

## **Senator Moulton's Testimony on SB 110 Exemption from civil liability related to the placement of buoys in waterways**

**June 2, 2015**

Over the years, Jackson and Clark Counties (both border Lake Arbutus) used to place buoys in the lake, but stopped doing so. The Lake Arbutus Lake Association investigated placing the buoys, but their insurance carrier strongly recommended against it. Wanting to mark the hazards, and increase the safety of the lake for residents and tourists, mutual constituents contacted my colleague Rep. Bob Kulp.

According to Legislative Council current law is somewhat unclear about the extent to which a person placing a navigational buoy may be liable for his or her negligence in placing or not placing a navigational buoy. This bill is meant to clarify that any person or association is immune from civil liability for damage or injury caused by placing or failing to place permitted buoys in a waterway. The buoys still have to be requested and the DNR has to authorize the placement of the buoys.

We had this bill drafted to help out the Lake Arbutus Lake Association, but I expect it might help some other lakes in the state as well.



**Senate Committee on Judiciary and Public Safety**  
**SB 110 – Buoy Placement Liability Exemption**  
**June 2, 2015**

Good morning Chairman Wanggaard and committee members. My name is April Dombrowski and I am the Recreation Enforcement and Education Safety Section Chief with the Department of Natural Resources' Bureau of Law Enforcement. The testimony I provide, for information only, will explain the permitting process the Department currently has in place that governs the placement of buoys in the waters of the state.

State statute 30.77 authorizes local unit of governments to enact local ordinance relative to boating, to include the placement of buoys in the waters. However, no one can legally place a buoy or marker in the waters of the state without the Department's approval. Under Wisconsin Administrative Code NR 5.09, this includes:

1. Regulatory buoys
  - a. *Slow-No-Wake buoys*
  - b. *Prohibited Entry buoys*
2. Non-Regulatory buoys
  - a. *Informational buoys;*
  - b. *Navigational buoys; and*
  - c. *Hazard buoys.*

NR 5.09 defines what buoys shall look like in size and marking.

There are two types of waterway marker buoy permit applications: local unit of *government* applications and *individual* applications. Individual applicants must involve the local unit of government in the approval process in order to permit buoy placements.

- Local unit of government involvement is necessary for ordinances requiring *regulatory* buoy placements (e.g. slow- no-wake, prohibited entry).
- Anyone can apply for a waterway marker permit for non-*regulatory* buoys (informational, navigational hazard). However if the applicant is not the governing entity, written permission is required from the riparian landowner.
- Swim area waterway markers do not require a local ordinance.
- Mooring buoys, in most cases, if placed within 150 feet of a riparian landowners shore do not require a buoy permit.

The Department, through the Bureau of Law Enforcement, works with applicants in advance at the local and regional level before final approval of the Waterway Marker Application and Permit (Form 8700-058). Approval letters are issued to the applicant along with the approved waterway marker application.

Within the waterway marker application, applicants are required to include a map with GPS coordinates of the buoys and/or markers to be placed upon approval. If there are changes to the permit, an applicant must submit amended or new waterway marker permit applications to properly reflect where the buoys are placed and the purpose.

Permit-applicants are responsible for the maintenance of permitted buoys. Applicants can delegate or hire out the placing of the buoys if they wish. This is a common practice across the state.

The Department currently publishes *A Guideline for Creating Local Boating Ordinances and Placing Waterway Markers in Wisconsin Water* (PUB-LE-317-2008) to assist people working through the permitting process. This information can be currently be found on our website at <http://dnr.wi.gov/topic/boat/ordinances.html>.

Thank you again for this opportunity to testify regarding the placement of buoys in Wisconsin waters. If you have any further questions or concerns, I would be happy to answer them.

**Reference:**

**NR 5.09(3) AUTHORITY TO PLACE MARKERS**

(a) No waterway marker may be placed on, in, or near the waters of the state unless such placement is authorized by a political subdivision of the state except that the provisions of this section do not apply to waterway markers placed by the department or an authorized agency of the federal government.

(b) Such political subdivision of the state shall, prior to authorizing placement, obtain the approval of the department. The political subdivision shall complete a waterway marker application form, indicating their approval or disapproval and submit the application to the department. The department shall review the application and approve or disapprove placement of the waterway markers. The department shall distribute a copy of the permit to the political subdivision, the applicant and the property owner. A copy of the permit will remain on file with the department. Mooring buoys placed within the boundaries of a state or federally approved mooring area are exempt from this section when such placement is authorized by the unit of government having jurisdiction. Approved waterway markers shall be labelled with a department assigned identification number. Waterway markers for which department approval was not obtained may be removed by the department.

(c) The political subdivisions of the state authorizing the placement of a waterway marker shall inform the department of the following:

1. Exact location of the marker, expressed in latitude and longitude, or in distance and direction from one or more fixed objects whose precise location is known.
2. The description and purpose of the marker, including its identifying number, if any, as required by sub.

(2) (a)

(4) MAINTENANCE OF WATERWAY MARKERS. Waterway markers shall be maintained in proper condition, or be replaced or removed, by the applicant.

**Notice:** Collection of this information is authorized under s. NR 5.09, Wis. Admin. Code. Failure to provide this information may result in removal of waterway markers. Personal information collected will be used to administer the Waterway Marker Permit program and may be provided to requesters as required by Wisconsin's Open Records law [ss. 19.31-19.39, Wis. Stats.].

**Instructions:** Refer to instructions and requirements on the back of this form. Complete this form and send to your local conservation county warden.

ID No.	Region	<input type="radio"/> Placement	<input type="radio"/> Discontinue	<input type="radio"/> Change
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Jurisdiction: <input type="radio"/> City <input type="radio"/> Town <input type="radio"/> Village of _____	County of _____, Wisconsin.
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<b>Section 1: Applicant Information</b>	<b>Section 2: Property Owner</b>
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Applicant Name	Property Owner Name
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Street Address	Street Address
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City	State	ZIP Code	City	State	ZIP Code
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Telephone Number (include area code)	Telephone Number (include area code)
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Name of lake or body of water buoys will be placed	I consent to the placement of water marker(s) adjacent to the waters of my private property.
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Location of Marker(s)	¼	¼	¼	Section	Township	Range	<input type="radio"/> E <input type="radio"/> W	Signature of Applicant (authorizing representative)	Date Signed
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For Construction Projects - Enter Information Below

WDOT Project Number	Project Start Date	Project End Date
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Type of Marker(s)	Qty.	Type of Marker(s)	Qty.	Message on Marker	Remarks
Aid to Nav. Center		Boat Excluded			Ordinance Required
Aid to Nav. Red		Swim Area		SWIM AREA	Name of Beach:
Aid to Nav. Green		Controlled Area			Ordinance Required
Mooring		Hazard Warning			
Non-standard or signs		Informational			

Describe:

Attach diagrams and maps showing the proposed location of the marker(s). Identify the exact location of the water marker(s) in distance from one or more fixed objects, whose location is known or provide the GPS coordinates of the marker(s) placement. The above information provided in support of the application for placement of water marker(s) is true and correct.

Applicant Representative (print name)	Signature of Applicant (authorizing representative)	Date Signed
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<b>Section 3: Local Government Authorization</b>
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- Approved** -- The above named applicant may place and maintain, subject to DNR approval, the above described marker(s).
- Disapproved** -- The placement of the described marker(s) may not take place.

Name of Local Government or State Agency	Restrictions
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Approved by (print name)	Title	Approved by (signature)	Date Signed
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<b>Leave Blank - DNR Use Only</b>			
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Warden's Recommendation <input type="radio"/> Approved <input type="radio"/> Disapproved	Recreation Safety Warden	<input type="radio"/> Approved <input type="radio"/> Disapproved	
Ordinance on File <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Not Required	Signature	Date Signed	
Warden's (Printed) Name		Bureau of Law Enforcement	<input type="radio"/> Approved <input type="radio"/> Disapproved
Warden's Signature	Date Signed	Signature	Date Signed

## General Information

The WATERWAY MARKER APPLICATION AND PERMIT, Form 8700-58, is an application to place waterway markers. When fully completed, it becomes a permit to place the markers, or a notice of discontinuing placement of markers or a notice of a change in the placement of markers in a previous permit. Markers may not be placed in Wisconsin waters until the permit application has been completed and this form has been approved by the DNR.

The municipality having jurisdiction over the water where the markers are placed must approve the permit issuance. The Department of Natural Resources (DNR) must approve the application prior to it becoming effective.

MOORING BUOYS may or may not need Department approval or SECTION 3 completed depending on the criteria in s. 30.772, Wis. Stats., or the existence of an approved mooring ordinance.

Generally, only municipalities may be the applicant for Aids to Navigation, Controlled Area and Boat Excluded markers.

**EXCEPTION: Swimming area buoys** can be approved for placement in conjunction with bathing beaches operated by resorts, clubs, civic organizations where they are open to the public or used by large numbers of people.

Municipalities, individuals, resorts, clubs, civic organizations, etc. may be the applicant for Hazard Warning and Informational markers.

Municipalities may contract with individuals, clubs and other organizations to buy, maintain and place Aids to Navigation and regulatory markers. The municipality maintains responsibility.

For unique circumstances, check with your local DNR Warden or your DNR Regional Recreation Safety Warden.

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## Instructions For Completing the Form

Indicate if application and permit is for a first time placement; a discontinuation, or a change of a current permit.

**Jurisdiction** - Identify the (City, Town or Village) of (Name of Municipality) having jurisdiction over the water and the County of (Name of County) where the markers will be or are currently located.

### Section 1 - Applicant and Section 2 - Property Owner

If the applicant or property owner is a municipality, business, club, etc., use this name in the "Applicant's Name" block. Name of Waterbody and Location of Marker(s) must be completed.

### Section 2 - Property Owner

Must be completed depending on the type of markers the permit is an application for.

### Type of Markers and Quantity

1. Locate the type of markers and fill in the quantity.
2. Provide the message to be placed on the marker if the markers are Controlled Area, Hazard Warning or Informational.
3. Remarks: Indicate if the marker is a sign or buoy or has unique characteristics.
4. Describe the exact message that will be written on the marker if non-standard or sign(s).

### Section 3 - Local Government Authorization

Must be completed by an officer or representative of the local government or State Agency with local jurisdiction. Approval signature must be an officer of the local jurisdiction even if applicant and local jurisdiction are the same governing body.

### Diagram(s) and Map(s) must:

1. Allow a person to locate where the markers are placed or will be placed.
2. Show the relation of the markers from some fixed reference point. Distances in feet must be shown from fixed reference point(s) and in relation to each marker.
3. Show the relationship of the markers to other riparian owners, significant objects and water areas.
4. Must be as accurate as possible. GPS or Land coordinates of each marker are preferred.

Upon completion of Section 1 and 2 (if necessary), forward the application to your local municipality for completion of Section 3. They must then forward it to the Department of Natural Resources.

If you have problems completing this form, consult with your local Warden or your Recreation Safety Warden.



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From: Wisconsin Association for Justice  
President Ann S. Jacobs

To: Senate Committee on Judiciary and Public Safety  
Rep. Van Wanggaard, Chair

Re: Testimony regarding 2015 Senate Bill 110

Date: June 2, 2015

#### Summary:

The Wisconsin Association for Justice (WAJ) opposes Senate Bill 110 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. 281.68(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 immune<sup>1</sup> from any suit and this legislation is unnecessary and redundant.

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<sup>1</sup> 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.



# WISCONSIN LAKES

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## TESTIMONY TO WISCONSIN SENATE COMMITTEE ON JUDICIARY AND PUBLIC SAFETY REGARDING 2015 SB110 (RE: AN EXEMPTION FROM CIVIL LIABILITY RELATED TO THE PLACEMENT OF BUOYS OR OTHER MARKERS IN WATERWAYS)

Presented by Michael Engleson, Executive Director

June 2, 2015

Good morning, and thank you for the opportunity to testify today on SB110.

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. We represent roughly 300 lake organizations, who in turn have over 80,000 members.

I'm here today to offer Wisconsin Lakes' support for SB110. 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 certain tasks, even ones such as marking navigational hazards in a water way. Most lake organizations have a pretty clear interest in marking hazards – the safety of themselves, their families and friends who use the lake. But fear of a costly lawsuit often prevents them from taking on the task.

It is true that some liability protection covers lake organizations and their volunteers under Wisconsin law. Lake organizations in Wisconsin tend to fall into one of three categories:

- Quasi-governmental lake districts organized under Chapter 33, who receive the same immunity as a governmental body,
- Non-profit corporations organized under Chapter 181, whose members (*but not the organization itself*), receive some liability protection under the federal "Volunteer Protection Act", and
- Unincorporated associations, covered under Chapter 184, whose members receive some limited liability from the statute, but not to the same level as districts and incorporated associations.

To my knowledge, few, if any, lake organizations are organized as LLC's or other types of corporations.

***Despite these protections, liability issues could still arise when placing navigational hazard buoys.*** Is an individual acting on behalf of his lake association, who is acting on behalf of the local town government that holds the DNR permit to place the buoy firmly covered by immunity? If he believes

*Wisconsin Lakes is a statewide nonprofit organization with nearly 1,000 members and contributors including individuals, businesses, and lake associations or districts representing more than 80,000 citizens. For over 20 years, Wisconsin Lakes has been a powerful bipartisan advocate for the conservation, protection and restoration of Wisconsin's lake resources.*

he's placed the buoy properly, but it is in fact outside the location allowed by the permit, still covered by that immunity? What constitutes "acting in good faith", a typical requirement of these immunity coverages? The law is not crystal clear in these instances, which leads to uncertainty and caution, which in turn leads to navigational hazards going unmarked.

With questions of liability still in play, 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. In addition, the clarity it would provide on the issue would make it much more likely for organizations to find an insurance carrier willing to cover the activity (a commonly seen problem is that insurers are not familiar with lake organization activities, and therefore leery of providing coverage). Finally, the likelihood of harm or damage to lake users because of negligent acts of placing the hazard buoys seems much smaller than the likelihood of harm or damage if the hazards remain unmarked, especially when there is great personal incentive to mark the buoys properly.

Any time a bill exempts a group or individuals from all civil liability for improper or erroneous actions merits careful consideration. But in this case 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, especially when it comes to helping to ensure the safe enjoyment of those waters by all recreational users. By encouraging more hazard buoy placement, this bill does just that. Wisconsin Lakes encourages the committee to support this bill.