



WISCONSIN LAKES

We Speak for Lakes!

4513 Vernon Blvd., Suite 101, Madison WI 53705

608.661.4313 ~ 608.661.4314 fax

info@wisconsinlakes.org

TESTIMONY TO WISCONSIN ASSEMBLY COMMITTEE ON NATURAL RESOURCES
AND SPORTING HERITAGE REGARDING 2015 AB 157 (RE: AN EXEMPTION FROM
CIVIL LIABILITY RELATED TO THE PLACEMENT OF BUOYS OR OTHER MARKERS IN
WATERWAYS)

Presented by Michael Engleson, Executive Director

May 27, 2015

Good morning, and thank you for the opportunity to testify on AB157.

My name is Michael Engleson, Executive Director of Wisconsin Lakes, a statewide non-profit conservation organization of waterfront property owners, businesses, lake associations, and lake districts.

I'm here today to offer Wisconsin Lakes' support for AB157. Our member organizations take great pride in their willingness and ability to manage their lake. Wisconsin's lake community has for decades saved the state and local governments thousands of dollars by taking on tasks themselves – everything ranging from aquatic plant management to monitoring boat landings for aquatic invasive species transport issues, to dealing with navigational issues within the waterbody.

But in this litigious society we live in, questions of liability always arise, and often are enough to prevent organizations from taking on tasks. While some liability protection while placing a navigational buoy does probably exist under statutory and common law, providing an upfront statutory protection that tells lake organizations that you and your members are protected in this activity so long as you are acting under a valid permit would add a level of comfort that we believe would allow many more groups to take on this task.

Any time a bill exempts a group or individuals from all civil liability for improper or erroneous actions under any circumstance (including inaction), as we believe this bill does, merits careful consideration. But here we believe the ability to get buoys safely placed to mark navigational hazards in a timely and efficient fashion far outweighs any risks of providing the exemption from liability.

In short, Wisconsin should do all it can to encourage the participation of lake organizations in the management of their waters, and this bill does just that in relation to buoy placement. Wisconsin Lakes encourages the committee to support this bill.



Lake Arbutus Association

May 27, 2015

Members of the Assembly Committee on Natural Resources and Sporting Heritage:

The Lake Arbutus Association would like your support of Assembly Bill (AB) 157. Our 200+ members support placing hazard warning buoys in key areas around our lake. Our membership feels the lake is less safe without the buoys.

Lake Arbutus had buoys marking the major hazards in the past. Over the past several years Jackson County and Clark County has stopped putting out the hazard buoys.

We were first told the cause was budget related. After we offered to purchase buoys and to install them, we were told the real issue is liability.

There are several large county run campgrounds (over 450 campsites) around the lake. We have several large sand bars just below the surface (one is 1,800 feet from shore) and rock piles on Lake Arbutus. Some of these rock piles are also just below the surface. Making things worse is the large number of non-local boaters that enjoy our lake who are not aware of these hazards.

Our lake also has dark tannic water color, making it impossible to see these hazards, even at slow speeds. Every weekend, I watch boaters run their boats into the sand bar or see water skiers being pulled into the very shallow or rocky areas.

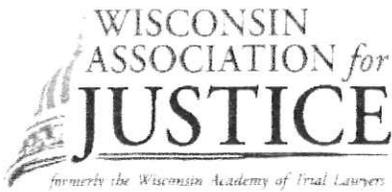
This bill will allow our lake association and others around the State of Wisconsin to work with the local townships and the DNR to get permits for the needed hazard warning buoys and to remove the threat of liability of not marking very possible hazard.

Thank you for your support!

Sincerely

Jim Beale

VP Lake Arbutus Association



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BRYAN M. ROESSLER
EXECUTIVE DIRECTOR

From: Wisconsin Association for Justice
President Ann S. Jacobs

To: Assembly Committee on Natural Resources and Sporting Heritage
Rep. Al Ott, Chair

Re: Testimony regarding 2015 Assembly Bill 157

Date: May 27, 2015

Summary:

The Wisconsin Association for Justice (WAJ) opposes Assembly Bill 157 because it jeopardizes the safety of boaters across Wisconsin by protecting bad-actors who negligently or willfully misplace, misuse or improperly place buoys. Lake associations and similar benevolent organizations are currently largely immune for suits brought with regard to placement of buoys. Insofar as this act may be trying to add to such protections, it in fact harms those associations by preventing persons (including those hired by lake associations) who act negligently, or even recklessly, thus making lakes less, not more safe.

Lake Associations and Their Volunteers Are Currently Largely Immune From Suit

Lake Associations are created pursuant to Sec. 30.92(1)(br), of the Wisconsin Statutes and are organized as non-profit corporations under Sec. 281.69(3m)(a), Wis. Stats. Lake Association volunteers, therefore, are immune from suit pursuant to the Volunteer Protection Act of 1997, a federal law that protects from liability for negligent activities the volunteers for non-profit organizations. Thus the persons who volunteer for their local lake association are immune from suit.

Additionally, there are "Lake Management Districts" which are quasi-governmental entities organized pursuant to Chapter 33 of the Wisconsin Statutes, which have the same immunities as other governmental organizations (such as cities or townships).

Thus, if the goal of this legislation is to provide protection for the persons who volunteer together in these organizations, they are already largely immune¹ from any suit and this legislation is unnecessary and redundant.

¹ They are not immune from reckless or intentional acts, nor should protecting people who intentionally or recklessly harm others be a desired goal.

The Legislation As Proposed is Overly-Broad and Jeopardizes The Safety of Boaters

As written, this legislation protects:

- **Private Contractors who are hired to place buoys and put them in the wrong place.**
For example, if I hire a company to safely mark a passage & they (negligently or intentionally) just don't do so, I cannot sue them in court. For example, I hire Bob's Buoy Company and they put the "stay right" buoy where the "stay left" buoy is and as a result, someone drowns. Under this bill, the Bob's Buoy Company would not be held responsible in court for that death.
- **People working for (anyone) who decide to put the buoys anywhere they want, regardless of the terms of a permit.**
For example, while placing the buoys, it begins to rain. Rather than come back once the weather clears, the buoys are quickly dropped in a random place, rather than marking a hazard. The misplaced buoys cause two boats to collide and someone is injured. Those workers (or company) would not be held liable, even though they did not properly place the buoys and knew it.
- **People who intentionally place them in places causing harm.**
A malicious ex-spouse who previously placed a permitted buoy decides to wreck their ex's boat by moving important buoys that mark a hazard. They cannot be sued in court for civil damages – they are entirely protected from civil liability.
- **People who knowingly allow misplaced buoys to remain.**
A local bar places a buoy to warn patrons of a rocky outcrop and tells patrons to use the buoy to safely guide them to the bar's pier. After a storm, the buoy moves and the bar chooses not to adjust the buoy even though they continue to solicit the business of boaters.

The volunteers of lake associations organized under Wisconsin law are largely immune from suit. Similarly, Lake Districts are also protected under the governmental immunity statutes. The proposed legislation is very broad and immunizes activities that jeopardize the safety of Wisconsin boaters. For these reasons, WAJ opposes the bill as proposed. If specific state legislation is preferred, it is recommended that the Lake Association statute be amended to specifically incorporate the language of the federal Volunteer Protection Act of 1997.

Public Law 105-19
105th Congress

An Act

June 18, 1997
[S. 543]

To provide certain protections to volunteers, nonprofit organizations, and governmental entities in lawsuits based on the activities of volunteers.

Volunteer
Protection Act of
1997.
42 USC 14501
note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Volunteer Protection Act of 1997".

42 USC 14501.

SEC. 2. FINDINGS AND PURPOSE.

(a) **FINDINGS.**—The Congress finds and declares that—

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because—

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D)(i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and

(ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) **PURPOSE.**—The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

SEC. 3. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY. 42 USC 14502.

(a) **PREEMPTION.**—This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.

(b) **ELECTION OF STATE REGARDING NONAPPLICABILITY.**—This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation—

- (1) citing the authority of this subsection;
- (2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and
- (3) containing no other provisions.

SEC. 4. LIMITATION ON LIABILITY FOR VOLUNTEERS. 42 USC 14503.

(a) **LIABILITY PROTECTION FOR VOLUNTEERS.**—Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—

- (1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;
- (2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken

within the scope of the volunteer's responsibilities in the non-profit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—

(A) possess an operator's license; or

(B) maintain insurance.

(b) CONCERNING RESPONSIBILITY OF VOLUNTEERS TO ORGANIZATIONS AND ENTITIES.—Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) NO EFFECT ON LIABILITY OF ORGANIZATION OR ENTITY.—Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) EXCEPTIONS TO VOLUNTEER LIABILITY PROTECTION.—If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e) LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF VOLUNTEERS.—

(1) GENERAL RULE.—Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) CONSTRUCTION.—Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f) EXCEPTIONS TO LIMITATIONS ON LIABILITY.—

(1) IN GENERAL.—The limitations on the liability of a volunteer under this Act shall not apply to any misconduct that—

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

SEC. 5. LIABILITY FOR NONECONOMIC LOSS.

42 USC 14504.

(a) GENERAL RULE.—In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY.—

(1) IN GENERAL.—Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY.—For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

SEC. 6. DEFINITIONS.

42 USC 14505.

For purposes of this Act:

(1) ECONOMIC LOSS.—The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) HARM.—The term "harm" includes physical, nonphysical, economic, and noneconomic losses.

(3) **NONECONOMIC LOSSES.**—The term “noneconomic losses” means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) **NONPROFIT ORGANIZATION.**—The term “nonprofit organization” means—

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(5) **STATE.**—The term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) **VOLUNTEER.**—The term “volunteer” means an individual performing services for a nonprofit organization or a governmental entity who does not receive—

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation, in excess of \$500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

SEC. 7. EFFECTIVE DATE.

(a) **IN GENERAL.**—This Act shall take effect 90 days after the date of enactment of this Act.

(b) **APPLICATION.**—This Act applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date.

Approved June 18, 1997.

LEGISLATIVE HISTORY—S. 543 (H.R. 911):

HOUSE REPORTS: No. 105-101, Pt. 1 (Comm. on the Judiciary) accompanying H.R. 911.

CONGRESSIONAL RECORD, Vol. 143 (1997):

May 1, considered and passed Senate.

May 21, considered and passed House, amended, in lieu of H.R. 911. Senate concurred in House amendment.

