of age of the fourth amendment, for the announced standards exhibited a heretofore unknown maturity.

The Court had accomplished a general expansion of the fourth amendment, and it appeared that even open fields could be brought under the amendment's protection if the circumstances were right. If a man stood in the middle of an empty cow pasture beside the freeway, he could not claim any protection from visual intrusion, but in a secluded field, surrounded by thick, tall growth, he might have a reasonable expectation of privacy from visual observation. Add sturdy fencing and "No Trespassing" signs around the perimeter of the property, and it would seem that he also had an expectation which society would not only accept as reasonable, but would almost never reject. It seems obvious, then, that even in an open field, if one manifested the requisite expectation under the proper conditions, he could count on the fourth amendment's protection. Many courts agreed with this analysis; however, this was not the understanding of all the courts. A brief study of some decisions that are representative of the open fields decisions which followed *Katz* evidences this inconsistency among the courts.

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82. *Katz*, 389 U.S. at 352.

VI. OPEN FIELDS AND THE FOURTH AMENDMENT AFTER *Katz*

After the *Katz* decision many courts assumed that the open fields doctrine had been modified to fall within the purview of fourth amendment protection. These courts tried to determine what was necessary to evidence a reasonable expectation of privacy in outdoor areas which society would accept as reasonable. Some courts found that certain kinds of fencing or the posting of "No Trespassing" signs met the test requirements. The following examples are a representative overview of this approach.

In *Norman v. State*[83] the Florida Supreme Court noted that taking "overt steps" to secure one's property against the public is evidence of a reasonable expectation of privacy.[84] Norman had been convicted of possession of cannabis with the intent to sell. The sheriff, acting on an informant's tip, and without benefit of warrant, went to the farm leased by Norman and, knowing it to be unoccupied, climbed a locked fence and walked to a barn on the premises. Peering through the windows, he confirmed that the building contained marijuana. Several days later Norman was stopped by a deputy and informed that the sheriff had seen the marijuana. The deputy asked to be taken to the marijuana barn. Norman complied and was later arrested; subsequently, officers returned to the farm and confiscated the marijuana.[85] The Florida Supreme Court held that climbing a fence to enter an unoccupied farm was a violation of the fourth amendment, because Norman, by placing the marijuana in a building and by fencing and locking his property, had evidenced a reasonable expectation of privacy.[86]

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83. 379 So. 2d 643 (Fla. 1980).

84. The court stated that

> the capacity to claim the protection of the fourth amendment depends upon whether a person has a "legitimate" expectation of privacy in the invaded area. That expectation will be recognized as legitimate if a person has exhibited an actual (subjective) expectation of privacy, and the expectation is one that society is prepared to recognize as reasonable. . . . It seems incontestable that Mr. Norman exhibited a subjective expectation of privacy in the tobacco barn and its contents. He took overt steps to designate his farm and barn as a place not open to the public. The contraband, covered and wrapped in tobacco sheets, was in a closed structure.

Id. at 647 (citation omitted).

85. *Id.* at 645.

86. *Id.* at 647. *Accord* United States v. Resnick, 455 F.2d 1127 (5th Cir. 1972) (three warrantless intrusions were made onto defendant's land which was in a sparsely populated area, fenced with a six-foot chain link fence topped with one foot of barbed wire, and all gates were locked; at one place the property was bounded by a lake; the officers gained access by crawling through barbed wire and wading through a marshy area; court held the last two intrusions invalid, without determining the status of the first entry), *cert. denied,*

In *Katz*, both the majority and Justice Harlan made reference to excluding that which was exposed to public view from fourth amendment protection, as being either evidence of a lack of intended privacy, or evidence of an unreasonable expectation of privacy. Further clarification of just what the Court had in mind regarding what would exhibit an actual expectation of privacy was given by the Court's 1974 decision in *Air Pollution Variance Board v. Western Alfalfa Corp.*[87] In that case, the Court implied that excluding the public from one's land would evidence such a subjective expectation. In contrast, the Court noted that plumes of smoke which a government health inspector had seen while taking a visual pollution test were visible to "anyone in the city who was near the plant" and thus were outside the protection of the fourth amendment.[88]

The Second Circuit followed the lead of *Katz* and *Air Pollution* in *United States v. Lace*,[89] observing that those things which any member of the public can see are outside the warrant requirement as applied to visual observation by the police. Lace and his coconspirators were convicted of trafficking in narcotics. They appealed their conviction on the grounds that their fourth amendment rights had been violated. Although the officers who investigated the case had a warrant when they seized the evidence used at trial, they had augmented the information provided by informants by entering the seventy-acre farm and observing the backyard area

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409 U.S. 875 (1973); State v. Kender, 588 P.2d 447 (Hawaii 1979) (lush growth of California grass provided a natural barrier within which defendant could have a reasonable expectation of privacy). *But see* United States v. Berrong, 712 F.2d 1370, 1373 n.5 (11th Cir. 1983) (court held that warrantless entry upon defendant's land and seizure of marijuana plants, after flying over to confirm a tip, was not a fourth amendment violation: "It is arguable whether appellant Berrong exhibited a subjective expectation of privacy. The record indicates the total absence of any fence, wall, 'no trespassing' signs, or other artificial obstructions to entry on the property."); Ford v. State, 569 S.W.2d 105 (Ark. 1978) (fenced and posted rural property under cultivation and without buildings is an open field), *cert. denied*, 441 U.S. 947 (1979); Luman v. State, 629 P.2d 1275 (Okla. Crim. App. 1981) (going through barbed wire fence and two gates to collect plant sample was not a violation of the fourth amendment for it was an open field outside the curtilage); Ochs v. State, 543 S.W.2d 355 (Tex. Crim. App. 1976) (dense growth around property does not necessarily make it something other than an open field), *cert. denied*, 429 U.S. 1062 (1977).

87. 416 U.S. 861 (1974) (health inspector, with neither warrant nor permission, entered a business's outdoor premises and made visual pollution tests of emitted smoke).

88. *Id.* at 865.

89. 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982). In *Lace* the court held that a rented home and the surrounding grounds which were visible from a public road and from which the public was not excluded were open fields for fourth amendment considerations. *Id.* at 49.

using binoculars and a spotting scope before securing the warrant.[90] The question, as the court saw it, was whether the warrant was issued upon sufficient legally obtained evidence. The court held that if some of the evidence was obtained illegally, that would not taint the warrant if, absent the illegally obtained evidence, there were still sufficient grounds for its issue.[91]

The court said that because the area was visible from the road, the defendants' lease arrangement contained an understanding that the owners of the property could enter and use it for recreation, and the land was not posted and was used by hunters, the observations made by the police did not require a warrant.[92] The defendants had not excluded the public, so the police had observed only that which was exposed to public view and thus the defendants did not have a reasonable expectation of privacy. The court did not have to determine whether the independent information was sufficient to justify the warrant.

In *State v. Manly*,[93] the Washington Supreme Court stated that even using a ladder and binoculars to look into a building through an uncurtained window was not an invasion of fourth amendment rights. Occupants of a second floor apartment were growing marijuana near a window. A university police officer reported that he had seen what he believed to be a marijuana plant through the window. As a result of that report, a detective in the drug control unit drove by the apartment twice, observing nothing. Subsequently, he made an additional observation from across the street, at which time he saw what he believed to be marijuana. To confirm this observation, he used binoculars to enhance his view. Confident that the plants were indeed marijuana, he crossed the street to stand on the sidewalk beneath the window and look once again with the binoculars, and reconfirmed his previous observations.[94]

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90. *Id.* at 47-50.

91. " 'The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause.' " *Id.* at 49 (quoting United States v. Giordano, 416 U.S. 505, 555 (1974) (Powell, J., concurring and dissenting)).

92. *Lace*, 669 F.2d at 47-50; *see also* United States v. Freeman, 426 F.2d 1351 (9th Cir. 1970) (marijuana plants visible from common walkway in apartment building, even if within the curtilage, cannot be reasonably expected to remain private); State v. Daugherty, 591 P.2d 801 (Wash. Ct. App. 1979) (a driveway is not a constitutionally protected area; it is semi-private inasmuch as anything seen from such a vantage point does not constitute a search), *cert. denied*, 450 U.S. 958 (1981).

93. 530 P.2d 306 (Wash.), *cert. denied*, 423 U.S. 855 (1975).

94. *Id.* at 307-08.

In securing a warrant based on these observations, the detective failed to mention his use of binoculars. The trial court, in holding that the use of binoculars invaded the defendant's reasonable expectation of privacy and in approving the *Katz* decision, found that "without the use of binoculars [the officer] lacked sufficient reason to justify issuance of the search warrant," and that the defendants "did not knowingly expose the marijuana plants to public view and had a reasonable expectation of privacy regarding them."[95]

The Washington Supreme Court, however, found the lack of curtains significant; it was evidence that the defendant had not manifested an intent to keep private that which could be seen through the open window. The court concluded that the plants were visible without binoculars, that there was no physical trespass, and that "[t]he use of binoculars under these circumstances did not constitute an illegal search of the premises."[96]

This line of decisions demonstrates that at least some courts accepted the premise that *Katz* set the standard for all fourth amendment decisions. The exceptions to the warrant requirement remained only for the physical protection of the authorities or in those instances where either escape or destruction of evidence was imminent. The open fields doctrine, for these courts, was subject to the same requirements as any other search and/or seizure. If there were a demonstration of an expectation of privacy which society was willing to accept as reasonable, a search warrant would be necessary to avoid the exclusionary rule.

There were, however, other courts which questioned how, if at all, the *Katz* decision modified *Hester*. In *State v. White*[97] the court observed that all courts could not agree as to what effect, if any, *Katz* had on *Hester*.[98] The opinion is devoid of facts, presenting only the defendant's contention that *Katz* would dictate that

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95. *Id.*

96. *Id.* at 309; *cf.* United States v. Allen, 633 F.2d 1282 (9th Cir. 1980) (use of binoculars from adjacent hilltop not illegal), *cert. denied*, 454 U.S. 833 (1981); People v. St. Amour, 163 Cal. Rptr. 187 (Ct. App. 1980) (use of binoculars in aerial search not unreasonable). *But see* State v. Barnes, 390 So. 2d 1243 (Fla. 1st DCA 1980) (marijuana in backyard, identifiable only through telescope, not within "plain view" exception); State v. Kender, 588 P.2d 447 (Hawaii 1979) (climbing fence and using telescope impermissible).

97. 332 N.W.2d 910 (Minn. 1983).

98. The *White* court noted that "[c]ommentators and courts have disagreed over whether the [open fields] doctrine lost some of its vitality as a result of the United States Supreme Court's decision in *Katz* . . . ." *Id.* at 911.

he had a reasonable expectation of privacy on his land.[99] Unsure whether to apply *Katz* or *Hester*, the court looked to both cases in deciding that the defendant's land was an open field and as such his rights had not been violated.[100]

The rationale applied by the federal court in *Fixel v. Wainwright*[101] was that the yard of a four-apartment complex was private enough to warrant a reasonable expectation of privacy.[102] While officers were in possession of a warrant to search Fixel's apartment, one of them concealed himself at the back of the building and, while thus hidden, observed Fixel leave the four-unit building several times, go to a pile of rubbish each time, and remove a shaving kit from the rubbish. The other officer remained in the front of the building observing activity there. After observing for some time, one officer executed the warrant, while the other retrieved the shaving kit. Although no narcotics were discovered in the apartment, the kit was found to contain heroin.[103]

The Fifth Circuit based its decision on the curtilage concept, stating that the entry into the yard was an unlawful encroachment on a protected area, even while they noted that *Katz* had discarded this distinction as a determinant of fourth amendment rights. The court believed that one had a reasonable expectation of privacy in his curtilage.[104]

In United States v. Cobler[105] the district court stated that a trespass by a law enforcement officer is not by itself a prima facie violation of the fourth amendment but suggested that trespass into one's home or curtilage would be relevant as evidence of a violation of one's reasonable expectation of privacy.[106] Acting on the suspi-

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99. *Id.*

100. In applying both *Katz* and *Hester*, the *White* court held that "[n]ot only was the land in question an 'open field' within the cases that rely on *Hester*, but defendant had not taken sufficient steps to demonstrate that he had a reasonable expectation of privacy in the land under the cases that rely on *Katz*." *Id.*

101. 492 F.2d 480 (5th Cir. 1974).

102. The court concluded that the public exposure of the backyard of the complex, which was surrounded by a fence, was too limited for the yard to be designated an open field. *Id.* at 484.

103. *Id.* at 481.

104. *Id.* at 483. In referring to the idea of curtilage as possibly being a protected area, the *Fixel* court said that "[t]he area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area . . . the courts historically have found helpful the common law concept of curtilage . . . ." *Id.* Yet, when holding that the backyard was not an open field, the court once again used the *Katz* notion of a reasonable expectation of privacy. *Id.* at 484.

105. 533 F. Supp. 407 (W.D. Va. 1982).

106. *Id.* at 411.

cion that the defendant was involved in the distribution of moonshine, agents placed the defendant under surveillance. When defendant's truck entered a dead end road, the agents set up a barricade. Approximately one-half mile from the point of entry the road became a private country farm road leading to an abandoned house and a farm leased by the defendant's father. Agents stopped a car leaving the farm and discovered a gallon of moonshine. An agent later discovered defendant's truck parked on a dirt farm path which surrounded the edge of an open field. The truck was unlocked, but a camper shell on the back was not. The shell had curtained windows. The agent, smelling the strong odor of moonshine and noticing a crack between the curtains, used his flashlight and saw some stacked jugs which he concluded contained moonshine. The agent forced entry into the camper shell and seized the whiskey.[107]

In deciding that the defendant's fourth amendment rights had not been breached, the court first noted that although the defendant had an expectation of privacy in the camper, it was neither legitimate, reasonable, nor justified. The court used the plain view exception to the warrant requirement to justify the seizure, stating that the position of the agent upon the farm land did not include an unjustifiable intrusion, because protection did not extend to open fields. The court implied that had the search occurred within the curtilage, rather than an open field, it might have been unlawful, despite the fact that expectations of privacy in an automobile are diminished.[108]

But in *United States v. Freie*,[109] the Ninth Circuit noted that common law property concepts were not determinative of an expectation of privacy; however, the court applied the common law curtilage concept when noting that the area searched was not adjacent to someone's home.[110]

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107. *Id.* at 408-09.

108. *Id.* at 410-12.

109. 545 F.2d 1217 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

110. The court said that a small rural airstrip and an adjacent private field which was surrounded by a cattle fence was an open field, and thus defendants could not have a reasonable expectation of privacy in closed cardboard boxes placed on the field. *Id.* at 1223. Supporting the *Katz* decision, the court noted:

> [T]he determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable. . . . Thus, the proper focus is no longer on common law property concepts. . . . It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy.

United States Forest Service rangers had observed a small airplane land at a rural airstrip. Several hours later, when the plane was apparently abandoned, the rangers approached it and observed boxes inside. The rangers called customs officials, but by the time the officials arrived the plane had left and the boxes were stacked in the field. A customs officer opened a box, discovered marijuana, and notified DEA agents who began surveillance. After a gun battle, one defendant was arrested and subsequently others were also placed in custody.[111] The court found that the defendants lacked a reasonable expectation of privacy in the open field, and that use of the drugs as evidence was permissible.[112]

Although these cases exhibit some confusion over the application of *Katz* property concepts, each court gave credence to the language of *Katz* by determining the existence or nonexistence of a reasonable expectation of privacy in resolving the fourth amendment questions presented to them. These courts had apparently not read *Katz* closely enough to ascertain that areas such as the curtilage were no longer automatically considered private. The courts' reasoning in these cases is unmistakably similar and certainly predicated upon the *Katz* holding. The major problem revealed by these cases, however, is the lack of consistency in the application of the criteria and in the results. There was no consensus among the courts as to what did or did not demonstrate an acceptable and reasonable expectation of privacy.

Conspicuous by their absence in the preceding discussion are *State v. Thornton*[113] and *United States v. Oliver*.[114] A more striking example of the divergence of result is not to be found. The United States Supreme Court has recently passed judgment on these cases, and those decisions will define, at least for a time, the viability of *Hester* after *Katz*.

VII. THE STATUS OF *Thornton* AND *Oliver* BEFORE THEIR TRIP TO WASHINGTON

In *Oliver*, Kentucky State Police, acting on an anonymous tip and rumor that marijuana was being grown, commenced an investigation. They entered Oliver's land via a posted road.[115] Upon en-

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Id. (citations omitted).

111. *Id.* at 1219-21.

112. *Id.* at 1223.

113. 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

114. 686 F.2d 356 (6th Cir. 1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984).

115. *Oliver*, 686 F.2d at 358.

countering a locked gate blocking the road a short distance beyond Oliver's house, they parked and proceeded on foot along a path which led to the barn. Near the barn, the officers had a brief encounter with an unidentified person who told them that they could not hunt there.[116] Beyond the barn, the officers discovered two marijuana fields. The fields were located about one mile from Oliver's home on land which he leased to others and were not visible from adjacent property.[117]

The trial court allowed suppression of the marijuana, believing that the gates and posting of the area created a reasonable expectation of privacy.[118] The Sixth Circuit had affirmed the suppression but, upon sitting en banc, reversed, reasoning that: (1) *Katz* dealt with a circumstance unpredicted at the time the fourth amendment was framed, whereas open fields were not unknown to either the Framers or to the Court when it announced *Hester*;[119] (2) the unobservability of a field from adjacent property did not preclude it from being an open field, but rather a distinction was to be made between the curtilage and land outside the curtilage;[120] and finally, (3) the court noted that persons in the field or houses built upon it would be protected, but not the field itself.[121] The court dismissed the "No Trespassing" signs and the gates as irrelevant.[122]

Factually, *State v. Thornton*[123] was remarkably similar. Acting upon an unsubstantiated tip that marijuana was growing in a wooded area behind a mobile home, and without the benefit of a warrant, officers entered the property of Thornton to verify the existence of the contraband.[124] The property was posted against trespassing and hunting and surrounded by an old stone wall and barbed wire fence. The officers crossed the yard and entered an

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116. *Id.*

117. *Id.*

118. *Id.*

119. The court noted that open fields have long been recognized as different from houses. *Id.* at 359.

120. The court stated:

> Finally, it was suggested at argument that, since these marijuana fields were not observable while standing on land other than Oliver's, these fields were not 'open fields' within the meaning of *Hester*. . . . It is clear, however, that the rule in these cases is meant to distinguish between curtilage and land outside the curtilage.

Id. at 360.

121. *Id.*

122. *Id.*

123. 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

124. *Thornton*, 453 A.2d at 490-91.

overgrown and unpaved road, which they followed into a dense woods, ultimately discovering marijuana patches.[125]

The trial court found that a subsequent warrant was tainted by the illegal search and suppressed both the plants and the testimony as to the observations of the officers.[126] The state appealed and the Maine Supreme Court affirmed, reasoning that: (1) the open fields doctrine required first, that the activity be openly pursued, and second, that the presence of the officers during their observations be lawful;[127] (2) the acts of fencing and posting of property clearly indicated that the public was excluded and that privacy was expected;[128] (3) the court believed that *Katz* had modified the wooden application of the open fields doctrine which was based upon common law property concepts;[129] and (4) the officers were not lawfully present on defendant's property when they made their observations, and because none of the exceptions to the warrant requirement were operating, the fourth amendment forbade their warrantless intrusion.[130]

These two cases, with their factual similarity and dissimilarity of result, are striking examples of the dichotomy which existed in fourth amendment open fields decisions. They reflected the need for clarification by the Supreme Court in order to obtain uniformity of constitutional interpretation.

VIII. Open Fields Go to Washington

In *Oliver*[131] the Supreme Court announced that its purpose was to clear the confusion over the vitality of the open fields doctrine.[132] The Court stated that the change in language from Madison's proposed draft[133] broadened the scope of the fourth

125. *Id.*

126. *Id.* at 492.

127. *Id.* at 495.

128. *Id.* at 494. "In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land." *Id.*

129. *Id.* at 495. " '[T]he issue of whether government action does or does not constitute a search is now understood to depend less upon the designation of an area than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.' " *Id.* at 493 (quoting State v. Gallant, 308 A.2d 274, 278 (Me. 1973)).

130. *Thornton*, 453 A.2d at 495-96.

131. Oliver v. United States, 104 S. Ct. 1735 (1984).

132. *Id.* at 1738.

133. *See supra* notes 7-9 and accompanying text.

amendment, but that "the term 'effects' is less inclusive than 'property' and cannot be said to encompass open fields."[134] The Court asserted that this judgment was not contrary to the *Katz* analysis of fourth amendment protection, which was predicated upon a reasonable expectation of privacy.[135]

Announcing that three factors will determine whether a governmental intrusion onto open fields without a warrant and absent exigent circumstances will be adjudged reasonable or unreasonable and promising that each would be equally weighted, the Court listed: (1) the intention of the Framers; (2) the uses to which the individual has put the location; and (3) the understanding of society that certain areas are to be more protected than others.[136] The Court summarily concluded that these factors precluded any legitimate demand for privacy out of doors beyond the curtilage, without any discussion of how the aforementioned factors applied to the case at bar.

The Court stated that the types of activities which the amendment was designed to protect from governmental intrusion do not take place outside the curtilage and declared that society has no interest in protecting the privacy of those in open fields.[137] Further, the Court contended, fences and signs are ineffective in excluding the public from rural open fields.[138] Interestingly, the Court found support for this statement in the fact that the government could have surveyed the property from the air but in so doing ignored the obvious fact that Katz, too, was ineffective in excluding the uninvited ear from his phone booth.[139]

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134. *Oliver*, 104 S. Ct. at 1740 (footnote omitted).

135. *Id.* Stating unequivocally that Justice Harlan's concurrence has become the standard for fourth amendment considerations, the Court opined that "the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Id.* (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

136. *Oliver*, 104 S. Ct. at 1741 (citing Payton v. New York, 445 U.S. 573 (1980); United States v. Chadwick, 433 U.S. 1, 7-8 (1977); Jones v. United States, 362 U.S. 257, 265 (1960)). "In this light, the rule of *Hester*, . . . that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver*, 104 S. Ct. at 1741.

137. *Oliver*, 104 S. Ct. at 1741.

138. *Id.*

139. The accused in both *Oliver* and *Thornton* conceded that overflight of their lands would not have been a violation. *Id.* at 1741 n.9 (citing United States v. Allen, 675 F.2d 1373, 1380-81 (9th Cir. 1980); United States v. DeBacker, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980)).

The Court stated that despite its decision here, an individual retains some degree of

Continuing, the Court reaffirmed *Hester*'s concept of curtilage as an area which is included within the amendment's explicit protection of the home, distinct from any other outdoor area. The Court concluded, however, that society is not prepared to accept as reasonable any expectation of privacy in open fields.[140]

The Court foreclosed any possibility that different circumstances might make the search of an open field unreasonable. The majority noted that the case by case analysis which had been taking place put the authorities at a disadvantage by turning the determination of a lawful entry by police into guesswork and then subjecting the judgment of the police to subsequent judicial review. This, the Court contended, led to the undermining of law enforcement. Additionally, the Court said that such ad hoc determinations encouraged arbitrary and inequitable decisions regarding constitutional rights.[141]

Then, surprisingly, the Court admitted that fences, warning signs, and secluded locations could evidence a reasonable expectation of privacy. However, the Court unequivocably stated that open fields would not be afforded protection regardless of the steps taken by a citizen to conceal his activities upon them, because police officers would be required to make a value judgment as to the adequacy of the steps taken.[142] The Court reasoned that the "Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post no trespassing signs."[143]

The Court went on to note that a trespass would not determine the constitutionality of a search because "[t]he existence of a prop-

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fourth amendment protection in open fields, reasoning that "protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable." *Oliver*, 104 S. Ct. at 1741 n.10.

140. Once again the Court urged the view that this return to the idea that certain areas were not to be afforded fourth amendment protection was not contrary to the holding in *Katz*. "[C]ommon law distinguished 'open fields' from the 'curtilage'. . . . The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home." *Oliver*, 104 S. Ct. at 1742 (citation omitted). It was because of the close association between the home and its curtilage that protection was extended to the curtilage in the first place. This extension of protection was accomplished by "reference to the factors that determine[d] whether an individual reasonably [might] expect that an area immediately adjacent to the home [would] remain private." *Id.*

141. *Id.* at 1742-43.

142. *Id.* at 1743. Apparently the Court felt that adequate guidelines could not be set to allow officers to make a value judgment. The Court ignored the fact that officers make value judgments in every instance where an exception to the warrant requirement exists. The majority was obviously unpersuaded by the cogent solution suggested by the dissenters.

143. *Id.* at 1743 n.13.

erty right is but one element in determining whether expectations of privacy are legitimate."[144]

In an attempt to harmonize its use of the common law property concept of curtilage with its rejection of common law trespass as definitive of wrongful invasion, the Court simply stated that "[t]he law of trespass . . . forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest."[145] Trespass law is unconnected with the idea of privacy, the Court contended; the concept of trespass developed in criminal law to protect against theft and vandalism and in civil law to protect ownership and use of land.[146]

Ultimately, the Court affirmed the decision of the Sixth Circuit in *Oliver* and reversed the decision of the Maine Supreme Court in *Thornton*.[147]

IX. The Dissent Notes Some Difficulties with the Decision

The dissenting Justices in *Oliver* recognized the contradiction which the majority ignored in advocating a literal interpretation of the fourth amendment while purporting to approve the decision in *Katz*.[148] Clearly, there is great difficulty in jumping from a liberal interpretation of the fourth amendment to a literal approach without overruling previous cases. In trying to harmonize such divergent philosophies the Court left us with discordance.

In addition, the dissenters contended, society does respect the fencing and posting of property as reasonable exhibitions of an expectation to be free from intrusion.[149] They noted that such demonstrations of privacy are not invariably connected with a desire to conduct criminal activity in secrecy but often are connected to per-

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144. *Id.* at 1743.
145. *Id.* at 1744.
146. *Id.* at 1744 n.15.
147. *Id.* at 1744.
148. *Id.* at 1744-51 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).
149. The dissent noted that

> because "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." . . . Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, . . . one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."

Id. at 1747 (citations omitted) (quoting Rakas v. Illinois, 439 U.S. 128, 144 n.12, 153 (1978)). Positive law, asserted the dissent, supports the reasonableness of the expectation.

fectly legitimate reasons.[150] Further, they stated that open areas are presumptively public places unless owners take the initiative to notify the public of the owner's contrary intentions.[151]

Justice Marshall argued that if a member of the public ignored such notice, he would be liable for criminal sanctions and questioned why a government official should be allowed to ignore that which the general public is commanded to obey.[152]

The ad hoc difficulties envisioned by the majority were not inevitable, the dissent believed.[153] The dissenters submitted that a workable test could be formulated such that when a landowner's exclusionary precautions are sufficient to impose criminal sanctions against trespassers, the fourth amendment's protections should attach. Police officers, being sufficiently conversant with the criminal law of trespass, are capable of making well-reasoned judgments about the lawfulness of a search rather than the haphazard guesses which the majority envisioned.[154]

X. AGED, THE FOURTH AMENDMENT REMAINS, A SHADOW OF ITS PREVIOUS SELF

The recent history of open fields decisions has shown that the Court was somewhat justified in its concern with the conflicting decisions characteristic of recent open field cases. *Thornton* and *Oliver* represent only the tip of that iceberg. However, the dissent-

150. *Oliver*, 104 S. Ct. at 1748 (Marshall, J., dissenting) (meeting lovers, solitary walks, gathering with fellow worshippers).

151. Some spaces are presumed to be accessible by "positive law and social convention" absent a manifestation of an intention to exclude. *Id.* at 1749. The taking of normal precautions to assure privacy in an area would affect the determination of whether fourth amendment protection will attach to that space, the dissent asserted. Additionally, because a landowner is not required to exercise his right to exclude, privacy claims are "strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance." *Id.*

152. *Id.* at 1750.

153. *Id.*

154. Justice Marshall suggested an easily applied rule: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* He stated that the advantages of the rule included: (1) the doctrinal basis is familiar to officials and citizens alike; (2) substantial case law and statutes would outline the required precautions; and (3) value judgments by police would be simplified because they would be based on well-known laws which they are already entrusted to uphold. *Id.*

As noted earlier, one standard which remains desirable is uniformity of constitutional rights throughout the land. The dissent fails to address the fact that their alternative solution, resting upon police familarity with local trespass law, will result in differing application of constitutional protections from one locality to another.

ing Justices presented a solution, using local trespass law, which would have left intact the fourth amendment's protection of reasonable expectations of privacy, while providing a rational solution to this dilemma.[155] If the Court felt it necessary, however, it could have simply stated that fourth amendment protection does not extend to open fields, regardless of any act by a citizen to assure privacy there, and merely returned open fields to their pre-*Katz* status.[156] Unsatisfied with this, however, the Court went further, and in attempting to justify its decision advocated two totally incongruous approaches to solving fourth amendment questions.

The Court's acknowledgement that fences and posting can demonstrate a reasonable expectation of privacy and its implicit recognition that the police are well aware of this clashes with its rejection of the reasonable expectation of privacy analysis in open fields cases, leaving one to question whether *Katz* is still viable, despite the Court's protestations to the contrary.[157] One can only speculate as to when the Court will again acknowledge the existence of a reasonable expectation of privacy which is universally recognized and accepted, then only to summarily dismiss it as being of no import to fourth amendment analysis.

More disturbing, however, is the rationale used to justify this warrantless intrusion—the contention that the authorities could have lawfully used aerial surveillance to search the property.[158] Such reasoning is contrary to everything that the *Katz* Court accomplished. One cannot help but recall the concern of Justice Brandeis in his *Olmstead* dissent.[159]

Is the Court prepared to justify an illegal search and seizure within one's home as soon as a device capable of visually penetrat-

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155. *Id.*

156. The comment of Justice Holmes in *Olmstead* comes immediately to mind:

> Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.

Olmstead, 277 U.S. at 470 (Holmes, J., dissenting).

The *Oliver* Court decided, much as the *Olmstead* Court had, that it was better to successfully prosecute those involved in drug trafficking and sacrifice individual rights, than live with the alternative.

157. *Oliver,* 104 S. Ct. at 1740.

158. *Id.* at 1741.

159. Brandeis envisioned all kinds of invasions defeating the trespass doctrine which might be accomplished with the advent of technology as yet unknown in 1928. *See supra* note 49 and accompanying text.

ing walls is invented? Is the Court going to use such convoluted reasoning to advocate any heretofore unlawful warrantless intrusion merely because a warrant could have been procured which would have made the intrusion lawful? If the police have at their disposal a legal method, the use of which would allow a search and seizure, will they no longer be required to use that legally prescribed method, but because of its very existence are they now to be permitted to use any method they desire without regard to its legality? Are we no longer to be afforded the unbiased reasoning of the courts before zealous police are allowed to enter wherever and whenever they please? In 1927 Justice Brandeis noted similar concerns.[160] And although his fears have not yet been realized, they remain concerns which the Court must not ignore.

The *Oliver* Court held that requiring the police to use the legal methods at their disposal would not "advance legitimate privacy interests."[161] One can only conclude that Justices White, Marshall, Brennan, and Stevens may have shown remarkable wisdom in refusing to have their names and reputations connected to such a broad rejection of fourth amendment application to open fields searches and seizures.

The Court has concluded that the fourth amendment may no longer be applied to open fields. In so doing, the Court returns to a literal interpretation of the Constitution. The Court's journey into liberal interpretation was short lived—a mere seventeen years. This change in philosophy is understandable, for it has occurred before and will no doubt occur again. But the difficulties in the Court's rationale present a distinctive concern. Did the Court intend to restrict the fourth amendment's application only in the area of open fields or does the decision foreshadow further intrusions into what have come to be expected fourth amendment protections? Only time will provide the answers to these questions.

160. Olmstead v. United States, 277 U.S. 432, 474 (1927) (Brandeis, J., dissenting).
161. *Oliver*, 104 S. Ct. at 1741 n.9.

Wisconsin Wildlife Federation

Chairman Kleefisch and Committee members, on behalf of the Wisconsin Wildlife Federation thank you for the opportunity to testify in strong opposition to Assembly Bill 411 that severely handicaps Wisconsin's conservation wardens from enforcing hunting, fishing and trapping laws on the 80% of Wisconsin lands that are privately owned. The Federation represents 204 hunting, fishing and trapping organizations in Wisconsin including 28 statewide organizations, 22 county or regional groups and 154 local conservation clubs. I have included the list of these clubs for your reference.

Virtually all Wisconsin sportsmen and women want the state's hunting, fishing and trapping laws enforced uniformly in the state. We do not want one standard of enforcement on public lands and another standard on private lands. We understand that fish and wildlife are owned by the public and there is a strong need to protect that fish and game from being poached even on private lands. A deer or turkey or grouse taken illegally on private lands is being taken from every sportsman and woman. Every person that is hunting, trapping or fishing on private lands without a license is taking money away from the State Fish and Wildlife Account and the management of fish and wildlife that it supports for all of us.

We challenge you to go to any rod and gun club in your District and ask the sportsmen and women that are there whether they support the men and women that are the conservation wardens in their area protecting the fish and wildlife for themselves and future generations. When you are there introduce yourself to the local warden that is likely to be present and find out first hand why it is important to be able to onto private open fields to check for licenses and violations of the game regulations. Ask your local warden what problems this bill will cause.

Most sportsmen and women hold their local conservation warden in high regard. They are professional law enforcement officers and are well-trained. If a warden does not carry out his or her enforcement responsibilities within the law or in a professional manner they are subject to supervision and disciplinary action. Please do not pass this bill and thereby severely restrict the ability for conservation wardens to enforce fish and game laws on private lands for the behalf of all sportsmen and women.

All of our 213 hunting, fishing and trapping affiliate clubs will be watching the progress of this bill very, very closely. Thank you again for this opportunity to testify on behalf of the sportsmen and women that make up the Wisconsin Wildlife Federation.

Respectfully submitted on July 19, 2017 by:
Ralph Fritsch on behalf of the
Wisconsin Wildlife Federation

Wisconsin Wildlife Federation Affiliate Clubs

Statewide Affiliates

American Wild Turkey Hunting Dog Assoc.

Challenge The Outdoors Inc

Dog Federation Of Wisconsin

Kids and Mentors Outdoors

Muskies Inc.

Sturgeon For Tomorrow North Chapter

Trout Unlimited Aldo Leopold

Trout Unlimited Green Bay Chapter

Walleyes For Tomorrow Inc

WI Assoc Of Field Trial Clubs

WI Assoc Of Sporting Dogs

Wisconsin Association of Beagle Clubs

Wisconsin Bowfishing Association

Wisconsin Coon Hunters Association Inc.

WI Council Of Sportfishing Org

WI Federation Of Great Lake Sport Fishing Clubs

WI Hunter Ed Instructor Association

WI Muzzleloading Association

WI Sharp-Tailed Grouse Society

WI Taxidermist Assoc

WI Trappers Association

WI Woodland Owners Association

Wildlife Society, UWSP Chapter

Wings Over Wisconsin

Wisconsin Division – Izaak Walton League of America

Wisconsin Falconer's Association

Wisconsin Trapshooting Association

Wisconsin Waterfowl Assoc

County or Regional Affiliates

Association Of Conservation Clubs Of Trempealeau County

Brown County Conservation Alliance

Calumet Co Conservation Alliance

Chippewa Valley Outdoor Resource Alliance

Columbia County Sporting Alliance

Dane County Conservation League

Dodge County Sporting Conserv Alliance

Dunn Co Fish & Game

Forest County Assoc Of Lakes Inc

LaCrosse County Conservation Alliance

Lincoln County Learn to Hunt

Lincoln County Sports Club

Manitowoc City Fish & Game Protective Assoc

Northern Wisconsin Houndsmen Association

Oconto Co Sports Alliance

Polk County Sportsmens Club

Racine Co. Conservation League Inc.

Racine County Line Rifle Club Inc

Sauk County Sportsman's Alliance

Sheboygan County Conservation Assoc

Southern Brown Conservation Club/izaak Walton League

Waukesha County Conservation Alliance

Winnebagoland Conservation

Alliance

Local Affiliates

Abbotsford Sportsmen's Club

Adell Sportsman Club

Almond Rod And Gun Club

American Legion #364 Giles Luce Post

Apostle Islands Sport Fishermen's Association

Ashland/Bayfield County Sportsmen

Augusta Area Sportsmens Club

Badger Dachshund Club Inc

Badger Fishermen's League

Bangor Rod & Gun Club

Barron County Youth Shooting Sports

Beaver Dam Conservationists Inc

Beloit Rifle Club, Inc.

Berlin Conservation Club

Big 4+ Sportsmen's Club

Big Oaks Hunting Club Inc

Bill Cook Chapter IWLA

Bloomer Rod & Gun Club

Blue Hills Sportsmen's Club

Boscobel Sportsmens Club

Breed Sportsman Club

Brice Prairie Conservation Association

Brill Area Sportsmen's Club, Inc.

Brown County Sportsmen's Club

Brule River Sportsmens Club

Buck Lake Sportsmans Club

Butte Des Morts Conservation Club

Carter Creek Sportsmen's Club

Cataract Sportsman Club

Central Saint Croix Rod & Gun Club

Central WI Gun Collectors Assoc Inc

Central WI Shoot To Retrieve

Central Wisconsin Sportsmen's Club

Chain O'Lakes Conservation Club

Chaseburg Rod N Gun Club

Chippewa Rod & Gun Club

Colfax Sportsmen's Club

Columbus Sportsman's Assoc Inc

Coon Valley Conservation Club

Crystal Lake Sportsmen Club

Daniel Boone Conservation League

Inc

De Pere Sportsman's Club

Delton Sportsmen Club

Door County Fish Farm & Game Club

Door County Rod & Gun Club Inc

Douglas County Fish & Game League

Dousman Gun Club

Durand Sportsmans Club

Eau Claire Rod & Gun Club

Ettrick Rod & Gun Club, Inc

Farmers & Sportsmen's Club

Field & Stream Sportsmens Club

Fin N Feather Sportsmans Club

Fort Atkinson Wisconservation Club

Four Lakes Metal Detector Club

Friends of MacKenzie Center

Friends of Poynette Game Farm

Friends Of The Brule

Friends of the St. Croix Wetland Management District

Green Bay Area Great Lakes Sport Fishermen

Grant County Outdoor Sport Alliance

Great Lakes Sport Fishermen

Ozaukee Chapter

Great Lakes Sports Fishermen Foundation LLC – Milwaukee

Green Bay Duck Hunters Assoc

Grellton Conservation Club

Hancock Sportsmen's Club

Hartford Conservation & Gun Club

Hayward Rod & Gun Club

Hmong American Sportsmen Club

Hope Rod & Gun Club

Hudson Rod Gun & Archery

Izaak Walton League Bill Cook Chapter

Jefferson Sportsmen's Club

Johnsonville Rod And Gun

Koenig's Conservation Club

Lake Poygan Sportsmen's Club

Lakeview Rod And Gun Club

LaValle Sportsmens Club

Little Wolf River Houndsmens Club

Madison Area Dachshund Club

Manitowoc County Coon Hunters

Manitowoc Gun Club

Maribel Sportsman's Club

Mayville Gun Club

Mill Creek Education & Gun Club

Milwaukee Casting Club

Milwaukee Police Officers Conservation-sportsman Club

Mishicot Sportsmen Club

Monches Fish & Game Club

Mosinee Sportsmens Alliance

Nekoosa Conservation League

North Bristol Sportsman's

Northwest Rod & Gun Club

Oakland Conservation Club

Oconomowoc Sportsman's Club Inc

Oconto River Watershed Trout Unlimited

Osseo Rod And Gun Club

Outagamie Conservation Club

Outdoor Inc Conservation Club

Padus Gun Club

Palmyra Fish & Game Club

Pecatonica River Valley Coon Hunters Club

Portage Rod and Gun Club

Prairie Rod And Gun Club

Pumpkin Center Sportsmens Club

Racine County Line Rifle Club Inc

Retreat Sportsmen's Club, Inc.

Rhine-Plymouth Field & Stream Inc.

Richfield Sportsmens Club

Ringtails Youth Crew

Rio Conservation Club

Rock River Koshkonong Assoc

Rock River Rescue Foundation

Rolling Hills Sportsman's Club

S Milwaukee 1400 Fishing & Hunting Club

Sauk Prairie Trap & Skeet Club

Sauk Trail Conservation Club

Sayner-St.Germain Fish & Wildlife Club

Shadows On The Wolf, Inc.

Sheboygan Area Great Lakes Sport Fishermen

Shoto Conservation Club

Silver Lake Sportsmans Club

Slinger Sportsman Club

Smerke's Sportsmen's Club

Southeastern Rod & Gun Club

Southern Clark County Sportsman's Club

Sparta Rod & Gun Club

Stan Plis Sportsmans League

Stanley Sportsmans Club & Foundation

Star Prairie Fish & Game Association

Sugar River Coon Hunters

Suscha-fale Sportsmen's Club

The Wildlife Society – UWSP

Tomorrow River Valley Conservation Club

Trempealeau Sportsman's Club

Triangle Sportsmens Club

Tri-County Sportswomen's Club, LLC

Twin City Rod & Gun Club

Underhill Sportsmans Club

Van Dyne Sportsmans Club

Viking Bow and Gun Club

Wales Genesee Sportsman Club

Watertown Archers Inc.

Watertown Conservation Club

West Bend Barton Sportsman Club

Westgate Sportsman Club Inc.

Wilderness Sportsmen's Club Inc.

Wildlife Restoration Association Inc.

Willow Aces

Wilton Rod & Gun

Winchester Gun Club

Winnebago Conservation Club

Wisconsin House Outdoorsmen Club

Yahara Fishing Club

Wisconsin Wildlife Federation

Chairman Kleefisch, Committee Members: on behalf of the Wisconsin Wildlife Federation, I will follow-up Ralph Fritsch's testimony by reviewing the constitutionally recognized authority of conservation wardens, like every other law enforcement officer, to enter onto open fields on private lands and thereby enforce Wisconsin's fish and game laws.

The bill's author has previously indicated that it is a violation of the Fourth Amendment to the United States Constitution for a conservation warden to enter onto the open fields of private lands to enforce conservation laws. The Federation has attached to this testimony two documents which provide a thorough analysis that statement is legally incorrect.

Specifically, longstanding Federal and State court cases and previous case law provide that the entry of law enforcement officers, including conservation wardens, onto the open fields of private property is an exception to the Fourth Amendment of the US Constitution, even if there is no reasonable suspicion or probable cause that a violation has occurred. It is especially important for conservation wardens to enter onto such lands because of their responsibility to protect the publicly owned fish and game in this state. Such protection becomes seriously in jeopardy if the 80% of the state that is privately owned is virtually off-limits to routine investigation of fish and wildlife licensing and game protection laws.

Let's review the law: In Hester v. United States, 265 U.S. 57, 68 L.Ed. 898, (1924), Justice Oliver Holmes, first enunciated the "open fields" doctrine: "The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

In an opinion written by Justice Louis Powell in Oliver v. United States, 466 U.S. 170, 80 L. Ed. 2d 214, 222 (1984), the Supreme Court reaffirmed the "open fields" exception to the Fourth Amendment. The Court explained an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. "[T]here is no societal Interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Id. 80 L.Ed.2d at 224." In other words, an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. Id. 80 L Ed.2d at 227-228.

In United States v. Cain, 454 F.2d 1285 (7th Cir. 1972), the US. Court of Appeals upheld the warrantless searches of a portion of a farm operated as the Grassey Lake Hunting Club. The defendants were charged with violations of the Migratory Bird Treaty Act. United States game management agents entered the grounds of the Hunting Club pursuant to a routine supervisory procedure to insure that all hunting ceased at the proper time. Citing from McDowell v United

States, 383 F.2d 599 (8th Cir. 1967), the court explained: "Under federal law the search of open fields without a search warrant is not constitutionally 'unreasonable.' Hester v. United States, 265 U.S. 57,68 L.Ed. 898 (1926). This is true even though entrance to the area searched was gained by trespass. Id. 454 F.2d at 1288."

Other Federal appellate courts have also similarly ruled: In United States v. Pinter, 984 F.2d 376 (10th Cir). cert. denied, 126 L.Ed.2d 224 (1993), the Tenth Circuit Court of Appeals held: "The open fields doctrine does not require that law enforcement officials have some objective reason - either probable cause or reasonable suspicion - before entering an open field." In United States v. Eastland, 989 F.2d 760 (5th Cir. 1993), the court agreed with the established precedent that no expectation of privacy attaches to open fields: "It is well-established that the Fourth Amendment does not apply to observations while standing on open fields."

The Federal Courts have specifically applied the "Open Fields Doctrine" to state conservation wardens: in United States v. Greenhead, Inc., 256 F.Supp. 890 (N.D.Cal. 1966), the court specifically upheld an open field search by game wardens who had "no knowledge or suspicion that the game laws were being violated." See also, United States v. Wylder, 590 F.Supp. 926 (D.Ore. 1984) (upholding warrantless search by game wardens); United States v. Swann, 377 F.Supp. 1305 (D.Maryland 1974) (upholding warrantless search by game wardens).

The "Open Fields Doctrine" has also been upheld by the Wisconsin Supreme Court: under the "open fields" doctrine, evidence that a body was found 450 feet from the defendant's house during random digging done at the direction of the sheriff acting without a warrant was properly admitted into evidence. Conrad v. State, 63 Wis. 2d 616, 218 N.W.2d 252 (1974) and seizure by police of a large quantity of marijuana from the defendant's 155-acre farm did not contravene their 4th-amendment rights. State v. Gedko, 63 Wis. 2d 644, 218 N.W.2d 249 (1974).

In conclusion, the entry of Wisconsin Conservation Wardens onto the open fields of private land, without reasonable suspicion or probable cause is fully consistent with the United States and Wisconsin Constitution and is fully consistent with Federal and State Supremed Court cases interpreting the Fourth Amendment. The application of the "Open Fields Doctrine" is especially important for enforcement of fish and game laws since fish and wildlife are publicly owned whether they are located on private or public property.

Submitted by:
George Meyer
Executive Director
Wisconsin Wildlife Federation
July 19, 2017

Open Fields, Curtilage, and Trespass

Open Fields

While the United States Supreme Court has interpreted the Fourth Amendment to hold that warrantless searches of "persons, houses, papers and effects" constitute a violation of the property owner's constitutional rights, the Court has held that such protection does not extend to open fields. Hester v. United States, 265 U.S. 57, 68 L.Ed. 898, (1924).

In Oliver v. United States, 466 U.S. 170, 80 L. Ed. 2d 214, 222 (1984), Justice Powell quoted Justice Holmes from Hester, supra. which first enunciated the "open fields" doctrine:

> The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

In *Oliver*, the Court upheld what has come to be known as the "open fields doctrine." In *Oliver*, the Kentucky state police, acting on a tip, entered onto Oliver's land to investigate whether he was growing marijuana. The property was fenced with a locked gate and a "no trespassing" sign. The police, without a warrant, climbed over the fence and observed a field of marijuana over a mile from the road. The police later obtained a warrant and arrested Oliver

Oliver claimed that because he had the property posted "no trespassing" and because the gate was locked, the officers' trespass constituted an illegal warrantless search. In ruling against Oliver, the Court "reject[ed] the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate." Id. at 182.

The Court concluded that the governments intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment. Id. 80 L.Ed.2d at 223. The Court also noted that this interpretation of the Fourth Amendments language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Id.

The Court explained an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. "[T]here is no societal Interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Id. 80 L.Ed.2d at 224. The Court further explained that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life." Id. 80 L.Ed.2d at 225. Thus, an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

Furthermore, the Court rejected the notion that the government's intrusion upon an open field was a "search' in the constitutional sense because that intrusion was a trespass at common law. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. Id. 80 L Ed.2d at 227-228.

In United States v. Cain, 454 F.2d 1285 (7th Cir. 1972), the US. Court of Appeals upheld the warrantless searches of a portion of a farm operated as the Grassey Lake Hunting Club. The defendants were charged with violation of the Migratory Bird Treaty Act. United States game management agents entered the grounds of the Hunting Club pursuant to a routine supervisory procedure to insure that all hunting ceased at the proper time. Citing from McDowell v United States, 383 F.2d 599 (8th Cir. 1967), the court explained:

> Under federal law the search of open fields without a search warrant is not constitutionally 'unreasonable.' Hester v. United States, 265 U.S. 57,68 L.Ed. 898 (1926). This is true even though entrance to the area searched was gained by trespass.Id. 454 F.2d at 1288.

Thus, an entry by trespass on to open land did not vitiate an otherwise lawful search. Id. 454 F.2d at 1287, citing United States v. Sorce, 325 F.2d 84 (7th Cir. 1963).

Further, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally "unreasonable" McDowell, v. U.S., supra, at 603.

In United States v. Pinter, 984 F.2d 376 (10th Cir). cert. denied, 126 L.Ed.2d 224 (1993), the Tenth Circuit Court of Appeals held:

> The open fields doctrine does not require that law enforcement officials have some objective reason - either probable cause or reasonable suspicion - before entering an open field. The fact that the agents suspected Pinter of wrongdoing makes no difference to the analysis. The fact that the property was privately owned and the agents were trespassers makes no difference. The fact that the property may not have been 'open' in the sense that the area was wooded and the laboratory location was not visible from a public place likewise is of no significance. Id. 984 F.2d at 379.

The court refused to carve out an exception to the open fields doctrine, i.e., one which would require probable cause or reasonable suspicion before law enforcement officers could enter an open field Id. The court declined to impose any such limitation on the open fields doctrine.

In United States v. Eastland, 989 F.2d 760 (5th Cir. 1993), the court agreed with the established precedent that no expectation of privacy attaches to open fields:

> It is well-established that the Fourth Amendment does not apply to observations while standing on open fields. See United States v. Pace, 955 F.2d 270, 274 (5th Cir. 1992) ....Justification for a search or seizure under the Fourth Amendment is required because it demands reasonableness. See Terry v. Ohio, 392 U.S. 1,20-21, 20 L.Ed.2d 889 (1968). But, where, as here, the governmental intrusion does not implicate the Fourth Amendment the reasonableness requirement is likewise not implicated. Id. 989 F.2d at 765.

The court concluded in a footnote, "therefore, we need not reach whether the officers had probable cause, or at least reasonable suspicion to justify entry." Id. 989 F.2d at 765, fn 6.

In United States v. Greenhead, Inc., 256 F.Supp. 890 (N.D.Cal. 1966), the court specifically upheld an open field search by game wardens who had "no knowledge or suspicion that the game

laws were being violated." See also, United States v. Wylder, 590 F.Supp. 926 (D.Ore. 1984) (upholding warrantless search by game wardens); United States v. Swann, 377 F.Supp. 1305 (D.Maryland 1974) (upholding warrantless search by game wardens).

Curtilage

Curtilage which is the zone of habitation, dwelling area, space necessary and convenient and habitually used for family purposes. Can include such areas as the pool, garden and garage.

The central question in determining if an area is within the curtilage is whether the area is so intimately tied to the home itself that it should be placed under the home's "umbrella" of fourth amendment protection.

Four factors to consider (guidelines only):

- Proximity of area to the home
- Whether the area is included within an enclosure surrounding the home
- The nature of the uses to which the area is put
- The steps taken to protect the area from observation by passersby.

See United States v. Dunn, 107 S. ct. 1134 (1986).

Factors weighing against a finding of curtilage include:

- Outbuildings are not included when the property is not a farm
- No fence existed around the premises (Note: contrast with boundary fences)
- The area determined to be curtilage was clearly marked by the removal of weeds and brush
- Area where marijuana plants were discovered was not used for "intimate activity associated with the sanctity of a man's home and the privacies of life"
- Underbrush in which the marijuana was hidden was natural and not cultivated by the defendant.

State v. Martwick, 2000 WI. 5, 231 Wis. 2d 801 (2000).

Defendant must show a subjective expectation of privacy that was objectively reasonable. The owner of commercial property must take steps to establish an affirmative expectation of privacy (e.g., signs, barricades, etc.). Fence did not establish the expectation where there was no gate and police routinely patrolled the area. The dumpster was not within the residential curtilage where it was next to the business office, even though the residence was nearby. *State v. Yakes*, 226 Wis. 2d 425 (Ct. App. 1999).

A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expatiation of privacy. *State v. Edgeberg,* 188 Wis. 2d 339, 347 (Ct. App. 1994)

INFORMATIONAL BRIEF

Law Enforcement Handbook

Effective Date:	Subject
8-29-01	**Conservation Warden Authority**
Relating To: **Warden's Authority to Enter Onto Private Property**	Document Number **IB 2001-10**
Adm. Code/Wis. Stats:	Initiator: **LE Handbook Original**

SUBJECT MATTER DESCRIPTION

Information on the authority of conservation wardens to enter private property in the performance of their duties without the permission of the owner.

INFORMATION AND REFERENCES

The regulation of fish and game is an exercise of the police power of the state, and, therefore, a law enforcement officer may take reasonably necessary action to enforce state fish and game laws, including entry upon private property without permission of the owner.

The police power is unlimited in scope as long as the method utilized is reasonable and not specifically prohibited by the Constitution of the United States, the Constitution of the State of Wisconsin, the courts or by statute. A law enforcement officer acting under authority of a statute or regulation enacted pursuant to this power may use any means reasonably necessary to enforce such regulations or statutes including trespass on private property.

A rule of general recognition is that one acting under authority for the government may justify acts which otherwise would be trespass, but it must appear that the authority in fact existed; and that it was valid, and it justified the method employed to carry out the authority; the particular act done; and the doing of it by the officer. (Corpus Juris. Secundum, Trespass, Section 54.)

In the case of Giacona vs. United States, 257 F 2d 450, Cert. den. 358 US 873, the court said, "When the performance of his duty requires an officer of the law to enter upon private property, his conduct otherwise a trespass is justifiable." It has also been said that, "conduct otherwise a trespass is often justifiable." It has also been said that, "conduct otherwise a trespass is often justifiable by reason of authority invested in the person who does the act, as, for example, an officer of the law acting in performance of his duty". (52 AM JUR, Trespass, Section 41.)

A conservation warden has the power to enter upon private lands without permission provided the warden is acting reasonably and within the scope of lawful authority. However, if the warden executes such authority in an unlawful and wrongful manner, or if the warden's act is in excess of his authority or if the warden's act is unreasonable, then the fact that such authority exists will not preclude an action against the officer for a trespass.

As a final point, the Fourth Amendment is simply not applicable to open field searches. No reasonable suspicion or probable cause is necessary to enter the land. The law enforcement officer must, however, be in the normal course of his law enforcement duties. The fact that the land is posted does not alone make the Fourth Amendment applicable. The primary limitation is that a warrant is required once the search comes within the protected areas known as the curtilage, i.e., that area within and around buildings for which the owner or occupant has a reasonable expectation of privacy.

The Wisconsin law on this subject begins with an Attorney General's opinion cited as **15 OAG 522 (1926)**, which is summarized as follows:

> "A conservation warden has the right to enter private land of any owner without permission for the purpose of searching for evidence to be used in criminal prosecutions in enforcing the fish and game laws. He has no right to hunt on said lands without permission."

Several Wisconsin cases make it clear that the fourth amendment is not applicable to open areas. Summaries of these cases follow:

- **Browne v. State, 24 Wis. 2d 491 (1964).** "Since criminal convictions require substantial evidence, the police must be given reasonable power to gather probative evidence. These two values conflict (personal privacy and the need for probative evidence), and in our system of government the difficult task is striking a satisfactory balance falls upon courts. Do trips through the technicalities of the law of trespass aid in the balancing task? The U.S. Supreme Court have recognized that they do not. In Jones v. United States, 362 U.S. 257, the court in determining the scope of standing to raise Fourth amendment issues, in its search for reasoned standards, was 'persuaded ... that it is unnecessary and ill-advised to import into the law surrounding the Constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in involving the body of private property law which, ...has been shaped by distinctions whose validity is largely historical.' ... Thus, whether or not a search or investigation is reasonable is not a matter for the application of the comparatively rigid rules of tort and property law, but is rather a matter of an inquiry as to whether the search or investigation is constitutionally reasonable under the circumstances. If police conduct is not considered unreasonable in the circumstances, it is not made unreasonable if it is deemed to have involved a civil trespass." The warden in this case was on the premises for the purpose of checking hunting licenses and investigating possible hunting violations.

- **State v. Davidson, 44 Wis. 2d 177 (1969).** "The United States Supreme Court has held that the privilege (i.e., the Fourth amendment) does not apply to open fields'. Neither does it apply to the lawn around the house." This search involved a search of the lawn about 10 feet from the garage. Note that at some point the lawn could come within the protected curtilage.

- **State v. Dombrowski. 44 Wis. 2d 486 (1969).** The court held that no search warrant is required to search the open fields on the farm. Thus a warden could consider it lawful to enter into open areas or fields to enforce hunting and game regulations or to search for evidence without a warrant. He would then have a right to enter and would not be liable for trespass if he is acting to enforce the laws of the state.

- **Ball v. State, 57 Wis 2d 653 (1972).** The court limits the right to search without a warrant to that area outside the home and around the home where an individual does not have a reasonable expectation of privacy. (This is not to say that if a warden searches a home or buildings or land near it, without a warrant, that he will necessarily be liable for trespass. But absent, exigent circumstances, it may be evident that he is acting unreasonably and outside the scope of his lawful authority and therefore open to a suit alleging trespass.)

- **Conrad v. State, 63 Wis. 2d 616 (1973).** "The law in Wisconsin in respect to 'open field' searches in areas away from the curtilage remains unchanged. No warrant is required for a search and police officers may search such areas above or below the ground undeterred by the Fourth amendment." In this case, the police officer used a backhoe to search the defendant's wood lot for a body.

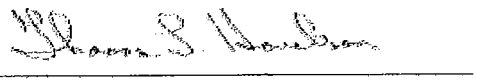
In addition, the U.S. Supreme Court ruled in **Oliver, 466 U.S.** that: "The government's intrusion upon an open field is not one of the unreasonable searches proscribed the Fourth Amendment , and an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers, Oliver, 466 U.S. at 181. Therefore, a police inspection of open fields simply does not infringe upon the personal and societal values protected by the Fourth Amendment. Oliver, 466 U.S. at 182-183.

BACKGROUND

If a further discussion of the law in this area is needed, contact the Bureau of Legal Services and request Legal Opinion
81-9 (February 17, 1981 memo from James Kurtz to Donald Beghin).

APPROVAL

FOR THE SECRETARY
By

Tom Harelson 
Director,
Bureau of Law Enforcement

Sauk County Sportman's Alliance

Representing over 2500 outdoor enthusiasts in *Greater Sauk County,* the Alliance is a county-wide collaboration of clubs dedicated to the conservation of Sauk County's wildlife and wild lands. The alliance seeks to inform, educate and involve its members, as well as, provide unity and fellowship among all sportsmen in the county and state.

July 18, 2017

To: Assembly Committee on Natural Resources and Sporting Heritage

Re: Assembly Bill 411 – Limiting conservation warden entry onto private lands.

I'm writing to inform you that the Sauk County Sportman's Alliance is very concerned about the negative conservation impacts of AB 411 and urges the committee to not advance this bill.

In a recent column Milwaukee Journal-Sentinel outdoor writer Paul Smith interviewed Wisconsin's former Chief Warden Randy Stark. Former Chief Warden Stark said, *"License compliance drops, funding for conservation declines, compliance with laws that protect wildlife, fish, game and public safety wanes, public safety is jeopardized, poaching on private land increases, and sportsmen and women, private landowners, Wisconsin's wildlife-based economy, and the citizens of Wisconsin all lose."* These are negative impacts our Alliance does not want to see occur.

Sauk County, like most Wisconsin's counties, is primarily privately owned. Healthy fish and wildlife populations which are held in public trust for all of us to enjoy are dependent upon the cooperation and compliance of thousands of private landowners with conservation laws. Thankfully, most landowners do this willingly. However, we all know that a few choose to ignore or violate those laws. These choices not only hurt Sauk's fish and wildlife populations, but impact the neighbors of these people. Our Alliance strongly feels that we need to maintain Wisconsin's conservation warden's ability to enter onto private lands as they do now.

We are also concerned about loss of important wildlife harvest data as hunter compliance with harvest reporting requirement drops in response to lack of conservation warden compliance checks on private lands. The Sauk County Deer Advisory Council (CDAC) annually makes recommendations on antlerless harvest quotas and permit numbers to achieve desired deer herd population goals. These decisions rely upon accurate harvest data. Conservation warden encounters with hunters provide some of our best data on hunter compliance with harvest registration laws. Because most of Wisconsin is privately-owned, most warden-hunter encounters occur on private land.

John Balfanz, President
608-643-2310

Pam Putkamer, Sec/Treasurer
608-356-4181

This source of information would be seriously damaged if AB 411 becomes law. We should be improving the data that CDACs are using, not degrading them.

We believe the track record from Sauk County demonstrates that our conservation wardens are exercising sound judgement when entering upon private lands. We further believe that there are adequate legal remedies for the rare situations that might occur where a conservation warden acts inappropriately.

John Balfanz, President
Sauk County Sportsman's Alliance
E10193 Prairie Road
Prairie du Sac, WI 53578
608-643-2310

Cc: Sauk County Legislators

7/19/2017; Public Hearing

Re: **Assembly Bill 411**, Restricting authority of Wardens on Private property.

My name is Kevyn Quamme, I live at: W 6970 County Road B in Dalton, WI.53926 Phone 608 209 3842

I am an active member of the North Bristol Sportsmans' Club in Dane County, Wings over Wisconsin, Wisconsin Wildlife Federation, Dane County Conservation League, Friends of the Poynette Game Farm, Wild Turkey Federation and others. I am an active Hunters Education Instructor and High School Trap Team Coach. I own hunting land in Northern Wisconsin and at my home in the center of the state, and spend time in the woods. I also Vote.

I am in opposition of the proposed bill. The authority to enforce hunting and fishing rules and regulations on the largest part of Wisconsin's wildlife habitat cannot be limited.

Many of the citations for over baiting, hunting out of season, over harvesting and the like are issued on Private lands. The violators may already feel isolated by not being visible to other hunters, but the added knowledge that a Conservation Warden will not be able to investigate suspicious behavior on private lands can only embolden the violators, taking advantage of the natural resource that belongs to all citizens of the state.

I am not aware of any public concern or demand to make any changes to the current policy and law, and can only imagine that any desire to limit warden access is self serving, and will allow, increase and encourage potential illegal and unethical activity on the private lands. Giving private land owners more flexibility and ability to harvest, and keep wildlife from crossing ownership borders to public and other open lands. Reducing public land hunters and visitors interaction with wildlife.

I am also not aware, or have not heard of any conflicts or complaints regarding any Warden of the State that may have abused or over applied the authority to enforce the Game and Fish Laws and regulations on private property. I have heard of a number of instances where enforcement was taken on private lands. Many in response to reports and tips to lead the wardens to the offending parties.

Please do not move forward with this proposed Bill or others similar to it. It is unnecessary, potentially harmful and will send the message to private land owners and eventually other hunters (not sportsmen) that the Warden's and the laws are becoming irrelevant. I believe it will also undermine the strong Ethical and Moral standards that we try to teach our new hunters and young people. This may lead to a lack of respect for the resource and a conflict among Private Land Hunters and Public Access hunters. Potentially reducing even further the recruitment of Hunters and Fisherman into Wisconsin's outdoors.

Thank you for your time and consideration of my opinion's.

Respectfully,

Kevyn Quamme

COMMENTS

ASSEMBLY BILL 411

By: John Wetzel July 18, 2017

I am John Wetzel and reside in La Crosse County.

I am opposed to AB 411 that removes the authority of conservation wardens from entering private property to enforce fish and game laws.

Fish and wildlife are public resources and wardens need to maintain the authority to enter the 80 percent of Wisconsin's land that is private to protect these resources for us - the public!

I am an active waterfowler and a member of several groups including the La Crosse County Conservation Alliance and the Waterfowl Committee of the Wisconsin Wildlife Federation. These groups work with the DNR to set annual waterfowl regulations.

Duck regulations are set so that there can be a fair distribution of harvest opportunity among all state waterfowlers. In addition several species such as mallards and wood ducks have restricted bag limits so that adequate numbers of these important species will return to breed in the state each year in order to provide huntable populations from year-to-year.

Concerning Canada geese, about half our harvest is from the Mississippi Valley Population which breeds along Hudson and James Bays in Manitoba, Canada. The population of MVP geese have been slowly dropping and protections are provided in Wisconsin by setting a special zone where many stop around Horicon Marsh - The Horicon Zone. In this Zone, hunters are limited to 12 geese per year and statewide, the daily bag limit is two geese per day, while other states allow up to five.

Without the ability of wardens to check private property, will illegal activity on private property be sufficient to tip the delicately balance of these species leading to reduced bag limits and/or seasons in Wisconsin?

Conservation groups from throughout the state have worked diligently with the DNR to prevent such a catastrophe. I hope you agree with us and will vote to reject Assembly Bill 411.

Thanks You -
John Wetzel
608-526-4238

WISCONSIN WATERFOWL ASSOCIATION

RESTORATION EDUCATION LEGISLATION

Wisconsin Waterfowl Association

Donald Kirby
Executive Director

Kelcy Boettcher
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Joseph Porten

Patrick Smith

Peter Strenn

Eric Urben

July 19th, 2017

Chairman Kleefisch & Members of the Assembly Committee on Natural Resources and Sporting Heritage

Testimony Opposed to AB411

WWA, a volunteer based organization, and its more than 6,000 members have worked in Wisconsin for 33 years, restoring wetlands & improving habitat on private and public lands, representing the desires of our association here in Madison, and educating young people and new hunters about our wetland and waterfowl resources. At no time in those 33 years has the desire to stop our Warden staff from entering private lands to ensure that our rules regulations and laws are being followed has ever come up. This bill is a solution seeking a problem.

In the North American Wildlife Conservation Model, one of the main tenants is the acknowledgement that all wildlife is owned by all of us, both those who migrate, like the ducks & geese we work for, as well as the deer, bears, and squirrels & rabbits, among a thousand other examples. Regardless of man's property marker, these resources belong to all of us. Only with access to private lands can the mission of overseeing & protecting these resources be accomplished. Earlier in my career in business, we'd often say, "if you want to manage it, measure it". The only way to measure compliance with our game laws, as well as other laws pertaining to our natural resources, to stay the course which we have run for generations, and continue to empower our Warden staff to enforce the law, as needed. Additionally, Wardens are oftentimes first responders for environmental emergencies, including spills & wetland areas. This bill will hamstring their investigations to determine responsible parties and effect quick cleanup.

Although compromise is often a hallmark of good legislation, this bill is not an example of that opportunity. On behalf of the board of directors, volunteers, and members of the Wisconsin Waterfowl Association, I ask you to reject AB411, and its ill-advised attempt to reduce the effectiveness of our natural resources law enforcement staff.

Thank you for allowing me to address your committee.

Donald Kirby - Executive Director

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WMC

WISCONSIN MANUFACTURERS & COMMERCE

Testimony Before The Assembly Committee on Natural Resources and Sporting Heritage In Support of Assembly Bill 411

Chairman Kleefisch and Committee Members:

Thank you for the opportunity to testify today. My name is Lucas Vebber and I am the General Counsel and Director of Environmental and Energy Policy at Wisconsin Manufacturers and Commerce (WMC). WMC is the state's chamber of commerce and manufacturers' association. With approximately 3,800 members, we are the largest business trade association in Wisconsin. WMC represents members from all over Wisconsin of all sizes and in every sector of the state's economy. I am here today to testify in support of Assembly Bill 411.

This legislation is very simple. It's only eleven lines long. It says a conservation warden may not enter private land for the purpose of enforcing laws that the DNR is required to administer unless that warden has reasonable suspicion that a violation of those laws is occurring. This is a common sense proposal.

This prohibition does not apply where a conservation warden is explicitly authorized by statute to enter private land. This provision retains the DNR's broad authority under current statute to enter business locations throughout the state to enforce laws. I would like to briefly highlight a few of those areas of the law where such explicit authority exists (a copy of each is attached):

- Wis. Stat. § 30.291 – Navigable Waters
- Wis. Stat. §§ 281.96 and 281.97 – Water & Sewage
- Wis. Stat. § 283.55 – Discharge Permitting
- Wis. Stat. § 285.19 – Air Pollution
- Wis. Stat. § 289.91 – Solid Waste
- Wis. Stat. § 293.86 – Metallic Mining
- Wis. Stat. § 295.17 – Nonmetallic Mining

We certainly understand the need and importance of enforcing state laws to ensure that permittees in Wisconsin are in compliance. We have no issue with compliance inspections to enforce state law. The powers conveyed by these statutes, however, are very broad and authorize <u>any</u> employee of the DNR to enter private property in the state. As this committee reviews this legislation, we encourage you to consider more clearly defining who specifically has this authority and when and how it may be used.

Thank you for your time, I would be happy to answer any questions you may have today.

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Founded in 1911, WMC is Wisconsin's chamber of commerce and largest business trade association.

the surface of any navigable waters which are frozen if the crossing is in the most direct manner practical, if the crossing is from a highway or private road or from an established trail and if the person operates the motor vehicle at the minimum speed required to maintain controlled forward motion of the motor vehicle.

~~(i) *Controlling Phragmites.* A person operating a motor vehicle in compliance with sub. (3m).~~

(3m) CONTROLLING PHRAGMITES IN OUTLYING WATERS. A person may operate a motor vehicle in outlying waters if the operation meets all of the following requirements:

(a) The operation of the motor vehicle is for the purpose of mowing or applying a herbicide for the purpose of controlling Phragmites australis.

(b) The operation of the motor vehicle occurs only on the exposed bed of the outlying water.

(c) The operation of the motor vehicle occurs between the period beginning on July 1 of a given year and ending on March 15 of the following year.

(d) The mowing or application of the herbicide interferes with or destroys native species only to the degree that is necessary to control the invasive species Phragmites australis.

(4) PENALTY. A person who violates this section shall forfeit $50 for the first offense and shall forfeit not more than $100 upon conviction of the same offense a 2nd or subsequent time within one year.

History: 1981 c. 189; 1987 a. 374; 1991 a. 39; 2003 a. 118; 2009 a. 28, 377; 2011 a. 208; 2011 a. 260 s. 80; 2015 a. 170.

30.291 Inspections for certain exemptions and permitted activities. (1) For purposes of determining whether an exemption is appropriate under s. 30.12 (1k), (2m) or (2r), 30.123 (6m) or (6r), or 30.20 (1m) or (1r), whether a general permit is appropriate under s. 30.206 (3), or whether authorization to proceed under a general permit is appropriate under s. 30.206 (3r), any employee or other representative of the department, upon presenting his or her credentials, may enter the site and inspect any property on the site.

(3) The department shall provide reasonable advance notice, before entering the site and inspecting the property.

(4) If the owner of the site refuses to give consent for an entry and inspection to determine whether authorization to proceed under a general permit is appropriate under s. 30.206 (3r), the department shall deny authorization to proceed under the general permit and shall allow an application to be submitted for an individual permit for the activity.

History: 2003 a. 118; 2007 a. 204.

30.292 Parties to a violation. (1) Whoever is concerned in the commission of a violation of this chapter for which a forfeiture is imposed is a principal and may be charged with and convicted of the violation although he or she did not directly commit it and although the person who directly committed it has not been convicted of the violation.

(2) A person is concerned in the commission of the violation if the person does any of the following:

(a) Directly commits the violation.

(b) Aids and abets the commission of the violation.

(c) Is a party to a conspiracy with another to commit the violation or advises, hires, counsels or otherwise procures any person to commit it.

History: 1987 a. 374.

30.294 Nuisances, abatement. Every violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person.

History: 1987 a. 374.

A citizen may bring suit under this section, pursuant to the public trust doctrine, directly against a private party for abatement of a public nuisance when the citizen believes that the department of natural resources has inadequately regulated the private party. When a municipality is a defendant, filing a notice of claim under s. 893.80 (1) (b) is not required if an injunction is sought under this section, whether or not the injunction will be directed against the municipality. Gillen v. City of Neenah, 219 Wis. 2d 806, 580 N.W.2d 628 (1998), 96–2470.

30.298 Penalties. (1) Any person who violates any provision of ss. 30.12 to 30.21 for which a penalty is not provided under the applicable section or by sub. (2) or (3) shall forfeit not less than $100 nor more than $10,000 for the first offense and shall forfeit not less than $500 nor more than $10,000 upon conviction of the same offense a 2nd or subsequent time.

(2) Any person who violates s. 30.18 (2) (a) 1. or 30.195 (1) shall forfeit not less than $500 nor more than $10,000 for the first offense and shall forfeit not less than $1,000 nor more than $10,000 upon conviction of the same offense a 2nd or subsequent time.

(3) Any person who violates a general permit under s. 30.206 or 30.2065 shall forfeit not less than $10 nor more than $500 for the first offense and shall forfeit not less than $50 nor more than $500 upon conviction of the same offense a 2nd or subsequent time.

(4) A violation of a permit, contract or order issued under this chapter is a violation of the statute under which the permit, contract or order was issued.

(5) In addition to the forfeitures specified under subs. (1) to (3), the court may order the defendant to perform or refrain from performing such acts as may be necessary to fully protect and effectuate the public interest in navigable waters. The court may order abatement of a nuisance, restoration of a natural resource or other appropriate action designed to eliminate or minimize any environmental damage caused by the defendant.

History: 1987 a. 374; 2003 a. 118; 2009 a. 391.

SUBCHAPTER III

DEVELOPMENT AND OPERATION OF HARBORS

30.30 Municipal authority to make harbor improvements. Every municipality having navigable waters within or adjoining its boundaries may exercise the following powers:

(1) HARBOR IMPROVEMENT. By proper filling or excavating or dredging and docking, create or improve any inner or outer harbor and such turning basins, slips, canals and other waterways within its boundaries as it determines are necessary.

(2) REPAIRS AND ALTERATIONS. Keep in repair and from time to time alter, extend, enlarge or discontinue any improvement mentioned in sub. (1).

(3) DOCK WALLS AND SHORE PROTECTION WALLS. (a) Either by itself or in conjunction with another municipality, construct, maintain or repair suitable dock walls or shore protection walls along the shore of any waterway adjoining or within the limits of such municipality, exclusive of privately owned slips. Such structures may be located within or without the municipal limits.

(b) Whenever an improvement, alteration, repair or extension of a dock wall or shore protection wall along the bank or shore of any waterway adjoining or within the limits of a municipality is required in order to eliminate menaces to navigation, or to promote the public health, safety or welfare, or to eliminate dilapidation, blight or obsolescence of such dock wall or shore protection wall, the board of harbor commissioners, if such board has been established within the municipality, or the local legislative body if no such board has been created, shall make a determination by resolution that it is essential that such dock wall or shore protection wall be improved, altered, repaired or extended. A certified copy of such resolution shall be served on the owners of the property of which such dock wall or shore protection wall is a part, by either forwarding such certified copy of the resolution by regis-

281.92 Limitation. Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31.

History: 1979 c. 221 s. 624; Stats. 1979 s. 144.27; 1995 a. 227 s. 435; Stats. 1995 s. 281.92.

DNR may consider wetland water quality standards in Wis. Admin. Code ch. NR 103 when making a water level determination under s. 31.02 (1). This section does not preclude the DNR from applying the wetland water quality standards in ch. NR 103 or other parts of ch. 281, when appropriate, after weighing factors under s. 31.02 (1). Rock–Koshkonong Lake District v. Department of Natural Resources, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800, 08–1523.

281.93 Hearings on certain water use actions. (1) PERMIT OR APPROVAL HOLDER OR APPLICANT: ORDER RECIPIENT. Any permit or approval, part of a permit or approval, condition or requirement in a permit or approval, order, decision or determination by the department under s. 281.344, 281.346, or 281.35 shall become effective unless the permit or approval holder or applicant or the order recipient seeks a hearing challenging the action in the following manner:

(a) *Petition.* The person seeking a hearing shall file a petition with the department within 30 days after the date of the action sought to be reviewed. The petition shall set forth specifically the issue sought to be reviewed, the interest of the petitioner, the reasons why a hearing is warranted, and the relief desired. Upon receipt of the petition, the department shall hold a hearing after at least 10 days' notice.

(b) *Hearing.* The hearing shall be a contested case under ch. 227. At the beginning of the hearing the petitioner shall present evidence in support of the allegations made in the petition. Following the hearing the department's action may be affirmed, modified, or withdrawn.

(1m) EFFECT OF A CHALLENGE. If a permit or approval holder or applicant seeks a hearing challenging part of a permit or approval or a condition or requirement in a permit or approval under sub. (1), the remainder of the permit or approval shall become effective and the permit or approval holder or applicant may, at its discretion, begin the activity for which the application was submitted or for which the permit or approval was issued.

(2) OTHER PERSONS. Except as provided in ss. 281.344 (4e) (g) and 281.346 (4e) (g), any person who is not entitled to seek a hearing under sub. (1) (intro.) and who meets the requirements of s. 227.42 (1) or who submitted comments in the public comment process under s. 281.344, 281.346, or 281.35 may seek review under sub. (1) of any permit or approval, part of a permit or approval, order, decision, or determination by the department under s. 281.344, 281.346, or 281.35.

(3) MINING HEARING. Subsections (1) and (2) do not apply if a hearing on the matter is conducted as a part of a hearing under s. 293.43.

History: 2007 a. 227.

281.94 Investigation of alleged water withdrawal violations. (1) Any 6 or more residents of this state may petition for an investigation of a withdrawal alleged to be in violation of s. 281.35, 281.344 (3) (a), or 281.346 (3) (a), in violation of a condition, limitation or restriction of a permit or approval issued in conformance with s. 281.35 (6) (a) or in violation of any rule promulgated under s. 281.35 (4) to (6), 281.344 (3) (a), or 281.346 (3) (a) by submitting to the department a petition identifying the alleged violator and setting forth in detail the reasons for believing a violation occurred. The petition shall state the name and address of a person in this state authorized to receive service of answer and other papers on behalf of the petitioners and the name and address of a person authorized to appear at a hearing on behalf of the petitioners.

(2) Upon receipt of a petition, the department shall do one of the following:

(a) If the department determines that the allegations are true, order the alleged violator to take whatever action is necessary to achieve compliance with the statute, rule, condition, limitation or restriction.

(b) Conduct a contested case hearing on the allegations of the petition. Within 60 days after the hearing, the department shall either dismiss the petition or notify the alleged violator of its finding that the allegations are true and order the alleged violator to take whatever action is necessary to achieve compliance with the statute, rule, condition, limitation or restriction.

(d) If the department determines that the allegations are untrue or that the petition was filed maliciously or in bad faith, dismiss the petition without holding a hearing.

(3) Any person who maliciously or in bad faith files a petition under sub. (1) is liable for attorney fees and damages or other appropriate relief to the person that is the subject of the petition.

History: 1985 a. 60; 1995 a. 227 s. 827; Stats. 1995 s. 281.94; 2007 a. 227.

281.95 Remedies; water withdrawal violations. Any person who makes a withdrawal in violation of s. 281.35, 281.344 (3) (a), or 281.346 (3) (a), in violation of a condition, limitation or restriction of a permit or approval issued in conformance with s. 281.35 (6) (a) or in violation of any rule promulgated under s. 281.35 (4) to (6), 281.344 (3) (a), or 281.346 (3) (a) is liable to any person who is adversely affected by the withdrawal for damages or other appropriate relief. Any person who is or may be adversely affected by an existing or proposed withdrawal which is in violation of a condition, limitation or restriction of a permit or approval issued in conformance with s. 281.35 (6) (a) or in violation of any rule promulgated under s. 281.35 (4) to (6) may bring an action in the circuit court to restrain or enjoin the withdrawal.

History: 1985 a. 60; 1995 a. 227 s. 828; Stats. 1995 s. 281.95; 2007 a. 227.

281.96 Visitorial powers of department. Every owner of an industrial establishment shall furnish to the department all information required by it in the discharge of its duties under subch. II, except s. 281.17 (6) and (7). Any member of the natural resources board or any employee of the department may enter any industrial establishment for the purpose of collecting such information, and no owner of an industrial establishment shall refuse to admit such member or employee. The department shall make such inspections at frequent intervals. The secretary and all members of the board shall have power for all purposes falling within the department's jurisdiction to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of necessary or essential data.

History: 1995 a. 227 ss. 402, 403.

281.97 Records; inspection. Records required by the department shall be kept by the owners and the department supplied with certified copies and such other information as it may require. Agents of the department may enter buildings, structures and premises of owners supplying the public or industrial plants with water, ice, sewerage systems, sewage or refuse disposal service and private properties to collect samples, records and information, and to ascertain if the rules and orders of the department are complied with.

History: 1995 a. 227 s. 410; Stats. 1995 s. 281.97.

281.98 Penalties. (1) Except as provided in ss. 281.344 (14) (a), 281.36, 281.346 (14) (a), 281.47 (1) (d), 281.75 (19), and 281.99 (2), any person who violates this chapter or any rule promulgated or any plan approval, license, special order, or water quality certification issued under this chapter shall forfeit not less than $10 nor more than $5,000 for each violation. Each day of continued violation is a separate offense. While an order is suspended, stayed, or enjoined, this penalty does not accrue.

(2) In addition to the penalties provided under sub. (1) or s. 281.99 (2), the court may award the department of justice the reasonable and necessary expenses of the investigation and prosecution of a violation of this chapter, including attorney fees. The department of justice shall deposit in the state treasury for deposit into the general fund all moneys that the court awards to the department or the state under this subsection. The costs of investigation and the expenses of prosecution, including attorney fees,

(g) Incorporate into a permit a condition of a publicly owned treatment works pretreatment program that has been approved by the department.

(2h) The department may, with the consent of the permittee, terminate a permit issued under s. 283.31 or 283.33 without following the procedures in sub. (2) (b) to (f).

(2m) The department may, upon request of the permittee, revise or modify a schedule of compliance in an issued permit if it determines that the revision or modification is necessary because of the happening of an event over which the permittee has little or no control. The first revision made under this subsection during the term of a permit need comply only with sub. (2) (c). Subsequent requests shall be subject to sub. (2) (b) to (f).

(3) (a) Any permittee who wishes to continue to discharge after the expiration date of the permittee's permit shall file an application for reissuance of the permit at least 180 days prior to its expiration.

(b) The department shall review each application for reissuance of a permit to ensure that:

1. The permittee is in substantial compliance with all the terms, conditions, requirements and schedules of compliance of the expired permit;

2. The department has current information on the permittee's production levels, waste treatment practices, and the nature, volume, content and frequency of the permittee's discharge;

3. The discharge is consistent with applicable effluent limitations and standards, water quality standards and any other legally applicable requirements, including any additions to, or revisions or modifications of such effluent limitations and standards, water quality standards, or other legally applicable requirements made during the term of the permit.

(c) If, after such review, the department finds that the requirements of par. (b) have not been met, the department shall not reissue such a permit.

(d) The department shall adhere to the notice and public participation procedures specified in ss. 283.39 to 283.49 in connection with each request for reissuance of a permit.

(e) Notwithstanding any other provisions of this section, any new source the construction of which is commenced after October 18, 1972, and which is so constructed to meet all standards of performance adopted under s. 283.19 shall not be subject to any more stringent standard of performance during either the 10–year period beginning on the date of completion of such construction or the period of depreciation or amortization of such facility for the purposes of section 167 or 169 of the internal revenue code, whichever period ends first.

(f) For the purposes of s. 283.63, denial of any application for the reissuance of a permit shall be treated as a denial of an application for a permit.

History: 1973 c. 74, 243; 1979 c. 221; 1985 a. 182 s. 57; 1991 a. 39; 1993 a. 16, 482; 1995 a. 227 s. 855; Stats. 1995 s. 283.53; 2011 a. 167; 2015 a. 307.

Timely review under s. 147.20 [now s. 283.63] of a modified permit does not reopen for consideration those unmodified portions of the permit for which the review period has expired. Village of Thiensville v. DNR, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986).

283.55 Monitoring and reporting; access to premises.

(1) MONITORING AND REPORTING REQUIREMENTS. Every owner or operator of a point source who is required to obtain a permit issued under s. 283.31 shall do all of the following:

(a) Establish and maintain records of the volume of effluent discharged and the amount of each pollutant discharged from each point source under the owner's or operator's ownership or control.

(b) Make regular reports to the department on the volume of effluent discharged and the amount of each pollutant discharged from each point source under the owner's or operator's ownership or control.

(c) Install, use and maintain such monitoring equipment or methods, including where appropriate, biological monitoring methods, as are necessary to determine the volume of effluent discharged and to identify and determine the amount of each pollutant discharged from each point source under the owner's or operator's ownership or control.

(d) Sample the effluents discharged from each point source under the owner's or operator's ownership or control in accordance with such methods, at such locations and in such manner as the department shall by rule prescribe.

(dm) Report any unscheduled discharge of untreated sewage or other wastewater to the department orally within 24 hours of the discharge and in writing within 5 days after the discharge.

(e) Provide such other information as the department finds is necessary to identify the type and quantity of any pollutants discharged from the point source.

(1m) REPORTS TO WATER UTILITIES. The department shall determine, after consultation with the owner or operator of the point source, whether to notify a public utility, as defined in s. 196.01 (5), that furnishes water to the public about a discharge reported under sub. (1) (dm) that may affect the public utility. The department shall base the determination on the public health risk caused by the discharge.

(2) ACCESS TO MONITORING EQUIPMENT AND RECORDS. (a) Any duly authorized officer, employee or representative of the department shall have right to enter upon or through any premises in which an effluent source that is required to be covered by a permit issued under s. 283.31 is located or in which any records required to be maintained by this section are located, and may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required by this section, and sample any effluents which the owner and operator of such source is required to sample under this section.

(b) No person shall refuse entry or access to any authorized representative of the department who requests entry under this subsection, and who presents appropriate credentials nor shall any person obstruct, hamper or interfere with any such inspection.

(c) Any records or other information furnished to or obtained by the department in the administration of this chapter, including effluent data, shall be a public record as provided in subch. II of ch. 19. Any records or other information, except effluent data, provided to the department may be treated as confidential upon a showing to the secretary that said records or information is entitled to protection as a trade secret as defined in s. 134.90 (1) (c). Nothing herein shall prevent the use of any confidential records or information obtained by the department in the administration of this section in compiling or publishing general analyses or summaries, if such analyses or summaries do not identify a specific owner or operator.

(3) CONSTRUCTION OF LAW. Subsection (1) shall be construed so as not to require actions unnecessarily redundant with s. 299.15. When a publicly owned treatment facility is required under state or federal law to monitor discharges into its system, records of such monitoring provided to the department, if substantially in compliance with the requirements of this section, shall serve in the place of the monitoring which would ordinarily be required of a person discharging into such system. Nothing in this section shall be construed to affect the validity of s. 299.15, nor shall that section be construed to limit the application of this section.

History: 1973 c. 74; 1979 c. 221 s. 2202 (39); 1981 c. 335 s. 26; 1985 a. 236; 1993 a. 16, 482; 1995 a. 227 s. 865; Stats. 1995 s. 283.55; 1999 a. 85.

Cross–reference: See also chs. NR 210, 211, 218, and 219, Wis. adm. code.

283.57 Waste treatment service charges.

No permit shall be issued to any publicly owned treatment works any part of which was constructed with the aid of federal grants made after March 1, 1973, unless it has adopted or will adopt a system of charges to assure that:

(1) Each recipient of waste treatment services shall pay its proportionate share of the cost of operation and maintenance, including replacement, of any waste treatment services provided by such treatment works;

285.14 State implementation plans. (1) CONTENT. The department may not submit a control measure or strategy that imposes or may result in regulatory requirements to the federal environmental protection agency for inclusion in a state implementation plan under 42 USC 7410 unless the department has promulgated the control measure or strategy as a rule.

(2) REVIEW BY STANDING COMMITTEES. At least 60 days before the department is required to submit a state implementation plan to the federal environmental protection agency, the department shall prepare, and provide to the standing committees of the legislature with jurisdiction over environmental matters, under s. 13.172 (3) a report that describes the proposed plan and contains all of the supporting documents that the department intends to submit with the plan. The department shall also submit to the legislative reference bureau for publication in the administrative register a notice of availability of the report. If, within 30 days after the department provides the report, the chairperson of a standing committee to which the report was provided submits written comments on the report to the department, the secretary shall respond to the chairperson in writing within 15 days of receipt of the comments. This subsection does not apply to a modification to a state implementation plan relating to an individual source.

History: 2003 a. 118; 2007 a. 20.

285.15 Interstate agreement. After May 14, 1992, the governor may enter into an agreement with the governor of the state of Illinois, that may also include the governors of the states of Indiana and Michigan, that specifies measures for the control of atmospheric ozone that are necessary in order to implement an interstate ozone control strategy to bring an area designated under 42 USC 7407 (d) as an ozone nonattainment area into attainment with the ambient air quality standard for ozone if the area includes portions of this state and the state of Illinois.

History: 1995 a. 227 ss. 458, 989.

Cross-reference: See also s. NR 1.50, Wis. adm. code.

285.17 Classification, reporting, monitoring, and record keeping. (1) (a) The department, by rule, shall classify air contaminant sources which may cause or contribute to air pollution, according to levels and types of emissions and other characteristics which relate to air pollution, and may require reporting for any such class. Classifications made pursuant to this section may be for application to the state as a whole or to any designated area of the state, and shall be made with special reference to effects on health, economic and social factors, and physical effects on property.

(b) Any person operating or responsible for the operation of air contaminant sources of any class for which the rules of the department require reporting shall make reports containing such information as the department requires concerning location, size and heights of contaminant outlets, processes employed, fuels used and the nature and time periods of duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled.

(2) (a) The department may, by rule or in an operation permit, require the owner or operator of an air contaminant source to monitor the emissions of the air contaminant source or to monitor the ambient air in the vicinity of the air contaminant source and to report the results of the monitoring to the department. The department may specify methods for conducting the monitoring and for analyzing the results of the monitoring. The department shall require the owner or operator of a major source to report the results of any required monitoring of emissions from the major source to the department no less often than every 6 months.

(b) Before issuing an operation permit that contains a monitoring requirement relating to the emissions from an air contaminant source, the department shall notify the applicant of the proposed monitoring requirement and give the applicant the opportunity to demonstrate to the administrator of the division of the department that administers this chapter that the proposed monitoring requirement is unreasonable considering, among other factors, monitoring requirements imposed on similar air contaminant sources. If the administrator determines that the monitoring requirement is unreasonable, the department may not impose the monitoring requirement. If the administrator determines that the monitoring requirement is reasonable, the applicant may obtain a review of that determination by the secretary. The secretary may not delegate this function to another person. If the secretary determines that the monitoring requirement is unreasonable, the department may not impose the monitoring requirement.

(3) The department may not post on the Internet any information that is required to be reported to the department under this chapter and that relates to a facility's air emissions, including the nature and duration of specific emissions of an air contaminant source and any results of monitoring the emissions of a contaminant source or the ambient air in the vicinity of a contaminant source, unless the department certifies that the information is accurate on the date on which the information is posted.

(4) The department shall evaluate the reporting, monitoring, and record–keeping requirements it imposes, as of July 2, 2013, on owners and operators of stationary sources that are required to have operation permits under s. 285.60 but that are not required to have operation permits under the federal clean air act. The department shall promulgate rules that simplify, reduce, and make more efficient those requirements, consistent with any applicable requirements under the federal clean air act.

History: 1991 a. 302; 1995 a. 227 s. 478; 1999 a. 9; 2003 a. 118; 2013 a. 20.

Cross-reference: See also NR 400–, Wis. adm. code.

285.19 Inspections. Any duly authorized officer, employee or representative of the department may enter and inspect any property, premises or place on or at which an air contaminant source is located or is being constructed or installed at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and s. 299.15 and rules promulgated or permits issued under this chapter or s. 299.15. No person may refuse entry or access to any authorized representative of the department who requests entry for purposes of inspection, and who presents appropriate credentials. No person may obstruct, hamper or interfere with any such inspection. The department, if requested, shall furnish to the owner or operator of the premises a report setting forth all facts found which relate to compliance status.

History: 1971 c. 125 s. 522 (2); 1979 c. 34; 1979 c. 221 s. 2202 (39); 1991 a. 302; 1993 a. 491; 1995 a. 227 s. 461; Stats. 1995 s. 285.19.

Cross-reference: See also ch. NR 439, Wis. adm. code.

SUBCHAPTER III

AIR QUALITY STANDARDS, PERFORMANCE STANDARDS; EMISSION LIMITS AND NONATTAINMENT AREAS

285.21 Ambient air quality standards and increments. (1) AMBIENT AIR QUALITY STANDARDS. (a) *Similar to federal standard.* If an ambient air quality standard is promulgated under section 109 of the federal clean air act, the department shall promulgate by rule a similar standard but this standard may not be more restrictive than the federal standard except as provided under sub. (4).

(b) *Standard to protect health or welfare.* If an ambient air quality standard for any air contaminant is not promulgated under section 109 of the federal clean air act, the department may promulgate an ambient air quality standard if the department finds that the standard is needed to provide adequate protection for public health or welfare. The department may not make this finding for an air contaminant unless the finding is supported with written documentation that includes all of the following:

1. A public health risk assessment that characterizes the types of stationary sources in this state that are known to emit the air

ardous waste is disposed of or to any intermediate hauler used to transport the solid or hazardous waste to a licensed facility.

History: 2013 a. 333.

289.68 Payments from the waste management fund and related payments. (1) PAYMENTS FROM THE WASTE MANAGEMENT FUND. The department may expend moneys in the waste management fund only for the purposes specified under subs. (3) to (6) and 1991 Wisconsin Act 39, section 9142 (2w). The department may expend moneys appropriated under s. 20.370 (2) (dq) for the purposes specified under subs. (3) and (5) and 1991 Wisconsin Act 39, section 9142 (2w). The department may expend moneys appropriated under s. 20.370 (2) (dt) for the purposes specified under sub. (4). The department may expend moneys appropriated under s. 20.370 (2) (dy) and (dz) for the purposes specified under sub. (6).

(2) PAYMENTS FROM THE INVESTMENT AND LOCAL IMPACT FUND. The department may expend moneys received from the investment and local impact fund only for the purposes specified under sub. (3), only for approved mining facilities and only if moneys in the waste management fund are insufficient to make complete payments. The amount expended by the department under this subsection may not exceed the balance in the waste management fund at the beginning of that fiscal year or 50 percent of the balance in the investment and local impact fund at the beginning of that fiscal year, whichever amount is greater.

(3) PAYMENTS FOR LONG–TERM CARE AFTER TERMINATION OF PROOF OF FINANCIAL RESPONSIBILITY. The department may spend moneys appropriated under s. 20.370 (2) (dq) for the costs of long–term care of an approved facility for which the plan of operation was approved under s. 289.30 (6) before August 9, 1989, that accrue after the requirement to provide proof of financial responsibility expires under s. 289.41 (1m) (b) or (f) as authorized under s. 289.41 (11) (b) 2.

(4) PAYMENT OF CLOSURE AND LONG–TERM CARE COSTS; FORFEITED BONDS AND SIMILAR MONEYS. The department may utilize moneys appropriated under s. 20.370 (2) (dt) for the payment of costs associated with compliance with closure and long–term care requirements under s. 289.41 (11) (b) 1.

(5) PREVENTION OF IMMINENT HAZARD. The department may utilize moneys appropriated under s. 20.370 (2) (dq) for the payment of costs associated with imminent hazards as authorized under s. 289.41 (11) (c) and (cm).

(6) PAYMENT OF CORRECTIVE ACTION, FORFEITED BONDS AND RECOVERED MONEYS. The department may utilize moneys appropriated under s. 20.370 (2) (dy) and (dz) for the payment of costs of corrective action under s. 289.41 (11) (bm).

(7) REPORT ON WASTE MANAGEMENT FUND. With its biennial budget request to the department of administration under s. 16.42, the natural resources board shall include a report on the fiscal status of the waste management fund and an estimate of the receipts by and expenditures from the fund in the current fiscal year and in the future.

History: 1995 a. 227 s. 590, 591.

SUBCHAPTER VIII

ENFORCEMENT; PENALTIES

289.91 Inspections. Any officer, employee or authorized representative of the department may enter and inspect any property, premises or place on or at which a solid waste facility is located or is being constructed or installed, or inspect any record relating to solid waste management of any person who generates, transports, treats, stores or disposes of solid waste, at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules promulgated or licenses issued under this chapter. No person may refuse entry or access to any officer, employee or authorized representative of the department who requests entry for purposes of inspection, and who presents appropriate credentials. No person may obstruct, hamper or interfere with any such inspection. The department, if requested, shall furnish to the owner or operator of the premises a report setting forth all facts found which relate to compliance status.

History: 1979 c. 34; 1981 c. 374 s. 148; 1987 a. 384; 1993 a. 491; 1995 a. 227 s. 529; Stats. 1995 s. 289.91.

289.92 Review of alleged violations. Any 6 or more citizens or any municipality may petition for a review of an alleged violation of this chapter or any rule promulgated or special order, plan approval, license or any term or condition of a license issued under this chapter in the following manner:

(1) They shall submit to the department a petition identifying the alleged violator and setting forth in detail the reasons for believing a violation occurred. The petition shall state the name and address of a person within the state authorized to receive service of answer and other papers in behalf of the petitioners and the name and address of a person authorized to appear at a hearing in behalf of the petitioners.

(2) Upon receipt of a petition under this section, the department may:

(a) Conduct a hearing in the matter within 60 days of receipt of the petition. A hearing under this paragraph shall be a contested case under ch. 227. Within 60 days after the close of the hearing, the department shall either:

1. Serve written notice specifying the law or rule alleged to be violated, containing findings of fact, conclusions of law and an order, which shall be subject to review under ch. 227; or

2. Dismiss the petition.

(b) Initiate action under s. 289.97.

(3) If the department determines that a petition was filed maliciously or in bad faith, it shall issue a finding to that effect, and the person complained against is entitled to recover expenses on the hearing in a civil action.

History: 1981 c. 374; 1995 a. 227 s. 640; Stats. 1995 s. 289.92.

289.93 Orders. The department may issue orders to effectuate the purposes of this chapter and enforce the same by all appropriate administrative and judicial proceedings.

History: 1995 a. 227 s. 524.

289.94 Imminent danger. (1) NOTICE REQUIRED. If the department receives evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste may present an imminent and substantial danger to health or the environment, the department shall do all of the following:

(a) Provide immediate notice of the danger to each affected municipality.

(b) Promptly post notice of the danger at the site at which the danger exists, or order a person responsible for the danger to post such notice.

(2) OTHER ACTIONS. In addition to the actions under sub. (1), the department may do one or more of the following:

(a) Issue any special order necessary to protect public health or the environment.

(b) Take any other action necessary to protect public health or the environment.

(c) Request the department of justice to commence legal proceedings to restrain or enjoin any person from handling, storage, treatment, transportation or disposal which presents or may present an imminent and substantial danger to health or the environment or take any other action as may be necessary to protect public health and the environment.

History: 1995 a. 227 s. 991.

289.95 Enforcement procedures for older facilities. (1) Notwithstanding s. 289.97, for solid waste facilities licensed on or before January 1, 1977, that the department believes do not meet minimum standards promulgated under s. 289.05 (1) and (2), the department may do any of the following:

(a) Initiate action under s. 289.94.

mance with the reclamation plan within one year after completion or abandonment of mining on any segment of the mining site, or if the exploration license or prospecting or mining permit is revoked under s. 293.87 (2) and (3), excepting acts of God, such as adverse weather affecting grading, planting and growing conditions, the department, with the staff, equipment and material under its control, or by contract with others, shall take such actions as are necessary for the reclamation of mined areas. The operator shall be liable for the cost to the state of reclamation conducted under this section. Any operator who is exempted from filing a bond or depositing cash, certificates of deposits or government securities by s. 293.51 (6) shall not be liable for an amount greater than an amount specified by the department. The specified amount shall be equal to and determined in the same manner as the amount of the bond or other security otherwise required under s. 293.51 (1), assuming the operator had not been exempt from such filing or depositing.

(3) All other prospecting and mining permits held by an operator who refuses to reclaim a mining site in compliance with the reclamation plan after the completion of mining or after the cancellation of a mining permit shall be canceled. The department may not issue any prospecting or mining permits for that site or any other site in this state to an operator who refused to reclaim a mining site in compliance with the reclamation plan.

(4) (a) The department may issue a stop order to an operator, requiring an immediate cessation of mining, in whole or in part, at any time that the department determines that the continuance of mining constitutes an immediate and substantial threat to public health and safety or the environment.

(b) If no hearing on the stop order was held, the department shall schedule a hearing on the stop order, to be held within 5 days after issuance of the order and shall incorporate notice of the hearing in the copy of the order served upon the operator. The department also shall give notice to any other persons who previously requested notice of such proceedings.

(c) Within 72 hours after commencement of any hearing under par. (b), unless waived by agreement of the parties, the department shall issue a decision affirming, modifying or setting aside the stop order. The department may apply to the circuit court for an order extending the time, for not more than 10 days, within which the stop order shall be affirmed, modified or set aside.

(d) The department shall set aside the stop order at any time, with adequate notice to the parties, upon a showing by the operator that the conditions upon which the order was based no longer exist.

History: 1973 c. 318; 1977 c. 421; 1981 c. 86; 1995 a. 227 s. 793; Stats. 1995 s. 293.83; 1997 a. 193, 252.

293.85 Cancellation of permit. The department may, after hearing, cancel:

(1) The prospecting permit for a prospecting site that is the site of a violation of this chapter.

(2) The mining permit for a mining site that is the site of a violation of this chapter.

(3) A mining or prospecting permit, if the permit holder intentionally made a false statement in the permit application or intentionally omitted information from the permit application which was material to permit issuance.

History: 1995 a. 227 s. 750, 994.

293.86 Visitorial powers of department. Any duly authorized officer, employee or representative of the department may enter and inspect any property, premises or place on or at which any prospecting or mining operation or facility is located or is being constructed or installed at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and chs. 281, 285, 289 to 292, and 299, subchs. I and II of ch. 295, and rules adopted pursuant thereto. No person may refuse entry or access to any such authorized representative of the department who requests entry for purposes of inspection, and who presents appropriate credentials, nor may any person obstruct, hamper or interfere with any such inspection. The department shall furnish to the prospector or operator, as indicated in the prospecting or mining permit, a written report setting forth all observations, relevant information and data which relate to compliance status.

History: 1995 a. 227 s. 404; 2013 a. 1.

293.87 Enforcement; penalties. (1) All orders issued, fines incurred, bond liabilities incurred or other violations committed under this chapter shall be enforced by the department of justice. The circuit court of Dane County or any other county where the violation occurred shall have jurisdiction to enforce this chapter or any orders issued or rules adopted thereunder, by injunctional or other appropriate relief.

(2) Any person who makes or causes to be made in an application or report required by this chapter a statement known to the person to be false or misleading in any material respect or who refuses to file an annual report under s. 293.53 (2) (a) or who refuses to submit information required by the prospecting or mining permit may be fined not less than $1,000 nor more than $5,000. If the false or misleading statement is material to the issuance of the permit, the permit may be revoked. If any violation under this subsection is repeated the permit may be revoked.

(3) Any person holding a prospecting or mining permit who violates this chapter or any order issued or rule adopted under this chapter shall forfeit not less than $10 nor more than $10,000 for each violation. Each day of violation is a separate offense. If the violations continue after an order to cease has been issued, the permit shall be revoked.

(4) (a) Except for the violations enumerated in subs. (2) and (3), any person who violates this chapter or any rule promulgated or any plan approval, license or special order issued under this chapter shall forfeit not less than $10 nor more than $5,000 for each violation. Each day of continued violation is a separate offense. While an order is suspended, stayed or enjoined, this penalty does not accrue.

(b) In addition to the penalties provided under par. (a), the court may award the department of justice the reasonable and necessary expenses of the investigation and prosecution of the violation, including attorney fees. The department of justice shall deposit in the state treasury for deposit into the general fund all moneys that the court awards to the department or the state under this paragraph. The costs of investigation and the expenses of prosecution, including attorney fees, shall be credited to the appropriation account under s. 20.455 (1) (gh).

History: 1973 c. 318; 1977 c. 421; 1995 a. 227 s. 796, 994; Stats. 1995 s. 293.87; 2001 a. 109; 2003 a. 309.

293.89 Citizen suits. (1) Except as provided in sub. (2), any citizen may commence a civil action on his or her own behalf:

(a) Against any person who is alleged to be in violation of this chapter.

(b) Against the department where there is alleged to be a failure of the department to perform any act or duty under this chapter which is not discretionary with the department.

(2) No action may be commenced:

(a) Under sub. (1) (a):

1. Prior to 30 days after the plaintiff has given notice of the alleged violation to the department and to the alleged violator; or

2. If the department has commenced and is diligently prosecuting a civil or criminal action, but in any such action any citizen may intervene as a matter of right.

(b) Under sub. (1) (b) prior to 30 days after the plaintiff has given notice of such action to the department.

(3) The court, in issuing any final order in any action brought under this section, shall award costs of litigation including reasonable attorney and expert witness fees to the plaintiff if he or she prevails, and the court may do so if it determines that the outcome of the controversy is consistent with the relief sought by the plaintiff irrespective of the formal disposition of the civil action. In

(f) Any mining operation, the reclamation of which is required in a permit obtained under ch. 293 or subch. III of ch. 295.

(g) Any activities required to prepare, operate or close a solid waste disposal facility under subchs. II to IV of ch. 289 or a hazardous waste disposal facility under ch. 291 that are conducted on the property on which the facility is located, but a nonmetallic mining reclamation ordinance and the standards established under s. 295.12 (1) (a) apply to activities related to solid waste or hazardous waste disposal that are conducted at a nonmetallic mining site that is not on the property on which the solid waste or hazardous waste disposal facility is located such as activities to obtain nonmetallic minerals to be used for lining, capping, covering or constructing berms, dikes or roads.

(i) Dredging for navigational purposes, to construct or maintain farm drainage ditches and for the remediation of environmental contamination and the disposal of spoils from that dredging.

(j) Removal of material from the bed of Lake Michigan or Lake Superior by a public utility pursuant to a permit under s. 30.21.

History: 1995 a. 227 s. 806; 1997 a. 27; 1999 a. 9; 2013 a. 1.

295.17 Inspection. (1) An agent of a county, city, village or town that has a nonmetallic mining reclamation ordinance that complies with s. 295.13 or 295.14 may enter a nonmetallic mining site in the performance of his or her official duties at any reasonable time in order to inspect those premises and to ascertain compliance with this subchapter. No person may refuse entry or access to an agent of the county, city, village or town who requests entry for purposes of inspection, and who presents appropriate credentials. No person may obstruct, hamper or interfere with the inspection. The county, city, village or town shall furnish to the operator any report prepared by the county, city, village or town regarding the inspection.

(2) Any duly authorized officer, employee or representative of the department may enter and inspect any property, premises or place on or at which any nonmetallic mining operation is located or is being constructed or installed at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and chs. 281, 285, 289 to 293 and 299 and rules adopted pursuant thereto. No person may refuse entry or access to any such authorized representative of the department who requests entry for purposes of inspection, and who presents appropriate credentials, nor may any person obstruct, hamper or interfere with any such inspection. The department shall furnish to the nonmetallic mining site operator a written report setting forth all observations, relevant information and data which relate to compliance status.

History: 1995 a. 227 s. 808, 995; 1997 a. 27.

295.18 Department review. (1) REVIEW. The department shall periodically review the nonmetallic mining reclamation program under this subchapter of each county and each city, village or town that exercises jurisdiction under this subchapter to ascertain compliance with this subchapter and the rules promulgated under this subchapter. This review shall include all of the following:

(a) A performance audit of the nonmetallic mining reclamation program of the county, city, village or town.

(b) Verification, by on–site inspections, of county, city, village or town compliance with this subchapter and rules promulgated under this subchapter.

(c) A written determination by the department, issued at least once every 10 years, of whether the county, city, village or town is in compliance with this subchapter and rules promulgated under this subchapter.

(2) NONCOMPLIANCE; HEARING. If the department determines under sub. (1) that a county, city, village or town is not in compliance with this subchapter and rules promulgated under this subchapter, the department shall notify the county, city, village or town of that determination. If the department decides to pursue the matter, it shall conduct a hearing, after 30 days' notice, in the county, city, village or town. As soon as practicable after the hearing, the department shall issue a written decision regarding compliance with this subchapter and rules promulgated under this subchapter.

(3) MUNICIPAL NONCOMPLIANCE; CONSEQUENCES. If the department determines under sub. (2) that a city, village or town is not in compliance with this subchapter and rules promulgated under this subchapter, the city, village or town may not administer the nonmetallic mining reclamation program. The county nonmetallic mining reclamation ordinance applies to that city, village or town and the county shall administer the nonmetallic mining reclamation program in that city, village or town. The city, village or town may apply to the department to resume its authority to administer the nonmetallic mining reclamation program, but not sooner than 3 years after the department issues a decision under sub. (2). The department, after a hearing, may approve the city, village or town request to administer the nonmetallic mining reclamation program if the city, village or town demonstrates the capacity to comply with this subchapter and rules promulgated under this subchapter.

(4) COUNTY NONCOMPLIANCE; CONSEQUENCES. If the department issues a written decision under sub. (2) that a county is not in compliance with this subchapter and rules promulgated under this subchapter, the department shall administer the nonmetallic mining reclamation program in that county, including the collection of fees, review and approval of plans, inspection of nonmetallic mining sites and enforcement, except that the department may not administer the nonmetallic mining reclamation program in a city, village or town that enacted an ordinance that complies with s. 295.14 before the department made its determination under sub. (2) and is administering that ordinance. The county may apply to the department at any time to resume administration of the nonmetallic mining reclamation program. The department, after a hearing, may approve the county request to administer the nonmetallic mining reclamation program if the county demonstrates the capacity to comply with this subchapter and rules promulgated under this subchapter. No city, village or town may enact an ordinance for and begin to implement a nonmetallic mining reclamation program during the time that the department administers the nonmetallic mining reclamation program in the county in which the city, village or town is located.

History: 1995 a. 227 s. 809; 1997 a. 27.

295.19 Enforcement; remedies; penalties. (1) ORDERS; ENFORCEMENT. The governing body of a county, city, village or town that has a nonmetallic mining reclamation ordinance that complies with s. 295.13 or 295.14, or an agent designated by that governing body, may do any of the following:

(a) Issue an order requiring an operator to comply with, or to cease violating, this subchapter, rules promulgated under this subchapter, the nonmetallic mining reclamation ordinance, a nonmetallic mining reclamation permit or an approved nonmetallic mining reclamation plan.

(b) Issue an order suspending or revoking a nonmetallic mining reclamation permit as authorized in the nonmetallic mining reclamation ordinance.

(c) Issue an order directing an operator to immediately cease an activity regulated under this subchapter, under rules promulgated under this subchapter or under the nonmetallic mining reclamation ordinance until the necessary nonmetallic mining reclamation plan approval is obtained.

(d) Submit orders to abate violations of the nonmetallic mining reclamation ordinance to the district attorney, the corporation counsel, the municipal attorney or the attorney general for enforcement. The district attorney, the corporation counsel, the municipal attorney or the attorney general may enforce those orders.

(2) DEPARTMENT ORDERS. The department may issue an order directing the immediate cessation of an activity regulated under

July 19, 2017

Dear Representatives Kleefisch, Quinn, Tittl, Edming, Nerison, Mursau, Skowronski, Ripp, Tusler, Stafsholt, Milroy, Heselbein, Spreitzer, Stuck, and Brostoff,

I was a conservation warden for nearly 30 years, the last 15 years as the Chief Warden. Following retirement I taught conservation and environmental law courses at UWSP for six years. I am a graduate of the FBI National Academy and was the 1st President of the National Association of Conservation Law Enforcement Chiefs.

I served under several governors, both Republican and Democrat, none of whom I believe would have supported this bill.

I'm a private landowner in Adams County and I'm opposed to this Bill, **AB411.**

I am perplexed as to the motivations behind supporters of this bill. For many years there have been no standing legal issues relating to privacy on open lands. This issue has been adjudicated numerous times by the Wisconsin and U.S. Supreme Courts and time after time the courts have consistently upheld the right and responsibility of Law Enforcement officers to enter open lands, which is the "open fields doctrine."

While AB411 seems punitively aimed at only conservation officers, the practical effect of preventing wardens' presence on private lands would be to transfer OWNERSHIP of Wisconsin's wildlife and environmental resources to every private land owner. This flies in the face of Wisconsin's policies since statehood!

Outdoor recreation in Wisconsin is a $12 billion endeavor, involving all of its land and water resources. We have about 6 million acres of public lands but 6 times as much land in private ownership. It should be apparent that our state's waters and wildlife (resources) do not only inhabit its public lands. The state's management and control of these resources MUST include some oversight of activities on private lands.

Wisconsin conservation wardens' work and their presence, in all of our counties and on all of the lands and waters in Wisconsin is essential to the proper management and protection of our resources, for the benefit of ALL our citizens.

Thank you.

Ralph E. Christensen Ralph Christensen

2425 First Avenue, Westfield, WI 53964

608-296-2925

chrispr@maqs.net

COMMENTS

ASSEMBLY BILL 411

By: John Wetzel July 18, 2017

I am John Wetzel and reside in La Crosse County.

I am opposed to AB 411 that removes the authority of conservation wardens from entering private property to enforce fish and game laws.

Fish and wildlife are public resources and wardens need to maintain the authority to enter the 80 percent of Wisconsin's land that is private to protect these resources for us - the public!

I am an active waterfowler and a member of several groups including the La Crosse County Conservation Alliance and the Waterfowl Committee of the Wisconsin Wildlife Federation. These groups work with the DNR to set annual waterfowl regulations.

Duck regulations are set so that there can be a fair distribution of harvest opportunity among all state waterfowlers. In addition several species such as mallards and wood ducks have restricted bag limits so that adequate numbers of these important species will return to breed in the state each year in order to provide huntable populations from year-to-year.

Concerning Canada geese, about half our harvest is from the Mississippi Valley Population which breeds along Hudson and James Bays in Manitoba, Canada. The population of MVP geese have been slowly dropping and protections are provided in Wisconsin by setting a special zone where many stop around Horicon Marsh - The Horicon Zone. In this Zone, hunters are limited to 12 geese per year and statewide, the daily bag limit is two geese per day, while other states allow up to five.

Without the ability of wardens to check private property, will illegal activity on private property be sufficient to tip the delicately balance of these species leading to reduced bag limits and/or seasons in Wisconsin?

Conservation groups from throughout the state have worked diligently with the DNR to prevent such a catastrophe. I hope you agree with us and will vote to reject Assembly Bill 411.

Thanks You -
John Wetzel
608-526-4238

Testimony to Assembly Committee on Natural Resources and Sporting Heritage

"AB 411 harms wildlife conservation"

July 18, 2017

Good morning Mr. Chairman and to all committee members. My name is Tom Hauge. I live in Prairie du Sac, Wisconsin. I have a passion for wildlife and have spent most of my 64 years working for wildlife conservation. I believe AB 411 is harmful to the conservation of our fish and wildlife resources. Specifically, I believe that AB 411 will a) make it harder to implement conservation policy, b) damage the accuracy of harvest data, and c) delay the discovery and response to fish and wildlife health emergencies.

Conservation Policy -Here in Wisconsin, and across America, we are the beneficiaries of a legal framework where the wildlife we enjoy and use are a public trust resource. Simply put, it means that no one person owns the wildlife, it belongs to all of us. This public trust doctrine has been built into state and federal regulations, as well as, international treaties to ensure that our human use of fish and wildlife resources is sustainable and will provide for healthy populations for future generations. This system has led to remarkable restorations of many wildlife populations that were over-exploited during the first 100 years of our country's history. A critical component of this system, is the development of professional conservation wardens that enforce and encourage compliance with the regulations that protect fish and wildlife.

My family is fortunate enough to own 20 acres in southwestern Sauk County. Our 20 acres is 10 acres less than the average forest landownership in Wisconsin as of 2006. I mention this because neither my family or the average Wisconsin forest landowner owns enough land to provide for the annual life-cycle needs of Wisconsin's wildlife species. Looking just at hunted species, nearly all species we hunt have home-ranges that are larger than the average ownership. This means that my family depends on all our neighbors following the conservation regulations to have healthy, huntable wildlife populations on the 20 acres we enjoy. Thankfully, most landowners do want to follow the regulations, but unfortunately, we all know some will make other choices. Our conservation wardens maximize neighborhood compliance through field checks during hunting seasons or other times of the year. If they are forced out of the woods, compliance is very likely to erode.

Harvest Data Accuracy – During my career as a Wisconsin DNR wildlife biologist, and as Director of the Wildlife Management Program, I understood that good conservation is dependent upon good data to make our decisions on. This remains true today. In the world of deer management, we now have citizen County Deer Advisory Councils (CDACs) that spend a great deal of time making recommendations on annual antlerless deer quotas and harvest permits. CDACs look closely at harvest data to inform their decisions. They trust that the harvest data accurately reflects what happened. This means that we need to maintain high levels of hunter

compliance with harvest reporting regulations and have an accurate estimate of hunter compliance rates. Warden field checks of hunters are critical to both maximizing harvest reporting compliance, as well as, providing an estimate on compliance rates. Last week, I visited with a retired warden who spent their entire career in Sauk County. When I asked what percentage of the private land field checks would be prevented if AB 411 became law, he indicated virtually all of them. I hate to think of losing the thousands of field checks he made during a 30-year career and impact those encounters had on the hunters and their hunting parties.

During a typical Wisconsin deer hunting season, wardens make hundreds of private land field checks of archers, crossbow and firearm hunters. With each encounter, wardens gain data on the hunter's success which then can be used to later compare against the harvest reporting database. This crosscheck allows the Department and CDACs to gather information on compliance rates which is important making decisions going forward.

AB 411 is likely to lead to reduced harvest reporting compliance and we'd also be losing our eyes in the field technique to measure compliance rates.

Wildlife Health Emergencies – Conservation wardens are most often the "first responders" when a report comes in about a health emergency occurring with Wisconsin's fish and wildlife populations. Using a Sauk County example, in the late 1980s, we had a significant duck die-off occur northwest of Spring Green. The die-off occurred on private agricultural fields. Because Wisconsin wardens can enter onto private lands, this die-off was quickly located and we were able to determine the cause for the die-off. In this case, the cause was the inappropriate disposal of organo-phosphate pesticide. By the way, the warden that discovered the source did suffer some short-term illness as result of absorbing some of the toxins through handling of the dead waterfowl.

Under AB 411, this warden would not have been able to enter on the land to locate the die-off site and secure it. This is a function that conservation wardens perform that is currently supported by existing law. Significant wildlife mortality events are thankfully uncommon, but when they occur it is very important that we react quickly to diagnose the cause and act to limit the impact. We should not limit our conservation warden's ability health emergency first responder role on enter private lands.

I'd urge your committee to not advance AB 411.

Thank you for your time.

Tom Hauge, Retired WDNR Wildlife Director
1225 Sunset Circle
Prairie du Sac, WI 53578

Mr. Chairman and members of the Committee,

RE: AB 411/SB 321

My name is Rolland Lee and I reside at W 10366 Deer Print Trail, Black River Falls, Wisconsin.

I am in opposition to AB 411/SB 321.

My educational background and employment experience influence my decision to oppose these bills. Upon graduating from UW-Stevens Point with duel majors in Biology and Conservation and after Naval Officer Candidate School, I was a commissioned officer in the United States Navy for three years assigned as the gunnery officer, and later ship's boatswain, on a ship which was the Primary Control Ship for six combat landings in Viet Nam. After separation from duty, I was appointed a Wisconsin Conservation Warden, first in Oshkosh and later Eau Claire. Then, I was selected as a Special Agent for the Federal Bureau of Investigation assigned first to the San Francisco Division and later the Seattle Division, working criminal cases. When my father's health began to decline, I resigned as Special Agent, FBI, and returned to the warden service where I served first in Horicon as the Dodge County warden. Next I served as warden supervisor covering four counties, headquartered at Black River Falls for nearly ten years. Following, I was District Warden (retitled later to Regional Warden) at Green Bay for oversight of the law enforcement program in fourteen counties and the waters of Green Bay and northern Lake Michigan. Lastly, I was promoted to Deputy Chief Warden in the central office for fourteen years. Upon retirement

relocated to Black River Falls where I served as Chairman to the Police Commission for a combined department from the city and Tn. of Brockway. And, after resignation of the Sheriff, I worked with others to have the new Sheriff appointed by the Honorable Governor Tommy G. Thompson and served for six and one-half years as the Undersheriff.

The "Open Fields Doctrine" applies to all law enforcement disciplines—local, county, state and federal officers. Long established from Common Law and supported by a number of court decisions, it is good law. And further, it is reasonable law. Establishing, by state statute, an exception by instituting "reasonable suspicion" or permission to enter the land creates problematic issues.

Some consequences of this new legal requirement before entering private property are:

- Fewer license compliance checks, hence eventual falling revenue for all fish and game programs.
- Rapid response to citizen complaints of violations will be impeded while additional facts are obtained to support the standard of reasonable suspicion.
- Development of co-operators (citizen informants) will be eroded when immediate response to violations does not occur. (Not infrequently these co-operators are hunting party members and family members, including spouses, which wardens do not want to disclose.)
- Violators trespassing on lands of another will more likely escape apprehension.

- Riparian rights of land ownership of stream beds and certain flowed lands will confound migratory bird, trapping, and fishing enforcement.
- Other law enforcement agencies under ss. 29.941 are impacted as the law, in part, reads: "All Sheriffs, deputy sheriffs and other law enforcement officers are deputy conservation wardens-----".
- "Additional Arrest Powers" conferred on Conservation Wardens under Chapter 29 may bring enforcement difficulties when fish or game violations are discovered when these arrests are made.
- Absentee land ownership becomes especially problematic as time to obtain permission may allow violators to escape apprehension.
- Crossing one or more parcels to reach a landlocked parcel where a violation is or has occurred may require permission of one or more owners.
- Parcels of land with multiple owners or corporate owners set up compounding difficulty for determining proper permission.
- ATV laws are enumerated in Chapter 23, accordingly wardens may enter private land to enforce those laws but at times wildlife laws may found to be in violation creating an unreasonable circumstance to void apprehension for the wildlife violations, under this legislative proposal.

Wildlife laws in Wisconsin are predicated by the notion that all wildlife is held in trust by the State of Wisconsin for the reasonable, lawful enjoyment of all people. The first principle in wildlife management is a high level of compliance of wildlife laws. The law must be enforced to ensure adequate and sustainable populations.

Respectfully,

Rolland E. Lee

Statement of opposition to AB 411- Creating costly problems for conservation, the public and law enforcement

Good Morning Members of the Assembly Natural Resources and Sporting Heritage Committee. Thank you for your public service and your listening to concerned citizens as well as experts on this important issue. My name is Thomas Thoresen. I want to express my deepest concerns of the negative, costly impacts that AB 411 will have on conservation, the public and law enforcement.

I have been a lifelong Wisconsin resident who has fished since being able to hold a fishing rod and has been actively partaking in Wisconsin's Hunting Heritage for over 55 years. Besides raising me to love our natural resources, my parents instilled in me a desire to be an advocate for good, clean and transparent government. My professional career started 42 years ago while working in the Assembly Chief Clerk's Office while attending UW Madison and then being hired as a conservation warden in 1979. Over my 26 year DNR career, I held positions as a field warden, warden safety specialist, environmental warden, warden supervisor, Deputy Enforcement Administrator, Recreational Safety Section Chief, Deputy and Acting Chief Warden. While I retired after 30 years of State Service in 2005, I have continued to stay active in conservation issues as a volunteer Hunter Safety Instructor, Board Member of Wisconsin League of Conservation Voters, member of the County Park Commission and my local Police and Fire Commission.

You all should have already received a letter from Randy Stark, the most recently retired Chief Conservation Warden on AB 411. I not only want to call your attention to make sure you read the deep concerns Randy Stark raised in his letter, but I too would also like to state why this causes costly problems for conservation, the public and all law enforcement, not just conservation wardens. I'm sure you will hear numerous people today give examples of why this is of serious concern to them as well.

First, let me reinforce the importance of protection of private property rights and our need to protect our natural resources. The Courts have struck this balance over the last 125 years with 4th Amendment protections as well as the "Open Fields Doctrine".

Secondly, let me explain why this legislation or some version of it will likely be costly in many ways to Wisconsin and our citizens. The natural resources and our environment will be harmed. Wisconsin relies mostly on voluntary compliance in protection of our natural resources. Conservation Wardens are spread very thin and their ability to check compliance on both public and private property is critical to successful protection and enhancement of the resources. This proposal would directly result in eventual substantial losses in quality resource protection and revenues to assure successful conservation programs. This is especially true in that I understand Wisconsin has over 80 % of the lands in private ownership. Examples: here is one as a field warden: anonymous hotline complaint; Waterfowl decoys left unattended in open water. When checking the complaint, not only is hunting occurring, the pond is baited. Conservation wardens need to follow up on these private land complaints and potentially take

enforcement action or unfair advantage and overharvest to the resources will occur. Another example: Substantial conservation programs revenue loss: I recently talked with fellow retired conservation warden from Chippewa County Dean Gullickson. Dean was shocked at how bad this legislation was and explained why being able to checking license compliance on private lands is critical. When he was a new warden in Chippewa County in the late 1980's, Dean went way back into a remote location in Chippewa County. Dean said he discovered 3 unlicensed deer hunters. When asked why they didn't have a deer hunting license, the response was" I've never been checked in my entire life". Like speeders on the highway, there is certainly a deterrent effect if people think they even might get checked.

Private landowners will not only be robbed by those on other properties who may violate the laws, private landowners potentially won't get the service to protection of their lands they do under the current law. Here is a real case example that retired Sauk County conservation warden John Buss gave me: A number of years ago, hundreds, thousands of tires were being dumped on rural private lands in Sauk and Richland counties. What helped the conservation wardens catch these polluters was they used" open fields doctrine " and followed big truck tracks that went back into these remote areas. Private landowners appreciated that their land could be protected and cleaned up from the illegal dumping.

Public safety undermined. Under the current authority, conservation wardens make it a priority to prevent problems especially in making sure safety laws are followed often by simply educating the public whether on public or private property about proper firearm handling, transportation, blaze orange/blaze pink clothing requirements, age of hunters being on their own, etc. A couple of other areas that could often prevent a problem from escalating that may or may not involve any reasonable suspicion of a violation, is when a dispute evolves on who is entitled to tag a deer. Thankfully most of these situations are avoided by people working out agreements with their private property neighbors ahead of time or seeking permission when it happens. Not always. Twice in my working 26 deer seasons in the field I had to resolve an otherwise tense situation where a deer tagging dispute erupted. Same can be said of removing those who are hunting while under the influence of intoxicants. Again, while extremely rare, it is a safety issue. Might the problem increase if conservation wardens no longer are doing compliance checks on private land? It will. It certainly won't go down.

One of the other areas of significant cost concerns will be in the area of litigation that will be passed on to the taxpayers. Let me give just a few examples. I checked and currently over 5,550 DNR Hotline complaints come into DNR each year. Thousands more go directly to the conservation warden or through the Sheriff's Dept. Each of these complaints have various levels of information that varies from sketchy/anonymous to concrete detailed information including substantial facts as well as the names of the witnesses and or complainant. The legislature in it's wisdom, protected Hotline informants under ss 23.38. This proposed law may well compromise the taking of otherwise strong cases forward if the identity of the complainant will be necessary to establish the conservation wardens reasonable suspicion standards. Likewise, if the complaint doesn't meet the reasonable suspicion standard as proposed, the conservation warden can't pursue any investigation on private property. To quote Randy Stark here, "The proposal undermines customer service delivery.... The cumulative impact sets in motion

another undesirable chain of events that creates a vicious cycle: the poachers will not be apprehended or face consequences for their behavior, future citizen cooperation will be eroded when their calls do not result in apprehension, poachers get more emboldened, wildlife is adversely impacted, and the absentee landowner on whose land the poaching is taking place loses opportunity to experience/legally harvested wildlife on their property."

The other areas that you can expect costly litigation if this or some version of this legislation passes, is the court cases of challenges of where did the arrest or seizure of evidence occur? Wisconsin has many small private property lots along lake shores and often small undiscernible property lines come into question. Was the warden entitled to be there/, make contact?, collect any evidence? Most of these questions are now resolved but court challenges to aspects of the "Open Fields Doctrine" may likely occur. Thus in addition, other law enforcement agencies will suffer.

I ask that you consider both the short and long-term cumulative impacts of this legislation and reject it. Wisconsin's wildlife economy generates billions of dollars for Wisconsin's outdoor recreation and tourism industry each year. The public depends on sound conservation programs that also promote and protect public health, safety and protects private and public property. It should be clear that there likely will be more negative effects to private property from this legislation than is gained. This proposal impedes effective and efficient service and ultimately will be costly to taxpayers. Please pursue other required existing complaint procedures to address these concerns.

Thank you for listening and please consider the many thoughts and concerns from the citizens who both wrote and those you hear from today.

Thomas Thoresen- DNR Deputy Chief Warden(Retired) 5874 Persimmon Drive, Fitchburg, WI. 53711

Thomas N. Thoresen 7/19/2017

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