

# SOS

## SAVE OUR SHORELINE

SOS DECEMBER 2005 NEWSLETTER

### ***STATE HIGH COURT TAKES OUR BEACHES BUT SOS BOARD VOWS TO FIGHT ON***

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I'm sure you have already heard that the Michigan Supreme Court, in the case of Glass v Goeckel, held that the public has the right, by virtue of the public trust doctrine, to walk anywhere on your beach below a so-called "ordinary high water mark." From all that I have read and heard, there is no question in my mind that the Court disregarded the law and bowed to the demands of newspaper editorial boards and others calling for open beaches. Speaking of newspapers, there simply is not much we can do about newspapers telling the public that we want to exclude the public from our beaches. Our issue in the Glass case was never about beachwalking; it was about ownership and the extent of the so-called "public trust doctrine." This is a judge-made theory being used to take property rights away from people in a number of states. We opposed expanding the "public trust" theory, not because we wanted to stop beachwalking, but because we wanted to preserve our



President Ernie Krygier

state's maintained beaches. Now, the MDEQ and others will say that the public trust doctrine imposed on your beach means you can't groom it. And who knows what else they'll now say you can't do.

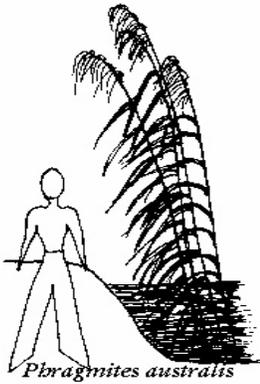
The newspapers also didn't tell you something else: the Michigan Supreme Court had no quarrel with the fact that riparians, and not the state, own the beaches. In fact, the Court rejected the Michigan Department of Environmental Quality's assertion, printed in thousands of letters to riparian owners, that the state owned to an elevation of 580.5 feet above sea level according to a state law. So if we've learned anything from this case, it's that you can't believe everything the MDEQ tells

you.

This fight is far from over, and your SOS Board of Directors is committed to the fight for your riparian rights. Earlier this month, we helped Richard and Kathleen Goeckel file a request for appeal with the U.S. Supreme Court. We hope to persuade the high court that the Michigan Supreme Court decision should be overturned as an unconstitutional confiscation of the world's longest freshwater shoreline.

Before I close, I have one more appeal: We need help! If you have a special talent—communications, the law, politics, environmental science, or fundraising—and are motivated to fight for our cause, please call me. Our SOS Board members are committed, but we can only expect so much from them. It is time for new leadership and new ideas to carry this organization through the challenges ahead of us. If you have the skills, please call me!

Ernie Krygier  
SOS President



*Phragmites* is much taller than humans

As noted in our last newsletter, the proliferation of phragmites threatens Michigan's beaches as well as its fully functional wetlands. This invasive, non-native plant can take over a beach or crowd out native wetland plants,

and virtually destroy native wetlands such as those at Wildfowl Bay or the Tobico Marsh. Among other things, the plants grow so dense that some wildfowl will not nest in them.

Thanks to a late-hour amendment advocated by SOS, phragmites was added to a list of biological materials that are prohibited in Michigan. As a result of the passage of 2005 PA 77, it is now illegal to propagate or spread phragmites in Michigan. SOS was able to act promptly on this bill thanks to our excellent relationship with state lawmakers made possible by our Political Action Committee Fund, and our government relation counsel-



*Phragmites dominates the former beach at Bay City State Recreation Area, once the state's most popular beach*

Faced with staggering legal costs from briefing in the Glass v Goeckel case, the SOS Legal Committee embarked on a 12 county fund drive that has raised over \$57,115 since March 2005. A record number of people responded, and since our February, 2005 newsletter, SOS membership is up by 674 with a total to date of 2,836 members. Thanks to this excellent response, all Glass v Goeckel

briefing costs have been paid, and the Legal Fund currently stands at \$56,195. This funding will serve us well in an appeal to the U.S. Supreme Court, or future litigation with the Corps of Engineers Detroit District, which continues to deny beach grooming permits where permission has been granted under state law, and where phragmites predominates.



# LEGAL CORNER

by Joe McBride



Much has happened over the past several months and as you may have heard some of it is good news and some of it is not so good. Your legal committee continues to press important issues that our members want resolved. Most of our members are concerned that their rights to maintain both residential and commercial beach property will continue to be threatened by the Michigan Department of Environmental Quality (MDEQ) and the Detroit District Corps of Engineers (COE). This is of great concern because the "Temporary Shoreline Maintenance Act," 2003 PA 14 is due to expire on June 4, 2006. You have our commitment to continue to work with our legislators on improving many aspects of this law and to make it permanent. In January, I plan to ask many of you to travel to Lansing in the spring to testify on the need for permanent legislation.

We continued to provide financial and legal support to Mr. and Mrs. Goeckel because ownership of the beaches is of great importance to our members. If our beaches are impressed with the Public Trust as the recent Michigan Supreme Court held, then you can be confident that the MDEQ will try as they did in 2000, 2001 and 2003 to prevent beach maintenance. We are very disappointed in the Michigan Supreme Court because they used ancient

Roman Law and Wisconsin Law to determine the scope of the public trust on Michigan soil and dismissed the richness of Michigan's common law and case law. The Supreme Court held that the shoreline property owners may own what their title describes but this title is impressed with the public trust and people may walk within the public trust area. I wonder what the reaction would be in Michigan if the Michigan Supreme Court used Roman Law and Wisconsin Law to determine if the tax laws were being applied correctly on the people of Michigan rather than relying upon current Michigan Law? Both Justice Markman and Justice Young supported the use of Michigan Law and its common law, but Justice Corrigan and the other justices disagreed. Perhaps we need to be very careful on which Justices we vote for in the coming years.

I know of no one who opposes beach walking; in fact it is an event that I rather enjoy, and I encourage others to incorporate beach walking into their weekend activities. Shoreline property owners are generous people who understand that it is a privilege to live on the beach, and they do not ob-

ject if individuals want to walk on their property as long as it is near the water. I have had several conversations with shoreline property owners who have lived on the shoreline for 60 plus years, and they can not recall when anyone objected to beach walking. Not even the Goeckels objected to Mrs. Glass walking on their beach. They only objected when Mrs. Glass went to court to establish a *right* to walk the beach. Is this sufficient reason to rewrite law in Michigan? Is this legislating from the bench recklessly rather than interpreting Michigan's law?

Not only was Michigan law changed, but the majority of the court did not provide any certainty as to the scope of the public trust. Therefore it could under one reading consume your entire beach. The two dissenting Justices, Markman and Young, believe that the public trust did not extend beyond the wet sand. Given the ambiguity of the scope of the public trust, you can be assured that the MDEQ & COE will try to over regulate your beach area. Under the Michigan Supreme Court decision the public trust area may be five feet, 100 or 200 feet or more depending upon the size of your beach and other characteristics.

Mr. and Mrs. Goeckel, with

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help from SOS, have appealed the Michigan Supreme Court decision to the US Supreme Court for an unlawful taking which is prohibited under the 5<sup>th</sup> Amendment. You can view the Petition for Writ of Certiorari on our website. We are hoping that the US Supreme Court finds that a taking has occurred and that the public trust does end at the water's edge. This has been the understanding of Michigan law since Hilt v Weber (1930), and would be consistent with Michigan's common law. Walking on the

shoreline, next to the water, has never been a serious issue with shoreline property owners. However, if shoreline property owners are going to pay a premium for shoreline property and higher taxes— while assuming personal liability for the shoreline— and at the end of the day have no control over their beach, then SOS still has a continuing obligation to its members to have the situation corrected and a modicum of fundamental fairness restored by the state and its courts.

In summary, the SOS board voted to work with legislators to repeal the sunset provisions of 2003 PA 14; to provide additional financial and legal support to Mr. and Mrs. Goeckel for their appeal and to work with legislators to develop a legislative scope of the public trust in accordance with Michigan's common law and case

law.

I also want to take this opportunity to personally thank all of you who have been so generous in your support of SOS to protect your property rights. It seems that each year we lose more and more of our constitutionally protected rights and it is only through your donations that we are able to slow this process down to the point where we can get it going in the direction that is advantageous to the people of Michigan. It has been my pleasure to serve as chairman of the legal committee these past three years, and I look forward to another successful year. If you have any comments or questions, please send an email to [sos-board@avci.net](mailto:sos-board@avci.net)

## OUR IMPERATIVE

In early 2006, House and Senate hearings will begin on whether or not vegetation removal and beach grooming should continue in Saginaw Bay and Traverse City.

If you have never been involved in speaking your mind on a specific topic before a legislative body, now is the time and your duty as a concerned property owner. Also, if you have presented before, it is critical that you prepare a very short presentation—two minutes—to tell the legislature why you believe that the beaches need to be maintained. You can tell them the way it was in 2000, 2001, 2002 and what changed in 2003 and why that was beneficial to you and your community and to the state. The leadership of SOS will provide a multi media presentation, but this will not alone be sufficient. We believe that is absolutely essential that we have dozens of shoreline property owners testifying. If you are interested, please contact Joe McBride at [sosboard@avci.net](mailto:sosboard@avci.net) who will provide assistance and coordination of the presentations.

If you cannot make a brief appearance, then your written statement will be very valuable, and we would like you to submit it to us. We will make sure that it is properly presented.



I would like to thank our members for their generous support over the past year. Without your contributions, our cause would not be heard. Your board has spent a considerable amount of time agonizing over SOS's direction. Please read our Legal Corner to see the direction we will be taking with your money. Please know that we will continue to use your money wisely in our goal of reasonable regulation of our beaches.

### CURRENT BALANCES

General Fund:	\$35,928.87
Legal Fund:	\$56,195.79
PAC Fund:	\$22,449.51
Bay City State Park	
Clean-Up Fund:	\$ 5,201.68

## WHY DO SOS MEMBERS REQUIRE THE SUNSET PROVISION TO BE REMOVED FROM THE “BEACH MAINTENANCE LAW”—2003 PA 14?

A brief history of why the “Beach Maintenance Law” was necessary will reveal our concerns. In 2000 the DEQ, because they claim they own the beach from the Ordinary High Water Mark lakeward, issued hundreds of cease and desist letters requiring shoreline property owners to stop removing vegetation—more often than not, the invasive, non-native plant Phragmites—and moving sand, typically sand that had accumulated over the winter from their beaches. The DEQ also demanded that shoreline property owners stop filling in mosquito-infested-stagnant ponds on their beaches.

Not only did the DEQ continue their unreasonable demands upon shoreline property owners, but the Detroit District, Army Corps of Engineers in lock-step fashion joined their friends (DEQ) and continued with their intimidating field officials and their threatening letters. In fact, the Detroit District began their judicial threats by suing three retired couples who were shoreline property owners and threatened them with fines of \$25,000 a day. So ordinary citizens said “enough is enough,” and sought to change both the DEQ’s and the Detroit District’s behavior through judicial or legislative means. Therefore, on August 1, 2001, SOS was formed as a non-profit corporation.

SOS members have worked very hard and have been very generous and have donated hundreds of dollars to make the appropriate changes. Without SOS’s effort, changes would only have been a dream. But thanks to our SOS membership, real change did happen. You can be sure the DEQ and the Detroit District have another plan for us, and it will not be one that is helpful.

In the spring of 2003, SOS spent months in Lansing, and through the great efforts of our lobbyist, we were able to get temporary relief from the arbitrary and unreasonable assault on shoreline property owners by the DEQ. In June of 2003, SOS, with the fantastic support of our lobbyist, assisted in negotiating temporary legislation for removing vegetation and grooming our beaches. That bill was passed unanimously, and signed into law by the Governor on June 4, 2003. About the same time, the Governor’s advertisements on TV called for everyone to go “Jump in the Lakes.”

But the “Shoreline Maintenance Law” is only temporary. It contains a Sunset Provision which will take effect on June 5, 2006. If not removed, the assault on our beaches by the DEQ will begin again. It will be like 2000, 2001 and 2002 all over again. Our SOS leaders are currently working to have the Sunset Provision removed from this Legislation, but it will be a difficult struggle.

What does the Sunset Provision mean to shoreline property owners?

1. We would not be able to get permits quickly to remove vegetation—often in the form of Phragmites—from our beaches after June 2006. Earlier this year, thanks to

the effort of SOS working with Senator Patricia Birkholz, Michigan law was amended to prohibit the propagation of Phragmites.

2. Some shoreline property owners will be denied permits, and costly judicial action will be necessary to clean one’s beach.

3. For those of you who do not have vegetation but just want to move sand or perform normal grooming, you will have to halt your activity after November 2007, and will have to apply to the DEQ for a permit.

So what can SOS members do?

A. Continue your membership support, because the more members SOS has, the more Legislators pay attention to us. “Strength is in Numbers.”

B. Encourage your shoreline neighbors to join SOS.

C. SOS needs your testimony in Lansing early next spring. Therefore, please submit your name to the SOS board so that the board can coordinate and help you tell your story. Legislators want to hear your frustration and concerns.

D. SOS encourages you to talk to your legislators about beach grooming activities and the need to repeal the Sunset Provision within 2005 PA 14.

E. SOS needs expert testimony in the fields of wetland science, taxation, spread of invasive species including Phragmites, tourism, healthy beaches and the need to protect the health of the people who use our shoreline. Please let us know if you can help or know of someone who could help us.

### IN MEMORIAM

This year, we lost a valuable SOS member and member of our Board of Directors. Gene Jakubczak was a valued member of the SOS Board, and served on our Science Committee. He also represented SOS on the Shoreline Task Force. Gene’s background, knowledge, and service to SOS was invaluable, and he will be sorely missed.



## 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.”