

OHIO DEPARTMENT OF NATURAL RESOURCES
1501-6-01 TO 1501-6-06

RULES FOR LEASING OF LAKE ERIE SUBMERGED LANDS

1501-6-01	Definition of terms.
1501-6-02	Application.
1501-6-03	Director's recommendations.
1501-6-04	Public hearing/public meeting.
1501-6-05	Lease.
1501-6-06	Rental.

1501-6-01 Definition of terms.

(A) "Applicant" means any person who applies to the department to develop or improve any part of the territory as defined in division (A) of section 1506.11 of the Revised Code.

(B) "Application" means the signed and completed form(s) and any supplemental information which may be required by the director in accordance with these rules and submitted to the director as provided in divisions (B) and (G) of section 1506.11 of the Revised Code.

(C) "Department" means the department of natural resources.

(D) "Development" or "improvement" means, but shall not be limited to, wharfs, breakwaters, piers, docks, bulkheads, marinas, groins, jetties, revetments, fill for the purpose of creating new lands or any structure of any kind which encroaches upon the territory.

(E) "Director" means the director of the department of natural resources.

(F) "Erosion control structure" means a structure solely and specifically designed to reduce or control lake Erie-related erosion of the shore. Examples include, but are not limited to, revetments, seawalls, bulkheads, and certain breakwaters and similar structures.

(G) "Fill" means any material used for the primary purpose of replacing lake Erie aquatic areas with dry land or changing the bottom elevation of lake Erie.

(H) "Governmental income producing facility" means any facility built in the territory managed by a governmental agency or by a contracted private management company which by the nature of the facility produces income above and beyond normal charges associated to cover operating costs. Said governmental agency shall include, but not be limited to, a county, township, village, municipality, port authority, park district or conservancy district.

(I) "Governmental non-income producing facility" means any facility built in the territory including, but not limited to, municipal water intake pipes, sewer outfall pipes, storm sewer outfall pipes, submerged cables or any other facility which is managed, owned, operated, occupied or utilized by a governmental agency for a governmental use or purpose at no charge or a nominal charge to cover operating cost. Said governmental agency shall include, but not be limited to, a county, township, village, municipality, port authority, park district, sewer district or conservancy district.

(J) "Large facility" means any semi-private or commercial facility built in the territory which exceeds four acres in total area and shall include, but not be limited to, an industrial facility such as a loading and off loading facility, an industrial water intake and an industrial water outfall, or fill to expand an upland or support facility for such use.

(K) "Lease" means a document prepared by the department containing terms and conditions for development or improvement of the territory of the state in lake Erie for a specified time, approved by the governor, and executed by the director in the manner prescribed by sections 1501.01, 1506.11 and 5301.13 of the Revised Code.

(L) "Littoral rights" means the right of an upland property owner to make reasonable use of the waters fronting the upland property and the right to wharf out to navigable waters within the projected boundaries of the upland property, said rights being subject to the rights of the state of Ohio and the United States.

(M) "Littoral zone" means the indefinite zone between the shoreline extending lakeward to the furthestmost line where waves begin to break.

(N) "Ohio coastal management program" means the comprehensive action of the state and its political subdivisions to preserve, protect, develop, restore or enhance the resources of the coastal area in accordance with established objectives, policies, standards and criteria concerning protection of the natural resources in the coastal area; management of coastal development and redevelopment; preservation and restoration of historic, cultural and aesthetic coastal features; public access to the coastal area for recreational purposes; and as otherwise described in divisions (B) and (C) of section 1506.01 of the Revised Code and the Ohio coastal management program document.

(O) "Nonpoint source management program" means the management program for controlling pollution added from nonpoint sources to the waters of the state and improving the quality of such waters submitted by the governor to the U.S. environmental protection agency and approved November 21, 1989, in accordance with section 319 of the federal water quality act of 1987 and any federally approved amendments to the program adopted in accordance with section 6217 of the coastal zone act reauthorization amendments of 1990.

(P) "Private floating dock or structure" means a dock or structure placed in the territory of lake Erie for the sole use of the upland owner for upland owner's personal benefit. Said structure or dock shall not be used for any monetary gain such as, but not limited to, dock space for rent, lease or sale.

(Q) "Public hearing" means a formal hearing conducted by the director, or designee, in which evidence may be presented and testimony given. These proceedings are recorded and an official transcript is made a part of the administrative record maintained by the department for the subject submerged lands lease application as provided for in division (C) of section 1506.11 of the Revised Code.

(R) "Public meeting" means an assembly conducted by the department, the purpose of which is to provide an opportunity for a lease applicant to explain the developments, improvements and/or activities upon lake Erie submerged lands to concerned agencies and the general public and afford an opportunity for interested parties to express any relevant issues or concerns as provided for in division (C) of section 1506.11 of the Revised Code.

(S) "Semi-private facility" means any facility built in the territory in conjunction with, but not limited to, condominiums, trailer parks, cooperatives, residential associations, campgrounds, or apartments.

(T) "Small commercial facility" means any facility built in the territory in connection with the providing of commercial services and does not occupy more than four acres of total area. A small commercial facility shall include, but not be limited to, a commercial marina, private club, yacht club, sailing club, transit ferry boat facility, or breakwalls constructed to protect inland marina channels and/or boat basin for access to lake Erie.

(U) "State resource waters" means surface waters of the state that lie within national, state and metropolitan park systems, wetlands, wildlife refuges, waters of exceptional recreational or ecological significance, and as otherwise described in state water quality standards, rule 3745-1-05 of the Administrative Code.

(V) "Structure" means any facility which requires fill being placed upon the submerged land of lake Erie, including, but not limited to, a rubble mound dock, rubble mound walk, rock filled timber crib dock, rock filled timber crib wall, pilings, steel sheet pile wall, revetment, unattached breakwall, precast concrete modular structure and riprap shore protection.

(W) "Territory" as used in these rules shall be as it is described in section 1506.10 and as it is defined in division (A) of section 1506.11 of the Revised Code. Where the territory has been artificially filled, the director shall determine the natural shoreline as accurately as possible, using the best practicable measures including, but not limited to, an analysis of the earliest known charts, maps or photographs.

(X) "Utility" shall mean any utility company regulated by; within the jurisdiction of; registered with, or licensed to do business in the state of Ohio by the public utilities commission of Ohio, that is engaged in an activity in the territory including, but not limited to, the placement of submerged cables, water intake pipes, water outfall pipes, sewer outfall pipes, storm sewer outfall pipes, and the related structures necessary for protection. This definition shall not include any existing fill or any proposed new fill used or proposed to be used for existing buildings, expansion of existing buildings, or any facilities related to the operation of the utility, including, but not limited to, electric power plants, coal storage facilities, coal loading and off loading facilities, or disposal sites for fly ash, bottom ash, dredged materials or other products.

HISTORY: Eff 4-30-92; 7-4-99

Rule promulgated under: RC Chapter 119.

Rule authorized by: RC 1506.02

Rule amplifies: RC 1506.10, 1506.11

R.C. 119.032 review dates: 6/30/99, 12/30/03

1501-6-02 Application.

An application shall be deemed unacceptable by the director if it is found to have incomplete or insufficient information for proper evaluation of the development, improvement or activity upon lake Erie submerged lands. The applicant shall be notified by the director if the application is unacceptable within sixty days of its receipt by the director. Upon receipt of said notification, the applicant may resubmit a new application for evaluation. The director must, within a reasonable period of time, process the application.

When the director finds that the effort to supplement the information on the application will be unavailing and that the application is not in accordance with the requirements of section 1506.10 and 1506.11 of the Revised Code and applicable rules, or that the applicant failed to respond to request for information within sixty days of notice, the director shall issue an order denying the application for a submerged lands lease, and shall notify the applicant of the opportunity for a hearing pursuant to section 119.06 to 119.13 of the Revised Code.

HISTORY: Eff 4-30-92

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Rule amplifies: RC 1506.10, 1506.11

119.032 Review Date: 6-30-99, 12-30-03

1501-6-03 Director's recommendations.

(A) The director's recommendation to the governor as to whether to approve an application for a lease of submerged land shall be based upon an evaluation of whether the development, improvement or activity is consistent with the policies of the Ohio coastal management program document, in accordance with section 1506.03 of the Revised Code and does not otherwise 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. Notwithstanding the policies of the Ohio coastal management program document, the director, in said evaluation, shall give due consideration to any artificially filled area or filled portion of any area of the territory or any development, improvement or activity thereon existing on March 15, 1989, as set forth in this rule.

(B) Consistent with the protection of coastal area resources, the department will coordinate policies and decision-making with the rules and policies of other state and federal resource and regulatory agencies. In considering an application for a submerged lands lease, the department may solicit comments and relevant information from adjacent property owners, port authorities, local jurisdictions and planning agencies, the Ohio environmental protection agency, the Ohio historic preservation office, the general public and other agencies or individuals as deemed appropriate by the director.

(C) The department in determining whether the development, improvement or activity as set forth in an application for a lease will be compatible with the rights of the public and the public trust uses of the affected area will consider the following:

(1) Whether the project prejudices the littoral rights of any owner of land fronting on lake Erie without permission of that owner.

(2) Whether the project conforms to the permitted uses as regulated by the local government, where applicable.

(3) Whether public uses such as, navigation, water commerce, and fishing in the affected 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.

(D) In addition to any other laws or rules administered by any other state, local or federal agency, these are the criteria, if applicable, against which each application for a lease of submerged lands will be evaluated:

(1) WATER DEPENDENCY

Generally, an application for a lease to place fill and/or to construct facilities in the territory for a non-water dependent development or activity (i.e. an improvement which by its nature does not depend on being located in or upon the water) will not be approved. An exception to this water dependency criterion would be an improvement in the territory which is beneficial and important to the general public's health, safety or welfare as determined by the director. Under this exception, there shall be no practicable alternative to the improvement including an alternative upland site, and all reasonable measures shall be undertaken by the applicant to minimize any adverse impacts upon the waters and underlying lands of lake Erie and the beneficial functions these resources perform.

This criterion shall not apply to a lease application for development of the territory where the territory has been artificially filled prior to March 15, 1989.

(2) PROTECTION OF ENVIRONMENTAL QUALITY

The director may require an environmental impact assessment or other information in order to determine the probable direct, secondary and cumulative impacts of the development, improvement or activity upon the natural and human environment. With regard to any artificially filled area or filled portion of any area of the territory existing on March 15, 1989, the requirement for an environmental impact assessment shall be limited to any new development, improvement or activity or any change in an existing development, improvement or activity on said area of the territory.

The environment impact assessment shall include, but not be limited to, the following issues:

(a) Potential impact upon air and water quality;

(b) The likelihood that the development, improvement or activity may affect historic, cultural and aesthetic resources;

(c) Open space or recreational uses of the shoreline where increased access to the shorefront is a particularly important concern;

(d) Floral and faunal communities where loss of biological resources or threats to endangered or threatened species are of particularly important concern.

(e) Potential impact upon wetlands, or other state resource waters.

(f) Potential impact upon the littoral zone including sand transport.

(g) The potential individual and cumulative impacts of the lease activity in conjunction with other similar activities in the project area or geographic region will be considered.

To the maximum extent practicable the department's review of a lease application will utilize information and findings which may be developed in the public review process conducted by the U.S. department of the army, corps of engineers for authorization of activities in navigable waters, the section 401 water quality certification by the director of the Ohio environmental protection agency, and the consistency reviews of the state under the Ohio coastal management and nonpoint source management programs.

(3) PUBLIC RECREATION.

The potential impact of any development, improvement or activity upon the public right of recreation, including present or prospective recreational uses by the public during the term of the lease, will be evaluated. Provision for public access may be required as a condition of a lease or permit depending upon historic use patterns and suitability of the lease site for existing or prospective recreational uses.

(4) RELATIONSHIP TO PLANS FOR PORT DEVELOPMENTS, COMMERCIAL NAVIGATION AND URBAN WATERFRONT DEVELOPMENT.

The department in determining the compatibility of the development, improvement or activity with existing waterfront master plans, local land use plans and regulations and any other relevant plans or programs adopted by local or regional authorities, will consider the following:

(a) Whether the development, improvement or activity assists in the redevelopment of deteriorating urban waterfronts and ports, and is sensitive to the preservation and restoration of historic, cultural and aesthetic coastal features.

(b) Whether the development, improvement or activity allows for public access to the waterfront for recreational purposes consistent with orderly coastal-dependent uses. The potential for a development, improvement or activity in the territory to directly or indirectly, preempt future public access to the coast or waters of lake Erie will be examined.

(c) To the maximum extent practicable, priority consideration will be given to new commercial and port-related developments, improvements or activities in or adjacent to areas where such development, improvement or activity already exists.

(d) The importance of the development, improvement or activity to the local and regional economy. Interstate commerce and any other identified national, state or great lakes region interest which would be affected by the development, improvement or activity will be considered. To this end, documentation of relevant intergovernmental consultation may be supplied by the applicant.

(e) The history of pre-existing uses including, but not limited to, services to the general public. To the maximum extent practicable, consideration shall be given to such uses on any artificially filled area or filled portion of any area of the territory existing on March 15, 1989.

HISTORY: Eff 4-30-92

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Rule amplifies: RC 1506.10, 1506.11

119.032 Review Date: 6-30-99, 12-30-03

1501-6-04 Public hearing/public meeting.

At any time during the lease application review period or upon completion of the department's evaluation, if the director finds that there is insufficient information upon which to base a decision, or if there are significant unresolved issues, the director may request the applicant to supply additional information and may declare that a public hearing or a public meeting be held to obtain the necessary information.

(A) If a public hearing is scheduled, said hearing shall be held at a time and place designated by the director. The hearing shall be of a formal nature. A court reporter shall be present and all parties shall have an opportunity to present evidence and/or provide testimony. Notice of said hearing shall be advertised in accordance with division (C) of section 1506.11 of the Revised Code. All costs pertaining to the hearing, including but not limited to the court reporter and advertisement, shall be paid by the applicant.

(B) If the director determines that a public meeting would serve to provide sufficient information to supplement the administrative record and support a decision whether or not a lease may properly be entered into, the director shall order a public meeting to be held in the geographic locality of the applicant's lease request. Notice of said public meeting shall be advertised in a manner to be determined by the director. All costs of the meeting shall be paid by the applicant.

(C) The public hearing or public meeting shall be limited to the gathering of information which directly pertains to the application in question and to the evaluation of the development, improvement or activity in accordance with section 1506.11 of the Revised Code and rules contained herein.

HISTORY: Eff 4-30-92

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Rule authorized by: RC 1506.02

Rule amplifies: RC 1506.10, 1506.11

119.032 Review Date: 6-30-99, 12-30-03

1501-6-05 Lease.

A lease for lake Erie submerged land shall be prepared by the department of natural resources and shall contain, but not be limited to, language which reflects the following:

(A) A metes and bounds description of the submerged land to be occupied or an alternate description referenced to the applicant's upland property description that is considered adequate by the director as provided by the applicant.

(B) The director shall set the period of time (term) of the lease. The term of the lease shall be fifty years unless the director recommends a longer or shorter term. Should the director recommend a lease term less than or greater than fifty years, the director shall state in writing the specific findings, rationale and justification for the differential in setting the term. Applicant shall have the right of appeal in accordance with sections 119.06 to 119.13 of the Revised Code.

(C) A complete description of the development, improvement or activity upon the submerged lands. Said clause shall contain the following "any change in use approved by the director, Ohio department of natural resources, may also result in a re-evaluation of the rent. Said lease shall be amended to reflect the proper rent as assigned by the director, based upon the new use," or words of similar import.

(D) There shall be no assignment, sublease or mortgage of the leasehold without the expressed written consent of the director, which consent shall not be unreasonably withheld or unreasonably conditioned.

(1) A written request to assign, sublet, or mortgage shall be delivered by the lessee to the director not less than ninety days prior to the proposed effective date thereof, and the director shall respond within thirty days of the director's receipt of such request. Any assignment shall be held in escrow by the closing officer of the title company, bank, or attorney until the sale of the uplands has been completed. Should the sale not be consummated then the assignment shall automatically be null and void. If the director fails to act in any manner within ninety days of the receipt of the written request, then the request shall be deemed approved by the director.

(2) Rent and other lease terms shall be subject to revision at time of assignment.

(3) Applicants for the director's consent to sublease, assign or mortgage shall be entitled to an administrative review of and appeal from any decision of the director pursuant to section 119.06 of the Revised Code.

(E) Each lease area shall be subject to the public's right to navigation in and around any structures covered in the lease. However, the public's right of navigation is limited to the extent that it does not interfere with lessee's safe use of lessee's structure.

(F) No lessee shall refuse, during storms or other adverse conditions, safe harbor refuge to any vessel seeking such refuge, provided that the harbor can safely accommodate such vessel.

(G) Each lease shall require adequate liability insurance or self insurance documentation for lessee, municipal corporations or political subdivisions of the state for lessee's development, improvement or activity in the territory and lessee's occupation of the territory. Minimum limits of liability insurance shall be established by the department and shall contain a clause naming the state of Ohio as additional insured.

(H) Each lease shall be subject to any and all local, state or federal laws or regulations. The issuance of the lease does not release the lessee from obtaining any and all other permits or documents from any local, state or federal agency as required for the use of the territory. Failure to obtain any required permits or documents shall be a violation of the lease and subject to cancellation under the default provisions therein.

HISTORY: Eff 4-30-92; 7-4-99

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Rule authorized by: RC 1506.02

Rule amplifies: RC 1506.10, 1506.11

R.C. 119.032 review dates: 6/30/99, 12/30/03

1501-6-06 Rental.

The rent rates herein determined shall be applied equally throughout the entire lake Erie shoreline, including Sandusky bay, Maumee bay and the islands. Rates will be determined by the director using the description of the development, improvement or activity provided by the applicant according to the following schedule:

(A) Existing fill – any artificially filled area or filled portion of any area of the territory existing on March 15, 1989, shall be charged \$0.01 per square foot per year for the term of the lease or renewals. This rental rate shall apply only to the use of the filled area as it existed on March 15, 1989. If the lessee or its assigns change the use of the filled area, the rent may be modified to reflect the rent rate in effect for the new use at the time of the change of use.

The rental rate for any artificially filled area of the territory existing on March 15, 1989, which qualifies as a governmental non-income producing facility as determined by the director, shall be \$1.00 per year.

(B) Private floating dock – \$50 per year.

(C) Private structure – \$50 plus \$0.02 per square foot of leased area per year.

(D) Private erosion control structure – \$50 plus \$0.01 per square foot of leased area for the first year, and \$0.01 per square foot of leased area per year thereafter.

This rental rate shall be applied to all qualifying leases, or qualifying portion of the leased area for leases executed on or after the effective date of this rule. For existing leases executed after the April 30, 1992 effective date of the original rules, this lease rate will apply upon the rent renewal date for the lease, unless the lease is modified prior to such date. This rate shall not apply to leases executed prior to April 30, 1992 unless the lease is modified on or after the effective date of this rule.

(E) Semi-private and small commercial facility occupying no more than four acres – \$0.03 per square foot of leased area per year.

(F) Large facility and an industrial facility – \$0.04 per square foot of the leased area per year.

(G) Utility – \$500 per year.

(H) Governmental income producing facility shall pay the rent for the category of the facility.

(I) Governmental non-income producing facility shall pay \$1.00 per year. Where practicable, a lease for all such governmental uses or purposes shall be covered in one instrument for each political subdivision.

(J) "Escalator clause" – the rental rates as provided for in paragraphs (B) to (H) of this rule, shall be recalculated every five years beginning on the fifth anniversary of the effective date of this rule and any increase shall be at the same rate of increase as the "National Consumers Price Index" (C.P.I.). The annual base rate for calculation purposes shall be the rate established by the U.S. department of labor for the city of Cleveland, Ohio, urban, all categories (C.P.I.U.) for February, 1992. That annual base rate is 136.2. The new rate shall be most recent C.P.I.U. annual rate established to the nearest month prior to the date of recalculation by the U.S department of labor. Once the new annual rate has been determined and the amount of increase has been calculated, then the new annual rate shall become the base annual rate for calculation purposes for the next five year period of time. This change in rates shall continue until such time as the C.P.I.U. is no longer used or the director determines that another method may be more accurate. The rental rate percentage increase shall be the lesser of the following:

(1) The base annual rate shall be subtracted from the new annual rate, the base rate shall be divided into the difference between the base rate and the new rate and the answer will be the percentage of increase or decrease over that five year period of time:

example:

new rate (nr)	140.2
- base rate (br)	136.2
<hr style="width: 100%;"/>	
difference (df)	4.0
df 4.0	
br 136.2	= .0293 or 2.93% increase

current rent: \$10,000.00×.0293 increase=\$293.00
new rent: \$10,293.00

(2) At no time shall the increases of the rental rate exceed 20 percent in any given five year period of time, nor shall the aggregate increase of the rental rate exceed 150 percent over the term of the lease. Also at no time shall the rental rate charged in any lease written by the state of Ohio pursuant to sections 1506.10 and 1506.11 of the Revised Code or by these rules be lowered.

Should the United States department of labor discontinue the use of C.P.I. the director shall select as nearly compatible a statistical formula on the purchasing power of the consumer dollar as is then available and published in some responsible governmental publication.

This escalator method shall not affect the rent charged under paragraph (A) of this rule existing fill or paragraph (H) of this rule governmental non-income producing facility.

HISTORY: Eff 4-30-92; 7-4-99

Rule promulgated under: RC Chapter 119.

Rule authorized by: RC 1506.02

Rule amplifies: RC 1506.10, 1506.11

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