

# FLOW



FOR LOVE OF WATER

## Before the International Joint Commission

***Executive Summary:  
Comments on Draft "Ten Year Review of the International Joint Commission's  
Report on Protection of the Waters of the Great Lakes Basin."***

Submitted to the  
Office of the International Joint Commission  
Ottawa, Canada  
and  
Office of the International Joint Commission  
Washington, D.C.

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**JUNE 30, 2015**

**THE FOLLOWING EXECUTIVE SUMMARY COVERS THE RECOMMENDATIONS SUBMITTED BY FLOW, JUNE 30, 2015, “COMMENTS ON DRAFT 10-YEAR REVIEW OF THE INTERNATIONAL JOINT COMMISSION’S 2000 REPORT ON THE PROTECTION OF THE WATERS OF THE GREAT LAKES.”**

The Great Lakes are threatened with significant current and future systemic harms, some of the potentially devastating although uncertain magnitude, others chronically and incrementally interfering with or impairing public and private uses of water and shorelines, and obstructing or thwarting the sustainability of the Great Lakes, their ecosystem and watersheds. The Great Lakes Report of the IJC in 2000 set a goal of protecting the lakes and waters of the Basin from diminishment as a result of diversions, consumptive uses, and to protect the integrity and sustain these waters and ecosystems. The Agreement and Compact address out-of-basin diversions and in-basin consumptive uses to minimize impairment and harm from new or increased existing or future diversions and consumptive uses. It set a standard for decisions by a regional body and imposes a duty on states to do the same. It contemplates assessments of cumulative impacts and consideration of inevitable effects of the uncertain dimensions of climate change.

However, the Agreement and Compact and other laws do not address systemic harms or threatened interference that often fall outside more narrowly focused regulatory frameworks. It has been seen that climate change results in a massive diversion or consumptive use of these waters, and significant harm to the ecosystem. Nutrient runoff and phosphorous, invasive species, widely varying or extreme waters result in similar systemic harms. Increased droughts, storm events, and the “nexus” of intense competition for water sources for food, energy, and population and development threatened to override commitments to protect the Great Lakes, its natural systems, public and private uses, and heavy public investments in harbors, navigation, recreation facilities, drinking supply systems, and habitat projects.

Accordingly, in order to fulfill and critically need for background principles that apply or supplement existing regulatory frameworks or other regimes in a time of uncertainty and potentially high magnitude of systemic harms or threats, the IJC is urged to adopt or incorporate a the public trust doctrine as a backstop or supplementary framework and set of principles. It is recommended that the IJC adopt and encourage states and provinces to exercise a commons or hydrological or water cycle framework and apply public trust principles and standards to address, study, and make decisions and/or recommend laws and policies consistent with these principles. To do so, both countries, the states and provinces, and the IJC will significantly advance the goals and purposes of the Great Lakes 2000 Report, and at the same time strengthen the design and goals of the Agreement and Compact and more fully address or solve the systemic effects and impacts that harm or threatened the Great Lakes, ecosystems, and the public and private uses, quality of life, and economies that depend on them.

In addition to the above overarching framework, the following specific recommendations are made to strengthen the goals of the IJC Great Lakes 2000 Report. Each of these recommendations, in turn, is uniquely related to the application of a public trust framework and principles; in turn, overarching public trust framework and principles would enhance the effectiveness of these recommendations.

**a. Climate Change**

The IJC 10-Year Review of the 2000 Report should recommend a reference or other actions to implement protection of Great Lakes water levels, habitat, watershed ecosystems, and the public and private uses that depend on them as follows:

- (i) Recommend a study to implement a standard and protocol to account for the effects and impacts of any diversion, consumptive use, and/or removal of water from the Basin as a result of climate change that are not subject to regulation under the Agreement or Compact or other state licensing or permitting regulations;
- (ii) Incorporate and account for the climate change effects and impacts in the approval of any diversion, consumptive use, or withdrawal of waters of the Great Lakes Basin that are subject to the Agreement or Compact or other state and provincial licensing, permitting or other regulatory actions;
- (iii) Implement as expeditiously as possible a water level/target policy that would act as a benchmark for energy policy within and outside of the Great Lakes Basin. While energy policies and requirements concerning greenhouse gases are outside the scope of the IJC 2000 Report and Reference, activities like climate change that affect water levels, flows, and sustainability are not. Water level targets and a public trust benchmark for the Great Lakes would form the basis for the IJC within the 2000 Report and Reference to educate the public, governments, provinces, and states on the relationship of climate change to the waters of the Great Lakes Basin, and urge energy policies, goals and targets that are consistent with protection of the Great Lakes and ecosystems. A new or supplemental protocol or compact for “Great Lakes Sustainable Water, Food, and Energy Agreement” could be considered.

**b. IJC Study of Increasing Demand and Shrinking Sources for Freshwater**

The 10-Year Review of the 2000 Report should recommend study and application of the precautionary principle to take into account the threats on waters of the Great Lakes Basin as the result of drought, storm and extreme hydrological effects, and the lack of sufficient water supply to meet the demand in various areas of North America or beyond; based on such study the IJC should recommend a continuous IJC study board review as part of the countries and IJC cumulative impact assessment on water levels, flows, and the integrity of the Great Lakes and their ecosystems; such a study board would report to the IJC on changes in demand, supply, water sources, from human consumption and activities and natural causes, and recommend proactive changes or actions by the IJC, the governments, states or provinces to strengthen protection of the Great Lakes from diversions, uses, and other removals.

**c. Scientific Information Based on Hydrologic Cycle**

The 10-Year Review of the 2000 Report should recommend study and incorporation of new science methods, tools, and modeling to collect information and conduct analyses based on an integrative or holistic framework that looks at and accounts for the effects and impacts on the connected or common groundwater/surface waters within the Great Lakes Basin from all human uses and activities affecting water and land and other natural processes within and the entire hydrologic cycle.

**d. Water, Energy, Food, and Climate Change “Nexus”**

It is recommended that the IJC implement a protocol that takes into the competing uses and future demand for freshwater, particularly the waters of the Great Lakes Basin, from agriculture, energy production and fossil-fuel extraction, and thermoelectric facilities, and their effect on water levels, flows, or the ecosystems and watersheds of the Great Lakes Basin; such protocol would include an integrative approach that accounted for the entire or virtual water loss or removal from these uses, and balance these competing demands and uses consistent with the overarching goal that protects the water levels, flows, and ecosystems of the Great Lakes Basin.

**e. Water Law and Policy**

The 10-Year Review report should recommend the establishment of an independent “Law and Policy Study Board” that assesses and reports to the IJC and the governments on significant changes in water law, such as riparian and groundwater law standards and criteria regarding water use and diversions within and outside watersheds, lakes, or streams, with a goal to maintaining common law and statutory principles that supplement the overall goals regarding diversions, consumptive uses, and protection of the flows, levels, and ecosystems set forth in the IJC Great Lakes 2000 Report.

The IJC should also consider, consistent with the approach taken in the IJC 2000 Report, establishing a “Law and Policy ‘Study Board’” that would advise the IJC and its scientific study boards and references on a continuing basis.

**f. Public Right to Navigation, Boating and Fishing and Public Trust Principles**

The 10-Year Review Report should add a section that recommends the adoption of public trust duties and principles as an overarching framework to protect the integrity of natural flows, levels, ecosystems, and the public and private uses of the navigable waters of the Great Lakes, from human uses and activities within and outside the Great Lakes basin and its watersheds. This will provide a “backstop” to the present 2000 Report and its goals, as well as supplementing existing laws and regulations, and the Agreement and Compact. These principles will also empower governments to implement and apply the recommendations addressed in these Comments. The public trust principles would call for:

- (i) Fulfillment of state and provincial and governmental duties to protect and preserve the public rights and trust in these public trust navigable waters;
- (ii) Consideration in governmental decisions and actions of the effects and impairment from human uses and activities on these waters and their public uses;
- (iii) Prohibit or restrict diversions, consumptive uses, removal of waters of the Great Lakes, or other effects and impacts on quantity and quality of these waters, that would materially impair flows, levels, their ecosystems, and the public trust uses that depend on them.

As noted, in recommendation e. above, the IJC should also consider, consistent with the approach taken in the IJC 2000 Report, establishing a “Law and Policy Study Board” that would advise the IJC on its actions, references, recommendations, and studies consistent with the goals of the 2000 Report.

**g. International Trade Agreements**

Because of the increased competition and pressure and demand for water in North America and elsewhere in the world, and the uncertainty of rulings under trade agreements like NAFTA, it is recommended that the 10-Year Review Report urge the adoption of a declaration, resolution, or new guiding principle that

puts the public, foreign governments, and investors on “notice” that the two countries, states, and provinces hold and have:

- (i) Inherent sovereign, ownership, and/or control as the Crown, in Canada, and sovereign governments, in U.S., over the waters of the Great Lakes Basin, including lakes, streams, groundwater, and hydrosphere, and their ecosystems;
- (ii) Hold and manage these waters of the basin within their respective jurisdictions and between them their shared common international boundary waters subject to a paramount public right of navigation, boating, and fishing, and as a public trust for the protection of navigation, fishing, boating, swimming, sustenance, and other public uses and needs associated with these waters;
- (iii) Hold and manage these waters as a trust that prohibits the transfer, grant, or subordination or impairment of these public trust waters.

As in specific recommendations e. and f., above, new developments and trends in international trade law agreements, decisions, or claims would be included in the work of the “Law and Policy Study Board.”