



ADVANCING PUBLIC TRUST SOLUTIONS
TO SAVE THE GREAT LAKES

Natural Resource Defense Council Report Illustrates Great Lakes Failures in Providing Access to Public Trust Water

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Unless you are lucky enough to own waterfront property, you probably access the public trust waters of the Great Lakes at local or state beaches. So what happens to the public's inherent right to access these public trust waters if those beaches are closed? This problem is highlighted by the findings of the Natural Resource Defense Council in their recent report entitled 'Testing the Waters: A Guide to Water Quality at Vacation Beaches'. The report notes that in 2011, the number of closing and advisory days at ocean, bay and Great Lakes beaches reached 23,481 days nationwide. Included in this figure were 64 closing and advisory events which lasted more than 13 consecutive weeks! The primary reason for such beach closings is when unsafe levels of bacteria are detected during beach water sampling. The samples indicate unsafe levels when pathogens are present typically from animal or human waste, at high enough concentrations so as to present a threat to human health. The report notes that the key contributors causing such waste to be present in the water were (1) stormwater runoff, (2) sewage overflows and inadequately treated sewage, (3) agricultural runoff, and (4) other sources such as beachgoers themselves, wildlife, septic systems, and boating waste.

Hitting close to home in the Great Lakes Region, 4 of the top 6 states having the highest percentage of water samples exceeding the Environmental Protection Agency's recommended single-sample maximum for designated beach areas were the Great Lakes States of Ohio, Illinois, Indiana and Wisconsin. Furthermore, 7 of the 15 'worst beaches', based on the presence of repeat offenses to water quality were Great Lakes Beaches. When broken down regionally, the Great Lakes region had the highest exceedance rate with 11% of samples exceeding recommended levels. Even if you are not a swimmer or boater and are not afraid of getting sick from being in contact with the water, there is another reason that these water resources can't be closed- money. In fact, the report estimates that a Great Lakes beach closing can cost the area up to \$37,030 in lost revenue per day! Many Ohio residents might in particular recall the events of a year ago, when agricultural practices in the northern part of the state led to the creation of large dead zones in Lake Erie. It was runoff instances such as this that led to not only the beaches being closed, but large portions of the entire lake.

In the United States, states hold all navigable waters and submerged lands in trust for the people under the Public Trust Doctrine. What this essentially ensures is that the public, those not owning land along navigable waterways, has a vested right to have access to and to use public waters for uses such as navigation, recreation and fishing. Inherent in these rights of access and use is a duty on the governing body to account for the protection of public trust waters and uses.

Clearly we have a bit of a conundrum here. We all have a guaranteed right to access and use our navigable waterways, but because of pollution, the government is in fact writing a check that its beaches can't cash. The situation is comparable to giving a child a popsicle, telling them it is theirs to enjoy, but then telling them that it will make them sick and they actually cannot eat it.

So what can we do as citizens to be able to enjoy our popsicle on a hot summer day? The answer may lie in using the Public Trust Doctrine itself. As previously stated, the doctrine holds an inherent duty for the governing body, in the United States that being the State itself, to account for protection of public trust waters and uses, something that the NRDC report and this article suggest that it is failing to do. Although earlier environmental battles led to protection against point source pollution effects on waterways, the teachings of the NRDC report see the problem as coming more often nowadays from non-point sources. The report points to solutions by way of moving our coastal communities in the direction of 'green infrastructure' which restores or mimics natural conditions and places emphasis on the use of porous pavement, green roofs, parks, roadside plantings and rain barrels to prevent runoff from reaching our waters. The report also suggests using the tenets of the Clean Water Act permitting process to promote the development of sewage overflow control plans and to promote local planning responsibilities.

So how can those who care about their access to clean beaches make the Great Lakes a better place to swim? Armed with a violation of the public trust argument, citizens need to urge state lawmakers to make the public trust a priority. Not only are we being denied access and use of our navigable waters but we are also being denied the revenue that comes from attracting others to our coasts. We must urge lawmakers to implement greener infrastructure and to prevent runoff at all costs. Especially in a region where beaches are covered in snow for at least half of the year, we must make strides toward ensuring that whatever few months of beach season we get, we are able to fully capitalize on both access and revenue. If the Great Lakes beaches are testing at polluted levels 11% of the time, are they really 'Great' beaches?