

State of Wisconsin



2021 Senate Bill 900

Date of enactment:
Date of publication*:

2021 WISCONSIN ACT

AN ACT to renumber 30.122; to amend 30.122 (title); and to create 30.01 (1h), 30.122 (2), 30.122 (3), 30.2039 and 885.335 of the statutes; relating to: use of fill in commercial waterways and establishing shorelines of Great Lakes waters.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 30.01 (1h) of the statutes is created to read:

30.01 (1h) "Commercial waterway" includes the portions of all of the following rivers that are within the Great Lakes basin and within incorporated areas:

- (a) Ahnapee River.
- (b) East River in Brown County.
- (c) Fox River, not including Lake Winnebago, Lake Butte des Morts, Lake Winneconne, or Lake Poygan.
- (d) Kewaunee River.
- (e) Kinnickinnic River, Menomonee River, and Milwaukee River.
- (f) Manitowoc River.
- (g) Menominee River.
- (h) Root River.
- (i) Sheboygan River.
- (j) St. Louis River.
- (k) West Twin River and East Twin River.

SECTION 2. 30.122 (title) of the statutes is amended to read:

30.122 (title) Unauthorized structures and fill.

SECTION 3. 30.122 of the statutes is renumbered 30.122 (1).

SECTION 4. 30.122 (2) of the statutes is created to read:

30.122 (2) A fill or deposit placed in a commercial waterway before the date provided in sub. (1) that created land at an elevation above the current ordinary high water mark and that has remained above the current ordinary high water mark since the date provided in sub. (1) may be used by the owner of the fill or deposit for any public or private purpose without restrictions imposed if any of the following apply:

(a) The fill is unauthorized and the department has not initiated an enforcement action relating to the fill prior to effective date of this paragraph [LRB inserts date].

(b) The fill is within an authorized bulkhead line established as provided under s. 30.11 and use of the filled area is not specifically restricted by the terms included in a submerged land lease under s. 24.39 (4).

SECTION 5. 30.122 (3) of the statutes is created to read:

30.122 (3) Nothing in this section abridges the riparian rights of riparian owners.

SECTION 6. 30.2039 of the statutes is created to read:

30.2039 Great Lakes shorelines established. (1) DEFINITIONS. In this section:

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

(a) "Great Lakes water" means Lake Superior, Lake Michigan, Green Bay, or Sturgeon Bay.

(b) "Municipality" means a city or village.

(c) "Record title holder" means a person with a claim of ownership of property based on a recorded conveyance of an ownership interest in the property.

(d) "Shoreline" means the boundary between upland and property waterward of upland areas.

(e) "Upland" means property that has been at an elevation above the current ordinary high water mark since the date provided in s. 30.122 (1) other than for temporary maintenance activities or because of accretion or reliction.

(2) SCOPE. This section applies to properties or portions of properties to which all of the following apply:

(a) The property includes portions of land that may have been part of the submerged bed of a Great Lakes water at the time of statehood.

(b) The property includes portions of land that are upland.

(c) The property is within a municipality.

(d) The property is not subject to a lake bed grant or a submerged land lease and is not landward of the shoreline established under s. 30.2038.

(3) APPLICATION. (a) A record title holder for property that meets the requirements under sub. (2) (a) to (d) may apply to the municipality in which the property is located for a determination of the location of the shoreline in accordance with this section.

(b) The application shall include all of the following information:

1. The legal description of the property and a survey map showing the proposed shoreline.

2. Photographs, survey data, publicly available global positioning system mapping, geographic information system mapping, or other documentation that provide evidence that the area landward of the proposed shoreline is upland.

(4) MUNICIPAL APPROVAL. (a) Except as provided in sub. (5), a municipality that receives an application under sub. (3) shall provide public notice that the application has been received. No earlier than 30 days following the public notice, the municipality shall determine whether the shoreline proposed under sub. (3) (b) 1. is in the public interest as provided in par. (c) 2.

(b) A municipality may by ordinance adopt a proposed shoreline for multiple properties within the municipality that abut a Great Lakes water if the municipality determines that the location of the shoreline is in the public interest as provided in par. (c) 2.

(c) In making a determination under this subsection, the municipality shall approve the proposed shoreline if all of the following apply:

1. The property meets the requirements under sub. (2) (a) to (d).

2. The municipality determines approval of the shoreline is in the public interest and the proposed use will promote the interests of the public, which may include public rights in navigable waters, economic development or redevelopment, the elimination of blight, remediation of brownfields, and settling uncertainty in title, and shall include public access or use of the property or project area, unless the existing use of the property is residential.

(d) A municipality may by ordinance adopt criteria for processing applications under this subsection.

(5) EXCEPTION. A parcel that has been separated from the submerged bed of a Great Lakes water by one or more other parcels since the date provided in s. 30.122 (1) is deemed to be not part of the lakebed of a Great Lakes water and shall be affected by this section in the same manner as property for which a determination is made that the property is held in fee title ownership and is not held in trust by the state for the public under sub. (9).

(6) SUBMITTAL TO THE DEPARTMENT. Upon making a determination to approve a shoreline under sub. (4), the municipality shall provide the approval to the department for review.

(7) NOTICE. (a) No later than 30 days after receiving a request for review under sub. (6), the department shall provide public notice by publishing a class 2 notice under ch. 985 and by posting notice on the department's Internet site. The notice shall provide an opportunity for members of the public to provide comments and request a public hearing. If a public hearing is requested, notice of the public hearing shall be provided by publishing a class 2 notice under ch. 985 and by posting notice on the department's Internet site.

(b) No later than 60 days following public notice under par. (a), or 60 days following a public hearing requested under par. (a), whichever is later, the department shall make a determination under sub. (8) (a).

(8) DETERMINATIONS BY THE DEPARTMENT. (a) For purposes of this section, the department shall adopt the shoreline approved by a municipality under sub. (4) and determine the shoreline is consistent with the public interest as provided in sub. (4) (c) 2. unless the department determines any of the following:

1. A portion of the area landward of the shoreline approved by the municipality under sub. (4) is not upland. If a determination under this paragraph is made, the department shall modify the proposed shoreline so that any portion that is not upland remains waterward of the shoreline and shall approve the modified shoreline.

2. The determination of the municipality under sub. (4) that the proposed shoreline is in the public interest is not supported by substantial evidence.

(b) If the department does not make a determination under this subsection in the period required under sub. (7) (b), the proposed shoreline is deemed approved.

(9) EFFECT OF DETERMINATION. (a) A determination under this section establishes the shoreline for purposes of determining the boundary of title between land held in trust by the state and land held in fee title ownership. For land held in fee title ownership as determined under this section, this determination operates in the same manner as if a person were granted quiet title to the property by a court under s. 841.10. A determination under this section shall be recorded with the register of deeds and posted on the department's Internet site.

(b) A determination under this section does not alter the rights of any record title holder other than to establish the shoreline under par. (a).

(c) This section does not alter the right of property owners to seek a quiet title action under common law.

SECTION 7. 885.335 of the statutes is created to read:

885.335 Actions concerning real estate near Great Lakes waters or commercial rivers. (1) No claim or counterclaim may be made in an action relating to the possession or title of any real estate if the claim or counterclaim is based on an assertion that the property includes portions of land that may have at one time been submerged beneath a Great Lakes water if such portions of land are upland, as defined in s. 30.2039 (1) (e), and the property is not subject to a lake bed grant or submerged land lease.

(2) No claim or counterclaim may be made in an action relating to the allowable use of any real estate if the claim or counterclaim is based on an assertion that the property includes portions of land that may have at one time been submerged beneath a commercial river, as defined in s. 30.01 (1h), or an assertion that the allowable use of the property is otherwise limited by a prior approval issued by the state or a local government, if s. 30.122 (2) is applicable to such portions of land.

SECTION 9. Nonstatutory provisions.

(1) LEGISLATIVE FINDINGS.

(a) The legislature recognizes and declares that the state is the trustee of the public trust established under article IX, section 1, of the Wisconsin Constitution and that the legislature is authorized as representative of the state to exercise the function of the trustee of that public trust in matters of specific application.

(b) The legislature recognizes that title to natural lake beds as existing at statehood, including those in the Great Lakes, generally is held by the state. *State v. Bleck*, 114 Wis. 2d 454 (1983); *Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901); *State v. Trudeau*, 139 Wis. 2d 91 (1987).

(c) The legislature finds that the combination of the dynamic nature of Great Lakes waters and the evolution of commercial harbors, urban areas, and other lakeshore development has resulted in considerable changes in the lake bed shoreline compared to the original government survey. In many places, formerly submerged areas have become upland and have been used for public or private purposes for decades.

(d) The legislature finds that the historical record to determine the location of the shoreline at the date of statehood, and the extent of natural or artificial changes to lake bed areas before and after statehood, is often incomplete and inconclusive.

(e) The legislature declares that the uncertainty of title to and the uncertainty associated with permissible uses of some lakefront property are a substantial impediment to orderly redevelopment and transfer of valuable lakefront properties, and it is in the public interest to promote the use of upland areas in a way that provides certainty and facilitates economic development, increased tax base, and public access.

(f) The legislature recognizes that courts have held that the location of the boundary of lake bed can change and that title to such areas can be adjusted under the common law doctrines of accretion and reliction through both natural processes and through the placement of artificial fill. *De Simone v. Kramer*, 77 Wis. 2d 188 (1977); *Heise v. Village of Pewaukee*, 92 Wis. 2d 333 (1979); *W. H. Pugh Coal Co. v. State*, 105 Wis. 2d 123 (1981); *Doemel v. Jantz*, 180 Wis. 225 (1923); *Angelo v. Railroad Com.*, 194 Wis. 543 (1928); *Jansky v. City of Two Rivers*, 227 Wis. 228 (1938). The legislature finds that the system for establishing the shoreline of Great Lakes waters under s. 30.2039, as created by this act, is permissible under the law because this system is based upon the longstanding doctrine of accretion.

(g) The legislature declares that the best available method to establish the shoreline between a Great Lakes lake bed and adjoining uplands for purposes of establishing ownership and allowable use of the adjoining uplands is the method established under s. 30.2039, as created by this act, and that this method is in the public interest, is consistent with the public trust doctrine, and promotes the most equitable method of determining the ownership and use rights applicable to lakefront property on the Great Lakes.

(h) Should a reviewing court of competent jurisdiction disagree with the legislative finding in par. (g), the legislature finds that the system for establishing the shoreline of Great Lakes waters under s. 30.2039, as created by this act, is permissible under the law because case law allows the legislature to make certain limited transfers of lake bed to a private party if it is part of a larger process that is in the public interest. *Milwaukee v. State*, 193 Wis. 423 (1927). The legislature finds that any transfers of former lake bed to a private party under s. 30.2039, as created by this act, are nominal transfers and are part of a process ensuring that uses of waterfront property serve public interests. The department of natural resources is not required to prepare a report under s. 13.097 (2) with respect to the process by which the department may establish a shoreline under s. 30.2039, as created by this act.

(i) Should a reviewing court of competent jurisdiction disagree with the legislative findings in pars. (g) and (h), the legislature finds that the system for establishing the shoreline of Great Lakes waters under s. 30.2039, as created by this act, is permissible under the law because this system is separately supported by the longstanding doctrine of adverse possession. The property subject to s. 30.2039, as created by this act, has been upland for more than 40 years, which is consistent with the doctrine of adverse possession. Multiple cases have indicated that the allowance for adverse possession of formerly submerged lands is constitutional. *Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901); *State v. Bednarski*, 1 Wis. 2d 639 (1957); *State v. Adelmeyer*, 221 Wis. 246 (1936).

(j) The legislature recognizes that in interpreting the public trust, the courts in Wisconsin have made a distinction between the ownership of the beds of navigable streams and natural lakes. For stream beds, the title is held by a fee title owner but this title is qualified by the rights of the public to use the water for navigation. *Munninghoff v. Wis. Conservation Com.*, 255 Wis. 252 (1949); *FAS, LLC v. Town of Bass Lake*, 2007 WI 73.

(k) The legislature recognizes that in *Muench v. Public Service Com.*, 261 Wis. 492 (1952), the court held that the public trust extends only to land under the stream of

a navigable water so long as the land constitutes part of the bed of the stream, and if the course of the stream is changed so that the land is no longer is part of the river bed, it ceases to be impressed with the public trust. The legislature recognizes that the state has allowed the relocation of navigable streams under s. 30.195 and, when such action is taken, any area that was formerly the bed of a stream is no longer subject to the public trust and may be used for any allowable private purpose.

(L) The legislature recognizes that the historic record on the extent of natural or artificial changes to the original riverbank and river bed is often incomplete and inconclusive.

(m) The legislature finds that where riverfront properties in incorporated areas have been filled for an extended time, any public rights in navigable waters that existed in the submerged area were extinguished when that area became upland and pursuant to s. 30.122, as affected by this act, and riverfront properties in incorporated areas are no longer subject to the public trust. It is now in the public interest to promote the use of upland areas in a way that provides certainty and flexibility for property owners, facilitates economic development and redevelopment, and increases the local tax base.
