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Activist Court Decision Leaves 11 Million Ohioans without Legal Representation in Lake Erie Coast Court Case

Appeals court legislates from the bench, claiming that 1) Ohio Attorney General has no right to represent 11 million citizens of Ohio unless asked by Governor or Legislature; and 2) Ohio Supreme Court got it wrong when it cited ordinary high water mark as Lake Erie boundary

(Columbus, OH)—If left unchallenged, a recent Ohio appeals court decision could leave the owners of Ohio's portion of Lake Erie—the state's 11 million citizens—with no one to represent their interests in a continuing battle over whether a citizen may walk along the dry shore of Lake Erie and whether upland private property owners have the right to place fences and structures along the coast without state oversight.

In its Aug. 21 decision in a class action lawsuit over ownership of Ohio's 312-mile Lake Erie coast, the 11th District Ohio Court of Appeals unexpectedly and without provocation ruled that the State of Ohio has no standing in the case. The unprecedented ruling came despite the fact that none of the parties had contested the State of Ohio's standing or the Attorney General's representation of the state in the case.

The court case—known as *Merrill vs. State of Ohio*—revolves around ownership of the narrow strip of land between the lake's ordinary high water mark and the water's edge, when that land is not covered by water.

In the case, private property owners adjoining the lake claim ownership to the low water mark and even to the international boundary with Canada; the Attorney General, the National Wildlife Federation, and the Ohio Environmental Council cite state and federal law confirming ownership to the ordinary high water mark.

"This ruling is a trifecta of injustice," said Trent Dougherty, Staff Attorney for the Ohio Environmental Council and Legal Director of the OEC Ohio Environmental Law Center.

"First, this activist court legislates from the bench and attempts to add words to the Ohio Revised Code. Second, it proposes to overrule 100 years of Ohio court precedence, including the clear finding that the Attorney General has the authority to represent the public's interest with regard to natural resources held in trust for the public. Finally, it tries to deprive the Attorney General of its constitutional protection as an independent office provided by Article III of the Ohio Constitution.

"The Ohio Attorney General doesn't just work for the 11 or so members of the Governor's cabinet. He also works for the 11 million people of Ohio, especially when it comes to protecting natural resources held in trust by the state for the public. If this ruling somehow was upheld, it would leave 11 million citizens bound and gagged and without a voice in what could be a landmark decision over access and care of the Lake Erie coast."

In 2005, owners of upland private property bordering Ohio's Lake Erie shore sued the Ohio Department of Natural Resources (ODNR). The property owners objected to the ODNR requiring landowners to obtain leases to place docks, wharves, and other structures along the shore, as provided by Ohio law.

After Gov. Ted Strickland took office, on July 13, 2007, he announced that the ODNR would no longer require a lease for any shoreline structure. He also stated that the ODNR was withdrawing as a defendant in the case. The then-Attorney General, Marc Dann, declared that he would remain in the case, representing the State of Ohio and its citizens and defending the Lake Erie Public Trust Doctrine.

In its decision, the appeals court took it upon itself to remove the Attorney General from the case, pointing to the ODNR's change in position and citing an Ohio law regarding the authority of the Ohio Attorney General.

The court cited Ohio Revised Code Section 109.02, which states, in pertinent part, "When required by the governor or the general assembly, the Attorney General shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested."

The law, however, does **not** state that the Attorney General cannot act on behalf of the public, as the Appeals Court decision implies. In fact, Appeals Court Judge Timothy Cannon disagreed with the other two appeals court judges in the case (Judge Colleen Mary O'Toole and Judge Diane Grendell) on this point.

In his dissent, Judge Cannon wrote the language of the Revised Code is "...language of inclusion, not of exclusion." He also wrote that, "...it is clear the citizens of the state of Ohio have an interest in the public trust portion of the waters of Lake Erie. Consequently, they are entitled to representation."

The court ruling also conflicts directly with previously established Ohio case law on the Ohio Attorney General's authority to represent the state with regard to natural resources held in trust for the public, including a 1975 case (State ex rel. Brown v. Newport Concrete Co.), which found, in pertinent part:

"[T]he Attorney General of Ohio is the constitutional legal officer for the state, and the officer generally relied upon to institute any necessary legal action to protect the property rights of the state, and the rights of its citizens pertaining to the use and enjoyment of such property."

"It is quite natural, pursuant to the general constitutional and statutory powers of the Attorney General of the state, that his office is the one which should exercise the rights of the state of Ohio as they relate to the natural resources of the state, and the rights of the citizens of this state to the continued free use of such resources as are held in trust by our state."

The OEC is concerned that the August ruling, unless challenged, could have a chilling effect on the willingness of a future Attorney General to sue a polluter, tobacco company, or rogue employer, without the express permission of the governor or the legislature.

The OEC also assailed the appeals court's upholding of the trial court's novel finding that the boundary between private and public property is where the water touches the land—a movable boundary that shifts over time. Ironically, the appeals court decision quotes passages from three separate Ohio Supreme Court cases (from 1878, 1916, and 1948), citing the ordinary high water mark as the public trust boundary.

"The appeals court misstates, misquotes, and misapplies 130 years of Ohio Supreme Court case law. This appeals court is saying that the Ohio Supreme Court did not really mean it when it cited the ordinary high water mark as the Public Trust boundary in 1878, 1916, and 1948. Instead, what the Supreme Court really meant what these three judges are saying in 2009. This decision is ripe for appeal, and we look forward to joining the Attorney General in the Supreme Court," said Dougherty.