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RE: Legal Protections for Coastal Environments and Resources in Michigan (MASGP 08-007-07)

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Dear Tracey,

Below is the summary of research regarding the question as posed to the National Sea Grant Law Center on available legal protections for coastal environments and resources in Michigan, especially the Saugatuck Dunes Coastal Region. The following information is intended as advisory research only and does not constitute legal representation of the Saugatuck Dunes Coastal Alliance or its constituents. It represents our interpretations of the relevant laws.

### **Coastal Zone Management Act**

The federal Coastal Zone Management Act establishes a national policy "To preserve, protect, develop, and where possible, to restore and enhance, the resources of the Nation's coastal zone for this and succeeding generations." It provides federal funding for states to develop and administer Coastal Zone Management Plans (CZMPs) according to guidelines set out in Act. State participation is voluntary. After a state's CZMP is approved, a designated state agency manages the state's coastal zone and oversees and enforces the state's CZMP policies.

Michigan's Coastal Management Program (CMP) was developed in 1978. The Department of Environmental Quality (DEQ) is charged with implementing and enforcing the state program, which uses coastal related sections of the Natural Resource and Environmental Protection Act (NREPA)<sup>1</sup> to

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<sup>1</sup> MICH. COMP. LAWS § 324.101 *et seq.*

protect the state's shoreline resources. Some of the state statutes administered through the program include the Shorelands Protection and Management Act, the Submerged Lands Act, and the Sand Dune Protection and Management Act. The CMP is administered by the Administration Section in the Environmental Science and Services Division within the DEQ.

The CZMA defines coastal zone as "coastal waters (including lands therein and thereunder) and the adjacent shorelands" and includes islands, intertidal areas, salt marshes, and beaches. The coastal zone extends seaward to the outer limits of state title under the Submerged Lands Act. In the Great Lakes basin, the seaward boundary of each state extends "to the international boundary between the United States and Canada."<sup>2</sup> The exception to this rule is Lake Michigan, which lies entirely within the United States; there the state jurisdictional boundaries have been defined by the states that border that lake – Michigan, Minnesota, and Wisconsin.<sup>3</sup> The zone extends inland "only to extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise." Michigan's coastal zone generally extends a minimum of 1,000 feet from the ordinary high water mark, but may extend further inland in some areas to encompass coastal lakes, rivermouths, and bays; floodplains; wetlands; dune areas; urban areas; and public park, recreation, and natural areas.

The CZMA contains a federal consistency requirement, which states that "Each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."<sup>4</sup> This provision requires federal consistency with a state's CMP. It applies in two situations (1) to any federal agency activities, and (2) to any license or permit granted by a federal agency.

Federal agencies determine whether their activities will "affect any land or water use or natural resource of the coastal zone" and submit a consistency determination (if there will be an effect) or a negative determination (if there will be no effect). The state has sixty days to object or concur with the agency's finding. A federal agency may proceed over a state's objection if the federal agency provides the state with a written statement showing that its activity is consistent to the maximum extent practicable.

With an application for a federal license or permit, the applicant must provide the permitting agencies and the affected states with a consistency certification. A state has six months to object or concur with the certification. If the state objects to the applicant's consistency certification, the federal agency may not issue the permit. An applicant can appeal the state's objections to the Secretary of Commerce. The Secretary can override the state's objections if the activity is consistent with the objectives of the CZMA or necessary in the interest of national security. Ultimately, the authorizing federal agency cannot approve a license or permit unless the state concurs or the Secretary overrides the state's objection. In Michigan, the Great Lakes Shorelands Section in the Land and Water Management Division, within the DEQ, performs consistency reviews.

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<sup>2</sup> 43 U.S.C. § 1312.

<sup>3</sup> MICH. COMP. LAWS § 2.201.

<sup>4</sup> 16 U.S.C. § 1456(c)(1)(A).

For instance, if development in the Saugatuck Dunes Coastal Region required a federal permit, such as a § 404 permit to fill wetlands, the developer would be required to submit a consistency certification to the DEQ for review. If the state objected to the developer's consistency certification, the Corps could not issue the § 404 permit. The developer could appeal to the Secretary of Commerce for review and the Secretary could only override the state's objection if the activity would be consistent with the objectives of the CZMA or necessary in the interest of national security.

### **Michigan Environmental Protection Act (MEPA)**

In addition to the protections provided by the federal CZMA and the Michigan NREPA, the Michigan Environmental Protection Act (MEPA) provides a cause of action for violations of the laws protecting the state's coast. Under MEPA, the "attorney general or any person may maintain an action . . . for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."<sup>5</sup>

The Act provides for immediate judicial review of allegedly harmful conduct and does not require exhaustion of administrative remedies before plaintiff files suit in circuit court.<sup>6</sup> However, a court may direct the parties to use available administrative proceedings.<sup>7</sup>

In making a MEPA claim, a plaintiff must make a prima facie showing that the conduct of the defendant "has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources."<sup>8</sup> To rebut the claim, a defendant may show contrary evidence or raise an affirmative defense that (1) "there is no feasible and prudent alternative to the conduct" and (2) the conduct "is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction."<sup>9</sup> Money damages are not available under MEPA, but costs may be allocated if the "interests of justice require."<sup>10</sup>

### **Shorelands Protection and Management Act**

The Shorelands Protection and Management Act (SPMA) is the primary state statute for the protection of the coast from coastal erosion and flooding, as well as environmental protection of coastal areas.<sup>11</sup> The SPMA regulates all shorelands on the Great Lakes and connecting waterways up to 1,000 ft landward of the ordinary high water mark. The DEQ is required to prepare a plan for the use and management of the shoreland.<sup>12</sup>

The SPMA requires setbacks and size parameters for development in areas eroding at an average rate of one foot or more per year. Under Part 323 of the SPMA, local governments have authority to enact shoreland zoning. To prevent against erosion, local governments may enact more stringent setback

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<sup>5</sup> MICH. COMP. LAWS § 324.1701(1).

<sup>6</sup> *Id.* at § 324.1701(2).

<sup>7</sup> *Id.* at § 324.1704(2).

<sup>8</sup> *Id.* at § 324.1703(1).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at § 324.1703(3).

<sup>11</sup> *Id.* at § 324.32301.

<sup>12</sup> *Id.* at § 324.32313.

distances. DEQ has also promulgated administrative rules regarding high risk erosion areas, the preservation of wildlife, and flood risk areas.<sup>13</sup> The Act is integrated with the Coastal Management Program discussed above.

Any development within the Saugatuck Dunes Coastal Region must comply with the Act, including the setback requirements. The Michigan courts have held that enforcement of the Act does not constitute a regulatory taking.<sup>14</sup>

### **Sand Dune Protection and Management Act**

The Sand Dune Management Act<sup>15</sup> was originally adopted to regulate sand mining, but was amended in 1989 to address dune destruction from development. It protects critical dune areas, which are designated by the DEQ.<sup>16</sup> Of the 250,000 dunes along the coast, 70,000 acres are designated as critical dunes. Non-critical dunes are not regulated unless a local government has implemented its own measures. Saugatuck, however, contains a Critical Dune Area.

The entire 413-acre Denison property falls within a Critical Dunes Area, which is regulated by the Michigan Department of Natural Resources. Under the Act, a permit is required for new construction, additions to existing structures, sand removal, driveways and parking areas, contour changes, vegetation removal, and industrial and commercial projects.

### **Great Lakes Submerged Lands Act**

Lake bottomlands and waters of the Great Lakes are held in trust by the state and the state has a duty to manage these resources for the benefit of its citizens. The Great Lakes Submerged Lands Act (GLSLA) regulates unpatented Great Lakes bottomlands as well as waters over submerged patented lands. It regulates construction activities and authorizes leasing and deeding bottomlands for specific uses.<sup>17</sup> The GLSLA prohibits the conveyance of state-owned unpatented bottomlands if such conveyance would substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation; or if the public trust in the state will be impaired.<sup>18</sup> The DEQ has promulgated rules related to the lease, conveyance, and use of submerged lands.<sup>19</sup> The rules include application procedures and permit requirements. An environmental assessment is required in each application for a permit, lease, deed, or agreement for bottomlands.<sup>20</sup>

### **Inland Lakes and Streams Act**

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<sup>13</sup> MICH. ADMIN. CODE §§ 281.21 – 281.26.

<sup>14</sup> In *Bond v. Department of Natural Resources*, a Michigan appellate court held that statutory designations of a landowner's land as environmentally protected under the Act did not constitute a taking because the landowner still had economically viable uses of his land. 183 Mich. App. 225 (Mich. Ct. App. 1989).

<sup>15</sup> MICH. COMP. LAWS § 324.35301.

<sup>16</sup> MICH. ADMIN. CODE §§ 281.401 – E M.413.

<sup>17</sup> MICH. COMP. LAWS § 324.32501.

<sup>18</sup> MICH. COMP. LAWS § 324.32502.

<sup>19</sup> MICH. ADMIN. CODE §§ 322.1001 – 1018.

<sup>20</sup> *Id.* at 322.1015.

The Inland Lakes and Streams Act (ILSA) requires individuals to obtain a permit from the Department of Environmental Quality (DEQ) for dredging, filling, construction, or related activities on inland lakes and streams. Prior to issuing the permit, the DEQ must make a determination “that the structure or project will not adversely affect the public trust or riparian rights.”<sup>21</sup>

### **Public Trust Doctrine**

Overlaying all the statutory protections for coastal environments and resources is the Public Trust Doctrine (PTD). The PTD is a creature of federal common law. Common law “consists of those principles, usage, and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature.”<sup>22</sup> The PTD provides that “public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of public uses.”<sup>23</sup>

The modern concept that certain lands and waters should be held in trust for the public to access for fishing, navigation, and recreation has its roots in Rome. The Institutes of Justinian, codified in 535 C.E., states that

by the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects *habitations*, monuments, and buildings which are not, like the sea, subject only to the law of nations.

In 1892, the U.S. Supreme Court described a state’s title in public trust lands as “a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”<sup>24</sup> Public trust waters are the state’s navigable waters and public trusts lands are the lands beneath those navigable waters, up to the ordinary high water mark.<sup>25</sup> Michigan courts have traditionally recognized that the public trust doctrine applies to the Great Lakes.<sup>26</sup> The landward boundary of the public trust in Michigan is the ordinary high water mark.<sup>27</sup> The state has a duty to hold such lands “for the benefit of the public in the enjoyment of the ancient rights of navigation, fowling, and fishing”<sup>28</sup> and to protect public trust resources.<sup>29</sup> “Littoral landowners [in Michigan] have always taken title subject to the limitation of public rights preserved under the public trust doctrine.”<sup>30</sup>

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<sup>21</sup> *Id.* § 324.30106

<sup>22</sup> Black’s Law Dictionary, 276 (6th Ed. 1990).

<sup>23</sup> Putting the Public Trust Doctrine to Work, 1 (2d Ed.1997).

<sup>24</sup> *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1892).

<sup>25</sup> See *Shively v. Bowlby*, 152 U.S. 1, 58 (1892). The mean high tide line is determined by averaging the high water marks observed over an 18.6 year cycle. (See *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10 (1936)). For lakes, rivers, and other navigable waters, the high water mark is determined by the vegetation line, the erosion line, or some other defining physical characteristic.

<sup>26</sup> See *People v. Silberwood*, 67 N.W. 1087 (Mich. 1896).

<sup>27</sup> *Glass v. Goeckel*, 703 N.W. 2d 58, 69 (Mich. 2005).

<sup>28</sup> *State v. Lake St. Clair Fishing & Shooting Club*, 87 N.W. 117, 125 (Mich. 1901).

<sup>29</sup> *People v. Broedell*, 112 N.W.2d 517, 519 (Mich. 1961).

<sup>30</sup> *Glass*, 703 N.W. 2d at 66.

The Michigan Supreme Court reaffirmed the doctrine's application to the Great Lakes in 2005. In *Glass v. Goeckel*, the court was called upon to settle a dispute between shoreline property owners and a beachwalker. The defendants owned property along Lake Huron. The plaintiff owned property across the street. The plaintiff brought suit seeking to prevent the defendants from interfering with her walks along the shoreline in front of defendant's house. The Michigan Court of Appeals ruled that neither the plaintiff nor any member of the public had a right to walk on the land between the ordinary high water mark and the water's edge.<sup>31</sup> This ruling, had it stood, would have effectively restricted beachgoers to the water except at public (state-owned) beaches. The Supreme Court reversed the Court of Appeals and held that "in order to engage in [] activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark."<sup>32</sup>

In Michigan, the PTD has advanced beyond state common law. The state legislature, due in part to the influence of law professor Joseph Sax whose seminal Michigan Law Review article, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*,<sup>33</sup> revived interest in the doctrine in 1970, has incorporated the doctrine into several key statutes. The Great Lakes Submerged Lands Act (GLSLA) and the Inland Lakes and Streams Act (ILSA) codified the common law rule that submerged lands are state-owned and held in trust. The GLSLA, which covers unpatented Great Lakes bottomlands as well as waters over submerged patented lands, prohibits the conveyance of state-owned unpatented bottomlands if such conveyance would substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation; or if the public trust in the state will be impaired.<sup>34</sup> The ILSA requires individuals wishing to conduct dredging, filling, construction, or related activities on inland lakes and streams to obtain a permit from the Department of Environmental Quality (DEQ). Prior to issuing the permit, the DEQ must make a determination "that the structure or project will not adversely affect the public trust or riparian rights."<sup>35</sup> In carrying out its duties under these statutes, the DEQ has defined the 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."<sup>36</sup>

Under both the common law and state statutes, therefore, the state of Michigan has a duty to protect Lake Michigan, its shorelands below the ordinary high water mark, and its resources so the public can exercise its traditional rights of fishing, commerce, and navigation. The Michigan Environmental Protection Act (MEPA) even provides a cause of action for public trust violations. Under MEPA, the "attorney general or any person may maintain an action . . . for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."<sup>37</sup>

The PTD is a powerful tool. State agencies can invoke the doctrine to prevent or restrict activities that might impair public trust waters, lands, or resources. Members of the general public can invoke the doctrine to secure access to waters and lands covered by the trust for activities related to fishing and boating. However, "reliance on the public trust doctrine requires a showing that the trust attaches to the

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<sup>31</sup> *Glass v. Goeckel*, 683 N.W. 2d 719 (Mich. App. 2004).

<sup>32</sup> *Glass*, 703 N.W. 2d at 74.

<sup>33</sup> 68 MICH. L. REV. 471 (1970).

<sup>34</sup> MICH. COMP. LAWS § 324.32502.

<sup>35</sup> *Id.* § 324.30106

<sup>36</sup> MICH. ADMIN. CODE r. 322.1001(1)(m).

<sup>37</sup> MICH. COMP. LAWS 324.1701(1).

resource in question.”<sup>38</sup> The PTD has geographic and substantive limits. In Michigan, for example, the PTD only applies to navigable waters and lands below the ordinary high water mark and to traditional public uses of those waterways. Some states, however, are expanding the doctrine to protect more general environmental values such preservation of habitat.<sup>39</sup>

### **Interdunal Wetlands**

Wetlands are regulated by both state and federal laws. At the federal level, § 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Activities regulated under this program include fills for development, water resource projects (e.g., dams and levees), infrastructure development (e.g., highways and airports), and conversion of wetlands to uplands for farming and forestry.

Michigan has assumed control of the administration of § 404 of the CWA in the state. Michigan law defines a wetland as, “land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh.” Michigan’s Wetland Protection Act (WPA) regulates wetlands:

connected to one of the Great Lakes or Lake St. Clair; located within 1,000 of the Great Lakes or Lake St. Clair; connected to an inland lake, pond, river, or stream; located within 500 feet of an inland lake, pond, river, or stream; not connected to one of the Great Lakes or Lake St. Clair, or an inland lake, pond, stream, or river, but are more than 5 acres in size and located in counties with a population of more than 100,000; not connected to one of the Great Lakes or Lake St. Clair, or an inland lake, pond, stream, or river, and less than 5 acres in size, but the DEQ has determined that these wetlands are essential to the preservation of the state’s natural resources and has so notified the property owner. Local governments may regulate wetlands not protected by the state, as long as the local regulations are at least as restrictive as state regulations.<sup>40</sup>

The WPA prohibits the deposit of fill material in a wetland; the dredging or removal of soil or minerals from a wetland; the construction, operation, or maintenance of any use or development in a wetland; or the draining of surface water from a wetland without a permit. To obtain a permit, an applicant must show avoidance of wetland resources to the greatest extent possible and minimization of unavoidable wetland impacts. Before the Department makes a decision on the issuance of a permit, there is a public comment period.

The Denison property contains roughly a dozen interdunal wetlands, or wetpannes. Interdunal wetlands, or wetpannes, are “wetlands dominated by grass-like vegetation that occurs in the low areas between sand dunes or beach ridges along the Great Lakes shoreline.”<sup>41</sup> Their water table and period of saturation fluctuates with Great Lakes water levels.

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<sup>38</sup> Treatise on Environmental Law § 10.05.

<sup>39</sup> Bertram Frey and Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J. L. REFORM 907, 954 (2007).

<sup>40</sup> MICH. COMP. LAWS § 324.30307

<sup>41</sup> <http://www.deq.state.mi.us/documents/deq-water-wetlands-Chap2pdf.pdf>

Any development on these wetlands would require a permit from the DEQ in addition to federal permits required by the Clean Water Act. Additionally, the interdunal wetlands support many endangered or threatened species, such as the Piping Plover, Pitcher's thistle, Lake Huron tansy, or Houghton's goldenrod, which are protected by the federal and state Endangered Species Acts (below).

### **Endangered Species**

To receive protection under the Endangered Species Act, a plant or animal species must be placed on the federal list of endangered and threatened wildlife and plants. A species is endangered when it is in "danger of extinction throughout all or a significant portion of its range."<sup>42</sup> A species is threatened when it is "likely to become an endangered species within the foreseeable future."<sup>43</sup>

When a species is listed, the agencies must also designate critical habitat. Critical habitats are areas within the geographic area occupied by species on which are found the physical and biological features essential to the conservation of the species and which may require special management considerations or protection. Critical habitat designations must be based on the best scientific data available, but must also consider economic impact of designation.

Section 9 of the ESA prohibits public and private activities that could result in a "take."<sup>44</sup> To avoid a "take," a person may not "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such activity."<sup>45</sup> Regulations also interpret "harm" to encompass "significant habitat modification or degradation."<sup>46</sup> A take of an endangered species may be lawful if that taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."<sup>47</sup> These are known as "incidental take permits." An applicant for this type of permit must submit a conservation plan discussing the impact of the incidental takings, the steps applicant will take to minimize the impact, and alternatives considered and reasons why they were not implemented.

Section 7 of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency, is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat."<sup>48</sup> In fulfilling these requirements, agencies must use the best scientific and commercial data available. Once Section 7 consultation has begun with respect to a project, the federal agency and the permit applicant shall not make any "irreversible or irretrievable commitment of resources" which has the effect of foreclosing the implementation of reasonable alternatives.<sup>49</sup>

In Michigan, the Natural Resources and Environmental Protection Act also regulates endangered species. The Michigan Department of Natural Resources (DNR) administers the Act in cooperation

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<sup>42</sup> 16 U.S.C. § 1532(6).

<sup>43</sup> *Id.* § 1532(19).

<sup>44</sup> *Id.* § 1538(a).

<sup>45</sup> *Id.* § 1532(20).

<sup>46</sup> 50 C.F.R. § 17.3

<sup>47</sup> 16 U.S.C. § 1539(a)(1)(B).

<sup>48</sup> *Id.* § 1536(a)(2).

<sup>49</sup> *Id.* § 1536(d).

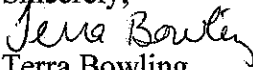


with the federal government.<sup>50</sup> “The department shall perform those acts necessary for the conservation, protection, restoration, and propagation of endangered and threatened species of fish, wildlife, and plants in cooperation with the federal government, pursuant to the endangered species act of 1973.<sup>51</sup> The DNR must determine species to be listed as endangered or threatened within the state and is required to review the list every two years.

Like the federal Act, Michigan specifies that a person “shall not take, possess, transport, import, export, process, sell, offer for sale, buy, or offer to buy, and a common or contract carrier shall not transport or receive for shipment, any species of fish, plants, or wildlife” appearing on endangered species lists, with exceptions “or scientific, zoological, or educational purposes, for propagation in captivity of such fish, plants, or wildlife to ensure their survival.”<sup>52</sup>

The interdunal wetlands on and near the Dennison property may support many endangered or threatened species, such as the Piping Plover, Pitcher’s thistle, Lake Huron tansy, or Houghton’s goldenrod.

We hope this information has been helpful. If you have any additional questions, please let us know.

Sincerely,  
  
Terra Bowling  
Research Counsel

  
Stephanie Showalter  
Director

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<sup>50</sup> MICH. COMP. LAWS § 324.36501.

<sup>51</sup> *Id.* § 324.36502

<sup>52</sup> 324.36505