
Wisconsin Legislative Council

AMENDMENT MEMO



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2023 Senate Bill 541

**Senate Substitute
Amendment 2**

BACKGROUND

Under Wisconsin’s [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*, 109 Wis. 418 (1901).] With respect to rivers, riparian owners own “qualified” title to river 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).]

Under current law, three statutory mechanisms regulate the placement of new fill in navigable waters, and ensure that any such fill is in the public interest. First, s. 24.39 (4), Stats., authorizes the Board of Commissioners of Public Lands (BCPL) to lease rights to fill in beds of certain lakes or navigable streams for navigational purposes or improvement or construction of certain harbor facilities. Second, under s. 30.11, Stats., 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). Finally, s. 30.12 (3m) (c), Stats., requires DNR to issue an individual 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.

Under key legal precedents, any new such grants and encroachments 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).] The Wisconsin Supreme Court has interpreted the public trust doctrine to prevent the Legislature from making a substantial grant of a lake bed for a purely private purpose. [*State v. PSC*, 275 Wis. at 118.]

A relatively few number of cases address proposals involving the use of only existing fill. In a few such cases, the Wisconsin Supreme Court has upheld shoreline determinations that may allow 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 SENATE BILL 541

2023 Senate Bill 541 makes various changes in the law to facilitate the use of certain historically filled areas of former lake and river bed located in cities and villages. As introduced, the bill authorizes the use of certain filled land located in a specified set of rivers. In addition, the bill creates a process through which a city or village may submit a proposed waterfront development plan to the DNR regarding the use of historic fill along a Great Lakes shoreline. Under the bill, DNR must approve the plan if it makes certain determinations. That approval triggers changes in the law that create a settled boundary and legal title to property and allow for the use of the filled area for an approved mix of public and private uses. Finally, the bill creates a process through which a city or village may apply to DNR to

amend the types of uses authorized for land subject to an existing submerged land lease or lake bed grant.

SENATE SUBSTITUTE AMENDMENT 2

Senate Substitute Amendment 2 retains the overall effect and purpose of the bill, but with several key changes. Specifically, as compared to the bill, as introduced, the substitute amendment: (1) removes provisions of the bill specific to certain rivers, and instead allows a city or village to propose a waterfront development plan with respect to certain Great Lakes river harbor areas in the same manner as authorized for certain former lake beds; (2) allows, rather than requires, DNR to approve a proposed waterfront development plan, if DNR makes certain determinations; (3) modifies the information that a city or village must include in an application for a waterfront development plan, and the findings that DNR must make to approve such a plan, for example by requiring that the plan grant an easement to DNR to ensure that public use areas remain consistent with the plan and by requiring that public use areas provide a “substantial benefit to the public interest in navigable waters,” rather than a determination that the public use areas are “sufficient”; and (4) modifies the criteria and procedure for an application to change allowable uses for land subject to an existing submerged land lease or lake bed grant, including by requiring that a proposed new use provides for specified types of public uses that are consistent with the public interest, rather than providing “reasonably adequate public access.”

Changing Uses of Great Lakes Filled Areas

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

- The area proposed to be used is used for parking lots, public or private buildings, roads, or railroads when the bill takes effect, but does not include any area 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, subject to compliance with the other stated criteria.
- The application is consistent with any waterfront development plan, described below.
- The application must promote appropriate public uses consistent with the public interest, and may include concessions¹ 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.

¹ 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 that support public access and use of navigable waters.

- 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.

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 River Bed or Former Lake Bed of a Great Lakes Water

The substitute amendment 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 areas.
- A delineation of any area that is subject to a lake bed grant, submerged land lease, shoreline established by legislation, or bulkhead line.
- A description of areas and types of proposed public use and any restrictions for safety or security reasons. The plan must describe how the public use areas will be accessible to the public.
- 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.

Under the substitute 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.

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 ch. 227, Stats.

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 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.

DNR's determination is subject to review under a contested case hearing process.

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

Existing Uses for Former Lake Bed

The substitute amendment 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 have remained at an elevation above the ordinary high-water mark since December 9, 1977, other than for temporary maintenance activities or because of accretion or reliction.
- The use of the property has not materially changed² since the effective date of this bill.

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

² 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.

Bar on Certain Court Actions

The substitute amendment 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 has remained at an elevation above the ordinary high-water mark since December 9, 1977, 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 remaining 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.

BILL HISTORY

Senator Stroebel offered Senate Substitute Amendment 2 on February 7, 2024. On February 8, 2024, the Senate Committee on Natural Resources voted to recommend adoption of the substitute amendment and passage of the bill, as amended, both on votes of Ayes, 5; Noes, 0.

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

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