

DATE: MARCH 18, 2009

TO: HON. PATRICIA BIRKHOLZ, CHAIR
SENATE NATURAL RESOURCES AND ENVIRONMENTAL
AFFAIRS COMMITTEE

FROM: SAVE OUR SHORELINE

RE: GOVERNOR GRANHOLM'S PROPOSAL TO ELIMINATE MDEQ
ENFORCEMENT OF WETLANDS PROTECTION ACT

POSITION

Save Our Shoreline ("SOS") Supports Governor Granholm's Proposal to Eliminate MDEQ Enforcement of the State's Wetlands Protection Act.

SUMMARY

Save Our Shoreline has enjoyed a more cooperative relationship with the MDEQ over the last three years, and successfully negotiated a general permit for beach grooming in 2007. Nevertheless, there are overwhelming reasons to eliminate MDEQ enforcement of wetlands under the wetlands protection act. Those reasons include the following:

(1) MDEQ wetland enforcement results in unnecessary duplication of effort with the Army Corps of Engineers;

(2) MDEQ's dual enforcement with the Corps of Engineers is complicated and confusing;

(3) MDEQ wetland protection policies have been counterproductive; and

(4) MDEQ wetland enforcement has been expensive.

As a result, Save Our Shoreline supports Governor Granholm's proposal to eliminate MDEQ enforcement of the state's wetlands protection act.

DISCUSSION

I. MDEQ's Wetland Protection Efforts Merely Duplicate Those of the Corps of Engineers.

Since water levels receded below normal in 1999, the MDEQ and the Corps of Engineers have proceeded in lock step to deny beach grooming efforts on Great Lakes beaches. Representatives of both agencies simply worked together in a common effort to stop beach grooming in its tracks, even if the result was rampant phragmites growth. For example, both agencies sent similar letters to beach residents asserting that beach grooming violated the law. See Exhibits "A" and "B." When shoreline owners pressed state legislators for relief from overregulation, both agencies worked together to implement a plan to thwart those efforts, including development and implementation of a joint public relations effort (See Exhibit "C," notes from a joint Corps/MDEQ/MDNR meeting obtained by SOS under the Freedom of Information Act). But when it came to legal action against beach grooming, the Corps of Engineers acted alone, suing three people in a planned effort to curtail beach grooming. See, for example, US v Kincaid, 463 F Supp 680 (2006). In other words, the Corps of Engineers was more aggressive than state regulators in curtailing beach grooming. This is not a criticism of state regulators, but it should calm any fears of those that believe the Corps of Engineers will be less vigilant than MDEQ in protecting alleged wetlands along the Great Lakes shores. Indeed, today, many shoreline owners have state authorization to groom beaches, only to be denied permission from the Corps. From the perspective of shoreline owners, the MDEQ's wetland protection efforts have merely duplicated the Corps' efforts.

II. Dual Enforcement With the Corps of Engineers is Complicated and Confusing.

The general public, including shoreline owners, have a difficult time understanding that permits are needed to maintain a yard or beach. It is fair to say that most citizens do not comply with permitting requirements for such activities. For those that want to comply, the dual permitting system is a substantial obstacle. It may be easy to comprehend by well-educated legislators and regulators in the prime of life, but the regulatory scheme is confusing and difficult to understand for, say, the average shoreline resident, many of whom do not have such educations, and a large portion of which are at or beyond retirement age. Of course, environmental statutes and regulations are vague and complicated, and even courts and judges cannot agree on their meaning.

Consider an example. A potential beach groomer must consider her rights under the Clean Water Act, and the Rivers and Harbors Act. They must consider the federal regulations issued pursuant to those laws. They must consider whether the activity requires an individual permit, or comes within a litany of federal regional permits. They must consider how the Detroit District has interpreted each of those laws and regulations. For example, if movement of sand violates the law, where does the Detroit District draw the line before it will require a permit? Does walking in a wetland require a permit? Does using a shovel and rake require a permit? What about ten family members with shovels and rakes? What about a rake pulled by a tractor? Once the need for a permit is determined, what should the permittee ask for? What will be allowed?

After a landowner answers these questions for federal jurisdiction, he must go through a similar analysis under state law. The answers can be much different. For example, the term "wetland" is defined differently under state and federal law, protecting different lands in many cases. Also, the MDEQ has recently asserted that mowing a wetland requires a permit, where the Detroit District does not require a permit for mowing.

These differing statutes and differing interpretations are confusing to ordinary people who are forced to wade through them. The regulatory approach may work for builders, engineers, and other construction professionals whose job it is to be familiar with such complex regulations. But for most residents that simply want to maintain their beach, the regulatory hurdle is insurmountable. SOS submits that most people confronted with such a complicated and confusing dual regulatory scheme will simply avoid it and fail to comply. A law aimed at controlling the behavior of ordinary people but which is too confusing for ordinary people to follow simply can't be effective to achieve the law's goals.

III. MDEQ Wetland Protection Policies Have Been Counterproductive.

While the MDEQ has battled shoreline property owners over a few hundred acres of shoreline, the invasive plant phragmites has ravaged thousands of acres of our state's Great Lakes shoreline, crowding out native plants and displacing wildlife. A recent newspaper article reported a strip of phragmites along the Saginaw Bay "a half mile wide." SOS believes that the MDEQ was too focused on controlling the behavior of shoreline owners instead of controlling the rampant growth of phragmites. The result is that phragmites has done many times more damage to our

shoreline than beach groomers could have ever done. Phragmites control efforts can be effective. On Beaver Island, the MDNR joined with a number of groups, including the Beaver Island Association, township supervisors, and Central Michigan University, and treated "nearly all the infestations on the island" (See Exhibit "D").

IV. MDEQ Wetland Enforcement Has Been Expensive.

Our organization questions the proposition that wetland protection enforcement costs the state only \$2 million per year. Over the last seven years, we have interacted with the MDEQ over shoreline issues in an ongoing struggle to preserve Great Lakes beaches. The MDEQ and, to some lesser extent, the MDNR, have devoted an extraordinary amount of resources to the beach grooming debate. MDEQ efforts are not limited to permitting and inspections, but include numerous public meetings, inter-agency meetings, legislative committee hearings, meetings with stakeholders, informational campaigns (one including a helicopter trip to visit newspaper editors), Freedom of Information Act responses, development of numerous informational brochures, submission of court briefs, state grants to environmental organizations, studies, and myriad other activities which SOS believes has cost the state much more than the figure put forth by the Governor. If we add the costs incurred by the great number of organizations joining the debate about the MDEQ's role in beach grooming (such as SOS, numerous private, non-profit environmental organizations, and government organizations like Sea Grant), the amount of money this state and its citizens have spent debating the MDEQ's role in beach grooming matters is much more substantial.

CONCLUSION

For all of the foregoing reasons, SOS believes MDEQ enforcement of the wetlands protection act is an unnecessary expense for our state. We support Governor Granholm's timely proposal to eliminate MDEQ enforcement of the wetlands protection act, and to instead rely on enforcement by the Corps of Engineers. Our organization is under no illusion about the Corps of Engineers' responsiveness to our state's citizens or its protection of our environment; that agency's track record on beach grooming matters is poor, and has led to rampant phragmites growth. But by allowing citizens to focus on one organization rather than two, we believe we have a better chance of improving that agency's responsiveness to our citizens, including shoreline owners.



JOHN ENGLER, Governor

DEPARTMENT OF ENVIRONMENTAL QUALITY

"Better Service for a Better Environment"

HOLLISTER BUILDING, PO BOX 30473, LANSING MI 48909-7973

INTERNET: www.deq.state.mi.us

RUSSELL J. HARDING, Director

REPLY TO:

LAND & WATER MANAGEMENT DIVISION
PO BOX 30458
LANSING MI 48909-7958

July 17, 2001

CERTIFIED MAILMr. Phillip Adair
Ms. Bernadette Adair
2865 Kawkawlin River Drive
Bay City, MI 48706

Form letter sent to
hundreds of Saginaw Bay shoreline
residents.

Dear Mr. Adair and Ms. Adair:

SUBJECT: Beachfront Maintenance - 715 Bay Road Parcel

It has come to the attention of the Michigan Department of Environmental Quality (MDEQ) that there has been recent unauthorized activity on State bottomlands adjacent to the above referenced parcel of property. You have been identified as the legal owner of this parcel of property. The purpose of this letter is to advise you that these activities are illegal and to seek your cooperation in complying with the law.

Lower water levels have exposed extensive bottomland areas along Saginaw Bay. Vegetation is regrowing in many of these areas. The shallow water and vegetation in these coastal areas provide substrate and habitat for a variety of invertebrates important in the diet of fish, birds, and other wildlife. Coastal vegetation provides food, shelter, and nesting and resting areas for waterfowl, songbirds, and other animals. Shoreline vegetation dissipates wave energy, buffers land from wave action, and protects the lake bottom from scour. Vegetation also helps maintain water quality by removing sediments and nutrients, and filtering materials from the water. These coastal areas are critical natural resources, worthy of special protection.

Bottomlands of the Great Lakes are owned by the State of Michigan and are generally those areas lakeward of the ordinary high water line, defined as areas below elevation 580.5 IGLD85 for Lake Huron. This elevation is approximately three feet above July 2001 levels. Several State statutes regulate these areas and adjacent wetlands.

In light of the varied interests in these coastal areas, the MDEQ is proposing revised rules that will allow for certain beach management activities. Until these rule revisions are promulgated, the following activities, subject to additional conditions, will be allowed:

Mowing of Vegetation. Lakefront property owners may mow vegetation to maintain temporary access on exposed bottomlands from the upland ownership directly to the existing still water shoreline, subject to the following limitations:

1. No plowing, disking, or other soil disturbance may take place.
2. No wood chips, paving, or other materials may be placed on the bottomlands.
3. The activity must be a single and complete project. If other activities that require a permit are submitted to the MDEQ for approval, these activities must be reviewed as part of the larger overall project.

Grooming Beaches. Lakefront property owners may mechanically groom the beach area on bottomlands to remove natural and manmade debris if all of the following conditions are met:

1. Grooming is accomplished by raking or dragging non-vegetated areas parallel to the still water shoreline and up to 30 feet landward of the shoreline.
2. Grooming is limited to the top four inches of the beach surface.
3. All collected debris is properly disposed of off of State-owned bottomlands and outside of any wetlands.
4. The beach area is comprised predominately of sand and pebbles.

It is imperative that any mowing and grooming activities strictly adhere to these regulations. Staff of the MDEQ and the Michigan Department of Natural Resources (MDNR) will be monitoring beachfront areas and taking enforcement action when future 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.

Individual permits are required from the MDEQ for work that goes beyond the above activities. A permit can generally be approved to construct a filled walkway up to 6 feet wide by 200 feet long through a swale with standing water conditions. An application for a permit may be obtained at the MDEQ's Land and Water Management Division (LWMD) home page, at www.deq.state.mi.us/lwm, or by calling the LWMD's Saginaw Bay District Office, at 989-686-8025.

Be advised that the United States Army Corps of Engineers (USACE) exercises Federal jurisdiction over Great Lakes bottomlands to an elevation of 581.5 IGLD85 and requires permits for all beach maintenance activities except mowing of vegetation. Beachfront owners should contact the USACE's Saginaw Field Office, at 989-894-4951, prior to initiation of any other beach maintenance activity.

We anticipate and would appreciate your full cooperation in this matter. If you have any questions, please contact Mr. Daniel Morgan, Supervisor, Saginaw Bay District Office, LWMD, at 989-686-8025, extension 8360.

Sincerely,



Richard A. Powers, Chief
Land and Water Management Division
517-373-1170

cc: U.S. Army Corps of Engineers
Mr. George Burgoyne, Jr., Resource Management Deputy, MDNR
Mr. Arthur R. Nash Jr., Deputy Director, MDEQ
Mr. Daniel Morgan, MDEQ
Permit Consolidation Unit, MDEQ

5

DEPARTMENT OF THE ARMY

DETROIT DISTRICT, CORPS OF ENGINEERS

REGULATORY OFFICE

SAGINAW FIELD OFFICE

P.O. BOX 428

ESSEXVILLE, MICHIGAN 48732-0428

September 14, 2000

IN REPLY REFER TO

File No. 00-016-307-0

Michelle Kirchman
309 South Linwood Beach Road
Linwood, Michigan 48634

Dear Ms. Kirchman:

You have been identified as a property owner on South Linwood Beach Road in an area where recent and extensive beach sanding and/or grading activity has taken place. A portion of this work occurred waterward of the Ordinary High Water Mark of Lake Huron and in wetlands adjacent to and in Lake Huron without authorization from the Corps of Engineers.

We are notifying you with this letter that in Lake Huron, as in all navigable waters of the United States including adjacent wetlands, any construction or discharges of dredged and/or fill material require prior authorization from the Corps of Engineers. The Corps' authority to regulate construction or other work, including the discharge of dredged and/or fill material, in navigable waters of the United States, including their adjacent wetlands is contained in Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act and regulations promulgated pursuant to these Acts. Filling and grading work, mechanized landclearing, the sidecasting of excavated material, and some forms of piling installation constitute or otherwise involve discharges of dredged and/or fill material under the Corps' regulatory authority.

You, or other parties on your behalf, should not conduct additional work in Lake Huron or its adjacent wetlands without first receiving Corps authorization for the work. At this time, we do not anticipate taking additional enforcement action on this matter; however, we will not hesitate taking action against any parties that resume such work without Corps authorization. Be advised that anyone who knowingly violates the above cited Federal statutes may be subject to the maximum penalties prescribed under the law. Such an incident may be referred to the U.S. Justice Department with a recommendation concerning the initiation of legal action against the responsible party and/or parties.

The purpose of the unauthorized work appears to be the clearing or outright elimination of wetland vegetation that has become established in nearshore portions of Saginaw Bay that are no longer inundated because of current low water conditions. In terms of both public and private interests, we are having trouble identifying a beneficial reason for this work. Coastal wetlands of this type help to improve the overall water quality of the lake and protect the shoreline from erosion during times of higher lake levels. Such wetlands also provide valuable habitat for a variety of aquatic as well as terrestrial species.

During our recent site inspection, we also identified a large upland sand beach area. Grading, filling, or other types of activities landward of Lake Huron's Ordinary High Water Mark and not in wetlands fall outside of the Corps' regulatory authority.

EXHIBIT "B"

If you have any questions, please contact William E. Leiteritz at the above address or telephone number (517) 894-5451. Please refer to File Number: 00-016-307-0 in any conversations or correspondence.

Sincerely,

Robert M. Tucker
Chief, Enforcement Branch
Regulatory Office

Copy Furnished

MDEQ, Saginaw Bay District Office

MULTI-AGENCY MEETING
DEQ/DNR/USACE
23 APRIL 2003

- ✓ State Legislation
 - Status?
 - Likely Results?
- ✓ DEQ / USACE Permitting Process
 - Similarities / Differences?
 - Timeline?
 - Since NOV 02 in Saginaw Bay – 5 applications to USACE: 3 issued, 1 pending, 1 just received.
 - Average Processing Time: 98 days (includes 2002)
 - Average for Issued Permits: 78 days
 - Automation?
 - Joint Permit Application @ 41 pages
 - Can we develop a 1 page (plus 1 page sketch) joint application specific to “beach maintenance on Michigan coasts”
 - Can we support automated submissions?
 - Forms, Samples on the web
 - USACE Proposed Regional Permit
 - Permit Fair
 - Forms available at political offices (state/fed reps), post offices, EPA/USACE field offices
- ✓ State Beaches
- ✓ Consensus Document
 - What can we do? Where is the high ground?
- ✓ Communication Strategy
 - Chester / Magness Editorial (Detroit, Lansing, Bay City, Traverse City, Ann Arbor)
 - Bay City / Port Huron Editorial Board Meeting
 - Environmental Groups
 - Web Page(s)
 - To/thru those with newsletters: GLC, Env Groups
 - Briefings to Congress (LTC): Miller, Stupak, Kildee, Camp (7 May)?
 - Public Meetings
 - ICW Shoreline Task Force
 - Engage Academic Community
- ✓ Worst Case Scenarios
 - Civil Disobedience
 - State Law Passes (or even comes close!)
 - Public Meetings Turn ugly
 - Water levels never come back

EXHIBIT “C”

USACE - DNR - DEQ

April 23 - 2003

MARIN FRANKFETH DNR 46MD 517 375 3458 frankfem@mi.gov
Mary Ellen Oppenell DEQ/OLMD 517-335-6947 CROWELL@MICHIGAN.GOV
Skip Pruss DEQ 517 241 7392 pruss@michigan.gov
GEORGE BURGOYNE DNR 517-373-0096 BURGOYNE@MICHIGAN.GOV
K. Cool DNR 517-335-4873 COOLKL@ " " " "
T. Magness USACE 313-226-6762 Thomas.Magness@DRAARMY.mil
Bob Tucker USACE 313-226-6812 bob.m.tucker@usace.army.mil
Lynn Duval USACE 313-226-4680 Lynn.M.Duval@USACE.army.mil
Christin Oaken-Bailey USACE 313-226-6822 Christine.Oaken-Bailey@USACE.army.mil
Wally Gauthier USACE 313-226-6827 Wally.A.Gauthier@USACE.army.mil
Hal Fitch DEQ/OLMD 517-241-1548 Fitchh@michigan.gov
Dana Debel Gov's Office 517-373-3100 debeld@michigan.gov
Carol Hankam DEQ 517 241 7396 hankamc@ " " " "
Ja Ann Merrick DEQ 517 241 7417 merrickj@ " " " "
Dennis Krupp DNR 517 373 0023 kruppdj@michigan.gov

4/23/03 MEC

- ★ DEQ/DNR/USACE joint mtg = Magness, Spol, Burgoyne, Merrick, Stibel, Pruss, Edick, Janereth, Gauthier, Sechad, Phis.
(Copps), Turkey, Koop, Gintan
- state of state legislation
- Sub sub, would result in alignment between USACE and DEQ, telling points (aka: Adm. sub.)
- mid-May - editorial boards of local papers? Magness
- USACE can issue RP w/in 2 weeks.
- permit fair?
- Short term applic. ? USACE (Wally) to propose a draft
- issue of en. discretion or "waiver of fact"? (quadratic)
- (at permit fair)
- joint editorial = Magness to draft for sig. by USACE, USEWS, EPA, DEQ, DNR.
- engage academic comm. HOW?
- CFA for pathways must be modified ??

Kool
Burjorne

4/23/03

Tom M.

4257 - 2 problems

1. carte blanche name req.

2. Trading Shelling including from outside

Bureau will move Hawk bill

" " Meet with SOS & US Fish

700 homes - Editorial Board & C Times
with Chester.

Permit Fair - Media work.

Enforcement Decretation - no fees

- 2 Page Application - To Rep./Sen./Officer/We
P&H Water

Communicate values

Actions we have taken

contact conservation

Letter to Pres.

1000 Acres of Habitat in Sag Bay at Risk

Phragmites Invade Saginaw Bay

If you look at them from one perspective, you might consider phragmites a beautiful, majestic grass that grows in wetlands; so much so that some people consider them ornamentals.

But to natural resources managers, phragmites is a curse.

"It grows so densely that it crowds out native plants and displaces wildlife," said DNR Wildlife Habitat Biologist Brian Mastenbrook..

"At Beaver Island the plant was just starting and the patches were relatively small and scattered," Mastenbrook said. "It expands fast. In Saginaw Bay, a strip of phragmites is reported to be a half-mile wide. We didn't want all the plants and animals that use the lakeshore to be displaced by it".

"By getting this done in the early stages, you save tons of money and effort," he continued. "We were able to treat Beaver Island in 2007 and 2008 for about \$23,000. That sounds like a lot of money, but when you look at what they're spending at Saginaw Bay, where they are spraying from helicopters, it's not that much."

When Mastenbrook got word the invasive plant was becoming established on Beaver Island, he wanted to stop its spread before it became a major concern.

Phragmites is found around the world. Although native to North America, the more invasive strains are exotics from Europe and Asia. In the continental U.S., it is most extensive on the East Coast, though it is rapidly colonizing the Midwest.

The long-stalked, reed-like plants, which can grow to nearly 20 feet in height, not only take over territories occupied by plants that are beneficial to fish and wildlife, but on Beaver Island also were encroaching on a number of endangered plant species, such as Lake Huron tansy, Michigan monkey flower and pitcher's thistle.

There was great cooperation among a number of groups, including the Beaver Island Association, the township supervisors and Central Michigan University, which has a bio-station on the island.

"We had a broad base of people who agreed it was a problem," Mastenbrook said.

The island association and the township started an education program and produced a video about the invasive plants to help the island residents and