

S.O.S. DUNES NEWS



Save Our Sand Dunes

S.O.S. DUNES NEWS IS PUBLISHED INTERMITTENTLY BY PRESERVE THE DUNES, INC.

VOL. 7 NO. 1 APRIL 2004

NEWS ITEMS

LAWSUIT UPDATE

In October the Michigan Supreme Court heard oral arguments in our suit against the MDEQ and TechniSand. We are seeking to prohibit strip mining of sand in a protected critical dune area. The Court has not yet made a ruling. We continue to hope that the justices will uphold and enforce the clear intent of the law.

TECHNISAND SEEKS NEW DREDGING PERMIT

Twenty-three days before their dredging permit for Nadeau Pit in Covert Township was to expire, TechniSand applied for a new one. Within three days the MDEQ issued a public notice. This allowed the required 20 days for public comment before the existing permit expired. Many neighbors were not notified because the application did not include a complete list of adjacent property owners.

PTD's review of the permit application indicated that there were numerous omissions and errors in the application. It is available online at www.deq.state.mi.us/lwmpnh/default.asp?PermitNo=04800013

The application "estimates" that they will dredge 260,000 cubic yards of sand (350,000 tons or 13,000 truck movements) and enlarge the lake to 36 acres.

PTD is concerned about potential harm to nearby Rogers Creek, a natural trout stream, the water quality of the lake when dredging is complete, and the impact on reclaimed slopes.

Protections that were included in

the expiring permit have been ignored. Our concerns have been communicated to the MDEQ.

We also requested a public hearing, as did Thunder Mountain Heights Land Corporation and Covert Township.

Since the public hearing will probably be held before the next newsletter is published, we will notify those on the email list when a date is set. (Make sure you are on the list by sending an email to sosdunes@daac.com.)

SAND DUNE DAY CELEBRATION

Sand Dune Day is May 19. To celebrate, PTD has scheduled a special dune walk for Sunday, May 16 at 2:00 PM. The walk will be held at the Van Buren State Park. Chuck Nelson, Director at Sarett Nature Center, will be our guide.

Entry into the park normally costs \$6 per car (\$8 for out-of-state cars). You can pay at the gate or enter for free as a guest of PTD by using the voucher on page 3. The ticket is good for May 16 only. Please carpool to reduce costs.

This is a chance to visit the park and see some beautiful dunes that you may not have seen before and have Chuck as your guide.

ROSS PRESERVE TRAILS TO BE IMPROVED

This summer, Boy Scouts of Troup 198, South Haven, will be cleaning and mapping the nature trails at the Ross Preserve of The Nature Conservancy in Covert. When the work has been completed visitors will enjoy marked, color-coded trails.

The project is being planned by James Ingraham, 14, who is earning his Eagle Scout rank. James is building an informational kiosk that will be located near the old cabin at Mud Lake. Maps of the trails will be available at the kiosk.

The Scouts have hiked and camped at the Ross Preserve for years. Preserve the Dunes is pleased to help by funding the materials for the kiosk.

PTD SPONSORS DUNE PROGRAM

This summer PTD will help sponsor a dune program at the Sarett Nature Center for 8- to 12-year olds. "Rock and Roll in the Dunes" will be held August 18 and 19 (Wednesday and Thursday) from 9:30 am to 2:00 p.m.

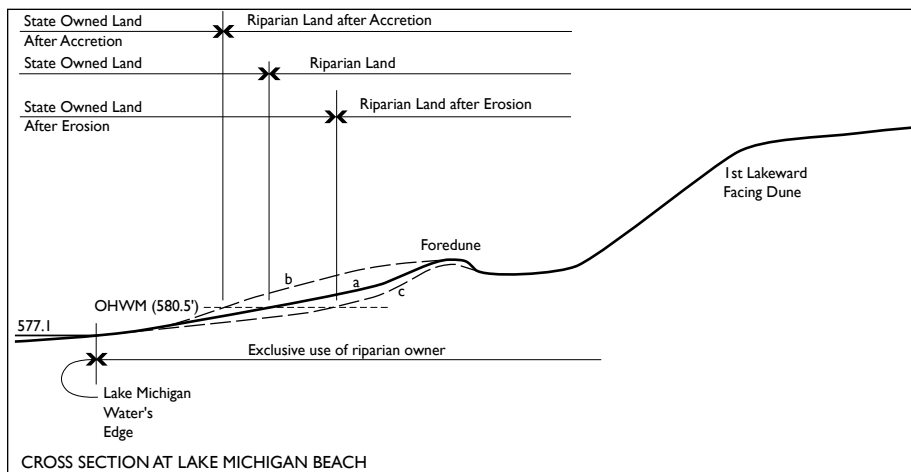
A \$10 fee and a Sarett family membership are required. Contact Sarett (269)927-4832 for more information and enrollment.

FAQ (Frequently Asked Questions)

Over the years SOS Dunes has received many questions about construction and development on the dunes. For example, "Who owns the beach? When do I need a MDEQ or a Corp of Engineers permit? What restrictions or requirements will be imposed? Where can I buy beach grass?" In this and subsequent issues, we will answer these and other questions as space allows. We will start at the water's edge.

WHO OWNS THE BEACH?

Magazine articles, newsletters, rumors and myths have dealt with this question. *SOS Dunes News* posed this question to Taglia, Fette, Dumke & White,



attorneys in St. Joseph, MI. They reported that this question was resolved by a Michigan Supreme Court decision in the case of *Hilt v. Webb*, which was decided in 1930, and an Attorney General's (AG) opinion (No. 5327 issued in 1978).

In short: Land above the ordinary high water mark (OHWM) is owned and controlled by the riparian owner. The land between the water's edge and the OHWM is owned by the State but controlled by the riparian owner except that any change to the beach in this area may only be done by permit from the State (and from the US Army Corp of Engineers (USACE)).

In more detail: The AG opinion cited the *Hilt v. Webb* decision that defines riparian rights as "(1) Use of the water for general purposes, as bathing, domestic use, etc. (2) To wharf out to navigability. (3) Access to navigable waters. (4) The right of accretions."

The AG opinion continues "it must also be kept in mind that a beach has two areas. One is the portion of beach that extends to the ordinary high water mark; this area provides a convenient access to the water and a place for sunbathing. Secondly, there is an area between the high water mark and low water mark. The beach that extends to the ordinary high water mark may be defined as 'upland' and is not subject to public use. With respect to the area between the high and low water line, the court said ... 'The riparian owner has the exclusive use of the bank and shore, ... although the title is in the State.' Thus, the owner cannot extend structures into the space between low and high-water mark, without consent of the State."

The AG opinion cites the Supreme

Court's decision "...And it has been held that the public has no right of passage over dry land between the low and high-water marks but the exclusive use is in the riparian owner, ..."

The AG then concludes "Thus the riparian property owner may prevent persons from using the beach of his riparian land regardless of whether the land is above or below the ordinary high water mark. . . ."

"In summary:

"1. A riparian at all times owns the upland to the ordinary high water mark, and may exercise control thereto, by virtue of rights stemming from Federal patent.

"2. The ordinary high water mark is set for all the Great Lakes . . . , and when the water recedes below the ordinary high water mark, the riparian owner has control over the exposed area, but may not place any permanent structures, or do any dredging or filling on this land without a permit from the Department of Natural Resources.

"3. The public may not use the beach whether it extends to the ordinary high water mark or to the low water mark. The public, however, has the right of passage in any area adjacent to riparian land covered by water."

WHERE IS THE OHWM?

The OHWM for Lakes Michigan and Huron was set by the Great Lakes Submerged Lands Act. It is at the contour line 580.5 feet above sea level based on the International Great Lakes Datum of 1985 (IGLD 85). It moves back and forth horizontally as the beach accretes or recedes.

The US Corp of Engineers reports that the average lake level in March

2004 was 577.1 feet. Therefore, the OHWM is currently 3.4 feet above the level of Lake Michigan or Huron when the waters are still. The OHWM is 581.5 feet for USACE permits.

WHAT PERMITS DO I NEED?

Of course, the permits required depend on what one plans to do. In this issue we will briefly describe the laws that may require a permit for various types of projects in the dunes. In later issues we will discuss the requirements of each in more detail.

The MDEQ has made applying for a permit somewhat easier than it might otherwise be. There is one form to complete, the Joint Permit Application, which is used for both MDEQ and USACE permits. This is available on the web at www.michigan.gov/deq under the "WATER" tab. [Note that the MDEQ is rebuilding its web site and directions given may not work in the future. If not, try using the search feature. Ed.]

Beginning at the lake, the first state law controlling an owner's actions is **Part 325, Great Lakes Submerged Lands**, which regulates activities that occur below the OHWM of the Great Lakes and all upland channels extending landward of the OHWM of the Great Lakes, and activities in the water when water levels are above the OHWM.

Purpose: To regulate all construction, excavation, and commercial facilities on the bottomlands of the Great Lakes.

Requirements: Permits required for all filling, dredging, grading and permanent structures (docks, piers, pilings, etc.) lying below the OHWM.

Permitting Authority: MDEQ, Geological and Land Management

Part 323, Shorelands Protection and Management, establishes requirements for specified environmental areas and for Designated High Risk Erosion Areas (HREA). Setback requirements are established for potential 30 year and 60 year erosion zones. The MDEQ plans to eventually have the boundaries of these zones mapped and available on their website. For now, you will have to contact the MDEQ/GLMD for information on HREA boundaries. The property's Tax

Identification helps locate the project and determine if the area is within a HREA or not.

Purpose: To protect designated environmental areas, flood risk areas and high risk erosion areas that may be damaged by various land use activities along the Great Lakes Shoreline.

Requirements: A permit is required for the erection, installation or moving of a permanent structure or an addition to an existing structure on a parcel of land of which any portion is a Designated HREA.

Permitting Authority: DEQ, Geological and Land Management Division.

Part 353, Sand Dune and Management, controls activities in Designated Critical Dune Areas (CDA). CDAs are identified by the MDEQ and mapped in the "Atlas of Critical Dune Areas," which is available on the web at www.michigan.gov/deq. Select "Sand Dunes Protection" under the "LAND" tab.

Requirements: All proposed uses in designated critical dune areas, including activities that involve vegetation removal and earth moving activities, as well as recreation, construction and silvicultural activities. Examples include additions to existing buildings within a CDA, septic tank construction and/or replacement within a CDA, contour changes (grading) within a CDA.

Permitting Authority: MDEQ, Geological and Land Management Division.

Part 301, Inland Lakes & Streams, controls activities effecting a natural or artificial lake, pond or impoundment 5 acres or greater, or a river, stream or creek (including county drains) that have a definite bank, bed, and visible evidence of continued flow or occurrence of water.

Requirements: A permit is required for activities that occur within an inland lake or stream or below the Ordinary High Water Mark (OHWM) of an inland lake or stream.

Permitting Authority: MDEQ, Geological and Land Management Division.

Part 303, Wetlands Protection. A wetland is land characterized by the presence of water at a frequency and duration sufficient to support – and that under normal circumstances does support – wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh. Typically a regulated wetland in Michigan is one contiguous to the Great Lakes or an inland lake or stream; or an area of 5 acres or more in size.

Requirements: A permit is required for any activity in a wetland.

Permitting Authority: MDEQ, Geological and Land Management Division.

Part 31, Water Resources Protection (Floodplain Regulatory Authority) controls activities in floodplains and in specified watersheds.

Requirements: A permit is required for activities within the 100-year

PRESENT TO RANGER AT THE PERMIT BOOTH UPON ENTRY	
PERMIT VOUCHER Van Buren State Park PRESERVE THE DUNES 5/16/04 THIS VOUCHER GOOD FOR ENTRY TO Van Buren State Park ONLY ON THE DATE RECORDED ABOVE	VISITOR PASS Van Buren State Park PRESERVE THE DUNES 5/16 PLEASE DISPLAY ON VEHICLE DASHBOARD (MUST BE VISIBLE THROUGH THE WINDSHIELD)

Please return this response form to support the goals of Preserve the Dunes.

We need to tell elected officials and government employees how many residents and property owners support these efforts. This measure of support is critical to successfully protecting the dunes and restricting sand dune mining. Only your name and address are necessary.

If you can also contribute financially, the funds are needed to continue our struggle to preserve the dunes through distribution of information, keeping our state representatives and local officials informed, and ensuring that the laws protecting sand dunes are enforced.

Preserve the Dunes, Inc. — Response Form

Mail the completed form to Preserve the Dunes, Inc., Post Office Box 581, Riverside, MI 49084-0581

I want to preserve the dunes of southwest Michigan and am concerned about the expansion of sand dune mining.

Name(s)		
Home Address		Michigan Address (if different)
City, State, Zip		City, State, Zip
Telephone 1	Telephone 2	Telephone
Fax	eMail	Fax

Annual Membership Form

In addition, enroll me(us) as a member for 2004 <input type="checkbox"/> Individual (\$6) <input type="checkbox"/> Family (\$10) I have also included a contribution in the amount of \$	Please contact me to work on the following committees: <input type="checkbox"/> Legal Affairs <input type="checkbox"/> Finance/Fund Raising <input type="checkbox"/> Newsletter <input type="checkbox"/> Public Hearings <input type="checkbox"/> Memberships	Membership dues underwrite the expense of keeping members informed about efforts to preserve the dunes and to monitor sand mining activities in Berrien, Van Buren and Allegan counties. <u>Checks should be made payable to Preserve the Dunes, Inc., which has 501(c)3 status. Contributions are tax deductible.</u>
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floodplain and floodway of a river, stream, drain, or inland lake. The regulation also applies to a watershed that has a drainage area of 2 square miles or greater, when measured at the downstream limits of a proposed project. Examples include constructing a bridge or culvert, filling, fencing, grading, filling.

Permitting Authority: MDEQ, Geological and Land Management Division.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) prohibits the obstruction or alteration of navigable waters of the United States without a permit from the USACE. Navigable waters associated with Michigan include the Great Lakes, their tributaries, and associated wetlands.

Requirements: A permit is required for all construction, grading and filling below the OHWM. Remember that the OHWM for USACE permits is one foot higher than for state law.

Permitting Authority: USACE

Activities in or near certain waterbodies or wetlands, may require further review by the United States Environmental Protection Agency (USEPA) or US Fish or Wildlife Service (USFW).

Many activities that require a JPA from the MDEQ may also require a **Part 91, Soil Erosion and Sedimentation Control** permit. The SESC is a separate permit program and requires a different application be made to the local regulating authority.

Purpose: To control erosion and to protect the waters of the state from sedimentation.

Requirements: A permit is required for all earth change activities which disturb one or more acres of land or if the earth change is within 500 feet of a lake or stream.

Permitting Authorities: A list of the local agencies issuing Part 91 permits can be found on-line at www.deq.state.mi.us/sesca.

If all documents are in order, permit

processing can take 60 to 140 days if a public hearing is not required.

PTD STILL NEEDS PROJECTOR

PTD needs a digital projector for PowerPoint presentations and showing digital slides at public meetings.

If you or your business have a projector that has been replaced with a newer model, we could make good use of your outdated one. The donation, as with all donations to PTD, is tax deductible. Contact Charles Davis at cf3@daac.com or 269-208-1711.

FUNDING STILL URGENTLY NEEDED

We need your financial support to continue this fight and to secure the victory.

There will continue to be the need for monitoring permit applications and ongoing sand dune mining. These require time. They require vigilance. But they also cost money. Please renew your membership and make a financial contribution to these efforts.

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