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# ROBERT BROOKS

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STATE REPRESENTATIVE • 60<sup>TH</sup> ASSEMBLY DISTRICT

**Hearing Testimony**  
**Senate Committee on Natural Resources and Energy**  
**Monday, February 15, 2021**

Chairman Cowles and members of the Senate Committee on Natural Resources and Energy, thank you for affording me with the opportunity to testify on behalf of Senate Bill 46, relating to: the presumption of riparian rights.

*Movrich v. Lobermier* issued a devastating blow to citizens who own land on one of Wisconsin's two hundred-forty flowages. Ultimately, the court ruled that the public trust doctrine does not allow landowners whose deed does not explicitly grant access to the waterbed of flowages, the ability to erect and maintain a pier. Thus, unless a landowners' deed grants the right to the waterbed beneath a flowage, the landowner cannot erect a pier.

Justice Rebecca Bradley, in her dissent, stated, "riparian rights in Wisconsin are sacred." Senate Bill 46 would protect the presumed riparian rights that innumerable Wisconsinites believe they are entitled to. In an effort to ensure the rights of these individuals are protected, Senate Bill 46 establishes that landowners, whose property abuts a flowage or artificial waterway, be afforded the ability to exercise all riparian rights established under law, unless the deed to the property states otherwise.

Senate Bill 46 does not make any changes to state environmental standards. In fact, these standards will be analogous to those in place prior to the Supreme Court's ruling in *Movrich v. Lobermier*. All land that abuts flowages will be treated as is under current law.

It is imperative to denote that this bill does not make it any easier to erect or maintain a pier and does not alter any language relating to siting, zoning, or mitigation.

Senate Bill 46 is a common-sense proposal that makes riparian rights a priority.

I am happy to answer any questions you might have.



# ROB STAFSHOLT

STATE SENATOR • 10<sup>th</sup> SENATE DISTRICT

(608) 266-7745  
Toll Free: (800) 862-1092  
Sen.Stafsholt@legis.wi.gov

P.O. Box 7882  
Madison, WI 53707-7882

DATE: February 15, 2021  
RE: **Testimony on Senate Bill 46**  
TO: Members of the Committee on Natural Resources and Energy  
FROM: Senator Rob Stafsholt

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Thank you Chairman Cowles and members of the Senate Committee on Natural Resources and Energy for hearing Senate Bill 46 relating to the presumption of riparian rights on navigable waterways and required real estate disclosures.

Last Session this bill passed the Assembly Floor and the Senate Committee on Natural Resources and Energy 5-0. It simply did not have time to be scheduled on the Senate Floor. A Wisconsin Supreme Court ruling (Movrich v. Lobermier) dealt a devastating blow to citizens who own land on one of Wisconsin's 240 flowages. Ultimately, the court ruled that the public trust doctrine does not allow landowners whose deed does not explicitly grant access to the water bed of flowages, the ability to erect and maintain a pier. Meaning that, unless a landowner's deed explicitly grants the right to the water bed beneath a flowage, a landowner cannot erect a pier.

As Justice Rebecca Bradley stated in her dissent, "riparian rights in Wisconsin are sacred." This bill will protect the presumed riparian rights that many Wisconsinites believe they are currently entitled to. To ensure the rights of these citizens are protected, this bill establishes that landowners, whose land abuts a flowage or artificial water way, have the ability to exercise all riparian rights established under law, unless the deed to the property explicitly states otherwise.

The bill changes no environmental standards that are found as they were prior to the Supreme Court decision. All land that abuts flowages will be treated as is under current law. This bill does not make it any easier to erect or maintain piers and does not change any language relating to siting, zoning, or mitigation relating to Wisconsin's shoreline zoning laws. This is a common sense bill that makes riparian rights a priority.

Again, thank you for allowing me to testify on Senate Bill 46. I would appreciate your support on this important piece of legislation.

## Miller, Evan

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**From:** Stacy Pettit <tmk1598@frontier.com>  
**Sent:** Saturday, February 13, 2021 9:50 AM  
**To:** Sen.Cowles; Sen.Felzkowski; Sen.Ballweg; Sen.Wirch; Sen.Agard  
**Cc:** Martinez, Brian; Miller, Evan; Moore, Heather; Mugnaini, Jason  
**Subject:** SB 46 Public Hearing  
**Attachments:** SB46 Proposed Amendment.docx; Real Estate Condition Report.pdf

**Importance:** High

Members of the Committee on Natural Resources and Energy:

We are requesting that the following original email and attached documents being included as our testimony at the short-noticed public hearing on February 15, 2021. We are adamantly oppose this bill as we are private flowage bed owners and are responsible for liability and environmental compliance to our conservation easement. Allowing riparians to do as they please on our lakebed property is unlawful and unconstitutional. Private owners deserve at least the same special treatment as the utility operators.

We am asking that you vote no this bill; however, we feel that is an unlikely outcome. So we are also requesting that you submit our Proposed Citizen Amendment to include privately deeded flowage bed owners in the language of this bill. If you do neither, we would like an honest explanation as to why. We will endlessly seek an explanation.

The following is our original email speaking to our requests and opposition. Please reach out to either of us through our contact info below ANYTIME, preferably prior to the hearing, to discuss this matter.

To whom it may concern regarding SB46 relating to the presumption of riparian rights on navigable waterways and required real estate disclosures:

The deeded navigable waterway bed owners of the state of Wisconsin, represented by Senators and Assembly men and women in the Wisconsin State Legislature, request our elected officials to submit the attached amended bill pertaining to riparian and flowage bed rights, on our behalf, at the appropriate moment in the legislative process.

We believe our requested amendment to the Bill is a common sense approach to make the Bill simple, fair, and equitable for deeded navigable waterway bed owners, hydroelectric operators and riparian owners alike. The current Bill and amendment unconstitutionally exclude ALL navigable waterway bed owners. Deeded navigable waterway bed owners and hydroelectric operators share equal responsibility and liability in our environmentally sensitive waterways, and therefore should be represented equally in this Bill. Waterway bed owners and hydroelectric operators possess insightful knowledge of their properties and can work with riparian owners to make decisions in the best interest of navigable waterways with the guidance of existing State Statutes and County Zoning law.

It is imperative that deeded navigable waterway bed owners are included in the language of this Bill. Bed owners also have an obligation to FERC guidelines because hydroelectric operators control the water that flows over the privately owned bed. You simply cannot ignore the importance of all parties involved in this scenario and the fact that they have historically peacefully co-existed. To continue to this symbiotic relationship, it is critical that this Bill is inclusive of ALL property owners.

Furthermore, the Real Estate Condition Report that has been used for nearly the past year already includes language that references a statute that has yet to be signed into law. This language addresses this issue and would indicate that a new law is simply not necessary. Please refer to attached Real Estate Condition Report, highlighted lines F17, F17m, and

### ***Analysis by the Legislative Reference Bureau***

Under current law, a person who owns land that abuts a navigable waterway (commonly known as a riparian owner) is afforded certain rights. In general, these rights include reasonable use of the waterway and the right to place structures such as piers in the waterway. These rights may be limited by statute and may be subject to the riparian owner acquiring necessary permits. Courts have also held that these rights may be subservient to private property rights, where one person owns land adjacent to a navigable waterway, the bed of which is owned by another person. This bill creates a presumption that an owner of land that abuts a navigable waterway is a riparian owner and is entitled to exercise all rights afforded to a riparian owner, even if the bed of the waterway is owned in whole or in part by another. The bill provides that the exercise of riparian rights remains subject to current law requirements and riparian rights may not be exercised if prohibited by the deed to the land or another written agreement or recorded instrument. The bill provides for reasonable restrictions on the exercise of riparian rights necessary for *a deeded navigable waterway bed owner or* the operator of a hydroelectric project to comply with requirements imposed under state or federal law or a federal energy regulatory commission license. If the bed of a navigable waterway is owned by *a deeded navigable waterway bed owner or an* operator of a hydroelectric project, the bill authorizes a riparian owner to apply to the applicable *deeded navigable waterway bed owner or* hydroelectric operator for permission to exercise a riparian right within the *privately owned navigable waterway bed or* hydroelectric project boundaries. A *deeded navigable waterway bed owner or* hydroelectric operator may approve or deny such a request, but *a hydroelectric operator* may deny a request only if necessary, to comply with requirements imposed under state or federal law or a FERC license. Finally, the bill requires the real estate condition and vacant land disclosure reports to include specific disclosures relating to riparian rights and ownership of a waterbody bed.

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

**SECTION 1.** 30.132 of the statutes is created to read:

**30.132 Riparian rights. (1) DEFINITIONS.** In this section:

(a) "Commission" means the public service commission.

(b) "Hydroelectric operator" means an operator of a project.

*(c) "Deeded navigable waterway bed owner" means a private property owner in possession of a validated deed containing a bed that underlies a navigable waterway.*

(d) "Project" means a hydroelectric project regulated by the federal energy regulatory commission or the department.

hydroelectric operator may not charge a fee related to a structure authorized under this paragraph unless a fee is provided for in an agreement between the hydroelectric operator and the project riparian that existed prior to the effective date of this paragraph .... [LRB inserts date].

(c) *Appeal to the commission.* A project riparian whose application is denied or approved with restrictions or who is charged an unreasonable fee under this subsection may appeal in writing to the commission. The commission may investigate the appeal and issue an order based on its investigation. The commission may not issue an order under this paragraph without a public hearing conducted in accordance with s. 196.26 (2).

(d) *Immunity from liability.* A *dede***ded navigable waterway bed owner or** hydroelectric operator is not liable to any person for any injury or damage arising from a project riparian's use of the *privately owned bed of a navigable waterway or* hydroelectric operator's property as provided in this section.

(4) EFFECT ON ENFORCEABLE INTERESTS. Nothing in this section invalidates any interest, whether designated as an easement, covenant, equitable servitude, restriction, or otherwise, which is otherwise enforceable under the laws of this state.

**SECTION 2.** 709.03 (form) F18. and F19. of the statutes are renumbered 709.03 (form) F20. and F21.

**SECTION 3.** 709.03 (form) F18. and F19. of the statutes are created to read:

**709.03** (form)

F18. Are you aware of a written agreement affecting riparian rights related to the property?

F19. Are you aware that the property abuts the bed of a navigable waterway that is owned by a *dede***ded navigable waterway bed owner or** hydroelectric operator?

Under Wis. Stat. s. 30.132, the owner of a property abutting the bed of a navigable waterway that is owned by a *dede***ded navigable waterway bed owner or** hydroelectric operator, as defined in s. 30.132 (1) (b), maybe required to ask the permission of the *dede***ded navigable waterway bed owner or** hydroelectric operator to place a structure on the bed of the waterway.

.... ....

**SECTION 4.** 709.033 (form) E17. to E21. of the statutes are renumbered 709.033 (form) E19. to E23.

**SECTION 5.** 709.033 (form) E17. and E18. of the statutes are created to read:

**709.033** (form)

E17. Are you aware of a written agreement affecting riparian rights related to the property?

.... ....

**DISCLAIMER**

THIS CONDITION REPORT CONCERNS THE REAL PROPERTY LOCATED AT \_\_\_\_\_  
IN THE \_\_\_\_\_  
(CITY) (VILLAGE) (TOWN) OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_  
STATE OF WISCONSIN.

THIS REPORT IS A DISCLOSURE OF THE CONDITION OF THAT PROPERTY IN COMPLIANCE WITH SECTION 709.02 OF THE WISCONSIN STATUTES AS OF \_\_\_\_\_ (MONTH) \_\_\_\_\_ (DAY), \_\_\_\_\_ (YEAR). IT IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR ANY AGENTS REPRESENTING ANY PARTY IN THIS TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PARTIES MAY WISH TO OBTAIN.

A buyer who does not receive a fully completed copy of this report within 10 days after the acceptance of the contract of sale or option contract for the above-described real property has the right to rescind that contract (Wis. Stat. s. 709.02), provided the owner is required to provide this report under Wisconsin Statutes chapter 709.

**NOTICE TO PARTIES REGARDING ADVICE OR INSPECTIONS**

Real estate licensees may not provide advice or opinions concerning whether or not an item is a defect for the purposes of this report or concerning the legal rights or obligations of parties to a transaction. The parties may wish to obtain professional advice or inspections of the property and to include appropriate provisions in a contract between them with respect to any advice, inspections, defects, or warranties.

**A. OWNER'S INFORMATION**

A1. In this form, "aware" means the "owner(s)" have notice or knowledge.

A2. In this form, "defect" means a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises.

A3. In this form, "owner" means the person or persons, entity, or organization that owns the above-described real property. An "owner" who transfers real estate containing one to four dwelling units, including a condominium unit and time-share property, by sale, exchange, or land contract is required to complete this report.

Exceptions: An "owner" who is a personal representative, trustee, conservator, or fiduciary appointed by or subject to supervision by a court, and who has never occupied the property transferred is not required to complete this report. An "owner" who transfers property that has not been inhabited or who transfers property in a manner that is exempt from the real estate transfer fee is not required to complete this report. (Wis. Stat. s. 709.01)

A4. The owner represents that to the best of the owner's knowledge, the responses to the following questions have been accurately checked as "yes," "no," or "not applicable (N/A)" to the property being sold. If the owner responds to any question with "yes," the owner shall provide, in the additional information area of this form, an explanation of the reason why the response to the question is "yes."

A5. If the transfer is of a condominium unit, the property to which this form applies is the condominium unit, the common elements of the condominium, and any limited common elements that may be used only by the owner of the condominium unit being transferred.

A6. The owner discloses the following information with the knowledge that, even though this is not a warranty, prospective buyers may rely on this information in deciding whether and on what terms to purchase the property. The owner hereby authorizes the owner's agents and the agents of any prospective buyer to provide a copy of this report, and to disclose any information in the report, to any person in connection with any actual or anticipated sale of the property.

CAUTION: The lists of defects following each question below are examples only and are not the only defects that may properly be disclosed in response to each respective question.

- |  | YES                      | NO                       | N/A                      |
|--|--------------------------|--------------------------|--------------------------|
| C3. Are you aware of the presence of asbestos or asbestos-containing materials on the property?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C4. Are you aware of the presence of or a defect caused by unsafe concentrations of, unsafe conditions relating to, or the storage of hazardous or toxic substances on neighboring properties? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C5. Are you aware of current or previous termite, powder post beetle, or carpenter ant infestations or defects caused by animal, reptile, or insect infestations?                              | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C6. Are you aware of water quality issues caused by unsafe concentrations of or unsafe conditions relating to lead?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C7. Are you aware of the manufacture of methamphetamine or other hazardous or toxic substances on the property?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C8. Explanation of "yes" responses _____   |                          |                          |                          |

**D. WELLS, SEPTIC SYSTEMS, STORAGE TANKS**

- |   | YES                      | NO                       | N/A                      |
|---|--------------------------|--------------------------|--------------------------|
| D1. Are you aware of defects in a well on the property or in a well that serves the property, including unsafe well water?<br>Well defects may include items such as an unused well not properly closed in conformance with state regulations, a well that was not constructed pursuant to state standards or local code, or a well that requires modifications to bring it into compliance with current code specifications. Well water defects might include, but are not limited to, unsafe levels of bacteria (total Coliform and E. coli), nitrate, arsenic, or other substances affecting human consumption safety. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D2. Are you aware of a joint well serving the property?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D3. Are you aware of a defect related to a joint well serving the property?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D4. Are you aware that a septic system or other private sanitary disposal system serves the property?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D5. Are you aware of defects in the septic system or other private sanitary disposal system on the property or any out-of-service septic system that serves the property and that is not closed or abandoned according to applicable regulations?<br>Septic system defects may include items such as backups in toilets or in the basement; exterior ponding, overflows, or backups; or defective or missing baffles.   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D6. Are you aware of underground or aboveground fuel storage tanks on or previously located on the property? (If "yes," the owner, by law, may have to register the tanks with the Wisconsin Department of Agriculture, Trade and Consumer Protection at P.O. Box 8911, Madison, Wisconsin, 53708, whether the tanks are in use or not. Regulations of the Wisconsin Department of Agriculture, Trade and Consumer Protection may require the closure or removal of unused tanks.)  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D7. Are you aware of defects in the underground or aboveground fuel storage tanks on or previously located on the property?<br>Defects in underground or aboveground fuel storage tanks may include items such as abandoned tanks not closed in conformance with applicable local, state, and federal law; leaking; corrosion; or failure to meet operating standards.  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D8. Are you aware of an "LP" tank on the property? (If "yes," specify in the additional information space whether the owner of the property either owns or leases the tank.)  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D9. Are you aware of defects in an "LP" tank on the property?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D10. Explanation of "yes" responses _____   |                          |                          |                          |

**E. TAXES, SPECIAL ASSESSMENTS, PERMITS, ETC.**

- |  | YES                      | NO                       | N/A                      |
|--|--------------------------|--------------------------|--------------------------|
| E1. Have you received notice of property tax increases, other than normal annual increases, or are you aware of a pending property reassessment? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| E2. Are you aware that remodeling was done that may increase the property's assessed value?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

- |  | YES                      | NO                       | N/A                      |
|--|--------------------------|--------------------------|--------------------------|
| F11. Is all or part of the property subject to or in violation of a farmland preservation agreement?<br>Early termination of a farmland preservation agreement or removal of land from such an agreement can trigger payment of a conversion fee equal to 3 times the class 1 "use value" of the land.<br>Visit <a href="https://datcp.wi.gov/Pages/Programs_Services/FarmlandPreservation.aspx">https://datcp.wi.gov/Pages/Programs_Services/FarmlandPreservation.aspx</a> for more information.  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F12. Is all or part of the property subject to, enrolled in, or in violation of the Forest Crop Law, Managed Forest Law, the Conservation Reserve Program, or a comparable program?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F13. Are you aware of a dam that is totally or partially located on the property or that an ownership in a dam that is not located on the property will be transferred with the property because it is owned collectively by members of a homeowners' association, lake district, or similar group? (If "yes," contact the Wisconsin Department of Natural Resources to find out if dam transfer requirements or agency orders apply.)   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F14. Are you aware of boundary or lot line disputes, encroachments, or encumbrances (including a joint driveway) affecting the property?<br>Encroachments often involve some type of physical object belonging to one person but partially located on or overlapping on land belonging to another; such as, without limitation, fences, houses, garages, driveways, gardens, and landscaping.<br>Encumbrances include, without limitation, a right or claim of another to a portion of the property or to the use of the property such as a joint driveway, liens, and licenses. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F15. Are you aware there is not legal access to the property?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F16. Are you aware of federal, state, or local regulations requiring repairs, alterations, or corrections of an existing condition? This may include items such as orders to correct building code violations.   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F17. Are you aware of a pier attached to the property that is not in compliance with state or local pier regulations? See <a href="http://dnr.wi.gov/topic/waterways">http://dnr.wi.gov/topic/waterways</a> for more information.  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F17m. Are you aware of a written agreement affecting riparian rights related to the property?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F17n. Are you aware that the property abuts the bed of a navigable waterway that is owned by a hydroelectric operator?<br><i>Under Wis. Stat. s. 30.132, the owner of a property abutting the bed of a navigable waterway that is owned by a hydroelectric operator, as defined in s. 30.132 (1) (b), may be required to ask the permission of the hydroelectric operator to place a structure on the bed of the waterway.</i>   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F18. Are you aware of one or more burial sites on the property? (For information regarding the presence, preservation, and potential disturbance of burial sites, contact the Wisconsin Historical Society at 800-342-7834 or <a href="http://www.wihist.org/burial-information">www.wihist.org/burial-information</a> ).  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F19. Explanation of "yes" responses _____<br>_____<br>_____  |                          |                          |                          |

### G. ADDITIONAL INFORMATION

- |  | YES                      | NO                       | N/A                      |
|--|--------------------------|--------------------------|--------------------------|
| G1. Have you filed any insurance claims relating to damage to this property or premises within the last five years?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| G2. Are you aware of a structure on the property that is designated as a historic building or that all or any part of the property is in a historic district?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| G3. Are you aware of any agreements that bind subsequent owners of the property, such as a lease agreement or an extension of credit from an electric cooperative?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| G4. Are you aware of other defects affecting the property?<br>Other defects might include items such as drainage easement or grading problems; excessive sliding, settling, earth movements, or upheavals; or any other defect or material condition.  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| G4m. Is the owner a foreign person, as defined in 26 USC 1445 (f)? (E.g. a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate.)<br>Section 1445 of the Internal Revenue Code (26 USC 1445), also known as the Foreign Investment In Real Property Tax Act or FIRPTA, provides that a transferee (buyer) of a U.S. real property interest must be notified in writing and must withhold tax if the transferor (seller) is a foreign person, unless an exception under FIRPTA applies to the transfer. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |





## Senate Committee on Natural Resources and Energy

### *2021 Senate Bill 46* *The Presumption of Riparian Rights* *February 15, 2021*

Good morning Chair Cowles and members of the committee. My name is Kyle McLaughlin, and I am the Waterway Program Coordinator with the Wisconsin Department of Natural Resources. Thank you for the opportunity to testify, for informational purposes, on Senate Bill 46, related to the presumption of riparian rights.

It is the department's understanding that the intention of this bill is to provide clarification regarding landowner's rights to place waterway structures, such as piers, on inland waters, specifically flowages and artificial impoundments where the bed of the flowage may be owned by an entity other than the adjacent riparian landowner, and seeks to add clarification to the statutes in response to the 2018 *Movrich v. Lobermeir* Wisconsin Supreme Court decision. It is also our understanding that this bill creates a real-estate disclosure processes when lands abutting navigable waterways are sold and establishes a process through which a project riparian must work with a hydropower company to review structures proposed to be placed upon the hydropower company's submerged lands.

The department has historically considered riparian owners to include those property owners with property abutting artificial flowages and impoundments. Pursuant to Ch. 30, Wis Stats., property owners that do not meet the definition of a riparian owner lack the authority to place waterway structures through an exemption or through a permit for these types of activities.

The Supreme Court decision creates some uncertainty in the ability for property owners abutting artificial flowages and impoundments to continue to place structures through exemptions or permitting. The department finds that proposed statutory changes to continue to treat property owners with property adjacent to artificial flowages or impoundments as riparians so they can apply for waterways permits would offer a reasonable pathway for common sense decision-making.

The department recognizes that the bill appropriately clarifies that this proposed legislation does not supersede the requirements of Chapter 30, Wis. Stats. Navigable waters are held within the public trust and the department has the constitutional and statutory responsibilities to ensure that structures and activities occurring in navigable waters do not conflict with the paramount public interest in those waters. The exercise of riparian rights is also qualified by the common law concept of reasonable use, which the department must incorporate in its Ch. 30 permitting decisions.

As currently drafted, however, the department finds that the proposed language may have implications beyond the intended scope of the bill. In some places in Wisconsin there are complex property ownership issues that arise as a result of historic development along waterfronts. The department does not understand this proposal to affect those issues, and so the department recommends consideration be given to clarifying the language in order to accomplish only the intended goal of the bill. The department recommended this clarification in the last session and will gladly engage as a resource should clarification be considered.

The department also recommends that SB 46 clarify that the riparian owner and bed owner remain subject to other existing laws, such as the prohibition on interference at remedial action sites where an engineering control, like a cap installed over contaminated sediment, is present on the bed of the waterway. The existing prohibition on interference at these types of remedial action sites prevents riparian owners from undertaking actions that disturb or damage an engineering control, such as through the installation of a pier. While the proposed law as written could be accommodated and applied at this limited set of remedial action sites on a flowage or artificial impoundments, it creates an additional layer of potential confusion over property rights and application of the prohibition designed to prevent disturbance of these sites with residual contamination. The department would welcome the opportunity to work with the bill authors to find ways to address these concerns.

In conclusion, the proposal as written appears to be implementable by the department in its permitting role. The department would like to reiterate that we support the ability to recognize landowners adjacent to flowages and impoundments as riparian owners, and to allow them to work through existing department administrative processes to exercise such rights. That said, we recommend that the proposal be clarified to avoid the potential for unintended consequences unrelated to the issue that is being addressed.

On behalf of the Department of Natural Resources and the Waterways Bureau, we would like to thank you for your time today. I would be happy to answer any questions you may have.



To: Members, Senate Committee on Natural Resources and Energy

From: Tom Larson, Executive Vice President

Date: February 15, 2021

Re: SB 46/AB 37 – Restoring the Right to Place a Pier on Flowages

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The Wisconsin REALTORS® Association (WRA) supports SB 46/AB 37, legislation seeking to clarify that all waterfront property owners, even those with land abutting flowages and artificial waterways, have the right to place a pier subject to the regulations in Chapter 30 of the Wisconsin Statutes.

**Background** – For over 140 years, Wisconsin law has recognized that owners of waterfront property have riparian rights, including the right to place a pier. See *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322, 2 N.W. 546 (1879). In 1959, the Wisconsin Legislature codified this right of waterfront property owners to place a pier. See Wis. Stat. § 30.13(1). In recent years, the legislature has further protected this right from permit requirements and enforcement actions if certain conditions are met. See Wis. Stat. §§ 30.12(1g)(f) and 30.12(1k).

In 2018, the Wisconsin Supreme Court, in *Movrich v. Lobermeier*, 2018 WI 9, ¶3, 379 Wis. 2d 269, 905 N.W.2d 807, declared that some waterfront property owners do not have a right to place a pier. Specifically, the Court held that owners of waterfront property along flowages and artificial waterways do not have the right to place a pier. *Id.* Because the lake beds of flowages and artificial waterways are privately owned, the Court reasoned that the owners of the lake beds can prohibit any pier from touching the bed or floating above it. *Movrich*, at ¶55.

**Potential Impacts of Case** – The *Movrich* case will likely have far-reaching impacts, possibly impacting a large number of waterfront property owners and businesses. Consider the following:

- **Thousands of waterfront property owners are impacted** -- The Court’s ruling applies to all flowages and potentially other “man-made” waterbodies in Wisconsin.
  - According to the Wisconsin DNR’s website, Wisconsin has approximately 260 flowages.<http://dnr.wi.gov/lakes/lakepages/Results.aspx?location=ANY&page=ANY&name=flowage&letter=ANY>.
  - Thousands of lakes in Wisconsin are considered “man-made” resulting from either the artificial raising of water levels or the damming of rivers and streams, including large water bodies such as Lake Koshkonong, Lake Wisconsin, and the various “chain of lakes” in areas like Minocqua and Eagle River.
- **All piers are prohibited, including floating piers** -- The Court’s ruling applies broadly to (a) all piers, even floating piers, (b) existing piers that have been placed for decades, and (c)

waterfront property that has been assessed for property tax purposes as having pier rights for years. Because of the Court's ruling, affected property owners may now be forced to either remove their pier or pay several hundred dollars for "dock license fee" to keep their existing pier.

- **Affected waterfront property owners have made significant investments in piers and watercraft** -- Affected property owners have invested thousands of dollars on piers, boats and other recreational vehicles with the expectation they could be used to directly access the water from their property. Waterfront businesses such as restaurants, marinas and gas stations rely exclusively on customers who access their businesses by boat. These businesses have invested thousands of dollars on piers, decks, retaining walls, and other improvements to their property to attract these boating customers to their businesses.

SB 46/AB 37 does the following:

- **Restores the presumption of riparian rights for waterfront property owners**, unless those rights are specifically prohibited by the deed to the land, written agreement, or other recorded instrument. The riparian rights are subject to federal law, state law, or a federal energy regulatory commission (FERC) license.
- With respect to flowage beds owned by hydroelectric utilities, SB 46/AB 37 contains the following provisions:
  - Existing piers and structures are grandfathered. No fees can be charged unless the fee was authorized as part of an existing agreement.
  - New piers and structures must receive authorization from hydroelectric utilities, but authorization can be denied only if the placement of the structure would violate federal or state law, or invalidate a FERC license. A reasonable fee can be charged, but only in an amount necessary to administer the FERC license program. Fees can be appealed to the PSC.
  - A hydroelectric utility is immune from liability if someone gets hurt on the riparian's structure.
- **New disclosures are added to the Real Estate Condition Report/Vacant Land Condition Report** to make prospective buyers aware of the limited riparian rights possessed by waterfront property owners along flowages with beds owned by hydroelectric utilities.

We respectfully request that you support SB 46/AB 37. **This is the same bill that passed the Assembly and Senate Committee on Natural Resources and Energy with unanimous support last session**, but didn't get scheduled for the floor in the Senate due to the cancellation of the March floor date. Please contact us at (608) 241-2047 if you have any questions about this legislation.



# WISCONSIN LAKES

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SB46 seeks to provide waterfront property owners on a navigable waterway who do not own the lakebed adjacent to their property a right to place a pier, other structures, or deposits on that lakebed. Certain restrictions to that right would apply if the property abuts lakebed owned by a hydroelectric operator.

Wisconsin Lakes is currently unopposed but neutral on this bill. We would consider supporting the measure if the bill was amended such that exercise of riparian rights would not damage existing conservation structures (such as a fish habitat restoration project) installed by the private lakebed property owner.

The bill asks the Legislature to resolve a tension that has existed in Wisconsin property law since before Wisconsin became a state, but which only recently came to light because of a legal dispute between property owners. The tension pits the presumptive right of a riparian to place structures such as a pier in navigable water off their property against the fundamental right of any private property owner to keep others off their property. In the *Movrich v Lobermeier* case which this bill seeks to overturn, the WI Supreme Court held in favor of the general private property right over the presumptive riparian right.

Wisconsin Lakes is a statewide non-profit conservation organization of waterfront property owners, lake users, lake associations, and lake districts who in turn represent over 80,000 citizens and property owners. For over 20 years, Wisconsin Lakes has been a powerful bipartisan advocate for the conservation, protection, and restoration of Wisconsin's lake resources.

We are generally supportive and protective of riparian rights. However, any legislation that takes a portion of a fundamental property right away from a private landowner, even if the land owned is simply lakebed, should not be undertaken lightly. As our membership contains proponents of both sides of this issue and as we are primarily a conservation organization we are not taking a formal position on this legislation as written.

That said, we do have some comments and a suggestion we believe would improve the bill.

First, it should be noted that this is not solely a bill about placing "piers." The right conveyed to a waterfront property owner would allow them to place other structures and deposits on someone else's lakebed and the bill does not define or limit what that means. For instance, could the riparian place dredge tailings on the other private landowner's lakebed?

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What can actually occur on the privately held lakebed is an especially important question to Wisconsin Lakes if it damages, covers, or limits the effectiveness of existing improvements to the lakebed designed for conservation purposes. For instance, dredge fill or even a pier placement over a fish habitat restoration project could not only damage the lake environment, it could also destroy an investment on the part of the private lakebed owner. In some cases, those damaged conservation improvements might have been partially funded by state surface water grant funds. Unless the pier, structure, or deposit would be prohibited or not qualify for some other permit, the bill provides no recourse for the private lakebed property owner to prevent this damage to their, or in some cases the state's, investment.

Fortunately, Wisconsin Lakes sees a fairly simple solution to this problem. While continuing to recognize the right of the waterfront property owner to exercise their riparian rights to place a pier, other structure, or deposits, a condition could be added that the riparian rights may only be exercised in a way that prevents damage to any existing conservation structures on the lakebed. Conversely, a riparian should still be allowed to maintain existing structures placed prior to the passage of the bill.

This new condition would not even be as restrictive as the limitation on the riparian rights in the case of a hydroelectric project as contemplated by the bill. It is a reasonable balancing, in our opinion, of the rights of the waterfront property owner and the private owner of the lakebed, no matter who that owner happens to be.

Wisconsin Lakes would consider supporting the bill with the addition of this condition.