

## **OHIO COASTAL MANAGEMENT PROGRAM POLICY 16 – PUBLIC TRUST LANDS**

**IT IS THE POLICY OF THE STATE OF OHIO TO PROTECT THE PUBLIC TRUST HELD WATERS AND LANDS UNDERLYING THE WATERS OF LAKE ERIE, PROTECT PUBLIC USES OF LAKE ERIE AND MINIMIZE THE OCCUPATION OF PUBLIC TRUST LANDS FOR PRIVATE BENEFIT BY:**

- A. REGULATING OFFSHORE DEVELOPMENT AND IMPROVEMENT PROJECTS BY REQUIRING A LEASE FOR THE USE OF SUBMERGED LANDS (O.R.C. 1506.10 AND 1506.11 AND O.A.C. 1501-6-01 THROUGH 1501-6-06);**
- B. REGULATING RECOVERY OF SUBMERGED ABANDONED PROPERTY THROUGH PERMITS (O.R.C. 1506.32); AND**
- C. ESTABLISHING AND ENFORCING LAKE ERIE SUBMERGED LANDS PRESERVES (O.R.C. 1506.31).**

### Authorities and Administration

The waters of Lake Erie and lands underlying them belong to the state as proprietor in trust for the people of the state for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands (O.R.C. 1506.10). Ohio's "public trust doctrine" was originally established in 1803 when Section 14, Article III, of the "Northwest Ordinance" gave the new state authority to regulate activities occurring in navigable waters within state boundaries.

The U.S. Supreme Court ruled in Illinois Central Railroad Company v. Illinois 146 US 387 (1892) that the state may not abdicate its control of public trust properties and leave them under private control. Subsequent court decisions have looked with disfavor upon governmental actions that reallocated public uses to those of a select, private party. Several Ohio cases have clarified that the "public use" is to be construed broadly and extended beyond the traditional concepts of commerce, navigation and fishery. Specifically, State ex rel Brown v. Newport Concrete Co. (1975) 44 Ohio App. 2d 121 clarified that public use includes recreation, while State ex rel Squire v. Cleveland (1948) 150 OS 303 asserted that law regarding public use should provide a broad construction of "navigation" and be flexible enough to allow for future, as yet unanticipated, beneficial uses.

- A. A lease from the State of Ohio, acting through the Director of ODNR, is required before any improvements may be made on the waters and the land underlying the waters of Lake Erie (O.R.C. 1506.11, O.A.C. 1501-6-01 through 1501-6-06). Although the current shoreline serves as the general baseline for determining which areas require a lease for development, state law

also requires a lease of Lake Erie submerged land for filled land that was originally occupied by the lake's waters. Landowners with such improvements made prior to October 13, 1955 are automatically granted a lease if the developments do not constitute an unlawful encroachment on navigation and water commerce interests. Any additions or improvements upon the existing fill or structures may require a new lease.

ODNR, REALM reviews proposed projects in accordance with the following criteria, established in O.A.C. 1501-06-03, to determine the potential impacts upon Lake Erie and the public's use of Lake Erie:

1. Water Dependency – Generally, an application will not be approved for a nonwater-dependent development or activity.
2. Protection of Environmental Quality – The Director of ODNR may require an Environmental Impact Assessment to determine probable impacts of the activity upon the natural and human environment.
3. Public Recreation – Potential impacts upon the public right of recreation, including present or prospective recreational uses, will be evaluated. Provision for public access may be required as a lease or permit condition depending upon historic use patterns and suitability of the lease site for existing or prospective recreational uses.
4. Relationship to port development, commercial navigation and waterfront development plans – Consideration will be given to compatibility with such plans, sensitivity to preservation and restoration of other coastal features, and importance to the local and regional economy, interstate commerce and other national, state or regional interests.

In addition, as provided in O.A.C. 1501-6-03, consideration will be given to the following:

1. Whether the proposed project will prejudice the littoral rights of any owner of land fronting on Lake Erie.
2. Whether the proposed project conforms to the permitted uses as regulated by the local government, where applicable.
3. Whether any of the public uses (navigation, water commerce and fishery) of the original area would be destroyed or greatly impaired.
4. Whether the diminution of the area of original use would be small compared to the use of the entire area.
5. Whether the area has a history of use including, but not limited to, services rendered to the general public.

In reviewing an application in terms of a project's potential impairment of public rights, ODNR solicits comments and uses, to the maximum extent practicable, the findings of the COE Section 10/404 permit process, and the Section 401 Water Quality Certification by Ohio EPA. This policy allows other state agencies to comment on potential environmental impacts before ODNR issues a submerged lands lease. (Erosion control measures also require a permit pursuant to O.R.C. 1521.22 [see Policy 2]. If proposed in conjunction with erection, construction or redevelopment of a permanent structure within the Lake Erie coastal erosion area, O.R.C. 1506.07 will apply as well.)

All lease agreements contain a reservation to the State of Ohio of all mineral rights and a provision that the removal of any mineral shall be conducted in a manner that does not damage any improvements placed by the littoral owner, lessee or permit holder on the lands. Also, no lease or permit expresses or implies any control of fisheries or wildlife.

Rental payments received from leases entered into on or after March 15, 1989, accrue to the Lake Erie Submerged Lands Fund (O.R.C. 1506.11). From the fund, 50 percent of each rental is paid to ODNR for administration of submerged lands and for the Coastal Management Assistance Grant Program. The other 50 percent of the rental is paid to the municipal corporation, county or port authority with jurisdiction over the area for which the lease was executed. For leases existing prior to March 15, 1989, the total lease rentals are paid directly to the local government until the renewal clauses becomes effective.

Rules for leasing of Lake Erie submerged lands are included in Appendix L.

- B. The State of Ohio holds ownership and title to submerged abandoned property in Lake Erie and ODNR administers a permit system for recovery of such property (O.R.C. 1506.33 and 1506.32). See Policy 26 for additional details.
- C. In order to provide special protection for significant abandoned property and features in Lake Erie, the Director of ODNR with approval of the Director of OHS may adopt rules to establish Lake Erie submerged lands preserves (O.R.C. 1506.31). See Policy 26 for additional details.