

SOS

SAVE OUR SHORELINE

SOS SEPTEMBER 2010 NEWSLETTER

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Inside this issue:

There is always change	1
Michigan AG takes sides in Ohio Lakefront Group case	1
Florida Supreme Court decision: a silver lining for MI Lakefront owners?	2
Great Lakes Wind Council	3
Wetlands Advisory Council update	3
Great Lakes Water Levels Study	4
Bogus Science: the Filtering Action of Weeds	4
Phragmites v. Oil Spill: Not much of a difference	5
Political Action Survey update	6
Treasurer's Message	7
ACOE Change in Command	7

THERE IS ALWAYS CHANGE

The summer of 2010 is coming to an end. We should all be happy for the weather. For the most of us, our beaches are in great shape. The water has not gone down. Our State and Federal governments have not been targeting our beaches. With the end of summer and the passing of time the leadership in government changes. Our elected representatives that we have worked with are leaving and new ones will follow. There is always change.

In government one thing is for sure: there will always be people that want our beaches. They are always looking for ways to take our beaches without paying for them. They simply do not believe in private property rights for those that have

been able to purchase water front property on the Great Lakes. Those that own property on the shoreline paid for their property and at a significantly higher property tax rate than those that own a home not located on the beach.

We will be voting in new leadership for both the State and Federal government this November. SOS will be sending out a questionnaire to many of the candidates for State office. We will be asking them to respond to questions that are important to our members. We will then share the information with our total membership. You may not be able to vote at your beach property, but your representatives in the State and Federal government will have a say on how our beaches will be governed.

We have and always will be invested in maintaining our beaches so that they will be clean and healthy. We have made a difference by standing together and defending our property rights. As time moves on and people try to change laws that would take our beaches away from the property owners, SOS will be there. I want to say thank you to all of you that support SOS.



Ernie Krygier

President
Save Our Shoreline

MICHIGAN ATTORNEY GENERAL MIKE COX OPPOSES SHORELINE OWNERS IN OHIO CASE

As mentioned in our April 2010 newsletter, the SOS board has been monitoring the legal issues in the Ohio Lakefront Group case, i.e. State of Ohio, ex rel, Robert Merrill, trustee et al and Homer S. Taft, et al v. State of Ohio, Department of, and State of Ohio and Natural Wildlife Federation. This case involves a challenge by the Ohio Attorney General to existing state law by asserting that the state owns the dry shore lands of Lake Erie, including the backyards and heretofore private property of lakefront owners. The action started when the state required lakefront property owners to lease and/or pay rent for occupying land that they already owned! The state had recently required property owners to lease or pay rent for structures commonly associated with beachfront property.

(continued on page 2)

MICHIGAN AG OPPOSES SHORELINE OWNERS IN OHIO CASE (continued)

The Ohio Lakefront Group initiated successful legal action to prevent this reversal of nearly 200 years of state property laws and won in Federal court, common pleas court and the state court of appeals. The courts found that the state's interest in the waters and submerged lands of Lake Erie does not extend beyond the water's edge and in fact, Ohio lakefront property owners retain their property rights to the water's edge. This was the law in Michigan until the 2005 Glass v. Goeckel decision took away shoreline owners' exclusive use and gave the public a right to walk the beaches. This Ohio court decision, if upheld, preserves the rights of property owners and may some day help guide Michigan to restore riparians' rights to the water's edge.

Michigan Attorney General Mike Cox noted the same possibility in relation to the Ohio Lakefront decision and accordingly, filed legal briefs in support of the Ohio Attorney General's office in July 2010. Cox did not specifically support the original State of Ohio contention that the state owns the dry shore lands of Lake Erie but rather, took issue with the ruling that lakefront property owners own to the water's edge. The Michigan AG clearly recognized the distinction between Ohio law and Michigan law in relation to riparian property rights and wanted the court to understand the potential impact on other states in relation to the public trust doctrine. A decision upholding the rights of Ohio lakefront owners would delegitimize the Glass decision that infringed on shoreline private property rights.

The case currently sits with the Ohio Supreme Court and a hearing date has yet to be scheduled. SOS will be filing an amicus brief in support of the Ohio Lakefront Group. It is important to support similar lakefront owners as they encounter aggressive government action to claim private property rights away from US citizens.

FLORIDA SUPREME COURT DECISION: A SILVER LINING FOR MICHIGAN LAKEFRONT OWNERS? (Special thanks to Dave Powers for this article)

SOS participated in the Florida beachfront property case, Stop the Beachfront Renourishment Inc v. Florida Department of Environmental Protection, reviewed by the United States Supreme Court during the recently completed 2010 session, by filing an amicus brief. The case involved the uncovering of bottomlands bordering the Atlantic Ocean that were subsequently filled in with sand and in effect, extended the existing beachfronts in some instances by several thousand square feet. The Florida Supreme Court found that the additional beachfront area that covered the bottomlands was state property. This was the case even in situations that the beachfront property owners had footed the bill for expansion of the beach area!

The beachfront property owners contended that the additional beachfront areas represented an accretion to their existing land and should properly be considered an addition to their existing property. The Florida beachfront owners sued in court on the grounds that denial of their property rights related to accretion of soil and land over time represented a judicial taking under the fifth amendment of the US Constitution.

The US Supreme Court heard oral arguments last December attended by SOS President Ernie Krygier, Board member Dave Almeter and SOS attorney (and former board member) Dave Powers.

The US Supreme Court ruled in favor of the State of Florida. The court upheld the state's contention that private property rights for beachfront owners in Florida extended only to high tide mark and that the new beach area from the filled bottomlands was state property. The court also referenced the distinction between the rights of property owners in relation to *accretion*, i.e. the gradual addition of dry land and soil to existing property as opposed to *avulsion*, i.e. a sudden addition of dry land and soil, even if by human action rather than natural occurrence. The new beach areas represented the process of avulsion and therefore were not subject to the accretion rights of beachfront property owners.

Although the Florida beach owners lost, Justice Scalia's decision sent a loud warning to state courts that they cannot use their power to change the law as a way of confiscating private property. Specifically, he said that 1) Individual laws in each state ultimately determine private property rights, and 2) The Supreme Court has standing to determine if a state court decision represents a "judicial taking" in violation of the fifth amendment of the US Constitution. This latter determination may ultimately provide Michigan beachfront owners a future opportunity to challenge Glass v. Goeckel or a similar case as an unlawful judicial taking under the fifth amendment. Although a majority of Justices did not support all of Justice Scalia's views, they did let him write the lead opinion, which suggests that they share some agreement with his message.

GREAT LAKES WIND COUNCIL

The Great Lakes Wind Council was created by an executive order by Governor Jennifer M. Granholm in 2009 as an advisory body within the MI Department of Energy, Labor and Economic Growth. The purpose of the council was to evaluate issues and make recommendations related to the development of offshore wind energy in Michigan. The council consists of state officials and other stakeholders appointed by the governor.

The Great Lakes Wind Council released its initial report in the fall of 2009 detailing the areas of great lakes bottomlands most favorable to offshore wind development ("wind resource areas"). The report focused on offshore areas that had a depth of 30 meters or less and at least 20 miles of contiguous square miles. This was approximately 7,800 miles (out of a state total of 38,000) of lake bottomlands. The council established buffer or exclusion zones related to national parks, military installations, harbors/marinas, airports and a minimum distance from shore of at least 6 miles.

The council subsequently added criteria related to shipping lanes, wildlife habitats and commercial fishing. This reduced the most favorable areas for offshore wind development to approximately 537 square miles located in the following areas: S. Lake Michigan near Berrien County, N. Lake Huron near Delta County, Central Lake Huron, S. Lake Huron near Sanilac County and Central Lake Superior near Alger County.

The Great Lakes Wind Council has continued their work during the past year by holding public meetings to both educate and solicit public input regarding offshore development, recommend options for bottomland selection and leasing processes, identify how the public could be compensated for the development of offshore wind power and recommending legal and regulatory changes necessary to establish offshore wind activity in the next several years.

SOS has been attending the regular meeting of the Great Lakes Wind Council and monitoring the development of offshore wind resource areas. SOS has not taken an official position either supporting or discouraging the development of offshore wind power. However it is important to note that not surprisingly, support for further development seems to be much higher among inland residents than coastal residents and the long term impact on fishing, wildlife and other natural resources is as of yet undetermined. In addition, windmills as far as 20 miles away are still visible from shore despite the attempts to include buffer zones from scenic areas.

SOS will continue to monitor these activities and keep our membership informed as Michigan continues its transition to offshore wind power.

WETLANDS ADVISORY COUNCIL

The Wetlands Advisory Council has been meeting to review and recommend improvements in the current wetlands restoration and enhancement permitting process scheduled to sunset in October 2010. The council consists of public officials, administrators from the Department of Natural Resources and Environment (DNRE) and various stakeholders. SOS members will remember that it was the active intervention and advocacy by SOS that enabled passage of a more reasonable beachfront permitting process back in 2005. As a result, it is very important that we continue to monitor changes in the permitting regulations to prevent an erosion of the improvements agreed to a few years ago.

SOS board members Chuck Groya, Bernie Uhlmann and former board member Dave Powers attended the most recent Wetlands Advisory Council meeting in July. The council is considering several recommendations to the DNRE in relation to existing permitting processes including: centralization and improved consistency of permitting decisions, increased involvement of external professionals with expertise in design & analysis of permit requests, identification of efficiencies to be gained via improved coordination with the Army Corp of Engineers, adoption of methods used in other states and an expansion of the general permit (GP) and minor project (MP) categories.

Many SOS members would support the stated objectives of the council particularly if implemented in a manner that respects riparian property rights. Unfortunately, the DNRE has too often pursued an agenda predicated on the basis of apathy and outright hostility to beachfront owners. Some of the other proposals under consideration, i.e. increased availability of DNRE staff to assist property owners in project planning and increased outreach and education to the public, have in the past equated to increased harassment of property owners by DNRE officials and political reeducation that you have lost some of your property rights by administrative decree.

SOS will continue to be vigilant in monitoring the activities of the Wetlands Advisory Council so that the final recommendations do not infringe upon our rights as citizens and property owners in Michigan.

GREAT LAKES WATER LEVELS – STUDY UPDATE by Dave Powers

Next summer will be an important time for those concerned about water levels in the Great Lakes. That is when a joint U.S. and Canadian panel will take final public input on its new plan for regulating water levels for Lakes Superior, Michigan-Huron, and Erie. The International Joint Commission's Upper Great Lakes Study is scheduled to conclude in 2012. The Study's plan will take into account the concerns of various "stakeholder" groups addressed by the study. Specifically, the study has set up committees of scientists that are studying the needs of, and impacts to, various user groups of the Great Lakes. These user groups include shoreline owners, commercial shipping, recreational boating, hydropower, and water users like municipalities. The study is also assessing environmental impacts.

The committees (called "technical working groups") have been busy studying their respective issues and are preparing to report their results to the study board. Once those reports are in, the study board will review them and begin making decisions about a future water level regulation plan. One thing has become clear: without building additional structures (e.g. weirs in the St. Clair River), we currently can influence water levels by only a few inches.

But that could change. As a result of public hearings on the St. Clair River portion of the study, the governments have recently asked the study board to report on aspects of re-establishing (raising) water levels to historical benchmarks, ranging from 10 cm (levels back to the early 1960s) to 50 cm (levels back to the early 1800s). Even raising water levels 10 cm would likely mean that high water periods would exceed 1986 levels. That should certainly get the attention of shoreline owners! Shoreline owners should monitor the study carefully, and shoreline owner groups like SOS should consider having experts lined up to review the study results and make comments at next summer's public meetings.

David Powers, former SOS Vice President, is the U.S. co-chair of the Public Interest Advisory Group for the International Joint Commission's Upper Great Lakes Study, and Study Board member.

BOGUS SCIENCE?: WEEDS AND THEIR FILTERING ACTION by Bernard Uhlmann

In recent years we have heard that the weeds growing on our beach area near the mouth of rivers play an important role in filtering the runoff from the river. Property owners failed to challenge that statement from environmental agencies. A closer look at that directive shows that it is based on speculation. There is no research that supports this concept.

A few years ago there was an attempt to generate data that supported the environmental group's contentions about the relationship between weed growth and positive effects on the environment. It did not take long to find defects in the research.

What researchers fail to take into consideration is that a study has to consider what happens on a year around basis. The most recent attempt involved a professor and some grad students taking some data over a couple of months. They extrapolated conclusions from this short term collection that were not valid. Property owners grant that there is a certain amount of filtering that occurs over the summer months. What studies do not take into consideration is what happens to that collection of dioxin-laden debris in the fall. The weeds that do the collecting die. They no longer hold the debris. They become part of the problem. The gales of November pound the former weed infested areas. They dislodge the collected debris and put it back into the environment. Once back in the system it circulates in the water and decomposes. It robs the lake of precious oxygen. Fish and other aquatic life need that oxygen to thrive.

Now these agencies wonder why there is tons of muck washing up on the once pristine beaches of Michigan's Thumb. You do not need an advanced degree in environmental science to figure this one out. There is a correlation between the amount of weed growth on the lake shoreline and the amount of muck that blows up on the beaches. Once bio-mass is created it does not disappear! It stays in the system in some form. Every year millions of dollars are spent dredging this debris from the shipping channel. Fishermen trolling for walleye observe tons of weeds floating free as they die every September.

Lakes can be killed! Saginaw Bay can be changed to an unproductive swamp. The truth is that Saginaw Bay is gradually being filled in. Agencies need not hassle the beach owner who removes these offending weeds at no cost to the government. Agencies need to stop producing bogus science. Agencies need to target those citizens who are creating fertile runoff that stimulates the excessive growth of bio-mass that is in the process of killing the lake we enjoy.

PHRAGMITIES v. OIL SPILL: NOT MUCH OF A DIFFERENCE?

(Special thanks to Joe McBride for this article)



In the spring of 2010 a disastrous oil spill occurred in the Gulf of Mexico that has occupied the attention of the public for many months. The continuous coverage of the accident offered by the 24 hour news cycle insured that the story of the oil spill would remain front and center in the public dialogue.

The damage to the local ecosystem, impact on wildlife, harm to the economy and devastation to shoreline property on the Gulf is well known to the public.



Interestingly enough, Michigan beachfront owners have been dealing with a very similar situation over the past several years. Phragmites, an invasive species, also represents an environmental disaster that has damaged the

local ecosystem, impacted wildlife, harmed the economy and devastated both public and private beachfront property in Michigan and elsewhere. Incidentally, it was SOS that pushed for legislation that declared Phragmites an invasive species that was destroying our functional wetlands (Wild Fowl Bay, Quanicasee, Tobico Marsh) and our traditional beaches including our public beaches in Bay City and Caseville.

In the end, the impact of Phragmites is no less as devastating on our shores as the oil spill is in the Gulf; however, it is more insidious and has been called the “cancer of our wetlands and shorelands”. The only other difference worth noting is that although both types of events are preventable, the cost associated with prevention varies significantly between oil drilling and Phragmites eradication. The first depends upon an expansion of regulatory oversight and expectations to ensure more complex and redundant safety measures are used. The second depends upon government permitting property owners to clean their beaches without the need for permits.

It is not an exaggeration to say that it seems that more conservative drilling approaches or the development of alternative forms of energy will more likely occur before the government permits property owners to remove Phragmites on their beaches without permits.



POLITICAL ACTION SURVEY

As mentioned in the report from our President Ernie Krygier, SOS has been developing a political survey for use by our lobbying firm, Kelly Cawthorne. The purpose of the survey is to determine the political views of prospective candidates for State office specifically in relation to beachfront property rights.

The questions are intended for SOS members to use as a guide for identifying which candidates for office are most likely to protect and respect the rights of SOS members. The survey will be distributed by Pat McCollough from Kelly Cawthorne in the next few weeks and the responses will be shared with SOS membership prior to Election Day in November. The survey consists of the following four questions and includes background reasoning for the question:

1. **BACKGROUND:** In 1930, the Michigan Supreme Court held that Great Lakes shoreline owners owned to the water's edge, and this holding has since been well-followed by the courts and opinions of the state's attorney general. Nevertheless, regulators and environmental advocates continue to dispute this proposition, arguing that private ownership ends at a so-called "ordinary high water mark," and that the state owns the dry beaches below that ambiguous mark. In the 2005 case of *Glass v. Goeckel*, the Michigan Supreme Court declined to address this question.

QUESTION 1: Would you support legislation declaring that Great Lakes riparians own to the water's edge?

2. **BACKGROUND:** In 1930, the Michigan Supreme Court held that Great Lakes riparian ownership included the riparian's right of exclusive use of their land to the water's edge. That holding had since been well-followed in court decisions and opinions of the state's attorney general. But in the 2005 case of *Glass v. Goeckel*, the Michigan Supreme Court ignored that precedent and announced that the public had a "public trust" right to walk on dry Great Lakes beaches up to the so-called "ordinary high water mark," a term the court conceded was "little defined" in Michigan jurisprudence.

QUESTION 2: Would you support legislation that nullifies the 2005 Michigan Supreme Court decision and restores exclusive use rights to the dry shore to their Great Lakes riparian owners?

3. **BACKGROUND:** After expanding the public's use to include beaches up to the "ordinary high water mark," and conceding that mark was "little defined," the *Glass v. Goeckel* court adopted a definition from Wisconsin as being:

the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.

Two justices dissented, and said that the public's rights end at that distinct line where sands wet from the continuous washing of waves turn to dry sands.

QUESTION 3: Would you support legislation that defines the public trust area, including the area where the public may walk, as ending at a line where dry sand meets sand made wet due to the continuous washing of the waves and the water?

4. **BACKGROUND:** In 2003, the state legislature passed the beach grooming law, 2003 PA 14, which specifically authorized certain beach maintenance activities (see below). In the debate, some argued that the beach grooming problem was a temporary one, as water levels would certainly soon return to normal. Accordingly, the law had a sunset provision. Unfortunately, the sunset provision occurred before water levels returned to normal. Water levels remain well below normal, and while state regulators have adopted a general permit authorizing certain activities, there is no guaranty that the permit will be renewed.

QUESTION 4: Would you support legislation that removes the sunset provisions of 2003 PA 14 to permit Beach Maintenance Activities on Great Lakes riparian lands conducted above the water's edge? "Beach Maintenance Activities" includes, but is not limited to, manual or mechanized leveling of sand, mowing, removal of invasive vegetation (as defined in 2005 PA 77) and grooming the top four inches of the area of Great Lakes riparian lands lying between the ordinary high-water mark and the water's edge as from time to time existing.

TREASURER'S MESSAGE - Chuck Groya

Hello SOS members. As mentioned in our recent annual dues letter, SOS has had a busy year and it looks to continue into 2011. Thanks to your support grooming and mowing permits are being granted. As always, money talks and keeps SOS monitoring what is going on in Lansing and with the Army Corp of Engineers. With that being said I would like to remind you that if you have not paid your dues for 2010 please do so soon.

Thanks again for your support of our mission to protect your shoreline interests.



**US ARMY CORPS OF ENGINEERS
CHANGE IN COMMAND**

Ernie Krygier, SOS President, attended the change in command ceremonies for the Army Corp of Engineers, Great Lakes and Ohio River Division in Detroit in July. The departing commander, Lt. Col. James B. Davis was replaced by Lt. Col. Michael C. Derosier. Ernie made a point (as he always does) of introducing himself and SOS to Lt. Col. Derosier and wished him good luck in his new command. Ernie also extended an invitation for Derosier to visit SOS members in the Saginaw Bay/Lake Huron and the Grand Traverse/Suttons Bay areas in the future. SOS is hopeful that we will have a productive and mutually respectful relationship with Lt. Col. Derosier and the Army Corp of Engineers during his tenure in the Great Lakes area.

SOS Objective: To preserve the right to eradicate invasive species and muck, especially phragmites, and to remedy governmental mismanagement of our lakes and shores that led to these problems

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
989-667-2910
www.saveourshoreline.org

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.)
- I'd like to donate an additional \$ _____ for _____ Legal Fund _____ PAC Fund

Please enter the name you would like to have on the membership roster: _____

Please be very specific. (Example: Bob Jones, Mr. & Mrs. Bob Jones, or Bob and Mary Jones?)

On behalf of Save Our Shoreline, we thank you for your support in protecting
Michigan's recreational beaches



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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.”