STATE OF INDIANA	)	PORTER COUNTY SUPERIOR COURT 5
	)	
COUNTY OF PORTER	)	CAUSE NO. 64D05-2512-RA-013842

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

PETITIONER'S OPENING BRIEF

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INTRODUCTION

This case concerns a question of exceptional importance to Indiana law: whether a state agency may unilaterally redefine a statutory definition and, in doing so, effectively redraw the boundary between public and private land along Lake Michigan. The Indiana General Assembly answered that question in 2020 when it codified—nearly word for word—the common-law definition of the natural "ordinary high water mark" ("OHWM") recognized by the Indiana Supreme Court in *Gunderson v. State*. That boundary, the Court held, separates public trust land from private property and may not be altered by the Department of Natural Resources ("DNR") absent a clear legislative directive. Yet the DNR has done precisely that. By substituting a federal regulatory standard for the natural OHWM required by Indiana law, DNR has shifted the public trust boundary lakeward, diminishing public trust land and the rights that attach to it.

The agency record leaves no doubt about what occurred. DNR did not apply the natural, common-law OHWM codified in Indiana's Public Trust Statute. Instead, it approved a shoreline delineation based on a federal regulatory definition and methods developed by the U.S. Army Corps of Engineers, which were designed long ago for an entirely different purpose: determining federal jurisdiction under the Clean Water Act. The result is not a minor technical variation. As the Natural Resources Commission ("NRC") observed on review, applying the two standards can produce "strikingly different" outcomes, with the federal approach allowing the boundary to be drawn at a transient wave line in the sand rather than at the stable, physical indicators that define the natural shoreline. That difference is dispositive, because every foot the boundary moves lakeward is a foot of public trust land lost.

The legal error is equally clear. The statute defines the OHWM using specific, natural, physical characteristics and nowhere authorizes DNR to replace that definition with a broader,

regulatory one. Nor could it. When the legislature codifies a common-law rule, it preserves it. And under *Gunderson*, the State is prohibited from altering the public trust boundary without a clear legislative directive to do so—one that is plainly absent here. DNR's interpretation otherwise replaces a statutory definition of an observable property boundary with a flexible, discretionary one and, in doing so, arrogates to the agency the very power the Indiana Supreme Court said DNR does not possess.

The two reviewing agencies in this case—the NRC and the Office of Administrative Law Proceedings ("OALP")—compounded DNR's error by refusing to address and correct the issue. For its part, the NRC treated this legal question of statutory interpretation as a factual dispute to deny summary judgment, despite the Parties' agreement—and established precedent—that the issue is a pure question of law. In turn, when the Town of Ogden Dunes claimed to have abandoned its DNR permit, the OALP dismissed the case as moot, declining to address a critical question of statutory construction that will recur in every future DNR permitting decision along Lake Michigan. The OALP's ruling disregards settled Indiana law recognizing that issues of great public importance—especially those defining the scope of public trust rights—warrant resolution even if the underlying dispute is arguably moot.

This Court should correct these errors. It should hold that the public interest exception to mootness applies and that judicial review is warranted. It should further hold that the Public Trust Statute requires application of the natural, common-law OHWM and that DNR's contrary interpretation and reliance on the Army Corps' definition and methodology is unlawful. Accordingly, Save the Dunes respectfully requests that the Court reverse the OALP's dismissal order, vacate the NRC's interlocutory order, grant summary judgment in favor of Save the Dunes

on the proper interpretation of Indiana Code § 14-26-2.1-2, and remand this matter for further proceedings consistent with the Court's decision.

FACTUAL BACKGROUND

Indiana Law Defines the Public Trust Boundary of Lake Michigan as the Natural OHWM

Hoosiers' public trust rights to use and enjoy the shoreline of Lake Michigan up to the natural OHWM is settled law. Consistent with more than a century of common law, the Indiana Supreme Court in *Gunderson v. State* confirmed that "the natural OHWM is the legal boundary separating State-owned public trust land from privately-owned riparian land." 90 N.E.3d 1171, 1187 (Ind. 2018); *see also id.* at 1180 (collecting citations dating back to 1845). The Court explained that this natural boundary is created by lake levels that fluctuate over time, leaving submerged bottomland exposed. *Id.* at 1180. And that exposed land "falls within the ambit of the public trust because the lake has not permanently receded . . . and may yet again exert its influence up to that point." *Id.* (quoting *Glass v. Goeckel*, 703 N.W.2d 58, 71 (Mich. 2005)). Accordingly, as defined by the common law, the natural OHWM is the *observable* 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 (quoting *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 427 (1851) (Curtis, J., concurring)).

In deciding *Gunderson,* the Court observed that DNR regulation had a definition that "reflected the traditional common-law OHWM" as "[t]he line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics" that include "a clear and natural line impressed on the bank or shore, shelving, changes in the soil's character, the absence of terrestrial vegetation, or the 'presence of litter or debris." *Gunderson*, 90 N.E.3d at. at 1185 (quoting the prior version of 312 IAC 1-1-26). Yet, DNR was not using that definition for

Lake Michigan's public trust boundary, and instead, relied on a "fixed elevation—581.5 feet above sea level—as the [Lake's] OHWM." *Id.* DNR argued that its use of this fixed value provided regulatory certainty whereas using the common-law definition "would lead to uncertainty regarding the boundary of riparian landowners and the extent of the DNR's regulatory jurisdiction." *Id.* at 1185.

Rejecting that view, the *Gunderson* court held that using a "static boundary" for the OHWM disregards the "adaptive doctrines of accretion and erosion" on which riparian boundary law relies, thereby "threatening to alienate public trust lands":

> Under the accretion doctrine, the riparian landowner gains property as the OHWM shifts lakeward due to the *gradual* deposit of sand or other material. The doctrine of erosion, by contrast, has the opposite effect: the riparian landowner loses property as the boundary shifts landward due to the gradual loss of shoreline. These doctrines operate to maintain the status quo of relative rights to the shores of navigable waters. While the physical boundary shifts (e.g., *shelving or terrestrial vegetation*) the legal relationships—private riparian ownership and public trust title—remain the same. In other words, while accretion or erosion may change the actual location of the OHWM, the legal boundary remains the OHWM.

Id. at 1186 (emphasis added) (internal citation omitted). Accordingly, the Court made clear that the "natural OHWM is the legal boundary separating State-owned public trust land from privately-owned riparian land" and DNR is *prohibited* from changing that boundary absent a clear legislative directive. *Id.* at 1186-87.

To comply with the *Gunderson* court's mandate, DNR developed guidance for identifying the Lake's natural OHWM under the common-law definition, explaining "the 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."[1] DNR further advised that "in cases where the

[1] R. Pt. 2 OALP001081, OALP001083 (Pet'r SJ Ex. O: Kacey Cook Affidavit and DNR Website Download) (emphasis added).

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*."[2]

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.

In July 2020, the Indiana General Assembly codified *Gunderson* and the common-law definition of Lake Michigan's natural OHWM in statute, "nearly word for word." Ind. Code § 14-26-2.1-2 ("Public Trust Statute").[3] In doing so, the legislature confirmed that the land below that boundary is held in trust by the State for all Indiana citizens, whose legal rights to use and enjoy Lake Michigan's natural scenic beauty and resources "without manmade additions or alterations"

[2] Id.
[3] R. Pt. 1 OALP000051 (Interlocutory Order Den. Summ. J.at ¶ 68).

are "vested rights." Ind. Code § 14-26-2.1-3 and -4.[4] Not one provision of the Public Trust Statute provides "a clear legislative directive" for DNR to interpret the codified, common-law OHWM definition any differently than the agency had before the statute was enacted.

Army Corps Uses a Different, Open-Ended Regulatory Definition

The U.S. Army Corps of Engineers ("Army Corps") has long defined the OHWM differently for its purpose of determining federal jurisdiction under the Clean Water Act to regulate discharges to "waters of the United States." *See* 33 C.F.R. § 328.3(c); 33 C.F.R. § 328.4. While the Army Corps' definition shares some language with the Public Trust Statute's OHWM definition, it differs in three key respects. *First*, unlike the Public Trust Statute, Army Corps' definition applies to water bodies other than Lake Michigan. *Id.*[5]

Second, while Army Corps' definition lists some of the same physical indicators of the natural OHWM, it includes open-ended language that allows delineation based on "other appropriate means that consider the characteristics of the surrounding areas." *Id.* These "other appropriate means" include "lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence" not tied to *observable*

[4] Although the Public Trust Statute does not define what a "vested right" is, the term is well understood to be a legally enforceable right that cannot be taken away without consent. *See Thacker v. Butler*, 134 Ind. App. 376, 382, 184 N.E.2d 894, 897 (1962) (explaining that an "absolute vested right, in a legal sense," is a right that is "complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent."); *see also Harraz v. Snyder*, 669 N.E.2d 911, 917 (Ill. App. 1996) (defining a vested right "as an expectation that is so far perfected that it cannot be taken away by legislation."); Bryan Garner, *Black's Law Dictionary* 1520 (10th ed. 2014) (defining "vested right" as "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.").

[5] R. Pt. 2 OALP001105, OALP001107 (Pet'r SJ Ex. R: Army Corps Regulatory Guidance Letter) ("Physical characteristics that correspond to the line on the shore established by the fluctuations of water *may vary depending on the type of water body* and conditions of the area." (emphasis added)).

shoreline conditions.[6] *Third*, Army Corps' definition serves a distinct purpose—to define the federal agency's jurisdiction to regulate dredge and fill discharges under Section 404 of the Clean Water Act and under Sections 9 and 10 of the Rivers and Harbors Act of 1899,[7] *see* 33 C.F.R. § 328.4, not to establish a property boundary between public trust and private land.

DNR Approved the Town's OHWM Delineation Based on Army Corps' Definition

In April 2020, the Town of Ogden Dunes ("the Town") submitted an emergency request to construct a mile-long stone revetment along its Lake Michigan's shoreline.[8] In August 2020, DNR granted emergency approval only for the eastern half of the revetment ("Phase I"), but not the western half ("Phase II").[9] Phase I was constructed under the emergency approval, but Phase II – the subject of this litigation – was not approved by DNR until June 2023.

In the interim three years, the Town communicated with DNR and Army Corps to come up with a method for determining an OHWM value that could be used for both DNR and Army Corps' purposes in permitting Phase II.[10] Those communications reveal the agencies' understanding of the wide gap between the Army Corps' method for identifying its jurisdictional benchmark, which can "default to the [fixed elevation] standard of 581.5 IGLD"— and DNR's

[6] R. Pt. 2 OALP001105, OALP001107 (Pet'r SJ Ex. R: Army Corps Regulatory Guidance Letter).
[7] *Id.* at OALP001105 (Pet'r SJ Ex. R: Army Corps Regulatory Guidance Letter).
[8] R. Pt. 2 OALP000841, OALP000876 (Pet'r SJ Ex. F: Town's Emergency Permit Application for Entire Revetment).
[9] R. Pt. 2 OALP000788, OALP000788 (Pet'r SJ Ex. C: Phase I Revetment Authorization).
[10] R. Pt. 2 OALP000977 (Pet'r SJ Ex. L: Email communications between DNR, Army Corps, and the Town's consultant) (Army Corps expressed desire to "com[e] up with some standards," as a "useful project," for "how to do a Lake Michigan OHWM assessment" – standards that Army Corps had not yet developed); *id.* at OALP001002 (Army Corps "recommend[ing] that [the Town] follow the same process as in IL").

post-*Gunderson* guidance for identifying the *observable* location of Lake Michigan's natural OHWM.[11]

Instead of following DNR's guidance, the Town's consultant used Army Corps' definition and methods.[12] In particular, the Town's consultant used the methodology in Army Corps' "Field Identification Data Sheet"[13] ("Field Data Sheet"), even though Army Corps confirmed the method is "not intended for coastal areas."[14] As a result, the Town's consultant arrived at an OHWM value of 581.5 feet IGLD-85 based on the Lake's average water level at the time and the consultant's survey of "*beach slope* breaks, [a] line of sediment sorting/different materials, organic and floating debris, shells, and any other indicator observed on the *beach slope*."[15] The photos below taken during the delineation, confirm the Town's consultant disregarded the *observable* shelving and changes in sand to vegetation at the toe of a dune bluff that is clearly visible much further inland:[16]

[11] R. Pt. 2 at OALP00996 (Army Corps explained that it does not "nitpick" the OHWM so long as the number is not drastically different from what the agency anticipates because the line it uses "is more administrative rather than something that influences the design" of construction); *compare to* R. Pt. 2 OALP001081, OALP001083 (Pet'r SJ Ex. O) (DNR's post-*Gunderson* guidance).
[12] R. Pt. 2 OALP001005, OALP001008 (Pet'r SJ Ex. M: Town App. 3/29/2023 for Phase II).
[13] *Id.* at OALP001053-56 (Pet'r SJ Ex. M: Town App. 3/29/2023 for Phase II).
[14] R. Pt. 2 OALP000985 (Pet'r SJ Ex. L: Emails between DNR, Army Corps, and GZA).
[15] R. Pt. 2 OALP001053-56 (Pet'r SJ Ex. M: Town App. 3/29/2023 for Phase II (emphasis added)).
[16] R. Pt. OALP001064-65 (Pet'r SJ Ex. M: Town App. 3/29/2023 for Phase II; photos from delineation).

Figure 5. West Project Area


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

Indeed, the NRC observed the "striking" and "radical" difference between DNR's post-*Gunderson* guidance for locating the natural OHWM, and the Town's delineation using Army Corps' method, describing the Town's "asserted OHWM" as "more akin to a recent wave break line on the sand [rather] than a long-standing change in soil, terrestrial vegetation, or shelving along the shorefront."[17]

On March 29, 2023, the Town submitted a revised permit application to DNR with the 581.5' IGLD-85 value and Army Corps' Field Data Sheet attached.[18] DNR accepted the Town's OHWM delineation using Army Corps' definition and methods, and approved the Phase II permit on June 1, 2023.[19] On June 3, 2023, DNR's counsel confirmed that "DNR relied on [Army Corps'] delineation" for purposes of the public trust, based on the DNR's view that Army Corps and the Public Trust Statute "have the same definitions of physical characteristics for the OHWM."[20]

[17] R. Pt. 1 OALP000051 (Interlocutory Order Den. Summ. J. at ¶ 80).
[18] R. Pt. 2 OALP001005 (Pet'r SJ Ex. M: Town App. 3/29/2023 for Phase II).
[19] R. Pt. 2 OALP000912 (Pet'r SJ Ex. G: DNR's Phase II Certificate of Approval).
[20] R. Pt. 2 OALP001096, OALP001098 (Pet'r SJ Ex. P: Attorney Correspondence);

Proceedings Before the NRC and OALP

On June 19, 2023, Save the Dunes sought the NRC's administrative review of the Phase II permit, raising several claims including that DNR failed to delineate the Lake's natural OHWM in accordance with the agency's own guidance, and in violation of *Gunderson* and the Public Trust Statute.[21] Within days of Save the Dunes' filing, DNR removed its post-*Gunderson* guidance from the agency's website—claiming the guidance is "outdated."[22] In its place, DNR published new guidance, which remains on agency's website to this day, expressing DNR's legal view that the Public Trust Statute's OHWM definition is "the same" as Army Corps' definition, and therefore the two agencies' "jurisdictional boundaries are the same."[23]

Based on this construction of the Public Trust Statute, DNR objected in discovery to Save the Dunes' use of the terms "common law, natural OHWM" and "common law OHWM" arguing that the Statute's OHWM definition "mirrors" Army Corps' definition and "supersedes the common law definition."[24] DNR also made a sworn admission of fact "that it did not make a 'common law' [OHWM] determination as that term is defined."[25]

After the close of discovery, Save the Dunes and DNR cross-moved for summary judgment on whether DNR may lawfully interpret the Public Trust Statute's OHWM definition as

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[21] R. Pt. 2 OALP001381 (Pet. Administrative Review).
[22] R. Pt. 2 at OALP001072 (Pet'r SJ Ex. N: Response to Req. to Admit No. 6)
[23] DNR, *Lake Michigan Ordinary High Water Marks* (last accessed on Apr. 18, 2026) at https://www.in.gov/dnr/water/lake-michigan/lake-michigan-ordinary-high-watermarks/#:~:text=The%20ordinary%20high%20water%20mark,ownership%20begins%20and%2For%20ends; R. Pt. 2 OALP001081, OALP001083 (Pet'r SJ Ex. O: Kacey Cook Affidavit and DNR Website Download); R. Pt. 1 OALP000051 (Interlocutory Order Den. Summ. J. at ¶ 77).
[24] R. Pt. 2 at OALP001066 (Pet'r SJ Ex. N at 1: DNR Discovery Responses) (stating that the Public Trust Statute "mirrors" the Army Corps' federal definition).
[25] R. Pt. 2 at OALP001072 (Pet'r SJ Ex. N at Response to Req. to Admit No. 5: DNR Discovery Responses) (referring to the definitions as "identical").

interchangeable with Army Corps' definition.[26] Following briefing, the NRC denied both motions concluding the question of DNR's and Army Corps' "overlapping jurisdictions" and "overlapping delineation factors" presented a genuine issue of material fact.[27] In doing so, the NRC speculated about the existence of some other evidence not in the record that "may help explain why [the Town's] delineated OHWM seems so radically different from the [DNR's] previous guidance."[28] Both parties moved for reconsideration agreeing the issue is purely a legal one.[29] The NRC then vacated the scheduled evidentiary hearing and deferred further proceedings to allow briefing on those motions.[30]

In the interim, private beachfront homeowners began constructing the revetment pursuant to licenses issued by the Town.[31] The Town asserted that no DNR permit was required because the homeowners were building "above" the OHWM determined using Army Corps' definition and methods.[32] The NRC granted Save the Dunes' request for an emergency stay because the location of that Army Corps-derived OHWM remained in dispute, and ordered the Town to cease construction pending resolution of the legal question.[33]

In July 2025—with the stay order in effect—this case, along with all pending NRC matters, was transferred to the OALP and assigned a new Administrative Law Judge.[34] Thereafter, on

[26] R. Pt. 1 OALP000489 (Pet'r's Mem. Supp. Mot. Summ. J.); R. Pt. 2 OALP001420 (Resp't's Mot. Summ. J.).
[27] R. Pt. 1 OALP000051 (Interlocutory Order Den. Summ. J.at ¶¶ 83-86).
[28] *Id.* at ¶ 81.
[29] R. Pt. 1 OALP000086 (Pet'r's Combined Mot. Reconsider & Correct Error, & Resp. to DNR's Mot. Recons. or Clarification ¶ 1); R. Pt. 1 OALP000203 (Resp't's Mot. Recons. or Clarification at 1).
[30] R. Pt. 1 OALP000180 (Order Vacating Hr'g & Setting Deadline for Pleadings).
[31] R. Pt. 1 OALP000264 (Aff. of Kim Ferraro).
[32] R. Pt. 1 OALP000265 (Aff. of Kim Ferraro).
[33] R. Pt. 1 OALP000280 (Order for Temporary Stay of Effectiveness of Permit).
[34] R. Pt. 1 OALP000120 (Notice of Case Transfer).

August 29, 2025, the Town moved to dismiss for mootness claiming it "no longer intend[ed] to proceed with the permitted activity" and had "formally abandoned the project."[35] Save the Dunes opposed the motion because the Town had not (and has not) denounced its plan to construct the revetment through private landowner licensing "above" the disputed OHWM. And, in any event, the unresolved issue of DNR's interpretation of the Public Trust Statute's OHWM definition is a matter of great public importance that is certain to recur—an exception to mootness.[36] In a two-page order, the OALP granted the Town's motion to dismiss, concluding without further explanation that Save the Dunes' arguments invoking the public interest exception to mootness were "unavailing."[37] This proceeding ensued.

* * *

As presented below, both the NRC's denial of summary judgment and the OALP's dismissal for mootness, leave unanswered the same central legal question—whether DNR's interpretation of the Public Trust Statute's OHWM as interchangeable with Army Corps' definition is lawful. That unresolved legal question, which is of great public importance and certain to recur every time DNR issues a permit along the lakefront, both defeats mootness and warrants summary judgment for Save the Dunes. Accordingly, this Court should reverse both rulings and decide this legal question in Save the Dunes' favor.

ARGUMENT

I. AOPA Standard of Judicial Review

Under the Administrative Orders and Procedures Act ("AOPA"), the Court must set aside agency action that is arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported

[35] R. Pt. 1 OALP000108 (Town's Mot. Dismiss for Mootness at 2).
[36] R. Pt. 1 OALP000035 (Pet'r's Resp. Opp'n to Town's Mot. Dismiss for Mootness).
[37] R. Pt. 1 OALP0000001 (Order Granting Mot. Dismiss at 1).

by a preponderance of the evidence. Ind. Code § 4-21.5-5-14(d). The Court reviews questions of law, including issues of statutory interpretation, *de novo,* without deference to the agency's interpretation. Ind. Code § 4-21.5-5-11(b); *Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 248 N.E.3d 1205, 1211 (Ind. 2024).

Whether a case is moot and whether an exception to mootness applies are likewise legal questions reviewed without deference to the agency's determinations. *See Matter of Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991). And finally, summary judgment is reviewed *de novo,* "applying the same standard as the trial court." *Young v. Hood's Gardens, Inc.*, 24 N.E.3d 421, 423–24 (Ind. 2015). Specifically, the Court shall "consider only those materials properly designated pursuant to Trial Rule 56" and must grant summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C).

Applying these standards here, the Court should reverse the OALP's dismissal for mootness as an abuse of discretion and contrary to law because the central legal question of DNR's interpretation of the Public Trust Statute's definition of Lake Michigan's public trust boundary presents a matter of great public importance that is likely to recur—an established exception to mootness. *Gunderson*, 90 N.E.3d at 1175 n.3. Likewise, the NRC's denial of summary judgment should be reversed because the agency failed to apply Trial Rule 56, speculated about evidence not in the record, and declined to resolve the statutory interpretation issue before it.

II. The OALP Erred in Dismissing This Case as Moot.

A case is moot only when the court can no longer grant effective relief. *Matter of Lawrance*, 579 N.E.2d at 37. Even then, Indiana courts recognize an exception for cases that present questions of great public importance that are likely to recur. *Id.*; *see also G.W. v. State*, 231 N.E.3d 184, 188 (Ind. 2024). This case falls squarely within that exception.

The Indiana Supreme Court already recognized that the location of Lake Michigan's public trust boundary "involves questions of great public interest" because it defines the extent of public trust and private land and, in turn, the scope of Hoosiers' vested rights to use and enjoy Lake Michigan and its shoreline. *Gunderson*, 90 N.E.3d at 1175 n.3, 1186-87. Because those public trust rights depend entirely on where the boundary is drawn, the question presented here is not merely technical, it is foundational. And the issue is certain to recur: DNR must determine the location of the OHWM, as it did in this case, *every time* it reviews a permit application for construction or modification along the shoreline. Therefore, this Court's ruling on the proper interpretation of the Public Trust Statute is necessary and cannot wait.

Apart from the public interest exception, this case is not moot because effective relief remains available. Although the Town has represented that it will not move forward with the project as permitted, courts routinely reject "voluntary cessation" arguments from litigants who have not sufficiently demonstrated they will not revert to the challenged conduct. The Town recently stated that this litigation has "stymied" its construction projects and previously announced a plan to authorize construction through private landowner licensing "above" the disputed OHWM—a plan it has not renounced. In other words, all signs point to the Town immediately returning to its old ways and hardening its shoreline using DNR's approved OHWM, which remains squarely in dispute. A ruling from this Court clarifying the proper interpretation of the Public Trust Statute's OHWM definition would therefore prevent construction on public trust land, provide meaningful relief, and resolve an ongoing controversy.

A. The Public Interest Exception to Mootness Applies.

The OALP dismissed this case on mootness grounds without meaningfully addressing the public interest exception, simply stating that Save the Dunes' arguments were "unavailing."[38] This failure was contrary to law, an abuse of discretion, and is not entitled to deference by this Court. The public interest exception applies when a case—like this one—presents (1) an issue of great public importance and (2) the issue is likely to recur. *Matter of Lawrance*, 579 N.E.2d at 37; *see also State ex rel. Indiana State Bar Ass'n v. Northouse,* 848 N.E.2d 668, 673 n.2 (Ind. 2006) (an "appellate court [may] address an issue, though moot, if it is a matter of great public importance and may be repeated"). Both requirements are satisfied here, and this Court should reverse.

1. DNR's Interpretation of the Public Trust Statute's OHWM Definition Presents an Issue of Great Public Importance.

A case presents an issue of great public importance when it raises "significant policy concerns" and a "need for guidance" for future litigants and lower courts. *Cent. Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 726 (Ind. 2008). Indiana courts "readily" apply the exception in those circumstances. *E.F. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 188 N.E.3d 464, 466 (Ind. 2022). The OALP should have done so here and the Indiana Supreme Court's decision in *Gunderson* confirms why.

In *Gunderson*, the Court held that DNR's determination of Lake Michigan's OHWM, "involves questions of great public interest" because it defines the extent of public and private property rights. *Gunderson*, 90 N.E.3d at 1175 n.3, 1186-87.[39] The Court therefore rejected DNR's

[38] R. Pt. 1 OALP000001 (Order Granting Mot. to Dismiss at 1).

[39] This public interest right to enjoy the land below the OHWM was recognized long before the nation's founding and is certainly still a matter of great public importance today. *Gunderson*, 90 N.E.3d at 1176 (citing *Shively v. Bowlby*, 152 U.S. 1, 11 (1894) ("Under English common law, 'both the title and the dominion of the sea . . . and of all the lands below high water-mark . . . are in the [state].'").

argument that that case was mooted by the Gundersons' sale of their lakefront property and instead applied the public interest exception to resolve the underlying legal question. *Id.* Specifically, the Court addressed whether DNR could replace the common-law OHWM definition with a fixed administrative value and held it could not. DNR lacks authority to alter the common-law OHWM definition because it "threatens to alienate public trust lands." *Id.* at 1186 (further explaining that "the state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan."). The same reasoning applies here.

DNR again seeks to change the common-law OHWM definition—this time by substituting Army Corps' federal standard—presenting the same type of agency-driven alteration of the public trust boundary that the Indiana Supreme Court held is forbidden and must be addressed notwithstanding mootness. The Public Trust Statute codified the common-law OHWM definition; it did not supersede it or provide DNR a clear directive to replace that definition with the Army Corps' regulatory one.[40] DNR's contrary view, if not corrected by this Court, would do precisely what *Gunderson* forbids: rework the public trust boundary by agency fiat. And that is an issue of great public importance that must be resolved.

This issue also has broader ecological and public-use consequences that warrant application of the public interest exception. The Public Trust Statute recognizes Hoosiers' vested rights in the preservation and protection of Lake Michigan and vested rights to access, use, and enjoy its natural scenic beauty. Ind. Code § 14-26-2.1-4 (defining "natural scenic beauty" to mean "conditions produced by nature without manmade additions or alternations."). The zone between the water's edge and the OHWM includes some of the most dynamic and sensitive habitats along

[40] For further discussion on the legal implications of the Public Trust Statute's codification of *Gunderson* and the common-law OHWM definition, *see supra* Section III.C.2.

Lake Michigan, supporting unique plant communities and providing essential functions such as nutrient exchange, erosion buffering, and wildlife movement.[41] Because this transitional area is directly influenced by coastal dynamics including accretion and erosion over time, accurate delineation of the Lake's OHWM is essential for DNR to protect the state's natural resources from encroaching shoreline development.

Simply put, the OHWM is a linchpin of public rights and environmental stewardship of the Lake. The Indiana Dunes are one of the most ecologically important places in the country.[42] Indiana's Lake Michigan shoreline runs directly through state's only national park, the Indiana Dunes National Park, which attracts over 3 million visitors a year.[43] *See United States v. U.S. Steel Corp*., No. 2:18-CV-127, 2021 WL 3884852, at *1 (N.D. Ind. Aug. 30, 2021) (noting "the public interest is particularly high in this case given the [defendant steel plant's] proximity to Indiana Dunes National Park."). Indeed, the poet Carl Sandburg wrote that the Indiana dunes "are to the Midwest what the Grand Canyon is to Arizona and the Yosemite is to California. They constitute a signature of time and eternity.'" *Town of Beverly Shores v. Bagnall,* 590 N.E.2d 1059, 1061 n.2 (Ind. 1992) (quoting *Town of Beverly Shores v. Bagnall*, 570 N.E.2d 1363, 1370 (Ind. App. 1991) (Hoffman, P.J., dissenting)). Plainly, the issue here is publicly important.

The statutory construction question at issue here is also novel and underdeveloped. Courts "readily" apply the public interest exception to resolve novel issues like this to build an instructive

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[41] *See, e.g.,* R. Pt. 1 OALP000530 (Pet'r SJ Ex. A: National Park Service's Indiana Dunes National Lakeshore, Shoreline Restoration and Management Plan/Final Environmental Impact Statement); R. Pt. 2 OALP000816 (Pet'r SJ Ex. D: National Park Service's public comments on the Town's permit application to DNR).

[42] *Indiana Dunes: History & Culture, Nat'l Park Serv.* (Apr. 17, 2026), https://www.nps.gov/indu/learn/historyculture/index.htm (noting the role of the Indiana Dunes in establishing the field of ecology).

[43] Indiana Dunes: Frequently Asked Questions, Nat'l Park Serv. (Apr. 17, 2026), https://www.nps.gov/indu/faqs.htm.

body of law. *E.F. v. St. Vincent*, 188 N.E.3d 464, 466-67 (Ind. 2022) (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 e.g., 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"). That is true here. The proper interpretation of the Public Trust Statute's OHWM definition is a novel question that warrants guidance from this Court.

Furthermore, Indiana courts routinely rely on the public interest exception in analogous settings. In *Matter of Lawrance*, the Court applied the exception to address a moot case because many citizens and institutions would confront the same issue again. 579 N.E.2d at 34 (applying exception to case regarding termination of life support, even though patient had already died of natural causes; holding 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."). In *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers Association*, the Court did the same because the meaning of the statute at issue mattered to the public at large. 456 N.E.2d 709, 712 (Ind. 1983) (applying exception to case regarding a statute governing teachers' salary provisions in new contract negotiations, even though a new contract had already been executed in the case before the Court, because "[a]lleged violations of [a] statute are clearly against the general public interest.").

There is no reason for a different outcome here. The public has a strong interest in knowing how DNR is interpreting the Public Trust Statute and its definition of Lake Michigan's OHWM, and that interest is not limited to the parties before the Court. Indeed, the public has expressed

serious concern about the issue.[44] The OALP's dismissal, which failed to resolve this matter of great public importance, is contrary to established law and should be reversed. If allowed to stand, DNR's flawed interpretation of Lake Michigan's natural OHWM will leave Hoosiers (including the hundreds of thousands of people who live and walk along the shore of Lake Michigan[45]) guessing where they may lawfully walk along the shoreline.

Under the common-law OHWM definition, as codified in the Public Trust Statute, the OHWM is rooted in visible, observable physical attributes; in other words, a line that can be easily recognized by the public. The Army Corps' OHWM definition, on the other hand, invites highly complex and technical methodology, illustrated by the Corps' January 2025 publication titled "National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams."[46] This 396-page manual, aimed at engineers and other practitioners, explains that "[g]iven the large diversity of stream and river systems across the US, the [Army Corps] recognized that a standardized, science-based approach to OHWM delineation was needed to support consistent,

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[44] *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.

[45] *See* U.S. Census Bureau QuickFacts: Lake County, Porter County, and LaPorte County, Indiana, https://www.census.gov/quickfacts/fact/table/lakecountyindiana,portercountyindiana,laportecountyindiana (last visited Mar. 21, 2026) (estimating a combined population of approximately 750,000–800,000 residents in counties directly bordering Lake Michigan along Indiana shoreline as of 2024).

[46] US Army Engineer Research and Development Center, National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams: Final Version (January 9, 2025), https://www.erdc.usace.army.mil/Media/Publication-Notices/Article/4026117/national-ordinary-high-water-mark-field-delineation-manual-for-rivers-and-strea/ (full report linked at http://dx.doi.org/10.21079/11681/49526). Although this manual is specific to rivers and streams, the manual is illustrative of Army Corps' highly technical approach. As noted above, the Rapid OHWM Field Identification Sheet used by the Town was designed by the Army Corps for OHWM identification for rivers and streams.

effective OHWM delineations in the field," and noting that some delineations are "complex" and result in "technical disputes."[47] In other words, Hoosiers would need to either master the Army Corps' methodology themselves or hire an engineer in order to know where they could walk on the beach.

Such uncertainty chills lawful conduct and would undermine the Public Trust Statute's purpose. *See, e.g., Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (explaining that unclear prohibitions can "chill, or deter" conduct by leaving people "unsure about the side of a line [their conduct] falls," causing them to avoid the conduct altogether); *Russell v. Douthitt*, 304 N.E.2d 793, 794 (Ind. 1973) ("One of the most fundamental truths in the law is that the law should be settled and plain so that those subject to the law, and the litigants, may know what they may or may not do legally."). Here, if Hoosiers cannot reliably predict where they can lawfully walk along the shore without trespassing on private property, the logical result is that they will not exercise their public trust right at all. That outcome would defeat the legislature's express intent to protect Indiana citizens' "vested right to . . . enjoy the natural scenic beauty of Lake Michigan." Ind. Code § 14-26-2.1-4.

In sum, the common-law OHWM standard – as codified in the Public Trust Statute – does not require the common person to have access to anything other than the beach in front of them. Anyone can see the line where the beach ends and the dunes begin to know where they can walk. *Id.* Yet, the OALP incorrectly concluded, without analysis, that this was not an issue of great public importance, disregarding settled law and abusing its discretion. This Court owes no deference to the OALP's unlawful dismissal and should thus vacate the decision and decide the publicly important legal question presented.

[47] *Id.* at xxv.

2. DNR's Unlawful Interpretation of the Public Trust Statute Is Virtually Certain to Recur.

The OALP also erred in dismissing this case as moot because DNR's incorrect interpretation of the Public Trust Statute's OHWM definition will recur every time DNR considers a permit application for construction along the lakefront—an occurrence that has happened nearly 500 times in the last two decades.[48]

The public interest exception to mootness applies when the same legal question is likely to arise again. *See e.g., Ind. Educ.*, 456 N.E.2d at 711 (applying the exception where a statutory issue, though moot as to the parties, recurred in school districts statewide). The bar is low: there need only be a "*possibility* of repetition." *Horseman v. Keller*, 841 N.E.2d 164, 170-71 (Ind. 2006). And legal questions involving procedural statutes are deemed especially likely to recur. *See Matter of Lawrance*, 579 N.E.2d at 37-38 (applying the public interest exception to case involving the interpretation of Indiana's Health Care Consent Act).

That standard is easily met here. DNR "has statutory authority over [the state's] navigable waters and continuous lands" including the Lake Michigan shoreline and must "consider the public trust" before issuing any permit for construction. *Gunderson,* 90 N.E.3d at 1183, 1185 (citing Ind. Code § 14-18-5-2, § 14-19-1-1(9), § 14-29-1, and 312 IAC 6-1-1(f)). That duty necessarily requires DNR to determine the location of the public trust boundary in each case.

As *Gunderson* itself illustrates, DNR's interpretation of the OHWM is not a one-time issue. There, DNR defended its use of a fixed administrative OHWM, arguing it "provide[d] notice" to the public while the common-law definition, according to DNR, would lead to regulatory

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

uncertainty. *Id.* at 1185. The Supreme Court rejected the agency's position, reaffirming the public trust boundary "remains the natural OHWM." *Id.* at 1185-86.

Even so, DNR now advances the same argument in different form. As the NRC observed below, DNR contends that treating the Public Trust Statute's OHWM definition as interchangeable with Army Corps' definition avoids "potential headaches" for permit applicants by aligning the agencies' jurisdictions.[49] This position is materially indistinguishable from DNR's argument rejected in *Gunderson* and confirms that the same legal issue—whether DNR may depart from the natural OHWM—will continue to arise in future permitting unless resolved by this Court.

In sum, the OALP's dismissal for mootness is contrary to the law and an abuse of discretion. DNR's interpretation of the Public Trust Statute's OHWM definition presents a recurring legal question of great public importance. This Court's guidance is therefore necessary to instruct DNR, future litigants, and inform the public of the boundary that defines their vested rights. Accordingly, the Court should reverse the OALP's erroneous dismissal and resolve the statutory question presented.

B. <u>Alternatively, The Case Is Not Moot.</u>

Apart from the public interest exception, the OALP erred because this case is not moot: the Court can still grant effective relief. A case is moot only when "no effective relief can be rendered to the parties before the court." *G.W.*, 231 N.E.3d at 188; *see also E.F.*, 188 N.E.2d at 466.

Here, the Town's purported "abandonment" of the permit does not eliminate the controversy.[50] Voluntary cessation does not, by itself, defeat jurisdiction. *State ex rel. Ind. State Bar Ass'n*, 848 N.E.2d at 673. A defendant must do more than offer a conclusory assurance that it

[49] R. Pt. 1 OALP000051 (Interlocutory Order Den. Summ. J.at ¶ 56).
[50] The Permit at issue here has not been formally revoked. *See* R. Pt. 1 OALP000048 (Petr's Resp. in Opp'n to the Town's Mot. to Dismiss at 14).

will not resume the challenged conduct. *Id.* Yet the OALP ignored the fact that the Town has made no binding commitment not to restart construction of the revetment "above" the disputed OHWM. To the contrary, the Town has indicated the opposite. In seeking expedited briefing from this Court, the Town represented that this litigation has "stymied" its efforts to "complet[e] necessary improvements,"[51] suggesting that construction will resume once the litigation concludes.

Furthermore, in April 2025, the Town stated under oath it had issued licenses to individual homeowners to proceed with construction without need for a DNR permit on the theory that the work would occur above the disputed OHWM.[52] The NRC issued an emergency stay to halt that construction pending resolution of whether the Army Corps-delineated OHWM value relied on by the Town reflects the lawful public trust boundary.[53] That same legal question remains undecided and is now before the Court. If the OALP's dismissal stands, nothing prevents the Town from allowing construction of the revetment to proceed "above" that disputed OHWM. Accordingly, the controversy remains live, effective relief is available, and the OALP's dismissal for mootness was erroneous. This Court should reverse.

III. The NRC Erred in Denying Summary Judgment for Save the Dunes.

The NRC's Interlocutory Order denying summary judgment for Save the Dunes rests on a fundamental error: it treated the parties' dispute over the proper interpretation of the Public Trust Statute's OHWM definition as a question of fact, rather than a pure question of law.[54] That error alone warrants reversal, a point on which both DNR and Save the Dunes agree.[55]

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[51] *See* Town's Motion to Set Briefing Schedule at ¶ 6 (March 10, 2026).
[52] R. Pt. 1 OALP000079 (Aff. of Scott Kingan).
[53] R. Pt. 1 OALP000280 (Order Granting Temporary Stay).
[54] R. Pt. 1 OALP000051 (Interlocutory Order Den. Summ. J.at ¶¶ 85-86).
[55] *See* R. Pt. 1 OALP000203 (Resp't's Mot. Recons. or Clarification at 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"); R. Pt. 1 OALP000204, OALP000205 (Resp't's Mot. Recons. or Clarification ¶¶ 6, 15 ("[i]t would

The NRC's error stems from its misapplication of Indiana's summary judgment standard and disregard of settled rules of statutory construction. First, the NRC erroneously mischaracterized certain core legal questions as genuine issues of material fact. Second, the NRC speculated about evidence not in the record to manufacture a fact dispute in violation of Trial Rule 56. And finally, although the NRC acknowledged the parties' competing statutory construction arguments, it failed to address them. When the summary judgment standard and established cannons of statutory construction are properly applied to the undisputed facts, the result is clear—Save the Dunes is entitled to summary judgment that DNR's interpretation of the Public Trust Statute is unlawful, and the Town's OHWM delineation (and DNR's approval of that delineation) is unlawful as well.

A. The NRC Erroneously Treated the Parties' Disagreement Over the Proper Interpretation of the Public Trust Statute as a Factual Dispute.

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. 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 Ass'n.,* 449 N.E.2d 276, 280 (Ind. 1983) ("[D]espite conflicting facts and inferences on some elements of a claim, summary judgment may be proper where there is no dispute or conflict regarding a fact that is dispositive of the litigation.") (quoting *Barnd v. Borst,* 431 N.E.2d 161, 164-65 (Ind. Ct. App. 1982)). Here, the NRC denied summary judgment for both parties concluding that "the question regarding overlapping jurisdictions between the [DNR] and the [Army Corps] and overlapping delineation factors regarding the Lake Michigan

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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"); R. Pt. 1 OALP000086 (Pet'r's Combined Mot. Reconsider & Correct Error, & Resp. to DNR's Mot. Recons. or Clarification ¶¶ 1-2) (agreeing with DNR that the proper interpretation of the Public Trust Statute's OHWM definition is a legal question).

OHWM are not laid to rest by the evidence and thus remain genuine issues of material fact."[56]

This was clear error for two reasons.

First, the facts that are material to this legal question are not in dispute as the NRC itself observed:

> Undisputed Material Fact 1: Following *Gunderson*, DNR published guidance explaining how to identify Lake Michigan's natural OHWM under the common-law definition, including illustrative photos showing the "visible" boundary marked by "*recognizable* shelving at the toe of the dune bluff and the presence/destruction of terrestrial vegetation."[57]
>
> Undisputed Material Fact 2: The Town did not follow DNR's post-*Gunderson* guidance. Instead, it used Army Corps' regulatory definition and methods to delineate the OHWM.[58]
>
> Undisputed Material Fact 3: DNR approved the Town's OHWM delineation in issuing the permit for Phase II and, by its own admission, "did not make a common-law determination as that term is defined"[59] based on DNR's legal position that:
>
> - its post-*Gunderson* guidance is "outdated" following enactment of the Public Trust Statute;[60]
> - the Statute "superseded" the common-law definition;[61] and
> - the Statute's OHWM definition is "the same" as the Army Corps' definition, such that the agencies' jurisdictional boundaries are likewise the same.[62]

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[56] R. Pt. 1 OALP000067 (Interlocutory Order Den. Summ. J. ¶ 85).
[57] R. Pt. 1 OALP000055 (Interlocutory Order Den. Summ. J. ¶ 27, Figure 1; R. Pt. 2 OALP001081, OALP001083, OALP001089 (Pet'r SJ Ex. O: Kacey Cook Affidavit and DNR Website Download).
[58] R. Pt. 1 OALP000054 (Interlocutory Order Den. Summ. J. ¶ 20); R. Pt. 2 OALP001005, OALP001053-56 (Pet'r SJ Ex. M: Town App. 3/29/2023 for Phase II); R. Pt. 2 OALP001100, OALP001102-03 (Pet'r SJ Ex. Q: Town Expert Disclosure and Report); R. Pt. 2 OALP001096, OALP001098 (Pet'r SJ Ex. P: Attorney Correspondence); R. Pt. 3 OALP001563, OALP001563 (Resp't Ex. 1-E: Correspondence Between Mr. Veriotti and Army Corps).
[59] R. Pt. 2 OALP001066, OALP001072 (Pet'r SJ Ex. N at Response to Req. to Admit No. 5: DNR Discovery Responses) (referring to the definitions as "identical").
[60] R. Pt. 1 OALP000059, OALP000061 (Interlocutory Order Den. Summ. J. ¶¶ 42, 51). R. Pt. 1 OALP000451 (Resp't's Mot. to Strike); R. Pt. 1 OALP000359 (DNR's Reply in Support of Mot. For Summ. J.); R. Pt. 1 OALP001434 (DNR's Mot. For Summ. J.).
[61] R. Pt. 2 OALP001066 (Pet'r SJ Ex. N: DNR Discovery Responses).
[62] DNR, *Lake Michigan Ordinary High Watermarks* at https://www.in.gov/dnr/water/lake-michigan/lake-michigan-ordinary-high-watermarks/ (accessed Apr. 19, 2026) ("DNR has

> Undisputed Material Fact 4: The Town's "asserted OHWM" using Army Corps' definition and methods is more akin to a recent wave break line on the sand rather than a long-standing change in soil, terrestrial vegetation, or shelving along the shorefront."[63]

Second, these undisputed facts show that the parties' disagreement is purely legal. The issue is not what the Town did, what DNR approved or why, or the outcome—those facts are settled. The issue is whether DNR's interpretation of the Public Trust Statute as interchangeable with Army Corps' definition is lawful. And 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.").

Even so, throughout its ruling, the NRC repeatedly mischaracterized this legal question as a fact dispute. For instance, the NRC concluded there is "a genuine issue of material fact regarding whether Indiana's list of OHWM determining factors are exhaustive or not intended to be exclusionary of other factors."[64] But there are no set of "facts" that could answer that question. Whether the statute's list of factors is exhaustive is purely a matter of statutory construction.

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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."). *See also* R. Pt. 1 OALP000352, OALP000353 (DNR referring to Public Trust Statute and Army Corps OHWM definitions as "the same"); R. Pt. 2 OALP001083 (DNR referring to the definitions as "the same"); R. Pt. 2 OALP001096, OALP001098 (DNR's assistant general counsel stating by email that "DNR relied on the USACE delineation" in approving the permit, as the "USACE and DNR have the same definitions of physical characteristics for the OHWM"); R. Pt. 2 OALP001072 (DNR Discovery Responses) (referring to the definitions as "identical"); R. Pt. 2 OALP001066 (DNR Discovery Responses) (stating that the Public Trust Statute "mirrors" the Army Corps' federal definition); R. Pt. 1 OALP000434 (Resp't's Resp. Opp'n to Pet'r's Mot. Summ. J. at 10) (referring to the definitions as "in effect essentially the same").

[63] R. Pt. 1 OALP000065-66 (Interlocutory Order Den. Summ. J. at ¶¶ 77, 80).

[64] R. Pt. 1 OALP000067 (Interlocutory Order Den. Summ. J. ¶ 86).

Similarly, the NRC erroneously held that whether DNR's approval of the Town's OHWM delineation "can be legally relied upon" or "complies with Indiana law" presents a genuine issue of material fact.[65] But whether an action complies with the law is not a factual question—it turns on what the law requires. Here, the relevant action—the Town's delineation of the OHWM using Army Corps' definition and methods and DNR's approval of that delineation—is an undisputed fact. The only question is whether that conduct is lawful under the Public Trust Statute, which is a matter of statutory interpretation. The NRC's failure to answer that legal question in the face of uncontroverted material facts runs counter to Trial Rule 56 and should be reversed.

B. The NRC Speculated About Evidence Not in the Record to Manufacture a Fact Dispute in Violation of Trial Rule 56.

The NRC made some findings that engaged with the legal question of whether DNR's interpretation of the Public Trust Statute is lawful. For instance, the NRC noted that the common-law definition of Lake Michigan's natural OHWM is codified in the Public Trust Statute "nearly word-for-word."[66] It observed the difference in language and distinct purposes between the Army Corps' definition and the Public Trust Statute's OHWM definition.[67] And the NRC observed the "strikingly different" results between the location of Lake Michigan's natural OHWM illustrated in DNR's post-*Gunderson* guidance and the Town's delineation using Army Corps' definition.[68]

But instead of recognizing the legal significance of these findings, NRC speculated about the existence of some hypothetical "environmental factors" or change in site conditions that "*may help explain* why Ogden Dunes' delineated OHWM seems so radically different from the Department's previous guidance."[69] The NRC similarly pondered that "*maybe* a change in the

[65] R. Pt. 1 OALP000064-67 (Interlocutory Order Den. Summ. J. ¶¶ 71, 80).
[66] R. Pt. 1 OALP000063 (Interlocutory Order Den. Summ. J. ¶¶ 67-68).
[67] R. Pt. 1 OALP000063-64 (Interlocutory Order Den. Summ. J. at ¶¶ 68-70).
[68] R. Pt. 1 OALP000065-66 (Interlocutory Order Den. Summ. J. at ¶¶ 77, 80).
[69] *Id.* (emphasis added).

proposed area of construction could explain the "striking" difference.[70] Based on this conjecture, the NRC then concluded that "a genuine issue of material fact remains regarding the legality and reliability of the OHWM" that DNR approved.[71]

Not only does the NRC's speculation find no support in the record, but it also 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 are insufficient to create a triable issue).

Trial Rule 56 requires real evidence to be designated (affidavits, depositions, admissions) to demonstrate a real fact dispute. "Perhaps" and "maybe" are not evidence. 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 "change in the area of construction" or other reason to explain why the Town's delineation under Army Corps' regulatory definition is "so radically different" from DNR's guidance for delineating the natural OHWM

[70] *Id.* ¶ 82 (emphasis added).
[71] *Id.* ¶ 84.

under the common law definition. They did not and it was not the NRC's job to ponder whether such evidence exists.

Indiana's summary judgment standard is designed to prevent precisely this sort of drift into imagined disputes. The only explanation for why the Town's delineation departs so significantly from DNR's post-*Gunderson* guidance is a legal one: DNR, by its own admission, did not follow the common-law definition of the natural OHWM, now codified in the Public Trust Statute. Instead, DNR followed Army Corps' federal regulatory definition that is not the same in language, purpose, or applicability to the common-law definition. Because the NRC recast this legal question into a speculative, factual one, its denial of summary judgment cannot stand.

C. The Public Trust Statute's Definition of Lake Michigan's OHWM is Not Interchangeable with Army Corps' Federal Regulatory Definition.

After conjuring 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 and agreed with Save the Dunes that the Public Trust Statute codified the common-law OHWM definition from *Gunderson* "nearly word-for-word,"[72] it never analyzed the statutory text beyond noting that the Statute's definition differs from the Army Corps' regulatory definition,[73] 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 of the Lake's natural OHWM—an admission dispositive of DNR's violation of the Public Trust Statute, warranting summary judgment for Save the Dunes.

[72] R. Pt. 1 OALP000063 (Interlocutory Order Den. Summ. J. ¶¶ 67-68).
[73] R. Pt. 1 OALP000063 (Interlocutory Order Den. Summ. J. ¶¶ 68-70).

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

The NRC entertained the notion that DNR's reliance on Army Corps' regulatory definition may be "justified" because its language is "similar" to the Public Trust Statute's definition.[74] This is reversible error for several reasons.

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.

To that end, the starting point for any statutory interpretation analysis is the plain meaning of the text. "Words are to be given their plain, ordinary, and usual meaning, unless a contrary purpose is shown by the statute or ordinance itself." *Hall Drive Ins, Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). Giving effect to the legislature's intent serves as a court's primary goal in interpreting a statute, and the statute's language is the best evidence of that intent. *Loomis v. ACE American Ins. Co.*, 244 N.E.3d 908, 914 (Ind. 2024) (citing *In re Supervised Est. of Kent*, 99 N.E.3d 634, 638 (Ind. 2018)); *Mi.D v. State*, 57 N.E.3d 809, 812 (Ind. 2016) (quoting *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012)).

[74] R. Pt. 1 OALP000065 (Interlocutory Order Den. Summ. J. ¶ 76).

In addition to language, courts must consider the statute's structure and avoid interpretations that render part of the statute meaningless or superfluous. *Turner v. State*, 253 N.E.3d 526, 536-37 (Ind. 2025) (citing *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195, 1199 (Ind. 2016)). Finally, courts must be mindful not only about what a statute says but also what it "does not say." *ESPN, Inc.*, 62 N.E.3d at 1195 (internal quotation marks omitted) (quoting *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016)). On that front, a statute's "enumeration of certain things . . . 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) (describing the long-standing principle of *expressio unius est exclusio alterius*) (citing *Brandmaier v. Metropolitan Dev. Comm'n of Marion Cnty*, 714 N.E.2d 179, 180 (Ind. Ct. App. 1999)). The NRC failed to apply any of these established principles here.

Starting with the plain text, comparing the Public Trust Statute's definition of Lake Michigan's OHWM to Army Corps' definition reveals their markedly distinct language:

Indiana Public Trust Statute, Ind. Code § 14-26-2.1-2	**Army Corps Federal Regulation,** 33 C.F.R. § 328.3(c)(4)
[The OHWM is] the line on the bank or shore <u>*of Lake Michigan*</u> 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.	Ordinary high water mark means that line on the shore • established by the fluctuations of water and • indicated by physical characteristics <u>*such as*</u> o clear, natural line impressed on the bank, o shelving, o changes in the character of soil, o destruction of terrestrial vegetation, o the presence of litter and debris, o <u>*or other appropriate means that consider the characteristics of the surrounding areas*</u>.

On its face, the Public Trust Statute defines Lake's Michigan's OHWM based on a limited list of factors. Ind. Code § 14-26-2.1-2. In contrast, Army Corps' regulatory definition is not confined to Lake Michigan, and more defines the OHWM of a waterway to include an open-ended list of factors, including a catch-all that allows consideration of "other appropriate means that consider the characteristics of the surrounding area." 33 C.F.R. § 328.3(c)(4).[75] Army Corps' regulatory guidance confirms that this catch-all phrase allows delineators to consider "lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence,"[76] none of which are listed in the Public Trust Statute.

Again, courts must be mindful of what a statute says and "does not say." The Army Corps' open-ended definition with its "other appropriate means" language has been in place since the regulation was promulgated in 1986[77] and could have been adopted by the Indiana legislature when it passed the Public Trust Statute in 2020. It did not. Instead, the legislature adopted the narrow, finite-factor common law definition from *Gunderson.* And 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 the public trust boundary of Lake Michigan.

Indeed, "the legislature is presumed to have intended the language used in [a] 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

[75] The NRC's Interlocutory Order cited to 33 C.F.R. § 328.3(e), which has the same language but is an outdated version of this regulation at 33 C.F.R. § 328.3(c)(4).
[76] R. Pt. 2 OALP001107 (Pet'r SJ Ex. R: Army Corps Regulatory Guidance Letter)
[77] *See Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41206-01 (November 13, 1986); *see also* R. Pt. 2 OALP001105 (Pet'r SJ Ex. R: Army Corps Regulatory Guidance Letter)

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*.

Here, the General Assembly's decision to codify the common-law definition of Lake Michigan's natural OHWM "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.[78] 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 § 14-26-2.1-1 (emphasis added); and (2) a declaration that "the state of Indiana owns all of Lake Michigan" within its boundaries "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).

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. 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").

[78] R. Pt. 2 OALP000985 (Pet'r SJ Ex. L: Email communications between DNR, Army Corps, and Town's consultant) (quoting Army Corps' agent, Soren Hall).

The plain language of the two definitions reveals an additional, crucial difference: they apply to different bodies of water. The Public Trust Statute applies only to Lake Michigan. Ind. Code 14-26-2.1-2 (the OHWM is "the line on the bank or shore *of Lake Michigan*"). The Army Corps' regulatory definition applies to all non-tidal waters of the United States. Specifically, 33 C.F.R. § 328.4 sets out the limits of the Corps' jurisdiction. For "[n]on-tidal waters of the United States[,] ... [i]n the absence of adjacent wetlands, the jurisdiction extends to the [OHWM]." 33 C.F.R. § 328.4(c)(1);[79] *see also Town of Ogden Dunes v. United States Dep't of Interior*, No. 2:20-CV-34-TLS-JEM, 2022 WL 715549, at *7 (N.D. Ind. Mar. 10, 2022) (explaining the Army Corps' jurisdiction over waters of the U.S.); *United States v. Marion L. Kincaid Tr.*, 463 F. Supp. 2d 680, 693–94 (E.D. Mich. 2006) (discussing the application of the OHWM to non-tidal waters under the CWA and the Rivers and Harbors Act (RHA) in relation to Lake Huron).

Army Corps' own guidance confirms that its definition applies to a wide variety of waterbodies, stating that "[p]hysical characteristics that correspond to the line on the shore established by the fluctuations of water may vary depending on *the type of water body* and conditions of the area."[80] The Public Trust Statute's definition that is designed to delineate a property boundary along the shores of a very specific waterbody – Indiana's 45-mile stretch of Lake Michigan – cannot be read as interchangeable with a broad definition designed to be a multipurpose framework for determining federal jurisdiction over a multitude of non-tidal waters.

This crucial distinction matters for another reason. It provides the context in which the NRC should have considered the meaning of the two definitions' "similar" language. "[W]ords that have one meaning in a particular [statutory] context frequently have a different meaning in

[79] If "adjacent wetlands are present, the jurisdiction extends beyond the [OHWM] to the limit of the adjacent wetlands." 33 C.F.R. § 328.4(c).
[80] *See also* R. Pt. 2 OALP001105 (Pet'r SJ Ex. R: Army Corps Regulatory Guidance Letter).

another context," and thus a court must consider that context to determine what significance words have in a statute. *MDM Invs. v. City of Carmel*, 740 N.E.2d 929, 935 (Ind. Ct. App. 2000) (quoting *Johnson Cnty Farm Bureau Coop. Ass'n, Inc. v. Ind. Dep't of State Revenue*, 568 N.E.2d 578, 581 (Ind. T.C. 1991)).

The purpose of Army Corps' OHWM definition is to determine the agency's jurisdiction to regulate discharges of dredge and fill material into U.S. waters. *See* 33 C.F.R. § 328.1 (noting that the purpose of the section containing the OHWM definition is to set forth "the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act"); 33 C.F.R. § 336.1 (explaining Army Corps' role in regulating discharge of dredge and fill material into U.S. waters).

In stark contrast, the common-law definition of the natural OHWM has, for hundreds of years, been used to define the public trust property boundary "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 that definition, now codified in the Public Trust Statute, is read to include an open-ended list of characteristics that goes far beyond the "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. This Court should not allow it.

2. **The NRC Failed to Appreciate the Legal Significance of the Public Trust Statute's Codification of the Common-Law OHWM.**

DNR's position on the Public Trust Statute's effect on the common-law shifted throughout the proceeding below. For example, in briefing on the parties' motions for reconsideration, DNR agreed that the Public Trust Statute "is the *codification* of the common law [OHWM] definition as defined in *Gunderson,*" yet in the same filing asserted that it need not

follow that definition because the "state statute indeed *supersedes* common law."[81] Perhaps these shifting positions stem from DNR's failure to appreciate the critical distinction between a statute that "codifies" the common law versus one that "supersedes" it. The NRC similarly failed to appreciate that distinction. Although the NRC recognized that the Public Trust Statute codified the common law OHWM definition "nearly word-for-word,"[82] it did not address the legal consequence of that conclusion, which has significant implications for how the Public Trust Statute must be 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, 915 (Ind. 2020). Stated differently, the common law remains "in force" and "continues to survive" 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." *Id.*

On the other hand, 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.")

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)

[81] R. Pt. 1 OALP000184-85 (Resp't's Reply in Support of its Motion for Reconsideration (emphasis added).
[82] R. Pt. 1 OALP000063 (Interlocutory Order Den. Summ. J. ¶¶ 67-68).

("[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.")

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 v. State*, 90 N.E.3d 1171, 1182 (Ind. 2018). 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 acknowledged that the Act "is public trust legislation" that "specifically excludes Lake Michigan from its ambit." *Id.* at 1182-1183 (internal quotation and citation omitted). Nevertheless, 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 thus "does not conflict with the common-law public trust doctrine as it applies to Lake Michigan." *Id.* There is no reason for a different outcome here.

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. 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. For that matter, the NRC observed that the Statute codified the common law definition "nearly word-for-word."

As such, there is nothing in the Statute to support DNR's view that the Statute "superseded" or in any way abrogated 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.[83] By codifying the common law definition, 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 (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" (quoting *Howard v. Ingersoll,* 54 U.S. (12 How.) 381, 427, 14 L. Ed. 189 (1851)) as compared to DNR's post-*Gunderson* guidance (confirming that Lake Michigan's natural OHWM under the common law definition is located where there is "recognizable shelving at the toe of the dune bluff and the presence/destruction of terrestrial vegetation.")[84]

The common law OHWM definition is the one that applies here. And that is the definition that DNR admitted under oath that it did not follow based on its flawed legal interpretation that the Public Trust Statute superseded the common law definition and adopted Army Corps' regulatory definition instead.[85] DNR's sworn admission explains why the Town's use of Army

[83] R. Pt. 2 OALP001426 (Resp't's Mot. Summ. J.) (stating "DNR updated its website in 2023 to reflect the change in law following enactment of Indiana Code section 14-26-2.1-2").
[84] R. Pt. 2 OALP001089 (Pet'r SJ Ex. O: Kacey Cook Affidavit and DNR Website Download).
[85] R. Pt. 2 OALP001066, OALP001072 (Pet'r SJ Ex. N at Response to Req. to Admit No. 5).

Corps' definition and methods resulted in an OHWM value based on a "recent wave break line on the sand" rather than at the "long-standing change in soil, terrestrial vegetation, and shelving along the shorefront,"[86] which is the location of the natural OHWM according to DNR's own guidance and a century of jurisprudence.

In other words, the "radical" and "striking" difference the NRC observed between the Town's delineation and DNR's post-*Gunderson* guidance stems not from changed "environmental factors,"[87] but from DNR's unfounded legal interpretation that the Public Trust Statute's definition is the same as Army Corps' definition. DNR's interpretation otherwise, simply because the two definitions share similar language, has no foundation in the law. The NRC's failure to reach this conclusion and resolve the legal dispute in Save the Dunes' favor was likewise contrary to law.

* * *

In sum, the NRC's denial of summary judgment rests on a series of legal errors. It mischaracterized a pure question of statutory interpretation as a factual dispute, speculated about evidence not in the record to manufacture that dispute, and then failed to resolve the legal question before it. The undisputed facts establish that DNR approved a delineation based on the Army Corps' regulatory definition rather than the common-law definition codified in the Public Trust Statute. Whether that interpretation is lawful is a question for the Court, not the factfinder. Applying the summary judgment standard and settled rules of statutory construction, the Court should grant summary judgment for Save the Dunes on that narrow legal issue and hold that DNR's interpretation of the Public Trust Statute is contrary to law.

[86] R. Pt. 1 OALP000066 (Interlocutory Order Den. Summ. J.at ¶ 80).
[87] R. Pt. 1 OALP000066 (Interlocutory Order Den. Summ. J.at ¶ 81).

CONCLUSION

This case presents a single, unresolved legal question: whether DNR may treat the Public Trust Statute's definition of Lake Michigan's OHWM as interchangeable with the Army Corps' regulatory definition. Both the NRC and the OALP declined to answer that question—first by recasting the issue as a factual dispute to deny summary judgment, and then by dismissing the case as moot. Both rulings were erroneous.

The question is one of statutory interpretation, not fact. It is also one of exceptional public importance. It defines the boundary between public trust land and private property along Lake Michigan and determines the scope of Hoosiers' vested rights to use and enjoy the shoreline. And because DNR must apply that definition in every permitting decision along the lakefront, the issue is certain to recur, unless resolved by this Court.

The agency record establishes that DNR approved a delineation based on the Army Corps' regulatory standard rather than the common-law definition codified in the Public Trust Statute, based on its view that the two are interchangeable. That interpretation finds no support in the statute, the common-law, or *Gunderson.*

This Court should resolve that question now. It should reverse the OALP's Final Dismissal Order, vacate the NRC's Interlocutory Order, and grant summary judgment for Save the Dunes on the narrow legal issue presented: that DNR's interpretation of the Public Trust Statute is unlawful and that the Town's OHWM delineation—and DNR's approval of it—cannot stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 20, 2026, service of the foregoing document was made on the following parties of record via the Indiana courts electronic filing system.

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