STATE OF INDIANA	)	PORTER COUNTY _____ COURT
	)	
COUNTY OF PORTER	)	CAUSE NO. _____

SAVE THE DUNES CONSERVATION FUND, INC., Petitioner,	)
vs.	)
TOWN OF OGDEN DUNES/SCOTT KINGAN and DEPARTMENT OF NATURAL RESOURCES, Respondents.	)

VERIFIED PETITION FOR JUDICIAL REVIEW

Petitioner, Save the Dunes Conservation Fund, Inc. ("Save the Dunes"), by counsel, and pursuant to Indiana Code § 4-21.5-5 *et seq.*, petitions the Court for judicial review of the Indiana Office of Administrative Law Proceedings' ("OALP") Order Granting the Town of Ogden Dunes' Motion to Dismiss of November 17, 2025 ("OALP's Dismissal Order"). The OALP's Dismissal Order is the final agency action in the matter of *Objection to Issuance of Permit for Construction No. LM-255-0 to The Town of Ogden Dunes, Scott Kingan, Porter County, Indiana,* OALP Cause No. DNR-2506 001954. As the final agency action, the OALP's Dismissal Order makes final a prior summary judgment ruling in this case for which Save the Dunes also seeks this Court's review: the Interlocutory Order of the Natural Resources Commission ("NRC") Denying Save the Dunes' Motion for Summary Judgment, Denying the Respondents' Motion for Summary Judgment, Denying Respondents' Motion to Strike, and Denying Save the Dunes' Motion to Exclude the Opinion Testimony of the Town of Ogden Dunes' Proffered Expert (March 21, 2025) ("NRC Interlocutory Order").

In accordance with Indiana Code § 4-21.5-5-7(b)(3), the OALP's Dismissal Order and the NRC Interlocutory Order (collectively, the "Final Ruling") are submitted with this Verified Petition as Exhibits A and B, respectively. Pursuant to Indiana Code § 4-21.5-5-14, Save the Dunes respectfully requests the Court to set aside the OALP's Final Ruling as arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure, and unsupported by a preponderance of the evidence. In support, Save the Dunes states as follows:

INTRODUCTION AND NATURE OF ACTION

1. Lake Michigan is not just a body of water. It is one of Indiana's most treasured and irreplaceable public resources. In turn, the Public Trust Doctrine is not just an abstraction. It is a foundational obligation. Indiana holds the bed and shores of Lake Michigan in trust for the people, and the boundary between public trust lands and private property is the Lake's natural ordinary high-water mark ("OHWM"). In *Gunderson v. State*, the Indiana Supreme Court held that this boundary was a matter "of great public interest" and made clear that the Indiana Department of Natural Resources ("DNR") is prohibited from altering it "absent a clear legislative directive." 90 N.E.3d 1171, 1175 n.3, 1185-86 (Ind. 2018) (quoting *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991)).

2. In 2020, the Indiana General Assembly codified the natural OHWM definition from *Gunderson* verbatim, offering no indication—much less the "clear legislative directive" *Gunderson* mandates—that DNR could construe the definition any differently from the common-law standard that has governed Lake Michigan's shoreline for centuries. *See* Act of March 21, 2020, P.L. 164-2020, § 57, 2020 Ind. Acts 2194, 2231-32 (codified at Ind. Code § 14-26-2.1-2). Yet DNR has since interpreted the Public Trust Statute definition—as it did in this case—as empowering the agency to apply the U.S. Army Corps of Engineers' regulatory definition of the

OHWM under the federal Clean Water Act, instead of the natural OHWM the legislature codified, effectively doing what *Gunderson* forbids: altering the public trust boundary without legislative authority. The effect is that DNR is diminishing Lake Michigan's public trust shoreline and eviscerating Hoosiers' public trust rights every time DNR makes a permitting decision.

3. This case presents that legal error for judicial review and its resolution will determine how the State protects Lake Michigan's shoreline for decades to come. The central legal question presented here is the correct interpretation of Indiana's Public Trust Statute, which codified *Gunderson* and the definition of Lake Michigan's natural OHWM as the property line between public trust and private land. It is DNR's position that the Public Trust Statute's definition of the OHWM, Ind. Code § 14-26-2.1-2, is "essentially the same" as the U.S. Army Corps of Engineers' OHWM definition at 33 C.F.R. § 328.3(c)(4) – and accordingly, the two agencies have concurrent jurisdictional boundaries. Ex. B at ¶ 28.

4. But the two definitions and the agencies' respective jurisdictions are *not* the same. The Army Corps' OHWM definition is different in applicability (Army Corps' definition is for all lakes, rivers, and streams; Indiana's is only for Lake Michigan); factors (Army Corps' definition includes an all-encompassing "or other appropriate means" phrase; Indiana's does not); and purpose (Army Corps' definition is used to determine the agency's federal jurisdiction under Section 404 of the Clean Water Act to regulate discharges of dredge and fill material; Indiana's is for delineating the property boundary between private and public lands).

5. These are distinctions with a significant difference. They also reveal the fundamental legal error in DNR's approach and the substantial threat it poses to Indiana's public trust lands. By treating the two definitions as interchangeable, DNR has abandoned its own guidance for identifying Lake Michigan's *natural* OHWM now codified in the Public Trust Statute,

and instead relies on Army Corps' methodology, which was never designed for coastal areas of the Great Lakes, much less to identify a public trust property line. Rather, Army Corps' procedures apply to rivers and streams and serve an entirely different purpose—to determine the reach of federal regulatory jurisdiction under the Clean Water Act ("CWA"), not to locate Indiana's public trust boundary along Lake Michigan.

6. As the NRC's Interlocutory Order makes clear, application of the two standards could yield "strikingly different" delineation outcomes. Ex. B. at ¶ 77. Army Corps' method places the OHWM at a location "more akin to a recent wave break line on the sand," whereas DNR's own post-*Gunderson* guidance for locating the natural OHWM placed the boundary "much further inland" where there is "a long-standing change in soil, terrestrial vegetation, and shelving along the shorefront." Ex. B at ¶¶ 79-80; *see also id.* at ¶ 78 (noting the "significantly differing conclusions" that could be drawn from the two different standards). The potential for sharply divergent delineation outcomes underscores why DNR's flawed statutory interpretation cannot stand and why Save the Dunes brought this case.

7. Save the Dunes filed the administrative proceeding below before the NRC in response to a permit issued in 2023 by DNR to the Town of Ogden Dunes. The permit allows the Town to harden a half-mile stretch of its Lake Michigan shoreline with a massive stone revetment. The Town's application (approved by DNR) relied on an OHWM delineation using Army Corps' regulatory definition and methods. In litigation, DNR confirmed that this permit approval reflects the Agency's official position that Indiana's statutory definition of the public trust boundary is the same and interchangeable with the Army Corps' regulatory definition of the OHWM. Moreover, DNR argued that this overlapping definition means that the DNR's jurisdiction under the Public Trust Statute and the Army Corps' jurisdiction under the Clean Water Act are "concurrent" along

Indiana's Lake Michigan shoreline. Ex. B at ¶ 56. That interpretation remains the Agency's formal position.[1]

8. In March 2025, the NRC denied the parties' cross-motions for summary judgment. In doing so, the NRC sidestepped the key legal issue, concluding that the question of DNR and Army Corps' "overlapping jurisdictions" and "overlapping delineation factors regarding the Lake Michigan OHWM" presented a fact issue to be resolved a final hearing. Ex. B at ¶ 85. Both parties moved for reconsideration of that ruling, agreeing that the question is one of statutory interpretation and thus a threshold question of law, not fact.[2]

9. In August 2025, the Town announced that it "no longer intends to proceed with the permitted activity" and, based on that representation, the Town moved to dismiss the case for mootness.[3] Save the Dunes opposed the motion, in part, because the question of DNR's improper interpretation of Indiana's Public Trust Statute remains an unresolved legal issue of great public importance that is likely to recur every time DNR makes a permitting decision. Indeed, the Indiana Supreme Court observed in *Gunderson* that DNR's decisions regarding the location of Lake Michigan's natural OHWM "involve[] questions of great public interest" that fall under the exception to the mootness doctrine. 90 N.E.3d at 1175 n.3. Nonetheless, the OALP granted the motion to dismiss and refused to engage with the narrow, but critical, issue of statutory interpretation. Ex. A.

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[1] Indiana Department of Natural Resources, *Lake Michigan Ordinary High Watermarks* at https://www.in.gov/dnr/water/lake-michigan/lake-michigan-ordinary-high-watermarks/ (stating "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") (accessed Dec. 9, 2025).

[2] DNR's Motion for Reconsideration or Clarification ¶ 15 (Apr. 24, 2025); Petitioner's Combined Motion to Reconsider and Correct Error, and Response to DNR's Motion for Reconsideration or Clarification at ¶¶ 1-2 (Apr. 28, 2025).

[3] Town's Motion to Dismiss for Mootness (Aug. 29, 2025).

10. That important public interest question is presented before this Court now, and its resolution has wide-reaching impacts on Hoosiers' use and enjoyment of Indiana's Lake Michigan shoreline. DNR made clear that it will continue to apply its disputed and flawed interpretation of Indiana's Public Trust Statute in future permit applications for construction projects on the lakefront, thereby threatening to alienate Hoosiers' vested public trust rights one unlawful permit decision at a time.

11. For these reasons detailed further below, the Court should: assume jurisdiction over this Petition; hold that the public-interest exception to mootness applies, and that judicial review is warranted notwithstanding any alleged mootness; reverse the OALP's Final Dismissal Order and hold that the agency erred in declining to decide the important legal question presented; set aside the NRC's Interlocutory Order Denying Summary Judgment for Save the Dunes and hold that the agency erred in finding a genuine issue of material fact; grant summary judgment for Save the Dunes on the proper interpretation and application of Ind. Code § 14-26-2.1-2 as addressed in this Petition; and remand back to OALP for further proceedings consistent with the Court's ruling.

I. Jurisdiction, Timeliness, and Venue

12. Save the Dunes is entitled to judicial review of the OALP's Final Ruling under Indiana Code § 4-21.5-5-2 for the following reasons:

13. Save the Dunes has standing to seek the Court's judicial review under Indiana Code § 4-21.5-5-3(a)(2) because Save the Dunes was a party to the proceeding that led to the OALP's Final Ruling.

14. Save the Dunes has exhausted all administrative remedies as required by Indiana Code § 4-21.5-5-4 for challenging the construction permit that DNR issued to the Town of Ogden Dunes. The OALP is the ultimate authority for administrative review of DNR's decisions. *See* Ind. Code § 4-21.5-1-15; Ind. Code § 4-15-10.5-12. The OALP's Final Order of November 17, 2025,

is the final agency action in this case. *See* Ind. Code § 4-21.5-3-27(a). *See also* OALP's Final Order, Ex. A at 2 (designating the Order as a "final order" subject to judicial review). Therefore, the OALP's Final Order is subject to judicial review along with the NRC's March 21 Interlocutory Order, Ex. B. *See* Ind. Code § 4-21.5-5, *et. seq.*

15. Venue is proper in this Court because the Town of Ogden Dunes, where the underlying permit was issued by DNR, is in this judicial district. *See* Ind. Code § 4-21.5-5-6(a)(2).

16. In accordance with Indiana Code § 4-21.5-5-5, Save the Dunes timely filed this Verified Petition for Judicial Review within 30 days of November 17, 2025, the date the OALP issued its Final Order.

17. Within 30 days of Save the Dunes' service of this Verified Petition on the OALP, the agency "shall transmit to the court the original or a certified copy of the agency record for judicial review" as required by Indiana Code § 4-21.5-5-13.

II. The Parties

18. Petitioner is Save the Dunes Conservation Fund, Inc. ("Save the Dunes"). Save the Dunes' mailing address is 444 Barker Road, Michigan City, IN 46360.

19. The following attorneys represented Save the Dunes before the OALP:

Kim Ferraro
Allison Gardner
Kacey Cook (appearance withdrawn)
Conservation Law Center
116 South Indiana Avenue
Bloomington, Indiana 47408

20. Respondent Agency whose actions are at issue is the Indiana Department of Natural Resources ("DNR"). DNR's mailing address is 402 West Washington Street, Indianapolis, IN 46204.

21. Respondent DNR is a state administrative agency charged with protecting and stewarding Indiana's public trust lands including the public trust rights in the shores of Lake Michigan. *See* Ind. Code § 14-29-1-8; 312 IAC 6-8-3. DNR is also responsible for reviewing and issuing permits under the Navigable Waterways Act ("NWA") and its implementing regulations, which likewise charge DNR with protecting the public trust in considering whether to allow construction of permanent structures on or within the OHWM of Lake Michigan. *Id.*

22. Counsel below represented DNR before the OALP:

Rebecca McClain, Legal Counsel
Indiana Department of Natural Resources
Indiana Government Center South,
Room W-295
402 W. Washington Street
Indianapolis, IN 46204

23. Permittee/Respondent the Town of Ogden Dunes ("Town") is a municipal corporation located on the northern edge of Porter County, adjacent to Lake Michigan, and is surrounded by the Indiana Dunes National Park. DNR issued the Permit at issue to the Town. The Town's mailing address is 115 Hillcrest Road, Ogden Dunes, IN 46368.

24. The following attorneys represented the Town of Ogden Dunes before the OALP:

David E. Woodward and R. Brian Woodward
Woodward Law Offices, LLP
200 East 90th Drive
Merrillville, Indiana 46410

25. The Indiana Office of Administrative Law Proceedings (OALP) is a state office that provides a central and independent hearings process for many types of disputes involving state government agencies. Ind. Code § 4-15-10.5, *et. seq*. On July 1, 2025, OALP assumed jurisdiction over DNR matters, including this case, which were previously heard by the NRC's Hearing

Division.[4] OALP's mailing address is Indiana Office of Administrative Law Proceedings, 100 North Senate Avenue, N-802, Indianapolis, Indiana 46204.

III. Agency Action at Issue

26. This matter stems from DNR's issuance, on June 1, 2023, of Construction Permit No. LM-255-0 ("Permit") authorizing the Town of Ogden Dunes to construct a 2970-foot long, 10-foot-wide stone revetment wall ("Phase II revetment") along the Lake Michigan shoreline. The Permit became effective on June 19, 2023.

27. On June 19, 2023, Save the Dunes filed a Petition for Administrative Review with the NRC challenging the Permit. The Petition alleged, in part, that DNR failed to properly determine the natural ordinary high-water mark ("OHWM") under Indiana law, in violation of Indiana's Public Trust Statute and *Gunderson*.

28. The NRC established a case management schedule on July 20, 2023, and the parties engaged in extensive fact and expert discovery over the following year.

29. On October 7, 2024, Save the Dunes moved for summary judgment, arguing in part that DNR's reliance on Army Corps of Engineers' definition and methods to delineate the OHWM violated the Public Trust Statute and *Gunderson*.

30. In March 2025, the NRC denied the parties' cross-motions for summary judgment and ordered a final evidentiary hearing. In doing so, the NRC concluded that the question of DNR and Army Corps' "overlapping jurisdictions" and "overlapping delineation factors regarding the Lake Michigan OHWM" presented a fact issue to be resolved. Ex. B at ¶ 85. Following the NRC's order, both parties moved for reconsideration of the Order, agreeing that the question is one of

[4] *See* Notice of Case Transfer to the Office of Administrative Law Proceedings and Assignment of ALJ (July 18, 2025).

statutory interpretation and thus a threshold question of law, not fact.[5] On May 1, 2025, the NRC vacated the scheduled hearing dates and set May 16, 2025, as the deadline for all remaining briefing on motions for reconsideration.[6]

31. In the interim, on April 1, 2025, private landowners in Ogden Dunes, operating under licenses issued by the Town, began construction of the revetment. The Town insisted that the landowners could proceed without a DNR permit, and that DNR lacked jurisdiction over the work, because the structure would be built "above" the disputed OHWM that DNR approved in issuing the permit. On April 3rd, Save the Dunes moved for an emergency stay of construction to preserve the status quo and prevent irreparable harm to public trust land pending resolution of the proper interpretation of the OHWM.[7] The same day, the NRC granted a temporary stay of effectiveness of the permit and ordered the Town to cease construction. The stay remained in effect throughout the remainder of the administrative proceeding.[8]

32. On July 1, 2025, while the reconsideration motions were still pending, the State of Indiana announced that all pending appeals with the NRC would be transferred to the Office of Administrative Law Proceedings ("OALP"), including this case. The OALP assumed jurisdiction of the case and assigned a new ALJ on July 18.

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[5] DNR's Motion for Reconsideration or Clarification ¶ 15 (Apr. 24, 2025); Petitioner's Combined Motion to Reconsider and Correct Error, and Response to DNR's Motion for Reconsideration or Clarification at ¶¶ 1-2 (Apr. 28, 2025).

[6] Order Vacating Hearing and Setting Deadline for Pleadings (May 1, 2025).

[7] Petitioner's Motion for Stay of Effectiveness (Apr. 3, 2025).

[8] Order to Temporary Stay of Effectiveness of Permit (Apr. 3, 2025); *see also* Report from Telephonic Status Conference (Apr. 9, 2025) (ordering that "the temporary stay of effectiveness of Permit LM-255-0 as related to any construction activity undertaken by the Town of Ogden Dunes authorized by Permit LM-255-0 remains in effect until the consolidated hearing [of the motion to stay and final evidentiary hearing] is concluded").

33. On August 29, 2025, the Town announced that it "no longer intend[ed] to proceed with the permitted activity[,] . . . has formally abandoned the project[,] and has no intention of acting under the permit." Based on that representation, the Town moved to dismiss the case for mootness.[9] Save the Dunes opposed the motion because the Town did not denounce its plan to license private construction of the revetment "above" the disputed OHWM as prohibited by the stay. Moreover, even if the Town has fully abandoned the project, the question of DNR's improper interpretation of Indiana's Public Trust Statute remains an unresolved legal issue of great public importance that is likely to recur every time DNR makes a permitting decision.[10]

34. Nevertheless, the OALP granted the Town's motion to dismiss for mootness in a two-page final order on November 17, 2025. Ex. A. The OALP's dismissal order disregards the Indiana Supreme Court's observation in *Gunderson* that DNR's decisions regarding the location of Lake Michigan's natural OHWM "involve[] questions of great public interest" that fall under the exception to the mootness doctrine. 90 N.E.3d at 1175 n.3.

35. Accordingly, the agency action at issue in this judicial review proceeding is the Dismissal Order of the OALP from November 17, 2025, which dismissed Save the Dunes' administrative challenge to Permit LM-255-0 on mootness grounds. This Dismissal Order ended administrative review without reaching the merits of Save the Dunes' claims concerning DNR's permitting decision and OHWM determination. The Dismissal Order also made final the NRC Interlocutory Order, which Save the Dunes now also challenges.

36. Based on these erroneous rulings, Save the Dunes seeks the Court's judicial review of the following issues:

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[9] Town's Motion to Dismiss for Mootness (Aug. 29, 2025).
[10] Petitioner's Response in Opposition to the Town's Motion to Dismiss for Mootness (Sept. 29, 2025).

a. Whether the OALP erred in dismissing this case as moot, because even if the challenged permit is no longer active, the unresolved issue of DNR's interpretation of the Public Trust Statute presents a purely legal issue of great public importance that is likely to recur – therefore falling within Indiana's public-interest exception to the mootness doctrine.

b. Whether the NRC erred in denying Save the Dunes' motion for summary judgment as to the correct statutory interpretation of the "ordinary high water mark" definition in Indiana's Public Trust Statute, Ind. Code § 14-26-2.1-2, based on a perceived fact issue that does not exist.

IV. The OALP's Final Ruling Violates AOPA

37. The OALP's Final Ruling – consisting of both the OALP Dismissal Order and the NRC Interlocutory Order – should be set aside as a violation of AOPA.

38. AOPA mandates that a court on judicial review shall set aside a state agency action that is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by preponderance of the evidence." Ind. Code § 4-21.5-5-14.

39. Courts "decide all questions of law, including any interpretation of a . . . state statute[] or agency rule, without deference to any previous interpretation made by the agency." Ind. Code Ann. § 4-21.5-5-11[11]; *see also Indiana Off. of Util. Consumer Couns. v. Duke Energy*

[11] This section was amended in 2024 to align with the U.S. Supreme Court's decision to overturn *Chevron v. NRDC*, 467 U.S. 837 (1984). *See* 2024 Ind. HEA 1003, Sec. 12 and Sec. 14(d)(5) (amending Ind. Code § 4-21.5-5-11 and -14); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)).

Indiana, LLC, 248 N.E.3d 1205, 1211 (Ind. 2024) (quoting Ind. Code § 4-21.5-5-11(b)) (affirming that, after the "legislature enacted major administrative-law reforms" in 2024, courts must now "decide legal questions 'without deference' to interpretations by an AOPA agency").

40. As detailed below, the OALP's Dismissal Order failed to consider the significant factual basis supporting the application of the public interest exception to mootness, despite the overwhelming case law precedent and great public importance of the issue. And the NRC's Interlocutory Order denying Save the Dunes' summary judgment motion was based on the ALJ's erroneous conclusion that a fact issue remained, despite agreement among the parties that the threshold question was a pure legal question as to the proper interpretation of Indiana's Public Trust Statute. *See* Ex. B at ¶ 85. And that legal question should have been resolved in Save the Dunes' favor. This Court owes no deference to the OALP's flawed rulings, which should be reversed as arbitrary, capricious, contrary to law, and unsupported by a preponderance of the evidence.

A. The OALP's Dismissal Order for Mootness Is Erroneous Because the Case Presents an Issue of Great Public Importance

41. To be clear: There is no question that, last May, the Town formally notified DNR[12] that it was abandoning its permit and scrapping plans to proceed with the "permitted activity." But that does not mean that the core legal issue cannot still be resolved, because this case presents an issue of great public importance that is likely to recur. This falls squarely within the public-interest exception to mootness in Indiana, and the Court should exercise its discretion to assume jurisdiction and issue a declaratory judgment on the parties' narrow question of statutory interpretation.

[12] The Town did not notify Save the Dunes and the OALP of its plan to abandon the permit until August 29, 2025, when the Town filed its Motion to Dismiss for Mootness.

42. Here, the OALP held, over Save the Dunes' objections, that this case was moot and granted the Town's Motion to Dismiss. In doing so, the OALP erroneously failed to consider the broad significance of the legal question at issue and the weight of Hoosiers' substantial public interest in the outcome of the case. The resolution of this critical question of statutory interpretation –- a pure question of law with wide-ranging implications for the public trust rights of Indiana citizens – is precisely the type of novel and important public issue for which a court should exercise its discretion to resolve on the merits. Accordingly, the OALP's dismissal order should be reversed.

43. Although "Article III of the United States Constitution limits the jurisdiction of federal courts to actual cases and controversies, the Indiana Constitution does not contain any similar restraint." *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991). Indiana courts have long recognized that a court may decide an otherwise moot case on its merits when "the issue involves a question of great public importance which is likely to recur." *J.F. v. St. Vincent Hospital and Health Care Center, Inc*., 256 N.E.3d 1260, 1265 (Ind. 2025); *see also In re Lawrance*, 579 N.E.2d at 37 (describing exception for cases "involv[ing] questions of great public interest[,]" which "typically contain issues likely to recur"); *Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Assoc.*, 456 N.E.2d 709, 712 (Ind. 1983) (same).

44. This case falls squarely within the public interest exception to the mootness doctrine because: (1) protection of public trust property along Lake Michigan is an issue of great public importance; (2) DNR's flawed interpretation of the statutory definition of Lake Michigan's OHWM will inform countless delineations in future permit applications for construction along the lakefront; and (3) an order from the Court on this issue would be highly instructive in the development of the public trust doctrine in Indiana. Accordingly, the OALP should have exercised its discretion to hear the case, and this Court should do so as well.

1. <u>This Legal Question Raises Issues of Great Public Importance</u>

45. The OALP should have exercised its discretion to resolve this case on the merits because correct delineation of the OHWM is essential to the protection of public trust property along Lake Michigan and lawful administration of the public trust doctrine is an issue of "great public importance." Cases of great public importance are those that, among other things, "raise important policy concerns[.]" *Mosley v. State*, 908 N.E.2d 599, 603 (Ind. 2009).

46. The Indiana Supreme Court in *Gunderson* recognized the significant public importance of DNR's OHWM determinations. In *Gunderson*, DNR argued it could rely on a fixed OHWM value for purposes of establishing the public trust boundary of Lake Michigan instead of delineating the natural OHWM under the common-law definition. 90 N.E.3d at 1185. Rejecting DNR's view, the Court held that DNR has no authority and is *prohibited* from changing the definition "as it threatens to alienate public trust lands." *Id.* at 1186. And given the "questions of great public interest" at issue, the Court also rejected DNR's contention that the Gundersons' sale of the disputed Lake Michigan property mooted the case and, accordingly, the Court assumed jurisdiction to hear the case on the merits. *Id.* at 1175 n.3.

47. The definition of the OHWM dictates the extent of public shoreline available for recreation and environmental stewardship at a time when shoreline hardening, erosion, and coastal hazards increasingly threaten Indiana Dunes National Park and adjacent communities. As the National Park Service warned in response to the Town's original permit for the revetment, construction below the natural OHWM in Ogden Dunes would eliminate public beach, impair ecological resources, and undermine the public trust rights recognized in *Gunderson*.[13] The

[13] *See* Save the Dunes' SJ Ex. D (National Park Service's public comments on the Town's permit application to DNR) (noting that DNR "must consider the legal and public ramifications of protecting the public's right to access the Lake Michigan shoreline").

public's ability to traverse and enjoy the shoreline—central to Indiana's identity and economy—hinges on where the State draws this boundary.

48. And the public is concerned. News of the proposed revetment in Ogden Dunes spurred extensive news coverage and public engagement, because Hoosiers – not just the residents of Ogden Dunes – are deeply invested in protecting their rights to access the beaches of Lake Michigan.[14]

49. The definition of the OHWM is particularly important in the public trust context because it serves as a fundamental legal and ecological boundary, marking where private property ends and publicly owned trust lands begin. This line, although sometimes subtle on the landscape, carries immense legal weight: it defines the scope of public rights to use and enjoy shorelines, lakes, rivers, and other navigable waters. By anchoring the boundary to natural, observable physical indicators—such as shelving, changes in soil, or the destruction of terrestrial vegetation—the OHWM ensures that the dividing line between public and private interests moves with natural shoreline processes rather than with administrative convenience or private development pressures. In this way, the OHWM acts as a safeguard that preserves public access, prevents unlawful privatization of public resources, and maintains a consistent, science-based standard for courts and agencies resolving property and permitting disputes.

50. Beyond its legal implications, the OHWM of Indiana's Lake Michigan shoreline is also critically important from an ecological perspective. The zone between the water's edge and

[14] *See, e.g.*, Christina Gibbs, *Possible Ogden Dunes revetment sparks debate*, Nw. Ind. Times (June 27, 2023), http://bit.ly/4rXRBOM; Doug Ross, *Drawing a line in the sand: Ogden Dunes, state and federal agencies and preservation group differ*, Chi. Trib. (May 3, 2025), https://bit.ly/48RB8D6; Karina Atkins, *Public interest vs. private homes: Climate change and erosion fuel disputes along Lake Michigan's shoreline*, Chi. Trib. (July 30, 2023), https://bit.ly/492bdJ1.

the OHWM includes some of the most dynamic and sensitive habitats along Lake Michigan, supporting unique plant communities and providing essential functions such as nutrient exchange, erosion buffering, and wildlife movement.[15] Because this transitional area is directly influenced by fluctuating water levels, storms, and sediment dynamics, accurate delineation of the OHWM is essential for DNR to regulate shoreline development and protect the state's natural resources. In short, the OHWM is not merely a technical line on a map—it is a linchpin of public rights and environmental stewardship of the Lake.

51. Because each construction decision along Lake Michigan depends on a clear, lawful definition of the OHWM, resolving the meaning of that boundary is essential to maintaining the State's fiduciary obligations under the public trust and safeguarding public use for generations. In short, the OHWM definition implements one of the State's foundational obligations to the public, and thus indisputably a matter of great public importance in Indiana.

2. <u>DNR's Interpretation is Virtually Certain to Recur</u>

52. DNR's unlawful interpretation of the Public Trust Statute is certain to recur unless this Court steps in.

53. The Town of Ogden Dunes is not the first party to request a permit from DNR along the Lake Michigan shoreline, and it will not be the last, because DNR is the permitting body for all construction projects along Indiana's shoreline of Lake Michigan. *See, e.g.*, Ind. Code § 14-29-1-8(a) (requiring the prior written approval of the DNR, Division of Water for placing, filling, or erecting a permanent structure in a navigable waterway or Lake Michigan). DNR is also empowered to "adopt rules under IC 4-22-2 to identify the location of the ordinary high water

[15] See, e.g., Save the Dunes' SJ Ex. A (National Park Service's Indiana Dunes National Lakeshore, Shoreline Restoration and Management Plan/Final Environmental Impact Statement); Save the Dunes' SJ Ex. D (National Park Service's public comments on the Town's permit application to DNR).

mark on the land adjoining the waters of Lake Michigan" for purposes of these permits. *Id.* § 14-29-1-9.

54. In the last few decades, DNR has received nearly 500 permit applications for Lake Michigan shoreline projects – including over fifty in the last five years alone.[16] Accordingly, there is no doubt that DNR will continue to have the opportunity to apply its OHWM definition and method of delineation to future permits.

55. DNR's interpretation—which treats the Army Corps' regulatory OHWM definition as interchangeable with the Public Trust Statute's OHWM definition—functions as an agency rule (albeit one that does not comply with the rulemaking procedures of Ind. Code § 4-22-2, as required by statute) that DNR will continue to apply in future permitting decisions. The Agency took an unambiguous stance on this interpretation in the proceedings below and has set forth a formal policy statement on the issue on its website.

56. And even if the Town of Ogden Dunes does not apply for a new permit with DNR for the same stone revetment project, other entities will apply for permits to construct other permanent structures along the lakeshore, and DNR will have to delineate the ordinary high-water mark for those projects. When courts consider whether the legal question is likely to recur in the future, the analysis is not limited to just the parties involved; it may also consider whether the legal question will arise among members of the public generally. *See In re Lawrance*, 579 N.E.2d. at 37 (finding likely recurrence for "many Indiana citizens, health care professionals, and health care institutions"); *Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Assoc.,* 456 N.E.2d 709, 711 (Ind. 1983) (likely recurrence "in many school districts throughout the state");

[16] *See* Indiana Department of Natural Resources, Division of Water, Online Database ("UNITY"), https://dowunity.dnr.in.gov/.

City of Huntingburg v. Phoenix Natural Resources, 625 N.E.2d 472, 474 (Ind. App. Ct. 1993) (likely recurrence "between different parties").

57. For instance, in a case involving a parents' motion to withdraw artificial nutrition and hydration to their daughter who was in a persistent vegetive state, the Indiana Supreme Court held that the daughter's death was not cause to moot the case because the issue was of "great public interest." *In re Lawrance,* 579 N.E.2d 32, 37 (Ind. 1991). Specifically, the Court explained that "irrespective of the death of the patient in this litigation, many Indiana citizens, health care professionals, and health care institutions expect to face the same legal questions in the future." *Id.* at 37. Furthermore, although the patient's death eliminated the "need to address all of the issues in the case as presented by the parties," the Court recognized that "when public questions remain at issue in case otherwise disposed of, [the] Court may select 'the essential questions in the case, so far as the record may be said to present them.'" *Id.* (citing *City of Jeffersonville v. Louisville & Jeffersonville Bridge Co.*, 83 N.E. 337 (Ind. 1908)).

58. This not a niche or speculative situation. It is virtually certain that DNR will continue to review and issue construction permits for property that abuts or overlaps with public trust property along Lake Michigan, and it is virtually certain that DNR will unlawfully apply the Army Corps' definition and methods for delineating the OHWM when doing so. The Court should assume jurisdiction to resolve the core question of statutory interpretation at issue before it occurs again elsewhere along the lakefront.

3. <u>This is a Novel Issue for Which Resolution Would Be Highly Instructive to Future Litigants</u>

59. The Court's guidance on the proper interpretation of the Public Trust Statute's OHWM definition – a complicated topic with limited existing precedent – would be highly instructive for DNR, future permit applicants, and the general public.

60. Courts "readily" apply this exception when facing novel legal questions that lack precedential guidance. *E.F. v. St. Vincent*, 188 N.E.3d 464, 466-67 (Ind. 2022). The Indiana Supreme Court recently observed that mootness exceptions are "especially appropriate in appeals that address novel issues, present a close case, or develop case law on a complicated topic." *Id.* (internal citations omitted) (noting that exception can be used "to address novel issues or close calls, or to build the instructive body of law to help trial courts"); *see also Anderson v. Huntington Cnty. Bd. of Comm'rs*, 983 N.E.2d 613, 617 (Ind. Ct. App. 2013) (dispute over "reasonable particularity" of records request was "an issue of first impression" qualifying for public interest exception); *Seo v. State*, 148 N.E.3d 952, 954 n.1 (Ind. 2020) (the public interest exception to mootness applies if a "case presents a novel, important issue of great public importance").

61. Courts find it "especially appropriate" to apply the public interest exception in cases that would clarify the law and instruct lower courts and future litigants. *T.M. v. Community Health Network, Inc*., 261 N.E.3d 765, 772 (2025) (quoting *E.F. v. St. Vincent*, 188 N.E. 3d at 465). This is particularly true in cases that address novel issues, *see In re Commitment of J.B.,* 766 N.E.2d 795, 798 (Ind. Ct. App. 2002) (applying the public interest exception to address "when doctors may forcibly administer medication to a person who refuses to take them"); present a close case, *see In re Commitment of M.Z*., 829 N.E.2d 634, 637 (Ind. Ct. App. 2005) ("[W]e choose to address this case on the merits because it is a close case."); or develop case law on a complicated topic, *see M.L. v. Eskenazi Health/Midtown Mental Health CMHC*, 80 N.E.3d 219, 222 (Ind. Ct. App.

2017) (applying the public interest exception because "Indiana case law [was] practically undeveloped" on the question at issue).

62. Furthermore, when intervening events eliminate the "need [to] address all of the issues in the case as presented by the parties," but questions of public importance remain at issue, courts "may select 'the essential questions in the case, so far as the record may be said to present them.'" *In re Lawrance*, 579 N.E.2d. at 37 (citing *City of Jeffersonville v. Louisville & Jeffersonville Bridge Co.*, 83 N.E. 337 (Ind. 1908)).

63. Here, the Court's guidance on the proper interpretation of the Public Trust Statute's OHWM definition would be instructive for DNR, future permit applicants, and the general public. Since the statute was enacted in 2020, no court has had occasion to interpret its provisions or consider whether DNR is properly implementing it. Meanwhile, DNR continues to issue permits for construction along the lakefront under the incorrect view that the Public Trust Statute directly mirrors the Army Corps' federal definition. Consequently, DNR's permit decisions may result in permanent structures being unlawfully built on public trust shoreline, thereby restricting public access, use, and enjoyment of the Lake. Because DNR's erred statutory interpretation will continue absent a judicial determination otherwise, the Court should exercise its discretion to resolve it.

64. Accordingly, the OALP should have exercised its discretion to resolve this case on the merits, and its Final Order dismissing the case as moot was arbitrary, capricious, an abuse of discretion, contrary to law, unsupported by a preponderance of the evidence, and should be reversed by this Court.

B. The NRC Erred in Denying Summary Judgment for Save the Dunes that DNR is Unlawfully Interpreting Indiana's Public Trust Statute

65. Also erroneous is the NRC's Interlocutory Order denying summary judgment for Save the Dunes, which rests on a fundamental mistake—the NRC's conclusion that the proper

interpretation of the Public Trust Statute's OHWM definition presents a question of fact, rather than a pure question of law. *See* Ex. B at ¶¶ 85-86. That error, alone, warrants reversal of NRC's Interlocutory Order.

66. Under Indiana law, statutory interpretation is always a legal question for the courts. *See Maynard v. State,* 859 N.E.2d 1272, 1274 (Ind. Ct. App. 2007). So too is the question of an agency's jurisdiction. *See Walczak v. Labor Works-Ft. Wayne LLC*, 983 N.E.2d 1146, 1152 (Ind. 2013) (quoting *Ind. Dep't of Env't Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 844 (Ind. 2003)) ("To the extent the issue turns on statutory construction, whether an agency possesses jurisdiction over a matter is a question of law for the courts.").

67. And while DNR and Save the Dunes did not agree on much in the underlying proceeding, both parties agreed on this point. *See* DNR's Motion for Reconsideration or Clarification at p. 1 (stating "[t]he question of law at issue here is the definition of the ordinary high water mark (OHWM) under Indiana law," which "is a statutory construction [issue] and a question of law for the ALJ, not a question of fact"); *id.* at ¶ 6 ("[i]t would be an exercise in futility to have a hearing on the merits related to the interpretation of the definition of the OHWM, which is a question of law and not a question of fact"); Save the Dunes' Combined Motion to Reconsider and Correct Error, and Response to DNR's Motion for Reconsideration or Clarification at p.1 (agreeing with DNR that the proper interpretation of the Public Trust Statute's OHWM definition is a legal question). The Court should thus vacate the NRC's Interlocutory Order and decide this important legal question, and it should do so in favor of Save the Dunes.

68. As demonstrated below, the NRC's denial of summary judgment for Save the Dunes is flawed for two independent reasons. First, the NRC ignored the undisputed material facts established in the record—confirmed by the NRC's own discussion of the evidence—and instead

invented a fact dispute based on conjecture about evidence that does not exist. Second, although the NRC acknowledged and extensively detailed the parties' competing statutory construction arguments, it failed to address them, thereby neglecting its responsibility to resolve the purely legal question before it. These errors reflect the NRC's misapplication of Indiana's summary-judgment standard and disregard of established rules of statutory construction that, when properly applied, confirm that the Town's OHWM delineation based on Army Corps' definition and methods (and DNR's acceptance of that delineation) is a violation of the Public Trust Statute as a matter of law thereby warranting summary judgment for Save the Dunes.

1. The NRC Disregarded Designated Evidence, Ignored its Own Discussion of the Evidence, and Speculated About Facts Not in the Record to Invent a Fact Dispute.

69. The NRC misapplied Indiana's summary-judgment standard by finding factual uncertainty where none exists. Under Indiana law, summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Ind. R. Trial P. 56(C). Even where some facts are disputed, summary judgment must be granted when the dispositive facts are not. *See Raymundo v. Hammond Clinic Assocs.*, 449 N.E.2d 276, 280 (Ind. 1983) (quoting *Barnd v. Borst*, 431 N.E.2d 161, 164-65 (Ind. Ct. App. 1982). That is the situation here.

70. The NRC's own discussion of the evidence confirms there is no material fact dispute about what the Town did in delineating the OHWM, what DNR accepted, or why DNR relies on the Army Corps' definition and methods:

> ***Undisputed Material Fact 1:*** *DNR's post*-Gunderson *guidance demonstrates the agency's understanding of how to identify the natural OHWM under the common-law definition, which is now codified in the Public Trust Statute.*

71. As the NRC observed, DNR developed detailed guidance following the *Gunderson* decision explaining how to delineate Lake Michigan's natural OHWM under the common-law

definition, *see* Ex. B ¶ 27 – a definition that was later codified in the Public Trust Statue "nearly word-for-word." *Id.* ¶¶ 67-68. That post-*Gunderson* guidance identifies the physical indicators that define the natural OHWM and describes DNR's understanding of how the definition governs its permitting decisions. *See* Ex. B ¶ 27 n.1 (citing Save the Dunes' SJ Ex. O). The following excerpt is taken directly from DNR's guidance, as of June 2023:[17]

> 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.

72. The guidance, as the NRC observed, also includes the below illustration and description of where the natural OHWM is located along the shoreline as indicated by "recognizable" changes in soil, vegetation, and "shelving at the toe of the dune bluff." Ex. B ¶ 27.

[17] Save the Dunes' SJ Ex. O at pdf p. 8.

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.

Undisputed Material Fact 2: *DNR admitted it did not follow its own post-*Gunderson *guidance and did not delineate the natural OHWM under the common law definition, based on its view that the Public Trust Statute "superseded" the common law definition.*

73. DNR admitted under oath that it "did not make a 'common law [OHWM] determination as that term is defined." DNR's Response to Req. to Admit No. 5, as referenced in Ex. B at ¶ 23 (citing Save the Dunes' SJ Ex. N at pdf p. 7). DNR's decision not to follow the common law definition was driven by its legal interpretation that Indiana's Public Trust Statute "superseded" the common-law definition and authorized the agency to use Army Corps' regulatory definition instead.[18] Based on that legal view, DNR stridently objected in discovery to Save the

[18] Save the Dunes' SJ Ex. N at 1 (DNR Responses to Discovery).

Dunes' use of the terms "natural OHWM" and "common law OHWM" arguing they are irrelevant due to the Public Trust Statute's enactment in 2020—a legal interpretation that led DNR to also argue that its post-*Gunderson* guidance is "outdated" and "irrelevant." Ex. B at ¶¶ 42, 51.[19]

74. Consistent with its interpretation that the Public Trust Statute "superseded" the common law definition, DNR also removed its post-*Gunderson* guidance from its website shortly after this case was filed and replaced it with a statement asserting that "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." Ex. B at ¶ 27 n.1 (quoting Save the Dunes' SJ Ex. O at pdf p. 3). As the NRC found, DNR admitted to altering its post-*Gunderson* guidance "to provide *updated* information regarding *how* to determine the location of the Lake Michigan OHWM" given the enactment of the Public Trust Statute. Ex. B at ¶ 51 (emphasis added).

Undisputed Material Fact 3: *The Town's delineation relied on Army Corps' regulatory definition and methods.*

75. Following DNR's interpretation that the Public Trust Statute's OHWM definition is "similar" or "essentially the same" as the Army Corps' regulatory definition, Ex. B at ¶¶ 28, 56, the Town delineated the OHWM for its revetment project using Army Corps' "Rapid Ordinary High Water Mark Field Identification Data Sheet (Field Test) and the factors used by [Army Corps'] to delineate an OHWM." Ex. B at ¶ 20. Army Corps itself confirmed that this Field Test "is designed to determine the OHWM of rivers and streams" under the federal CWA, "not the OHWM of Lake Michigan" under Indiana's Public Trust Statute. Ex. B at ¶ 29 (citing Save the

[19] *See also* DNR Summary Judgment Response Brief at 6, 12-14; Save the Dunes SJ Ex. N at 1, 7 (DNR Responses to Discovery including Response to Req. to Admit No. 6).

Dunes' SJ Ex. L at pdf. p 9, and Ex. M at pdf pp. 51-52). Nonetheless, DNR approved the Town's delineation and issued the Permit based on Army Corps' methodology. Ex. B at ¶ 20.

Undisputed Material Fact 4: *Applying the distinct standards could produce "radically" and "strikingly" different delineation outcomes.*

76. The NRC compared the Town's delineation photographs to DNR's post-*Gunderson* guidance for delineating the natural OHWM and observed the "strikingly different" delineation outcomes between the two. Ex. B at ¶¶ 77, 80.[20] Specifically, the NRC observed that the Town's delineation using Army Corps' methods placed the OHWM at a location that "is more akin to a wave break line on the sand [rather] than a long-standing change in soil, terrestrial vegetation, or shelving along the shorefront," which "could indicate that the OHWM should be delineated further inland from the shorefront." Ex. B at ¶¶ 77, 79-80.

Figure 1.

Image taken from Save the Dunes Exhibit O

Image taken from Department Exhibit 1-B

Figure 4. Middle Project Area

[20] *See* Save the Dunes' SJ Ex. M at pdf p. 61; Save the Dunes' SJ Ex. O at pdf p. 12.

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

77. These are the material facts here, none are disputed, and they conclusively prove: (a) that DNR understands the fundamental difference between the common law definition of the natural OHWM—the definition DNR admits it did not follow in this case—and Army Corps' regulatory definition; (b) application of the different definitions in the field could produce "radically" and "strikingly" different delineation outcomes; and (c) DNR approved the Town's OHWM delineation using Army Corps' definition, based on its legal position that the Public Trust Statute "supersedes" the common-law definition and effectively replaces it with one that mirrors Army Corps' definition (such that the two definitions can be used interchangeably, and the agencies' jurisdictions are essentially the same).

78. Yet, instead of resolving whether DNR's interpretation of the Public Trust Statute is correct, the NRC speculated there might be some other evidence of "environmental factors" or a "change in the area of construction" to explain why the Town's delineation under Army Corps' regulatory definition "seems so radically different" from DNR's guidance for delineating the natural OHWM under the common law definition. Ex. B at ¶¶ 81-82.

79. The NRC's conjecture finds no support in the record, and it disregards Indiana Trial Rule 56, which prohibits a court from deciding summary judgment based on speculation or

evidence not properly designated to it. *See* Ind. R. Trial P. 56(E); *Cave Quarries, Inc. v. Warex LLC*, 240 N.E.3d 681, 685 (Ind. 2024) (confirming that "mere speculation is insufficient" to demonstrate a fact issue); *Rood v. Mobile Lithotripter of Ind., Ltd.*, 844 N.E.2d 502, 507 (Ind. Ct. App. 2006) (explaining that under the designation requirements of Trial Rule 56 parties may "no longer rely without specificity on the entire assembled record to fend off or support motions for summary judgment" and the court has no duty "to search the record to construct a claim or defense for a party… to discern whether an issue of material fact exists."); *Conrad v. Waugh,* 474 N.E.2d 130, 136 (Ind. Ct. App. 1985) (mere contentions of contested facts insufficient to create a triable issue).

80. Here, DNR and the Town had nearly two years in fact and expert discovery, and an opportunity during summary judgment briefing, to produce evidence of some "environmental factors" or a "change in the area of construction" or other reason to explain why the Town's delineation under Army Corps' regulatory definition "seems so radically different" from DNR's guidance for delineating the natural OHWM under the common law definition. They did not.

81. As the NRC itself confirmed, DNR instead stubbornly advanced its legal view that using Army Corps' standard to delineate the public trust boundary is justified "given the similarities" between Army Corps' OHWM definition and the Public Trust Statute's definition. Ex. B at ¶ 55. Indeed, the NRC recited each of DNR's statutory construction arguments including the agency's view that its interpretation of the Public Trust Statute as providing DNR and Army Corps with "concurrent jurisdictions remove[s] potential headaches from applicants during permitting processes." Ex. B at ¶ 56.

82. In sum, the NRC violated Trial Rule 56 by ignoring the undisputed designated evidence and relying instead on speculation to invent a fact dispute that does not exist. With no

evidence to support any alternative explanation for why the Town's delineation departs so "radically" from DNR's guidance on delineating Lake Michigan's natural OHWM under the common law definition, the only explanation is a legal one: the common law definition and Army Corps' definition are not the same in language, purpose, or applicability warranting summary judgment for Save the Dunes on this legal question.

2. The NRC Violated Trial Rule 56 By Failing to Resolve the Purely Legal Question Before It.

83. After inventing a fact dispute where none exists, the NRC compounded its error by failing to decide the purely legal question both parties raised. Although the NRC rejected the DNR's "superseded" theory[21] and agreed with Save the Dunes that the Public Trust Statute codified the common-law OHWM definition from *Gunderson* "nearly word-for-word," Ex. B at ¶¶ 67-68, it never analyzed the statutory text beyond noting that the Statute's definition differs from the Army Corps' regulatory definition, Ex. B at ¶74, never applied the canons of statutory construction, and never addressed the legal consequences of DNR's admission that it did not follow the common-law definition—an admission dispositive of DNR's violation of the Public Trust Statute, warranting summary judgment for Save the Dunes .

a. The NRC Ignored the Legal Significance of the Public Trust Statute's Codification of the Common-Law OHWM.

84. The distinction between a statute that "codifies" the common law versus one that "supersedes" it has profound implications for how the Public Trust Statute is interpreted. Specifically, a codifying statute incorporates existing common law principles into statutory form without altering them. *See River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 914-15 (Ind. 2020) (explaining that the common law remains "in force" and "continues to survive"

[21] Save the Dunes' SJ Ex. N at 1 (DNR Discovery Responses).

when a statute is "declaratory of the common law, contain[s] nothing inconsistent with the common law, and [makes] no declarations express or implied regarding the common law").

85. In contrast, a superseding statute modifies or replaces the common law with conflicting legal principles. *See, e.g.*, *Sanquenetti v. State,* 727 N.E.2d 437, 439 (Ind. 2000) (concluding that a statute that departed from common law principles of criminal liability regarding principals and accessories had "supersede[d] the common law . . . and thus… the legal distinction between a principal and an accessory ha[d] ceased to exist.").

86. Due to these key differences, courts presume when interpreting 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." *Clark v. Clark*, 971 N.E.2d 58, 62 (Ind. 2012) (emphasis added); *see also Kosarko v. Padula*, 979 N.E.2d 144, 148 (Ind. 2012) ("[w]hen resolving a conflict between the common law and a statute, [courts] presume that the legislature did not intend to alter the common law unless the statute declares otherwise in express terms or by unmistakable implication") (emphasis added)); *Fields v. Gaw*, 213 N.E.3d 1028, 1032 (Ind. Ct. App. 2023) ("statutes in derogation of the common law are to be strictly construed because [courts] assume that the legislature does not intend by a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication.").

87. For that matter, the Indiana Supreme Court in *Gunderson* confirmed these principles in rejecting the private landowners' argument "that Lake Michigan enjoys no public trust protections because lawmakers expressly excluded that body of water from Indiana's Lake Preservation Act." *Gunderson*, 90 N.E.3d at 1182. Confirming that "Indiana ha[d] not abrogated its common-law fiduciary responsibilities to Lake Michigan, either expressly or implicitly, through the Lake Preservation Act[,]" the Court first observed that the Act "is public trust legislation" that

"specifically excludes Lake Michigan from its ambit." *Id.* at 1182-83 (internal quotation and citation omitted). Even so, the Court reasoned that "the Act does not expressly abrogate the common-law public trust doctrine" because "it merely states that the Act 'does not apply' to Lake Michigan" and found "nothing in the Act that conflicts with the common-law public trust doctrine as it applies to Lake Michigan." *Id.* There is no reason for a different outcome here.

88. As extensively briefed to the NRC, not one provision in the Public Trust Statute states by "express terms or by unmistakable implication" that the Statute is intended to supersede or abrogate the common law public trust doctrine as it applies to Lake Michigan.[22] Nor is there any indication, express or implied, that the Statute is intended to change the common law definition of Lake Michigan's natural OHWM that the *Gunderson* Court held is the property boundary between public trust and private land. *Id.* at 1187 ("we hold that the natural OHWM is the legal boundary separating State-owned public trust land from privately-owned riparian land."). For that matter, the NRC itself observed that the Statute *codified* the common law definition from *Gunderson* "nearly word-for-word," Ex. B at ¶¶ 24, 67-68, but failed to recognize the legal significance of that conclusion given DNR's sworn admission that it did not follow that definition or its post-*Gunderson* guidance for delineating the natural OHWM under the common law definition.

89. The NRC should have ruled that there is no indication in the plain language of the Public Trust Statute, much less an explicit directive, to support DNR's view that the Statute "superseded," abrogated, or in any way changed the common law definition or required DNR to "update" its post-*Gunderson* guidance for *how* to apply the common law definition based on some "change in the law" that never occurred. Ex. B at ¶¶ 27, 42.[23]

[22] Save the Dunes' MSJ at 24-27.

90. Having confirmed that the Public Trust Statute codified the common law definition, the NRC should have held that the legislature did not direct DNR to construe or apply that definition any differently than the agency had been for two years post-*Gunderson*—an application that is consistent with how the common law definition had been construed and applied for more than a hundred years before that. *See Gunderson*, 90 N.E.3d at 1181 (quoting *Howard v. Ingersoll*, 54 U.S. (12 How.) 381, 427, 14 L. Ed. 189 (1851)) (observing that "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."); Save the Dunes' SJ Ex. O at pdf p. 8; *supra* at 22-23 (discussing DNR's post-*Gunderson* guidance, which states "the location of the OHWM" under the common law definition is "based on the appearance of recognizable shelving at the toe of the dune bluff and the presence/destruction of terrestrial vegetation").

91. That is the definition that applies here. And that is the definition that DNR admitted under oath it did not follow in this case, proving as a matter of law that DNR violated the Public Trust Statute. DNR's admission also explains why the Town's use of Army Corps' distinct definition and methods resulted in an OHWM value based on a "recent wave break line on the sand" – a boundary markedly different from the location of the common-law definition of the natural OHWM at the "long-standing change in soil, terrestrial vegetation, and shelving along the shorefront," Ex. B at ¶ 80, which is the correct location of Lake Michigan's natural OHWM.

92. The NRC's failure to reach this conclusion and resolve the legal dispute in Save the Dunes' favor was arbitrary, capricious, not in accordance with law, and should be corrected by the Court.

b. The Similarities in Language Between the Public Trust Statute's OHWM Definition and Army Corps' Definition Does Not Make Them Interchangeable.

93. The NRC also erroneously entertained the notion that DNR's reliance on Army Corps' regulatory OHWM definition may be "justified" because its language is "similar" to the Public Trust Statute's definition. Ex. B at ¶ 76. This is wrong for several reasons.

94. As an initial matter, "a legal interpretation of one act cannot force a similar conclusion when a different act with different provisions is under consideration." *Spaulding v. Int'l Bakers Servs., Inc.*, 550 N.E.2d 307, 309 (Ind. 1990) (quoting *Snyder Constr. Co. v. Thompson*, 248 N.E.2d 560, 563 (Ind. Ct. App. 1969); *see also MDM Invs. v. City of Carmel*, 740 N.E.2d 929, 935 (Ind. Ct. App. 2000) ("Since words that have one meaning in a particular [statutory] context frequently have a different meaning in another context, it is necessary to consider the context to determine the significance of the words used in a statute"). Thus, the fact that the two definitions have similar language does not automatically make them the same or any way "justify" DNR's interpretation that they are.

95. Furthermore, as the NRC itself observed, the Public Trust Statute's definition of the OHWM is distinct in language, application, and purpose from Army Corps' regulatory definition. The Public Trust Statute, which applies only to Lake Michigan, defines the Lake's OHWM based on a limited list of factors:

> As used in this chapter, "ordinary 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.

Ex. B at ¶ 68 (quoting Ind. Code § 14-26-2.1-2 (emphasis added)). The definition's purpose is to delineate the boundary between private property and public "land adjoining the waters of Lake

Michigan" that is 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 identify a specific property line between private and public land along Lake Michigan in which all Hoosiers have a "vested" property right. Ind. Code § 14-26-2.1-4.

96. In contrast, Army Corps' regulatory definition applies to all waterways—lakes, rivers, and streams—and defines the OHWM more broadly to include a non-exhaustive, open-ended list of factors, including all "other appropriate means that consider the characteristics of the surrounding area"—language not included in the Public Trust Statute's definition:

> 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.***

Ex. B at ¶ 29; *id.* ¶ 69 (quoting 33 C.F.R. § 328.3(c)(4))[24]; *id.* ¶ 74 (observing the additional language in Army Corps' definition). Unlike the Public Trust Statute, the purpose of Army Corps' definition is not to define a property boundary, but to determine the federal agency's jurisdiction to regulate dredge or fill discharges into U.S. waters under Section 404 of the CWA. *See* 33 C.F.R. § 328.1; Ex. B at ¶ 29.[25] The NRC acknowledged these textual and functional differences but ignored their legal significance in several respects.

97. *First,* as discussed above, courts presume when interpreting 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. The Army Corps' open-ended definition with its "other appropriate means" language has been in

[24] Note that the NRC's Interlocutory Order cited to an outdated version of this regulation, which is now at 33 C.F.R. § 328.3(c)(4) rather than 33 C.F.R. § 328.3(e).
[25] *See also* Save the Dunes' SJ Exs. L and R.

place since it was promulgated in 1986[26] and could have been adopted verbatim by the Indiana legislature when it passed the Public Trust Statute in 2020. But instead, the legislature codified the narrow, finite-factor common law definition from *Gunderson*. That decision is dispositive that the legislature did not intend for DNR to rely on Army Corps' "similar" definition with its open-ended list of physical characteristics to delineate Lake's Michigan' public trust boundary.

98. *Second,* when interpreting a statute, a court's "primary goal is to fulfill the legislature's intent[,]" the "best evidence" of which is the statute's language. *Mi.D v. State*, 57 N.E.3d 809, 812 (Ind. 2016). Moreover, "the legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an absurd or unjust result." *Orange v. Indiana Bureau of Motor Vehicles*, 92 N.E.3d 1152, 1155 (Ind. Ct. App. 2018) (quoting *Nash v. State*, 881 N.E.2d 1060, 1063 (Ind. Ct. App. 2008). "Thus, [the court] must keep in mind the objective and purpose of the law as well as the effect and repercussions of such a construction." *Id*.

99. Here, the General Assembly's decision to codify the common law definition of Lake Michigan's natural OHWM, as set forth in *Gunderson*, "nearly word-for-word" is the "best evidence" of the legislature's intent that the definition be used to delineate a precise property boundary, not a "purely administrative value that does not need to be precisely delineated" for Army Corps' purposes.[27] And that intent was made even more explicit by the legislature's decision to include two other provisions in the Statute: (1) a definition of "Lake Michigan" as "the *land* adjoining the waters of Lake Michigan up to the ordinary high water mark[,]" Ind. Code § 14-26-

[26] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206-01, 41251 (November 13, 1986) (to be codified at 33 C.F.R. pt. 328); *see also* Save the Dunes' SJ Ex. R at 1 (Army Corps Regulatory Guidance Letter No. 05-05 (2005)).
[27] Save the Dunes' SJ Ex. L at pdf p. 20 (quoting Army Corps' agent, Soren Hall).

2.1-1 (emphasis added); and (2) a declaration that "the state of Indiana owns all of Lake Michigan within the boundaries of Indiana in trust for the use and enjoyment of all citizens of Indiana" such that private *land*owners along the waterfront do "not have the exclusive [property] right to use the water or *land* below the ordinary high water mark of Lake Michigan." Ind. Code § 14-26-2.1-3 (emphasis added).

100. DNR's interpretation of the Statute's OHWM definition as containing a limitless number of physical characteristics to be subjectively weighed by a delineator is in direct conflict with that intent. Indeed, ambiguity has no place in the definition of property boundaries, as property descriptions outline the physical markers that are to be relied on in the field. *See De Long v. Starky*, 120 Ind. App. 288, 291 (1950). Thus, property descriptions that offer a list of optional markers from which to choose renders the property description indiscernible and void. *See id.* (explaining that "a deed of real estate, the description of which is impossible of ascertainment, is void and can afford no basis for an action to quiet the legal title to the land involved").

101. The same is necessarily true of the definition of Lake Michigan's public trust property boundary. The *Gunderson* Court confirmed that, for hundreds of years, "American common law defined [the public trust] 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 1181. If the Indiana definition of OHWM is read as including an open-ended list of characteristics that goes far beyond these "distinct" characteristics in the common law definition, its purpose as a property boundary and the intent of the Indiana Legislature would be frustrated as it was in this case.

102. Based on these controlling canons of statutory construction, there is no question that DNR does not share jurisdiction with Army Corps under the CWA, or any other federal law. Rather, DNR's jurisdiction arises under state law, Indiana's Public Trust Statute—a law enacted by the General Assembly to codify the State's public trust doctrine as it applies to Lake Michigan, including the common law definition recognized in *Gunderson* as the critical property line where private rights end and public trust rights begin. The language of Army Corps' definition with its open-ended list of physical characteristics was not adopted by the Indiana legislature in express, unmistakable terms (or even implied ones) when it enacted the Public Trust Statute. And that decision is binding on DNR, the NRC, and this Court.

V. Conclusion

103. This case presents a singular legal issue with consequences that extend far beyond the parties: how Indiana defines, protects, and preserves its Lake Michigan public trust shoreline. The OALP's refusal to address that question, despite its obvious public importance and likelihood of recurrence, was legal error. So too was the NRC's denial of summary judgment for Save the Dunes, which rests on two fundamental mistakes: ignoring undisputed material facts and failing to apply governing canons of statutory construction to resolve a purely legal dispute the agency was required to resolve.

104. The administrative record is clear. The Town's Army Corps-based delineation approved by DNR did not follow the common law definition of Lake Michigan's natural OHWM. DNR's approval was based on its flawed legal interpretation that the Public Trust Statute displaced the common law OHWM definition and should instead be interpreted the same as 33 C.F.R. § 328.2(c)(4). As a result, the Town's delineation failed to identify Lake Michigan's public trust boundary in violation of the Public Trust Statute and the Indiana Supreme Court's decision in *Gunderson*.

105. Under the Indiana legislature's 2024 administrative law reforms, this Court owes *no deference* to DNR's unlawful interpretation, or the OALP's Final Ruling that failed to correct it. *See* Ind. Code § 4-21.5-5-11; *Indiana Off. of Util. Consumer Couns. v. Duke*, 248 N.E.3d at 1211. This Court should therefore decide the statutory question presented in favor of Save the Dunes and restore the protections the Public Trust Statute affords Lake Michigan and the public that depends on it.

VI. Request for Relief

106. For all the foregoing reasons, and pursuant to Ind. Code § 4-21.5-5-15, Save the Dunes respectfully requests this Court to:

a. Assume jurisdiction over this Petition for Judicial Review;
b. Hold that the public-interest exception to mootness applies, and that judicial review is warranted notwithstanding any alleged mootness;
c. Reverse the OALP's Final Dismissal Order and hold the agency erred in declining to decide the publicly important legal question presented;
d. Set aside the NRC's Interlocutory Order Denying Summary Judgment for Save the Dunes and hold that the agency erred in finding a genuine issue of material fact;
e. Grant summary judgment for Save the Dunes on the proper interpretation and application of Ind. Code § 14-26-2.1-2 as addressed in this Petition;
f. Remand back to OALP for further proceedings consistent with the Court's ruling;
g. Provide any further relief the Court deems just and proper.

Respectfully submitted,

/s/ *Kim E. Ferraro*

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VERIFICATION

I affirm under penalties for perjury that the above and foregoing statements and representations are true to the best of my knowledge and belief.

/s/ Kim E. Ferraro

CERTIFICATE OF SERVICE

I certify that on December 17, 2025, the foregoing document was filed with the Porter County Court via the Court's electronic filing system and served upon the following parties by Certified Mail, Return Receipt Requested:

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I also certify that on December 17, 2025, the foregoing document was served via electronic mail upon the following attorneys of record in the underlying OALP proceeding.

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