



Press Release

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Court case could result in vast new rights to fill, build along Lake Erie shore

2009 could be pivotal year for public enjoyment and state protection of priceless natural asset — Ohio's 312-mile Lake Erie coast

HURON, OHIO—2009 could hold two separate, but unequal futures for Ohio's Lake Erie coast:

- Continued recognition of the ordinary high water mark as the boundary between public and private property along with the state's authority and responsibility to balance the interests of property owners to develop the shore with condominiums and other structures with the right of walkers and others to stroll and recreate along the dry shore.

- OR -

- A sudden erosion of state authority, resulting in vast new rights for property owners to fill and claim ownership of formerly submerged lands and the expulsion of walkers, anglers and others from the narrow strip of dry beach below the ordinary high water mark.

That's the view of the Ohio Environmental Council, a statewide environmental-conservation organization that is a defendant in a 2004 class-action lawsuit brought by upland property owners who claim ownership and control over the coast, off-shore to the ordinary low water mark.

"The trial court issued a 'Fill, Baby, Fill' decision," said Jack Shaner, OEC Deputy Director.

"Emboldened by the court decision, some property owners not only are claiming ownership and the right to exclude the public from the beach, but also new rights to fill the lake and claim title to any area they fill. If appellate courts uphold the ruling, property owners could build-out the coast with fences and 'Keep Out' signs while shrinking public access. Between the court case, proposed legislation and pending state rules, 2009 could be a very decisive year," said Shaner.

The dispute revolves around control of the narrow strip of land between the lake's historic ordinary high water mark and the water's edge, when that land is not covered by water. Under existing federal and state law, shore land located lake-ward of the ordinary high water mark is subject to government protection, regardless of whether it is covered by water on a given day.

Some property owners contend they have exclusive title to most of Ohio's Lake Erie coast, citing deeds that reference various property boundaries. Some even claim ownership to Canada.

The OEC believes one or more of the following could occur in 2009:

- The Ohio Appeals Court likely will issue a ruling on the class-action lawsuit, *Merrill v. State of Ohio*, sometime early next year. The case offers the most comprehensive review of Ohio coastal law in half a century. The court's findings may well be appealed to the Ohio Supreme Court.

- The Ohio General Assembly could decide not to wait for the courts to rule and could consider new legislation. For six years, property rights advocates have pushed to strip from Ohio law the need for a state permit to build along the shore. Their proposed legislation would scuttle the Ohio Department of Natural Resource's power to consider a proposed project's impact on navigation, water commerce, wildlife, environmental quality, and public recreation.

- The Ohio DNR may move forward with some version of new administrative rules to govern the placement of fill, docks, break-walls and other structures along the shore by upland property owners. The draft rules would implement Ohio Governor Ted Strickland's new policy, announced July 13, 2007, to accept a property owner's property description at face value. The draft rules relieve property owners of having to obtain a lease for any project located lake-ward of the ordinary high water mark. Instead, owners could apply for either a lease or a permit.

Any of these actions could have sweeping implications for property owners and the public, including beach walkers, anglers, waterfowl hunters and birders who want to access the shore.

The Lake County court decision already may be having a chilling effect on new state rules to control development along the shore. Property owners and at least one state lawmaker are pressuring the ODNR to amend the draft rules. They want the state to disregard the historic definition of the Lake Erie "territory" and instead follow the more narrow one proposed by the court—even while it is under appeal. Under current law, the ODNR can govern the placement of fill and structures, not only in the lake, but even land-ward of the water's edge. This is important because waves, wind and ice can reach far upland, destroying inadequately designed structures.

On Jan. 2, 2006, an 8-year-old Vermilion boy playing along the shore was crushed to death by a 600-pound slab of concrete that slid down a bluff. The concrete had been placed along

the bluff in a failed attempt to control costal erosion. The owner did not have a permit for the fill.

“Many upland owners are conscientious about the shore,” said Shaner. “Still, the coast is littered with illegal, unsightly and unsafe fill. Haphazardly strewn tires and concrete eventually will fail and slide into the lake, hastening erosion. This trashes private property and the public’s resources, alike. ODNR must maintain control over all coastal structures and fill placed anywhere along or near the shore. Why would anyone fight this?”

“Michigan and Pennsylvania guarantee their citizens the right to walk the Lake Erie coast, up to the high water mark. In Ohio, that right is under attack, as is our state’s ability to protect the coastline’s scenic beauty and fragile ecosystem. But only the state has the authority and the resources to balance development and protection. If we are not careful, that fine balance could erode in 2009. In fact, it may already be slipping away,” said Shaner.