

Public Rights in Milwaukee's Fresh Coast: Is the Proposed Dredged Material Management Facility an Opportunity for the Community?

Highlights

- Stakeholders need to clarify the purpose of the newly-created land to fully assess compliance with the public trust doctrine.
- Designers of the lakebed landfill should disclose how it will adapt to climate impacts and protect water quality.
- Stakeholders should survey the impacted community to inform future land and water uses.

Introduction

The Milwaukee Estuary Area of Concern (AOC) spans three rivers and parts of the inner and outer harbor. This area was federally-designated an AOC due to legacy contaminated sediment found in the waterways — pollution for which no one party is responsible. Currently, the Wisconsin Department of Natural Resources (WDNR), with input from the Port of Milwaukee, Milwaukee Metropolitan Sewerage District (MMSD), and community members, is deciding whether to deposit the contaminated sediment dredged from cleaning up the AOC to a new lakebed landfill (called a dredged material management facility or DMMF) adjacent to the Port. This project is an exciting opportunity to restore Milwaukee's waterways, which creates new possibilities for the public's use and enjoyment. In order to fully catalyze this opportunity, disadvantaged communities in Milwaukee should inform the restoration and final use of the newly-created land, consistent with Wisconsin's public trust doctrine.

Legal Context

Much of Milwaukee's coastline is built on filled lakebed that the legislature granted to the city or county. To develop these newly-created lands, the local government needs to follow the purposes in the grants and the public trust doctrine. The granted lakebed where the DMMF is proposed is stipulated for harbor purposes, but the grant also allows for "any other purpose" under the public trust doctrine.

For example, WDNR guidance explains that while the state has considerable flexibility in approving the uses for lakebed grants, its discretion is limited to the uses that are consistent with public rights under the public trust doctrine.

Public trust doctrine: Grounded in Wisconsin's Constitution, this law makes the State the trustee of Wisconsin's waters and protects Wisconsinites' right to fish and recreate, enjoy scenic beauty, navigate, and conduct water-based commerce, on clean water.

Lakebed fill: Newly-created land built on lakebed.

Legislative lakebed grant: A grant from the state legislature to develop on lakebed in navigable water.

Without clear language about how the newly-created land will be used, the WDNR cannot ensure that public rights to the iconic Lake Michigan waterfront will be protected.

Chicago's Cautionary Tale: Consider a similar project near the south side of Chicago where the lakebed fill was ultimately supposed to be a new community park. However, the lack of a reliable timeline is now causing community turmoil because the state continues to grant permits for expansion — effectively delaying the promised end public use. This situation is a prime example of why disadvantaged communities should inform the restoration, timeline, and final use of newly-created land on lakebed.

Legal Context Continued

The Wisconsin Constitution imposes a duty on the state to act as trustee in holding the state's water in trust for the public. Then, case law requires that projects on lakebed in navigable water, given by grant, comply with the stipulated uses and the public trust doctrine. In Wisconsin, this means that the project should meet the following six-factors. . .

- 1. A public body should control the use of the area,**
- 2. The area should be used for public purposes and open to the public,**
- 3. The filled area should be small in comparison to the rest of the lake,**
- 4. Current public uses on the lake should not be destroyed or greatly impaired,**
- 5. The impairment of public rights to use the lake for recreation should be negligible compared to the greater convenience afforded to the public from the grant, and**
- 6. The use of the lakebed fill should not be solely for a local purpose.**

The proposed DMMF would be placed on the south side of Milwaukee, which hosts a diverse community. Currently, stakeholders have not specified any public trust uses after installation of the DMMF. A fallout like the one in Chicago can be avoided by hewing closely to the six-factors. In addition, WDNR should share with the public an assessment of the design life of the structure and whether it can adapt to climate extremes under a variety of scenarios. This will help demonstrate long-term public rights protections.

Policy Recommendations

- The WDNR should support a process that engages the community to weigh in on final uses of the newly-created land.
- Stakeholders should clearly identify the final disposition of the land prior to approval, consistent with the six-factor test, so the WDNR can accurately assess the project's compliance with the City's lakebed grant and the public trust doctrine.
- WDNR should require public rights protections when it issues a 401 Water Quality Certification.
- Stakeholders should establish a timeline for completion of the project to demonstrate that the public's rights won't be impaired over time.
- Considering climate impacts, designers of the DMMF should explore future-looking designs to increase the longevity of the DMMFs life span and prevent adverse water quality impacts.

By following these recommendations, the community can use the DMMF project as an empowering opportunity to actively participate in the development of this project, while increasing access to public green space necessary to exercise public rights to enjoy the state's waters.

Implications

- The Center for Water policy recommends the above actions to ensure consistency with the public trust doctrine.
- These recommendations closely align with prior WDNR guidance about development on lakebed grants.
- Stakeholders have a generational opportunity to embrace community input by actively involving the WDNR's Community Advisory Committee (CAC) and surveying what communities want with these restoration efforts.
- These recommendations help preserve public rights in and increase access to the Lake Michigan waterfront, especially for disadvantaged communities that may lack options in their neighborhoods.

Sources:

- WIS. CONST. art. IX, § 1.
- Act of June 12, 1909, ch. 358, 1909 Wis. Sess. Laws 402–403 (ceding original grant of submerged land for Port operations to the city of Milwaukee); Act of June 22, 1923, ch. 285, 1923 Wis. Sess. Laws 478–479 (stating that the lakebed should be used “to construct dock and wharf facilities on any of said land and to use any or all of said land for any proper purpose.”); Act of June 30, 1931, ch. 381, 1931 Wis. Sess. Laws 598–599 (amending chapter 285 and clarifying public purposes).
- *City of Madison v. State*, 83 N.W.2d 674 (Wis. 1957).
- *State v. Pub. Serv. Comm’n*, 82 N.W.2d 71 (Wis. 1957).
- Great Lakes Water Quality Agreement of 1972, U.S.-Can., Apr. 15, 1972, 23 U.S.T. 301.
- Letter from to Donald Hanaway, Att’y Gen., to Carroll Besadny, Wis. Dep’t of Nat. Res. Secretary (Aug. 11, 1987) (on file with the Center for Water Policy).
- Memorandum from Robert Roden, Director of Bureau of Env’t Analysis, Wis. Dep’t of Nat. Res., to District Directors re Lakebed/Riverbed Commercial and Public Development, (Jan. 26, 1989).
- Letter from Grant Langley, Milwaukee City Att’y, to Alderman Tony Zielinski, City of Milwaukee (Jan. 26, 2011).
- Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustee’s World*, 39 ECOLOGY L. QUARTERLY 123 (2012).
- *Rock-Koshkonong Lake Dist. v. State Dep’t of Nat. Res.*, 833 N.W.2d 800 (Wis. 2013)
- *Great Lakes Areas of Concern*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/great-lakes-aocs> (describing an area of concern as “[a] location that has experienced environmental degradation. EPA and other federal and state agencies are working to restore the 26 remaining U.S. AOCs in the Great Lakes basin.”) (last updated Sept. 14, 2021).
- Sarah Martinez & Melissa K. Scanlan, [*Great Lakes Restoration and the Public Trust Doctrine: Milwaukee’s Restoration Obstacles and Opportunities*](#), 12 Sea Grant Law & Policy Journal 1 (2022)

Center for Water Policy



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