STATE OF MICHIGAN

IN THE SUPREME COURT

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.

_____/

Supreme Court Docket No. 126409

Court of Appeals Docket No. 242641

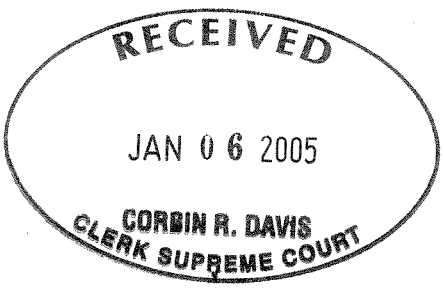
Alcona Circuit Court No. 01-10713-CK

Pamela S. Burt (P47857)
Weiner & Burt, P.C.
Attorney for Plaintiff-Appellant
635 N. U.S. 23
P.O. Box 186
Harrisville, MI 48740
(989) 724-7400

Scott C. Strattard (P33167)
Braun, Kendrick, Finkbeiner
Attorneys for Defendants-Appellees
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

_____/

BRIEF OF AMICUS CURIAE
TIP OF THE MITT WATERSHED COUNCIL



Submitted by:
Chris A. Shafer (P48068)
Professor
Thomas M. Cooley Law School
300 S. Capitol Ave.
P.O. Box 13038
Lansing, MI 48901

January 6, 2005

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STATEMENT OF QUESTIONS PRESENTED

1. IS THERE A CLEAR LEGAL BOUNDARY AT THE ORDINARY HIGH-WATER MARK, AS SPECIFIED IN BOTH STATE ADMINISTRATIVE RULES AND STATUTE, THAT SEPARATES PRIVATELY OWNED UPLANDS FROM PUBLICLY OWNED BOTTOMLANDS ON THE GREAT LAKES?

   The Trial Court answered "yes".
   The Court of Appeals answered "yes".
   Plaintiff-Appellant answers "yes".
   Defendants-Appellees answer "no".
   Amicus Curiae Watershed Council answers "yes".

2. DOES THE GREAT LAKES SUBMERGED LANDS ACT AND PUBLIC TRUST DOCTRINE REGULATE AND PROTECT WATERS OF THE GREAT LAKES AND BOTTOMLANDS LYING BELOW THE ORDINARY HIGH-WATER MARK?

   The Trial Court answered "yes".
   The Court of Appeals answered "yes".
   Plaintiff-Appellant answers "yes".
   Defendants-Appellees answer "no".
   Amicus Curiae Watershed Council answers "yes".

3. SHOULD THIS COURT GIVE SUBSTANTIAL DEFERENCE TO LONG-STANDING AGENCY POLICY OF INTERPRETING AND ADMINISTERING THE GREAT LAKES SUBMERGED LANDS ACT?

   The Trial Court did not answer this question.
   The Court of Appeals impliedly answered this "yes".
   Plaintiff-Appellant would answer this "no".
   Defendants-Appellees would answer this "no".
   Amicus Curiae Watershed Council answers "yes".

4. HAVE DEFENDANTS-APPELLEES AND AMICI CURIAE SAVE OUR SHORELINE AND CHAMBER OF COMMERCE ET AL. MISSED THE RELEVANT STATUTE OF LIMITATIONS BY SEVERAL DECADES TO RAISE THE "WATER'S EDGE" CLAIM, AND SHOULD THE DOCTRINE OF LACHES OPERATE TO ENJOIN THIS CHANGE OF LEGAL BOUNDARY FROM THE ORDINARY HIGH-WATER MARK?

The Trial Court did not answer this question.
The Court of Appeals did not answer this question.
Plaintiff-Appellant would answer "yes".
Defendants-Appellees would answer "no".
Amici Curiae Save Our Shoreline and Chamber of Commerce, et al., would answer "no".
Amicus Curiae Watershed Council answers "yes".

INTEREST OF AMICUS CURIAE

Tip of the Mitt Watershed Council ("Watershed Council") was founded in 1979 and is incorporated as a Michigan non-profit organization. Based in Petoskey, Michigan, the Watershed Council is the lead organization for water resources protection in Antrim, Charlevoix, Cheboygan, and Emmet counties. The Watershed Council has over 2,000 contributing members and is governed by a 14 member Board of Directors. The Watershed Council's mission statement reads:

> *The Tip of the Mitt Watershed Council is the voice for Northern Michigan's waters. We are dedicated to protecting our lakes, streams, wetlands, and ground water through respected advocacy, innovative education, technically sound water quality monitoring, and through research. We achieve our mission by empowering others and we believe in the capacity to make a positive difference. We work locally, regionally, and throughout the Great Lakes Basin to achieve our goals.*

Amicus Curiae Watershed Council represents the ecological and public interest in northern Michigan's treasured water features, including the Great Lakes, and has consistently supported sound stewardship of our natural heritage. Reviewing and providing comments on state and federal permit applications for work with potentially negative impacts along northern Michigan's Great Lakes shoreline has been a long standing component of the Watershed Council's work. Traditionally, the Watershed Council has been very concerned with maintaining and enhancing the water quality of the Great Lakes and protecting ecologically essential coastal wetlands on places like Grand Traverse Bay, Thunder Bay and Saginaw Bay. As such, and with an eye to future shoreline issues such as bulk water export, the Watershed Council is vitally interested in maintaining the state's regulatory authority and public trust responsibilities over Great Lakes bottomlands and coastal wetlands.

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT

Amicus Curiae Watershed Council agrees with Plaintiff-Appellant's statement of the Court's jurisdiction.

STANDARD OF REVIEW

Amicus Curiae Watershed Council accepts the Court of Appeals' statement of the standard of review, *see Glass* v *Goeckel*, 262 Mich App 29, 32-33; 683 NW2d 719 (2004), as the proper standard of review in this matter.

I. STATEMENT OF FACTS

Amicus Curiae Watershed Council accepts Plaintiff-Appellant's statement of facts in her Brief In Support Of Application For Leave To Appeal at 1-7.

II. INTRODUCTION

The central issue in this case is whether the public has a right of access along and across the dry beaches and exposed lakebed (known as lateral access) lying below the ordinary high-water mark on the Great Lakes in front of private property. This was the primary issue identified by the Court of Appeals in its decision in *Glass* v *Goeckel*, 262 Mich App 29, 30, 683 NW2d 719 (2004), and is the only issue raised by the Plaintiff-Appellant on appeal to this Court. *See* Plaintiff-Appellant's Brief In Support Of Leave To Appeal at vii. The Court of Appeals held that there is no public right of passage over dry beaches and exposed lakebed along privately owned portions of the Great Lakes shoreline. *See Glass supra* at 43-44. With its decision, the Court of Appeals affirmed well-settled rules of property as reflected in Michigan case law, and longstanding administrative agency policy by the Michigan Department of Natural Resources and since 1996, by the Department of Environmental Quality. *See* Section III C, *infra.* The Court of Appeals decision is consistent with a "well reasoned"[1] opinion by former Attorney General Frank Kelley, which ruled that there was no right of public passage along the exposed lakebed in front of private riparian property on the Great Lakes.[2] *See* OAG No 5327 (July 6, 1978).

Mr. Kelley's opinion relied in part on this Court's decision in *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), as did the Court of Appeals in this case. *See Glass, supra* at 37-41. In *Hilt* this Court observed approvingly that "it has been held that the public has no right of passage

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[1] John G. Cameron, Michigan Real Property Law, Vol I at 84 (2d ed 1993).

[2] This Court observed in *Thies* v *Howland*, 424 Mich 282, 288 n2; 380 NW2d 463 (1985), that "strictly speaking, land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral." However, as in *Thies* "the term 'riparian' is often used to describe both types of land and will be so used in this opinion," *id.* at 288 n2, and in this Brief Amicus Curiae as well.

over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the state." *Hilt* at 226 (citing *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923)).

In contrast, Plaintiff-Appellant's attorney does not cite a case from a Great Lakes state in her Brief In Support Of Application For Leave To Appeal in support of the alleged right of lateral access across dry beaches or the exposed lakebed along privately owned Great Lakes shoreline. It is also noteworthy that two well respected treatises[3] do not contain a single citation from a Great Lakes state in support of this alleged lateral beach access right along the Great Lakes shoreline. Also, no Great Lakes state cases are cited in a recent annotation concerning implied acceptance of public beach access.[4] Cases concerning the doctrine of custom are cited in Oregon, express dedication in California and Georgia, prescription in Maryland and New Jersey, and implied dedication in California, but no positive examples are cited from a Great Lakes state.[5] Indeed, the only Michigan case cited, *Kempf* v *Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976), held that public use of a beach on Higgins Lake did not establish a public easement through prescription or dedication, and that some form of governmental action to accept such beach access was required. *See id.* at 343-44. Therefore, it seems clear that if this alleged right of lateral beach access along the dry portions of the Great Lakes shoreline exists, it apparently hasn't been recognized by the appellate courts of any Great Lakes state, including Michigan.

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[3] *See* David C. Slade, Putting The Public Trust Doctrine To Work (2d ed 1997), and A. Don Tarlock, Law Of Water Rights And Resources (1995).

[4] *See* Anno, *Implied Acceptance, By Public Use, of Dedication of Beaches or Shoreline Adjoining Public Waters*, 24 ALR4th 294 (2002).

[5] *See id.*

Plaintiff-Appellant and the trial court in this matter relied heavily on the Great Lakes Submerged Lands Act (formerly 1955 PA 247, as amended, codified originally at 322.701 *et seq.*, and now codified as Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act, MCL 324.32501 *et seq.*), in support of the asserted right of lateral beach access below the ordinary high-water mark on the Great Lakes shoreline. *See Glass, supra* at 44. However, the protected uses listed in Section 2 of Part 325, MCL 324.32502, are all aquatic in nature, rather than terrestrial. The public uses of the waters of the Great Lakes and publicly owned bottomlands specifically protected by this statute are hunting, fishing, swimming, pleasure boating and navigation. *See* MCL 324.32502. The Court of Appeals held that none of these protected uses embraced a public right "to walk on a beach fronting private property along one of the Great Lakes." *Glass, supra* at 45. This holding is consistent with the general rule pertaining to public uses related to or stemming from a right of navigation, that "the public right of navigation does not include, as incidental thereto, the use of shore lands held in private ownership." 78 Am Jur 2d, Waters, §151 (2002)(citations omitted).

The traditional law in this state is that the public has a legal right to walk along and wade in the shallow waters of the Great Lakes on the state's publicly owned bottomlands. *See eg*, OAG No 5327, *supra* at 4. The Court of Appeals affirmed this traditional right in holding that Plaintiff-Appellant, as a member of the public, "is entitled to utilize the lake bottom until it first reaches dry land for purpose of navigating the Lake Huron shoreline." *Glass,* supra at 46. This line of demarcation is sometimes referred to as the "water's edge," s*ee id.* at 44, or the "lake shore," *see Hilt, supra* at 206. Amicus Curiae Watershed Council respectfully urges this Court to clarify this portion of the Court of Appeals' holding to include the wet sand area immediately adjacent to the submerged lands that are saturated by the waters of the Great Lakes due to the

forces of wind, waves, barometric pressure changes and storms. *See* Appendix 1. Using the wet sand area as the upper limit of the public's right of passage along the Great Lakes bottomlands is much more consistent with the dynamic nature of the Great Lakes, which are constantly moving to their own rhythms.

Amicus Curiae Watershed Council is submitting this brief to affirm the ordinary high-water mark as the proper legal boundary between privately owned bottomlands and publicly owned bottomlands. *See* Part III A., *infra.* Amicus Curiae Watershed Council is very concerned with recent claims by Defendants-Appellees and Amici Curiae Save Our Shoreline (SOS) and Chamber of Commerce et al., (Chamber), that the water's edge should be the dividing line for ownership purposes along the Great Lakes shoreline. *See* Defendants-Appellees' Brief In Opposition at 11, n5. In addition, although the Court of Appeals acknowledged the state's public trust responsibilities pertaining to the Great Lakes bottomlands, *see Glass, supra* at 42-43, Amicus Curiae Watershed Council is concerned that this analysis did not do justice to this Court's longstanding commitment to and rich history of applying the public trust doctrine, and did not fully comprehend the extent of the state's duty to protect these essential natural resources. Amicus Curiae Watershed Council also hopes to provide this Court with useful insight into some of the hydrologic aspects of fluctuating Great Lakes water levels and dynamic coastal wetlands to provide a physical context in which to apply the appropriate legal principles. *See* Part III B, *infra.* And finally, Amicus Curiae Watershed Council will raise several legal arguments such as judicial deference to longstanding agency policy, statute of limitations concerns and the doctrine of laches that should provide a sound legal basis for rejecting Defendants-Appellees' and Amici SOS and Chamber's claims that the water's edge is the proper legal ownership boundary along the Great Lakes shoreline. We believe and will demonstrate

that it is they who are seeking to fundamentally alter well-settled rules of property rather than those, such as the Watershed Council and the State of Michigan, who assert that the ordinary high-water mark is the statutorily established ownership boundary.

III. ARGUMENT

A. The statutorily established ordinary high-water mark is the proper legal boundary that separates privately owned uplands from the publicly owned bottomlands along the Great Lakes shoreline.

1. This Court's decision in *Hilt, supra*, is important, but not the final analysis.

Although the Court of Appeals quoted at length from Section 2 of Part 325, *supra*, which references the natural ordinary high-water mark, *see Glass*, *supra* at 44-45, it did not fully recognize the significance of this statutorily established boundary line for protecting the state's Great Lakes bottomland resources. Relying largely on *Hilt, supra*, the Court of Appeals concluded that the riparian owner had the exclusive right of use and access across the exposed lakebed to the water's edge and the legal right to prevent members of the public from using this portion of the shoreline. *See id.* at 44,46. The Court of Appeals, Defendant-Appellees and Amici Curiae SOS and Chamber have devoted large portions of its decision and their briefs to analyzing and discussing *Hilt.* While *Hilt* is an important decision and there is much to applaud about it, it is simply not the final word or the Rosetta Stone unlocking the mysteries of bottomland boundaries and ownership along the Great Lakes shoreline. Rather, *Hilt* is one key link in the evolutionary chain of law pertaining to ownership and protection of coastal resources that has culminated in several state and federal statutes, which have clarified and modified the common law in this area.

On the positive side, *Hilt* correctly held that the meander line was not the final legal boundary for determining riparian ownership but rather an approximation of the lakeward boundary of uplands for purposes of the original sale of property through a federal patent. *See Hilt supra* at 204-205 (relying on *Hardin* v *Jordon*, 140 US 371, 381 (1890)). *Hilt* specifically overruled the aberrant decisions in the "Kavanaugh Cases" (*Kavanaugh* v *Rabior*, 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW 2 (1928), which had thrown the legal status of Great Lakes shoreline ownership in Michigan in turmoil. *See Hilt, supra* at 222, 227. In *Hilt*, the court adopted the "moveable freehold" concept, whereby the riparian owner's property expanded through accretion or a permanent lowering of water levels, known as reliction, and conversely a riparian owner's property contracts or is reduced through erosion or permanent increases in water levels. *See Hilt, supra* at 216, 219-220. The court specifically endorsed the public trust doctrine as articulated in *Illinois Central R Co* v *Illinois* 146 US 387 (1892), and held that this doctrine applies to Michigan's Great Lakes submerged lands. *See Hilt, supra* at 217, 224-225.

Despite these positive aspects of the *Hilt* decision, it is important to understand the facts and issues in the case and recognize some imprecise terminology used in the case to place the decision in its proper perspective and not stretch it past all reason. First, it is essential to recognize that the court in *Hilt* was determining ownership of high and dry land some 277 feet inland from the water's edge and 44 feet above the level of Lake Michigan, and not title to Great Lakes bottomlands as in the *Glass* case. *See Hilt supra* at 201. The court itself was at pains to make this clear when it stated: "Lest we be misled, we must keep it clear that the issue is not as to the ownership of submerged land or of an island arising out of a lake . . . It covers only dry land . . . ." *Hilt, supra* at 203. Second, the court made a key factual error when it stated that the

lakeward extent of federal patents was the water's edge, rather than the high-water mark. *See Hilt* at 204. This erroneous understanding of the lakeward extent of federal patents appears to have originated in a case involving fishing rights on Thunder Bay in northern Lake Huron, *Lincoln* v *Davis*, 53 Mich 375, 384-385; 19 NW 103 (1884) where the court incorrectly referred to the low-water mark as the lakeward boundary for federal patents. In fact, the Supreme Court has clearly held that the lakeward or riverward boundary along navigable waters was the high water mark, rather than the low-water mark. *See Shively* v *Bowlby*, 152 US 1, 49 (1894). Relying on the equal footing doctrine in S*hively* the Court stated that "[t]he new states admitted into the Union since adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands below the *high-water mark* within their respective jurisdiction." *Id.* at 26 (emphasis added). The Court also specifically applied this doctrine to the Great Lakes and determined that the states owned the "beds and shores of such waters . . . beyond the limits of high water." *Id.* at 43-44.

In addition to the inaccurate reference to the low-water mark instead of the high-water mark used in issuing federal patents, the *Hilt* Court used several imprecise terms such as "water's edge" and "lake shore" as the lakeward boundary for private riparian ownership. *See Hilt, supra* at 204, 206. Since these references weren't really germane to the fundamental issue in the case, namely title to high and dry uplands rather than submerged lands, they should be considered dicta and not binding. The *Hilt* Court also made rather loose use of the terms "accretion", "accession" and "reliction", *see Hilt, supra* at 201, 203, 218, such that the critical element of a permanent gaining of land through accretion or a permanent lowering of water levels in reliction, as distinct from a temporary uncovering of bottomlands resulting from natural water level

fluctuations, is blurred.[6] Justice Potter in his concurring opinion in *Hilt supra,* was concerned about the imprecise use of these terms and emphatically stated: "The doctrine of reliction has no application to lands temporarily laid bare by a recession of the water due to variation in the amount of evaporation and precipitation, nor to lands laid bare by a recession of the water due to diversion or drainage." *Hilt, supra* at 228. Justice Potter's observation is especially relevant because it appears that the court was laboring under a misunderstanding of the extent of natural water level fluctuations on the Great Lakes. This is evident from the court's quoting from *People* v *Warner*, 116 Mich 228, 239 (1898) as follows: '"If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low-water identical for the proposed boundaries. . . ."'*Hilt, supra* at 208. This lack of appreciation of the hydrology and naturally fluctuating water levels of the Great Lakes in 1930 is easily understood from the vantage point of 2004 when we have much better data and predictive models for water levels.

Great Lakes water levels fluctuate seasonally, reflecting the annual hydrologic cycle in the Great Lakes Basin. Water levels begin to rise in the spring due to snowmelt, rain and reduced evaporation, and generally peak in June or July. By late summer, as runoff decreases and evaporation increases, water levels begin to fall to their mid-winter lows. Seasonal variations in water level of about one foot are typical for Lakes Michigan and Huron. *See* Appendix 2. Great Lakes water levels fluctuate over longer periods as well. These interannual fluctuations are the result of longer term differences in precipitation and evaporation in the lake drainage basins, and amount to a range of 6.5 feet from high to low water levels on Lakes

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[6] "Accretion" is defined as "the gradual accumulation of land by natural forces, especially as alluvium is added to land situated on the bank of a river or on the seashore." Black's Law Dictionary at 21 (7th ed 1999). "Reliction" is defined as "a process by which a river or stream shifts its location, causing the recession of water from its bank." *Id.* at 1293. The terms aren't especially helpful to our present case because we are dealing with temporarily exposed lakebed rather than permanently created upland.

Michigan and Huron. *See* U.S. Army Corps of Engineers, Detroit District, Great Lakes Water Level Facts (1987). *See* also Appendix 3. Over the past 40 years, Lakes Michigan and Huron have experienced significant interannual water level fluctuations ranging from record low levels in the early 1960's, to record high levels in the early 1970's and mid 1980's, to declining levels in the late 1990's and near-record low levels in 2001 and 2002. *See* Appendices 2 and 3. These fluctuations were not permanent changes in water level and did not change legal boundaries through reliction. Rather, they were just part of the natural fluctuations in water levels and reflect the dynamic nature of the Great Lakes. The Great Lakes are constantly changing, which is why the ordinary high-water mark was devised as a stable, predictable and easily documented boundary along the Great Lakes shoreline. *See* Part III A2, *infra*.

One final limitation of *Hilt* deserves attention and that is its reliance on a Wisconsin case, *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923). The *Hilt* Court cited *Doemel* approvingly for the proposition that the exclusive right of access to the water's edge when it was below the ordinary high-water mark was with the riparian property owner, although the state owned the bottomlands. *See Hilt, supra* at 226. While *Doemel* is appropriate to cite for this issue, which is germane to the central issue in the *Glass* case, it is not persuasive for purposes of determining the ownership boundary on the Great Lakes shoreline. Defendant-Appellees and Amici SOS and Chamber devote many collective pages in their briefs extolling the virtues of *Doemel* on the boundary issue. Their reliance is quite simply misplaced. *Doemel* involved an inland lake, Lake Winnebago, and not a Great Lake. What Defendant-Appellees and Amici SOS and Chamber are overlooking or ignoring is that Wisconsin, like Michigan, uses the ordinary high-water mark as the legal boundary between privately owned uplands and publicly owned bottomlands on the Great Lakes. The Wisconsin Supreme Court emphatically stated that this was the legal boundary

for Wisconsin's Great Lakes in *State* v *Trudeau*, 139 Wis2d 91; 408 NW2d 337 (1987), a case involving a proposed condominium project along the Lake Superior shoreline. Relying on a much earlier decision that held the same thing for Lake Michigan, *Illinois Steel Co* v *Bilot*, 109 Wis 418, 425; 84 NW 855 (1901), the court held that title to the beds of the Great Lakes up to the ordinary high-water mark were owned by the state and held in trust by the state for the people of Wisconsin. *See Trudeau, supra* at 341. The Wisconsin court quoted from *Diana Shooting Club* v *Husting*, 156 Wis 261, 272; 145 NW 816 (1914), which had previously defined the ordinary high-water mark as "'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.'"[7] *See Trudeau, supra* at 341. This definition, as we shall see in Part III A2, *infra*, is virtually identical to the definition first promulgated in 1958 by the former Department of Conservation under the original Great Lakes Submerged Lands Act, *supra*, and which is still used today by the Department of Environmental Quality (DEQ) in administering Part 325, *supra*. Therefore, it is *Trudeau*, rather than *Doemel* that is much more pertinent to the ownership boundary issue on Michigan's Great Lakes shoreline.

Hilt is an important and venerable case in Michigan's law pertaining to the Great Lakes shoreline, but it is essential to understand precisely what it held and what its limitations are, and not stretch it beyond all reason. It is also crucial to recognize that legislative action in the form of both state and federal statutes, as analyzed in the next section, clarified the common law and

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[7] Amicus Curiae SOS derisely dismisses the ordinary high-water mark as "often referred to but seldom defined, in case law and is further clouded by many varied judicial, statutory and administrative definitions and references." Amicus Curiae SOS Brief at 3 n1. On the contrary, there is a remarkable consistency among judicial, statutory and administrative definitions of ordinary high water mark that Amicus SOS chooses to ignore. *See* Part A2, *infra*. *See also*, 78 Am Jur 2d, Waters at §293 (2002).

designated the ordinary high-water mark as the legal boundary separating privately owned uplands from publicly owned bottomlands along the Great Lakes shoreline.

2. Legislative Action Codified the Ordinary High-Water Mark As The Critical Shoreline Boundary.

In 1953, Congress enacted the federal Submerged Lands Act, 43 USC §1301 *et seq.*, to confirm state ownership of submerged lands within their respective jurisdictions and to reverse the effect of *United States* v *California*, 332 US 19 (1947) which had held that oil and gas resources below those bottomlands belonged to the federal government. *See United States* v *Michigan*, 471 Fed Supp 192, 276 (1979), *see also* 78 Am Jur 2d, Waters at §291 (2002). Section 1301 of this federal statute defines "lands beneath navigable waters" as:

> all lands within the boundaries of each of the respective states which are covered by nontidal waters that were navigable under the laws of the United States at the time such state became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the *ordinary high-water mark* as heretofore or hereafter modified by accretion, erosion, and reliction." 43 USC 1301(a) (emphasis added).

The act by its terms applies both to ocean coast states and Great Lakes states, *see* §1301(b), and declares that title and ownership of the submerged lands and natural resources lying "beneath the navigable waters within the boundaries of the respective states. . ." is confirmed in the states. 43 USC §1311.

Shortly after Congress enacted the Submerged Lands Act and used the ordinary high-water mark as the boundary line for state bottomlands ownership, the Michigan Legislature passed the Great Lakes Submerged Lands Act (GLSLA), *supra.* This state statute was originally enacted in response to the federal Submerged Lands Act in an effort to resolve trespasses and clear title to literally hundreds of filled lots and parcels located along the shoreline of Lake St.

Clair.[8] Section 2 of the GLSLA originally defined the submerged lands affected by the statute as "all of the unpatented submerged lake bottom lands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it which have heretofore been artificially filled in and developed with valuable improvements." MCL 322.702. Thus, no specific upper boundary for the state's submerged lands was designated by the Legislature in the original statute.

In 1958, the Legislature amended the statute by adding a new Section 10 that made it a criminal offense to engage in unauthorized filling of the state's Great Lakes bottomlands. *See* 1958 PA 94, originally codified as MCL 322.710, now codified as MCL 324.32510. This Court's decision in *Obrecht* v *National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960), involving a proposed commercial dock and channel on Tawas Bay, discussed the history of this amendment. Also in 1958, the former Department of Conservation, which administered the GLSLA at that time, promulgated a regulation that further defined bottomlands of the Great Lakes and adopted the ordinary high-water mark as the upper limit of the state's bottomland ownership. *See* 1959 AACS, R 299.371 (attached as Appendix 5A). This administrative regulation defined "lake bottomlands" as "the lands in the great lakes and bays and harbors thereof lying lakeward of the natural ordinary high water line." *Id.* at R 299.371(b). These same rules defined the term "ordinary high water line" as:

> that natural line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked on by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape or vegetation may be somewhat altered during exposure at low stages in the

[8] *See* Personal Interview with Mogens C. Nielsen, retired former Supervisor of the Submerged Lands Management Unit, Michigan Dep't of Natural Resources (August 27, 2004) (notes on file with author.)

> fluctuations of the water levels, but will be reestablished with the return of high stages. When the soil, vegetation or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place. *Id.* at R 299.371(a).

These two definitions were again promulgated in 1967 in a revised set of rules for the GLSLA in virtually identical form except that ordinary high water line became "ordinary high-water mark." *See* 1979 AC, R 281.901(2) & (4)(attached as Appendix 5B). The definition of bottomland remained the same in a new set of rules promulgated by the Department of Natural Resources in 1982 and that remain in effect today, *see* 1982 AACS, R 322.1001(e) (attached as Appendix 5C), now codified at 1999 AC, R 322.1001 *et seq.*, but the definition of ordinary high-water mark was changed to reflect 1968 amendments to GLSLA that listed specific elevations for each of Michigan's Great Lakes. *See id* at R 322.1001(j). Thus, for over 45 years the state agencies responsible for administrating the provisions of the GLSLA have consistently used the ordinary high-water mark as the upper boundary of the state owned bottomlands of the Great Lakes.

Two decisions of this Court prompted the Legislature to clarify certain aspects of the GLSLA. The first of these was *People* v *Broedell*, 365 Mich 201; 112 NW2d 517 (1961), a case involving filling of bottomlands on Lake St. Clair. The court noted that there was some confusion in the Michigan cases whether the low-water mark or high-water mark was the proper legal boundary of ownership along the Great Lakes shoreline. *See id.* at 206. The court did not resolve this uncertainty and remanded the case to the lower court to determine if the filled area in question was located within a private claim on Lake St. Clair that pre-dated statehood. *See id.* at 206, 208. A second case, *Klais* v *Danowski*, 373 Mich 262; 129 NW2d 414 (1964) held that bottomlands located within a private claim issued by either the French or British governments prior to statehood were not owned by the state, and the state could not charge riparian owners for

the value of the filled bottomlands. *See id.* at 273, 276-278. The court noted, as it had previously in *Broedell, supra* at 204, that there was evidence of considerable long-term and seasonal fluctuation of water levels on Lake St. Clair, *see Klais* at 278, but this did not alter the fact that the bottomlands in question were located within a private claim or patented area and the state's ownership only applied to unpatented bottomlands. *See id.* at 277.

In response to these two decisions, the Legislature amended the GLSLA in 1965 and again in 1968 to clarify which waters and bottomlands of the Great Lakes were subject to the statute's jurisdiction. The 1965 amendments to the GLSLA, which was originally introduced as HB 2859 and signed into law as 1965 PA 293, did four primary things. First, the phrase "waters of the Great Lakes" or the term "water areas" was inserted no less than seven times to make it clear that the statute applied to waters of the Great Lakes wherever they were, regardless of whether the bottomlands were patented or unpatented. *See* 1965 Unofficial Amended House Bills 2801-2900, Legislative Service Bureau, in State Archives RG 89-445, vol 8 (attached as Appendix 6). In direct response to the court's decision in *Klais, supra,* the Legislature amended the act in nine places to clarify that the state's power to lease or deed bottomlands only applied to unpatented bottomlands, and not land within private claims. *See* Appendix 6. And thirdly, the Legislature added a new sub-section (2) to Section 3, which required a permit from the Department of Conservation for "dredging or placing spoil or other materials on bottomlands." 1965 PA 293, originally codified at MCL 322.703, now codified as MCL 324.32503(2). Finally, the Legislature also authorized riparian owners to apply to the department for a lakeward boundary determination or a certificate of accretion, which would confirm that new upland had been created along the shoreline through accretion. *See* 1965 PA 293, originally codified at MCL 322.711, now codified at MCL 324.32511.

Unfortunately, there is minimal legislative history concerning the original GLSLA or the 1965 and 1968 amendments. A major fire in the Lewis Cass State Office Building in 1951 destroyed most of the older legislative documents, and legislative committees did not begin retaining committee records of pending bills until 1968. *See* Personal Interview, Mark E. Harvey, Reference Archivist, Michigan Historical Center (August 23, 2004). Hence the use of the unofficial amended House bills in this analysis.

The 1968 amendments to the GLSLA are directly germane to the legal status of the ordinary high-water mark. Originally introduced as HB 2621 and signed into law as 1968 PA 57, the amendments are especially significant because they delineate and define the ordinary high-water mark as the boundary between private uplands and public trust bottomlands. *See* 1967 Unofficial Amended House Bills 2526-2675, Legislative Service Bureau, in State Archives RG 89-445, vol 22 (attached in Appendix 7). Section 2 of the GLSLA was amended to specify that the statute's provisions applied to unpatented lake bottomlands and patented lands of the Great Lakes "lying below and lakeward of the natural ordinary high-water mark." 1968 PA 57, originally codified at MCL 322.702 and now codified at MCL 324.32502. In amending the statute, the Legislature incorporated the same ownership boundary and terminology used by the Department of Conservation in promulgating the 1967 Submerged Lands administrative rules, *supra*. The Legislature further defined this boundary by inserting the following language at the end of Section 2: "For purposes of this Act [now Part 325] the ordinary high-water mark shall be deemed to be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet." 1968 PA 57, now codified at MCL 324.32502. These statutory elevations were based on literally hundreds of field surveys conducted by biologists, engineers

and surveyors employed by the former Department of Conservation in the late 1950's and early 1960's in determining where the ordinary high-water marks were located along the Great Lakes shorelines and what specific lake elevations correlated with the field observations. *See* Personal Interview, Mogens C. Nielsen, *supra*.

Further evidence of the successful application of the ordinary high-water mark leading up to the statutory amendments is shown by a Department of Conservation memorandum from 1960 that indicates that over 400 submerged lands cases had already been effectively resolved and that the agency's definition of ordinary high-water mark had worked well. *See* Memorandum from Charles Miller to Gaylord H. Walker at 4 (Dec 8, 1960)(attached as Appendix 8). That the Legislature considered the 1968 amendments establishing the specific ordinary high-water mark elevations for each Great Lake were significant is evident from a press release dated May 28, 1968, the day the bill was signed into law, from the bill's chief legislative sponsor. Representative Raymond L. Baker stated that the new amendments to the GLSLA provided "a much needed, permanent reference point for determining public and private rights where Great Lakes shorelines are involved." Representative Baker, Press Release (May 28, 1968)(attached as Appendix 9).

In its most recent decision pertaining to Great Lakes bottomlands, *Peterman* v *Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994), a case involving damage caused to private beachfront property on Grand Traverse Bay by construction of a public boat launch ramp, this Court reaffirmed the importance of the high-water mark boundary. The decision contains an excellent discussion of the principal of state navigational servitude, *see id.* at 195, and contains numerous references to the ordinary high-water mark as an important boundary. *See id.* at 198-200. In fact, the court references this boundary in its holding "that while compensation is usually

not necessary for the erosion of beach under the *high-water mark* caused by navigational improvements by the state, compensation is due for the destruction of plaintiff's fast lands." *Id.* at 180. (emphasis added). Consequently, it seems clear that the ordinary high-water mark is firmly established statutorily and well recognized as an important public/private boundary by this Court.

The Legislature has again reaffirmed the continued validity and vitality of the ordinary high-water mark boundary with two recent legislative actions in 2000 and 2003. In 2000 the Legislature adopted a new Part 326, Great Lakes Submerged Logs Recovery, of NREPA, 2000 PA 278, MCL 324.32601 *et seq.*, that governs removal of submerged logs from the state's bottomlands. The terms "bottomlands" and "ordinary high-water mark" are defined the same as in Part 325, Submerged Lands, *supra*, and specific reference is made in Part 326 to the comparable definitions in Part 325. *See* MCL 324.32601(a) & (f). Obviously, the Legislature intended the ordinary high-water mark to remain the clear boundary between private uplands and public bottomlands. Most recently in 2003, the Legislature amended Part 325, *supra*, to authorize limited vegetation removal between the ordinary high-water mark and the water's edge without a state permit in two designated pilot demonstration areas along the Great Lakes shoreline. *See* 2003 PA 14, MCL 324.32516. This again confirms the Legislature's reliance on and commitment to the ordinary high-water mark as the critical ownership boundary along the Great Lakes shoreline.

The ordinary high-water mark has a long and venerable history in this state as reflected in judicial decisions of this Court, long-standing policy of the agencies entrusted with administering first the GLSLA and now Part 325, and repeated acts of the Legislature mandating continued use of this critical boundary. Basic constitutional notions of separation of power as reflected in the

Michigan Constitution, *see* Const 1963, art 3, §2, require that this Court give substantial deference to these repeated and consistent legislative pronouncements. The Court has consistently honored this constitutional principle of judicial deference to reasonable acts of the Legislature. For example, in *Charter Twp of Northville* v *Northville Public Schools*, 469 Mich 285, 290; 666 NW2d 213 (2003), this Court stated: "If unambiguous, the Legislature will be presumed to have intended the meaning expressed [in the statute], and the courts enforce that meaning without further judicial construction or interpretation." (Citation omitted.) More recently in *Mayor of Lansing* v *Michigan Public Service Comm'n*, 470 Mich 154, 157; 680 NW2d 840 (2004), the court reiterated this rule of construction and stated that it applied to statutes and administrative regulations. The court emphasized that its task "under the Constitution is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law." *Id.* at 161. The court also determined that the clear language of the statute in question "compels a particular result, and the justices of this majority do not believe themselves empowered to reach a different result by substituting their own policy preferences for those of the Legislature." *Id.* at 164. And most recently, this Court affirmed the general rule that "the proper exercise of the 'judicial power' will obligate the judiciary to give faithful effect to the words of the Legislature – for it is the latter that exercises the 'legislative power,' not the judiciary . . . ." *National Wildlife Federation* v *Cleveland Cliffs Iron Co*, 471 Mich 608, 637; 684 NW2d 800 (2004).

Amicus Curiae Watershed Council respectfully urges this Court to maintain fidelity to the ordinary high-water mark as the administratively and statutorily established boundary separating private uplands from public bottomlands, and reject the water's edge claims advanced by

Defendants-Appellees and Amici Curiae SOS and Chamber, which represents a radical change in Michigan's property rules pertaining to the Great Lakes shoreline.

B. The Great Lakes Submerged Lands Act and the public trust doctrine regulate and protect waters of the Great Lakes and bottomlands below the ordinary high-water mark.

1. Introduction

Amicus Curiae Watershed Council basically agrees with the summary and historical analysis of the public trust doctrine contained in Plaintiff-Appellant's Brief In Support Of Leave To Appeal (*see* pages 10-23), since it is based on three other primary sources.[9] Amicus Curiae Watershed Council writes separately on this issue to emphasize the importance of the public trust doctrine to protecting Michigan's magnificent coastal resources, and to take strong exception to Amicus Curiae SOS's denigration of this ancient and venerable doctrine as the "so-called public trust doctrine." *See* Amicus Curiae SOS Brief at 22. Amicus Curiae Watershed Council is also concerned that although the Court of Appeals recognized and cited authority where Michigan had clearly adopted the public trust doctrine, *see Glass, supra* at 42-43, the Court of Appeals misapprehended several key aspects of the doctrine. Specifically, the Court of Appeals used the water's edge as the key jurisdictional dividing line (*see id* at 43), as opposed to the ordinary high-water mark, which is the statutorily established and judicially recognized correct line for the state's public trust jurisdiction over Great Lakes bottomlands.

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[9] *See* generally David C. Slade, Putting The Public Trust Doctrine To Work (2d ed 1997); Chris A. Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L REV 9, 71-90 (Spring 1999); and Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH L REV 473 (1970).

2. Overview of the Public Trust Doctrine

The public trust doctrine traces its lineage back to Roman Law and the Codes of Justinean which was later incorporated into English common law and ultimately recognized by the federal and state courts in this country in a series of decisions in the 1800's.[10] The basic tenant of the public trust doctrine is that certain natural resources, especially the waters and submerged lands of the sea coast and navigable lakes and rivers, are of such importance to the public that they are incapable of purely private ownership and control.[11] The public trust doctrine was first recognized in American jurisprudence in an 1821 New Jersey case involving dredging of an oyster bed in Raritan Bay,[12] and then broadly extended to all tidelands and tidal rivers by the Supreme Court in *Martin* v *Waddell's Lessee*, 41 US (16 Pet) 367 (1842). The Court next extended the public trust doctrine up the Mississippi River in *Barney* v *City of Keokuk*, 94 US (4 Otto) 324 (1876), and finally into the Great Lakes in *Illinois Central R Co* v *Illinois*, 146 US 387, 437, (1892), a case that Professor Sax refers to as the "lodestar" of American public trust law.[13]

In *Illinois Central*, *supra,* the Court invalidated a purported legislative conveyance of over 1,000 acres of Lake Michigan bottomlands along the Chicago waterfront, *see id.* at 454, and held that certain uses of the navigable waters of the Great Lakes, including commerce, fishing

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[10] *See* Slade, *supra* at 3-5; *see also* Shafer, *supra* at 71.

[11] *See id.*

[12] *See Arnold* v *Mundy*, 6 NJL 1 (NJ 1821).

[13] *See* Sax, *supra* at 489.

and navigation, must be protected for the public. *See id.* at 452. In reaching this conclusion, the Court stated in a frequently quoted passage:

> The state can no more abdicate its trust over property in which the whole people are interested, like the navigable waters and the soils under them, so as to leave them under the exclusive control of private parties, except in the instance of parcels mentioned for the improvement of navigation and use of the waters, or when parcels can be disposed of without impairment of the public trust interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace. Id.* at 453 (emphasis added).

This emphatic statement in *Illinois Central* is especially germane to this case because conversion of public trust bottomlands and resources to purely private use is exactly what Defendants-Appellees and Amici Curiae SOS and Chamber are trying to accomplish with their water's edge ownership claim.

In describing the nature of the state's trust in the Great Lakes submerged lands, the Court stated:

> But it is a title different in character from that which the state holds in lands intended for sale . . .It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, and have liberty of fishing therein, *freed from the interference of private parties*. *Id.* at 452 (emphasis added).

In a passage especially germane to the Great Lakes Submerged Lands Act, *supra*, and recognized by this Court with its decision in *Obrecht* v *National Gypsum Co, supra*, the Court stated:

> The soil under the navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. *It is therefore appropriately within the exercise of the police power of the state. Id.* at 459 (emphasis added).

Just two years after it's decision in *Illinois Central*, the Court strongly affirmed the public trust doctrine in *Shively* v *Bowlby, supra,* a case the Court later referred to as "the seminal case in American public trust jurisprudence." *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 473 (1988). This decision contains an excellent discussion of the evolution of the public trust

doctrine from salt water tidal areas into freshwater rivers and lakes. *See Shively supra* at 15-19, 49-50. The Supreme Court has recently affirmed the continued vitality of the public trust doctrine with its decision in *Phillips Petroleum, supra,* which confirmed state ownership over, and extended the public trust authority into very shallow tidal flats and coastal wetlands along the Gulf of Mexico in Mississippi. *See id.* at 476, 479-80.

3. Michigan Adopts and Consistently Administers the Public Trust Doctrine

For over a century this Court has repeatedly recognized and applied the public trust doctrine to both Great Lakes bottomlands and inland navigable rivers and streams. Just four years after *Illinois Central, supra,* this Court quoted extensively from Justice Field's majority opinion to confirm state ownership of the bottomlands of Lake Erie in *People* v *Silberwood*, 110 Mich 103, 107-108, 67 NW 1087 (1896). Just five years later, in *State* v *Lake St. Clair Fishing & Shooting Club*, 127 Mich 580, 594-595; 87 NW 117 (1901), this Court again quoted extensively from *Illinois Central, supra,* to confirm state ownership and public trust nature of the bottomlands of Lake St. Clair. A few years later the court was again confronted with bottomland title issues on Lake St. Clair in *State* v *Venice of America Land Co,* 160 Mich 680; 125 NW 770 (1910), and again confirmed that the state owned the bottomlands of Lake St. Clair and that this ownership and public trust nature extended to the shallowest parts of the lake. *See id.* at 689-690, 701. This Court also held that because of the trust nature of the bottomlands, the state could not be divested of its ownership through adverse possession. *See id.* at 702. This Court again confirmed the state's ownership of and public trust responsibility over Lake St. Clair bottomlands in *Nedtweg* v *Wallace* (On Rehearing) 237 Mich 14, 16-17, 20; 208 NW 51 (1927), which also cited and relied on *Illinois Central, supra.* Finally, the Court extended these

ownership and trust authorities of the state to the bottomlands of Lake Michigan in *Hilt, supra* at 224-225.

Over 75 years ago this Court also extended the public trust doctrine to inland navigable rivers in *Collins* v *Gerhardt*, 237 Mich 38; 211 NW 115 (1926), a case involving a wading fisherman on the Pine River. The court first confirmed that the river was navigable because it had been used to float commercial logs during the logging era. *See id.* at 45. The court observed that although plaintiff owned the bed of the river, he did not own the water or the fish in the river, which, "[s]o far as they are capable of ownership they belong to the State for the common benefit of the people." *Id.* The court determined that the riparian owner took title to their property subject to the state's paramount trust interest. *See id.* at 47. This Court emphasized: "It is immaterial who owns the soil in our navigable rivers. The trust remains. From the beginning the title was impressed with this trust for the preservation of the public right of fishing and other public rights, which all citizens enjoyed in tidal waters under common law." *Id.* at 48. Regarding the nature of the state's trust interest, the court stated that as long as water flowed and fish swam in the Pine River, the public's rights of fishing *"are protected by a high, solemn and perpetual* trust, which it is the duty of the state to forever maintain.*"* *Id.* at 49 (emphasis in original). These broad underlying principles of public access to and public trust protection of navigable rivers were subsequently affirmed by this Court in *Attorney General, ex rel* v *Taggart,* 306 Mich 432; 11 NW2d 193, 196 (1943).

With its decision in *Obrecht* v *National Gypsum Co,* 361 Mich 399; 105 NW2d 143, (1960), a case involving a large commercial dock and navigation channel on Tawas Bay, this Court returned to the Great Lakes and continued the evolution of the public trust doctrine in Michigan. In *Obrecht*, this Court stated that the Supreme Court, "equally with legislative and

executive department's is one of the sworn guardians of Michigan's duty and responsibility as trustee" over the beds of the Great Lakes with the state's boundaries. *Id* at 412. The court stated that it had previously committed itself "to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central R Co* v *Illinois*." *Id.* (citation omitted). In affirming the state's right to authority to regulate navigation structures and protect Great Lakes bottomlands, the court determined that "the public title and right is supreme as against *National Gypsum's* asserted right of wharfage, and hold that the later may be exercised by the company only in accordance with the regulatory assent of the state." *Id.* at 413. This establishes a firm rule of the public trust doctrine in Michigan that private riparian interests are subservient to the state's public trust authority. *See* Shafer, *supra* at 82. In language especially germane to the present case, the court rejected the notion of unrestrained private riparian rights and declared that it was not inclined to "open our shoal waters and renowned miles of sandy beaches to ruthless and uncontrolled exploitation . . . ." *Id.* at 417.

Most recently, as previously discussed in Part III A2, *supra*, the court in *Peterman, supra*, confirmed the state's navigational servitude and public trust responsibility over the Great Lakes bottomlands. *See Peterman, supra* at 193-194. (citing *Venice America, supra, Collins* v *Gerhardt, supra,* and *Nedtweg* v *Wallace, supra*). Thus, for over one hundred years this Court has faithfully and consistently applied the public trust doctrine to protect Michigan's Great Lakes submerged lands resources.

4. <u>The GLSLA Codifies the Public Trust Doctrine in Michigan.</u>

The Great Lakes Submerged Lands Act as originally enacted in 1955 and amended in 1965 and 1968, *see* Part III A2, *supra,* is essentially a codification of the public trust doctrine for

Michigan's Great Lakes domain.[14] This statute, now codified as Part 325 of NREPA, *supra,* has repeated references to public trust principles and mandates. For example, Section 2 of Part 325 specifies that "[t]his part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section [meaning those submerged lands lying lakeward of the natural ordinary high-water mark]. . . ," and that private use or regulated filling of bottomlands "will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that *the public trust in the state will not be impaired* . . . ." MCL 324.32502 (emphasis added). Section 3 of Part 325 authorizes the Department of Environmental Quality (DEQ) to enter into agreements and leases for the private use of the waters and submerged lands "after finding that the public trust in the waters will not be impaired or substantially affected." MCL 324.32503(1). This section also authorizes the Department to regulate "dredging or placing spoil or other materials on bottomlands," MCL 324.32503(2), a provision that is fully consistent with the public trust mandate to protect the waters and beds of the Great Lakes, and the constitutional mandate to prevent pollution, impairment and destruction of the state's natural resources. *See* Const 1963, art 4, §52.

In addition to the statutory public trust mandates, the Department of Natural Resources (DNR) promulgated administrative rules in 1982 that reflect this commitment to protect the public trust resources. The administrative rules specifically define "public trust" as "the perpetual duty of the state to secure to its people the prevention of pollution impairment or destruction of its natural resources, and rights of navigation, fishing, hunting and use of its lands and waters for other public purposes." 1982 AACS R 322.1001)(m)(attached as Appendix 5C),

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[14] *See* Shafer, *supra* at 85. *See also*, *Superior Public Rights* v *Dep't of Natural Resources*, 80 Mich App 72, 85; 263 NW2d 290 (1977), where the Court of Appeals stated that "[t]he tests set forth in *Illinois Central R Co, supra,* and the Great Lakes Submerged Lands Act, *supra,* are nearly identical, and go about *protecting public trusts in a similar manner*."(Emphasis added).

now codified at 1999 AC, R 322.1001 *et seq.* These rules also list the four commonly recognized riparian rights identified in *Hilt, supra* at 225, "subject to the public trust," R 322.1001(o), and specify that in authorizing permits for placing fill and structures such as shore protection devices, docks and marinas on Great Lakes bottomlands, previously the DNR and now the DEQ "may require such conditions as it deems reasonable and necessary to *protect the public trust* and private riparian interests . . . ." R 322.1011(1) (emphasis added). The DEQ may also authorize an upland channel if, among other requirements, it determines that the channel will not impair "the *public trust or interest*, including fish and wildlife habitat, in the adjacent land and water area." R 322.1012(1)(a) (emphasis added). Finally, the rules require the DEQ in evaluating applications for permits, leases, deeds and agreements to determine that "the adverse impacts to the environment, *public trust*, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible." R 322.1015 (emphasis added). Thus, the administrative rules of the agency charged with protecting the state's Great Lakes public trust resources fully reflect this public trust duty, which has been consistently mandated by this Court's decisions for over a century.

5. Fluctuating Water Levels Significantly Affects the Ecology of Great Lakes Shorelines

As discussed previously in Part III A 2, short term, seasonal, and long-term water level fluctuations occur on the Great Lakes, and these fluctuations all influence the location of the water's edge at any point in time. As water levels rise and fall in the vertical dimension, the horizontal location of the water's edge changes. The magnitude of this horizontal change is dependent on the slope of the lake bottom. For example, in Saginaw Bay on Lake Huron, where the slope of the lake bottom is nearly level, any change in water level has the effect of exposing or inundating large amounts of lakebottom. During the recent period of low water levels, federal

officials observed that a one foot decrease in water levels at one location on Saginaw Bay resulted in over 1000 feet of lake bottom being exposed in the waterward direction.[15] In contrast, on a shoreline with a nearly vertical slope like the sandstone cliffs of Pictured Rocks National Lakeshore on Lake Superior, a foot drop in water levels would result in almost no horizontal change in the water's edge.

Water level fluctuations are especially important to Michigan's coastal wetlands, which are some of the most ecologically valuable habitat areas in the state. [16] In addition to songbirds, amphibians and mammals, coastal wetlands provide habitat for two dozen waterfowl species,[17] and approximately 90% of all fish species are dependent on these areas for some aspect of their life history.[18] These fish and wildlife resources fuel a multi-billion dollar recreational industry in Michigan.[19] Coastal wetlands also protect water quality by absorbing polluting nutrients and reducing erosion and sediment suspension by absorbing wave action along the shoreline.[20] The ecological value of Michigan's remaining coastal wetlands, which are located primarily on Saginaw Bay, Lake St. Clair, Thunder Bay, in the Les Chennaux Islands, and along the western

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[15] *See* Telephone Interview, Thomas Allenson, U.S. Army Corps of Engineers, Detroit District, December 6, 2004.

[16] *See* Patricia Chow-Frazer and Dennis A. Albert, Biodiversity Investment Areas: Coastal Wetlands Ecosystems, State of Lakes Ecosystem Conference (SOLEC), available at http://www.epa.gov/glnpo/solec98/papers/coastalbia/index.html (1998).

[17] *See id.*

[18] *See* David J. Jude and Janice Papas, *Fish Utilization of Great Lakes Coastal Wetlands*, 18(4) J Great Lakes Res 651(1992).

[19] *See* U.S. Fish and Wildlife Service, 1996 National Survey of Fishing, Hunting and Wildlife-Associated Recreation, at 10, 98-99 (1996).

[20] *See* Michigan Dep't of Natural Resources, Coastal Wetlands Value Study In Michigan, Vol 2 at 13-14, 43-47 (1978).

end of Lake Erie, is all the more critical because Michigan has lost over 70% of its original estimated 369,000 acres of these resources.[21]

The dynamic nature of coastal wetlands and their reliance on fluctuating water levels is well documented.[22] Although water level fluctuations cause large stresses to coastal wetlands, they are vital in maintaining wetland diversity.[23] Important shorebird habitat is created as the lakes recede toward the lower end of the cycle. *See* Appendix 4. After a growing season during the low water levels, the exposed bottomlands quickly become vegetated and provide excellent habitat for a wide range of wildlife and protection from wind erosion.[24] When the water levels rise again after several years, the vegetated bottomlands are flooded again, providing excellent aquatic habitat for fish and wildlife, as well as reducing erosion caused by waves and storm action.[25] Thus it is of crucial importance to the ecological health of Michigan's Great Lakes shorelines that the coastal wetland vegetation is allowed to naturally respond to changing water levels and not be artificially destroyed or altered by mechanical or other means.

Protecting essential fish and wildlife habitat as an integral component of a state's public trust authority was first recognized in California. In *Marks* v *Whitney*, 491 P2d 374 (Cal 1971), the California Supreme Court recognized recreational and ecological concerns as a legitimate

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[21] *See id.* Vol 1, at 50.

[22] *See* generally Leah D. Mink, Great Lakes Coastal Wetlands: An Overview of Controlling Abiotic Factors, Regional Distribution and Species Composition, Michigan Natural Features Inventory (1998); Doug Wilcox and Thomas Whillans, *Techniques for Restoration of Disturbed Coastal Wetlands of The Great Lakes*, J Soc Wetland Scientists, Vol 9, No 4 (1999).

[23] *See* Doug Wilcox and Laurie Maynard, Coastal Wetlands-State of Lakes Ecosystem Conference (SOLEC), http://www.epa.gov/glnpo/solec/96/coastal/index.html (1996).

[24] *See* Wilfred Cwikiel, Beach Grooming or Wetland Destruction?, National Wetlands Newsletter, vol 25, no 5 (2003).

[25] *See id.*

aspect of the state's public trust responsibilities over its tidelands. In *National Audubon Soc'y* v *Superior Court of Alpine County,* 658 P2d 709 (Cal 1983), the California Supreme Court extended this public trust responsibility to diversions of water that were adversely affecting salinity levels and nesting habitat for migratory birds in Mona Lake, a navigable lake in eastern California. And finally, our sister Great Lakes state of Wisconsin used the public trust doctrine to protect riverine floodplain and wetland habitat from private filling activities in *Just* v *Marinette County*, 201 NW2d 761 (Wis 1972). The Wisconsin Supreme Court stated in an oft-quoted passage that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Just, supra* at 768. The court emphasized that the "[t]he State of Wisconsin under the [public] trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters." *Id.* The court further declared that "[t]he active public trust duty of the state of Wisconsin in respect to navigable waters requires the state to not only promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty." *Id.* (citing *Muench* v *Public Serv Comm'n*, 53 NW2d 514 (Wis 1952). The Wisconsin Supreme Court affirmed the public trust principles as applied to wetlands protection in *Zealy* v *City of Waukesha*, 548 NW2d 528 (Wis 1996).

In *K & K Construction* v *Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998), this Court recognized that the state of Michigan had "a legitimate interest in protecting and preserving wetlands." *Id.* at 585 (citing *Harkings* v *Dep't of Natural Resources*, 206 Mich App 317,324; 520 NW2d 653 (1994)("the WPA [Wetlands Protection Act] unquestionably advances a legitimate state interest.") This is especially true for the Great Lakes, where the coastal wetlands are on bottomlands owned by the state of Michigan and held in trust for all the

citizens of Michigan for navigational, recreational *and* ecological purposes. Although the Court of Appeals recognized this stewardship responsibility over the Great Lakes bottomlands in its decision in *Glass, supra* at 43, it incorrectly used the water's edge as the upper limit of the state's public trust jurisdiction, instead of the judicially recognized, statutorily established, and ecologically necessary ordinary high-water mark. Therefore, Amicus Curiae Watershed Council respectfully urges this Court to correct this aspect of the Court of Appeals' decision to reflect, consistent with over 100 years of public trust jurisprudence in this state and the express terms of Part 325, *supra,* that the state's public trust authority extends to the waters of the Great Lakes, whether above or below the ordinary high-water mark, and that its ownership of the Great Lakes bottomlands extends up to the statutorily established ordinary high-water mark for each lake. *See* MCL 324.32502.

C. This Court should give substantial deference to longstanding agency policy in interpreting and administering the GLSLA, especially where it establishes a well-settled rule of property.

As discussed previously in Part III A2, *supra*, the agency charged with administering the GLSLA originally and now Part 325 (initially the former Department of Conservation, then the DNR and since 1996 the DEQ), has since at least 1958 had a consistent policy of using the ordinary high-water mark as the legal boundary separating private riparian uplands from state owned Great Lakes bottomlands. The former Department of Conservation promulgated two sets of administrative rules in 1958 and 1967 that defined and used the ordinary high-water mark as the legal ownership boundary along the Great Lakes shorelines for resolving trespasses and issuing deeds, leases and agreements. *See* Part III A2, *supra,* and Appendix 5. In 1968, the Michigan

Legislature ratified the administrative agency's policy by amending the GLSLA, *supra*, to specifically incorporate the ordinary high-water mark as the proper legal boundary separating uplands from bottomlands, and defined this line with specific elevations for each of Michigan's Great Lakes. *See* Part III A2, *supra*. Finally, in 1982 the Department of Natural Resources (DNR) promulgated the last set of administrative rules for the GLSLA, *supra*, which also reference and use the ordinary high-water mark as the proper legal boundary. *See* Part III A2, *supra*, and Appendix 5C. These administrative rules are still in effect today and used by the DEQ in administering Part 325, *supra*.[26] Thus for over 45 years the ordinary high-water mark has been the officially promulgated and statutorily endorsed boundary line for property ownership along the Great Lakes shoreline.

It is a general rule of administrative law in Michigan that an agency's interpretation of the authority granted in one of its statutes is entitled to deference by the courts. [27] Regarding an agency's administrative rules, Dean LeDuc observes: "As long as the rules promulgated are within the confines of the statute – that is, as long as the policy developed in the rules is consistent with the general policy in the statute – the policy reflected in the rules will be sustained." *Id.* at §1:06. Substantive administrative rules that are properly promulgated have the force of law and are equally binding on the administrative agency and the public, as well as the courts. *See id.* at §4:21. In addition to the deference normally given to an agency's expertise and administrative experience, courts "defer to agency interpretations which have received long-standing acquiescence from the Legislature." *Id.* at §9:19 (citing *Magreta* v *Ambassador Steel*

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[26] *See* Telephone Interview, Thomas P. Graf, Submerged Lands Specialist, Michigan Dep't of Env Quality (December 10, 2004).

[27] *See* Don LeDuc, Michigan Administrative Law, §1:02 (2d ed 2001); *see* also 22 Michigan Civil Jurisprudence, Statutes §164 (1998).

Co, 380 Mich 520; 158 NW2d 475-476 (1968)). In the case of the administering agencies' definition and consistent use of the ordinary high-water mark, not only has there been longstanding acquiescence by the Legislature, but the Legislature specifically endorsed this boundary line with its amendments in 1968, and again in 2000 and 2003. *See* Part III A 3., *supra.*

In addition to Dean LeDuc's principles of judicial deference to agency policy, another leading treatise states emphatically: "A long-standing construction given to a statute by the executive department of the state government, which has been accepted as universal, will not be disturbed without strong reasons, especially where it has become, to some extent a rule of property, and where many titles depend on it."[28] This Court held precisely this in *Malonney* v *Mahar*, 1 Mich 26 (1847), where many recorded titles were based on longstanding interpretations of statutes administered by county treasurers and their deputies. *See id* at 30. In view of this situation, this Court stated that the longstanding interpretation had become a rule of property with many titles depending on it and, therefore, it was "important to sustain the acts of the deputy, unless his authority to do the act complained of is manifestly against law." *Id.*

This is precisely the situation we are faced with in the current case with a well settled rule of property firmly in place for over 45 years and repeatedly used by the lead administrative agencies in resolving title disputes and issues along the Great Lakes shoreline. As early as 1960, the Department of Conservation reported that it had successfully used the ordinary high-water mark to resolve over 400 bottomland trespass cases located primarily on Lake St. Clair. *See* 1960 Dep't of Conservation Internal Memorandum, *supra*, (attached as Appendix 8). Since 1960, literally hundreds of additional deeds, leases, agreements, boundary determinations and certificates of accretion have been issued by the state predicated on the ordinary high-water mark

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[28] 22 Michigan Civil Jurisprudence, Statutes at §168 (1998).

as the legal boundary between private and public shoreline property.[29] Undoubtedly, in many cases the original deeds, leases, and agreements have been conveyed down the chain of title to successive purchasers or assigned to new operators of marinas and commercial navigation facilities.[30] Consequently, the ordinary high-water mark and the administrative agencies' consistent use of it for over 45 years has become a well-settled rule of Great Lakes property law in Michigan. Literally hundreds of private, public, and commercial deeds, leases and other instruments of conveyance authorized by Part 325, *supra*, have been issued in reliance on this legal boundary and, in turn, conveyed to many subsequent purchasers in good faith. Therefore, Amicus Curiae Watershed Council respectfully urges this Court to show proper deference to this long standing agency policy, as specifically adopted and endorsed by the Legislature, and not disturb this settled rule of shoreline property ownership. We also ask this Court to categorically reject Defendants-Appellees' and Amici Curiae SOS and Chamber's claims that the water's edge is the proper legal ownership boundary, which would represent a radical change in Great Lakes shoreline rules of property.

D. Defendants-Appellees and Amici Curiae SOS and Chamber have missed the pertinent statute of limitations by several decades and the doctrine of laches should operate to enjoin their water's edge claims.

Defendants-Appellees and Amici Curiae SOS and Chamber are claiming on appeal in this case that riparian owners along the Great Lakes shoreline own to the water's edge, which over the past several years of lower water levels has been substantially lakeward of the ordinary high-

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[29] *See* Telephone Interview with Thomas P. Graf, *supra.*

[30] *See id.*

water mark. This essentially amounts to an equitable quiet title claim or a legal action of ejectment against the State of Michigan for its Great Lakes bottomlands up to the ordinary high-water mark. The Revised Judicature Act (RJA), MCL 600.101 *et seq.*, created a single cause of action that was previously provided by quiet title and ejectment actions. [31] This combined title action is now provided in MCL §600.2932(1) and it eliminated the formal distinctions between quiet title and ejectment actions. *See* Cameron, *supra* at §30.26. Section 2932(5) of the RJA provides that actions under this combined title remedy are equitable in nature. *See* MCL §600.2932(5). Section 5815 of the RJA provides that the pertinent statute of limitations applies to all equitable and legal actions, and that the doctrine of laches applies "in actions where equitable relief is sought." MCL §600.5815. *See Tray* v *Whitney*, 35 Mich App 529, 534-535; 192 NW2d 628 (1971). Section 5801 of RJA provides that the period of limitations for real property actions ranges from 5 years for a fiduciary's deed or court-ordered sale to 15 years for prescriptive or adverse possession claims. *See* MCL 600.5801(1)-(4). Concerning the relationship between periods of limitation and laches, this Court explained in *Lothian* v *Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982), that laches is concerned with the effect of delay and periods of limitation are concerned with the fact of delay. (Citations omitted.) This Court also declared in *Rowry* v *Univ of Michigan*, 441 Mich 1, 11; 490 NW2d 305 (1992), that "laches can operate to cut short a statutory limitation period when equitable relief is sought." The court held that where the doctrine of laches applied, the exercise of due diligence was required to avoid unduly prejudicing the parties. *See id.*

Applying these concepts and rules to the current case, it is readily evident that the Appellees and Amici Curiae SOS and Chamber are far past any pertinent statute of limitation to

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[31] *See* John G. Cameron, Michigan Real Property, §30.23 (2d ed 1993).

claim private ownership to the water's edge. As seen in the last section, Part III C, *supra,* the Department of Conservation first promulgated administrative rules in 1958 that adopted the ordinary high-water mark as the legal boundary between private uplands and public bottomlands, and by 1960 had successfully resolved hundreds of trespass claims on Lake St. Clair and Saginaw Bay. This line of demarcation was specifically adopted by the Legislature in the 1968 amendments to the GLSLA, *supra.* Therefore, the riparian property owners along the Great Lakes shoreline have been on at least constructive notice, if not actual notice, of this legal boundary administratively since 1958 and statutorily since 1968. Applying the most lenient statute of limitations for property disputes of 15 years leads unmistakably to the conclusion that Appellees and Amici Curiae SOS and Chamber are between 21 and 31 years too late in raising the water's edge claim. Also, since the RJA declares that the single quiet title action is equitable in nature, and that equitable claims are subject to the affirmative defense of laches, this doctrine also applies in the instant case. As noted, this Court held in *Rowry, supra,* that laches could reduce or cut short the applicable statute of limitations where the parties would be prejudiced by undue delay. For over 45 years the Department of Conservation initially, then the DNR, and most recently the DEQ have issued hundreds of deeds, leases, agreements and other conveyances all in reliance on the ordinary high-water mark as the proper legal boundary. This seems like an especially appropriate circumstance to apply the doctrine of laches and the pertinent statute of limitations, and conclude that Appellees and Amici Curiae SOS and Chamber are at least 2 to 3 decades too late to pursue their water's edge claim. Therefore, Amicus Curiae Watershed Council respectfully urges this Court to reject, estop and otherwise enjoin Appellees' and Amici Curiae's water's edge claim.

Amicus Curiae Watershed Council also urges this Court to reject Amici Curiae's bogus takings claim raised in their briefs, *see* SOS Brief at 47 and Chamber Brief at 16, because ownership of the bottomlands below the ordinary high-water mark is well established to be in the state of Michigan, impressed with the public trust doctrine, and there is no taking and can be no taking under these circumstances.[32] In dramatic contrast, it should be noted that this Court has previously held in both *Lake St. Clair Shooting Club supra*, and *Venice of America, supra*, that the statute of limitations and claims of adverse possession will not run against the state over its Great Lakes bottomlands because of their special public trust character. In addition, the RJA was amended in 1988 to eliminate the statute of limitations against state lands in general. *See* 1988 PA 35, now codified at MCL 600.5821(1). This reinstated the common law rule that a plaintiff could not successfully claim adverse possession over state owned property. *See Gorte* v *Dep't of Transportation*, 202 Mich App 161,166; 507 NW2d 797 (1993). In *Goodall* v *Whitefish Hunt Club*, 208 Mich App 642,647; 528 NW2d 221 (1995), the court observed that the Legislature's 1988 amendment was based on a conclusion that adverse possession of state-owned property was against public policy. Therefore, because of the state ownership and public trust character of the property involved, Appellees' and Amici's claims of ownership to the water's edge, which would displace the public's title and public trust interest in thousands of acres of Great Lakes bottomlands, should be dismissed and permanently enjoined.

IV. CONCLUSION

The Court of Appeals correctly decided in this case that traditionally there was no legally recognized right in Michigan for the public to traverse across the dry beaches and exposed

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[32] *See* Shafer, *supra* at 94-100. *See also*, this Court's affirmation of state navigation servitude and no compensation rule for damages below the ordinary high-water mark in *Peterman, supra*.

lakebed below the ordinary high-water mark along the Great Lakes shoreline. However, as the Court of Appeals held, the public does have the legal right to wade and walk in the shallow waters of the Great Lakes bottomlands. In addition, daily, seasonal and long-term fluctuations of water levels all occur in this highly dynamic coastal environment causing the water's edge to move dramatically from hour to hour, day to day, and year to year. Therefore, using the wet sand area as the upper limit of the public's right of passage along the bottomlands is consistent with the dynamic nature of the Great Lakes.

The ordinary high-water mark is the judicially recognized, administratively utilized, statutorily established, and ecologically necessary legal boundary line between privately owned uplands and publicly owned bottomlands. For over 100 years this Court has consistently recognized that the public trust doctrine imposed a solemn duty on the state of Michigan to firmly protect the waters of the Great Lakes and the state owned bottomlands below the ordinary high-water mark. Therefore, the Court of Appeals clearly erred when it stated that the water's edge was the boundary line for public trust purposes. In view of the administrative agencies' consistent policy for over 45 years in interpreting and administering first the GLSLA, *supra,* and now Part 325, *supra*, with the ordinary high-water mark as the proper legal boundary, this Court should give substantial deference to this long-standing agency policy, especially where hundreds of deeds, leases and other conveyances have been issued based upon it. And finally, Defendants-Appellees and Amici Curiae SOS and Chamber are several decades past the pertinent statute of limitations to raise their water's edge ownership claims and the doctrine of laches should be applied to permanently reject and enjoin their claims.

V. RELIEF REQUESTED

Amicus Curiae Watershed Council respectfully asks this Court for the following relief:

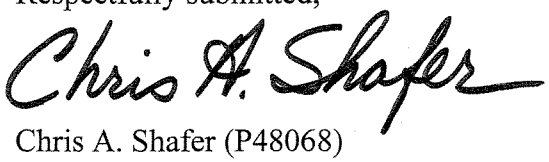
1. To affirm the ordinary high-water mark as the proper legal boundary that separates privately owned uplands from state owned bottomlands along the Great Lake shoreline;

2. To affirm that the public trust doctrine applies to the waters of the Great Lakes and state owned bottomlands below the statutorily established ordinary high-water mark and imposes a solemn fiduciary duty on the state of Michigan to protect these critical coastal resources;

3. To affirm the Court of Appeals' decision that the public has a legal right to walk on the state owned bottomlands of the Great Lakes below the water's edge, but to clarify that due to the highly dynamic nature of the shoreline, the water's edge includes the wet sand area impacted by wave action for purposes of lawful public passage; and

4. To reject Defendants-Appellees' and Amici Curiae SOS and Chamber's water's edge ownership claims as wholly without legal merit and decades past any reasonable time frame to be raised, and to reject their specious taking claim as a legal impossibility that cannot be applied to state owned bottomlands, which are strongly impressed with the public trust.

Respectfully submitted,



Chris A. Shafer (P48068)
Attorney for Amicus Curiae Watershed Council
Thomas M. Cooley Law School
300 South Capitol Avenue
Lansing, Michigan 48933

VI. APPENDICES

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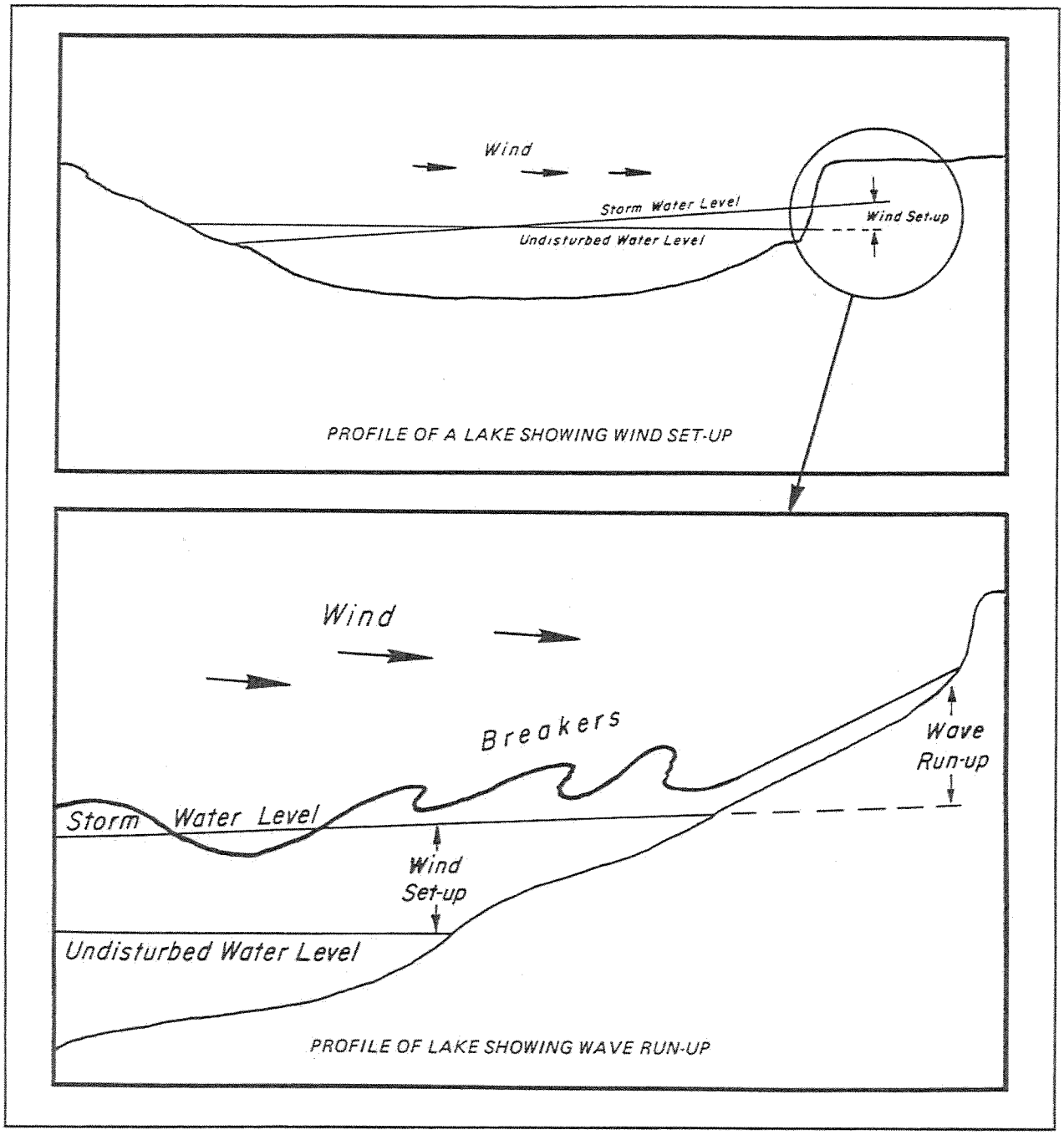
APPENDICES 1 – 4

Great Lakes Water Level Fluctuation
Graphs and Illustrations

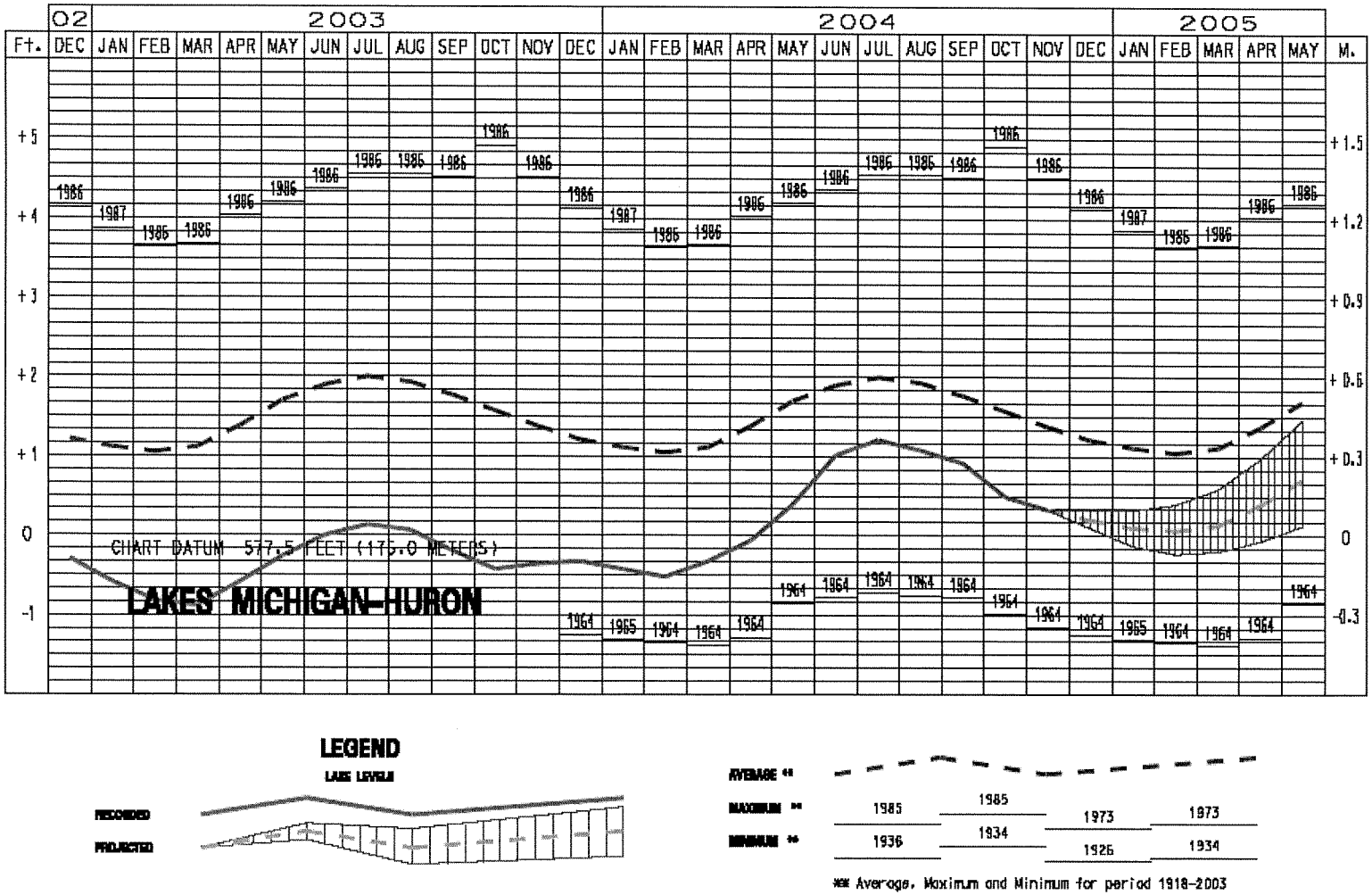
Appendix 1 – Graphical Interpretation of Short-Term Fluctuations



The above graphics show water level fluctuations caused by wind. Graphics from: Minc, Leah D. 1997 (revised 1998). Great Lakes Coastal Wetlands: An Overview of Controlling Abiotic Factors, Regional Distribution, and Species Composition. Michigan Natural Features Inventory. Lansing, Michigan. Used with permission of author.

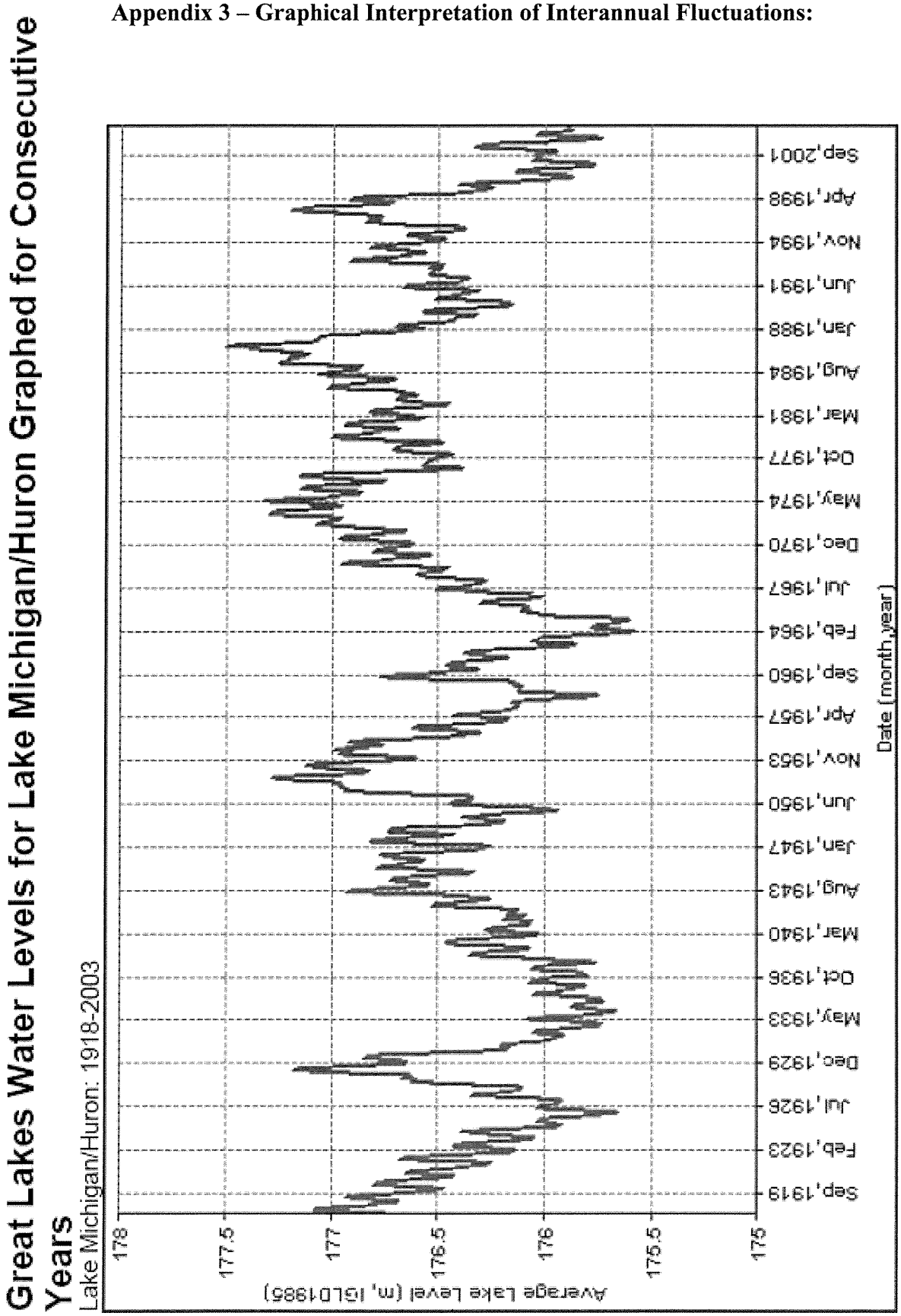
Appendix 2 – Graphical Interpretation of Seasonal Fluctuations:

LAKES MICHIGAN–HURON WATER LEVELS – DECEMBER 2004



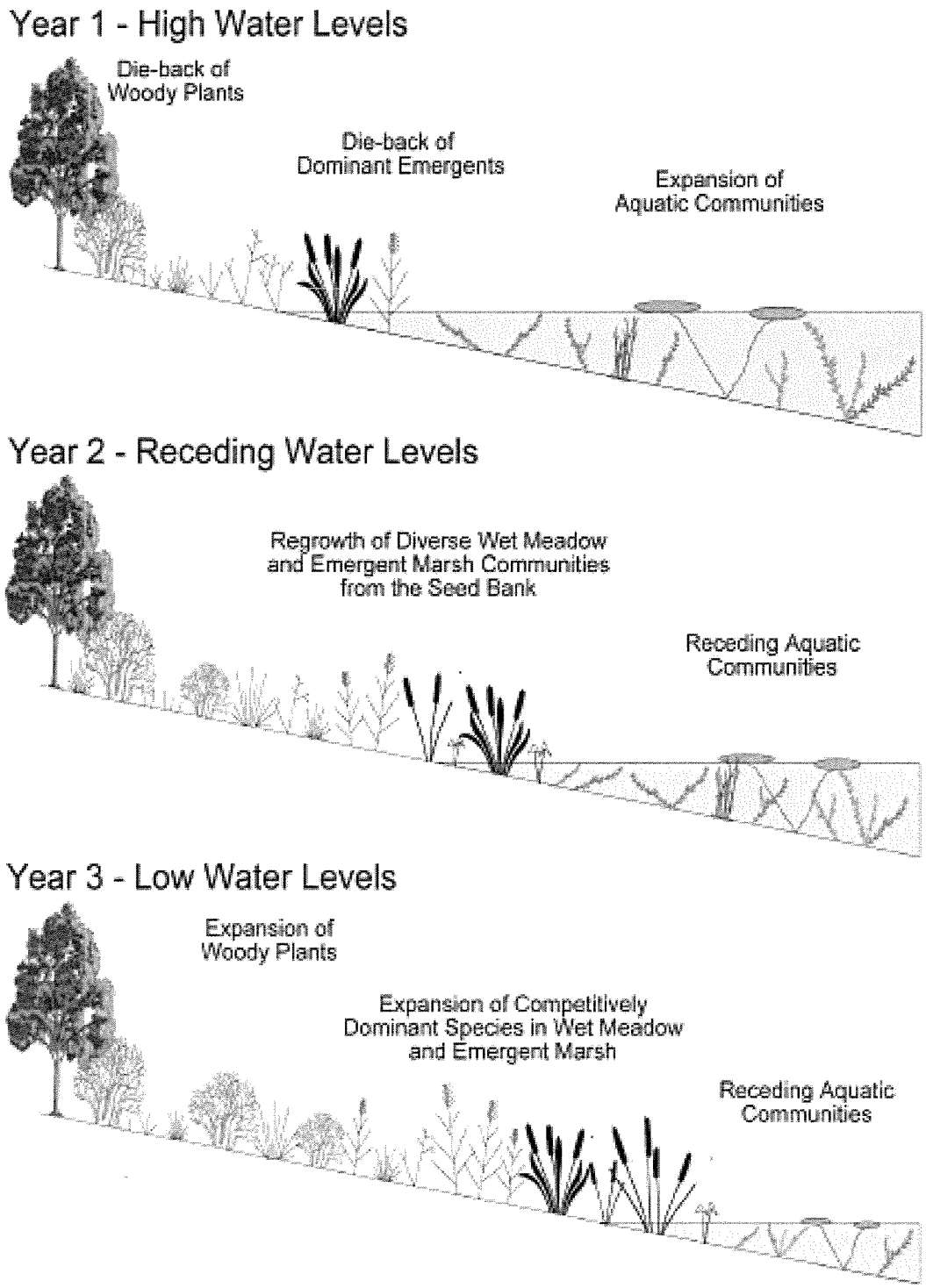
The U.S. Army Corps of Engineers has been measuring water levels on the Great Lakes since 1865. The above graph displays the average water levels (dashed line) for Lake Michigan-Huron since 1918, as well as record high and low water levels (line with year above) during that time. The graph also shows the recorded (solid line) and projected (dashed line with confidence intervals) water levels from December 2002 to May 2005. As shown by the long term average (dashed) line, the typical seasonal fluctuation of Lake Michigan-Huron from summer highs to winter lows is approximately one foot.

Appendix 3 – Graphical Interpretation of Interannual Fluctuations:



The above graph displays water level data collected by the U.S. Army Corps of Engineers from 1918 to 2003. The short term (29 to 38 year), "quasi-periodic," water level fluctuations identified by Thompson and Baedke can be seen on this graph.

Appendix 4 – Graphical Interpretation of Effects of Water Level Fluctuations on Coastal Wetlands



The dynamic nature of Great Lakes coastal wetlands and their reliance on fluctuating water cycles is well documented (Minc 1997, Wilcox and Whillans 1999). Although water level fluctuations cause large stresses to coastal wetlands, they are ultimately vital in maintaining wetland diversity (Wilcox and Maynard 1996). Important shorebird habitat is created as the lake levels trend toward the low part of the cycle. After a growing season during low water levels, the exposed bottomlands quickly become vegetated and provide excellent habitat for a wide range of wildlife and reduce wind erosion. When the water levels come back up after a few years, the vegetated bottomlands are again flooded, providing excellent habitat for fish and waterfowl, as well as reducing erosion caused by waves. Graphic from Wilcox and Maynard 1996. Used with permission of authors.

APPENDIX 5

3 Sets of Great Lakes Submerged Lands
Administrative Rules

STATE OF MICHIGAN

Appendix 5A

SUPPLEMENT TO

1954
Michigan Administrative Code

CONTAINING

COMPILATION, CODIFICATION OR AMENDMENTS OF RULES, REGULATIONS OR ORDERS FILED BETWEEN JANUARY 1, 1959 and DECEMBER 31, 1959

1959 Annual Supplement

COMPILED BY THE
LEGISLATIVE SERVICE BUREAU
AND
SECRETARY OF STATE

By Authority of Act 88, P. A. 1943, as amended

SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1960

COOLEY LAW SCHOOL

DEPARTMENT OF CONSERVATION

PUBLIC EXHIBITION OF WILD ANIMALS

R 299.81—R 299.89.

HISTORY: 1944 AC, pp. 153-155; 1954 AC, pp. 1907-1909; superseded by R 299.91-R 299.105.

R 299.91—R 299.105.

HISTORY: 1955 AACS, pp. 70-75.

OIL AND GAS OPERATIONS

R 299.141 — R 299.190.

HISTORY: These rules are superseded by R 299.441a—R 299.490.

SPACING, DRILLING, DEEPENING AND PLUGGING OF WELLS FOR NATURAL DRY GAS

R 299.201 — R 299.244.

HISTORY: These rules are superseded by R 299.501—R 299.544.

GREAT LAKES SUBMERGED LANDS

R 299.351—R 299.363.

HISTORY: 1956 AACS, pp. 205-207. These rules have been superseded by R 299.371-R 299.381.

(By authority of Section 9, Act No. 247, Public Acts of 1955, as amended [CL 1948, § 322.709], and in compliance with Act No. 88, Public Acts of 1943, as amended, [CL 1948, § 24.71 et seq.] and Act No. 197, Public Acts of 1952, as amended [CL 1948, § 24.101 et seq.])

R 299.371.

1. Whenever used in these rules and regulations, the following definitions of words and phrases will be intended:

(a) "Ordinary high water line" shall refer to that natural line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be reestablished with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place.

(b) "Lake bottom land" shall refer to the lands in the great lakes and bays and harbors thereof lying below and lakeward of the natural ordinary high water line.

(c) "Upland" shall refer to the riparian and/or littoral property lying adjacent and contiguous to the lake bottom land for which application is made.

HISTORY: 1954 ACS 19, p. 8.

R 299.372.

2. Application forms mentioned under section 4(a) of the act may be obtained from the lands division, department of conservation, Lansing, Michigan. Each application shall indicate the kind of conveyance or agreement desired by the applicant, but the department of conservation reserves the right to offer such conveyance or agreement as shall best serve the public interest. A separate application shall be filed for each separate parcel of lake bottom land, except that 1 application shall be accepted for more than 1 parcel of bottom land fronting on a single upland ownership.

HISTORY: 1954 ACS 19, p. 8.

R 299.373.

3. The department of conservation shall accept applications for the sale, lease or other disposition of lake bottom lands only where the applicants can show that they are the upland owners of properties abutting or situated opposite the lake bottom lands, are the occupants of lake bottom lands by conveyances through the chain of title from upland owners, or otherwise hold all necessary legal rights for the specific purposes for which applications are filed.

HISTORY: 1954 ACS 19, p. 8.

R 299.374.

4. The abstract of title and tax history required under Section 4(b) of the act will be reviewed by the department of conservation to determine if the applicant is the riparian owner or occupant eligible to receive a deed, lease, or other agreement as provided under section 4(a) of the act. In lieu of an abstract of title, the department of conservation may request a title insurance commitment or policy and any other title evidence that it may deem necessary to establish that the applicant is the party eligible to receive a deed, lease, or other agreement.

HISTORY: 1954 ACS 19, p. 9.

R 299.375.

5. The $50.00 application fee required under section 4(c) of the act shall accompany the application and may be remitted by check, money order, or bank draft. This fee may be waived in cases where applications are filed by municipalities for lake bottom lands for public uses as provided under section 5(b) of the act.

HISTORY: 1954 ACS 19, p. 9.

R 299.376.

6. The approvals of federal, state, and local governmental agencies required under section 4(b) of the act shall be submitted to the department of conservation with the application in the following forms:

(a) The approval of any federal agency as required under the act shall include that of the United States corps of engineers as to any matters pertaining to or affecting navigation or other federal interests. A permit or letter to the applicant, or a true copy thereof, of consent or nonobjection from such federal agency, will be accepted as such approval.

(b) The approval of the Michigan waterways commission may be in any form or letter to the applicant which that body may deem necessary and sufficient to conform with the requirement in the act.

(c) The approval of the legislative body of the local unit of government shall be in the form of a certified copy of the resolution of the city or village council, or of the township board, as the case may be, granting such approval.

HISTORY: 1954 ACS 19, p. 9.

R 299.377.

7. Each application shall be accompanied by a map on 1 or more sheets of substantial paper or tracing cloth, including blue prints or their equivalent, but excluding tracing paper, prepared by a registered land surveyor as required under section 4(a) of the act. The map shall show the upland property owned by the applicant as well as the lake bottom land for which application is made, and shall show the location of the water's edge at the time the survey is made. The map may be prepared at any convenient scale, but shall not be smaller than 100 feet to an inch. The survey of the lake bottom land applied for shall be tied to a legal corner of a subdivision according to the original government survey, of a private claim, or of any lot, block, or boundary corner of a recorded subdivision or plat generally accepted and used for legal conveyancing of property in that area. Such corner shall not be located on submerged land of the great lakes at the time the survey for the application is made. Measurements shall be in feet and decimals thereof. The survey description of the lake bottom land applied for and the certification by a registered surveyor shall appear on the face of the map.

HISTORY: 1954 ACS 19, p. 9.

R 299.378.

8. Where application is made for filled in lake bottom land under section 5(a):

(a) In addition to the requirements given at paragraph 7 above, the lake bottom land shall be so surveyed and described as to run along the outermost edge of the sheet piling, shoring, cribwork, seawall, or similar installation providing for a vertical face to the lake bottom. Where no such installations have been placed, the lines shall run along the edge of the base of the natural slope of the material used for making and protecting the fill. Such lines may be straight, curvilinear, or similarly regular along practical courses rather than follow the exact irregular edges of such fill bases, but shall follow such edges as closely as practicable along average lines.

(b) The ordinary high water line before the fill was made shall be indicated and labeled on the map from the best information or evidence available, and shall constitute 1 or more of the exterior courses of the lake bottom land applied for where the parcel adjoins any upland. A statement by the applicant as to the source of such information or evidence of the ordinary high water line and the date of fill shall accompany the map. The indicated location of the ordinary high water line, however, shall in no way be binding upon the state of Michigan. Where additional or more reliable information as to the location of the ordinary high water line is obtained, the department of conservation, in its discretion, may cause the map to be corrected to show the more exact location of such ordinary high water line.

(c) In determining the consideration to be paid for lake bottom lands as provided in section 5(a) of the act, the improvements which are to be excluded in determining the fair, cash market value of the property shall be construed to be buildings, equipment attached to the land, installations and other improvements placed on the land after filling, erosion control works such as sheet piling, shoring, cribwork, sea walls, or similar installations to protect fills from erosion. The fill itself shall not be construed to be an improvement for which such exclusion will be made.

HISTORY: 1954 ACS 19, p. 9.

R 299.379.

9. Where application is made for unfilled lake bottom land under section 5(c):

In considering any application for unfilled bottom lands, the act shall be construed so as to preserve and protect the interests of the general public. The preservation of the natural shore line and of the public trust shall be of paramount concern. There must be a showing of clear and present necessity beyond mere convenience or economy. Application will be considered for only so much bottom land as is deemed necessary by the department of conservation in granting relief requested.

(a) Applications made for the purposes of flood, shore erosion, drainage, or sanitation control will be accepted for consideration where there is a definite need for such control. The variety of conditions under which necessity for these control measures can be shown is such that the applications will be considered on the particular circumstances surrounding each.

(b) Applications for straightening shore lines will be considered only where irregular shore lines to be eliminated are caused by man-made structures or caused by other activities of man beyond the control of the applicants. Such applications will be considered where projections of previously filled in lake bottom lands project lakeward of any individual applicant's land so as to form a pocket of water between such projections. In some instances applications will be considered where such projections form a pocket of water fronting on more than 1 riparian ownership if it can be shown beyond any reasonable doubt that the conditions and nature of the water pocket causes the owners involved to suffer damage in some manner.

(c) In addition to the requirements given at paragraph 7 above, the lake bottom land shall be surveyed and described as a metes and bounds description, with a showing on the map of the angles and lines measured on and from the upland which were used to calculate the positions of any points and lines located on submerged lake bottom lands by triangulation.

(d) The ordinary high water line shall be indicated and labeled on the map under the same requirements and conditions as given at paragraph 8(b) above. Where the application is made for the purpose of straightening an irregular shore line, the map

shall show to map scale the adjoining properties between which the proposed fill is to be made and the points thereon between which the lakeward line is to run.

(e) The fair, cash value to be paid as consideration for lake bottom land under section 5(c) of the act shall be determined by considering the fair, cash market value of the land as though it were completely filled in and suitable for the uses to which other filled in lake bottom lands in the same area are devoted, and then applying the same appraisal approach as given in section 5(a) of the act. The objective in view shall be that comparable lake bottom lands, whether filled or unfilled, will have comparable basic appraisal values.

HISTORY: 1954 ACS 19, p. 10.

R 299.380.

10. Where application is made for lake bottom land for marina purposes under section 5(d):

In considering applications for leases for marina purposes, the protection and enhancement of the public interest in the bottom lands and waters of the great lakes shall be of primary concern. The department of conservation shall give consideration to the character and current uses of adjacent shore and lake properties. An applicant may, under certain circumstances, be required to give supporting evidence satisfactory to the department of conservation that marina services in the locality are desirable.

(a) Applications shall not include any more fill area than is necessary to provide for the protection of the mooring area and to serve such other necessary purposes as are directly concerned with mooring and boat storage. Applications involving fills for secondary purposes which only supplement the primary purposes of such fills shall not be approved.

(b) If only unfilled lake bottom lands are involved in any application, the survey and map requirements given under paragraphs 7 and 9 above shall be met. If both filled and unfilled lake bottom lands are involved, the requirements under paragraphs 7, 8 and 9 shall be met.

(c) In addition to the above survey requirements, a plan shall be submitted showing the present or proposed marina development on lake bottom land, including the showing of fills, piling, and any other structures or improvements, together with the location, number, and size of all boat wells or slips.

(d) Application for a marina lease shall include the water area to be occupied and used for the marina, such as mooring and boat storage, turning basis, traffic lanes, and such filled-in projections from the upland as are needed for the protection or operation of the mooring area. If the development of a marina is to include the filling of lake bottom lands for the purposes of straightening a shore line, application for lands to be so filled shall be made under section 5(c) of the act. If it is to include lands already filled, applications for such filled lake bottom lands shall be made under section 5(a) of the act.

(e) The term of lease shall not exceed 25 years and shall have provision for renewal or extension upon satisfactory performance during the prior term of the lease.

(f) The lease shall provide for advance annual rental equal to 10% of the fair, cash value of the lake bottom land covered by the lease. The fair, cash value of the lake bottom land shall be determined by considering the fair, cash market value of the land as though it were completely filled in and suitable for the uses to which other filled in lake bottom lands in the same area are devoted, and then applying the same appraisal approach as given in section 5(a) of the act. The objective in view shall be a rental based on land values commensurate with values determined for lake bottom lands, whether filled or unfilled, for the other uses and purposes contemplated under the act. In any case, the annual rental shall not be less than $100.

(g) The lease shall provide that within 30 days of the expiration of the first 5-year period of the lease, and within 30 days of the expiration of each of the successive 5-year periods, a revaluation of lease rental shall be made for the purpose of determining an adjusted advance annual rental to be paid for the ensuing 5-year period of the lease. The adjusted rental shall be based on the fair, cash value of the lake bottom land at the time the revaluation is made, using the formula and approach given in section 10(f) above.

(h) The lease shall contain provisions for the lessee to remove all structures and improvements placed by him on the leased premises within a given time after nonuse or abandonment of the leased premises for marina purposes by the lessee. Provision shall also be made for the proper removal of piling and such other hazards to safety and navigation as shall be deemed necessary by the department of conservation to be removed upon nonuse or abandonment of the leased premises for marina purposes.

(i) No lease assignment or any other agreement entered into affecting leasehold rights shall be valid except after written approval of the department of conservation. An executed copy of the assignment, or agreement affecting leasehold rights, shall be furnished to and retained by the department of conservation for its files.

(j) Before a lease will be executed, or an assignment approved, the lessee shall file a bond, with surety acceptable to the department of conservation, conditioned that the lessee, his heirs, executors, administrators, successors, and assigns will truly perform faithfully the covenants, conditions, and agreements specified in the lease, and in the laws of the state of Michigan which apply. The amount of the bond shall be determined by the department of conservation and shall be commensurate with the financial obligations incurred in fulfilling all covenants, conditions, agreements, and requirements under the lease.

(k) Any lease shall be forfeited and all rights thereunder terminated if the lessee fails to start and to proceed with due diligence to complete the development of the marina within 2 years from the date of the lease or if the lessee fails for any consecutive 2-year period to operate the marina.

(l) Upon expiration of the lease or upon nonuse or abandonment of the leased premises for marina purposes, and following performance of the requirements outlined under paragraph (h) above, the lessee shall execute and deliver to the department of conservation a recordable release of all the rights and interests in the leased premises. The release shall not become effective until the lease and surety bond requirements and obligations have been met and the bond duly discharged.

HISTORY: 1954 ACS 19, p. 10.

R 299.381.

11. The lines of any description of lake bottom land for which application is made shall not enter areas of riparian rights held by any other upland owner. Where there is any disagreement on lines of riparian rights or conflict of ownership of or rights to lake bottom lands between the applicant and any other upland owner or owners, every effort shall be made by the parties concerned to settle such disagreement or conflict by acquiescence or by proper court proceedings before the department of conservation shall consider the application. The department of conservation shall not act as adjudicator to settle any bona fide disagreement or conflict in property lines, lines of riparian rights, or rights to apply for any parcel of lake bottom land.

HISTORY: 1954 ACS 19, p. 12.

OIL AND GAS OPERATIONS

R 299.441a—R 299.490.

HISTORY: 1956 AACS, pp. 207-217.

SPACING, DRILLING, DEEPENING AND PLUGGING OF WELLS FOR NATURAL DRY GAS

R 299.501—R 299.544.

HISTORY: 1956 AACS, pp. 217-224.

LICENSING AND OPERATION OF SHOOTING PRESERVES

R 299.601—R 299.615.

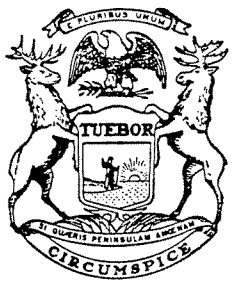
HISTORY: 1957 AACS, pp. 377-379. These rules would appear to have been superseded in their entirety by R 299.621-R 299.635.

Appendix 5B

STATE OF MICHIGAN

MICHIGAN ADMINISTRATIVE CODE 1979

By authority of Act No. 193 of the Public Acts of 1970, as amended, being §8.41 et seq. of the Michigan Compiled Laws



VOLUME I

COMPILED AND PUBLISHED BY THE
MICHIGAN LEGISLATIVE COUNCIL

(3) When establishing a bulkhead line on its own application, the department may retain jurisdiction over the area landward of the bulkhead line to the ordinary high-water mark.

History: 1954 ACS 79, p. 27, Eff. May 11, 1974.

R 281.842 Notification of pending applications.

Rule 32. The list prepared and mailed by the department pursuant to subsection (1) of section 6 of the act will include permit applications received during each week and projects for which permits have been issued. The list shall be mailed weekly to each subscriber. The list includes information on process number, job name, applicant name and address, watercourse, watershed, location of proposal by town, range and section and project description.

History: 1954 ACS 79, p. 27, Eff. May 11, 1974.

R 281.843 Hearings.

Rule 33. (1) The department may hold a public informational hearing when a proposed project appears to be controversial, or where additional information is desired prior to action by the department. The department shall make a determination on the permit application within 30 days following the hearing.

(2) All other hearings shall be conducted in accordance with subsection (2) of section 11 of the act.

(3) All persons who receive notification under subsection (1) of section 6 of the act shall receive at least 10 days' prior notification of any hearings held under this act.

History: 1954 ACS 79, p. 28, Eff. May 11, 1974.

R 281.844 Inspection and certification of completed project.

Rule 34. (1) The applicant shall notify the hydrological survey division within 48 hours of completion of the project to facilitate scheduling a final inspection prior to certification.

(2) The department shall schedule its field inspection of a completed project only when weather conditions will permit a thorough inspection thereof.

History: 1954 ACS 79, p. 28, Eff. May 11, 1974.

R 281.845 Special conditions.

Rule 35. Whenever vertically upward bottomland displacement, also called surcharge, results from filling or other activity immediately adjacent to the displacement area by the applicant, he shall be responsible for its timely removal at the direction of the department.

History: 1954 ACS 79, p. 28, Eff. May 11, 1974.

R 281.846 Rescission.

Rule 36. The rules of the department entitled "Inland Lakes and Streams" being R 281.801 to R 281.810 of the Michigan Administrative Code and appearing on pages 4120 to 4122 of the 1967 Annual Supplement to the Code, are rescinded.

History: 1954 ACS 79, p. 28, Eff. May 11, 1974.

GREAT LAKES SUBMERGED LANDS

(By authority conferred on the department of conservation by section 9 of Act No. 247 of the Public Acts of 1955, section 252 of Act No. 380 of the Public Acts of 1965, and sections 2 and 4 of Act No. 197 of the Public Acts of 1952, as amended, being §§322.709, 16.352, 24.102, and 24.104 of the Michigan Compiled Laws)

R 281.901 Scope and definitions.

Rule 1. (1) These rules are promulgated for the purpose of implementing Act No. 247 of the Public Acts of 1955, as amended, being §§322.701 to 322.711 of the Michigan Compiled Laws, hereinafter referred to as the act.

(2) "Ordinary high-water mark" means the line between upland and bottomland which persists through successive changes in water levels, and below which the presence and action of the water is so common or recurrent as to mark upon the soil a character, distinct from that which occurs on the upland, as to the soil itself, the configuration of the surface of the soil and the vegetation. When the soil, configuration of the surface or vegetation have been altered by man's activity, the ordinary high-water mark shall be located where it would have been if this alteration had not occurred.

(3) "Department" means the department of conservation.

(4) "Bottomland" means lands in the Great Lakes and bays and harbors thereof lying below and lakeward of the ordinary high-water mark.

(5) "Marina" means a dock, wharf, pier, mooring space, or other facility used for the servicing of watercraft of any size and kind which are used (a) for the business of transporting public or private passengers or freight, or (b) for recreational purposes and the marina is available to the public and charges are made for any of its services.

(6) "Submerged patented lands" means any submerged lands lying within a specific legal government grant area.

(7) "Upland" means the riparian or littoral property contiguous to the bottomland for which application is made.

History: 1954 ACS 51, p. 11, Eff. Aug. 15, 1967.

R 281.902 Applications; forms and number.

Rule 2. Application forms for deeds, leases, agreements, permits, or certificates shall be obtained from the lands division, department of conservation, Lansing, Michigan, or from any field office of the department. A separate application shall be filed for each separate parcel of filled or unfilled unpatented lake bottomland, or water area over patented submerged land, or for a certificate of boundary, except that 1 application may be accepted for more than 1 parcel of bottomland fronting on a single upland ownership.

History: 1954 ACS 51, p. 11, Eff. Aug. 15, 1967.

R 281.903 Applications; contents.

Rule 3. An application of any kind shall indicate the extent of the applicant's riparian interest and shall include the names and addresses of adjoining riparian owners. The extended lines of a description of bottomland for which application is made shall not enter the area of riparian rights held by any other riparian owner. The application shall indicate that the applicant is the direct abutting upland owner opposite the bottomland or water area applied for or opposite the boundary requested to be certified or that he otherwise has a legal right to file the application.

History: 1954 ACS 51, p. 11, Eff. Aug. 15, 1967.

R 281.904 Applications; title evidence and maps.

Rule 4. (1) An application for a deed, lease, agreement, or certificate shall be accompanied by evidence of title consisting of an abstract of title, title insurance or other evidence deemed by the department sufficient to entitle the applicant to receive a deed, lease, agreement, or certificate.

(2) Application for a deed, lease, agreement, or certificate shall be accompanied by a map on 1 or more sheets of substantial paper or tracing cloth, including blueprints or their equivalent, excluding tracing paper, and prepared by a registered land surveyor. The map shall show the upland property owned by the applicant and the bottomland or water area applied for, or the location of the boundary to be certified, together with the water's edge at the time of the survey. The ordinary high-water mark shall also be shown. The map shall be prepared at a scale not smaller than 100 feet to an inch. The survey shall be by metes and bounds and shall be tied to a legal corner of a subdivision, according to the original government survey, of a private claim, or of any lot, block or boundary corner of a recorded subdivision or plat generally accepted and used for legal conveyancing of property in the area. The corner shall not be located on submerged land of the Great Lakes at the time the survey is made. All angles and lines measured on or from the upland used to calculate by triangulation the position of any points or lines on bottomland shall be shown. The survey description of the areas applied for and the certification by a registered surveyor shall appear on the face of the map.

History: 1954 ACS 51, p. 11, Eff. Aug. 15, 1967.

R 281.905 Surveys of bottomland filled or to be filled.

Rule 5. In addition to the requirements of R 281.904 where unpatented bottomland is filled or to be filled, or patented bottomland is to be filled, the survey shall show the location of the ordinary high-water mark with relation to the outermost edge of any sheet piling, shoring, cribwork, seawall, or similar installation providing for a vertical face. Where no such installations have been placed, the survey lines shall run along the outermost edge of the base of the natural slope of the material used for making and protecting the fill. Such lines may be straight, curved, or similarly regular along practical courses rather than following the exact irregular edges of such fill bases, but shall follow such edges as closely as practicable along average lines.

History: 1954 ACS 51, p. 12, Eff. Aug. 15, 1967.

R 281.906 Approvals by governmental agencies and units.

Rule 6. The approvals of governmental agencies and units shall accompany the application as follows:

(a) Action by the United States corps of engineers shall be in permit or letter form to the applicant and shall indicate the consent or nonobjection of the corps from the standpoint of federal navigation.

(b) Approval by the state waterways commission shall be in letter form to the applicant and shall indicate the consent or nonobjection of the commission.

(c) Approval by a local unit of government shall be in the form of a certified copy of a resolution of its legislative body.

History: 1954 ACS 51, p. 12, Eff. Aug. 15, 1967.

R 281.907 Marinas.

Rule 7. (1) When an application is made for bottomland or water area for marina purposes, the protection and enhancement of the public interest in the bottomlands and waters of the Great Lakes shall be of primary concern. The department will consider the character and current uses of adjacent shore and lake properties and local zoning ordinances. An applicant may be required to furnish supporting evidence satisfactory to the department that marina services in the

(2) The survey in addition to other requirements, shall show all fills, pilings, structures, and improvements including mooring area, boat storage, turning basins, and traffic lanes, existing at the date of the application or to be constructed or located thereafter, and the location, number, and size of all boat wells or slips.

History: 1954 ACS 51, p. 12, Eff. Aug. 15, 1967.

R 281.908 Marinas; leases.

Rule 8. (1) A lease for marina purposes shall not exceed a term of 50 years and shall provide for its renewal or extension upon satisfactory performance during the prior term.

(2) The lease shall provide for an advance annual rental equal to 10% of the fair cash value of the bottomland covered by the lease less the value of any improvements. In any case, the annual rental shall not be less than $50.00. If economic conditions change, the lessee may petition the department for a redetermination of the annual rental.

(3) The lease shall provide that the lessee remove structures and improvements on the leased premises after nonuse or abandonment, and piling and other hazards to safety and navigation when required by the department.

(4) An assignment or other agreement affecting the lease is not valid except after written approval by the department. An executed copy of the assignment or agreement shall be furnished to the department.

History: 1954 ACS 51, p. 12, Eff. Aug. 15, 1967.

R 281.909 Marinas; bonds.

Rule 9. The applicant for marina purposes shall file a surety bond or other assurance satisfactory to the department immediately after final approval by the state administrative board and before execution of the lease by the department, conditioned that he will truly and faithfully perform the covenants, conditions and agreements specified in the application and lease and further conditioned that all pilings or other structures that may be a hazard to navigation or interfere with the public trust, be removed upon cancellation or termination of the lease. The amount of the bond shall be determined by the department and be commensurate with the financial obligations incurred in fulfilling all covenants, conditions, agreements, and requirements of the application and lease. The bond shall be in effect for the period of the lease term, plus 2 years.

History: 1954 ACS 51, p. 12, Eff. Aug. 15, 1967.

R 281.910 Marinas; termination of leases.

Rule 10. (1) A lease shall be forfeited and all rights thereunder terminated if the lessee fails to start and proceed with due diligence to complete the marina within 2 years from the date of the lease or a longer period of time set forth in the lease, or if the lessee, for any consecutive 2 years or longer period set forth in the lease, fails to operate the marina. The department, upon request of the lessee, may extend such periods.

(2) Upon expiration of the lease or upon non-use or abandonment of the leased premises for marina purposes, and following performance of the requirements outlined in R 281.909, the lessee shall execute and deliver to the department a recordable release of all his rights and interests in the leased premises. The release shall not become effective until the lease and surety bond requirements and obligations have been met and the bond duly discharged.

History: 1954 ACS 51, p. 13, Eff. Aug. 15, 1967.

R 281.911 Application fees.

Rule 11. The application fee required by the act shall accompany an application and be remitted by check, money order, or bank draft. A fee is not required for a permit to excavate, dredge, or place spoil or other materials on bottomland. Upon approval by the state administrative board of the deed, lease, agreement, or certificate, the applicant is entitled to credit of the application fee against any additional consideration required to be paid.

History: 1954 ACS 51, p. 13, Eff. Aug. 15, 1967.

R 281.912 Processing of applications by department.

Rule 12. (1) An application for a permit to alter or maintain an existing channel or to excavate a new channel for the purpose of accommodating small pleasure craft or for beach improvement may be filed with any field office of the department or a local conservation officer. A local conservation officer may issue a permit for such a purpose if there is no substantial damage to or interference with any public interest, including fishing, hunting, swimming, pleasure boating, or navigation. Where he observes such excavation or improvement and a permit has not been issued, he shall inform the riparian owner of the requirement for a permit and upon application, shall issue a permit if the project is within the scope of this paragraph.

(2) The department may require acquiescence or approval in writing by adjacent riparian owners if the application raises questions concerning lines of riparian rights extended or interference with adjacent riparian owners. Failure to settle a dispute concerning riparian lines extending over bottomland shall be resolved by the courts before further action is taken by the department.

(3) The department reserves the right to offer such deed, lease, agreement, or certificate as will best serve the public interest.

(4) In case of a project for a fill, the department may require a surety bond or other acceptable guarantee depending on the nature of the project and ability of the applicant to complete the project satisfactorily during the period of construction.

History: 1954 ACS 51, p. 13, Eff. Aug. 15, 1967.

R 281.913 Criteria for considering applications.

Rule 13. (1) When an application is made for unpatented, unfilled lake bottomland or for a water area over patented lake bottomland or for certification of boundaries, the act shall be construed to preserve and protect the interests of the general public. The maintenance of the shoreline and the preservation of the public trust are of primary concern.

(2) An application for the purposes of flood, shore erosion, drainage or sanitation control will be considered where need for such control is necessary.

(3) An application for straightening shorelines will be considered where it is desirable to establish a smooth, free-flowing shoreline, free of natural or man-made irregularities or those caused by other activities of man beyond the control of the applicant.

(4) Any other application for filling bottomlands or water areas will be considered when in the public interest or when it will not substantially affect the public trust.

History: 1954 ACS 51, p. 13, Eff. Aug. 15, 1967.

R 281.914 Consideration.

Rule 14. (1) In determining the consideration to be paid for the conveyance of unpatented bottomland filled prior to October 14, 1955, the improvements which

are to be excluded in determining the fair cash market value of the property are construed to be buildings, equipment attached to the land, installations, other improvements placed on the land after filling, erosion control works such as sheet piling, shoring, cribwork, seawalls, or similar installations to protect fills from erosion.

(2) The consideration to be paid for the conveyance of unpatented bottomlands shall not be less than the fair cash market value of the lands less improvements but in no case less than $50.00 or less than 30% of the value of the land as determined from the value of adjacent uplands.

(3) No consideration is required for a permit or agreement to fill or occupy water areas over patented lands except the $50.00 filing fee.

History: 1954 ACS 51, p. 14, Eff. Aug. 15, 1967.

R 281.915 Hearings.

Rule 15. The department upon its own motion, or upon the request of any interested party, may hold a hearing before consideration of any application for a deed, lease, agreement, boundary certificate, or permit to fill or dredge unpatented bottomland or water area over patented bottomland. Any hearing under these rules shall be conducted in accordance with Act No. 197 of the Public Acts of 1952, as amended, being §§24.101 to 24.110 of the Michigan Compiled Laws. The department shall give notice of the hearing to known interested parties including adjoining riparians. Notice of a hearing shall be by certified mail, return receipt requested, to the sendee's last known address on file with the department, or by at least 1 publication in a newspaper of general circulation in the county where the affected waters lie, in either case, not less than 20 days before the hearing. On termination of the hearing, and after review of the testimony, a decision shall be made on the merits and the application approved or disapproved, and thereafter if approved, shall be submitted to the conservation commission and state administrative board for final disposition.

History: 1954 ACS 51, p. 14, Eff. Aug. 15, 1967.

MARINE AND RECREATIONAL VEHICLE SECTION

GENERAL RULES

(By authority conferred on the department of conservation by sections 27 and 151 of Act No. 303 of the Public Acts of 1967, being §§281.1027 and 281.1151 of the Michigan Compiled Laws)

PART 1. REGATTAS AND MARINE PARADES

R 281.1001 Definitions.

Rule 1. The terms defined in Act No. 303 of the Public Acts of 1967, being §§281.1001 to 281.1199 of the Michigan Compiled Laws, have the same meaning when used in these rules.

History: 1954 ACS 53, p. 5, Eff. Feb. 14, 1968.

R 281.1002 Applications; filing and contents.

Rule 2. An individual or organization planning to hold a regatta or marine parade on the waters of this state shall file with the director an application for a sanction to hold such event. The application shall include the following:

(a) Name and address of applicant.

STATE OF MICHIGAN

Appendix 5C

MICHIGAN ADMINISTRATIVE CODE 1979

By Authority of Act No. 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws

T. M. COOLEY LAW SCHOOL

1982 ANNUAL SUPPLEMENT

COMPILED BY THE

LEGISLATIVE SERVICE BUREAU

AND PUBLISHED BY THE

DEPARTMENT OF MANAGEMENT AND BUDGET

MACKINAC ISLAND STATE PARK COMMISSION

GENERAL RULES

(By authority conferred on the Mackinac Island state park commission by section 1 of Act No. 22 of the Public Acts of 1907, section 2 of Act No. 54 of the Public Acts of 1909, and section 3 of Act No. 355 of the Public Acts of 1927, as amended, being §§318.91, 318.82, and 318.63 of the Michigan Compiled Laws)

PART 1. DEFINITIONS

R 318.119b Rescinded.

History: 1954 ACS 77, Eff. Dec. 13, 1973; 1979 AC; rescinded 1979 ACS 1, Eff. Feb. 22, 1980.

PART 2. REGULATIONS

R 318.136 Number of carriage permits.

Rule 36. The commission shall issue, on or before June 1 of each year, such number of permits for carriages-for-hire as, in its judgment, will adequately serve the public, but not more than the following maximum numbers:

(a) Sight-seeing carriages ..... 55 permits.
(b) Taxicabs ..... 17 permits.
(c) Drive-yourself carriages ..... 18 permits.
(d) Livery carriages ..... 21 permits.

History: 1954 ACS 24, Eff. Nov. 12, 1960; 1954 ACS 77, Eff. Dec. 13, 1973; 1979 AC; 1979 ACS 6, Eff. May 20, 1981; 1979 ACS 11, Eff. July 27, 1982.

R 318.145a Rescinded.

History: 1954 ACS 77, Eff. Dec. 13, 1973; 1979 AC; rescinded 1979 ACS 1, Eff. Feb. 22, 1980.

LAND RESOURCE PROGRAMS DIVISION

GREAT LAKES SUBMERGED LANDS

(By authority conferred on the department of natural resources by section 9 of Act No. 247 of the Public Acts of 1955, as amended, and section 252 of Act No. 380 of the Public Acts of 1965, as amended, being §§322.709 and 16.352 of the Michigan Compiled Laws)

R 322.1001 Definitions.

Rule 1. (1) As used in these rules:

(a) "Accretion" means land created as a result of natural depositions or placement of a lawful, permanent structure.

(b) "Act" means Act No. 247 of the Public Acts of 1955, as amended, being §322.701 et seq. of the Michigan Compiled Laws, and known as the Great Lakes submerged lands act.

(c) "Agreement" means a binding contract between the state and another person concerning the private use of patented or unpatented bottomlands, except for use for "marina purposes" as defined in the act.

(d) "Applicant" means a person applying for a deed, lease, agreement, or permit to use or alter unpatented lands or an agreement or permit for use of water areas over patented lands.

(e) "Bottomland" means lands in the Great Lakes, and bays and harbors thereof, lying below and lakeward of the ordinary high-water mark.

(f) "Conveyance" means a deed, lease, agreement, or certificate as referred to in the act.

(g) "Department" means the department of natural resources.

(h) "Dredging" means removal of any mineral, organic, or other material from or within the bottomland or waters of the Great Lakes by any means.

(i) "Filling" means placement of any mineral, organic, or other material on the bottomlands or into the waters of the Great Lakes.

(j) "Ordinary high-water mark" means the elevations set by the act. When the soil, configuration of the surface, or vegetation has been altered by man's activity, the ordinary high-water mark shall be located where it would have been if this alteration had not occurred.

(k) "Other materials" means any man-made structure or installed device or facility extending over or placed on bottomlands below the ordinary high-water mark, including, but not limited to, all of the following:

(i) Bulkheads.
(ii) Groins.
(iii) Riprap.
(iv) Jettys.
(v) Breakwaters.
(vi) Piers and pipelines.
(vii) Pilings.

The term also means a man-made structure or installed device or facility attached to or administered by a marina. The term does not include temporary docks, boat hoists, or other devices for private use which are removed annually.

(l) "Person" means any individual, partnership, corporation, association, political subdivision, the state, the department, an instrumentality or agency of the state, a political subdivision of an instrumentality or agency of the state, a department or other instrumentality or agency of the federal government, or other legal entity.

(m) "Public trust" means the perpetual duty of the state to secure to its people the prevention of pollution, impairment or destruction of its natural resources, and rights of navigation, fishing, hunting, and use of its lands and waters for other public purposes.

(n) "Riparian owner" means one who owns upland bordering the bottomland or water area.

(o) "Riparian rights" means all those rights accruing to ownership of riparian property, including the following, subject to the public trust:

(i) Access to the navigable waters.
(ii) Dockage to boatable waters; wharfage.
(iii) Use of water for general purposes, such as bathing and domestic use.
(iv) Title to natural accretions as determined by the department.

(p) "Submerged patented lands" means any bottomlands lying within a specific government grant area, including a private claim patent, federal patent, or state swampland patent.

(q) "Unpatented lands" means all bottomlands except submerged patented lands.

(2) The terms defined in the act have the same meanings when used in these rules.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1002 Applications for deeds, leases, agreements, and certificates; forms; content.

Rule 2. (1) Application forms for deeds, leases, or agreements to use or alter unpatented lands, for certificates of lakeward boundary and accretion, or for agreements for use of water areas over patented or unpatented bottomlands may be obtained from the department. The applicant shall file separately for each parcel of bottomland, unless the parcels of bottomland front a single upland ownership. If the parcels front a single upland ownership, 1 application may be submitted.

(2) An application for deeds, leases, agreements, or certificates shall not be considered administratively complete by the department until all information requested on the application form, the application fee, and any other information requested by the department have been received by the department. After receipt of an otherwise complete application, the department may request such additional information, environmental assessments, appraisals, records, or documents as are determined to be necessary to make a decision to grant or deny such a conveyance. The department shall notify the applicant in writing when the application is administratively complete.

(3) If an applicant fails to respond to any written inquiry or request from the department within 30 days, the application shall be denied without prejudice and the file shall be closed.

(4) Application fees shall be submitted to the department with the initial submittal of an application form. The fee shall be paid by check, money order, or draft made payable to: "State of Michigan."

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1003 Marina lease application; criteria and procedures.

Rule 3. (1) When an application is made for filled or unfilled bottomland or water area for marina purposes, the protection and enhancement of the public trust in the bottomlands and waters of the Great Lakes shall be of primary concern. The department shall consider the character and current uses of the adjacent upland. An applicant may be required to furnish supporting evidence, satisfactory to the department, that marina services in the locality are necessary and feasible.

(2) In addition to the application requirements of R 322.1002, a survey shall be provided which specifies the location of all fills, pilings, structures, and improvements, including all of the following:

(a) The existing and planned mooring area.

(b) Boat storage.

(c) Turning basins.

(d) Traffic lanes.

(e) The location, number, and size of all boat wells, slips, and pumpout facilities.

(3) The department may require the design and survey of projects costing $50,000.00 or more to be certified and sealed by a registered professional engineer as authorized in Act No. 299 of the Public Acts of 1980, as amended, being §339.101 et seq. of the Michigan Compiled Laws.

(4) The applicant shall file a surety bond or other assurance satisfactory to the department immediately after final approval by the state administrative board and before execution of the lease by the department. The surety bond or other assurance shall ensure that the applicant will truly and faithfully perform the covenants, conditions, and agreements specified in the lease, and shall

further ensure that all pilings or other structures be removed upon cancellation or termination of the lease. The amount of the bond shall be determined by the department and shall be commensurate with the cost of restoring bottomlands to pre-lease condition. The bond shall be in effect for the period of the lease term or until all lease conditions have been fulfilled to the department's satisfaction.

(5) The department shall issue a statement releasing the lessee and the bond company upon termination of the marina lease and upon satisfactory restoration of the bottomlands.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1004 Marina lease conditions.

Rule 4. A lease shall provide for all of the following conditions to be maintained by both the lessee and the department:

(a) A term of not more than 50 years. A lease may provide for its renewal or extension upon satisfactory performance during the prior term.

(b) An advance annual rental fee to be determined by the department. The annual rental fee shall not be less than $50.00. The department shall review the annual rental fee once every 5 years and adjust the annual rental fee to reflect changes in the general economic conditions. The changes shall be based on the percentage change of the United States bureau of labor statistics 'all-items' index, and other economic indicators.

(c) That the assignment or other agreement modifying the lease is not binding on the department unless approved in writing by the department. An executed copy of the assignment or agreement shall be furnished to the department for approval.

(d) That the marina construction shall be completed within a specified term, normally not more than 2 years from the date of issuance of the lease. An extension of time may be granted by the department for just cause. The lease shall be forfeited if the lessee does not complete the marina within the specified time set forth in the lease or the extension authorized by the department.

(e) That the construction and operation of the facility will not adversely impair the use of or destroy the waters or natural resources of the state.

(f) That the facility shall be maintained in an aesthetically pleasing manner.

(g) That the structures do not constitute a safety or navigation hazard and shall be maintained in good repair.

(h) That the lessee shall have sole maintenance responsibility of the facility and shall remove structures and improvements on the leased premises after nonuse or abandonment. Nonuse or abandonment shall occur when the facility is not used for commercial purposes for 2 successive seasons following completion of construction or execution of a lease.

(i) That upon nonuse or abandonment of the leased premises for marina purposes, or failure to construct or operate the marina facility in accordance with the lease conditions, the lessee shall execute and deliver to the department a release in recordable form of all his or her rights and interests in the lease premises. The release shall not relieve the lessee of the lease and surety bond requirements until all obligations have been met and the bond is duly discharged.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1005 Agreements; department authorization; conditions.

Rule 5. Persons shall secure an agreement from the department to use patented and unpatented bottomlands for industrial and commercial wharfage

and other private waterfront development. At a minimum, the following conditions shall be in all agreements:

(a) Occupancy shall be governed by the terms of the act.

(b) Maintenance operations and improvements shall be approved by the department and shall not interfere with the public trust in adjacent waters and rights of adjacent riparian owners.

(c) At the time the agreement is terminated, all facilities and installations, including fills, shall be removed by the occupant to the satisfaction of the department.

(d) Assignment of an agreement shall not be binding on the department, unless approved in writing by the department.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1006 Conveyance applications; approval criteria; provision for public access to Great Lakes waters required.

Rule 6. (1) Review of an application for a deed, lease, agreement, certificate of boundary determination, or certificate of accretion shall be based on the following criteria:

(a) Whether the deed, lease, or agreement has a clear and present necessity beyond mere convenience or economy.

(b) Whether the conveyance of unfilled submerged lands is necessary to accomplish the purposes and activities stated in the act.

(c) Whether the project conforms to required sanitation laws and does not injure the material rights of adjoining riparian owners or any riparian owners of the water affected.

(d) A determination by the department that the private or public use of such lands and waters will neither substantially affect the public use thereof nor impair the public trust or interest of the state.

(2) Conveyance to local units of government shall contain a provision for public access to and along Great Lakes waters.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1007 Conveyance of real estate rights; determination of fair, cash market value.

Rule 7. (1) The consideration to be paid to the state for each bottomland parcel to be conveyed shall be determined by the department, but at no time shall the consideration be less than $50.00.

(2) The consideration to be paid as fair cash market value for a deed to filled unpatented bottomlands shall be determined as follows:

(a) Fills placed before the effective date of the act or before state permit authority, except those processed in accordance with subdivision (d) of this subrule, shall be charged 30% of the filled bottomland or full market value of the unfilled bottomlands, whichever is greater, giving due consideration to riparian rights.

(b) Fills placed after proper permits were obtained shall be charged a minimum of 30% of the value of the filled bottomland or full market value of the unfilled bottomlands, whichever is greater, giving due consideration to riparian rights.

(c) Fills placed in violation of the permitting authority of the act, if conveyed, shall be charged a minimum 100% of the value of the filled bottomlands based on their highest and best use. Due consideration may be given to riparian rights.

(d) Fills which were placed before the effective date of the act, which are used for residential purposes, which are part of a recorded subdivision, which are less than ¼ acre, and which do not adversely affect the public trust may be charged a fee of $500.00 as the full market value. The fee stated in this subdivision shall be adjusted every 5 years according to the bureau of labor statistics 'all-items' index and other economic indicators.

(3) The consideration to be paid as fair cash value for deeds to unpatented lands which are not filled or substantially changed from their natural character and which are to be used or are being used for flood control, shore erosion control, drainage, and sanitation control shall be 30% of the value of the filled bottomland, based on its highest and best use, giving due consideration to riparian rights.

(4) The consideration for leases to unpatented bottomland for marina purposes shall be not less than 5% of the typical gross dockage and mooring rent in the area. A lease period may be a period of up to 50 years, but rental rates shall be adjusted at least every 5 years. Adjustments shall be in all years ending in "0" or "5." The rental fee adjustment shall be directly proportional to the bureau of labor statistics 'all-items' index and other economic indicators. Typical gross dockage and mooring rent shall be based on the most efficient use of the area involved.

(5) Upon approval of any deed, lease, or other agreement, the application fee shall be credited against the consideration to be paid to the state.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1008 Permits.

Rule 8. (1) A riparian owner shall obtain a permit from the department before dredging, filling, or placing spoil or other materials on bottomlands; dredging, altering, or maintaining an existing upland channel; or constructing a new upland channel.

(2) A permit for upland channelling, as required in section 12 of the act, is not required for the construction of boat wells and slips which are not more than 50 feet in length, as measured inland from the ordinary high-water mark, and which facilitate private, noncommercial recreational boat use, if dredging or placement of spoil does not extend lakeward of the ordinary high-water mark.

(3) Placing spoil or other material on bottomlands does not include either of the following:

(a) Seasonal, private, noncommercial docks and boat hoists.

(b) Maintenance of a structure constructed under a permit issued pursuant to the act, if the maintenance is in place and in kind with no design or materials modification.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1009 Permit application procedures.

Rule 9. (1) An application for a permit shall be made on a form as prescribed and provided by the department. Application forms may be obtained from the department or from any designated field office of the department.

(2) An application for a permit shall not be considered administratively complete until all information requested on the application form, the application fee, and any other information requested by the department have been received by the department. After receipt of an otherwise complete application, the department may request such additional information, environmental assess-

ments, records, or documents as are determined to be necessary to make a decision to grant or deny a permit. The department shall notify the applicant in writing when the application is administratively complete.

(3) If an applicant fails to respond to any written inquiry or request from the department within 30 days, the application shall be denied without prejudice and the file shall be closed.

(4) For upland channels, a fee of not less than $50.00, payable to: "State of Michigan," shall accompany the application.

History: 1979 ACS 12. Eff. Oct. 30, 1982.

R 322.1010 Notification of pending applications; determination of applications; copies.

Rule 10. (1) Upon receiving an application for a permit or conveyance, except for applications for those projects stated in R 322.1013, the department shall submit copies for review to all of the following:

(a) The director of public health or the local health department designated by the director.

(b) The county, city, village, or township clerk.

(c) The county drain or road commissioners.

(d) The local port commission, if any.

(e) The 2 adjacent riparian property owners.

(2) To be considered in the department's review of an application, a response to a public notice or request for a public comment meeting shall be received by the department within 20 days of the mailing of such public notice.

(3) Upon request, the department shall provide any person with a copy of a conveyance, permit, or application and supporting documents, pursuant to Act No. 442 of the Public Acts of 1976, as amended, being §15.231 et seq. of the Michigan Compiled Laws.

History: 1979 ACS 12. Eff. Oct. 30, 1982.

R 322.1011 Permit issuance; conditions and requirements.

Rule 11. (1) The department may require such permit conditions as it deems reasonable and necessary to protect the public trust and private riparian interests including the following:

(a) A surety bond or other acceptable guarantee, before issuing a permit, for projects with the potential for significant environmental impact and to ensure the ability of the applicant to complete the project satisfactorily during the period of the permit.

(b) That dredged materials be deposited in a manner which will cause the least damage to the public trust, benefit public interests, or mitigate damage done through navigation projects.

(c) That filling, dredging, and placing spoil and other materials on bottomlands shall be conducted in a manner which will cause the least damage to the public trust, cause the least disruption to the littoral drift and longshore processes, enhance the public trust or interests, or mitigate damages.

(d) Monitoring to assure that no injury to the natural resources or to the riparian interests of adjacent property owners occurs, including specifically monitoring the littoral drift in the project area.

(e) That the project be in compliance with local zoning ordinances. If the facility is not in compliance, and if the local unit of government having proper jurisdiction notifies the department at the time of public notice objecting to the issuance of a permit, the department shall withhold permit issuance for 30 days

from the date of expiration of public notice. If the local unit of government does not file an action to restrain operation of the facility in a public forum within the specified 30-day time frame, the department may issue a permit for marina operation if all other criteria are met.

(f) That the work specified in the permit shall be completed within a specified term, normally not more than 1 year from the date of issuance, or as otherwise determined by the department. An extension of time may be granted by the department for just cause.

(2) Maintenance dredging permits may be granted for a period of 5 years, if the area to be dredged and the disposal area remain the same.

(3) The department shall, upon request, provide advice to the applicant for the consideration and protection of the public trust and private riparian interests.

(4) A permit does not obviate the necessity of receiving approval from the United States army corps of engineers and other federal, state, or local units of government, where applicable.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1012 Upland channelling; requirements.

Rule 12. (1) The department shall not issue a permit for upland channelling, unless the project conforms to all of the following provisions:

(a) The channel will not significantly impair the public trust or interest, including fish and wildlife habitat, in the adjacent land and water area.

(b) The channel and adjacent commercial or residential development will conform to the requirements for platting land, local zoning, and sanitation laws.

(c) The channel will not cause material injury to the rights of adjoining riparian owners or any riparian owners of the water affected.

(d) The channel will be maintained pursuant to the conditions of the permit by existing and future owners of the land fronting the channel.

(e) Channelling will not be in conflict with other state statutes.

(f) Channels in multi-residential or commercial developments will be of sufficient width to accommodate prospective traffic, watercraft dockage, and maintenance dredging.

(g) Channels will be constructed to a sufficient depth to minimize weed growth.

(h) Stabilization of channel banks will be required to control bank slumping and siltation.

(i) Channels for multi-residential or commercial projects will be constructed so the channel banks are a minimum of 100 feet from each adjacent riparian property line, except where an adjacent riparian owner's approval has been obtained.

(j) All dredged materials will be handled pursuant to R 322.1011.

(2) The channel shall be a public waterway, unless it is an intake or discharge canal as determined by the department.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1013 Minor project permit; eligibility.

Rule 13. (1) The department may process applications in accordance with R 322.1014 for those projects of a minor nature which are not controversial, which have minimal adverse environmental impact, which will be constructed of clean, nonpolluting materials, which do not impair the use of the adjacent bottomlands by the public, and which do not adversely affect riparian interests of adjacent owners.

(2) The following projects are eligible for a minor project permit:

(a) Noncommercial single piers, docks, and boat hoists which meet the following design criteria:

(i) Are of a length or size not greater than the length or size of similar structures in the vicinity and on the watercourse involved.

(ii) Provide for the free littoral flow of water and drift material.

(b) Spring piles and pile clusters when their design and purpose is usual for such projects in the vicinity and watercourse involved.

(c) Seawalls, bulkheads, and other permanent revetment structures which meet all of the following purpose and design criteria:

(i) The proposed structure fulfills an identifiable need for erosion protection, bank stabilization, protection of uplands, or improvements on uplands.

(ii) The structure will be constructed of suitable materials free from pollutants, waste metal products, debris, or organic materials.

(iii) The structure is not more than 100 feet in length and is located in an area on the body of water where other similar structures already exist.

(iv) The placement of backfill or other fill associated with the construction does not exceed an average of 1 cubic yard per running foot along the shoreline and a maximum of 100 cubic yards.

(v) The structure or any associated fill will not be placed in a wetland area or placed in any manner that impairs surface water flow into or out of any wetland area.

(d) Groins 25 feet or less in length which are placed at least twice their length from adjacent property lines.

(e) Filling for restoration of existing permitted fills, fills placed incidental to construction of other structures, and fills that do not exceed 100 cubic yards as a single and complete project, where the fill is of suitable material free from pollutants, waste metal products, debris, or organic materials.

(f) Dredging for the maintenance of previously dredged areas or dredging of not more than 100 cubic yards as a single and complete project when both of the following criteria are met:

(i) No reasonable expectation exists that the materials to be dredged are polluted.

(ii) All dredging materials will be removed to an upland site exclusive of wetland areas.

(g) Structural repair of man-made structures, except as exempted by R 322.1008(3), when their design and purpose meet both of the following criteria:

(i) The repair does not alter the original use of a currently serviceable structure.

(ii) The repair will not adversely affect public trust values or interests, including navigation and water quality.

(h) Fish habitat structures which meet both of the following criteria:

(i) Are placed so the structures do not impede or create a navigational hazard.

(ii) Are permanently anchored to the bottomlands.

(i) Scientific structures such as staff gauges, water monitoring devices, water quality testing devices, survey devices, and core sampling devices, if the structures do not impede or create a navigational hazard.

(j) Navigational aids which meet both of the following criteria:

(i) Are approved by the United States coast guard.

(ii) Are approved under Act No. 303 of the Public Acts of 1967, as amended, being §281.1001 et seq. of the Michigan Compiled Laws, and known as the marine safety act.

(k) Extension of a project where work is being performed under a current permit and which will result in no damage to natural resources.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1014 Minor project permit; application procedures.

Rule 14. (1) The department may issue a permit for a minor project, as stated in R 322.1013, after an administratively complete application has been filed pursuant to R 322.1009.

(2) Permit applications filed for minor projects shall be field inspected by the department before issuance.

(3) Public notice procedures set forth in R 322.1010 may be waived for those applications meeting minor project permit requirements.

(4) Projects applied for under the minor project permit authority which are controversial or which will have a significant environmental impact shall be processed as described in R 322.1010.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1015 Environmental assessment.

Rule 15. In each application for a permit, lease, deed, or agreement for bottomland, existing and potential adverse environmental effects shall be determined. Approval shall not be granted unless the department has determined both of the following:

(a) That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.

(b) That there is no feasible and prudent alternative to the applicant's proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1016 Inspection and certification of completed projects.

Rule 16. (1) The department may issue a certification for a project after final inspection, if the project was satisfactorily performed according to state permit.

(2) Where notice of certification is required as a permit condition, the permittee shall notify the department within 10 days of completion of the project to schedule a final inspection for certification. The department shall schedule its field inspection of a completed project when weather conditions will permit a thorough inspection.

(3) When any permit conditions are not complied with, enforcement action may be brought against the permit holder.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

R 322.1017 Hearings.

Rule 17. (1) The department may hold a public comment hearing when a proposed project appears to be controversial, where additional information is desired before action by the department, or upon request, if such request is made within the public notice period.

(2) Persons aggrieved by an action or inaction of the department may request a formal hearing on the matter, pursuant to the provisions of Act No. 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws, within 60 days of the notice of the department's decision.

History: 1979 ACS 12, Eff. Oct. 30, 1982.

APPENDIX 6 – 7

Legislative History:

1965 Unofficial House Bill No. 2859
and
1967 Unofficial House Bill No. 2621

P.A. 293
7-22-65
E.E.

UNOFFICIAL
HOUSE BILL No. 2859

April 14, 1965, Introduced by Reps. Snyder, Horrigan, Steeh, Kelsey, Monks, Goemaere, Clark, Slingerlend and Arnett and referred to the Committee on Conservation and Recreation.

A bill to amend the title and sections 2, 3, 4, 5, 6, 7 and 10 of Act No. 247 of the Public Acts of 1955, entitled as amended

"Great Lakes submerged lands act,"

sections 2, 3, 4, 5, 6 and 10 as amended and added by Act No. 94 of the Public Acts of 1958, being sections 322.702, 322.703, 322.704, 322.705, 322.706, 322.707 and 322.710 of the Compiled Laws of 1948; and to add a new section 11.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. The title and sections 2, 3, 4, 5, 6, 7 and 10 of Act No. 247 of the Public Acts of 1955, sections 2, 3, 4, 5, 6 and 10 as amended and added by Act No. 94 of the

1 Public Acts of 1958, being sections 322.702, 322.703,
2 322.704, 322.705, 322.706, 322.707 and 322.710 of the
3 Compiled Laws of 1948, are hereby amended and a new sec-
4 tion 11 is added, the amended title and amended and added
5 sections to read as follows:

6 TITLE

7 An act to authorize the department of conservation
8 of the state of Michigan to grant, convey or lease cer-
9 tain unpatented lake bottomlands and unpatented made lands
10 in the Great Lakes, including the bays and harbors there-
11 of, ~~or to enter into other suitable agreements in regard~~
12 ~~thereto,~~ belonging to the state of Michigan or held in
13 trust by it; TO PERMIT THE PRIVATE AND PUBLIC USE OF WATERS
14 OVER SUBMERGED PATENTED LANDS AND THE MAKING OF AGREEMENTS
15 LIMITING AND REGULATING THE USE THEREOF; ~~and~~ to provide
16 for the disposition of revenue derived therefrom; AND TO
17 PROVIDE PENALTIES FOR VIOLATION OF THIS ACT.

18 Sec. 2. The lands covered and affected by this act
19 are all of the unpatented lake bottomlands and unpatented
20 made lands in the Great Lakes, including the bays and har-
21 bors thereof, belonging to the state of Michigan or held
22 in trust by it, including those lands which have heretofore
23 been artificially filled in. THE WATERS COVERED AND AF-
24 FECTED BY THIS ACT ARE ALL OF THE WATERS OF THE GREAT

LAKES WITHIN THE BOUNDARIES OF THE STATE. This act shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands AND WATERS and to provide for the sale, lease, exchange or other disposition of ~~such~~ UNPATENTED lands AND THE PRIVATE OR PUBLIC USE OF WATERS OVER PATENTED AND UNPATENTED LANDS AND TO PERMIT THE FILLING IN OF PATENTED SUBMERGED LANDS whenever it is determined by the department of conservation that THE PRIVATE OR PUBLIC USE OF such lands ~~have no substantial~~ AND WATERS WILL NOT SUBSTANTIALLY AFFECT THE public ~~value~~ USE THEREOF for hunting, fishing, swimming, pleasure boating or navigation ~~and~~ that the ~~general~~ public ~~interest~~ TRUST IN THE STATE will not be impaired by such AGREEMENTS FOR USE, sales, lease or other disposition. The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented lake bottomlands and unpatented made lands AND PATENTED LANDS in the Great Lakes and the bays and harbors thereof.

Sec. 3. (1) The department of conservation, hereinafter referred to as the "department", after finding that the public ~~interest~~ TRUST IN THE WATERS will not be impaired or substantially ~~injured~~ AFFECTED, is hereby authorized to ~~grant and convey by quitclaim deed~~ ENTER INTO AGREEMENTS PERTAINING TO WATERS OVER AND THE FILLING IN OF SUBMERGED

"BUT THE ACT SHALL NOT BE CONSTRUED AS AFFECTING PROPERTY RIGHTS SECURED BY VIRTUE OF A SWAMP LAND GRANT."

1 PATENTED LANDS, OR TO LEASE OR DEED UNPATENTED LANDS, after
2 approval of the state administrative board. ~~, the lands~~
3 ~~described in section 5 of this act or to enter into leases~~
4 ~~or other suitable agreements in regard thereto. The lands~~
5 ~~surveyed under Act No. 175, Public Acts of 1899, and subject~~
6 ~~to the control of the department under Act No. 326 of the~~
7 ~~Public Acts of 1913, as amended, being sections 322.401 to~~
8 ~~322.429, inclusive, of the Compiled Laws of 1948, are ex-~~
9 ~~cepted from the operation of this act. Such~~ QUITCLAIM
10 deeds, leases or agreements may be ~~granted~~ ISSUED or enter-
11 ed into by the department with any person, firm, ~~society,~~
12 ~~association,~~ OR corporation, PUBLIC OR PRIVATE, OR the
13 United States of America ~~and any governmental unit of the~~
14 ~~state of Michigan in the manner herein prescribed~~ COVERING
15 UNPATENTED LANDS, and shall contain such terms and condi-
16 tions and requirements which shall be deemed just and equi-
17 able and in conformity with the public ~~interest~~ TRUST as
18 determined by ~~said~~ THE department. The department shall
19 reserve to the state of Michigan all mineral rights, in-
20 cluding but not limited to coal, oil, gas, sand, gravel,
21 stone and other materials or products located or found in
22 said lands, EXCEPT WHERE LANDS ARE OCCUPIED OR TO BE OCCU-
23 PIED FOR RESIDENTIAL PURPOSES AT THE TIME OF CONVEYANCE.
24 (2) AFTER THE EFFECTIVE DATE OF THIS AMENDATORY ACT

OF 1965, A RIPARIAN OWNER SHALL OBTAIN A PERMIT FROM THE DEPARTMENT, FOR WHICH NO CHARGE SHALL BE MADE, BEFORE DREDGING OR PLACING SPOIL OR OTHER MATERIALS ON BOTTOMLAND.

Sec. 4. (a) Application for a deed or lease to ~~said~~ UNPATENTED lands or ~~other~~ agreement ~~in regard thereto~~ FOR USE OF WATER AREAS OVER PATENTED LANDS shall be on forms provided by the department. Such application shall include a surveyed description of the lands OR WATER AREA applied for, together with a surveyed description of the riparian ~~and/~~ or littoral property lying adjacent and contiguous to ~~said~~ THE lands OR WATER AREA, certified to by a registered land surveyor. ~~; which~~ THE description shall show the location of the water's edge at the time it was prepared and such other information that shall be required by the department. ~~Said~~ THE applicant shall be a riparian ~~and/~~ or littoral owner or owners of property touching or situated opposite the unpatented land OR WATER AREA OVER PATENTED LANDS applied for or an occupant of said land. ~~Said~~ THE application shall include the names and mailing addresses of all persons in possession or occupancy or having any interest in the adjacent or contiguous riparian ~~and/~~ or littoral property or having riparian ~~and/~~ or littoral rights or interests in the lands OR WATER AREAS applied for and such application shall be

accompanied by the written consent of all persons having an interest in the lands OR WATER AREAS applied for in -said- THE application.

(b) Before an application can be acted upon by the department, the applicant -must- SHALL secure approval of or permission for his proposed use of such lands OR WATER AREA from any federal agency as provided by law, the Michigan waterways commission and the legislative body of the local unit or units of government within which such land OR WATER AREA is or will be included, or to which it is contiguous or adjacent. -;-and-- No deed, lease or agreement shall be issued or entered into by the department without such approvals or permission. The department may also require the applicant to furnish an abstract of title and ownership, and a 20-year tax history on the riparian -and/- or littoral property which is contiguous or adjacent to the lands OR WATER AREA applied for, as well as ON the lands applied for, if available.

(c) The department shall require the applicant to deposit a fee of not less than $50.00 for each application filed, which fee shall be deposited with the state treasurer to the credit of the state's general fund. Should a deed, lease or other agreement be approved by the department, the applicant shall be entitled to credit for -said-

1 THE fee against the consideration which shall be paid for
2 such deed, lease or other agreement.
3 Sec. 5. Should the department determine that it is
4 in the public interest to grant an applicant a deed or
5 lease to such lands OR ENTER INTO AN AGREEMENT TO PERMIT
6 USE AND IMPROVEMENTS IN THE WATERS or to enter into any
7 other agreement in regard thereto, ~~it shall be the duty of~~
8 the department ~~to~~ SHALL determine the amount of considera-
9 tion to be paid to the state by such applicant FOR THE
10 CONVEYANCE OR LEASE OF UNPATENTED LANDS.
11 (a) THE DEPARTMENT MAY PERMIT, BY LEASE OR AGREEMENT,
12 THE FILLING IN OF PATENTED AND UNPATENTED SUBMERGED LANDS
13 AND PERMIT PERMANENT IMPROVEMENTS AND STRUCTURES AFTER
14 FINDING THAT THE PUBLIC TRUST WILL NOT BE IMPAIRED OR SUB-
15 STANTIALLY INJURED.
16 THE DEPARTMENT MAY ISSUE DEEDS OR MAY ENTER INTO
17 LEASES if the UNPATENTED lands applied for have been arti-
18 ficially filled in or ~~in any manner changed from their~~
19 ~~original character~~ ARE PROPOSED TO BE CHANGED FROM THE
20 CONDITION THAT EXISTS ON THE EFFECTIVE DATE OF THIS ACT
21 by filling, sheet piling, shoring, or by any other means,
22 and such ~~aforesaid~~ lands are used OR TO BE USED or occu-
23 pied in whole or in part for uses other than ~~rightful~~
24 EXISTING, LAWFUL riparian ~~and/~~ or littoral purposes~~;~~.

The consideration to be paid to the state FOR THE CONVEYANCE OR LEASE OF UNPATENTED LANDS by such applicant shall be not less than the fair, cash market value of the ~~aforesaid~~ lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the land. ~~If the application is filed after October 14, 1960, for changes in use made before October 14, 1955, the department may add 25% to the consideration to be paid the state. If the application relates to changes in use made after October 14, 1955, and prior to the effective date of this act, the department shall add 50% to the consideration to be paid to the state.~~ In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian ~~and/~~ or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands.

(b) ~~Deeds, leases or~~ Agreements FOR THE LANDS OR WATER AREA DESCRIBED IN SECTION 2 may be granted to or entered into with local units of government for ~~such consideration~~ PUBLIC PURPOSES and containing such terms and conditions which may be deemed just and equitable

1 in view of the public ~~-interest-~~ TRUST involved ~~-including-~~
2 AND MAY INCLUDE the granting of permission to make such
3 fills as may be necessary ~~-in order to complete any un-~~
4 ~~finished public project existing at the time this act~~
5 ~~takes effect~~.
6 (c) If the UNPATENTED lands applied for have not been
7 filled in,~~-or-~~ NOR in any way substantially changed from their
8 natural character at the time the application is filed
9 with the department, ~~and~~ the application is filed for the
10 purpose of flood control, shore erosion control, drainage
11 and sanitation control or to straighten irregular shore
12 lines, the consideration to be paid to the state by the
13 applicant shall be the fair, cash value of such land, giv-
14 ing due consideration to its being adjacent to and con-
15 nected with the riparian ~~-and/-~~ or littoral property owned
16 by the applicant. ~~The minimum consideration to be paid to~~
17 ~~the state by any applicant shall be not less than $100.00.~~
18 (d) Leases or agreements COVERING UNPATENTED LANDS
19 may be granted or entered into with riparian or littoral
20 proprietors for commercial marina purposes or for marinas
21 operated by ~~-municipalities-~~ PERSONS, corporations, clubs
22 or associations for such consideration and containing such
23 terms and conditions which are deemed by the conservation
24 department to be just and equitable. Such leases may in-

1 clude either filled or unfilled lake bottomlands, or both.
2 Rental shall commence as of the ~~effective date of Act No.~~
3 ~~247 of the Public Acts of 1955, unless the marina operation~~
4 ~~were commenced at a later date, in which case~~ rental ~~shall~~
5 ~~commence as of the date operations were started or the ef-~~
6 ~~fective date of the lease~~ DATE OF USE OF SUCH UNPATENTED
7 LANDS FOR THE MARINA OPERATIONS. DOCKAGE AND OTHER USES
8 BY MARINAS IN WATERS OVER PATENTED LANDS ON THE EFFECTIVE
9 DATE OF THIS ACT SHALL BE DEEMED TO BE LAWFUL RIPARIAN USE.
10 The term "marina purposes" as used in this act shall
11 be construed as an operation making use of Great Lakes
12 submerged bottomlands or filled in bottomlands for the
13 purpose of service to boat owners or operators which may
14 restrict or prevent the free public use of the affected
15 bottomlands or filled in lands.
16 (e) If the department after investigation determines
17 that an applicant has wilfully and knowingly filled in or
18 in anyway substantially changed the lands applied for with
19 an intent to defraud, or if the applicant has acquired
20 such lands with knowledge of such fraudulent intent and
21 is not an innocent purchaser, the sale price shall be the
22 fair cash market value of the land. An applicant may re-
23 quest a hearing of any determination made hereunder. The
24 department shall grant a hearing if requested.

1 Sec. 6. The fair, cash market value of lands approved
2 for sale under the provisions of this act shall be determined
3 by the department. IN NO INSTANCE SHALL THE CONSIDERATION
4 PAID TO THE STATE BE LESS THAN $50.00. If the applicant
5 is not satisfied with the value determined by the depart-
6 ment, within 30 days after the receipt of such determination
7 he may submit a petition in writing to the ~~state tax com-~~
8 ~~mission~~ CIRCUIT COURT OF THE COUNTY IN WHICH SUCH LANDS
9 ARE LOCATED AND THE COURT SHALL APPOINT AN APPRAISER OR
10 APPRAISERS AS THE COURT SHALL DETERMINE for an appraisal
11 of said lands. Decision of the ~~state tax commission~~
12 COURT shall be final.
13 Sec. 7. All moneys received by the department from
14 the sale, leasing or other disposition of lands AND WATER
15 AREAS under this act shall be paid to the state treasurer
16 and be credited to the state's general fund. The depart-
17 ment shall comply with the accounting laws of this state
18 and the requirements with respect to submission of budgets.
19 The department is hereby authorized to hire such employees,
20 assistants, and services that may be necessary within the
21 appropriation made therefor by the legislature and to
22 delegate such authority as may be necessary to carry out
23 the terms of this act.
24 Sec. 10. Any person who excavates or fills, or in

1 any manner alters or modifies any of the land OR WATERS
2 subject to the provisions of this act without the approval
3 of the department shall be guilty of a misdemeanor, and
4 upon conviction shall be fined not more than $1,000.00 or
5 imprisoned not more than 1 year, or both such fine and
6 imprisonment. Lands, the use of which are so changed,
7 shall not be sold to any person convicted under this
8 section at less than fair, cash market value.
9 SEC. 11. A RIPARIAN OWNER MAY APPLY TO THE DEPART-
10 MENT FOR A CERTIFICATE SUITABLE FOR RECORDING INDICATING
11 THE LOCATION OF HIS LAKEWARD BOUNDARY OR INDICATING THAT
12 THE LAND INVOLVED HAS ACCRETED TO HIS PROPERTY AS A
13 RESULT OF NATURAL ACCRETIONS OR PLACEMENT OF A LAWFUL,
14 PERMANENT STRUCTURE. THE APPLICATION SHALL BE ACCOM-
15 PANIED BY A FEE OF $200.00 AND PROOF OF UPLAND OWNERSHIP.

The amendment concurred in, a majority of the members serving voting therefor, by yeas and nays, as follows:

Roll Call No. 930

YEAS

Anderson	Ensign	Mahalak	Sheridan
Arnett	Esch	Mahoney	Smart
Baker	Farnsworth	Marshall	Snyder
Boos	Faxon	Mattheeussen	Spencer
Burton	Ferguson, Mrs.	McCollough, Mrs.	Starr
Buth	Fitzgerald	McNeely	Steeh
Cater	Fitzpatrick	Michalski	Stempien
Charron	Flavin	Monks	Stevens
Clark	Folks	Montgomery, G.	Stopczynski
Conlin	Ford	Montgomery, G. F.	Strange
Cooper	Gray	Morrison	Suski
Copeland	Hampton	Pears	Thorne
Crim	Hayward	Petitpren	Tisdale
Crowley	Hoffman	Powell	Wagner
Davis, S. J.	Hood	Raap	Waldron
DeMaso	Kelsey	Rohlfs	White
De Stigter	Kildee	Root, C. H.	Woodman
Dingwell	Kok	Root, E. V., Jr.	Young, Mrs.
Elliott, Mrs.	Law	Sharpe	Asso. Speaker pro tem
Engstrom	Little		78

NAYS

0

The question being on agreeing to the title as amended by the Senate,

The title was agreed to.

The bill was referred to the Clerk for enrollment printing and presentation to the Governor.

The motion prevailed.

YEAS—24.

Beadle	Hart	Nichols	Romano
Bowman	Huber	Novak	Schweigert
Brown, B.	Johnson	O'Brien, C.	Troutt
Brown, G.	Levin	Potter	Vanderploeg
Bursley	Lockwood	Richardson	Volkema
Craig	McCauley	Roberts	Zaagman

NAYS—13.

Dunn	Mack	Rozycki	Young
Dzendzel	O'Brien, M.	VanderJagt	Youngblood
Fitzgerald	Robinson	VanderLaan	Zollar
Lane			

The bill was passed, a majority of the Senators serving having voted therefor.

The question being on agreeing to the title of the bill,

Mr. C. O'Brien moved to amend the title by striking out "Great Lakes submerged lands act," and inserting "An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; and to provide for the disposition of revenue derived therefrom,".

The amendment to the title was adopted.

The Senate agreed to the title as thus amended.

Mr. Schweigert moved that the bill be given immediate effect.

The motion prevailed, 2/3 of all the Senators serving having voted therefor.

H 2859

R.O. #70 5/11 Pg. 1258 Amend. —

I R. #76 5/19 Pg. 1475 Amend. +1

R.3T. #78 5/21 Pg. 1606 Amend. —

Yeas 80 Nays 2 J.E. - Reps. Cater, Morrison + Walden named co-sponsors.

#75 [illegible] 1139 - [illegible]

[illegible] #[illegible] [illegible] Pg. [illegible] Amend. —

[illegible] #[illegible] [illegible] Pg. [illegible] Amend. +1

R.3T. [illegible] Pg. [illegible] Amend. [illegible]

Yeas [illegible] Nays [illegible] [illegible]

#100 - 6/23 - P. 2613 - Lie over 1 Day

#101 - 6/24 - P. 2741 - Amendment amendment

Rq. to Clerk for Enrollment

P.A. 57
5-25-65
J.E.

UNOFFICIAL

HOUSE BILL No. 2621

March 2, 1967, Introduced by Rep. Baker and referred to the Committee on Conservation and Recreation.

A bill to amend section 2 of Act No. 247 of the Public Acts of 1955, entitled as amended

An act to authorize the department of conservation the state of Michigan to grant, convey or lease certain unpatented lake bottom- and unpatented made lands in the Great Lakes, including the bays and harbors of, belonging to the state of Michigan or held in trust by it; to permit the ate and public use of waters over submerged patented lands and the making of eing ements limiting and regulating the use thereof; to provide for the disposition venue derived therefrom; and to provide penalties for violation of this act,", section 322.702 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 2 of Act No. 247 of the Public Acts of 1955, as amended by Act No. 293 of the Public Acts of 1965, being section 322.702 of the Compiled Laws of 1948, is amended to read as follows:

1 Sec. 2. The lands covered and affected by this act are
2 all of the unpatented lake bottomlands and unpatented made
3 lands in the Great Lakes, including the bays and harbors
4 thereof, belonging to the state ~~of Michigan~~ or held in trust
5 by it, including those lands which have heretofore been arti-
6 ficially filled in. The waters covered and affected by this
7 act are all of the waters of the Great Lakes within the
8 boundaries of the state. This act shall be construed so as
9 to preserve and protect the interests of the general public
10 in the aforesaid lands and waters and to provide for the
11 sale, lease, exchange or other disposition of unpatented
12 lands and the private or public use of waters over patented
13 and unpatented lands and to permit the filling in of patented
14 submerged lands whenever it is determined by the department
15 of conservation that the private or public use of such lands
16 and waters will not substantially affect the public use
17 thereof for hunting, fishing, swimming, pleasure boating or
18 navigation or that the public trust in the state will not
19 be impaired by such agreements for use, sales, lease or other
20 disposition. The word "land" or "lands" whenever used in
21 this act shall refer to the aforesaid described unpatented
22 lake bottomlands and unpatented made lands and patented lands
23 in the Great Lakes and the bays and harbors thereof LYING
24 BELOW AND LAKEWARD OF THE NATURAL ORDINARY HIGH-WATER MARK;

1 but the act shall not be construed as affecting property
2 rights secured by virtue of a swamp land grant. FOR PUR-
3 POSES OF THIS ACT THE ORDINARY HIGH-WATER MARK SHALL BE
4 DEEMED TO BE AT THE FOLLOWING ELEVATIONS ABOVE SEA LEVEL,
5 INTERNATIONAL GREAT LAKES DATUM OF 1955: LAKE SUPERIOR,
6 601.5 FEET; LAKES MICHIGAN AND HURON, 579.8 FEET; LAKE
7 ST. CLAIR, 574.7 FEET; AND LAKE ERIE, 571.6 FEET.

OR SUCH RIGHTS AS MAY BE ACQUIRED BY ACCRETIONS OCCURING THROUGH NATURAL MEANS OR RELICTION.

YEAS—31.

Beadle	Dzendzel	Lockwood	Schweigert
Bouwsma	Faust	Lodge	Stamm
Bowman	Fleming	McCauley	Toepp
Brown	Gray	Novak	VanderLaan
Bursley	Hart	O'Brien	Young
Byker	Hungerford	Richardson	Youngblood
Cartwright	Lane	Rockwell	Zollar
DeMaso	Levin	Rozycki	

NAYS—0.

The bill was passed, a majority of the Senators serving having voted therefor.

The question being on agreeing to the title of the bill,

Senator Rockwell moved to amend the title by striking out "Great Lakes submerged lands act,", and inserting "

		Pittenger	Swallow
		Powell	Symons, Mrs.
Cooper	Huffman	Prescott	Tierney
Davis, C. J.	Hunsinger, Mrs.	Rohlfs	Tisdale
Davis, R. W.	Jowett	Root, C. H.	Traxler
Davis, S. J.	Kehres	Root, E. V., Jr.	Vaughn
Del Rio	Kildee	Rush	Warner
De Stigter	Kok	Ryan	Weber
Edwards	Kolderman	Schmidt	Wierzbicki
Elliott, Mrs.	Law	Sheridan	Woodman
Engstrom	Licata	Smit	Young
Farnsworth	Little	Smith, J. F.	Ziegler
Faxon	Mahalak	Smith, R.	Speaker pro tem
Fitzgerald	Mahoney		90

NAYS

McCollough, Mrs.	Sharpe	2

The House agreed to the title of the bill.

House Bill No. 2621

1968 G.O. #24 2/15 Pg. 352 Amend. (1)

T.R. #35 2/16 Pg. 374 Amend. #1

R.3T. #26 2/19 Pg. 388 Amend. —

Yeas 90 Nays 2

G.O. #31 4/25 Pg. [illegible] Amend. —

T.R. #71 5/13 Pg. 995 Amend. —

R.3T. #72 5/16 Pg. [illegible] Amend. —

Yeas 31 Nays 0

#75 - 5/16 - P. 1919 - PP 5/17

#76 - 5/17 - P. 1930 - Bill given to G.O. Refuse to send for Enrollment

Passed the House .....

#82 - 5/15 - P. 2105 - Presented to Governor at 1:52

.....

Clerk of the House of Representatives

Passed the Senate .....

.....

Secretary of the Senate

1-L

APPENDIX 8 – 9

Documents Related to the Ordinary High-Water Mark:

1960 Dep't of Conservation Memorandum
and
1968 Press Release from Representative Baker

DEPARTMENT OF CONSERVATION

December 8, 1960

TO: Gaylord A. Walker, Deputy Director

FROM: Charles E. Millar, Chief, Lands Division

SUBJECT: Legal Background for the Phrase "ordinary high water mark"

In recent staff discussions of proposed legislation on inland waters and on revision of Department Letter 140, questions as to use of the phrase "ordinary high water" have been raised. Specifically, question has been raised as to (1) the basis in law or legal precedent for the use of this term, and (2) the practicability of this concept and the feasibility of actually determining the location of the "ordinary high water mark" on the ground.

Unlike the situation in Michigan, in many states the public owns the bottom lands of lakes and streams. In consequence, there have been a multitude of court cases in which a line between public property and riparian ownership has been at issue and in the course of rendering opinions on these cases, many courts have dealt with the concept and definition of "high water mark" and "ordinary high water mark". Following are a few of the many citations which can be found:

"ORDINARY HIGH WATER MARK" AS IT APPLIES TO U. S. LAND GRANTS

Of fundamental importance is the fact that this term has been used in defining the limits of federal patents bordering navigable waters, (whether meandered or not meandered). The following citations appear as given in United States Code Annotated, Title 43, Ch. 22, Sec. 931, p. 205.

> United States grants of public lands bordering upon navigable rivers convey title to the line of ordinary high-water mark of such rivers...Washougal & L. Transp. Co. v. The Dalles, P. & A. Nv. Co. (1902) 68 P. 74, 27 Wash. 490.
>
> A riparian proprietor on a navigable stream has absolute title to the line of ordinary high-water mark by virtue of a chain of title reaching back to the sovereign, and owns to the center of the stream by grace of the state, subject, however, to public rights, substantially the same as those incident to navigable waters at common law, unaffected by the size of the river. Gniadck v. Northwestern Improvement & Boom Co. (1898) 75 N.W. 894, 73 Minn. 87; Franzini v. Layland (1903) 97 N.W. 499, 120 Wis. 72.

In Michigan, "by grace of the state" (supreme court rulings) the riparians are said to own the bottoms of inland lakes and streams. This does not, however, affect the validity of use of the term "ordinary high water mark" as the upper limit of those aspects of the water which are held in trust by the public,

such as navigation, fishing, and other types of public enjoyment.

"ORDINARY HIGH WATER MARK" AS USED IN WISCONSIN

In Wisconsin it has long been the rule that the State owns the bottoms of inland lakes as well as the Great Lakes. The ordinary high has become established as the dividing line between public and private interests.

In 1959, Wisconsin made numerous revision in its statute which defines navigable waters and public rights in waters, prohibits structures and fills, regulates wharves, etc. The following appears as a "Legislative Council Note" annotation to this revised law in Wests Wisconsin Statutes Annotated, Vol. 4, 1960, Cumulative Pocket Park, page 57:

> The meander line also is meaningless from the standpoint of establishing respective rights of riparian owners and the public; it is the ordinary high water line that controls.

Note that this line is applied not simply to bottom-land upland property ownership division, but to "respective rights of riparian owners and the public". Wisconsin lakes and streams being similar in character to those of Michigan, their use of this term should give confidence that it will also well apply in Michigan.

HIGHWATER MARK - HIGH WATER LINE

> Ordinarily, the terms "high water line" and "high water mark" are synonymous, City of Manhattan Beach v. Cortelyou, 76 P.2d 483, 10 Cal.2d 653.

ORDINARY HIGH WATER MARK - HIGH WATER MARK

The use of the term "ordinary high water mark" is less common than the term "high water mark". As a matter of practice, however, the terms are used for the same purposes and the former is an adaptation or perhaps a more precise statement of the latter, though less commonly used.

> "High water mark" means ordinary high-water mark--the point at which the sovereign ownership of the state begins. Rondell v. Fay (1867) 32 Cal. 354. (As quoted in U. S. Code Annotated, Title 43, 931)

> In action to quiet title . . . term "high-water mark" meaning, in view of Civ. Code, P830, neither an extremely high nor an extremely low water line, but referring to the ordinary high-water mark. Ross v. Burkhard Inv. Co., 265, P 982, 984, 90 Cal. App. 201.

Many times the courts have gone to great pains to point out that high water mark does not mean the line reached by extreme highs, or great floods, or freshets, etc., but rather means a level that is so ordinarily reached that it leaves evidence on the ground that is observable and locatable. Using "ordinary high" eliminates the extremes in the first place, and to us is the preferable term.

MOST FREQUENTLY USED DEFINITION

Following is the definition which is quoted most frequently and is found to be repeated word for word in many court opinions, and with some variation in still more opinions. We here quote from Farnham on Water and Water Rights, Vol. II, 416:1461.

> "But the definition which best meets all requirements of the case and which has in effect been adopted by the weight of authority is that high-water mark is the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as with respect to the soil itself." (emphasis added)

ADDITIONAL DEFINITIONS

Following are two additional definitions selected from the many given Words and Phrases (a "legal dictionary" of some 45 volumes), Vol 19, pp 435-439.

> By the ordinary "high-water mark" of a navigable stream is meant the point up to which the presence of the water is so continuous as to leave a distinct mark by erosion, destruction of vegetation, or other easily recognized characteristics; and, where the bank at a particular place is of such character that the high-water mark cannot be easily determined, other places on the bank may be resorted to for determining the high-water mark. Diana Shooting Club v. Husting, 145 N.W. 816, 820, 156 Wis. 261, Ann.Cas.1915 C, 1148. (emphasis added)

The underlined words in this Wisconsin case demonstrate that the courts can and do recognize the necessity of a practicable definition and reasonable method of determining the actual location of the line on the ground.

> High-water mark does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, nor yet does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes. Welch v. Browning, 87 N.W. 430, 431, 115 Iowa, 690.

The underlined words could serve as a guide to arriving at decision in such cases as that of Base Line Lake, discussed by the Staff a few months ago, in which the issue involved a "flood stage" of a lake, with water encroaching beneath forest cover.

Words and Phrases contains about 40 citations giving definitions or explanation of ordinary high and high water mark. These applications are in good agreement with each other, and there is no important conflict among them which cause us difficulty in applying the concept.

SUMMARY

In summary, it can clearly be said that the term "ordinary high water mark" is an acceptable legal term in general use and widely applied. The courts and the law would not make such prevailing and general application of the term if it were not a practicable term, and if it were not possible to make concrete application in the field in the matter of locating an actual line upon the ground upon which all parties could arrive at agreement.

- - - - - - - - - - - - - -

For comparative purposes, we here append definition of the term as stated in Paragraph 1a of the Rules and Regulations for administration of the Great Lakes Submerged Lands Act, together with additional stipulations appended to the definition:

DEFINITION:

> "Ordinary high water line" shall refer to that natural line between the upland and the lake bottom land which persists through periodic

changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland.

ADDED EXPLANATION:

This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be re-established with the return of high stages.

This sentence is intended to be added explanation or amplification. It is not essential to the definition, and if it confuses rather than clarifies, it could be eliminated.

ADDED PROVISION:

When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place.

This provision is intended to establish and remove any doubt as to method of determining the ordinary high when the shoreline has been altered.

Experience in administration of the Great Lakes Submerged Lands Act has shown the use of this term, and this particular definition, to be highly acceptable. While in a very few cases where long stretches of shoreline have been filled many years ago, there may be some disagreement as to location of the line, there has otherwise been substantially no difficulty in arriving at agreement with riparian owners in the some 400 cases already handled, and no litigation or threat of litigation has arisen on this point.

Copies to: Director
Secretary
Assistant Deputy Directors
Regional Chiefs
Paul Barrett
N. V. Olds
H. J. Hanes
Division Chiefs

FOR IMMEDIATE RELEASE

LANSING, May 28 --- an ordinary high water mark was established for Michigan's Great Lakes this morning when Governor Romney signed House Bill No. 2621. A situation which for years caused confusion and controversy among shoreline owners, surveyors, land developers and the state itself came to an end with the signing.

Representative Raymond L. Baker, of Farmington, who introduced the bill and promoted its passage, termed the measure "a much-needed, permanent reference point for determining public and private rights where Great Lakes shorelines are involved." Heretofore, the location of property lines were clouded due to the constantly fluctuating water levels.

The new law established the ordinary high water mark at these elevations above sea level: International Great Lakes Datum - Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair 574.7 feet; Lake Erie, 571.6 feet.

Among other things, establishment of the ordinary high water mark indicates to a property owner that he may not dredge, fill, or build on land which is temporarily exposed below the mark. Any such projects would require a state permit and approval of the local government.