

Wisconsin Legislative Council

AMENDMENT MEMO



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2023 Assembly Bill 579

Assembly Substitute Amendment 1, as Amended by Assembly Amendment 1

BACKGROUND

Along Wisconsin's Great Lakes shoreline and in certain rivers, existing fill and deposits resulting from old industrial activity, natural changes, or other waterway impacts typically cannot be developed or used without a state permit, established bulkhead line, or submerged lake bed lease. Those methods for approving use are subject to public interest determinations, as specified in the statutes and in case law interpreting the public trust doctrine.

Under the public trust doctrine, the state generally holds the title to the beds of lakes in the state, to be held in trust for public use. [*Illinois Steel Co. v. Bilot*, 84 N.W. 855 (Wis. 1901).] Conversely, riparian owners own “qualified” title to river beds, subject to the rights of navigational use and other recognized forms of public use by others.¹ [See *Ashwaubenon v. PSC*, 22 Wis. 2d 38 (1963).]

The Wisconsin Supreme Court has held that the Legislature may grant or allow encroachments in certain portions of navigable waters. Under key legal precedents, such grants and encroachments generally must be used for purposes of public navigation or recreation. [*Angelo v. Railroad Commission*, 217 N.W. 570 (Wis. 1928); *State v. PSC*, 81 N.W.2d 71 (Wis. 1957).]

The case law is somewhat less straightforward as applied to use of existing encroachments, particularly where there may be no clear evidence of a historical shoreline, or where processes of accretion (accumulation of sand or soil) or reliction (erosion of sand or soil) may have shifted boundaries over time, including in situations where natural accretion may have been aided by artificial construction. In such cases, the Wisconsin Supreme Court has upheld shoreline determinations that may allow private ownership of small parts of historic lake bed. [See, e.g., *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927); *W. H. Pugh Coal Co. v. State*, 105 Wis. 2d 123, 126-27 (Wis. Ct. App. 1981).]

2023 ASSEMBLY BILL 579

In relevant part, 2023 Assembly Bill 579: (1) authorizes the use of existing fill in certain commercial river areas; (2) creates a process for a city or village to amend the uses allowed within certain filled areas of the Great Lakes; (3) creates a process for a city or village to develop certain land that may have been a formerly submerged bed of a Great Lakes water; and (4) deems fee title ownership of certain

¹ That distinction may provide an argument supporting a greater degree of flexibility for the Legislature, as the trustee under the public trust doctrine, to determine the permitted uses of historic river beds as opposed to historic lake beds. Wisconsin statutes and administrative code provisions also recognize this distinction. For example, an applicant may seek a Department of Natural Resources (DNR) permit to change the course of a stream and put the former location of the stream to a purely private use. [s. 30.195, Stats.] In contrast, a permit is not available to “move” a lake. In addition, s. 13.097, Stats., which requires the DNR to prepare a report enumerating public trust implications of any lake bed grant, has no analogue for river beds.

land that may have been a formerly submerged bed of a Great Lakes water, but now is separated from the water by another parcel.

Assembly Substitute Amendment 1, as amended by Assembly Amendment 1 (hereafter “amendment”): (1) removes the first element of the bill, listed above; (2) modifies the second and third elements in a few respects, including with regard to the manner in which private concessions are an allowable use of property; (3) modifies the third element to add land that may have been a formerly submerged riverbed; and (4) prevents DNR from preparing a statutorily required report.

Use of Existing Fill in Certain Commercial River Areas

Bill

The bill authorizes the use of fill placed in a specified list of commercial river areas located within a city or village for any public or private purpose without restrictions imposed, if the fill: (1) was placed before December 9, 1977; (2) created land that has been at an elevation above the ordinary high water mark (OHWM) since that date; and (3) is either within a bulkhead line (and not otherwise restricted by the terms of a submerged land lease) or was unauthorized but has not been subject to a DNR enforcement action.

Amendment

The amendment removes this provision from the bill.

Amending Uses of Great Lakes Filled Areas

Bill

The bill creates a process for a city or village to amend the uses allowed within an area in a Great Lakes water that was filled before August 8, 1989, pursuant to authorization in specific legislation, a lake bed grant, or a submerged land lease. The process begins with an application submitted by the municipality to DNR. The application must include a legal description of the authorization and the filled area, a description of the proposed amendment to the existing authorization, and a determination by the governing body of the municipality approving the proposed amendment.

DNR must evaluate an application based solely on whether the proposed uses meet various criteria, including the following:

- The area proposed to be used remains under the **ownership and control of the municipality**, except as follows:
 - The municipality may grant easements, licenses, or leases to public or private entities.
 - The municipality may convey a filled area to a private entity in possession of adjacent private land that can be exchanged for the filled area and used for public purposes.
 - Any existing use by private entities may continue.
- The application allows **reasonably adequate public access** to a Great Lake and its shoreline.
- The application **promotes the public interest**, which may include the enhancement of navigation or public rights in navigable waters, recreational uses, public facilities, and public transportation, the elimination of blight, the remediation of brownfields, and other private economic development consistent with enhancing public access and use of the waterfront area.

Not later than 30 days after receiving an application, DNR must provide notice and an opportunity for the public to submit comments and request a hearing. Not later than 60 days after providing notice, or

60 days after holding a hearing, DNR **must approve the application** unless it determines that the criteria listed above are not satisfied.

Amendment

The amendment retains the overall process for a municipality to receive permission to amend the uses allowed within a Great Lakes filled area. However, it modifies the terminology so that the municipality applies for permission to “change” allowable uses rather than to “amend” allowable uses. It also modifies the criteria and process used by DNR in evaluating an application.

The amendment removes the requirement that DNR must evaluate an application based **solely** on whether the proposed uses meet the stated criteria, and replaces the criteria described above with the following:

- The area proposed to be used must remain under the **ownership and control of the municipality**, except that the municipality may grant leases or licenses to private or public entities, subject to compliance with the other stated criteria.
- The application must promote appropriate **public uses consistent with the public interest**, which may include concessions² open to the public under long-term lease with the municipality if the concessions provide a significant public benefit to the public interest. Also, the proceeds (other than real property taxes) from any lease or license to private or public entities to create or operate a concession must be used by the municipality to promote the public interest in navigable waters pursuant to a plan approved by DNR.
- The application must **promote other public objectives**, which may include the elimination of blight, the remediation of brownfields, and other private economic development benefits.
- The application must include appropriate **mechanisms for DNR enforcement**.

Under the amendment, DNR must hold a hearing not later than 90 days after receiving an application and **must make a determination** on whether to approve the application not later than 90 days after the hearing, unless DNR and the applicant agree to extend that timeline. A failure of DNR to act on an application within the relevant timeline may not be deemed to be an approval by DNR. A determination on an application is subject to review under ch. 227, Stats.

Developing Former Lake Bed of a Great Lakes Water

Bill

The bill creates a process for a city or village to create a waterfront development plan with respect to parcels that may have been submerged bed of a Great Lakes water at the time of statehood. The process begins with a plan submitted by the municipality to DNR, including a map of areas that will be dedicated to the public for public use, areas that will allow private use, and the boundary between them. The plan must include various other elements, including the following:

- A description of areas and types of **proposed public use** and any restrictions for safety or security reasons.
- A plan for **implementing and enforcing** the development of the public use areas, including appropriate ordinances.

² “Concession” means a private allowable use that is a structure or facility that provides lodging, restaurant and food and beverage services, or retail services that support public access and use of navigable waters.

Not later than 30 days after receiving a plan, DNR must provide notice and an opportunity for the public to submit comments and request a hearing. Not later than 60 days after providing notice, or 60 days after holding a hearing, DNR **must approve the plan**, or approve the plan with conditions, unless it makes certain determinations, including the following:

- The **public use areas are insufficient**, based on the value of increased public access and use compared to existing use, the need for private development to fund and support public access and use, and the relative amount and quality of public and private use areas in light of overall site characteristics.
- The plan does not contain sufficient provisions to ensure that the public uses will be **implemented**.

An approval by DNR constitutes a determination that the public interest is served by implementation of the plan, and that the boundary between former lake bed areas held in trust by the state and former lake bed areas held in private fee title is in the public interest. Upon implementation of the plan, that boundary shall have the same effect as if the boundary were confirmed in a quiet title action granted by a court.

Amendment

The amendment retains the overall process for a municipality to obtain approval of a waterfront development plan and also the legal effect of a DNR approval. However, the amendment allows a plan to include parcels that may have been part of a **riverbed** at the time of statehood. It also modifies the required elements of a plan submitted by a municipality and modifies the criteria and process used by DNR in evaluating a plan.

The amendment modifies the two elements of the plan described above, as follows:

- In the description of areas and types of **proposed public use**, the plan must describe how the public use is consistent with the standards by which DNR evaluates the plan.
- In the plan for **implementing and enforcing** the development of the public use areas, the plan must include a plan for perpetual maintenance of the public use areas, must require that the record title holder grant an easement to DNR ensuring that future use of the public areas will be consistent with the plan, and must include appropriate mechanisms for DNR enforcement.

Under the amendment, DNR must hold a hearing not later than 90 days after receiving a plan and must make a determination on whether to approve the plan not later than 90 days after the hearing, unless DNR and the applicant agree to extend that timeline. A failure of DNR to act on a plan within the relevant timeline may not be deemed to be an approval by DNR. A determination on a plan is subject to review under ch. 227, Stats.

The amendment clarifies that DNR may impose additional restrictions and conditions on a plan. It also provides that DNR **may not approve a plan** unless it makes certain determinations, including the following (which replace the two determinations described above):

- The amount and location of the **public use areas provide a net benefit to protect the public interest**. Appropriate public uses in public use areas may include concessions open to the public under a long-term lease with a municipality if the concessions provide a significant public benefit to the public interest. Also, the proceeds (other than real property taxes) from any lease or license to private or public entities to create or operate a concession must be used by the municipality to promote the public interest in navigable waters pursuant to a plan approved by DNR.

- In the part of the plan requiring sufficient provisions to ensure that the public uses proposed in the plan will be implemented, the amendment requires that the public uses will be **perpetually maintained**.

Finally, the amendment provides that, if a plan includes former riverbed, and the plan is approved by DNR and implemented, any former riverbed areas of the plan designated for private use are not subject to a navigational servitude.

Former Lake Bed Now Separated From the Water by Another Parcel

Bill

The bill deems a parcel of land to not be part of the lake bed of a Great Lakes water and to be held in fee title ownership if it meets the following criteria:

- The parcel has remained separated from the water by one or more parcels since December 9, 1977.
- There is a record title holder for the parcel.

Amendment

The amendment adds the following additional criteria that must be met:

- The parcel must not have been filled pursuant to specific legislation, a lake bed grant, or a submerged land lease.

DNR Report on Legislation Providing for Conveyance of Lake Bed Area

Current law requires DNR to submit to the Legislature a report on any legislation that conveys a lake bed area or that amends a prior conveyance of a lake bed area. The amendment prevents DNR from preparing such a report on the bill.

BILL HISTORY

Representative Wittke offered Assembly Substitute Amendment 1 on January 9, 2024. On January 11, 2024, the Assembly Committee on Environment recommended adoption of the substitute amendment, and passage of the bill, as amended, each on a vote of Ayes, 5; Noes, 3.

Representative Wittke offered Assembly Amendment 1 to Assembly Substitute Amendment 1 on January 25, 2024. On that same day, the Assembly adopted the simple amendment, adopted the substitute amendment, as amended, and passed the bill, as amended, each on a voice vote.

For a full history of the bill, visit the Legislature's [bill history page](#).

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