

ANALYSIS OF SENATE BILL 581 (AS AMENDED IN SENATE)

SECTION 1. IC 14-8-2-289, AS AMENDED BY P.L.82-2005, 2 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE 3 JULY 1, 2019]:

Sec. 289. "Unit of local government", for purposes of IC 14-10-4, IC 14-12-1, and IC 14-22-10, means a:

- (1) county;
 - (2) city;
 - (3) town; or
 - 4) township;
- located in Indiana.

SECTION 2. IC 14-10-4 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2019]:

Chapter 4. Commission Authority Over Lake Michigan Shore Zones

Sec. 1. This chapter applies to:

- (1) a privately owned lot; or
 - (2) a privately owned tract of land described by metes and bounds;
- only if there is no other privately owned lot or tract of land described by metes and bounds located between the lot or tract and the Lake Michigan shore.

Sec. 2.

As used in this chapter, "Lake Michigan" refers to the waters of Lake Michigan that are within Indiana.

Sec. 3.

As used in this chapter, "Lake Michigan shore" means the land along the edge of Lake Michigan between:

- (1) the waters of Lake Michigan; and
- (2) the ordinary high water mark.

Sec. 4.

(a) As used in this chapter, "Lake Michigan shore zone" means the land between:

- (1) the ordinary high water mark of Lake Michigan; and
- (2) the lakeside property line of:
 - (A) a privately owned lot; or
 - (B) a privately owned tract of land described by metes and bounds; that adjoins the Lake Michigan shore.

Commented [O1]: The term "privately owned lot" is defined below to exclude beach front property owned by local governments. As a result, this Act would extend the new "zone" it creates below over existing parks and beach front land owned by Indiana municipalities.

Commented [O2]: •This new "zone" is at best confusing and unnecessary. At worst, it is a back-handed attempt to give away the State-owned shore to private property owners and usurp local government control of municipal park land and by-pass local beach protection and coastal hazard ordinances.

This "zone" is based on faulty legal assumptions or an attempt to impose state control over municipal park land:

•This "zone" cannot extend lakeward of the OHWM based on a "lot" or "metes and bounds" private property deed because the Indiana Supreme Court found as a matter of law that no private property deed can extend below the Lake Michigan OHWM in Indiana. The US Supreme Court has now confirmed that ruling. See **Gunderson v. State**.

•If the property line is landward of the OHWM, this language suggests there is either a "No Man's Land", State-owned land, or local government-owned land between the private property line and the OHWM. But the law does not permit a "No Man's Land" and if the State owns it, the State already has the right to regulate on it. The target of this appears to be local government-owned park land, beach access lots, and public frontage.

(b) The term includes any seawall constructed on the lakeside property line of a privately owned lot or tract of land described by metes and bounds.

Sec. 5. As used in this chapter, "lakeside property line" means the property line of:

- (1) a privately owned lot; or
- (2) a privately owned tract of land described by metes and bounds; on the side on which the lot or tract is nearest to the Lake Michigan shore.

Sec. 6. As used in this chapter, "ordinary high water mark" means:

- (1) the line on the shore of Lake Michigan that is five hundred eighty-one and five tenths (581.5) feet above sea level; or
- (2) the natural line on the bank of Lake Michigan that is established by the fluctuations of water and indicated by certain physical characteristics, including the following:
 - (A) A clear and natural line impressed on the bank or shore.
 - (B) Shelving.
 - (C) Changes in the soil's character.
 - (D) The absence of terrestrial vegetation.
 - (E) The presence of litter or debris deposited by a natural process.

Sec. 7. As used in this chapter, "privately owned lot" means a distinct parcel of land, including any improvements located on the land, that is owned by:

- (1) one (1) or more individuals;
- (2) a trust;
- (3) a corporation; or
- (4) another entity other than the government of the United States, the state of Indiana, or a unit of local government.

Sec. 8. As used in this chapter, "seawall" means a wall that is located on the lakeside property line of a privately owned lot or privately owned tract of land described by metes and bounds.

Sec. 9. The commission may adopt rules under IC 4-22-2 13 concerning the following:

- (1) The movement of sand across a Lake Michigan shore zone through natural forces or otherwise, and the return of the sand to the Lake Michigan shore.
- (2) The flow of water, including water from a source on a privately owned lot or privately owned tract of land described by metes and bounds, across a Lake Michigan shore zone.
- (3) Permitting and specifications for any maintenance, construction, or another similar activity in the Lake Michigan shore zone related to:
 - (A) beach grooming;
 - (B) seawalls;
 - (C) revetments;
 - (D) secondary erosion control; and
 - (E) retaining walls.
- (4) Other matters relating to the use of Lake Michigan shore zones.

Commented [O3]: This suggests a seawall constructed on a property line is considered to be located in the "zone", not on the private property. A private party cannot construct on property it does not own.

Commented [O4]: •The Indiana Supreme Court in *Gunderson* expressly held that this 581.5 ft elevation (known as the IGLD) is NOT the boundary between state and private property on the Lake Michigan shore in Indiana and is also not the OHWM prescribed by federal law as the boundary of the public trust.

• *Gunderson* recognized that the natural OHWM boundary of the Public Trust was established under federal law over a hundred years. The General Assembly cannot change federal law.

• **Background:** The 581.5 ft elevation comes from a 1985 average of the vertical height of the water (not its location on the shore) as measured at multiple locations throughout Lake Huron and Lake Michigan. It has nothing to do with the actual OHWM on the shore which reflects wave dynamics based on site-specific topography, littoral flow patterns, and weather. As found by the Indiana Supreme Court, the OHWM was and is the boundary of the Equal Footings public trust lands granted to Indiana at statehood.

Commented [O5]: •There is a well-established procedure for utilizing a combination of these physical characteristics to determine the location of the OHWM.

•Where the necessary combination of factors cannot be found on any lot due to natural or man-made conditions, the method provides that the delineator look for these physical indicators on nearby properties.

• Under the accepted methodology, only when the indicators cannot be found on nearby properties is it permissible to use another method to determine the location of the OHWM.

•The vegetation line is a practical "short-hand" for approximating the location of the OHWM which is readily observable to all persons on the beach and adjacent landowners.

Background: The physical characteristics method has been developed over many years and is used by the Corps of ... [1]

Commented [O6]: The effect of this definitional exclusion of local governments own lots from the definition of "privately owned lots" is to usurp local control of municipal parkland and beach frontage, including by-passing beach protection and shore hazard ordinances. See Section 1 above and Section 10 below.

Commented [O7]: •This Section is unnecessary. The Commission already has the authority to adopt regulations regarding these matters on state land below the OHWM and any other state land.

•The Commission must exercise that authority consistent with the public trust rights of the public.

Sec. 10. The rules adopted by the commission under this chapter supersede an ordinance of a unit of local government, including an ordinance adopted under IC 36-7-4, that is inconsistent with the rules adopted under this chapter.

Sec. 11. This chapter does not limit the use of the Lake Michigan shore zone by the owner of a privately owned lot or privately owned tract of land described by metes and bounds:

- (1) for ordinary recreational purposes; or
- (2) to gain access to Lake Michigan.

SECTION 3. IC 34-30-19.5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2019]:

Chapter 19.5. Immunity of Owner of Property Near Lake Michigan Public Trust Land

Sec. 1. As used in this chapter, "Lake Michigan public trust land" means land adjoining Lake Michigan to which the state of Indiana holds legal title in trust for the recreational use of the public.

Sec. 2. As used in this chapter, "owner" means a person that:

- (1) has a fee interest in;
- (2) is a tenant, lessee, or occupant of; or
- (3) is otherwise legally in control of; a property.

Sec. 3. As used in this chapter, "property" means a tract of land, including the buildings and improvements on the land.

Sec. 4. (a) Except as provided in subsection (d), a person who goes upon the property of another with or without permission for the purpose of:

- (1) going to or departing Lake Michigan public trust land; or
- (2) going to another destination upon leaving Lake Michigan public trust land; does not have assurance that the property is safe for the purpose.

(b) The owner of the property does not:

- (1) assume responsibility; or
- (2) incur liability;

for an injury to a person or property caused by an act or omission of another person using the property.

(c) This section does not affect the following:

- (1) Existing Indiana case law on the liability of property owners with respect to:
 - (A) business invitees in commercial establishments; or
 - (B) invited guests.
- (2) The attractive nuisance doctrine.

(d) Subsection (a) does not apply to personal injury, death, property damage, or other loss caused by the property owner's intentional misconduct.

Commented [O8]: •This provision would allow Commission regulations to usurp local governments' rights under the Indiana Zoning Code to adopt setbacks, design criteria, restoration requirements, run-off and flood control parameters, and other critical parameters for development on private land within the local governments' jurisdiction.
•This provision would also prevent local governments from adopting Lake Michigan shore line protection ordinances suited to the shoreline adjacent to their communities, as has been encouraged by INDR and other state, regional, and federal entities.

Commented [O9R8]:

Commented [O10]: •This provision would unconstitutionally create special rights, including the right to recreation, on public property to the limited class of persons who own private property and apparently denying those same rights to persons who don't own property.
•Littoral property owners already have "riparian rights" which do not include an exclusive right to recreation.

Commented [O11]: In a best case, this new section is simply unnecessary because premises trespass is already addressed under other provisions of the Indiana code.

In a worst case, this new section is a back-handed attempt to reduce the area of the shore on which the Public Trust applies to only land that is immediately adjacent to the water. This would be legally incorrect and lead to more litigation. The Public Trust extends up to the OHWM as a matter of federal law that cannot be changed by the Indiana General Assembly.

Commented [O12]: •As discussed above, this is not a complete or accurate definition of the public trust land.
•Public Trust land is all land lakeward of the OHWM.
•Creating a different definition is at best unnecessary and confusing and at worst a back-handed attempt to un-do the Indiana Supreme Court's decision in Gunderson.

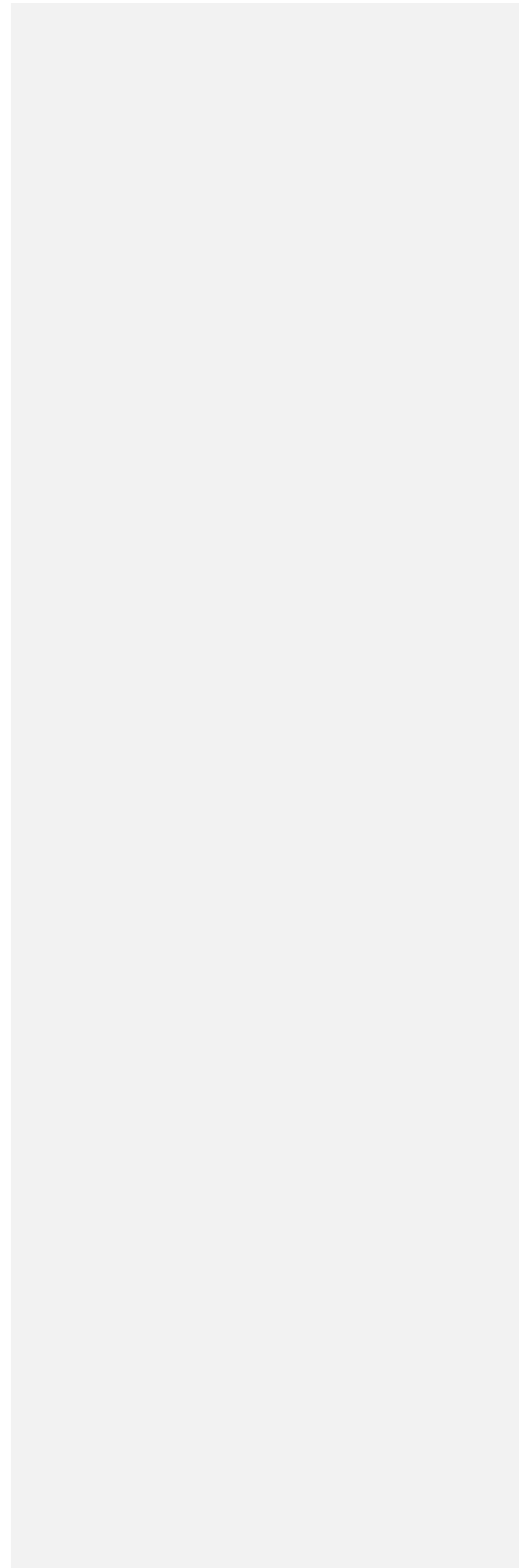
Commented [O13]: This is an unusually broad definition of ownership that may create confusion in the implementation and enforcement of premises trespass law on properties on the Lake Michigan beach.

Commented [O14]: •This provision would require the lakefront "owner" to prove that the trespasser had as a "purpose" going to the Lake Michigan public trust land.
•Trespassing is trespassing – no matter for what purpose.
•Eliminating this unnecessary limitation on existing premises trespass laws also would make the incomplete and inaccurate definition of "public trust lands" above unnecessary.

SECTION 4. [EFFECTIVE JULY 1, 2019]

(a) IC 34-30-19.5, as added by this act, applies to personal injury, death, property damage, or other loss that occurs after June 30, 2019.

(b) This SECTION expires July 1, 2020.



- There is a well-established procedure for utilizing a combination of these physical characteristics to determine the location of the OHWM.
- Where the necessary combination of factors cannot be found on any lot due to natural or man-made conditions, the method provides that the delineator look for these physical indicators on nearby properties.
- Under the accepted methodology, only when the indicators cannot be found on nearby properties is it permissible to use another method to determine the location of the OHWM.
- The vegetation line is a practical “short-hand” for approximating the location of the OHWM which is readily observable to all persons on the beach and adjacent landowners.

Background; The physical characteristics method has been developed over many years and is used by the Corps of Engineers, USEPA, and US Bureau of Land Management on Lake Michigan and by IDNR for all other Indiana lakes. No single factor is determinative. As a first step, this methodology distinguishes terrestrial plants found only in upland soils from aquatic plants that can survive in aquatic soils. Shelving and the other indicators are then used to confirm where the lake bed ends and uplands begin.
