

Along the Shore

A Shoreline Management Guide for Michigan Coastal Landowners





The Public Trust Doctrine provides the legal basis for coastal land use.

Great Lakes Coastal Land Use

Do you own property along Michigan's Great Lakes coast? If so, then this pamphlet is for you. It explains the shoreline management activities that may or may not require federal or state permits. You will also find contact information for people who can answer your permit-related questions.

Who Regulates Shoreline Management Activities?

Both state and federal agencies have a role in regulating how private landowners manage the land along the Great Lakes coast. In Michigan, these agencies are the U.S. Army Corps of Engineers (Corps) and the Michigan Department of Environmental Quality (MDEQ). The State's regulatory authority is based, in part, on the Public Trust Doctrine, which obligates it to protect the waters and bottomlands of the Great Lakes to preserve the public's right to boat, fish, hunt, and traverse the shoreline. See page 11 for more information about the origin of the Public Trust Doctrine.

The Corps and MDEQ's roles in regulating Great Lakes shorelines are defined by statutes outlining their responsibility to protect the public's interest in unimpeded navigation, clean water, and environmental quality. The most important of these are the federal *Clean Water Act* and Part 325, Great Lakes Submerged Lands, of Michigan's *Natural Resources and Environmental Protection Act* (NREPA).

A line called the ordinary high water mark (OHWM) is important in defining the extent of state and federal authority over Great Lakes bottomlands. See page 9 and 10 for more information about determining the OHWM. A number of other statutes apply to the areas that are both above and below the OHWM in Michigan. For example, Part 303, Wetland Protection, of the NREPA protects all wetland areas that are greater than 5 acres in size or are contiguous to a water body, such as a lake, stream, pond, or the Great Lakes.



Shoreline Management Activities

What types of activities DO NOT require a permit?



Building a sand castle, hand raking, and many other activities do not require a permit.



It has been determined that the following activities will have little or no impact on habitat and other natural resource values associated with vegetation growing along the shore. Therefore, these activities are not regulated and do not require state or federal permits:

- Hand shoveling, manually raking and/or manually burying dead fish, zebra mussel shells, trash, and dead vegetation;
- Hand shoveling and raking wind-blown sand from home sites; or
- Hand shoveling or manually pulling small numbers of plants, except those that are listed as state-or federally-threatened or endangered species.

The general rule-of-thumb is: activities that are carried out using human power (e.g., raking, shoveling), and on a limited scale do not require permits. If you wish to undertake mechanized activities or work on a large scale, such as adjacent to your entire waterfront, you will need to obtain permits from both the Corps and the MDEQ.



The roots of native plant species hold surface sands in place. Shown from left are: Rush (*Juncus balticus*), Mossy stonecrop (*Sedum acre*), Silverweed (*Potentilla anserina*).

What types of shoreline management activities require a permit in Michigan?

General Permits

In the summer of 2007, the MDEQ established requirements for a General Permit category which allows Great Lakes shoreline property owners to conduct certain shoreline management activities through a simplified authorization process for a reduced application fee. This General Permit (GP) category was created with public input to replace the “beach maintenance” exemptions incorporated into Parts 303 and 325 of the NREPA by Public Act 14 of 2003. The Act designated November 1, 2007 as the expiration of the “beach maintenance” exemptions. MDEQ established this GP category prior to the expiration date to ensure property owners have time to come into compliance with the new regulations before the summer of 2008. If proposed shoreline management activities meet the criteria discussed on page 6, then the shoreline property owner will likely qualify for authorization under the GP category. If proposed activities go beyond this criteria, the property owner will be required to modify plans or apply for an Individual Permit (see page 8).

The GP has limitations. It cannot authorize projects proposed in designated Environmental Areas, (except for mowing invasive species in accordance with an approved MDEQ management plan or mowing a 10 foot wide pathway to the shoreline) or in areas serving as habitat for threatened and endangered animal or



Phragmites (common reed), an invasive species

plant species. The GP only applies to activities proposed below the OHWM and above the water's edge. Several of the activities covered by the GP category, including leveling sand, grooming sand, and construction of a path, may only be conducted in areas that are naturally free of vegetation, or where vegetation has been removed in accordance with the NREPA.

Property owners who undertook vegetation removal activities without authorization **prior to June 5, 2006** may obtain approval under the GP for leveling, grooming, or path construction activities by demonstrating that they would have qualified to remove vegetation under PA 14 of 2003 or would have qualified to obtain a letter of permission as described by the Act. This type of approval may be obtained until August 1, 2009.

When applying for authorization under the GP category, property owners may use abbreviated application forms for both Corps and MDEQ applications. The forms are available at www.michigan.gov/deqwetlands.

Leveling Sand

Property owners must obtain authorization under the GP category to use mechanized equipment to relocate sand, through grading and/or spreading, that has been deposited on upland riparian property. Sand leveling activities are limited to areas that are naturally free of vegetation, or where vegetation was removed in accordance with the NREPA. Natural lake contours and shoreline location may not be altered, nor can basins be excavated. Leveling of sand is not authorized in non-sand areas, such as organic or cobble areas, and no new upland areas may be formed through this process. Note that this activity also requires a Corps Regional Permit.

Grooming Sand

Property owners must obtain authorization under the GP category to use mechanized equipment for raking sand and removing debris, including muck/algae, other dead vegetation, trash, zebra mussels, and animal or fish carcasses. Grooming is limited to the top four inches of sand, and may only be conducted in areas that are naturally free of vegetation or where vegetation was removed in accordance with the NREPA. No destruction or disturbance of plants or plant roots is allowed. Note that this activity also requires a Corps Nationwide Permit.

Constructing a Path

Property owners must obtain authorization under the GP category to construct a temporary pathway from upland directly to the water's edge. For individual property owners, one six foot wide path may be constructed. For commercial hotel or public access properties, a single ten foot wide path may be constructed for every 200 feet of frontage (e.g., 200 feet = 1 path, 350 feet = 1 path, 450 feet = 2 paths, 600 feet = 3 paths, etc.). This activity is limited to areas that are naturally free of vegetation, or where vegetation has been removed in accordance with the NREPA. Only sand and/or gravel from the site may be used and no alteration of the natural shoreline contours is permitted. Note that this activity also requires a Corps Nationwide Permit.

Mowing

Property owners must obtain authorization under the GP category to mow vegetation on Great Lakes bottomlands and the activity must accomplish one of the following purposes:

- Create a pathway, ten feet wide or less, to the water's edge;
- Create an individual recreation area, not exceeding 400 square feet;
- Mow in previously mowed areas of Saginaw or Grand Traverse Bays, if the applicant can demonstrate that previous mowing activities were conducted in accordance with the NREPA; or
- Mow an area predominantly vegetated by invasive or non-native species in accordance with recommendations provided by the MDEQ. These recommendations for invasive species control plans may be found at www.michigan.gov/deqwetlands



To qualify for authorization under the General Permit, all mowing must be to a height of no less than four inches. Please note that mowing to four inches significantly reduces the habitat value of the shoreline vegetation. If your goal is to ensure an unimpeded view of the water, consider mowing to 20 inches (or as high as your equipment will allow), which preserves the majority of the habitat value. The presence of birds and other wildlife attracted by the richer habitat will also enhance your view!

Individual Permits

Any mechanized activities or construction of structures on the Great Lakes shoreline (dredging, filling, building a dock, disking, plowing, mowing, etc.) that exceed those that may be authorized under the GP category as described above require an Individual Permit from the MDEQ. Mechanized activities below the water's edge also require an Individual Permit. This type of permit application involves a higher fee, a public notice, a potential public hearing, and a more thorough review by the Corps and MDEQ. Property owners can access the Individual Permit application at www.michigan.gov/jointpermit.

Removing Vegetation

Manual or mechanized removal of vegetation other than *de minimus* hand removal requires an Individual Permit with public notice from both the Corps and the MDEQ. *De minimus* hand removal refers to insignificant or minute vegetation removal that is done without mechanized equipment in a very small area. Group efforts or hiring workers to clear large areas by hand is not considered *de minimus* activity.

What is the Ordinary High Water Mark?

Definition

The OHWM is a line defining the boundary between upland and bottomland. The line is established by using marks on the shoreline where the long-term presence of water leaves a distinct impression indicated by different soil types, surface configuration, or vegetation. The line persists through changes in water levels and may be above the current water level.

Federal Definition

U.S. Army Corps of Engineers

In 1974, Corps offices around the Great Lakes agreed on an elevation of the OHWM for each lake based on consistent physical characteristics corresponding to historic water level data dating back to the 19th century. This line is used to govern the application of regulations under several statutes, including the *Rivers and Harbors Act* and the *Federal Clean Water Act*. Historic water levels were based on “sea level,” and in 1985, the U.S. and Canada agreed on a specific location on the St. Lawrence River as “sea level”.

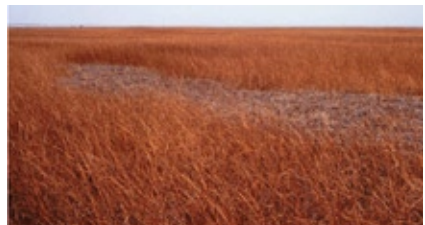
State Definition

Michigan Department of Environmental Quality

The Michigan Legislature also established a statutorily defined OHWM in order to demarcate the area regulated by Part 325, Great Lakes Submerged Lands, of the NREPA, which covers activities in Great Lakes waters and bottomlands. The State’s statutory definition also uses elevations above sea level to assist in establishing the OHWM, along with consistent physical characteristics that indicate long term persistence of water.



Pinconning outer bay, high water erosion in 1988.

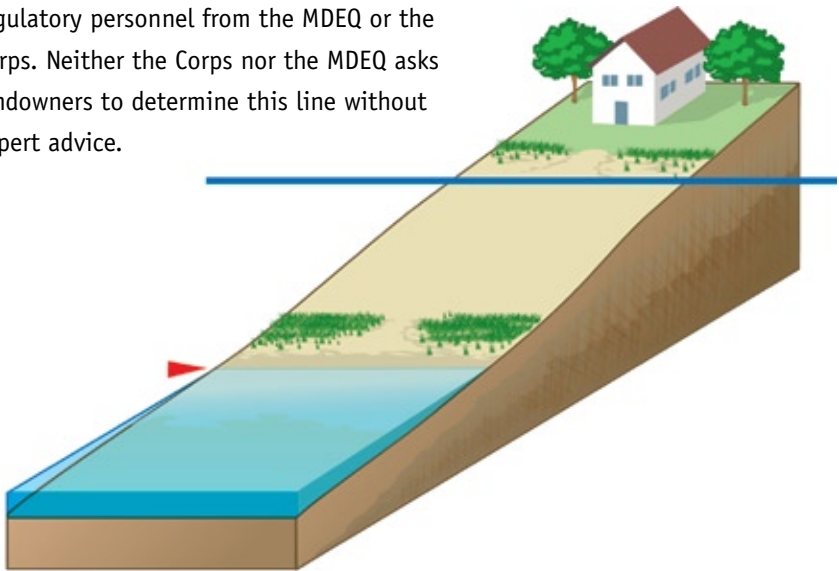




Pinconning shoreline shown during low water in 2001.



How is the location of the OHWM determined?

The OHWM is determined with assistance from regulatory personnel from the MDEQ or the Corps. Neither the Corps nor the MDEQ asks landowners to determine this line without expert advice.



-  **WATER'S EDGE (a movable line)**
-  **ORDINARY HIGH WATER MARK (a fixed line)**

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What is the Public Trust Doctrine?

The Public Trust Doctrine evolved from the concept that certain natural resources (i.e., air and water) are so critical that they must be protected for the long term good of the public, rather than exploited by individual landowners. This concept has been with us since Roman times and was embraced by the English in developing legal principles applying to coastal areas long before they colonized North America. The intent of the Public Trust Doctrine is to preserve the public's ability to engage in benefits such as fishing, hunting, and navigation.

To protect these benefits, title to navigable waters and underlying bottomlands, including the area subject to the ebb and flow of the tide, must be retained by the sovereign government for the benefit of all people. Under this unique rule, although the sovereign government may convey bottomlands to individuals, those lands remain subject to recognized Public Trust rights to fish, hunt, and navigate. Lands covered by this principle are often described as being "held in trust" by the state. During the initial formation of the federal government, the United States took title, in trust, to all lands seaward of the high tide mark along ocean shores from England. Individual states then took this title when they entered the Union.

In the United States, the Public Trust Doctrine was eventually recognized as applying to all navigable waters, including the Great Lakes. In these non-tidal waters, the Public Trust Doctrine extends to the areas of shoreline subject to the longer term fluctuations in water levels experienced on inland waters. On the Great Lakes the landward boundary of the public trust area is defined by the OHWM, which, as explained on page 9, demarcates the area where high water levels in the Great Lakes have been known to persist and will return again as part of the long term hydrological cycle. In other words, even though the areas below the OHWM on the Great Lakes are not permanently submerged, and may be exposed for long periods of time, the water will eventually return to the OHWM, just as ocean waters return to high tide levels. Thus, these exposed bottomlands remain subject to the Public Trust. The Michigan Supreme Court recently reaffirmed that the Public Trust Doctrine applies in areas of exposed bottomlands below the OHWM. This case confirmed the public's right to traverse the shoreline.



Contacts

It is important that you understand your rights and responsibilities related to maintaining your shoreline. If you have any questions, please feel free to contact the offices below for help:

Michigan Department of Environmental Quality
Environmental Assistance Center: 1-800-662-9278
www.michigan.gov/deqwetlands
(See Great Lakes Shoreline Management)

U.S. Army Corps of Engineers
Regulatory Staff: (313) 226-2218
www.lre.usace.army.mil/who/regulatoryoffice

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Michigan Sea Grant College Program
University of Michigan
Samuel T. Dana Building, Suite 4044
440 Church Street
Ann Arbor, Michigan 48109-1041

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