

Before the National Ocean Council

Comments on the Draft National Ocean Policy Implementation Plan

**Ecosystem Based Management and Public Trust Principles
for the Great Lakes and its Watersheds**

Office of the National Ocean Council
and
Office of the Council of Environmental Quality
and
Office of Science and Technology Policy
Washington, D.C.

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Flow for Water (“Flow”) is for the opportunity to make submit the following comments recommending overarching public trust principles for agency and governmental decisions affecting the Great Lakes waters and ecosystem.¹

“The Executive Order [13547] adopts a National Policy that includes a set of overarching guiding principles for management decisions and actions toward ...
“an America whose stewardship ensures that the ocean, our coasts and the Great Lakes are health and resilient, safe and productive, and understood and terasured so as to promote the well-being, prosperity, and security of present and future generations.”

¹Attached to these comments is a report by James M. Olson, J.D., LL.M., Chair, Flow for Water, a non profit organization and Coalition, consisting of sixteen non profit organizations in Canada, U.S., and Great Lakes region. The Report is entitled *Report to the International Joint Commission on the Principles of the Public Trust Doctrine for the Great Lakes Boundary Waters* (Flow for Water, Nov. 30, 2011) (hereafter “Public Trust Report”) was prepared with the assistance of OLSON, BZDOK,& HOWARD, P.C., Traverse City, Michigan. The author would like to acknowledge and thank Molly Krauza, Vermont Law School Water and Justice Program, and Professor Jack Tuhloske, Director of the Water and Justice Program, Vermont Law School.

(National Ocean Policy, <http://www.whitehouse.gov/administration/eop/oceans/policy>)

President Obama recognizes that America’s stewardship of the ocean, our coasts, and the Great Lakes is intimately linked to “overarching guiding principles” that foster national prosperity, environmental sustainability, human health and well-being, adaptation to climate and other environmental change, social justice, foreign policy, and national and homeland security. The principles of the public trust doctrine, embedded in the law and history of the Great Lakes, is just such overarching principle.

Executive Summary

Public trust principles² inherent in the public trust doctrine offer time-tested “overarching principles”³ and a “new direction” or “new standard”⁴ for a comprehensive and integrative approach for the 21st Century with which the federal, state, local governments, and

² *Id.* (“Public Trust Report”). The extensive report concludes that one of the most effective overarching principles and new directions for the Great Lakes and ecosystem is the public trust recognized in these magnificent navigable waters from the founding days of our Nation.

³ President Obama’s recognition of the need for a policy of “stewardship” for our oceans, coasts, and Great Lakes, and the National Ocean’s Policy call for “overarching guiding principles for management decisions and actions toward achieving this vision of stewardship.

⁴ Final Recommendations of the Interagency Ocean Policy Task Force, July 19, 2010, pp. 2-3. See also *Emerging Issues of the Great Lakes in the 21st Century*, Report of the Great Lakes Science Advisory Board to the International Joint Commission, p. 5 (Peter Boyer, Allan Jones, and Deborah Swackhamer eds., 2006)(highlighting a “Need for a New Vision,” calling for the integration of resource management goals and new multiple long-term objectives, and for “improved governance” based on a “renewed sense shared purpose” with integrated roles, responsibilities, decision making, greater accountability, and higher or layered levels of principles where shared values protect and maintain high natural amenities that sustain their use and enjoyment); and Hon. Lisa Jackson, Administrator, U.S. Environmental Protection Agency, Welcome Address at the IJC Biennial Meeting, Detroit, Michigan, Afternoon Town Hall Session (Oct. 12, 2011).

others can better protect, regulate, and address the serious systemic and transboundary harms and threats to these shared waters and their connected public natural resources and ecosystems.

It is submitted that as part of the President's and the Executive Office's historic efforts to establish a national water policy for the oceans, coasts, and our Great Lakes, public trust principles offer a comprehensive, integrative, and efficient means to achieve several of the objectives of the Nation's new emerging water policy. These principles are easily incorporated into existing frameworks, such as the National Environmental Policy Act (NEPA) requirements for environmental impact statements or environmental assessments and other documents arising out of major federal actions affecting the human environment, including the Nation's water resources. For example, there is no reason these principles could not be incorporated in a special Executive Order or Council of Environmental Quality guideline that incorporates these standards or principles into the existing decision making framework, building and using this existing framework to begin immediate implementation of this National Policy without infrastructure costs or expensive institutional changes.

Requested Action

Based on the information below, as well as the supporting documentation offered in conjunction with this Comment, Flow respectfully request that the National Ocean Council incorporate in its Draft Implementation Plan the following requested action:

- 1. Reaffirm that the Great Lakes are subject to a public trust under U.S. Supreme Court and Great Lakes states; law, and held and managed by these basic public trust principles to better protect these waters and their ecosystem for present and future generations.**
- 2. Adopt a new supplemental Guiding Principle for federal actions subject to the National Environmental Policy Act based on public trust principles for the National Ocean Policy Implementation Plan to empower and require federal and other governmental agencies to**

protect the integrity of quantity, quality, Great Lakes and ecosystem.

- a. This new Guiding Principle would require that all federal agencies would in addition to existing NEPA review requirements evaluate, disclose, and consider the adverse impacts on the Great Lakes, uses made thereof, and the ecosystem of the Great Lakes watersheds and Basin.**
- b. The new Guiding Principle would incorporate the following basic principles:**
 - (1) Evaluation and identification of the affects and impacts, including cumulative direct and indirect impacts, taking into account climate change and adaptation to climate change, on flows, levels, and water quality of the waters of the Great Lakes;**
 - (2) Evaluation and identification of the affects and impacts, including cumulative direct and indirect impacts, taking into account climate change and adaptation to climate change on the ecosystems;**
 - (3) Evaluation and identification of uses, benefits, and cost to the waters, ecosystem, and public and private present and future uses of the Great Lakes, taking into account their long term protection for future generations;**
 - (4) Evaluation of Impacts based on the requirements of (1) through (3) above that could be avoided by full consideration of alternatives to the proposed or preferred action.**

As demonstrated below, it is our contention that the adoption of these requested action items represents a simple yet innovative approach to crafting solutions to both current management challenges and potential future threats to the shared waters of the Great Lakes, and is supported by a long-standing recognition and utilization of public trust principles across jurisdictional boundaries throughout the Great Lakes region.

Request 1. Reaffirm the Great Lakes a Commons and Adopt a Statement of Public Trust Principles

The Great Lakes truly embody a whole commons – in the larger hydrological system one fifth of the world’s freshwater – of people and a commonly shared resource, and they are most appropriately viewed as a public commons.⁵ Adopting public trust principles will foster the development of an inclusive perspective applicable to all of the persons and interests who use and depend on a common and shared waters resource and ecosystem like the Great Lakes. Water has been viewed as a public shared commons in western civilization for almost 2000 years, and the Great Lakes are living waters that form an integral part of an ecosystem that supports both a sustainable quality of life and economic livelihood for millions throughout the Great Lakes region.

As we move into the 21st Century, however, the people of the Great Lakes region face an unprecedented array of large-scale and potentially devastating threats to the Great Lakes ecosystem, and by extension, the lives and livelihoods of its people. The Great Lakes currently face a collapse in the food chain for fisheries caused by invasive species, “dead zones” in Lake Erie from runoff, continued loss of wetlands and biodiversity, increased water demands from agriculture and energy production of unconventional deep shale gas and oil reserves, and the commodification and privatization of these waters. These problems are compounded by similar, systemic losses and threats in North America and worldwide: the addition of 2 billion more

⁵ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge Univ. Press, 1990); Poteete, Janssen, and Ostrom, *Working Together: Collective Action, the Commons, and Multiple Methods of Practice* (Princeton Univ. Press, 2010) (Noble Prize winner in economics who has pioneered economic and social theories to demonstrate that humans tend to seek common sharing and solutions that sustain common resources rather than destroy or deplete them in a spiral of “tragedy of commons.”).

people over the next 40 years, heavy demand for more food and water, energy production in China, India, the western U.S. dislocating waters to both mine coal and explode shale rock to capture oil and gas⁶, and global warming and the myriad dramatic effects of a changing climate, including intensified droughts and storms, pushing millions of people to migrate as environmental refugees.⁷ All of this puts not only the earth on edge, but its people. In addition to the challenges facing the Great Lakes and their ecosystem, there is the pressure from population migrations, increased intensity and frequency of pollution, losses, and storms that will likely foment serious conflict.⁸

In order to take action in response to these profound threats, and to do so on a collective basis, public trust principles are required. The importance of the commons framework and public trust principles is that they provide just the cohesive vision and approach that the National Ocean Council and federal and other partnering agencies need to address these challenges in the immediate future, and over the long term. Therefore, by recognizing and adopting a commons framework, coupled with time-tested water commons, public use, and public trust principles, the IJC will be able to implement a unifying perspective for taking action to address these varied

⁶ Keith Schneider, Chokepoint US, Water News (Sept. 2010), *available at* <http://www.circleofblue.org> (last visited Nov. 28, 2011).

⁷ Lester Brown, *World on Edge* (Earth Policy Inst. 2011); Alex Prud'homme, *The Ripple Effect: Fate of Freshwater in the 21st Century* (2011).

⁸ Schwartz and Randall, *Abrupt Climate Change Scenario and Its Implications for United States National Security* (Pentagon, October 2003).

threats and protect this shared common water resource and ecosystem that all people need for quality of life, economic stability, community resilience and adaptability, and security.⁹

Request 2. Add a Supplemental Public Trust Guiding Principle to the NEPA Process for the Great Lakes or other Critical Regional Features

Public trust principles include a standard of no significant (substantively measurable) impairment of public trust uses, waters, or related water dependent resources. (Public Trust Report, p. 13) The non-impairment standard addresses both the quantity or “affect on flows or levels” and the quality or “no pollution” mandates of the Treaty. Public trust principles also impose a duty on governments to account for their actions or inactions regarding whether they have prevented improper alienation or private transfers of public trust waters, impaired public trust waters or uses, and protected the purity and flows and levels of water resources and the related ecosystem.

This is important, if not critical for the National Ocean Policy Implementation Plan, given its commitment to and national priority objectives, including Ecosystem Based Management, protection and restoration of waters and coasts like the Great Lakes, more accountability and coordination, water quality and land sustainability, resiliency and adaptation. The public trust doctrine, especially the duties to account and the prohibition on impairment, provides a means by which to directly integrate both the protection of the chemical, biological, and physical integrity of the Great Lakes ecosystem, as well as the prevention of harm and

⁹ *Id.*, *Governing the Commons*. “Any group that attempts to manage a common resource (e.g. aquifers, judicial systems, pastures) for optima sustainable production must solve a set of problems in order to create institutions for collective action; there is some evidence ... that a small set of design principles in creating these institutions can overcome these problems.” www.cooperationcommons.com/node/361.

impairment before governmental decisions, such those under NEPA, regarding the use of public trust waters or related ecosystem should be approved or denied.

Finally, the gap in institutional and/or overlapping legal frameworks and programs identified in the Final Recommendations of the Interagency Ocean Policy Task Force could be significantly narrowed if not filled by incorporating these principles into the NEPA review process and other programs or actions initiated pursuant to National Ocean Council's implementation plan. Adding a commons and overarching public trust Guiding Principle, the IJC could play a lead role in returning the commons and public trust heritage and principles around public water to center stage, which in turn would foster a vision that respected first and foremost the duties under the solemn perpetual trust associated with navigable waters to protect these waters, the public's, community, and landowner, farmer and business protected uses, and the ecosystem for generations to come.

More recently the focus of the International Joint Commission, charged with responsibility for Great Lakes waters under the Boundary Waters Treaty of 1909, has turned to the integrity of the ecosystem or "interacting components of air, land, water, and living organisms, including humans, within the drainage basin..."¹⁰ 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."¹¹ This same approach is now

¹⁰ See Art. 1(g) ("Great Lakes Ecosystem"). Great Lakes Water Quality Agreement of 1972, U.S.-Can., Apr. 15, 1972, 23 U.S.T. 301. It was later amended in 1978 and 1987. See Great Lakes Water Quality Agreement of 1978, U.S.-Can., Nov. 22, 1978, and Great Lakes Water Quality Agreement of 1987, U.S.-Can., Nov. 18, 1987 (collectively referred to hereinafter as the "Great Lakes Water Quality Agreement" or "GLWQA"), *available at* <http://www.ijc.org/rel/agree/quality.html>.

¹¹ *Id.*

central to the Nation's new water and ocean policy fostered by the President's Executive Order No. 13547 and the work of the Ocean Policy Task Force and National Ocean Council.

Public trust principles could be instrumental in promoting research, exploration, public education, and (importantly) oversight of the effects of uses, diversions, exports, obstructions, climate change, and other activities on the flows, levels and ecosystem of the Great Lakes. This would also strengthen the basis for integrating water quantity, quality and ecosystem protection. (Public Trust Report, p. 36.) Finally, as noted above, this would provide a basis for IJC to improve accountability and compliance,¹² and whenever necessary recognize, consistent with the duties impose under public trust law, the need to consider effects and make findings that confirm that the public trust in these waters or protected navigational, recreational, ecological, or sustainable economic uses will not be alienated or impaired prior to the approval or recommendation of certain actions. (Public Trust Report, p. 8.)

History of Public Trust Principles in the Great Lakes

Based on principles dating back to the Justinian Code of Rome in the 5th century through the Magna Carta and English legal and political history, rivers and lakes and the oceans, seas, and navigable waters like the Great Lakes have been viewed as a commons held and managed for the benefit of the public. (Public Trust Report, p. 6-7) Water has been deemed common and public for almost 2000 years.

Navigable waters, like the Great Lakes, are considered moving and flowing and thus owned by the Crown in Canada and the sovereign states. While land became property in the sense that it can be privately owned and transferred with rights of exclusive possession under the

¹² Great Lakes Water Quality Agreement Review Report, Vol. 1, p. 53 (2007)

common law in England, as subsequently passed into the law of Canada and the United States, water did not. Water remains in the Crown, in Canada, and in the sovereign states in the United States,¹³ with only the right of use connected with private landownership that is riparian or abuts a lake or a stream or overlies groundwater. Generally, the water is held by the states and protected by the federal government as sovereign for the benefit and welfare of citizens.

The public trust doctrine was first noted in the United States in 1821 in state court decision that prohibited a landowner's exclusive private claim to the oyster beds in public waters adjacent to his riparian land. (*Id.* at 8.) Water became titled in the states, as sovereign, and subject to a public trust as part of their admission or grant of statehood in the United States, subject to a navigational servitude in favor of free passage and commerce over the navigable waters in the federal government. As the doctrine evolved, public trust came to mean, at least as to special navigable waters, that governments hold these waters and the lands beneath them as the sovereign on behalf of and for the benefit of its citizens for fishing, boating, swimming, navigation, and other recreational or similar uses of substantial public need. (*Id.* at 5.)

In 1892, the United States Supreme Court in *Illinois Central Rail Road Co. v. Illinois* ruled that all of the Great Lakes were subject to the public trust doctrine subject to a navigational servitude in favor of the federal government (Public Trust Report, pp. 9-13). Today, the courts in all eight states in the Great Lakes and states along the border between Canada and the United States have adopted the public trust doctrine. (*Id.* at 14-27.) In addition, some states have

¹³ State sovereignty over water is subject to a reservation for navigation and commerce in the United States as part of the open and free passage for navigation, fishing, and the public trust held by the states. In Canada, the Crown owns the water, and the federal government reserved navigation, shipping, fishing, and other powers, in the **Constitution of 1867**, when it vested most of the power over water in the provinces. (Public Trust Report, p. 28.)

codified the public trust doctrine in their constitutions or by statute. (*Id.*)

More recently, the Canadian courts have begun to recognize the potential for public trust principles, and several Canadian water law or policy experts, based on significant research and analysis, have urged the adoption of public trust principles by the courts or the provincial governments. (Public Trust Report, p.30.) Canadian governments have also begun to incorporate public trust principles into their water and natural resource laws. (*Id.* at 30-31.) The public trust doctrine has also been applied to protect common bodies of water from abuse or private control by the courts of other countries. (*Id.* at 33.)

On February 22, 2012, the United States Supreme Court, in the *PPL Montana v Montana* decision (Slip Opinion, pp. 24-26, Feb. 22, 2012, No. 10-218), while rejecting state title in segments of riverbeds in Montana, reaffirmed the fundamental public trust in the waters of states and the obligation of the federal government to recognize and respect the public trust in these waters. Moreover, the Court reaffirmed that navigable waters and bottomlands in waters like the Great Lakes are absolutely titled in the states as sovereigns, and the federal governments retains the right to protect its navigational and commercial uses of these waters subject to improper alienation or impairment of public trust waters or interests. (*Id.*, pp. 11-14)

Basic Public Trust Principles or Standards

There are three basic principles or standards in public trust law that govern all decisions, rights, and duties regarding navigable waters, such as Great Lakes boundary waters under the Boundary Waters Treaty. (Public Trust Report, pp. 34-36.) These were recognized by early U.S. public trust law, like the *Illinois Central Railroad* decision in 1892 (*Id.* at 13.), as well as

common law cases in the states and provinces (*Id.* at 28.):¹⁴

1. Public trust waters and protected uses cannot be alienated by government, and in any event may never be transferred or controlled for private purposes; that is, a public purpose is required.
2. The proposed diversion or use cannot materially impair the flow, level, integrity, or quality of public trust water, tributary water, or public trust resources or protected public uses.
3. A duty is imposed on government to account for its actions or approvals of a diversion or use by making duly recorded findings based on adequate information concerning the effects of a proposed use to assure that there is no unlawful alienation or transfer for private purpose and no material impairment of public trust waters or uses.

There are four additional principles that flow from the basic principles above. (Public Trust Report, pp. 36-39.)

1. The substantial value of public trust waters, natural resources, and uses is presumed, and the burden of proof is on those who seek to use or alter the public trust commons or uses, both human and other species.
2. The *de minimis* harm rule does not apply to public trust waters and natural resources, therefore “nibbling effects” or cumulative effects must be considered and determined by government not to violated any of the core public trust principles or standards before any decision on approval or denial of a use may be made.
3. Government has a continuing duty to protect public trust waters, their flows, levels, quality, and the integrity of the ecosystem; because of this government has a duty to consider and determine that there will be no impairment or harm to the flows, levels, quality, and integrity of public trust waters, uses, and ecosystem before it makes any decision or approves or denies any request for a permit or other governmental action. This duty includes data and information required for long term planning and future decisions to satisfy the solemn and perpetual trust responsibility..
4. Government must balance two or more competing uses so they share the common public trust waters or public natural resources or commons in a manner that the

¹⁴ The principles in the “Requested Action” to be considered by the National Ocean Council above are intended to mirror and are based on these basic and corollary principles.

public trust is not impaired and protected public trust uses, such as boating, swimming, fishing, drinking water, bathing, and other personal or recreational activities are not subordinated to private or non trust public uses, such as public infrastructure; this means that all reasonable private use, the *jus publicum*, and public uses, the *jus publicum*, may be accommodated so long as the public trust waters and ecosystem are not harmed and paramount public right to public uses are not subordinated or impaired.

These principles are consistent with the ecosystem approach, collaboration, and sound independent scientific fact finding. Similarly, these public trust principles are also compatible and consistent with stewardship and call for an “overarching principle” by the President’s Executive Order, the Council’s statement of National Policy, the Objectives identified by the Ocean Policy Task Force, and the draft Implementation Plan.

Public Trust and Treaty and Water Rights of Native Americans

As indicated above, public trust principles would be compatible with and protect the rights and interests or uses of the indigenous peoples who inhabit the Great Lakes region and basin. These rights were not surrendered under numerous treaties involving lands and adjacent waters. The sacred, cultural, and economic and survival connection to water is very significant. Public trust principles would incidentally respect and protect these rights and uses in a manner similar to the trust uses of water protected under the public trust doctrine.¹⁵

Public Trust and Navigable Waters in International Agreements

In addition to the recognition of the rights of the public to “free and open” use of navigable waters of the Great Lakes under Article I of the Boundary Waters Treaty, several agreements between the countries or provinces and states have recognized or referred to these

¹⁵ First peoples and Indian tribal uses include fishing, farming, commerce, and recreation. Traditional protected public trust uses include navigation, fishing, boating, swimming, bathing, hunting, recreation. (Public Trust Report, p.31.)

waters as being “held in trust.” (Public Trust Report, p. 33.) The Great Lakes Charter of 1985 deemed these waters a “public resource held in trust” for future generations. The Federal Water Development Act, 1986 and amended in 2000, acknowledged the importance of Great Lakes and tributary waters and prohibits their diversion or export without review and consent by all eight Great Lakes states’ governors. The Great Lakes Compact carried this finding and acknowledgment forward, both as a finding and standard for decisions by the governors regarding diversions or uses of waters of the Great Lakes basin. (*Id.*)

Public Trust Principles and the Boundary Waters Treaty of 1909

A review of the Treaty and the many decisions and references made by the IJC demonstrates that the principles of equal use, shared use, order of preference for domestic and drinking water, navigation, and power generation, and protection of existing uses or other interests in the use of the waters, such as public trust uses and riparian uses, embrace a commons approach that points toward public trust principles. (*Id.* at 46) Public trust principles, in fact, would promote the common and shared, equal use of Great Lakes boundary waters and their protection for the public and the health, safety, and general welfare or benefit of inhabitants in the basin and the two countries, provinces, and states in the basin. (*See* Arts. I, III, IV, and VIII, Boundary Waters Treaty)

Threats and Losses: The Time Is Ripe for Public Trust Principles

The threats and losses to the Great Lakes from local, regional, and international threats from demands, climate change, and pollution were briefly touched upon at the outset of this Presentation. However, a couple of specific examples are noteworthy.

As noted by U.S. International Joint Commission Co-Chair Lana Pollock in a presentation at the recent IJC Town Hall meeting in Detroit, in just 15 years quagga mussels

have caused the loss of 85 percent of a tiny shrimp (*diporiea*) crucial to the food chain for the fishery in Lake Michigan.¹⁶ Losses that occur from an invasion of Asian Carp would wipe out a fishery worth \$7 billion per year. (Public Trust Report, p. 50.) Phosphorous from non-point runoff from agriculture has likely resulted in massive dead zones in Lake Erie.

Other threats and issues include hydraulic fracturing of deep shale formations that demand and discharge massive quantities of contaminated water, invasive species and shipping industry “ballast water” exchange technologies, nuclear waste disposal or shipments, near shore erosion and sedimentation, international agribusiness export of food and “virtual water” consumed to produce it, biodiversity loss, privatization of public or municipal water sources, and threatened water exports and diversions from increased energy and food demand in the Western U.S. or China.¹⁷

Public trust principles provide a comprehensive unifying vision that would impose an ethic and duty to look at these waters and impose a solemn trust to protect these public trust waters, and their uses, and ecosystem in perpetuity. Despite all of society’s efforts to protect the remnants of earth and see the coming crises at all levels regarding the life supporting systems of the earth, has lost sight of the fact that there is an inalienable right, a gift, in the air, water, lakes, streams, wildlife, and biodiversity of earth that is common and essential to all of us.

As recognized in a report by several water and environmental policy leaders and experts, the public trust doctrine principles offer two important imperatives that can better assure intergenerational equity and clarity to the governance of oceans and coastal waters and

¹⁶ IJC Biennial Meeting, Townhall Afternoon Session, Detroit, Oct. 13, 2011.

¹⁷ Schneider, n. 6, *supra*.

ecosystems like the Great Lakes. (Turnipseed, Berkman, Blumm, Crowder, Curri, Gjerde, Longest, Osherenko, Parentau, Roady, Sagarin, Sand, Wood, *The Public Trust Doctrine and Rio + 20*, National Center for Ecological Analysis and Synthesis, University of California, Santa Barbara, <http://globaltransition2012.org/2012/02/the-public-trust-doctrine>) The authors concluded that by applying public trust principles to oceans and navigable waters like the Great Lakes, a governmental framework is established for government to comprehensively and equitably manage and account for and protect the sustainable uses and our high seas, water resources, and their ecosystems.

Conclusion

In conclusion, it may be helpful to consider the observations of three leaders and citizens who share this vision for the Great Lakes boundary waters:

President Barack Obama in Executive Order 13547 declared that it is the policy of the Nation to protect, restore, and hold the oceans and waters under stewardship principles for the benefit of “present and future” generations.

White House Council on Environmental Quality chairperson Nancy Sutley, in a news release on the Ocean Policy Task Force’s recommendations, noted that the growing number of threats and competing demands “with a growing number of recreational, scientific, energy, and security activities, we need a national policy that sets the United States on a new path for the conservation and sustainable use of these critical natural resources.”

Former Gov. William G. Milliken, from Michigan and long respected for his efforts and vision for protecting the Great Lakes, recently said in a statement to the International Joint Commission,

I look to our water future with both apprehension and hope.

The source of my apprehension is the ever-growing global demand for and threatened harm to fresh water. Another source of concern is the magnitude of harms that now threaten these waters.

For centuries our rivers and lakes have been considered a commons belonging to us all, available for use so long as that use does not impair the use of others... If we observe this principle in public policy and private actions, there will be no limit to our prosperity. Water will then continue to define us, enrich us in ways that include but reach far beyond dollar values, and be our legacy to generations to come. It is no wonder that the Supreme Court once declared that our streams, lakes, and Great Lakes are held in a “high, solemn and perpetual trust.”

For the foregoing reasons, Flow for Water respectfully requests the National Ocean Council to incorporate into its objectives, actions, or goals an “overarching Guiding Principle” to protect and save for generations based on the public trust in the waters of the Great Lakes. Specifically, the request is to declare the public trust principles as important for overall national water policy, and to incorporate public trust principles into specific measures and actions for protecting and restoring the Great Lakes in to federal actions or decisions that affect the Great Lakes or its adjoining watersheds and ecosystem.

Alternatively, the National Ocean Council and/or Council on Environmental Quality, along with the Environmental Protection Agency, are urged to incorporate these principles to protect the Great Lakes and uses made of the lakes and related water resources in their guidelines and federal regulations and standards for environmental impact statements and environmental assessments under the National Environmental Policy Act.

Respectfully submitted,

Dated: February 27, 2012.

James M. Olson
Chair
Flow for Water