BEFORE THE NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:

SAVE THE DUNES CONSERVATION FUND, INC., Petitioner,	)	
vs.	)	CAUSE NO. 23-036W
TOWN OF OGDEN DUNES/SCOTT KINGAN and DEPARTMENT OF NATURAL RESOURCES, Respondents.	)	Permit No. LM-255-0

PETITIONER'S MEMORANDUM IN SUPPORT OF SAVE THE DUNE'S MOTION FOR SUMMARY JUDGMENT

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ATTORNEYS FOR SAVE THE DUNES CONSERVATION FUND, INC.

TABLE OF CONTENTS

I . INTRODUCTION

This case stems from the Indiana Department of Natural Resources' ("DNR") approval of the Town of Ogden Dunes' ("Town") plan to build the second half of a mile-long armor stone revetment on Lake Michigan for the private benefit of beachfront landowners along the Town's stretch of shoreline. DNR did so without delineating the boundary between private property and public land held in trust by the State, and without evaluating the revetment's impacts on the public trust to ensure that Hoosiers' vested, public trust rights are not alienated as required by Indiana's Public Trust Statute (Ind. Code § 14-26-2.1 *et seq.*), the Navigable Waterways Act (Ind. Code § 14-29-1 *et seq.*), and the Indiana Supreme Court decision in *Gunderson v. State,* 90 N.E.3d 1171 (Ind. 2018).

In *Gunderson,* the Court made clear that Indiana has "exclusive title to the bed of Lake Michigan up to the *natural* OHWM [ordinary high water mark], including the temporarily exposed shores," which it holds in public trust for its citizens. 90 N.E.3d at 1181-1182. The Court also confirmed that this property boundary is distinct from the fixed, administrative OHWM value of 581.5' International Great Lakes Datum 1985 ("IGLD85") that the U.S. Army Corps of Engineers ("Army Corps") and DNR had been using as a "jurisdictional benchmark for administering [their respective] regulatory programs." *Id.* at 1186-1187.

On that front, the Court observed that the "natural" or "common law" OHWM is a *gradually* moving physical boundary indicated by shifts in "shelving and terrestrial vegetation" due to accretion and erosion of the shoreline *over time*. *Id.* at 1186. The Court also rejected DNR's argument that the administrative boundary had "superseded the common law boundary," and squarely concluded that DNR is prohibited from changing the common law boundary "[a]bsent *a*

clear legislative directive" to do so, as it would "threaten[] to alienate public trust lands." *Id.* at 1182, 1185-1186 (emphasis added). Yet that is precisely what DNR did in this case.

In approving the Town's plans to harden its Lake Michigan beach with a stone wall, DNR relied on an OHWM delineation conducted by the Town and approved by Army Corps. The Town's delineation followed Army Corps' method for delineating the OHWM of rivers and streams, not Lake Michigan or its coastal areas. And the Town's delineation followed Army Corps' administrative definition of the OHWM developed long ago for determining the agency's federal jurisdiction to regulate discharges of dredge and fill material into U.S. waters under the Clean Water Act ("CWA"), not for delineating the public trust property boundary on Indiana's Lake Michigan shoreline.

Even so, DNR contends that relying on Army Corps' OHWM determination in this case is perfectly okay because, according to DNR, when the Indiana General Assembly passed the Public Trust Statute in 2020 to codify *Gunderson*, it supplanted the common law definition and replaced it with Army Corps' regulatory definition. But that is not remotely close to what the legislature did. Rather, state lawmakers adopted word-for-word, the same common law OHWM definition, cited by the *Gunderson* Court, that has long been contained in the Indiana Administrative Code. *Id.* at 1185 (confirming that the OHWM definition in 312 IAC 1-1-26(1) "reflects the *traditional common-law OHWM*" (emphasis added)); *see also* Ind. Code § 14-26-2.1-2 (defining the OHWM of Lake Michigan based on the same physical characteristics listed in 312 IAC 1-1-26(1) and "affecting" the statutory authority for 312 IAC 1-1-26).

For that matter, nowhere in the Public Trust Statute is Army Corps or its administrative definition even mentioned, much less does the statute contain the necessary "clear legislative directive" for DNR to cede its responsibility to Army Corps to determine the extent of Indiana's

ownership and authority over the state's public trust land. Indeed, DNR's own guidance and communications with Army Corps confirm DNR's understanding that the Public Trust Statute codified the natural, common law OHWM definition for Lake Michigan, and that definition is markedly distinct from Army Corps' administrative definition in its language, application, and purpose. DNR's mere say-so in this case that the two definitions are the same and, therefore, the agencies' respective jurisdictional boundaries are the same, does not make it so and amounts to an unpromulgated agency rule that has no foundation in Indiana law.

For these reasons that are discussed further below, Save the Dunes is entitled to summary judgment on its claim that in permitting the Town's revetment, DNR failed to delineate the natural OHWM of Lake Michigan as required by Indiana's Public Trust Statute and *Gunderson*. Save the Dunes is also entitled to summary judgment on its claim that DNR violated provisions of the Navigable Waterways Act requiring the agency to evaluate whether the Town's revetment will violate the public trust and, if so, to deny the project or condition its approval on terms that would allow placement of the structure without violating the public trust. 312 IAC 6-1-1(f)(1); 312 IAC 6-8-3(c). Indeed, without knowing the location of the property line between public trust and private land, DNR could not possibly have evaluated the full nature and extent of public trust impacts that the revetment will have.

II. STATEMENT OF UNDISPUTED FACTS

Historical Background

The Town of Ogden Dunes sits on a one mile stretch of Indiana's Lake Michigan shoreline that is surrounded by the Indiana Dunes National Park on both sides. *See Town of Ogden Dunes v. United States DOI*, No. 2:20-CV-34-TLS-JEM, 2022 U.S. Dist. LEXIS 42494, at *6 (N.D. Ind. Mar. 10, 2022) (citing the Town's complaint and confirming that the Town "is effectively

surrounded by the Park").[1] The Port of Indiana Burns Harbor Complex, built in the 1960s just east of the National Park's Portage Lakefront and the Town's beach, has blocked the natural flow of sand to those beaches ever since. *Id.* at *7-8.[2]

Due to the sand starvation, the Town installed a "shore protection system (sheet piling, stone toe, and revetment) . . . in the 1980s and 1990s," along much of its property above the Lake's OHWM. *Id.* at *8. And in 1997, the Army Corps approved a permit allowing the Town to install additional sheet piling below the OHWM along the east end of the Town's beach. *Id.* at *9. In 2000, the Army Corps placed 143,000 cubic yards of sand on the National Park's Portage Lakefront, which in turn provided "ample beach for Ogden Dunes for many years." *Id.* However, by 2009 the east end of the Town's beach was again exposed. *Id.*

Based on extensive study, Army Corps, the National Park Service ("NPS), DNR, and the Town all agree that the preferred solution to this decades-old problem is beach nourishment (sand replacement).[3] However, instead of investing in that solution, or taking advantage of funding support to do so, the Town has spent the last four decades suing the Indiana Port Commission and others. *The Town of Ogden Dunes, et. al v. Bethlehem Steel Corp., et al*, 996 F. Supp. 850, 852-853 (N.D. Ind. 1998) (providing the history of the Town's litigation efforts up to that point). For instance, in one of the Town's lawsuits, a settlement was reached where the Port paid the Town

[1] *See also* Town of Ogden Dunes' website at https://ogdendunes.in.gov/about/pages/location; and Exhibit A at pdf p. 27: NPS, U.S. Dept. of Interior, *Shoreline Restoration and Management Plan/Final Environmental Impact Statement*, Park Map (Aug. 2014).
[2] Exh. A at pdf p. 51; *see also* Exhibit B at pdf pp. 5-6, 8-9: Army Corps, *Burns Waterway Harbor, Indiana Shoreline Damage Mitigation and Reconnaissance Study, IN 905(b) Analysis* (Oct. 2010).
[3] Exh. A at pdf pp. 51-53, 63-65; Exhibit C at pdf pp. 1, 10: DNR's Phase I Emergency Approval (Aug. 11, 2020) with supporting documents, which include Army Corps' provisional permit (May 14, 2020), and the Town's letter to the Indiana Department of Homeland Security (Mar. 19, 2020).

$300,000 to buy a dredge to maintain its beach. *Id.* at 852. Yet, the Town never followed through with the purchase and instead sued the Port again. *Id.* at 852-853.

In more recent years, the Town has been engaged in protracted litigation with the Army Corps and the National Park Service ("NPS") for declining to approve the revetment at issue here. *Town of Ogden Dunes v. United States Dept. of Interior*, 2022 U.S. Dist. LEXIS 42494, *12.[4] Of particular relevance, NPS submitted public comments to DNR opposing the revetment due to the adverse effects it will have on the surrounding Indiana Dunes National Park and the public trust:

> Artificially armoring the entirety of the southern Lake Michigan shoreline along the boundary of the Town of Ogden Dunes will transfer and exacerbate the erosion onto NPS lands, evidence of which is already showing on the west side of town from the illegally placed rock at and below the natural ordinary high water mark (OHWM). The result of the proposed action would be a hardened peninsula (Ogden Dunes) and erosion cut points on either side. This action will result in, well researched and known, direct impact to lands owned in fee by the National Park Service. The NPS-administered West Beach properties contain rare species and plant communities not found elsewhere in the State of Indiana.
>
> Additionally, the creation of a revetment will result in a shoreline profile consisting of 1-5 ton boulders piled a dozen feet high and stretching out between 20-70 feet from the base of the existing seawall. The proposed action will result in there being no public beach when the lake does return to a lower level. The Indiana DNR must consider the legal and public ramifications of protecting the public's right to access the Lake Michigan shoreline, hard fought and presented in the Gunderson decision.[5]

The NPS also pointed out to DNR that the Town appeared to be prioritizing private property interests above the public trust:

> The NPS has recommended to the Town, on numerous occasions, that their focus should be on what protective actions are possible above the natural OHWM, on Town and private lands that would not require federal permits. The Town has replied several times that a solution south of the seawall would be too expensive, would impact the private lake views and would shrink the size of private yards. The Town now would have us believe that there are no viable engineering solutions that can be implemented on their own land when the reality is that it is simply cheaper

[4] Exhibit D at pdf 4: U.S. Dept. of Interior, NPS Public Comments to DNR (June 11, 2020) (detailing NPS' repeated formal objections to the entire revetment).
[5] Exh. D. at pdf pp. 5-6.

> to impact public owned and regulated lands while maintaining/restoring their private yards.[6]

The Town's focus on protecting private yards and lake views aligns with the fact that beachfront landowners are footing the bill for the revetment, not the Town.[7] Yet, even among the Town's residents, placing a massive stone wall along the entire length of the Town's shoreline is controversial.[8]

DNR's Permitting of the Revetment

It is in the backdrop of this decades-long controversy that DNR considered the Town's application for a permit to harden its shoreline. The Town submitted an emergency request to construct the entire revetment in April of 2020.[9] Four months later, DNR emergently approved construction of the eastern half of the revetment ("Phase I") but did not approve the western half ("Phase II") for another three years.[10] In the interim, DNR's view of its responsibility to safeguard the public trust took a dramatic turn.

Initially, DNR took a strong stance as exemplified by its letter of January 8, 2021, reminding the Town of its obligations to meet the public trust conditions DNR imposed in its emergency authorization of Phase I, which DNR made clear also apply to Phase II:

> During our conversations with you leading up to the emergency authorization, the Department listed several conditions required in order to comply with the provisions of IC 14-29-1 and IAC 6-1-1. These conditions must be met to assure public access is not impeded due to the recent construction of the permanent structure (rock revetment), a portion of which occupies the public trust area along and lakeward of the ordinary high water mark. As described in the Department's

[6] Exh. D. at pdf p. 6.
[7] Exhibit E at pdf pp 6-8; 12-13; 14-16; 17: Town's communications at OD1000-1003, 1103-1104; 1188-1190; 1194.
[8] Exh. E at pdf pp 9, 11: Town's communications at OD1008, 1012 (survey of residents confirming that "most residents want partial shore protection work, but not the full revetment").
[9] Exhibit F: Town's First Application for the Entire Revetment (April 27, 2020).
[10] Exhibit C: DNR's Emergency Authorization of Phase I (August 11, 2020); Exhibit G: DNR's Certificate of Approval for Phase II (June 1, 2023).

> August 11, 2020 Emergency Authorization, these conditions must be fully addressed prior to the issuance of a permanent after-the-fact license (permit) for the structure. *It should be noted that the Department's conditions also apply and must be addressed for the remaining portion of the Town's shoreline protection project application…*"[11]

To date, the Town has not complied with any of these public trust conditions.

DNR also sent deficiency notices in late 2022 and early 2023—*after* the Public Trust Statute was enacted—each time directing the Town to revise its application based on what DNR then referred to as the "common law" OWHM value of 584.0' IGLD85, as required by *Gunderson.*[12] In response, the Town's attorney asked DNR to "stay the deficiency deadline" while the Town's federal litigation against the Army Corps and NPS proceeded.[13] After that, the DNR's view of what *Gunderson* required changed, and the agency capitulated to the Town's will.

In January of 2023, the Town submitted an application for Phase II stating it would "wait for [DNR's] help/decision regarding the OHWM."[14] The Town expressed concern that what DNR referred to as the "common law" OHWM value of 584.0' was "significantly more than the previous regional permit applications using a 581.5' feet value[;]" and, therefore, DNR and Army Corps agreed "that a field visit [would] refine that value sometime in 2023, followed by revisions to the project plans as needed, including the quantity of stone fill below the OHWM"—which at 584.0' was estimated to be nearly 4000 tons covering three quarters of an acre.[15] In anticipation of "refining" the OHWM value, Army Corps, DNR and the Town's consultant were confused over

[11] Exhibit H at pdf p. 1: DNR Letter to the Town Re: Permit Conditions for Permanent Placement of the Ogden Dunes Shoreline Protection Project (Jan. 8, 2021) (emphasis added).
[12] Exhibit I: DNR Deficiency Notices (Aug. 24, 2022, Oct. 13, 2022, Feb. 23, 2023).
[13] Exhibit J: Town Attorney's Letter to DNR Re: Deficiency Notices (Sept. 12, 2022).
[14] Exhibit K at pdf p. 1: First Permit Application for Phase II (Jan. 25, 2023) with email to DNR from Town's consultant, Dan Veriotti.
[15] Exh. K at pdf 6.

who would conduct the delineation.[16] But regardless of who did it, Army Corps' agent Soren Hall expected an OHWM value below 584' "[g]iven the continued decline in lake levels."[17]

Ultimately, the Town's consultant Dan Veriotti with GZA GeoEnvironmental, Inc. ("GZA"), performed the delineation on March 24, 2023, with Army Corps and DNR staff "in attendance" and arrived at an OHWM value of 581.5', which coincidently is the same administrative value preferred by the Town.[18] A few days later, on March 29, 2023, the Town submitted its revised application for Phase II, recalculating the ~4000 tons of stone fill below the 584.0' OHWM value down to just a fraction—a mere 345 tons covering less than a tenth of an acre below 581.5'—which DNR concluded eliminated the need for any compensatory mitigation.[19]

While the Town claims the revetment will provide "improved public beach access locations" and a half-acre of restored dune grass plantings, the design drawings show that any beach access and dune grass restoration will happen *above* the revetment for the benefit of private beachfront homeowners, with minimal access for the public.[20] Even so, DNR approved the Town's plan on June 1, 2023 without any mention of the public trust and without enforcing the public trust conditions that DNR had previously imposed on Phase II in issuing emergency authorization for Phase I.[21] In doing so, neither DNR nor the Town obtained written authorization from the National Park Service as required by 312 IAC 6-8-2(e), despite the ongoing federal litigation and serious concerns NPS raised.[22]

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[16] Exhibit L at pdf p. 12, 22-24: Email communications between DNR, Army Corps, and GZA.
[17] Exh. L at pdf p. 12.
[18] Exh. K at pdf p. 6; Exhibit M at pdf 4: Second Application for Phase II (March 29, 2023).
[19] Exh. M at pdf p. 5; Exh. G.
[20] Exh. M at pdf pp. 10, 26-41.
[21] Exh. G.
[22] Exhibit N at pdf pp. 8-9: DNR's Responses to Petitioner's Initial Discovery Requests, Answer to Request to Admit 10 (claiming not to understand what "written authorization" means).

DNR's Shifting Views on the Location of Lake Michigan's Public Trust Boundary

At least up until February of 2023—the month before DNR approved Phase II—the agency still held the view that the common law OHWM is the public trust boundary as mandated by *Gunderson.*[23] For that matter, as of June 5, 2023, DNR had this to say on its public-facing website about the definition of the common law OHWM and its application to Lake Michigan:

> The Indiana Administrative Code definition reflects the *traditional common-law, or natural, OWHM* as: The line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics. 312 I.A.C. 1-1-26(1). These physical characteristics include a clear and natural line impressed on the bank or shore, shelving, changes in the soil's character, the destruction of terrestrial vegetation, or the presence of litter or debris.
>
> In its February 14, 2018 ruling, *Gunderson v. State, 90 N.E.3d 1171 (2018)*, the Indiana Supreme Court held that the boundary separating public trust land from privately owned riparian land along the shores of Lake Michigan is the common-law ordinary high water mark and that, absent an authorized legislative conveyance, the State retains exclusive title up to that boundary. As such, the Indiana DNR will apply the common-law OHWM when considering applications for construction activities along the Lake Michigan shoreline.
>
> It is important to note that the physical location of the OHWM will move over time due to natural erosion and deposition (called accretion) of sand along the shoreline. This natural process will cause the DNR's point of regulatory jurisdiction to change over time and, therefore, the DNR will verify the location of the OHWM on a case by case basis. At locations where an existing seawall is present and located lakeward of the OHWM, the DNR will consider the toe of the seawall as the OHWM for jurisdictional purposes.
>
> Figure 1 [below] provides an example application of the physical characteristics test to determine the location of the ordinary high water mark along the Lake Michigan Shoreline in Indiana.

[23] *See* Exh I: DNR Deficiency Notices (Aug. 24, 2022, Oct. 13, 2022, and Feb. 23, 2023).

Figure 1.

> The dashed line on Figure 1 depicts the location of the OHWM based on the appearance of recognizable shelving at the toe of the dune bluff and the presence/destruction of terrestrial vegetation. In cases where the OHWM is not visible due to the discontinuous nature of the beach, the location of the OHWM will be verified through application of the physical characteristics test from nearby locations where the OHWM is visible.
>
> . . . .
>
> The waters and land up to the ordinary high water mark of Lake Michigan . . . are owned by the State of Indiana and are held in trust for the use and enjoyment of the public.
>
> 
>
>
> Swimming, fishing* and boating are allowed in addition to enjoying the scenic natural beauty of Lake Michigan.[24]

Shortly after this case was filed, DNR revised this web content. In its place, the agency left the first three paragraphs—namely, those paragraphs discussing the *Gunderson* decision, the IAC definition of the common law OHWM, and DNR's statement that it "will apply the common-law OHWM when considering applications for construction activities along the Lake Michigan

[24] Exhibit O at pdf pp. 8-9; 12: Affidavit of Kacey Cook with pdfs of DNR webpages, *Lake Michigan Ordinary High Water Marks* and *Lake Michigan*, https://www.in.gov/dnr/water/lake-michigan/lake-michigan-ordinary-high-watermarks/ and *Lake Michigan Shoreline Recreation Guidelines* https://www.in.gov/dnr/lake-michigan-coastal-program/lake-michigan-shoreline-recreation-guidelines/ before and after DNR's revisions—i.e., the webpages as they existed on June 5, 2023 (before revisions), and on September 3, 2023 (after revisions) (emphasis added).

shoreline."[25] However, DNR removed the illustrative photos and explanation of *how* the agency would apply the common law OHWM definition to Lake Michigan, and replaced it with the following, conflicting language that DNR would instead apply Army Corps' definition because, according to DNR, it had "consistently stated" that it was okay to do so:

> In 2020, the Department of Natural Resources (DNR) successfully advocated for the codification of the Indiana's Supreme Court ruling in Gunderson with HEA 1385 (2020), which included defining the ordinary high water mark (OHWM) in IC 14-26-2.1-2. During the legislative discussion on HEA1385 and in subsequent legislative sessions, DNR has *consistently stated* that the factors used to determine the OHWM for DNR and the U.S. Army Corps are the same, and therefore their jurisdictional boundaries are the same.[26]

So now, even though DNR continues to say on its website that it "will apply the *common-law* OHWM when considering applications for construction activities along the Lake Michigan shoreline," the agency insists it did not have to do so in this case because, as DNR sees it, the Public Trust Statute's OHWM definition "mirrors" Army Corps' definition and "supersedes the common law definition."[27]

DNR's Reliance on Army Corps' OHWM Determinations

Based on its new view that the Public Trust Statute adopted Army Corps' definition, DNR confirmed that in permitting Phase II, the agency relied on the Town's OHWM determination conducted by the Town's consultant, Dan Veriotti, who followed Army Corps' regulatory definition, procedures, and guidance.[28] In turn, Mr. Veriotti confirmed that the 581.5' OHWM value he came up with is based on Army Corps' "methodology," using Army Corps' "Rapid OHWM Field Identification Data Sheet," which Mr. Veriotti claims is the generally accepted,

[25] Exh. O at pdf p. 3.
[26] Exh. O at pdf p. 3 (emphasis added).
[27] Exh. N at pdf 1: DNR Responses to Petitioner's Initial Discovery Requests ("object[ing] outright" to Petitioner's use of the term "common law OHWM" for that reason).
[28] Exhibit P: Email of DNR attorney Rebecca McClain to Save the Dunes' counsel (June 5, 2023).

"standard procedure" for complying with Indiana's Public Trust Statute OHWM definition and requirements.[29]

Contrary to Veriotti's view, Army Corps confirmed that it lacks standards "for how to do a Lake Michigan OHWM assessment."[30] For that matter, Army Corps' agent Soren Hall mused that it "could be a useful project to work on" so that Army Corps would "have something in writing . . . [to] provide to consultants."[31] And due to the lack of standards, Army Corps suggested that Mr. Veriotti follow the same process that Army Corps used in Illinois to reach an OHWM value "near 583' IGLD-85" in 2022.[32]

Communications between Army Corps and DNR also reveal that the agencies were confused as to how Army Corps' definition would apply to Lake Michigan in Indiana given their distinct regulatory roles.[33] For instance, in one email exchange between Army Corps' agent, Soren Hall and DNR's Division of Water Director, Ryan Mueller, Mr. Hall explained that for Army Corps, the OHWM is merely an "administrative" value that does not need to be precisely delineated and, for that matter, can be a fixed value for the agency's purposes:

> A change in beach grade is often the best indicator because there are often several lines along the beach from different storm events. The photos can be very difficult to pick up these subtleties, but as long as the OHWM isn't drastically different from what I would anticipate, *I don't nitpick it* because [unlike DNR] our mitigation is not based upon fill acreage, *so the actual line is more administrative* [for Army Corps] rather than something that influences the design. In situations where water is up to a wall or revetment and there are no adjacent areas where the OHWM can be gleaned from field characteristics, *we default to the standard of 581.5'-IGLD*.[34]

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[29] Exhibit Q at pdf pp. 3-4: Town's Expert Disclosure and GZA GeoEnvironmental, Inc.'s Report, signed by Dan Veriotti, P.E. (May 28, 2024).
[30] Exhibit L at pdf p. 16.
[31] Exh. L at pdf p. 16.
[32] Exh. L at pdf p. 22.
[33] Exh. L at pdf p. 20.
[34] Exh. L at pdf p. 20.

Amid this confusion, Dan Veriotti went ahead and decided on his own to use Army Corps' *Rapid Ordinary High Water Mark Field Identification Data Sheet* ("Field Data Sheet") for Phase II, even though the Field Data Sheet's instructions indicate that it is used to identify the OHWM of rivers and streams, not coastal areas of the Great Lakes—a fact also confirmed by Army Corps.[35] And further belying Mr. Veriotti's proclamation that use of the Field Data Sheet is the "standard procedure" for complying with Indiana's Public Trust Statute, nowhere does the Data Sheet or its instructions say anything about the Public Trust Statute, Lake Michigan, or anything remotely related to determining the critical property line between public trust and private land.

Instead, Army Corps' regulatory guidance confirms that the agency's OHWM definition is used to conduct "jurisdictional determinations for non-tidal waters under Section 404 of the [CWA] and under Sections 9 and 10 of the Rivers and Harbors Act [RHA],"[36] not Indiana's Public Trust Statute. As such, delineators are directed to consider a non-exhaustive list of physical characteristics that "may vary depending on the *type of water body*,"[37] whereas the list of physical characteristics in Indiana's Public Trust Statute is finite and applies only to Lake Michigan. Ind. Code § 14-26-2.1-2.

Nevertheless, DNR disclosed in discovery that even the 584' OHWM value it used in 2020 for Phase I—what it referred to as the "common law OHWM"[38]—was likewise determined by Army Corps.[39] In turn, Army Corps based that value on a delineation conducted for the Town of Long Beach (located 20 miles to the east of Ogden Dunes), which was used by Army Corps and

[35] Exh. L at pdf p. 9; Exh. M at pdf pp. 51-52.
[36] Exhibit R at pdf 1: Army Corps, Regulatory Guidance Letter No. 05-05 (Dec. 7, 2005).
[37] Exh. R at pdf. p. 3.
[38] Exh. J: DNR Deficiency Notices (Aug. 24, 2022, Oct. 13, 2022, and Feb. 23, 2023).
[39] Exh. N at pdf pp. 2, 6: DNR's Responses to Petitioner's Initial Discovery Requests (Answers to Interrogatory 3 and Request to Admit 1).

DNR for two years as a *fixed, regional* OHWM value for the entire Indiana shore of Lake Michigan,[40] despite the *Gunderson* Court's clear mandate that DNR is prohibited from using such a fixed value for purposes of the public trust. 90 N.E.3d at 1185-1186.

And contrary to DNR's own guidance on how to locate the common law OHWM; that is, on a "case-by-case basis" looking for site-specific physical characteristics, primarily "recognizable shelving at the toe of the dune bluff and the presence/destruction of terrestrial vegetation,"[41] Army Corps' Long Beach determination was based on "physical characteristics [that were] relatively consistent across the region"[42] and a value that was not much more than the "normal water levels [of the Lake] at the time."[43]

Consistent with this approach, Mr. Veriotti confirmed that he determined the OHWM for Phase II by looking at the Lake's "average water level" on the day of the delineation, which "was 579.2 ft as recorded by the Calumet Harbor, IL gauge."[44] He also placed survey flags every 50 feet along the "beach slope" to mark the "line of sediment sorting/different materials, organic and floating debris, shells, and any other indicator observed *on the beach slope*."[45] But nowhere in Mr. Veriotti's report does he mention the clear shelving and marked change from sand beach to sand dunes with terrestrial vegetation as seen in the photographs (below) that were taken during the delineation:[46]

[40] Exh. E at pdf p. 1: Email from DNR's Steve Davis to the Town describing the Army Corps' regional delineation (Bates No. OD0737); Exhibit S: *Army Corps Ordinary High Water Mark Determination for Long Beach, Indiana* (October 14, 2020) (Bates No. OD0743).
[41] Exh. O at pdf p. 9.
[42] Exh. S at pdf p. 4 (Bates OD0742-0743).
[43] Exh. S at pdf p. 4 (Bates OD0742-0743).
[44] Exh. M at pdf p. 50.
[45] Exh. M at pdf p. 50 (emphasis added).
[46] Exh. M at pdf pp. 60-61 (photos in Figures 5-7).

Figure 5. West Project Area


Figure 6. Break in Beach Slope, Different Beach Materials (1)

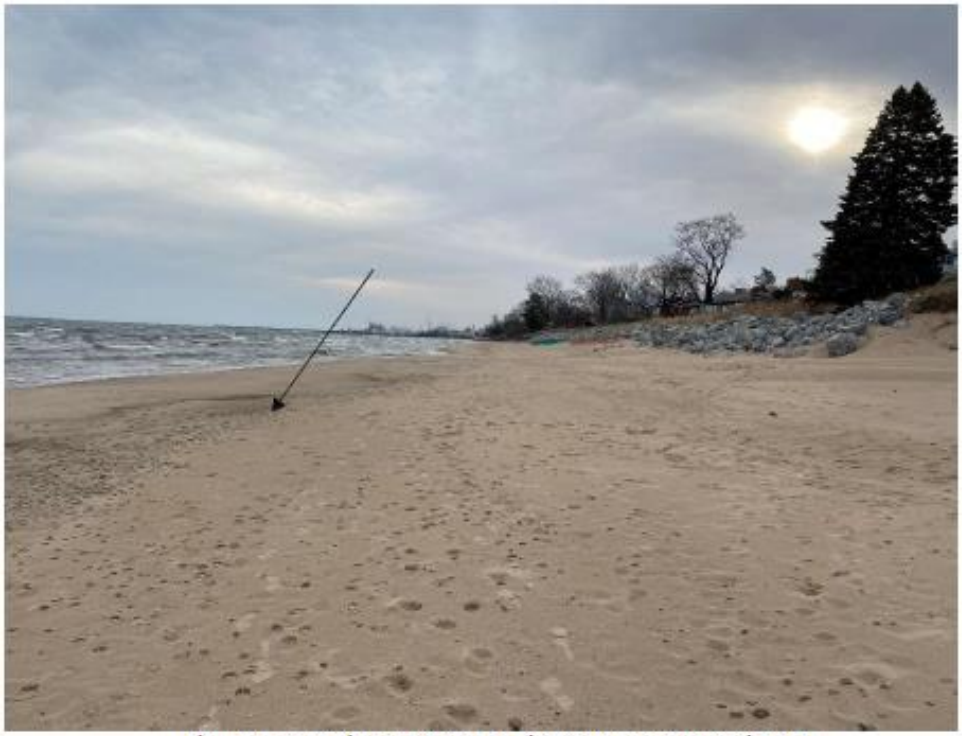

Figure 7. Break in Beach Slope, Different Beach Materials (2)

Instead, as confirmed by Dr. Guy Meadows, Director of the Great Lakes Research Center at Michigan Technological University and a coastal engineer with more than 50 years of experience in coastal dynamics science and engineering, what Mr. Veriotti's photographs show is that Mr. Veriotti delineated the line of "a recent wave swash event and not the clear line impressed on the bank of the wave eroded foredune of the back beach, which is the location of the natural OHWM."[47]

Expert Opinions of Dr. Guy Meadows

As Dr. Meadow's CV confirms, he is a leading expert and scholar in the field of Great Lakes coastal processes science and engineering.[48] Over his 50-year career, Dr. Meadows has done

[47] Exhibit T at pdf pp. 4, 6: Petitioner's Expert Disclosure and Dr. Meadows' Report (Apr. 24, 2024); Exhibit U: Deposition of Dr. Guy Meadows at p. 21:15-24 (confirming that his disclosed expert report contains his opinions and the bases of those opinions).
[48] Exhibit V: Curriculum Vitae of Dr. Guy Meadows.

extensive research in coastal dynamics and the response of coastlines to natural and anthropogenic stresses including study of the impacts of shoreline hardening structures like the revetment at issue in this case.[49] He has advised federal and state agencies including Army Corps, the National Park Service, NOAA, Michigan's DNR and department of Environment, Great Lakes and Energy (formerly MDEQ), and other agencies on issues related to nearshore sediment movement including beach profile changes in response to changing water levels and wave energies, and helped Michigan understand and define the OHWM for public trust versus regulatory purposes.[50]

For decades, Dr. Meadows taught graduate level courses in coastal engineering and ocean physics, naval architecture and marine engineering, and was the Director of the Marine Hydrodynamics Laboratory at the University of Michigan where Dan Veriotti—the Town's consultant—was Dr. Meadows' student.[51] And as the Founding Director of the Great Lakes Research Center, Dr. Meadows has been engaged in comprehensively studying the dynamic changes that Lake Michigan's shorelines in Wisconsin, Illinois, Indiana and Michigan have undergone in response to record-setting low water levels in 2013 followed by record-setting high water levels in 2020.[52]

Based on Dr. Meadows' "thorough examination of the history of delineating OHWM values in the Great Lakes, as well as [his] deep understanding of the dynamics of the Great Lakes' basin and shorelines," he confirmed that there are "[h]istorically two standards for determining

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[49] Exh. V at pdf pp. 7-14.
[50] Exh. V at pdf p. 40; *see also* Exhibit U: Deposition of Dr. Guy Meadows at p. 26:2-5 (stating "with respect to the Army Corps of Engineers, I've had extensive experience on the Michigan shoreline with looking at elevation standard of high water marks as well as nature – natural ordinary high water marks.").
[51] Exh. V at pdf pp. 1-2; 4-6; Exh. U: Meadows Dep. at p. 104:17.
[52] Exh. V at pdf pp. 13, 18-19.

Great Lakes' OHWM levels"; namely, "an elevation-based standard (EOHWM)" that Army Corps uses, and a "physically-based or natural standard (NOHWM)" that is codified in Indiana's Public Trust Statute.[53] At deposition, Dr. Meadows put it this way, "the nature-based ordinary high water mark is not an elevation, [i]t is a place."[54]

Dr. Meadows also confirmed that DNR's public guidance on how to identify Lake Michigan's common law OHWM (*supra* at 11-12), provides a good example of how to locate the NOHWM.[55] Specifically, Dr. Meadows explained:

> [In *Figure 1*,] IDNR properly identifies the NOWHM along a line (the yellow dashed line in the image) that has clearly been under occasional wave attack during significant high water events and corresponds to a change in the character of beach sand representing a shift to material eroded from the foredune as well as the presence of debris. It should be noted that in this IDNR example, the natural small berm between the yellow dashed line and the swash zone (an area of periodic wetting by incident waves) was not selected by IDNR as the location of the NOWHM.
>
> . . . .
>
> In stark contrast, the GZA's [Dan Veriotti's] delineation report for Phase 2, contains referenced photographs taken during the field visit with IDNR and Army Corps in attendance. Those photographs demonstrate marked differences between the GZA's establishment of the OHWM value of 581.5 ft IGLD 1985 and the IDNR's depiction of the NOWHM in *Figure 1*. One of the photographs . . . taken during GZA's field visit of the 'West Project Area' (Figure 5 in the GZA report) shows a beach backed by eroded foredune similar to that in the IDNR example. Even so, GZA places the 'Delineated OHWM' at a location that was recently wetted by incident wave action and <u>not</u> as IDNR did, at the line impressed on the bank corresponding to a change in the character of beach sand composed of material from the wave eroded foredune, which is plainly evident in the background.
>
> . . . .
>
> Similarly, Figures 6 and 7 from GZA's delineation report . . . again demonstrate that GZA improperly placed the 'Delineated OHWM' at what appears to be a recent wave swash event and not at the clear line impressed on the bank of the wave eroded foredune of the back beach, <u>which is the location of the NOHWM.</u>[56]

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[53] <u>Exh. T at pdf p. 3.</u>
[54] <u>Exh. U:</u> Meadows Deposition at p. 29:22-24.
[55] <u>Exh. T at pdf p. 4.</u>
[56] <u>Exh. T at pdf pp. 4-6 (emphasis added).</u>

In addition, Dr. Meadows evaluated the impacts of Phase II, concluding that: (1) it "will further exacerbate erosion of the Ogden Dunes Beach and the scouring of the nearshore lakebed, and will ultimately fail, a result that will be reached more quickly due to gaps in the structure due to homeowners declining to participate[;]"[57] and (2) as recognized by the National Park Service, it "will further interrupt natural coastal dynamics, including the accretion and erosion of sand along the shoreline" and, as a result, will "almost certainly perpetuate erosion further down the beach, starving the downdrift National Park West Beach property of sand and resulting in the loss of beach at that site."[58]

Finally, Dr. Meadows confirmed that there is not an emergent need as the Town claims to build Phase II. Specifically, Dr. Meadows points to the consistent decline in Lake Michigan's water levels since 2020 and predictions by Army Corps that these lower lake levels will persist into the foreseeable future—conditions that provide "an opportunity to investigate alternative and more resilient solutions."[59] Dr. Meadows' opinions, along with the facts, data, information, and other grounds that support them, are extensively detailed in his comprehensive, 21-page expert report.[60]

Conclusory Opinions of Dan Veriotti

In contrast to Dr. Meadows' detailed report, Mr. Veriotti's expert report is just over one page and entirely conclusory. Much of the report is dedicated to restating the uncontested facts that Mr. Veriotti used Army Corps' Field Data Sheet to conduct the OHWM delineation for Phase II, and that DNR and Army Corps were in attendance and signed off on that approach[61]—which is

[57] Exh. T at pdf pp. 12-19.
[58] Exh. T at pdf p. 20.
[59] Exh. T at pdf pp. 21-23.
[60] Exh. T.
[61] Exh Q. at pdf pp. 3-4.

precisely the reason we are all here. For that matter, the rest of Mr. Veriotti's report does nothing more than parrot DNR and the Town's legal argument that Veriotti's OHWM determination "is in compliance with the [Indiana Public Trust Statute's] definition and requirements" because Army Corps and DNR said so.[62] Remarkably, nowhere in Mr. Veriotti's two-page report does he even mention his former professor Dr. Meadows, much less respond to Dr. Meadows' explanation of the critical distinction between Lake Michigan's natural OHWM and the elevation-based OHWM that Army Corps uses for its regulatory purposes.

Similarly, DNR has not disclosed any expert witness to engage with Dr. Meadows' opinion on this central issue. Instead, DNR disclosed its staff who were involved in reviewing the Town's application for Phase II as its experts.[63] However, none of these witnesses prepared expert reports. Instead, as DNR explained, their "opinions are contained in documents already produced in [fact] discovery, including the Certificate of Approval, the OHWM delineation report drafted by GZA, the [Army Corps'] concurrence, and review reports identified for each individual expert," none of which address or engage in any way with Dr. Meadows' opinion on the distinction between the NOHWM and EOHWM.[64] As detailed below, the foregoing undisputed facts warrant summary judgment for Save the Dunes.

III. ARGUMENT

A. Indiana's Summary Judgment Standard

Indiana's Administrative Orders and Procedures Act ("AOPA") allows a party in an administrative proceeding to seek summary judgment "as to all or any part of the issues in a proceeding . . . under Trial Rule 56 of the Indiana Rules of Trial Procedure." Ind. Code § 4-21.5-

[62] Exh Q. at pdf 4.
[63] Exhibit W: DNR's Expert Witness List.
[64] Exh. W at 2.

3-23(a), (b). In turn, Trial Rule 56 provides that summary judgment is appropriate if the designated evidentiary material shows that "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Ind. R. Trial P. 56(C); *Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015). The purpose underlying the summary judgment procedure is to terminate those causes of action which have no factual dispute, and which may be decided as a matter of law. *LeBrun v. Conner*, 702 N.E.2d 754, 756 (Ind. Ct. App. 1998).

When a motion for summary judgment is made and supported with evidence as provided in Trial Rule 56, the adverse party may not merely rest upon his pleadings in opposing the motion. *Mullin v. Municipal City of S. Bend*, 639 N.E.2d 278, 281 (Ind. 1994). Rather, the non-movant "is obliged to disgorge sufficient evidence to show the existence of a genuine triable issue." *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1082 (Ind. Ct. App. 1998). Mere contentions of contested facts are insufficient to create a triable issue. *Conrad v. Waugh*, 474 N.E.2d 130, 136 (Ind. Ct. App. 1985). Finally, even if there are "conflicting facts and inferences on some elements of a claim," summary judgment is proper "where there is no dispute or conflict regarding a fact that is dispositive of the litigation." *Raymundo v. Hammond Clinic Asso.*, 449 N.E.2d 276, 280 (Ind. 1983). That is the situation here.

As detailed below, DNR has a legal duty to safeguard Hoosiers' vested public trust rights in Lake Michigan when considering whether to authorize construction of a permanent structure below the Lake's natural OHWM. DNR's reliance on Army Corps to determine the public trust boundary based on the federal agency's administrative OHWM definition and shifting "methods" in applying that definition to Indiana's Lake Michigan shoreline, is dispositive of Save the Dunes' claim that DNR failed to protect Hoosiers' public trust rights when it approved Phase II of the Town's revetment. DNR's mere say-so to the contrary—that the Public Trust Statute's definition

somehow "superseded" the common law OHWM definition and replaced it with Army Corps' definition lacks merit, violates the Public Trust Statute and *Gunderson,* and amounts to an unlawful, unpromulgated agency rule. Accordingly, this Court should grant summary judgment in favor of Save the Dunes.

B. DNR's Reliance on Army Corps to Determine Lake Michigan's Public Trust Boundary in Indiana Violates the Public Trust Statute and *Gunderson.*

DNR's defends its reliance on Army Corps' definition and methods to determine the location of Indiana's public trust boundary based on three arguments: (1) that the Public Trust Statute's definition of Lake Michigan's OWHM "supersedes" the common law definition; (2) the Public Trust Statute's OHWM definition is the same as Army Corps' regulatory definition; and (3) because DNR has "consistently stated" that the two agencies' definitions are the same, that means their jurisdictional boundaries are the same. *See supra* at 13. DNR is wrong on all fronts.

a. The Public Trust Statute Did Not "Supersede" the Common Law Definition, it Codified the Definition.

As detailed above, the Indiana legislature passed the Public Trust Statute to *codify* the common-law public trust doctrine as it applies to Lake Michigan, not to abrogate, or replace it with something else. For that matter, DNR states as much on its *current* website: "In 2020, the Department of Natural Resources (DNR) successfully advocated for the *codification* of the Indiana's Supreme Court ruling in *Gunderson*." *Supra* at 13 (emphasis added). As part of codifying *Gunderson,* the state legislature adopted the language of 312 IAC 1-1-26, which the *Gunderson* Court held is the common-law or natural OHWM public trust property boundary of Indiana's Lake Michigan shoreline. 90 N.E.3d at 1185.

Even so, DNR insists in this case that the Public Trust Statute's definition of the OHWM has "superseded" the common law definition, thereby allowing DNR to rely on Army Corps'

regulatory definition. This argument is remarkably similar to DNR's contention in *Gunderson* that the Court squarely rejected.

In *Gunderson,* DNR insisted that its grant of "statutory authority over navigable waters and contiguous lands" allowed the agency to use a fixed, administrative OHWM value of 581.5' for Lake Michigan, also used by Army Corps, which had "superseded" the common law OHWM definition in 312 IAC 1-1-26. *Id.* at 1185 (also insisting that use of the common law OHWM "would lead to uncertainty regarding the boundary of riparian landowners and the extent of the DNR's regulatory jurisdiction.").

Rejecting that view, the Court relied on the established rule of statutory construction that "[w]hen interpreting a statute, [courts] presume that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication." *Id.* at 1182 (quoting *Clark v. Clark,* 971 N.E.2d 58, 62 (Ind. 2012)). Considering the statutory authorities cited by DNR, the Court observed that they "merely assign to DNR general managerial responsibility over the navigable water of Indiana and State lands adjacent to a lake or stream," but do not contain any "legislative guidelines on regulating public trust lands, let alone sufficient standards to guide the agency." *Id.* at 1186. Accordingly, the Court held that in "the absence of a clear legislative directive," DNR has no authority and is *prohibited* from changing the common law OHWM definition of Lake Michigan "as it threatens to alienate public trust lands." *Id.* at 1186. There is no reason for a different outcome here.

Not one provision in Indiana's Public Trust Statute provides DNR with a "clear legislative directive" to abrogate or disregard the common law definition of Lake Michigan's public trust boundary and rely on Army Corps' federal administrative OHWM definition instead. Starting with

Ind. Code § 14-26-2.1-4, that provision states that Hoosiers "have a *vested* right[65] in the preservation and protection of Lake Michigan" and "a *vested* right" to use and enjoy the Lake and its resources and natural scenic beauty—that is, in "conditions produced by nature *without manmade additions or alterations.*" Ind. Code § 14-26-2.1-4 (emphasis added). No mention of Army Corps or abrogating the public trust doctrine there.

Next, the Statute defines "Lake Michigan" to mean "the waters of Lake Michigan[,] the land under the waters of Lake Michigan[,] and the land adjoining the waters of Lake Michigan up to the *ordinary high water mark* within the boundaries of Indiana." Ind. Code § 14-26-2.1-1 (emphasis added). Again, not a peep about Army Corps, its federal OHWM definition, or the legislature's intent to supersede the common law definition.

The Statute goes on to define Lake Michigan's OHWM as "the line on the bank or shore of Lake Michigan that is established by the fluctuations of water and indicated by physical characteristics, including a clear and natural line impressed on the shore, shelving, changes in character of soils, the destruction of terrestrial vegetation, and the presence of litter or debris." Ind. Code § 14-26-2.1-2 (internal numbering and lettering omitted). But far from superseding the common law definition, the Statute plainly adopts the language of 312 IAC 1-1-26, which "reflects the traditional common-law OHWM" of Lake Michigan. *Gunderson,* 90 N.E.3d at 1185-1186.

Indeed, except for the specific mention of Lake Michigan, the Public Trust Statute's OHWM definition is *identical* to 312 IAC 1-1-26 in all material respects. 312 IAC 1-1-26 (defining the OWHM as "the line on the shore of a waterway established by the fluctuations of water and

[65]A "vested right" is one that is "accrued, fixed, settled, absolute [and] having the character or giving the rights of absolute ownership [that] is not contingent [or] subject to be defeated by a condition precedent." Black's Law Dictionary, 11th Ed. Moreover, a "vested right" cannot be terminated by the government without implicating due process. *See e.g., Metro. Dev. Comm'n v. Pinnacle Media,* LLC, 836 N.E.2d 422, 425 (Ind. 2005).

indicated by physical characteristics . . . including [a] clear and natural line impressed on the bank, [s]helving, [c]hanges in character of the soil, [t]he destruction of terrestrial vegetation; [t]he presence of litter or debris." 312 IAC 1-1-26 (internal numbering omitted)). And if there were any doubt, the annotation for 312 IAC 1-1-26 cites to Ind. Code § 14-26-2.1-2 as having "affected" the statutory authority for the definition).

In sum, the legislature's inclusion of the IAC's common-law OHWM definition in Indiana's Public Trust Statute did not serve to "supersede" that common law definition, as DNR contends, it merely codified the definition in Indiana law. And DNR cannot change it "absent a clear legislative directive," which is does not have. *Gunderson*, 90 N.E.3d at 1185.

b. *The Public Trust Statute's Definition of the OHWM is Distinct in Language, Purpose, and Application from Army Corps' Regulatory Definition*

DNR insists that the property boundary of Indiana's public trust land can be delineated using Army Corps' administrative OHWM definition and methods because, in DNR's view, Army Corps' federal definition is the same as the Public Trust Statute's OHWM definition. They are not.

To start, the language of the two definitions is plainly different. The Public Trust Statute defines the OHWM of Lake Michigan only based on a limited list of factors:

> '[O]rdinary high water mark' means the line on the bank or shore of *Lake Michigan* that is: (1) established by the fluctuations of water; and (2) indicated by physical characteristics, including: (A) a clear and natural line impressed on the shore; (B) shelving; (C) changes in character of soils; (D) the destruction of terrestrial vegetation; and (E) the presence of litter or debris.

Ind. Code § 14-26-2.1-2. In contrast, Army Corps' administrative definition applies to all waterways—lakes, rivers, and streams—and defines the OHWM more broadly to include a non-exhaustive list of factors:

> The term 'ordinary high water mark' means that line on the shore established by the fluctuations of water and indicated by physical characteristics *such as* a clear, natural line impressed on the bank, shelving, changes in the character of soil,

> destruction of terrestrial vegetation, the presence of litter and debris, *or other appropriate means that consider the characteristics of the surrounding areas*.

33 CFR 328.3. (emphasis added).[66] This difference in language is not inconsequential for at least four reasons.

First, as discussed above, courts are to presume when they interpret a statute "that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication." *Gunderson*, 90 N.E.3d at 1182 (quoting *Clark*, 971 N.E.2d at 62)). Here, the Army Corps' more flexible definition has been in place since at least 2005 and thus could have been adopted verbatim by the Indiana legislature when it passed the Public Trust Statute in 2020. But instead, the legislature the codified the same limited-factor, common law definition set forth in the IAC that the *Gunderson* Court held was the appropriate definition for delineating the property boundary between public trust and private lands. The DNR cannot ignore this legislative mandate.

Second, DNR's view that Army Corps' definition is somehow interchangeable with the Public Trust Statute's definition is undermined by another well-established tenant of statutory construction; that is, *expressio unius est exclusio alterius* or "the enumeration of certain things in a statute necessarily implies the exclusion of all others." *T.W. Thom. Constr., Inc. v. City of Jeffersonville*, 721 N.E.2d 319, 325 (Ind. Ct. App. 1999). Army Corps' regulatory guidance makes clear that the "other appropriate means" language in the Army Corps' definition has been interpreted by the federal agency to include *a non-exhaustive list* of factors that are not included in the Public Trust Statute's definition. Army Corps' guidance also confirms that none of the factors are required to make a OHWM determination and "may vary depending on the type of

[66] See also Exh. R at pdf p. 1: Army Corps Regulatory Guidance Letter No. 05-05 (2005).

water body and conditions of the area"—i.e., they may apply to water bodies *other* than Lake Michigan.[67] On the other hand, the Indiana legislature included a finite list of physical characteristics that define the natural OHWM of Lake Michigan. And that decision is dispositive that the Army Corps' definition, with its open-ended, optional, and additional factors, do not, and were not intended to define the extent of Indiana's public trust land.

Third, the distinct purposes of the two definitions underscore how far apart they are. Indiana's Public Trust Statute is clear that its provisions apply only to Indiana's Lake Michigan shoreline with the Statute's OHWM definition used for the very specific purpose of delineating the property boundary between private and public "land adjoining the waters of Lake Michigan" owned by the State "in trust for the use and enjoyment of all citizens of Indiana." Ind. Code § 14-26-2.1-1; § 14-26-2.1-3. In other words, the Public Trust Statute's OHWM definition is used to delineate a property boundary and the extent of Hoosiers' *vested* property rights.

On the other hand, Army Corps' definition is used to determine the agency's federal jurisdiction under Section 404 of the CWA to regulate discharges of dredge and fill material into U.S. waters.[68] And as applied to Lake Michigan, Army Corps' definition is used to obtain a purely "administrative" value that does not need to be precisely delineated and, for that matter, can be a fixed value for the federal agency's purposes.[69] As the *Gunderson* Court made clear, using such a "fixed" value is precisely the wrong, unlawful, improper approach for delineating the property boundary between private and public trust land. 90 N.E.3d at 1185. Yet DNR used it anyway.

Finally, the unlawful nature of DNR's reliance on Army Corps' definition is reflected in *Gunderson* Court's explanation of what the natural, common-law OHWM of Lake Michigan is:

[67] Exh. R at pdf p. 3.
[68] Exh. R at pdf p. 3.
[69] Exh. L at pdf p. 20.

> Perhaps the Michigan Supreme Court articulated it best: The term OHWM 'attempts to encapsulate the fact that water levels in the Great Lakes fluctuate. This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies.' *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58, 71 (Mich. 2005). And 'although not immediately and presently submerged,' this land 'falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point.' *Id.*
>
> Rather than positioning the OHWM at the water's edge, early American common law defined that boundary as the point 'where the presence and action of water are *so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself*.'

Gunderson, 90 N.E.3d at 1180-1181 (emphasis added).

In other words, the natural OHWM is not the line on the beach created by a recent wave swash event that washed up some "floating debris and shells" onto the beach as Mr. Veriotti identified using Army Corps Field Data Sheet.[70] Rather, as Dr. Meadows explained the natural OHWM is precisely where DNR's guidance places it: "[T]he location of the OHWM is based on the appearance of *recognizable shelving* at the toe of the dune bluff and the *presence/destruction of terrestrial vegetation*."[71] DNR's removal of this guidance from its website conveniently after this case was filed does not magically transform the Public Trust Statute's definition of the natural, common law OHWM into Army Corps' regulatory definition. Without question, they are not the same and DNR's reliance on Army Corps' definition and methods is dispositive that it failed to conduct a proper delineation of the natural OHWM in this case.

c. DNR's Mere Say-So that the Army Corps' Jurisdictional Boundary is the Same as the Public Trust Boundary Amounts to an Unpromulgated Agency Rule.

[70] Exh. M at pdf p. 50 (emphasis added).
[71] Exh. O at pdf pp. 8-9, 12; Exh. T at pdf pp. 4-6.

DNR insists that since it "has *consistently stated* that the factors used to determine the OHWM for DNR and the U.S. Army Corps are the same . . . [the agencies'] jurisdictional boundaries are [therefore] the same."[72] But no matter how many times the agency says something, does not make it so. Administrative decisions must be based upon written, ascertainable standards that are available to the public. *Podgor v. Indiana University*, 381 N.E.2d 1274, 1283 (Ind. Ct. App. 1978). And, for an agency rule to be valid, it must go through the proper rule-making process. *Ind Dept. of Envtl. Mgmt. v. Twin Eagle, LLC*, 798 N.E.2d 839, 847-848 (Ind. 2003) (an agency "may regulate by a new rule only if the proper rulemaking procedures have been followed").

For instance, in *Bankview Farm II, Inc. v. Indiana Department of Environmental Management*, the Grant Circuit Court recently overturned a wetland determination conducted by IDEM based on the agency's unwritten, unpromulgated procedure for conducting wetland determinations. Cause No. 27C01-2307-MI-000067 (Grant Circuit Court, July 2, 2024).[73] Like DNR's unwritten practice of relying on Army Corps' OHWM determinations, IDEM had an unwritten procedure of following the Army Corps' wetland determination process, which led IDEM to conclude that a portion of *Bankview's* property had regulated wetlands that he had unlawfully filled. *Id.* at 1-2.1-2, 4, 6. The Court vacated IDEM's wetland determination as invalid and contrary to law because, as the Court explained, "IDEM never went through the required rulemaking process for its wetland determination procedure" and "did not even write the policy down." *Id.* at 20-22. That is precisely the situation here.

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[72] Exh. O at pdf p. 3 (emphasis added): DNR, *Lake Michigan Ordinary High Watermarks* (also available at https://www.in.gov/dnr/water/lake-michigan/lake-michigan-ordinary-high-watermarks/).

[73] A copy of the Order, which adopted the petitioner's proposed findings of fact and law, and retains petitioner's original heading, is provided for the Court's convenience as Exhibit X.

While the Natural Resources Commission and DNR have rule-making authority to implement the Public Trust Statute, Ind. Code § 14-26-2.1-5, neither agency has exercised that authority. Thus, DNR's repeated statements that the Public Trust Statute's definition of the OHWM is the same as Army Corps' definition, and therefore it can rely on Army Corps' OHWM determinations, have no legal effect. They are also contrary to law.

As the *Gunderson* Court observed, only the legislature has the power to make law. *Gunderson*, 90 N.E.3d at 1186. Accordingly, while the legislature can "make a law delegating power to an agency to determine the existence of some fact or situation upon which the law is intended to operate," the "delegate[ion] of rule-making powers . . . [must be] accompanied by sufficient standards to guide the agency in the exercise of its statutory authority." *Id.* As detailed above, there is not one provision in the Public Trust Statute that could in any way be interpreted as providing legislative guidance for DNR to ignore *Gunderson* and conflate the public trust boundary as one in the same with Army Corps' jurisdictional boundary. Thus, even if the Commission and DNR had adopted a rule ceding their authority to Army Corps to determine the extent of Indiana's public trust land, such a rule would be invalid. *Gunderson*, 90 N.E.3d at 1187 (if administrative rules and regulations are in conflict with the state's organic law, or antagonistic to the general law of the state, then they are invalid").

In sum, DNR's claim that it can rely on Army Corps' definition and methods to determine the location of Indiana's public trust boundary has no support in the law. The Public Trust Statute's definition of Lake Michigan's OWHM is not the same as Army Corps' definition, it did not "supersede" the common law OHWM definition, and DNR's mere say-so that the two definitions are the same is nothing more than an unlawful, unpromulgated agency rule. Accordingly, DNR's undisputed reliance on Army Corps' determination in permitting Phase II was unlawful and

warrants summary judgment for Save the Dunes on its claim that DNR failed to delineate the natural OHWM in violation of the Public Trust Statute and *Gunderson*.

C. DNR Failed to Assess Whether the Revetment Will Violate the Public Trust in Violation of the Public Trust Statute and the Navigable Waterways Act

While the NRC and DNR have not exercised their rule-making authority under the Public Trust Statute, they did pass rules long ago to implement DNR's statutory charge under Indiana's Navigable Waterways Act ("NWA"), Ind. Code § 14-29-1 *et seq.*, to regulate the placement of permanent structures in the State's navigable waters. To that end, the NRC established standards governing DNR's decision-making as to "whether to grant approval for the placement of a permanent structure in Lake Michigan under IC 14-29-1," including a "rock revetment." 312 IAC 6-8-1(a), (c)(18). Those standards require DNR to determine, among other things, whether placement of a revetment along Lake Michigan "would violate the public trust doctrine" and, if it would, DNR "*shall* either deny the application or condition [its] approval . . . upon terms that would allow placement of the structure without violation of the public trust doctrine." 312 IAC 6-8-3(c) (emphasis added); *see also* 312 IAC 6-1-1 (before issuing a license to build a permanent structure in a navigable waterway, DNR "shall consider the public trust").

By relying on Army Corps to determine the public trust boundary based on the federal agency's definition and unsettled methods, DNR violated these standards. Indeed, there is no evidence in this case that DNR gave anything but superficial consideration of the Revetment's impacts on the public trust. DNR's early communications with the Town identified appropriate conditions that the Town must meet to mitigate impacts to the public trust, all of which focused on providing meaningful, *lateral* public access to the Town's beach. Yet, none of these conditions made their way into the final Permit for Phase II despite DNR's mandate that the conditions must be satisfied before it would approve Phase II.

For that matter, DNR's environmental review focused on impacts to wildlife and water quality but makes no mention of the public trust. And any consideration for public access was only in reference to the Town's plan to replace (or maintain) already existing access points that mainly serve private properties. Similarly, the final Permit itself makes no mention of the public trust but instead parrots the Town's stance that public access can somewhere be found on land above the Revetment.[74] But even if DNR had considered the public trust, it could not possibly have considered the full range of impacts due to the Town's unlawful OHWM delineation based on Army Corps' definition and methods that left out a large portion of public trust beach.

The NRC standards under the NWA also impose several requirements on the applicant that wants to build a permanent structure in Lake Michigan. One is to "evaluate the likely impact of the structure on coastal dynamics, including . . . shoreline erosion and accretion, sand movement within the lake, and the interaction with existing structures." 312 IAC 6-8-2(d). The applicant must also "provide *notice* to persons adjacent to the affected real property" and "demonstrate either that [the applicant] is the fee owner of land immediately adjacent to the site where the construction would take place or that the applicant has *written authorization* from the fee owner of that land." 312 IAC 6-8-2(e), (f) (emphasis added). Neither of these requirements were followed by the Town.

There is a meager, one-paragraph "Impact Assessment" provided in the Town's application that summarily concludes that because "clean quarry stone" will be used in the "small area below the OHWM (0.071 acres)" there will be "no increases in suspended particle load or turbidity" and will "not alter the quality of the Lake Michigan water."[75] And aside from the fact that the Town's consultant improperly delineated this "small area" of impact based on Army Corps' Field Data

[74] Exh. G.
[75] Exh. M at pdf p. 6.

Sheet, there is absolutely no discussion in the Town's application of the revetment's long-term impacts on shoreline erosion and accretion, or sand movement within the lake. This is especially concerning given the serious concerns raised by the National Park Service that the revetment will cause further erosion and degradation of the shoreline in the adjacent and surrounding Indiana Dunes National Park.

For that matter, there is no dispute that the Town did not notify or obtain the National Park Service's written authorization for Phase II, as the adjacent fee owner of land, in clear violation of 312 IAC 6-8-2(e). And despite the NPS's well-documented and legitimate concerns submitted to DNR that the revetment will cause the very types of harm to the National Park that 312 IAC 6-8-2 requires DNR to evaluate, DNR feigned "lack of information or knowledge" as to what the NPS's concerns even are.[76]

CONCLUSION

For all the foregoing reasons, the Court should grant summary judgment for Save the Dunes. There is no genuine issue of material fact that DNR issued a Permit to the Town for Phase II that is based on an unlawful OHWM determination that precluded any meaningful evaluation of the revetment's impacts on the public trust in violation of Indiana's Public Trust Statute, the Navigable Waterways Act, and the Indiana Supreme Court ruling in *Gunderson.*

Respectfully submitted,

/s/ Kim E. Ferraro

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[76] Exh. N at pdf p. 9: (Answer to Petitioner's Request to Admit No.1).

CERTIFICATE OF SERVICE

I certify that on the 7th day of October, 2024 service of a true and complete copy of the foregoing document was made upon the parties listed via electronic mail, an accepted form of service in this case.

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