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DYNNIE L. MAZEIKA
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL.)	CASE NO. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.,)	
)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,)	
)	
vs.)	PLAINTIFFS' MOTION FOR CLASS
)	CERTIFICATION ON COUNT ONE OF
STATE OF OHIO, DEPARTMENT OF)	THE FIRST AMENDED COMPLAINT
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents.)	

Pursuant to Rule 23 of the Ohio Rules of Civil Procedure, Plaintiffs move this Court for an Order certifying a class in this lawsuit as follows:

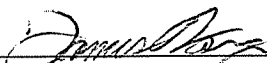
All private persons and entities holding fee simple title to real property in Ohio that abuts Lake Erie and is below the elevation of 573.4 feet IGLD (1985).

("the Class").

Excluded from the Class are the Defendants in this action, the State of Ohio, Department of Natural Resources, Sam Speck, Director of the Ohio Department of Natural Resources and the State of Ohio ("the State"), any entity in which the State has a controlling interest, any officers or directors of the State, the legal representatives, heirs, successors, and assigns of the State, and any political subdivisions as defined in Ohio Revised Code § 2744.01.

As evidenced by the allegations stated in the Plaintiffs' First Amended Complaint and as stated more fully in the attached Memorandum in Support, this case meets all the requirements to be a class action. Thus, this Court should certify Count One of the First Amended Complaint as a class action.

Respectfully submitted,



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ROBERT MERRILL, TRUSTEE, et al.,)	
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)	PLAINTIFFS' MOTION FOR CLASS
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Defendants-Respondents.)	

INTRODUCTION

The State of Ohio, Department of Natural Resources', Sam Speck, Director of the Ohio Department of Natural Resources' and the State of Ohio's (together, "the State") recent change-of-position that it owns the land along Lake Erie between the shoreline and the purported "ordinary high water mark" as defined by the U.S. Army Corps of Engineers (hereinafter "OHW") has resulted in a uniformly unlawful confiscation of private property from all owners of the approximately 15,500 parcels of property that abut Lake Erie. In this suit, the Plaintiffs seek to vindicate those rights: each of the named Plaintiffs is a landowner whose property abuts Lake Erie and whose property rights have been impacted by the State's land grab. (Complaint ¶¶ 2, 3, 11-13, 26, 28). Since the Plaintiffs will fairly and adequately protect the interests of the class, all of the prerequisites for a class action, as stated in Rule 23(A) of the Ohio Rules of Civil Procedure have been met.

Likewise, as stated in Rule 23(B) of the Ohio Rules of Civil Procedure, a class action is particularly suited as a means to vindicate these property rights because:

- * the State has acted on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief to the class as a whole. *As stated above, the State's recent policy change has resulted in a confiscation of real property from each owner of land abutting Lake Erie.*
- * prosecution of separate actions by individual class members would create the risk that varying adjudications which would create incompatible standards of conduct for the State. *For instance, the State's leasing program for land lakeward of OHW could be*

found to be permissible for some landowners and impermissible for a neighboring landowner.

- * adjudications with respect to the named Plaintiffs property rights would be practically dispositive, or at least substantially impair, other landowners' ability to protect their own property interests. *Any ruling adverse to the named Plaintiffs on the extent of the State's ownership rights will, as a practical matter, serve as precedent for other class members' efforts to vindicate their own property rights.*
- * the questions of law or fact common to the members of the class predominate over questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Since Plaintiffs are only seeking class certification on Count One of the First Amended Complaint at this time, the disputed issue is essentially legal and thus, a class action is clearly the appropriate method under which to proceed.*

Based on these points, each of the requirements of Civil Rule 23(A) and (B) are met and, thus, Count One of the First Amended Complaint should be certified as a class action.

BACKGROUND

The Plaintiffs, Robert Merrill, Trustee; Ohio Lakefront Group, Inc. ("OLG"); Anthony J. Yankel; Charles S. Tilk; Sheffield Lake, Inc.; Sandra L. Wade; David A. Zeber; Adrian F. Betleski; Steve Nickel; Lemarr L. and Patricia J. French; Neal Oscar Luoma; and Timothy and Kimberley Rosenberg (collectively, the "Named Plaintiffs") bring this action against the State based on the Ohio Department of Natural Resources' improper practice of asserting ownership and possession over Ohio citizens' private property abutting Lake Erie. This is not a case, as the State has misconstrued it, regarding the State's regulation of private property. Instead, the Named Plaintiffs challenge the State's brazenly unlawful claim of ownership over lands located lakeward of OHW that are privately held. The State's assertion of ownership and control over all such lands abutting Lake Erie deprives all littoral owners of their property rights, including their right to exclude others for their own property. (Complaint ¶¶ 1, 11-13, 26-28).

For over 200 years, Ohio law has recognized that the lakeward property line of a littoral owner of property abutting Lake Erie is a "moveable freehold." In other words, the property line moves either lakeward or landward by virtue of accretion, erosion, or reliction. The status of the law is not subject to reasonable dispute. Ohio law has always stated that public ownership is limited to the water extending out from the shore and the soil beneath and that, conversely,

private ownership of land abutting Lake Erie extends at least to the water. See Sloan v. Biemiller, 34 Ohio St. 492 (1878), syll. ¶ 4; see also 2000 Ohio Atty. Gen. Op. No. 47, fn.3 (noting exception whereby private owners also may hold title to submerged lands lakeward of the shoreline). The plain language of the Ohio Revised Code makes this point abundantly clear. See R.C. § 1506.10.¹ In fact, the State’s counsel here, the Ohio Attorney General, specifically instructed ODNR in 1993 that the State’s interest in Lake Erie does not extend above the water’s edge. See 1993 Ohio Atty. Gen. Op. No. 025.

Recently, however, ODNR has maintained that the state of Ohio owns all the land lakeward of OHW, which was defined by the U.S. Army Corps of Engineers based on data from the mid-1980’s. (Complaint ¶ 11). Thus, in defiance of Ohio law, and its own counsel’s position, ODNR states that it owns all property lakeward of OHW, regardless of whether the property is dry land or privately owned. See Exhibit A hereto, a copy of the Ohio Department of Natural Resources brochure stating its current policy. As a result, ODNR has attempted unlawfully to exercise ownership rights over all property lakeward of OHW. (Complaint ¶¶ 1, 11, 12, 24, 26). Among other things, ODNR has imposed leasing obligations upon those who seek to occupy or use this land (as well as submerged land used to wharf out to navigable waters) and has declared that littoral landowners may not exclude others from these “public” lands that are, in fact, rightfully owned by those littoral landowners. (Complaint ¶¶ 1, 12, 28).

The Named Plaintiffs seek to certify a class for purposes of Count One of the First Amended Complaint—a count seeking a declaration regarding the extent of the State’s property rights, reserving certification of Counts Two and Three (the constitutional takings issues) until after the declaratory judgment issue has been resolved.

¹ Ohio Revised Code § 1506.10 states, in relevant part:

It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state . . . Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters . . . shall not be considered as having prejudiced the rights of the public in such domain. (emphasis supplied)

**THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF OHIO CIVIL
RULE 23 AND SHOULD BE CERTIFIED**

Ohio judges have broad discretion to entertain class-action lawsuits. *Planned Parenthood Ass'n v. Project Jericho*, 50 Ohio St. 3d 56, 62 (1990). Likewise, a determination that a class should be maintained is one that will “not be disturbed absent a showing of abuse of discretion.” *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St. 3d 200 (1987), syllabus. “Civ. R. 23 is to be liberally construed in the early stages of litigation. . . .” *Portman v. Akron Sav. & Loan Co.*, 47 Ohio App. 2d 216, 220 (Summit App. 1975). Further, citing the trial courts’ special expertise and familiarity with case management problems and its inherent authority to control its own docket, appellate courts have held that any doubts a trial court may have as to whether the elements of a class certification have been met should be resolved in favor of upholding the class. *Carder Buick-Olds Co. Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App. 3d 635, 639 (Montgomery App. 2002).

In *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67 (1998), the Ohio Supreme Court summarized the showing from Civil Rule 23 necessary in order for a court to certify a class action. These requirements are:

- (1) An identifiable class must exist and the definition of the class must be unambiguous;
- (2) The named representatives must be members of the class;
- (3) The class is so numerous that joinder of all members is impracticable;
- (4) there must be questions of law or fact common to the class;
- (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class;
- (6) the representative parties must fairly and adequately protect the interests of the class; and
- (7) One of the three Civ. R. 23(B) requirements must be met.

Hamilton, 82 Ohio St. 3d at 71 (citing Civil Rule 23(A) and (B)). The Named Plaintiffs need only demonstrate that it is more likely than not that these elements exist. *Warner v. Waste Mgt., Inc.*, 36 Ohio St. 3d 91, 94 (1988). As will be discussed below, this standard is exceeded, each of these factors is clearly met and a class ought to be certified.

A. There is an Identifiable Class

Ohio Civil Rule 23 requires plaintiffs to provide a description of the class that is “sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Hamilton*, 82 Ohio St. 3d at 71-72. Therefore, the class definition must be “precise enough ‘to permit identification’ of eligible claimants within a ‘reasonable effort’” *Id.* at 72, quoting *Warner*, 36 Ohio St. 3d at 96.

The Class is defined as: **All private persons and entities holding fee simple title to real property in Ohio that abuts Lake Erie and is below the elevation of 573.4 feet IGLD (1985).** This Class definition is unambiguous and allows for easy identification of all Class members with reasonable effort. Simply by resorting to the county property records for those counties along the shores of Lake Erie, the identity of the landowners whose property abuts the shoreline of Lake Erie may be discerned. The elevation line intersecting these properties at 573.4 feet IGLD (1985) is readily determined by a surveyor, as has been done by the State itself on countless occasions. In fact, on information and belief, the Named Plaintiffs understand that the Ohio Department of Natural Resources has records of the lands below OHW over which it is improperly exercising authority pursuant to Ohio Revised Code § 1506.10 and .11. Thus, this factor is easily satisfied.

B. The Named Plaintiffs are Class Members

The class membership prerequisite only requires that the representatives have standing to sue. *Hamilton*, 82 Ohio St. 3d at 74. In order to have standing to sue as a class representative, the plaintiffs must “possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent.” *Id.*; citing 5 Moore’s Federal Practice (3 Ed. 1997) 23-57, Section 23.210.

In the present case, the Named Plaintiffs are each owners of land abutting Lake Erie. See Complaint ¶ 3. As a result of the State’s policies, each of the Named Plaintiffs will suffer the same injury as the injury suffered by the class as a whole: the confiscation of their private property if this Court determines that the State’s interpretation of its boundaries exceeds the boundaries created by law.² Therefore, the class membership requirement is satisfied.

² Furthermore, the Ohio Lakefront Group has standing to bring claims here as an organization. See *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

C. The Class Is So Numerous that Joinder of All Members Is Impracticable

The numerosity requirement considers the number of claimants who might deserve an opportunity to participate in the case. The Rule does not specify the minimum size that would render joinder impracticable. Instead, courts are given a “degree of flexibility in the determination of whether the proposed class is sufficiently numerous to qualify under Civ. R. 23(A)(1).” *Vinci v. American Can Co.*, 9 Ohio St. 3d 98, 99 (1984); *see Reeb v. Ohio Dept. of Rehabilitation*, 203 F.R.D. 315, 321 (S.D. Ohio 2001) (class of fifty-nine correctional officers satisfied the requirement); *Henderson*, 82 Ohio St. 3d at 74 (finding 2,700 class members as sufficient). Furthermore, “[j]oinder is more likely to be impracticable if the class members can be assumed to lack the ability or the motivation to institute individual actions. For example, if [a] class member’s individual claims involve only a small amount of damages, class members would be unlikely to file separate actions. Courts have concluded their joinder is impracticable in such circumstances.” *Hamilton*, 82 Ohio St. 3d at 75, *quoting* 5 Moore’s Federal Practice (3 Ed. 1997) 23-71, Section 23.22[5].

Here, there are approximately 15,500 parcels of real property abutting Lake Erie. As a result, the number of persons and entities who own real property in Ohio abutting Lake Erie is sufficiently large enough to satisfy the numerosity requirement of Ohio Civil Rule 23. Given the size of the proposed Class, joinder would be impracticable at this stage of the proceedings. Based on these points, this factor is satisfied.

D. Numerous Questions of Law or Fact Are Common to the Class

Ohio Civil Rule 23 requires that there be questions of law or fact common to the class. The Rule does not require a total commonality of issues to certify a class. *Planned Parenthood*, 52 Ohio St. 3d at 64. Rather, commonality usually “is met without difficulty for the parties and very little time need be expended on it by the . . . judge.” *Warner*, 36 Ohio St. 3d at 97. Commonality exists when there is a “common nucleus of operative facts, or a common liability issue.” *Marks v. CP Chem. Co.*, 31 Ohio St. 3d 200, 202 (1987) *citing* *Miles v. N.J. Motors*, 32 Ohio App. 2d 350 (Lucas App. 1970). In fact, this element “has been characterized as a ‘low hurdle’ easily surmountable.” *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996), *quoting* *Scholes v. Stone, McGuire, & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992), *see also* *Hamilton*, 82 Ohio St. 3d at 77 (finding that courts generally give the commonality requirement a “permissive application”).

In this case, there are many factual and legal questions common to all Class members. Factually, all Class members but OLG are owners of real property which is impacted by the State's definition of the extent of the public lands lakeward of OHW, and OLG is a representative of many such property owners. Legally, common to all Class members are the questions of whether: (1) ODNR's policy of establishing private property lines complies with existing state law; and (2) whether the State owns all land lakeward of OHW. Because of these common factual and legal issues, the commonality requirement is satisfied.

E. The Named Plaintiffs' Claims Typify Those of All Class Members

"The requirement for typicality is met where there is no express conflict between the class representatives and the class." *Hamilton*, 82 Ohio St. 3d at 77. The typicality requirement serves to protect "absent class members and promot[e] the economy of the class action[s] by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman*, 88 Ohio St. 3d at 484, *citing* 5 Moore's Federal Practice (3 Ed. 1977), Section 23.24[1] at 23-92 to 23-93. The Rule does not require that the Named Plaintiffs' claims be identical to those of all other class members. *Id.* Furthermore, only an "express conflict between representatives and the class" can preclude class certification on these grounds. *Shaver v. Standard Oil Co.*, 89 Ohio App. 3d 52 (Huron App. 1993).

In the present case, the Named Plaintiffs' claims typify those of all Class members. The Named Plaintiffs and the remaining class members each share the same claim: the State's recent policy that the State's land extends lakeward of OHW has resulted in an unlawful confiscation of both the Named Plaintiffs' and the remaining class members' private property. In this instance, since the gist of this lawsuit is the determination of the extent of the State's property interests in lands, in the face of property rights of private landowners, below OHW, the only antagonistic interests are between each of the individual class members and the State, not between class members themselves. As such, there are no conflicts or antagonistic interest between the Named Plaintiffs and the Class.

F. Adequate Representation of the Class

The adequate representation element is clearly met here. "A representative is deemed adequate so long as his or her interest is not antagonistic to that of other class members." *Hamilton*, 82 Ohio St. 3d at 77-78, *citing Warner*, 36 Ohio St. 3d at 98.

The Named Plaintiffs are adequate representatives of the Class. Since their claims are typical of the Class, there will be no antagonistic interests that would inhibit a zealous pursuit of the claims in the First Amended Complaint. While it is anticipated that neither this motion nor the summary judgment motion to be filed on Count One will entail much discovery, the Named Plaintiffs are nevertheless ready to engage in whatever discovery or other legal proceedings that are necessary in order to prosecute the interests of the Class. Finally, the Named Plaintiffs will promote the interest of the Class through qualified counsel. The Class is represented by highly experienced and qualified counsel with experience in class action suits. Therefore, there simply is no dispute that the Named Plaintiffs and their counsel will adequately represent the class.

G. The Proposed Class Satisfies the Requirements Set Forth in Ohio Civil Rule 23(B).

Ohio Civil Rule 23 requires that the proposed class satisfy one of the three sections of that Rule. Here, a class action is appropriate under each of the requirements of Civil Rule 23(B)(1) through (B)(3).

Most obviously applicable are the provisions of Ohio Civil Rule 23(B)(2), which authorizes a class action where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Civ. R. 23(B)(2). This case is uniquely suited to proceed as a class action under that provision. Indeed, Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2 Ed. 1986) 470, Section 1775 state that under the similarly worded Rule 23 of the Federal Rules of Civil Procedure, provided that the Rule 23(a) requirements have been met, cases seeking class wide declaratory or injunctive relief should ordinarily be certified as a class: “[i]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).”

Due to the fact that ODNR has acted on grounds generally applicable to the Class by declaring all land lakeward of OHW to be State property, this Court should make appropriate declaratory relief with respect to the class as a whole. Furthermore, since the Class has met the Rule 23(a) prerequisites and declaratory relief has been requested, the action should be allowed to proceed under subdivision (b)(2).

Ohio Civil Rule 23(B)(1) also is applicable. This provision states that a class action may be maintained where “prosecution of separate actions by individual class members would create the risk of”: (1) “varying adjudications” creating “incompatible standards of conduct for the party opposing the class” or (b) “adjudications with respect to the individual members of the Class” which would “as a practical matter be dispositive of the interests” or would “substantially impair or impede” the other non-party classmembers’ ability to protect their interests.” Both of these circumstances are satisfied here.

The requirements of Rule 23(B)(1) are met here because, without a class, inconsistent or varying adjudications with respect to individual members of the class might occur which would establish incompatible standards of conduct for the State. The easiest example of this concern is the State’s leasing program for land between the shoreline and OHW. If a class is not certified, then the State could continue to lease the land lakeward of OHW to landowners who were not a Named Plaintiff in this case. The State also could take similar action, such as granting beach access, as to all landowners along Lake Erie except for those Named Plaintiffs in this case.

Likewise, any ruling adverse to the named Plaintiffs on the extent of the State’s ownership rights will, as a practical matter, serve as precedent for other class members’ efforts to vindicate their own property rights. Because the issue set forth in Count One of the First Amended Complaint is essentially legal, if this court were to rule adversely to the Named Plaintiffs, the likelihood exists that such a ruling would have a greater precedential value because of the absence of distinguishing facts. At a minimum, an adverse ruling here would “substantially impair or impede” the non-Named Plaintiffs’ ability to protect their interests within the meaning of Civil Rule 23(B)(1).

Finally, this Class satisfies the requirements under Ohio Civil Rule 23(B)(3). Ohio Civil Rule 23(B)(3) authorizes class certification where: (1) common questions of law or fact “predominate over questions affecting only individual members;” and (2) a class action is “superior to the other available methods for the fair and efficient adjudication of the controversy.” Ohio Civil Rule 23 (B)(3); *see also Warner*, 36 Ohio St. 3d at 96.

In establishing predominance, plaintiffs must demonstrate more than just the existence of common issues. *Toledo Fair Housing Ctr. v. Nationwide Mut. Ins. Co.*, 94 Ohio Misc.2d 17, 34 (Lucas Cty. Com. Pleas 1996). Instead, one should examine “whether common questions of law and fact” represent a “significant aspect” of the class in this case and whether these questions are

“capable of resolution for all members of the class in a single adjudication.” *Lowe v. Sun Refining & Marketing Co.*, 73 Ohio App. 3d 563, 571 (Lucas App. 1994). Due to the fact that ODNR’s practices of asserting ownership of land abutting Lake Erie lakeward of OHW uniformly impact the Named Plaintiffs and the entire Class, and because this motion only seeks to certify a class on Count One of the Complaint, then issues of fact and law common to all Class members predominate over any individual issues.

In addition, a class action is the superior method for resolving this controversy. Under Civil Rule 23(B)(3), superiority means “economy, efficiency, and ease of handling.” *Cleveland Bd. of Educ. v. Armstrong World Indus.*, 22 Ohio Misc. 2d 18, 26 (Ct. C. Pl. Cuyahoga 1985). Summarizing the requirements of Civil Rule 23(B)(3), the Ohio Supreme Court in *Hamilton*, cited the following factors as relevant to this determination:

- The claimants’ interest in bringing and controlling separate actions;
- The existence of other lawsuits already filed individually by other class members;
- The desirability or undesirability of concentrating the litigation of the claims in the particular form; and
- The difficulty likely to be encountered in the management of the class action.

Hamilton, 82 Ohio St. 3d at 79-80.

These factors are met here. In the present action, many of the Class members have little interest in bringing this litigation individually because of the costs involved. Further, to Class counsel’s knowledge, there are no existing lawsuits involving the conduct complained of herein that are not already joined to this case and thus, this Court will not impede competing litigation. Further, in consolidating the Class members before one forum, the Class action will be convenient, inexpensive, and allow a universal proof of critical elements, thereby, achieving judicial efficiency. Similarly, due to the commonality of the issues and facts described above, there will be few difficulties in managing a class trial. For these reasons, a class action under Count One of the First Amended Complaint satisfies Rule 23(B)(3) as well.

CONCLUSION

For the reasons set forth herein, the Plaintiffs respectfully request that the Class be Certified on Count One of the First Amended Complaint and that they be appointed to represent the Class.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Plaintiffs' Motion for Class Certification on Count One of the First Amended Complaint and Memorandum in Support* was served, via regular U.S. mail, upon the following, this 16th day of September, 2004:

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EXHIBIT A

Submerged Lands Management



Rights and Opportunities on the Ohio Shore of Lake Erie

Who Owns Lake Erie: Ohio's Public Trust

The Public Trust Doctrine provides that public trust waters, the lands beneath, as well as the living resources inhabiting these waters within a state is property held by a state in trust for the benefit of all the people. The doctrine establishes the right of the public to use and enjoy the trust property for a wide variety of recognized public uses. Ohio Revised Code Section 1506.10 declares that Lake Erie waters, submerged lands and contents belong to the state of Ohio, and have always belonged to the state as proprietor in trust for the people of the state. This special title includes those lands formerly underlying Lake Erie and now artificially filled.

What is the Boundary of the Public Trust?

Ohio law uses the term "natural shoreline" to define the boundary of the public trust property (O.R.C. §1506.11). The Ohio Department of Natural Resources (ODNR) follows the common law principal that the trust property includes the lands below the Ordinary High Water elevation (OHW). The federal government conveyed this property, to OHW elevation, to the state of Ohio when the state was organized in 1803. The U.S. Army Corps of Engineers (Corps) has established the OHW elevation for Lake Erie at 573.4 feet, International Great Lakes Datum (IGLD) 1985. This boundary, established administratively by the Corps utilizing long-term water level and climate data, coincides very well with the physical evidence of what is sometimes referred to as the ordinary high water mark.

ODNR uses this OHW elevation as the boundary of the Lake Erie trust property in its submerged lands leasing program. It is consistent with the Corps' jurisdictional boundary for regulatory purposes, and is consistent with Ohio case law and Supreme Court decisions. The state of Ohio does not assert this public trust ownership in areas that extend upstream beyond the mouths of Lake Erie tributaries, even though the lake-influenced OHW elevation can often be measured far upstream. Lake Erie's natural shoreline (the boundary of the trust property) does change over time as a result of natural processes such as erosion or accretion. On the other hand, the location of the natural shoreline can also become fixed behind artificial structures or fill placed along the shoreline.

What Rights Do the Public Have within the Public Trust Area?

Public trust lands are special in nature, and include the public's right to use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. The Ohio Supreme Court has expressed thorough agreement with the Ohio Attorney General that there should not be a narrow meaning of navigation and public uses. The Court has expressed its firm belief that the law should be flexible enough to be applied to a constantly progressive civilization. However, the public uses to which Lake Erie and its submerged lands may be adapted are also

subject to the powers of the United States government and must respect the property rights of littoral owners of upland property to make reasonable use of the waters in front of their lands.

What Rights do Owners of Private Shoreline Property Have within the Public Trust Area?

A littoral owner is one who owns upland property on the shoreline of Lake Erie. The terms "littoral" and "riparian" are often used synonymously. Littoral owners have unique rights stemming from ownership of waterfront land. Littoral property owners have the right to reasonable use of the waters in front of their lands. The littoral right of access provides the property owner reasonable access to the water from his or her property. This might be achieved by access from the shore or by use of a mooring, or by constructing a dock appropriately authorized by a state submerged lands lease and permit from the Corps of Engineers. A littoral owner cannot exclude the public from lawful uses of navigable water. Similarly, a duly authorized dock or other littoral structure is private property, and no one can legally interfere with the exercise of this right of access.

Shoreline Protection

Ohio's coastal management policies allow property owners to repair existing structures and to construct erosion control measures necessary to protect homes and other property. ODNR issues submerged land leases for erosion control structures that are built on public trust property (beyond the natural shoreline). This is mutually advantageous because it protects the public's rights in Lake Erie and also establishes the property owner's legal interest in the public trust lands. Other permits and approvals are necessary for erosion protection structures. ODNR's Division of Engineering reviews plans for shoreline structures and issues permits to construct works to arrest or control erosion, wave action or inundation along the Ohio shoreline of Lake Erie. An erosion control structure that does not extend beyond the natural shoreline, or OHW elevation, will not require a submerged lands lease, but will require a permit to construct from ODNR's Division of Engineering.



Our Mission

As stewards of Lake Erie's coastal resources, we will attain and sustain a healthy coast by balancing its use and preservation

If you have comments or questions, please contact the
Coastal Management Program at (614) 265-6383 or FAX (614) 267-2981
Or

ODNR's Coastal Services Center at (419) 626-7980 FAX: (419) 626-7983

TOLL FREE: 1-888-644-6267

Web: <http://www.dnr.state.oh.us/odnr/reim/coastal/cmp.htm>

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O H I O
C O A S T A L M A N A G E M E N T P R O G R A M





The Public Trust, which includes Lake Erie's water, the land beneath the water, and the resources living in the water, is held in trust by the State of Ohio for the benefit of its citizens. The State, acting as a trustee for all Ohioans, allows public land and natural resources to be used for recreation, public infrastructure, private enterprise, and in the case of Lake Erie, protection of shoreline property from flooding and erosion.

The "Public Trust Doctrine" recognizes that littoral (shoreline) property owners have the right to reasonably use the water fronting their property. A Submerged Lands Lease is the mechanism by which Ohio authorizes this use of the Lake Erie Public Trust. Leasing submerged land enables the state to manage the Public Trust, accommodate various private and public uses, and help protect the rights of littoral property owners.

Here are answers to some common questions about Submerged Lands Leases

What is a Submerged Lands Lease ?

A Submerged Lands Lease is a contract between a shoreline property owner and the State of Ohio. The lease grants a private or public entity the special use of a portion of Public Trust (i.e. Lake Erie submerged land) in exchange for a rental fee.

The lease states the legal responsibilities of the lessor (the State of Ohio) and the lessee (the applicant). It defines the leased land's boundary, the authorized use(s), sets the rental rate and the term of occupancy. Leases are prepared by the Ohio Department of Natural Resources (ODNR) and executed by the Governor as proprietor in trust for the citizens of Ohio.

What are the rental rates ?

The annual rental rate is based on the square footage of Public Trust area occupied by the structure and the proposed use of the structure. Rental rates range between 1 to 4 cents per square foot. A flat annual fee for processing the payment may be charged in addition to the rental rate depending on the type of usage.

What projects require a Submerged Lands Lease ?

A Submerged Lands Lease is required for wharfs, docks, marinas, piers, boat ramps, seawalls, breakwaters, stone revetments, groins, jetties, water intakes, utility lines, and any other acceptable structure or fill that occupies the Lake Erie Public Trust. Only the portion of a structure that occupies the Public Trust must be leased.

Sandusky Bay and Maumee Bay are considered part of the Lake Erie Public Trust. The rivers and streams that empty into Lake Erie are not.

Do existing structures require a Submerged Lands Lease ?

Existing structures or fills that are not currently leased require a Submerged Lands Lease. In some circumstances, modifications to the existing structure or fill may be required to comply with applicable laws and policies. ODNR will assist you with determining what structures need to be leased and what, if any, modifications may be necessary.

How is a Submerged Lands Lease application obtained ?

A Submerged Lands Lease application form and detailed instructions can be found in the *ODNR Coastal Permits and Lease Booklet*, which can be obtained from the **ODNR Coastal Services Center at 1630 Sycamore Line, Sandusky, Ohio 44870** or by calling **(419) 626-7980**.

Please note that a resolution from the local legislative authority that has jurisdiction at the location of the proposed lease area (e.g. port authority, municipality, or county) must accompany a Submerged Lands Lease application. Contact information for these local authorities and guidance on obtaining a resolution can be obtained by contacting the ODNR Coastal Services Center.

Is there an application fee ?

There is no fee to apply for a Submerged Lands Lease. However, the services of an Ohio Registered Professional Surveyor are usually needed to establish the lease boundary and square foot area.

What happens after an application is submitted ?

ODNR reviews the application to determine if it is complete and if the project complies with Ohio law, including Ohio's Coastal Management Policies. If the application does not contain all of the documents and information listed in the *ODNR Coastal Permits and Lease Booklet*, ODNR will request the information needed to complete the application. If the missing information is not received in a reasonable time, the application is returned as incomplete.

ODNR's review of the application usually includes a site visit and may generate comments. These comments are sent to the applicant noting any specific concerns that need to be addressed. The applicant may need to modify the proposed project to address any conflicts with applicable laws and policies.

After ODNR determines that the project is acceptable, a draft lease is sent to the applicant. The draft lease must be signed by the applicant and returned to ODNR along with the first lease payment. ODNR then forwards the draft lease to the Governor for signature.

An executed lease is sent to applicant. The executed lease represents a binding property transaction and should be recorded by the applicant at their county recorder's office.

How long is a Submerged Lands Lease valid ?

Submerged Lands Leases are typically valid for a 50 year period and renewable for an additional 50 years.

For further information on Submerged Lands Leases please contact:

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1-800-644-6267
(419) 626-7980
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<http://www.dnr.state.oh.us/odnr/reim/coastal/cmp.htm>