

2022 -- H 8055 SUBSTITUTE A

LC005560/SUB A

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2022

A N A C T

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

Introduced By: Representatives Cortvriend, Filippi, Fogarty, Ruggiero, Carson, Craven,
Handy, Knight, Cassar, and Bennett

Date Introduced: March 25, 2022

Referred To: House 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 property owners
5 along 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 constitution but have enjoyed a long use
8 going back to our founding documents, including the 1663 Rhode Island Charter from King Charles
9 II. The general assembly further acknowledges the use and enjoyment of the shore by Native
10 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 Section 17, shall
23 be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed
24 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, judges and lawmakers
8 of the scientific findings establishing the difficulties in using the MHW line as the indicator of
9 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 MHW for, at
31 most, only a few hours over a tidal cycle. This occurs only at or near the time of low tide.

32 In sum, retaining the MHW rule employed by the court in 1982 results in the public only
33 having meaningful shoreline access at or near the time of low tide, if at all, at some locations. Thus,
34 the constitutional right and privileges of the shore delineated in the 1986 Constitutional Convention

1 amendments have become illusory under such a rule.

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

4 **46-23-26. Recognizable High Tide Line for the Public's Rights and Privileges of the**
5 **Shore.**

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

18 (b) The public's rights and privileges of the shore are established by Article 1, Sections 16
19 and 17 of the Rhode Island Constitution.

20 (c) The public's rights and privileges of the shore may be exercised, where shore exists, on
21 wet sand or dry sand or rocky beach, up to six feet (6') landward of recognizable high tide line;
22 provided, however, that the public's rights and privileges of the shore shall not be afforded where
23 no passable shore exists, nor on land above the vegetation line, rocky cliffs, sea walls, or other
24 legally constructed shoreline infrastructure.

25 (d) Any landowner whose property is subject to the exercise of the public's rights and
26 privileges of the shore as defined in this chapter shall be afforded the liability limitations pursuant
27 to § 32-6-5.

28 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 a definition of the recognizable high tide line for the public's rights
- 2 and privileges of the shore.
- 3 This act would take effect upon passage.

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