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# Wisconsin Legislative Council

## ACT MEMO

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April 8, 2024

**2023 Wisconsin Act 247**  
[2023 Senate Bill 541]

**Use of Certain Areas of Formerly  
Submerged Lake and River Beds**

### BACKGROUND

Under Wisconsin’s [public trust doctrine](#), the state generally holds title to the beds of lakes in trust for public use. [*Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901).] With respect to rivers, however, riparian owners own “qualified” title to the beds, subject to the rights of navigational use and other recognized forms of public use by others. [See *Ashwaubenon v. PSC*, 22 Wis. 2d 38 (1963).]

Generally, three statutory mechanisms regulate the placement of new fill in navigable waters, and ensure that any such fill is in the public interest. First, the Board of Commissioners of Public Lands (BCPL) may lease rights to fill in beds of certain lakes or navigable streams for navigational purposes or improvement or construction of certain harbor facilities. [s. 24.39 (4), Stats.] Second, a municipality may adopt an ordinance establishing a bulkhead line along the shore of a navigable water within its boundaries, subject to approval by the Department of Natural Resources (DNR). [s. 30.11, Stats.] Finally, DNR must issue a permit to a riparian owner for a deposit of fill material if DNR finds that: (1) the deposit will not materially obstruct navigation; (2) the deposit will not be detrimental to the public interest; and (3) the deposit will not materially reduce the flood flow capacity of a stream. [s. 30.12 (3m) (c), Stats.]

Under key legal precedents, any such new fill generally must be used for purposes of public navigation or recreation, at least in lakes. [*Angelo v. Railroad Comm’n*, 194 Wis. 543 (1928); *State v. PSC*, 275 Wis. 112 (1957).] In the relatively smaller number of judicial decisions addressing the use of existing fill, Wisconsin courts have in some cases upheld shoreline determinations that allow for private ownership of portions of formerly submerged 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 WISCONSIN ACT 247

2023 Wisconsin Act 247 creates statutory authority and procedures to allow for the use of certain former lake and river bed areas with longstanding fill.

#### Changing Uses of Great Lakes Filled Areas

The act creates a process for a city or village to change 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 change to the existing authorization, and a determination by the governing body of the municipality approving the proposed change.

The act requires DNR to evaluate an application based on whether the proposed uses meet various criteria, including the following:

- The area proposed to be used was used for parking lots, public or private buildings, roads, or railroads when the act takes effect, but does not include any area currently used for public park purposes.
- The area proposed to be used remains under the ownership and control of the municipality, except that the municipality may grant leases or licenses to private or public entities for the purpose of providing concessions,<sup>1</sup> subject to compliance with the other stated criteria.
- The application is consistent with any waterfront development plan, described below.
- The application promotes appropriate public uses consistent with the public interest, and may include concessions open to the public under long-term lease with the municipality if the concessions provide a significant public benefit to the public interest in navigable waters. 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 promotes other public objectives, which may include the elimination of blight, the remediation of brownfields, and other private economic development benefits.
- The application includes appropriate mechanisms for DNR enforcement.

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 a contested case hearing process.

## **Developing Former River Bed or Former Lake Bed of a Great Lakes Water**

The act creates a process by which a city or village may create a waterfront development plan with respect to parcels that may have been part of a river bed or may have been a submerged bed of a Great Lakes water at the time of statehood. The process begins with a plan submitted by the municipality to DNR. The plan must include all of the following:

- A map identifying affected parcels of land.
- An approximate delineation of the shoreland at statehood, based on existing government survey maps.
- A delineation of upland<sup>2</sup> areas.
- A delineation of any area that is subject to a lake bed grant, submerged land lease, bulkhead line, or the legislatively established Milwaukee shoreline.
- A description of areas and types of proposed public use and any restrictions on public use for safety or security reasons. The plan must describe how the public use areas will be accessible to the public.

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<sup>1</sup> In this context, “concession” means a private allowable use that is a structure or facility that provides lodging, restaurant and food and beverage services, or retail services supporting the public interest in navigable waters and that support public access and use of navigable waters.

<sup>2</sup> “Upland” means property that remained at an elevation above the current ordinary high-water mark from December 9, 1977, to the effective date of this act.

- An overall plan for developing the area, 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.
- A plan for implementing and enforcing the development and perpetual maintenance of the public use areas, including appropriate ordinances. The plan 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.

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.

DNR may not approve a plan unless it determines all of the following:

- The private uses proposed in the plan are not inconsistent with existing lake bed grants or submerged land leases and will not materially affect the public interest in navigable waters.
- The amount and location of the public use areas to be developed and maintained under the plan provide a substantial benefit to the public interest in navigable waters. Appropriate 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 in navigable waters. The plan must also require the proceeds (other than real property taxes) from any lease or license to private or public entities to create or operate a concession to be used by the municipality to promote the public interest in navigable waters pursuant to a plan approved by DNR.
- The boundary established in the plan will not result in a substantial impairment of the public interest in navigable waters and is incidental to the development and perpetual maintenance of the public use areas of the plan.
- The plan contains sufficient provisions to ensure that the public uses will be implemented and perpetually maintained.

DNR may impose additional restrictions and conditions on a plan.

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 a contested case hearing process.

An approval by DNR constitutes a determination that the public interest in navigable waters is served by implementation of the plan. With respect to areas that may have been part of the submerged bed of Great Lakes water at the time of statehood, DNR's approval also has the effect of establishing that the boundary between land that is held in trust by the state (or otherwise publicly owned) and land held in private fee title ownership is in the public interest in navigable waters.

Upon implementation of portions of a plan that relate to public use areas: (1) any former river bed areas of the plan designated for private use are not subject to a navigational servitude; and (2) the boundary between former lake bed areas held in trust by the state and former lake bed areas shall have the same effect as if the boundary were confirmed in a quiet title action granted by a court.

## Former Lake Bed Now Separated From the Water by Another Parcel

The act 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 remained separated from the water by one or more parcels from December 9, 1977, to the effective date of the act.
- There is a record title holder for the parcel.
- The parcel must not have been subject to a fill authorization pursuant to specific legislation, a lake bed grant, or a submerged land lease.

## Existing Uses for Former Lake Bed

The act generally requires DNR to treat upland property adjacent to the Great Lakes as property that is owned by the record title holder for purposes of exercising any regulatory authority, if the property meets the following criteria:

- The property includes portions of land that remained at an elevation above the ordinary high-water mark from December 9, 1977, to the effective date of this act, other than for temporary maintenance activities or because of accretion or reliction.
- The use of the property has not materially changed<sup>3</sup> since the effective date of this act.

However, the act specifies that the requirement does not authorize the combining of existing uses on multiple properties.

## Bar on Certain Court Actions

The act bars claims and counterclaims in certain court actions affecting the possession of or title to real estate. No claim or counterclaim may be based on an assertion that the property includes portions of land that may have at one time been submerged beneath a Great Lakes water, in any of the following situations:

- The property remained at an elevation above the ordinary high-water mark from December 9, 1977, to the effective date of this act, and the use of the property has not materially changed, as defined above.
- The property was designated as land held in fee title ownership by a boundary approved in a waterfront development plan, described above.
- The property is held in fee title ownership on the basis of having remained separated from a Great Lakes water by another parcel or parcels, as described above.
- The use of the property was approved in an amendment to uses of a filled area, as described above.

**Effective date:** March 29, 2024

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

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<sup>3</sup> For this purpose, “materially changed” means a material modification or termination of an existing use and does not include the maintenance, repair, replacement, restoration, rebuilding, remodeling, or expansion of any part of any existing structure or the transfer of property.