

SOS

SAVE OUR SHORELINE

SOS FEBRUARY 2004 NEWSLETTER

Fighting to Preserve Your Riparian Rights

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It may be cold outside, but your SOS Board has not slowed down, and there is a lot to report. Organizational meetings last fall in Tawas, Oscoda and Traverse City now have us approaching 2,000 member households. This spring, we will take our message to Michigan's upper peninsula. In Alpena, Congressman Bart Stupak pledged his support for residents who choose to maintain their beaches, and his H.B. 2687, aimed at forcing the Corps of Engineers to follow Michigan's new beach grooming law, is in committee. In November, SOS representatives spent one hour with Attorney General Michael Cox and his staff in his Lansing office, apprising him of numerous legal issues. In January, the MDEQ granted its first permit to re-



Krygier

move vegetation under the new law on a beach where vegetation actually exists. Then it was on to the Michigan Court of Appeals in Lansing to hear arguments on a case brought to overturn an Oscoda judge's decision that the public has the right to walk on any Lake Huron beach below the elevation of 579.8 feet above sea level. Thanks to our legal fund, SOS was able to file an amicus brief in the case, explaining that shoreline owners own to the water's edge. Speaking of our legal fund, you may recall that we helped Herb and Marion

Kincaid defend a suit brought against them by the Corps of Engineers. The federal judge handling the case has now launched its own inquiry to determine whether the Corps violated federal court rules by bringing the lawsuit without adequate basis. The court is also considering the Kincaid's request for the return of attorney fees under the Equal Access to Justice Act and, if successful, could help to replenish our legal fund.

We have a lot of irons in the fire, but that is what it takes to preserve Michigan's public and private recreational beaches. Thank you for your continued support in this important and historic battle.

Ernie Krygier
SOS President

The End of the Road

By Jay Graebner



If you live near a state, county, or township road that ends at the water's edge, you probably have experienced numerous altercations and/or episodes with excessive noise. Some non-waterfront visitors take it upon themselves to erect docks and hoists, to have late night parties or to race their ATV's past your bedroom window before the crack of dawn. This type of behavior would disturb any

neighborhood, but because it is a waterfront area, these folks believe they have a right to do these things. When confronted about these situations, the response can be ugly and even dangerous.

A solution to these problems may be forthcoming this year. House Bill #4141 was introduced last fall to address the problems associated with road ends. At the request of the

(Continued on page 2)

Michigan Court of Appeals, Representative John Stakoe introduced legislation that would limit the use of this public access to ingress and egress of the lake itself. It would not allow docks, hoists, picnicking, sunbathing, lounging or the overnight mooring of boats.

The House committee on Conservation and Outdoor Recreation held a hearing on the bill in Lansing on October 15, 2003. I attended and testified at the hearing and was pleased to see the support the bill is receiving from the MDEQ, MDNR and the office of the Attorney General, among others. The room was so full that a second area was set up down the hall to handle the overflow. Very high emotions were expressed by both sides of the issue, with the non-waterfront folks outnumbering the waterfront owners at least three to one. An amendment was made during the hearing to limit this version to inland lakes only. A separate bill would follow addressing the Great Lakes. The reasoning was this: there is a very distinct difference on waterfront own-

ership between the two. Inland lake property owners own to the center of the lake, which would include the lake bottom. Great Lakes property ownership extends to the water's edge.

We will be following the progress of this legislation and lending our support for passage of some sort of common-sense use of road ends legislation. When SOS was formed in August of 2001, the issue at hand was our ability to maintain our beaches as beaches, because shoreline property owners own to the water's edge. We wanted to be able to remove vegetation, fill-in swales, move sand that accumulates and groom our property as we have for decades. A lot of progress has been made, and we will not rest until it is over. However, SOS is finding there are many waterfront property rights issues that need to be addressed, and we will be doing what we can to defend those rights by bringing legal action when appropriate and support legislation that would benefit our membership. ■



Shoreline Views

OHIO LAKEFRONT GROUP UPDATE

You may recall that in Ohio, a grass-roots group very similar to SOS, the Ohio Lakefront Group (OLG), is combating government assertions of ownership of Lake Erie's shores. The Ohio Department of Natural Resources (ODNR) has not only asserted ownership, but it has threatened to remove seawalls and other structures unless the riparian owners sign a lease and pay ODNR a fee. With membership of well over 4,000 households, OLG is working toward a legislative solution. On

December 10, 2003, an OLG-sponsored bill passed the Ohio House of Representatives by a vote of 77 to 20. Among other things, the bill would specify that the landward boundary is "where the waters of Lake Erie make contact with the land." Like the MDEQ, the ODNR argues, contrary to Ohio caselaw, that the southerly shore of Lake Erie means the ordinary high water mark (OHWM). Like SOS, OLG recognizes that the burden of "reasonable regulation" might properly extend up to the

OHWM, but state ownership of bottomland ends at the water's edge. Ohio Senate Committee hearings on the bill were scheduled for February 11 and February 18, and OLG took busloads of people to the hearings. An OLG victory will strengthen our cause. Your board is in constant communication with OLG leaders, exchanging information and ideas and offering support. See www.ohiolakefrontgroup.com for more information. Your board encourages your support of OLG in its efforts. ■



Treasurer's Update

By: Jay Graebner

Our financial status is in reasonable shape. The three funds that I oversee currently stand as follows: The legal fund is \$49,412.15 and holding steady because we are not currently involved in any major litigation. We are involved in several smaller issues, as you will see in other sections of this newsletter. This will not be a large amount to have on hand if we do enter into another major legal battle. You may recall in the last newsletter report that in my first year as Treasurer, I wrote legal fund checks totaling over \$219,000. Because of the importance of our legal fund, your board encourages you to consider this fund first for any voluntary contributions to SOS.

Our general fund account currently stands at \$34,600.93. This account pays for all of our general operating expenses. We recently sent out renewal notices to a large

number of our membership and that helped replenish this account. While this amount may seem significant, you must also recall from my last newsletter report that I spent over \$37,000 in my first year as Treasurer.

The last fund is our new SOS-PAC. This account was formed so we could participate in the political arena in Lansing and abide by the Michigan campaign finance laws. In order for any person or entity to donate over \$500 to any one or more politician or ballot initiative, you must form a political action committee (PAC). We also learned that we could not fund this from our existing accounts. The donations had to be solicited for the sole purpose of running a PAC. Once again, many of our members stepped up to the plate and donated funds for this new initiative. In the first five

months we received hundreds of donations totaling \$38,234.28. This money will be used to support candidates who support the mission of SOS. To date, we have already made expenditures of \$9,993.34. So you can see that while \$38,000 might seem like a lot of money, it doesn't take long to spend it among the 148 members of the House and Senate. If you have not yet donated to this new fund, please consider doing so now. This is an election year in the House and we want to help shape the outcome. The power in our membership numbers is enormous. If every member were to give only \$50.00, we could raise approximately \$100,000! Every donation counts. We had suggested donations be made representing one dollar for each front foot of property you own. Isn't your property worth that?

SOSPAC CONTRIBUTION FORM

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Name _____ Address _____ Amount _____
 City _____ State _____ Zip _____

If giving over \$100.00, we also need:

Employer _____ Employer Address _____
 City _____ State _____ Zip _____
 Position with employer _____

Note

We cannot accept contributions from corporations, labor unions or Indian tribes. Donations from a partnership are acceptable with a breakdown by name and address of which partner gave what amount.

SEND TO: SOSPAC P.O. Box 347 AuGres, MI 48703

MDEQ RELUCTANTLY GRANTS FIRST LETTER OF PERMISSION FOR VEGETATION REMOVAL

Despite passage of a state law allowing the removal of vegetation on pilot area beaches that were vegetation-free as of January 1, 1997, the MDEQ did not initially follow the law. In the negotiations surrounding the law, the MDEQ sought to have the law apply only to those with vegetation-free beaches. SOS insisted that those who ceased maintaining their beaches due to threats of the MDEQ and the Corps starting in the year 2000 have the same ability to groom under the law as those who ignored those threats. The compromise, worked out only moments before the bill was voted upon on the Senate floor, involved a benchmark date of January 1, 1997. Beaches which were vegetation-free on that date could be maintained vegetation-free under the law; beaches that were not so maintained were not eligible for "letters of permission" for vegetation removal.

Like the beaches of most SOS members, SOS Director Frank Whalen's beach was vegetation-free on January 1, 1997, so on July 21, 2003, he promptly requested his letter of permission. Despite a ten-day deadline, the MDEQ did not respond until September 3, 2003, denying Frank's permit. Most egregious, however, is the MDEQ's failure to even consider whether Frank had a vegetation-free beach in 1997. We knew the MDEQ was unhappy with its compromise, but we had hoped the agency would follow the law in good faith. The MDEQ had previously granted letters of permission for beaches which had no substantial vegetation, but because Frank's beach currently had vegetation, the MDEQ asserted Frank's request did not qualify under the new law.

Despite some hesitation, Frank ultimately appealed. Aided by your SOS Board, Frank supplied photographs of his beach both before and after January 1, 1997. The pictures told the story that both before and after that date, his beautiful Saginaw Bay beach was vegetation-free. Rather than hold a hearing, the appeals officer encouraged Frank and the MDEQ to talk. Frank stood firm on his request to maintain the entirety of his beach. In October, as part of a meeting with Michigan's attorney general, SOS representatives brought Frank's request to his attention, complete with photographs and a written account.

On January 7, 2004, Frank received his letter of permission to groom his entire beach, as did some of his neighbors that had worked with him. Despite the delay, SOS



January 7, 2004

Mr. Frances W. Whalen
293 Donahue Beach
Bay City, MI 48706

Dear Mr. Whalen:

SUBJECT: DEQ File Number 03-09-0027-P,
T15N, R5E, Section 33, Bay County.

The Department of Environmental Quality (DEQ), Geological and Land Management Division (GLMD) has received additional information and re-evaluated your request to remove vegetation from an area of Great Lakes bottomland located at 293 Donahue Beach, Bay County. Your request was reviewed under the authority of Part 303, Wetlands Protection, and Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

We find your request meets the requirements of Section 32516, and is hereby approved. You may remove vegetation from the exposed bottomland of the Great Lakes in the area of the bottomland controlled by you at 293 Donahue Beach extending from the ordinary high water mark to the current water's edge. All removed vegetation and debris must be disposed of properly outside of any wetland or lake.

This approval expires June 5, 2006.

This activity also requires a permit from the U.S. Army Corps of Engineers (USACE) under federal law prior to any removal of vegetation. Please contact the USACE's Detroit District at 313-226-2218 or www.lrs.usace.army.mil/index.cfm?chn_id=1081 to obtain information and an application for permit.

Great Lakes coastal areas are nesting sites for a variety of birds and mammals. Great care must be exercised to avoid disturbing nest sites. It is important to note that orders developed under Part 401, Wildlife Conservation, of the NREPA, provide the following protection (exceptions to wild birds and animals:

Section 2.1 states, in part:

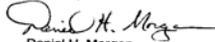
"Unless otherwise specified in this order, a person shall not do any of the following:

- (5) Injure, destroy, or rob the eggs of birds protected by the laws of this state or this order, or molest, harass, or annoy those birds upon their nests.
- (11) Destroy, disturb, or molest at any time any bear, beaver, muskrat, raccoon, squirrel, mink, badger, or rabbit house, hole, burrow, nest, dam, or den which may be used by such animals."

Federal regulations provide additional protection to nesting migratory birds.

If you have further questions regarding beach maintenance activities, please contact me or GLMD staff located at the address or phone number listed below. Additional information is also available on the DEQ website at www.michigan.gov/deq.

Sincerely,


Daniel H. Morgan
District Supervisor

applauds MDEQ Director Steven Chester for his agency's compliance, if reluctant, with the law. Nevertheless, the MDEQ has much work to do to fully comply with the law regarding the ten-day decision provision and issuance of letters without unnecessarily putting citizens through a complicated appeal process.

Armed with this state determination, Frank has now renewed his request for a federal permit from the Army Corps of Engineers (ACOE). The comment period remains open through February 29, 2004. SOS members supporting Frank's request can write through that date. For more information, see "Current Public Notices" on the Detroit District's website. The Detroit District's answer will be a key indicator of the direction of our future actions, and is a key indicator of whether we will have clean beaches for the summer of 2004.

If you haven't yet requested permits for summer 2004 grooming, now is the time to do so. Don't be left in the weeds! If you need help in making your request, or have questions, contact an SOS board member. ■

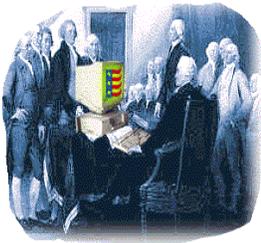


LEGAL CORNER



By Joe McBride

Your legal committee continues to press important issues with respect to real property rights including the right to maintain residential and commercial beach property. Our forefathers, Washington, Jefferson, Hancock, Hamilton, Franklin, and many others



who fought for private property rights, believed they were so fundamental that it became the

cornerstone of the Declaration of Independence and the United States Constitution.

We have all seen examples of when private property rights have not been protected and instead controlled by governments (most third-world countries). It is also interesting to note that China is in the process of amending its constitution to protect private property rights. Their rationale: "the protection of private property is essential to advancing economic reforms that have let millions of Chinese lift themselves out of poverty."

SOS continues to be vigilant and knows that it must strongly oppose any government action aimed at controlling private beaches, just as it must oppose federal actions to control our state's public beaches. This will continue to take many of our dollars to support those who are being threatened; to support legislators who advocate our issues; and to bring actions against our government to stop the assault on our riparian rights.

Less Than Full Victory

Many thought that after the legislative victory in the Michigan legislature, we could enjoy the summer of

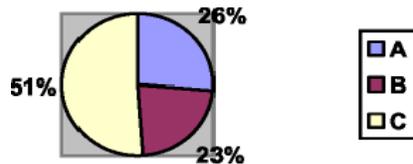
2003 and be able to maintain clean, safe and healthy beaches; and that tourism and beach front property would continue to enjoy improved value for which the state reaps huge tax dollars. But that did not happen. The MDEQ continued to deny permits for vegetation removal, as did the Army Corps of Engineers. Only in the last month have we seen a glimmer of hope that these agencies will follow the unanimous voice of Michigan's legislature and its governor that Michigan's residents be allowed to preserve their beaches.

Surveys

We were curious as to the number of our members who applied for permits from the MDEQ, and if they did not apply, what their reasons were. Here are their responses:

Permit Process Unpopular

Only 4% of those who responded to our survey said they applied for a permit from the MDEQ to remove vegetation, and those that responded said the permits were not granted. For members that did not apply, 51% said if they had applied to the MDEQ, the MDEQ would just send the request to the ACOE, and they do not want the ACOE on their beach.

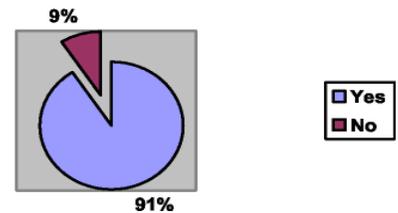


Twenty-six percent (26%) said they do not have vegetation on their beach, and no permit is required to move sand or groom their beach under state law. Twenty-three percent (23%) said they have vegetation, but they do not want the MDEQ on their beach.

Real Estate Professionals Reject Government Assertions About Weedy Land Values

We were also interested in the opinions of professional brokers and appraisers in the Saginaw Bay and Grand Traverse Bay areas with respect to property values and why people purchase shoreline property. These were some of the issues that the MDEQ and ACOE raised in a recent publication, "Be a Great Lakes Steward!" That publication asserts that increased vegetation has no effect on property values. Our survey of real estate brokers and appraisers disclosed a different view.

Ninety-one percent (91%) said property that is weed-free along Michigan's shoreline will sell for more than property full of weeds, and 90% said that it will appreciate at a greater rate as well.



The "Great Lakes Steward" publication also said that "... potential buyers are interested in the Great Lakes shoreline for fishing, bird watching and nature exploration- all activities enhanced by vegetated bottomlands." But the professional experts (100% of those responding) said that fishing, bird watching and nature exploration are not the reasons why buyers purchase shoreline property. The reason they buy shoreline property is so they can swim, boat, view, have sandy beaches, enjoy resale appreciation, and permit their children, grandchildren, and others to enjoy the beach.

(Continued from page 5)

Also, 91% of the experts responding to our survey said that the ACOE's policy of keeping stagnate water and vegetation on the beaches will decrease the selling price of shoreline property, and that tourism dollars for the beach communities will be reduced as well.

Another response we received from the experts said: "We need to enact legislation to protect the beaches as a valuable resource for tourism. People who believe in letting property go to weeds must live in a vacuum."

SOS will utilize this information in formulating a response to the many misrepresentations of fact in the "Great Lakes Steward" publication.

Michigan's Attorney General

We are still very concerned about the ownership position that the MDEQ has taken. They



believe that Michigan holds in public trust all lands waterward of the ordinary high water mark and that we as shoreline property owners must follow their agenda to return the beaches to pre-settlement conditions (beaches to wetlands). Ernie, David, Joe and our attorneys have met with Attorney General Mike Cox, provided him our legal research on the issue, and asked that he issue an opinion on the ownership issue. We anxiously await his opinion.

Amicus Brief (Friend of the Court's Brief)

Our attorneys have filed an amicus brief in Michigan's Court of Appeals to prevent a lower court ruling from taking effect on a shoreline property owner. Essentially, Alcona County Circuit Judge John F. Kowalski said that the public could use the beach area below the high water mark because that property is owned by



the public, and the shoreline property owner cannot prevent another from using that portion of his beach for such activities as sunbathing and other normal beach activity. This is the kind of action SOS must continue to oppose. Does it take money to prepare a legal brief? Of course, but the loss of private property is priceless and deserves our attention. I know of no one who is ready to give up their property rights, but I know of several who are willing to give your property rights away. Your support of the SOS legal fund is imperative. Please make a contribution to protect your property rights in 2004. Just send your check to SOS and note that it is for the legal fund.

Federal Legislation – Bart Stupak

We have also been very busy working with Congressman Bart Stupak on getting a bill introduced and passed by Congress in 2004. This bill would require the



ACOE to follow Michigan's law with respect to beach maintenance. Congressman Bart Stupak attended our recent informational meeting in Alpena and gave his unequivocal support for this legislation. Please send a thank you letter to Congressman Stupak for his courage to do the right thing. In early spring, several members of SOS's board plan to meet with the Michigan congressional delegation to express our support for the bill.

Kincaid Litigation – Update

In our last newsletter, we stated that the U.S. District Court dismissed the case against the Kincaids and that the Kincaids sued the Army Corps of Engineers under the Equal Access to Justice Act to recover their attorney fees, which exceeded \$150,000. Apparently concerned about the actions of the ACOE, the Court has requested, on its own volition, that the parties

present briefs on the issue of whether the ACOE violated Rule 11 of the federal court rules by bringing a baseless suit against the Kincaids.



A February 12, 2004 hearing was adjourned, but we anticipate the hearing will be rescheduled. If the Kincaids are successful, SOS may recover a substantial sum to replenish its legal fund. We encourage the Court to send the ACOE a message that the courts will not tolerate the abuse of our citizens by government with baseless lawsuits.

Agreement with Kelly-Cawthorne

SOS has signed an agreement with Kelley-Cawthorne to represent us in Lansing for 2004. They have consistently been instrumental in promoting our legislative agenda. They are truly professionals of the highest caliber who command great respect on both sides of the aisle. The year 2004 will be a very active legislative year for SOS and their support will be of enormous importance to us. ■



HELP WANTED!

Your SOS Board is currently seeking members interested in participating in SOS leadership.

If interested, please contact any board member.



As **summer 2004 approaches**, we have some hope that this summer may be our first summer of relief from the weeds which pollution, invasive species and low water levels have brought to our beaches. With many “irons in the fire,” and predictions of higher water levels, your SOS board looks forward this spring to the following:

- Determination by the Detroit District of the Corps of Engineers whether it will grant vegetation-removal commensurate with state law;
- Kincaid case decision on attorney fees, which could help replenish our legal fund;
- Moving forward on federal legislation and administrative contacts;

- Michigan Court of Appeals decision on ownership to the water’s edge;
- Response from Attorney General to research inquiry on the issue of ownership to the water’s edge;
- Working toward extension or elimination of sunset provision under state law enacted in 2003;
- Additional organizational efforts, including visits to the Upper Peninsula.

As long as our membership supports our mission, your SOS board of directors is committed to reasserting our right to maintain Michigan’s public and private beaches, and preserving our riparian rights, including ownership to the water’s edge, all while balancing those rights with the needs of the environment. ■

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Membership Application

Thank you for your interest in joining Save Our Shoreline, Inc. Please complete the following information and send it to:

Save Our Shoreline, Inc.
P.O. Box 2307
Bay City, Michigan 48707-2307
989-667-2910
www.saveourshoreline.org

Last Name: _____ First Name: _____

Mailing Address: _____ City: _____

State: _____ Zip: _____ Phone: _____

Email Address: _____ Fax: _____

Name of your beach area: _____
 (i.e. AuGres, Bay City, Caseville, Grand Traverse area, Tawas)

- I wish to join.
- I have enclosed \$50.00 (\$25.00 application fee and \$25.00 annual fee). Please make check payable to Save Our Shoreline, Inc.

Upon receipt of your application, you will receive one membership certificate. Please enter the name you would like to have on the membership certificate. _____

Please be very specific. (Example: Bob Jones, Mr. & Mrs. Bob Jones, or Bob and Mary Jones?)

On behalf of Save Our Shoreline, Inc., we thank you for your support in protecting Michigan’s recreational beaches.



SAVE OUR SHORELINE

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Bob Harvey	Director	423 S Linwood Bch	Linwood	697-3046
John Dwan	Director	146 Little Killarney	Bay City	684-9887
David Kraft	Director	7960 Bay Drive	Sand Point	856-7653
Joe McBride	Director	7838 Port Austin Rd.	Sand Point	856-2572
Frank Whalen	Director	293 Donahue Bch	Bay City	686-2176
Gene Jakubczak	Director	467 S. Linwood Bch	Linwood	697-5386
Michael MacColeman	Director	2345 N. US Hwy 31 N	Traverse City	(231) 938-8888
David Almeter	Director	3804 Lee Point Rd.	Suttons Bay	(231) 271-6554

OUR MISSION:

“To organize waterfront property owners and those with similar interests consistent with the goals of the organization; to preserve and maintain riparian rights, including the right to maintain safe recreational beaches and waterfront areas, both public and private; and to preserve and maintain a proper balance for the coexistence of man and nature upon and near waterfront property.”