

2023 -- S 0417 SUBSTITUTE A

LC001241/SUB A/2

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2023

A N A C T

**RELATING TO WATERS AND NAVIGATION -- COASTAL RESOURCES MANAGEMENT
COUNCIL**

Introduced By: Senators McKenney, Sosnowski, Euer, Pearson, Miller, DiMario, Gallo,
DiPalma, Gu, and Kallman

Date Introduced: February 16, 2023

Referred To: Senate Judiciary

It is enacted by the General Assembly as follows:

1 SECTION 1. Legislative findings.

2 (1) The general assembly finds that the lack of a workable, readily identifiable right of
3 access to the shore by the public has led to confusion, conflict and disputes between those
4 attempting to exercise their rights and privileges to the shoreline and the rights of landowners whose
5 property abuts the shore.

6 (2) The general assembly recognizes and declares the public's rights and privileges of the
7 shore of this, the ocean state, are not only guaranteed in the State Constitution but have enjoyed a
8 long use throughout history to our founding documents, including the 1663 Rhode Island Charter
9 from King Charles II. The general assembly further acknowledges the use and enjoyment of the
10 shore by Native Americans for thousands of years prior to that.

11 From the Rhode Island Charter (1663-1843)

12 "Our express will and pleasure is, and we do, by these presents, for us, our heirs and
13 successors, ordain and appoint that these presents, shall not in any manner, hinder any of our loving
14 subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England,
15 in America, but that they, and every or any of them, shall have full and free power and liberty to
16 continue and use the trade of fishing upon the said coast, in any of the seas thereunto adjoining, or
17 any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish, and
18 to build and set upon the waste land belonging to the said Colony and Plantations, such wharves,

1 stages and workhouses as shall be necessary for the salting, drying and keeping of their fish, to be
2 taken or gotten upon that coast."

3 (3) Rhode Island's historical commitment to the public rights and privileges of the shore is
4 so strong that it was written into our Constitution in 1843 making us unique to other states:

5 From the Rhode Island Constitution (1843)

6 "The people shall continue to enjoy and freely exercise all the rights of fishery, and the
7 privileges of the shore, to which they have been heretofore entitled under the charter and usages of
8 this state. But no new right is intended to be granted, nor any existing right impaired, by this
9 declaration".

10 (4) The general assembly also recognizes that its public trust duty to preserve the public's
11 rights and privileges of the shore is a progressive and evolving doctrine that is expected to adjust
12 to changing circumstances. In this spirit, voters of Rhode Island overwhelmingly supported the
13 reinforcement of these rights and privileges in 1986 following the constitutional convention of that
14 same year.

15 Added to the constitution in 1986

16 "Section 16. Compensation for taking of private property for public use -- Regulation of
17 fishery rights and shore privileges not public taking.

18 Private property shall not be taken for public uses, without just compensation. The powers
19 of the state and of its municipalities to regulate and control the use of land and waters in the
20 furtherance of the preservation, regeneration, and restoration of the natural environment, and in
21 furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of
22 fishery and the privileges of the shore, as those rights and duties are set forth in Article I, Section
23 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not
24 be deemed to be a public use of private property.

25 "Section 17. The people shall continue to enjoy and freely exercise all the rights of fishery,
26 and the privileges of the shore, to which they have been heretofore entitled under the charter and
27 usages of this state, including but not limited to fishing from the shore, the gathering of seaweed,
28 leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their
29 rights to use and enjoyment of the natural resources of the state with due regard for the preservation
30 of their values; and it is the duty of the general assembly to provide for the conservation of the air,
31 land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means
32 necessary and proper by law to protect the natural environment of the people of the state by
33 providing adequate resource planning for the control and regulation of the use of the natural
34 resources of the state and for the preservation, regeneration, and restoration of the natural

1 environment of the state."

2 (5) In 1982, our state supreme court, acknowledging that it was acting in the absence of
3 guidance from the general assembly, defined the public's rights to the shore by the mean high water
4 (MHW) line, derived from an arithmetic average of high-water heights measured over an 18.6-year
5 metonic cycle. The 1986 Constitutional Convention considered and rejected defining the mean high
6 tide line for purposes of public access by this means and, accordingly, amended the constitution.
7 Moreover, since 1982, there has also been a greater awareness by the public, judiciary and
8 lawmakers of the scientific findings that establish the difficulties in using the MHW line as the
9 indicator of public rights to the shore.

10 The general assembly accepts the conclusions of the coastal scientists from the University
11 of Rhode Island who have documented that:

12 (i) The MHW line is not a visible feature that can be seen on the beach like a watermark or
13 debris line. MHW is an elevation, calculated from the average of all the high tides, two (2) per day
14 in Rhode Island, over a nineteen (19) year period and the MHW line is where this elevation
15 intersects the beach profile. It cannot be determined by the naked eye and requires special surveying
16 expertise and equipment, thereby making it impossible for the general public to know where the
17 line is.

18 (ii) The MHW line may change on a daily basis. Because the profile or shape of the beach
19 changes constantly, as waves move sand onshore, offshore and alongshore, the location where
20 MHW intersects the beach likewise changes. Even when the MHW line is found through precise
21 surveying, it does not remain in the same location for very long on a wave-dominated shoreline.
22 For instance, two (2) years of near weekly surveyed beach transects in the town of Charlestown
23 revealed that the position of the MHW line migrated back and forth across a one hundred twenty-
24 five foot (125') swath of the beach profile.

25 (iii) The MHW line is based on measurements collected inside a tide gauge, an instrument
26 that filters out dynamic factors like breaking waves, which causes water to run up the beach. In
27 other words, the measure of MHW is insulated from the dynamic action of the surf, which projects
28 the water to a higher elevation. This results in a pervasive and predominant situation in which the
29 actual water line is significantly landward of the MHW line. Data has shown that, on most days,
30 due to the dynamic action of the surf and other factors, dry sand is exposed below the MHW line
31 for, at most, only a few hours over a tidal cycle. This exposure occurs only at or near the time of
32 low tide.

33 In sum, while the MHW may be helpful for other purposes, such as findings or definitions
34 pertaining to waters and navigation, use of the MHW for determining shoreline access has restricted

1 the public's rights. Retaining the MHW line rule employed by the court in 1982 results in the public
2 only having meaningful shoreline access at or near the time of low tide, if at all, at some locations.
3 Thus, the constitutional right and privileges of the shore delineated in the 1986 Constitutional
4 Convention amendments have become illusory under such a rule.

5 (6) Insofar as the existing standard for determining the extent of the public's access to the
6 shore is unclear and not easily discernable, due to the lack of a boundary that can be readily seen
7 by the casual observer on the beach, resulting in confusion, uncertainty and even confrontation, the
8 General Assembly is obligated to provide clarity. This enactment constitutes the necessary
9 clarification in accordance with Article I Section 17 of the R.I. Constitution.

10 SECTION 2. Chapter 46-23 of the General Laws entitled "Coastal Resources Management
11 Council" is hereby amended by adding thereto the following section:

12 **46-23-26. The public's rights and privileges of the shore.**

13 (a) The public's rights and privileges of the shore are established by Article I, Sections 16
14 and 17 of the Rhode Island Constitution.

15 (b) For purposes of this chapter, the "recognizable high tide line" means a line or mark left
16 upon tidal flats, beaches, or along shore objects that indicates the intersection of the land with the
17 water's surface level at the maximum height reached by a rising tide. The recognizable high tide
18 line may be determined by a line of seaweed, oil or scum along shore objects, a more or less
19 continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or
20 characteristics, or other suitable means that delineate the general height reached by the water's
21 surface level at a rising tide. If there is more than one line of seaweed, oil, scum, fine shell, or
22 debris, then the recognizable high tide line means the most seaward line. In the absence of residue
23 seaweed or other evidence, the recognizable high tide line means the wet line on a sandy or rocky
24 beach. The line encompasses the water's surface level at spring high tides and other high tides that
25 occur with periodic frequency, but does not include the water's surface level at storm surges in
26 which there is a departure from the normal or predicted reach of the water's surface level due to
27 the piling up of water against a coast by strong winds, such as those accompanying a hurricane or
28 other intense storms.

29 (c) Notwithstanding any provision of the general laws to the contrary, the public's rights
30 and privileges of the shore may be exercised, where shore exists, on wet sand or dry sand or rocky
31 beach, up to ten feet (10') landward of the recognizable high tide line; provided, however, that the
32 public's rights and privileges of the shore shall not be afforded where no passable shore exists, nor
33 on land above the vegetation line, or on lawns, rocky cliffs, sea walls, or other legally constructed
34 shoreline infrastructure. Further, no entitlement is hereby created for the public to use amenities

1 privately owned by other persons or entities, including, but not limited to: cabanas, decks, and
2 beach chairs.

3 (d) Any landowner whose property abuts the shore shall, with respect to the public's
4 exercise of rights and privileges of the shore as defined in this chapter, be afforded the liability
5 limitations pursuant to chapter 6 of title 32.

6 (e) The coastal resources management council (CRMC) in collaboration with the
7 department of environmental management (DEM), shall develop and disseminate information to
8 educate the public and property owners about the rights set out in this section.

9 (f) The CRMC in collaboration with the DEM, and the attorney general, shall determine
10 appropriate language and signage details for use at shoreline locations.

11 **SECTION 3. This act shall take effect upon passage.**

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

A N A C T

RELATING TO WATERS AND NAVIGATION -- COASTAL RESOURCES MANAGEMENT
COUNCIL

1 This act would provide that the public's rights and privileges of the shore established by
2 Article I, Sections 16 and 17 of the State Constitution may be exercised where shore exists, on wet
3 or dry sand or rocky beach up to ten feet (10') landward of the high tide line but not where no
4 passable shore exists with abutting landowners afforded limited liability.

5 This act would take effect upon passage.

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