

**PRESENTATION IN SUPPORT OF
LEGISLATION TO PRESERVE
BEACH MAINTENANCE IN MICHIGAN**

PRESENTED BY:



a Michigan nonprofit membership corporation

February 1, 2003

INTRODUCTION

Founded in August 2001, Save Our Shoreline, Inc. is a grass roots Michigan nonprofit membership corporation which has grown to nearly 1,650 member households as of February 1, 2003. Originating in Bay City, the core membership composition has quickly expanded from residents of the Saginaw Bay (and others that support them) to most of Michigan's Lake Huron shoreline, and now also includes a substantial membership from the Grand Traverse Bay region. The group was formed after new, coordinated enforcement efforts by the Michigan Department of Environmental Quality and the United States Army Corps of Engineers (ACOE) to preclude beach maintenance which beach residents have conducted for decades. Save Our Shoreline has formed a voluntary legal fund which its members have generously supported, and SOS is engaged in litigation with the United States Army Corps of Engineers. This litigation includes the filing of an amicus brief with the United States Supreme Court in a case which may affect beach maintenance rights, and a request to intervene in the Kincaid case currently before the United States District Court in Bay City, Michigan. SOS has also employed attorneys and has researched the issues of ownership and regulatory control of beaches in the State of Michigan. The 1,650 member households of SOS strongly support

legislation to preserve the rights of property owners to mechanically groom their beaches.

BACKGROUND

Michigan residents, including those around the Saginaw Bay, have groomed and maintained their beautiful sugar sand beaches for decades without incident. Beach maintenance has been customary to remove sands from lawns blown by winter winds (see Exhibit 1), algae and dead shells from zebra mussels (see Exhibit 2), other historical debris, such as alewives in the late 1960's, and nuisance beach vegetation (see Exhibit 3). At least for the Saginaw Bay, private beaches constitute a small fraction of the Saginaw Bay shoreline, most of which is state owned, or vastly undeveloped, agricultural or large rural weed areas. (See Exhibit 4). It is the shallow marshy areas which tend to be undeveloped, while the higher areas with little or no traditional vegetation have been developed for shoreline residential use, with typical lot frontage ranging from 40 feet in width to 100 feet in width. Most of these residential areas were developed decades ago, and traditionally have been used and known as "beachfront areas."

The DEQ set out to change all that in the spring of 2000. In a "Briefing Report" revised on May 22, 2000, the DEQ unilaterally established a policy to "protect coastal marshes"

between the actual shoreline and the so-called ordinary high water mark, which is an artificial line defined by statute. (See Exhibit 5). The Briefing Report relies on a weak legal analysis as its authority for the DEQ's new policy. The DEQ then set out on a course to, in our view, indoctrinate legislators, send out letters to owners, and then engage in enforcement action.

And send out letters they did--hundreds of them, all along the developed portions of the Saginaw Bay and beyond. The letters incorrectly assert that the State of Michigan owns the beaches in times of low water, specifically "those areas lakeward of the ordinary high water line, defined as areas below elevation 580.5 IGLD85 for Lake Huron." The letters further advise:

Staff of the MDEQ and the Michigan Department of Natural Resource (MDNR) will be monitoring beachfront areas and taking enforcement action when further activities violate State regulations. Minor offenses are a misdemeanor punishable by a fine of up to \$500. Penalties for unauthorized filling, dredging, or grading are more severe (emphasis added).

(See Exhibit 6). Monitoring did occur, and shoreline residents became intimidated as they observed planes and helicopters fly along the beachfront, and DEQ personnel with cameras and clipboards came out to the beaches. There next followed numerous beachfront confrontations. Scores of residents were met, literally, out on their beaches by DEQ representatives, and they

were threatened with criminal action if they did not "cease and desist" maintaining their beach.¹ These were not isolated, but were widespread. Residents were told they did not own the beaches, and in some areas government representatives even planted stakes marking the asserted line of ownership. (See Exhibit 7). The DEQ has issued at least two citations (see Exhibit 8), but to our knowledge, none has been successfully prosecuted. Despite nearly two years of enforcement efforts, including public hearings, the DEQ reported in a May 15, 2002 briefing report that "opposition to government regulation of [so called] exposed bottomlands remains strong."² (See Exhibits 9 and 10). A July 2002 walk of several miles from Linwood to the Bay City State Recreation Area by SOS Vice President David Powers revealed about 90% of all beaches were still maintained to some degree.

Unless this issue is resolved before spring of 2003, SOS fears that the standoff between DEQ officials and shoreline residents will escalate to a crisis level. The 1,600 member households of SOS appear before this committee today not only to express our displeasure for the unjustifiable actions of the

¹ Because neighbors traditionally banded together to hire or conduct beach maintenance, these confrontations often involved groups of people.

² Indeed, several local governmental units and other organizations have passed resolutions opposing the policies of the DEQ, and supporting beach residents in their efforts to maintain their beaches. (See Exhibit 9).

DEQ; we are here to demonstrate to you that the DEQ's new offensive against shoreline residents has no basis in law; that it has usurped this legislature's power to determine state policy; and that the conversion of Michigan's beaches to wetlands is bad public policy.

BEACHES AND MICHIGAN'S SECOND LARGEST INDUSTRY: TOURISM

According to the U.S. Army Corps of Engineers in a 2002 report, tourism is our nation's largest industry, its largest employer, and its largest earner of foreign exchange (see Exhibit 11), and beaches are the largest factor in tourism. See www.virginiashoreandbeach.com/valu.htm. In Michigan, tourism is second only to our auto industry. With over 3,000 miles of shoreline, Michigan cannot ignore the economic value of its beaches. For example, Caseville resident Margaret McBride, using a statistical model employed by Donald Holeczek, director of the Michigan State University Travel, Tourism, and Recreation Resource Center, estimates that Caseville's public beaches are worth about \$18 million annually to the Caseville community. (See Exhibit 12). SOS believes the tourism industry in the Traverse City area, centered on that area's beaches, is at least \$500 million annually, and statewide tourism equates to over \$12 billion annually. At an SOS presentation to State Senator Kenneth Sikkema, chairman of the Great Lakes Task Force, a

representative of the Bay County Convention and Visitor's Bureau testified that the absence of a useable beach (which has been converted to weeds by the DEQ) at the Bay City State Recreation Area severely hampers the Bureau's efforts to bring tourists to Bay County.

PUBLIC HEALTH AND SAFETY

Wetlands policy takes on a different light when wetlands abut densely populated areas. Any student of history or land use planning recognizes the link between standing marsh waters and disease, and mankind's historic taming of marshes in populated areas in favor of the public health. Hundreds of years before the birth of Jesus Christ, the Romans drained marshes in favor of public health, and that practice has continued to this day in the name of public health and safety. It comes as no surprise that the Michigan Department of Community Health has urged the elimination of standing water to protect against the deadly West Nile virus (see www.Michigan.gov/mdch). (See Exhibit 13).

In contrast to this policy to protect public health, the DEQ threatens legal action against anyone who takes action to eliminate standing water on his or her beach. Dan Morgan, of the DEQ's Bay City office, was quoted as saying "a wetland tends not to be an issue for mosquitos breeding." (See Exhibit 14).

Those knowledgeable in mosquito control disagree. In an October edition of "Currently Speaking," a television production of Delta College, the Director of Saginaw County's mosquito control program advised that wetlands are indeed a legitimate concern for the spread of West Nile virus. Dale Lipor, Health Officer of the Huron County Department of Community Health, said, "any kind of stagnant water can be a breeding ground for mosquitos," and that "it's important that homeowners remove the stagnant water that they can find around their homes." Bill Wallace, director of the Tuscola County Mosquito Abatement program, was quoted as saying, "The marsh wetlands do produce a lot of mosquitos...it's a trick to control them near the [Saginaw] bay." When confronted with Dan Morgan's assertion that a wetland "tends not to be an issue for mosquitos breeding," these professionals disagreed. "The argument doesn't hold a lot of water," Wallace was quoted as saying. Bay County Mosquito Control Program Director Tom Putt noted that beaches don't have "enough predators to control the mosquito population there. Not many insects or other animals eat mosquito larvae," he was quoted as saying. Both Putt and Wallace, when interviewed, agreed that "the small puddles along the shoreline don't provide enough wave or ripple action" to prevent mosquitos from laying eggs.

It is not only the standing water which threatens the public health. Tall weeds and grasses, which the DEQ seeks to force upon beach owners, is also a threat. "Mosquitos hang out in the grassy brush area during the day," said Steve Halstead, who is an Equine Veterinarian for the Michigan Department of Agricultural. He was quoted as saying that "homeowners need to make sure they eliminate tall grasses and weeds by their homes and that they keep their grass mowed regularly around their homes." (See Exhibit 14).

According to the Centers for Disease Control and Prevention (CDC), the West Nile Virus has already killed over 40 people in Michigan, and there have been 467 suspected or confirmed infections from the virus in Michigan. Further, Michigan ranked second in the nation, behind only Illinois, in terms of total West Nile cases. Apart from humans, 110 species of birds have been affected by the virus, including the Bald Eagle, Golden Eagle, Red Tailed Hawks, Great Horned Owls, Snowy Owls, and others. What does the CDC recommend? Like local and state authorities, the CDC recommends that residents limit the places available for mosquitoes to lay their eggs by eliminating standing water sources from around your home.

Standing water and vegetation along the Saginaw Bay often consists of or results from such pollutants as fertilizer

runoff, raw sewage from inadequate treatment facilities, and decay of increased organic materials. See Miller, "Balance Needed on Wetland Weeds," Bay City Times, October 11, 2000. (See Exhibit 15). Zebra mussels contribute to this problem in many ways. (See Exhibit 16). Bacterial infections are the result. Both the sponsor of this bill, Brian Palmer, and this presentation's author, David Powers, attribute sores which appeared after swimmers used the beach near their homes in 2002 to this standing water. A photo accompanies this report. (See Exhibit 17).

Clearly, the public health authorities disagree with Morgan's assertion about the risks of the DEQ's policies to Michigan's citizens. In addition to those factors, beach vegetation suggests other risks for families, such as rodents, snakes, and other undesirable and dangerous things. It is contrary to sound public policy to prohibit shoreline residents from keeping their homes safe for themselves and their children by ridding their beaches of nuisance vegetation and standing water.

TAX VALUES AND THE LOCAL TAX BASE

Common experience evidences the fact that people tend to construct homes where beaches, rather than wetlands, predominate, because most people prefer beaches over wetlands.

SOS Director David Kraft, a real estate broker in the Caseville area, in an unscientific comparison, considered the value of homes in three types of areas: beachfront homes with no vegetation; those with some vegetation; and those with a lot of vegetation. Not surprisingly, homes with clean, weed free beaches commanded the highest value. (See Exhibit 18).

The involuntary conversion of Michigan's beaches to coastal wetland will have a profound effect on local tax revenues and local economies. As evidenced by the analysis above, and by the obvious fact that people tend not to congregate and live near established wetlands, the market will not support current values if the DEQ is successful in the destruction of Michigan's beaches. This would result, and SOS believes already has resulted, in lower values for existing shoreline properties, which will correspond to lower assessed values and lower tax revenues. Especially in times of a sluggish economy and local budget challenges, Michigan's coastal communities cannot afford the destruction of its beaches.

THE VALUE OF COASTAL WETLANDS

The DEQ and environmental organizations argue that coastal wetlands are invaluable, and that the DEQ's actions are justifiable and necessary to preserve those areas. SOS disagrees. As set forth below, evidence shows that much of the

vegetation recently seen on Michigan's coastal shoreline is de minimus and will be temporary; and much of it is the unnatural result of pollutants and changes effected by invasive species.

The DEQ's recent enforcement efforts have been widespread and indiscriminate, and include lower lying more densely vegetated areas, and higher, dryer areas alike. As indicated above, of the approximately 20% of the Saginaw Bay's shoreline which has seen residential development, most has, predictably, been on high and dry ground, which has not traditionally seen vegetation. For those areas that see vegetation, that vegetation is quite limited to a few feet. SOS submits that the cost of forcing the involuntary growth of vegetation in established residential and tourist areas far exceeds the environmental benefits of growing vegetation on those beaches, especially in comparing those areas with the vast acreages of wetlands already protected.

The newly seen vegetation will also be temporary. In 2001, Lake Huron levels were at a low point not seen since 1965. (See Exhibit 19). As the lake is said to have a 30-35 year cycle, we expect lake levels will return, as records show they already have. As vegetated areas become inundated with water, the vegetation will, over time, disappear. Beach owners should not

be forced to deal with nuisance vegetation which will ultimately disappear anyway.

SOS also questions whether the vegetation we see today is in fact historically natural. As environmentalist Terry Miller states:

Nothing produces a nutrient-rich shoreline more than one repeatedly spiked with human sewage, regularly fed phosphorus from industry and periodically fed nitrogen from the runoff of thousands of farm fields that surround the bay or border drainage ditches that empty into the bay. Of course throw into the mix alien species like zebra mussels, which allow deeper penetration of the life giving sun, and we have a creative soup that is ripe for seeding.

(See Exhibit 15). That is the observation of many shoreline owners, too.

To demonstrate Miller's point, we need not look further than the Bay City State Recreation Area, whose beach today is simply a vast marsh. It was not always that way. In 1930, the beach saw 1,565,903 visitors, 18% of the entire statewide park system, and the park was ranked #1 in Michigan State Park attendance. In 1958, the park was ranked 4th in statewide attendance with 834,000 visitors. (See Exhibit 20). In 1965, the State Park was still popular, and a picture from the "Bay City Centennial 1865-1965 Picture Album" shows a vast, beautiful, and vegetation free Bay City State Park beach. (See Exhibit 21). That is not the picture of the beach today.

Instead, weeds cover the beach (see Exhibit 21), and despite a community effort³ urging the DEQ to restore virtually the entire beach (see Exhibit 22), the DEQ remains recalcitrant. SOS submits that those weeds are not the natural state of affairs, and they demonstrate the absolute failure of DEQ policy to protect our waters. Perhaps the recent passage of Proposal 2 will help our Saginaw Bay beaches. While we are here, we urge this committee to tell the DEQ to clean up the Bay City State Park beach for the benefit of the citizens of Bay County and for all of Michigan.

ENFORCEMENT

As indicated above, the DEQ's efforts to convert Michigan's beaches to coastal wetlands is unpopular. Further, enforcement efforts have not deterred those who believe they need to maintain their beach to protect their lawns, their property values, the safety of themselves and their children, and their way of life. All three shoreline owners recently sued by the United States Army Corps of Engineers are retirees, two of which were at one time union auto workers. They are just ordinary, law abiding citizens faced for the first time in their lives with being confronted by the awesome power of the state and

³ State Representative Joe Rivet, then the Director of the Bay County Convention and Visitors Bureau, chaired the Citizen's Advisory Committee that developed a 1994 Master Plan for the Bay City State Park.

federal government. Will the DEQ continue to make criminals and lawbreakers out of our community's hardworking, law abiding citizens and retirees? SOS submits that such a policy for Michigan is ill advised.

DEQ POLICIES ARE CONTRARY TO LAW

In its May 22, 2000 Briefing Report and numerous newspaper articles, the DEQ asserts that the basis for its actions is state ownership of all beaches below an elevation of 580.5 feet above sea level delineated in the Great Lakes Submerged Lands Act, MCL 324.32501. That representation has no basis in law, and SOS urges this committee to reject out of hand this false notion.

In 1930, following another time of low water in 1926, the Michigan Supreme Court in Hilt v Weber, 252 Mich 198 (1930), after being briefed by the State's Conservation Department, in a landmark decision determined "for all time" that those that abut the Great Lakes own to the water's edge. (See Exhibits 23 and 24). The dissenting judge in that case summed up the effect of this monumental decision: it was "far reaching, for it constitutes the Michigan shoreline of 1,624 miles [in 1930] private property, and thus destroys for all time the trust

vested in the state for the use and benefit of its citizens."⁴ As recently as March 2001, Attorney General Jennifer Granholm's office recognized the continued authority of this decision.⁵ (See Exhibit 25).

The DEQ next reasons in its May 22, 2000 Briefing Report that other existing provisions of law, such as the Great Lakes Submerged Lands Act, The Wetlands Protection Act, or the Shorelands Protection Management Act "could" address this issue. By its very terms, the Great Lakes Submerged Lands Act applies only to state owned lands, which under the authority of Hilt do not include beaches. The DEQ claims the Shorelands Protection Management Act requires it to "document the value of the habitat" and to designate the beaches as "environmental areas," something the DEQ seems unwilling to do. Finally, the Wetlands Protection Act precludes "dredging" and "filling" wetlands. SOS submits those terms do not include customary beach maintenance,

⁴ You will likely hear from the DEQ and environmental groups that the "public trust" doctrine applies to our beaches. Hilt, by its clear language, decided to the contrary. SOS has researched the issue, and the DEQ's "public trust" assertions are not supported by Michigan law.

⁵ There is no question that the environmental community has embraced and utilized the "public trust" doctrine as its newest tool in its assault on private property rights. SOS submits that government should proceed on such theories with caution. John Adams, in his Defense of the Constitutions of Government, declared: "property is surely a right of mankind as real as liberty. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not force of law and public justice to protect it, anarchy and tyranny commence."

but supports H.B. 6814 to send a clear and unequivocal message to the DEQ that its policies are not supported by law.

CONCLUSION

People living and recreating around the Saginaw Bay, after at least a century of enjoying their clean, sugar sand beaches, have become accustomed to this as the natural state of their environment. Some residents obtained the benefit of a clean, sand beach without much effort, while others have had to maneuver sand in relatively small amounts to maintain their beaches. Ignoring or unaware of the historical state and usage of the Saginaw Bay over the last century, the DEQ has sought to change the way of life of thousands of citizens without any direction of change in policy from this legislature, and without adequate basis in law. While the DEQ is charged with implementing environmental protection statutes, it is up to the legislature to determine Michigan's overall public policy. Coastal wetlands may be beneficial when weighed in a vacuum, but that benefit must yield to public health and safety, the economic value of tourism, our local economies and tax base, the sanctity of private property, and the will of shoreline owners and their local communities.

Update as of May 5, 2003

Since the original distribution of this document, SOS has learned some additional points of interest.

The environmental community has asserted that the proposed legislation subjects "Michigan's entire coastline" to mechanized grooming. See Commentary, Michigan Outdoors News, April 18, 2003 (Scott McEwen, Michigan Wetland Action Coalition) (Exhibit 26.) That assertion is untrue. Several laws protect perhaps half or more of Michigan's coastline, such as Part 323, Shorelands Protection and Management Act, and Part 353 Sand Dune Protection and Management Act. (See Exhibit 27). For example, the Shorelands Protection and Management Act regulates and protects about one half of the coastline of the Saginaw Bay as "environmental area," lands shown by studies as "necessary for the preservation of fish and wildlife." Since the beaches have not been so designated, by logic they must not be "necessary for the preservation of fish and wildlife," and permits should not be required for their maintenance (See maps, Exhibit 28).