

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

NATURAL RESOURCES AND  
ENVIRONMENTAL PROTECTION  
ACT:

Issues relating to the intentional sinking of  
a vessel to expand recreational diving  
opportunities on Great Lakes bottomlands

GREAT LAKES BOTTOMLANDS:

Assuming the appropriate state and federal authorization has been obtained, if the owner of a vessel intentionally sinks it in the Great Lakes, physically deserts the vessel, and publishes a notice stating that the owner intends to completely relinquish title, possession, and control of the vessel, without vesting ownership in any other person, the vessel could be considered abandoned under both Michigan common law and Part 761 of the Natural Resources and Environmental Protection Act, MCL 324.76101(a). But such actions would not necessarily relieve the person who sunk the vessel from legal responsibilities or liabilities that could arise from the act of sinking.

A vessel intentionally sunk in the Great Lakes does not automatically become property of the State of Michigan when it comes to rest on state bottomlands. The State does, however, reserve to itself a possessory right or title superior to that of a finder to abandoned property of historical or recreational value found on state-owned bottomlands of the Great Lakes. Moreover, pursuant to federal law, the State has title to certain abandoned shipwrecks, including those embedded in Great Lakes bottomlands, as well as other historically significant shipwrecks on Great Lakes bottomlands. In addition, Part 761 provides for the Departments of Environmental Quality and History, Arts, and Libraries to regulate any recovery, alteration, or destruction of abandoned, sunken watercraft, or associated property on Great Lakes bottomlands.

Opinion No. 7229

May 7, 2009

Honorable Michelle A. McManus  
State Senator  
The Capitol  
Lansing, MI

Honorable Jason Allen  
State Senator  
The Capitol  
Lansing, MI

You have asked a series of related questions concerning a proposal by an organization to intentionally sink a vessel in order to expand recreational diving opportunities on Great Lakes bottomlands. These questions involve Part 325 (Great Lakes Submerged Lands) of the Natural

Resources and Environmental Protection Act (NREPA), 1995 PA 59, MCL 324.32501 *et seq.*, and Part 761 (Aboriginal Records and Antiquities) of the NREPA, MCL 324.76101 *et seq.*

Before addressing your specific questions, it is important to note that an intentional sinking may violate both state and federal law. Michigan law generally prohibits the intentional sinking of a vessel in the Great Lakes without state authorization. Part 325 applies to "all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it."<sup>1</sup> MCL 324.32502. The State of Michigan acquired title to these bottomlands in its sovereign capacity upon its admission to the Union and holds them in trust for the benefit of the people of Michigan. *Illinois Central R Co v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892); *Nedtweg v Wallace*, 237 Mich 14; 208 NW 51 (1927). MCL 324.32512(1)(c) prohibits placement of material on Great Lakes bottomland in the absence of a permit or legislative authorization:

Unless a permit has been granted by the [Department of Environmental Quality] or authorization has been granted by the legislature . . . a person shall not do any of the following:

\* \* \*

(c) Dredge or *place* spoil or *other material* on bottomland. [Emphasis added.]

Since the intentional sinking of a vessel in the Great Lakes necessarily entails its placement on bottomlands, that activity would require a permit under Part 325 unless it is otherwise authorized by statute.

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<sup>1</sup> Generally, a land patent is an instrument of conveyance by which the government first conveys fee simple title to public lands. See *Wilcox v Jackson*, 38 US (13 Pet) 498, 516; 10 L Ed 264 (1839); *Glass v Goeckel*, 473 Mich 667, 683 n 11; 703 NW2d 58 (2005); and *People ex rel Brewer v Kidd*, 23 Mich 440, 445-446 (1871).

Part 761 of the NREPA addresses various aspects of the State's interests in "abandoned property of historical or recreational value," MCL 324.76102(1), including such property "found on the state owned bottomlands of the Great Lakes." MCL 324.76102(2). Among other things, Part 761 creates an underwater salvage and preserve committee, MCL 324.76103, and directs the Michigan Department of Environmental Quality (DEQ), in consideration of the advice of that committee, to establish by rule Great Lakes bottomlands preserves, to be jointly administered by the DEQ and the Department of History, Arts, and Libraries. MCL 324.76111.<sup>2</sup> This latter section does allow for intentional sinking of vessels, but only under specifically limited circumstances:

Upon the approval of the [underwater salvage and preserve committee], not more than 1 vessel associated with Great Lakes maritime history may be sunk intentionally within a Great Lakes bottomlands preserve. However, state money shall not be expended to purchase, transport, or sink the vessel. [MCL 324.76111(6).]

In summary, Michigan law forbids the intentional sinking of vessels in the Great Lakes except as authorized by Parts 325 and 761 of the NREPA.<sup>3</sup>

Federal law also constrains the intentional sinking of vessels in navigable waters, including the Great Lakes. The Rivers and Harbors Act of 1899, 33 USC 409, makes it unlawful

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<sup>2</sup> See 1981 AACS, R 299.6001-R 299.6003; 1985 AACS, R 299.6004; 1987 AACS, R 299.6005; 1988 AACS, R 299.6006-R 299.6007; 1991 AACS, R 299.6008-R 299.6009; 1998-2000 AACS, R 299.6010; 1999 AACS, R 299.6011; and 2008 AACS, R 299.6012, establishing various Great Lakes state bottomland preserves.

<sup>3</sup> Although beyond the scope of your question, there are other legal constraints to intentionally sinking a vessel. For example, the person responsible could also be liable for contamination of the water caused by substances on the vessel, such as residual fuel, under state and federal environmental statutes. Part 31 (Water Resources Protection) of the NREPA, MCL 324.3101 *et seq*; Clean Water Act, 33 USC 1251 *et seq*. The vessel could also be deemed a common law nuisance. *Detroit Bd of Water Comm'rs v Detroit*, 117 Mich 458; 76 NW2d 70 (1898). See also *Wyandotte Transp Co v United States*, 389 US 191; 88 S Ct 379; 19 L Ed 2d 407 (1967) (ruling that the owner of a sunken ship may be held responsible for the removal expenses incurred by the government resulting from the negligent sinking of a ship).

"to sink, or permit or cause to be sunk, vessels or other craft in navigable channels" and provides for the marking and removal of sunken vessels that obstruct navigation. Another provision of the same statute, 33 USC 403, more generally prohibits the creation of obstructions to the navigable capacity of waters of the United States and the filling of navigable channels except as otherwise authorized by federal law or the United States Army Corps of Engineers. Accordingly, federal as well as state authorization would be required to intentionally sink a vessel in the Great Lakes.<sup>4</sup>

Within this statutory framework, you first ask three closely related questions that may be collectively paraphrased as follows: If an individual or organization that holds title to a vessel intentionally sinks it<sup>5</sup> in the Great Lakes and publishes a statement in a newspaper that it intends to abandon the vessel, would the vessel be considered "abandoned" under Michigan law?

Abandonment under these circumstances is distinctly a question of property law. The term itself has been defined in Black's Law Dictionary (Revised 4<sup>th</sup> ed) p 9, as:

The giving up of a thing absolutely, without reference to any particular person or purpose, as throwing a jewel into the highway; leaving a thing to itself, as a vessel at sea; vacating property with the intention of not returning, so that it may be appropriated by the next comer.

The common law of property is well settled that abandonment (as distinguished from loss) consists of two elements: "[A]n intention to relinquish the property and acts putting that

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<sup>4</sup> For example, before intentionally sinking a vessel for recreational diving purposes in the Alger Underwater Preserve established in Lake Superior pursuant to Part 761 of the NREPA, the Alger Underwater Preserve Committee, Inc., obtained a permit from the DEQ under Part 325 of the NREPA and a permit from the United States Army Corps of Engineers under section 10 of the Rivers and Harbors Act of 1899, 33 USC 403.

<sup>5</sup> You also ask whether "'scuttling' a vessel is the same as '[i]ntentionally sinking.'" The Random House Webster's College Dictionary (1997) offers the following definition of "scuttle": "3. to sink (a vessel) deliberately by opening seacocks or making openings in the bottom." Since the terms are essentially synonymous, the responses to your questions would be the same whether the activity is characterized as "scuttling" or "intentionally sinking."

intention into effect, see *Log-Owners' Booming Co v Hubbell*, 135 Mich 65, 69; 97 NW 157 (1903), *Emmons v Easter*, 62 Mich App 226; 233 NW2d 239 (1975)." *Van Slooten v Larsen*, 410 Mich 21, 50; 299 NW2d 704 (1980).

The Michigan Supreme Court recognized in *Rudnik v Mayers*, 387 Mich 379, 384; 196 NW2d 770 (1972), that the intent must be to abandon completely and without reference to another person or purpose [quoting 1 CJS, Abandonment, § 1, p 4]:

"'Abandonment' of property or a right is the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession, and control, and without vesting ownership in any other person."  
[Emphasis in original deleted.]

Thus, abandonment is established under the common law of property when the intent to abandon is clearly expressed, and is accompanied by actions indicating relinquishment and no intention to return to assert ownership.

Similar principles apply in determining whether a vessel is "abandoned" for purposes of Part 761. MCL 324.76101(a) defines "abandoned property" in part as:

[A] watercraft, including a ship, boat, canoe, skiff, raft, or barge; the rigging, gear, fittings, trappings, and equipment of an aircraft or watercraft; the personal property of the officers, crew, and passengers of an aircraft or watercraft; and the cargo of an aircraft or watercraft, which have been deserted, relinquished, cast away, or left behind and for which attempts at reclamation have been abandoned by owners and insurers.

Under this statute, as at common law, property that is permanently relinquished by its owner is "abandoned."<sup>6</sup>

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<sup>6</sup> This opinion does not address any rights or interests that may be asserted by third parties, such as insurers or lien holders.

Applying these common law and statutory standards to the situation described in your requests leads to the conclusion that the vessel in question could be deemed abandoned. Specifically, an express public statement of the intent to completely relinquish title, possession, and control of the vessel, without vesting ownership in any other person, together with the physical desertion of the vessel, could establish that the vessel is abandoned.<sup>7</sup>

It is my opinion, therefore, in answer to your first question, that, assuming the appropriate state and federal authorization has been obtained, if the owner of a vessel intentionally sinks it in the Great Lakes, physically deserts the vessel, and publishes a notice stating that the owner intends to completely relinquish title, possession, and control of the vessel, without vesting ownership in any other person, the vessel could be considered abandoned under both Michigan common law and Part 761 of the NREPA, MCL 324.76101(a). But such actions would not necessarily relieve the person who sunk the vessel from legal responsibilities or liabilities that could arise from the act of sinking the vessel.

You next ask whether a vessel that is intentionally sunk in the Great Lakes automatically becomes property of the State of Michigan when it comes to rest on state bottomlands. It appears that this question is based upon MCL 324.76102(2), in which the State "reserves" rights to certain abandoned property of historical or recreational value:

The state reserves to itself a possessory right or title superior to that of a finder to abandoned property of historical or recreational value found on the state owned bottomlands of the Great Lakes. This property shall belong to this state

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<sup>7</sup> Again, abandoning a vessel would not necessarily relieve the person responsible for sinking the vessel from legal responsibilities or liabilities that could arise from the act of sinking the vessel.

with administration and protection jointly vested in the department [of Environmental Quality] and the department of history, arts, and libraries.

By its terms, the statute applies only to "abandoned property" that is also "of historical or recreational value." Under Part 761, "historical value" means "value relating to, or illustrative of, Michigan history, including the statehood, territorial, colonial, and historic, and prehistoric native American periods." MCL 324.76101(f). "Recreational value" is statutorily defined as "value relating to an activity that the public engages in, or may engage in, for recreation or sport, including scuba diving and fishing." MCL 324.76101(h). As the Court of Appeals explained in *People v Massey*, 137 Mich App 480, 489-490; 358 NW2d 615 (1984), this law protects:

[T]he public trust of articles possessing historic and recreational value . . . [and] the state's interest in preserving its heritage for the use and enjoyment of its citizens.

Reading MCL 324.76102(2) according to the plain meaning of the language chosen by the Legislature, it is apparent that the State does not automatically assume title to any vessel or other object found on its Great Lakes bottomlands. MCL 324.76102(2) specifically "reserves" to the State "a possessory right or title *superior to that of a finder*." (Emphasis added.) This language does not automatically and absolutely vest in the State title to all abandoned property of historical or recreational value located on state bottomlands. Rather, it defines the relative rights of the State and a "finder" of the property, that is, a person who locates the abandoned property and who might then attempt to claim, recover, or remove it from the bottomlands without the consent of the State.<sup>8</sup> While the second sentence of MCL 324.76102(2) states that "[t]his

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<sup>8</sup> Under the common law doctrine of finds, which is sometimes applied to long lost and abandoned shipwrecks, a finder may seek to acquire title to such property by demonstrating both the intent to own it and acts designed to establish exclusive control and possession of it. *Columbus-America Discovery Group v Atlantic Mutual Ins Co*, 974 F2d 450, 459-460 (CA 4, 1992).

property shall belong to this state," that language, like any other provision of a statute, must be read and construed in the context of the entire statute. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003); *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 538; 565 NW2d 828 (1997). Read in the context of Part 761 as a whole, the phrase "*this property shall belong to this state*" refers back to the State's property interest described in the immediately preceding sentence. (Emphasis added.) The evident purpose of the second sentence is to assign responsibility for the administration and protection of these interests to the DEQ and the Department of History, Arts, and Libraries. Reading the sentences of subsection (2) of MCL 324.76102 together, if a finder encounters abandoned property of historical or recreational value on the Michigan bottomlands of the Great Lakes and seeks to take possession and assert title to it, the State may assert a superior right to the property.

It is important to note, however, that the State of Michigan's legal and regulatory interests in abandoned property on Great Lakes bottomlands, including shipwrecks, are not limited to the provisions of MCL 324.76102(2). For example, federal law also provides that the State has title to certain abandoned shipwrecks of historical value. In the Abandoned Shipwreck Act, 43 USC 2101 *et seq*, the United States "asserts title to any abandoned shipwreck that is (1) embedded in the submerged lands of a State . . . or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register [of Historic Places]."<sup>9</sup> 43

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<sup>9</sup> In *Zych v Unidentified, Wrecked and Abandoned Vessel, Believed to be the Seabird, etc.*, 941 F2d 525, 529 (CA 7, 1991), the Court of Appeals explained that the scope of the Abandoned Shipwreck Act is limited:

Congress only cared to transfer ownership and ensure protection of shipwrecks of "historic significance," House Report at 365, which it estimated to be a mere five to ten percent of the 50,000 abandoned shipwrecks located in the navigable waters of the U.S. House Report at 365. In the ASA [Abandoned Shipwreck Act], the concept of "embeddedness" serves as a proxy for historic value.

USC 2105(a). The title of the United States to any such shipwreck is then by law "transferred to the State in or on whose submerged lands the shipwreck is located." 43 USC 2105(c).

Moreover, regardless of whether the State chooses to assert a possessory right or title to certain abandoned property of historical or recreational value on Great Lakes bottomlands under state law, the State retains broad authority to regulate activities pertaining to all abandoned property on Great Lakes bottomlands, including shipwrecks. MCL 324.76107(1) provides:

Except as provided in section 76108, a person shall not recover, alter, or destroy abandoned property<sup>[10]</sup> which is in, on, under, or over the bottomlands of the Great Lakes, including those within a Great Lakes bottomlands preserve, unless the person has a permit issued jointly by the department of history, arts, and libraries and the department [of Environmental Quality] under section 76109.

Violations of that requirement are subject to criminal prosecution, MCL 324.76107(4) – (7), as well as civil enforcement. MCL 324.76114(2).<sup>11</sup>

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<sup>10</sup> "Abandoned property" means:

[A]n aircraft; a watercraft, including a ship, boat, canoe, skiff, raft, or barge; the rigging, gear, fittings, trappings, and equipment of an aircraft or watercraft; the personal property of the officers, crew, and passengers of an aircraft or watercraft; and the cargo of an aircraft or watercraft, which have been deserted, relinquished, cast away, or left behind and for which attempts at reclamation have been abandoned by owners and insurers. Abandoned property also means materials resulting from activities of historic and prehistoric Native Americans. [MCL 324.76101(a).]

<sup>11</sup> The exception to this permit requirement is limited to recovery of abandoned property that is: (a) outside a Great Lakes bottomlands preserve; (b) not in or associated with a sunken aircraft or watercraft; and (c) recoverable by hand without mechanical or other assistance. MCL 324.76108(1). Under certain conditions, such property recovered without a permit must still be reported to the Department of History, Arts, and Libraries and made available for its inspection to determine its historical value. In addition, MCL 324.76109 prescribes detailed permitting requirements for recovery of abandoned property located on, in, or in the immediate vicinity of and associated with a sunken watercraft. These regulatory requirements are not contingent upon any assertion by the State of title to a sunken vessel.

It is my opinion, therefore, in answer to your second question, that a vessel intentionally sunk in the Great Lakes does not automatically become property of the State of Michigan when it comes to rest on state bottomlands. The State does, however, reserve to itself a possessory right or title superior to that of a finder to abandoned property of historical or recreational value found on state-owned bottomlands of the Great Lakes. Moreover, pursuant to federal law, the State has title to certain abandoned shipwrecks, including those embedded in Great Lakes bottomlands, as well as other historically significant shipwrecks located on Great Lakes bottomlands. In addition, Part 761 provides for the Departments of Environmental Quality and History, Arts, and Libraries to regulate any recovery, alteration, or destruction of abandoned, sunken watercraft, or associated property on Great Lakes bottomlands.

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