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# Wisconsin Legislative Council

## AMENDMENT MEMO

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**Memo published:** February 22, 2022

**Contact:** Anna Henning, Senior Staff Attorney

**2021 Assembly Bill 849**

**Assembly Substitute  
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, as interpreted over time by the courts, 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.<sup>1</sup> [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. Public Service Commission*, 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).]

### 2021 ASSEMBLY BILL 849

2021 Assembly Bill 849: (1) authorizes the use of existing fill in certain commercial river and harbor areas; (2) creates a process for establishing the shoreline along the Great Lakes; and (3) bars certain court actions.

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<sup>1</sup> 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.

## **Use of Existing Fill in Certain Commercial Rivers and Harbor Areas**

The bill authorizes the use of fill placed in a specified list of commercial river and harbor areas for any public or private purpose, 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.

## **Process for Establishing a Great Lakes Shoreline**

The bill creates a process for establishing a shoreline boundary in cities and villages along Lake Superior and Lake Michigan. The process begins with an application submitted to the relevant municipality by a record title holder.<sup>2</sup> The application must include a legal description of the property, a survey map showing the proposed shoreline, and photographs, survey data, publicly available global positioning system (GIS) mapping, or other documentation that provides evidence that the area landward of the proposed shoreline has been at an elevation above the OHWM since December 9, 1977.

Under the bill, a municipality must determine that a proposed boundary meets certain requirements, including that the property includes a former lakebed that has been at an elevation above the OHWM since December 9, 1977 (other than for temporary maintenance activities or because of accretion or reliction), and that the proposed shoreline is both in the public interest and will promote the interests of the public.<sup>3</sup>

Following municipal approval, DNR must hold a public comment period, and a public hearing if requested, regarding a proposed shoreline. DNR then must adopt the proposed shoreline and determine that it is within the public interest within 60 days, unless DNR determines that the property has not been at an elevation above the OHWM for the requisite time period, or that a municipality's public interest determination lacks substantial evidence.

When DNR adopts the proposed shoreline, that action has the effect of establishing 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." However, the bill specifies that DNR's decision does not affect the rights of any record title holder, other than to establish the shoreline.

## **Bar on Certain Court Actions**

The bill bars certain court actions affecting the possession or title to real estate. Under the bill, no action may be commenced by any person, or by the state or any local unit of government, 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 the land has been at an elevation above the OHWM since December 9, 1977, and the property is not subject to a lake bed grant or a submerged land lease.

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<sup>2</sup> However, the bill also allows a municipality to enact an ordinance establishing a proposed shoreline for multiple shoreline properties.

<sup>3</sup> The bill specifies that "interests of the public" may include public rights in navigable waters, public use, economic development or redevelopment, the elimination of blight, remediation of brownfields, and settling uncertainty in title. In this context, the bill provides a presumption that existing residential uses require minimal or no public access or use.

## ASSEMBLY SUBSTITUTE AMENDMENT 1

Assembly Substitute Amendment 1 retains the bill's overall framework and approach, but with some modifications. Specifically, the substitute amendment does all of the following:

- Narrows the scope of the portion of the bill relating to the use of fill in commercial waterways to only certain river areas, specifically by: (1) applying that portion of the bill only to land located within cities and villages; and (2) removing the harbor areas from the authorization provided by that portion of the bill.
- Expressly requires municipalities to determine that the proposed use of Great Lakes shoreline property will provide public access or use of the property, in addition to the more general public interest and promotion of public interest determinations, except with respect to residential property.
- Authorizes municipalities to adopt criteria, by ordinance, for processing applications for proposed shoreline.
- Clarifies that DNR's oversight role under the bill is limited to the portion of the bill relating to proposed Great Lakes shoreline boundary changes and that DNR's review of a municipality's proposed shoreline is confined to the same public interest criteria that applied to the municipality.
- Provides that if DNR does not make a determination with respect to a proposed shoreline within 60 days after the public comment period or hearing, the shoreline is deemed approved.
- Adds a requirement that shoreline determinations made under the bill must be recorded with the register of deeds and posted on DNR's website.
- Revises the limitation on court actions, specifically by: (1) barring certain **claims and counterclaims**, rather than barring certain **actions** affecting real estate title; and (2) applying the bar on claims to both Great Lakes shoreline and the river bed areas affected by the bill.
- Adds legislative findings, which, in part, set forth legal arguments that could be asserted if the bill were challenged under the public trust doctrine. Among other information, the findings state the following with regard to the use of fill along commercial rivers and the establishment of Great Lakes shorelines:
  - The original survey determinations of the locations of Great Lakes shorelines contained inaccuracies, and shorelines have migrated or been artificially manipulated over time.
  - It is in the public interest to promote the use of filled former waterways.
  - The process in the bill for the establishment of Great Lakes shorelines is permissible because it is in the public interest and is based upon the longstanding doctrine of accretion. If a court disagrees that the doctrine of accretion supports the process, the findings state that the process is nevertheless permissible either as a matter of adverse possession or because the Legislature is allowed to make certain transfers of lake bed to a private party for private purposes.
  - Although DNR must prepare a report within 15 days after legislation is introduced that conveys lake bed (or amends a prior conveyance of lake bed), DNR is not required to prepare such a report with respect to the process of establishing a shoreline under the bill.
  - The historic record regarding natural and artificial changes to riverbanks and river beds is inconclusive.

- Where a portion of a river has been filled for an extended period of time, public rights in navigation in that portion of the river no longer exist and the public interest is served by promoting the use and development of that land.

## **BILL HISTORY**

Representative Wittke offered Assembly Substitute Amendment 1 on February 18, 2022. On February 22, 2022, the Assembly Committee on Environment voted to recommend adoption of the substitute amendment on a vote of Ayes, 7; Noes, 0. The committee then voted to recommend passage of the bill, as amended, on a vote of Ayes, 6; Noes, 2.

AH:ksm