



Lake Michigan Chapter For Shoreline Preservation Newsletter – Winter 2009

UPDATE ON THE INTERNATIONAL UPPER GREAT LAKES STUDY

By Roger J. Smithe

Lake levels have come up about a foot in the last year. Many of us have lost 50 feet or more of nice sandy beach, and are wondering how the IUGLS study is coming. Everyone reading this probably knows that the IUGLS study is being made to determine:

- (1) Whether restrictions should be placed in the St. Clair River to raise the level of Lakes Michigan and Huron even more (What a disaster that would be!), and
- (2) Whether to change the formula for balancing the levels of Lake Superior and Lakes Michigan - Huron as water is continuously released from Lake Superior at Sault Ste. Marie.

In our summer newsletter we were happy to report that the IUGLS Study Board had released a draft report on May 1, recommending that **NO ACTION** be taken in the St. Clair River. That was good news! The full report, as well as a 19-page summary and much more information on the study is available on the web at: <http://www.iugls.org>. The final report is expected soon.

During the summer the Study Board held 17 public meetings, including one in Muskegon, Michigan on June 9. In all, about 400 people attended the meetings, 130 people spoke up with comments, and in addition there were about 40 letters written with comments. We do not know if the No Action recommendation will stand up in the final report, but we are hopeful because we believe it was based on the thoroughness and the sound scientific basis of the study, a reluctance to tamper with nature, and the fact that levels are rising again.

However, The Georgian Bay Association, in Canada, continues to be strongly in favor of restrictions and has been very vocal in opposition to the study decision.

When the report is final, the draft **NO ACTION** recommendation of the Study Board will go to the IJC. The IJC will then hold another round of public hearings in 2010 for more input. **It will be essential for the Coalition and for individual Coalition members, once again, to attend, comment, and write letters.** We will let you know about dates, meeting locations and addresses as soon as they are available.

Now the second part of the study: Lake Superior regulation. This is moving slowly. A draft report is not expected until 2012. There are Technical Working Groups (TWGs) evaluating the impact that alternate regulation plans would have on Shoreline Property, Recreational Boating, Power Generation, Navigation, Public Water Supply, and the Environment. This work is beginning in earnest, now that the St. Clair River work has been finished, and we will keep you informed as developments occur.

LEGAL DOES MATTER

By John Ehret, Esq.

U. S. SUPREME COURT

Stop the Beach Nourishment v. Florida will be ruled on by the U.S. Supreme Court in early summer of 2010. The question before the court is whether the state of Florida can seize ownership of beaches from riparians simply by virtue of having put down nourishment. Attorney Dave Powers from Save Our Shoreline (S.O.S.) has filed an Amicus Brief on behalf of riparians. Oral arguments will be held on December 2, 2009. There is great interest nationwide. Attorney Powers has given us a copy of his Friend of the Court brief. We have excerpted the conclusion of his argument as follows:

“The concept of judicial taking is often discussed as a possible tool for this Court to curb abuse by state courts which might use their power to develop the common law as a means to confiscate private property for public use. Private ownership of beaches and shoreline property are under attack by state governments unwilling to settle for regulatory control under the police power, and the protections such an approach provides private owners. As evidenced by cases in New Jersey, Michigan, and now Florida, among others, state courts continue to disregard their prior decisions and shift control of such lands to the states, some without any discussion of why public policy favors such a move. With property law being a creature of the common law, the constitutional protection of private property will mean little if state courts can change the common law of property whenever they deem a public need. This court should find that the Florida approach in this case violates the Fifth and Fourteenth Amendments to the U.S. Constitution.”

OHIO

The Ohio Court of Appeals hearing the lakefront ownership case unanimously affirmed the trial court’s ruling that lakefront lands extend to the water’s edge on any given day and those owners could exclude the public from their beach. Two members of the court also found that the Attorney General did not have the right to appeal when the Governor had decided to reverse the prior governor’s policy. Both the State via the Attorney General, and Intervenors National Wildlife and Ohio Environmental Council have sought leave to appeal to the Supreme Court of Ohio. They continue to assert an “ordinary high water mark” standard for public ownership of the beach and the right of the public to “recreate” on the beach, including landing boats, walking, and any other recreational activities. Former IGLC Chair Homer Taft filed a cross-appeal asserting the traditional “low water” view of boundaries of inland lakes in colonial times, especially since most lands were in private ownership before Ohio’s organization. Taft also defended the Court of Appeals ruling, made at his suggestion, that the Attorney General lacked standing to appeal in defiance of the Governor and objected to ODNR’s unusual “appeal” without presenting any issue to the Supreme Court when they had failed to appeal and accepted the trial court’s ruling below. The class counsel for Ohio Lakefront Group is expected to file their response on whether the Court should accept the appeals by December, and the Court will then decide whether to accept the appeal and on what issues, with argument likely by next summer.

MICHIGAN

In the damage phase of the Banks v. US case, the U. S. Court of Claims has ruled that owners of record in January 2000 are entitled to past, present, and reasonably foreseeable FUTURE damages. Although I don’t agree 100% with this ruling, it preserves the rights of 95% of the plaintiffs and can be considered a great victory. You will recall that Federal Judge Emily C. Hewitt ruled (September 28, 2007) after a one-week liability trial held in Niles, Michigan, that the Corps of Engineers was “Responsible for damages for any portion of 30% of each of the plaintiffs total erosion above the high water mark (fast land) that was not effectively mitigated by the Corps nourishment.” A damage trial is scheduled for September 27, 2010. For further information, you may contact John Ehret at (708) 748-8975.

CORPS OF ENGINEERS

Detroit: I believe the Detroit District Corps is violating the constitutional right to private property by taking littoral and river sediment out of the underwater shore which supports our fast land. Fast land is defined as “vegetation, trees, stairs, houses, and shore protection structures.” I strongly encourage property attorneys of Michigan to bring suit under the Federal Tort Claims Act 28 USC 1346b (1982). This can be done in the local Federal District Court instead of going to Washington D.C. to the U. S. Court of Federal Claims. The suit can be brought against named individuals.

Such a case was brought in 1982 in the Federal District Court of Michigan Southern Division. The case was Donna J. Asselin (a founding member of the Great Lakes Coalition) et al v. USA. The plaintiffs lost because under the “discretionary function” section 28 USC 2680 (a) of the Tort Claims Act, the government did not waive sovereign immunity. BUT NOW, the case of Owen v. USA 851 F. 2d 1404 (1988) has determined that interfering with sand supply is an absolute, categorical taking for which there is no room for policy judgment and therefore no discretion. Owen was decided *en banc*, that is, all ten judges of the Federal Circuit Court of Appeals joined unanimously.

New Orleans: Federal District Judge Stanwood Duval, Jr. has ruled in the first of thousands of Katrina cases that “SAFETY AND POOR ENGINEERING” are not policy matters subject to discretionary judgment. He held the Corps of Engineers liable for \$700,000 damages to three individuals and one business in his November 19, 2009 156-page opinion.

NOBEL PRIZE IN ECONOMICS

By John Ehret, Esq.

Elinor Ostrom, a professor at Indiana University and winner of the 2009 Nobel Prize in Economics “for her analysis of economic governance, especially the commons,” demonstrated by her research that natural resources such as pastures, woods, and lakes can be successfully managed by users — that’s us—the owners. She challenged the conventional wisdom that common property should be regulated by central authorities such as the Army Corps of Engineers. I thought the Navy had all the destroyers!

BOARD OF DIRECTORS MEETING

A new slate of officers was unanimously elected at the Great Lakes Coalition's board of directors meeting held November 9, 2009 at GLC headquarters in Douglas, Michigan.

Officers:

Marcia Wineberg – President
Gay Peterson – Vice President
Sue Oakes – Secretary
Joe Milauckas – Treasurer

Directors:

John H. Boyd
John R. Ehret
Ray Oakes
Larry Robson
Roger J. Smithe
Bill Somerville

Marcia resides in Illinois and maintains a weekend residence in St. Joseph, Michigan. She has been a long-time member of the Coalition and was elected to the Board last year. Marcia is a plaintiff in Banks v. US.

Gay, a long-time Board member, is a resident of Montague, Michigan.

Sue lives in Montague, Michigan and has been filling in as temporary Board secretary. She is the wife of GLC board member Ray Oakes.

Joe Milauckas, Saugatuck, Michigan, will continue on as treasurer while stepping down from his long tenure as president of our group along with being a founding member of the Coalition. Joe's diligent leadership has continued to move us forward in our efforts to protect our shorelines and beaches.

BEQUEST

A \$2,000 bequest was received from our friend and former director Quincy White. Quincy was a founding member of the Coalition and resided in New Buffalo. He was a long-time director and chairman of our Legal Committee. Quincy passed away in 2008.

Time to renew your membership for 2010, or join us if not already a member:

**Michigan/Lake Michigan Chapter-Great Lakes Coalition
P. O. Box 429
Saugatuck, MI 49453
(269) 857-8945**

We are a 501(C) (3) tax-deductible organization

NAME _____

MAILING ADDRESS _____

LAKE PROPERTY ADDRESS IF DIFFERENT _____

E-MAIL ADDRESS _____

2010 MEMBERSHIP DUES: \$35_____ ADDITIONAL CONTRIBUTION: \$_____

DATE _____ SIGNATURE _____



**GREAT LAKES
COALITION**

Michigan/Lake Michigan Chapter for Shoreline Preservation

P. O. Box 429, Saugatuck, MI 49453

www.iglc.org