

SOS

SAVE OUR SHORELINE

SOS February 1, 2003 Newsletter

SOS IS ON THE MOVE!

- Letter from the President 1
- Governmental Affairs 1
- Legal Corner 2
- A Letter from our Traverse City Organizers 3
- The Science of Weed Growing 4
- Membership Application Form 4
- Portions of Borden Ranch Oral Arguments Before Supreme Court 5
- Excerpts from House Committee Report 5
- The Board 6



HAPPY NEW YEAR!

It has only been four months since we sent to you our last newsletter, but we have a great deal to report to you. Since that newsletter, a key congressional committee has issued a committee report directing the Corps of Engineers to work with us to bring beach maintenance within a general permit; members of the U.S. Supreme Court, in response to our Amicus Curae Brief filed in August of 2002, have favorably commented on their view

of beach maintenance under the Clean Water Act; and the State Legislature has considered a House bill to allow beach maintenance, an effort that triggered over 7,000 letters of support from you, our members.

At the same time, numerous public and private organizations have recently issued resolutions or proclamations of support for beach maintenance rights. As a grass-roots organization composed mostly of homeowners and residents, we have a great deal to be thankful for over the last year, as we have laid an excellent foundation for achieving our goals. But the new year brings new chal-

lenges, and there is a lot of work to be done if we are going to achieve our goal of clean, safe and well-maintained beaches for all to enjoy. Over the next year, I will necessarily be calling on you, as an invaluable member of SOS, to help in the fight to save our beaches from those who would take them from us. In this new year, I pledge to you once again that I will not stop until our public and private beaches may be made clean and safe for the enjoyment of ourselves, our visitors, our children and grandchildren.

**Ernie Krygier,
SOS President**

Governmental Affairs Committee Update

The Governmental Affairs Committee was busy during the election season. We sent out 34 surveys to politicians running for office in districts SOS is active in. Of the 34 surveys sent out we only received 11 back. The overall consensus of those 11 was supportive. Of those that supported our work 7 won in the election.

It was only 2 days after the election that SOS took a bus loaded with members to Lansing for the House of Representatives Hearing on Bill 6418. This Bill would allow for grooming of beaches to a depth of 4 inches. There were approximately 70 of us present at the Hearing and it is fair to say that we dominated the room. Senator elect Jim Barcia and Representatives Brian Palmer and Dale Sheltroun spoke in favor of the Bill.

Save Our Shoreline board members Ernie Krygier, Dave Powers and Joe McBride were allowed to give a 15-minute power point presentation. We believe we made a favorable impression but the clock ran out on this legislature's session and the Bill will be reintroduced in the next session.

On November 26th SOS was belatedly invited to a private and a public meeting of several regulatory and non-regulatory agen-

cies, but at the direction of either Rep. Joseph Rivet or the Corps of Engineers, your president and vice president were not invited. There were also representatives on hand for state and federal elected officials. The meeting was held at the Bangor Township Hall in Bay City. The private meeting lead to the formation of a task force that will attempt to reach a consensus of reasonable measures lakefront property owners may take to maintain their beaches. The task force will be meeting several times starting in January with hopes of a successful conclusion by the end



SOS President Ernie Krygier addresses the troops on bus to Lansing

of March. SOS is disappointed that its president and vice president were excluded from the task force. We are further disappointed that virtually all other task force members belong to environmental organizations. Missing from the task force are representatives from other interest groups, such as tourism, business, schools, local government (impacted by loss of revenue) and public health. Notwithstanding these serious shortcomings, SOS is committed to doing its best to reach a consensus on beach grooming.

SOS is very active on regulatory, legislative and legal efforts to achieve a victory for the reasonable use and maintenance of our beaches but we need you! Don't stop writing letters just because SOS is not asking you to. Write your State and Federal elected officials regularly. We also need you to talk to your neighbors and ask them if they belong to SOS. If they don't belong, let us know where to send them an application. You can also get an application on the Internet at www.saveourshoreline.org. ■



LEGAL CORNER



Editor's Note. This newsletter, and this discussion of the law, is informational, and is not intended to be legal advice. Persons intending to take any action on their beach should consult with their own attorney.

Your legal committee is composed of Pete Frauson, Neal Tiernan, Ernie Krygier, David Kraft, Gene Jakubczak and Joe McBride. The tasks of the legal committee are to bring recommendations to the board of directors and to work with SOS's attorneys to bring a permanent solution to the issues of ownership and beach maintenance.

On the State level, the legal committee is working with SOS's attorneys in researching the law with respect to ownership. Our research today clearly indicates that Michigan shoreline property owners own to the water's edge and are subject to reasonable regulation by the state. The DEQ asserts the State of Michigan owns from the high water mark (an artificial elevation defined by law) waterward. It will likely take legal action against the State of Michigan to quiet title since the DEQ continues to assert they own the beaches. Your board has not yet made a decision on bringing such a suit, but it continues to be an option seriously considered by the board.

STATE LEGISLATION

Also on the State level, we are working with State Senator Barcia – D and State Representative Brian Palmer – R to get a bill passed in 2003 to permit normal beach maintenance. Thanks to your great response to our Call to Action, we estimate that over 7000 letters were sent to State legislators. WOW! We tried to get the bill out of committee during the lame duck session, but that did not occur. We nevertheless have received pledges of support from key legislators, and we are very optimistic that we will be successful in 2003, again with your help. We need each of you to review our web site www.saveourshoreline.org for timely information on this issue and to send emails and letters to encourage your State representatives to vote for its passage.

On the Federal level, we have requested intervention in the Kincaid Case (a Caseville resident who is charged with maintaining her beach); however, that re-



SOS board members at the U.S. Supreme Court

quest was denied. The Court said that SOS had a substantial legal interest and that SOS's impairment of its legal interest is possible if SOS were not permitted to intervene. However the court found that the Kincaids had adequate representation and therefore denied our intervention. What does this mean for SOS? Well, if the Kincaids lose so do we. As you know our legal fund was set up for instances like this to provide legal assistance to a member, on a case-by-case basis, which could result in a win for all of our members.

SOS IN THE U.S. SUPREME COURT

Additionally, we filed an amicus brief with the US Supreme Court in Washington, DC (Borden Ranch) and were invited to oral arguments, which took place on December 10, 2002. Ernie Krygier, David Powers, Mike MacColeman and Joe McBride attended. (The case involved the issue of whether a farmer's use of a "deep ripping" farm plow in a wetland violated the Clean Water Act. SOS filed a brief to let the Court know that the Corps also thinks using rakes and plows on the beach violate the Act.) Their interest peaked when Justice Breyer asked the Justice Department's Attorney, Mr. Minear, "What about raking the beach? You know, there are people here worried about what you're going to do next and say they can't rake the beach in front of their house on the shore of the lake. What about that?" Mr. Minear responded, "The answer again is founded in the agency's regulations which make clear that de minimis disturbances simply do not rise to the level of a violation." Justice Scalia said, "Well, I don't think Congress wanted the homeowner to have to worry about raking." Our counsel, Nancie Marzulla, commented to us later that it is extraor-



SOS Presentation to State Legislators

(Continued on page 3)

(Continued from page 2)

dinary for the Court to mention issues raised in an amicus brief during oral arguments. Obviously, SOS got the attention of the Court. Because Justice Kennedy recused himself from the case, the decision came down 4 to 4, and there were insufficient votes to overcome a victory by the Corps in the lower court. Had Justice Kennedy been able to participate in the decision, we believe the Corps would have lost the case, which likely would have also been a victory for beach owners. Nevertheless, we believe the decision is very instructive. First, it tells us that the law the Corps is relying on to take over our beaches is so unclear that not even the US Supreme Court can agree on what the law means. Second, we believe that if our issue ever reaches the US Supreme Court, there is a good likelihood that the court would rule our beach maintenance does not violate the Clean Water Act. We already know from the oral argument that Justice Scalia agrees with us from his comment: "Maybe they (Congress) didn't think a rake is a point source (of pollution), as I don't." We are including relevant portions of the Supreme Court transcript for your review at the end of this newsletter.

SOS IN U.S. CONGRESS

Additionally, we are working with our Senators and Congressmen as well as the House Committee that is responsible for the Clean Water Act and funding projects for the Army Corps of Engineers. Thanks to the heroic efforts of Jim Barcia, the US House Committee on Transportation and Infrastructure issued language as part of a committee report that recognizes the problems shoreline owners are facing, and directs the Corps to "review section 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act, and the beach maintenance activities of landowners along Lake Huron, to determine if these activities actually constitute an activity that requires a permit under federal or state law." If the Corps finds beach maintenance is a regulated activity, then "the committee directs the Corps of Engineers to work with the property owners (to address) the effects of the beach maintenance activities and bring them within the scope of a general permit." While attending the oral arguments in the Borden Ranch case, Board members Krygier, Powers, McBride and MacColeman met for over one hour with five staffers of the Committee to report on



SOS Board members meet with Nancie Marzulla in her Washington D.C. Office

the status of the Corps' efforts to comply with this directive. The Board members also had a separate meeting, lasting over one hour, with two staff members from Senator Carl Levin's office. All of these Washington, DC staffers were well acquainted with SOS and the issues that face us, and SOS is pleased with the commitment of support we received. A copy of the full committee report as it relates to us is included with a copy of this newsletter.

Your legal committee is extremely proud of what SOS has been able to accomplish. Having only been in existence since July 2002, we have obtained written litigation strategies from two excellent firms, chosen a strategy for ourselves, and embarked on that strategy. In seven months' time, our issue has been addressed both by Congress and peripherally by the US Supreme Court. We have conducted an in-depth analysis of our ownership rights under state law and obtained a written report from our attorneys. We have worked with legislators on developing language for proposed changes to the Clean Water Act and a state law. A bill was submitted to the state legislature, and SOS made a presentation to a committee of the state house. We have engaged the law firm of Kelley Cawthorne to assist us in our legislative endeavors. We are also helping beach owner Marion Kincaid defend against the only known enforcement action regarding beach maintenance. We have accomplished all the above by spending only \$120,000 from the Legal Fund you entrusted to us. ■

A LETTER FROM OUR TRAVERSE CITY ORGANIZERS

We would like to take this opportunity to thank Save Our Shoreline for coming to the Grand Traverse Bay area and assisting the shoreline property owners with their ongoing problems with the Army Corps of Engineers and the Michigan Department of Environmental Quality.

Thank you to the 150 Traverse City area households who have become members of SOS. As in all new organizations, growth is a very important factor. We are asking all members to have a friend or neighbor join SOS. Application forms are on the website at www.saveourshoreline.org, as well as on page 4 of this newsletter..

Tentative plans call for a Task Force meeting here in Traverse City in February, 2003. All members are encouraged to come and express their views. Meetings will be held in Traverse City to keep local members updated. Help is needed to organize phone committees. For questions, call Dave Almeter at (231) 271-6554 or Michael MacColeman at (231) 938-8888. ■

THE SCIENCE OF WEED GROWING
Pollution is Fertilizer on Your Beach

Where are all these ditch weeds in front of our houses coming from anyway? Remember those dandelions you let get ahead of you, and how about the crab grass? All these and other plants give off seeds and some of them are blown across the water and settle to the bottom, others were washed there and the birds transport other seeds. Now, most plants don't grow without fertilizer, especially on rocky and sandy soil that would describe the land of our newly extended beaches. Unfortunately, it is *well fertilized!* In the Saginaw Bay, over 1.2 billion gallons of untreated or partially treated sewage waste—nature's fertilizer— was discharged from January 1 through June 30, 2001. Annualized that would come out to about 1/2 gallon of waste for each square foot of the Bay. If you dumped that much manure on your garden, imagine how your vegetables would grow. Unfortunately, into the entire Lake Michigan/Huron system, there are several tens of billions of gallons of sewage dumped each year. Are the Army Corps and Michigan DEQ sending letters and prosecuting those responsible for this pollution? No, because it is permitted. That means that others are allowed to take the preverbal "dump" on your yard.

This isn't all the fertilizer though. Where do you think all those endless miles of Michigan drainage ditches go? You know water doesn't flow uphill. All the sediment, fertilizers and possibly animal waste flows down the ditch, into the creek, into the river and into our front yards. There is so much of this runoff that there isn't a good estimate of the millions of tons that go into the Great Lakes each year. For those of you who pump water from the lake are you getting the picture of why your grass, flowers and bushes thrived on the pumped lake water! Are the Army Corps and Michigan DEQ sending letters and prosecuting those responsible for this pollution? No, because this is also allowed. Also allowed is the salt, oil, gasoline and other stuff that washes down the storm drain from the streets into ... into your front yard. Then there are the zebra mussels. Studies by the Corps show that these pesky critters store up phosphorus—a fertilizer—and then release it at times of stress. So these zebra mussels can be releasing phosphorus near your beach.

All of this is the result of man settling next to the water and using it. There is a cry to return the area to "presettlement" conditions to stop this pollution. This must mean that those pursuing this course must either be unsettled (don't use toilets, drive cars, eat farm-produced foods.....) or are willing to go somewhere else so they can pollute that place. Unfortunately, the rational solution isn't to go away so everything can be as it was. The solution is to clean up as we go. That means no sewage overflows, untreated drainage ditch discharges or untreated storm sewer discharges. How would this be done? I'll argue that a hundred feet of weeds along the entire shore of the Michigan isn't going to do it. This type of treatment will take an investment for treatment facilities to handle it. Is this possible? The technology is available; only the dollars are needed. Instead of the empty rhetoric calling for "presettlement" day, it's time to develop a plan to finance the real solution or keep letting the millions of gallons flow until our Great Lakes aren't so great anymore. If the Army Corps could build things they could actually help for a change. ■



SAVE OUR SHORELINE
www.saveourshoreline.org

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 Code: _____

Email Address: _____ Phone: _____

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 your 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 your property rights.

**Relevant Portions of Borden Ranch Oral Argument
before U.S. Supreme Court**

QUESTION: What about the raking the beach? You know, there are people here worried about what you're going to do next and say they can't rake the beach in front of their house on the shore of the lake. What about that?

MR. MINEAR: The answer again is found in the agency's regulations which make clear that de minimis disturbances simply do not rise to the level of a violation.

QUESTION: Well, I mean, but they're saying we go out every morning. We like a neat beach and we -- we rake it. And I don't know. Are you going to say that's de minimis or not? They like to rake their beach. They -- they see a lot of muck washed up from the lake. So they go out there and they -- they go rake the beach, and they throw away all the muck. It might be like an oil spill. I don't know. It could be terrible. They clean up the beach, and they say on your definitions what you're going to do is you're going to subject them to permits every time they want to stop -- clean up some environmental disaster.

MR. MINEAR: I think, Your Honor, the question is have they been subjected to that type of -- of regulation, and the answer is no.

QUESTION: Well, they're worried that they might be. My question is, if we decide the case the way you want, are we, in fact, making their worry justified?

MR. MINEAR: I do not think so, Your Honor. And again, I think it's important to remember that what the agency is fully concerned with are those types of serious violations that cause real environmental harm.

QUESTION: Well, I don't think Congress wanted the homeowner to have to worry about raking. I don't think they wanted to place the -- the homeowner at the -- at the mercy of this benign agency who will say, well, there, there, don't worry. We won't get you for raking.

MR. MINEAR: Your Honor --

QUESTION: I doubt whether raking was intended to be covered.

MR. MINEAR: I think, Your Honor, then if they had not intended that there would be enforcement discretion exercised by an agency, they wouldn't have prohibited the addition, any addition, of any pollutant from any point source. They made the net that was covered here quite broad because they realized there's a vast variety in the types of environmental harm that might be caused --

QUESTION: Maybe they didn't think a rake was a point source as I don't.

MR. MINEAR: Your Honor, they -- they have had ample opportunities to change the regulations -- or to change the -- the terms of the statute. The statute has been revised three times, and they've been quite specific in what they've done. The normal farming exemption is a good example. Congress could have simply exempted all farming activities from coverage under section 404 or the Clean Water Act it-

self. Instead, it drew a very specific line in this case and it said that we are only restricting normal farming activities and we're subjecting them to a recapture provision. That recapture provision applies whenever the activity, even if it's simply plowing, results in the change in use of the property and also results in a diminishment of the waters of the United States, if it actually fills --

QUESTION: Mr. Minear, are you saying that an -- an ordinary plow too, like this deep ripper, would be a point source, but what takes that activity out is that it would come under the normal farming exemption?

MR. MINEAR: That's exactly right.

QUESTION: But it is a point source.

MR. MINEAR: That is correct. The -- the plow would be a point source. And this is the reason why Congress enacted the normal farming exemption. It realized it defined these terms quite these terms quite broadly, and it . . . ■

**EXCERPTS FROM
HOUSE COMMITTEE ON TRANSPORTATION
AND INFRASTRUCTURE REPORT**

85

Section 594. Additional assistance for critical projects

Amends section 219 of the Water Resources Development Act of 1992 to add assistance for critical projects.

ADDITIONAL MATTERS

The water levels of the Great Lakes are cyclical, rising and falling as temperature and precipitation patterns naturally change over the years. Currently, the level of the Lake Huron is in a low period, exposing muck and weeds that can be both unhealthy and unsightly. This exposed lake bottom also can serve as a breeding ground for mosquitoes. The Committee is aware that some owners of property on Lake Huron, in Saginaw Bay, have tried to clean up this muck and weeds. As a result of these beach maintenance activities, the Corps of Engineers has issued cease and desist orders and threatened some landowners with penalties under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. In fact, the Detroit District has informed us. "[I]n an effort to keep such unauthorized work from spreading across the entire Saginaw Bay, we secured assistance from the US Attorneys Office to take action against three, randomly chosen parties," threatening criminal penalties.

The Committee is concerned about how the Detroit District chose to address this situation. The Committee directs the Corps of Engineers to examine its enforcement measures, and instead emphasize education and compliance assistance to carry out its regulatory authorities.

The Committee directs the Secretary to have the Secretary's Counsel review section 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act, and the beach maintenance activities of landowners along Lake Huron, to determine if these activities actually constitute an activity that requires a permit under federal or state law.

If, after the review, Counsel for the Army determines that the beach maintenance activities of these landowners are regulated activities, the Committee directs the Corps of Engineers to work with the property owners the effects of the beach maintenance activities and bring them within the scope of a general permit.

The Committee also is aware of problems with an invasive aquatic species known as tamarisk, or salt cedar, that is using 2 to 4.5 million acre-feet of water in reservoirs on the West Coast. The Corps of Engineers' has a great deal of expertise in aquatic plant control through its Aquatic Plant Control Research Program. The Committee encourages the Corps to look for opportunities to use this program to assist with the control of tamarisk.

LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

The Subcommittee on Water Resources and Environment held three days of hearings on projects, programs and policies considered during the development of H.R. 5428: on March 7, 2002; April 10, 2002; and April 17, 2002. During these hearings, testimony was received from 30 witnesses, including Members of Congress, the Administration, project sponsors, national water resources development and environmental organizations, and state and local officials. On February 27, 2002, the Subcommittee also held a hearing



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John Dwan	Director	146 Little Killarney	Bay City	684-9887
Pete Frauson	Director	309 S Linwood Bch	Linwood	697-1991
David Kraft	Director	7960 Bay Drive	Sand Point	856-7653
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Frank Whalen	Director	293 Donahue Bch	Bay City	686-2176
Michael MacColeman	Director	2345 N. US Hwy 31 N	Traverse City	(231) 938-8888
Gene Jakubczak	Director	467 S. Linwood Bch	Linwood	697-5386

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.”