



TO: Members of the Natural Resources Board

FROM: Wisconsin Manufacturers & Commerce

RE: Written Comments on the DNR's Rulemaking Process for Board Order WY-29-19 (Agenda Item #6.A.), and response to the DNR's April 13 presentation to the Natural Resources Board on Aquatic Plant Management

DATE: Wednesday, June 15, 2022

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to provide written comments on proposed Board Order WY-29-19, relating to NR 107. This memo highlights some of our ongoing concerns with this rulemaking process. In addition, this memo provides a brief rebuttal to information provided by the Department at the Natural Resources Board (NRB) meeting on April 13, 2022.

To begin, WMC sincerely thanks Members of the Natural Resources Board for delaying a vote on this wide-ranging rule. This rule greatly impacts many of our members, including small business biologists that apply herbicides on Wisconsin lakes and ponds. Late June is the busiest time of the year for many of them, and a vote during the June meeting would have effectively denied an opportunity for these small businesses to be heard directly by the Board.

The purpose of this memo is to provide a more complete picture of the data presented to the Natural Resources Board at its April Board meeting, as well as highlight some key concerns with the process. In particular:

1. Far from advocating a "hands-off" approach, a key study cited by the Department on Eurasian Watermilfoil points to the critical importance of herbicide treatments for lake management.
2. The twelve unmanaged lakes studied by the Department in its internal review of Eurasian Watermilfoil are not representative of a typical lake.
3. Lake treatment permits issued by the DNR have *declined* over the last five years, not *increased*.
4. The Department has not been transparent about the aquatic plant management program, nor the proposed NR 107 rule changes.

Please note: These comments are not focused on the rule itself, but the process. The DNR only announced yesterday – Tuesday, June 14 – that the revised rule was available to review. WMC

will provide additional comments on the proposed rule when it has had the opportunity to review the revised rule with members and property owners.

1. Far from advocating a “hands-off” approach, the Department’s central study on Eurasian Watermilfoil points to the critical importance of herbicide treatments in lake management.

To begin, during an April 13 NRB Meeting, DNR staff pointed to its study of “twelve lakes with Eurasian watermilfoil for almost 20 years.” DNR staff noted that eight of those twelve lakes have seen natural population declines of Eurasian watermilfoil “in the absence of active management.”

There are multiple problems with this claim. To begin, one of the twelve lakes cited as lacking “active management” is Lake Wingra in Dane County. However, mechanical harvesting has been utilized on this lake for at least a decade, and is certainly a form of active management. Indeed, one of the core goals of the Aquatic Plant Management Plan for Lake Wingra is to “periodically control Eurasian water-milfoil when growths undermine lake access or interfere with special events.”¹ Contrary to the DNR’s claim, Lake Wingra is not an unmanaged lake.

There are also issues with the other lakes cited in the study. Of note, Crystal Lake received a DNR permit in 2021 for Diver Assisted Suction Harvesting (DASH) to manage Eurasian Watermilfoil. Residents by Hancock Lake attempted unsuccessfully to manage its Eurasian Watermilfoil via hand pulling; it didn’t work and the lake association was awarded a DNR grant in 2021 to create a management plan for control. Moreover, many of the lakes cited in the study have little/no development on them or are difficult for the public to access.

More importantly, the central, peer-reviewed study utilized by the DNR to advocate a “hands-off approach” with Eurasian Watermilfoil simply does not point to that conclusion.

For background, WMC submitted an open records request more than a month ago to the DNR to better understand the science behind the Department’s claims in its April 13 presentation to the Board. In response, the only peer-reviewed document provided by the DNR was a 2017 study by UW-Madison and the DNR: An 11-year study on Eurasian Watermilfoil that compared 15 lakes managed with herbicide versus 13 unmanaged lakes.²

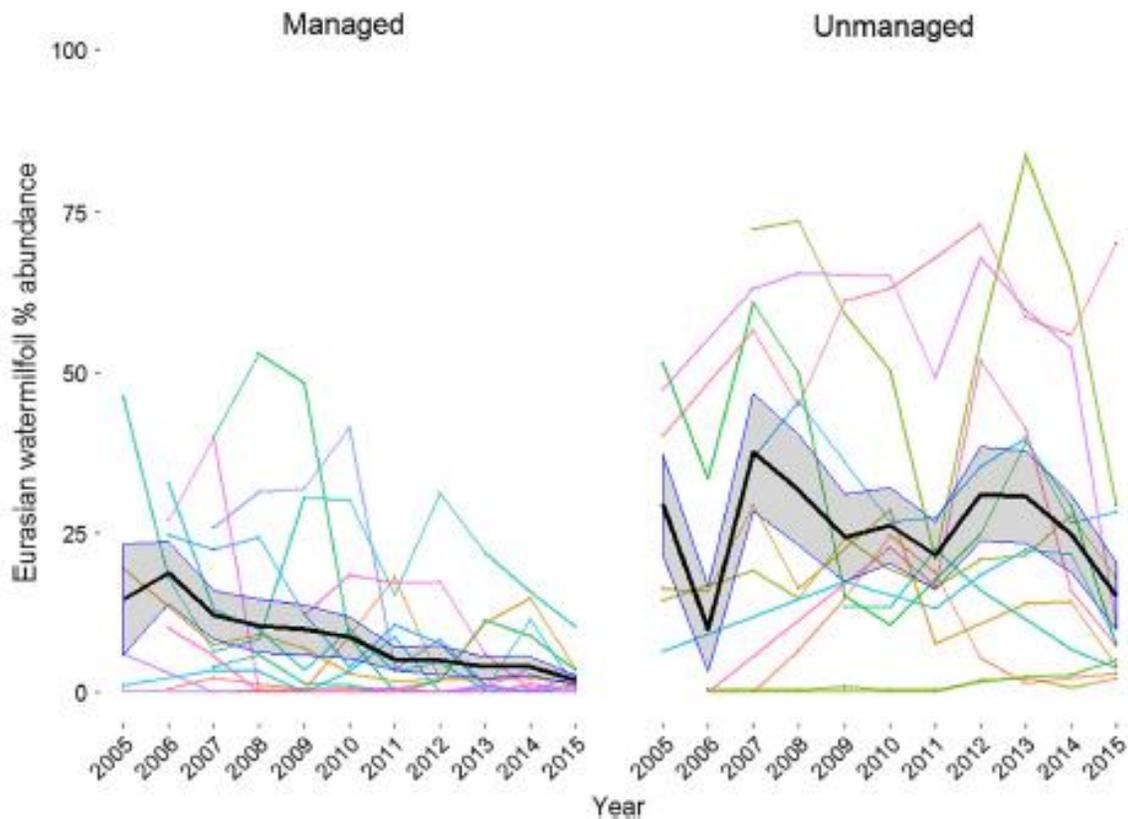
However, **contrary to what is suggested by DNR staff, this study does not advocate for a “hands off” approach for Eurasian Watermilfoil (EWM).** Instead, the study demonstrates how herbicide treated lakes achieved more consistent reductions for invasive weeds than

¹ See “Amendment 2 to Aquatic Plant Management Plan, Lake Wingra” - <https://lwr.d.countyofdane.com/documents/pdfs/APM/Wingra/Wingra-Plan-2017---Finalx.pdf>

²Kujawa et. al. 2017; “Lessons from a decade of lake management: Effects of herbicides on Eurasian watermilfoil and native plant communities,” <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/ecs2.1718>

unmanaged lakes. The chart below compares abundance of EWM between managed (treated with herbicide) and unmanaged lakes reviewed in the study:

Fig 1: Comparison of Eurasian Watermilfoil in Managed and Unmanaged Lakes in Wisconsin



Please note that the trend line above shows a consistent, average decline overall for managed lakes, but very sporadic results for unmanaged lakes.

This result is reinforced by the conclusions of the study authors themselves. In its conclusion, the authors state the following:

“Our findings indicate that herbicide treatment is a valuable adaptive management tool to control *M. spicatum* [Eurasian Watermilfoil]. It appears to be particularly effective in recently invaded lakes, where it can be used with lower frequency and overall magnitude to maintain low *M. spicatum* [Eurasian Watermilfoil] abundance.”³

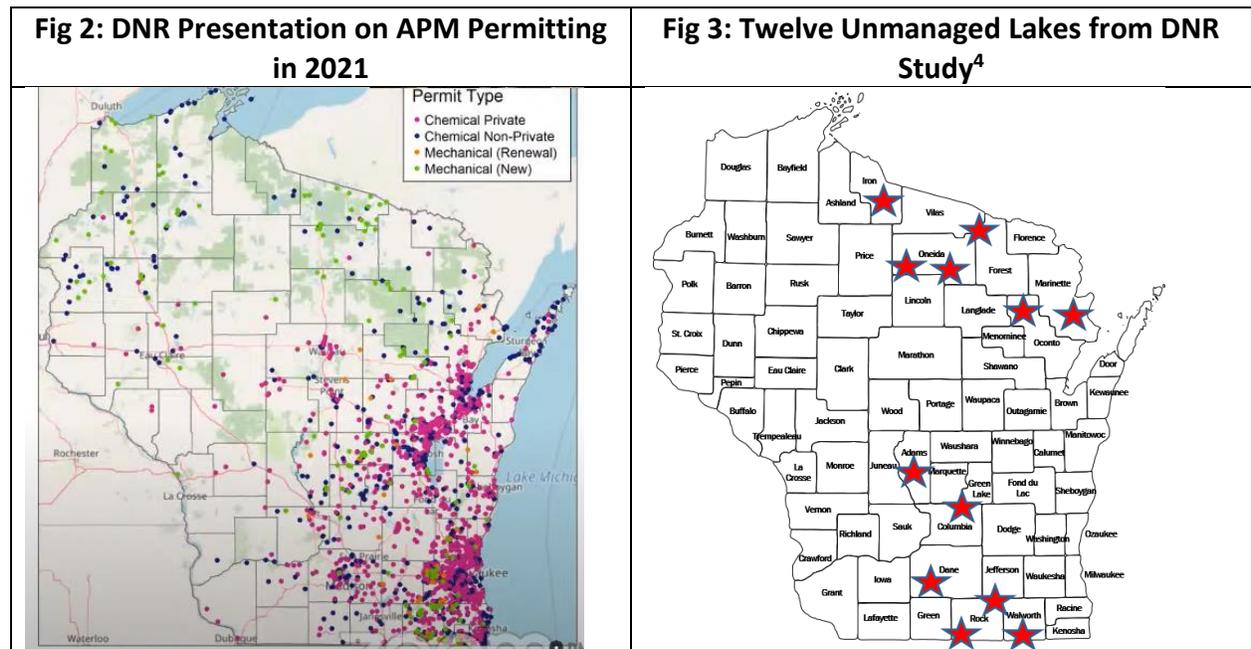
Unfortunately, instead of relying on the information plainly presented in the study or the conclusions reached by the study’s authors, certain DNR staff appears to be cherry-picking passages from the study to reach its own conclusions about proper lake management. It is also

³ See “Conclusions and directions for future research” – page 13 of Kujawa et. al. study

relying on its own research on the twelve unmanaged lakes, research which has not been peer-reviewed.

2. The twelve unmanaged lakes studied by the Department in its internal review of Eurasian Watermilfoil are not representative of a typical lake.

During its presentation to the Natural Resources Board, DNR staff presented a slide suggesting that herbicide treatments (while occurring statewide) are most common in southeastern Wisconsin. However, the twelve unmanaged lakes in the Department’s study are primarily from northern and south central Wisconsin. Please see the figures below:



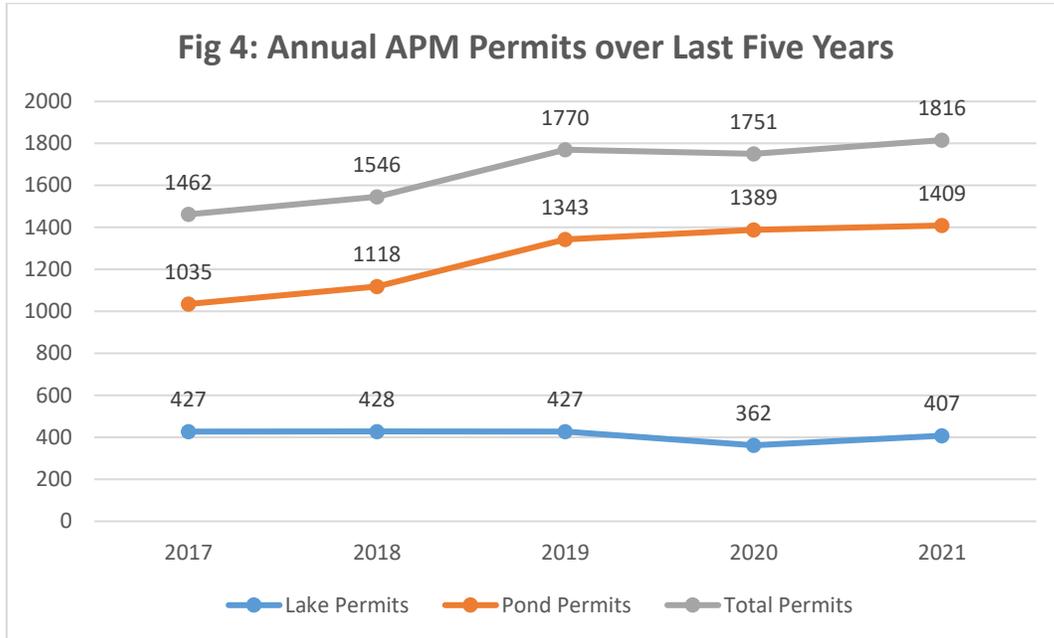
This discrepancy is very problematic. As acknowledged by DNR staff in its April 13 presentation to the Board, waters in the southern portion of the state are more fertile and have more established invasive plant populations, a longer growing season, higher recreational use and density, and denser shoreline development.

In other words, a lake in southeast Wisconsin has more in common with a nearby lake in southeast Wisconsin than a lake in Iron or Vilas County. Unfortunately, the Department is using data gathered from these dissimilar, unmanaged lakes to inform permitting decisions on lakes throughout Wisconsin, and ignoring the input of licensed biologists that have successfully managed Wisconsin lakes for years and even decades.

3. Lake permits have *declined* over the last five years, not *increased*.

⁴ Each star denotes a lake; lake locations are listed by county and are approximate.

In its April 13 presentation, DNR staff noted that 2,023 total permits were issued in 2021, and that “permit applications have increased 26% since 2017.” Importantly, while total permits issued by the Department may have increased over the past five years, the number of lake permits issued annually has actually declined. Please see the chart below:



As demonstrated in the chart above, the growth in total permits is entirely driven by a growth in pond permitting. Conversely, lake permitting has declined – from 427 permits issued in 2017 to only 407 permits issued in 2021.⁵

This data simply reinforces what WMC has long heard from licensed biologists and lake associations that utilize herbicide treatments as part of a broader strategy to manage lakes – DNR staff is simply not approving treatment permit applications it approved in the past. Moreover, this is being done absent any lawful change in state statute or the administrative code (NR 107).

4. The Department has not been transparent about changes to the Aquatic Plant Management program, which is hurting the regulated community.

When the DNR formally presents to the Board, it will likely point to a long process of hearings and stakeholder meetings to justify moving the rule forward. However, it should be noted that DNR staff has routinely ignored the input of the experts in the aquatic plant management control community throughout this rulemaking process. In addition, **staff have refused to turn over studies and other scientific information purportedly used to justify this rulemaking, despite the fact that the information was requested 18 months ago.**

⁵ This data was obtained from the DNR via an open records request by WMC.

Unfortunately, DNR staff's lack of transparency gets even worse. As of this writing, WMC still has two pending open records requests before the Department of Natural Resources, including one that is the subject of litigation because the Department refused to release records relating to the surface water grant program that are clearly subject to release under Wisconsin's Open Records Law. This failure to follow the law is troubling, and raises serious questions as to what staff are attempting to hide.

One of these open records requests was submitted on May 3, 2022. To summarize, WMC requested information pertaining to the DNR's April 13 presentation to the Board, permitting information, as well as aquatic plant management citations and referrals to prosecution over the past five years. DNR staff furnished a partial response on June 2 (and some of the information received was referenced previously in this memo).

One glaring deficiency in the records provided is information on citations and referrals for violations of herbicide treatment regulations. With Board Order WY-29-19, DNR staff is undergoing a complete rewrite of the rules that govern aquatic plant management in Wisconsin, absent any federal requirement or any direction to do so from the Legislature. In addition, the Department has not provided any evidence that that an uptick in rule violations warrants this change. To date, DNR staff in its open records response has only provided seven instances of citations issued for aquatic plant management violations in Wisconsin, all of which are for doing chemical treatment unlawfully (which suggests they were not done by licensed applicators). This begs the question: What real problems are DNR regulators attempting to resolve with this rulemaking?

Another open records request was submitted to the DNR on February 25, 2021. WMC requested information on surface water grants from the Department. The DNR confirmed receipt of the request on February 26, 2021.

On March 23, 2022, more than a year after the request was made, the request was partially denied. Key records were redacted, others were provided in a format that required special software to open, and other portions were fully denied. The matter is currently being litigated by WMC in circuit court.⁶

These responses to WMC's open records requests are wholly inconsistent with the Department's claim of a transparent aquatic plant management program and a transparent rulemaking process.

Conclusion:

The Department continues to claim it is pursuing an open and transparent rulemaking process. However:

⁶ See *WMC v. DNR, Case 2022CV000386*

1. The Department is relying on data that is not peer-reviewed. The only peer-reviewed study cited by the DNR points to the importance of herbicide treatments – the opposite of claims made by the Department.
2. The Department is relying on studies of lakes with substantially dissimilar characteristics from lakes treated with herbicides.
3. Treatment permits for lakes over the past five years have *declined*, not *increased*.
4. The Department has slow-rolled open records requests about the aquatic plant management program, and has ignored the input from expert biologists throughout the rulemaking process.

Again, WMC sincerely appreciates the decision by the Natural Resources Board to delay this vote to better allow the public to present its case before the Board at a future meeting. Thank you for considering our comments.