

EXHIBIT 1

WHAT DOES IT MEAN TO YOU?

If you are a riparian the land above the OHWM is your private domain. When the water levels drop below the OHWM, the riparian property owner has exclusive use of the exposed lake or river bed. Everyone has the right to use the water to swim, boat or walk as long as they "keep their feet wet." A waterfront property owner may prevent a member of the public from walking on the exposed bed of the waterway through non-structural means (fences and walls are not allowed, however temporary signs and verbal warnings are acceptable). Trespassing complaints are handled through the local sheriff's department or police department.

As a member of the public you need not worry about the location of the OHWM as long as you stay in the water. If you are navigating a water body and come across an obstruction you are allowed a reasonable portage, using the shortest distance possible, to go above the OHWM around the obstruction.

Many development activities above the OHWM require county permits. Some development activities above the OHWM require DNR permits; most development projects below the OHWM require DNR permits.

If you need to know more about the OHWM, contact the DNR Water Management Specialist at www.wisconsin.gov.



PUBL-WZ004 08REV

Ordinary High Water Mark (OHWM)



**SHORELAND
WETLAND**
Zoning

THE OHWM FORMS SEVERAL IMPORTANT BOUNDARIES. IN WISCONSIN, THE CITIZENS "OWN" THE BEDS OF NATURAL LAKES, WHICH ARE HELD IN TRUST FOR THEM BY THE STATE. THE OHWM IS THE DIVIDING LINE BETWEEN PUBLIC AND PRIVATE OWNERSHIP ON NATURAL LAKES. ON STREAMS, THE RIPARIAN LANDOWNER USUALLY OWNS THE BED TO THE CENTER OF THE STREAM, BUT THE PUBLIC HAS THE RIGHT TO USE THE WATER FOR ACTIVITIES SUCH AS CANOEING AND FISHING.

In 1914, the Wisconsin Supreme Court heard a trespass case where a citizen had been cited for hunting in an area of flooded vegetation. The court determined that the hunter was exercising his public rights because his boat was below the OHWM and then defined the OHWM as:

The area where the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristic.

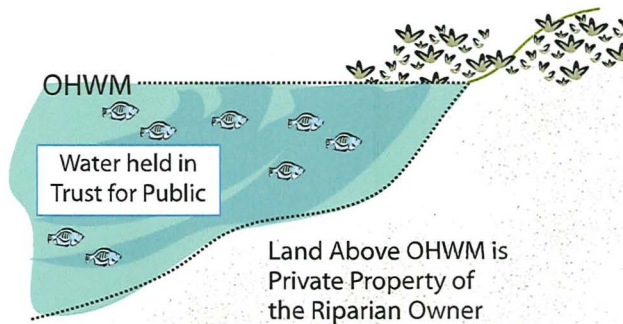
The OHWM is important to determine state and county jurisdictional areas, private vs public ownership, and where the public can navigate.

HOW TO FIND THE OHWM:

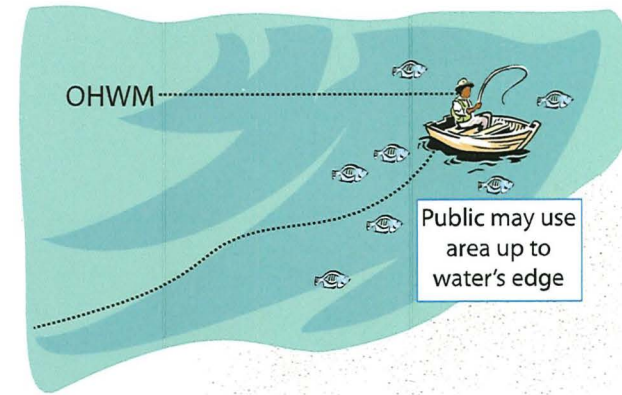
To locate the OHWM, go to your shoreline and look for obvious indicators of water. These indicators may include:

- stains on rocks or other shoreline structures
- bare dirt, marks on trees
- exposed roots running along the shore
- changes in vegetation from water plants to upland plants

Ordinary High Water Mark (OHWM)
Public may use area up to water's edge



When the Water Level is High



There are some water bodies where the OHWM can be more difficult to locate. These may include bogs, pothole lakes, fluctuating water levels due to natural or artificial impacts, rapidly urbanizing watersheds, altered shorelines, wetland fringes and the Great Lakes. In these cases contact the local DNR water management specialist. If your OHWM is for regulatory purposes, the final determination must be made by DNR staff.

When the Water Level is Low



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EXHIBIT 2

Navigation and the incidents to navigation:



Common questions about the public's right to access.

This fact sheet is designed to help people understand the state law for accessing lakes and streams in Wisconsin for boating, swimming, hunting, fishing and other public interests¹.

State law

The Northwest Ordinance of 1787 and the state constitution in 1848 provide that navigable waters are held in the public trust and are common highways. While early common law focused on whether or not a waterway was capable of floating saw-logs to market, in *Muench v. Public Service Commission*,² the Wisconsin Supreme Court said “it is no longer necessary in determining navigability of streams to establish a past history of floating logs, or other use of commercial transportation, because any stream is “navigable in fact” which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.”

Indeed, the *Muench* Court found that a waterway need not be navigable at all times, but only on “a regularly recurring basis, such as during spring runoff periods.” In a later case called *Klingeisen v. DNR*³, the Court found that the public trust also applies to artificial navigable waters that are “directly and inseparably connected with natural, navigable waters.”

As the test for navigability evolved over time, so did the concept of what constitutes a public purpose. Initially, public rights were limited to navigation and fishing. In *Diana Shooting Club v. Husting*⁴, the Wisconsin Supreme Court expanded the concept of public rights in navigable waters. The court held that navigable waters “should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation.”⁵ Landowners generally hold title to beds of adjacent *streams*; you need their permission to place or anchor traps because trapping is not an incident of navigation, or to build permanent duck blinds on the bed. Landowners *may* also own part of the bed of raised lakes and flowages.



¹ This fact sheet does not reflect and should not be utilized to determine the state's regulatory jurisdiction over waterbodies under Chs. 30 and 281, Wis. Stats.

² *Muench v. Public Service Commission*, 261 Wis. 492, 506 (1952).

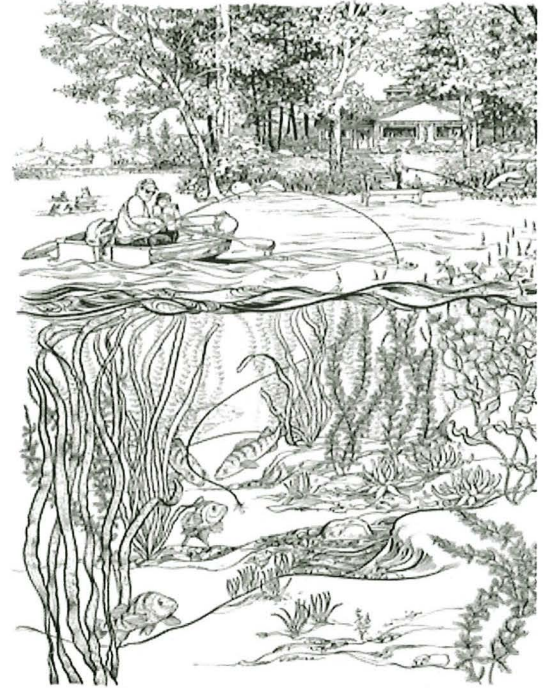
³ *Klingeisen v. DNR*, 163 Wis. 2d 921, 929 (Ct. App. 1991).

⁴ *Diana Shooting Club v. Husting*, 156 Wis. 261(1914)

⁵ *Diana Shooting Club v. Husting*, 156 Wis. 261, 271 (1914)

What are the public's rights to navigation?

Everyone has the right to use public water bodies to swim, boat, or walk as long as they “keep their feet wet.” While you must gain access through legal means, anyone may recreate in a public water body provided you stay in the water. If you reach an obstruction (downed tree, bridge, culvert, etc.) in a stream, you have a right to exit the water and enter the exposed stream bed between the water's edge and OHWM as needed to bypass the obstruction.⁶ No statutes or court cases have expressly stated that the public has such a right on a lake or that the public has a right to enter above the OHWM of a waterbody as needed to bypass an obstruction.



If you are a riparian landowner, the land above the OHWM is your private domain. When the water levels drop below the OHWM, the riparian property owner has exclusive use of the exposed lake or stream bed (except as noted above). A waterfront property owner may prevent a member of the public from walking on the exposed bed of the waterway through non-structural means (fences and walls are not allowed, however temporary signs and verbal warnings are acceptable). Trespass complaints are handled through the local sheriff's department or police department.

Where is the ordinary high water mark?

In *Diana Shooting Club v. Husting*⁷, the Supreme Court defined the OHWM as "the point on the bank or shore up to which 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."

Water marks are often at various elevations, but the most permanent and prevalent marks constitute the ordinary high water mark. The OHWM does not change with temporary fluctuations in water levels, nor is it always at or near open water, as is the case with cattail marshes and bogs.

How can I tell if I have the right to navigate on a water body?

A good general rule is that any water body that has an official name, or is shown as a water way with a solid or dashed blue line on the topographic maps and has a defined bed and bank is likely to be public. To determine if the waterway is likely a public waterbody, check a local topographic map or the department's surface water data viewer at <http://dnrmaps.wi.gov/SL/Viewer.html?Viewer=SWDV>. As long as access is gained legally, the public may navigate and recreate within these water bodies as long as they keep their feet wet. The public may boat, fish, hunt or conduct other incidents of navigation on unnamed water bodies if you can float from a named water body into an unnamed water body. For ponds or ditches that are located wholly on a private property and that are not connected to a named water body, the ponds or ditches are most likely for private use only unless the property owner grants you legal access. The department recommends that you err on the side of caution, so if you are uncertain whether the pond or ditch is a public water body then you should stay out until you are able to verify whether or not the water body is public and access may be gained legally.

For more information on this topic, please see <http://dnr.wi.gov/topic/fishing/questions/access.html>

⁶ Section 30.134, Wis. Stats.

⁷ *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914).

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EXHIBIT 3

What Does the OHWM Mean to You as a Riparian Property Owner?

Riparian is the often-used legal term for waterfront property owner.

As a riparian, the land above the OHWM is your private domain. To protect public waters, you may need to get a permit for any structure or activity to be placed or conducted near the shoreline. Check with your area water management specialist (see web site) and local zoning office (in courthouse or municipal building) before beginning any work.

When the water level is below the OHWM you have the exclusive right to use the exposed bed of the waterway in front of your property until the water returns. The public may swim, boat or walk in the water along the shore. You may prevent people from walking on the exposed bed of the waterway by nonstructural means (i.e., fences or walls are not allowed).

Natural processes, such as erosion or deposition, can affect the location of the OHWM. Sometimes, shoreline land area is increased by the natural deposit of materials on the shore or bank. You gain title to all naturally deposited new dry land. You do not gain title to new land areas deposited as a result of your own actions such as filling in the water.

Do you need to know more about OHWM?

If you have questions on your water rights or if need to find the OHWM on your property, contact your area water management specialist, as listed on our web site.

<http://dnr.wi.gov/org/water/fhp/waterway/index.htm>



PUBLIC OR PRIVATE? II



The Ordinary High Water Mark

Under the constitution, lakes and streams belong to all citizens. The OHWM establishes the boundary between public lake bed and private land. The riparian (waterfront) landowner owns the land above the OHWM. The citizens of Wisconsin own the beds of natural lakes, which are held in trust for them by the state. On streams, the riparian landowner owns the bed to the center of the stream, but the public has the right to use the water for activities such as canoeing and fishing.

The Wisconsin Department of Natural Resources (WDNR) and the U.S. Army Corps of Engineers has the authority to require permits or plan approvals for activities in public waters below the OHWM and in some instances above the OHWM where the activity might affect the waterway. **Local zoning ordinances usually require structures to be set back from the water, measuring from the OHWM.**

What is the OHWM?

The OHWM is the point on the bank or shore where the water is present often enough so that the lake or stream bed begins to look different from the upland. Specifically, the OHWM is:

the point on the bank or shore up to which the water, by its presence, wave action or flow, leaves a distinct mark on the shore or bank.

The mark may be indicated by erosion, destruction of, or change in vegetation or other easily recognizable characteristics.

How is the OHWM found?

If you are a landowner planning to build near or change your shoreline, you might need to know the location of the OHWM. You may request that Wisconsin DNR field staff locate the OHWM on your property through on-site studies of physical and biological conditions at the shoreline.

The principal indicator is the change from water plants to land plants. In the area where the plants change, the investigator may also use other indicators such as: change in soil type, ridges, other erosion marks, and water stains on rocks, soil, trees or structures. If none of these indicators are available in the immediate location, the elevation of the OHWM may be found at another spot and transferred to your property.

What Does the OHWM Mean to You as a Citizen?

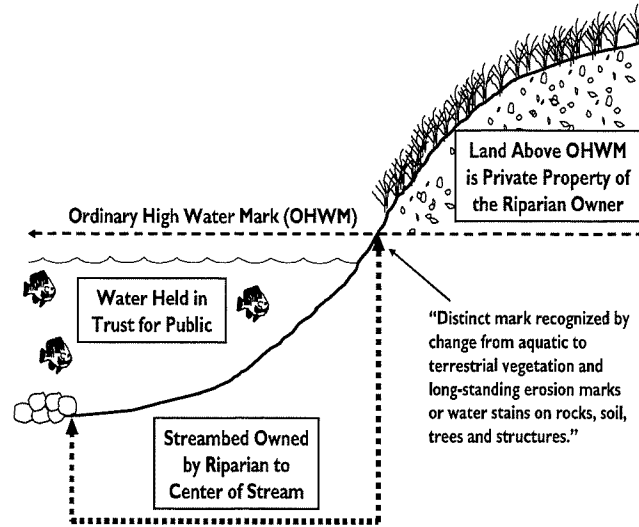
As long as you keep your feet wet, you may walk along the shore, swim or boat in any navigable lake or stream. You need not worry about the location of the OHWM as long as you stay in the water.

However, when water levels are below the OHWM, waterfront property owners can prevent you from walking on the exposed bed of the waterway.

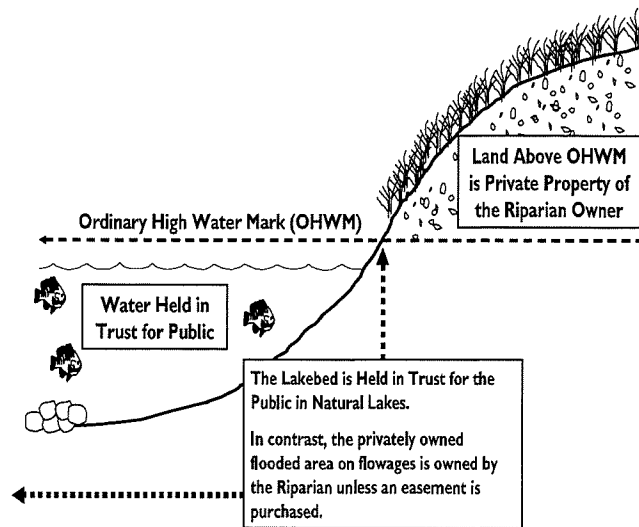
YOUR RIGHTS IN RELATION TO THE OHWM

Ownership & Use

In Streams

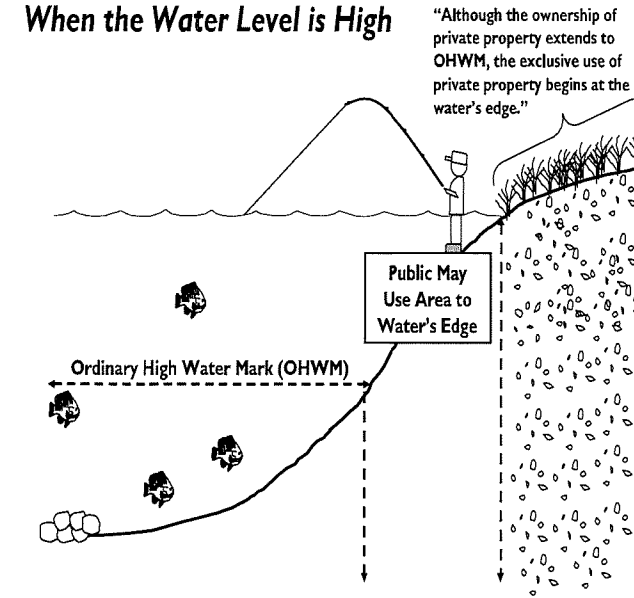


In Lakes

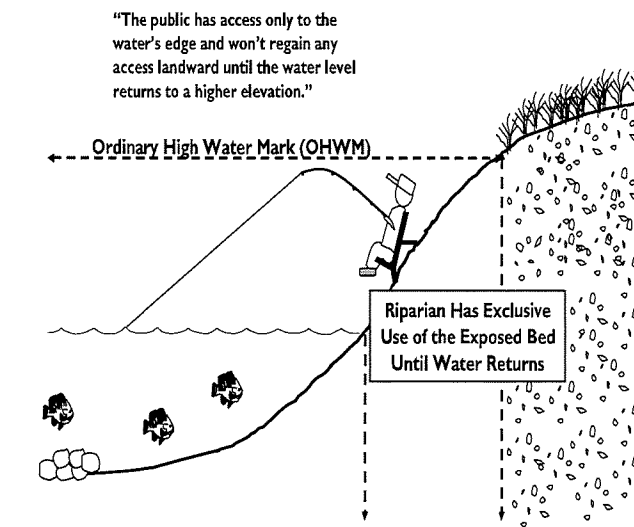


When Water Levels Change

When the Water Level is High



When the Water Level is Low



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EXHIBIT 4



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August 6, 2021

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Diane L. Milligan
DNR Attorney
Wisconsin Department of Natural Resources
101 South Webster Street
P.O. Box 7921
Madison, WI 53708-7921

Dear Attorney Milligan:

Reinhart Boerner Van Deuren s.c. represents Mr. Thomas (Tom) Reiss in matters related to the use of the Kaul Park access site (the "Access Site") located on CTH "CW" in the Town of Ixonia, Jefferson County, Wisconsin. The Access Site, was originally built to provide area fire departments with a source of water and to permit small craft, such as canoes and kayaks, access to the Rock River. More recently, when conditions permit, airboat operators have used it illegally to gain access to private properties located beyond the ordinary high-water mark ("OHWM"). Such use was never contemplated or intended when the Access Site was constructed. Recently, you and I spoke about your April 19, 2021 letter addressed to the Town of Ixonia Board (the "Letter"). While I understand that the Letter was written in response to concerns regarding closure of the Access Site under certain high-water conditions, the misuse of the Access Site and its impact on surrounding properties is of present concern to Mr. Reiss, his neighbors and the Town of Ixonia. Your Letter briefly mentioned those concerns.

Your Letter states "[i]t is our understanding that the Town has fielded complaints from a nearby property owner who has expressed concerns about boat motor noise and traffic. We also understand that neighbors are concerned about use of the launch by individuals who launch boats when the park is open and land after it is closed, as allowed under Wisconsin law."

Unfortunately, your statement does not adequately summarize the concerns that exist with area residents and by the elected officials of the Town of Ixonia. Concerns related to current use of the Access Site include: (i) use by excessively loud airboats equipped with intense lighting systems; (ii) access of lands well-beyond the OHWM associated with the Rock River; (iii) damage and disturbance to highly sensitive habitat that was formerly inaccessible and thus largely protected; (iv) growing conflict between area residents and airboat operators using the Access Site throughout evening and early morning hours (which at times involves the illegal discharge of firearms); and (v) the safety concern resulting from area fire departments being unable to use the Access Site due to vehicles and trailers blocking access.

Diane L. Milligan

August 6, 2021

Page 2

The Access Site was originally constructed to provide access to area fire departments to on-board water for emergency responses. Because of the limited and unimproved parking conditions, the Access Site has historically been used for the deployment of canoes and kayaks. Recently, the Access Site has been increasingly used to launch airboats. These airboats are propelled by large fans and are capable of operating in only inches of water. The engines are usually sourced from airplanes or automobiles and often operate without mufflers or other sound control devices. The noise levels can exceed 120 decibels (db). As noted later herein, Wisconsin limits noise emission to no more than 86 decibels. In addition to the extraordinary noise, these airboats are also equipped with intensely powerful LED lighting systems that can illuminate large areas. As inferred in your Letter, the airboat operators use the Access Site before it closes and operate the boats and the lighting systems throughout the night and early morning hours without regard to privacy concerns and property rights of area residents. Wisconsin's Administrative Code, specifically NR 1.91(4)(d)(6), appears to limit any attempt by the municipality regulate when the Access Site must be vacated ("Any boat launched during operating hours may not be denied egress from the water at any time through the public boating access).” As a result, there have been documented confrontations between area residents and airboat users.

In addition to the extraordinary noise and light being emitted during evening and early morning hours, the airboats access lands adjacent to (or well beyond) the Rock River's OHWM during certain times of the year (generally the spring and fall). Through the use of various satellite-based mapping tools, airboat operators can access property well-beyond the OHWM of the Rock River whenever a few inches of water are present. In some instances, even lack of water does not dissuade airboat operators from attempting to gain access to property. Several years ago, for instance, Tom Reiss was able to see from his home intense lights coming from an airboat that appeared to be “stuck” on his driveway. He drove to investigate what was happening and found two airboat operators with shovels and other equipment attempting to dig out a section of his only driveway to gain access to the opposite side. Airboat operators now attempt to gain access to areas that have historically been regarded as private property well beyond the “...point on the bank... which **the presence and action of surface water is so continuous** [emphasis added] as to leave a distinctive mark by erosion, destruction or terrestrial vegetation or other easily recognized characteristics.” (Wis. Stat. § 236.025(b)(2)). As shown in the attached Exhibit A, property surrounding Mr. Reiss' home typically has no standing water and is used for agricultural purposes. Occasionally the floodplain surrounding his home fills with standing water (well outside of the OHWM as defined in Wis. Stat. § 236.025(b)(2)) and opportunistic airboat operators use such conditions, without limitation and without consideration or respect, to access *everything* possible. As noted, this has led to damage to property (roads and fences) and has led to confrontations with landowners in this area. It should also be noted that these users regularly discharge firearms at night and early morning outside of lawful shooting times.

Diane L. Milligan
August 6, 2021
Page 3

Because technology and potentially changing weather conditions have allowed access of remote areas well outside of the Rock River's OHWM, airboat operators are gaining access to sensitive areas that would have been impossible to reach in previous times. They are accessing sensitive areas, during critical breeding and migration periods, throughout the evening and early morning hours with vessels that can emit 120 db of noise and use intense lights. The destruction of important habitat and interference with migratory birds and other animals during critical periods is of great concern. Wis. Stat. § 30.62(2)(b) provides that "[n]o person may operate a motorboat powered by an internal combustion engine on the waters of this state in such a manner as to exceed a noise level of 86 measured on an "A" weighted decibel scale." Upon information and belief, because of the manner in which the airboats are operated, the noise limitations are being violated on a regular basis.

Finally, the general issue of safety is a significant concern for Mr. Reiss and area residents. As noted herein, the rising level of conflict between airboat operators and area residents is well-documented. The use of critically noisy boats, equipped with intense lighting systems, throughout the evening and early morning hours without regard to area residents (or wildlife) will continue to become an increasingly significant concern likely to lead to physical confrontation. Additionally, the Access Site is not designed to accommodate both automobiles with trailers *and* provide reasonable access to area fire departments for on-loading water. Often, when water conditions provide opportunities to access remote properties, automobiles with trailers block the Access Site and make any attempt to on-load water impossible. Please see the attached Exhibit B depicting the Access Site.

Your Letter makes reference to public access standards and the abandonment process that is set forth in Wis. Admin. Code 1.91 through 1.93 and in Wis. Stats. Section 66.1006. While Mr. Reiss appreciates your concern, Mr. Reiss does not believe that the "solution" to this issue necessarily invokes an abandonment. According to NR 1.91(2)(a) abandon, abandonment or discontinuance "...means a permanent or long-term closure of an access site whether by resolution, ordinance, signing, placement of a physical barrier or by other means that reduces access." Here, all issues result from airboats using the Access Site. Only this type of watercraft: (i) regularly operate in violation of the State's limit on noise emissions; (ii) can navigate beyond the Rock River's main channel to access any and all private properties beyond the OHWM regardless of distance from the river (provided there is enough standing water); (iii) operate well into the evening and early morning hours using powerful LED lighting systems; and (iv) are uniquely capable of disturbing wildlife and destroying sensitive ecosystems.

Mr. Reiss is not advocating for the "...permanent or long-term closure of an access site..." On the contrary, Mr. Reiss is requesting that the Town of Ixonia working in cooperation with the DNR, provide "reasonable public boating access" through the adoption of a use plan that is consistent with the requirements of NR 1.91. NR 1.91(2)(i)(4) provides that "[r]easonable public boating access" means opportunities for public enjoyment and use of navigable waters

Diane L. Milligan
August 6, 2021
Page 4

which...[a]ssure that levels and types of waterway by all users do not interfere with public health, safety and welfare.” The facts present in this matter clearly indicate that the use of airboats is highly disruptive to area residents; damage private property and natural resources; harm wildlife during critical breeding and migration phases; and threaten to interfere with emergency responders. In summary, the use of airboats does in fact interfere with the “public health, safety and welfare” of the community. No other users of the Access Site present the same concerns.

The Town of Ixonia, working with the DNR and other interested stakeholders, must prepare and enforce a plan that addresses the requirements of NR 1.91 and, in doing so, prohibits airboats from using the Access Site. NR 1.91(6)(b) provides that:

“[p]lans shall identify and assess the effects of waterway use on natural resources, describe mechanisms to protect public safety and natural resources, and identify public boating access that meets the objectives of s. NR 1.90. Plans may apply to individual waters or groups of similar waters. Plans shall consider environmental as well as social and developmental factors which may include:

1. Environmental sensitivity criteria:

- a. Lake size and irregularity.
- b. Lake depth and contour.
- c. **Sensitive areas for fish, wildlife and aquatic plants.** [emphasis added]
- d. Nature and composition of fish, wildlife and presence of threatened or endangered resources.
- e. Lake bottom sediment types.
- f. Natural shoreline features.
- g. Sensitivity to exotic species.
- h. Water quality.
- i. **River or stream characteristics.** [emphasis added]

2. Social and developmental criteria:

- a. Shoreline beauty.
- b. Shoreland zoning.
- c. Land use and land cover.
- d. **Traditional, existing and potential water uses.** [emphasis added]
- e. **Ability of the municipality to regulate land use and development.** [emphasis added]
- f. **Ability of the municipality to enforce public safety regulations.** [emphasis added]
- g. Water use regulations proposed or in effect.

Diane L. Milligan
August 6, 2021
Page 5

- h. Proximity to other waters.
- i. Proximity to population centers.
- j. Demand for recreational opportunities.
- k. **Impact on public safety.** [emphasis added]
- l. Presence of culturally or historically significant features.
- m. **Trespass problems associated with increased access on rivers and streams.** [emphasis added]

3. Appropriate levels and types of public access based on a consideration of the issues in subs. 1. and 2.

4. Ability of the municipality to effectively implement the plan.

NR 1.91(6)(b) clearly demonstrates that the concerns that exist with respect to airboats using the Access Site, must be addressed by an appropriate plan that takes into consideration the criteria noted in NR 1.91(6)(b)(1) and (2). Such plan must also be enforced.

Finally, your Letter states that “[t]he [DNR] may approve the abandonment under limited conditions, and given the fact that this access was developed with [DNR] funding.” Again, please note that we do not believe that the appropriate remedy involves an abandonment. However, it is worth noting that the Access Site itself was constructed sometime in the 1970’s for emergency response purposes. Later, the DNR *may* have made a small investment in further improving the Access Site to allow for the launching of small watercraft. It is my understanding that whether the Access Site was “developed” by the DNR and/or what the level of investment might have been has been requested by Mr. Reiss and the Town of Ixonia but has not been made available. As such, Mr. Reiss, as former Town Chairman, respectfully refutes the assertion that a substantial investment was made by the DNR.

As noted, the issues we are presenting here are different than those that were addressed in your Letter (which focused primarily on closure of the Kaul Park due to high water conditions). Your Letter did, however, at least mention the concerns that Mr. Reiss, other area residents, and the Town of Ixonia elected officials have expressed. Again, the solution to these problems, involves placing restrictions on airboats using the Access Site and in enforcing such restrictions.

Yours very truly, ..



Troy E. Giles

Diane L. Milligan
August 6, 2021
Page 6

Exhibit A

(Aerial images of Thomas Reiss' Property and Surrounding Conditions)

Jefferson County Land Information



Color Summer 2013

- Red: Band_1
- Green: Band_2
- Blue: Band_3



Jefferson County Geographic Information System

Printed on: July 18, 2021

DISCLAIMER: This map is not a substitute for an actual field survey or onsite investigation. The accuracy of this map is limited to the quality of the records from which it was assembled. Other inherent inaccuracies occur during the compilation process. Jefferson County makes no warranty whatsoever concerning this information.

Author: Public User

Jefferson County Land Information



Color Spring 2010

- Red: Band_1
- Green: Band_2
- Blue: Band_3



Jefferson County Geographic Information System

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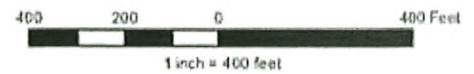
Printed on: July 18, 2021


Author: Public User

Jefferson County Land Information



B&W Spring 1996



 Jefferson County Geographic Information System

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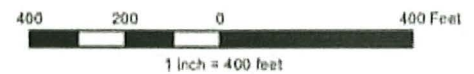
Printed on: July 18, 2021

Author: Public User

Jefferson County Land Information



B&W Spring 2000



Jefferson County Geographic Information System

Printed on: July 18, 2021

DISCLAIMER: This map is not a substitute for an actual field survey or onsite investigation. The accuracy of this map is limited to the quality of the records from which it was assembled. Other inherent inaccuracies occur during the compilation process. Jefferson County makes no warranty whatsoever concerning this information.

Author: Public User

Jefferson County Land Information



B&W Spring 2004 & 2005



Jefferson County Geographic Information System

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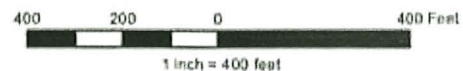
Author: Public User


Jefferson County Land Information



Color Summer 2008

- Red: Band_1
- Green: Band_2
- Blue: Band_3



 Jefferson County Geographic Information System

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Printed on: July 18, 2021

Author: Public User

Jefferson County Land Information



Color Spring 2010

- Red: Band_1
- Green: Band_2
- Blue: Band_3

Jefferson County Land Information



<p>Description</p> <p> Municipal Boundaries</p> <p>Parcel Lines</p> <p> Property Boundary</p> <p> Old Lot/Meander Lines</p>	<p> Rail Right of Ways</p> <p> Road Right of Ways</p> <p> Section Lines</p> <p> Surface Water</p> <p> Map Hooks</p>	<p>Tax Parcels</p> <p>raster.SDE.ORTHOS_2018</p> <p> Red: Band_1</p> <p> Green: Band_2</p> <p> Blue: Band_3</p>
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Jefferson County Geographic Information System

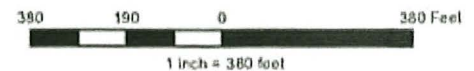
DISCLAIMER: This map is not a substitute for an actual field survey or onsite investigation. The accuracy of this map is limited to the quality of the records from which it was assembled. Other inherent inaccuracies occur during the compilation process. Jefferson County makes no warranty whatsoever concerning this information.

Printed on: July 18, 2021
Author: Public User

Jefferson County Land Information



Description		— Rail Right of Ways	Tax Parcels
	Municipal Boundaries	— Road Right of Ways	Jefferson_County_Wide_Mosaic.sid
Parcel Lines		— Section Lines	 Red: Band_1
—	Property Boundary	— Surface Water	 Green: Band_2
---	Old Lot/Meander Lines	— Map Hooks	 Blue: Band_3



Jefferson County Geographic Information System

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Printed on: July 18, 2021

Author: Public User

Diane L. Milligan
August 6, 2021
Page 7

Exhibit B

(Image of the Kaul Park Access Site)

Jefferson County Land Information



Description	— Rail Right of Ways	Tax Parcels
Municipal Boundaries	— Road Right of Ways	Jefferson_County_Wide_Mosaic.sid
Parcel Lines	— Section Lines	Red: Band_1
— Property Boundary	— Surface Water	Green: Band_2
--- Old Lot/Meander Lines	— Map Hooks	Blue: Band_3



Jefferson County Geographic Information System

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Author: Public User

FILED
07-11-2023
Clerk of Circuit Court
Cindy R. Hamre Incha
2023CV000258

EXHIBIT 5



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April 5, 2022

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Michael Kowalkowski
DNR Attorney
Wisconsin Department of Natural Resources
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Dear Attorneys Milligan and Kowalkowski:

As you know, we represent Mr. Thomas Reiss in matters related to the public's use of the Kaul Park access site (the "Access Site") located on CTH "CW" in the Town of Ixonia, Jefferson County, Wisconsin. Mr. Reiss objects to members of the public trespassing on his private uplands (i.e., that part of Mr. Reiss's land located beyond the OHWM). In *State v. Kelley*, the court characterized lands bordering bodies of water but above the high water mark as being "uplands" 2001 WI 84, ¶ 33 n.13, 244 Wis. 2d 777, 629 N.W. 2d 601. This same definition is provided as a footnote (5) in *State v. Trudeau*, 139 Wis. 2d 91, 102 n.5, 408 N.W. 2d 337 (1987). In my previous letter dated August 6, 2021, I described how air boat operators have used the Access Site to trespass upon Mr. Reiss's uplands. We believe that the air boat operators are relying upon documents published by the DNR that mis-state the law to justify their access. I've included examples of these errant publications as Exhibit A.

Mr. Reiss requests that the DNR take the following actions: (1) immediately update its publications to accurately reflect the status of Wisconsin law (i.e., clarifying that the public does not enjoy the right of access to private lands located beyond the OHWM) and (2) assist with enforcing Mr. Reiss' property rights with respect to matters properly administered by the DNR by training wardens and other enforcement officials regarding the law.

Diane L. Milligan
Michael Kowalkowski
April 5, 2022
Page 2

DNR PUBLICATIONS:

As noted above, air boat users are claiming that DNR publications justify entry into the Mr. Reiss's uplands, well-beyond the OHWM, during high-water conditions through the “keep your feet wet” argument. In other words, so long as water is present, trespassers claim to have an unfettered right to access such lands. One DNR publication, dated September 14, 2014, declares the right of the public to access private property by simply “keeping your feet wet.” It states “[e]veryone has the right to use public water bodies to swim, boat or walk as long as they “keep their feet wet.” The publication appears to cite Wis. Stat. 30.134 as authority.

However, Wis. Stat. 30.134 provides no support for the “keep [your] feet wet argument.” On the contrary, rather than confirming any rights of the general public, it confirms the exclusive rights of the riparian owner to the exposed shore areas along streams (except to exit the body of water to bypass an obstruction). Wis. Stat. 30.134 reads in part: (3) “*Restrictions, Members of the Public: (c) Use of an exposed shore area of a stream by members of the public does not grant an easement or other right to the exposed shore area that is greater than the right granted to the public under this section.*” Further, we are aware of no authority under Wisconsin law that allows the public access to private uplands (including, but not limited to, during periods of seasonal flooding).

On the contrary, on page 4 of *Wisconsin Water Law, A Guide to Water Rights and Regulations* published by the University of Wisconsin Extension, the authors, citing *Village of Menomonee Falls v. DNR*, 140 Wis.2d 579, 412 NW.2d 505 (Ct. App. 1987) make clear that “*occasional ponding of diffused surface water does not create public rights in such waters.*” In this case, the court opined that it had “*no fear that flooded backyards and street gutters will be declared navigable waters,*” (140 Wis. 2d at 593), citing the sections 30.10(1) and (2) of the Wisconsin Statutes, which legislatively limits navigable waters to lakes, streams, bayous and marsh outlets which are navigable in fact. However, this fear is justified given your erroneous publications suggesting that Mr. Reiss’s flooded fields beyond the OHWM (which are, in-fact, his “backyard”) are navigable and therefore open to the air boats or to the public in general.

In a second publication entitled *Public or Private? II The Ordinary High Water Mark*, the DNR writes: “*As long as you keep your feet wet, you may walk along the shore, swim or boat in any navigable lake or stream. You need not worry about the location of the OHWM as long as you stay in the water.*” Yet in the same document, the DNR notes “*As a riparian, the land above the OHWM is your private domain.*” Moreover, the illustration under the caption “*When the Water Level is High*” appears to improperly mislabel the location OHWM (as compared to the illustration immediately below it), further adding to confusion.

Diane L. Milligan
Michael Kowalkowski
April 5, 2022
Page 3

Similar statements are set forth in a document titled *Ordinary High Water Mark (OHWM) Shore/Wet Land Zoning* (PUBL-WZ004 08 REV). This document correctly summarizes the holding in *Diana Shooting Club v. Husting*, 156 Wis. 261 (1914) by stating that “In 1914, the Wisconsin Supreme Court heard a trespass case where a citizen had been cited for hunting in an area of flooded vegetation. The court determined that the hunter was exercising his public rights because his boat was below the OHWM...”[emphasis added]. The publication rightly asserts that “Land Above the OHWM is Private Property of the Riparian Owner” but then incorrectly concludes that “As a member of the public you need not worry about the location of the OHWM as long as you stay in the water.”

Documents published by the DNR are mis-stating the law and creating significant conflict between private property right claimants and those persons believing they have right to access uplands so long as “they keep their feet wet” or “stay in the water.” Because of their apparent misunderstanding of the law, local law enforcement officials (including DNR conservation officers) are reluctant to assist Mr. Reiss in protecting his private property and the conflicts have worsened and will continue to escalate.

PRIVATE PROPERTY RIGHTS ENFORCEMENT:

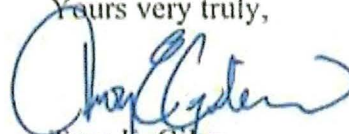
Mr. Reiss intends to engage reputable civil engineering/surveying/water resources firm to survey the Property to determine the location of the OHWM. Following the initial determination, Mr. Reiss will seek concurrence from the DNR as to the location of the OHWM. Once established, he will post signs indicating that lands lying beyond the OHWM (i.e. the uplands) are private and not accessible during any period without consent (even during periods of flooding). Such an approach is part of Mr. Reiss’s careful management of the Property and we believe that, given the natural resources that are at risk, should be welcomed by the DNR.

In summary, we are asking for the DNR to (1) amend its publications that incorrectly state the current law which is causing serious conflict and (2) assist Mr. Reiss in enforcing laws that are properly under the jurisdiction of the DNR as it relates to private lands that are off-limits to the general public. It should be noted that in every instance, the air boat users are in pursuit of fish/game while access the Property. We do believe this approach is correct and represents an opportunity to work with the DNR.

Diane L. Milligan
Michael Kowalkowski
April 5, 2022
Page 4

I am available to discuss this matter with you at any time. Given the potential for spring flooding, we are requesting that this matter be advanced as quickly as possible. If you are unwilling to abide by this request, Mr. Reiss has authorized us to seek a declaratory action in state court confirming his interpretation of the law.

Yours very truly,



Troy E. Giles

47119304

Exhibit A

(DNR Publications)

Navigation and the incidents to navigation:



Common questions about the public's right to access.

This fact sheet is designed to help people understand the state law for accessing lakes and streams in Wisconsin for boating, swimming, hunting, fishing and other public interests¹.

State law

The Northwest Ordinance of 1787 and the state constitution in 1848 provide that navigable waters are held in the public trust and are common highways. While early common law focused on whether or not a waterway was capable of floating saw-logs to market, in *Muench v. Public Service Commission*,² the Wisconsin Supreme Court said "it is no longer necessary in determining navigability of streams to establish a past history of floating logs, or other use of commercial transportation, because any stream is "navigable in fact" which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes."

Indeed, the *Muench* Court found that a waterway need not be navigable at all times, but only on "a regularly recurring basis, such as during spring runoff periods." In a later case called *Klingeisen v. DNR*,³ the Court found that the public trust also applies to artificial navigable waters that are "directly and inseparably connected with natural, navigable waters."

As the test for navigability evolved over time, so did the concept of what constitutes a public purpose. Initially, public rights were limited to navigation and fishing. In *Diana Shooting Club v. Husting*,⁴ the Wisconsin Supreme Court expanded the concept of public rights in navigable waters. The court held that navigable waters "should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation."⁵ Landowners generally hold title to beds of adjacent *streams*; you need their permission to place or anchor traps because trapping is not an incident of navigation, or to build permanent duck blinds on the bed. Landowners *may* also own part of the bed of raised lakes and flowages.

¹ This fact sheet does not reflect and should not be utilized to determine the state's regulatory jurisdiction over waterbodies under Chs. 30 and 281, Wis. Stats.

² *Muench v. Public Service Commission*, 261 Wis. 492, 506 (1952).

³ *Klingeisen v. DNR*, 163 Wis. 2d 921, 929 (Ct. App. 1991).

⁴ *Diana Shooting Club v. Husting*, 156 Wis. 261 (1914)

⁵ *Diana Shooting Club v. Husting*, 156 Wis. 261, 271 (1914)

What are the public's rights to navigation?

Everyone has the right to use public water bodies to swim, boat, or walk as long as they "keep their feet wet." While you must gain access through legal means, anyone may recreate in a public water body provided you stay in the water. If you reach an obstruction (downed tree, bridge, culvert, etc.) in a stream, you have a right to exit the water and enter the exposed stream bed between the water's edge and OHWM as needed to bypass the obstruction.⁶ No statutes or court cases have expressly stated that the public has such a right on a lake or that the public has a right to enter above the OHWM of a waterbody as needed to bypass an obstruction.

If you are a riparian landowner, the land above the OHWM is your private domain. When the water levels drop below the OHWM, the riparian property owner has exclusive use of the exposed lake or stream bed (except as noted above). A waterfront property owner may prevent a member of the public from walking on the exposed bed of the waterway through non-structural means (fences and walls are not allowed, however temporary signs and verbal warnings are acceptable). Trespass complaints are handled through the local sheriff's department or police department.



Where is the ordinary high water mark?

In *Diana Shooting Club v. Husting*⁷, the Supreme Court defined the OHWM as "the point on the bank or shore up to which 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."

Water marks are often at various elevations, but the most permanent and prevalent marks constitute the ordinary high water mark. The OHWM does not change with temporary fluctuations in water levels, nor is it always at or near open water, as is the case with cattail marshes and bogs.

How can I tell if I have the right to navigate on a water body?

A good general rule is that any water body that has an official name, or is shown as a water way with a solid or dashed blue line on the topographic maps and has a defined bed and bank is likely to be public. To determine if the waterway is likely a public waterbody, check a local topographic map or the department's surface water data viewer at <http://dnmmaps.wi.gov/SI/Viewer.html?Viewer=SWDV>. As long as access is gained legally, the public may navigate and recreate within these water bodies as long as they keep their feet wet. The public may boat, fish, hunt or conduct other incidents of navigation on unnamed water bodies if you can float from a named water body into an unnamed water body. For ponds or ditches that are located wholly on a private property and that are not connected to a named water body, the ponds or ditches are most likely for private use only unless the property owner grants you legal access. The department recommends that you err on the side of caution, so if you are uncertain whether the pond or ditch is a public water body then you should stay out until you are able to verify whether or not the water body is public and access may be gained legally.

For more information on this topic, please see <http://dnr.wi.gov/topic/fishing/questions/access.html>

⁶ Section 30.134, Wis. Stats.

⁷ *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914).

WHAT DOES IT MEAN TO YOU?

If you are a riparian the land above the OHWM is your private domain. When the water levels drop below the OHWM, the riparian property owner has exclusive use of the exposed lake or river bed. Everyone has the right to use the water to swim, boat or walk as long as they "keep their feet wet." A waterfront property owner may prevent a member of the public from walking on the exposed bed of the waterway through non-structural means (fences and walls are not allowed, however temporary signs and verbal warnings are acceptable). Trespassing complaints are handled through the local sheriff's department or police department.

As a member of the public you need not worry about the location of the OHWM as long as you stay in the water. If you are navigating a water body and come across an obstruction you are allowed a reasonable portage, using the shortest distance possible, to go above the OHWM around the obstruction.

Many development activities above the OHWM require county permits. Some development activities above the OHWM require DNR permits; most development projects below the OHWM require DNR permits.

If you need to know more about the OHWM, contact the DNR Water Management Specialist at www.wisconsin.gov.



PUBL-WZ004 08REV

Ordinary High Water Mark (OHWM)



SHORELAND WETLAND Zoning

THE OHWM FORMS SEVERAL IMPORTANT BOUNDARIES. IN WISCONSIN, THE CITIZENS "OWN" THE BEDS OF NATURAL LAKES, WHICH ARE HELD IN TRUST FOR THEM BY THE STATE. THE OHWM IS THE DIVIDING LINE BETWEEN PUBLIC AND PRIVATE OWNERSHIP ON NATURAL LAKES. ON STREAMS, THE RIPARIAN LANDOWNER USUALLY OWNS THE BED TO THE CENTER OF THE STREAM, BUT THE PUBLIC HAS THE RIGHT TO USE THE WATER FOR ACTIVITIES SUCH AS CANOEING AND FISHING.

In 1914, the Wisconsin Supreme Court heard a trespass case where a citizen had been cited for hunting in an area of flooded vegetation. The court determined that the hunter was exercising his public rights because his boat was below the OHWM and then defined the OHWM as:

The area where the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristic.

The OHWM is important to determine state and county jurisdictional areas, private vs public ownership, and where the public can navigate.

HOW TO FIND THE OHWM:

To locate the OHWM, go to your shoreline and look for obvious indicators of water. These indicators may include:

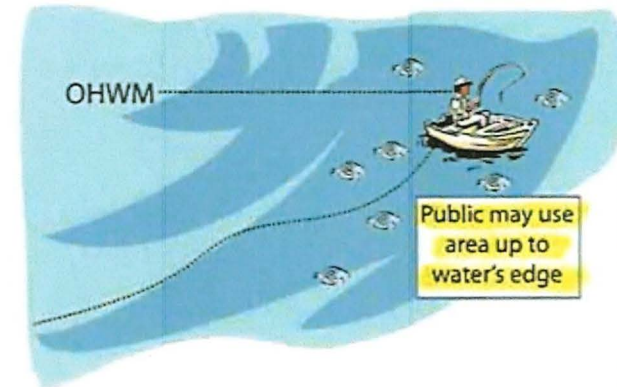
- stains on rocks or other shoreline structures
- bare dirt, marks on trees
- exposed roots running along the shore
- changes in vegetation from water plants to upland plants

Ordinary High Water Mark (OHWM)

Public may use area up to water's edge



When the Water Level is High



There are some water bodies where the OHWM can be more difficult to locate. These may include bogs, pothole lakes, fluctuating water levels due to natural or artificial impacts, rapidly urbanizing watersheds, altered shorelines, wetland fringes and the Great Lakes. In these cases contact the local DNR water management specialist. If your OHWM is for regulatory purposes, the final determination must be made by DNR staff.

When the Water Level is Low



What Does the OHWM Mean to You as a Waterfront Property Owner?

Riparian is the often-used legal term for waterfront property owner.

As a riparian, the land above the OHWM is your private domain. To protect public waters, you may need to get a permit for any structure or activity to be placed or conducted near the shoreline. Check with your area water management specialist (see web site) and local zoning office (in courthouse or municipal building) before beginning any work.

When the water level is below the OHWM you have an exclusive right to use the exposed bed of the waterway in front of your property until the water returns. The public may swim, boat or walk in the water along the shore. You may prevent people from walking on the exposed bed of the waterway by nonstructural means (i.e., fences or walls are not allowed).

Natural processes, such as erosion or deposition, can affect the location of the OHWM. Sometimes, shoreline land area is increased by the natural deposit of materials on the shore or bank. You gain title to all naturally deposited new dry land. You do not gain title to new land areas deposited as a result of your own actions such as filling in the water.

What do you need to know more about OHWM?

If you have questions on your water rights or if need to find the OHWM on your property, contact your area water management specialist, as listed on our web site.

<http://dnr.wi.gov/org/water/fhp/waterway/index.htm>



PUBLIC OR PRIVATE? II



The Ordinary High Water Mark

Under the constitution, lakes and streams belong to all citizens. The OHWM establishes the boundary between public lake bed and private land. The riparian (waterfront) landowner owns the land above the OHWM. The citizens of Wisconsin own the beds of natural lakes, which are held in trust for them by the state. On streams, the riparian landowner owns the bed to the center of the stream, but the public has the right to use the water for activities such as canoeing and fishing.

The Wisconsin Department of Natural Resources (WDNR) and the U.S. Army Corps of Engineers have the authority to require permits or plan approvals for activities in public waters below the OHWM and in some instances above the OHWM where an activity might affect the waterway. ***Local zoning ordinances usually require structures to be set back from the water, measuring from the OHWM.***

What is the OHWM?

The OHWM is the point on the bank or shore where the water is present often enough so that the lake or stream bed begins to look different from the upland. Specifically, the OHWM is:

the point on the bank or shore up to which the water, by its presence, wave action or flow, leaves a distinct mark on the shore or bank.

The mark may be indicated by erosion, destruction or change in vegetation or other easily recognizable characteristics.

How is the OHWM found?

If you are a landowner planning to build near or change your shoreline, you might need to know the location of the OHWM. You may request that Wisconsin DNR field staff locate the OHWM on your property through on-site studies of physical and biological conditions at the shoreline.

The principal indicator is the change from water plants to land plants. In the area where the plants change, the investigator may also use other indicators such as: change in soil type, ridges, other erosion marks, and water stains on rocks, soil, trees or structures. If none of these indicators are available in the immediate location, the elevation of the OHWM may be found at another spot and transferred to your property.

What Does the OHWM Mean to You as a Citizen?

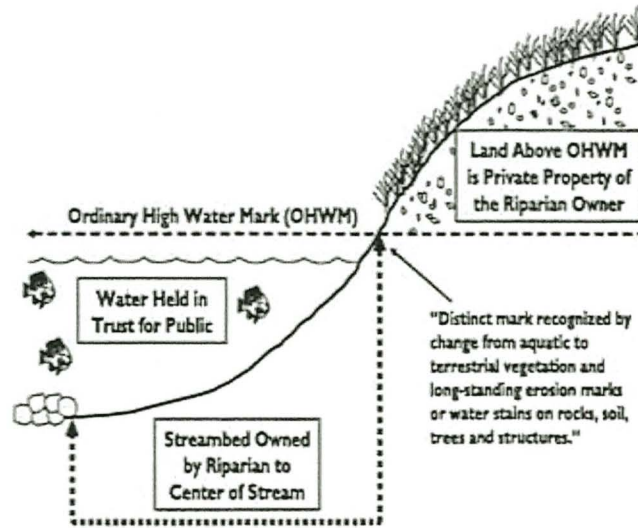
As long as you keep your feet wet, you may walk along the shore, swim or boat in any navigable lake or stream. You need not worry about the location of the OHWM as long as you stay in the water.

However, when water levels are below the OHWM, waterfront property owners can prevent you from walking on the exposed bed of the waterway.

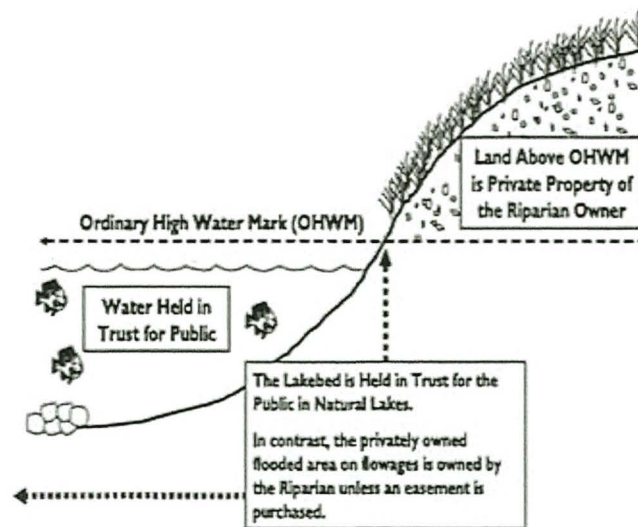
YOUR RIGHTS IN RELATION TO THE OHWM

Ownership & Use

In Streams

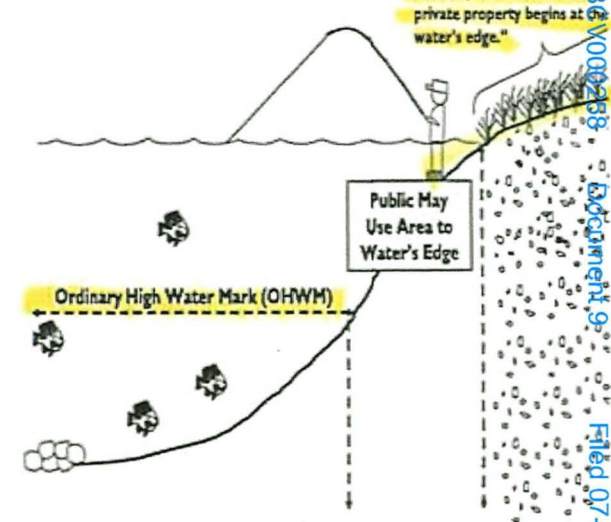


In Lakes

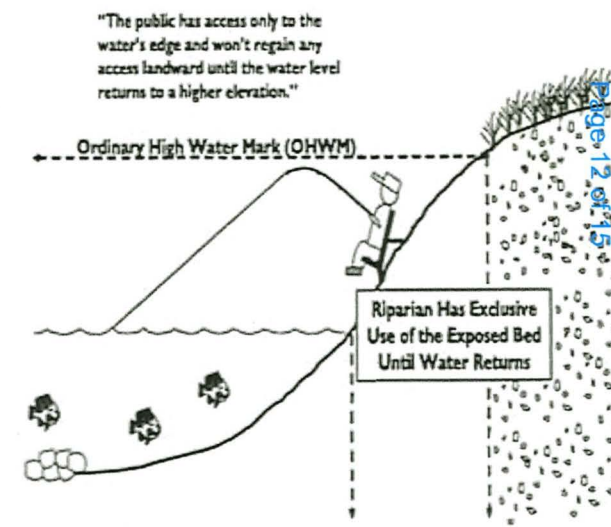


When Water Levels Change

When the Water Level is High



When the Water Level is Low





Public or Private? II

The Ordinary High Water Mark

The OHWM forms several important boundaries. The dividing line between public and private ownership of land on natural lakes is determined by the OHWM. The citizens of Wisconsin own the beds of natural lakes, which are held in trust for them by the State. The riparian (waterfront) landowners own the land above the OHWM. On streams, the riparian landowner owns the bed to the center of the stream, but the public has the right to use the water for activities such as canoeing and fishing.

The Department of Natural Resources (DNR) and the U.S. Army Corps of Engineers have the authority to require permits or plan approvals for activities in public waterway below the OHWM and in some instances above the OHWM where the activity might affect the waterway. Local zoning ordinances usually require structures to be set back from the water, measuring from the OHWM.

The ordinary high-water mark (OHWM) is the point on the bank or shore where the water is present often enough so that the lake or stream bed begins to look different from the upland. Specifically, the OHWM is the point on the bank or shore up to which the water, by its presence, wave action or flow, leaves a distinct mark on the shore or bank. The mark may be indicated by erosion, destruction of or change in vegetation or other easily recognizable characteristics.

How is the OHWM found?

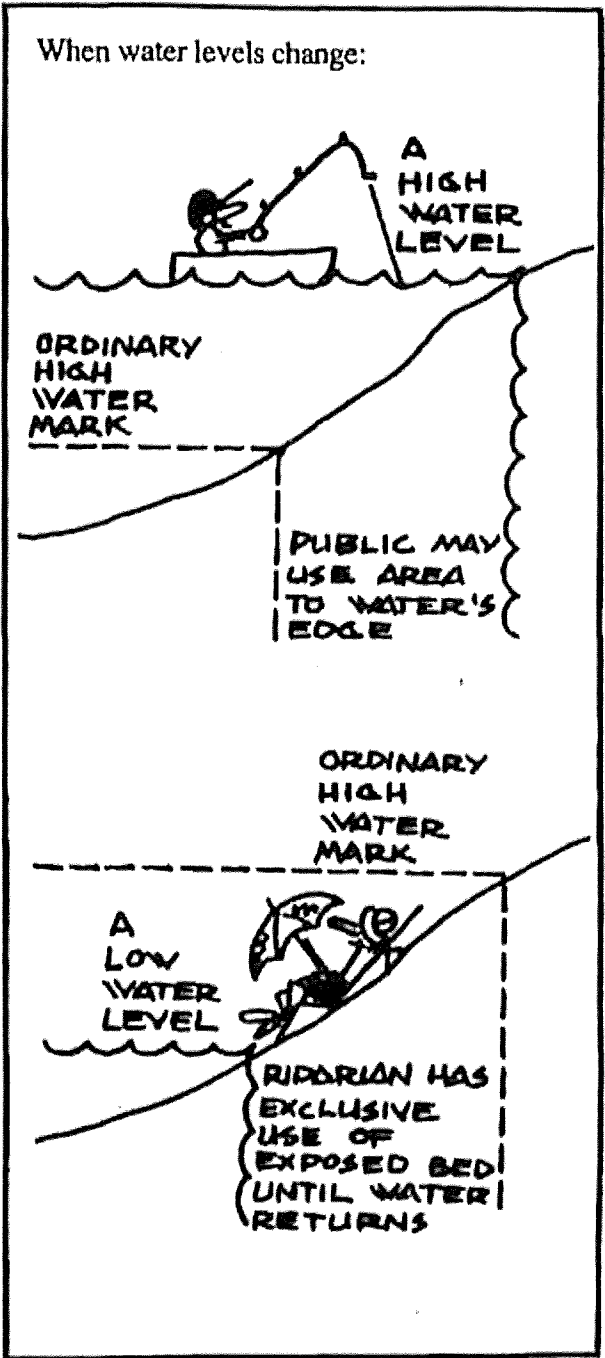
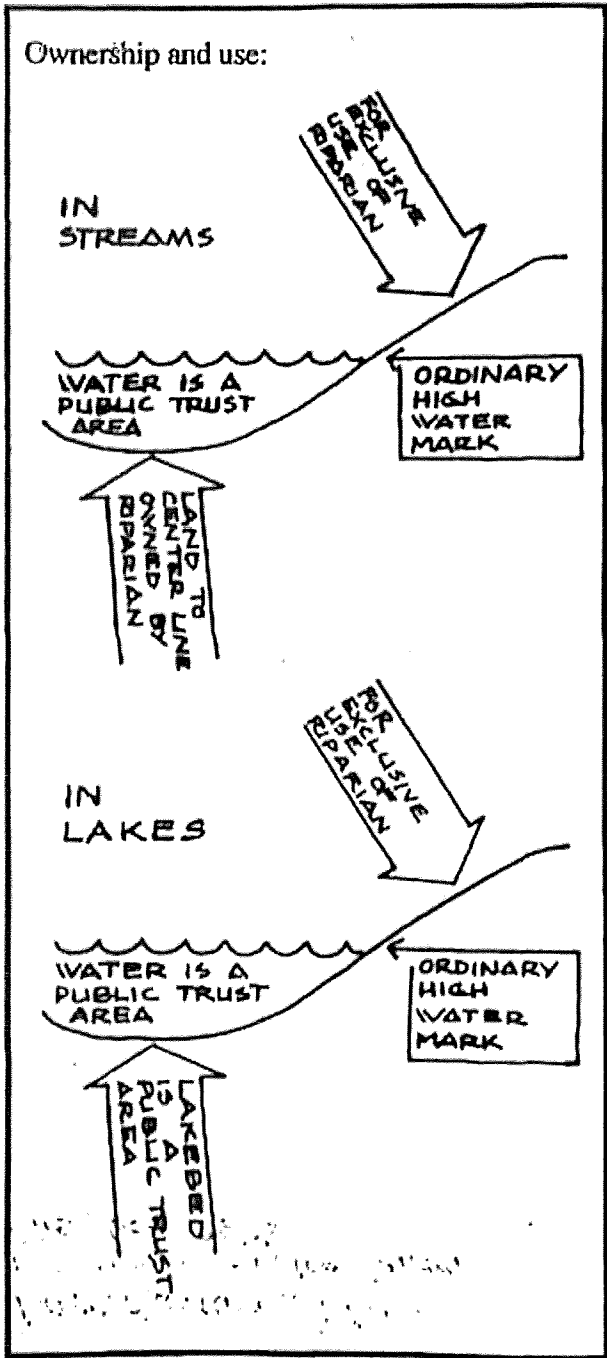
Typically, you might need to know the location of the OHWM if you are a landowner planning to build near or change your shoreline. You may request a determination of the OHWM on your property by contacting your area water management specialist (see list).

Wisconsin DNR field staff locate the OHWM through on-site studies of physical and biological conditions at the shoreline. The principal indicator is the change from water plants to land plants. In the area where the plants change, the investigator may also use indicators such as change in soil type, ridges or other erosion marks or water stains on rocks, soil, trees or structures. If none of these indicators are available in the immediate location, the elevation of the OHWM may be found at another spot and transferred to the site in question.

What does the OHWM mean to you as a citizen?

As long as you keep your feet wet, you may walk along the shore, swim or boat in any navigable lake or stream. You need not worry about the location of the OHWM as long as you stay in the water.

Waterfront property owners can prevent you from walking on the exposed bed of the waterway when the water is below the OHWM.



What does the OHWM mean to you as waterfront property owner?

Riparian is the often-used legal term for waterfront property owner.

As a riparian, the land above the OHWM is your private domain. To protect the public waters, you may need to get a permit for any structure to be placed near the shoreline. Check with your area water management specialist (see list) and local zoning office (in courthouse or municipal building) before beginning any work.

When the water level is below the OHWM you have the exclusive right to use the exposed bed of the waterway in front of your property until the water returns. The public may swim, boat or walk in the water along the shore. You may prevent people from walking on the exposed bed of the waterway by nonstructural means (i.e., fences or walls are not allowed).

Natural processes, such as erosion or deposition, can affect the location of the OHWM. Sometimes, shoreline land area is increased by the natural deposit of materials on the shore or bank. You gain title to all naturally deposited new dry land. You do not gain title to new land areas deposited as a result of your own actions such as filling in the water.

Erosion is a slow wearing away of shore or bank material. You can protect your property from erosion. A permit program has been set up to ensure proper erosion control practices. Contact your area water management specialist (see list) before beginning any shoreline erosion control project.

Do you need to know more about OHWM?

If you have questions on your water rights or need to find the OHWM on your property contact your area water management specialist as listed below.

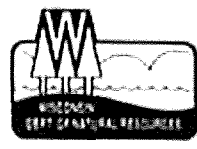
Dave Kafura, DNR
Hayward Service Center
(715) 634-2688

Information and assistance

Your Area Water Management Specialist—

Find your county listed below.

- | | |
|---|---|
| Brule 715-372-4866
Ashland-Bayfield-
Douglas-Iron | Sturgeon Bay .. 414-746-2860
Calumet-Door-Kewaunee-
Manitowoc-Winnebago |
| Cumberland .. 715-822-3590
Barron-Polk | Eau Claire 715-839-3769
Chippewa-Dunn-Eau
Claire-Pepin-Pierce-St.
Croix |
| Spooner Ranger Station
715-635-4097
Burnett-Washburn | Black River Falls .. 715-284-
1424 Buffalo-Clark-
Jackson-Trempealeau |
| Park Falls 715-762-3204
Price-Rusk-Sawyer-
Taylor | La Crosse 608-785-9010
Crawford-La Crosse-
Monroe-Vernon |
| Woodruff 715-358-9214
Forest-Onocida-Vilas | Dodgeville 608-935-3368
Grant-Green-Iowa-
Lafayette-Richland |
| Antigo 715-627-4317
Langlade-Lincoln-
Marathon | Madison 608-273-5970
Dane-Jefferson-Rock |
| Wisconsin Rapids .. 715-421-
7815 Adams-Juneau-
Portage-Wood | Madison 608-275-3228
Columbia-Marquette-Sauk |
| Wausaukee ... 715-856-9160
Florence-Marlquette-
Menominee-Oconto | Horton 414-387-7878
Dodge-Fond du Lac-Green
Lake |
| Green Bay ... 414-448-5166
Brown-Outagamie | Milwaukee 414-263-8677
Kenosha-Milwaukee-
Ozaukee-Racine-
Sheboygan-Walworth-
Washington-Waukesha |
| Oshkosh 414-424-7885
Shawano-Waupaca-
Wauchara | |



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2023CV000258

EXHIBIT 6



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June 27, 2022

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Michael Kowalkowski
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Dear Diane and Mike:

Following your receipt of my letter dated April 5, 2022, attorney Michael Kowalkowski and I spoke about the public's right to access land beyond the OHWM during abnormally high water conditions. Although we were discussing Mr. Tom Reiss's property in particular, the discussion included a general review of the public's right to access land beyond the OHWM.

At the time of our discussion, Mr. Kowalkowski indicated that the DNR's position was that there was no clear guidance on the issue (i.e., regarding the public's right to access land beyond the OHWM). We discussed a number of fact specific scenarios. Mr. Kowalkowski indicated that the matter should be addressed on a case-by-case basis and was fact specific. I responded that laws governing access and trespass cannot and should not be determined on an *ad hoc* basis. I further noted that determining rights in an *ad hoc* manner will lead to conflict (as it has with respect to Mr. Reiss's situation) and confusion to law enforcement.

My April 5, 2022 letter cited various DNR publications that we believe provide incorrect guidance to members of the public. Mr. Kowalkowski reiterated that the DNR's "keep your feet wet" argument was correct even if such advice is used by individuals to go beyond the OHWM and travel on temporarily flooded uplands. We note that the publications themselves, which provide a general rule, are inconsistent with the law.

Diane L. Milligan
Michael Kowalkowski
June 27, 2022
Page 2

I provided a number of authoritative cases supporting Mr. Reiss's position that the public does not have the right to go beyond the OHWM during periods of abnormally high-water conditions. In addition to those cases cited in my April 5, 2022 letter, the fairly recent Supreme Court decision in *Rock-Koshkonong Lake Dist. V. State Dept. of Natural Resources*, 350 Wis. 2d 45 (2013) provides clear guidance.

The *Koshkonong* decision involved the question about whether the DNR had the authority to decide a matter regarding water levels in an impounded lake via the public trust doctrine. The Court, in rejecting the DNR's position, noted that "...the DNR inappropriately relied on the public trust doctrine for its authority to protect non-navigable land and non-navigable water above the ordinary high water mark." We believe this clearly applies to the present matter involving Mr. Reiss. With respect to Mr. Reiss's property, the only time that the land is accessible to the public is during periods of irregular flooding. Seemingly, the DNR's position is that the "keep your feet wet" argument, arising through the public trust doctrine, permits such access. This position is contrary to the holding in *Koshkonong* and in other cases.

Mr. Reiss's land is not navigable above the OHWM. Mr. Reiss's upland lying beyond the OHWM is not subject to the public's use under the public trust doctrine. The Court further noted that "[t]he DNR's position seeks to extend its public trust jurisdiction beyond navigable waters to non-navigable waters and land.... Eliminating the element of "navigability" from the public trust doctrine would remove one of the prerequisites for DNR's constitutional basis for regulating and controlling water and land. Applying the public trust doctrine to non-navigable land above the OHWM would eliminate the rationale for the doctrine. The ramifications for private property owners could be very significant." Additional commentary by the Court includes the notation that "[i]f the public trust were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on private land, and it would be difficult to cabin [or limit] expansion of the state's new constitutionality based jurisdiction over private land." DNR's invitation to "keep your feet wet" in any instance and as a general rule is, in fact, an extension of jurisdiction over private land and confers rights upon the public that do not exist and, as the court suggests, invites trespass.

Mr. Reiss is dependent upon the DNR and other law enforcement agencies aiding in the enforcement of his rights. He further has the right to be protected against the DNR conferring 'rights' upon members of the public that they do not have, especially when those 'rights' are in direct conflict with his well-established private property interests. Accordingly, in the absence of the DNR's concurrence, Mr. Reiss intends to file a declaratory action asking a court to confirm his interpretation of the law. Once his rights are confirmed, he intends to determine the location of the OHWM (established through concurrence with the DNR or by working directly with the DNR). Once established, Mr. Reiss intends to post signs indicating that lands lying

Diane L. Milligan
Michael Kowalkowski
June 27, 2022
Page 3

beyond the OHWM are private and not accessible during any period without consent (even during periods of irregular flooding).

Prior to moving forward, Mr. Reiss would welcome additional discussions regarding the matters set forth herein and in my April 5, 2022 letter. I am available to discuss this matter at any time but please note that Mr. Reiss intends to pursue a declaratory action without delay.

Yours very truly,



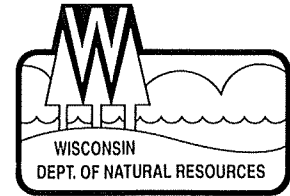
Troy E. Giles

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EXHIBIT 7

State of Wisconsin
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May 31, 2023

Attorney Troy Giles
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Waukesha, WI 53187-2265

Sent via email to: tgiles@reinhartlaw.com

Dear Attorney Giles,

I am writing to respond to your letter dated May 10, 2023, regarding members of the public accessing your client's property using airboats in times of high water on the Rock River. Please be aware that the public's right to use navigable waters is provided by the Wisconsin Constitution and case law interpretation, not by any law or policy enforced or administered by the department. The department has no regulatory role in "allowing" the public to exercise this right as alleged in the draft complaint accompanying your letter. In regard to your client's property, the department has not made any determination nor advised any member of the public that they may or may not access the water that inundates your client's property when the Rock River is high. Likewise, as you are no doubt aware, the department has no authority to enforce trespass laws that may or may not apply to your client's situation.

As you correctly note, the department's regulatory jurisdiction under Ch. 30, Wis. Stats., extends to the ordinary high water mark of navigable waters. The draft complaint alleges that the department has expanded its jurisdiction above the ordinary high water mark on to your client's property. However, the department has not asserted any regulatory jurisdiction under Ch. 30 over areas you assert are upland. The department has made no ordinary high water mark determination nor any navigability determination on your client's property, nor required waterways permits for any work in those areas you assert are upland. The department has also not asserted that your client is infringing public rights under s. 30.03, Wis. Stats.

As has been previously communicated to you, the actions of members of the public are not subject to the department's control. Any issue your client has with where members of the public traverse may be a matter of trespass or damage to property, which must be addressed at the local level where authority for enforcement of the law lies.

Sincerely,

A handwritten signature in black ink that reads "Michael Kowalkowski".

Michael Kowalkowski
Staff Attorney

cc: Attorney Diane Milligan, WDNR