



State of Wisconsin
2021 - 2022 LEGISLATURE

LRBs0401/2
ZDW:skw

**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO ASSEMBLY BILL 849**

February 18, 2022 - Offered by Representative WITTKÉ.

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

Analysis by the Legislative Reference Bureau

This bill provides for the lawful public or private use of land that has been above the ordinary high water mark of a commercial waterway or a Great Lakes water since December 9, 1977. Under current law, all permanent alterations, deposits, or structures, other than boathouses, that affect navigable waters are presumed in conformity with the law if they were constructed before December 9, 1977, and did not require a permit at the time of construction.

Historic fill in commercial waterways

The bill applies, in part, to fill placed prior to 1977 that created land above the ordinary high water mark of a commercial waterway, which is a specified list of rivers. If the fill is unauthorized fill for which the Department of Natural Resources has not initiated an enforcement action or is within an authorized bulkhead line and not specifically restricted by a submerged land lease, the owner of the fill may use the fill for any purpose.

Establishing the shorelines of Great Lakes waters

The bill applies, in part, to property that 1) includes land that may have been part of the submerged bed of a Great Lakes water at the time of statehood; 2) includes portions of land that are upland, which is defined to mean land that has been above the ordinary high water mark since December 9, 1977; 3) is within a municipality; and 4) is not subject to a lake bed grant or a submerged land lease and is not landward of the statutorily established shoreline in the city of Milwaukee.

The record title holder of applicable land may submit a proposed shoreline to the municipality in which the land is located. The municipality must approve the proposed shoreline if the municipality determines the proposed shoreline is in the public interest and the proposed use will promote the interests of the public and if the proposed use will provide public access or use. If a municipality approves a proposed shoreline, the municipality must submit the approval to DNR for review.

Following a public notice and comment period, DNR must adopt the shoreline approved by the municipality unless DNR determines that a portion of the area landward of the shoreline is not upland or there is not substantial evidence that the shoreline as proposed is in the public interest. A determination by DNR 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.

The bill also prohibits the commencement of any action affecting the possession or title of any real estate based on an assertion that the property includes portions of land that may have at one time been submerged beneath a Great Lakes water or a commercial waterway, if the portions of land are upland and not subject to a lake bed grant or a submerged land lease or otherwise limited by a prior approval issued by the state or a local government.

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

- 1 **SECTION 1.** 30.01 (1h) of the statutes is created to read:
- 2 30.01 (1h) “Commercial waterway” includes the portions of all of the following
- 3 rivers that are within the Great Lakes basin and within incorporated areas:
- 4 (a) Ahnapee River.
- 5 (b) East River in Brown County.
- 6 (c) Fox River, not including Lake Winnebago, Lake Butte des Morts, Lake
- 7 Winneconne, or Lake Poygan.
- 8 (d) Kewaunee River.

1 (e) Kinnickinnic River, Menomonee River, and Milwaukee River.

2 (f) Manitowoc River.

3 (g) Menominee River.

4 (h) Root River.

5 (i) Sheboygan River.

6 (j) St. Louis River.

7 (k) West Twin River and East Twin River.

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

9 **30.122 (title) Unauthorized structures and fill.**

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

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

12 30.122 (2) A fill or deposit placed in a commercial waterway before the date
13 provided in sub. (1) that created land at an elevation above the current ordinary high
14 water mark and that has remained above the current ordinary high water mark since
15 the date provided in sub. (1) may be used by the owner of the fill or deposit for any
16 public or private purpose without restrictions imposed if any of the following apply:

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

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

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

24 30.122 (3) Nothing in this section abridges the riparian rights of riparian
25 owners.

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

2 **30.2039 Great Lakes shorelines established.** (1) **DEFINITIONS.** In this
3 section:

4 (a) “Great Lakes water” means Lake Superior, Lake Michigan, Green Bay, or
5 Sturgeon Bay.

6 (b) “Municipality” means a city or village.

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

9 (d) “Shoreline” means the boundary between upland and property waterward
10 of upland areas.

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

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

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

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

19 (c) The property is within a municipality.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 **885.335 Actions concerning real estate near Great Lakes waters or**
23 **commercial rivers.** (1) No claim or counterclaim may be made in an action
24 relating to the possession or title of any real estate if the claim or counterclaim is
25 based on an assertion that the property includes portions of land that may have at

1 one time been submerged beneath a Great Lakes water if such portions of land are
2 upland, as defined in s. 30.2039 (1) (e), and the property is not subject to a lake bed
3 grant or submerged land lease.

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

10 **SECTION 9. Nonstatutory provisions.**

11 (1) LEGISLATIVE FINDINGS.

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

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

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

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

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

10 (f) The legislature recognizes that courts have held that the location of the
11 boundary of lake bed can change and that title to such areas can be adjusted under
12 the common law doctrines of accretion and reliction through both natural processes
13 and through the placement of artificial fill. *De Simone v. Kramer*, 77 Wis. 2d 188
14 (1977); *Heise v. Village of Pewaukee*, 92 Wis. 2d 333 (1979); *W. H. Pugh Coal Co. v.*
15 *State*, 105 Wis. 2d 123 (1981); *Doemel v. Jantz*, 180 Wis. 225 (1923); *Angelo v.*
16 *Railroad Com.*, 194 Wis. 543 (1928); *Jansky v. City of Two Rivers*, 227 Wis. 228
17 (1938). The legislature finds that the system for establishing the shoreline of Great
18 Lakes waters under s. 30.2039, as created by this act, is permissible under the law
19 because this system is based upon the longstanding doctrine of accretion.

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

1 equitable method of determining the ownership and use rights applicable to
2 lakefront property on the Great Lakes.

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

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

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

7 (k) The legislature recognizes that in *Muench v. Public Service Com.*, 261 Wis.
8 492 (1952), the court held that the public trust extends only to land under the stream
9 of a navigable water so long as the land constitutes part of the bed of the stream, and
10 if the course of the stream is changed so that the land is no longer is part of the river
11 bed, it ceases to be impressed with the public trust. The legislature recognizes that
12 the state has allowed the relocation of navigable streams under s. 30.195 and, when
13 such action is taken, any area that was formerly the bed of a stream is no longer
14 subject to the public trust and may be used for any allowable private purpose.

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

18 (m) The legislature finds that where riverfront properties in incorporated areas
19 have been filled for an extended time, any public rights in navigable waters that
20 existed in the submerged area were extinguished when that area became upland and
21 pursuant to s. 30.122, as affected by this act, and riverfront properties in
22 incorporated areas are no longer subject to the public trust. It is now in the public
23 interest to promote the use of upland areas in a way that provides certainty and

1 flexibility for property owners, facilitates economic development and redevelopment,
2 and increases the local tax base.

3 (END)