



MI Water Trail Summit: Legal Considerations

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About MI Sea Grant

Mission: Enhance sustainability of Michigan's Great Lakes coasts

Activities: Research, Education and Outreach

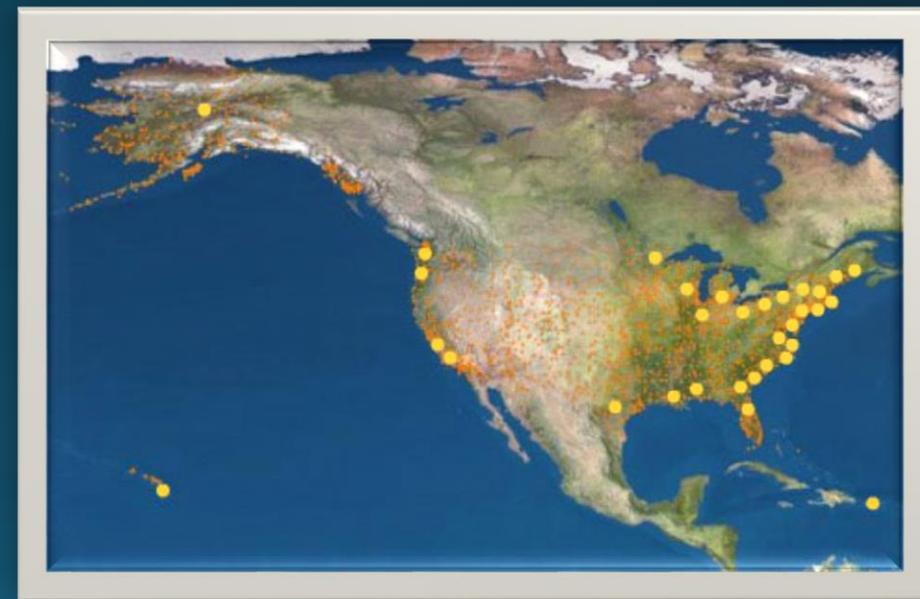
Focus Areas:

Sustainable Coastal Communities & Economies

Healthy Coastal Ecosystems

Safe & Sustainable Seafood

Coastal Hazard Resilience



Today's Topics

- Sea Grant Law Center White Paper 2014
- Ordinary High Water Mark
- Sea Grant Law Center White Paper 2016



Prefacing Remarks:

- I am not a lawyer
- This presentation is based on advisory research only and not meant to be construed as legal advice and does not constitute legal representation for Michigan Sea Grant or our constituents.
- The statements, findings, conclusions and recommendations are the authors and do not necessarily reflect the views of Michigan Sea Grant, NOAA or the U.S. Dept. of Commerce.



Sea Grant Law Center White Paper 2014

Questions:

1. Does allowing water trail users on public or private property expose local governments or private landowners to liability?
2. If local governments or landowners improve a natural sandy beach launch site to add floating docks, signage, lockers or other amenities, what effect will that have on liability?

*Acknowledgement: Terra Bowling, National Sea Grant Law Center at the University of Mississippi

Sea Grant Law Center White Paper 2014

Opinion:

“It appears that local governments and private landowners listed on the water trail would be protected from liability in most instances.”

- MI Recreational Use Act (RUA) – Governments and Landowners
- MI Governmental Tort Liability Act (GTLA) – Governments

There are a few exceptions...MAYBE

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RUA: Question 1 Liability for Access – Exceptions

- Landowner is negligent (described as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm, in other words is willful or malicious)
 1. That the defendant owed a duty to the plaintiff,
 2. The defendant breached that duty; and
 3. The breach proximately caused injury to the plaintiff
- Landowner charges “valuable consideration” (within the meaning of RUA...must be in the form of specific fee for use of a particular recreational question, such as a boat launch fee)

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Opinion:

“Essentially, liability under RUA would only occur if *conduct is willful or malicious* or when valuable consideration is paid in return for use of recreational facilities. Therefore, when operating and maintaining sites listed on the water trail, landowners should strive to act with reasonable care.”

(care which a reasonable person or entity in the same position would recognize as necessary to prevent the act from creating a reasonable risk of harm to another)

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GTLA: Question 1 Liability for Access – Exceptions

- Generally only looked at if governments are not immune under RUA, and
- If the government has given its consent, and
- If the government is engaged in an exercise or discharge outside of a government function (defined as an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law)
- Government performs a proprietary function (within the meaning of GTLA...acts conducted *primarily for the purpose of producing a profit* and are not normally supported by taxes or fees, such as renting kayaks or other equipment for a profit)

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RUA: Question 2 Liability for Improvements – Exceptions

- Injuries are caused by gross negligence or willful and wanton misconduct of the owner, tenant or lessee of the land

Opinion:

“RUA does not provide for increased liability with the addition of improvements.”; “Landowners should act reasonably by maintaining any signs or improved facilities that they do provide.”; “Landowners or governments should consult with local private counsel regarding how their activities may affect the applicability of the RUA

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GTLA: Question 2 Liability for Improvements – Exceptions

- Government facilities operated for profit

Opinion:

“Facilities that operate for profit, such as a boat ramp that charges for use, may not be immune from liability under the proprietary function exception.”

Ordinary High Water Mark

Issue: Does the public have the right to walk along the shores of the Great Lakes where a private landowner holds title to or beyond the water's edge?

2005 *Glass v Goeckel* - MI Supreme Court said "yes" from the lake bottom to the ordinary high water mark (that point where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.") The line will be relatively constant with time and should not change appreciably as lake levels change.

Ordinary High Water Mark

Relevance to Water Trails:

???

Private Property:

“Paddlers should always respect private land owners along the water trail. It should be assumed that all property is private unless otherwise noted. Please do not stop and come onto private property unless it’s for an emergency.” michiganwatertrails.org

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Question

- Could water trail users be held liable for trespass onto private property under an emergency circumstance?

Opinion:

“it would be safe to assume that trespass, even for emergency purposes, could result in criminal, or more likely, recreational trespass. In addition, the water trail user would also incur liability for any damage that is done to the property under common law trespass.”

*Acknowledgement: Terra Bowling, National Sea Grant Law Center at the University of Mississippi

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WHY?

1) Public Trust Rights

- Navigable waters up to the ordinary high water mark are held by the state “for the benefit of the public in the enjoyment of the ancient rights of navigation, fowling, and fishing” and to protect public resources.

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2) Trespass

- Civil – Landowner may bring a civil trespass action against a person who enters onto another's land without consent. Trespasser would also be liable for nominal damages.
- Criminal – Charge may be brought when a) entering after being forbidden to do so; b) remains on property after being told to leave; or c) enters fenced or posted farm property without owner consent.
- Recreational – created by legislature in the Natural Resources and Protection Act

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Recreational (continued) – May not enter property for recreational activities w/o consent when:

- Property is fenced or enclosed;
- There is a sign that conspicuously prohibits trespassing; OR
- A person has previously been forbidden from the property.

EXCEPT...

- Retrieving a hunting dog;
- Fishermen when avoiding a natural or artificial hazard or obstruction in the water.

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- 3) Emergency Circumstances (in some jurisdictions such as MA, NJ, DC)
- Necessary to protect the public from danger or from an emergency situation (i.e. prevent a fire or to help in a natural disaster). Must be reasonable under the circumstances.
 - Private necessity to protect the person or their property from danger in a temporary, emergency situation (i.e. to escape a wild animal).



Contacts & Questions

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