

SOS

SAVE OUR SHORELINE

SOS JULY 2007 NEWSLETTER

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CLOSING THE DEAL

Almost a year ago, your SOS Board embarked on a new road to assure our continued ability to maintain our beaches. It was in April of 2006 that we proposed to meet with MDEQ leaders to forge a compromise solution to the expiring beach grooming law. I am proud to report that after much work, the MDEQ has proposed a general permit which SOS leaders said we could live with. The public comment period is now closed, and we anticipate issuance of that permit any time. For its part, the Corps of Engineers-Detroit District reissued and expanded their Regional Permit so they can quickly grant



Krygier

permission to level or groom beaches if you fill out a simple one or two-page form. With these state and federal permits in place, most of us should be able to groom our beaches—if we jump through a few hoops—for another five years.

Since we last reported to you, a federal judge has said that the Corps of Engineers has no authority to simply set the Lake Huron (or Lake Michigan) Ordinary High Water Mark (“OHWM”) at 581.5 feet above sea level. The new governor in Ohio

said that his state will no longer assert (just like our MDEQ asserted here) that the state owns up to the OHWM.

There’s been a lot of groundwork over the last few years, but finally the pieces are coming together.

If you get this in time, let me remind you of our Annual Meeting in Caseville on Saturday, July 28 at the Caseville High School auditorium at 10:00 a.m.

I wish you all a great summer and look forward to seeing some beautiful Michigan beaches.

Ernie Krygier
SOS President

New Permit and Process for Beach Maintenance Activities

By Chuck Groya



AS MOST of our members are aware, 2003 PA 14, the law that allowed beach maintenance, will fully expire in November of this year. Your SOS Board has been extremely busy working to keep your rights to maintain your historical beach. Many of the Board members and our scientists traveled to Lansing (several times) to testify before the Joint Committee on Natural Resources related to the beach grooming issues. The Committee’s direction to SOS and the MDEQ was to create a Workgroup and come up with a solution.

Three of your Board members volunteered to meet over several months with the MDEQ and some other interested parties, such as Ducks Unlimited and Tip of the Mitt. It turned out to be usually a dozen or more MDEQ members and environmentalists meeting with our three Board members. Our Board members proved to be up to the task. After the Workgroup traveled along the shores of Saginaw and Grand Traverse Bays, and many meetings and correspondence over the last year, the MDEQ proposed a General Permit (GP) for the State

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of Michigan, and the public comment period ended May 6, 2007. According to information obtained from an SOS Freedom of Information Act request, there was broad support for the General Permit, including the EPA, several state departments, and dozens of individuals. We anticipate issuance of the General Permit soon.

The proposed GP has some similarities to 2003 PA 14, but is not the same. To view the full GP, go to the MDEQ's website (www.michigan.gov/deqwetlands), or our website, or check with your local MDEQ office.

SOS tentatively plans to join the MDEQ in putting on workshops to help shoreline property owners understand

the new regulations and assist in filling out the paperwork. The fee for a five-year permit under the GP is going to be \$100. I know none of us wants to shell out any more funds, but a fee has always been in existence for permits. Many members of the workgroup wanted the fee to be much higher, but your Board members stood firm and were able to keep the fee reasonable.

Your SOS Board feels this GP is the best solution to the issues of beach maintenance we could obtain at this time. We are not 100% happy with everything, but that is the way negotiations work. We hope you understand and agree with your Board's recommendation.

Michigan Beaches at Enormous Risk

By Joe McBride

I believe that most shoreline property owners are outstanding stewards and act responsibly to protect our environment and the health of those who visit the shoreline of Michigan. We are reminded daily of the beauty of the shoreline and just how privileged many of us are to live on the shoreline and watch our children and grandchildren playing on clean and healthy beaches.

While most of us paid dearly for the privilege to live on the shoreline (purchase price and annual taxes), it seems like our government, both state and federal, continues to test our resolve. These are the very same taxes that pay for both federal and state agencies that are supposed to improve our water quality and protect our way of life. Yet I see only continuous degradation of our water quality (uncontrollable algae) and a significant impact in our way of life (unreasonable shoreline regulations) and irresponsible and unsci-

entific studies funded by our government with little accountability.

Having served on the SOS Board and as Chairman of the Legal Committee for six years, I thought that I could make a bigger difference than I have. My work was a love of our constitutionally protected rights and for this community. However, the MDEQ and the Detroit District are very formidable organizations. They are fully funded with your tax dollars, and I believe they are a serious threat to our shoreline. I would ask all of you to give of your time to keep our communities safe from economic destruction and our quality of life by continually supporting SOS financially and donating your time to serve on the board. When SOS asks for \$100, send them \$200 - \$500 for that is what I intend to do and if you want to protect your property you should as well. The board works extremely hard for you and the least you can do is to support them financially.

It has been a pure pleasure serving; however, I believe that SOS needs new and more talented members than I, and I also need a breather. Therefore, I will be leaving the board in August and will remain a strong SOS member. I will occasionally write and speak on shoreline issues through various forums. I believe that legislation will be required to balance all the competing interests and that judicial action will be required against the state and federal government in order to save our constitutionally protected rights.

Thank you for your continual support and strong vigilance.



A LOOK AT OUR OPPOSITION

By David Powers

I recall overhearing a conversation of beachowners at a party in October 2001, only two months after SOS was formed. "Aren't these letters from the MDEQ against beach grooming ridiculous?" asked one neighbor. "Yeah," said another. "How are those SOS guys doing; did they go to Lansing and get it resolved yet?"

Six years later, with beach grooming still under fire in Michigan, I am still amazed at how little many of us know about the people fighting against beach grooming. Only by looking at who they are will we understand why the battle has been so hard-fought, and why it will not be over any time soon.

As our materials reflect, SOS first identified the most obvious enemies of beach grooming: The MDEQ and the Corps of Engineers, Detroit District. After all, they are the ones who wrote us letters and came to our beaches, and ultimately filed lawsuits in an attempt to stop a practice that has gone on for generations. Since that time, those organizations have found allies, and this article is about them.

Identifying the enemies of beach grooming is not hard: their names appear on literature you have probably received in the mail. They include:

- Michigan Department of Environmental Quality
- Corps of Engineers--Detroit District
- US Fish and Wildlife Service
- Michigan Sea Grant
- Tip of the Mitt Watershed Council
- Michigan Environmental Council
- Ducks Unlimited
- Michigan United Conservation Clubs
- National Wildlife Federation
- Lone Tree Council

Many of our members are, or have been, members of these organizations, and are surprised to learn that they have vigorously opposed not only beach grooming, but have also vigorously opposed your riparian right of ownership to the water's edge. Therein lies one quandary for SOS: the leaders of our opposition often have no specific mandate from their members for their actions against beach grooming and beach ownership.

PROCEEDING UNDER A QUESTIONABLE MANDATE

The MDEQ and the Corps of Engineers are a perfect example. There is no law that specifically declares beach grooming illegal. In other words, there is no mandate from the public for these agencies to go out and stop beach grooming.

But the leaders of these agencies oppose beach grooming, so they have found laws they consider vague enough to possibly include beach grooming. For example, the Corps of Engineers interprets movement of dry beach sand as the "addition of a pollutant to the waters of the United States," thereby making it prohibited by the Clean Water Act. The MDEQ interprets your beach as an area "commonly referred to as a swamp, bog, or marsh," and therefore a "wetland" under state law. If you disagree, it doesn't matter; the courts have said they will give "deference" to agency interpretations of law. And so government agency leaders empower themselves to do things that might never have been intended by our elected leaders. To this day, we have not found a single state or federal court decision holding that beach grooming violates the law. But the Corps of Engineers and the MDEQ, relying on their own interpretation of vague laws, still act as if they have a mandate from the public to regulate beach grooming.

Many of our members are, or have been, members of environmental organizations like Tip of the Mitt, Lone Tree Council, Ducks Unlimited, or Michigan United Conservation Clubs ("MUCC"). These organiza-

tions have done much to protect our environment and raise awareness of environmental issues. But do their leaders also have a mandate from their members to attack riparian rights? Tip of the Mitt and MUCC leaders obviously think so; they asked the Michigan Supreme Court to give the public the right to hunt, fish, swim, and walk on our private beaches. We believe that many contributors to Tip of the Mitt and MUCC would be surprised to learn that their money was used to attack long-established private property rights.

GOVERNMENT MONEY

In conjunction with having a questionable mandate, the leaders of regulatory and environmental organizations are especially adept at finding money to oppose beach grooming and our riparian rights. It is ironic that our federal Constitution specifically protects private property but is silent on environmental protection, while at the same time we have a huge environmental protection bureaucracy, but no agency dedicated to property-rights protection.

Government money is everywhere being used to attack our riparian rights in many ways. The most obvious government funding goes to the MDEQ, Corps of Engineers, Fish and Wildlife Service, and similar agencies, which often are coordinating their response to beach grooming. Their money is spent in various ways. But other gov-

ernment spending against us is more insidious. Money that our legislators allocate to "education" gets funneled to universities and ultimately to the "Michigan Sea Grant" program to oppose us. For example, when we attacked the flawed MDEQ beach grooming study before the legislature last year, Sea Grant sent a University of Michigan professor to testify in support of the study. Our Freedom of Information Act requests have disclosed that Tip of the Mitt Watershed Council has obtained hundreds of thousands of dollars in government funding over the last few years. When General Motors was sued years ago relating to contamination in the Saginaw River, the government-forced settlement included a fisheries trust fund which was used by our opposition to fund a misleading, but flashy, well-produced pamphlet, which they mailed to shoreline owners across the state. Our opposition is well schooled in finding government money to wage the battle against us, while we depend on voluntary contributions of our members.

TAX-FREE FUNDING

Because SOS seeks to protect its members' constitutionally protected property rights, we do not qualify as a charitable, 501 (c)(3) organization under the federal tax code. When you contribute to SOS, you get no tax deduction. Supporters of Tip of the Mitt and other organizations that attack riparian rights get tax

deductions for their contributions. So for every dollar an SOS member contributes, we estimate that a Tip of the Mitt member must only contribute 70 cents to match what SOS gets.

TEACHING THE CHILDREN

Getting into the hearts and minds of young people has long been a proven method of selling products and ideas. In a recent "wetlands education" visit to the Bay City State Recreation Area through his public school, my fifth grader reports his group being told that plants like cattails perform important functions, but that "SOS is killing the cattails." My fifth grader suggested that SOS should have a representative at the park to set the record straight.

CONCLUSION

Although there are many well-funded and well-organized groups attacking our riparian rights, we can take some comfort that these groups and their leaders do not have broad support or a specific mandate on this issue. On the other hand, SOS has over 3,000 households united on a common cause, and many of us are very active and very passionate. Despite the obstacles, SOS has been very successful; and working together, we can continue that success.

UPDATE

US V KINCAID:**THE OHWM ON SAGINAW BAY IS NOT 581.5 FEET ABOVE SEA LEVEL**

Since 2001, SOS has provided financial support to the Kincaids, a Caseville couple sued by the U.S. Army Corps of Engineers for grooming their beach. After one year of litigation, the government dropped its lawsuit, but the Kincaids requested reimbursement of their attorney fees based upon a federal law, the Access to Justice Act. That request was filed June 19, 2003. About 3 1/2 years later, on November 11, 2006, Federal District Judge David Lawson finally issued a decision denying the motion for attorney fees. In the process, however, Judge Lawson made an important announcement: he said the U.S. Army Corps of Engineers--Detroit District has no authority for setting an administratively determined Ordinary High Water Mark. ("OHWM"). Many of you may have received letters from the Corps of Engineers telling you

that the OHWM on your Lake Huron or Lake Michigan beach is 581.5 feet above sea level. Judge Lawson rebuked that assertion. Here's what he wrote:

However, the concept of an administrative OHWM finds no support in federal law. Moreover, it appears that the Corps has chosen the highest level reached by Lake Huron in decades as its selection of an "ordinary" high water mark. That choice violates the traditional notion of the concept of an *ordinary* high water mark, which was intended to account for the day to day fluctuations of the levels of oceans, and later lakes and rivers, if not due to tides then as a result of wind and weather. Moreover, the selection of an extraordinar-

ily high lake level as the administrative OHWM alone defies the plain meaning of the term "ordinary" . . . the historic maximum lake level cannot constitute an "ordinary" high water mark as that term is defined by the cases and regulations or the common-sense meaning of the term's constituent words."

The Corps of Engineers did not appeal this holding, and we do not know if the Corps of Engineers will actually change its 30+-year-old policy of using the administrative OHWM of 581.5 to determine its jurisdiction, but keep this decision in mind if the Corps tells you your Lake Huron or Lake Michigan OHWM is 581.5 feet above sea level.



The Ohio Lakefront Group's ("OLG") class action suit against the State of Ohio has received class certification, and as a result, virtually every Ohio Lake Erie shoreline owner is a party to the lawsuit. Attempts by the state and environmental groups to remove the case to federal court have failed, and motions for summary judgment (requests for the Judge to decide the case immediately without a trial) were due May 30, 2007.

After making a campaign promise of support, Ohio's Democratic Governor Ted Strickland announced on July 13, 2007 that his administration will honor shoreline owners' deeds, and will no longer argue that the state owns up to the "ordinary high water mark." But the state's Attorney General has said he will continue to defend the lawsuit based on the Public Trust Doctrine, according to a 7-14-07 article in the Toledo Blade. For more information, view the OLG's website at www.ohiolakefrontgroup.com.

INTERNATIONAL JOINT COMMISSION APPOINTS

SOS VICE PRESIDENT

TO PUBLIC INTEREST ADVISORY GROUP TO WATER LEVELS STUDY

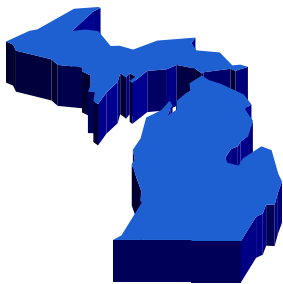
SOS Vice President David Powers was recently appointed by the International Joint Commission to its Public Interest Advisory Group (“PIAG”) to the International Upper Great Lakes Study. The role of the PIAG is to provide advice and engage public involvement in the study. The five-year study will seek to determine whether the regulation of Lake Superior outflows can be improved to ad-



Powers

dress the evolving needs of users on Lakes Superior, Huron, Michigan, and Erie. The study will investigate physical changes in the St. Clair River as one factor that might affect water levels and flows. The study may explore remediation options.

If you have any thoughts about the study you would like to share, contact Dave at dpowers@smpklaw.com.



CORPS OF ENGINEERS REISSUES AND EXPANDS REGIONAL PERMIT FOR MICHIGAN

On June 29, 2007, the Corps of Engineers reissued and expanded a Regional Permit for Michigan which will extend to May 14, 2012. The Regional Permit contains provisions for leveling of sand, grooming of sand, and sand paths. The new Regional Permit replaces a Regional Permit for Leveling of Sand issued on May 20, 2003, but improves upon it in two important ways: first, it specifically provides that leveling “may be performed as often as necessary.” It also authorizes the Corps to authorize work based on photographs without a site visit. Under the new and old permit, upon the submission

of a simple application, the Corps can authorize the movement of up to two cubic yards of sand per lineal foot of property. See the actual permit for other limitations.

New to the Regional Permit is the Corp’s ability to authorize “Grooming of Sand” of up to 25 cubic yards per lot, which can be done as often as necessary. Sand can be raked, dragged, or pulled, but may not exceed four inches below the surface. Under both provisions, the work can be authorized only above the water’s edge, and only if the area is a non-wetland that under normal circumstances has no vegetation.

The Regional Permit also authorizes sand paths up to six feet in width. Whether you want to level sand, groom sand, or construct a path, you must still complete a simple application and receive consent, but unlike the previous Regional Permit, the new version allows the Detroit District staff to authorize the work based on dated photographs in lieu of a site visit. The Detroit District contemplates authorizing this type of work within five to fifteen days of an application. For more information, see the full text of the Regional Permit posted on our website.

After Glass v Goeckel



In our last newsletter, we reported that we helped Richard and Kathleen Goeckel file a request for appeal to the U.S. Supreme Court. We had hoped that court would review and overturn the poorly reasoned Michigan Supreme Court decision that for the first time gave the public rights to use our beaches. Unfortunately, that request was denied. The denial does not necessarily mean that the U.S. Supreme Court approves of the decision, or that it was correctly decided; it could just mean that the court is too busy with other matters to take up the issue at this time. If more state courts decide to cast aside long-established property rights in favor of granting new public rights, the high court may later be persuaded to take up the issue.

One possible opportunity may come out of a pending case in Ohio. As many of you know, the Ohio Lakefront Group (an Ohio group similar to SOS) has filed a class action lawsuit against the State of Ohio to determine the title to the Lake Erie shores. The State says they own the shores, and it requires that shoreline residents sign a "lease" and pay a fee before conducting any work on the shore. The residents say they own it, and

the State cannot require that they lease their own land back from the state. The court recently granted class action status, and the lawsuit will now be binding on both the State and virtually every Lake Erie shoreline owner. It will take several years, but this case may also present itself to the U.S. Supreme Court. In any event, a decision from the Ohio Supreme Court on the issues of ownership and public trust--good or bad--will be very influential in the long-term legal battle for our beaches. SOS supports the Ohio Lakefront Group in its lawsuit, and we urge you to offer whatever support you can offer our friends in Ohio.

Your SOS Board of Directors continues to evaluate other options to respond to the unconstitutional confiscation of our exclusive-use rights by the Michigan Supreme Court. As always, our options are largely determined by your continued support, and especially support for our legal fund. One thing is clear: the fight for Michigan's beaches is far from over, and the poorly reasoned decision of the Michigan Supreme Court in *Glass v Goeckel* may not stand the test of time.

Membership Application

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

Save Our Shoreline
 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.)

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, we thank you for your support in protecting Michigan's recreational beaches.



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Telephone: (989) 667-2910

SOS OFFICERS AND DIRECTORS:

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Frank Whalen	Director	293 Donahue Bch	Bay City	686-2176
Brian Eggers	Director	693 S Linwood Bch	Linwood	754-9896
David Almeter	Director	3804 Lee Point Rd	Suttons Bay	(231) 271-6554
George Sarris	Director	2305 N US Hwy 31 N	Traverse City	(231) 938-9741
William Putman	Director	9862 N Shore Dr	Pigeon	(989) 453-7144

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.”