TESTIMONY OF FREDRIC N. GOLDBERG
ON BEHALF OF SAVE OUR SHORELINE, INC.

I am an attorney practicing with the Grand Rapids law firm of Mika Meyers Beckett & Jones PLC. A significant part of my practice over the last 25 years has been in the area of the regulation and development of natural resources located within the State. As a result, I have considerable expertise regarding the scope and extent of public and private rights in lands and natural resources and the substantive authority and limits which exist with regard to the State's regulation of such lands and natural resources.

In addition, I and other members of my firm have considerable expertise in the law of eminent domain and regulatory takings. For example, I participated in my firm's representation of Miller Brothers Oil Company in connection with the Nordhouse Dunes matter, which resulted in a $120 million regulatory takings judgment against the State and in favor of the landowners and oil and gas lessees in that case.

Save Our Shoreline, Inc. has asked me to present testimony regarding two points of law. First, does the Great Lakes Submerged Lands Act, now Part 325 of NREPA, create any form of public ownership in Great Lakes shorelands up to the ordinary high-water mark? Second, what is the scope and extent of the public interest in exposed bottomlands of the Great Lakes bordering this State? I am here today to briefly testify regarding our conclusions on these issues.

Great Lakes Submerged Lands Act – Part 325 of the Natural Resources and Environmental Protection Act

Based upon our review of the legislative history of Part 325, the pertinent Michigan Supreme Court cases and the plain language of the statute, it is our conclusion that Part 325 neither creates nor affirms any type of public ownership interest in Great Lakes shorelands. The first sentence of

Section 32502 clearly supports this conclusion, stating merely that the lands covered or affected by Part 325 are those portions of the Great Lakes bottomlands "belonging to the State or held in trust by it." No other provision in Part 325 defines or delineates what bottomlands belong to the State or are held in trust by it. Thus, in order to determine what lands belong to the State of Michigan or are in held in trust by it, one must necessarily look beyond the provisions of Part 325. Before I discuss what the law of Michigan provides in that regard, I would like to briefly review with you the legislative history of what is now Part 325.

In 1955 PA 247, the Legislature enacted the original version of Part 325, then known as the Great Lakes Submerged Lands Act. The lands which were covered by that Act were "Great Lakes bottomlands belonging to the State of Michigan or held in trust by it which have heretofore have been artificially filled in and developed with valuable improvements." Thus, in its original form, Part 325 applied to a very limited category of lands. The legislation was enacted to authorize the State to sell only artificially filled in and developed bottomlands. Prior to enactment of this statute, the State had begun legal proceedings against persons who had filled in bottomlands in shallow waters along the Great Lakes. This created a substantial uproar among the population, and led directly to this legislation (which was intended to fix the problem by allowing the State to sell the filled-in bottomlands to the persons controlling them). A commentator on the enactment of this provision described it as "a temporary relief measure for a limited class of squatters."

The Great Lakes Submerged Lands Act was subsequently amended in 1958, 1965, twice in 1968, 1982 and 1993. Despite all of the amendments, Section 32502's limited applicability only to lands belonging to the State or held in trust by it remained intact, and no provisions were added which could in any way be interpreted to create or affirm public ownership of Great Lakes beaches. While language defining the location of the ordinary high-water mark was added in 1968, that

language does not in any way create a State ownership interest in lands lying below that mark. Thus, the available legislative history confirms that this Act does not, and was never intended to, address title to Great Lakes beaches.

Absence of Public Ownership or Public Trust Interest In Great Lakes Beachfront

The private ownership boundary along the Great Lakes shoreline was definitively set by the Michigan Supreme Court in the case of *Hilt* v *Weber*, which is reported at 252 Mich 198 (1930). That case held that a riparian owner's property along the Great Lakes shoreline extended to the water's edge, thereby confirming the existence of a movable boundary that would follow the water's edge as it existed from time to time. In fact, the lone dissenting justice in *Hilt* v *Weber* expressly stated that, under the majority's decision in that case, a Great Lakes riparian owner possessed fee title to all lands lying between the water's edge and the ordinary high-water mark, free of any public trust.

At the time that the Great Lakes Submerged Lands Act took effect in 1958, the Michigan regulatory authorities recognized that the Act did not purport to alter the movable boundary of private ownership – being the water's edge – established by the Michigan Supreme Court in *Hilt* v *Weber*. This administrative interpretation is confirmed by *People ex rel Director of Conservation* v *Broedell*, 365 Mich 201 (1961), wherein the court stated that,

> "Plaintiff [Department of Conservation] says that in administering the submerged lands acts, above-mentioned, it follows the 'philosophy' which it says is found in *Hilt* v *Weber*, 252 Mich 198 (71 ALR 1238), of 'a movable freehold,' that is to say, that the dividing line between the State's and the riparian owners' land follows the water's edge or shoreline at whatever level it may happen to be from time to time."

We have obtained copies of the transcript of the testimony referred to by the court in *Broedell*, and the Chief of the Lands Division of the Department of Conservation did indeed so testify.

It is therefore clear that the provisions in Senate Bill 244 and House Bill 4257 which would allow beach maintenance activities to be conducted on lands lying between the ordinary high-water mark and the water's edge would merely allow a property owner to engage in such activities on his or her own property – property in which the State has no ownership interest at all.

Some have argued that although the State does not own the property lying between the water's edge and the ordinary high-water mark, that property is somehow subject to the "public trust." This is not accurate. The Michigan Supreme Court has found that the State's public trust interest in Great Lakes bottomlands stops at the water's edge [*Hilt* v *Weber*, 252 Mich 198 (1930)], or perhaps at the low-water mark, which is a point even further lakeward than the water's edge [*Lincoln* v *Davis*, 53 Mich 375 (1884); *LaPorte* v *Menacon*, 220 Mich 684 (1922)].

Moreover, even if the State's public trust interest did extend to the ordinary high-water mark, the beach maintenance activities which SB 244 and HB 4257 would allow would not impair the public trust in any way. The only rights secured under the public trust are the rights of navigation, commerce and fishing. The public trust has been defined as a "trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Collins* v *Gerhardt*, 237 Mich 38, 46 (1926) quoting from *Illinois Central Railroad Co* v *Illinois*, 146 US 387, 452 (1892) (emphasis added). Obviously, a property owner undertaking beach maintenance activities on newly exposed beach land is not impairing or interfering with navigation, commerce or fishing. Thus, the public trust doctrine is completely inapplicable to beach maintenance activities.

Further, SB 244 and HB 4257 would greatly lessen the State's exposure to regulatory takings claims by beach front property owners, based upon current regulations denying them use of their property below the ordinary high-water mark. The current regulations could subject the State to

significant liability for just compensation. For example, in *Peterman* v *DNR*, 446 Mich 177 (1994), the Michigan Supreme Court imposed liability for payment of just compensation on the State for the taking of lands lying lakeward of the ordinary high-water mark that were unnecessarily destroyed by the construction of a public boat ramp on adjacent property. The risk to the State is real. SB 244 and HB 4257 would go a long way toward reducing that risk under the current circumstances.

In sum, SB 244 and HB 4257 would do no more than remedy the unfair situation that exists when private landowners are unable to protect their property values (as well as the health and safety of themselves and their families) by engaging in beach maintenance activities, at the same time benefitting the State by ameliorating the risk of takings claims by lakefront property owners.