O·H·I·O ENVIRONMENTAL COUNCIL

Draft Comments

Initial Comments on:

Draft Ohio Administrative Code Rule Changes for the Permitting of Coastal Structures along the Ohio Shore of Lake Erie
OAC 1501-6-01 through 1501-6-06 and OAC 1501-6-31 through 1501-6-40

Presented to:

Ohio Department of Natural Resources and
The Coastal Resources Advisory Council
Thursday, November 8, 2007 - Ashtabula, Ohio

On behalf of our more than 100 member environmental and conservation group members and thousands of individual citizen members throughout the state of Ohio, the Ohio Environmental Council (OEC) submits these initial comments jointly to the Ohio Department of Natural Resources and to the Coastal Resources Advisory Council for your respective consideration regarding draft Ohio Administrative Code (OAC) rules for the permitting of coastal structures and the occupation of submerged lands along the coast of Lake Erie.

Overall Perspective

In many ways, the draft rules provide a fair and responsible framework for the State to manage its fragile coastal resources for the shared rights and interests of the several thousand private upland property owners and 11 million citizen owners of the Lake Erie Public Trust. For this, the Ohio Department of Natural Resources is to be commended. In other ways, the rules pose serious questions or problems; fail to correct serious ongoing problems; or miss an opportunity to resolve other problems.

To put our initial comments into context, please know that the OEC fundamentally disagrees with Governor Strickland's apparent retreat from a strong assertion of the public trust land doctrine, as implied in the Governor's policy position announced on July 13, 2007 and as evidenced by the Ohio DNR's change of position in the court case pending in the Lake County Court of Common Pleas. The OEC is an Intervener in that court case and supporter of the public's rights to Lake Erie Public Trust property, which includes the lands underlying the waters of Lake Erie and also all lands formerly underlying the waters of Lake Erie but now artificially filled., extending from the international boundary of Canada to the Ordinary High Water Mark (OHWM) of the Ohio shores of Lake Erie.
We respectfully remind the Department and the Advisory Council to keep uppermost in mind that the public enjoys protection of the territory of Lake Erie (up to the OHWM) under Federal and Ohio laws for navigation, fisheries, commerce, and recreation. Additionally, as confirmed by the Ohio Supreme Court, a littoral (or upland) owner along Lake Erie has no title beyond the natural shoreline. As such, all draft rule changes must respect the public trust and

anything in the rules that may infringe on those public trust rights is invalid and should be rejected.

As decreed by the Ohio Supreme Court, the State of Ohio must forever uphold its guardianship responsibilities to the holders of the Lake Erie public trust and may never transfer ownership or abrogate any public trust responsibility to Lake Erie and its public trust lands. Accordingly, the OEC does not accept or condone any interpretation of the proposed draft rules – including the proposed new lease and permit scheme – that would attempt to refute, reinterpret, misinterpret, or otherwise overturn the Lake Erie Public Trust doctrine and its continued application.

Specific Comments

The following are OEC's initial comments on the draft proposed rule changes marked as "Draft as of 09-08-0," as posted on the Ohio DNR Division of Coastal Management's website. Please know that we continue to review the draft rules and likely will be submitting additional comments in the near future.

Proposed revisions to existing rules, OAC Sec. 1501-6-01 through OAC Sec. 1501-6-06

1501-6-01 Definition of terms

Comment: We appreciate the continued inclusion of scientific terminologies when defining biological processes, such as "aquatic areas," "littoral zone," and "surface water" and "state resource waters." Each of these terms is well understood by coastal scientists, but it is important to use objective, scientific terminology when defining these terms to avoid the potential for misinterpretation or misapplication.

1501-6-02 Application

The rule change appears to include mostly non-substantive changes for improved clarification. The OEC has no objection to this proposed rule change.

1501-6-03 Director's recommendations

The rule change would repeal the long-standing requirement in the existing Ohio Administrative Code that a lease of submerged land must be consistent with the policies of the Ohio Coastal Management Program Document.

First concern: The Document is the State of Ohio's official integrated management plan, as approved by the National Oceanic and Atmospheric Administration. The plan – which is the result of decades of painstaking development and represents the input of many diverse stakeholders – is the State of Ohio's formal plan for balancing the rights and interests of all users of Ohio's coastal resources, while, first and foremost, protecting those resources for enjoyment by current and future generations. All Ohio policies must continue to be consistent with the Document.

Second concern: It is our understanding that only the Federal government – not Ohio – has the authority to exempt Ohio from compliance with the terms of its federally-approved Document.

Third concern: The proposed rule change potentially could endanger Federal funding of Ohio's coastal management program. Through its approved coastal management program, Ohio receives $2.2 million funding per year from the National Oceanic and Atmospheric Administration (NOAA) to administer the Ohio coastal management program. In addition, Ohio has received approximately $501,000 in federal grant funding between FY2001 and FY2005 to preserve, protect, develop, restore, and enhance Ohio's valuable and oftentimes vulnerable coastal resources.

Recommendation: We strongly urge the restoration of this long-standing safeguard.

Additional concern: While maintaining our previously stated concern about the new lease-permitting system (described above in "Overall Perspective"), we strongly urge the Department to amend this existing rule or whatever existing rule is most appropriate, to apply the rule's (1501-6-03) provisions equally to the proposed new permitting system. Regardless of whether it may be proposed by lease or by permit, a proposed development, improvement, or other activity poses the same potential to contravene the general public's interest in Lake Erie submerged lands, waters of the state, fish and wildlife, or cultural or other public trust resources.

Recommendation: The rule (or whatever other rule is most appropriate) should respect this fact and apply its requirements equally to applications by lease as well as by permit.

1501-6-04 Public hearing/public meeting

Concern: While maintaining our previously stated concern about the new lease-permitting system (described above in "Overall Perspective"), the rule's provisions should apply equally to both leases and permits. Regardless of whether it may be proposed by lease or by permit, a project application may convey insufficient information upon which the Director may base a decision and/or may present significant unresolved issues.

Concern: Furthermore, the draft rules contain no provision for public notification of, and public comment on, the potential individual and cumulative impacts of a proposed project. As recognized in existing Ohio law (O.A.C. Sec. 1501-6-03), proposed lakeshore projects may affect the rights, interests, uses, and quality of not only the applicant, but also of:

- adjoining or nearby upland property owners;
- the public rights to navigation, water commerce, fishing, and recreation;
- environmental quality, including air and water quality; historic, cultural, and aesthetic resources; open space and recreational uses of the shoreline; floral and faunal communities, including the loss of biological resources and threats to endangered or threatened species;
- wetlands and other state resource waters;
- the littoral zone, including sand transport; and
- the project area and adjoining geographic region.

A lease or permit carries with it a long-term use of a portion of the Lake Erie Public Trust. It is only fair and just that the public be notified and afforded the opportunity to comment on such applications, especially those involving large projects.

Recommendation: The Department should amend this rule (or whatever other rule is most appropriate) such that the DNR Director should have the authority to request all applicants (both lease and permit) to supply additional information and to declare that a public hearing or a public meeting be held. In addition, the public should be notified of all lease and permit applications (perhaps by posting of permit applications on the Department's website) and have the right to review all applications, to submit comments, and to request the Director hold a public hearing or public meeting.

1501-6-05 Lease

First concern: While maintaining our previously stated concern about the new lease-permitting system (described above in "Overall Perspective"), we suggest that many of the existing rule's provisions should apply equally to both leases and to permits.

Second concern: While maintaining our previously stated concern about the new lease-permitting system (described above in "Overall Perspective"), the draft rule repeals the requirement for liability insurance. Does this mean that the State of Ohio is now assuming liability for a lessee that fails to obtain insurance for a project – including for commercial projects? Why should the State of Ohio and its taxpayers assume this liability, when it is the lessee—not the public—that primarily (if not exclusively) enjoys the benefit of the project?

Third concern: The draft rule references the term, "valid deeded parcel," yet there is no requirement that the applicant provide a copy of the referenced deed. No bank or title insurer would accept a deed at face value; why should the Department?

Recommendation: Per our previously stated concerns about the Governor's policy (described above in "Overall Perspective"), we have very serious concerns about this draft rule. We are deferring further comment and any recommendations, however, until we have more thoroughly analyzed the draft rule.

1501-6-06 Rental

First concern: The draft rule repeals the specific description that lease rental rates apply equally throughout the entire lake Erie shoreline, "including Sandusky bay, Maumee bay and the islands." Can this be interpreted to mean that leases in the specified areas are not subject to rental rates?

Second concern: The draft rule provides for automatic lease rental rate increases. Has the Department compiled a fiscal analysis to estimate the income that may be generated from lease rentals?

Third concern: It is our understanding that the Department generates approximately $800,000 per year in lease rental income, of which half of that revenue is directed to local jurisdictions (cities, port authorities, etc.) and the other half of which remains with the Department and is matched on a 1:1 basis by NOAA to help the Department defray the costs of its coastal management program. As such, the Department realizes approximately $800,000 per year in rental income. This income helps to defray the cost of administering

Ohio's coastal management program. We are very concerned that this income appears to be at risk of serious erosion, should a substantial number of qualifying lease holders opt instead for the proposed permit system. Has the Department compiled a fiscal analysis to estimate the income that may be lost under the proposed rule package?

Recommendation: The Administration's new policy on leases and permits appears to have put the Department in a very vulnerable fiscal situation. Ohio's coastal management program can ill afford to suffer any revenue loss. Any draft rule changes must be revenue neutral or, if not, additional revenue sources must be identified to make the program whole.

New proposed draft rules, OAC Sec. 1501-6-31 through OAC Sec. 1501-6-40

Overall, our previously stated concerns about the Governor's policy (described above in "Overall Perspective") continue to apply to these proposed new draft rules.
We are continuing to review these proposed new rules and will be submitting detailed comments. Here, though, are some preliminary comments:

1501-6-32 Applicability of permit requirements for Coastal Structures

Comment: The draft rule requires a coastal structure permit "for any coastal structure that will control or affect waves or flood waters eminating from Lake Erie along or near the Ohio shoreline of Lake Erie including related islands, bays and inlets." We strongly support this provision. Waves and ice forces can and do reach much further inland and higher than the OHWM. This has caused the destruction of inadequately designed structures, which has lead to impacts to upland owners who relied upon the structures to protect their house or other structures. It also has impacted the public resource, creating navigational and recreational hazards and damaging near shore habitat. As such, it is essential that DNR exercise the authority to control the placement of structures and projects located landward of the OHWM that may pose the potential to fail and to affect adjoining upland property owners, the public, and the public's resources.

Comment: We greatly appreciate the proposal to require most proposed coastal project applications to include detailed plans and specifications prepared by a registered professional engineer and/or surveyor as applicable, to prevent unnecessary storm damage and coastal erosion. This allows for appropriate management to prevent, correct, and arrest erosion along the Ohio shore of Lake Erie.

1501-6-34 Filing fee

Concern: The proposed fee structure does not fully compensate the services provided by the Department during the permitting process. Reevaluation of the fee amount is in the best interests of the Department, the public, and even applicants. As the lead agency charged with the responsibility to preserve, protect, develop, and restore our shared coastal resources, the Department needs adequate resources to oversee coastal management and resources for compliance inspection. Revaluation of the fee amount is also in the interest of applicants: Inadequate funding will hobble the Department's ability to promptly and thoroughly review applications and adequately oversee coastal management.

1501-6-35 Review of permit applications

Comment: We greatly appreciate the parallel incorporation of environmental review requirements from the existing lease rules to the proposed permit rules. Proposed shoreline structures and projects pose the potential for environmental impacts, including increased erosion, damage to adjacent upland property, habitat destruction, and long shore current disruption. This is true regardless of whether a shoreline structure is proposed for approval by a state lease or a state permit. As such, it is essential to maintain this protection which exists in current Ohio law.

1501-6-37 Permit compliance and prohibitions; and 1501-6-39 Penalties

Comment: We very much appreciate the permit compliance, prohibitions and penalties included in this draft rules. In particular, we applaud the total ban on the placement of unauthorized fill. This common-sense provision is in everyone's best interests.

Sadly, unsuitable materials have been and continue to be placed along the shoreline for shore protection. Also, suitable materials oftentimes have been placed but in a manner or design that is not effective for shore protection. Well-intentioned or not, the dumping of demolition debris, unstable materials, and improperly designed or constructed erosion control measures can pose a threat at the location of the work, or even far removed from the activity. This is due to the action of storms, waves and currents that move material along the shore. These actions individually and cumulatively result in serious adverse affects on the use and enjoyment of Lake Erie waters and its shorelands by other upland property owners and the public.

As was tragically evidenced in the death of an 8-year-old boy killed while playing along the Lake Erie shore by unstable concrete fill that broke lose from an overhead cliff in Vermilion, Ohio last winter, un-permitted projects can pose a threat to human life and limb, as well as to property, the living resources of the lake, and the right of people to enjoy the lakeshore. No one wants to pose a risk to others; requiring all projects to be permitted is a reasonable response that protects all lakeshore users' interests.

Concern: Though the draft rules outline permit compliance, prohibitions and penalties, they do not provide for compliance criteria enforcement. This is a serious deficiency. The NOAA Evaluation findings for the Ohio Coastal Management Program released in February 2005, state with respect to Shoreline Structure Permits and Submerged Lands Leases, "There is no active monitoring for violations and no active pursuit of enforcement of violations." The proposed rules take no steps to rectify this issue, nor to identify resources for inspections. Several constructed barriers exist along the Ohio Lake Erie shoreline that are neither permitted nor water dependent. It is unfair to law-abiding upland property owners and the public that these un-permitted structures continue to be allowed to exist.

Recommendation: The rules need to provide for compliance criteria enforcement.

Conclusion

The OEC supports a strong coastal management program that:

- first and foremost, protects and preserves the priceless natural assets of Ohio's Lake Erie coast,
- respects the shared rights and interests of upland property owners as well as the citizens of Ohio, and
- meets all federal requirements.

We appreciate this opportunity to submit these initial comments. We continue to review the draft rules and likely will be submitting additional comments in the near future. Meantime, we respectfully ask for your careful review and favorable consideration of these comments.

Thank you.

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