

A Problem that Doesn't Exist

September 13, 2017

At the recent public hearing in Sturgeon Bay, abundant facts and evidence were shared to assist DNR staff in determining an Ordinary High Water Mark (OHWM) on the westside waterfront. It is our hope that the result will honor public rights to public land. Such an outcome is what the Friends of Sturgeon Bay Public Waterfront have been working for: respect for the process and the Public Trust Doctrine.

The Public Trust Doctrine protects our water and our shorelines. Filled lakebeds are common in urban areas where past maritime uses are being converted to new uses – and public rights to trust land need to be defended. There is an established legal process that municipalities or other property owners can and should follow to determine private versus public land. The City of Sturgeon Bay could have saved time and taxpayer money by doing so here. The Friends of the Sturgeon Bay Public Waterfront held the City accountable to the process, and we hope that it will result in an Ordinary High Water Mark determination that respects the Public Trust Doctrine.

Properly administered, the Public Trust Doctrine *is* fair. It helps communities achieve lasting and significant economic development returns. When filled lakebed parcels (for example, docks that were built when shipping and rail were crucial forms of transport, or for commercial fishing) convert from past maritime uses, then protecting these “made lands” as the public asset they are broadens the economic opportunity in all surrounding lands. The Public Trust Doctrine is a smart economic development tool that benefits everyone, not just a few.

We also hope that the state legislature embraces its charge to uphold the Public Trust Doctrine. Rep. Kitchens said recently, “Other communities should not have to go through this in the future.” This may be his justification for legislation to affect the Ordinary High Water Mark along the west waterfront or state-wide. Remember, though, that the City of Sturgeon Bay set out to circumvent the constitutionally-mandated Public Trust Doctrine, asking for political favors, ignoring its obligation as a public servant and creating many of its own preventable problems. Legislation is a solution in search of a problem that doesn't exist. There is an established legal process for DNR to determine the Ordinary High Water Mark. That is what DNR is doing.

Rep. Kitchens also said that, “The issue is complicated. The basic problem is that there is no definition of OHWM on these filled lands.” He also recently quoted someone from the DNR, perhaps not a scientist, saying that “this is an impossible task.” These assertions are not true. In the face of the wealth of historical evidence from pre-settlement onward, including detailed maps, taking the position that ‘we just don't know’ or ‘we just can't go back in time and determine the facts’ is disingenuous.

Determining an OHWM is not complicated or difficult. Finding a *perfect* OHWM on altered property may be complicated and difficult, but finding a *reasonably approximate* OHWM is

quite straightforward. Determining the OHWM *approximately* (within tens of feet) on filled lakebed can be done using readily available online resources.

Michael Cain, who served as the DNR's primary attorney in the area of water regulation until his retirement in 2008 (and thereafter was periodically called on by the state to review documents in order to assure continuity in the administration of these laws), provided written testimony, read out loud at the recent hearing. He explained that the DNR performed OHWM determinations in filled lakebed situations in approximately three to ten cases each year, when such boundaries were in dispute. Mr. Cain spelled out the practice and procedure for doing such determinations – again, three to ten of them each year. He explained that the DNR “sought to identify the natural and historic shoreline of the affected lake or stream at the time of statehood. This process was conducted through a review of cartographic, documentary and physical evidence of the natural and historic shoreline.” He spells out numerous historical resources, “routinely sought and collected” by agency staff in this process. Mr. Cain also says soil borings, where available or required to be obtained, would be analyzed by specialists “in order to determine the boundary of the natural and historic shoreline and to determine whether filled areas located waterward from that boundary resulted from accretion or as a result of legal or illegal filling.” Soil borings throughout the west waterfront showing artificial fill have been available within DNR and from the City; these were summarized by another expert at the hearing. Far from being ‘impossible,’ this was a regular task performed through an established procedure on multiple sites each year by DNR.

My advice for Rep. Kitchens is two-fold. First, recommend that the DNR review and, as needed, improve documentation of straightforward, science-based guidance in order to increase the consistency, efficiency, and fact-based OHWM determination process. There is good reason to let the system work as it has for over 100 years. We need knowledgeable natural resource professionals – *not legislators* – to create science-based guidance, and use that guidance to determine OHWM by applying local facts to the local, site-specific shoreline. The system does not need fixing. It just needs clarification, good communication and continuity.

Second, as Rep. Kitchens now serves on the board of the Wisconsin Coastal Management Program, before the WCMP gives grants for coastal management work, have them ensure that every municipal grant recipient understands the Public Trust Doctrine and obtains an OHWM determination through a standard, transparent process with the DNR. I wish WCMP had followed a procedure like this for the grants it issued to Sturgeon Bay, circa 2011-2013.

The Public Trust Doctrine benefits everyone in Wisconsin. When our state was founded, the United States government required only two things: that any new states created in the Northwest Territory must have the same rights as other states, and that navigable waterways be forever free to the public – i.e., the Public Trust Doctrine. Upholding that public right is our shared bond.

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