FLOW
FOR LOVE OF WATER

Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

December 5, 2017

Michigan House of Representatives
Natural Resources Committee
P.O. Box 30014
Lansing, MI 48909-7514

VIA ELECTRONIC SUBMISSION

Dear Michigan House of Representatives Natural Resources Committee:

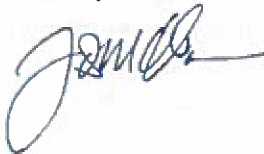
Legislation before the House Committee on Natural Resources exceeds the Legislature's constitutional powers and puts publicly owned waters and submerged lands at risk.

S.B. 409 allows private riparian landowners to occupy Great Lakes submerged lands (which belong to the public) and construct private noncommercial harbors adjacent to their upland riparian property. This sets a terrible precedent that could lead to other private interests seeking to make private ownership claims on the Great Lakes and their submerged lands.

In an 1892 decision, the U.S. Supreme Court ruled that states cannot cede these submerged lands and waters to private parties because the title to them is "held in trust for the people of the state, that they may enjoy the navigation of waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties."

S.B. 409 runs afoul of Supreme Court precedent and sound stewardship of our waters, and should be rejected.

Sincerely,



Jim Olson, President and Founder

153 ½ EAST FRONT STREET, STE 203C
TRAVERSE CITY, MI 49684

231.944.1568
FLOWFORWATER.ORG

Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

A NONPARTISAN COMMENT ON PROPOSED SENATE BILL 409 AND THE PUBLIC TRUST DOCTRINE

THE AMENDMENT TO THE GREAT LAKES SUBMERGED LANDS ACT FOR LEASING OF GREAT LAKES BOTTOMLANDS FOR PRIVATE HARBORS VIOLATES THE PRINCIPLES OF THE PUBLIC TRUST DOCTRINE

James M. Olson, J.D., LL.M.[1]
President and Legal Advisor
For Love of Water ("FLOW")

December 5, 2017

INTRODUCTION

For Love of Water ("FLOW") is a nonpartisan, independent law and science policy center dedicated to sustaining the high shared public values protected by the public trust impressed on the Great Lakes and their tributary waters. For over 100 years, Michigan and United States Supreme Court decisions have adopted inviolate principles governing the public trust doctrine. Under public trust law, the legislative, executive, and judicial branches of government are the sworn guardians to fulfill their mandatory duty to protect the Great Lakes, their bottomlands, and these public rights and trust uses private from subordination, alienation and impairment.

FLOW has carefully evaluated the provisions of Senate Bill 409 that would amend the Great Lakes Submerged Lands Act ("GLSLA"), MCL 324.32501 *et seq.* to authorize the Department of Environmental Quality ("DEQ") to issue leases to private riparian landowners to occupy and construct private noncommercial harbors adjacent to their upland riparian property. As illustrated in this analysis, accepting its provisions in their best light, the legislature does not have the authority to enact Senate Bill 409 because it violates and exceeds its authority based on the principles of public trust doctrine in the Great Lakes.

[1]Mr. Olson, a principal in Olson, Bzdok & Howard P.C., Traverse City, www.envlaw.com, has practiced environmental, land use, water and public trust law for more than 40 years. He holds a B.A. Business, Michigan State University; J.D. Michigan State College of Law (Detroit College of Law), and LL.M., in public lands, waters, and environmental law, University of Michigan Law School. He is President and Legal Advisor, For Love of Water (FLOW), and has authored books and numerous articles and papers and lectured widely on water, environmental law, government and land use, public trust, and the Great Lakes.

THE PRINCIPLES AND LIMITATIONS OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine applies to all bottomlands and navigable waters of the Great Lakes up to the ordinary high-water mark, whether by common law[2] or statute – the GLSLA.

THE STORY OF *ILLINOIS CENTRAL RAILROAD V. ILLINOIS* CASE

In the late 1800s, Illinois Central Railroad persuaded the Illinois legislature to deed nearly a square mile of Lake Michigan for a showcase industrial beachhead for its operations. Not long after, emboldened from a continuing outcry from Chicago voters over the conveyance of Great Lakes waters and bottomlands, a newly elected legislature rescinded the deed.

After state and federal lawsuits, the case ended up in the U.S Supreme Court, which agreed with the State of Illinois. Conveyed or not, the deed was void because the state did not have the authority to convey Lake Michigan and its bottomlands in the first place. Why? Because all of the Great Lakes, their connecting waters, and navigable lakes and streams in the states are owned by the state, from admission on statehood, and are subject to a public trust, which forbids transfers, alienation and subordination of the surface waters and bottomlands of the Great Lakes for primarily private purposes.

The Supreme Court characterized these waters and bottomlands as a "title held in trust for the people of the state, that they may enjoy the navigation of waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties."[3] The Court declared that: "The trust devolving upon the State for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property."[4]

THE STORY OF MICHIGAN'S *OBRECHT V NATIONAL GYPSUM CO.* CASE

In the late 1950s, after the passage of the Great Lakes Submerged Lands Act, a major riparian dock was allowed to be constructed in Lake Huron. In 1960, the Michigan Supreme Court, noting its decision was a "forerunner" over the treasured inland seas known as the Great Lakes, ruled that the private dock had been authorized contrary to the principles of public trust law in *Illinois Central Railroad.* The Court reasoned: (1) that generally that the dock could not be authorized by the state because the state did not have authority to relinquish control, lease or transfer the waters and bottomlands of Lake Huron for private purposes,[5] and unless (2) the proposed or existing use or transfer was determined on the facts to constitute (a) a primarily private purpose, and (b) would not substantially impair or significantly harm or interfere with the public trust waters, natural resources, or public trust uses.

[2] *Illinois Central Railroad v. Illinois*, 146 US 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 399 (1960); *Glass v. Goeckel*, 703 N.W.2d 58, 64–65, 73–74 (Mich. 2005); Joe Sax, The Public Trust Doctrine in Natural Resource Law, 68 Mich L. Rev. 41 (1970); James M. Olson, All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine, 15 Vt. J. Env. L. 148-151 (2014).

[3] *Illinois Central Railroad*, 146 US at 452.

[4] 146 US at 460. The only exception to the rule against alienation or transfer is where there is (1) a predominant public purpose and (2) no substantial, meaning material, impairment of the public trust water, natural resources, or protected public trust uses. 146 US at 455-456; *Obrecht v National Gypsum Co*, 361 Mich 399 (1960).

[5] *Obrecht*, 361 Mich 399.

In summary, based on *Illinois Central* and *Obrecht* and other Michigan public trust decisions, the following common law public trust principles are binding on the state, including the legislature, agencies, and state elected leaders:

(1) No alienation, transfer, lease, deed, occupancy agreement for use and control for primarily private purposes.[6]

(2) Even if there is a primary public purpose, there can be no alienation, transfer, lease, occupancy, deed or permit for public trust purpose unless it is expressly and unambiguously authorized and determined there will be no material impairment to public trust waters, natural resources, and/or public trust uses.

(3) There is a stringent "solemn" affirmative duty to protect the public trust waters, lands, natural resources, and public trust uses, and this includes consideration of all effects, necessity, alternatives, of a proposed project.

(4) The public trust extends to the entire surface of a lake or stream and the lands beneath them.[7]

(5) *De minimus* or "trifling impact" arguments do not apply to public trust questions when it comes to purpose and impairment; in other words, precedent and cumulative effects of precedent must be considered.[8]

The principles of *Illinois Central* and *Obrecht* and related cases operate as a strict limitation on the exercise of legislative power regarding the sovereign title and control of the Great Lakes for the paramount rights of citizens who are the beneficiaries of this public trust.

As Justice Black declared in *Obrecht*, the state is the "sworn guardian" of the paramount public trust in the Great Lakes and their bottomlands to assure that the trust from generation to generation is not reduced, diminished, weakened or violated. This means that regardless of partisan or personal views regarding a proposed transfer, lease or occupancy of the Great Lakes, these principles apply to all citizens and all branches of government. The bottomlands and waters of the Great Lakes are titled held in trust by the state as sovereign for the benefit of citizens in perpetuity. The public trust cannot be relinquished, transferred, leased for primarily private purposes, or in circumstances where private use of the bottomlands would necessarily exclude members of the public.

THE CURRENT GLSLA

The GLSLA authorizes smaller traditional riparian private docks, wells and slips; but any other uses, leases or authorization, such as marinas, must serve a primary public purpose and be entirely open to the public. A private breakwater or private harbor are not authorized *unless* the landowner applies for a lease to operate a marina that services and is open to the public for boating and fishing or other recreation. The law does not authorize private, noncommercial harbors or breakwaters on public trust bottomlands.

Sec. 32502. The lands covered and affected by this part are *all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes*, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it, including those lands that have been artificially filled in*
Sec. 32503. (1)... *the department, after finding that the public trust in the waters will not be impaired or substantially affected, may enter into agreements pertaining to waters over and the filling in of*

---

[6]*Obrecht*, 361 Mich 399; *Illinois Central Railroad*, 146 US 387.
[7]*Michigan v. Broedell*, 112 N.W.2d 517, 518-519 (Mich. 1965).
[8]*People v Babcock*, 38 Mich App 336 (1972).

submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board.

Sec. 32504. (2) Before an application is acted upon by the department, the *applicant shall secure approval of or permission for his or her proposed use* of such lands or water area *from* any federal agency as provided by law, *the department with the advice of the Michigan waterways commission, and the legislative body of the local unit or units of government within which such land or water area is or will be included, or to which it is contiguous or adjacent*. A deed, lease, or agreement shall not be issued or entered into by the department without such approvals or permission.

Sec. 32505. (1) If the department determines that it is in the public interest to grant an applicant a deed or lease to such lands or enter into an agreement to permit use and improvements in the waters or to enter into any other agreement in regard thereto, the department shall determine the amount of consideration to be paid to the state by the applicant for the conveyance or lease of unpatented lands.
(2) The department may permit, by lease or agreement, the filling in of patented and unpatented submerged lands and permit permanent improvements and structures after finding that the public trust will not be impaired or substantially injured.
(3) The department may issue deeds or may enter into leases if the unpatented lands applied for have been artificially filled in or are proposed to be changed from the condition that exists on October 14, 1955 by filling, sheet piling, shoring, or by any other means, and such lands are used or to be used or occupied in whole or in part for uses other than existing, lawful riparian or littoral purposes.

Sec. 32512. (1) ... unless a permit has been granted by the department pursuant to part 13[1] or authorization has been granted by the legislature, or *except as to boat wells and slips facilitating private, noncommercial, recreational boat use*, not exceeding 50 feet in length where the spoil is not disposed of below the ordinary high-water mark of the body of water to which it is connected, a person shall not do any of the following:
(a) Construct, dredge, commence, or do any work with respect to an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection of the waterway with any of the Great Lakes, including Lake St. Clair.
(b) * * *
(c) * * *
(d) Construct a marina.
(emphasis added in italics).

PROPOSED SENATE BILL 409

(6) THE DEPARTMENT MAY ENTER INTO A LEASE WITH THE OWNER OF RIPARIAN OR LITTORAL PROPERTY, *OCCUPIED ONLY FOR SINGLE-FAMILY RESIDENTIAL PURPOSES, TO USE THE ABUTTING UNPATENTED LAKE BOTTOMLANDS AND WATERS OVER THOSE BOTTOMLANDS FOR A PRIVATE HARBOR*
(7) IF ALL OF THE FOLLOWING CONDITIONS ARE MET:

(A) THE PRIVATE HARBOR *WAS* FORMED BY A BREAKWATER ERECTED ON UNPATENTED LAKE BOTTOMLANDS.
(B) THE *PRIVATE HARBOR IS USED EXCLUSIVELY FOR PRIVATE*, NONCOMMERCIAL RECREATIONAL WATERCRAFT.
(C) THE FULL TERM OF THE LEASE IS 50 YEARS CONSISTING OF TWO 25-YEAR TERMS.
(D) THE CONSIDERATION FOR THE LEASE IS AS FOLLOWS:
(*i*) FOR A LEASE ENTERED INTO ON OR AFTER THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT AMENDED THIS SECTION, *A LUMP-SUM PAYMENT AT THE BEGINNING OF THE FIRST 25-YEAR TERM OF THE AGREEMENT OF 1% OF THE CURRENT*

STATE EQUALIZED VALUE OF THE LESSEE'S UPLAND RIPARIAN OR LITTORAL PROPERTY OR PAYMENT OF THE LUMP SUM PURSUANT TO A SCHEDULE AS AGREED BY THE DEPARTMENT, AND A LUMP-SUM PAYMENT AT THE BEGINNING OF THE SECOND 25-YEAR TERM OF THE AGREEMENT OF *1% OF THE CURRENT STATE EQUALIZED VALUE OF THE LESSEE'S UPLAND RIPARIAN OR LITTORAL PROPERTY* OR PAYMENT OF THE LUMP SUM PURSUANT TO A SCHEDULE AS AGREED BY THE DEPARTMENT.

THE APPLICATION OF PUBLIC TRUST PRINCIPLES TO PROPOSED SENATE BILL 409

Proposed Senate Bill 4009 adds a new subsection (7) to Section 32505 to provide for the leasing of Great Lakes bottomlands and waters subject to three specific conditions. It should be noted that the current GLSLA Section 32505 provides for leasing based on express fair market cash value provided the structure or improvement has been authorized pursuant to the public trust standards in Sections 32502, 32503 and 32504.

There is no general authority to lease in Section 32505 unless authorized under the previous sections, because those sections contain standards that are nearly identical to the *Illinois Central* case. If a proposed use, structure, or improvement does not or cannot meet the standards of *Illinois Central*, then the legislature or state cannot authorize it. In the *Obrecht* case, the Michigan Supreme Court adopted the *Illinois Central* standards or principles, and made it very clear that the GLSLA and any proposed use could not be authorized if not in compliance with the *Illinois Central* principles or those set forth in *Obrecht*. Both cases prohibit a legislature or agency from authorizing, conveying or leasing any such structure, improvement or use unless it is in accordance with these the public purpose and nonimpairment standards and the other five principles described above.

Proposed Senate Bill 409 does not comply with *Illinois Central* and *Obrecht* and the above public trust law principles, and therefore cannot be enacted.

(1) The exclusive private nature of the Senate Bill exceeds and violates the standard and principles of *Illinois Central*, *Obrecht*, and the other cited Michigan common law decisions. It also violates public trust law in other Great Lakes states.[9] On its face, the proposed bill authorizes leasing of bottomlands for a private harbor along with a private breakwater. It states that this is "only for single family residential purposes," for "private harbor," "... private harbor is used exclusively for ... private watercraft."

(2) The conditions imposed on the proposed private harbors are ambiguous and not explicit. For example, Section (7)(A) states that the "private harbor... <u>was</u> formed on a breakwater on... on bottomlands." What does "was" mean? Does it mean any breakwater that was constructed on bottomlands before the date of the proposed Senate Bill 409 amendment? Does it mean only those breakwaters that were constructed and occupied bottomlands before the effective date of the GLSLA on October 14, 1955? Does it mean some other time between 1955 and the date of the proposed amendment? More importantly, there is no adverse possession or similar claims by riparians to breakwaters or similar structures on bottomlands that exist before 1955, filled or

[9] Like Michigan in the *Obrecht* case, Wisconsin followed the principles of the *Illinois Central* case. Public trust bottomlands and waters cannot be conveyed or leased to private owners for private purposes. *See McClellan v Prentice*, 55 N.W. 764, 769-770 (Wis. 1893); *Illinois Steel Co v Bilot*, 84 N.W. 856, 85 N.W. 402 (1901).

occupied by structures or not because they are subject to the public trust doctrine.[10] Moreover, public trust bottomlands and waters cannot be occupied or authorized to be occupied for purposes that violate public trust standards, such as public purpose and no interference or impairment of public uses for boating, fishing, or swimming on the whole surface of the Great Lakes.[11]

(3) The proposed bill's compensation provision allows the landowner to pay less than fair market cash value, which by definition subsidizes private harbors and private use at less than the fair compensation required of other classes of users. Even if a use is primarily for a public purpose and/or without material impairment of citizens' beneficiary protected public trust uses (boating, fishing, swimming, etc.), the state cannot grant or lease for less than fair market cash value, or it would constitute a subsidy – that is an unlawful private purpose.

CONCLUSION AND RECOMMENDATIONS

Based on the foregoing analysis, Senate Bill 409 expressly violates and is not authorized under the GLSLA and the public trust doctrine. The only way existing private breakwaters could be authorized as part of a harbor would be to:

(1) require that the facility and its use are open to the public for boating, fishing, or other recreation,
(2) explicitly limit the authorization to lease to breakwaters that existed before October 1955,
(3) require a showing by the applicant that it is predominantly for a public purpose and will not impair the waters, habitat, fish, or fishing, boating, and swimming or other public use, and
(4) require compensation to the state at fair market cash value.

Thank you for the opportunity to submit the foregoing analysis and conclusion. If the committee has any questions or additional information is required, contact FLOW at info@flowforwater.org or (231) 944-1568.

###

[10] *State v Venice of America Land Co.*, 160 Mich 680 (1910); *Kavanaugth v Rabior*, 22 Mich 68 (1923).

[11] *Michigan v. Broedell*, 112 N.W.2d 517 (public trust extends to the whole surface of the lake); *People v Babcock*, 38 Mich App 336 (small nibbling transfers or impairments cumulatively violate the public trust in public trust waters)., 518-519 (Mich. 1965).