

Assessment Guidelines and considered the issue of whether this governmental action equates to a constitutional taking of property. See Const 1963, art 10, § 2.

PARTIES

Dr. Drozdowicz appeared *in propria persona* and testified on his own behalf. Through his testimony, Dr. Drozdowicz entered Exhibits A and B without objection.

The WRD, which administers Part 325, offered the testimony of Kathryn Kirkpatrick, an Environmental Quality Analyst for the WRD and the testimony of Christopher Antieau, the Great Lakes Bottom Land Specialist for WRD. Through the testimony of Ms. Kirkpatrick, WRD entered Exhibits R-1, R-2, and R-3 without objection.

FINDINGS OF FACT

On February 9, 2021, Dr. Martin Drozdowicz submitted an application seeking to build a new seawall in front of his property on Lake Erie in Monroe, Michigan. The application was assigned number HP6-C9EN-QEKAJ. In Dr. Drozdowicz's application, he proposed to construct a new seawall 14 feet in front of his existing seawall to be flush with the seawall on the neighboring property immediately to the north of his property. The new seawall would be constructed of steel and be 96 linear feet long along the lakefront. It would also have a return of 14 linear feet, at a 90-degree angle from side facing the lake, to connect back to the existing seawall on the neighboring property immediately to the south. Dr. Drozdowicz's proposal would require removing six cubic yards of existing concrete riprap in front of his existing seawall, permanently filling 1344 square feet of Lake Erie behind the new seawall with 137 cubic yards of backfill, and installing approximately 8 cubic yards of natural rock toe stone on the waterward side of the new seawall. (Tr., p 11; Exhibit R-2.)

Because the seawall on the property immediately to the north of Dr. Drozdowicz's property extends 14 feet farther into Lake Erie than does Dr. Drozdowicz's seawall, the shoreline is "irregular." Building a new seawall 14 feet in front of Dr. Drozdowicz's existing seawall would not eliminate the irregularity, however, because the seawall on the property immediately to the south of Dr. Drozdowicz's property is flush with his current seawall. A new irregularity would be created at the southern end of Dr. Drozdowicz's seawall where it would turn at a 90-degree angle to return and reconnect with the seawall on parcel to the south. Thus, the effect of the project would be to transfer the shoreline irregularity one parcel to the south. (Tr., pp 47-49; Exhibit R-2, pp 56-57.)

The primary purpose of Dr. Drozdowicz's proposal is to reduce flooding on his property. Additionally, for aesthetic reasons, Dr. Drozdowicz seeks to align his seawall with the seawall on the north adjacent property to remove the current irregularity in the

shoreline. WRD reviewed the application under Part 325 of the NREPA because it involved filling the bottomlands of Lake Erie and placing a structure on the bottomlands of Lake Erie. (Tr., p 11; Exhibit R-2, pp 15, 56-57).

Kathryn Kirkpatrick, an Environmental Quality Analyst for WRD, completed a site inspection and met with Dr. Drozdowicz on April 12, 2021. During her site visit, Ms. Kirkpatrick informed Dr. Drozdowicz that his proposal to place a new seawall 14 feet in front of his existing seawall appeared to be an unnecessary occupation of Lake Erie. She also noted, however, that the file was still in the application period and that WRD had not yet reached a final decision. During the inspection, Ms. Kirkpatrick observed that the existing seawall was still functioning and informed Dr. Drozdowicz that placing a new seawall 12 inches in front of the existing seawall (as opposed to 14 feet) would be considered a "Minor Project" that would be allowed. (Tr., p12).

WRD issued public notice of Dr. Drozdowicz's application on May 12, 2021. The 20-day public comment period ended on June 1, 2021. No comments from the public were received. (Tr., p 13.) Chris Antieau of EGLE and Sara Thomas of the Department of Natural Resources ("DNR") submitted comments. Ms. Thomas's comment addressed the possible impact on the fishery (Exhibit R-2, pp 19-20).

Mr. Antieau's comment addressed the need for a conveyance of the bottomlands. Mr. Antieau opined that, "[i]t appears this property is located within Private Claim 442." He explained that many private claims extend into Great Lakes waters and that, "if the [private claim] covers the area of the fill, a conveyance would not be required." He continued that the conveyance issue could be resolved at a later date if WRD ultimately decided to issue the permit. (Exhibit R-2, pp 17-20).

On May 18, 2021, through an email sent by Ms. Kirkpatrick to Dr. Drozdowicz, WRD proposed a compromise with Dr. Drozdowicz that would allow him to build a "diagonal" seawall connecting the seawall on the property to the north (which was 14 feet in front of his existing seawall) to the seawall on the property to the south (which was flush with his existing seawall), in a straight line. WRD's alternative proposal would eliminate the existing shoreline irregularity without creating a new one. Ms. Kirkpatrick additionally clarified that no conveyance would be needed if Dr. Drozdowicz agreed to the compromise proposal, but that the original proposal could possibly require a conveyance for deed. On May 22, 2021, Dr. Drozdowicz rejected the alternative by return email. (Tr., pp 13-14, 48-49; Exhibit R-2, pp 6, 19-20, 21-24). WRD also advised Dr. Drozdowicz that other feasible and prudent alternatives exist, including (1) building a new seawall 12 inches in front of his existing seawall or (2) installing flood wings to his existing seawall. (Exhibit R-2, p 2).

WRD denied Dr. Drozdowicz's application on June 8, 2021, by an application denial letter. WRD determined that Dr. Drozdowicz's proposal was an unacceptable

occupation of Lake Erie and that feasible and prudent alternatives exist. (Tr., pp 14-18; Exhibit R-2, pp 1-3).

PART 325 – GREAT LAKES SUBMERGED LANDS

Statutory Requirements

I. Jurisdiction

Section 32512 of NREPA requires the issuance of a permit before fill may be placed on Great Lakes bottomlands. MCL 324.32512(1)(c). The Administrative Rules promulgated under Part 325 also provide that “a riparian owner shall obtain a permit from the department before ... placing spoil or other materials on bottomlands....” Mich Admin Code, R 322.1008. The Rules define “bottomland” as “lands in the Great Lakes, and bays and harbors thereof, lying below and lakeward of the ordinary high-water mark.” Mich Admin Code, R 322.1001(1)(e). The Rules also define the “ordinary high water mark” (OHWM) as “the elevations defined in the act.” Mich Admin Code, R 322.1001(1)(j). For Lake Erie, the NREPA provides that the OHWM is 571.6 feet, International Great Lakes datum of 1955, see MCL 324.32502, which equates to 572.2 feet international Great Lakes datum of 1985. In his Application, Dr. Drozdowicz seeks to build a seawall and place fill below the OHWM of Lake Michigan. (Exhibit R-2, pp 38-72). Based on this evidence, the WRD has jurisdiction and the proposed activity will be reviewed under the Part 325 permitting standards.

II. Section 32502

The issuance of a permit under Part 325 is governed by § 32502, which provides, in pertinent part:

This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, ... and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired....

MCL 324.32502. Thus, there are two prerequisites for the issuance of a permit under § 32502: (1) the private or public use must not substantially affect the public use of the lands and waters for hunting, fishing, swimming, pleasure boating, and navigation; and (2) the private or public use must not substantially impair the public trust. A review of the evidence in this contested case, with respect to the strictures of § 32502, will be addressed *infra*.

A. Public and Private Use

Dr. Drozdowicz's application indicates that the construction of the seawall and the placement of 137 cubic yards of fill upon the Lake Erie bottomlands is for a private use (Exhibit R-2, p 68). The area to be filled will be for Dr. Drozdowicz's private use. Therefore, I find, as a matter of Fact, that the proposed construction of a seawall and placement of fill upon Lake Erie bottomlands is for a private use.

The first inquiry thus turns to whether the placement of fill upon bottomlands for a private use will substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation. MCL 324.32502. Ms. Kirkpatrick testified that the proposal would permanently remove 1300 square feet of Lake Erie from availability for public uses including hunting, fishing, swimming, pleasure boating, and navigation. (Tr. pp 16, 20-21, 42). Given the relatively small size of the area to be filled in front of Dr. Drozdowicz's house, an area that is now almost entirely filled with concrete riprap, the impact of the proposal would not have a "substantial" impact on hunting, fishing, swimming, pleasure boating, and navigation on Lake Erie. Therefore, I find, as a Matter of Fact, that the proposed private use of the Lake Erie bottomlands will not substantially affect the public's use of those lands and waters for swimming, pleasure boating, and navigation.

B. Public Trust

Under the common law, the public trust ensures the public's right to navigate, fish, and fowl on the waters of the state. See *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926). The public trust doctrine applies only to navigable waters. *Bott v Natural Resources Comm'n*, 415 Mich 45, 71 (1982). With respect to Great Lakes bottomlands, the Supreme Court has established that occupation of bottomlands may be allowed if it does not substantially impair the public's interest in the lands and waters remaining. *Obrecht v National Gypsum Co*, 361 Mich 399, 413 (1960). See also *Superior Public Rights, Inc v Department of Natural Resources*, 80 Mich App 72, 84 (1977). As noted *supra*, the proposed bottomland fill will not have a substantial impact upon hunting, fishing, swimming, pleasure boating, or navigation. Therefore, I find, as a Matter of Fact, that the proposed private use of the Lake Erie bottomlands will not substantially affect the public trust.

III. Administrative Rule 15

In reviewing an application for a permit for use of Great Lakes bottomlands, the WRD must also ensure that the activity complies with Rule 15 of the Administrative Rules promulgated under Part 325. Rule 15 provides:

In each application for a permit, lease, deed, or agreement for bottomland, existing and potential adverse environmental effects shall be determined. Approval shall not be granted unless the department has determined both of the following:

- (a) That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.
- (b) That there is no feasible and prudent alternative to the applicant's proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare.

Mich Admin Code, R 322.1015. The facts related to each of the requisite elements of Rule 15 will be reviewed *infra*.

a. Environmental Effects

With respect to adverse effects to the environment, Ms. Kirkpatrick testified credibly that vertical seawalls are “perpetually damaging to lake ecosystems” because they “reflect and intensify wave energy causing scouring of the bottomland and re-suspension of sediments in the near shore zone of the lake which can negatively impact fish spawning and degrades habitat and water quality.” She further testified that seawalls “prevent movement of wildlife and aquatic organisms from nearshore aquatic habitat to land.” (Tr. p 16). The proposal calls for new fill from the shoreline out to eighteen feet (including the new rip rap). Accordingly, this would have a lasting impact on the nearshore habitat and bottomlands of Lake Erie. Ms. Kirkpatrick testified that WRD relied on the comment submitted by Ms. Thomas, of the Fisheries Division of the DNR that “[n]earshore habitats sustain the magnitude and diversity of Lake Erie’s food web, which ultimately sustains the lake’s sport fishery.” According to Ms. Thomas’s letter to WRD, filling 18 feet of bottomlands in front of Dr. Drozdowicz’s property would permanently interfere with an area of the lake where plankton and invertebrates that sustain fish are produced, where forage fish such as minnows grow and try to evade predators, and where many fish spawn and spend their entire lives. Additionally, the effect of his proposal would be to transfer the existing shoreline “irregularity” in front of his property to the parcel immediately to the south of his property, thus placing his neighbor in the same position that he now occupies. Consequently, allowing this project could have a “domino effect” in the area, resulting in cumulative losses of habitat. (Exhibit R-2, p 7; Tr., p 27). Based on the entirety of the record, I find, as a Matter of Fact, that the proposed construction of a new vertical seawall and the placement of fill in the project area would cause significant adverse effects on the environment.

b. Public Trust

The probable effects on the public trust were addressed under the § 32502 analysis *supra*, wherein it was determined that the proposed project will not substantially affect the public trust. I incorporate such findings into this criterion under Rule 15 analysis.

c. Riparian Rights

Ms. Kirkpatrick testified that WRD did not find any adverse impacts to riparian rights as defined under Part 325. Therefore, I find, as a Matter of Fact, that there are no adverse effects to the riparian interests of adjacent owners.

d. Feasible and Prudent Alternative

While construing Part 303 of NREPA, the Court of Appeals held that a feasible alternative is one that is “capable of being put into effect or accomplished,” while a prudent alternative is one “exercising sound judgment.” See *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 466 (1996).

WRD proposed, as a feasible and prudent alternative to Dr. Drozdowicz’s proposal, that rather than build a new seawall parallel to the front of his property (i.e., aligned with the seawall on the property to the north), he could construct his seawall on a diagonal line, connecting both the seawalls to the north and south of his property without the need for a 14-foot return on a 90-degree angle. Dr. Drozdowicz rejected WRD’s alternative proposal for two reasons: aesthetics and functionality. He testified that all other properties in Bolle’s Harbor, the neighborhood where Dr. Drozdowicz’s property is located, have seawalls that are in a “straight alignment” in front of their property. Because the cost of the project would be over \$50,000, Dr. Drozdowicz wishes to build a new seawall that is aesthetically consistent with other properties in his neighborhood. He also testified that a diagonal seawall would “amplify” wave action toward the property of his neighbor to the south. (Tr., p 32, 50).

With respect to the argument about “amplification” of the waves, Dr. Drozdowicz offered nothing but his own conjecture. Mr. Antieau, in contrast, testified credibly that connecting the two adjoining seawalls without creating any new corners would “assuage concerns of shoreline connectivity.” (Tr., p 49).

With respect to Dr. Drozdowicz’s aesthetic concerns, WRD’s proposal for a diagonal seawall connecting to each of Dr. Drozdowicz’s neighbors would avoid creating the kind of shoreline irregularity that now exists between his property and his neighbor to the north. Dr. Drozdowicz’s proposal would transfer the irregularity one parcel to the south. There is no dispute that it would be feasible to build a seawall in front of Dr. Drozdowicz’s property that directly connects to the seawalls in front of both adjoining properties. Moreover, a “diagonal” seawall connected to the two adjoining seawalls

would be prudent (meaning an exercise of sound judgment) because it would eliminate the existing shoreline irregularity without creating a new “corner” through the construction of a seawall farther out into Lake Erie than the existing seawall of the adjoining parcel to the south. Allowing the construction of this kind of shoreline irregularity could lead to a “domino effect” of similar seawall extensions along the shoreline. Therefore, I find, as a Matter of Fact, that a feasible and prudent alternative to Dr. Drozdowicz’s proposal exists.

CONCLUSIONS OF LAW


Based on the Findings of Fact, I conclude, as a Matter of Law:

1. Dr. Drozdowicz is the proper applicant for a permit, and the application for a permit was properly processed.
2. The project proposed in the Application is regulated under Part 325, because the activity is to occur lakeward of the ordinary high water mark on the bottomlands of Lake Erie. MCL 324.32512(1)(c); MCL 324.32502; Mich Admin Code, R 322.1001(1)(e); Mich Admin Code, R 322.1001(1)(j); Mich Admin Code, R 322.1008.
3. The proposed private use of the Lake Erie bottomlands will not substantially affect the public’s use of those lands and waters for hunting, fishing, swimming, pleasure boating, and navigation. MCL 324.32502.
4. Lake Erie bottomlands are impressed with the public trust. MCL 324.32502; *Bott v Natural Resources Comm’n*, 415 Mich 45, 71 (1982).
5. The proposed private use of the Lake Erie bottomlands will not substantially affect the public trust. *Obrecht v National Gypsum Co*, 361 Mich 399, 413 (1960); Mich Admin Code, R 322.1015.
6. The proposed placement of fill in the project area will cause significant adverse effects on the environment. Mich Admin Code, R 322.1015.
7. There are no adverse effects from the proposed project on the riparian interests of adjacent owners. Mich Admin Code, R 322.1015.
8. A feasible and prudent alternative to the proposed placement of fill on Great Lakes bottomlands exists. Mich Admin Code, R 322.1015.

FINAL DECISION AND ORDER

Based on the Findings of Fact and Conclusions of Law, it is **DETERMINED** that the application for a permit submitted by Dr. Drozdowicz is **DENIED** under the permitting criteria of Part 325 of the NREPA.

This is a final order that resolves the last pending matter and closes the contested case.



Paul Smith
Administrative Law Judge

REVIEW OF THIS DECISION

In light of the 2018 amendments to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1301, *et seq.*, the right to seek review of this decision may vary based on the particular Part of the NREPA under which this contested case was brought. To ascertain the correct manner to seek review of this decision, and the correct time frame for review, the parties and/or their legal counsel should examine the applicable statutes and administrative rules. See, Section 1317 of the NREPA, being MCL 324.1317; Sections 88 and 301-306 of the APA, being MCL 24.288 and MCL 24.301-306; and the Department of EGLE website information regarding petitions for review at: www.michigan.gov/egle.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 15th day of July 2022.

R. Tidwell

R. Tidwell

**Michigan Office of Administrative
Hearings and Rules**

Via Electronic Delivery

Christopher Conn
Department of Environment, Great Lakes & Energy,
Enforcement Unit
Water Resources Division
PO Box 30458
Lansing, MI 48909
connc@michigan.gov

Dr. Martin Drozdowicz
13794 Lake Drive
Monroe, MI 48161
drozdentist@aol.com