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**Advocacy Digest | March 21, 2023**

**Brad Boycks, Executive Director**

**Reforms to TRANS 233 out for authors soon**

**Reforming the DOT rule regarding subdivision that abut a state highway (TRANS 233) is a provision on our advocacy agenda and an issue that we have been working on for a number of years. We have secured two authors for the bill, State Senator and Chair of the Senate Transportation Committee Cory Tomzcyk (R-Mosinee) and State Representative Dave Murphy (R-Greenville).**

**The major provisions in the bill draft are:**

1. *Setback Reduction:* The Proposed Legislation modifies the setback area from 100 feet to 50 feet. The 50-foot setback is more reasonable than 100 feet to protect property owners’ interests in free use of property. WisDOT still maintains the ability to condemn additional property if needed for future transportation needs.
2. *Definition of “Structure” in Setback Area:* The Proposed Legislation clarifies that a “structure” matches a common understanding: items that are “portable,” i.e., movable. Examples include swing sets and bike paths. Non-movable items are prohibited in the setback area unless a variance is granted. The amended definition allows WisDOT to focus on safety of keeping a setback area free of non-movable objects, yet allows WisDOT to use its future planning tools to make decisions in order to avoid absurd results. The Proposed Legislation also recognizes WisDOT’s obligation and privilege to determine what structures may create an “adverse affect” on public safety or a structure that will create adverse.
3. *Using “Substantial Evidence” for Decisions:* The Proposed Legislation requires WisDOT to make decisions based on “substantial evidence.” This requirement allows WisDOT to focus on public safety based on data, reports and scientific standards, and future transportation plans, but reduces decisions based on opinions of what should be allowed in a setback area without any data to support that decision.
4. *Variance Process.* The Proposed Legislation sets forth a specific statutory variance process (the “Variance Process”) to correct the confusion created by the various court cases and conflicting Wisconsin Administrative Rules. The Variance Process accomplishes the following:
	1. WisDOT may still utilize its future plans, applicable data, and planning tools when considering a variance request.
	2. By requiring “substantial evidence” to justify its decision, WisDOT will focus on actual plans and data to justify its decision, not just personal opinions.
	3. The Variance Process allows for statewide policy standards, yet allows WisDOT flexibility in unique circumstances in which it makes sense to allow a structure within the setback area. The language presents a statutory solution for avoiding absurd results.
	4. WisDOT’s future plans and facility improvements are a priority in determining whether to grant a variance. WisDOT may require a property owner to waive future compensation for removal of the property within the setback area if WisDOT needs the area for its transportation facilities. This accomplishes the use of one’s property while still protecting the public and taxpayers for future transportation facilities or required improvements.
	5. Sets forth a review process, which is key because denial of a variance raises questions of due process in light of the loss of use of one’s property without compensation.
	6. The focus remains on public safety as the top priority. WisDOT may deny a variance if the use described in an owner’s variance application poses a danger to public safety.
5. *Correction of Public-Facing Information:* The Proposed Legislation directs WisDOT to correct the errors currently set forth in its policies and website. While this type of information is not usually included in legislation, WisDOT’s failure to fix the inaccurate and confusing information that it stated as current policy.

Once this bill is circulated by the bill authors for co-sponsors we will likely reach out to members via the VoterVoice system so you can contact your member of the state assembly and state senate and ask them to co-author the bill.

**FROM NAHB: Biden WOTUS Rule in Effect in 48 States**

The Biden administration’s new “waters of the United States” (WOTUS) rule is in effect in 48 states across the nation, but the rule could be short-lived because the Supreme Court’s upcoming ruling under Sackett v. EPA is squarely focused on the legality of the significant nexus test, which is a critical part of the final rule. The verdict could come anytime within the next few weeks.

Meanwhile, a Texas federal court has blocked the Biden WOTUS rule from taking effect in Texas and Idaho, and specifically cited serious concerns regarding the significant nexus text. NAHB and other groups had sought a nationwide injunction, but the judge in the case ruled that it would only apply to those two states.

There are also two other cases in Kentucky and North Dakota where states and businesses are challenging the rule. NAHB participated in the Texas lawsuit and has sought to intervene in North Dakota.

In practice, the significant nexus test has proven extremely difficult to apply consistently in the field, leaving developers and builders unable to discern for themselves which isolated wetlands, ephemeral streams or even human-made drainage features, like roadside ditches, are federally jurisdictional under the Clean Water Act.

The new WOTUS rule radically extends the areas in which home builders are required to get federal permits. This will result in continued regulatory barriers to affordable housing as single-family and multifamily developers struggle to find the developable land necessary to produce the new affordable housing units this nation desperately needs.

As of now, if a developer or builder approaches the U.S. Army Corps of Engineers seeking a jurisdictional determination or a federal wetlands permit, the now-effective final rule applies nationwide except for Texas and Idaho. If the same developer or builder had an approved jurisdictional determination under the prior Trump WOTUS rule but now wants to proceed and get a federal wetlands permit, they would have to move forward under the new Biden WOTUS rule.

On the legislative front, NAHB worked aggressively to get a bipartisan House resolution passed recently that would rescind the Biden WOTUS rule. A Senate vote on the same resolution is expected within the next week or two. If the Senate resolution is approved, NAHB will urge Biden to sign the measure into law. However, the president is expected to veto the measure if it reaches his desk.

NAHB will keep fighting on the legislative and legal fronts and continue to call on the president to heed the will of the people by signing this resolution into law if it passes the Senate and directing his administration to craft a new WOTUS rule that restores common sense and predictability to the federal wetlands permitting process while maintaining environmental protection of our nation’s waterways.