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Re: Water Trail Liability (NSGLC-14-04-06)

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Dear Mary,

Thank you for your advisory request regarding potential liability issues to local governments and private landowners participating in Michigan's Great Lakes Water Trails. After completing my research, it appears that local governments and landowners listed on the water trail would be protected from liability in most instances. The information below is intended as advisory research only and does not constitute legal representation of Michigan Sea Grant or its constituents. It represents our interpretations of the relevant laws and regulations.

Water trails are similar to hiking trails. According to the National Park Service, “[w]ater trails are recreational routes on waterways with a network of public access points supported by broad-based community partnerships.” Fishermen, hikers, or other recreational users may also use the trail to find recreation opportunities.

The *Michigan’s Great Lakes Water Trails* website, [www.michiganwatertrails.org](http://www.michiganwatertrails.org), provides water trail information online for nearly every mile of Michigan’s Great Lakes shoreline, as well as for dozens of connecting inland waterways. Visitors to the site can access maps with information about facilities and access points, along with informational videos, shoreline photos, and a trip planner. Some regions have also included information on local services, attractions, and amenities for paddlers, such as places to eat, shop, sleep, and rent or purchase paddling gear. The website is hosted by a non-profit organization and website content is added by regional planning organizations, local governments, and volunteers. The project is funded, in part, by the Michigan Coastal Zone Management Program, Department of Environmental Quality Office of the Great Lakes, and NOAA.

As a result of the water trail initiative, Michigan Sea Grant has received questions from local governments and private landowners inquiring about potential liability issues for including their sites on the water trail. As I understand it, the frequently asked questions fall into two categories: 1) does allowing water trail users on public or private property expose local governments or private landowners to liability?; and 2) if local governments or landowners improve a natural sandy beach launch site to add floating docks, signage, lockers or other amenities, what effect will that have on liability?

### **Liability for Including Sites on the Water Trail**

Most likely, any liability claim related to injuries on the water trail would be based in negligence. Common law, which is law developed by courts as opposed to legislatures, defines negligence as “...conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm ...”<sup>1</sup> To prove negligence, a plaintiff must prove three elements: 1) that the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; and 3) the breach proximately caused injury to the plaintiff.

The “duty of care” owed to a plaintiff depends on the status of the person on the land at the time of the accident. Visitors to access points on the water trail would be considered “invitees,” which are people who enter onto land for the purpose for which the land is held open to the public.<sup>2</sup> All landowners have a duty to conduct their activities with “reasonable care” for an invitee’s safety and to protect invitees from conditions that the invitee is unlikely to discover.<sup>3</sup> “Reasonable care” is the care with which a reasonable person or entity in the same position would recognize as necessary to prevent the unreasonable risk of harm to another.<sup>4</sup>

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<sup>1</sup> Restatement (Second) of Torts § 282 (1965).

<sup>2</sup> *Id.* § 332.

<sup>3</sup> *Id.* § 341A.

<sup>4</sup> *Id.* § 298.

Landowners generally do not have a duty to protect invitees from obvious dangers posed by water, such as the risk of drowning or diving into obviously shallow water. These general common law rules, however, may be abrogated by state legislation.

In Michigan, liability for including sites on water trails may be limited by two statutes. For private landowners, the state's Recreational Use Act serves to limit liability for those who open their land to the public for recreational use. For state agencies and local governments, they may be immune from suit under the Recreational Use Act and/or the Governmental Tort Liability Act.

#### *MI Recreational Use Act*

As mentioned above, the Recreational Use Act (RUA) provides immunity for both private and public landowners. Michigan's Recreational Use Act states

*...a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.*<sup>5</sup>

Further, the RUA specifically provides immunity from injuries arising out of persons entering or exiting from a Michigan trailway, unless the injuries were caused by gross negligence or willful and wanton misconduct. That subsection of the RUA specifies that the trail "may be located on land of any size including, but not limited to, urban, suburban, subdivided, and rural land."<sup>6</sup>

Courts have held that "the [RUA] applies to a public invitee who uses a public recreation area without paying a valuable consideration for such use."<sup>7</sup> Therefore, local governments or landowners who allow water trail users to use their land should be protected under the statute, unless they charge "valuable consideration" for the use of the land or engage in "gross negligence or willful and wanton misconduct."<sup>8</sup>

Courts in Michigan have issued rulings on when the payment of fees constitutes "valuable consideration." Simply paying to enter a park does not remove the protection of the RUA. For instance, a court ruled that a park patron's payment for a permit when entering a park would not be enough to remove protection under the RUA, because the park permit fee applied only to motor vehicles and therefore was a fee for the use of park roads and parking lots and not valuable consideration for use of the park.<sup>9</sup> One court noted that "[v]aluable consideration' within the meaning of Recreational Land Users Act ... must be in form of specific fee for use of

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<sup>5</sup> MICH. COMP. LAWS § 324.73301(1).

<sup>6</sup> MICH. COMP. LAWS § 324.73301(2).

<sup>7</sup> Estate of Matthews by Matthews v. City of Detroit, 367 N.W.2d 440, 443 (1985).

<sup>8</sup> MICH. COMP. LAWS § 324.73301(2).

<sup>9</sup> Schiller v. Muskegon State Park 395 N.W.2d 75 (1986).

particular recreational area in question.”<sup>10</sup> So, if a local government charges for the use of specific facilities, such as a launch site, the RUA immunity may not apply.

Whether conduct qualifies as “gross negligence” or “willful or wanton misconduct” would be a fact-specific inquiry. Gross negligence has been defined as reckless conduct that shows substantial lack of concern for whether injury results.<sup>11</sup> An allegation of gross negligence must be for actions of subsequent negligence—or an action that happens after a user is on the property. It would not apply to actions that defendants should have taken before users enter their land, such as posting signs.<sup>12</sup> Willful and wanton conduct is generally either intent to harm or indifference as to whether harm will occur.<sup>13</sup> Essentially, liability under the RUA would only occur if conduct is willful or malicious or when consideration is paid in return for the use of recreational facilities. Therefore, when operating and maintaining sites listed on the water trail, landowners should strive to act with “reasonable care.”<sup>14</sup>

### *Government immunity*

If local governments are immune under the RUA, courts will generally not examine whether a broader governmental immunity provision applies. In some cases, however, the RUA may not be applicable and the court would turn to considering liability under Michigan’s Governmental Tort Liability Act.<sup>15</sup> Some courts have examined the government’s immunity under both acts.<sup>16</sup> Below is an examination of how governmental immunity might be applied to recreational liability cases.

Under the doctrine of sovereign immunity, a governmental entity may only be sued if the government has given its consent. Michigan’s Governmental Tort Liability Act preserves this sovereign immunity with certain exceptions. “Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function ....”<sup>17</sup> The immunity extends to local governments.<sup>18</sup> The key question with respect to water trails is, therefore, whether the operation and maintenance of sites listed on the water trail is a government function and whether any exceptions to the government function immunity apply.

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<sup>10</sup> Syrowik v. City of Detroit, 326 N.W.2d 507 (1982).

<sup>11</sup> Kruse v. Iron Range Snowmobile Club, 890 F.Supp. 681 (W.D. Mich. 1995).

<sup>12</sup> McNeal v. Dep’t of Natural Res., 364 N.W.2d 768, 771-72 (1985).

<sup>13</sup> James v. Leco Corp., 427 N.W.2d 920 (1988).

<sup>14</sup> As stated above, “reasonable care” is the care with which a reasonable person or entity in the same position would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another. Restatement (Second) of Torts § 298.

<sup>15</sup> Ballard v. Ypsilanti Twp., 549 N.W.2d 885, 887 (1996).

<sup>16</sup> Feliciano v. Dep’t of Natural Res., 293 N.W.2d 732, 736 (1980); *McNeal*, *supra* note 12.

<sup>17</sup> MICH. COMP. LAWS § 691.1407.

<sup>18</sup> “Government agency” is defined as the state “or a political subdivision,” and the definition of “political subdivision” includes municipal corporations and counties. *Id.* at § 691.1401.

“Governmental function” is defined as an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.<sup>19</sup> The determination of whether an activity is a government function is a fact-specific question that can only be answered by a court. Michigan courts have ruled on whether or not the operation of parks is a government function. Two appellate courts have found that governmental immunity applies where government agencies have provided public access to public areas that have not been developed for intensive use.<sup>20</sup> This would include large rustic parks, forests, and other lands left substantially in their natural condition, and public waters other than supervised beach areas.<sup>21</sup> The courts reasoned that allowing access to such areas is “uniquely governmental” and within the category of government function.<sup>22</sup> Therefore, it appears that areas not developed for intensive use would fall within governmental immunity. The section below, “Liability from Improvements,” will discuss whether improvements, such as signage or facilities, would remove governmental immunity.

There are certain exceptions to governmental function immunity, however. Namely, immunity does not apply in instances in which governments perform a proprietary function.<sup>23</sup> Proprietary functions are acts conducted primarily for the purpose of producing a profit and are not normally supported by taxes or fees.<sup>24</sup> For example, a plaintiff brought suit for an injury sustained while roller skating at an outdoor rink located in a municipal park. The municipal authority charged admission and offered skate rentals. The court held that this was a proprietary function, and not a governmental function, and was therefore not protected from liability under the immunity statute. If local governments rent kayaks or other equipment for a profit, governmental immunity may not apply.

### **Liability from Improvements**

The second part of your request related to whether the “improvement” of a natural sandy beach launch site to one with floating docks, signage, lockers or other amenities will affect liability. First, let’s look at the effect improvements might have under the RUA. The RUA does not provide for increased liability with the addition of improvements. So, as long as the injuries are not caused by gross negligence or willful and wanton misconduct, the owner, tenant or lessee of the land would be immune from liability. As noted above, an allegation of gross negligence must be for actions of subsequent negligence—or actions that happen after a user is on the property. It would not apply to actions that defendants should have taken before users enter their land, such as posting signs.<sup>25</sup> Essentially, as noted above, the landowners should act reasonably by maintaining any signs or facilities that they do provide.

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<sup>19</sup> *Id.* at § 691.1401(b).

<sup>20</sup> *McNeal, supra* note 12; *Feliciano, supra* note 16.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> MICH. COMP. LAWS § 691.1413.

<sup>24</sup> *Id.* at § 691.1413.

<sup>25</sup> *See McNeal, supra* note 12 at 771-772.

Now, let's look at how improvements might affect government immunity under the Michigan Governmental Tort Liability Act. As mentioned above, Michigan appellate courts have found that governmental immunity may not protect developed recreational areas. However, this does not mean the land may not be improved in any way. For example, in *McNeal v. DNR*, the court found that a recreation area was still in its natural condition, even though there was a parking lot and several nearby warning signs.<sup>26</sup> However, facilities that operate for profit, such as a boat ramp that charges for use, may not be immune from liability under the proprietary function exception. The court in *McNeal* also ruled that the fact that an area adjacent to the park was leased to a private company did not convert the entire site into a proprietary function.

### **Conclusion**

Considering the general provisions discussed above, it appears that private and public landowners would be protected in most instances from liability by either the Recreational Use Act or government immunity. To maintain their immunity, landowners should act reasonably by maintaining facilities or equipment. And, as noted above, signage would not be required to protect landowners for liability; however, appropriate signage regarding potentially dangerous areas could be useful. Landowners or governments should consult with local private counsel regarding how their activities may affect the applicability of the RUA. I hope you find this information useful. Please contact me at anytime if you have additional questions.

Sincerely,

Terra Bowling  
National Sea Grant Law Center

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<sup>26</sup> See *McNeal*, *supra* note 12.