STATE OF WISCONSIN CIRCUIT COURT SAWYER COUNTY

STATE OF WISCONSIN, MARTIN AND MADELINE LEVAKE, CHARLES LEVAKE, JOHN FAVELL, GERALD P. BLAKE, ROBERT ELLERBROOK, JAMES B. AND JOAN L. MILLER, RANDY AND JUDY SWANSON, ALAN STEWART, BRANDY NOVAK AND LOUIS THOMAS AUSTIN III,

Plaintiff,

vs.

WILLIAM ZAWISTOWSKI, A/K/A WILLIAM ZAWISTOWSKI, JR.,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Case No.: 04 CV 75

This matter was presented as a trial to the court and subsequently briefed by counsel for the parties. Extensive testimony was received and the court has reviewed numerous exhibits and other evidence. Based upon that record and all the reasonable inferences that can be drawn from the evidence, the court hereby makes its findings of fact and conclusions of law.

BACKGROUND

The individual plaintiffs and the State of Wisconsin have brought this action asserting that defendant William Zawistowski's cranberry operation located on the south shore of Musky Bay on Lac Courte Oreilles is causing a public and private nuisance. The Zawistowski family has operated cranberry farms for decades, and the marshes along Musky Bay have been in operation for over 60 years.

This case involves §823.08 Wis. Stat., commonly referred to as the "Right to Farm Act". It appears to be the first case filed in Wisconsin regarding an alleged nuisance on a public waterway and the interplay of §823.08 Wis. Stat. and Article IX, Section 1 of the Wisconsin Constitution.

The state fruit in Wisconsin is the cranberry. Persons who grow cranberries upon their lands are allowed to construct and maintain dams or ditches upon or to any water source in this state as necessary for the purpose of "flowing such lands" and to construct ditches and drains as necessary to flood, drain and carry off water from lands growing cranberries, or to irrigate and fertilize the cranberry beds. (See §94.26 Wis. Stat.)

The provisions of §823.08 Wis. Stat. were enacted in 1981. Prior to that time, the common law in this state had not sufficiently developed to provide much guidance regarding the competing interests of cranberry growers who use waters of this state and the rights of other riparian owners or the public. The issue of whether §94.26 Wis. Stat. would provide ultimate protection against the public's interest, if a cranberry grower's legal use of the water would be contrary to the public health, welfare or safety, was never fully addressed.

While rights granted to cranberry growers by statute prior to 1981 were substantial, they were not paramount to the rights of the public when considering public health or welfare. *Cranberry Creek D. District v. Elm Lake C. Co.*, 170 Wis. 362, 367 (1920). The enactment of §823.08 Wis. Stat. created additional protections for agricultural operations facing nuisance allegations. This case appears to be one of first impression. The issues before this court are complex and the competing public policies are important. The following are the findings of this court and of its ultimate conclusions of law.

FINDINGS OF FACT

1. The individual plaintiffs in this matter are riparian property owners on the shores of Musky Bay. Musky Bay is a rather large bay or inlet on a large inland lake located in Sawyer County, named Lac Courte Oreilles.

2. The State of Wisconsin, through the office of the attorney general, is also a plaintiff in this matter representing the public's interest regarding the use and enjoyment of Lac Courte Oreilles, specifically within the area known as Musky Bay.

3. Defendant, William Zawistowski, is an adult resident of Sawyer County, who, together with his family, own and operate cranberry farm operations in Sawyer County. One of those operations is located along the southern shore of Musky Bay with one cranberry marsh located at the southeast corner of Musky Bay and the other located at the southwest corner of Musky Bay. This particular operation started in 1939 by Zawistowski's father. These respective marshes are known as the "east" and "west" marshes. Both marshes are substantially independent of each other and have separate and distinct ditches and pumping systems. The ditches and pumping systems are designed to:

a) extract water from Musky Bay to be used to flood the cranberry beds; and,

b) drain the marsh and return water to Musky Bay from each cranberry marsh.

4. Each ditch or canal is manmade and are connected to Musky Bay. They were presumably created by defendant's father during the time when he operated the cranberry marshes.

5. Lac Courte Oreilles is the largest natural lake in Sawyer County and according to Exhibit 203, is the eighth largest lake in the state of Wisconsin. Musky Bay is between 200 and 300 acres in size and is a shallow bay with significant aquatic vegetation.

6. A portion of Lac Courte Oreilles borders the Lac Courte Oreilles Indian Reservation. The Lac Courte Oreilles Tribe is part of the Lake Superior Band of Ojibwas. The tribe has made a concerted effort over a number of years to monitor water quality on Lac Courte Oreilles including monitoring water quality within Musky Bay.

7. The Zawistowski family has operated both the east and west cranberry marshes on the south shore of Musky Bay for decades. As part of the operation of both cranberry marshes, various fertilizers containing phosphorus have been applied to the marshes. Until recently, some fertilizer has been applied by airplanes. That practice has been discontinued in the last few years.

8. Zawistowski's use of fertilizer is less than what is generally recommended by various recognized experts familiar with cranberry farming. The Zawistowski cranberry operation is using methods of operation which are common throughout the cranberry industry, both in Wisconsin and elsewhere. The Musky Bay marshes are "open" systems and depend upon Musky Bay as their primary source of water.

9. Zawistowski's cranberry marsh operations bordering Musky Bay use the waters of Musky Bay to flood the cranberry beds as necessary. This court has not been shown and is unaware of any water quality standard established by the Wisconsin legislature, or any rule-making body within this state, which regulates the discharge of water from cranberry farms.

10. The riparian owners along Musky Bay, other than defendant Zawistowski, including those which are private plaintiffs in this matter, either occupy primary or secondary residences along Musky Bay. There appear to be no existing commercial enterprises along the shoreline of the bay except for the cranberry marshes operated by the defendant. In the past, there was at least one operating resort on Musky Bay.

11. Musky Bay, together with much of Lac Courte Oreilles, has historically been used for recreational purposes such as fishing, boating, swimming and sailing.

12. Lac Courte Oreilles is home to a variety of fish species. Lac Courte Oreilles originally had a naturally reproducing muskellunge (musky) population. This population was native to Lac Courte Oreilles. At some point in the late nineteenth century, or during the twentieth century, northern pike were introduced into the lake through a human-initiated stocking program. Presently, the primary species of fish within the Lac Courte Oreilles watershed are walleye, northern pike, small mouth bass, musky, perch and bluegill. Walleye and musky populations are presently maintained by a stocking program. Apparently, there is little or no natural reproduction of the native musky population in Lac Courte Oreilles.

13. The Wisconsin Department of Natural Resources has, for a number of years, studied Lac Courte Oreilles and Musky Bay.

14. Musky Bay was apparently a primary spawning ground for the native musky population of Lac Courte Oreilles. That population was studied by the Wisconsin Department of Natural Resources (and possibly its predecessor) for a number of years. Presently, fishery biologist Frank Pratt, an employee of the Department of Natural Resources, continues to study and monitor the Lac Courte Oreilles and Musky Bay fishery. Mr. Pratt began his regular study and monitoring of Lac Courte Oreilles and Musky Bay in approximately 1976. Mr. Pratt's testimony before the court is given great weight due to his long-term personal and professional familiarity with Lac Courte Oreilles, and, in particular, Musky Bay. His scientific opinions, and personal observations are compelling because of his lengthy research and regular visits to Musky Bay.

15. Biologist Pratt is qualified to give opinions regarding the health and status of the aquatic community of Musky Bay.

16. According to Pratt's testimony, when he began his studies of Lac Courte Oreilles, Musky Bay was, as he described it, in a late mesotropic stage with some musky still spawning within the bay. He described Musky Bay as containing numerous rooted weeds (macrophytes). Those weeds were described as growing up from the bottom of the bay to close to the water's surface, but not so high as to interfere with the operation of his watercraft. He described the north shore of Musky Bay as having a harder bottom and in some spots, a sandy bottom. He noted some wild rice growth still existed in 1976. He described the fishery population as being varied.

17. Mr. Pratt testified that by 2005, the quality of the habitat in Musky Bay had degraded. He indicated that musky spawning had essentially stopped, though he could not give an opinion to the exact cause or causes. He testified that the introduction of the northern pike to Lac Courte Oreilles, has had a likely impact on the musky population because the young northern pike mature faster and earlier than that of the musky and are likely predators of the young musky soon after they are hatched. He also testified that the degradation of habitat in Musky Bay, primarily the increased density of aquatic vegetation (weeds) (macrophytes) is likely depleting the oxygen levels near the lake bed where the musky eggs are maturing, impacting their ability to adequately develop.

18. Mr. Pratt also testified that there has been a definite change in the fish habitat of Musky Bay since 1976. The macrophytes are much more dense today than they were in 1976. He also testified that in the last 15 years, the algae growth has noticeably increased. He indicated that in 1976, he and his associates did not have any difficulty operating their boats with outboard motors within Musky Bay. He indicated that presently, even in the late spring, there are difficulties

accessing portions of the bay as a result of the increased macrophyte and algae growth. Under cross-examination, Mr. Pratt described his observations of the algae blooms as "very pronounced" in the last ten years. He also commented that he has a significant familiarity with most of the lakes in Sawyer County and that he is not familiar with a similar body of water in Sawyer County having the same poor water quality conditions that he is presently seeing in Musky Bay.

19. Mr. Pratt was asked to review numerous historical documents, which indicated that significant weed growth existed in the past, and, as early as the 1940's, algae was observed growing on the water's surface of the bay.

20. Various lay witnesses, property owners and previous property owners, including the defendants, Mr. and Mrs. Zawistowski, testified that Musky Bay, in the present day, is substantially the same as it was in decades past.

21. Other lay testimony, including the private plaintiffs, indicated that water quality has deteriorated and the amount of surface algae blooms have increased noticeably in the last ten to fifteen years.

22. The court heard testimony from various water quality experts, aquatic biologists, and other similar experts. The primary focus of plaintiffs' claims are that substantial amounts of phosphorus is entering Musky Bay, causing an increase in growth of aquatic plants (macrophytes, weeds, etc.) and causing additional algae to grow across the bay. The increased growth of submerged and floating mats of algae are a significant portion of plaintiffs' claim that nuisance conditions exist on Musky Bay. Plaintiffs further allege that toxic blue-green algae is present in Musky Bay. There is some evidence that blue-green algae may contain toxins that may be harmful to humans. It is unclear if any algae in Musky Bay is harmful to humans.

23. Phosphorus is found naturally in the environment. It is also an ingredient in many fertilizers and other household products. The level of phosphorus introduced into a body of water will have a direct effect on aquatic vegetation, including algae. Apparently, phosphorus can cause algae to grow fast and in great quantities depending on numerous factors including size and depth of the lake and the climate.

24. There are numerous methods to index, rate or determine water quality, or overall aquatic health. Those methods include the Floristic Quality Index and the Trophic State Index.

25. According to aquatic biologist, Steve Hjort and Dr. Stanley Nichols, Musky Bay shows average or slightly above average water quality according to the Floristic Quality Index. According to the same testimony, other portions of Lac Courte Oreilles in general were listed as below average according to the Floristic Quality Index. Dr. Nichols and Mr. Hjort essentially concluded that Musky Bay has a reasonably healthy and diverse aquatic plant community. They also felt that Musky Bay had the largest and most diverse aquatic macrophyte community on all of Lac Courte Oreilles.

26. Algae, and even blue-green algae, is reasonably common in many lakes, rivers and other bodies of water throughout Wisconsin. There is evidence to suggest that certain blue-green algaes may contain toxins which could be harmful to humans. However, there is little evidence of specific cases of blue-green algae causing humans to become ill. Blue-green algae likely exists within Musky Bay but is not the dominant type of algae in Musky Bay. Many species of algae are not necessarily unhealthy to an aquatic eco-system, however, an overabundance of algae likely will have a negative impact on the aquatic eco-system. Deterioration of water quality and water clarity and the increased growth of algae and macrophytes is a process known as eutrophication.

Eutrophication may be caused by increasing the inputs or inflow of nutrients, particularly nitrogen and phosphorus, into a body of water.

27. There is a process to determine the sources of nutrients entering a body of water. A calculation to determine the amounts and sources of phosphorus also exists. This is the creation of a phosphorus budget. The court heard testimony relative to at least two opinions regarding a phosphorus budget of Musky Bay. Both plaintiffs' and defendant's experts gave opinions regarding the likely sources of phosphorus surrounding Musky Bay and both opinions related to a time frame within the last five years.

28. The Trophic State Index measures the relative water quality within a body of water. Lac Courte Oreilles, in general, is characteristic of a mesotrophic lake which generally means moderate productivity and water quality. However, there are times of the year and areas of the lake in which the condition often improves to oligotrophic, which is a characteristic of clear or cleaner water with fewer nutrients and low productivity. Musky Bay, however, is considerably shallower than most other areas of the lake and has historically higher concentrations of aquatic vegetation. Musky Bay is more turbid and higher in productivity and nutrients. This is a characteristic more consistent with a eutrophic status on the index.

29. Musky Bay exhibits water quality characteristics that appear to change during the course of the year. For instance, it would be likely that the clarity of water would be greater in the spring and fall than it would be during the summer period. Based upon the totality of the evidence presented to the court, the greater weight of the credible evidence suggests that at the present time, and for at least the last several years, Musky Bay has shown a significant change in both its water clarity, macrophyte production and algae growth during the summer months. This court is satisfied

that the evidence suggests that substantial levels of nutrients, specifically phosphorus, flowing into Musky Bay is causing the macrophyte community to increase and also causing the presence of both surface algae and subsurface algae to increase. The greater weight of the credible evidence suggests that Musky Bay is exhibiting overall water quality consistent with a late mesotrophic state, moving to a eutrophic state. Musky Bay is becoming more eutrophic over time.

30. There are numerous sources of phosphorus accumulating in Musky Bay. Those sources include phosphorus from residential properties along the lake, naturally from the bog area along the south shore, from Zawistowski's east and west cranberry marshes and from the agricultural lands west of Musky Bay.

31. While the parties disputed the amounts of phosphorus coming from each of these potential sources, the court is satisfied that the evidence is clear that phosphorus originating from the agricultural lands to the west of Musky Bay enters Musky Bay by way of the defendant's cranberry marshes, primarily the west marsh. Furthermore, the court is satisfied that a direct result of the method Zawistowski uses to retrieve and discharge water to and from Musky Bay causes substantial amounts of nutrients, including phosphorus, to be discharged directly into Musky Bay. This intentional process is the primary source of phosphorus entering Musky Bay. Therefore, even if the agricultural lands to the west of Musky Bay are a significant or even a primary original source of phosphorus, that phosphorus apparently finds its way into Zawistowski's cranberry marsh where it is then subjected to the intake of water from Musky Bay and finally discharged directly into Musky Bay. Therefore, defendant Zawistowski's actions create circumstances in which the phosphorus in Zawistowski's cranberry beds, regardless of its original source, is directly discharged

into Musky Bay through the manmade canal and ditch system. This is an intentional act by Zawistowski.

32. While the parties dispute the sources of phosphorus which eventually find their way to Musky Bay, both plaintiffs' and defendant's experts indicated Zawistowski's cranberry operations and the agricultural lands to the west together represent the majority of the phosphorus which enters Musky Bay. It is not necessary to determine the location of the initial source of said phosphorus, but rather who controls the phosphorus before it is discharged into the bay, and who causes the discharge to occur. The evidence is quite clear that Zawistowski controls the majority of the phosphorus which enters Musky Bay, and actually causes the same to directly enter Musky Bay. There is no evidence before the court to suggest that the agricultural properties west of Musky Bay directly or intentionally discharge phosphorus into Musky Bay.

33. There was considerable disputed testimony regarding a study involving core samples taken from Musky Bay. However, the core sampling performed by Paul Garrison, a research scientist with the Department of Natural Resources, appears to be reliable. Mr. Garrison did not perform his studies in contemplation of this litigation. Mr. Garrison's testimony and findings are given due regard as they appear to be both credible and reliable. Therefore, this court is satisfied by the greater weight of the credible evidence, and the reasonable inferences that can be drawn from the evidence, that the phosphorus entering the bay has accumulated within the sediment of the bay and within the bio-mass of the bay. The core samples indicate the presence of phosphorus within the sediment has substantially increased starting in the mid-1980's.

34. The water samples taken by Dan Tyrolt as part of his study of Lac Courte Oreilles, tend to show the water leaving the Zawistowski cranberry beds and entering Musky Bay contains, at

times, significant amounts of phosphorus. There is no dispute that Zawistowski's cranberry farm uses phosphorus. It is reasonable to presume some of that phosphorus would be washed into Musky Bay through the ditches and canals.

35. While this court is satisfied that the amount of latent phosphorus within the bio-community of Musky Bay has shown a steady and substantial increase starting in the mid-1980's, the court cannot find, as a factual basis, that the amount of phosphorus entering the bay has necessarily increased. The inferences from the evidence is that a long-term and continuous process of depositing phosphorus and other nutrients into Musky Bay, even if the amounts entering the bay do not show substantial increases over time, causes the phosphorus to accumulate in the sediment. It may be, however, that the amounts of phosphorus discharging from Zawistowki's cranberry operations have increased over the last ten to fifteen years. Regardless, it would appear that the amount of phosphorus entering the bay is more than is necessary to maintain a static aquatic vegetative community. Musky Bay is essentially receiving more phosphorus than it needs, causing its plant and algae community to grow rapidly.

36. Furthermore, the court is satisfied that the amount of phosphorus dissolved in the waters of Musky Bay, and within the sediment of Musky Bay, and held within the vegetative community and biomass along the bottom of the bay, is now in such quantities that even if the discharge of phosphorus from the cranberry marshes would cease, excessive amounts of phosphorus would continue to exist in Musky Bay, likely causing increased vegetative and algae growth to continue into the future.

37. The water discharges from defendant's cranberry marshes along the south shore of Musky Bay are the primary sources of phosphorus entering Musky Bay. The best evidence before

the Court indicates that somewhere between 40 percent and slightly more than 50 percent of the phosphorus entering Musky Bay is a direct result of the water discharges from Zawistowski's cranberry marshes.

38. Because Musky Bay has historically been shallow with a naturally high density of aquatic vegetation, the introduction of phosphorus and other nutrients, in excess of what would be naturally occurring, likely caused an already significant macrophyte community to increase substantially, and likely caused existing algae in the bay to increase significantly. Musky Bay was probably more susceptible to the adverse effects of nutrient loading because of its shallow, warm water, weed-laden environment.

39. Based upon the totality of the evidence, this court concludes that Zawistowski knew that phosphorus, together with other nutrients from the fertilizer he uses on his cranberry beds, would enter Musky Bay through the manmade ditches and canals that Zawistowski uses to intake and discharge water to and from Musky Bay. Furthermore, defendant's own experts have given the opinion that additional phosphorus from lands owned by others are entering Zawistowski's property. It is unknown when Zawistowski became aware that phosphorus from other lands was entering his west cranberry marsh.

40. The court is satisfied that Zawistowski knew that phosphorus from his cranberry beds is directly discharged into Musky Bay. Zawistowski is familiar with the cranberry industry and the use of fertilizer. He knew through prior litigation and inquiries through the Department of Natural Resources and previous studies by the Lac Courte Oreilles Indian Tribe, that excess nutrient discharges into Musky Bay may be causing an increase in algae growth. While Zawistowski has apparently disagreed with some of the assertions and scientific opinions, it is certain that he was

made aware that the issue of his discharge of phosphorus and other nutrients directly into Musky Bay, in the opinion of some, causes increases in aquatic vegetation.

41. Zawistowski knew or should have known that the discharge of fertilizer enriched water into Musky Bay would affect the plant life in Musky Bay. It is not reasonable to believe that a direct discharge of water, which would obviously contain phosphorus and other fertilizers and nutrients, would not have an impact on the aquatic plants of Musky Bay. Zawistowski knew his fertilizer helped his cranberry plants to grow. He should have reasonably known the same fertilizer would also cause the aquatic plants in Musky Bay to increase.

42. While defendant Zawistowski had knowledge that he was discharging phosphorus into Musky Bay and that phosphorus would certainly cause the plant life in Musky Bay to grow at accelerated rates, there is insufficient evidence for the court to find that Zawistowski knew that the amounts of phosphorus or other nutrients that he caused to enter Musky Bay were unreasonable. There is no standard upon which to compare what levels of phosphorus would be appropriate, or inappropriate, to discharge into Musky Bay.

43. The court is satisfied by the preponderance of the evidence that the increased vegetative growth within Musky Bay and the increased growth of subsurface and surface algae, at certain times of the year, interferes with both the riparian owners' and the public's use of some portions of Musky Bay for some periods of time, primarily during the months of June, July and August, in some years. However, the court cannot find that the riparian owners' and the public's use is interfered with every day during the months of June, July and August. The court can find by the preponderance of the evidence that at certain times, portions of Musky Bay become inaccessible to many motor-driven watercraft. Furthermore, it is a reasonable inference that some portions of

Musky Bay, during portions of some years, are inaccessible to other watercrafts, such as canoes or kayaks. The primary locations on Musky Bay which become difficult or impractical to access or use during certain times are along the eastern and southern shores.

44. At certain times, and in certain places on Musky Bay, the increased aquatic vegetation, and more pointedly, the surface and subsurface algae growth, interfere with the use and enjoyment of Musky Bay by the riparian owners and the public. The court cannot find that all of Musky Bay becomes inaccessible or unusable by riparian owners or the general public, even during times that algae growth is abundant. During most of the spring, fall and winter, the public's right to use Musky Bay is not infringed.

45. While there is evidence that the ecology of Musky Bay is impacted by the introduction of nutrients, including phosphorus, the court cannot find from the evidence presented that the increased phosphorus, caused by Zawistowski's cranberry operation, is deteriorating the ecological health of Musky Bay to the point that the fish populations or aquatic vegetation growth is substantially harmed. The court can find that the ecology of Musky Bay is changing as a result of the increased nutrient loading. There is evidence which the court finds to be credible, that the phosphorus discharge into Musky Bay is changing the plant and fish community to a certain extent and is likely accelerating Musky Bay's classification from a mesotrophic to a eutrophic body of water, as it is measured on the Trophic State Index. Essentially, the aging process of Musky Bay has been accelerated.

46. It is a reasonable inference that should present conditions continue and discharges of phosphorus by Zawistowski continue, Musky Bay will exhibit additional increases in algae and

other aquatic vegetation and that such increases, in the future, may cause greater portions of Musky Bay to become inaccessible to the riparian owners and the general public.

47. The public's right of use and enjoyment and the riparian owners' rights of use and enjoyment have been interfered with in a manner which makes it difficult to use watercraft on some portions of Musky Bay at certain times during certain years when the algae growth is significant. It is a reasonable inference that at the same times and places, similar and collateral uses, such as fishing or swimming, would likewise be infringed.

48. There was some evidence regarding the individual plaintiffs' alleged monetary damages resulting from their nuisance claims. Based upon the totality of the evidence and the reasonable inferences that can be drawn from the evidence, the court cannot find, as a factual matter, that any of the individual plaintiffs have suffered monetary damage. There is inconclusive evidence that property values on Musky Bay have decreased, or not increased as rapidly as the property values on other sections of the lake.

49. There is insufficient evidence that the presence of algae or blue-green algae in Musky Bay represents, at the present, a substantial risk or threat to the physical health of humans.

50. There is insufficient evidence for the court to determine whether Zawistowski created the original conditions (discharge of phosphorus causing increased plant and algae growths) affecting Musky Bay. It is uncontroverted that Zawistowski's father started the cranberry operations and presumably dug the ditches and canals which now act as the point source for much of the phosphorus discharged into Musky Bay. However, the court cannot determine when phosphorus fertilizer was first employed by Zawistowski, nor can the court determine when

phosphorus fertilizer was first employed by the neighboring agricultural property to the west of Musky Bay.

51. The court also cannot determine at what specific time (month or year) the conditions on Musky Bay were such that the increased aquatic plant and algae growth caused by the discharge and presence of phosphorus began to interfere with traditional recreational uses of portions of Musky Bay.

52. The people of Wisconsin had the right to use and enjoy Musky Bay prior to the time Zawistowski's family started cranberry operations on the bay. However, all other individual plaintiffs, other than Madeline and Martin LeVake, took title to and began their use and enjoyment of their properties after Zawistowski's agricultural use began.

DISCUSSION OF THE LAW

Plaintiffs assert that Zawistowski's cranberry operation is causing nuisance conditions to exist on Musky Bay. Zawistowski's cranberry operation is an agricultural use, as that term is referred to in §823.08(2)(b) Wis. Stat., and as further defined in §91.01(1) Wis. Stat.. Therefore, the Right to Farm Law applies to this case.

The first issue that requires attention is whether, under the facts of this case, a private, or public nuisance exists. If a private or public nuisance exists, §823.08(3) Wis. Stat. limits recognition of a nuisance unless all of the following apply:

1. The agricultural use or agricultural practice alleged to be a nuisance is conducted on, or on a public right-of-way adjacent to, land that was in agricultural use without substantial interruption before the plaintiff began the use of the property that the plaintiff alleges was interfered with by the agricultural use or agricultural practice.

2. The agricultural use or agricultural practice does not present a substantial threat to the public health or safety. (*Emphasis* added. See §823.08(3)(a)(1) and (2)) Wis. Stats.)

The court is satisfied that as a matter of law, the public's right to use the waters of Musky Bay, predates any cranberry farming on the south shore of Musky Bay. Therefore, the State of Wisconsin, as plaintiff, was first in time and in right of use to the waters of Musky Bay. However, with the exception of Martin and Madeline LeVake, none of the individual plaintiffs claim a use, or legal interest in their property along Musky Bay, prior to 1939. In 1939, William Zawistowski's father began operating cranberry marshes along Musky Bay. The agricultural use or practice need not be in exclusive or continuous ownership to be afforded protections under §823.08(3) Wis. Stat.. However, individual plaintiffs alleging a nuisance under §823.08 Wis. Stat. are not afforded the same luxury and cannot stand upon the historical shoulders of their predecessors in title.

Madeline and Martin LeVake acquired the LeVake family property on Musky Bay by gift. The family ownership appears to go back unabated into the early 1930's. The LeVake families'use appears to predate the creation of the cranberry operation in 1939.[1] For the purposes of this record, the court will conclude that Madeline and Martin LeVake, as plaintiffs, have a use which predates the agricultural use or practice of Zawistowski. The remaining individual plaintiffs cannot prevail on their private nuisance claims under §823.08 (3)(a)(2) Wis. Stat.

NUISANCE ANALYSIS

When determining whether a nuisance exists, courts must journey into the penumbra of subjective observation. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." *Metropolitan Sewage District v. Milwaukee*, 2005 Wi 8, ¶24, 277 Wis. 2d 635 (2005). The two varieties of nuisances, that being public or private, are distinguishable by the nature of the invaded

interest. "The essence of a private nuisance is an interference with the use and enjoyment of land." *Id.* ¶27. A public nuisance, however, is different. "[A] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." *Id.* ¶29. The invaded interest in a public nuisance is broader than that of a private nuisance. A public nuisance is "an unreasonable interference with a right common to the general public." *Id.*

While the plaintiffs' allege both a private and public nuisance, it is unclear where a riparian owner's right to use and enjoy the public waterways of this state differ from that of the public in general, except in the convenience of owning property adjoining a waterway. The private plaintiffs claims, based upon the facts presented, are complaints about the inability to use the waters of Musky Bay as they intended. There was little evidence regarding an individual plaintiff's inability to reasonably use their own land. While the riparian plaintiffs own a somewhat unique ability to exercise almost exclusive use over that narrow domain between their land and the lake bed, the use referred to in this case is intrinsically tied to the water and differs little from the general public's right of use. While the riparian owner exercises the authority over who may fish from his or her pier, the public in general can fish the same water which surrounds the pier. An essential element of a private nuisance is an alleged interference with the use and enjoyment of land. Here, the alleged wrongdoing deals with the use of the water. This case is more about the concept of a public nuisance from the standpoint that the riparian owners have a right to use and enjoy our navigable waterways, in the same manner, however more convenient, as the public in general. The private riparian plaintiffs in this matter make claims which are virtually indistinguishable from the claim that the public's right to the use of Musky Bay has been infringed.

In this particular case, to determine if a public nuisance exists, this court must decide if the Zawistowski cranberry operations interfere with a "public right or the use and enjoyment of a public space", *Id.* ¶30, and if it does interfere with a public right, does liability flow from the activity. A nuisance can exist without connecting liability to any party. Liability is dependent upon some underlying tortious activity that causes the interference. *Id.* ¶25. The plaintiffs have alleged that the ultimate responsibility falls on the defendant, not because of his negligence, but because of his intentional activity. The elements necessary for determination of liability in a public nuisance case, is the same as in a private nuisance case. *Id.* ¶46. In cases where the conduct is intentional and adversely affects a public right of use, the conduct needs to be not only intentional, but unreasonable, even if lawful, for liability to attach. *Stunkel v. Price Electric Coop.*, 229 Wis. 2d 664, 670 (Ct. App. 1999).

In this case, it is clear that Zawistowski's act of discharging phosphorus laden water through a manmade ditch or canal directly into Musky Bay is an intentional act. The act of digging the ditch and using the water is a legal activity. The water discharged by Zawistowski is the primary source of phosphorus entering Musky Bay, and the phosphorus (together with other nutrients from fertilizers) is the proximate and primary cause of increased aquatic vegetation and surface and subsurface algae growth in Musky Bay. While the amounts of phosphorus (or other nutrients) used by Zawistowski in his cranberry operations, cannot be found to be unreasonable for purposes of growing cranberries, the intentional and continuous act of discharging of phosphorus directly into Musky Bay, has caused, over time, increased aquatic plant and algae growth. Defendant's intentional activity, on any particular day, may not directly result in any interference of the public's

right to use Musky Bay, however, the accumulated effect of defendant's continuous and intentional activity is the cause, even if the effect is unintended.

It is possible that Zawistowski's father originally created the process which eventually resulted in the existing effects on Musky Bay, and that defendant Zawistowski has simply maintained those same conditions. "One who maintains a nuisance created by another is liable for injuries sustained because of the danger incident thereto, just as clearly as if he had himself created the danger in the first place." *Brown v. Milwaukee Terminal R. Co.*, 199 Wis. 575, 590 (1929). Therefore, the maintenance or continuation of the nuisance is, as a matter of law, a new nuisance. *Id.* "If the owner or the occupier of property continues a nuisance created thereon by others, he is liable, not because he owns or occupies the premises, but because he does not abate the nuisance. *Id.* Because there is no evidence of any ill will, malice or evil intent on behalf of the defendant to cause harm to Musky Bay, liability can only be conferred if Zawistowski, without any desire to cause harm, nonetheless had knowledge that his otherwise legal enterprise is causing harm or is substantially certain to cause the harm resulting in the interference of the public right. *Vogel v. Grant-Lafayette Electric Coop*, 201 Wis. 2d 416, 430–431 (1996). It is important to clarify that when a nuisance is alleged to fall under the category of intentional conduct, the "knowledge" requirement refers to knowledge that the condition or activity is causing harm to another's use or enjoyment. *Id.* at 431. Zawistowski certainly knew that he was discharging phosphorus and other nutrients directly into Musky Bay. Furthermore, the court is satisfied that though Zawistowski was not using unreasonably large amounts of fertilizer for his cranberry operation, he either knew, or should have known, because of his familiarity with the cranberry industry, that phosphorus commonly used in growing cranberries, if discharged into a body of water, would assist in the

growth of plant life. Certainly, Zawistowski knew, and hoped, that his fertilizer would assist in growing strong, healthy and abundant cranberry plants. It is not reasonable for Zawistowski to believe that the same phosphorus-laden water that he uses to feed his plants, when discharged into Musky Bay, would not have the same effect upon the plant community within the bay. Because phosphorus helps his plants grow, it must therefore follow that that same phosphorus will likely assist the plants in Musky Bay to grow. To claim otherwise, under the facts of this case, would be unreasonable and incredible. Therefore, Zawistowski must have known that it was substantially certain that the phosphorus-laden water that he was directly discharging into Musky Bay would assist the aquatic vegetation in Musky Bay to grow at an accelerated rate.

While Zawistowski certainly knew, or should have known, that his activity would cause aquatic plants to grow at an increased rate in Musky Bay, the question remains whether Zawistowski had the knowledge that that activity was causing harm to the public's right to use the bay. This question is better answered in the discussion of whether there is the requisite interference with the public's right to use Musky Bay. Obviously, if no such public nuisance exists, it would be difficult to establish that Zawistowski knew of any harm.

Is there a public nuisance on Musky Bay?

Based upon the court's factual findings, it is clear that between the increased growth of aquatic vegetation, such as the macrophytes, and the substantial increase in subsurface and surface algae on Musky Bay, certain locations on Musky Bay, during certain portions of the summer months, are substantially inaccessible to the general public in ways traditionally employed for recreational uses. However, during the majority of the year, Musky Bay is reasonably accessible to the general public for traditional recreational purposes such as boating or fishing. Some boats,

primarily as a result of size and draft, would not be able to successfully navigate much of the bay even if aquatic plants were not abundant. However, smaller boats with shallower drafts can access the bay for most uses during most of the year. Obviously, during the winter months, after the lake is covered with ice and snow, the bay is accessible to the general public. The question then becomes; how much interference of a body of water is necessary to constitute a public nuisance? How long does the condition have to last to constitute a public nuisance? Are the answers to these questions purely subjective? If there is an answer buried within the common law, it is either not directly on point, or undiscovered by the parties and the court.

It is not in dispute that the public right in this case is one founded upon constitutional principles and whose legal origins predate Wisconsin statehood. [2] The citizens of this state enjoy a protected right to use its navigable waterways. Recognized limitations to this trust doctrine, however, provides insight when determining how much interference of the public's right to use the waterways is allowed before it "substantially or unduly interferes with the use of a public place, or with the activities of an entire community." *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶21, 254 Wis. 2d 77 (2002). There are numerous examples of various individuals or groups authorized by the operation of law (either state or local) to proscribe a particular use of a navigable body of water, which would be contrary to the rights of other users.

> In many cases the Supreme Court has upheld a variety of intrusions into the public waterways, sometimes in the service of commercial interest, even when such intrusions are permanent in nature and destructive of other interests protected by the trust. The task employed in each case has been a balancing test in which the court has weighed the harm done by the intrusion against the benefits conferred by allowing it. *State v. Village of Lake Delton,* 93 Wis. 2d. 78, 94 (1978). See in general, *Merwin v. Houghton*, 146 Wis. 398 (1911); *Milwaukee v. State*, 193 Wis. 423 (1927).

In the *Lake Delton* case the Court of Appeals upheld a local ordinance regulating and granting the Tommy Bartlett Waterski Show the right to use part of Lake Delton. Bartlett was allowed to exclusively use a portion of the lake at certain times. Various other types of obstructions (and interferences) with the public use of waterways have been approved to accomplish various public purposes. "These include wharves and piers, log booms, dams and bridges placed in and over the water so long as they do not materially obstruct navigation." *Id. at* 98. However, if the effect of certain legislation which impacts the trust doctrine is solely to benefit a private interest, that legislation is likely void. *Id.* at 93. Also, courts are not strictly bound by a legislature's stated public purpose and, "the question whether the act was designed to accomplish some public good or merely to advance a private gain was a question to be determined by the court." *Id.* at 92. In *Priewe v. Wis. State Land & Imp. Co.*. 93 Wis. 534 (1896), the court stated, "[t]he legislature had no power, under the guise of legislating for the public health, to authorize the destruction of the lake, and thereby create a nuisance to the great injury of the plaintiff as a riparian owner, for private purposes and for the sole benefit of private parties." *Id.* at 552.

There appears to be no legal basis to suggest that §94.26 Wis. Stat., et. al (the cranberry law) is designed exclusively for a private purpose. While it benefits private citizens, it appears to be premised upon a public policy to promote the culture of cranberries. While the cranberry industry in Wisconsin has been afforded significant statutory protections, including the right to access the public waterways of this state for purposes of irrigation and fertilization, there is no legal basis, at the present, to make a finding that such a legislative pronouncement violates the

trust doctrine. It does not infer any legislative intent to allow a public waterway to be damaged or destroyed.

Plaintiffs suggest that any degree of pollution which interferes with the public's use of a waterway is a public nuisance. This court does not believe the law supports such a conclusion. At least not yet. Court's have heard this assertion before. It is the expansion of the "free use" declaration in the trust doctrine. The court in *Lake Delton* addressed a similar assertion by stating,

> [t]he state . . . argues that the legislative intent expressed in the chapter as a whole is to provide for the free use of all navigable waters in the state by all members of the public, and that foreclosing a portion of any lake to any member of the public for any period of time is inconsistent with that intent. In many sections of Chapter 30, the legislature itself has undertaken to order, limit and in some cases, to foreclose, the exercise of certain public rights in navigable waters. The rights of the public to use navigable waters are not absolute, but are subject to state and local police power to insure that such rights are exercised in a safe and orderly manner. (*Id.* at 111-112, emphasis added.)

Some interference with the public's right to use the waterways of this state is tolerable. The question remains, to what extent? Certainly, cranberry growers cannot be given a free pass to do whatever they choose for the purpose of growing a healthy cranberry crop. Zawistowski's apparent position that he can, because it is legal to do so, discharge water with substantially increased levels of phosphorus, may not be a reasonable exercise of a conferred statutory right. The extent of the effect, whether intended or not, is determinative.

Absent either a statutory or common law directive establishing that a temporary or partial interference of the public's right to use a waterway, caused by a non-physical intrusion, is unreasonable, this court cannot conclude that intermittent blooms of subsurface and surface

algae, causing temporary periods of time in which portions of the waterway are inaccessible to the general public, is a public nuisance.

The court does recognize that the amount of interference to the public's right of use in this case is likely expanding in size and duration. A public nuisance is essentially developing, but has yet to reach the level of an unreasonable interference. What is unclear, however, is what level of interference triggers a finding of a public nuisance with this type of intrusion? The present law suggests some intrusions are tolerable. Because there was little evidence indicating how many days per year the public was interfered with and what proportion of the bay was generally inaccessible, this court cannot quantify the interference in objective terms.

This conclusion is partially based on subjective observation of the evidence and the court's own judicial view of Musky Bay. Certainly, Lac Courte Oreilles, including Musky Bay, is a beautiful inland lake. There are times, however, when Musky Bay has floating mats of algae which makes use of certain areas, practically impossible. This court simply cannot determine, as a matter of law, that the amount of time and the overall scope of the interference is such that it is a public nuisance, under the present state of the law.

PUBLIC HEALTH OR SAFETY

While this court cannot find legal support to determine, as a matter of law, that the level of interference of the public's right to use Musky Bay is not unreasonable, a conclusion of law should be given to whether or not the Right to Farm Act requires adverse human health effects to be established in this case. There is no clarification in the law on this point, and an answer to this issue is important in the event the matter is remanded back to the circuit court.

Under Wis. Stat. §823.08, the state's Right to Farm Act, "[a]n agricultural use or an

agricultural practice may not be found to be a nuisance if . . . [it] does not present a substantial threat to public health or safety." Wis. Stat. § 823.08(3)(a)2 (2002). A significant issue in this case is whether or not the Right to Farm Act requires adverse human health effects in order for an agricultural use or practice to be deemed to "present a substantial threat to public health or safety." Zawistowski asserts that the discharges from his cranberry bog do not present a human health threat and therefore may not be found to be a nuisance. The plaintiffs assert that by rendering Musky Bay unfit for recreational uses, Zawistowski's cranberry operation presents a substantial threat to public health or safety. (The plaintiffs do not concede that the discharges present no human health threat.)

The Act provides no definition for the phrase "present a substantial threat to public health or safety;" consequently, its application to this case must be determined through statutory interpretation. It is not necessary to the disposition of this case to determine the broad scope of the phrase. It is sufficient at this time to narrow the focus of the inquiry to the question, "Does an agricultural practice that does not create a human health risk but does render a public water body unfit for recreational use (a public nuisance) present a substantial threat to public health or safety?"

Statutory interpretation presents a question of law. *State v. Michels*, 141 Wis. 2d 81, 87, 414 N.W.2d 311 (Ct. App. 1987). The purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature. *McEvoy v. Group Health Coop.*, 213 Wis. 2d 507, 528, 570 N.W.2d 397 (1997). "If the language of the statute clearly and unambiguously sets forth the legislative intent," courts will "not look beyond the statutory language to ascertain its meaning." *Reyes v. Greatway Insurance Co.*, 227 Wis. 2d 357, 365, 597 N.W.2d 687 (1999). However,

"when a statute appears unambiguous on its face, it can be rendered ambiguous by its interaction with and its relation to other statutes." *State v. White*, 97 Wis. 2d 193, 198, 295 N.W.2d 346 (1980).

The legislative purpose of the Right to Farm Act, as outlined in the text of the Act, assists in ascertaining the legislative intent. It reads:

> The legislature finds that development in rural areas and changes in agricultural technology, practices and scale of operation have increasingly tended to create conflicts between agricultural and other uses of land. The legislature believes that, to the extent possible consistent with good public policy, the law should not hamper agricultural production or the use of modern agricultural technology. The legislature therefore deems it in the best interest of the state to establish limits on the remedies available in those conflicts which reach the judicial system. The legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly.

Wis. Stat. §823.08(1).

This purpose statement partially describes the current dispute – a conflict between agricultural and other uses of land, created, in part, by development in a rural area coinciding with a change in the scale of the agricultural operation. However, this case also presents the conflict between the statutory right conferred to cranberry growers and the constitutional right the public enjoys over the waterways of this state. The Right to Farm Act limits the remedies available to the non-agricultural parties to the conflict. This limit is effectuated, in substantial part, by §823.08(3)(a)2, which adds the "substantial threat" element to a nuisance action.

The phrase in the purpose statement that best aids the interpretation of the "substantial threat" requirement is that "to the extent possible *consistent with good public policy*, the law should not hamper agricultural production." (emphasis added) Wis. Stat. §823.08(1). The

legislature clearly determined that good public policy requires nuisance actions to be maintainable when the agricultural use "present[s] a substantial threat to public health or safety." The obverse must also be true. The legislature determined that good public policy justifies barring a nuisance finding if no such substantial threat is presented by the agricultural use or practice.

The term "public health or safety" is not defined by the Right to Farm Act. It is noteworthy that the legislature chose not to include "public welfare" along with "public health" and "safety" in §823.08. Obviously the legislature intended the Act to apply to a more narrow class of activities than would be actionable under the broader category of those affecting public health, safety or welfare. Zawistowski suggests that a definition of public health can be imported from Chapter 160 of the Wisconsin Statutes. He notes that §160.05(6) Wis. Stat. differentiates between a "public health concern" and a "public welfare concern." He describes the differences as "[c]oncerns about 'public health' are limited to hazards to human health, while aesthetic concerns fall within the scope of 'public welfare.'" Def. Post-Trial Rep. Br. at 11.

A careful review of §160.05(6) Wis. Stat. provides reason to be cautious about adopting its definition of "public health" for purposes of interpreting §823.08 Wis. Stat.. Chapter 160 addresses groundwater protection, specifically providing for the adoption of numerical standards for the concentration of polluting substances in groundwater. Wis. Stat. §160.001. The public health aspects of the chapter relate directly to health hazards associated with drinking water. This is evident by the fact that one of the characteristics considered in determining whether a substance is a public welfare concern is the influence that substance has on "the suitability of water for uses other than human drinking water." Wis. Stat. §160.05(6)(d)2. The aesthetic

concerns that Zawistowski refers to, in the context of drinking water protection, would cover such items as odor, color or taste of the groundwater.

The considerations of the public health aspects of the recreational use of navigable waters of the state are far broader than the health concerns related to the suitability of drinking water. Consequently, the dichotomy between public health and public welfare provided by Chapter 160 does not resolve the question.

The public's use of the state's navigable waters is a significant part of society's overall recreational pursuits. The importance of these recreational pursuits was identified by the supreme court early in the last century. By that time, the public waters were being "used by the people for sailing, rowing, canoeing, bathing, fishing, hunting, skating, and other public purposes." *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 47 (1929). The public's right to use the waters of the state for these purposes was just as legitimate as the "older" uses of the water for commercial navigation. *Id.* With respect to the recreational use of water, the court noted at that time that, "[i]ndeed, courts have recognized, and now more than ever before recognize, the public's interest in pleasure and sports as a measure of public health." *Id.* at 46-47. (*emphasis added.*)

The notion that the recreational use of public water bodies is a matter of public health is further supported by the implications of interpreting the Right to Farm Act in accordance with the public trust doctrine, which is found in Article IX, Section 1, of the Wisconsin constitution. Courts have a duty to "construe a legislative enactment as to find it in harmony with constitutional principles." *Hopper v. Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977). The public trust doctrine was extensively analyzed by the Wisconsin Supreme Court in *Muench*

v. Public Service Commission, 261 Wis. 492, 55 NW2d 40 (1952).

Having its roots in the Northwest Ordinance of 1787, the public trust doctrine was incorporated into the Wisconsin constitution when Wisconsin became a state in 1848. *Id.* at 499. Section 1, article IX of the Wisconsin constitution actually incorporated verbatim the wording of the Northwest Ordinance. *Id.* It states:

> The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefore.

In *Muench*, the Court cited the following as "[o]ne of the clearest statements of the trust doctrine:"

> The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth.

Muench, 261 Wis. at 502, citing *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 426, 84 N.W. 855 (1901). Furthermore, "[t]he public trust doctrine . . . is part of the organic law of the state, and is to be broadly and beneficially construed." *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 23, 244 Wis. 2d 497, 628 N.W.2d 781 (citing *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914)).

The essence of the public trust doctrine is that the beds of navigable waters of the state are held by the state in trust for public use. The original purpose of the public trust doctrine was to ensure that navigable waters would be available to the public for commercial purposes. Over

time, the Wisconsin Supreme Court recognized the public's right to recreational use of navigable waters as also being preserved by the public trust doctrine.

The public trust doctrine does not create an independent cause of action, but establishes standing to sue for the purpose of vindicating the public trust. *State v. Deetz*, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974). It provides citizens the opportunity to challenge the validity of legislative action that is violative of the trust. *Id.* at 11. The state legislature, as trustee, "has no more authority to emancipate itself from the obligation resting upon it . . . to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose." *Priewe v. Wisconsin State Land & Imp. Co.,* 103 Wis. 537, 549-50 (1899). Efforts by the legislature to "serve or advance purely private interests to the detriment of the public interests protected by the trust are invalid." *Lake Delton, 78.*

Not every infringement on the public's use of navigable waters violates the public trust doctrine. *See Merwin v. Houghton*, 146 Wis. 398, 131 N.W. 838 (1911); *Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927); *State v. Public Service Comm.*, 275 Wis. 112, 81 N.W.2d 71 (1957). In *Lake Delton*, the court of appeals reviewed numerous cases in which intrusions into the public waterways were upheld. It concluded that a balancing test, weighing "the harm done by the intrusion against the benefits conferred by allowing it," was employed in each case. *Id. at* 94.

A court should be convinced that that the legislature intended to infringe upon the public's enjoyment of the state's navigable waters prior to undertaking a balancing of interests. The cases reviewed in *Lake Delton* all involved legislative action that clearly intruded upon the

public use of a navigable water body. To suggest that the legislature could impliedly intrude upon the public rights protected by the trust would trivialize the legislature's obligation to preserve the trust and would fail to give the public trust doctrine the broad and beneficent construction that it demands. Yet, that is what Zawistowski's interpretation of the phrase "present a substantial threat to public health or safety" would require. If the public's recreational use of Musky Bay is not a matter of public health, then Zawistowski could be permitted to render the bay virtually unfit for recreational use. If phosphorus, algae or blue-green algae does not represent an identifiable threat to human health, as Zawistowski claims, then he could essentially discharge phosphorus into Musky Bay until its entire surface area was covered in a thick mat of algae, with no recourse by the public. He would be protected from any nuisance claim, provided that the condition of the bay did not pose a hazard to human health. A court could then undertake a balancing of interests to determine whether this broad grant of authority to use a public water body in this fashion violates the public trust doctrine. Such a balancing of interests in this case is unnecessary, as no attendant legislative grant of authority can be inferred. There is no indication that the legislature intended, through the passage of the Right to Farm Act, to grant farmers the ability to render a public water body unfit for public recreational use.

Consideration of the public trust doctrine in this case seems to be necessary only because of the unique status that Wisconsin cranberry farming operations enjoy. The Cranberry Law (Wis. Stat. §§94.26 – 94.35), adopted in 1867, allows cranberry growers specific rights to the use of public waterways. It allows them to build and maintain dams and ditches for the purpose of flooding, draining and fertilizing their cranberry growing lands. Wis. Stat. §94.26. The

Cranberry Law has been considered by the Wisconsin Supreme Court on at least three different occasions. In 1920 the court stated:

> Conceding the [cranberry] law is valid as against private persons or private interests, it does not follow that it can be invoked against public interests. . . . [I]t is clear that whatever rights were granted to the owners of lands adapted to cranberry culture they were not paramount to rights involving the public health and welfare, but subordinate thereto.

Cranberry Creek Drainage District v. Elm Lake Cranberry Co., 170 Wis. 362, 367, 174 N.W. 554 (1920). Then in 1980 the court determined that cranberry growers are not required to obtain DNR permits for the water diversion dams that are erected pursuant to section 94.26. *See State v. Zawistowski*, 95 Wis. 2d 250, 290 N.W.2d 303 (1980). Finally, in 1989 the court considered whether cranberry dams are subject to various DNR-enforced provisions of chapter 31 of the Wisconsin Statutes. The court noted:

> The DNR has . . . argued that the state's paramount interest in protecting public safety supersedes any rights that cranberry growers were granted under the cranberry laws. They argue on the strength of *Cranberry Creek Drainage District v. Elm Lake Cranberry Company* . . . We find no evidence to support this contention. . . . Although public safety is a concern of the state, the DNR presents no authority suggesting that the legislature has delegated to the DNR the power to regulate safety hazards created by cranberry dams. In addition to liability arising under the cranberry laws themselves, cranberry dams are still subject to common law tort and property use restrictions. The public is not unprotected. *Tenpas v. Department of Natural Resources*, 148 Wis. 2d 579, 591-92, 436 N.W.2d 297 (1989).

While it would seem axiomatic that the DNR would regulate discharges into a waterway from cranberry operations, the oversight is apparently not unintentional. The Cranberry Law, as interpreted by the supreme court, appears to leave a nuisance claim as the only avenue through which plaintiffs can obtain relief. Zawistowski's interpretation of the 'substantial threat to public health or safety' element under the Right to Farm Act would render his water diversions from,

and discharges into, Musky Bay all but immune from legal recourse unless humans are threatened with illness or death. The 'protection' that the public was assured in *Tenpas* would be essentially removed. The legislature's intent to create such a sweeping intrusion into the public's right to use Musky Bay can not be inferred from its use of the phrase "present a substantial threat to public health or safety," with nothing more.

The Right to Farm Act must be construed, if possible, so "as to find it in harmony with constitutional principles." *Hopper*, 79 Wis. 2d at 128. The Act is harmonized with the public trust doctrine, provided that an action that unreasonably interferes with the public's right to use such waterways is deemed to present a substantial threat to public health or safety. Therefore, a public nuisance on or in the trust waters of this state is, in and of itself, a substantial threat to the public health or safety.

CONCLUSION

There is satisfactory evidence for the court to find that Zawistowski's cranberry operation is intentionally discharging phosphorus laden water directly into Musky Bay, and, that additional phosphorus is causing the aquatic plants and algae in Musky Bay to increase in number and size. Those same plants and algae interfere with the public's ability to use Musky Bay at certain times and in certain locations. Furthermore, Zawistowski either knew, or should have known, his phosphorus discharges would cause the plants and algae in the bay to grow at accelerated rates. These adverse effects to the bay, however, have not yet reached levels which this court can determine to be unreasonable under the present state of the law.

The court is further satisfied that the existence of a public nuisance in or on a navigable waterway of this state is a substantial threat to the public health or safety, as a matter of law.

The court recognizes that a conclusion of law relative to §823.08(3)(a)(2) Wis. Stat. may not have been necessary considering the court could not find a legal basis to conclude a nuisance exists, however, significant differences of opinion regarding interpretation of this statute was presented and a concise conclusion of law on this point will help clarify the issue, should the matter be appealed and eventually remanded to this court.

Finally, while this decision carries with it an inference that Zawistowski did not know his operation was causing harm, because the harm caused is not yet unreasonable, Zawistowski can no longer hide behind a veil of self-imposed ignorance to the effects his cranberry operation is having on Musky Bay. His actions are beginning to interfere with a protected right, and the public is not without the ability to intervene, should the interference reach unreasonable levels. While Zawistowski may continue his operations as is, he does so at his own risk.

Plaintiffs' claims are denied. The issue of costs and fees are reserved for further proceedings.

Dated this 5th day of April, 2006.

BY THE COURT:

Honorable John P. Anderson
Circuit Court Judge

JPA/jbg
CC: Ms. Shari Eggleson
Mr. Alf E. Sivertson
Mr. Ronald R. Ragatz/Mr. Jacob P. Westerhof
Mr. Mark Andrews

1) Neither party adequately addressed the issue of whether the LaVakes "used" the property prior to 1939. For this purpose, and as explained later in the opinion, it is not a critical determination because the court is treating the riparian plaintiffs the same as the general public in this case.

2) Article IX, Section 1, of the Wisconsin Constitution, adopted at the territorial convention in 1848 and approved by congress admitting Wisconsin into the Union, incorporated the wording of the Northwest Ordinance with respect to navigable waters. The Northwest Ordinance of 1787 was the main governing mechanism for the Northwest Territory. See *Muench v. Public Service Commission*, 261 Wis. 492, 499 (1952). The *Muench* case is probably the single best source within the common law which explains the historical precedent of the trust doctrine in Wisconsin.