



ADVANCING PUBLIC TRUST SOLUTIONS
TO SAVE THE GREAT LAKES

Analysis of Ohio House Bill 473 Flow for Water

James M. Olson¹
May 17, 2012

Flow for Water has reviewed Ohio House Bill 473 ("H.B. 473"), which passed the House in April 2012, and is before the Senate for approval, amendment, or rejection. While H.B. 473 has improved thresholds for permits and criteria to protect waters within the Great Lakes Basin and Lake Erie watershed, the proposed bill would fall short of compliance with Ohio's responsibilities under the Great Lakes Compact.

Flow for Water is a nonprofit organization in the Great Lakes Basin whose goal is to ensure that decisions by government, business, and persons that affect the future health, use, and enjoyment of the Great Lakes honor and respect the public trust in the Great Lakes and their tributaries for present and future generations.² In these waters and their bottomlands, under the public trust there is a duty on governments to protect and prevent material harm or subordination of the public's paramount right to use and enjoy these waters for navigation, boating, commerce, fishing, swimming, and other recreation and enjoyment. Further, there is a limitation on government, and private persons and entities that protects this public right of use and enjoyment from interference, harm, or subordination. The courts of virtually all eight Great Lakes states, and the U.S. Supreme Court, recognize the public trust in the Great Lakes.³

The following analysis looks at H.B. 473 through the paramount importance of the public trust in these waters, which support the economic interests, livelihood, and quality of life of over 30 million people. The Policy Center recognizes the diverse needs of the people of each of the Great Lakes states and the provinces of Quebec and Ontario, but

¹Mr. Olson is a senior principal of Olson, Bzdok & Howard, P.C., an environmental, land, local government, and water law firm with offices in Traverse City, Michigan. He also chairs the Flow for Water Coalition. He has extensive experience in water, environmental, and public trust law, as well as publishing articles and presenting lectures on the Great Lakes Compact.

²Flow for Water Coalition ("FLOW") is a coalition of nonprofit organizations in the U.S. and Canada, including many from the Great Lakes. The goal of FLOW is to assure the protection of the waters of the Great Lakes Basin as a commons, and to protect and assure under public trust principles the wise use and quality of life supported by the health and integrity of these waters by private persons, farmers, businesses and the more than 40 million people who are citizens of the states or provinces within the Basin.

³E.g., *Illinois Central Rail Rd v Illinois*, 146 U.S. 387 (1892); *People ex rel Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976); *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143 (Mich. 1960); *State ex rel. Brown v. Newport Concrete Co.*, 336 N.E.2d 453, 457-58 (Ohio Ct. App. 1975); *Coleman v. Schaeffer*, 163 Ohio St. 202 (Ohio 1955). See also "Report to the International Joint Commission, Public Trust Principles in the Great Lakes," pp. 14-28, Nov. 30, 2011 (James Olson, et al., flowforwater.org).

understands that no matter what the approach, need, or dynamic in each state or province, the integrity of both quality and quantity of the Great Lakes and its tributaries must be preserved generation to generation in order to sustain the economy, jobs, and quality of life in the region. This analysis of H.B. 473 is not submitted to support or oppose the bill, but to provide key educational information to advance the debate surrounding the bill, hopefully, to the betterment of all who live, work, visit, use, and enjoy the waters of Lake Erie and the Great Lakes basin.

1. H.B. 473 and related sections of Ohio water laws do not expressly declare that the state holds the water in trust for the health, safety and welfare of its citizens. The Great Lakes Compact declares that the waters of the Great Lakes are “a public resource held in trust.” H.B. 473 should include a declaration or finding that reaffirms this trust against outside interests or claims that, in the future, will threaten and compete with Ohio farmers, businesses, cities, and citizens for water. It would be prudent to include an express declaration in the bill that states, “The waters of Lake Erie, including its tributary waters, are an immeasurable public treasure and resource held in trust for the benefits of the citizens of the State.” Further, it would be prudent to provide an overall “umbrella” or safety net standard to safeguard against unforeseen claims for water against an Ohio citizen’s use of Lake Erie or its tributaries. This can be done by adding a new Subsection (B)(4) that states, “(4) consider the adverse individual and cumulative impacts to the public trust in the waters of Lake Erie.”
2. H.B. 473 Section 1522.03(C) prohibits the adoption of rules that are less stringent than the criteria under the Compact. This creates a serious problem, because there may be some instances, because of needs of Ohioans, where it is in the interest of the health, safety, welfare, protection, or use and enjoyment of the water and natural resources of Ohio to impose a special rule within the framework of H.B. 473 that is more stringent than the Compact criteria. In addition, this language could be used by some persons or interests to maximize water uses, negatively impacting the quality and quantity of water in Lake Erie and its watershed, placing state citizens, property owners, and businesses at a disadvantage. Moreover, it could be construed to limit protections for landowners, farmers, and businesses under the existing common law of property. It is far better for Ohio and its citizens, landowners, farmers, and businesses to remove the “no more stringent than” sentence from Subsection 1522.03, and address issues on a case-by-case basis under the permit system and its rules.
3. Subsection 1522.13(B) that confines the “significant adverse impact” standard to “Lake Erie watershed considered as a whole” is contrary to Sections 4.10 and 4.11.2 of the Compact. This standard, in effect, would mean that any individual consumptive uses or withdrawals that may cause disturbing impacts or drops in water levels within a segment of river or stream could not be prohibited if it cannot be shown that the Lake Erie watershed “as a whole” is not harmed. To address this major exemption from the standard, and to avoid the direct conflict with the Compact, the “considered as a whole” language should be deleted. In the

- alternative, and because the language of Subsection 1522.13 is currently inadequate, the Subsection could be modified to clarify that “as a whole” means or is tied to “likely cumulative impacts.” Hence, Subsection 1522.13(B) could be modified to read, “... will or will not likely result in any significant present and probable future individual or cumulative adverse impacts on quantity or quality of the waters and water dependent natural resources of the Great Lakes basin considered as a whole...” This would then require a consideration of both present and future impacts, if probable, so that “cumulative impacts” would include the precedential or cumulative effects over time on the waters of Lake Erie as a whole.
4. Subsection 1522.13(E) makes sure that a standard does not interfere with existing reasonable uses of water as declared by Ohio Constitution, art. I, sec. 19b, and under the common law. In order to make sure that a person’s reasonable use includes both landowners’ and all citizens’ rights to swim, fish, boat, and recreate in the waters of Lake Erie, as protected by common law riparian rights and the public trust, Subsection 1522.13(E) should be modified to read, “... Affect, limit, diminish, or impair any private or public rights validly established...” Ohio, art I, sec. 19b, protects both existing private reasonable use of water and recognized the importance of existing public rights to use these public waters held by the state for the benefit of both private and public use by citizens of the state.
 5. Subsection 1522.21(A) limits the definition, and hence rights, of a “person who is or will be aggrieved or adversely affected” to “a person with a direct economic or property interest that is or will be adversely affected...” As a general rule of law, particularly in the field of natural resources and the environment, persons “aggrieved or adversely affected” are those who can show any “special and direct or significant interest” that is unique to them, as distinct from society as a whole, in order to have legal standing under principles of fairness and due process protected by the 5th and 14th Amendments of the U.S. Constitution, and similar provisions in the Ohio Constitution. Moreover, there are many instances where a person enjoys and uses water for recreation, research, education, or health reasons, that are non-economic or do not involve an interest in property itself. Additionally, members of the public have a distinct individual and shared right with others under the public trust to use Lake Erie for boating, fishing, swimming, and other recreation that are personal and similar to that enjoyed by those who use water in connection with a property. In order to embrace both private and public rights, uses, and interests, Subsection 1522.21(A) should be amended to read, “... means a person with a direct economic or property interest or other special and concrete use or interest that will be adversely affected...”
 6. Subsection 1522.21(C)(4) prohibits the recovery of attorney fees to any party in any administrative or legal proceeding. This could work to the disadvantage of the State, and create difficulties or barriers for the agency or specifically, Chief of Division of Surface Water in enforcing or applying the law to protect the interests of the State, its businesses, citizens, and its water dependent natural resources.

While it may be wise not to allow attorney fee awards in every case to a prevailing party, it would be unwise to flatly prohibit it in every situation. Hence, an exception should be added at the end of Subsection 1522.21(C)(4) that reads, “... except in those circumstances that based upon good cause and a showing that an apportionment of attorney fees would be in the public interest and consistent with the purposes of this Act.”

Flow for Water appreciates the opportunity to share the foregoing analysis with persons interested in learning about and improving H.B. 473 for the benefit of the waters and people of the Great Lakes basin. Questions or comments may be directed to Ursula Jonsson, Communications Director, Flow for Water, ursula@flowforwater.org, or James M. Olson, Flow for Water, jim@flowforwater.org.