



Comments on Redraft Ohio Administrative Code Rule Changes for the
Permitting of Coastal Structures along the Ohio Shore of Lake Erie
and Coastal Leases and Permitting

Ohio Administrative Rule Sections 1501-6-01 through 1501-6-09 and Sections 1501-6-31
through 1501-6-39

Presented to the Ohio Department of Natural Resources, Office of Coastal Management
Public Meeting in Painesville Township, Ohio
Thursday, September 11, 2008

Overall Perspective

On behalf of our more than 100 environmental and conservation group members and thousands of individual citizen members throughout the state of Ohio, the Ohio Environmental Council (OEC) submits these comments to the Ohio Department of Natural Resources, Office of Coastal Management for its consideration regarding draft rule changes to the Ohio Administrative Code for the permitting of coastal structures and the occupation of submerged lands along the Ohio coast of Lake Erie.

The Office of Coastal Management is charged with the mighty responsibility of ensuring a balance between the use of resources along Ohio's 312-mile coast and sustaining what makes the coast so compelling and at the same time so vulnerable: its incomparable scenic beauty, its destructive wave and wind action, and its fragile ecosystem. This is a tough, but important job, and the Ohio Environmental Council commends the Office of Coastal Management for this review and updating of Ohio's administrative rules governing the development of the Lake Erie coast, including the construction of projects and the placement of structures in the Lake Erie territory. We also want to publicly thank the Office for traveling to Ottawa, Lake, and Cuyahoga counties this month to solicit public comment on the draft rules.

Overall, the OEC believes 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 the 11 million citizen owners of the Lake Erie Public Trust. For this, the Office of Coastal Management is to be commended. There are a relative few rules that we believe should be strengthened or further clarified. Our overall support of the rule package – along with our remaining concerns and recommendations respectfully submitted for consideration – are summarized and detailed below.

General Comments

The OEC believes the Ohio DNR Office of Coastal Management has done a fair and responsible job of:

1. Uniformly applying the requirement for an environmental review for projects, regardless of whether the project is proposed by lease or by permit. Proposed shoreline structures and projects can 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.

This is critically important to protecting the rights of upland property owners and the public, alike, as well as the natural, historic, cultural, and aesthetic features of Lake Erie. An identical project proposed by lease or by permit will pose the same potential impacts. Accordingly, the Department is correct to make no distinction between the two when it comes to terms and conditions of the lease or permit. The proposed rules do a good job of applying review and enforcement criteria fairly and uniformly.

2. Remaining appropriately neutral as to the boundary of the Lake Erie territory. The legal boundary of the landward most reach of the Lake Erie territory is in dispute, as we all know. While it is true that the the Lake County Court of Common Pleas declared a new boundary line for the public trust territory in Ohio of Lake Erie in the class-action lawsuit *Merrill v. State of Ohio*, it also is true that:

- The newly declared boundary is an ambiguous boundary or, to quote from the court decision, “a moveable boundary.”
- The trial court also specifically did not attempt to list or comprehensively define all of the littoral rights of upland land owners, deferring, instead, for those rights to be “determined on a case-by-case basis.”
- Both the plaintiffs and the defendants have appealed various parts of the decision.

(See the excerpts from the trial court decision, below.)

We believe the Department has acted appropriately in not attempting to apply the new boundary as proposed by the trial court. Instead, the Department appears to have chosen an appropriate and reasonable approach: remain neutral and simply continue the existing and long-standing definition of the Lake Erie territory, as defined in existing Ohio Administrative Code Section 1501-6-01 (W) and as described and defined in Ohio Revised Code Sections 1506.10 and 1506.11 (A). To suddenly apply this recent trial court decision without awaiting the results of pending appeals would at best be premature and at worst be irresponsible.

3. Requiring permit and/or lease applicants to submit certain information, including detailed plans and specifications, that are prepared by a registered surveyor and/or registered professional engineer. We believe this is altogether appropriate and will serve the best interests of upland property owners and the public, alike, as well as Lake Erie. In order to confirm the sound engineering of a proposed project and to gauge the potential impact of a proposed project on adjoining upland owners, the public, and the natural, historic, cultural, and

aesthetic features of Lake Erie, it is essential that the Department have access to professionally prepared plans and documents. Requiring the certification of such information by a registered surveyor and/or registered professional engineer also protects the interests of the applicant against a project planner who may base a project on ambiguous or poorly defined plans and specifications. Without this sort of detailed information submitted by professionals, the Department will be hard pressed to make accurate and timely decisions on project applications. This serves no one's interests.

The Department is to be commended for its level-headed approach to the rule package. The Department should maintain each of these three important foundations of the proposed rule package and should resist any pressure to weaken or abandon them.

Excerpt from *Merrill v. State of Ohio* decision of the Lake County Court of Common Pleas, December, 11, 2007:

[¶243] Defendants-Respondents and Intervening Defendants have failed, as a matter of law, to show that the landward boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary High Water Mark of 573.4 IGLD (1985), and Plaintiffs-Relators and Intervening Plaintiffs have failed to show that the lakeward boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary Low Water Mark. The court declares that the law of Ohio is that the proper definition of the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis.

[¶244] The court's decision does not attempt to list or comprehensively define all of the littoral rights of landowners of Ohio property adjoining Lake Erie, preferring instead to have those rights determined on a case-by-case basis. Similarly, the court's decision does not attempt to cover swamp lands covered by the federal Swamp Land Act of 1850.

Background on OEC perspective

For the record, the OEC fundamentally disagrees with Governor Strickland's retreat from a strong assertion of the Lake Erie Public Trust, 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 *Merrill* court case. Also for the record, the OEC is an intervening defendant in the *Merrill* court case. The OEC firmly supports the public's interest in the territory of Lake Erie which includes the Ohio waters of Lake Erie together with the soil beneath and their contents (including 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 ask the Strickland Administration 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 would be legally invalid.

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 to the waters and submerged lands of Ohio’s Lake Erie territory.

NOTE: While the OEC supports the overall rule package, our support should not be construed to imply any backtracking on our fundamental objection to the Strickland Administration’s softening of the public trust doctrine, as summarized above. We continue to maintain our fundamental concern and objection to that.

Specific Comments

The following are the Ohio Environmental Council's (OEC) specific comments on the draft proposed rule changes marked as "Draft OAC as of 06/06/08" as posted on the Ohio DNR Division of Coastal Management's website.¹ Please know that we continue to review the redraft and may submit additional comments in the near future.

Proposed revisions to existing rules OAC Section 1501-6-01 through OAC Section 1501-6-09 (pp. 1 – 30)

1501-6-01 Definitions (pp. 2 – 6)

The OEC supports the rule.

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

We do, however, have one specific objection and related recommendation:

Aesthetic features

Recommendation: Here (and throughout the rule package), the rule (division "U") deletes the word "aesthetic." Why? We believe this is improper, unjustified, and inconsistent with Ohio law. The underlying statute (Ohio Revised Code Section 1506.01) specifically references, "preservation and restoration of historic, cultural, and aesthetic coastal feature[s]". (Emphasis added.) Further, "aesthetic" has a different meaning than "historic" or "cultural." Some aesthetic features also share historic and/or cultural features; however, not all aesthetic features share one or both of these other features. Aesthetic is included in the underlying statute for a reason: to protect aesthetic features. There is no justification for deleting aesthetic from the rules. The rules should reinstate the word "aesthetic."

1501-6-02 Submerged Lands Application (pp. 7 - 13)

The OEC supports the rule.

In particular, we appreciate the proposed provisions that:

- Require the submission of a complete application
- Require the submission of a non-refundable fee with the application
- A copy of the most current conveyance record of all parcels included in the application
- A listing of all adjoining property owners
- A map and detailed plans of the proposed project
- A metes and bounds description prepared by a professional surveyor
- Detailed plan views for both existing and new projects

¹ http://ohiodnr.com/Portals/13/OAC%20rules%20081108_as_posted.pdf

- Require the submission of copies of Ohio EPA Section 401 and US Army Corp of Engineers Section 404 permit applications (to support consistency and coordination among the agencies)
- Written justification for any exception to water dependency, pre-existing uses or term of submerged lands lease and/or submerged lands permit

These are each sound and important requirements.

Minor Recommendation: We respectfully suggest that the Department allow for applicants to file both application fees as well as applications, on-line.

Minor Recommendation: The “a” in the green text under (D) (7) (a) on p. 7 should be capitalized.

1501-6-03 Review of submerged lands lease and/or submerged lands permit applications (pp. 14 – 18)

The OEC supports the rule.

In fact, we believe this is one of the most important rules to maintain the integrity of the overall rule package. A submerged land project may pose 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, regardless of whether the project is proposed by lease or by permit.

The OEC feels very strongly that:

- The Department's continued recognition and application of the boundary of Lake Erie as described in the existing OAC Section of the definition of the Lake Erie territory is altogether appropriate, responsible, and even-handed.
- The Department's requirement that permit and/or lease applicants must submit certain information, including detailed plans and specifications, that are prepared by a registered surveyor and/or registered professional engineer also is critically important and is altogether appropriate, responsible, and even-handed.

Please see the extended discussion, above (pp. 2 – 3).

The OEC also appreciates:

- The express requirement that submerged land leases and permits be consistent with the policies of the Ohio Coastal Management Program Document.
- The express criteria requirements against which consider submerged land lease and permit applications are considered shall include considerations of whether the proposed project:
 1. is for a water dependent use, only
 2. protects the environment
 3. respects both present and prospective recreational uses by the public
 4. is compatible with public uses, including port developments, commercial navigation, and urban waterfront development projects
- The equal application of the environmental review provided in existing OAC Sec. 1501-6-03 to submerged land leases and permits. It is critically important that the Director maintain discretion to require an environmental impact assessment to determine any possible significant impacts of a development, improvement or activity upon the natural and human environment, including, specifically, whether public uses such as navigation, water commerce, and fishing in the affected area would be destroyed or greatly impaired.

- The clarification that the application of the environmental assessment to historic public uses includes such services as public transport through ferry services, public boat launch, public trails, utility corridors or easements, and publicly maintained navigational channels.

1501-6-04 Notification of submerged lands lease/submerged lands permit application (pp. 19 -20)

The OEC supports the rule.

In particular, we appreciate the proposed provisions that:

- Require the applicant to give notice to adjoining property owners
- Require the Department to post the application on the Internet
- Provide for 30 days of public comment on the application

The Internet is an increasingly important and universal access point of information for the public. We applaud the Department for its commitment to transparency and efficient and economic access by the public to this important information. Our only gentle recommendation would be to provide for an easy way for the public to submit on-line comments on an application. If specific rule language must or should be promulgated to facilitate this, we urge the Department to consider this.

1501-6-05 Submerged Lands Lease/Submerged Lands Permit (pp. 21 – 25)

The OEC appreciates the proposed provisions that:

- Direct the Director to set lease and permit time period. We believe that a 50-year term for general length serves the public interest in Lake Erie Public resources.
- Recognize the Director’s authority to inspect to insure that the occupation of the territory is in compliance with the lease/permit.
- Expressly prohibit the occupation of the Lake Erie territory—including by unauthorized fill—without a permit or lease.
- Expressly authorize the Director to inspect projects and to issue notices of non-compliance and assess penalties for continued non-compliance for unauthorized occupation of the Lake Erie territory.
- Direct the Department to conduct appeal hearings in the county in which the application is made.

We do, however, have one philosophical objection and several specific recommendations:

Objection: Proposed division “B” provides for permits for the occupation of submerged lands. In the language of the proposed rule, the Department may provide for a permit that contains language that reflects a plat “of the submerged lands to be contained in the permit referenced to the applicant's upland property description.” We categorically object to any express or implied interpretation, implication, or construction of the proposed rule that an upland owner may validly own any submerged lands in the Ohio portion of Lake Erie. Under Ohio law, we do not believe that any applicant’s upland property description can validly claim private ownership over any submerged lands of Lake Erie. As such, we reject this portion of the proposed rule. Although we disagree with and have appealed the findings of the Lake County court decision, even that decision did not recognize the private ownership of submerged lands located lake-ward of the water’s edge. We are aware of the Strickland

Administration's policy, as announced on July 13, 2007. Saying that this is the new policy of the State of Ohio, however, does not make the policy legally valid. The Ohio Attorney General has identified exhaustive and conclusive case law that effectively disputes the Strickland position. The Strickland Administration has yet to offer any legal basis for its policy.

Recommendation: The rule repeals the long-standing requirement that a lessee (and, now, a permittee) obtain and maintain liability insurance. Does this mean that the State of Ohio assumes liability for a lessee or permittee 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 or permittee—not the public—that primarily (if not exclusively) enjoys the benefit of the project? If this is not the case, then the Department, though the lease/permit instruments should expressly admonish the applicant that he assumes all liability associated with a project and that a lease or permit in no way indemnifies the holder from liability. We strongly recommend that the existing requirement be maintained and be extended to permittees.

Recommendation: Sections “A” and “B” contains no language binding the lease or permit holder, respectively, to safeguard the public resources of Lake Erie. We respectfully suggest the addition of section (A)(8) as follows: “Said lease holder shall respect the public interest in Lake Erie resources and the beneficial functions these resources provide.”

Recommendation: While the OEC acknowledges and supports the clear enforcement provisions detailed in divisions “D” and “E,” we are deeply concerned that the Department does may not have sufficient resources to adequately implement these good sections. As such, we respectfully request the Department to conduct a budget analysis of the resources needed to implement the monitoring and compliance measures indicated in these sections. We are concerned that the current staff level of the Office of Coastal Management is just not adequate for the effective execution of these provisions.

Recommendation: Unauthorized occupation of the Lake Erie territory may put at risk the protection of upland property, the exercise of littoral rights, the exercise of public rights to commerce, fishery, or recreation, as well as the natural resources of Lake Erie. Disrespect for the law—especially by repeated and flagrantly unpermitted occupation—should not be tolerated. To inhibit disrespect for the law, the rules should mandate a fine for each unlawful occupation that may occur and should authorize increased fine amounts for repeat offenders. In addition, the entire rules package should require the Director to consider the past compliance history of the applicant for any lease or permit provided in Chapter 1501 and related chapters of the OAC, including, specifically, any repeated violations of the prohibition of unlawful occupation of the territory.

1501-6-06 Rental (pp. 26 – 28)

The OEC has deep concerns about this rule.

It is our understanding that the Department generated approximately \$800,000 in State Fiscal Year (SFY) 2007 and approximately \$530,000 in SFY 2008 in lease rental income, of which, in compliance with the Ohio Revised Code, the Department remitted half of that revenue to local jurisdictions (cities, port authorities, etc.) and retained the other half for Department coastal operations, which was matched under Federal law on a 1:1 basis by NOAA. 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.

It is our further understanding that rental income from private, residential upland owners comprises only about 10% of all rental income collected by the Department (approximately \$50,000 in SFY 2008), while rental income from mostly for-profit enterprises comprises the vast majority of the remaining 90%

of income. Commercial lease and permit holders that may a profit from permission to occupy submerged lands should be assessed much larger lease and permit fees than are proposed by the rule. Surely a \$50 application fee will not even begin to cover the cost of permit applications, especially, from commercial project applicants.

Recommendation: The Strickland 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 at least not result in a loss of revenue. The public should be assured that commercial lease and permit holders are paying their fair share of the Department’s administration of the coastal management program. The Department should provide an estimate of revenue and administration costs estimated for the new lease/permit program. We respectfully but vigorously recommend that the lease and permit fees for commercial projects be increased commensurate with actual administrative costs.

1501-6-07 Appeal Process (p. 29)

No comments.

1501-6-08 Penalties (p. 30)

The OEC supports strong penalties for non compliances and especially for repeat violations.

1501-6-31 Definitions (pp. 31 – 32)

No comments

1501-6-32 Applicability of Permit Requirements for Coastal Structures (pp. 33)

The OEC supports the rule.

The draft rule requires a coastal structure permit for “any coastal structure that will control erosion, wave action, or inundation 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.

As discussed earlier (see pp. 2 – 3), the OEC 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. The Department’s requirement that permit and/or lease applicants must submit certain information, including detailed plans and specifications, that are prepared by a registered surveyor and/or registered professional engineer also is altogether appropriate, responsible, and even-handed.

Recommendation: Under the language of the proposed rule, it is not clear that all applicants– including applicants for rehabilitation projects – must apply for a permit. The rule language should clear up this ambiguity.

1501-6-33 Coastal Structure Permit Application (pp. 33 – 37)

The OEC supports the rule.

In particular, we appreciate the proposed provisions that:

- Require the submission of a complete application
- Require the submission of a non-refundable fee with the application
- A copy of the most current conveyance record of all parcels included in the application
- A listing of all adjoining property owners
- A map and detailed plans of the proposed project
- A metes and bounds description prepared by a professional surveyor
- Detailed plan views for both existing and new projects
- Require the submission of copies of Ohio EPA Section 401 and US Army Corp of Engineers Section 404 permit applications (to support consistency and coordination among the agencies)
- Written justification for any exception to water dependency, pre-existing uses or term of submerged lands lease and/or submerged lands permit

These are each sound and important requirements.

Minor Recommendation: We respectfully suggest that the Department allow for applicants to file both application fees as well as applications, on-line.

1501-6-34 Review of Coastal Structure Permit Application (pp. 38 - 40)

The OEC supports the rule.

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 can 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.

In particular, we appreciate the proposed provisions that:

- Require the Director to review whether the project will function as intended and will minimize the occupation of Lake Erie, it's bays and inlets.
- Authorize the Director to require and environmental impact assessment to determine the possible impacts of any development, improvement or activity upon the natural and human environment.
- Require the assessment of impacts on recreational uses and open space on the shoreline where increases access to the shorefront is a particularly important concern.

- Require the Director to consult with and provide coordination among local, state and federal agencies and authorizes the Director to develop a consolidated permit processes.

As discussed earlier, the OEC strongly supports the Department's proposal to continue to recognize the existing administrative and statutory definition and description of the Lake Erie territory.

As discussed earlier (pp. 2 – 3 of these comments), we believe the Department has acted appropriately in not attempting to apply the new boundary as proposed by the trail court. Instead, the Department appears to have chosen an appropriate and reasonable approach: remain neutral and simply continue the existing and long-standing definition of the Lake Erie territory, as defined in existing Ohio Administrative Code Section 1501-6-01 (W) and as described and defined in Ohio Revised Code Sections 1506.10 and 1506.11 (A). To suddenly apply this recent trial court decision without awaiting the results of pending appeals would at best be premature and at worst be irresponsible.

The OEC also strongly supports the Department's proposal to require permit and/or lease applicants to submit certain information, including detailed plans and specifications, that are prepared by a registered surveyor and/or registered professional engineer. We believe this is altogether appropriate and will serve the best interests of upland property owners and the public, alike, as well as Lake Erie. In order to confirm the sound engineering of a proposed project and to gauge the potential impact of a proposed project on adjoining upland owners, the public, and the natural, historic, cultural, and aesthetic features of Lake Erie, it is essential that the Department have access to professionally prepared plans and documents. Requiring the certification of such information by a registered surveyor and/or registered professional engineer also protects the interests of the applicant against a project planner who may base a project on ambiguous or poorly defined plans and specifications. Without this sort of detailed information submitted by professionals, the Department will be hard pressed to make accurate and timely decisions on project applications. This serves no one's interests.

Recommendation: Add to division (C) (6) (f), information and findings which may be developed by the U.S. Department of the Interior, Fish and Wildlife Services for authorization of activities carried out in a manner that safeguards wildlife. This will further the worthy goal of encouraging the DNR to utilize information and findings which may already be developed by other relevant agencies.

Recommendation: In considering a permit application, the Director shall consider any prior compliance or non-compliance history of the applicant.

1501-6-35 The Coastal Structure Permit (p. 41)

The OEC supports the rule.

In particular, we appreciate:

- The provision added by the Department stating that no structures can be modified from the original permitted structure without a permit. This will prevent expansion in the territory without the review of the Director or his agents.
- The two-year time limit on completing a project. Uncompleted projects may pose a risk to people and to the natural resource. Projects should not be allowed to have an open-ended construction window.

Minor Recommendation: The "s" in "permits" in the second sentence of division "A" should be deleted.

1501-6-36 Coastal Structure Permit Compliance (pp. 42 – 43)

The OEC supports the rule, with one serious reservation.

In particular, we appreciate:

- The inclusion of the Director’s authority or that of his representatives, to inspect construction activities to insure that the occupation of the territory is in compliance.
- The express prohibition on the placement or dumping of fill or debris along or near the shore for the purpose of controlling erosion, wave action or inundation, unless authorized as part of a project by a permit under this section. The inclusion of 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.

Recommendation: The OEC does support these sections; however we do fear that the Department and specifically the Office of Coastal management may not have the resources needed for implementation of these two sections. We request a budget analysis of the resources needed to implement the monitoring and compliance measures indicated in these sections. Again, we are concerned that the current staff level of the Office of Coastal Management just is not adequate for the execution of these provisions.

Recommendation: It is not clear whether the proposed division (C) (b) could be read to imply that the person responsible for project that has been undertaken without a permit, but that completes the project before a notice of non-compliance has been issued, could somehow evade an order of non-compliance. The rule should be clarified to prevent such a perversion of the otherwise good intent of the rule.

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.

1501-6-37 Appeal Process (p. 44)

No comments.

1501-6-38 Penalties (p. 45)

The OEC supports strong penalties for non compliances and especially for repeat violations.

1501-6-39 Severability (p. 45)

No comments.

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;
- Meets all federal requirements; and
- Supports the objective of coastal zone enhancement of attaining increased opportunities for public access, taking into account current and future public access needs, to coastal areas of recreational, historical, aesthetic, ecological, or cultural value.

We appreciate this opportunity to submit these initial comments. We continue to review the draft rules and may submit 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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