



TERRY MOULTON



WISCONSIN STATE SENATOR

23RD SENATE DISTRICT

From: Senator Terry Moulton
To: Senate Committee on Sporting Heritage, Mining and Forestry
Re: Testimony on Senate Bill 506
Relating to: Determinations of navigability of a stream.
Date: November 28, 2017

Mr. Chairman and committee members, thank you for allowing me to submit testimony today about Senate Bill 506 and determining the navigability of streams.

As you know, stream navigability is a determination made by the Department of Natural Resources that lets the public know if a stream is physically navigable by a boat or canoe, making it a public waterway in Wisconsin. One problem with navigability determinations is that they can be changed at any time based on the amount of water available in the stream. This can be a problem for private property owners if the stream is connected to a private body of water on their land.

The need to clarify when navigability can be reviewed was brought to us by a constituent who has been working with the U.S. Fish and Wildlife Service to turn the unofficial lake on his private land into a place where disabled children and veterans can come and experience Wisconsin's sporting heritage by fishing in a safe, quiet environment. He plans to restock the lake and modify its boundaries so that special docks can be put in for wheelchair access. His project would be greatly affected if the DNR changed the navigability determination for the stream due to changes he has made to water levels or the dam.

Senate Bill 506 specifically addresses this issue by limiting the DNR's ability to change a non-navigability determination on a body of water with a dam during the restoration agreement with the federal government. If a DNR non-navigable determination has been established, a dam has been placed on the stream and if the impoundment has been or is subject to a Fish and Wildlife Habitat Development agreement, then this bill prevents the DNR from reversing the determination unless all dams or other structures that change the flow of the stream and levels of water have been returned to their natural state. This bill, as drafted, is entirely focused on navigability determinations on a private body of water on private property that ensures private property rights and simultaneously creates a net environmental benefit.

This bill also does not give property owners free rein to do what they want with a body of water because it requires a restoration agreement as well as compliance with the federal water quality requirements. The body of water must also be manipulated by a dam or other alteration and already have a navigability determination. The DNR can always revisit the navigability determination after the manipulations that have been made on the land have been returned to their original state and the agreement is expired.

The intent of SB 506 is simple and applies in very narrow circumstances. By removing an unpredictable regulation and restoring private property rights the result is a net environmental benefit that ensures disabled, mobility impaired individuals and veterans have the necessary access to enjoy Wisconsin's sporting heritage. Please vote in favor of SB 506. Thank you for allowing me to submit testimony today.

Serving the 23rd Senate District



Romaine Quinn

STATE REPRESENTATIVE • 75th ASSEMBLY DISTRICT

November 28, 2017

Senate Committee on Sporting Heritage, Mining, and Forestry

Chairman Tiffany and members of the committee:

Thank you for inviting me to testify on Senate Bill 506/ Assembly Bill 599.

The Public Trust Doctrine is enshrined in Wisconsin's state Constitution: if a body of water is physically navigable by boat or canoe, as determined by the Department of Natural Resources, it must be made accessible by the public. This right gives all of our citizens the ability to take advantage of an incredible variety of outdoor activities, from fishing and hunting to canoeing and skiing. It's a right we all cherish.

But the navigability determination is a grey area in an otherwise clear map. DNR wardens are able to change navigability determinations at any time.

Often, that can be a good thing. Natural changes in water flows and rainfall lead to changes in a stream – formerly muddy creeks can become navigable rivers over time, and vice versa. That is all to the good.

However, the DNR also has the ability to change navigability determinations after man-made changes have impacted a privately-owned waterway. This means that if a private landowner goes through all of the permitting process to install a dam on a non-navigable body of water and then makes improvements to his land, the DNR can come back in and determine that all of a sudden, the former creek is now a navigable river. Without the *intentional* changes made to the land and creek *by the landowner*, that waterway may never have been navigable.

SB 506/ AB 599 correct this unfortunate oversight. Under this bill, the DNR will have clear guidelines for when it is appropriate and allowable to change a navigability determination. Once a determination of non-navigability is made for a stream and a dam is built that modifies the flow of that stream, the DNR cannot change the rules of the game and determine that the stream must now be opened to the public.

Now, if we had left it at that, I'd say we were doing a good job of protecting landowners' property rights. But we wanted to make sure that the natural resources we treasure in Wisconsin were protected as well. So we added another clause: it's not good enough to have just gotten the determination of non-navigability and put up a dam; you must also have participated in a wildlife rehabilitation program as well. Such programs would include the federal Fish and Wildlife Service Partners for Fish and Wildlife Habitat Development Agreement, or programs like it.

Finally, if the dam or other structures that artificially change the flow of the stream are removed and the restoration project agreement has been complete, the DNR is again free to determine navigability.

It is important to note also that the permitting process for dams remains exactly the same. So do the guidelines for determining navigability. Landowners must stay in compliance with all relevant water quality requirements. The only thing they can do is improve their land.

SB 506/ AB 599 will have a net environmental benefit to Wisconsin's waterways. When landowners are secure in the knowledge that the rules of the game won't be changed on them without warning, they will be more likely to make the kinds of investments in restoration that we all want to see, and that will have a net benefit to the wildlife of our state. They will also be more likely to be involved in creating good outcomes for the state by using the land in the best ways possible – whether for encouraging their own friends and relatives to enjoy Wisconsin's wildlife, or encouraging handicapped children and veterans to do the same.



Senate Committee on Sporting Heritage, Mining and Forestry
2017 SB 506
Determinations of Navigability of a Stream
November 28, 2017

Good afternoon Chairman Tiffany and committee members. My name is Connie Antonuk, and I am the Acting Deputy Division Administrator for the Division of External Services at the Wisconsin Department of Natural Resources. Thank you for the opportunity to testify for informational purposes on Senate Bill 506.

Current law regulates a number of actions taken in or near navigable waters including the placement of structures and the deposit of materials on the beds of navigable waters, as well as the removal of materials from the beds these waters. The areas around navigable waterways are also subject to shoreland zoning ordinances, wetland zoning ordinances, and construction site erosion control and storm water management zoning ordinances. Under current law, no dam, bridge or other obstructions may be placed in or over a navigable stream without a permit.

SB 506 provides certain exemptions to current law related to navigable waters that would only be applicable for habitat restoration projects undertaken in partnership with the United States Fish and Wildlife Service or similar environmental restoration projects. The bill makes the following changes:

Declarations of navigability

The bill creates a new section under which, if the Department had determined that a stream or portion of a stream is non-navigable, the Department's ability to change that determination is restricted if both of the following criteria are met:

1. A dam is constructed on the stream that modifies the flow of the stream or portion of stream as compared to the natural flow prior to construction; and,
2. The artificial impoundment created is or has been subject to a federal Fish and Wildlife Service Partners for Fish and Wildlife Habitat Development Agreement or similar environmental restoration project.

This restriction on navigability determinations for certain impoundments does not apply if the structures are removed and all changes to the stream and adjacent land are substantially returned to their natural state as they existed prior to construction.

Currently, if no restrictions exist in statute, the Department can change a determination of non-navigable for a waterway such as a lake, river or stream to navigable and regulate the waterbody accordingly. Changes in navigability can be due to changes in the watershed of a waterway or portion of a waterway that may result in increased flow and create a navigable condition.

Applicability of navigable waters regulation to artificial waterbodies and certain impoundments

SB 506 creates a new exemption from the requirement to obtain a permit for work in navigable waters for certain impoundments if the impoundment does not discharge directly into a natural navigable waterway, is the result of construction of a dam on a stream or portion of a stream the Department has previously determined to be non-

navigable and the impoundment is or has been subject to a federal Fish and Wildlife Service Partners for Fish and Wildlife Habitat Development Agreement or similar environmental restoration project.

Navigable waters protection law

SB 506 also creates a new exemption from local zoning requirements related to shorelands, wetlands, construction site erosion control and storm water management for lands adjacent to certain impoundments if the impoundment does not discharge directly into a natural navigable waterway, is the result of construction of a dam on a stream or portion of a stream the Department has determined to be non-navigable, and the impoundment is or has been subject to a federal Fish and Wildlife Service Partners for Fish and Wildlife Habitat Development Agreement or similar environmental restoration project.

I hope you find this information helpful. I would be happy to address any questions you may have.



Senator Tom Tiffany
Chair, Senate Committee on Sporting Heritage, Mining and Forestry

November 28, 2017

Re: SB 506

Chairman Tiffany and members of the Senate Committee on Sporting Heritage, Mining and Forestry, thank you for the opportunity to speak on behalf thousands of River Alliance of Wisconsin members--small business owners, individuals, and local watershed protection groups.

River Alliance of Wisconsin is for restoration. Healthy rivers, lakes and wetlands are essential for our wildlife and ecosystems to thrive. When we read Senator Moulton's co-sponsorship memo we saw some things we agreed with, such as "fishing is a vital part of our state's culture and tradition." However, as we read the bill we saw several things that are counter to restoration.

Restoration projects that are looking to benefit the native plants, animals and ecosystems should not need to be exempt from shoreland zoning, wetland zoning, or storm water management zoning ordinances, or construction site erosion control. These types of policies help protect water quality by reducing things like soil erosion from entering waterways that could harm fish populations.

We are also concerned that this bill is creating an incentive to dam streams and could lead to unintended consequences. Water is connected. What happens upstream impacts what happens downstream. Again, the zoning and erosion control exemptions could send polluted water downstream.

Our biggest concern is the prohibition for the DNR to change their determination of non-navigability of a stream after a dam is placed on the non-navigable stream, unless the dam is removed and the stream is returned to its natural state.

As you know, Wisconsin's Public Trust Doctrine states that all navigable waters in the state are "common highways and forever free," and held in trust by the Department of Natural Resources, for the people of Wisconsin. If you remove DNR's authority to change navigability determination, you are allowing the possibility of navigable waters not being protected as our Constitution requires.

Streams are dynamic systems, they are ever changing. They are impacted by drought, floods, and changes on the landscape. This bill is allowing unlimited changes by man and machine with little protection for water quality. These changes could take a non-navigable stream and create stream bed and banks, and a depth that the DNR would determine as a navigable stream, using the navigability definition determined by the Supreme Court. But, under this bill the DNR would not be able to change the determination to navigable. That would leave this navigable stream without

the required protections under the Public Trust Doctrine. To us, this is allowing public waters to be privatized.

We understand that there is a specific and relatively unique situation that prompted the creation of this bill. From what we understand of the situation we think further discussion between the landowner and the DNR is the best solution. Creating a statewide policy to solve one landowner's challenges is just asking to create more problems than solutions around the rest of the state.

Please put a halt to this bill and direct DNR to work with this landowner on solutions for his situation that do not jeopardize protections for the rest of the state.

Thank you,

Allison Werner
River Alliance of Wisconsin



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November 28, 2017

TESTIMONY TO SENATE COMMITTEE ON SPORTING HERITAGE, MINING, AND FORESTRY ON SB506

Thank you for the opportunity to testify today on SB506. My name is Michael Engleson, and I am the Executive Director of Wisconsin Lakes. Wisconsin Lakes is a statewide non-profit conservation organization of waterfront property owners, lake users, lake associations, and lake districts who in turn represent over 80,000 citizens and property owners. For 25 years, Wisconsin Lakes has advocated for the conservation, protection, and restoration of Wisconsin's lake resources.

SB506 is an overbroad solution to what appears to be an issue for a constituent that could be solved through different means. Because this bill likely runs afoul of the public trust doctrine of the Wisconsin Constitution, and because its unintended consequences could harm the property interests and values of individuals, including some of my members, who are downstream of the impoundments this bill would exempt from regulation, as well as the interests of the general public, Wisconsin Lakes urges you to reject it.

The type of impoundment this bill deals with arises from the damming of a natural waterbody, such that what is created is clearly able to support watercraft, and is therefore, under Wisconsin law, a navigable body of water. To call it anything else would, in our opinion, be constitutionally problematic.

But beyond the question of how something on which you could float a pontoon boat could be considered non-navigable, are the many questions the bill raises:

- What counts as a "similar environmental restoration project" to the Fish and Wildlife Service project specifically mentioned in the bill language?
- What happens if the participating landowner fails to meet the conditions of the restoration program, fails to maintain the restoration, or leaves the restoration program?
- If a "restoration" is meant to restore a waterbody, how does allowing that waterbody to become impaired meet the goals of restoration?
- What happens if the unregulated impoundment becomes impaired, and sends impaired water downstream to a navigable section?
- What if those downstream navigable waters are themselves impounded, and the property values of waterfront owners on that lake drop because their waters are impaired due to the unregulated waters flowing into their lake? What protections are being offered to those property owners?

If an impoundment is being created from a natural waterway to facilitate a "restoration", to benefit a fishery or recreational interests, public interest in those waters is crucial or we are creating a de facto private interest in waters with implications to the public and other private interests downstream. Smart minds should be able to arrive at a way to create such restoration projects that meet the needs of the person doing the restoring, without selling out the rights of everyone else.

Wisconsin Lakes is a statewide non-profit conservation organization of waterfront property owners, lake users, lake associations, and lake districts who in turn represent over 80,000 citizens and property owners. For over 20 years, Wisconsin Lakes has been a powerful bipartisan advocate for the conservation, protection, and restoration of Wisconsin's lake resources.