



**House Bill 206  
Opponent Testimony of Jerome C. Tinianow  
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**House Agriculture and Natural Resources Committee  
Representative Jim Aslinides, Chairman**

**May 11, 2005**

My name is Jerry Tinianow, and I am the Executive Director of Audubon Ohio. We are the Ohio office of the National Audubon Society. On behalf of the 14,000 Audubon members in Ohio, thank you for this opportunity to explain our opposition to H.B. 206.

Audubon Ohio opposes H.B. 206 because it purports to divest the State of its public trust rights over submerged lands below the ordinary high water mark ("HWM"), so that private owners can exclude the public from areas of the lakeshore previously open to them.

We also oppose the bill because it needlessly expands littoral rights in an open-ended manner, thereby opening the door to a free-for-all among lakefront owners as they compete to construct all manner of new and revamped structures in and along Lake Erie. We anticipate that the Ohio Department of Natural Resources and other witnesses will amply cover the problems with the bill's expansion of littoral rights, so I will focus on the Public Trust Doctrine and the wrongful divestiture of submerged lands under H.B. 206.

**Your Role As Trustees**

H.B. 206 is special interest legislation. It would not benefit all, or even a substantial portion, of the people of Ohio. Rather, it is designed to benefit only those who own land along Lake Erie – a group that, by even the most generous estimates, constitutes less than 0.5% of the population of Ohio.

H.B. 206 purports to surrender rights that the State of Ohio holds as a trustee, not just for the 0.5% of Ohioans who own property along the Lake, but for all of the people of Ohio. In considering H.B. 206, this Committee – this House – and this General

Assembly -- are acting as both legislators and as trustees. As such, they must act consistent with the trust, for the benefit of all of the beneficiaries

The proponents acknowledge that there is a public trust doctrine applicable to the waters and submerged lands of Lake Erie. Sen. Grendell, in his written proponent testimony, said the “[w]e do not seek to change the historic definition of the Public Trust Doctrine.” While he and they recognize the public trust doctrine, however, the suggestion that H.B. 206 would not “change the historic definition” of the doctrine is misleading. The bill does not change the definition of the doctrine, but instead violates the doctrine by changing the definition of public trust lands in a way that gives those lands away for purely private benefit.

Trusts involve (a) a trustee, (b) one or more beneficiaries, and (c) a trust property that the trustee administers for the beneficiaries. In this instance the State is the trustee; the beneficiaries are all of the citizens of Ohio; and the trust property consists of the waters of Lake Erie and the lands that are or, in some instances that have been, submerged under those waters.

In any trust, both the trustee and the beneficiaries are “owners” of the trust property. The trustee is known as the “legal” owner, because it has title to the property. The beneficiaries are known as the “beneficial” owners because the trustee owns and administers the property for their benefit.

People who own property that abuts the shore of Lake Erie, that is, “littoral owners,” have an obvious interest in H.B. 206. There is another group of “owners” who also have an interest in H.B. 206, namely, everyone else in Ohio. They are the beneficial owners of the waters and submerged lands of Lake Erie. This includes everyone starting across the street from the lakefront owners, down to the Ohio River. In considering H.B. 206, you must serve the interests of all of the beneficial owners, and be consistent with the trust you have been given.

### **The Ordinary High Water Mark**

The proponents have attempted to create confusion about the source and nature of the State’s public trust over the waters and submerged lands of Lake Erie. They argue that state law governing submerged lands does not make a specific reference to the ordinary high water mark, instead using the terms “southerly shore” and “natural shoreline.” The proponents, however, ignore federal law. That is where the law of submerged lands begins.

The term “ordinary high water mark” and its applicability to Lake Erie are defined in federal law. Specifically, the Submerged Lands Management Act, adopted by Congress in 1953, provides in 43 U.S.C. 1311(a) that “title to and ownership of the lands beneath navigable waters within the boundaries of the respective States ... are ...

recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto ....” 43 U.S.C. 1301(a) defines “lands beneath navigable waters” to mean “all lands within the boundaries of each of the respective States which were covered by nontidal waters that were navigable ... at the time such State became a member of the Union, ... up to the ordinary high water mark ....”

Although the Submerged Lands Management Act was first adopted in 1953, Congress was not adopting a new doctrine. Rather, Congress noted at the time that the language quoted above “merely fixes as the law of the land that which, throughout our history ... was generally believed and accepted to be the law of the land.” The language “recognizes, confirms, vests, and establishes in the States the title to ... submerged lands, which they have long claimed, over which they have always exercised all the rights and attributes of ownership.” 1953 U.S. Code Congressional and Administrative News 1385, 1399 (quoting H.R. Rep. No. 215).

Ohio courts recognize that the State’s control over submerged lands along Lake Erie has existed since statehood. “It is clear to this court that the trust doctrine of state control over the submerged lands of Lake Erie and its bays for the beneficial ownership of the public, which originated in England and has been strongly reinforced in this country by judicial decision, has existed in this state since Ohio was admitted to the union in 1803.” *Thomas v. Sanders*, 65 Ohio App. 2d 5, 9 (Erie County 1979) (emphasis added).

Ohio codified its authority over the Lake and its submerged lands in RC 1506.10, which reads in part:

It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners ....

RC 1506.10 is the successor to General Code 3699-a, enacted in 1917. Although codification of the State’s public trust rights did not occur until 1917, and the Submerged Lands Act was not enacted until 1953, both Congress and the courts have recognized that the underlying legal principals have existed since statehood.

### **The History of the Corps of Engineers Is Irrelevant**

Senator Grendell and other proponents attack ODNR's reliance on the current definition of HWM used by the U.S. Army Corps of Engineers. They argue that the Corps did not even exist until 1899, and did not establish its interpretation of the HWM until 1955. They have their history right, but it is irrelevant. ODNR has never claimed that it was using a Corps definition prior to 1955. It is using the Corps definition today, for its present operations.

The Submerged Lands Management Act confirmed state authority over lands below the HWM, but did not define the HWM. RC 1506.10 does not use the term "high water mark," but instead uses the term "southerly shore of Lake Erie" to describe where the public trust begins. These two laws, however, must be construed together in a manner that makes them consistent. As Attorney General Betty Montgomery noted in Opinion No. 2000-047 (Dec. 29, 2000)(copy attached), if a court can interpret a statute so as to retain the public's trust rights in navigable waters, the statute should be so construed. Op. at 9 (holding that the state could revoke legislation authorizing the conveyance of submerged lands to a port authority).

RC 1506.10 delegates administration of Ohio's public trust lands and waters to ODNR "in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section." In order to carry out its designated authority under Chapter 1506, ODNR needs to interpret the Submerged Lands Management Act and RC 1506.10, and must do so by treating the term "high water mark" in the federal statute and the term "southerly shore" in the state statute as consistent. It does so by using the HWM defined by the U.S. Army Corps of Engineers at 573.4 feet above sea level, to define the "southerly shore" and "natural shoreline" of Lake Erie.

ODNR notes that this boundary "coincides very well with the physical evidence of what is sometimes referred to" as the HWM. *Beach Cliff Board of Trustees v. Ferchill*, 2003-Ohio-2300 ¶ 16 (Ct. App. Cuyahoga County May 8, 2003).<sup>1</sup> Thus, the HWM recognized by ODNR matches both the level designated by the Corps and the physical evidence of where the Lake lies at its ordinary high level.

Without question, there are other possible definitions of the HWM. The General Assembly could choose a different definition, but, as explained below, in doing so it must not act arbitrarily. For example, it cannot adopt legislation that, in effect, says that the HWM is whatever is in someone's deed, or is the low water mark, or is the "usual" water mark. H.B. 206 violates the public trust because it defines the southerly shore, and hence

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<sup>1</sup> The court of appeals in *Beach Cliff* held that ODNR controlled lands below the HWM, even though they had been artificially filled to a level above that line. The court held that ODNR's position was correct, and the Ohio Supreme Court declined to review the case.

the limits of the State's trust, at a point that, while ambiguous, is plainly not the HWM, but something below it.

### **H.B. 206 Would Abandon the High Water Mark**

The Lake does not normally lie at the HWM. Rather, as proponents noted during their testimony, the level is usually below that point. As a result, there is often an area of dry beach, the width of which varies from almost nothing to hundreds of feet, depending up where one is along the Lake. The term "submerged land" is used to refer in part to this beach, even though it is submerged only some of the time. [Similarly, under the law governing wetlands, an area may be regulated as a wetland even though it is only "wet" some of the time.]

H.B. 206 purports to cede some of the State's authority over submerged lands below the HWM. It does so by inserting a new definition in 1506.01(J):

"Southerly shore" and "natural shoreline" mean the line at which the water usually stands when free from disturbing causes.

This definition is ambiguous. It is not clear what "usually" means, or what is included among "disturbing causes." Except when the Lake is frozen, it is always being subjected to disturbing causes, such as wind and wake. Indeed, freezing itself could be deemed a "disturbing cause." This ambiguity would open a Pandora's Box of conflicting claims along the Lake.

Ambiguity, however, is not the main problem with this provision. The main problem is that, whatever this definition does mean, it plainly does not mean the HWM. As the proponents recognize, the Lake does not "usually" lie at the HWM. If it did, we would not be debating the public trust, because there would rarely be any dry beach exposed. It is clear that this proposed change in Ohio law is intended to cede authority previously claimed under RC 1506.10 over the area between the HWM and wherever it is that "the water usually stands when free from disturbing causes."

This purpose is further demonstrated by the fact that H.B. 206, in a separate section of the bill, would add a definition of "ordinary high water mark" as new RC 1506.40(A):

As used in this section, "Ordinary high water mark" means the ordinary high water mark of Lake Erie that is established from time to time by the United States army corp [sic] of engineers for regulatory purposes.

This definition is expressly applicable only to RC 1506.40, and hence not to RC 1506.10. The latter would instead now be subject to the new definitions of "southerly shore" and "natural shoreline" under RC 1506.01(J). If 1506.01(J) were not intended to

change the scope of the public trust, why would it define the “southerly shore” and the “natural shoreline” differently from the definition of HWM in 1506.40(A)? Why not use the same definition for both?

The answer is obvious. The proponents plainly intend to withdraw the State from a portion of its public trust lands and cede them to neighboring private owners. While the proponents will deny that the State presently has control over the area in question, if they felt that the law was clear on this point they would have no need for H.B. 206. Their support for H.B. 206 betrays an understanding on their part that their interpretation of the public trust doctrine would not stand up in court. They plainly understand that H.B. 206 is meant, not to confirm existing law, but to change the law by giving public trust lands over to them.

### **The Proposed Transfer of Beach Would Be a Breach of Trust**

Trustees are not supposed to give away trust property. They are supposed to safeguard it for their beneficiaries, and give it away only if doing so serves the purpose for which the trust exists. The U.S. Supreme Court has specifically applied this principal to submerged lands in the Great Lakes. In *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892) the U.S. Supreme Court held in its ninth headnote that any act of the legislature purporting to grant title to submerged lands in Lake Michigan was ineffective, because the state could not convey public trust lands. Similarly, in *State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303 (1948), the Supreme Court of Ohio held in its sixth headnote:

[T]he state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private use different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.

H.B. 206 thus does what a trustee is not allowed to do. It purports to cede authority over public trust submerged lands for purposes that are purely private and of no benefit to 99.5% of the beneficial owners, the people of Ohio.

The proponents of the bill were candid about why they want this change. They want to use it as a basis for excluding the public from the beach below the HWM. The courts have recognized, however, that public access is one of the purposes of the public trust. It is viewed as an adjunct to navigability. “[M]ore recently navigability has been held to include recreational as well as commercial use.” *Thomas*, 65 Ohio App. 2d at 14. This makes sense, because the two are connected. The dry beach may be used, for example, by a kayaking tour group that needs a rest, or researchers who are tracking a bird along the shore, or hunters and fishers who are licensed by the State to pursue game.

Divesting control over public trust lands so that private owners can exclude the public from them is thus a direct contravention of the State's obligations as trustee.

Attorney General Montgomery's Opinion 2000-047 says that the State may surrender at most only a portion of its rights to public trust property, and then only by specific legislation (i.e., legislation dealing with a particular parcel) that advances public trust purposes and that does not substantially impair the public's use of the remaining public trust lands or waters. Legislation such as H.B. 206 that attempts to cede dry beach along virtually the entire lakeshore, enacted so lakefront owners can exclude 99.5% of the beneficiaries from it, would be in direct contravention of this rule.

### **What About The Deeds?**

During testimony by proponents, the Committee learned that deeds for lakefront property have many different types of descriptions of the lakeward boundary. Some lakefront owners have deeds that describe their lakeward boundary as the high water mark. Others have deeds that describe it as the low water mark, or some other ambiguous point that may be below the HWM. The proponents argue that such deeds trump the State's control of lands below the HWM, and that ODNR's assertions to the contrary amount to a taking without compensation.

Owners rarely tolerate takings without compensation for long. One would expect that if the owners were correct, someone, somewhere, would have gone to court and proven them correct by now. Yet even though there are apparently hundreds, if not thousands, of lakefront owners who have LWM deeds or other deeds that extend to or into the Lake, and even though ODNR has been demanding submerged land leases for many years, not a single owner has ever proven in court that their deed trumps the public trust. No one has proven a "taking;" no one has ever persuaded a court to order ODNR off "their" land. If deeds trump the public trust, why has no court in Ohio ever so held?

Deeds do not tell the entire story, because deed language can change over time. One cannot acquire title superior to the State's public trust simply by changing the language in a deed and then carrying the language forward thereafter. Yet the proponents admit that this is exactly what happened in the past. During proponent testimony on May 4, 2005, Lakefront Group President Tony Yankel testified that deeds to lakefront property were changed in the late 19<sup>th</sup> Century after a pair of court decisions that he contends validated a trust boundary below the HWM:

Notably, when land bordering Lake Erie was transferred after these decisions, the language in many deeds fixing the property boundary as "the Lake" or "the shore of Lake Erie" was changed to read "low water mark of Lake Erie" or "the shore of Lake Erie, at low water mark."

Testimony of Anthony Yankel, at 8. Audubon Ohio disputes his interpretation of these decisions, but not his testimony that legal descriptions in deeds for lakefront property were changed thereafter. The fact is that much of the deed language that proponents rely on today results from unilateral decisions made 100 years ago to change legal descriptions. No one, however, can expand his or her rights simply by changing the language in his or her deed. The fact that the changed language is then carried forward from one deed to another thereafter means nothing.

Witness Tom Jordan testified that he had traced deed history back to pre-Revolutionary times, and that, with one exception, none of the old deeds used the term “high water mark.” He did not, however, indicate that the deeds used the term “low water mark;” he simply said they did not use “high water mark.” As Mr. Yankel testified, older deeds used general terms like “the Lake” or “the shore of Lake Erie.” While Audubon Ohio has not seen the old deeds produced by Mr. Jordan, we suspect that they use the same kind of general terms quoted by Mr. Yankel. Such deeds would be consistent with Audubon Ohio’s view of the public trust, and do not demonstrate an intention to convey rights below the HWM.

Mr. Jordan described the earliest deeds, i.e., those to the Connecticut Land Company as the first private owner of a portion of the lakeshore, as “quitclaim deeds.” A quitclaim deed is a deed in which the grantor identifies certain property and conveys whatever interest he has in it, without representing that he has any interest at all. Such a deed would again be consistent with Audubon Ohio’s view of the public trust. Like any other public authority, the Commonwealth of Connecticut would not have had authority to convey public trust lands for purposes inconsistent with the public trust. When, by quitclaim deed, it conveyed whatever it had the right to convey, such conveyance would not have included rights over public trust land that it had no authority to convey.

The proponents take a different view of Ohio law than we do. Thus, we have a dispute about the extent of the public trust and how it interacts with current deeds. Enacting H.B. 206 would not be a proper response to this dispute. Typically when a trustee is confronted with conflicting claims about trust property, the trustee turns to the courts for guidance. If the trustee acts without obtaining a legal ruling, it risks choosing the wrong side and thereby violating its obligations as trustee.

As the Committee is aware, in this instance there is already litigation pending in federal court in Cleveland in which the disputed interpretations of Ohio law can be resolved. The proponents of H.B. 206 have not presented any compelling arguments as to why the General Assembly should step into this dispute and choose sides before a proper legal interpretation has been rendered.

If the owners’ view of the public trust is ultimately vindicated in court, then there is no need for H.B. 206. On the other hand, if Audubon Ohio’s view is vindicated, then

H.B. 206 would amount to an unjustified surrender by the State of its public trust rights, and a violation of the State's obligations as trustee. The prudent course for the State, as trustee, is to have these issues resolved in court before acting.

### **Conclusion**

Senator Grendell positions H.B. 206 as a bill to protect private property rights. Without question, private property is central to our legal and economic system in the United States. Even the most ardent property rights advocate, however, will not contend that private property is totally immune from conflicting public rights. Were it otherwise, property owners could conduct any activities they wished on their lands. Only an anarchist would take such a position. The proponents are clearly not anarchists.

Lake Erie is a remarkable and special area. Because it is a resource like no other, special rules have always applied to property along the Lake, just as they have always applied to America's ocean coastlines. As the Ohio Supreme Court noted in *Squire*, littoral owners are charged with knowledge that special rules apply along the Lake.

H.B. 206, in its proposed new definition of the southerly shore and the natural shoreline, would abandon the public trust. Its proponents are thus asking this Committee, the House and the General Assembly to breach their duties as trustees by enacting the bill. Do not go along with this. Please respect the property rights of all of the beneficial owners of the Lake Erie shore. Do not pass H.B. 206.