



**House
Legislative
Analysis
Section**

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GREAT LAKES BOTTOMLANDS PRESERVES

Senate Bill 721 as passed by the Senate
First Analysis (12-6-88)

RECEIVED

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Sponsor: Sen. William Faust
Senate Committee: Natural Resources and
Environmental Affairs
House Committee: Tourism and Recreation

Mich. State Law Library

THE APPARENT PROBLEM:

Michigan is estimated to be one of the nation's leaders in the area of shipwreck preservation, protection, and management techniques. Michigan's shipwreck legislation has been a model for other states. However, many think that the legislation could be strengthened. Some cite the need for greater clarification of the act's provisions and more representation of the public and tourists' interests on the Underwater Salvage Committee, the committee that monitors preserves. Others suggest the need for a comprehensive study of the preserve system that would detail the exact location of each wreck.

Michigan's Great Lakes bottomlands preserves are one of the state's most popular resources for divers and maritime historians. The preserves attract divers nationwide. However, some divers have noted widespread depletion of the preserves as they have gained in popularity. It has been estimated by a member of the state's Underwater Salvage Committee that 90 percent of the shipwrecks at depths of 50 or 60 feet in the preserves are in extreme disrepair due to illegal salvaging. Most of the wrecks between depths of 150 feet to 175 feet are intact. However, the state's diving community advocates dives of no greater depth than 130 feet, and most people dive at depths between 50 and 60 feet. Current fines are not a deterrent to illegal salvaging; the expensive items that can be gained from illegal salvaging are worth the potential slap on the wrist that a misdemeanor represents. It has been suggested that an increase in the severity of penalties for illegal salvaging could help to deter that activity.

Divers and state historians have also expressed concern about the decline of potential preserves space. The Great Lakes bottomlands preserve act provides for the designation of five percent of the total bottomland of the Great Lakes to be designated as preserve area. Department of Natural Resources (DNR) estimates show that approximately 85 percent of the available bottomland preserve space has been designated. Many divers and historians have suggested that the state's bottomlands preserves should be expanded because they think that there are other areas within the Great Lakes that hold shipwrecks and unique geological and archaeological features of historical importance to the state.

Many local units of government have shown an interest in the fate of bottomlands preserves. Several local units have found the preserves to be a major tourist attraction and a boom to their economies due to the influx of divers and their families into lakefront communities. However, many local units feel that more could be done to promote the preserves. Specifically, they suggest interpretive programs that would detail where shipwrecks are located and the history of the wrecks as a way of allowing all of the state's citizens to enjoy the resources. Local units and divers have also suggested the intentional sinking of ships in preserves

in order to maintain diver interest, and an increase in management of the preserves to continue stimulation of local economies.

THE CONTENT OF THE BILL:

The bill would amend the Great Lakes bottomlands preserves act to provide for additional bottomland preserves and to clarify and strengthen the provisions of the act.

Underwater Salvage and Preserve Committee. The "Underwater Salvage and Preserve Committee" would be created to provide technical and other advice to the director of the Department of Natural Resources (DNR) and the secretary of state regarding their responsibilities under the act. The committee would consist of two members appointed by the director of the DNR, who had primary responsibility in the DNR for administering the act; two members appointed by the secretary of state who had primary responsibility in the Department of State for administering the act; one member appointed by the director of the Department of Commerce; and four members appointed from the general public by the governor with the advice and consent of the Senate. (Two of the members appointed from the general public would have to be experienced in recreational scuba diving.) Members of the committee would serve three-year terms, and a vacancy would be filled in the same manner as original appointment. Members would serve without compensation, except for their regular state salary when applicable.

The chairperson of the committee would alternate between the representatives from the DNR and the Department of State and would be designated by the director of the DNR or the secretary of state. The term of the chairperson would be one fiscal year, with the first chairperson being named by the DNR to a term ending September 30, 1989. The chairperson would have to file an annual report with the secretary of state, the director of the DNR, and the director of the Department of Commerce. The committee would be considered an advisory body and could do all of the following:

- recommend the creation of and boundaries for Great Lakes Underwater Preserves;
- review applications for underwater salvage permits and make recommendations regarding their issuance;
- consider and make recommendations regarding the charging of permit fees and the appropriate use of revenue generated by those fees;
- consider the need for and content of rules to implement the bill and make recommendations concerning the promulgation of rules;
- consider and make recommendations concerning appropriate legislation and program operation.

S.B. 721 (12-6-88)

OVER

The bill specifies that the committee could not supersede or replace the responsibility or authority of either the secretary of state or the director of the DNR to carry out their respective responsibilities under the act.

Underwater Property Recovery Permits. The act allows the DNR to issue permits to authorize the recovery of abandoned property located on or in a sunken aircraft or watercraft. In addition, the bill would require permits for recovering property "located in the immediate vicinity of and associated with" such a sunken vessel. The bill would require that the application form for such a permit, which must be prescribed by the DNR, be approved by the secretary of state's office.

The bill specifies that an application for a permit would not be complete until all information requested by the DNR and the secretary of state's office was received by the DNR. The DNR could request additional information after the submission of an application. The DNR or the secretary of state's office would have to notify an applicant in writing if the application were deficient, and the applicant would have 20 days to provide the additional information. If the applicant failed to respond, the application would be denied unless the applicant requested and provided reasonable justification for an extension.

The act requires the DNR and the secretary of state's office to approve or disapprove a permit application within 30 days after the filing of a complete application. The bill specifies that such a decision would have to be made with the advice of the committee. Also, the act allows an application to be approved conditionally; the bill would allow the DNR and the secretary of state's office to impose conditions "as are considered reasonable and necessary to protect the public trust and general interest." In addition to the conditions allowed by the act, the bill would include those that accomplished one or more of the following:

- prohibited injury, harm, and damage to a bottomlands site or abandoned property that was not authorized for removal by the permit holder;
- prohibited or limited the amount of discharge of pollutants or debris that could emanate from a shipwreck or salvage equipment;
- required the permit holder to submit a removal plan before beginning salvage operations.

The removal plan could be required in order to ensure the safety of those involved in the removal of abandoned property and to address how the permit holder proposed to prevent, minimize, or mitigate adverse effects on the property and the surrounding geographic features.

A person who discovered an abandoned watercraft outside of a Great Lakes bottomlands preserve would be entitled to recover any cargo if the person applied for a permit within 90 days after the discovery. If the individual failed to apply within 90 days, an exclusive cargo recovery permit would have to be issued to the first person who applied for one. Only one such permit at a time could be issued and operative. If a discovery were made simultaneously by more than one individual, a permit could only be approved for the first person or persons jointly applying.

DNR Establishment of Great Lakes Bottomlands Preserves. The act requires the DNR to establish Great Lakes bottomlands preserves, and the bill would require that this be done by rule promulgated under the Administrative Procedures Act. The bill further specifies that a bottomlands preserve could be established whenever a bottomlands area included a single watercraft of historical value; two

or more abandoned watercraft; or other features of archaeological, historical, recreational, geological, or environmental significance. Bottomlands areas that contained few or no watercraft or features related to the character of a preserve could be excluded from preserves. In establishing bottomlands preserves, the DNR would be required to consider all of the following:

- whether creation of a preserve was necessary to protect either abandoned property possessing historical or recreational value or significant underwater geological or environmental features;
- the extent of local support for creation of a preserve;
- whether a preserve development plan was prepared by a state or local agency;
- the extent to which preserve support facilities (e.g., roads, marinas, charter services, hotels, medical hyperbaric facilities, and rescue agencies) had been developed in or were planned for the area.

A permit to recover abandoned artifacts within a bottomlands preserve could not be granted except for historical or scientific purposes or when the recovery would not adversely affect the historical, recreational, or cultural integrity of the preserve as a whole.

The act limits the total area of Great Lakes bottomlands preserves to not more than five percent of the Great Lakes bottomlands within Michigan. The bill would increase that limit to ten percent, and specify that individual Great Lakes bottomlands preserves could not exceed 400 square miles an area. The bill would also authorize, upon the approval of the committee, the intentional sinking of not more than one vessel associated with Great Lakes maritime history within a Great Lakes bottomlands preserve. No state money could be used to purchase or sink such a vessel.

Suspension, Revocation, and Civil Actions. The DNR or the secretary of state's office, individually or jointly, could summarily suspend or revoke a permit if either found that a permit holder was not in compliance with the act, or rule promulgated under it, or a provision or condition of the permit. Damaging abandoned property or failure to use diligence in attempting to recover property for which a permit was issued also would be grounds for suspension or revocation of a permit. If a permit holder requested a hearing within 15 days after a suspension or revocation took effect, the DNR or the secretary of state's office would have to conduct an administrative hearing to consider whether the permit should be reinstated.

The bill would authorize the attorney general to commence a civil action in circuit court on behalf of the DNR, or the secretary of state's office, or both, to enforce compliance with the act; to restrain a violation of the act or an action contrary to a decision to deny a permit; to enjoin further removal of artifacts, geological material, or abandoned property; or to order the restoration of an affected area to its prior condition.

Forfeiture of Equipment. A watercraft, motor vehicle, or any other equipment or apparatus used to commit a violation of the act or rules promulgated under it could be "attached, proceeded against, and confiscated."

In order to confiscate, a law enforcement or conservation officer who seized the property would have to file a complaint in the circuit court for the county in which the seizure was made or in the Ingham County Circuit Court. The complaint would have to specify the kind of property seized, the time and place of seizure, the reasons for the seizure, and a demand for the property's condemnation

and confiscation. Upon the filing of such a complaint, an order would have to be issued requiring the owner to show cause why the property should not be confiscated.

The order would have to be served on the owner of the property as soon as possible, and at least seven days before the complaint would be heard. The court, for cause shown, could hear the complaint on shorter notice. If the owner of the property were not known or could not be located, the required notice could be served by:

- posting a copy in three public places for three consecutive weeks in the county where seizure occurred and by sending a copy of the order;
- certified mail to the last known address of the owner;
- publishing a copy in a newspaper once a week for three consecutive weeks in the county where seizure occurred and by sending a copy by registered mail to the last known address of the owner;
- or in another manner as the court directed.

If the court determined that the property was possessed, shipped, or used contrary to law, the court would have to issue an order condemning and confiscating the property and directing its sale or other disposal by the director of the DNR. If the owner signed a release, the court proceeding would not be necessary. If the court determined that the property was not possessed, shipped, or used contrary to law, the court would have to order the director of the DNR to return the property to its owner immediately. Proceeds received from the sale or disposal of confiscated property would have to be credited to the proposed Underwater Preserve Fund.

Underwater Preserve Fund. The bill would establish the Underwater Preserve Fund as a separate fund in the state treasury. Money in the fund could be appropriated only for the following purposes:

- to the secretary of state's office for the development of maritime archaeology in Michigan;
- to the Department of Commerce for the promotion of Great Lakes bottomlands preserves;
- to the DNR for the enforcement of the act.

Penalties. A person who recovered, altered, or destroyed abandoned property in, on, under, or over the bottomlands of the Great Lakes without a permit to do so issued jointly by the DNR and the secretary of state's office would be guilty of a felony if the property had a fair market value of \$100 or more. Such a violation would be punishable by imprisonment for up to two years, a maximum fine of \$5,000, or both. A person who otherwise violated the permit provisions of the act or a rule promulgated under it would be guilty of a misdemeanor, punishable by a maximum fine of \$5,000, imprisonment for up to six months, or both.

Rules. The bill would authorize the DNR and the secretary of state's office to promulgate rules jointly for each Great Lakes bottomlands preserve. The rules would govern access to and use of preserves, and could regulate or prohibit the alteration, removal, or destruction of abandoned property, features, or formations within a preserve.

Scuba Diving. The bill would specify that anyone who participated in the sport of scuba diving on the Great Lakes bottomlands would be accepting "the dangers which adhere in that sport insofar as the dangers are obvious and necessary." Such dangers would include but not be limited to all of the following:

- injuries that could result from entanglements in sunken watercraft or aircraft;
- the condition or location of sunken watercraft or aircraft;
- the failure of the state to fund staff or programs at bottomlands preserves;
- the depth of the objects and bottomlands within preserves.

The bill would take effect January 1, 1989.

MCL 299.51 et al.

FISCAL IMPLICATIONS:

According to the Department of Natural Resources, the state is currently operating the underwater salvage and bottomlands preserve program without funding, and the state plans to continue to operate the program in that manner. However, the bill will increase the demand for services in the form of management of preserves, protection of resources and enforcement of the act even though the funding source identified in the bill is not suitable to provide ongoing program support. (12-5-88)

ARGUMENTS:

For:

Michigan's Great Lakes bottomlands preserves act was one of the first of its kind in the nation. It is nationally viewed as one of the most comprehensive acts covering salvaging and preserves. However, some of the provisions in the bill concerning permit applications and removal of certain items have caused confusion among those affected by the legislation. The bill will simplify and clarify several provisions of the bottomlands legislation and help alleviate confusion about different procedures under the act. Further, the bill will establish Michigan as the undisputed leader of bottomlands protection and management.

For:

Before the enactment of the bottomlands legislation in 1980, an ad hoc committee existed to serve as a liaison between the Departments of State and Natural Resources, divers, and other salvagers of antique and aboriginal items. Some were concerned that the committee would be disbanded by the departments after the enactment of the legislation in 1980, but the departments felt that the committee served a vital advisory and information gathering capacity for the state. Currently, the committee is composed of five members: two representatives of the DNR; two representatives of the secretary of state's office; and one representative of the general public. In order to ensure the continuity of the office and performance of its functions, the bill will establish the Underwater Salvage and Preserve Committee.

Further, many divers and local units of government think that there should be more public and tourist representation on the committee because the preserves are a tourist attraction. Many communities view the preserves as important recreational resources and think that the committee should examine the recreational aspect of issues concerning bottomlands preserves. The communities stress that the underwater resources are important to all of the state's citizens and that more attention should be given to issues that would make those resources available for everyone. The bill will address this concern by adding three representatives of the general public to the committee that monitors salvaging and by adding a representative of the Department of Commerce to the committee.

For:

Several members of the diving community and the historical community within the state have expressed frustration about the lack of documentation of the location of shipwrecks and other archaeological or geological features of importance to the state's maritime history. According to representatives of the Department of State's Bureau of History, a systematic survey of all preserve resources detailing exactly where each wreck is located has never been compiled. However, many studies have been done on a less comprehensive scale, and they suggest that there are a sizable number of wrecks in the preserve areas. Many of the state's citizens, including divers and historians, think that it would be advantageous for the state to undertake a comprehensive study of the state's bottomlands. The bill will address this concern by requiring the Underwater Salvage and Preserve Committee to recommend the creation of and boundaries for Great Lakes Underwater Preserves.

For:

Illegal salvaging is one of the most harmful activities occurring at bottomlands preserves, yet the state has been virtually powerless to stop it. The problem has been well documented. There have been several accounts of the irrevocable damage to vessels and the theft of desirable artifacts from wrecks. Preservation of the wrecks is a must in order to safeguard the state's maritime history and to preserve the state's underwater heritage. Many think that the act's current penalties are too weak to serve as a deterrent to illegal salvaging, and they cite the abundance of stripped wrecks as proof of their beliefs. It is agreed that the severity of the bill's penalties, including provisions for felony crimes and increased fines and forfeiture of equipment, will deter the illegal salvaging of items from bottomland resources. Further, it is common knowledge that many of the items pillaged from preserves are often invaluable historically and literally. Therefore, many think that the potential \$5,000 fine and felony provision are quite appropriate for the pillaging of items worth more than \$100.

Against:

The bill does not provide enough money for the enforcement of the act's provisions, and the illegal salvaging provisions in particular. The act has been administered without the appropriation of state money for the past eight years. Many illegal salvagers go undetected because there is no extra enforcement money under the act. Therefore, money from the sale of boats and equipment that have been confiscated is not expected to meet, or even come close to, the funding requirements for administration of the act, and the bill will not address this concern.

For:

Michigan has gained a national reputation for its bottomlands preserves because the cold freshwater of the Great Lakes has helped maintain the preserves. However, the bottomlands available for designation as preserves are rapidly decreasing, and both divers and historians are worried about the future protection of bottomlands of historical and recreational importance to the state that are not currently covered under the act. The bill will address these concerns by doubling the amount of bottomlands available for designation as preserves from approximately 1,900 square miles to 3,800 square miles.

For:

Many local units and some others think that bottomlands preserves perform the dual function of safeguarding the state's underwater heritage and providing vital recreational resources to certain areas of the state. These people have suggested that certain groups be allowed to sink ships of maritime interest in preserves in order to maintain diver interest in preserves and continued economic stimulation from divers and their families. The bill would address this concern by providing for the sinking of one vessel in each bottomland preserve.

Against:

Many people feel that sinking a ship in a preserve is unnecessary and would leave the state vulnerable to liability suits. Opponents of the ship sinking provision think that the intentional sinking of a ship would turn the state's bottomlands into an underwater junkyard. In addition, the current preserves are a natural accumulation of wrecks. By placing false wrecks in the preserves, visitors to the preserves may assume that the false wrecks are authentic. If the ship sinking is successful, it could lead to the placement of other undesirable items in the preserves. Opponents of ship sinking also assert that it is ludicrous to consider intentionally sinking ships when the state has not yet determined the exact number of wrecks currently in existence on the state's bottomlands. Further, they think that even though the DNR would require ships to meet extremely rigid specifications and the bill provides for strict permit requirements, the state assumes a certain amount of liability by the simple fact that it provides for the intentional sinking of ships.

Response: The bill would add language to the act regarding the dangers of the sport of scuba diving, patterned after the language in current law regarding the sport of skiing. The bill's language will force divers to acknowledge the inherent dangers of their sport, and it will make them take responsibility for those dangers. Although it is probable that the state's liability for divers will be tested by lawsuits, it is expected that the bill's language will protect it from most litigation just as the ski language has done.

POSITIONS:

The Department of Natural Resources supports the bill. (12-2-88)

The Department of State supports the bill. (12-5-88)

The Michigan Underwater Salvage Committee supports the bill. (12-4-88)

The Michigan Bottomlands Underwater Preserve Committee supports the bill. (12-5-88)

The Michigan Skin Diving Council supports the bill. (12-2-88)