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October 24, 2005

Rep. Scott Gunderson, Chair
and members
Assembly Natural Resources Committee

Re: Assembly Bill 71

: Dear Representative Gunderson and Members,

I am writing on behalf of the Wisconsin Association of Lakes ("WAL") in opposition to AB-71. WAL recognizes that determination of the ordinary high water mark ("OHWM") is critical to private riparian owners and the public. WAL members have sometimes been frustrated by inconsistent or inaccurate OHWM determinations and by the limitations on property use that can result.

There is little controversy over the definition of the ordinary high water mark. For a century or more the Courts have held that the ordinary high water mark means: "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Lawrence v. American Writing Paper Co.*, 144 Wis. 556 (1911). State administrative rules have not deviated from this longstanding legal meaning of the term.

The OHWM is located by reference to physical characteristics observable on the ground. Although the determination of a high water mark is not always easy, it should be objective.

Assembly Bill 71 appears to be based on the perception that any determination made by a county government will be more accurate than one made by the State. But without establishing any qualifications for the individuals who conduct these determinations, there is no basis for property owners or the Legislature to assume that county personnel will produce more reliable results than state employees.

Many advocates for this legislation assume that a County OHWM determination will be more favorable to a private property owner than one made by state. However, WAL is not persuaded that establishing 72 new OHWM authorities will make these determinations more

accurate, more consistent or more favorable to either private or public interests. We are concerned AB-71 could be found an impermissibly delegation of authority over a statewide responsibility to a county government in violation of Section 22, Article IV of the Wisconsin Constitution. (See, *Muench v. Public Service Com.*, 261 Wis. 492, 515 “[T]he state may only delegate to county boards powers of a local character, and may not delegate powers over matters of state-wide concern.”)

WAL does recognize a need for state action to address OHWM concerns. But, rather than focusing on who makes OHWM determinations, we recommend that the Legislature review the specific regulatory consequences of OHWM determinations and consider whether modifications should be made. WAL also supports improved training efforts to ensure that these determinations are made as consistently as possible, given the variety of circumstances presented by Wisconsin’s vast waterfront lands.

Thank you for your consideration.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.

William P. O'Connor

WPO/lac
Enclosure

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