

SOS

SAVE OUR SHORELINE

SOS FEBRUARY 2005 NEWSLETTER

PROTECTING RIPARIAN RIGHTS AND MICHIGAN'S GREAT LAKES BEACHES

ON TO THE SUPREME COURT!



Michigan Hall of Justice, home of the Michigan Supreme Court

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If it seems like a long time since our last newsletter, you are right. With your help, your board has been busy protecting our beaches, and once again there is much to report. We have followed the *Glass v Goeckel* case all the way to the Michigan Supreme Court, and a hearing will take place March 8 in Lansing, where they will be discussing whether you or the state owns the beach in front of your cottage, home, or resort property. I am very proud of our legal team and the briefs that we and others have filed in support of riparian ownership. We anticipate a decision by mid-summer. The hearing is open to the public, so those of you that might be interested in this once-in-a-lifetime opportunity to hear the court debate riparian ownership may want to attend. Attendance won't influence the Court's decision, but it sure will be interesting for those attending!

As I am sure you know, the beach grooming law, 2003 PA 14, has been very effective, and many of us

are now receiving beach grooming permits from both the MDEQ and the Corps of Engineers. One area where the Corps has refused to grant a number of permit requests is between the Saginaw and Kawkawlin Rivers near Bay City, which just happens to be where I live. Other land owners in that area are appealing the denial with our help.

We are also broadening our education of state and federal regulators, as well as the public, about the threat of phragmites, that tall new plant that is overtaking many of our beaches. On their road to converting our beaches to wetlands, these agencies apparently did not know that the "emergent wetland" vegetation coming to many of our beaches was phragmites, an invasive, non-native plant that thrives in polluted waters and is deemed by wetland scientists as a major threat to our coastal wetlands.

These are just some of the things we've been working on, and this news-

letter will fill you in on the rest. Just think of where we would be without

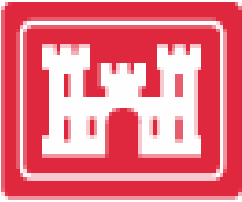


President Krygier

Save Our Shoreline: The MDEQ would be exercising ownership of our beaches, and perhaps placing survey stakes, as they did in some areas. There would be no beach grooming law. Permit forms would be 40 pages, not one, and rarely granted. Public beaches would have more vegetation. Phragmites would be overtaking much of the shoreline in polluted areas like the Saginaw Bay. The Corps of Engineers would be suing non-compliant riparian owners in federal court. We are indeed fortunate that so many of us banded together to stop this madness.

Ernie Krygier
SOS President

Corps of Engineers Cincinnati Office: Detroit District is Biased



The Corps' Cincinnati office has issued a report declaring that the Detroit District's permit denial for Saginaw Bay beach grooming was "biased," "arbitrary," and "result driven."



Beach of Guy Pittman, Caseville, Michigan

Confronted with threatening letters and lawsuits against riparian owners, this organization has been highly critical of the Corps' Detroit District. That the Detroit District was not properly following the law was confirmed when it voluntarily dropped its litigation against the Kincaids after a full year of litigation, and after a Congressional committee questioned its activities. Now, a Corps supervisory office has itself criticized the Detroit District. In reviewing an appeal of the denial of a beach grooming permit submitted by SOS member Guy Pittman, the Corps' Cincinnati office has issued a report declaring that the Detroit District's handling of his permit request was "biased," "arbitrary," and "result driven." The Cincinnati office directed the Detroit District to reconsider Mr.

Pittman's permit request using proper criteria. The permit was subsequently granted. A complete copy of the review document can be found on our website. The Pittman case is one of two appeals we are aware of that have been decided. Both were appeals of the decisions of Lt. Col. Thomas Magness, the previous commanding officer of the Detroit District, and both were decided against the Detroit District. Your SOS board continues to communicate with the Detroit District and its new commander so that future permit decisions might be made in compliance with the law. SOS is currently aware of two pending appeals, including the appeal of Frank Whalen and several other SOS members located between the Kawkawlin and Saginaw Rivers in Ban-

gor Township. The Corps has apparently determined not to grant permits in this area, which just happens to be where SOS President Ernie Krygier resides. Further, SOS has learned that despite regulatory directions that compel the Detroit District to defer to state law, including 2003 PA 14, the Detroit District in 2001 adopted an interpretation of that regulation which essentially disregards the regulation's intent. Your SOS board believes the 2001 interpretation is another example of Detroit District bias, and has determined to aid those residents in contesting this interpretation. A copy of the Detroit District's memorandum setting forth its interpretation is available on our website. For more information, contact Dave Powers.



Corps and MDEQ Granting More Beach Grooming Requests on Saginaw Bay

From anecdotal evidence received by SOS, it appears the MDEQ and the Detroit District—under new leadership—have stepped up their issuance of letters of permission and beach grooming permits. While some areas have not benefited, many others have, with permits now being issued to owners

who received cease and desist letters in 2000 and 2001. In addition to the passage of 2003 PA 14 and SOS's other legislative efforts, the permits are the result of SOS's ongoing communication with these agencies, as well as successful appeals. ■



Beachgoers enjoy a well-groomed public beach in Traverse City

Ohio Lakefront Group UPDATE



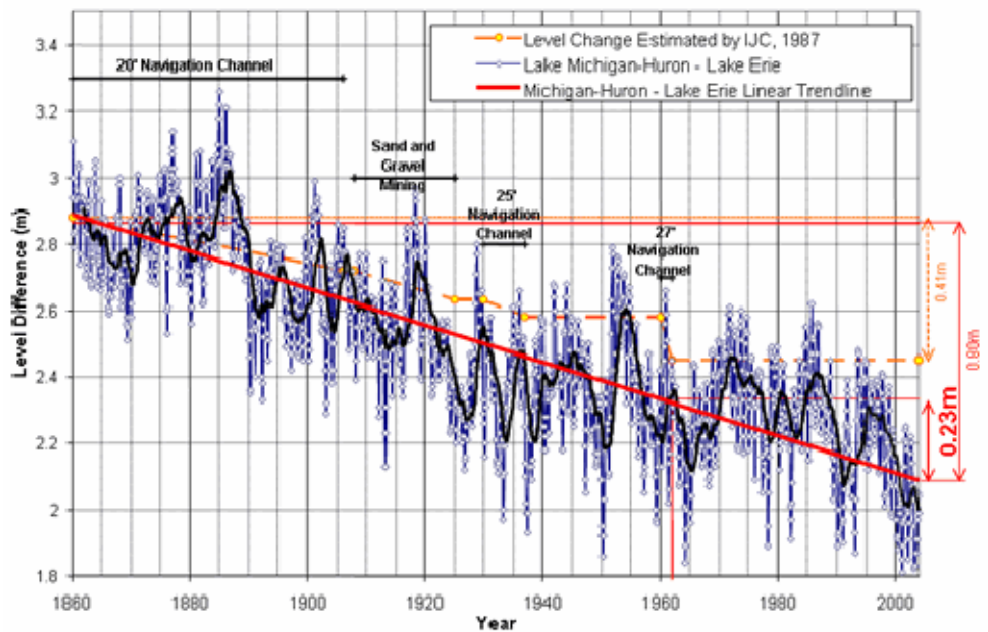
In our last newsletter, we reported that the Ohio Lakefront Group was fighting for legislation to stop the Ohio DNR from claiming state ownership of Lake Erie beaches. That effort stalled in the Ohio Senate, and the controversy has moved to the courts. The Ohio

Lakefront Group and others have filed a class action lawsuit against the Ohio DNR for a declaration that the Lake Erie beaches are owned by the riparian. Early attempts by the Ohio DNR to have the suit dismissed failed, and the case is proceeding. Hearings to deter-

mine whether to give the suit class-action status will take place in March. The Ohio Lakefront Group provides suit information regularly on its website, including court documents. See <<http://www.ohiolakefrontgroup.com>>. ■

Understanding Lake Levels

According to the MDEQ, the Corps' Detroit District, and press accounts, the vegetation that started sprouting on Lake Huron beaches in the late 1990's was merely a function of temporary, cyclical low water. Despite ever-increasing raw sewage and other pollutants being dumped into our lakes, the agencies refuse to recognize this as a factor. A recent study by Canada's Georgian Bay Association, a property-owners group of about 4,200 families, highlighted another factor at play: a permanent lowering of water levels. We have long known that three factors have resulted in lower water levels over the last 140 years: dredging, gravel mining, and water diversion, mainly at the Chicago River. Since the 1860's, these factors have been attributed to a lowering of water levels of about one foot. A quick glance at water-level charts from the late 1800's and the



late 1900's will confirm this fact. But the Georgian Bay study suggests that dredging of the St. Clair River and subsequent gouging is causing a much more pronounced effect on water levels, and may have lowered them to as much as

three feet below where they would be without the influences of man. You can see the study at <<http://www.georgianbay.ca>> or look for the link on our SOS website.

■■■



TREASURER'S REPORT

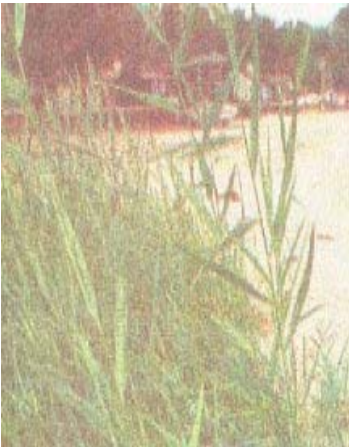
by Chuck Groya



As of February 8, 2005, our Legal Fund has \$99,448. That amount will soon be reduced as we pay the substantial cost of briefing in the *Glass v Goeckel* case. Our General Fund is doing well at \$42,924. Finally, our Political Action Committee Fund stands at \$20,093. The total

amount of these funds is well improved over last year's, showing that SOS members are not ready to cede their property over to the MDEQ any time soon. Thanks to all of you that have paid their dues and contributed to our PAC and Legal Funds. ■

Phragmites: The Killer Weed by Betty Pattullo



Phragmites is an aggressive, unwanted invader that is making its way around the Saginaw Bay.



Phragmites in state-protected "environmental area" at mouth of Saginaw River

Have you seen a strange, giant (ten to twelve feet high) plant growing on your beach that you don't remember seeing a decade ago? Have you wondered what it is? Chances are, it is Phragmites, which has been identified on many of our beaches in the Saginaw Bay and threatens our fully functional wetlands.

What is Phragmites? *Phragmites australis* is a large perennial rhizomatous grass, or reed. The name Phragmites is derived from the Greek word for fence. Phragmites is frequently regarded as an aggressive, unwanted invader in the East and Upper Midwest. It has also earned this reputation in the Mississippi River Delta of southern Louisiana, where in the last 50 years, it has displaced species that provide valuable forage for wildlife, particularly migratory waterfowl. There is some suspicion that although the species is indigenous to North America, new, more invasive types were introduced from Europe.

Phragmites is especially common in alkaline and brackish (slightly saline) environments, but its growth is greater in fresh water. Phragmites occurs in disturbed areas as well as pristine sites such as our beaches. In fact, we have experienced a dramatic increase in Phragmites population in the northeastern and Great Lakes States over the past decade.

Phragmites proliferates through seeds and a process called fragmentation. Seeds are shed from November through January and so may be among the first seeds to reach these sites. If the seeds

germinate and become established, the young plant will remain a small plant for at least two years, resembling many other grasses. Later, perhaps from the input of nutrients and other pollutants, they may take off and assume the tall growth form that makes the species easily identifiable. Increases in soil nutrient concentrations, especially nitrates, are primarily responsible for increases in Phragmites population. (At hearings before the Legislature last year, environmentalists told state senators that the Saginaw River, which dumps into the Saginaw Bay, has record measurements of nitrates). Salinity and depth of the water table are among the factors which control the distribution and performance of Phragmites. Phragmites does not do well when covered with water. Water temperature is also a factor. Some scientists believe that global warming may be responsible for the recent spread of Phragmites northward.

Fragmentation occurs when pieces of the plant, any piece, are relocated. Relocation can occur when we have a storm and the Phragmites is removed by the wave action and relocated on beaches miles from the original site. Killing frost may knock the plants back temporarily but can increase stand densities by stimulating bud development.

Once a new stand of Phragmites takes hold, it spreads predominantly through vegetative reproduction. Individual rhizomes live for 3 to 6 years and buds develop at the base in late summer each year. The buds mature and

typically grow about 1 meter (over 3 feet) and up to 10 meters in newly colonized nutrient-rich areas.

SOS has discussed the threat of Phragmites with our country's preeminent wetland scientists. One of those scientists reports that the threat of Phragmites to our fully functional wetlands "scares him to death." Phragmites dominates the former beach at the Bay City State Park. The weed surrounded a Caseville couple's beach before they were sued by the Corps of Engineers in 2002 for beach grooming. And it can now be spotted in fully functional wetlands along the Saginaw Bay, including Tobico Marsh, the beaches of Quanicassee, and Wildfowl Bay.

In 2004, SOS began its public awareness campaign about the threat of this invasive, non-native plant. In the coming months and years ahead, SOS will broaden the education of our state and federal regulators about the threat of Phragmites.

Much of the above information was based upon information from The Nature Conservancy-Element Stewardship Abstract 1993, which is available on our SOS website under the "Library" button. ■



Phragmites on Caseville Beach, next door to Herb & Marion Kincaid, who were sued for beach grooming



LEGAL CORNER

by Joe McBride



The Legal Committee has been busy doing the necessary work of both managing our legal campaigns, and assuring that SOS has the proper resources to be victorious. Thanks to the generous support of many SOS members, SOS continues to be the envy of onlookers monitoring our progress.

Who Owns Michigan's Great Lakes Beaches? The Michigan Supreme Court May Once Again Tell Us.

In our last newsletter, I reported that we had filed an amicus brief with the Michigan Court of Appeals in the case of *Glass v Goeckel*. The case involves the claim of Mrs. Glass, who says that as a member of the public, she has free use of the beach, as public property, up to an elevation of 579.8 feet above sea level, a so-called "ordinary high water mark." The Goeckels, cottage owners near Oscoda, are defending their beach against that claim. Alcona County Judge John F. Kowalski ruled that the beach belongs to the state, and that the public had free reign of the beach in front of the Goeckels' cottage. The Goeckels appealed, and sought additional legal help. They approached SOS Vice President and Attorney David Powers, who directed them to an appellate specialist. David then shared our substantial research with Mr. Goeckel and his new attorney. He was also retained by SOS to draft and submit a brief to the Michigan Court of Appeals on behalf of SOS, a copy of which can be found on our website. Relying substantially on our brief, the

Court of Appeals reversed Judge Kowalski and found that the public had no right to use of private riparian beaches. The Court did, however, suggest that the state owned the beaches under the public trust doctrine, contrary to our research. We were extremely concerned about this language, and could only hope that the Plaintiff would appeal. An appeal would allow the Michigan Supreme Court an opportunity to correct the Court of Appeals' error.

That hope became reality last fall, when the Plaintiff appealed, and the Michigan Supreme Court agreed to hear the case. Suddenly, we found we were not alone. Joining in the fight to protect our title to Michigan's beaches were the following organizations:

- Michigan Chamber of Commerce
- Michigan Bankers Association
- National Federation of Independent Business Legal Foundation
- Michigan Hotel, Motel & Resort Association
- Defenders of Property Rights, a national non-profit corporation in Washington D.C.
- International Great Lakes Coalition, an international association of Great Lakes property owners

In early February, SOS and these organizations submitted briefs to the Court, supporting the Goeckels' claim of ownership to the water's edge, including the right of exclusive use. I must tell you that the briefs supporting our position are especially well researched and well

written. Briefs against private ownership were filed by the National Wildlife Federation, Michigan United Conservation Clubs, and Tip of the Mitt Watershed Council. Interestingly, the Tip of the Mitt brief acknowledges that riparians have exclusive use of the beaches under existing law.

We are confident that any objective reader of these briefs must conclude that Michigan's Great Lakes beaches are owned by us--the riparians--and not the State of Michigan. The briefs are available on our website, and a summary of our SOS brief follows this article. Oral argument on the case will occur in Lansing at the Hall of Justice on Tuesday, March 8, 2005 commencing at 9:30 a.m., and we anticipate a decision by mid-summer. SOS has provided financial support to the Goeckels in this important battle. Who owns Michigan's Great Lakes beaches? Our research tells us that riparians do. Let's all hope the Michigan Supreme Court agrees!

SOS Teams With Nationally



SOS Vice President and Attorney Dave Powers at work in Washington D.C.

(Continued from page 5)

Known Constitutional Law Expert on Brief.

Save Our Shoreline has filed an amicus brief with the Michigan Court of Appeals in another case involving the possible expansion of the so-called “public trust doctrine,” this time in a case involving a stream. In *Michigan Citizens for Water Conservation v Nestle Waters North America Inc.*, the plaintiff is requesting that the Court of Appeals apply the “public trust doctrine” to expand public control over waters of a non-navigable stream in northern Michigan. SOS opposes the use of this legal doctrine to expand government control over private property without compensating the owner. In its brief, SOS Vice President and Attorney David Powers teamed with nationally known constitutional law expert Viet Dinh, a Georgetown Law School professor, to demonstrate why expansion of public rights via the public trust doctrine would violate Michigan’s Constitution, among other things. Professor Dinh



Professor Viet D.

graduated from Harvard University, has clerked for a U.S. Supreme Court Justice, and has appeared on national television networks, such as Fox News. The brief demonstrates how other states in recent years have refused to expand the public trust doctrine, and suggests that Michigan should continue to follow suit. The brief can be found on our website.

SOS Supports Appeals of Permit Denials.

Several homeowners in Bangor Township, near Bay City, have had their beach grooming permits denied by the Corps’ Detroit District. SOS had been monitoring the request,

which was initiated by SOS Board member Frank Whalen, among others, to see if the Detroit District would defer to state law as required by federal regulations. SOS has now learned that in 2001, while the MDEQ was implementing a rule change authorizing limited beach grooming, the Corps’ Detroit District quietly prepared an internal memorandum explaining how it might interpret its regulations in such a way as to avoid deferring to state decisions on such matters. When the applicants demanded that the Detroit District defer to Michigan’s beach grooming law, 2003 PA 14, the Detroit District declined, citing the 2001 memorandum. SOS is convinced the 2001 memorandum is simply another example of what has already been established: Detroit District bias. The SOS Board has determined to support the appeal of these owners, which includes board members Frank Whalen and Chuck Groya. If these owners succeed in their appeals, the Detroit District will be forced to defer to state law in deciding permit requests for all other shoreline owners.

Members Answer Call for Additional Funds.

Your Board asked, and you answered. Our 2004 campaign for additions to the Legal Fund resulted in total contributions for the year of \$147,239 (our June 26, 2004 letter raised \$95,389, and our follow-up letter on November 23, 2004 raised \$51,850). These funds allowed us to do all of the work described above, and we still have funds in place to finish some of the items we are working on. As SOS members, we can be proud that we have done everything in our power to assure a positive outcome from the Michigan Supreme Court in *Glass v Goeckel*. And there is plenty left to do: provisions of the beach maintenance bill expire in 2006 and 2007, which is right around the corner.

SOS Renews Agreement with Kelley-Cawthorne.

After some spirited debate, the SOS Board agreed unanimously to renew our contract with our legislative relations counselors, Kelley-Cawthorne. The contract renewal is a substantial portion of our Legal Fund budget, but with the expiration of the beach maintenance bill coming upon us, it is imperative that we maintain our presence in Lansing. We anticipate 2005 will be an active legislative year for SOS in Lansing, and we would not want to be there without Pat McCollough and the consummate professionals at Kelley-Cawthorne.

Kincaid Litigation Update.

We are still waiting for a decision from U.S. District Judge David Lawson on whether the Kincaids will be reimbursed for attorney fees totaling \$157,682, which they spent defending themselves against the Corps of Engineers’ Detroit District. After one year of litigation demonstrated that their case was totally flawed, Lt. Col. Thomas Magness and the Detroit District voluntarily dropped the case. The Kincaids first filed their request for attorney fees in a motion dated June 19, 2003, and they have waited nearly two years for an answer from Judge Lawson.

Conclusion.

As you can see, our all-volunteer Legal committee remains quite busy. There is plenty of work yet to be done. If you have any interest in serving on the Legal Committee, please contact Joe McBride.■

Membership Application

Thank you for your interest in joining Save Our Shoreline. Please complete the following information and send it to:
Save Our Shoreline
P.O. Box 2307
Bay City, Michigan 48707-2307

Last Name: _____ First Name: _____

Mailing Address: _____ City: _____

State: _____ Zip: _____ Phone: _____

Email Address: _____ Fax: _____

Name of your beach area: _____
 (i.e. AuGres, Bay City, Caseville, Grand Traverse area, Tawas)

- I wish to join.
- I have enclosed \$50.00 (\$25.00 application fee and \$25.00 annual fee). Please make check payable to Save Our Shoreline.

Upon receipt of your application, you will receive one membership certificate. Please enter the name you would like to have on the membership certificate. _____. Please be very specific. (Example: Bob Jones, Mr. & Mrs. Bob Jones, or Bob and Mary Jones?)

SAVE OUR SHORELINE AMICUS BRIEF: A SYNOPSIS

By David Powers

Our 49-page amicus brief filed with the Michigan Supreme Court in the case of *Glass v Goeckel* contains a thorough explanation of Michigan law on the issue of Great Lakes shoreline ownership. It also contains a fascinating history of how the MDEQ's predecessor, the Department of Conservation, developed its flawed position on ownership, and a history of the Department of Conservation's failed attempts to change the law in the 1960's.

The issue of Great Lakes shoreline ownership was resolved in 1930 by the Michigan Supreme Court in *Hilt v Weber*, which declared that riparians own to the water's edge, where the public trust stops. Arguments that the *Hilt* decision did not apply to land uncovered by low water, or that the state was not bound by the decision, were rebuffed when the Michigan Supreme Court reversed the decision of *Kavanaugh v Baird* in 1931. U.S. Supreme Court decisions are consistent with *Hilt*. For example, in *Massachusetts v New York*, the Supreme Court held that the shores between low and high water marks are not owned by the state. Cases involving oceans, which hold that the state owns to an ordinary

high water mark, do not apply to the Great Lakes, where the tides have little or no influence. In each of three cases over the last century, the Michigan Supreme Court has refused to expand the public trust doctrine to turn private property over to the state.

Since the Great Lakes Submerged Lands Act, enacted in 1955, applies only to state-owned lands, it does not apply to our privately owned beaches. The Act's establishment of an ordinary high water mark has no application to our beaches. The Department of Conservation tried, but failed, to amend the Act, so that it would establish a new boundary between public and private land at the ordinary high water mark. Its proposed changes were rejected by the Legislature.

In trying to convince the legislators to change the law, the Department of Conservation developed a legal memo to legislators. The memo asserted that in *Hilt v Weber*, the Michigan Supreme Court held that the shore between low and high water marks was in the state. But the memo took words from the *Hilt* decision out of context, because the Court was actually saying quite the opposite. Anyone that reads the decision carefully will see the mistake made by the Department of Conservation. Unfortunately, the Attorney General issued an opin-

ion in 1978 that makes the same mistake, and the MDEQ and the MDNR still hold to this mistaken interpretation. They have spent a great deal of state funds telling the public the state owns the beaches, and it is all based on a mistaken interpretation that can be traced back to that 1962 memo. The Michigan Supreme Court should use this case to clarify that riparians own the beaches and to clearly indicate that the Department of Conservation's interpretation of the *Hilt* case is wrong.

A decision which confirms title in riparian owners will not have the grave consequences Mrs. Glass and some environmentalists assert. Under Michigan law, people are free to walk the beaches until the owner notifies them otherwise, so beachwalking will continue as it has in the past. Also, the government will still have the power to regulate activity on the beach, just as it does on other properties, if it chooses to do so. But that regulation will have to be reasonable.

A complete copy of our amicus brief can be found on our website. ■



SAVE OUR SHORELINE

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OUR MISSION:

“To organize waterfront property owners and those with similar interests consistent with the goals of the organization; to preserve and maintain riparian rights, including the right to maintain safe recreational beaches and waterfront areas, both public and private; and to preserve and maintain a proper balance for the coexistence of man and nature upon and near waterfront property.”