

At a Loss: **The State of Wisconsin** **after Eight Years without** **the Public Intervenor Office**



**A Report Prepared for the
Wisconsin Stewardship Network**

by Jodi Habush Sinykin



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On the Cover

As public intervenors, Kathleen Falk (center) and Thomas Dawson (right) were champions of the environment and provided solid advice to the Wisconsin Legislature on its public trust obligations to protect the state's natural resources. In this 1995 photo, Falk and Dawson chat with Paul Hassett, former director of Wisconsin Manufacturers and Commerce, who publicly opposed abolition of the Public Intervenor Office in 1995.

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Executive Summary

In the years since its elimination in 1995, citizens and state officials have made a concerted effort to restore Wisconsin's Public Intervenor Office, the state entity created in 1967 by Republican Governor Warren P. Knowles to protect public rights in the state's natural resources and to ensure fair play and due process for matters of environmental concern. With every passing year since the Office's demise, the base of citizen and political support for its restoration has only grown larger. 2003 Assembly Bill 46, seeking the reinstatement of a Public Intervenor Office with all the authority and powers possessed by the Office prior to 1995, represents the most current legislative effort in this respect.

As will be outlined in the pages of this report, the Public Intervenor Office valiantly served Wisconsin's citizens from 1967 to 1995 by fulfilling its legislative mandate to champion public rights in the state's natural resources and to ensure government accountability in matters of environmental concern. In addition to assisting hundreds of Wisconsin citizens every year with their environmental concerns by advising them on the use of existing local and state law to preserve their public rights and protect their families and property, the Public Intervenor Office repeatedly went to bat on behalf of Wisconsin citizens in courtrooms across Wisconsin and on up to the U.S. Supreme Court to protect and preserve their waterways, wildlife, lakefronts, and home communities from environmental degradation.

Moreover, the Public Intervenor Office served as an invaluable resource to Wisconsin legislators and agencies both by providing legal guidance and valuable assistance during the rule revision process and by building citizen and legislative support for the passage of the following landmark laws:

- Wisconsin's DDT Ban
- 1982 Employees' Right to Know Law
- Acid Rain Legislation
- Wisconsin's 1984 Groundwater Law
- Non-metallic Reclamation Bill of 1994

Additionally, in keeping with Wisconsin's populist roots, the public intervenors' government watchdog function not only protected Wisconsin citizens' right to an accountable and effective government but championed their right to obtain complete and accurate information regarding issues of importance to the public good and to Wisconsin's natural resources. Finally, it is apparent that the Public Intervenor Office provided an important benefit to Wisconsin's business community by reducing legal uncertainty, serving as an industry problem-solver, and protecting Wisconsin's tourism industry.

When the Public Intervenor Office was dismantled as part of Governor Thompson's 1995-1996 budget, there was an immediate public outcry and much concern voiced over the prospective void created by the loss of these champions of the public trust and advocates of the state's natural resources. And in the ensuing eight years, the impact of the public intervenor's elimination upon government institutions, the state's natural resources, and the rights of Wisconsin's citizens has been great.

The findings of this report demonstrate that the demise of the Public Intervenor Office has left Wisconsin's environment and many Wisconsin citizens in a vulnerable position. Without the Public Intervenor Office's advocacy efforts, the right of Wisconsin citizens to an accountable government has been placed in jeopardy. Citizens have had to go it alone in their efforts to oppose special interest provisions hidden within state budget bills and, without the checks and balances provided by the watchdog Intervenor Office, Wisconsin's Department of Natural Resources has demonstrated significant shortcomings in the enforcement of state and federal environmental laws.

Furthermore, the public intervenor's ability to provide top-notch scientific, technical, and legal expertise has been sorely missed in matters of environmental importance to Wisconsin citizens and, as a result, important environmental regulations and legislation have become stymied in committee. Indeed, Wisconsin citizens have been faced with the expensive and overwhelming task of defending the Public Trust Doctrine in Wisconsin. In the face of powerful lobbyists, wealthy corporations, and a daunting state bureaucracy, citizens have been forced to spend thousands of their own dollars and countless hours to realize the quality of information and the level of legal assistance formerly provided by the Public Intervenor Office at a cost of less than five cents per year for each Wisconsin citizen.

In sum, these findings outlining the far-ranging contributions of the Public Intervenor Office and the detrimental void created by its elimination strongly recommend the prompt restoration of the Public Intervenor Office in Wisconsin.

Introduction

The Public Intervenor Office: An Essential Component of Wisconsin's Environmental Heritage

With more than 15,000 inland lakes, 33,000 miles of rivers and streams, 5.3 million acres of wetlands, 471,329 acres of state forests, and its geographical position alongside the Mississippi River, Lake Michigan, and Lake Superior, Wisconsin has long enjoyed a reputation as a state rich in natural beauty and recreational opportunities.¹ But beyond its beautiful geography and natural resources, Wisconsin has been blessed with a legal tradition that has developed and preserved a legal theory known as the Public Trust Doctrine. Rooted in the “common highways and forever free” language of Article IX of Wisconsin's Constitution, the Public Trust Doctrine has been best articulated by the Wisconsin Supreme Court as follows:

The right of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given to financial rights.²

Wisconsin's adherence to the Public Trust Doctrine, along with the state's populist roots,³ has culminated in Wisconsin's stature as an environmental leader and in a state heritage as the proud protector of its citizens' right to the enjoyment and protection of their state's natural resources and right to an accountable government.

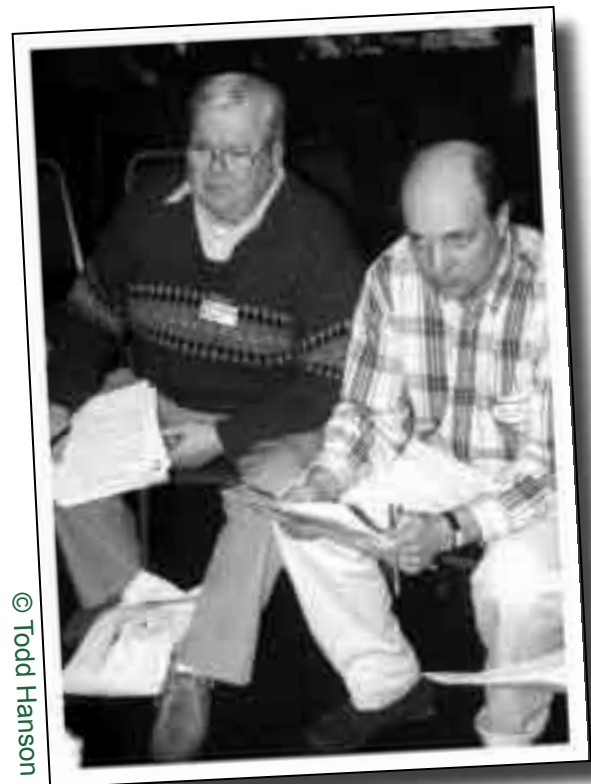
An essential component of Wisconsin's environmental leadership position remains the role played by the Public Intervenor Office, a state institution created in 1967 by Republican Governor Warren P. Knowles as part of a large scale effort to accomplish a reorganization of Wisconsin's executive branch. The “Kellett Bill” that emerged from over a year's worth of planning, public hearings, and debate accomplished two major changes: first, a merger of the Conservation Department and the Department of Resource Development and, second, the creation of the Office of the Public Intervenor. Under the Kellett Bill's mandate, the Public Intervenor Office was to “protect public rights in water and other natural resources” and to insure fair play and due process for matters of environmental concern in the bureaucratic decision-making process of Wisconsin agencies.⁴ Importantly, the Office's role was constructed to be distinct from that of any other state entity, to intervene on behalf of public rights in the court system, in administrative hearings, and before legislative and rule-drafting committees in order to safeguard the rights shared by all Wisconsin citizens under state law in Wisconsin's natural resources.

Over the course of its twenty-eight year history, the Public Intervenor Office remained a lean and economical state entity, consisting at its height of only two attorneys, limited clerical support, and the occasional addition of short-term intervenors assigned to particular projects as needed.⁵ Indeed, the office budget of the Wisconsin Public Intervenor Office totaled only \$232,000 in 1994, amounting to an infinitesimally small percentage of the state's 15.5 billion budget for that year.⁶ **The entire Public Intervenor Office cost the citizens of Wisconsin less than a nickel each year per person.**⁷

As a state office, the Public Intervenor Office was accountable to both the Office of the Attorney General and its own Citizen Advisory Committee. By statute, the Citizen Advisory Committee for the Public Intervenor Office consisted of nine citizens with solid conservation credentials from around the state, who were appointed by the attorney general for four-year terms.^{8,9} Meeting regularly in meetings open to the public, the Citizen Advisory Committee selected specific environmental matters for public intervenor intervention and involved itself in the Office's litigation strategy decisions and policy priorities. In the words of Dane County Executive Kathleen Falk, who served as a public intervenor from 1983 to 1995, “the strength of the public intervenor lay with its Citizen Advisory Committee, whose wisdom and perspective was larger than any one individual and enabled true integrity of the Office's decision-making process.”¹⁰

Notwithstanding its minimal size, the Public Intervenor Office served as an important counterbalance to Wisconsin's Department of Natural Resources (DNR) and other state agencies enacting policies pertaining to environmental matters. Reflecting upon the Office of the Public Intervenor, former Wisconsin Governor and United States Senator Gaylord Nelson noted in 1995 that "while extremely small within all of state government, the Office has played an extremely critical role in helping keep Wisconsin as one of the natural resource jewels of the country."¹¹ Indeed, in 1984, the Wisconsin State Legislature, with bipartisan sponsorship and support, acted affirmatively to clarify and to expand the public intervenor's role in Wisconsin by providing it with "authority to initiate actions and proceedings before *any* agency or court in order to raise issues, including issues concerning constitutionality."¹² Clearly, Wisconsin lawmakers, in drafting the Public Intervenor Office's expansive mandate, recognized the high value Wisconsin citizens place upon the protection and maintenance of their state's natural resources for themselves, their children, and their children's children.

Jack Wahlers (left) and Dave Johnson of the Central Wisconsin Chapter of Trout Unlimited evaluate the implications of spring water withdrawals soon after Perrier announced its plans to tap into the Mecan springs in 2000. Without the Public Intervenor Office, state conservation organizations had to step in to defend the state's Public Trust Doctrine.



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Part I:

Contributions Made by the Public Intervenor Office

From 1967 to 1995, the Public Intervenor Office fulfilled its mission as a champion of Wisconsin citizens' public rights, as envisioned by Governor Knowles and the Wisconsin State Legislature, by successfully advocating on behalf of Wisconsin citizens in a number of important ways.¹³ In addition to serving an invaluable advisory function to Wisconsin legislators, agency rule-makers, and citizens on issues concerning environmental matters, the public intervenors marshaled their resources to select and to litigate a limited number of precedent-setting cases through the court system. In this fashion, the Office could bring judicial scrutiny upon those government agencies failing to meet their obligations under state and federal law, thereby protecting the environment and public health in the process. Furthermore, the public intervenors' ability to build consensus between business interests and environmental groups not only mitigated citizen opposition to proposed development projects, but ultimately resulted in the enactment of intelligently drafted rules and regulations which enabled Wisconsin's business community to bypass costly litigation and the need for remediation.

THE MANY FACES OF THE PUBLIC INTERVENOR

Legal Advocate:	Filed a limited number of precedent-setting cases to watchdog the enforcement of state and federal environmental laws and to protect citizens' right to an accountable and effective government.
Champion of Public Rights:	Served as a clearinghouse for inquiries and requests for legal assistance and as champion of the public's right to obtain accurate information bearing upon issues of importance to the public good and Wisconsin's natural resources.
Legislative Advisor:	Provided legal and technical advice to legislators, testified at committee hearings, and promoted environmental legislation.
Bureaucratic Partner:	Worked with agency rule-makers to formulate effective regulations to maximize implementation and enforcement of environmental rules and legislation.
Consensus Builder:	Worked alongside business leaders, legislators, and agencies to reach consensus between business objectives and environmentalist concerns, enabling the business community to bypass expensive litigation and costly remediation and benefiting Wisconsin's tourism industry.

A. The Public Intervenor Office Was Both Legal Advocate and Champion of Public Rights

1. Through Citizen Support and Advocacy, the Public Intervenor Office Championed the Public's Right to Enjoy and Protect Wisconsin's Natural Resources

By means of its Citizen Information and Assistance Program, the Public Intervenor Office assisted hundreds of Wisconsin citizens every year with their questions and worries about environmental matters in their neighborhoods and home communities, including concerns over contaminated wells, noise and odor nuisances, leaking landfills, and property devaluation. Public intervenors advised citizens on how to use existing local and state laws to protect their families and property from environmental contamination and to preserve their public rights in Wisconsin's natural resources.¹⁴ They further counseled citizens on how to avoid costly litigation by exploring alternatives to litigation, such as encouraging citizens to pack their town hall to advocate for their positions before local town boards.¹⁵

In this fashion, the Public Intervenor Office was able to provide information and legal backing to Wisconsin citizens who otherwise would have lacked the resources necessary to take on the state bureaucracy and require agencies to enforce existing laws and rules against corporate and other private polluters. Former public intervenor Kathleen Falk recalled many evenings, too many to count, that she spent in citizens' homes listening to their concerns and advising them on what legal recourse was available to them. "We went to people where they were, to try to be the most use to them," said Falk.¹⁶ One citizen member of an organization of Sauk County residents fighting in the 1990s for the clean-up of groundwater pollution caused by an army ammunition plant described the assistance provided by the Public Intervenor Office in this way:

Our offices are our kitchen tables, our budget is the family budget, and our staff is our friends and neighbors, but each of us has a common adviser we can turn to, and that's the public intervenor.¹⁷

In addition to empowering citizens, the Public Intervenor Office worked valiantly to champion the public rights of Wisconsin citizens.

- **Upheld Rights of Communities**—Taking a case on behalf of the Town of Casey in Washburn County all the way up to the United States Supreme Court in the 1991 *Mortier* case, the Public Intervenor Office successfully argued for the right of local communities to reasonably regulate pesticide use with standards stronger than federal law if necessary to protect citizens' health and the environment.^{18,19}

As another such example, the public intervenors went to bat for the Town of St. Germain in Vilas County to defend its right to reasonably regulate clear-cutting of forests on its town roads in order to protect its tourist trade.²⁰

- **Protected Navigable Waterways and Wetlands**—The Public Intervenor Office played a leading role in the development of rules providing for the protection of waterways and wetlands from non-metallic mining operations. Responsive to public concern in the 1970s over the severe erosion and sedimentation damage to valuable trout streams in Marathon and Pierce Counties caused by unregulated sand and gravel mining operations, the public intervenors toured damaged waterways and mining sites in these counties and, thereafter, petitioned the Natural Resources Board to develop rules for the regulation of nonmetallic mining. This public intervenor petition became the framework for the DNR’s development of Administrative Code NR 340, adopted in 1979, which established the presumption that dredging near waterways has a negative environmental impact and requires the applicant both to prove otherwise and to demonstrate that a feasible alternative is not available.²¹

Likewise, with respect to wetlands, the Public Intervenor Office was a leader in spurring the DNR not only to adopt rules requiring permits for wetland fill and destruction, but also to use its authority under the Clean Water Act to issue or deny water quality certification to Army Corps of Engineers CWA Sec. 404 permits, thereby providing for greater protection of wetlands.²²

- **Preserved Wildlife**—In a series of lawsuits filed in 1989-90 against the DNR, the Public Intervenor Office successfully prevented a solid waste landfill from being established in the middle of the Machickanee Forest in Oconto County. The public intervenor introduced evidence to the circuit court showing that after the DNR had approved the county’s application to withdraw landfill site lands from the County Forest Program, Oconto County purchased interest in a Marinette County municipal landfill which would be sufficient for Oconto County’s municipal waste needs for the next twelve to eighteen years.²³ By presenting this evidence and involving itself in this matter, the Public Intervenor Office was instrumental in preserving this area for wildlife.

- **Ensured Lakefront Access**—For many years during the 1980s, the Public Intervenor Office, through the efforts of Kathleen Falk, successfully advocated for the rights of the public, including disabled citizens, to fish and recreate along Lake Michigan on the Summerfest grounds in Milwaukee.²⁴

2. The Public Intervenor Office’s Legal Advocacy Safeguarded Citizens’ Rights to Obtain Complete and Accurate Information

The Public Intervenor Office worked to ensure that Wisconsin state government based its public policy decisions upon accurate information and open public discourse. Few would argue with the primacy of information or with the principle that the equal right of access to information creates a more level playing field in our society in an important respect. As will be demonstrated in the following examples, the public intervenors worked hard to disseminate scientific and technical information to citizen groups, to retain and utilize experts, and to provide in-depth policy analyses to state legislators and regulators.

The Public Intervenor Office also staunchly defended Wisconsin citizens’ rights to permit notices and to participate in public hearings. Michael Cain, a staff attorney at the DNR for over 25 years who had a great deal of contact with the Public Intervenor Office over the years, explained that “the Public Intervenor Office served an important role in providing the public with the mechanism by which they were able to voice their concerns over a particular project or piece of legislation and have them taken into consideration by a state office.”²⁵

- **Environmental Impact Statements**—In the 1991 case of *Sierra Club et al. v. Department of Transportation*, the Public Intervenor Office brought suit against the Wisconsin Department of Transportation (DOT) due to the agency’s failure to submit an Environmental Impact Statement along with its proposed \$184 million road building program in its 1991 budget. A Dane County circuit judge ruled in the Public Intervenor Office’s favor, requiring the DOT to prepare an Environmental Impact Statement along with any major transportation proposal submitted to the legislature.

As an additional result of this lawsuit, the Public Intervenor Office and the DOT reached an agreement to expand public awareness and involvement in proposed transportation projects. In 1992 alone, nine public informational meetings were held around the state, providing presentations on proposed transportation plans, citizen question and answer time, and opportunity for public testimony to be taken and considered by the Department of Administration (DOA) in budget development.²⁶

- **Protecting the Public’s Right to Contested Case Hearings**—In the 1981 case of *Town of Two Rivers v. State, Department of Natural Resources*, the public intervenor successfully challenged the DNR’s refusal to hold public contested case hearings before proceeding with a determination of proposed solid waste disposal sites.²⁷ In agreement with the public intervenor’s position, the Court of Appeals ruled that “the citizenry enjoys a right to demand a hearing before that decision is made” and affirmed the circuit court’s earlier order affording the public with the opportunity to participate in contested case hearings concerning placement of the solid waste dumps.



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Mining activists celebrate the passage of the Mining Moratorium Law on the Chippewa Flowage. The Public Intervenor Office brought in outside experts to comment on the scientific claims made by the mining company in its permit application before the DNR.

THE CRANDON MINE EXPERIENCE

The public intervenor's expertise in evaluating environmental impacts and disseminating scientific and technical information to the public was also indispensable throughout the Crandon Mine permitting process. In 1975, an ore body of zinc and copper was discovered within a 100-foot-wide by one-mile-long slab of bedrock located about five miles south of Crandon, one mile south of Swamp Creek, a tributary of the Wolf River, and one mile upstream of the wild rice beds of the Mole Lake Chippewa Reservation.²⁸ Flambeau Minerals Corporation sought mining permits from the Wisconsin DNR in the early 1980s but halted the lengthy permit process at the end of 1986, after the DNR had already completed an environmental impact statement and scheduled a final hearing date on the permit requests.

In February of 1994, a new Wisconsin partnership called Crandon Mining Company, consisting of two international mining firms, Exxon Coal and Minerals Company and Rio Algom Limited, filed formal notice of intent to assess the mine's potential environmental effects, once again initiating the complicated permit process required to obtain the state, federal, and local permits needed to remove the 55 million tons of metal ore from the site. In evaluating the proposed mine's environmental impacts, Laura Sutherland, the assistant attorney general assigned as a part-time public intervenor in this matter, hired top experts to meet the public's need for accurate information and to help predict and prevent contamination of the Wolf River and groundwater. Based upon these experts' findings, Sutherland provided written comments to the DNR in April of 1994, calling attention to, among other concerns, the fact that up to 2,000 gallons of water per minute would have to be pumped out of the proposed mine's shaft in order to prevent flooding of the mine, impacting groundwater and surface water resources.

Water in the general area of the mine will fall as a result. Some lakes and streams could lose volume and suffer decreased water levels. Some wetlands and wells may dry up altogether.²⁹

And with the additional potential release of mine waste water in the amount of up to 3,000 gallons per minute into Swamp Creek and downstream to the Wolf River, the Public Intervenor Office further cautioned against the harm such discharges would have on fish and, thereby, on Wisconsin's tourist industry in the surrounding counties.³⁰

B. The Public Intervenor Office Was Both Legislative Advisor and Bureaucratic Partner

1. The Public Intervenor Office Advanced Environmental Rules and Legislation

Armed with their legal expertise and backed by their Citizen Advisory Council, the public intervenors provided an invaluable resource to Wisconsin legislators and agency rule-makers, aiding their efforts to enact laws and rules responsive to Wisconsin citizens' environmental, health, and property concerns. The public intervenors benefited Wisconsin legislators while furthering citizens' public rights by working behind the scenes, in public meeting halls, corporate boardrooms, and legislative chambers, to build citizen and legislative support for the passage of landmark laws in Wisconsin, including the following:

- **DDT Ban**—The Public Intervenor Office was the first to take legal action against DDT, and Wisconsin subsequently became the first state in the country to ban DDT, setting the stage for the national ban on DDT in 1973.
- **Employees' Right to Know Law**—The Public Intervenor Office played an important role in supporting the enactment of this law in 1982, which requires all public sector employers in Wisconsin to inform workers about toxic substances, infectious agents, and pesticides used in the workplace. This Wisconsin law became the model for the federal legislation, The Emergency Planning and Community Right-to-Know Act (EPCRA)³¹, passed in 1986, which seeks comparable protection of workers and citizens on the federal level.
- **Acid Rain Legislation**—In 1986, Wisconsin became the first state to pass a law to control acid rain. The law required that by 1993 Wisconsin's major electrical utility companies would cut in half their 1980 emission levels of sulfur dioxide.³²
- **Wisconsin Groundwater Law**—The public intervenors were instrumental in framing this 1984 law in response to significant public concern in the 1980s arising from the discovery of widespread groundwater contamination by the carcinogenic potato herbicide Aldicarb. Wisconsin's 1984 Groundwater Law, still hailed as the most comprehensive program for managing and protecting groundwater in the United States,³³ protects Wisconsin's groundwater, the source of drinking water for over 75% of Wisconsin's residents and nearly all its rural residents, by setting an Enforcement Standard (ES) and Preventive Action Level (PAL) for each groundwater contaminant and establishes a mechanism for groundwater monitoring and subsequent legal actions when contamination exceeds the enforcement standard.³⁴
- **Non-metallic Reclamation Bill**—This 1994 bill, supported and promoted by the Public Intervenor Office, required the establishment of standards for the restoration of gravel pits, stone quarries, and other non-metallic mineral extraction sites in Wisconsin to prevent companies from abandoning such sites and creating safety hazards and diminished property values to nearby landowners.

Moreover, the public intervenors assisted Wisconsin legislators by responding to frequent requests by members of both the Assembly and Senate, as well as committee chairs, to provide legal opinions and testimony concerning rule revisions proposed by state agencies such as the DNR, DOT, and the Public Service Commission (PSC). In this fashion, the Public Intervenor Office functioned in the manner of a think tank, involved in the analysis of public policy and providing a political counterweight to private interests and lobbyists.

Indeed, under their legislative mandate, the public intervenors enjoyed the unique status of being a respected government player on equal footing with other state agencies like the DNR and PSC, but also possessing the ability to legally challenge their agency actions. This status, coupled with the Public Intervenor Office's perception as an objective party, ensured that the public intervenors were always provided "a place at the table" at agency and legislative hearings where their very presence often promoted a more balanced and functional discourse. The following example involving the DNR is demonstrative of the array of options available to the public intervenors to help them effectively achieve their goals of safeguarding Wisconsin's natural resources for the public trust.

AN INTERVENOR IN ACTION: PROTECTING WISCONSIN DRINKING WATER

In 1994, the DNR sought to revise Wisconsin rules regarding drinking water standards for certain chemicals like Xylene and Toluene. Upon being notified that the standards being recommended by the DNR as "permissible levels" of these chemicals would result in unacceptably odorous drinking water, Thomas Dawson, who served as a public intervenor from 1976 to 1995, investigated.³⁵

Dawson first commissioned the assistance of the State of Wisconsin Laboratory to prepare samples of water containing Xylene and Toluene at the levels authorized by the DNR's proposed rule. Upon personally experiencing the strong odor of the lab's water samples, which, in Dawson's words, "smelled just like model airplane glue," Dawson went before the DNR Board informally and cautioned against their acceptance of the revised water standards.³⁶

After the DNR Board refused to heed the public intervenor's concerns and instead accepted the revised rules, Public Intervenor Dawson testified at the hearings before the Legislature. Bringing with him the State Laboratory samples he had commissioned which contained water that was plainly odorous, Thomas Dawson addressed the assembled legislators as follows:

The DNR says this is water that is acceptable to drink. Is this the kind of water that you think the people in Wisconsin should be given to drink? The kind of water you would expect a mother in Wisconsin to put in a bottle along with formula for her baby?³⁷

The legislators, many of whom were blatantly angry at the noxious smell of the drinking water, voted to reject the DNR Board's decision approving the proposed water standards and decided to send the rule back to the DNR for revision.

2. The Public Intervenor Office's Advocacy Efforts Protected Wisconsin Citizens' Right to an Accountable and Effective Government

In keeping with Wisconsin's populist roots, the Public Intervenor Office worked to ensure a Wisconsin state government that complied with established law, not a state government beholden to special interests. As stated by Kathleen Falk, "because government is only as good as its citizens, the public intervenors' most important role was making government accountable."³⁸ Towards this end, the public intervenors focused their litigation and advocacy efforts, when needed, upon governmental bodies, not private individuals or businesses, for their failure to enforce existing state and federal law aimed to protect the environment or the health and safety of Wisconsin citizens.

Certainly, the public intervenors' active role in advocating for public rights, coupled with its power to sue, had a significant impact upon Wisconsin's DNR. In the words of George Meyer, who led the DNR's Enforcement Division from 1980 to 1993 and who was the DNR secretary from 1993 to 2001, the Public Intervenor Office helped the DNR optimize its objectives in a number of important ways. In public trust cases, for example, where the DNR "was outgunned," DNR staff attorneys were helped immeasurably by having the public intervenors in their camp, helping to prepare the case, obtain expert witnesses, and drum up public support and participation in administrative law proceedings.³⁹ George Meyer additionally recognized the public intervenors' ability to proceed with enforcement actions that the DNR could not move forward on due to the agency being "locked in politically."⁴⁰ For example, whereas the DNR was forestalled from going after other state agencies like the DOT or the DOA, the Public Intervenor Office could proceed against them for their violations of state laws without recourse and, in fact, was clearly instructed to do so under the Office's 1984 legislative mandate. Indeed, the very presence of the Public Intervenor Office helped drive the DNR internally on the basis that DNR employees could point to the Office and its ability to sue to convince DNR administrators "to get things done that normally wouldn't get done within a bureaucracy."⁴¹

With respect to the DNR's rulemaking process, George Meyer further praised the public benefit provided by the public intervenors' presence on DNR's Technical Advisory Committees. According to Meyer, the public intervenors' participation on these committees provided a necessary counterweight to industry and manufacturing representatives by virtue of the fact that their status as a governmental agency prevented them from being marginalized in the manner of other environmental voices.⁴² In this fashion, the public intervenors helped to ensure a balanced communication of information and a moderate approach with respect to the particular policy matter or rule pending before the DNR.

In addition, the very presence of the Public Intervenor Office helped keep Wisconsin's legislative process accountable by deterring legislators' attempts to insert special interest statutes bearing upon public rights as part of state budget legislation. As George Meyer acknowledged, during the public intervenors' tenure, if legislators were to attempt to reward their constituents with special interest laws, the vigilance of the public intervenors would ensure that those "legislators would be buying (their constituents) a lawsuit" instead.⁴³ This, of course, changed after the Office's elimination in 1995, as will be discussed in Part Two, Section B of this report with regard to the *Oak Creek* and *Silver Lake* litigation.

C. The Public Intervenor Office's Role as a Consensus Builder Provided Important Benefits to Wisconsin's Business Community

1. The Public Intervenor Office Reduced Legal Uncertainty

One of the many ways that the Public Intervenor Office provided a benefit to the business community was the manner in which the public intervenors' advisory and consensus-building capacities lessened the risk of litigation. With the help of the public intervenor in the rule-making process, Wisconsin laws and regulations coming out of the Legislature and state agencies were less likely to be subject to a series of major revisions and, therefore, less likely to be contested. Indeed, according to former public intervenor Thomas Dawson, as a result of the public intervenors' work with state agencies to draft environmentally appropriate regulations, Wisconsin business leaders and representatives had the opportunity to provide input into the process, enabling an exchange of ideas that led to the enactment of intelligent regulations.⁴⁴ One of the best examples of this cooperation remains Wisconsin's 1984 Groundwater Law, in which the Public Intervenor Office worked closely with business interests to work out a public policy that provided environmental protection for Wisconsin citizens while ensuring regulatory certainty for the business community.^{45, 46}

Donald Gallo, an environmental lawyer who has represented a variety of business, industrial, and governmental entities including the DOT, agreed with the public intervenors' contributions in this respect:

From the business point of view, the process has resulted in a more certain and consistent regulatory framework. It means minimizing risks associated with legal uncertainty, which translates into less costly regulation and a lower probability of facing environmental lawsuits.⁴⁷

Kenosha mayor John Antaramian similarly praised the Public Intervenor Office. While proceeding with redevelopment plans for his city's lakefront, the mayor actively sought out the intervenors' opinions, reasoning:

There are many times I prefer to deal with the intervenor than with narrow interest groups. On this (lakefront) site, we did not have to bring them in, but wanted to avoid lawsuits further down the road after considerable investment has been put into the project.⁴⁸

2. The Public Intervenor Office Served as an Industry Problem-Solver

Due to their unique status, public intervenors were often able to facilitate compromises between business objectives and environmentalist concerns. As stated by former public intervenor Thomas Dawson:

The Public Intervenor Office was duty bound to carry out its job, which was to protect Wisconsin's environment but not necessarily to stop a particular project, which was often the objective of environmental groups.⁴⁹

Towards this end, the public intervenors sought to "maximize the middle ground" by exploring less damaging alternatives, and by recommending protective measures that could be undertaken by developers and businesses at nominal expense compared to the cost of protracted litigation.⁵⁰

- **Lowes Creek in Eau Claire**—For example, in Eau Claire, when environmentalists strongly opposed a development project on the basis of its potential to damage a major trout stream called Lowes Creek by means of runoff and erosion, the Public Intervenor Office filed suit to protect the waterway but simultaneously extended its hand to the City of Eau Claire to see if the situation could be worked out. Thereafter, the Public Intervenor Office and the City of Eau Claire entered into a settlement agreement that permitted the development to go forward with an eye toward the environmentalists' concerns. Ultimately, settlement basins were constructed to avoid water quality degradation, and the developers' goals were fully realized. The result achieved, in the words of former public intervenor Thomas Dawson, "a win-win" situation.⁵¹

- **Mining Operations**—Likewise, the Public Intervenor Office worked with industry, agencies, and legislators for years to develop environmentally sound legislation and rules governing mining operations in Wisconsin. Towards this end, however, the public intervenors did not unconditionally oppose all mining in Wisconsin. For example, with respect to the Kennecott mine near Ladysmith, the Public Intervenor Office withdrew from active participation in the application hearing process after several years of the Office's cooperative communication with the mining company following the finding by the intervenors' expert hydrogeologist that the mining company had implemented reasonable methodologies to predict future groundwater impacts and thereby meet Wisconsin groundwater standards.⁵² While other citizen and environmental groups remained opposed to the mine and sued the DNR, the Public Intervenor Office did not.

- **Prairie du Chien Harbor Dock**—Another example of the role that the Public Intervenor Office played as a problem-solver includes the conflict between environmentalists and industry relating to the Prairie du Chien harbor dock in the east channel of the Mississippi River. In the 1990s, environmentalists had sought to shut down the harbor dock because of the adverse impact of barge traffic upon endangered species, including endangered mussel species. Prairie du Chien business and commercial interests, on the other hand, sought to upgrade and expand the harbor facilities to meet the need for continued growth and development. The Public Intervenor Office once again was able to negotiate a compromise, in 1992, that avoided litigation—in this case, by urging the consolidation of the harbor away from the habitat of the endangered species.^{53, 54}

- **Riverwalk Guidelines**—The Public Intervenor Office, together with the DNR, worked out a set of guidelines in 1991-92 that permitted wide scale development along Milwaukee's Riverfront while protecting public access to the river and meeting public trust concerns relating to the river itself. Businesses and developers along Milwaukee's Riverfront benefited greatly from the public intervenors' participation in this complicated process.⁵⁵

3. The Public Intervenor Office Helped Wisconsin's Tourism Industry

With Wisconsin's thousands of inland lakes, miles of rivers, and beautiful landscape, it comes as no surprise that tourism has consistently ranked as the state's second largest industry, accounting for \$5.7 billion per year in 1994 and up to \$11.7 billion per year according to the latest calculation in 2002.⁵⁶ Wisconsin is home to thousands of resorts, lodges, and camping grounds, catering to tourists seeking enjoyment from fishing, hunting, canoeing, and camping. Quite clearly, these activities are dependent upon the quality, viability, and scenic beauty of the state's natural resources. As demonstrated in small part in the chart below for 1994, the year prior to the Public Intervenor Office's elimination in 1995, there can be little doubt that the Public Intervenor Office provided a substantial financial benefit to thousands of Wisconsin's businesses involved in the tourism industry through its environmental advocacy efforts on behalf of public rights.

A 1994 SNAPSHOT: GIVING CREDIT WHERE CREDIT IS DUE⁵⁷	
Intervenor Action	Tourist Spending in 1994
Blocked the expansion of the Kidney Island Sludge Containment Facility in Green Bay Harbor, thereby preventing toxic dredgings from affecting water quality and fish viability in the more than 100 miles from Green Bay at the mouth of the Fox River to Door County's Washington Island.	Tourists spent \$237.8 million in Brown County and \$174.1 million in Door County, ranking them No. 5 and No. 7, respectively, among the top 10 Wisconsin counties in terms of tourism revenues.
Reached consensus with highway construction companies to preserve Fish Creek Slough, an 835 acre wetland west of Ashland in Bayfield County that merges with Chequamegon Bay and is an important fishery area for Lake Superior.	Tourists spent \$83.5 million in Ashland and Bayfield Counties.
Prevented storm sewer runoff from contaminating Lowes Creek, a major trout stream in the Eau Claire area.	Tourists spent more than \$146 million in Eau Claire and Chippewa Counties.
Monitored the Crandon area mining project, protecting the Wolf River and its surrounding areas from any adverse environmental impact.	Tourists spent \$55.3 million on tourism related to the Wolf River in the Northeast Wisconsin counties of Forest, Oconto, and Langlade. ⁵⁸

It is in consideration of these and many other successful efforts on the part of the Public Intervenor Office to safeguard Wisconsin's natural resources and the \$5.76 billion in tourist spending at stake in 1994 alone that many Wisconsin businesspeople and citizens questioned the elimination of the Public Intervenor Office, whose annual cost to the state budget in 1994 comprised \$232,000—far less than 1% of the tourism money at stake.

Part II.

The Void Created by the Loss of the Public Intervenor Office

In the 1995-1996 state budget, in a purported effort to “streamline government,” Governor Thompson and the Wisconsin Legislature made radical changes to the way Wisconsin historically had addressed environmental issues. For one, the secretary of the DNR was changed into a governor-appointed position, thereby removing the DNR from the control of the Natural Resources Board (an independent citizen committee composed of citizens appointed to six-year terms) and turning it into an agency operating under the control of the Governor’s Office. The second major change enacted by the 1995-1996 state budget bill was the de facto elimination of the Public Intervenor Office. The Office was cut down to one attorney with no secretarial support, moved out of the Department of Justice (DOJ) into the DNR’s Bureau of Legal Services, and, most significantly, deprived of its power to sue on behalf of Wisconsin’s citizenry.⁵⁹ This shadow of a Public Intervenor Office, already rendered powerless without its ability to sue or enforce environmental protections, was abolished quietly a few years later by the legislature.⁶⁰

Since the public intervenors’ elimination, an extensive and varied array of citizens have sought the Office’s reinstatement, including hunting and fishing groups, AFL-CIO members, DNR workers, business organizations, environmental activists, and politicians. For example, in a survey of DNR workers conducted in 2000 by Public Employees for Environmental Responsibility (PEER), two-thirds of the 1,500 respondents wanted the Public Intervenor Office restored.⁶¹ Likewise, at the Wisconsin Department of Natural Resources Conservation Congress hearings held statewide on April 13, 2000, conservation voters recommended by a 6,591 to 981 margin that the Public Intervenor Office be reinstated.⁶² More recently, Attorney General Peg Lautenschlager voiced her support of Assembly Bill 46, the bill currently seeking the restoration of the Public Intervenor Office, stating:

I believe the elimination of the Public Intervenor’s Office in 1995 was a mistake. Although this action was taken under the guise of streamlining government and eliminating duplication, I couldn’t disagree more with the contention by opponents of the Office of the Public Intervenor that these critical environmental issues are being given the same resources or attention today—they clearly are not.⁶³

In statements during his campaign and to the press since his election, Wisconsin Governor Jim Doyle has also voiced his support for the restoration of the Public Intervenor Office.⁶⁴ In light of Assembly Bill 46 and its many supporters, it will be important to assess the significant void created in Wisconsin by the loss of the state’s Public Intervenor Office.

A. The Public Intervenor Office's Ability to Provide Top-Notch Scientific, Technical, and Legal Information and Expertise Has Been Sorely Missed in Matters of Environmental Importance to Wisconsin Citizens

Who is defending the Public Trust Doctrine in Wisconsin? To do it on their own, Wisconsin citizens need to know the law, need money and resources, and need to be timely with respect to statutes of limitation, notification deadlines, and hearing dates. The following examples demonstrate the daunting and expensive task facing Wisconsin citizens lacking the assistance of the public intervenors.

1. Citizens Have Been Forced to Spend Their Own Money to Obtain Access to Accurate Information Concerning Wisconsin's Natural Resources

- **Kidney Island Dredge Spoils Containment Facility in Green Bay**—In 1988, the Public Intervenor Office successfully blocked the expansion of a toxic PCB dump called Kidney Island in the waters of Green Bay Harbor by seeking a contested case hearing before an administrative law judge in order to challenge the DNR's approval of the facility's expansion proposal and the DNR's grant of water quality certification to the proposed project. In agreement with the public intervenors' position, the hearing examiner reversed the DNR's grant of certification in consideration of the potential for damaging water quality in Green Bay and of the DNR's failure to comply with Wisconsin law concerning the grant of certification in a contested case.⁶⁵

A mere two weeks after the Public Intervenor Office was eliminated, the DNR reissued a permit to expand the Kidney Island facility in Green Bay Harbor without providing Green Bay citizens with the opportunity for public hearings on the matter or the benefit of extensive scientific and technical studies. In contrast to the 1988 proceedings, this time the citizens of Green Bay had to proceed without the help and expertise of the public intervenors and, as a result, were forced to spend nearly \$15,000 of their own money to obtain protection of their public rights and the enforcement of state law, not to mention the vast amount of taxpayer money wasted by the state in re-fighting the same issue again.⁶⁶ Ultimately, in 1998, the matter was resolved once again before an administrative law judge who overturned the DNR's decision to expand the PCB dump in Green Bay waters, thereby upholding the Public Intervenor Office's earlier victory some ten years prior.⁶⁷

- **Crandon Mine**—Prior to the Office's elimination in 1995, the public intervenors had retained three renown experts to evaluate and inform the public of the environmental impacts attendant to the proposed Crandon mining operation. Since then, citizens had been forced either to rely upon mining representatives for information, or to obtain it at their own expense and effort.
- **Power Line between Duluth and Wausau**—The Public Intervenor Office's expertise would be invaluable in the assessment of the environmental impact of the proposed 250-mile-long transmission line between Duluth and Wausau involving a 150-foot-wide swath through thousands of properties and thousands of acres of wildlife habitat. Without this Office, citizens have had to undertake this enormous task themselves at a significant disadvantage compared to the size and wealth of the corporations supporting the project.

2. Agency Regulations Have Been Stymied without Public Intervenor Input and Advocacy

- **Mining Moratorium Regulations Unwritten**—After five years, DNR has yet to prepare the necessary rules and regulations needed to interpret the Mining Moratorium Law enacted in 1998.
- **Air Pollution Rule Revision Stalled**—Revisions being considered as the first updates to the state’s air pollution rule (NR445) since it was adopted in 1988 remain on hold in the legislative process following a four-year process involving state business associations and environmental groups.⁶⁸ Because the proposed revisions provide “tremendous benefits to many industry members,” as well as to Wisconsin’s environment, the delay in the rule’s enactment has been harmful to business and environmental interests alike.⁶⁹

B. Without the Public Intervenor Office, Wisconsin Citizens’ Right to an Accountable Government Has Been Placed in Jeopardy

Following the elimination of the Public Intervenor Office in 1995, the costly and time-consuming burden of bringing Wisconsin state entities to task for failure to uphold existing environmental and constitutional laws has fallen to private Wisconsin citizens—or no one at all.

1. Wisconsin Citizens Have Had to Go It Alone in Efforts to Oppose the Inclusion of Detrimental Special Interest Provisions within State Budget Bills

In the years since the Public Intervenor Office’s elimination, Wisconsin’s Legislature has introduced numerous statutory provisions that are violative of state environmental protections as part of the state budget or as special interest statutes. As a consequence of Wisconsin court decisions determining that the DNR and the DOJ have no standing to object to the constitutionality of these special interest statutes, the full burden of litigating these public trust matters has fallen on the shoulders of Wisconsin citizens and privately funded environmental groups.

- **The City of Oak Creek Litigation: Pre and Post-Public Intervenor**—In 1994, the public intervenor challenged the constitutionality of a statute, included as part of the 1991 budget bill, which specifically exempted the city of Oak Creek from having to restore Crayfish Creek to its natural state after it had illegally placed a cement structure in the waterway.⁷⁰ The Public Intervenor Office objected to this special interest statute on constitutional grounds and the Wisconsin Court of Appeals agreed, reasoning that because the statutory exemption had been drafted by the Joint Finance Committee as part of the 1991 budget bill encompassing over 700 pages of session laws, without prior introduction before the legislature, and without any public hearings held on its content, the Court could not be assured that the statute had not been “smuggled or logrolled through the legislature without the benefit of deliberative legislative consideration.”⁷¹

In 1996, however, one year after the elimination of the Public Intervenor Office, the legislature passed another bill that again sought to exempt Oak Creek from having to remove the cement structure from Crayfish Creek. Given the absence of the public intervenors, the state’s attorney general brought an action against this special statutory exemption, claiming that it was unconstitutional and a public nuisance. Whereas the circuit court found that the attorney general had standing to bring the action, the Court of Appeals reversed the decision, holding that “the attorney general lacked the necessary

statutory authority to challenge the constitutionality of the statute in this case.”⁷² The Wisconsin Supreme Court affirmed in a decision starkly highlighting the void left by the Public Intervenor’s Office, concluding that because the attorney general lacked standing to attack the statute’s constitutionality, the statute’s presumed constitutionality remained.⁷³

- **Silver Lake: No DNR Standing**—When property owners at Silver Lake in Waushara County complained that the DNR’s determination of the ordinary high water mark resulted in a loss of beach real estate, legislators sponsored provisions in the state budget legislation along with a later piece of legislation to help the property owners’ in their dispute against the DNR. The DNR challenged the constitutionality of these statutes on the basis of their violation of the Public Trust Doctrine and the circuit court agreed. However, in *Silver Lake Sanitary District v. Wisconsin Department of Natural Resources*, the Court of Appeals rejected the DNR’s argument that it should be permitted (as had the Public Intervenor Office) to challenge a statute’s constitutionality if an issue of great public concern was presented.⁷⁴ Rather, the Court of Appeals ruled that in the absence of a private litigant, “the DNR had no standing” to contest the constitutionality of any statute, including those at issue bearing upon the determination of high water marks in Wisconsin lakes.⁷⁵
- **Ashley Furniture**—In order to prevent two high quality wetlands from being destroyed as a result of a “private bill” wetland exemption for Ashley Furniture Industries contained within the state’s 1999 budget bill, five statewide environmental groups had to invest tens of thousands of dollars and countless hours in a three-year effort which included a massive publicity campaign and a lawsuit, successfully won in August of 2001.⁷⁶

2. Wisconsin’s DNR Has Demonstrated Shortcomings in the Enforcement of State and Federal Environmental Laws

As mentioned earlier, simultaneous with the elimination of the state’s Public Intervenor Office, the 1995-1996 budget bill significantly altered the structure and makeup of Wisconsin’s DNR. In addition to granting the governor direct control over the DNR secretary, the DNR suffered severe budget cuts, reorganization, and the elimination of more than 400 staff across the state. These cuts, together with a corresponding decline in morale, has undermined DNR enforcement of environmental laws. As reflected in the tables of referrals to the State of Wisconsin Department of Justice Environmental Protection Unit, the number of cases that the DNR referred to the DOJ for prosecution significantly declined in the years immediately following the DNR’s reorganization.⁷⁷ Assistant Attorney General JoAnne Kloppenburg explained the drop as a consequence of the great uncertainty and dislocation that the DNR experienced when it was made a cabinet agency and its reorganization took people away from their prior areas of expertise and experience.⁷⁸ While DNR case referrals have returned to historic levels in several areas in the years since, there remains a continuing reduction in hazardous waste referrals due almost entirely, in Kloppenburg’s view, to staffing and resources shortages, since hazardous waste violations require serial onsite inspections for which DNR staff have had neither the time nor the resources.⁷⁹ For similar reasons, the DNR in 1999 failed to inspect up to 53% of all major industrial facilities with a Wisconsin Pollutant Discharge Elimination System (WPDES) permit in contrast to the DNR’s perfect inspection record for these facilities in the years 1990 to 1994.⁸⁰ Given these enforcement issues and the additional budget and staff cuts that the DNR has been forced to sustain, Wisconsin citizens have had no recourse in the years since the Public Intervenor Office’s elimination other than to mobilize their own resources to try to hold the DNR accountable for the enforcement of environmental laws.

C. The Absence of the Public Intervenor Office Has Left Many Wisconsin Citizens, as well as Wisconsin's Tourism Industry, in a Vulnerable Position

With the absence of the Public Intervenor Office in the development of new laws and regulations necessary to protect public rights in Wisconsin's natural resources, Wisconsin citizens concerned about their environment and matters affecting their families and communities have been deprived of a unifying public voice and behind-the-scenes advocate as demonstrated by any one of the following current issues.

- **Energy Planning**—Wisconsin is at the threshold of making critical decisions concerning Wisconsin's future energy needs. The Public Intervenor Office, with its technical and legal expertise and ability to give a venue to citizen concerns, could certainly be playing a valuable role.
- **Gaps in Water Law Protection**—As highlighted by the Perrier case, Wisconsin's high capacity well legislation fails to provide adequate protection to the state's lakes and waterways. Like its instrumental role in the 1984 Groundwater Law, the Public Intervenor Office could be working to develop consensus among industry, state, and environmental representatives to hammer out intelligent public policy.
- **Proposed State Highway Expansion**—Significant environmental justice issues, as well as environmental impact concerns, have been exposed by the DOT's proposed highway expansion plans, which the public intervenors could be bringing to the attention of both the agency and the public at large.
- **Development Concerns in the North Woods**—The Public Intervenor Office could be playing a major role in finding the common ground between shoreland owners and public rights advocates in Wisconsin's north woods and in assisting the DNR in the rulemaking process already underway with NR 115.

In addition, Wisconsin citizens and businesses dependent upon the state's tourism industry have also been placed in a vulnerable position since the Public Intervenor Office's elimination. According to former Wisconsin Department of Tourism secretary Moose Speros, in 2001 tourists spent \$316 per second in Wisconsin, with about \$11 billion in annual economic impact and tax revenue of more than \$1.5 billion.⁸¹ "We have a great product," Speros explained, and "the more product you have, the more customers you will have."⁸² Mary Jane Huston, Wisconsin state director of the Nature Conservancy, agrees and notes that with almost one-third of Wisconsin's tourism revenue generated by outdoor activities like wildlife watching, hunting, and fishing, "there is a direct connection between conserving our state's lands and waters and the health of our tourism industry."⁸³

With the widespread contamination of Wisconsin lakes and waterways by mercury, however, Wisconsin's tourism industry may be placed in harm's way. Mercury is a neuro-toxin, which can damage the kidneys and impair the brain and nervous system's ability to function, resulting in the reduction of IQ, memory, attention span, and coordination.⁸⁴ Especially vulnerable to mercury's effects are small children and pregnant women. While initially an airborne pollutant, primarily generated by coal burning power plants, mercury settles in water where bacteria converts mercury to a more toxic form, methylmercury, which accumulates in fish.⁸⁵ Recently, the DNR was forced to widen the scope of its fish consumption advisory from 341 lakes to *all* of the more than 15,000 lakes in Wisconsin. The DNR advisory warns anglers not to eat certain types and sizes of fish caught in any Wisconsin waterway due to unsafe levels of mercury. In consideration of the following fishing facts published by the Wisconsin DNR, it is clear that the DNR's mercury advisory is of no small consequence to the State of Wisconsin and its citizens.

WISCONSIN FISHING FACTS FOR 2001 ⁸⁶
Wisconsin ranks in the top five fishing destinations
23% of Wisconsin adults fished in 2001
Fishing supported 26,000 jobs
Anglers spent \$1.2 billion on gear and trips
Fishing generated \$90 million in taxes
In 2001 alone, Wisconsin fishing generated a \$2.3 billion economic impact

And, yet, despite the clear need for intervention given the magnitude of the environmental and public health concerns raised, the Mercury Reduction Bill proposed in 2000 (SB 177), was voted down in the Joint Finance Committee despite extensive public support for the bill, including hundreds of citizen groups, as well as the support of the DNR and bipartisan legislators. By many accounts, the bill was killed as a result of powerful lobbying pressures and a misinformation campaign, which the Public Intervenor Office, with its network of experts and respected status in the legislative arena, might have effectively countered.

In another recent effort, the DNR in June of 2003 unanimously approved new rules requiring the reduction of airborne mercury emissions from power plants. Yet, these rules, which require legislative approval before they can take effect, may also run into trouble, as did the Mercury Reduction Bill before them, without the public advocacy efforts of the Public Intervenor Office.⁸⁷ Thus, as demonstrated here, when the owners of Wisconsin businesses and resorts that cater to anglers are asked by residents and tourists alike, "Can we eat the fish?" it seems that all hands point to a far larger question: Without the Public Intervenor Office, who *is* looking out for our public lands and waters?

Conclusion

Thus, there can be no denying that the Public Intervenor Office provided a tremendous benefit to Wisconsin citizens during the Office's tenure from 1967 to 1995. Notwithstanding their impressive number of legal victories, many would argue that the intervenors' greatest accomplishments took place outside the litigation context—in the invaluable assistance that they provided legislators and agency rule-makers as well as in the benefit that they provided Wisconsin business interests and environmental groups in building consensus on matters of environmental concern.

Since the Office's elimination in 1995, Wisconsin citizens, lawmakers, and bureaucrats have been at a loss. Without the intervenors' counterbalance to Wisconsin's DNR and other state agencies, the enforcement of state and federal laws has declined and citizens have had to go it alone in their efforts to seek expert information or oppose special interest statutes buried within state budget bills. Without the public intervenors' participation on technical advisory committees, testimony before legislative committees, and outreach to business, industry, and environmental leaders, necessary environmental regulations and legislation have become bogged down in committee. The elimination of this champion of the public trust has left a conspicuous void in Wisconsin's environmental arena and the findings of this report certainly argue for the restoration of the Public Intervenor Office in Wisconsin.

Endnotes

1. Wisconsin Department of Tourism, "Wisconsin Tourism Facts," Wisconsin Department of Tourism, http://agency.travelwisconsin.com/PR/Tourism_Facts/Facts.shtm.

2. *Muench v. Public Service Commission*, 261 Wis. 492 (1952).

3. United States Senator Russell Feingold, "Who You Callin' a Populist, Buddy?" (essay, April 1996): "Part of that (populist) legacy is 'the Wisconsin idea,' the marshaling of the resources of government, business, academia and citizens' groups to come up with solutions to social and economic challenges."

4. A. Christenson and P. Dubois, *Public Advocacy and Environmental Decisionmaking: The Wisconsin Public Intervenor*, Institute of Governmental Affairs and Institute of Ecology, Environmental Quality Series No. 26, (University of California, Davis, February 1977).

5. In 1977, the Public Intervenor Office, working with University of Wisconsin Law School professors Arlen Christenson and James McDonald, created the Public Intervenor Clinical Law Program. As outlined by Assistant Attorney General Thomas Dawson, who served as a public intervenor from 1976 to 1995, this program recruited six to eight law students per semester to practice environmental law under the supervision of the public intervenors and Professors Christenson and McDonald. Without pay, but receiving law school credits for their work, the students investigated citizen complaints, researched the law, and delivered advice to hundreds of citizens. They were further responsible for investigating permit applications to the Army Corps to fill wetlands, which involved interviewing applicants, obtaining facts, and assessing alternatives to avoid wetland destruction. In addition, the students also wrote similar letters to the DNR to deny or condition water quality certification for the federal wetland fill permit applications. In this manner, as a result of the Public Intervenor Clinical Law Program, the taxpayers of Wisconsin were able to get thousands of dollars of valuable work rendered at no expense to the state.

6. Wisconsin Stewardship Network, "Didn't Taxpayers Save Money by Eliminating the Intervenor?" Wisconsin Stewardship Network, <http://www.wsn.org/issues/PIOsavemoney.html>.

7. A. Christenson, "The Vital Role of the Public Intervenor," Wisconsin Stewardship Network, <http://www.wsn.org/issues/PIOchristenson.html>.

8. Sec. 165.076, Wis. Stats. (1995).

9. As explained by former intervenor Thomas Dawson, the four-year terms of Citizen Advisory Committee members was begun by Attorney General Don Hanaway and continued by Attorney General Jim Doyle. Prior to that, the Citizen Advisory Committee members served at the pleasure of the attorney general.

10. Kathleen Falk (current Dane County executive and former public intervenor), telephone interview with the author, October 7, 2003.

11. Gaylord Nelson to Wisconsin Legislators and Governor Tommy Thompson, April 14, 1995.

12. 1983 Act 410 sec. 165.075, Stats.

13. Two public intervenors, in particular, had the most significant impact on the direction and efficacy of the Public Intervenor Office: Thomas Dawson, who served as a public intervenor for 19 years from 1976 to 1995, and Kathleen Falk, who served as a public intervenor for 12 years from 1983 to 1995. The level of dedication, skill and intelligence possessed by these two individuals was confirmed in interview after interview.

14. Similarly, long-time member of the Public Intervenor Office's Citizen Advisory Committee, University of Wisconsin Law Professor Arlen Christenson explained the Office's role as follows: "We tell citizens how to cut red tape, what people to contact, what their rights are, what hearings they can get, where to turn for legal representation. A lot of our calls involve local government decisions as well as ones made by state bureaucracies." Public Intervenor Office, *Public Intervenor Accomplishments* (handout), 1995.

15. Thomas Dawson (current assistant attorney general and unit director for the Environmental Protection Unit of the Wisconsin Department of Justice and former public intervenor), written comments, August 24, 2003.

16. Kathleen Falk (current Dane County executive and former public intervenor), telephone interview with the author, October 7, 2003.

17. R. Seely, "Public Intervenor Praised," *Wisconsin State Journal*, February 28, 1995.

18. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991).

19. Beyond its defense of local government rights, the *Mortier* case also demonstrates the moderating influence of the Public Intervenor Office. As described by Thomas Dawson in written comments dated August 24, 2003, the Town of Casey originally contacted the Public Intervenor Office seeking to impose an ordinance totally banning the aerial application of pesticides in the town due to concern for its citizens and tourist industry. The public intervenors counseled against the total ban in favor of the more moderate approach of requiring a permit before aerial spraying.

20. Thomas Dawson (current assistant attorney general and unit director for the Environmental Protection Unit of the Wisconsin Department of Justice and former public intervenor), written comments, August 24, 2003; see also Public Intervenor Office, *Public Intervenor Accomplishments* (handout), 1995.

21. Wisconsin Department of Natural Resources, "Chapter 105: Nonmetallic Mineral Mining and Reclamation," *DNR Waterway and Wetland Handbook*, Wisconsin Department of Natural Resources, <http://www.dnr.state.wi.us/org/water/fhp/handbook/>.

22. Thomas Dawson (current assistant attorney general and unit director for the Environmental Protection Unit of the Wisconsin Department of Justice and former public intervenor), written comments, August 24, 2003.

23. *State Public Intervenor v. Wisconsin Department of Natural Resources*, 171 Wis.2d 243, 490 N.W.2d 770 (Ct. App. 1992).

24. "Festival Oversight Change Threatened Mayoral Aide," *The Milwaukee Journal Sentinel*, June 13, 1998.

25. Michael Cain (DNR staff attorney), telephone interview with the author, August 14, 2003.

26. "Meeting to Seek Input on Budget," *The Milwaukee Journal*, July 28, 1992.

27. *Town of Two Rivers v. State, Department of Natural Resources*, 105 Wis.2d 721, 315 N.W.2d 377 (Ct App. 1981).

28. "Proposed Giant Mine Raises Fears," *The Milwaukee Journal*, April 27, 1994.
29. Id.
30. Id.
31. 42 USC 11001 et seq. (1986).
32. Wisconsin Department of Natural Resources, *Acid Rain in Wisconsin*, (publication AM-129-94), Wisconsin Department of Natural Resources, <http://www.dnr.state.wi.us/org/aw/air/health/acidrain.htm>.
33. L. Chern, and D. Johnson, "Walking on Water," *Wisconsin Natural Resources Magazine*, June 1998.
34. Wisconsin Stewardship Network, "Pesticide Update," Wisconsin Stewardship Network, <http://www.wsn.org/pesticideupdate2.html>.
35. Thomas Dawson (current assistant attorney general and unit director for the Environmental Protection Unit of the Wisconsin Department of Justice and former public intervenor), interview with the author, July 17, 2003.
36. Id.
37. Id.
38. Kathleen Falk (current Dane County executive and former public intervenor), telephone interview with the author, October 7, 2003.
39. George Meyer (current Wisconsin Wildlife Federation executive director and former DNR secretary), interview with the author, August 5, 2003.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. As recalled by Kathleen Falk in an October 7, 2003 telephone interview with the author, former intervenor Thomas Dawson's work in developing new sand and gravel regulations demonstrated both Dawson's exceptional ability to find common ground and the Public Intervenor Office's success in securing the adoption of environmentally protective regulations that industry could live with.
47. J. Paulus, "Environmental House Cleaning," *Corporate Report Wisconsin*, June 1995.
48. Id.

49. Thomas Dawson (current assistant attorney general and unit director for the Environmental Protection Unit of the Wisconsin Department of Justice and former public intervenor), interview with the author, July 17, 2003.
50. Id.
51. Id.
52. Minutes of May 8-9, 1990 Citizen Advisory Committee Meeting, Department of Justice Memorandum, June 7, 1990.
53. Thomas Dawson and Kathleen Falk, memorandum to Legislative Fiscal Bureau, April 10, 1995.
54. Michael Cain (DNR staff attorney), telephone interview with the author, August 14, 2003.
55. Id.
56. Wisconsin Department of Tourism, "2002 County Economic Profiles," Wisconsin Department of Tourism, http://agency.travelwisconsin.com/research/economicimpact_Active/02countyprofiles/Sheboygan County 2002.pdf.
57. "SportsDay," *The Milwaukee Journal Sentinel*, May 16, 1995.
58. Davidson-Peterson Associates, *The Economic Impact of Expenditures by Travellers on Wisconsin, Calendar Year 2002, Highlight Summary*, (Wisconsin Department of Tourism 2003).
59. Wisconsin Stewardship Network, "The History of the Public Intervenors Office: A Broken Promise," Wisconsin Stewardship Network, <http://www.wsn.org/issues/PIOhistory.html>.
60. Id.
61. Wisconsin Stewardship Network, "DNR Watch: Research Report No. 7," (citing the 2000 survey of Wisconsin DNR employees conducted by Public Employees for Environmental Responsibility [PEER]), Wisconsin Stewardship Network, <http://www.wsn.org/issues/DNRwatch7.html>.
62. D. Hissom, "Environmental Watch," *Shepherd Express Metro* (Milwaukee), April 27, 2000.
63. Wisconsin Department of Justice News Release, April 1, 2003; see also "Restore Intervenor Position," *Wisconsin Rapids Daily Tribune*, April 2, 2003.
64. R. Seely, "DNR to See Big Changes with Doyle," *Wisconsin State Journal*, December 3, 2002.
65. *State Public Intervenor v. Wisconsin Dept. of Natural Resources*, 184 Wis.2d 407, 515 N.W.2d 897 (1994).
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67. Id.; see also Clean Wisconsin (formerly Wisconsin's Environmental Decade), "State of the State's Environment: 1998," Wisconsin Stewardship Network, <http://www.wsn.org/issues/stateofstate.html>.
68. R. Seely, "State May Revise Rules for Clean Air," *Wisconsin State Journal*, April 21, 2003.

69. Donald Gallo (environmental attorney), telephone interview with the author, August 11, 2003.
70. *City of Oak Creek v. State Dept. of Natural Resources*, 185 Wis.2d 424, 518 N.W.2d 276 (Ct. App. 1994).
71. *Id.* at 439, citing *Davis v. Grover*, 166 Wis.2d, 501, 522, 480 N.W.2d 460, 467 (1992).
72. *State v. City of Oak Creek*, 223 Wis.2d 219, 227, 588 N.W.2d 380
73. *State of Wisconsin v. City of Oak Creek*, 232 Wis.2d 612, 2000 WI 9 (2000).
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