

**GREAT LAKES RESTORATION AND THE PUBLIC TRUST DOCTRINE:
MILWAUKEE’S RESTORATION OBSTACLES AND OPPORTUNITIES**

Sarah Martinez¹ & Melissa K. Scanlan²

I. INTRODUCTION

The Great Lakes are a bi-national treasure containing 84% of North America’s fresh surface water; but are also home to many sites of legacy toxic contamination, called Areas of Concern (AOC). The Great Lakes Legacy Act and Great Lakes Restoration Initiative accelerated the pace of restoring these sites.³ In 2021, President Biden signed the Infrastructure Investment and Jobs Act, which allocated \$1 billion in funding for Great Lakes restoration to continue “addressing toxic substances and Areas of Concern”—a move that clearly demonstrates the priority of maintaining the health and resilience of the Great Lakes region.⁴

After decades of work on the Milwaukee Estuary AOC, the legacy contaminants in its sediments will soon be dredged in an effort to restore beneficial uses such as being able to consume the fish one catches without a health concern

¹ Sarah Martinez is the Sea Grant UW Water Science-Policy Fellow, Water Policy Specialist in the Center for Water Policy at the University of Wisconsin – Milwaukee’s School for Freshwater Science. She received her J.D. from the University of Utah’s S.J. Quinney College of Law in 2021. The authors would like to thank Michael Cain, retired Wisconsin Department of Natural Resources attorney, and Michael Kowalkowski, Staff Attorney at the Wisconsin Department of Natural Resources, for their input on drafts of this article.

² Melissa K. Scanlan is the Lynde B. Uihlein Endowed Chair and Professor in Water Policy, Director of the Center for Water Policy at the University of Wisconsin- Milwaukee’s School of Freshwater Science, Affiliate Faculty UW Law School.

³ Congress authorized the Great Lakes Legacy Act in 2002, reauthorized it in 2008, and made the first appropriation in 2004. The Act funds contaminated sediment remediation in the Great Lakes. *Great Lakes Legacy Act*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/great-lakes-aocs/great-lakes-legacy-act> (last updated Dec. 14, 2021).

⁴ THE WHITE HOUSE, A GUIDEBOOK TO THE BIPARTISAN INFRASTRUCTURE LAW FOR STATE, LOCAL, TRIBAL, AND TERRITORIAL GOVERNMENTS, AND OTHER PARTNERS 255 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/01/BUILDING-A-BETTER-AMERICA_FINAL.pdf.

or enjoying a beach that is clear of harmful bacteria or algae.⁵ With funding from federal, state, and non-profit partners, the Milwaukee Estuary AOC restoration will cost roughly \$200 million to complete.⁶ The preferred alternative for disposal of these dredged sediments is an in-lake containment, called a Dredged Material Management Facility (DMMF), adjacent to the Port of Milwaukee (the Port). The project involves the use of Lake Michigan's lakebed, which implicates the public trust doctrine. This article analyzes the legal issues involved in filling the lakebed for this purpose and the need for a determination of future uses of the new land.

This article provides a succinct overview of the proposed use of the lakebed for the DMMF. Then it explains the public trust doctrine as applied to Lake Michigan and the special category of legislative lakebed grants. In fact, the most famous public trust case, *Illinois Central*, involved a lakebed grant in Lake Michigan. *Illinois Central's* legal precedent grounds the discussion on lakebed grants, but this article goes further by bringing the reader into modern jurisprudence with Wisconsin Supreme Court decisions and applies that precedent to a proposed filling of lakebed. The larger discussion of lakebed grants serves as a short background for the subsequent investigation of the specific legislative lakebed grants to Milwaukee in the area managed by the Port. The lakebed grants at issue specify public trust purposes. Based on an analysis of those grants and the public

⁵According to the International Joint Commission, there are 14 beneficial use impairments that could potentially be caused by an AOC and any impairments need to be removed during the restoration of an AOC for it to begin delisting the area and citing it as a restoration success on the Great Lakes. These beneficial use impairments are: 1. Restrictions on Fish and Wildlife Consumption, 2. Tainting of Fish and Wildlife Flavor, 3. Degradation of Fish and Wildlife Populations, 4. Fish Tumors or Other Deformities, 5. Bird or Animal Deformities or Reproduction Problems, 6. Degradation of Benthos, 7. Restrictions on Dredging Activities, 8. Eutrophication or Undesirable Algae, 9. Restrictions on Drinking Water Consumption or Taste and Odor Problems, 10. Beach Closings, 11. Degradation of Aesthetics, 12. Added Costs to Agriculture or Industry, 13. Degradation of Phytoplankton and Zooplankton Populations, and 14. Loss of Fish and Wildlife Habitat. *Great Lakes Beneficial Use Impairments*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/great-lakes-aocs/beneficial-use-impairments-great-lakes-aocs> (last updated July 20, 2021).

⁶ John Gurda, *A Toxic Legacy: Milwaukee Prepares to Clean Up 150 Years of Water Pollution*, MILWAUKEE METRO. SEWERAGE DIST. (Aug. 4, 2020, 10:00 AM), <https://www.mmsd.com/about-us/news/a-toxic-legacy>.

trust doctrine, precedent should guide a fact-intensive inquiry of the use of lakebed for a DMMF and the future use of the newly created land.

II. PROPOSED USE OF LAKEBED AS PART OF CLEANING UP THE MILWAUKEE ESTUARY AREA OF CONCERN

In accordance with the Great Lakes Water Quality Agreement of 1972 between the United States and Canada, the U.S. Environmental Protection Agency (EPA) designates AOCs when there is “significant impairment of beneficial uses . . . as a result of human activities at the local level.”⁷ Currently, twenty-six AOCs remain in the Great Lakes Basin; Milwaukee is home to one of the larger AOCs.⁸ The Milwaukee Estuary AOC covers roughly ten miles spanning three rivers and parts of the inner and outer Milwaukee harbor.⁹ Upon completion of this project, the Milwaukee Estuary AOC will be one of the largest public works projects in Milwaukee’s history.¹⁰ This section briefly covers why the Milwaukee estuary is an AOC and then discusses the Wisconsin Department of Natural Resources’ (WDNR) preferred alternative for disposal of the dredged sediment—the DMMF.

A. A Brief History of the Milwaukee Estuary AOC

The Great Lakes Water Quality Agreement establishes a non-regulatory approach to addressing legacy contaminated sediments. These are pollutants for which there is often no identifiable responsible party liable to pay for cleaning up

⁷ Great Lakes Water Quality Agreement of 1972, U.S.-Can., Apr. 15, 1972, 23 U.S.T. 301.; *Great Lakes Areas of Concern*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/great-lakes-aocs> (describing an area of concern as “[a] location that has experienced environmental degradation. EPA and other federal and state agencies are working to restore the 26 remaining U.S. AOCs in the Great Lakes basin.”) (last updated Apr. 6, 2022).

⁸ *Milwaukee Estuary AOC*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/great-lakes-aocs/milwaukee-estuary-aoc> (last updated Jan. 18, 2022) (explaining that the original Milwaukee Estuary included a total of 8.6 miles of riverbed, and the inner and outer Harbors, but was expanded in 2008 to include parts of Cedar Creek, Lincoln Creek, and the Little Menomonee River). When the agreement was enacted in 1972 there were 43 AOCs identified in the Great Lakes. *Id.*

⁹ *Id.*

¹⁰ *Id.*

the contamination.¹¹ Sediment in the AOCs is often contaminated with toxic chemicals such as polychlorinated biphenyls (PCBs), heavy metals like mercury, and oil, grease or other petroleum byproducts, that entered the waterbody prior to modern pollution controls.¹²

The Milwaukee Estuary AOC includes the Milwaukee River, Kinnikinic River, Menomonee River, and parts of the inner and outer harbor of Lake Michigan.¹³ The EPA designated this area as an AOC in 1987 because these waterways' sediments are contaminated with PCBs, polycyclic aromatic hydrocarbons (PAHs), and heavy metals.¹⁴ These contaminants are harmful to both humans and fish. Since the late 1980s, scientists have studied the effects of PCBs, and it is widely accepted that PCBs are highly carcinogenic.¹⁵ According to the EPA, PCBs also cause adverse immune, reproductive, neurological, and endocrine effects in humans.¹⁶ PAHs are also detrimental to human health. According to the Agency for Toxic Substances and Disease Registry, PAHs are also likely carcinogenic.¹⁷ Moreover, all three of these pollutants contribute to the degradation of eleven beneficial uses the EPA and WDNR identified.¹⁸

¹¹ If there is a more recent identified responsible party in the mix, that entity may separately be under a Resource Conservation and Recovery Act order to remove contaminated sediment. This was the situation with the Tyco facility on restoring the AOC on the Lower Menominee River in Wisconsin. *Lower Menominee River AOC*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/great-lakes-aocs/lower-menominee-river-aoc> (last updated June 13, 2022).

¹² U.S. ENV'T PROT. AGENCY, *supra* note 3.

¹³ *Map of the Milwaukee Estuary Area of Concern*, WIS. DEPT. OF NAT. RES., https://dnr.wisconsin.gov/sites/default/files/topic/GreatLakes/MKE_AOCMap.pdf (last visited May 27, 2022).

¹⁴ *Milwaukee Estuary Area of Concern: About the Milwaukee Estuary AOC*, WIS. DEPT. OF NAT. RES., <https://dnr.wisconsin.gov/topic/GreatLakes/Milwaukee.html> (last visited May 27, 2022).

¹⁵ *Learn about Polychlorinated Biphenyls (PCBs)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs> (last updated Jun. 5, 2022) (explaining “[s]tudies in humans support evidence for potential carcinogenic and non-carcinogenic effects of PCBs”).

¹⁶ *Id.*

¹⁷ AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, POLYCYCLIC AROMATIC HYDROCARBONS (PAHS) TOXFAQS, <https://www.atsdr.cdc.gov/toxfaqs/tfacts69.pdf> (1996) (explaining that “[t]he Department of Health and Human Services (DHHS) has determined that some PAHs may reasonably be expected to be carcinogens.”).

¹⁸ WIS. DEPT. OF NAT. RES., REMOVAL TARGET UPDATES FOR THE MILWAUKEE ESTUARY AREA OF CONCERN 3 (2021)

The WDNR created a Remedial Action Plan to guide the cleanup of these waterways.¹⁹ Their remedial action plan strategizes how to remove the beneficial use impairments and tracks progress, with the ultimate goal to delist the Milwaukee Estuary as an AOC.²⁰ According to the August 2021 Remedial Action Plan, the WDNR has removed one of the eleven identified beneficial use impairments, and the WDNR believes they are making significant progress towards removal of the others.²¹

B. The WDNR's Preferred Alternative for Disposal of Contaminated Sediments is a Dredged Material Management Facility on the Bed of Lake Michigan

According to WDNR's estimates, the Milwaukee AOC contains between one to two million cubic yards of contaminated sediment.²² The WDNR, along with stakeholders, proposed to dredge these sediments, remove them from the AOC, and

https://widnr.widen.net/view/pdf/eg6c0gkkmj/GW_MKE_RAP2020.pdf?t.download=true (listing the following as impaired beneficial uses: dredging restrictions, fish tumor and deformities, bird or animal deformities or reproductive problems, restriction on fish and wildlife consumption, degradation of benthos, degradation of phytoplankton and zooplankton populations, Loss of fish and wildlife habitat, degradation of fish and wildlife populations, beach closings (recreational restrictions), eutrophication or undesirable algae, degradation of aesthetics).

¹⁹ *Milwaukee Estuary Area of Concern*, WIS. DEPT. OF NAT. RES.,

<https://dnr.wisconsin.gov/topic/GreatLakes/Milwaukee.html> (last visited May 27, 2022).

²⁰ *Id.* (stating that “[t]he DNR is committed to making progress in the AOC in order to delist, or remove, the Area of Concern designation and continues to work with stakeholders to identify goals and actions necessary to address legacy contamination in the AOC.”).

²¹ WIS. DEPT. OF NAT. RES., FINAL BUI REMOVAL PACKAGES WITH COVER LETTERS 1

https://widnr.widen.net/view/pdf/kfxiz5jfiu/GW_MKE_AestheticsBUIRemoval2021.pdf?t.download=true; WIS. DEPT. OF NAT. RES., REMEDIAL ACTION PLAN PROGRESS SUMMARY FOR THE MILWAUKEE ESTUARY AREA OF CONCERN 3 (2021),

https://widnr.widen.net/view/pdf/eg6c0gkkmj/GW_MKE_RAP2020.pdf?t.download=true.

²² WIS. DEPT. OF NAT. RES., ANALYSIS OF DREDGED MATERIAL MANAGEMENT ALTERNATIVES 1 (2020) [hereinafter ANALYSIS OF DREDGED MATERIAL MANAGEMENT ALTERNATIVES],

https://dnr.wisconsin.gov/sites/default/files/topic/Brownfields/tr/20191112_MKE_AOC_Material_ManagementAnalysisTextFigures.pdf.

dispose of them in a new lakebed containment facility, near the Port, on the east side of Jones Island.²³

The WDNR considered three options before recommending the DMMF as its proposed alternative: do nothing, truck the contaminated sediment to a landfill in Menomonee Falls, Wisconsin, or build the DMMF on the bed of Lake Michigan.²⁴ Moreover, the DMMF is specifically designed to last for the next 100 years and control “potential releases of contaminants to the environment.”²⁵ Once the DMMF is full, it will be capped with a clean material (e.g., sand).²⁶ After it is capped, the WDNR’s assessment suggested that the newly created land, subject to the limits of the public trust doctrine, “can be developed for Port commercial expansion and other public uses.”²⁷

In the WDNR’s assessment of alternatives, they identified nine criteria to determine the best route.²⁸ As part of the criteria, the choice of where to dispose of the sediment must take both state and community acceptance into consideration.²⁹ The WDNR concluded the DMMF alternative met all nine of these criteria.³⁰

²³ *Id.*; WATERWAY RESTORATION PARTNERSHIP, DREDGED MATERIAL MANAGEMENT FACILITY FACT SHEET 1 (2020) [hereinafter DMMF Fact Sheet], <https://www.mkewaterwaypartners.org/wp-content/uploads/2021/06/WRP-DMMF-Fact-Sheet.docx.pdf>.

²⁴ DMMF Fact Sheet, *supra* note 23, at 1.

²⁵ *Id.* at 2.

²⁶ *Id.* (explaining that “A cap is a layer of clean material, such as sand, that is placed over the contaminated sediments to mitigate the risk posed by those sediments.”).

²⁷ *Id.* at 1–2 (stating that “[t]he area above the stored sediment becomes usable as newly created land, which can be developed for Port commercial expansion and other public uses.”).

²⁸ ANALYSIS OF DREDGED MATERIAL MANAGEMENT ALTERNATIVES, *supra* note 22, at 1 (citing Natural Resources (NR) 722.07(4), the Wisconsin Administration Code, and the National Contingency Plan (40 C.F.R. § 3 00.430(e)(9)).

²⁹ *Id.*

³⁰ *Id.* at 12; *see also* MILWAUKEE METRO. SEWERAGE DIST., PERMIT APPLICATION FOR LOW-HAZARD WASTE GRANT OF EXEMPTION: MILWAUKEE ESTUARY AOC DREDGED MATERIAL MANAGEMENT FACILITY 1–2 (2021), <https://dnr.wi.gov/topic/waste/documents/comment/MilwaukeeDMMF/LHERequest.pdf> (explaining the regulatory requirements of the DMMF facility).

However, as of January 1, 2022, the WDNR has not yet issued a document with its final decision.³¹

It might be surprising to realize there are no federal or Wisconsin statutory or administrative code requirements that directly address the design and operation of a DMMF; the application to the WDNR to build the DMMF is for a low hazard waste exemption. There is also a regulatory review that involves the Army Corps of Engineers Section 404 and 408 permits under the Clean Water Act. When the Corps proposes to issue a 404 permit it triggers the WDNR's determination whether to issue a Water Quality Certification per the Clean Water Act and its state regulations in NR 299.³²

As noted, the DMMF is to be built on the bed of Lake Michigan. Is creating this DMMF on the bed of Lake Michigan consistent with the Wisconsin Legislature's lakebed grant to Milwaukee and Wisconsin's Constitutional requirements?³³ Does the answer depend on defining the end use of the newly created dry land for a public trust purpose? While creation and future use of the DMMF obviously implicates the public trust doctrine, whether the WDNR is authorized to issue or deny a chapter 30 permit after it has considered the impacts on public trust rights is discussed in the next section.

³¹ E-mail from Gerald DeMers, Environmental Eng'r, Wisconsin Dep't of Nat. Res., to Sarah Martinez, Water Pol'y Specialist, Ctr. for Water Pol'y. (Nov. 15, 2021, 10:46 CST) (on file with Center for Water Policy).

³² Section 408 of the Clean Water Act provides the Corps may grant permission to another entity to alter a civil works project when the alteration will not injure the public interest. Section 404 of the Clean Water Act provides the Corps may grant permission for the discharge of dredged or fill material in the waters of the United States. When the Corps proposes to issue a 404 permit for this project, the WDNR is required to follow procedures and standards in Wis. Admin. Rule NR 299 to issue or deny a water quality certification. The WDNR may deny a certification for any activity where the WDNR "does not have reasonable assurance that any discharge will comply with . . . any other appropriate requirements of state law as outlined in s. NR 299.04." NR 299.01(2)(a). Then in NR 299.04 (1)(b)6, the regulation specifies the activity will comply with "[p]ublic interest and public rights standards, related to water quality, set forth" in a variety of subsections of chapter 30, the statute that is a key locus of public trust authority in Wisconsin.

³³ Act of June 4, 1921, ch. 307, 1921 Wis. Sess. Laws. 452–453 (conveying original submerged land for creation of Bradford beach and Lincoln Memorial Drive); Act of June 16, 1933, ch. 261, 1933 Wis. Sess. Laws 587–588 (amending chapter 307 of the grant for Bradford Beach).

III. THE PUBLIC TRUST DOCTRINE IN WISCONSIN CONTROLS THE USE OF THE BED OF LAKE MICHIGAN

Wisconsin's long legal history developed the state's public trust doctrine as it is known today. The public trust doctrine is "the body of law that directs the state to hold navigable waters in trust for shared use by the public."³⁴ Understanding the doctrine requires a review of the Wisconsin Constitution, state statutes and regulations, DNR guidance, and common law established by the Wisconsin judiciary and U.S. Supreme Court. When Wisconsin became a state, it incorporated language from Article IV of the Northwest Ordinance into Article IX §1 of the Wisconsin Constitution, which reads in pertinent part:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, *shall be common highways and forever free*, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.³⁵

This section of the constitution imposes a duty on and gives authority to the state to act as a trustee of the state's waters.³⁶ This section also serves as the basis for public rights to use trust property. Public rights that are protected by the public trust doctrine—at their core—were the traditional rights of navigation, water-based commerce (such as using the rivers to float logs from timberlands to market), and fishing.³⁷ Over time, Wisconsin courts expanded these to recognize public rights in navigable water to include the right to recreation, enjoyment of scenic beauty,

³⁴ Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustee's World*, 39 *ECOLOGY L. Q.* 123, 128 (2012).

³⁵ WIS. CONST. art. IX, § 1.

³⁶ Melissa K. Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees, and Political Power in Wisconsin*, 27 *ECOLOGY L. Q.* 135, 141 (2000)

³⁷ Scanlan, *supra* note 34, at 133–135.

protected shoreland, and to enjoy these rights the water must be managed to minimize pollution.³⁸

For example, in 1914, the Wisconsin Supreme Court held in *Diana Shooting Club* that the right to hunt and fish on navigable water was incidental to the right of navigation.³⁹ Following this, in 1930, the Wisconsin Supreme Court in *Nekoosa* explained that "[a]s population increases, these waters are used by the people for sailing, rowing, canoeing, bathing, fishing, hunting, skating, and other public purposes."⁴⁰ Twenty years later, in *Muench*, the court recognized the enjoyment of scenic beauty as a public right.⁴¹ Finally, in 1969, the court held in *Reuter* that before any water regulation permit could be issued, WDNR must look at potential water quality impacts. In so holding, the court recognized the right to clean, unpolluted waters.⁴² Thus, the judiciary has a long history of recognizing beauty, recreation, and the right to clean water as rights under the public trust doctrine. To guide implementation of the public trust doctrine, the legislature enacted chapters 30 and 31 of the Wisconsin Statutes, which authorizes the WDNR to issue permits for activities impacting the state's waterways.⁴³

A. Wisconsin has Two Ways to Allow the Use of Lakebed

The state has two ways to allow the filling and use of lakebed protected by the public trust doctrine. The state legislature has limited authority to make lakebed grants. Lakebed grants convey the use of submerged lakebed for public use and are recorded in Wisconsin's statutes. Many of the recorded lakebed grants to municipalities are over a century old. Without a lakebed grant, one may apply for a permit to deposit fill on a lakebed under section 30.12.⁴⁴

³⁸ *Rock-Koshkonong Lake Dist. v. State Dep't of Nat. Res.*, 2013 WI 74, ¶ 76, 350 Wis.2d 45, 833 N.W.2d 800 (summarizing public rights in Wisconsin).

³⁹ *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914); *see also Willow River Club v. Wade*, 76 N.W. 273, 277 (Wis. 1898) (establishing a right to fish under the public trust doctrine).

⁴⁰ *Nekoosa Edwards Paper Co. v. Railroad Comm'n*, 228 N.W. 144, 147 (Wis. 1930).

⁴¹ *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 521 (Wis. 1951).

⁴² *Reuter v. Dept. of Nat. Res.*, 168 N.W.2d 860, 861 (Wis. 1969).

⁴³ WIS. STAT. § 30.01-99; WIS. STAT. § 31.01-99.

⁴⁴ WIS. STAT. § 30.12.

Under either avenue, the state's trust obligations to monitor and enforce the public trust doctrine continue.⁴⁵ As trustee, the state cannot convey complete title in fee to anyone: The state may grant the lakebed only for public trust purposes.⁴⁶ These purposes include the above-mentioned public rights, traditional public trust purposes like docks and wharfs, as well as parks.⁴⁷ Notably, parts of Milwaukee's Lincoln Memorial Drive and lakefront parks, beaches, marinas, and museums are built on land created through legislative lakebed grants.⁴⁸

Furthermore, the state may never divest itself of the affirmative obligation to maintain granted lands in trust for the public.⁴⁹ Despite this, the legislature restricted the WDNR's regulatory authority in some situations, which limits its ability to proactively serve as a trustee. For instance, the legislature removed the WDNR's authority to require a municipality that holds a legislative lakebed grant in Lake Michigan to obtain a permit under chapter 30 before filling lakebed in the grant area.⁵⁰ Despite the inability to proactively regulate through the issuance or

⁴⁵ Letter from George E. Meyer, Secretary, Wis. Dep't of Nat. Res., to Thomas Ament, Milwaukee Cnty. Executive, Milwaukee Cnty. (June 10, 1996) [hereinafter Meyer-Ament Letter] (on file with the Center for Water Policy); see also Paul Schinner, Comment, *Wisconsin's Public Trust Doctrine: A New Framework for Understanding the Judiciary's Role in Protecting Water Resources*, 2015 WIS. L. REV. 1129, 1145–1146 (explaining that the public trust applies to lakebed regardless of navigability).

⁴⁶ Scanlan, *supra* note 36, at 149 (stating that “[a]lthough Wisconsin’s legislature has made grants of public trust property, this property can only be used for public purposes and does not operate to transfer legal title from the state.”).

⁴⁷ Act of June 12, 1909, ch. 358, 1909 Wis. Sess. Laws 402–403 (ceding original grant of submerged land for Port operations to the city of Milwaukee); Act of April 22, 1893, ch. 197, 1893 Wis. Sess. Laws 239–241 (ceding land for expansion of boulevards and a public park); Act of July 2, 1925, ch. 415, 1925 Wis. Sess. Laws 606–607 (granting submerged land for park, boulevard or highway purposes near the current Port of Milwaukee).

⁴⁸ Act of April 22, 1893, ch. 197, 1893 Wis. Sess. Laws 239–241 (granting “to the city of Milwaukee a certain portion of submerged land, lying along and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Milwaukee, for public park and boulevard purposes.”).

⁴⁹ *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) (quoting *Illinois Central* in saying that “[t]he state can no more abdicate its trust over property in which the whole people are interested”); see also Scanlan, *supra* note 36, at 148 (explaining that “[a]s early as 1927, the Wisconsin Supreme Court . . . require[ed] affirmative actions to protect the trust . . .”).

⁵⁰ WIS. STAT. 30.05, (stating “Nothing in this chapter relative to the establishment of bulkhead or pierhead lines or the placing of structures or deposits in navigable waters or the removal of materials from the beds of navigable waters is applicable to submerged shorelands in Lake Michigan, the title to which has been granted by the state to a municipality.”).

denial of a section 30.12 permit, the WDNR has a statutory duty to enforce the public trust, including monitoring the use of lakebed grants.⁵¹ In practice this means the WDNR reviews the municipality's proposed uses of lakebed grants and may offer a written analysis or speak at a public hearing about the consistency with the public trust doctrine. While these are not regulatory actions per se, they put the grant holder on notice of the WDNR's position. As discussed below, the common law that articulates the constitutionality of lakebed grant uses helps to inform WDNR's review of proposals and monitoring of implementation. If a grant holder proceeds in a way the WDNR determines as inconsistent with the public trust, among other things, section 30.03 empowers the WDNR to initiate enforcement actions on their own or through a referral to the state Department of Justice, to abate a nuisance related to violating public trust rights.⁵² This is a more reactive than proactive system for protecting public trust rights.

However, the cooperative federalism between the state and federal government under the Clean Water Act may offer a permit authority pathway that is more proactive about including an assessment of public trust rights. When the Army Corps of Engineers proposes to issue a 404 permit under the Clean Water Act for the proposed DMMF, it triggers the WDNR to issue or deny the related Water Quality Certification. This permit process may involve an analysis of public trust rights. According to state regulation, the WDNR may deny a water quality certification for any activity where the WDNR "does not have reasonable assurance that any discharge will comply with . . . any other appropriate requirements of state law as outlined in s. NR 299.04."⁵³ Those "appropriate requirements of state law" in NR 299.04 specify that the activity will comply with "[p]ublic interest and public rights standards, related to water quality, set forth" in a variety of subsections of chapter 30, the statute that is a key focus of public trust authority in Wisconsin.⁵⁴ Thus, the WDNR's Water Quality Certification may be a point where the agency

⁵¹ WIS. STAT. 30.03 (4)(a) (explaining that "[i]f the department learns of a possible violation of s. 281.36 or of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law.").

⁵² WIS. STAT. § 30.03.

⁵³ WIS. ADMIN. CODE § NR 299.01(2)(a).

⁵⁴ *Id.* § NR 299.04 (1)(b)6.

can exercise its trustee review of the DMMF. The next section discusses public interest and public trust standards.

B. The Legislature's Authority to Convey Lakebed is Limited and Must be in the Public Interest

In 1892, the United States Supreme Court addressed the states' ability to alienate trust property in *Illinois Central*.⁵⁵ The Illinois legislature granted and then repealed the use of lakebed in Lake Michigan for a railway company to construct a depot and harbor.⁵⁶ Illinois Central Railway Company sought to reinstate the lakebed grant.⁵⁷ The Court held the lakebed grant invalid because it violated the public trust doctrine.⁵⁸ The Court reasoned that the state of Illinois held the bed of Lake Michigan in trust for the people and, as such, the legislature's original grant was invalid because it violated the trust.⁵⁹ The Court declared:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of peace.⁶⁰

Thus, *Illinois Central* effectively restricted the states' ability to convey to a private entity, such as a railroad company, property held in trust for the public. However, this was not a total prohibition against legislative lakebed grants.⁶¹ The Court instead limited grants of trust property to those "used in promoting public interests" or those lands that "can be disposed of without any substantial impairment of the public interest in the land and water remaining."⁶²

⁵⁵ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892); see also Ill. Steel Co. v. Bilot, 84 N.W. 855, 857 (Wis. 1901) (explaining that the court remanded the case to determine which parts of Jones Island in Milwaukee were on lakebed fill and which were not because the state cannot abdicate its trust of these lands).

⁵⁶ Ill. Cent., 146 U.S. at 447-449.

⁵⁷ Id. at 448.

⁵⁸ Id. at 460.

⁵⁹ Id. at 453.

⁶⁰ Id.

⁶¹ Scanlan, *supra* note 34, at 142.

⁶² Ill. Cent., 146 U.S. at 453.

After *Illinois Central*, Illinois continued to make grants of lakebed. These grants survived court challenges if they were for public purposes. For instance, the Illinois Supreme Court found the public benefitted from the expansion of Chicago's Lakeshore Drive on filled lakebed and upheld these grants even though they were to private parties.⁶³ However, the court invalidated grants that were not for a public purpose. For instance, in *Scott*, the Illinois Supreme Court held that a grant of submerged land to the United States Steel Corporation had no public purpose.⁶⁴ The grant would have allowed the steel company to expand their operation and build facilities on lakebed fill in Lake Michigan.⁶⁵ The court saw the expansion of steel operations as a private purpose and invalidated the grant.⁶⁶ The court also noted any benefit to the public would only be incidental and that any economic benefit or additional employment would be too indirect to satisfy the requirement of public purpose.⁶⁷

C. The State Cannot Use a Lakebed Grant for Purely Private Interests

Wisconsin courts built on the foundation established by the U.S. Supreme Court in *Illinois Central*. Similar to Illinois, the Wisconsin judiciary rejected grants for private purposes. In 1893, in *McLennan v. Prentice*, the Wisconsin Supreme Court faced the issue of competing rights in lakebed under navigable water.⁶⁸ There the defendant, a private party, attempted to convey water lots under Lake Superior.⁶⁹ Regarding that conveyance, the court explained that “the state is the owner of the fee of all lands under navigable waters in the Great Lakes, but in trust only, for public uses and purposes of navigation and fishing, and they may not be granted . . . to a private person for purely a private purpose”⁷⁰ Then, in 1896,

⁶³ *People ex rel. Moloney v. Kirk*, 45 N.E. 830, 832 (Ill. 1896) (conveying submerged land to private owners for the expansion of Chicago's Lake Shore Drive because they were paying for the construction, and it benefitted the public).

⁶⁴ *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 781 (Ill. 1976).

⁶⁵ *Id.* at 779 (stating that “[t]he defendant steel company plans to construct an additional facility which will extend its South Work's Plant some 194 acres into Lake Michigan.”).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *McLennan v. Prentice*, 55 N.W. 764, 769 (Wis. 1893).

⁶⁹ *Id.* at 766.

⁷⁰ *Id.* at 770.

the court held in *Priewe v. Wis. State Land & Improvement Co.* that a lakebed grant is invalid when it benefits a private interest in purpose and effect.⁷¹ Here, the Wisconsin legislature granted the lakebeds of two lakes to John Reynolds, a private party. In developing drainage systems throughout Wisconsin at that time, the legislature requested Reynolds drain the lakes. The court found that Reynolds used this grant purely for private purposes—to operate farming and resort enterprises—resulting in “pecuniary gain[s] to private parties” and as such, the court invalidated the grant.⁷² Thus, if a lakebed grant in purpose and effect solely benefits a private interest, the legislation will be void.

In the 1927 decision in *City of Milwaukee*, against the backdrop of the roaring twenties, the Wisconsin Supreme Court held that a lakebed grant for dock and wharf facilities did not violate the public interest because it was “an important factor in the industrial life of the city”⁷³ The legislature granted the lakebed to the City of Milwaukee who allowed Illinois Steel Company to use the area in aid of navigation and commerce, to construct dock and wharf facilities, and for any other proper purpose.⁷⁴ The court recognized that so long as the proposed use of the lakebed aided public trust purposes—here, constructing Milwaukee’s outer harbor for navigation—the use will be consistent with the public trust doctrine.⁷⁵

⁷¹ *Priewe v. Wis. State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1896).

⁷² *Id.* at 921–922 (Wis. 1896); *see also McLennan*, 55 N.W. at 770 (explaining that land under the Great Lakes “between the shoal water and navigable water” is held in trust for the people and cannot be used for purely private purposes.”).

⁷³ *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927).

⁷⁴ *Id.* at 821.

⁷⁵ *Id.* at 830; *see also* Letter from Grant Langley, Milwaukee City Att’y, to Alderman Tony Zielinski, City of Milwaukee (Jan. 26, 2011) [hereinafter Langley-Zielinski Letter] (on file with the Center for Water Policy) (explaining that the Wisconsin Supreme Court in *City of Milwaukee* “recognized that lakebed grant lands were held in trust for public uses and for the purposes of navigation and fishing, but that development along the lakeshore in aid of uses consistent with those parameters was in no manner inconsistent with that doctrine.”).

D. The Use of a Lakebed Grant Should Satisfy the Six-Factors Laid Out in *Public Service Commission* and *City of Madison*

In the 1957 decision *State v. Public Service Commission*, the Wisconsin Supreme Court held that the use of a lakebed grant to create a city park was valid.⁷⁶ The state legislature made a lakebed grant to the City of Madison to use the newly created land as a park, parking lot, and highway, subject to the approval of the Public Service Commission.⁷⁷ The challenger to the grant contended that “the public purpose to be served by the project [was] local” and thus violated the public trust doctrine.⁷⁸ The court upheld the grant and Commission approval based on multiple factors it found relevant to the determination.⁷⁹ The court concluded that using lakebed fill to construct a park satisfied the state’s duty under the public trust doctrine by attaching importance to these facts:

1. “Public bodies will control the use of the area.
2. The area will be devoted to public purposes and open to the public.
3. The diminution of the lake area will be very small when compared to the whole of [the lake].
4. No one of the public uses of the lake as a lake will be destroyed or greatly impaired.
5. The disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded to those members of the public who will use the city park.”⁸⁰
6. The use was not for such a local purpose that it would be an improper use of state property (this factor was introduced by the court in *City of Madison v. State*, discussed below).⁸¹

⁷⁶ *State v. Pub. Serv. Comm’n*, 82 N.W.2d 71 (Wis. 1957).

⁷⁷ *Id.* at 72.

⁷⁸ *Id.* at 73.

⁷⁹ *Id.* at 73–74.

⁸⁰ *Id.* at 73–75.

⁸¹ *City of Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957).

That same year, in *City of Madison v. State*, the supreme court faced the issue of whether the city had the right to build a civic center (now known as Monona Terrace) on lakebed fill in Lake Monona.⁸² Due to railroad tracks and steep grades, there was little to no access to Lake Monona from certain parts of the city. In 1932, the legislature granted the lakebed for various municipal purposes.⁸³ Years later the city issued \$4 million in bonds to erect and equip a civic center on the granted lakebed. The state contended that the legislature did not intend for the grants to authorize construction of a building the size and character proposed, and if they did, the grants should be declared unconstitutional.⁸⁴ The Wisconsin Supreme Court analyzed the same factors as *State v. Public Service Commission*, and reasoned that “purposes of the proposed building are in large part recreational . . . that the building will attract to the site large numbers of people . . . and . . . provide a vantage point from which these people may enjoy the natural beauty of Lake Monona.”⁸⁵ The court explained that if a project on lakebed fill was for a local purpose, it would be an improper use of trust land.⁸⁶ However, the court held the civic center was not so local as to run afoul of the public trust doctrine. There has not been further litigation to define what is too “local”, although it is suggested that “local” is related to public access. Thus, if a proposed use is open to the public, it is not so local as to be an improper use under the public trust doctrine.⁸⁷

IV. CAN THE CITY OF MILWAUKEE USE THE LAKEBED GRANT TO ERECT A DMMF ON THE BED OF LAKE MICHIGAN?

As discussed, the proposed DMMF will be a containment structure on the bed of Lake Michigan to hold sediment dredged from the Milwaukee Estuary AOC. In addition to the regulatory processes and permits required for this project, the lakebed fill for the DMMF needs to fit within the purpose of the lakebed grant. U.S.

⁸² *Id.*

⁸³ *Id.* at 675 (listing municipal purposes like “park purposes, park drives, and automobile parking areas.”).

⁸⁴ *Id.* at 677.

⁸⁵ *Id.* at 678.

⁸⁶ *Id.*

⁸⁷ *State v. Pub. Serv. Comm’n*, 82 N.W.2d 71, 75 (Wis. 1957) (stating that “[t]here is no contention here that the purpose authorized . . . is not public.”).

and Wisconsin Supreme Court precedent inform the meaning of the city's lakebed grant.

A. The Legislature Granted Lakebed to Milwaukee in Multiple Acts

Starting in 1893, the state legislature made several grants to the City and County of Milwaukee for varying purposes.⁸⁸ For instance, the state granted lakebed for the popular Bradford Beach and Summerfest grounds.⁸⁹ The state also granted the lakebed to be filled and used for public roads and boulevards, parking lots, docks, fisheries, and railways.⁹⁰

The proposed DMMF would be built on submerged land granted to the City of Milwaukee in 1909, and later amended two times.⁹¹ The 1909 grant to the City was “to be held and used by said city for public slips, basins, docks, wharves, structures, roads, highways, railroads and railways, railway terminals and lake and rail facilities and spurs for shipping.”⁹² In 1923, the legislature amended section one of the 1909 grant to add subsection two of the grant which included expansive language allowing use for “any proper purpose.”⁹³ This amendment reads, in pertinent part:

⁸⁸ Act of April 22, 1893, ch. 197, 1893 Wis. Sess. Laws 239–241 (ceding land for expansion of boulevards and a public park).

⁸⁹ Act of June 4, 1921, ch. 307, 1921 Wis. Sess. Laws. 452–453 (conveying original submerged land for creation of Bradford beach and Lincoln Memorial Drive); Act of June 16, 1933, ch. 261, 1933 Wis. Sess. Laws 587–588 (amending chapter 307 of the grant for Bradford Beach).

⁹⁰ *Map of Lakebed Grants near the Port of Milwaukee*, in WIS. DEPT. OF NAT. RES., LAKEBED GRANT MAPPING: MAPS OF LAKEBED GRANTS IN THE CITY OF MILWAUKEE (1993), following p.10; Act of April 22, 1893, *supra* note 88 (ceding land for expansion of boulevards and a public park); Act of July 2, 1925, ch. 415, 1925 Wis. Sess. Laws 606–607 (granting submerged land for park, boulevard or highway purposes near the current Port of Milwaukee).

⁹¹ Act of June 12, 1909, ch. 358, 1909 Wis. Sess. Laws 402–403 (ceding original grant of submerged land for Port operations to the city of Milwaukee); Act of June 22, 1923, ch. 285, 1923 Wis. Sess. Laws 478–479 (amending chapter 358 from 1909 relating to cession of certain submerged lands to Milwaukee); Act of June 30, 1931, ch. 381, 1931 Wis. Sess. Laws 598–599 (amending chapter 285 and clarifying public purposes). *See also Map of Lakebed Grants near the Port of Milwaukee*, *supra* note 90.

⁹² Act of June 12, 1909, *supra* note 91.

⁹³ Act of June 22, 1923, *supra* note 91 (stating that the lakebed should be used “to construct dock and wharf facilities on any of said land and to use any or all of said land for any proper purpose.”).

2. That portion of said lands above described . . . owner or owners are authorized and empowered to fill in and reclaim any unfilled portions of said land and, in aid of commerce and navigation, to construct dock and wharf facilities on any of said land and to use any or all of said land **for any proper purpose.**⁹⁴

Then in 1931, the legislature amended the grant again. Section one, subsection one reads in pertinent part:

1. [The submerged land between the shore, north line of Russell avenue and harbor entrance] are hereby ceded . . . to the city of Milwaukee . . . for the purpose of improving, filling and utilizing the same **for harbor purposes and in aid of navigation**, in any manner the said city may -deem expedient, and particularly, but without by such specific enumeration limiting the aforesaid purposes, for the **purpose of establishing and maintaining thereon breakwaters, bulkheads, piers, wharves, docks, slips, basins, warehouses, transfer sheds, structures, roads, highways, railway terminals, lake and rail facilities and spurs for shipping, airports and other harbor facilities**, including the right to lease, either for exclusive or common use, such particular parcel or parcels of said lands as said city may deem expedient to any party or parties **for any purpose or use requiring, involving or connected with the construction, maintenance, operation or use of any of the aforesaid harbor or navigation facilities.**⁹⁵

Thus, read in its entirety, the lakebed grant includes the stipulated uses for harbor and navigation facilities, such as docks, slips, and breakwaters, and any other proper purposes under the public trust doctrine. In a 2011 letter from Milwaukee's city attorney, he similarly describes the 1931 amended grant as follows:

[T]he express intent of the Legislature was to grant broad but not unlimited discretion to the City to use these lakebed grant lands for an

⁹⁴ *Id.*

⁹⁵ Act of June 30, 1931, *supra* note 91 (emphasis added).

enumerated array of public purposes. These include transportation uses, commercial port uses, or traditional navigational and recreational uses as encompassed and envisioned by the underlying general public trust doctrine. While the City is granted considerable flexibility in the manner by which these lands may be used, that flexibility is by no means unlimited . . .⁹⁶

Therefore, the lakebed grant binds Milwaukee to devote the newly created land of a DMMF to harbor and navigation facilities and/or other public trust purposes, including recreation.

B. WDNR's Guidance Sets a Policy that is Protective of Public Uses of Lakebed Fill Areas

In another part of the Milwaukee lakefront, it is instructive to see how Wisconsin's attorney general interpreted public trust obligations on lakebed fill. In 1987, the attorney general responded to the WDNR's request for guidance on legislative grants to municipalities.⁹⁷ The attorney general explained that a restaurant (previously named Pieces of Eight, and currently Harbor House) was in no way compatible with the uses allowed under the lakebed grant to Milwaukee for navigation and fisheries.⁹⁸ Lakebeds used inconsistently with the grant may revert to the state if the state brings a successful enforcement action.⁹⁹ Despite its incompatibility, because the state allowed the restaurant to exist for twenty years without objection, the attorney general opined that it would not be an "equitable or reasonable use of the state's prosecutorial discretion" to dismantle the restaurant.¹⁰⁰ The attorney general recognized that leaving the restaurant in place would lead to future proposals that are inconsistent with the public trust doctrine.¹⁰¹ As a remedy, the attorney general advised the WDNR to "candidly acknowledge" the restaurant

⁹⁶ Langley-Zielinski Letter, *supra* note 75.

⁹⁷ Letter from Donald Hanaway, Att'y Gen., to Carroll Besadny, Wis. Dep't of Nat. Res. Secretary (Aug. 11, 1987) (on file with the Center for Water Policy).

⁹⁸ *Id.* at 1.

⁹⁹ *Id.* (stating "[t]he legislation further provides that land used inconsistently with these stated purposes reverts to the State of Wisconsin's ownership (Chapters 151 and 516, Laws of 1929).")

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

cannot be justified as a lakebed use consistent with public trust purposes, and pointed out that when the department newly discovers proposed or recent “lakebed development inconsistent with public trust purposes, it has a constitutional duty to prevent or abate misuse of the state’s lakebed.”¹⁰²

In the late 1980s, the WDNR developed guidelines for reviewing proposed uses of lakebed grants because it was fielding a variety of proposals for commercial developments in lakes and rivers.¹⁰³ For the Harbor House and other food services provided on filled lakebed, the WDNR’s guidelines underscore the importance of public access. For instance, the WDNR’s guidelines establish that the “facility must be open to the public. This means that . . . [a] substantial majority (90%?) [sic] must be open to the public without charge during normal operating hours, [with an exception for rentals].”¹⁰⁴ The guidelines continue, “[t]he facility must be designed and operated in such a manner that all members of the public making a ‘normal’, lawful use of the area in which it is located have free and open access to and use of the facility.”¹⁰⁵

More broadly, the WDNR’s 1989 guidance on development of lakebed grants clarified their policy that “filling of lakes and streams for development purposes be substantially related to navigation and its incidents.”¹⁰⁶ The WDNR stated that this means the lakebed grants “must, where possible, be construed as only allowing what the Constitution itself permits.”¹⁰⁷ That guidance contains a list of all lakebed grants and their approved purposes, which allows one to see the WDNR’s policy in practice. The use of lakebed for commercial purposes that are not directly related to navigation, such as the Pieces of Eight/Harbor House

¹⁰² *Id.*

¹⁰³ Meyer-Ament Letter, *supra* note 45.

¹⁰⁴ WIS. DEP’T OF NAT. RES., GUIDELINES FOR FOOD SERVICE IN LAKEBED AREAS 1, Attachment 2 to Memorandum from Robert Roden, Director of Bureau of Env’t Analysis, Wis. Dep’t of Nat. Res., to District Directors re Lakebed/Riverbed Commercial and Public Development (Jan. 26, 1989) (on file with the Center for Water Policy).

¹⁰⁵ *Id.*

¹⁰⁶ Memorandum from Robert Roden, Director of Bureau of Env’t Analysis, Wis. Dep’t of Nat. Res., to District Directors re Lakebed/Riverbed Commercial and Public Development, at 1 (Jan. 26, 1989) (on file with the Center for Water Policy).

¹⁰⁷ *Id.* at 2.

restaurant are the aberration. Instead, allowed public uses revolve around parks, beaches, harbors, and the like.¹⁰⁸

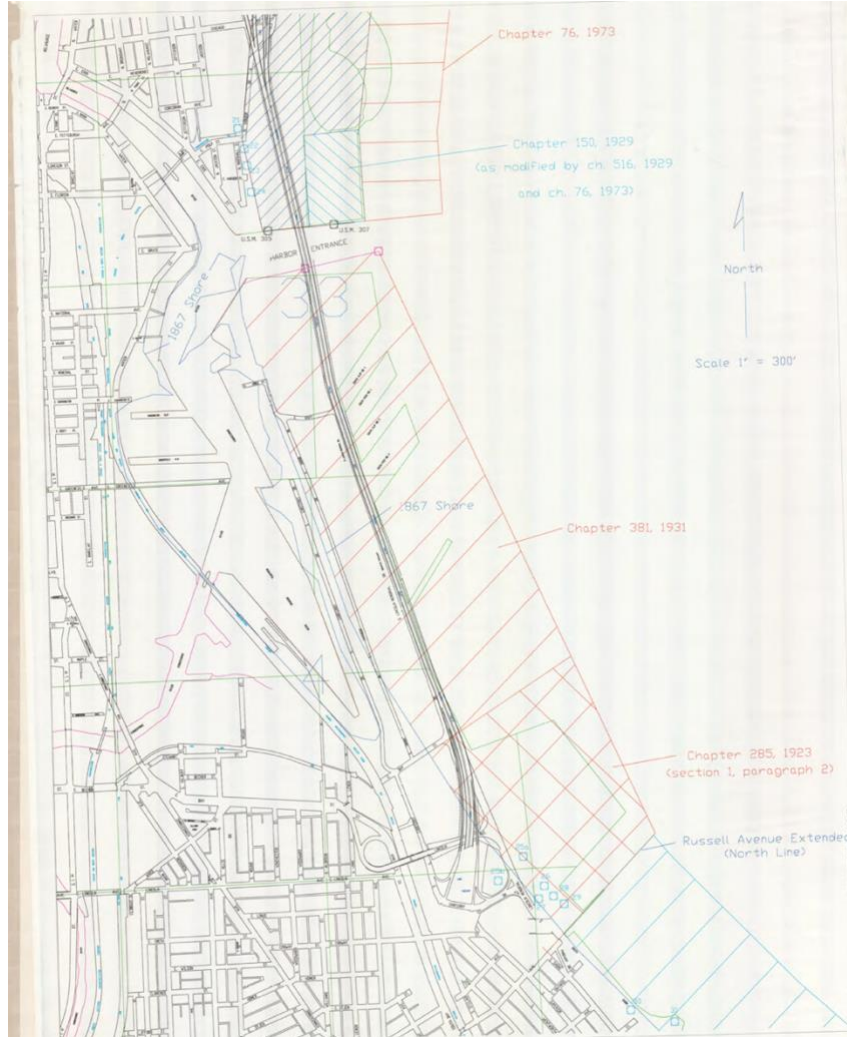
C. The Port is Partly Operating on Lakebed Filled Pursuant to these Grants

The Port is partly operating on filled lakebed. The legislature granted submerged land in Lake Michigan to the city of Milwaukee for dock and wharf operations and/or other proper public trust purposes.¹⁰⁹ Figure 1 below shows the area these lakebed grants encompass, and the proposed DMMF is within this area. This section briefly discusses the Port's composition and governance as an entity of the City, and then provides a short overview of their obligations under the public trust doctrine.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ Act of June 12, *supra* note 91 (ceding original grant of submerged land for Port operations to the city of Milwaukee)

FIG- 1 PORT OF MILWAUKEE LAKEBED GRANT¹¹⁰



¹¹⁰ FOTH INFRASTRUCTURE & ENV'T, LLC, PORT MILWAUKEE LAKEBED GRANTS 3 (2021) <https://dnr.wi.gov/topic/waste/documents/comment/MilwaukeeDMMF/DRAAppendixO.pdf>. Image Courtesy of Wis. Dep't of Nat. Resources.

The Port is a department within the City of Milwaukee.¹¹¹ Their mission is to increase “international trade, business development, job creation, and public access to the waterfront.”¹¹² The Port emphasizes its importance in maintaining Milwaukee as a “water-centric” city by supporting “water-based commerce, recreation and leisure.”¹¹³ The Port is governed by a seven-member Board of Harbor Commissioners.¹¹⁴ Its members are appointed by the Mayor of Milwaukee and confirmed by the common council.¹¹⁵ The Board of Harbor Commissioners supervises the Port’s day-to-day operations, including development, recreational use, and leases.¹¹⁶

Some of the Port’s operations exist on lakebed fill granted by the legislature to the city. In those areas of lakebed fill, the Port is obligated to abide by the purposes listed in Milwaukee’s lakebed grants and subject to the limits of the public trust doctrine. Thus far, the Port serves as the “landlord” for the Summerfest grounds, Discovery World, and the Harbor House restaurant.¹¹⁷ Furthermore, the Port’s website states that they maintain public access points across the Port during certain hours, including the area immediately west of the proposed DMMF facility depicted by the lime green line accompanied by the hooked fish icon. These areas are for “picnicking, fishing, and other outdoor leisure.”¹¹⁸

¹¹¹ *The City of Milwaukee*, PORT OF MILWAUKEE, <https://portmilwaukee.com/Port-Mke/About-Port-Milwaukee/City-of-Milwaukee> (last visited Nov. 5, 2021); *Port Leadership*, PORT OF MILWAUKEE, <https://portmilwaukee.com/Port-Mke/About-Port-Milwaukee/Port-Leadership> (last visited June 1, 2022).

¹¹² *Mission and Vision*, PORT OF MILWAUKEE, <https://portmilwaukee.com/Port-Mke/About-Port-Milwaukee/Mission> (last visited June 1, 2022).

¹¹³ *Id.*

¹¹⁴ *Port Leadership*, *supra* note 111.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Jeramey Jannene, *Port Seeks to Develop Cruise Ship Dock*, URBAN MILWAUKEE (Nov. 8, 2021, 4:08 PM), <https://urbanmilwaukee.com/2021/11/08/eyes-on-milwaukee-port-seeks-to-develop-cruise-ship-dock/>.

¹¹⁸ *Public Access at the Port*, PORT OF MILWAUKEE, <https://portmilwaukee.com/Port-Mke/Cruises-Recreation/Public-Access> (explaining that Kaszube’s Park and other public access sites for fishing and recreation are available) (last visited June 1, 2022).

FIG. 2 – PORT MILWAUKEE PUBLIC ACCESS MAP¹¹⁹

In a 2011 letter addressed to Alderman Zielinski about siting a wind turbine at the Port, City Attorney Grant Langley described the Port’s obligations under the public trust doctrine.¹²⁰ After analyzing the lakebed grants, the city attorney Langley noted there are standards to assess the compatibility of uses on lakebed. Specifically, the uses must “[bear] some relationship to transportation, commercial port development, or the more traditional array of uses relating to navigation, fisheries, and other forms of recreation” for the Port’s obligation under the public trust doctrine to be met.¹²¹ Ultimately, the city attorney emphasized two things: first, that any dispute would be a “fact-intensive inquiry,” and second, that his office’s reading of applicable cases indicated “courts would not sustain

¹¹⁹ *Id.* Image Courtesy of Port of Milwaukee.

¹²⁰ Langley-Zielinski Letter, *supra* note 75.

¹²¹ *Id.* at 4. (explaining that “[w]hile the City is granted considerable flexibility in the manner by which these lands may be used, that flexibility is by no means unlimited, and both the Legislature and the courts have developed standards by which particular uses may be evaluated for compatibility with the public trust doctrine.”).

development of lakebed grant land subject to the public trust doctrine for purely private purposes unrelated to the use and enjoyment of the public.”¹²²

V. IS THE DMMF CONSISTENT WITH MILWAUKEE’S LAKEBED GRANT AND THE PUBLIC TRUST DOCTRINE?

As noted by the city attorney, the lakebed grant at issue is for commercial port development or the more traditional array of uses relating to navigation, fisheries, and other forms of recreation. Using the lakebed to construct an in-lake containment structure for contaminated sediment without defining a future use consistent with the public trust, does not appear to fit within the grant’s purposes. This could potentially be cured by specifying a public purpose for the ultimate end use of the newly created land.

A. Public Trust Doctrine Consistency Determinations

A public trust doctrine consistency determination involves applying the relevant case law and the six-factors derived from *Public Service Commission* and *City of Madison*. The DMMF could meet all of the factors to satisfy Milwaukee’s obligations under the public trust doctrine if the future use of the land is for public trust purposes and open to the public. To reiterate, the six-factors are as follows:

1. Whether public bodies will control the use of the area,
2. Whether the area will be devoted to public purposes and open to the public,
3. Whether the diminution of lake area will be very small when compared to the whole of the lake,
4. Whether any of the public uses of the lake as a lake will be destroyed or greatly impaired,
5. Whether the impairment of the public rights to use the lake for recreation is negligible compared to the greater convenience afforded to the public from the grant, and

¹²² *Id.* at 3.

6. Whether the use of the lakebed fill will be for more than a local purpose.¹²³

Factor #1 - Whether public bodies will control the use of the area

Considering the first factor, the Port is anticipated to manage the DMMF in perpetuity.¹²⁴ The Port is a department within the city government, so the facility would meet the first factor of public bodies controlling use of the DMMF.

Factor #2 - Whether the area will be devoted to public purposes and open to the public

The second factor indicates the DMMF would need to be devoted to public purposes and open to the public. Drawing on City Attorney Langley's words when evaluating the same lakebed grants at issue here, "courts would not sustain development of lakebed grant land subject to the public trust doctrine for purely private purposes unrelated to the use and enjoyment of the public."¹²⁵ If the future use of the land created by the DMMF were for a purely private purpose, a court would likely reject the project. Here, a DMMF created in the pursuit of cleaning up the Milwaukee Estuary AOC could be seen as a public purpose. In prior court cases, water quality was described as part of public trust rights.¹²⁶ Despite this, there are no cases in Wisconsin finding a lakebed containment of dredged sediments to meet the public purpose requirements of the public trust doctrine. One should not read too much into this absence as it simply means there has not been a legal challenge of this type of use.

Further, while it is being built, the area cannot be open to the public. The 1931 grant allows the city to fill the lakebed "for harbor purposes and in aid of

¹²³ *City of Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957); *State v. Pub. Serv. Comm'n*, 82 N.W.2d at 73–74. *See also* Scanlan, *supra* note 34, at 142–143 (discussing the first five factors of the test).

¹²⁴ ANALYSIS OF DREDGED MATERIAL MANAGEMENT ALTERNATIVES, *supra* note 22, at 4.

¹²⁵ Langley-Zielinski Letter, *supra* note 75.

¹²⁶ *Just v. Marinette Cnty.*, 201 N.W.2d 761, 768 (Wis. 1972); *Reuter v. Dep't of Natural Res.*, 168 N.W.2d 860, 861–63 (Wis. 1969).

navigation, in any manner the city may deem expedient. . . .”¹²⁷ Thus, the city could argue that they have the authority to use the lakebed for the DMMF facility, as a manner of filling they deem expedient. Given the WDNR’s position on an existing containment facility for sediments from navigational dredging, this weighs in favor of the DMMF fitting within the grant’s purposes.

However, after it is filled, there needs to be a purpose that is consistent with the public trust doctrine, and that points towards a use that is open to the public. The WDNR has a list of uses of lakebed grants that it found permissible and impermissible. Included in that list is a confined disposal facility (CDF), which the WDNR found permissible but noted the newly created land’s “ultimate use must be compatible with trust doctrine and Supreme Court guidelines.”¹²⁸ This reference is to the Jones Island CDF and is located within the lakebed grant at issue here. The Jones Island CDF also holds dredged sediment that, given the location and time period of the dredging, is suspected to contain contaminants. It is the basis for expanding the Port’s harbor facilities. For instance, the Port converted a portion of the south end of the Jones Island CDF, immediately south of the proposed DMMF, into a docking facility and parking lot for the Lake Express ferry back in 1998.¹²⁹

Then, in November 2021, the Port of Milwaukee began searching for a developer “to build [a] terminal for cruise ships on 5 acres immediately east of the Lake Express building.”¹³⁰ The Port has already entered into agreements with

¹²⁷ Act of June 30, 1931, *supra* note 91 (stating that “dry or submerged under the waters of Lake Michigan, are hereby * * * ceded, granted and confirmed to the city of Milwaukee * * * , a municipal corporation, for the purpose of improving, filling and utilizing the same for harbor purposes and in aid of navigation, in any manner the said city may -deem expedient, and particularly . . . for the purpose of establishing and maintaining thereon breakwaters, bulkheads, piers, wharves, docks, slips, basins, * * * warehouses, transfer sheds, structures, roads, highways, railroads * * * , railway terminals * * * , lake and rail facilities and spurs for shipping, airports and other harbor facilities.”).

¹²⁸ WIS. DEP’T OF NAT. RES., COMPILATION OF DEPARTMENT POSITIONS TO DATE ON SPECIFIC TYPES OF DEVELOPMENT 2 (on file with the Center for Water Policy).

¹²⁹ U.S. ARMY CORPS OF ENGINEERS, PHASE II DREDGED MATERIAL MANAGEMENT PLAN STUDY: MILWAUKEE HARBOR, WISCONSIN 17 (2008), <https://www.lre.usace.army.mil/Portals/69/docs/PPPM/PlanningandStudies/milwaukeedmmp/MilwaukeeDMMPfinal2.pdf>.

¹³⁰ Jannene, *supra* note 117.

Viking Cruises and other operators to bring cruise ships to Milwaukee.¹³¹ According to the Port, they intend to “[expand] the recreational, entertainment, tourism, cultural, [and/or passenger vessel utilization]” on the property.¹³² Moreover, in the Port’s call for development proposals, the Port cites the public trust doctrine and the lakebed grants as requiring the port to develop the site for “public purposes and uses, including commercial navigation and recreation.”¹³³ Currently, there are signs at the existing CDF which allow for limited use of the land for fishing, and once the CDF is stable it could potentially allow for more intensive public usage. Wisconsin Governor Tony Evers awarded the Port of Milwaukee a \$3.5 million grant towards construction of what is being called the South Shore Cruise Dock on the existing CDF.¹³⁴ The Port Director maintains that the new development will be a “dynamic experience” coupling economic development with cultural amenities and public access as required under the public trust doctrine.¹³⁵

As far as the status of the proposed DMMF goes, in February 2022, the Wisconsin State Assembly unanimously voted to approve construction of and funding for the DMMF through the use of Water Infrastructure Finance and Innovation Act loans, WDNR bond funds, as well as other funding sources.¹³⁶ The legislation allows for the reservation of space for flood management projects, potentially extending the time it takes to fill the DMMF and establish any kind of

¹³¹ *Id.*

¹³² *Id.*

¹³³ PORT OF MILWAUKEE, SOUTH SHORE CRUISE DOCK REQUEST FOR INTEREST (RFI) 2 (2021) <https://portmilwaukee.com/ImageLibrary/PortMke/Contract-Opportunities/RFIforSouthShore11.08.21.pdf>.

¹³⁴ Jeramey Jannene, *Port Building New Cruise Ship Dock*, URBAN MILWAUKEE (Feb. 3, 2022, 3:26 PM), <https://urbanmilwaukee.com/2022/02/03/eyes-on-milwaukee-port-building-new-cruise-ship-dock/> (explaining that “state’s grant will only cover half of the dock’s approximately \$7 million cost. The city-owned port intends to cover the remainder with a \$500,000 grant it received in 2021 from the Wisconsin Department of Transportation and the proceeds from the city’s sale of land for Komatsu Mining South Harbor Campus development in the inner harbor.”); *see also* Press Release, Tony Evers, Gov. Evers Announces More Than \$20 Million in Tourism Capital Investment Grants for Projects Across the State (Feb. 2, 2022) (on file with Center for Water Policy).

¹³⁵ Jannene, *supra* note 134.

¹³⁶ *See* WIS. STAT. § 200.35 (14)(b); *see also* U.S. ENV’T PROT. AGENCY, WATERWAY FLOOD MANAGEMENT AND RESTORATION PROJECTS, <https://www.epa.gov/system/files/documents/2022-01/milwaukee-factsheet.pdf> (last visited Jun. 8, 2022).

public trust amenities on the newly-created land.¹³⁷ The legislative decision to construct and fund the DMMF did not involve a public trust analysis on any publicly available official record. In sum, although mention of the public trust doctrine is plentiful in public-facing news stories, the proposed DMMF should have a more defined set of future uses that are open to the public in order to satisfy the second factor.¹³⁸

Factor #3 - Whether the diminution of lake area will be very small when compared to the whole of the lake

To evaluate the third factor, a court would consider the prospective size of the project in relation to the project area as a whole.¹³⁹ It is hard to assess the diminution of the lake because of its sheer size. Here, the proposed DMMF will be 2,200 feet at its longest and 1,050 feet wide, extending into Lake Michigan. In comparison, Lake Michigan spans 22,300 square miles.¹⁴⁰ Overall, the DMMF would take up a negligible amount of space when compared to the whole of Lake Michigan. The proposed DMMF is set for construction within the inner harbor, inside the breakwaters extending around Jones Island. Should the court consider the discrete area of the inner harbor compared to the DMMF, the project may be seen as more of a significant displacement of water and lakebed.

Factor #4 - Whether any of the public uses of the lake as a lake will be destroyed or greatly impaired

The fourth factor calls for an evaluation of how the DMMF will affect the current public uses occurring at the proposed DMMF site, such as fishing.

¹³⁷ See WIS. STAT. § 200.35 (14)(h); see *infra* notes 129–135.; see also Maxwell Evans, *State Says South Lakefront Dump Site Can Operate for Another Year as Army Corps Pursues Decades-Long Expansion*, BLOCK CLUB CHICAGO (Dec. 14, 2021, 8:21 PM), <https://blockclubchicago.org/2021/12/14/state-says-south-lakefront-dump-site-can-operate-for-another-year-as-army-corps-pursues-decades-long-expansion/>.

¹³⁸ PORT OF MILWAUKEE, *supra* note 133, at 2 (citing the public trust doctrine several times throughout and explaining that “The Wisconsin Public Trust Doctrine requires that the Site be developed for public purposes and uses, including commercial navigation and recreation.”).

¹³⁹ *Public Access at the Port*, *supra* note 118.

¹⁴⁰ *About the Lakes: Lake Michigan*, GREAT LAKES COMMISSION, <https://www.glc.org/lakes/lake-michigan> (last visited June 1, 2022).

Currently, the area has a sign marking it as open for fishing. There are anecdotes that the area is valuable to fisherpersons for smelt and other species. However, official studies that evaluate the frequency of usage of the adjacent area around the proposed DMMF site for fishing or other uses would be helpful evidence to evaluate the impact. It is unclear how significantly the displacement of water to construct the facility or closure of the adjacent land might affect those who use the area to fish.

Factor #5 - Whether the impairment of the public rights to use the lake for recreation is negligible compared to the greater convenience afforded to the public from the grant

The fifth factor calls for a balancing of harms and benefits. The current location for the proposed DMMF is home to recreational fishing, boating, and sailing. The court in *City of Milwaukee* suggested that Lake Michigan was “naturally designed to serve commercial purposes” as justification for creating lakebed fill on which to build Port and harbor facilities.¹⁴¹ However, note that this ruling came out of the 1920s, in a time when the industrial revolution propelled every decision. Today, Lake Michigan serves as both a navigable water body for Port operations, and as a mecca for a host of recreational activities worth protecting and promoting. The Port is not only facilitating traffic with lake ferries, but also now investing to attract tourists on cruise ships.¹⁴² Additionally, as mentioned, the area immediately west of the proposed DMMF is already open to public access. Should the DMMF proceed, that area will be closed to public use as the water is displaced and the facility constructed and filled. Not only that, but the DMMF is designed to last the next 100 years without leaching contaminants into the surrounding water.¹⁴³ The DMMF will need ongoing management to ensure that the containment is sound, and nothing leaches out to harm current and future

¹⁴¹ *City of Milwaukee v. State*, 214 N.W. 820, 823 (Wis. 1927).

¹⁴² *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914) (explaining that the public trust doctrine “should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.”).

¹⁴³ DMMF Fact Sheet, *supra* note 23, at 1 (stating that “[t]he DMMF is designed for a 100-year design life, including changes in Lake Michigan water level and 100-year probability rain and wave events.”).

generations who rely on clean Lake Michigan water for their drinking water supply. Thus, the DMMF may not meet this factor if it is found to impair current public uses and pose a risk to Lake Michigan. Any harms to public rights should be weighed against the benefits of the project. The WDNR and government participants indicate that the DMMF is critical if they are to move forward with dredging the AOC and restoring beneficial uses in the surrounding rivers and estuary. That benefit is potentially much larger than any displacement of public uses by constructing the DMMF. If the DMMF's future end use is defined in a way that opened it as a recreational asset for the public, this would be an even clearer balancing analysis in favor of the DMMF.

Factor #6 - Whether the use of the lakebed fill will be for more than a local purpose

Finally, as to the sixth factor, the proposed DMMF may be less likely to be seen as too local if the newly created land is dedicated to public purposes and expands access to the exercise of public rights. Precedent suggests that this prong is met when public parks or similar gathering spaces are created because they attract visitors from all over the state and the country. So, if the DMMF is closed to public access, then it is more likely to fail this prong. Consider previous examples of lakebed fill for public purposes in Milwaukee: Bradford beach, Veteran's Park, and Lakeshore State Park were created with the intent to provide the public with a natural green space to exercise enjoyment of scenic beauty, fishing, navigation, recreation, and more. Using these examples, the newly created land should similarly follow the model set by previous lakebed projects in order to satisfy this prong.

B. Further Considerations

Whether the DMMF and the newly created land meets the six-factors will be a fact intensive analysis if it is challenged in court. These factors could also be incorporated into the WDNR's work as trustee. WDNR could use the factors to evaluate its position as it monitors and enforces whether the use of the lakebed is consistent with the grant and constitutional requirements. WDNR could also incorporate the factor analysis to guide the Water Quality Certification for the

DMMF when it assesses impacts on public rights. If the City and Port take steps now to clearly define the final disposition of the land in a way that is consistent with public trust purposes and open to the public this would weigh in favor of being a constitutionally sound use of the granted lakebed.

Consider the CDF the Corps of built between 1982 and 1984 as a cautionary tale. The Corps proposed to expand operations at the Chicago South Steel Works CDF.¹⁴⁴ The Chicago Area CDF is a forty-three acre in-lake containment of sediments co-managed by the Illinois International Port Authority and the Chicago Park District.¹⁴⁵ The Corps originally planned to transfer the CDF to the Chicago Park District when it reached capacity around 2022; however, the Corps now aims to continue dredging sediment and adding to the CDF for the next twenty years.¹⁴⁶ Many residents believed the CDF would be converted into a park as far back as the mid-1990s; however, the park was never built.¹⁴⁷ Instead, the Corps applied for an extension of the state permit that allows it to operate and applied for another permit allowing it to expand the facility.¹⁴⁸ Multiple conservation organizations want the Corps and the city to reconsider the expansion.¹⁴⁹ Community groups vowed to contest any permit needed for expansion of the facility.¹⁵⁰ Other community organizations like Friends of the Parks advocated against the expansion of the CDF and urged for the creation of the park they were promised that would benefit South

¹⁴⁴ U.S. ARMY CORPS OF ENG'R, CHICAGO AREA CONFINED DISPOSAL FACILITY DATA ANALYSIS 1984 THROUGH 2005 2 (2006)

https://www.lrc.usace.army.mil/Portals/36/docs/projects/calumetharbor/FOIA%202019_Trend%20Analysis/2006%20Chicago%20CDF%20Data%20Trend%20Analysis.pdf.

¹⁴⁵ U.S. ARMY CORPS OF ENG'R, CALUMET HARBOR & RIVER, IL AND IN CHICAGO AREA CONFINED DISPOSAL FACILITY,

<https://www.lrc.usace.army.mil/Portals/69/FactSheets/CDFFactSheets/2015%20CDF%20Fact%20Sheet%20LRC%20Chicago.mapdocx.pdf> (last visited Nov. 20, 2021).

¹⁴⁶ William Lee, *Residents Fight Army Corps Plan to Expand Sludge Tank at the Mouth of the Calumet River instead of Building a Park*, CHI. TRIB. (Mar. 25, 2021, 9:27 AM),

<https://www.chicagotribune.com/news/environment/ct-environmental-justice-sludge-tank-calumet-river-20210325-z5pfoshoorfuvnnakacxy5bdqm-story.html>.

¹⁴⁷ Brett Chase, *An underwater lakeside dump could have become a park. Now it might turn into a bigger dump*, CHI. SUN TIMES (Nov. 12, 2021, 11:43 AM),

<https://chicago.suntimes.com/2021/11/12/22773172/confined-disposal-facility-calumet-river-park-harbor-southeast-side-pollution-lake-michigan>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Chicago, mostly comprised of Black and Latinx communities.¹⁵¹ What's more, allowing for expansion of the facility would likely delay any plans to restore the CDF site to parkland by at least twenty-five years.¹⁵² Thus, specifying dates for filling and the end use of the land at the outset can serve to avoid public outcry later.

VI. CONCLUSION

With the Infrastructure Investment and Jobs Act of 2021's boost of \$1 billion in federal funding to cleanup and restore AOCs in the Great Lakes, along with state and local investments, restoring the Milwaukee Estuary's AOC is within reach. This is an exciting opportunity for the area to tackle the complexity of addressing legacy pollution in this valuable freshwater system. The extent of public investment and effort underscores the need to ensure the restoration produces public benefits. There are a couple of key public trust legal issues implicated in using Milwaukee's lakebed grant to construct a DMMF and any future uses of the newly created land.¹⁵³ First, does the grant allow for the use of lakebed as to contain sediments in the DMMF? Second, if the grant allows Milwaukee to establish the DMMF adjacent to the Port, does the grant restrict the City's choice of future uses of the new land to serve public trust purposes? To answer these questions, one must analyze the specific language in the legislative lakebed grants in light of the Wisconsin Constitution and relevant case law that articulates six relevant factors for lakebed grants. That will be a fact-intensive inquiry and the purpose of the newly created land will need to be clarified in order to fully assess compliance with the public trust doctrine.

¹⁵¹ *Id.*; CHICAGO METRO. AGENCY FOR PLANNING, SOUTH CHICAGO COMMUNITY DATA SNAPSHOT 3 (2021), <https://www.cmap.illinois.gov/documents/10180/126764/South+Chicago.pdf> (estimating that roughly 76.5% of south Chicagoans are Black, and 19.8% are Latinx).

¹⁵² Maxwell Evans, *Lakefront Dump Site Opposed by Park Advocates, Southeast Siders Hasn't Had A Valid Pollution Permit Since May 31*, BLOCK CLUB CHICAGO (June 30, 2021, 8:45 AM), <https://blockclubchicago.org/2021/06/30/lakefront-dump-site-opposed-by-park-advocates-southeast-siders-hasnt-had-a-valid-pollution-permit-since-may-31/>.

¹⁵³ Act of June 12, 1909, *supra* note 91 (ceding original grant of submerged land for Port operations to the city of Milwaukee); Act of June 22, 1923, *supra* note 91 (amending chapter 358 from 1909 relating to cession of lakebed to Milwaukee and incorporating "any proper purpose" language); Act of June 30, 1931, *supra* note 91 (amending subsection one of section one of chapter 285 and clarifying public purposes).

While we will not predict how the decisions will be made, we note that today we are benefiting from the foresight the state legislature and Milwaukee's political leaders had a century ago to dedicate lakebed grant areas to public gathering places, beaches, marinas, and parks. This stands in contrast to neighboring Great Lakes' cities that lack such extensive public assets. The decisions government leaders make today about the DMMF will impact future generations, some of whom are not yet born and lack a political voice. In such a situation, it is critical for leaders to fully evaluate and protect the long-term goals for the community to exercise public rights in navigable waters.