The Beach Walker Case – Almost 15 Years Later

(OR, "THE HIGH WATER BLUES")

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On July 29, 2005, the Michigan Supreme Court adopted its famous decision regarding members of the public walking along the Michigan shorelines of the *Great Lakes in Glass v Goeckel,* 473 Mich 667 (2005). In that case, the Court held that members of the public can walk along the shorelines of the Great Lakes within Michigan between the water and the ordinary high water mark, even over the objection of the owner of the adjoining riparian property. Even though that decision is now almost 15 years old now, it is amazing how few problems it has caused for riparian property owners along the Michigan shores of the Great Lakes.

With the water level of the Great Lakes currently at record levels, the decision in *Glass v Goeckel* now has a bittersweet meaning. On virtually every Great Lakes shoreline within Michigan, the water level is at or above the Great Lakes' ordinary high water marks. Therefore, there is virtually no Great Lakes shoreline that constitutes dry land between the lake waters and the ordinary high water mark within which members of the public can walk without the permission of the owner of the adjoining riparian property. Accordingly, until the levels of the Great Lakes drop sufficiently to provide a walkable area on dry land between the lake waters and the ordinary high water mark, members of the public will likely not be able to walk on dry land along the shoreline of the Great Lakes in Michigan without the consent of the owner of the adjoining riparian property. Until the levels of the Great Lakes drop significantly on most shorelines, a walking member of the public can avoid trespass only by either walking in the water or obtaining the permission of the riparian property owner involved to walk on his or her shoreline landward of the ordinary high water mark (i.e. on the uplands).

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2019's high water conditions for the Great Lakes raises another important issue. Many Michigan statutes, municipal zoning ordinances and other laws and regulations refer to the "ordinary high water mark" or "high water mark" of a lake. The definition of those phrases, as well as the numerical related water elevations involved, are very important for a variety of different purposes. For example, the "ordinary high water mark" or "high water mark" comes into play in the following circumstances:

1. Where members of the public can walk on the shorelines of the Great Lakes.
2. Zoning or other government setbacks for new buildings and structures from a body of water.
3. When state permits are required for activities lakeward of the ordinary high water mark or high water mark.

In addition, countless legal descriptions for property deeds and easements throughout Michigan rely on the phrases "ordinary high water mark" or "high water mark".

Given that Michigan has now experienced a so-called one hundred year cycle for the high water mark in many Michigan lakes and on the Great Lakes twice within only 33 years (1986 and 2019), will both science and the law have to "reset" what constitutes the "ordinary high water mark" and "high water mark" for every Michigan inland lake and each of the Great Lakes? If high water has become the norm, then the old bench marks for the "ordinary high water mark" or "high water mark" will become degraded or even meaningless. Should the new definitions now be based on a 50-year cycle? A 30-year cycle? Or some other benchmark?

Some might ask why does this matter? High water is a physical reality. However, if the legal benchmark for high water points is moved further inland due to extraordinarily high water in a given year or over a new cycle, that new benchmark will likely stay in the same place, even when the waters recede. Therefore, even if the waters recede significantly over the next few years, the changed benchmark line for the ordinary high water mark or high water mark would still be located further inland on a property.

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Changing the definition of the benchmarks for these phrases will have significant real world impacts. If the ordinary high water mark and high water mark benchmarks for inland lakes and the Great Lakes are changed (presumably, the lines would be moved further inland), it would prompt the following:

a. New buildings and structures would have to be set back even further from a body of water.

b. Permits for altering the lakefront would become more frequent.

c. Waterfront property would effectively have less land area to be included in legal descriptions.

d. What is considered Great Lakes bottomlands could change.

e. It could alter where dredged lake spoils can be disposed.

f. The definition or location of "shoreline" for statutory and other purposes might change.

g. It could affect where oil and gas drilling can occur near lakes.

h. Sand dune permits could change.

i. Soil erosion and sedimentation permits could be required more often.

j. New wetlands may be created.

Whether the phrases "ordinary high water mark" and "high water mark" should be changed (and if so, to what) will likely be a contentious issue in the future, not only from a scientific and physical perspective, but also from a legal standpoint as well.

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As of the date of printing of this article, experts on water levels for the Great Lakes believe that it is highly likely that the lake levels for Lake Michigan, Lake Huron and Lake Superior could be even higher in 2020 than they were in 2019. Should that occur, it could have disastrous effects throughout Michigan. Hopefully, state officials have begun planning and acting for that possibility, including setting aside additional emergency funds, further streamlining the State permitting process for seawalls, shore rocks and other wave barriers, seeking additional emergency funding from the federal government and other emergency measures. Waiting until next spring to act may very well be too late.