



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

August 14, 2017

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VIA ELECTRONIC SUBMISSION

**RE: PUBLIC COMMENTS ON THE REVIEW OF NATIONAL MARINE SANCTUARIES AND MARINE NATIONAL MONUMENTS DESIGNATED OR EXPANDED SINCE APRIL 28, 2007, PURSUANT TO EXECUTIVE ORDER 13795**

We are writing to express support for the current boundaries of the Thunder Bay National Marine Sanctuary within Michigan’s boundaries in Lake Huron. The boundaries are appropriate for the cultural and historic resources the expansion is designed to protect. Any effort to alter the boundaries to facilitate mineral development will run afoul of both federal and state law. Thunder Bay is the only National Marine Sanctuary in the Great Lakes. The sanctuary was expanded from 448 to approximately 4,300 square miles in 2014. It now encompasses nearly 100 nationally significant shipwrecks.

The expanded sanctuary boundaries enjoy community support and were founded on an extensive public consultation process. The expansion effort took seven years. Meetings and comment opportunities were ample.

Executive Order 13795 makes it clear that energy production and mineral extraction is the purpose of this review: “The energy and minerals produced from lands and waters under Federal management are important to a vibrant economy and to our national security.” But the Thunder Bay expansion seems to have been inadvertently swept into the review mandated by the order, as it requires analysis of “opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf.” The OCS, of course, is not a feature of the Great Lakes.

Significantly, in addition to both state and federal statutory prohibitions on oil and gas drilling in and under the Great Lakes, Michigan is charged under common law with protecting the public trust in Great Lakes waters and submerged lands. Minerals extraction from Great Lakes

bottomlands, therefore, is not feasible. Our letter focuses on this legal protection for the largest freshwater ecosystem in the world.

## **I. LEGAL FRAMEWORK AND HISTORICAL BACKGROUND ON PUBLIC TRUST LAWS**

### **A. The Common Law Public Trust Doctrine in the Great Lakes**

Upon joining the Union in 1837, Michigan took title to all navigable waters and the lands beneath them in trust for the benefit of all citizens.<sup>1</sup> The public trust includes fish, aquatic resources, and habitat within the boundaries of the Great Lakes and their tributary navigable waters. The public trust protects preferred public trust uses of these waters and lands, including navigation, fishing (including tribal fishing), drinking water, boating, swimming, and fowling dependent on the integrity of these public trust lands and waters.<sup>2</sup> The public trust imposes an affirmative “solemn” and “perpetual” duty on the state, as trustee, to protect and prevent impairment of these public trust uses, lands, and waters.<sup>3</sup>

There are only two very narrow exceptions<sup>4</sup> within which the state may authorize a use or occupancy by conveyances, leases, or agreements for public or private use of these bottomlands and waters. The state must determine in due recorded form that (1) the purpose is primarily related to the protection and promotion of these public trust interests and uses; and (2) the proposed use or conduct will not likely result in an unacceptable risk of impairment or harm to these public trust waters, bottomlands and public trust uses, now or for future generations. If these standards are not established and determined by specific findings that the existing or proposed use does not fall within one of the two exceptions, the use or activity is not legally authorized.<sup>5</sup>

Moreover, it is important to understand that these public trust waters and bottomlands can never be alienated, surrendered, transferred or subordinated. The State reserves the inherent right to modify or revoke any conveyance or agreement for use of these public trust lands and waters to assure and obtain the continued authorization by the State that the use falls within the above-described narrow exceptions.<sup>6</sup> For example, in *Illinois Central Railroad v Illinois*,<sup>7</sup> the

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<sup>1</sup> *Illinois Central R.R. v Illinois*, 146 US 387, 436-37 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 399, 412-414 (1960).

<sup>2</sup> Sax, Joseph L., *The Public Trust Doctrine in Natural Resources Law*, 68 Mich L. Rev. 471 (1970); Olson, James M., *Universal Adoption of Public Trust Doctrine*, 15 VT. ENV. LAW J. 135 (2014).

<sup>3</sup> *Collins v Gerhardt*, 237 Mich 38; 211 NW 115, 118 (1926).

<sup>4</sup> *Obrecht*, 361 Mich at 412-414; Great Lakes Submerged Lands Act, §§ 32502;R 322.1001(m).

<sup>5</sup> *Collins v Gerhardt*, 237 Mich at 49; *Superior Public Rights v DNR*, 80 Mich App 72, 85-86 (1977) (The court found the Illinois Central and GLSLA tests for the two narrow exceptions that allow a permit or agreement to occupy public trust bottomlands to be “nearly identical,” and that there was “no inconsistency” between the GLSLA and the narrow exceptions in Illinois Central).

<sup>6</sup> *Obrecht* 361 Mich at 412-413; *Illinois Central*, 146 US at 436-437, 453-454.

<sup>7</sup> *Illinois Central*, 146 US at 453-454. (The State cannot abdicate its duty under public trust law; it can only authorize permits or grants for trust uses if within the two narrow exceptions (1) improvement of navigation or a public trust use or (2) no impairment or substantial effect on the public trust bottomlands and waters); *Superior Public Rights v DNR*, 80 Mich App at 85-86 (An unauthorized occupation by utility cooling discharge pipes and an unloading dock fell within one of the GLSLA and Illinois Central exceptions). Plaintiffs claimed the authorization

Illinois legislature granted occupancy of bottomlands and waters of Lake Michigan to the railroad company for private purposes. A subsequent legislature changed its mind and repealed the grant. The company appealed to the courts, and ultimately the U.S. Supreme Court nullified the grant of public trust bottomlands and waters to the railroad because it violated the public trust. The U.S. Supreme Court ruled that:

“The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property... [T]here always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.” \* \* \* “The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it... There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.”<sup>8</sup>

Executive Order 13795 directly violates Michigan’s “high, solemn and perpetual duty”<sup>9</sup> as trustee to protect the paramount public trust in these waters from endangerment and unacceptable risks of potential oil and gas drilling in Great Lakes bottomlands.

## **B. The Great Lakes Submerged Lands Act and Rules**

The Michigan Legislature passed the Great Lakes Submerged Lands Act (“GLSLA”) in 1955. The GLSLA authorized the State under narrow circumstances to convey leases, deeds, occupancy agreements, or issue permits for use of patented lands on proper consistent with standards under the public trust doctrine. The purpose of the GLSLA at the time was to require authorization for both past unauthorized and future uses of unpatented, patented, and previously filled bottomlands.<sup>10</sup> Under public trust law and the GLSLA, there are only two narrow exceptions for occupancy and use of public trust lands and waters: (1) the use must be primarily for a public purpose that benefits the public trust; (2) the proposed use must not impair or substantially affect the public trust in the bottomlands and waters of the Great

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fell outside the two exceptions for permits or conveyances allowed by Illinois Central. The Court of Appeals held that the authorizations for the dock and discharge pipes fell within the exceptions of the GLSLA, and that the GLSA standards were consistent with the narrowly defined exceptions *Illinois Central*).

<sup>8</sup> 146 US at 459-460. The Michigan Supreme Court adopted the rulings of *Illinois Central* in *Obrecht*, at 412-414; *Illinois Central*, 146 US at 459-460; *National Audubon v Superior Court for Alpine County*, 658 P2d 709 (Cal. 1983); *Kootenai Env. Alliance v Panhandle Yacht Club*, 671 P2d 1085, 1094 (Id 1993).

<sup>9</sup> *Collins v Gerhardt*, 237 Mich 38; 211 NW 115, 118 (1926).

<sup>10</sup> MCL 324.32502, MCL 324.32503.

Lakes.<sup>11</sup>

Executive Order 13795 also directly violates Michigan's statutory protection of public trust waters and bottomlands codified in the GLSLA against unacceptable uses, such as oil and gas drilling.

## **II. DRILLING IN THE GREAT LAKES VIOLATES MICHIGAN LAW**

### **Natural Resources and Environmental Protection Act (NREPA)**

Section 32503 (2) of NREPA provides that the State "shall not enter into a lease or deed that allows drilling operations beneath unpatented lands for the exploration or production of oil or gas." Section 32502 of NREPA provides that "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. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state."

Executive Order 13795 also directly violates Michigan's recently statutory prohibition against any lease or deed authorizing drilling oil or gas operations beneath the unpatented lands of the Great Lakes.

## **III. DRILLING IN THE GREAT LAKES VIOLATES FEDERAL LAW**

### **Energy Policy Act of 2005**

A permanent ban on Great Lakes oil drilling was signed by President Bush (with Congress placing temporary bans beginning in 2001). Section 386 of the Act, 42 USC 15941, provides that "No Federal or State permit or lease shall be issued for new oil and gas slant, directional, or offshore drilling in or under one or more of the Great Lakes."

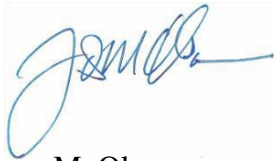
Executive Order 13795 also directly violates this express federal prohibition against federal or state permits authorizing any type of offshore oil and gas drilling in the Great Lakes.

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<sup>11</sup> *Illinois Central*, 146 U.S. at 456-460; *Obrecht*, 361 Mich. at 412-414; *Superior Public Rights*, 80 Mich App 72 at 85-86.

In sum, the state and federal authorities described above explicitly prevent mineral extraction in the expansion area of Thunder Bay National Marine Sanctuary. Therefore, the rationale of Executive Order 13795 does not apply to Thunder Bay, and no change in its boundaries is warranted. Thank you for the opportunity to comment.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "James M. Olson".

James M. Olson  
President

A handwritten signature in blue ink, appearing to read "Elizabeth R. Kirkwood".

Elizabeth R. Kirkwood  
Executive Director