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December 14, 2016

Kristi DeFoe, Project Manager
Corps of Engineers Detroit
District Regulatory Office
477 Michigan Avenue
Detroit, MI 48226-2550

Re: File No. LRE-1990-2000050-S16
Proposed Reissuance of Regional Permit for Minor Work,
Structures and Discharges of Dredged and Fill Material
in Michigan

Dear Ms. Defoe:

This firm represents Save Our Shoreline, an organization composed primarily of owners of homes and cottages along Michigan's Great Lakes shoreline. We write to comment on the above referenced proposal. Specifically, we propose that for your Regional Permit, you simply authorize any work permissible under Michigan's Beach Grooming Law, 2012 PA 247. We believe that result is mandated by 33 CFR 320.4(j)(2) and (4), which requires that you typically defer to state permitting decisions.

Some background is in order. Your agency asserts that it is authorized to regulate beach grooming—but not mowing—under the Clean Water Act. We disagree with that conclusion, and explained our position in our *amicus* brief filed with the U.S. Supreme Court in the case of *Borden Ranch Partnership*.

In any event, Nationwide Permit (NWP) 18 authorizes discharges (outside of a wetland) such as movement of sand of up to 25 cubic yards; however, anything over 10 cubic yards requires a "pre-construction notification." Your proposed Regional Condition to NWP 18 (see File No. LRE 2016-6 Public Notice dated June 15, 2016) seeks to limit that work to 40 feet of frontage

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and no more than 1000 square feet. We commented in opposition to that proposal, and are not aware of your final determination.

Your proposed Regional Permit—which should not be confused with the NWP Regional Conditions—allows additional work. Category S allows up to 2 cubic yards of sand leveling per lineal foot of frontage, or up to 100 cubic yards for a typical 50 foot wide beach. Category T allows grooming of sand up to 4 inches in depth. These permissions are conditioned on the site being "a non-wetland area that under normal circumstances vegetation is non-existent, very sparse, or consists predominantly of plants not typically adapted to wetland conditions." The permissions are additionally conditioned on a "site inspection" performed by your office. This "site inspection" requirement stands at odds with the purpose of a Regional Permit, which is to allow deminimus activities without the cost and delays from the need to get permission, and should, at a minimum, be eliminated as an unwarranted intrusion on property rights contrary to 33 CFR 320.4(g).

Your agency last issued its Regional Permit in May 2012. Michigan has since addressed shoreline regulation by way of statute. Under 2012 PA 247, the state authorizes "[l]eveling of sand, removal of vegetation, grooming of soil, or removal of debris, in an area of unconsolidated material predominantly composed of sand, rock, or pebbles, located between the ordinary high-water mark and the water's edge." The only exception relates to the St. Clair flats area.

This multi-layered federal and state regulatory framework is unnecessarily confusing, especially for a typical shoreline owner. In fact, it has been our experience that most shoreline owners simply do not understand this labyrinth of regulations, and cannot understand them even when provided with a thorough explanation. What they do know is that they want to maintain their beach in the manner to which they have become accustomed, without interference or threats from their government.

It is our belief that the Detroit District's regulatory effort over Great Lakes beaches since 1999 has actually resulted in MORE harm to the Great Lakes ecosystem than if citizens were left alone. In our view, the result of that regulatory effort has been the inundation of Great Lakes shores with the invasive,

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non-native plant *Phragmites*, which has caused greater harm to our shores than any beach grooming effort ever might have. We view with interest a similar environmental fiasco now occurring in Iowa as a result of another government program—CREP—which has led to the proliferation of Palmer Ameranth in that state.

In our view, history has shown that the regulatory effort to curtail grooming during the low water period beginning in the late 1990's was ill-informed. Premised on the faulty prediction that native vegetation would populate the exposed shores and thereafter persist, the regulatory community—including the Detroit District—failed to anticipate that *Phragmites* would be the ultimate beneficiary of its policies, and that exposed vegetation would not survive re-inundation.

As indicated above, this is the public's first opportunity to comment on your proposed Regional Permit since the passage of 2012 PA 247. We agree with the requirement in 33 CFR 320.4(j)(2) and (4) that your agency should typically defer to state regulatory decisions. As a result, we believe the Detroit District should, for its Michigan Regional Permit, simply authorize any activity permitted under 2012 PA 247. The state of Michigan has, after substantial and highly publicized debate, considered the claimed benefits and effects of your regulatory effort, and come down on the side of beach grooming. Under your regulations, the state's determination should typically prevail. We submit that given its experience over the last 17 years, the Detroit District is unable to identify overriding national issues and explain why they are overriding in importance, all as required by 33 CFR 325.2(a)(7).

Our view is that a review of the public interest factors supports deference to 2012 PA 247. Please consider our review of these public interest factors as set forth in our letter dated July 29, 2016 regarding file number LRE 2016-6 (copy enclosed). By simply adopting the provisions of Michigan law for your Regional Permit, you will greatly simplify the regulatory framework so that it can be understood by the regulated public; you will reduce the cost burden to the government; and at the same time, you will protect the environment.

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Please include us on any distribution list for your determination.

Respectfully Submitted,

Smith, Martin, Powers & Knier, P.C.



By: David L. Powers
Attorneys for Save Our Shoreline

DLP/sh
Enc.
cc: Save Our Shoreline