



Jeff Mursau

STATE REPRESENTATIVE • 36TH ASSEMBLY DISTRICT

Assembly Committee on Environment AB254- Wetland Assured Delineation Program

January 10, 2024

Committee Members:

Thank you for the opportunity to testify in support of Assembly Bill 254, which directs the Department of Natural Resources to establish a wetland assured delineation program in Wisconsin.

In 2017, then Governor Walker, signed a bill into law that created the Wetland Study Council. One of the tasks of the committee was to review a pilot program at the DNR referred to as the "Assured Delineator Program". The intent of the program was to create a private-public partnership that allowed private delineators to make accurate wetland boundary determinations that are in line with state and federal standards. Throughout the pilot program, the DNR provided technical assistance and oversight of the private delineators to ensure the program was operating within the highest standards.

The Wetland Study Council determined that the Assured Delineator Program had been successful and recommended that it continue and be codified in state statute and become a permanent program. The bill before you today is a result of working with stakeholders over the past two years to make that happen.

Senate Bill 254 would create an additional method under state law for which a person could delineate the boundaries of a wetland in a manner recognized by the DNR. A person would need to apply to the DNR to be certified as an assured delineator. A requirement of certification would include at least five years of full-time professional field experience in wetland field delineation and completion of a wetland delineation-training course based on U.S. Army Corps of Engineers wetland delineation model. Once certified, a wetland delineation prepared by an assured delineator would have the same effect as a wetland identification or confirmation prepared by the DNR.

The bill is supported by a number of groups including: Wisconsin Realtors Association, Wisconsin Wetlands Association, the League of Municipalities, and the Wisconsin Society of Land Surveyors.

Once again, thank you for holding a public hearing on this important piece of legislation. I am happy to answer any questions you may have.



ROBERT L. COWLES

Wisconsin State Senator, 2nd Senate District

STANDING COMMITTEES:

Natural Resources & Energy, Chair
Transportation & Local Government, Vice-Chair
Economic Development & Technical Colleges

Testimony on 2023 Assembly Bill 254

Senator Robert Cowles

Assembly Committee on Environment

January 11th, 2024

Thank you, Chair Oldenburg and Committee Members, for holding a hearing on 2023 Assembly Bill 254. This bill codifies the assured wetland delineator pilot program at the DNR into law, making it a permanent program.

When developing anything from an access point for vehicles in farm fields all the way to hundred-plus acre industrial developments, persons requesting or leading the project may be required to have a wetland identification and delineation of their property. The identification and delineation is to determine if any wetlands are present, and if so, where, how many and how much, to account for these features in permitting decisions.

Numerous options exist for project leaders to do wetland identifications and delineations, including the newest option where a highly-skilled third-party known as an 'assured wetland delineator' does the site work and submits a report to the Department of Natural Resources (DNR). This is the only wetland identification and delineation option which does not require a site visit from the DNR itself, saving time and money during development for persons who use this option and reducing the administrative burdens on DNR staff.

While this program has been operating effectively as a non-statutory pilot program for about 15 years, interested parties have requested an effort to make this program permanent. Assembly Bill 254, drafted in collaboration with stakeholders over the past two-plus years following a recommendation from the Wetland Study Council, does just that by mimicking most aspects of the current program and transferring the pilot to statutes.

Under the legislation, an assured delineator must apply to the DNR and meet certain qualifications, including at least five-years of full-time experience as a wetland delineator and completion of a training course. If they qualify and are accepted, they may act as an assured delineator and serve their clients in a professional and efficient manner unless they are found to have failed to comply with the statutorily-prescribed code of conduct. Some examples of a violation of the code of conduct include knowingly breaking state or federal wetland or waterway laws, knowingly falsifying wetland boundaries, misrepresenting another's work as your own, and failing to finish continuing education. All delineation reports must be submitted in-time for any regulatory decision-making, but otherwise this qualified person may help developers skip the expensive waiting game for a DNR site visit.

Passage of Assembly Bill 254 is necessary to ensure the continued success of the program by solidifying the lessons of the past few years from the pilot while cementing professional conduct requirements. This will also satisfy potential concerns from federal partners which share regulatory oversight of Wisconsin wetlands.

Finally, I want to note that we've been having conversations with stakeholders who overall appreciate the effort, but have some concerns regarding specific provisions in Assembly Bill 254. We've been working on amendment language that will hopefully satisfy all parties, and should be prepared to introduce that language soon.

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Assembly Committee on Environment

Assembly Bill 254 *Wetland Assured Delineation Program* *January 11, 2024*

Good morning, Chair Oldenburg, and members of the committee. My name is Tom Nedland, and I am a Section Manager in the Waterways Program at the Wisconsin Department of Natural Resources. Thank you for the opportunity to testify, for informational purposes, on Assembly Bill 254 (AB 254), related to creating a wetland assured delineation program.

Wisconsin has a long history of protecting our state wetlands, which provide important public benefits for recreation, flood control, water quality improvement, and fish and wildlife habitat. Wisconsin also has a long history of providing opportunities for property owners, businesses, and municipalities to impact wetlands when unavoidable, in accordance with state law. An important step in complying with state wetland laws is determining the wetland boundaries and obtaining department concurrence or approval of those boundaries.

Existing Wisconsin State Statute 23.321(2) specifies that the department will offer fee based services for wetland boundary identification or confirmations that a property owner may use. Understanding the precise location of wetlands helps property owners and businesses in project planning and allows projects to avoid or minimize impacts to wetlands, as well as to accurately calculate wetland loss. This proposed legislation offers another option for property owners, businesses, and municipalities to acquire a department approved wetland delineation – through a wetland assured delineation program.

The Waterways Program has been operating a pilot wetland assured delineation program since 2006, with demonstrated benefits to property owners, businesses, municipalities, environmental consultants, and the department. The pilot program currently has 45 environmental consultants who operate as assured delineators. These assured delineators submit around 700 delineation reports each year. The pilot program utilizes best management practices and field audits that give the department the confidence to approve these delineations without additional review by staff. This has streamlined the confirmation of project-specific wetland delineations for property owners and businesses and has been viewed as an asset within the Waterways Program and by multiple stakeholders.

The department had the pleasure of working with the members of the Wetland Study Council on this legislation and specifically, the qualifications an assured delineator must meet. These qualifications, specified in AB 254, include educational and training requirements, and at least 5-years of full-time professional field experience. Consistent with current practices under the pilot program, AB 254 requires the department to review the performance of assured delineators on a recurring basis.

If the department identifies inaccuracies in a wetland delineation report, then the work of assured delineators may be investigated to ensure confidence in the determined wetland boundary. If infractions

or violations of the program standards are found during an audit or investigation, then the assured status of the individual delineator may be revoked.

AB 254 establishes fees authorized under s. 23.321(2d) of Wis. Stats to provide the staffing and funds to sustain the oversight, integrity, and quality of the program.

Department staff have found the assured delineation community to be a respected group of wetland ecologists and professionals with extensive expertise in their field. The pilot program has been an effective tool in streamlining the delineation approval process for property owners, businesses, and municipalities, and instrumental in protecting wetland natural resources. AB 254 would allow the department to maintain this important service into the future.

Department staff are grateful to the authors for their questions and insights related to this bill and look forward to offering continued assistance to the authors as needed. In closing I want to thank the authors for including the department's feedback while drafting this bill, and for their continuous collaboration on this program.

On behalf of the Department of Natural Resources, we thank you for your time today. I would be happy to answer any questions you may have.

Heartland

ECOLOGICAL GROUP INC

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July 26, 2023 Revised January 10, 2023

Office of State Senator Robert Cowles
Evan Miller, Chief of Staff
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RE: Kraemer Comments on Assembly Bill 254

Dear Mr. Miller:

I appreciate the opportunity to provide public comments regarding the proposed Assembly Bill 254 (the "Bill") that addresses the Professional Wetland Delineation Assurance program for the state of Wisconsin. I had previously provided verbal comments at the public hearing for the Senate Bill 254 on May 10, 2023, and followed up with this written summary of those comments. I am providing these same comments regarding the AB 254.

I have been an assured wetland delineator since the inception of the pilot program (March 2006) and am the sole, longest standing assured delineator in the state. I have personally completed 1000's of wetland delineations under the program standards. I founded Heartland Ecological Group, Inc. (certified by the DOA as woman-owned, small business) which specializes in wetland delineation, wetland regulatory support/permitting, and ecological restoration.

Heartland employs the most assured wetland delineators in the state, and we complete by far the most assured delineations annually (150-200 or >25% of the assured wetland delineations in the state). Over the last five years, Heartland's wetland team has evaluated over 22,000 acres of land to assess and map wetlands, which has resulted in the identification and protection of over 2,800 acres of various wetland ecosystems throughout Wisconsin. I regularly collaborate with WDNR leadership and technical staff throughout the course of my 20-year career related to programmatic support, policy interpretation, and other regulatory/technical guidance.

As you might expect, this Bill potentially has a substantial effect on our staff and our business. While I am supportive of the concept and intent of Bill, I do have significant concerns about some aspects of the Bill and perhaps some unintended consequences as follows:

1. Performance review, auditing and revocation.

According to the Bill on page 3 lines 18-21



2. Identify a “sunset” on the Performance review and auditing program

Related to the same concerns that I have described in the above section, I strongly suggest that there is a sunset identified on the timeframe of which an assured wetland delineation can be audited by the Department for compliance with the wetland assurance program. Specifically, if wetland delineations are being audited for compliance with the program that were completed several years prior, it is likely that the wetland boundaries have already been relied upon for financial investments, regulatory approvals, and in many cases the project may already have been constructed. Again, this creates substantial risk, liability, and uncertainty for the businesses providing this service and the stakeholders utilizing the service, while also potentially undermining the purpose and intent of the program.

While I agree, audits and review of professionally assured delineators work is necessary to assess compliance and integrity with the program goals, I suggest that wetland delineations that are subject to audit for program compliance are limited to those delineations that are submitted to the Department within the prior 12-months from the time of the audit.

Additionally, I suggest that there are limitations identified that limit the Department’s ability to modify regulatory decisions that have relied upon the wetland delineation regardless of the results of the audit. The Bill could specify that the consequences of the audit shall be limited solely to the consideration of the professionally assured delineators compliance with the program and not have an after-the-fact effect on the project compliance or regulatory decisions.

3. Wetland Delineation Report Submittal Timeline Requirements

The Bill identifies requirements for when assured wetland delineation reports must be submitted to the Department in compliance with the program on page 4 lines 1-7. While I agree with the proposed requirement that reports shall be submitted to the Department to allow sufficient time for a regulatory decision, I believe that the proposed latest date of submittal of March 15 is arbitrary and unnecessary. Wetland delineations are completed under contract with an end client, and the timeline of the completion of the contracted work should be determined by the client requesting the services and governed by the private-party contract. It is common practice that project stakeholders are most interested in the location and extent of the wetlands on subject property initially for planning purposes that do not involve regulatory decision making and the wetland delineation reports are completed when then are needed for regulatory decisions. Given the significant seasonality for completing wetland delineations in Wisconsin (generally 6 months: May – October), businesses providing this service often focus resources on completing the require fieldwork during the growing season and when possible, completing the wetland delineation reports



during the winter months. This allows these businesses to continue full-time employment of assured wetland delineators through the winter.

I suggest modifying the report submittal timeframe in the Bill to convey the following; "wetland delineation reports must be submitted to the Department in order to be considered an assured wetland delineation. Until a report is submitted to the Department, the work is not considered assured and the wetland delineation cannot be relied upon for regulatory decisions by the Department or other state-mandated regulatory programs".

4. Proposed Fees

The Bill proposes an annual certification fee of \$1,200 and filing fee of \$20 per each report submitted. This would equate to approximately \$8,000 in annual fees for Heartland. As a small business, this is substantial, completing wetland delineations is highly competitive and low margin. One of the intents of the professional wetland assurance program is to reduce the workload of Department staff while not compromising the appropriate identification and protection of the state's wetland resources. The private sector providing this service is already required to significantly invest in continued education and training of professionally assured staff in order to adhere with the program requirements. Implementation of the professionally assured wetland delineator program directly results in saving the Department money and resources. I do not think it is justified to seek more fees from the professionals that are providing the services that benefit the Department, rather than seeking additional fees from those that utilize the Department's services.

In comparison, under the current wetland identification program, the Department charges landowners only \$300 to complete a wetland determination and boundary mapping on a 5-acre property and often may mobilize hundreds of miles around the state to complete that the work. In the private sector, the same service would cost on average approximately \$1,500. Not only is the Department in direct competition with the private sector, with benefit of subsidizing the fees, this Bill further increases the cost of business of the private sector furthering the competitive advantage of the state to provide the same service.

I suggest that the annual certification fees remain fixed at the current rate (\$900/annually) and the report filing fee is eliminated from the Bill. If additional revenue is necessary for the Department's wetland program, I suggest that the fees that the Department charges landowners for staff to complete wetland determinations are reevaluated and adjusted upward to more closely align with the current private sector market rate of the same service. Additionally, the fee structure for the wetland permit application program could be reevaluated and adjusted upward to increase necessary program revenue. The benefit of these suggested options is that revenue comes from the end user of the Department's



services rather than from the professional service providers that are supporting the Department's program.

5. Effective Time Period of Assured Wetland Delineations

The Bill defines that a wetland delineation prepared by an assured delineator remains effective for a period of 5-years from the date upon the report is submitted to the Department on page 8 lines 19-21. While this is consistent with current practice for federal wetlands, the Bill fails to distinguish between the effective period of wetland delineations of federal vs nonfederal wetlands and contradicts current state statutes, specifically 23.321(5)(b)1. that specifies wetland delineations are valid for a period of 15-years on nonfederal wetlands or within areas that are subject to specific stormwater approvals and permits. In order to avoid further confusion or conflict on this matter, I strongly suggest specifically identifying the 15-year effective time period consistent with current state statutes.

Once again, I truly appreciate your consideration of my comments related to the proposed Assembly Bill 254. I would be happy to meet with you to discuss further at your request.

Sincerely,

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WMC

Wisconsin's Chamber

TO: Chair Oldenburg & Members, Assembly Committee on Environment

FROM: Craig Summerfield, Sr. Director of Environmental & Energy Policy

DATE: January 11, 2024

RE: WMC testimony requesting amendment to Assembly Bill 254, relating to the wetland assured delineator program

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to testify on Assembly Bill 254, which sets statutory requirements for the wetland assured delineation program. WMC is testifying today for information only. While we support the goal of the legislation, we respectfully request an amendment to address potential unintended consequences of the bill.

WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, and from every sector of the economy. Since 1911, our mission has been to make Wisconsin the most competitive state in the nation to do business. This mission includes advocating for cost-effective environmental regulations that are no more stringent than necessary to protect the environment.

WMC appreciates the efforts by bill authors Senator Cowles and Representative Mursau to establish a statutory framework for the DNR's wetland assured delineation program. Generally speaking, WMC welcomes the regulatory certainty associated with providing statutory requirements for this pilot program. Indeed, the concept of an "assured professional" initiative is one that may merit expansion into other environmental programs administered by the DNR. However, we also support modifications to the legislation to ensure the bill does not inject new regulatory uncertainty into projects impacting wetlands.

In particular, WMC is concerned with a provision within AB 254 relating to complaints and investigations of wetland delineations. This provision stipulates any person may file a complaint with the DNR alleging inaccuracies in a wetland delineation completed by an assured delineator, allows the DNR to investigate, and provides that such an investigation can be used for wetland permitting and exemption decisions (though the data collected in such an investigation cannot be the sole basis to modify a permit).

WMC is worried about potential unintended consequences associated with this provision. Projects impacting wetlands are already often very lengthy and incredibly expensive. A late complaint to a completed wetland delineation could trigger a DNR investigation, additional delays, and more uncertainty for construction projects.

To address this, WMC would support an amendment striking lines 8-20 on page 6 of Assembly Bill 254. It should be noted that the bill would still retain other checks and balances for assured delineators, including a minimum of 5 years of experience, minimum education and training requirements, and the submission of 6 representative wetland delineation reports from the last 2 growing seasons. In addition, the DNR would retain the authority to conduct performance reviews and audit wetland delineators, as well as revoke the certification of a delineator if warranted.

Thank you for the consideration of my testimony. I am happy to answer any questions.