



Ensuring the Waters of the Great Lakes Basin  
Are Healthy, Public, and Protected for All

September 11, 2023

Michigan Department of Environment, Great Lakes and Energy Water Resources Division, Cadillac District c/o Robyn Schmidt 120 W. Chapin Street Cadillac, MI 49601-2158	United States Army Corps of Engineers Permit Evaluation Western Section, Regulatory Branch c/o Jeff Fritsma Grand Haven Field Office Grand Haven, MI. 49417-1791
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**RE: Proposed Crib Pier, R. Mampe/Omena Blue Moon LLC, 3388 Omena Point Rd., Omena, EGLE, WRD #HPT-45R7-1C96K, U.S. ACE No. LRE-2023-00371-56-R23, Section 36, T31N, R11W, Leelanau Township, Leelanau County, Michigan**

Dear Ms. Schmidt and Mr. Fritsma:

FLOW (For Love of Water), a Great Lakes law and policy center, submits the following comments and concerns regarding the application for the proposed 138-foot pier on the lakefront property at 3388 Omena Point Road.

The construction of the proposed pier appears to be unreasonable as it requires substantial alteration of Great Lakes bottomlands to accommodate a large, permanent, commercial type pier. The project is, on its face, violative of the public trust doctrine, a well-established set of principles delineating public and private rights regarding the ownership and use of Great Lakes coastal shorelines. As such, the proposed project also contravenes correlative riparian rights of nearby property owners and the general public's rights to use, enjoy, and access Lake Michigan waters by encroaching and interfering with the public right to traverse the Great lakes shoreline and navigate near shore waters. The proposed project will also disturb the local coastal ecology and interfere with littoral currents that define the shoreline's limnological equilibrium. Issuing a permit authorizing the proposed project would, accordingly, contravene Michigan's jurisprudence, interfere with recognized public rights and those of nearby property owners, and imbalance and disturb the dynamic processes to maintain the ecology of the near shore waters in the area.

**Site Conditions – Unreasonable Impacts**

Michigan's Great Lakes coastal shorelines are among the most biologically diverse, fecund, and productive systems in North America. The varied and abundant species of waterfowl, fish, amphibians,

reptiles, and benthic communities are pervasive and well documented.<sup>1</sup> The nearshore waters directly adjacent to the subject property on Omena Point Road are known spawning areas for lake trout and yellow perch.<sup>2</sup>

Fish species diversity and production in the nearshore waters are higher than in offshore waters, and virtually all species of Great Lakes fish use the nearshore waters for one or more critical life stages or functions. “The nearshore waters are areas of permanent residence for some fishes, migratory pathways for anadromous fishes, and temporary feeding or nursery grounds for other species from the offshore waters.”<sup>3</sup>

The coastal shorelines of the Great Lakes experience constant wave action and dynamic littoral currents that are key forces that sustain and nourish the systemic limnological equilibrium upon which aquatic flora and fauna depend. The proposed crib construction will interdict natural processes and ecological functions to the detriment of the environment and other property owners. The natural existing littoral transport pathways will be interrupted, altering the processes of reliction and accretion and potentially radically altering neighboring shorelines by depriving other properties of accreting sand and cobble that would otherwise benefit neighboring lakefront properties.<sup>4</sup>

All of these impacts are contrary to the policies and goals of federal and state coastal zone management efforts. EGLE’s Coastal Zone Management Plan (CZMP) has the express objective to “ensure Michigan’s coastal habitats are protected, preserved, and restored for use and enjoyment of Michigan’s citizens and visitors.”<sup>5</sup> The CZMP embodies the constitutional mandate of Article IV, Section 52 of the Michigan Constitution, which creates a magisterial and administrative mandate compelling the state to protect our natural resources:

“The conservation and development of the natural resources of the state are hereby declared to be *of paramount public concern* in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”

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<sup>1</sup> See, Grobbel Environmental & Planning Associates, Expert Assessment and Comment - Proposed Crib Pier, R. Mampe/Omena Blue Moon LLC, 3388 Omena Point Rd., Omena, September 1, 2023.

<sup>2</sup> ArcGIS Online, Fish Spawning Atlas

<https://www.arcgis.com/apps/mapviewer/index.html?layers=52c47def2e7344f68b0ffe981a97af1c&layerId=0>

<sup>3</sup> Edsall, T. and Charlton, M., Nearshore Waters of The Great Lakes, December, 1997.

[https://archive.epa.gov/solec/web/pdf/nearshore\\_waters\\_of\\_the\\_great\\_lakes.pdf](https://archive.epa.gov/solec/web/pdf/nearshore_waters_of_the_great_lakes.pdf)

<sup>4</sup> See, [Peterman v Department of Natural Resources](#), 446 Mich. 177 (1994), where the Department of Natural Resources was held liable for a “taking” of private property when it authorized the construction of a pier that interrupted the littoral flow of sand to neighboring properties.

<sup>5</sup> EGLE, Coastal Management Program Strategic Direction, Fiscal Years 2019-2024

<https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/Coastal-Management/strategic-direction-2019-2024.pdf?rev=c25f454608704a2480f984eaa7da3f91>

Article IV, Section 52 also supports and informs the application of the public trust doctrine to this proposed project.

### **Application of the Public Trust Doctrine**

The public trust doctrine is the “lodestar” set of jurisprudential principles that establish the public’s ownership and rights to use and enjoy the navigable waters of the Great Lakes and the bottomlands beneath them. Under the public trust doctrine, the navigable waters of the Great Lakes as well as their tributary rivers and streams constitute a legally enforceable “public trust.” Michigan citizens are the beneficiaries of the trust, and the government, as the fiduciary, has the legal responsibility to protect the trust from impairment. The Michigan Department of Environment, Great Lakes, and Energy’s explanation of the public trust doctrine is clear and concise:

“The bottomlands of the Great Lakes are held in trust by the State of Michigan for use and enjoyment by its citizens. The State, as the owner and trustee, has a perpetual responsibility to the public to manage these bottomlands and waters for the prevention of pollution, for the protection of the natural resources and to maintain the public's rights of hunting, fishing, navigation, commerce, etc. The State of Michigan's authority to protect the public's interest in the bottomlands and waters of the Great Lakes is based on both ownership and state regulation. The Public Trust Doctrine, as the basis for Part 325, provides state authority to not only manage but also to protect the public's fundamental rights to use these resources.

Michigan courts have determined that private uses of the bottomlands and waters, including the riparian rights of waterfront property owners, are subject to the public trust. In other words, if a proposed private use would adversely impact the public trust, the State of Michigan's regulatory authority requires that the proposal be modified or denied altogether in order to minimize those impacts.”<sup>6</sup>

The state’s fiduciary obligation to protect public trust resources from impairment is, in the words of the Michigan Supreme Court, a “high, solemn and perpetual” duty.<sup>7</sup> The public trust doctrine must be observed by the state in decision-making regarding proposed uses of Great Lakes waters and bottomlands and also can be used to invalidate governmental and private actions that violate the doctrine.<sup>8</sup>

The relationship of the public trust doctrine to the public’s right to traverse the Great Lakes shoreline is critically important and unambiguous. In the landmark case of *Glass v Goeckel*, the Michigan Supreme

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<sup>6</sup> Department of Environment, Great Lakes, and Energy, Great Lakes Bottomland Conveyances <https://www.michigan.gov/egle/about/organization/water-resources/shipwrecks/great-lakes-bottomland-conveyances>

<sup>7</sup> *Collins v. Gerhardt*, 211 N.W. 115 (Mich. 1926)

<sup>8</sup> See, Kilbert, K., The Public Trust Doctrine and the Great Lakes Shores, Cleveland State L. Rev., 2010 <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1065&context=clevstlrev>

Court made clear that the public trust doctrine ensures the public's right to walk the Great Lakes shoreline without interference:

“We hold, therefore, that defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine. Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark.”<sup>9</sup>

As the proposed Mampe pier would obstruct the public's right to walk the shoreline, the project would violate the public trust doctrine's core principle of ensuring public access to the shoreline of the Great Lakes.

### **EGLE and U.S. Army Corps Permit Review Authority and Responsibility**

The Great Lakes Submerged Lands Act (Part 325 of NREPA) authorizes the state to convey public trust bottomlands of the Great Lakes when the public use of those lands will not be impaired or substantially affected. Part 325 incorporates the common law public trust findings that must be made by the state before it may lawfully authorize the state to convey public trust waters and bottomlands of the Great Lakes. The permit applicant must demonstrate, and the permitting agency must find, that the public use of Great Lakes waters and bottomlands will not be impaired or substantially affected.<sup>10</sup> The Mampe permit application makes clear that the nature and scope of the construction activity, as well as the final project design, will impair and substantially affect public rights in Great Lakes waters and bottomlands. EGLE, therefore, cannot make the requisite findings to satisfy Part 325 and authorize the proposed project.

The United States Army Corps of Engineers' (USACE) jurisdiction over the proposed project is defined by Section 10 of the federal Rivers and Harbors Act of 1899, 33 USC § 403 (the “Act”), which provides:

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.”

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<sup>9</sup> [Glass v Goeckel](#), 473 Mich. 670 (2005).

<sup>10</sup> [MCL 324.32503\(1\)](#)

Federal regulations promulgated pursuant to the Rivers and Harbors Act make clear that permits are required under Section 10 for “structures” or “work” in, or affecting, the navigable waters of the United States.<sup>11</sup> The USACE is statutorily empowered to exercise discretionary authority to comprehensively review a permit application when, as here, the public interest is implicated. Projects falling under USACE nationwide permits are no exception to discretionary oversight.<sup>12</sup>

The proposed project would extend 138 feet into the waters of Omena Bay, presenting a navigation hazard to contiguous and nearby lakefront property owners and unreasonably interfering with the public’s right to navigate the areas’ waters.

### **Determination of Feasible and Prudent Alternatives**

Given its dimensions and configuration, the proposed project is unquestionably incongruous with the interests of nearby property owners. The applicant’s right to use and enjoy the waters of Lake Michigan, including the rights to boat and wharf, can be accommodated by a more reasonable dock design and one congruous with the docks utilized by neighboring property owners.

Mich. Admin. Rule 15, promulgated pursuant to Part 325 sets forth with specificity the responsibility of EGLE to determine the likely effects of the proposed permitted activity and determine whether there are feasible and prudent alternatives to a given project if the project may have adverse effects on the environment or the public trust.

“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.<sup>13</sup>

In conformity with Rule 15, the joint permit application requires an analysis of feasible and prudent alternatives. The joint permit application asks the applicant for an:

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<sup>11</sup> “Structures” is defined at [33 CFR 322.2](#) “The term structure shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.”

<sup>12</sup> “District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines *or for any factor of the public interest.*” 33 CFR § 330.1 - Purpose and policy <https://www.law.cornell.edu/cfr/text/33/330.1>

<sup>13</sup> Michigan Administrative [Rule 322.1015](#), Environmental assessment.

“Alternatives Analysis detailing all options considered and why this is the least impactful feasible and prudent proposal. The depth of this analysis is typically commensurate with the size and purpose of the project and at minimum should include variables such as alternate locations (including other properties), configurations and sizes (layout and design), and methods (construction technologies), and other constraints (local regulations, resource issues). Discussion should also include why the do nothing alternative is not feasible or prudent.”<sup>14</sup>

No such analysis is apparent in the Mampe permit application.

Moreover, the Michigan Environmental Protection Act (MEPA), also implicated by the proposed project, prevents an agency from issuing a permit for an activity that is likely to result in pollution, impairment or destruction of the air, water or other natural resources, or the public trust in those resources, if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.<sup>15</sup>

Feasible and prudent alternatives clearly exist which avail the applicant in terms of dockage that interferes less with the riparian rights of neighboring property owners and the public trust rights of the general public. According to an informed survey, “docks and boat moorage in the vicinity of and at the applicant’s real properties and throughout Omena Bay are typified by off shore moorings, seasonal docks 50 feet or less in length, or shore stations.”<sup>16</sup> These are reasonable dockage solutions that do not impermissibly interfere with others’ riparian rights.

In summary, our jurisprudence regarding public rights in navigable waters reflects long standing principles regarding the public’s right to use navigable waters without unreasonable interference. Reaching back 1500 years, the *Institutes of Justian* held that the sea as well as the shores of the sea could not be appropriated for private use and must be available to all. Adopted by English law, transferred to the United States, and embodied in the public trust doctrine, these principles of correlative riparian rights have served the public well. The proposed project contravenes these principles and therefore, the permit should be denied.

Sincerely,



Liz Kirkwood  
Executive Director  
FLOW (For Love of Water)

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<sup>14</sup> Digital EGLE/USACE Joint Permit Application (JPA) for Inland Lakes and Streams, Great Lakes, Wetlands, Floodplains, Dams, Environmental Areas, High Risk Erosion Areas and Critical Dune Areas, page 3.

<sup>15</sup> MEPA, [MCL 324.1705\(2\)](#)

<sup>16</sup> Grobbel Environmental & Planning Associates, Expert Assessment and Comment.

cc: Senator Damoose  
Representative Coffia

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