



DAVID CRAIG

STATE SENATOR

Assembly Committee on Environment and Forestry
February 19, 2018
Assembly Bill 935
Senator David Craig, 28th Senate District

Chairman Mursau and Committee Members:

Thank you for considering my testimony on behalf of my constituents in the 28th Senate District regarding AB 935 relating to creating a permit exemption for small dredging projects.

This piece of legislation is straightforward. Simply stated, this bill would allow riparian owners to remove (dredge) up to 50 cubic yards of unconsolidated sediment (silt) in man-made impoundments without a permit if the removal of material meets several specific criteria. This legislation is being introduced to assist riparian owners and users alike in our communities across the state in being able to utilize and enjoy these great natural resources for boating, kayaking, fishing, hunting and other water-related recreational activities.

Many riparian owners like those in the Fox River-Tichigan Lake waterway in Racine County and in other similar areas across the state are unable to enjoy natural resources because foreign silt buildup is preventing even small crafts like canoes and kayaks from effectively navigating the waterway, and causing swimmers to get stuck in the muck. Further, the issue of siltation and lack of use of these waterways has a dramatic negative impact on riparian owners' property values. This legislation will help riparian owners restore these important natural resources to their pristine state, while enabling the Department of Natural Resources ("DNR") to dictate best management practices for the removal of this silt to ensure it is undertaken in a responsible manner.

The DNR itself has recognized the problem of sedimentation in impoundments and even established a "general permit" for dredging small amounts of material like those covered by AB 935. However, the general permit process has proved too onerous, timely, and confusing for many property owners. In fact, of the thousands of riparian owners who would be eligible to dredge and remove muck from their riparian zones, very few residents have been able to proceed. Specifically, according to DNR, only a total of 4 people have been approved under the dredging general permit, while 2 others were denied and 2 more were required to obtain individual permits. Dredging is a recognized and legal method for cleaning up navigable waters – however, the lack of permit approvals clearly indicate that the current process is not working and that AB 935 is needed to provide immediate relief to the thousands of property owners impacted by this problem, specifically those riparian owners on man-made impoundments.

Thank you for your attention and consideration of my testimony.



CHUCK WICHGERS

STATE REPRESENTATIVE • 83rd ASSEMBLY DISTRICT

Chairman Mursau, Vice-Chairman Krug, and fellow committee members,

Thank you for holding a public hearing on Assembly Bill 935, and for allowing me the opportunity to testify on its behalf.

Natural riparian zones are essential to a healthy riverbed and a fully functioning ecosystem. The water flowing through these zones help restore the ground water in the region, as well as optimizing the health of the plant and animal life in the zone. Riparian areas that occur as the result of man-made impoundments, are much less helpful to our ecosystem than a naturally occurring one. They result in flooding, changes in the waterway's elevation, and sedimentary deposit on the banks of the waterway.

This bill affects only riparian zones that occurred due to a man-made impoundment. This leaves naturally occurring riparian zones completely untouched. It, also exclusively affects sediment that was deposited as a result of man-made impoundments. Everything underneath that layer will be completely untouched and unaffected. Thus allowing landowners that live in riparian zones to clean up from the erosion of the riparian zones.

AB 935 allows for the removal of silt in impoundments without a permit if and only: if the removal occurs within the owners riparian zone, the removal of the sediment does not exceed more than 50 cubic yards per year, and the removal occurs only to allow a line of navigation to the waterway for the owner. In addition, the riparian owner must use the practices for removal and disposal established by the Department of Natural Resources and published on its website.

On the DNR's website itself, it is very hard to find the locations of where to apply for a general permit. If you are lucky enough to have found the form to fill out. The form itself is not an easy one to fill out. This legislations eliminates that step and allows the owner of the property to preform simple seasonal remove of the sediment.

Thank you for your consideration.

Representative Chuck Wichgers



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TESTIMONY TO ASSEMBLY COMMITTEE ON ENVIRONMENT AND FORESTRY ON AB935

Thank you for the opportunity to testify today on AB935. My name is Michael Engleson, and I am the Executive Director of Wisconsin Lakes, 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 25 years, Wisconsin Lakes has advocated for the conservation, protection, and restoration of Wisconsin's lake resources.

Wisconsin Lakes is opposed to AB935, even though we recognize the utility of dredging in many circumstances, including the situation that gave rise to this bill. While the problem the bill attempts to fix - the ability of riparians on impoundments that tend to fill in with sediment to reach the navigational channel of the lake - is real, the fix the bill employs jeopardizes the safety of the waters the riparian owner seeks to enjoy, and endangers the enjoyment and possibly the property values of *other* riparians on the lake because of the degradation a poorly done or badly located dredge can cause. In addition, the bill uses ambiguous definitions and does not take into account the sometimes murky question of who owns the lakebed in an impoundment.

Dredging is not a simple project, akin to scooping the scum out of the bottom of the bathtub. Dredging in the wrong place can destroy habitat and upset the nearshore lake ecosystem. For instance, aquatic invasive species near the dredged area would find attractive habitat, especially aquatic invasive plants such as eurasian watermilfoil, flowering rush, Hydrilla, and others. AIS monitors tell stories of finding EWM established exclusively along a dredging line. The state and local lake organizations spend thousands of dollars to control such invaders, often on the very lakes on which dredging projects like this would take place.

But invasives are not the only worry from a dredging project gone bad. Sediment, especially that of impoundments, often contains suspended contaminants - everything from algae inducing phosphorus to heavy metals and other harmful materials for which excavation must be done extremely carefully, and is costly to dispose of. If the lake was subject to aquatic plant management activities in the mid-20th century, its sediments may contain residue from then-standard treatments of copper or sodium arsenite - arsenic. In fact, according to information from the Department of Natural Resources, 89% of all impoundments do not support fish consumption "[d]ue, in part, to the accumulation of sediment behind riverine structures and proclivity of pollutants ... to attach to sediment."

The riparian members of Wisconsin Lakes do expect to be able to take steps to take advantage of the lake, which sometimes reasonably includes dredging. But they also reasonably expect to be protected from harms caused by the actions of their neighbors, including from dredging projects gone wrong. That's why the state currently requires dredging activities to be permitted through DNR - to identify problem dredging areas before projects cause lasting, costly harm to the lake and other property owners.

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 25 years, Wisconsin Lakes has been a powerful bipartisan advocate for the conservation, protection, and restoration of Wisconsin's lake resources.

If a dredging project is exempt from a permit as it might be under this bill, there is no site visit by a resource professional from DNR or anywhere else required, that might identify a problem *and its solution that would allow the dredge to proceed safely*. There is no public notice that would allow a neighbor to communicate information that the riparian who wishes to dredge does not know and that might cause harm. It opens the door to unscrupulous contractors who might not care about the need or safety of a particular dredge. And the bill's admonition to follow best management practices published on the DNR's website is a weak protection at best - it fails to require the use of a contractor with demonstrated understanding or certification in those BMP's, and provides no penalty for failing to meet them.

On the other hand, continuing the existing permit requirement not only allows DNR to provide some oversight to make the project safe and conducted with best management practices, it also serves as a vehicle to educate the applicant on why dredging is a more complicated process than one might at first think. It allows the Department to advise the riparian on ways that might make the project more lake friendly, or at least less likely to cause harm. Yes, it can be a burden, and sometimes the answers might not be the ones we want to hear, but for the sake of the lake, for the sake other riparians, and frankly, for the sake of protecting your own property from the mistakes and negligence of others, permitting is a proactive form of management that the members of Wisconsin Lakes understand we need to accept.

Moreover, in 2017 the DNR issued a general permit that greatly simplifies the permitting process for a riparian wishing to dredge. While by no means perfect in our opinion, that permit does at least create a balance between the burden of an individual permit and the danger of no permit at all. According to my conversations with DNR, the GP was invoked sparingly, only 8 times, since its release. Six projects were allowed to proceed, while two were denied for not meeting the qualifications of the permit. Interestingly, in roughly the same time period, 80 applications for an individual permit were received by the department and *all* of them were issued successfully. With these numbers, it's hard to argue the permitting process isn't working.

In addition to these general faults with SB789, the bill uses ambiguous language such as "man-made impoundment". While often used casually, this is not a term typically used by DNR, nor is it clearly defined in statute or case law, and it is unclear what sort of waterbody it specifically means. Is it any water backed up behind a dam? Does it exclude riverine lake systems, such as Lake Winnebago where water levels are controlled by a dam, but a natural lake exists with or without the dam? This is an important question, because it determines which riparians are being given the exemption.

The bill also fails to provide any method to ensure the only sediment being removed is "unconsolidated sediment that was deposited after the navigable water was affected by the impoundment", leading to more questions of the impact of untrained dredgers.

And the amount of sediment allowed to be removed, 50 cubic yards per year, (about 5 dump truck loads) seems arbitrary, and overly-large. The DNR's GP, presumably developed to maximize flexibility while minimizing risk, allows only 25 cubic yards, over 5 years. This bill would allow 10 times as much! Because the bill doesn't factor in the size of the lake or the number of properties on the lake, that could be a significant percentage of a small and/or heavily developed waterbody's bed.

And finally, the bill fails to take into account the recent Wisconsin Supreme Court decision *Movrich v Lobermeier* (2105AP583), which held that a riparian does not have the right to place a pier on the lakebed

of an impoundment if a private entity owns the lakebed, even if the waters above that lakebed are clearly covered by the Public Trust Doctrine. This is not an entirely uncommon experience, most notably in the utility owned reservoirs on the Wisconsin River (which seem to fall under the scope of this bill).

Wisconsin law holds that the state only owns the lakebed of natural lakes; the land that an impoundment floods does not suddenly transfer to public ownership. So, an impoundment's lake bed could be owned by one landowner, with a riparian owning up to the water's edge. If that riparian can't affix a pier to the other's lakebed even if the lake is navigable and its waters are under the public trust, it would seem to follow that they would not be allowed to dredge the lakebed they do not own. SB789, however, seems to grant the riparian the right to dredge simply because of the presence of navigable waters, in contravention of the constitutional principles laid out by the court in *Movrich*. Because of this tension with newly decided caselaw, the bill is inadvertently opening the door to a lawsuit against an unsuspecting riparian who dredges someone else's lakebed.

Despite the concerns raised above over the extreme risk posed by permitless dredging in general to the lake itself, as well as to neighboring riparians and their property values, and the specific concerns with the language and terms of this bill that cause confusion and may lead to lawsuits against riparians, Wisconsin Lakes does believe there is a place for dredging, and we understand the need for riparians to be able to access the navigational channel of their lake from their shore, if it can be done without undue harm.

We also understand, that for some lakes, requiring every waterfront owner to go through even the general permitting process is probably inefficient. To solve this problem, we return to a suggestion we made when this bill was introduced in the previous legislative session. For some lakes, a lakewide permitting process could be established where DNR does one inventory of the entire lake, determines places that could be problematic or require additional investigation, and then for all other areas of the lake issues a lake-specific general permit, or GP-like mechanism that would allow individual riparians to proceed. This entire process could be facilitated by a local lake organization, and might be eligible for funding through a lake management grant. Indeed, this could potentially be part of the lake management planning process for that lake.

Solutions, therefore, exist to ease the burden on riparians on sediment rich impoundments to undertake activities to reach the navigational channel of their lake short of simply allowing them to dredge with no oversight whatsoever. To protect our waters, and to protect our properties, we must have in place some level of oversight. Otherwise, who knows what we'll stir up.

Wisconsin Lakes would be happy to participate in a discussion to reach the sort of workable compromise we've proposed on this issue, and we've reached out to the bill's authors with that offer. In the meantime, we urge this committee to reject AB935.