FLOW
FOR LOVE OF WATER

ADVANCING PUBLIC TRUST SOLUTIONS
TO SAVE THE GREAT LAKES

December 10, 2013

Mr. Keith Creagh, Director
Department of Natural Resources
P.O. Box 30452
Lansing, Michigan 48909-7952

Mr. Tim Nichols, Chair
Natural Resource Commission
Department of Natural Resources
Mineral Management Section
P.O. Box 30452
Lansing, Michigan 48909-7952

RE: Comment and Recommendations on Law and Policy for State Land Leases within the "Holy Waters" Area of the AuSable River and Manistee River Watersheds

Dear Director Creagh and Chairperson Nichols and the Commission:

FLOW ("For Love of Water") is submitting the following Comment and Recommendations to the Michigan Department of Natural Resources ("DNR" or "Department") and the Natural Resources Commission ("NRC") in connection with proposed state oil and gas leases. This includes the subject of the "Holy Waters" state leases at the NRC's meeting on December 12, 2013.

FLOW is a non-profit organization whose mission is to assist leaders and the public to better understand and apply existing common law and statutory principles to protect the integrity of public lands and waters in the Great Lakes basin. In September 2012, FLOW submitted a Report/Comment to NRC and DNR, setting out the basis for application of public trust and MEPA principles to the NRC and DNR's nomination, auction, classification, and leasing of special and unique state lands, such as state parks, recreation areas, game areas, wildlife management areas, and other conservation lands. In Michigan, two key laws protect the integrity of these lands and waters: (1) the public trust doctrine and (2) the Michigan Environmental Protection Act, Part 17, NREPA, MCL 324.1701 et seq. The September 2012 Report/Comment is incorporated by reference as background regarding state land leasing for oil and gas development, including water and surface intensive unconventional high volume hydraulic fracturing ("HVHF").

FLOW's current Comment addresses the state's inherent lack of sufficient consideration or process for identification and protection of special designated state conservation lands or other special and unique state lands and waters related to the auction and leasing of state lands for oil and gas development. Currently, designated conservation lands and special, unique areas like the "Holy Waters" in the AuSable and Manistee River watershed areas are *not* identified or adequately protected from intensive development or cumulative impacts from oil and gas development, especially HVHF.

Section I of this Comment provides an overview about the state land leasing process and the current deficiencies in assessing cumulative impacts and protecting specially designated areas like the Holy Waters. Section II outlines the agency's existing legal duties to protect these trust resources under

common law, statutory law, and case law. Finally, Section III sets forth a new approach to state land leasing of oil and gas development with the following recommendations. First, designated conservation lands and special or unique lands and waters must be identified, and any state leases within these areas must be designated "non-development." Second, these lands must be leased on the conditional provisions that (a) prohibit any surface development, (b) prohibit any reclassification or other authorization that would allow surface development, and (c) require any adjacent oil and gas developments to file with the DNR and NRC a development plan and cumulative impact study of likely effects on air, water, natural resources, wetlands, fishing, fish and aquatic habitat and the public trust in those resources. The right to develop oil and gas under the lease would be conditional on compliance with these requirements and all other relevant laws, regulations, procedures, and guidelines or orders.

In sum, FLOW respectfully requests that DNR (1) adopt the Comment's recommendations as part of the agency's overall oil and gas rules, regulations, procedures and state land oil and gas law and policy; and (2) refuse to accept state land oil and gas leases within the "Holy Waters" area of the AuSable and Manistee River watersheds.

I. BACKGROUND

In our September 2012 Comment/Report, FLOW requested the DNR and NRC to refuse to auction or lease certain state lands that had been specially designated as a state park, recreation area, state game areas, or wildlife management areas. Those state lands were acquired and/or managed by federal and/or state funds (e.g. Pittman-Robertson Wildlife Restoration Act and Dingell-Johnson Sport Fish Restoration Act), and are mandatory "non-development" areas. These areas are also declared to be held and managed as a public trust for the benefit of the citizens of Michigan. As will be seen below, unfortunately "non-development" does not mean no development on the surface.

FLOW has reviewed the state land areas nominated and auctioned within the Holy Waters areas of the AuSable River and Manistee River watersheds. In the Fall 2013 state oil and gas auction, lands were auctioned for lease within this Holy Waters area classified as "development," "development with restrictions," and "non-development" (including "default" non-development parcels not yet formally reviewed or classified). Under DNR procedures and the state form oil and gas lease, any of these "non-development" leased lands can be reclassified, changed, or amended to authorize surface oil and gas development uses, facilities, and activities, such as footprints for oil and gas drilling pads, flowlines, gathering lines, access and other roads, and high-capacity water wells. Even if the leases remain "non-development," the surface can be developed, altered or used to accommodate oil and gas development from adjacent leased lands or "development" and "development with restrictions" parcels. Other than formal reclassification, state "non-development" leased lands can be developed on the surface with little or no notice, opportunity for public comment, or right of review or appeal.

As noted by the DNR in its answers given during the discovery process in a Barry County lawsuit over the validity of auctioning and/or leasing specially designated areas in Allegan and Barry Counties, DNR officials stated that no impact statement or analysis is done by the DNR before auctioning and/or leasing state lands for oil and gas developments. *Michigan Land, Air, Water Defense v DNR*, Circuit Court No. 12-507-CE. While the Circuit Court dismissed the lawsuit as premature on August 13, 2013, the Court stated that it would rule otherwise if (1) an oil and gas auction sale included not only "non-development" leases in an auction or lease, but adjacent or nearby lands classified as "development" and/or "development with restrictions;" and (2) the DNR fails to provide adequate notice, opportunity for hearing or public comment, and judicial review before it reclassified or before any variance or other authorization to use the surface of "non-development" leased parcels.

In other words, when it comes to special or unique state lands there must at least be meaningful notice, hearing/comment, consideration, determinations, and appeal before the surface of any specially designated state lands can be auctioned and/or subsequently altered, used or developed.

Notwithstanding the position of the DNR or parties in the Barry and Allegan County lawsuits, the DNR process relies on the Department of Environmental Quality ("DEQ") to consider impacts on the environment or natural resources as part of the application for a drilling permit for each well. However, because the DEQ's assessment is quite narrow (limited to each well), the DEQ does not consider and determine the likely cumulative impacts and effects on air, water, natural resources, public uses and enjoyment and public trust on special and unique state designated land areas. Moreover, the agency cannot consider the unavoidable impacts from the leasing of the state land itself.

The DNR reasons that it can review impacts or effects on leased parcels, especially "non-development" leases, at the time a request is made for reclassification. However, actual reclassifications are rare; and the more usual process to use or locate facilities on the surface of a "non-development" lease parcel is to authorize a variance, lift restrictions, or allow amendment of the lease for surface development. In addition, by separate process, the DNR Real Estate Division grants easements and use permits for pipelines, roads, water wells, and other facilities and activities on the surface of a "non-development" parcel. However, once a lease is granted and signed, the lease provides for reclassification or such other authorizations. And, like the DEQ permitting review, the DNR review is limited to the parcel covered by the lease, and as noted above, does not include cumulative land use or impact analysis. Moreover, the DNR procedures do not require any disclosure of overall development and land use of an area, and do not address the impacts or effects of such overall development. As a result, under current DNR and DEQ review procedures, overall effects and impacts from changes in land use and development are *not* considered by the state in leasing and permitting oil and gas development. Given the intensive and industrial nature of unconventional hydraulic fracturing, the cumulative nature of impacts has the potential to significantly impact wide areas. Oil and gas company, Encana, for example, is developing resource hub pads for more than a dozen of wells in Kalkaska County, which, in turn, is part of a proposed 500 well development across a northern tier of counties. Current wells use up to 21 million gallons of water per well, and pending permits are requesting up to 35 million gallons of water per well.

The justification for allowing development and production under these special state lands is to prevent the drainage of oil and gas beneath those state lands from nearby private or development lease property. Deeper formation HVHF or "fracking" requires highly pressurized chemical water mixtures to explode the rock in order to capture and produce gas or oil, so there is no significant drainage. Thus, the justification or premise underlying leasing state forest lands as "non-development" should be reevaluated, especially for parks, recreation and game, natural, and other special and unique areas in Michigan. There is little or no drainage, so the original justification to protect the state from loss of oil and gas revenues no longer exists. In other words, our laws and policies must play catch up with the current oil and gas technology.

Moreover, to understand the impacts on state leased lands, it is critical for DNR to analyze the cumulative effects of oil and gas exploration in Michigan on the air, water, and land natural resources, especially for the irreversible commitment of state forest and park, water, wetland, habitat, and recreational values when these lands are leased. However, DNR currently does not conduct this type of assessment, reasoning that the Michigan DEQ will later conduct all impact evaluations at the drilling permit stage when leases have already been auctioned off to the highest bidder. This delayed

approach in evaluating the impacts of oil and gas exploration *after* DNR has sold its state land leases fundamentally fails to assess the cumulative impacts on air, water, natural resources, all held in public trust for the citizens of Michigan.

As noted by law professor Nicholas Robinson, "Most environmental degradation occurs incrementally and cumulatively."[1] For example, the impacts of auctioning off for development a parcel of state land can be profound, and even more profound when it comes to unconventional natural gas and/or oil hydraulic fracturing; a single oil and gas well can demand 8 to 21 million gallons over a 3 week period, or ½ to 1 million gallons of water and chemical mixture a day. A multiple oil and gas well development on single or adjacent pads ("hubbing"), where each oil and gas well requires 21 to 35 million gallons in successive 3-week periods over 6 months to one year will result in exponential effects and impacts (e.g. Excelsior and Garfield and BCA oil and gas well projects, Kalkaska County, Manistee and AuSable river watersheds). Thus, it is critical that the suggested recommendations, noted above, are implemented. Such an approach will avoid development of any kind on the surface and/or near the surface of designated or special and unique state land areas. Each oil and gas well is part of a larger multiple well and multiple pad development. Impacts and land use changes are massive, industrial in nature, with silica dust, noise, vibration, and intensive water and chemical hauling, mixing, operations, and disposal, roads, and pipelines. The DNR is charged by law to address both land use and impacts to the environment that are inseparable from the generic land uses and unavoidable impacts that are implicitly authorized by a state land lease. Under current procedures, changes and effects from change in land use or impacts on special or unique state land natural or special areas are not adequately considered.

II. MEPA AND PUBLIC TRUST DUTIES REQUIRE CONSIDERATION OF LIKELY EFFECTS AND IMPACTS TO SPECIAL DESIGNATED AREAS OR UNIQUE AREAS OR FEATURES SUCH AS THE "HOLY WATERS."

As documented by FLOW's September 2012 Comment/Report, existing law and policy under the DNR Organic Act, the Michigan Constitution Art 4, Sec. 52, the Michigan Environmental Protection Act, and applicable appellate court decisions require the DNR to consider cumulative and generic developments of state owned lands and the likely impacts of such developments before they are leased. If the consideration of impacts on and natural values and lands and waters are not made *before* the transfer, of if the transfer is not expressly reserved and conditional, the right of the state to fully and properly consider effects and protect state lands, waters, and natural resources is lost. The DNR can impose any restrictions or protections it wants as part of a lease, because it is not a regulatory power of private rights, but an exercise of state property power on behalf of state and its citizens. It is no different than a private landowner protecting her or his property before leasing or granting an easement or other right in land. Deferring to the DEQ to consider impacts and impose limitations or restrictions is far different, because the DEQ's police power is limited. For example, in the agency's regulations governing oil and gas leases, the Department has clear authority to decline any bid in order to uphold its duty to prevent the impairment of public trust resources. R299.8104(6) states that:

> (6) The Department reserves the right to reject any bid and may, in its discretion, stop the sale of any sale unit at any time and for any stated reason.

[1] Robinson, Nicholas A., "SEQRA's Siblings: Precedents from Little NEPA's in the Sister States" (1982). Pace Law Faculty Publications. Paper 386. http://digitalcommons.pace.edu/lawfaculty/386

A. DNR's Has a Legal Duty to Protect the Public Trust

DNR's legal duty to protect the state natural resources held in public trust stems from a number of sources, including the 1917 Organic Act, the 1939 Oil Conservation Act, and the common law as set forth in *Michigan Oil Company v Natural Resources Comm'n*, 406 Mich 1; 276 NW2d 141 (1979).

1. The Public Trust Doctrine

The public trust doctrine is deeply rooted in our history dating back to the Roman times of Justinian. Water then like water now was so valuable that under Roman law, the air, the rivers, the sea, and the seashore were dedicated to public use and could not be placed under private ownership. Not long after the Magna Carta in 1215, British Courts ruled that the sea, its fish and habitat were also held in trust, and that the Crown could not interfere with or alienate (transfer) the public's right to fish, boat, and swim. Fast forward to 1892, and since then, the United States Supreme Court, and virtually every Great Lakes state, including Michigan, have ruled that the Great Lakes are a perpetual trust in favor of citizens, and that neither government nor others can diminish, impair or dispose of these treasured waters. Public trust resources are not limited to water, but include air and special and unique state and federal lands. Thus, it is the government's duty to protect these resources, like that of a trustee who is charged with the duty of protecting the principal of a trust for its legally named beneficiaries.

The public trust serves a noble purpose as articulated by the California Supreme Court in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441 (1983). "Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id.* As Michigan state agencies, NRC, DNR, and DEQ all have an affirmative duty under the common law to protect state natural resources held in public trust.

2. The 1917 Organic Act

The 1917 Organic Act, as amended, Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.503(1), and its rules, set forth a clear duty to protect state lands and natural resources:

> (1) The department shall protect and conserve the natural resources of this state; provide and develop facilities for outdoor recreation; prevent the destruction of timber and other forest growth by fire or otherwise; promote the reforesting of forestlands belonging to this state; prevent and guard against the pollution of lakes and streams within this state and enforce all laws provided for that purpose with all authority granted by law; and foster and encourage the protection and propagation of game and fish.

3. The 1939 Oil Conservation Act

The Legislature declared in the 1939 Oil Conservation Act[2] that its state resources would be protected from uncontrolled and rampant oil and gas exploration. Implicitly, the Legislature impressed the state with a trust duty to prevent harm, waste, and exploitation from oil and gas resources development.

[2] Act 61, Public Acts of 1939, as amended MCL 319.1 et. seq.; MSA 13.139(1) et. seq, as amended, part 615 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), 1994 PA 451, MCL 324.61501 et seq.,

> It has long been the declared policy of this state to foster conservation of natural resources so that our citizens may continue to enjoy the fruits and profits of those resources. Failure to adopt such a policy in the pioneer days of the state permitted the unwarranted slaughter and removal of magnificent timber abounding in the state, which resulted in an immeasurable loss and waste. * * * *The interests of the people demand that exploitation and waste of oil and gas be prevented so that the history of the loss of timber may not be repeated*. It is accordingly the declared policy of the state to protect the interests of its citizens and landowners from unwarranted waste of gas and oil and to foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of these natural products. To that end, *this part is to be construed liberally to give effect to sound policies of conservation and the prevention of waste and exploitation.*

MCL 324.61502.

4. Michigan Oil Case: State's Failure to Evaluate Natural Resources During 1970s Oil and Gas Exploration Was a Major "Policy Blunder," Threatening the Public Trust on State Lands

In *Michigan Oil Company v Natural Resources Comm'n*, 406 Mich 1; 276 NW2d 141 (1979), and its companion lawsuit, *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741, 275 NW2d 538 (1979) both involving a 1968 sale of oil and gas leases in a large area of unique state lands, including Pigeon River Country State Forest, the Court of Appeals chastised the Department and the NRC, labeling their attempt to lease these unique state lands a "policy blunder." *Michigan Oil Company v. Natural Resources Comm'n*, 71 Mich App 667, 674-75, 249 NW2d 135 (1976). "The term 'blunder' is not too strong a word to describe the DNR's 1968 decision to offer, at public auction, oil and gas leases…." *Id.* The Court of Appeals observed that the NRC simply had conducted too "little investigation or consideration of the effects of possible drilling on state lands and other natural resources entrusted by law to the care of the commission." *Id.* The Court explicitly recognized the agencies' public trust duties, stating that "[t]he commission expressly retained its statutory authority to fulfill its duty to the people of the State of Michigan by regulating the use of the state lands and resources placed in its control and held by it as a *public trust*." *Id.* at 688-89 (emphasis added). To cure this situation, the Court directed the NRC to conduct a comprehensive management plan of Pigeon River and its sensitive ecological and wildlife features *before* issuing any oil and gas drilling permits to Michigan Oil. *Id.* at 694.

In affirming the Court of Appeals, the Supreme Court of Michigan held that the 1939 Oil Conservation Act's definition of "waste,"[3] not only referred to waste of oil and gas, but also included any harm to wildlife and public uses, pollution, or the environment. *Michigan Oil v Natural Resources Commission*, 406 Mich 1 (1979). The Court rejected "a construction of the oil conservation act which would permit oil and gas drilling unnecessarily detrimental to the other natural resources of this state." 406 Mich at 23. In addition, the Court held that the NRC had statutory authority to deny Michigan Oil's request for a drilling permit in a sensitive area that supported bear, bobcat, and the last sizeable wild elk herd east of the Mississippi river. Moreover, the NRC had an affirmative statutory duty to prevent waste, which the Court defined to include serious or unnecessary damage to or destruction of wildlife.

5. DNR's Oil and Gas Leasing Policy and Procedures Include Protection of Natural Resources under the Public Trust Doctrine

DNR's Oil and Gas Leasing Procedure DNR 27.23-15 recognizes the public trust doctrine:

[3] MCL 324.61504, and 324.61501(q)(i)-(ii).

> "It shall be the policy of the Natural Resources Commission (NRC) to manage State-owned minerals in a manner that protects and enhances the ***public trust***. Surface and mineral ownership may be consolidated when it is in the best interests of the State. Minerals shall be developed in an orderly manner to optimize revenue consistent with other public interest and natural resource values." (emphasis added).[4]

Policy and Procedure DNR 27.23-14 references the public trust duty:

> "Under the provisions of P. A. 451 of 1994, Part 5, Section 502, the NRC and Director of the Department of Natural Resources (DNR) are responsible for managing these lands and mineral resources to ensure protection and enhancement of the ***public trust***."[5] (emphasis added).

B. DNR's Has a Legal Duty to Conserve Natural Resources Under Michigan's 1963 Constitution and the Michigan Environmental Protection Act ("MEPA")

Under Michigan's 1963 Constitution, all state agencies, including NRC, DNR, and DEQ, have an express duty to protect the state's natural resources. Article 4 § 52 of the Constitution declares:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Article 4, § 52 creates a mandatory duty for the legislature to enact legislation to protect the state's natural resources. *State Hwy Comm'n v Vanderkloot*, 392 Mich 159, 182; 220 NW2d 416 (1974); *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002) (same analysis). The MEPA "marks the Legislature's response to our constitutional commitment to the 'conservation and development of the natural resources of the state.'" *Ray v. Mason Co Drain Comm'r*, 393 Mich 294, 304; 224 NW2d 883 (1975); W. Rodgers, *Environmental Law* §2.16 at 184 (1977).

Specifically, MEPA imposes a mandatory duty on individuals and organizations both in the public *and* private sectors to prevent environmental degradation, which is caused or is likely to be caused by their activities. MEPA applies to oil and gas orders, permits, and proposed projects. *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741, 275 NW2d 538 (1979) (denying DNR's decision to grant permit for ten exploratory wells based on likely adverse impacts to pollute, impair, and destroy wildlife). MEPA applies to agency actions approving, licensing, or permitting conduct that is likely to harm or impair, pollute or destroy the "air, water, natural resources, or public trust" in those resources. *Anglers of the AuSable v MDEQ,* 283 Mich App 115; 485 Mich 1067, 488 Mich 69 (opinion vacated on rehearing) (the decisions upheld the trial and appellate court holdings that MEPA applies to state department, commission, and other proceedings); *State Highway Comm'n*, 392 Mich at 187-88.

Accordingly, under MEPA, the state agencies have the authority and affirmative duty to consider and determine the likely effects of conduct approved or authorized by them, as well as the alternatives to such conduct. *State Hwy Comm'n*, *supra*; *Ray*, 393 Mich 294; 224 NW2d 883 (1975).

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[4] http://www.midnr.com/Publications/pdfs/InsideDNR/publications/DNRPolProc/27.23.15.htm
[5] http://www.midnr.com/Publications/pdfs/InsideDNR/publications/DNRPolProc/27.23.14.htm

III. FLOW RECOMMENDATIONS

Based on the above, FLOW recommends that the DNR and NRC develop a formal rule, procedure or binding order to identify and protect special and unique state lands and waters. Safeguards as articulated in the following recommendations are critical to preserving and protecting the gems of the state, like the Holy Waters area:

(1) The DNR should suspend the sale of state lands that have a special designation, such as parks, recreation, game areas, wildlife areas, and state lands that have similar special and unique values or features, like the Holy Waters area of the AuSable and Manistee river watersheds.

(2) The DNR should refuse to sign the leases for auctioned state lands within the Holy Waters' area unless and until

(a) a process is instituted by rule and or binding procedure that reviews, considers and identifies special and unique areas or already designated special areas (parks, recreation, game, and wildlife areas);

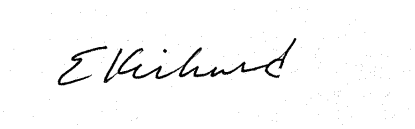
(b) the agency imposes an unconditional "non-development" lease restriction with no opportunity to develop or use the surface for any operations, activities related to oil and gas development; i.e. the "non-development" classification is binding on all and cannot be changed, varied, or amended in any way through reclassification or any other authorization or approval; and

(c) as part of the agency's review of state lands nominated for auction and leasing, the DNR will require a comprehensive oil and gas development proposal and cumulative environmental impact report of an overall proposed oil and gas development before any parcel of state land near or within "non-development" parcels, evaluating likely effects on the state's air, water, and other natural resources. (As an alternative, the lease would be modified to require the mandatory filing of a development plan for a project or multiple well area of a township or townships or counties, together with a thorough cumulative environmental impact report at the time it files any drilling permit applications, with the DNR, who shall separately evaluate and authorize as a condition of the lease oil and gas development within the plan area).

For these reasons, FLOW urges the DNR and NRC to refuse to accept state land oil and gas leases within the Holy Waters area of the AuSable and Manistee River watersheds. Further, FLOW submits that the DNR should adopt the above recommendations as part of the agency's overall oil and gas rules, regulations, procedures and state land oil and gas law and policy.

Thank you for the opportunity to submit this additional Comment to you concerning a critical law and policy issue that, hopefully, will be addressed before any lease is accepted or entered into within the Holy Waters area or other special, unique or designated state lands.

Sincerely,



Elizabeth R. Kirkwood
Executive Director
FLOW

xc: Honorable Richard Snyder, Governor