



ADVANCING PUBLIC TRUST SOLUTIONS
TO SAVE THE GREAT LAKES

Revitalizing and Re-envisioning the Great Lakes Water Quality Agreement: An Overarching Framework for the Boundary Waters and Great Lakes Ecosystem

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The high level diplomacy between the United States and Canada, importance of the International Joint Commission concerning the protection of our international boundary waters, including the Great Lakes and its ecosystem, and the need to provide meaningful public participation in renewing the Great Lakes Water Quality Agreement (GLWQA) require a delicate balance. This is not to say that the public comment and participation should be unduly curtailed by protocol that prevents timely and meaningful comments on real concerns or limitations of the current or proposed GLWQA and Annexes.

Accordingly, as a general comment, Flow for Water suggests that the IJC revisit the opportunity for public input and participation to promote accountability before any final decision on the proposed changes to the GLWQA. Moreover, and importantly, Flow for Water offers specific comments below that are tailored to the Boundary Waters Treaty of 1909, the GLWQA and Annexes, and commons and public trust principles, with a view toward what could, and indeed should, be included in the review and renegotiation of the GLWQA and related programs of the IJC.

Without diminishing the importance of the details and debate over public disclosure and participation in the proposed changes to the GLWQA, or the implications of the recent commitments of accountability for the GLWQA's programs, boards, and committees, Flow for Water, Great Lakes' specific comments are submitted as what might be characterized as "overarching principles." The reason for this approach is based on the rapidly intensifying demands and impacts on water, or threat to waters of the Great Lakes Basin, as a result of the predicted world water crisis.² There has never been a time so

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²Prud'homme, Alex, *The Ripple Effect: The Fate of Freshwater in the Twenty First Century* (Scribner 2011). According to U.N. reports more than 1 billion people in the world do not have access to clean water, and it could increase to more than 3 billion in 15 to 20 years. Fishman, Charles, *The Big Thirst* (Free Press 2011).

critical as the present for the IJC to re-envision its role and the GLWQA – given the threats of invasive species, Asian Carp, water exports, climate change, nuclear waste shipments, unconventional “fracking” for western US and Canadian deep shale gas and oil production with their excessive demand for water.³ The IJC, given its authority under the Boundary Waters Treaty, can provide an important substantive framework for the outer limits on these demands, threats, and impacts on boundary waters and the Great Lakes, and at the same time allow for flexibility under the GLWQA for its goals, Annexes, and programs. Thus, the following comments are made to address how an overarching framework and these principles will compliment the IJC framework and authority under the Boundary Waters Treaty and GLWQA.⁴

1. The IJC should adopt immediately an overarching substantive framework for the Great Lakes Water Quality Agreement that views water as a commons and public trust for all decisions affecting the flow and level or quality or pollution of the boundary waters of the two countries.

The Boundary Water Treaty empowers the IJC to protect quality and quantity by protecting “flows and levels” of boundary waters:

... no further or other uses or obstructions or diversions ... of boundary waters on either side of the line, affecting the natural level or flow of boundary waters ... shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval ... of ... the International Joint Commission.⁵

The Treaty also empowers the IJC to protect the quality of these waters from “pollution:”

... the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Article VIII vests the IJC with the jurisdiction to approve uses, diversions or obstructions that may affect flows and levels. Each country has equal rights in the use of the waters

³E.g., Schneider, Keith, *ChokePoint U.S.: Understanding the Tightening Conflict Between Energy and Water in the Era of Climate Change*, Water News, Circle of Blue www.circleofblue.org (Sept. 2010); Barlow, Maude, *Our Great Lakes Commons: A Plan to Protect the Great Lakes Forever* (Council of Canadians, Mar. 2011).

⁴These comments are submitted pursuant to public notice and are filed by September 20, 2011 at binational.net/glwqa_2011public_e.html.

⁵Art III, Treaty between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada of 1909 (referred to herein as “Boundary Waters Treaty”). Article III also addresses the jurisdiction of the International Joint Commission over water works projects provided the works do not “materially affect the flow of boundary waters” on the other side.

without disturbance of existing uses or diminishment of the “amount available for use.”⁶ Decisions are subject to principles of equal use except for a preference for domestic and sanitary purposes, navigation, power and irrigation.⁷

In summary, the Treaty establishes authority and standards for the IJC to establish a substantive overarching principle for its reviews, programs, studies, agreements like the GLWQA, and Annexes, with the various committees and subcommittees that now exist and will be retained or those newly established under a renewed GLWQA.

2. An overarching and substantive commons and public trust framework for the GLWQA would establish a broad principle to protect the flows and levels and water quality of the boundary waters and Great Lakes Ecosystem, while providing, simultaneously, flexibility for the governments, their committees and subcommittees under the GLQWA to address the specific issues, including toxic substances, chemicals, habitat, climate change, invasive species and unpredictable new threats from intensified demands from the world water crisis.

Canadian and United States water law support the integration of water quality and quantity to protect the integrity of the Great Lakes ecosystem. Water has been considered public and a commons for nearly 2000 years.⁸ This basic principle is embedded in the common law. Water is “common to all citizens” and is therefore protected and regulated for the common use and benefit of citizens.⁹ The basic principle is also inherent in Canadian law, where landowners have rights to use water, but do not own it outright since it remains and is owned by the Crown. Like the United States, Canada and its provinces share constitutional and statutory powers to manage and protect water for the public good.¹⁰ The Great Lakes Compact between the Great Lakes states declares the waters of the Great Lakes a “precious public natural resource shared and held in by the states.”¹¹ The parallel agreement between Ontario and Quebec and the States declares the waters of the Great Lakes “are a shared public treasure and the States and Provinces as stewards have a shared duty to protect, conserve and manage” these waters.¹²

⁶*Id.*, Article VIII.

⁷*Id.*

⁸*Institutes of Justinian*, 2.1.2 (529 A.D): “By the law of nature, these things are common to [humankind]: the air, running water, the sea, and consequently the shores of the sea.”

⁹*Arnold v Mundy*, 6 N.J.L.1, 71 (1821).”Others [property] remain common to all the citizens.... Of this later kind are the air, the running water, the sea, the fish, and the wild beasts... But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had;... the wisdom of the law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit.” This basic principle has been uniformly recognized by the states.

¹⁰Sec. 109, *Constitution Act* (1867). Public lands, and uses thereof, such as water, belongs to the Crown, but the beneficial use of public lands is given to the provinces.

¹¹Sec. 1.3.1.a. and b., Great Lakes-St. Lawrence River Basin Water Resources Compact.

¹²Preamble, Great Lakes-St. Lawrence River Basin Water Resources Agreement, Dec. 13, 2005.

U.S. courts have ruled that the waters of the Great Lakes and their tributary lakes and streams are owned by the states and, in most instances, held as a public trust for the benefit of its citizens. In 1892, the U.S. Supreme Court, in the *Illinois Central Railroad v. Illinois* case, extended the public trust doctrine to the Great Lakes.¹³ The Court ruled that waters of the Great Lakes could not be transferred for primarily private purposes and that no private or public use could materially impair public trust waters or uses. Great Lakes states have applied the public trust doctrine to the Great Lakes and inland lakes and streams.¹⁴ More recently, several jurisdictions have extended the doctrine to groundwater because of its seamless single hydrologic connection to lakes and streams.¹⁵

In the past decade, Canada has witnessed an increasingly serious interest in the public trust doctrine or its principles.¹⁶ One court foreshadowed the recognition of the public trust doctrine for special or unique public resources, like water.¹⁷ Canadian water policy experts have called for the evaluation and potential application of the public trust doctrine in Canada because the two countries share the same legal heritage of at least 100 significant water bodies.¹⁸

The unique value of the public trust and commons framework for IJC mandates to prevent “pollution” and “affects on flows and levels” of boundary waters is that these waters have always been deemed a commons held in public trust. Under this framework, private and public uses of water, whether for industry, business, mining, farming, tourism and recreation, or maintaining the integrity of the ecosystem, are allowed under the laws of each state or province, and the two countries, subject to the umbrella or guiding principles of public trust law or concepts. This means that while the IJC, the two

¹³146 U.S. 387 (1892). (“The trust devolving upon the state for the public ... cannot be relinquished by a transfer...”). See generally, Sax, Joseph L., *The Public Trust Doctrine in Natural Resources Law*, 68 Mich L Rev 471 (1970).

¹⁴E.g. *Obrecht v National Gypsum Co.*, 105 NW2d 143 (Mich. 1960); *Scott v Chicago Park District*, 360 NE2d 773 (Ill. 1976). See also Scanlan, Melissa, *The Evolution of the Public Trust Doctrine [in Wisconsin]*, 27 Ecology L. Q. 135 (2000). Olson, James M., *The Public Trust Doctrine [in Michigan]*, 1975 Det. Col. L. Rev. 161 (1975).

¹⁵*Nat'l Audubon v Super. Ct. Alpine County*, 658 P2d 709 (Cal. 1983)(tributary waters to public trust waters subject to protection under public trust doctrine); *In re Water Use Permit Applications*, 9 P3d 409 (Haw. 2000)(public trust in groundwater); *In re Omya*, (Opinion, Wright J., Vt. Tr. Ct. No. 96-6-10, Feb. 28, 2011) (upheld public trust duty to protect groundwater under Vermont public trust statute).

¹⁶Pentland, Ralph, *The Public Trust Doctrine: Potential in Canadian Water and Environmental Management*, POLIS Ecological Sustainability Project, Discussion Paper No. 09-03, (B.C., June 2009); *Canadian Forest Products v R in right of British Columbia*, 2004 SCC 38 (2004); Maguire, John C., *Fashioning an Equitable Vision for Public Resource Protection and Development in Canada, The Public Trust Doctrine Revisited*, Journal of Environmental Law and Policy (1997).

¹⁷*Canadian Forest Products*, n. 11, *supra*.

¹⁸Pentland, Ralph, n. 11, *supra*. Alberta and British Columbia water and policy experts are looking at the public trust doctrine as an umbrella context for provincial water allocation and even limited water marketing regimes. Brandes, Oliver M. and Christiansen, Randy, *The Public Trust and Modern BC Water Act*, POLIS (June 2010).

countries, provinces, states, and agencies strive to address specific threats, such as those described above, there is a declared principle in place, with substantive and historic meaning, to make clear to all, including foreign investors, landowners, or water users, that there are outer limits beyond which they cannot go to exploit these precious and valuable boundary waters and their related ecosystem.

Those principles include: (1) a general prohibition on wholesale transfer, diversion, or use of these waters for primarily private control, ownership, or purposes; (2) limitation on impairment or pollution of water from diversions, uses, or other actions that would abuse and transgress the rights and uses of private and public entities or persons of these boundary waters, or the rights and uses and interests of the two countries in the water quality and flows and levels of these waters; (3) accountability by governments and agency decision makers to fully identify, understand, and account for impacts, impairments, or diversions and uses that would violate these principles.

It is submitted that the flexible and dynamic and substantive nature of these principles would operate side-by-side with existing and future uses of water as provided by the common and statutory law within the two countries, provinces and states. This is particularly important, because if the two countries and IJC favor a broader delegation of review, study, and recommendations or decisions by boards, committees, or subcommittees under the GLWQA, the IJC and GLWQA could provide a framework of principles that would maintain the purposes of the Boundary Waters Treaty and the public trust, and at the same time protect the integrity of these waters and Great Lakes ecosystem from threats, known or unforeseen. This would also assure that citizens, businesses, and governments of both countries would share a common set of principles for governance and protection of their respective interests against foreign claims or challenges under international trade laws like NAFTA or GATT.¹⁹

3. The revitalization and renewal of the GLWQA should integrate a commons and public trust overarching principles into the various programs, projects, studies, and goals of the GLWQA.

In 1972, the IJC in adopting the WQA launched a long-term effort to protect the boundary waters. The WQA has evolved into an ecosystem approach that integrates water quality with water and land uses, air deposition, direct and nonpoint discharges, and overland stormwater drainage and run off. Flows and levels, whether induced or caused by human activities, are an integral part of water quality and the health and integrity of the ecosystem.²⁰

The pioneering work of the IJC and its Science Advisory and Water Quality Boards has focused on critical water pollution issues, including phosphorous, toxics, non point and direct discharges, sewage, invasive species, and shipping impacts. More recently the focus has turned to the integrity of the ecosystem or "interacting components of air, land,

¹⁹ Olson, James. *Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements*. 2006 Mich. St. Rev. 1103 (2007).

²⁰The IJC already collects data on flows and levels of boundary waters.

water, and living organisms, including humans, within the drainage basin ..."²¹ One of the IJC's specific goals adopts an "Ecosystem Objective" that seeks to "maintain the chemical, physical and biological integrity of the waters of the Great Lakes Basin Ecosystem."²²

Concluding Remark

Under the Boundary Waters Treaty and/or the GLWQA and its integrated ecosystem approach, the IJC and GLWQA, with its boards, committees, and Annexes, could be instrumental in promoting research, exploration, public education, and oversight of the effects of uses, diversions or future diversion threats, exports, obstructions, or climate change, and also the unforeseen activities that affect the flows, levels and ecosystem of the boundary waters and their tributaries. By acting now the IJC would play a lead role in managing and protecting boundary waters and the ecosystem through a framework of commons and public trust that would integrate both quantity and pollution in efforts to address threats that both countries, their communities, citizens, and businesses face in the 21st century.

The opportunity to submit the above comments is most appreciated. If more information is desired, Flow for Water and its coalition can be contacted at the address on these comments or info@flowforwater.org or olson@envlaw.com.

Sincerely,

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²¹WQA, Art 1 (g)(Great Lakes ecosystem).

²²*Id.*