

Great Lakes: Lake levels give rise to legal questions

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TRAVERSE CITY — Both state and federal experts advise shoreline communities and property owners to prepare for record high water levels through summer's end on Lake Michigan — and associated conflicts bound to arise.

This advice comes as the six-month forecast for Great Lakes water levels by the U.S. Army Corps of Engineers both confirmed May levels on Lakes Michigan and Huron — considered the same hydrological body — set a new monthly mean record, and may well continue to do so through September.

Meanwhile, state and academic experts point to conflicting legal doctrines regarding Great Lakes shorelines that could lead to greater friction not only among neighboring property owners, but also from the public at large.

Rising waters, conflicting interests

Federal scientists announced this week that record-breaking water levels should be expected on Lakes Michigan and Huron all summer long.

“Water levels will stay above records at least through August. September will be close. It's forecast to match the record in September,” said Deanna Apps, USACE physical scientist for the Detroit district. Contrarily, she said none of the other Great Lakes are expected to break high water levels set last year or in past seasons.

Federal records show last month's median level on Lakes Michigan and Huron was 8 inches above last year.

Also, officials forecast June's median water level will be 5 inches higher than the 1986 record, and nearly 3 feet higher than normal.

As the big lakes' levels continue to rise, both state regulators and academic shoreline experts suggest there could be a number of legal issues that pop up.

“We do have too many homes built too close to the shoreline, but they were built there legally,” said Jerrod Sanders, assistant district supervisor with the Michigan Department of Environment, Great Lakes and Energy.

More than 1,000 permits for Great Lakes shoreline protection projects were processed by the state agency in the first half of the current fiscal year, he said, with each case considered both individually and collectively for impacts to the natural environment.

Sanders said it's a challenge that one arm of EGLE pushes for better environmental decision-making in terms of ecological outcomes, while another is bound by strict legal standards. It means somewhat murky waters.

Decisions agency officials make must balance the public trust interest versus private property rights, he said.

Legal doctrines, expected challenges

Courts have upheld the public's right to walk the Great Lakes' beaches — an area of shoreline held in public trust — but some efforts to hard-arm against rising water levels result in a complete loss of beach because of wave action scouring the lake bottom.

That's not good for the public's beach-walking rights, Sanders said, nor for environmental outcomes in sensitive near-shore aquatic habitats.

So EGLE officials conduct “alternative analysis” and urge homeowners to use “less impactful” solutions to protect houses and minimize ecological harm, he said.

That could mean a rip-rap recommendation instead of a seawall, or refusal to allow landowners to protect dunes from high water levels and instead limit them to saving only their home. That's because officials “know armoring the shoreline has long-term negative impacts,” Sanders said.

At the same time, he admitted that when homeowners do install permitted shoreline armor and the beach is eventually scoured away, he does not know whether beach-walkers are legally allowed to climb over rip-rap or walk behind seawalls under their court-protected public trust rights.

That's a big problem, academics said.

Richard Norton, University of Michigan professor of architecture and urban planning, said this situation highlights the intersecting and often conflicting legal doctrines at play — private property rights, common use and public trust rights, and the state's authority to adopt laws to promote public health, safety and general welfare.

"We need to have the really hard conversation. What do we really want to protect in the long term," Norton said.

The U-M professor said he expects to see legal challenges in the coming months not only between neighboring landowners about shoreline armaments, but also to determine whether the state revokes its public trust duty by even allowing Great Lakes shorelines to be armored.

Additionally, landowners could challenge the state's ability in cases in which officials deny permits to armor the shoreline, Norton said.

None of this has yet been tested in court, he said.

Sanders said he expects to see these issues appear in courtrooms soon enough, as he knows of several private property owners and organized groups "at war right now over these issues." When administrative appeal processes conclude, he said lawsuits may well be filed up and down the coasts. Guy Meadows, director of the Great Lakes Research Center and professor of marine engineering at Michigan Tech University, said his research involves nearshore hydrodynamics and predicting future outcomes.

He said there are significant infrastructure and private property investments at great risk in his 80-year predictive outlook, should trends in climate and cyclical Great Lakes water levels continue as expected. That goes for all the big lakes, he said.

Apps, Sanders, Norton and Meadows all spoke Friday during a webinar hosted by nonprofit Institute for Journalism and Natural Resources.