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ADVANCING PUBLIC TRUST
SOLUTIONS TO SAVE THE
GREAT LAKES

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Public Trust Doctrine Policy Framework Encouraged in Final LEEP Report FLOW Commends International Joint Commission as “Forward-Thinking”

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TRAVERSE CITY, MI – FLOW lauds the International Joint Commission (IJC) for including public trust standards into its recommendations for solving Lake Erie’s harmful algal blooms in its 2014 final Lake Erie Ecosystem Priority (LEEP) report. FLOW’s comments to the IJC on its draft LEEP report (2013) urged state governments to apply public trust standards as a key strategy for restoring and protecting Lake Erie’s waters. FLOW congratulates the IJC for their forward-thinking approach, one that includes the public trust doctrine as a mechanism that extends beyond traditional regulations to eliminate the nutrient runoff loads causing of algal blooms.

Harmful algal blooms (HABs) – an issue once thought to be solved when legislation regulated public wastewater treatment facilities and outlawed phosphorous from soaps and detergents in the 1970s – created a “dead zone” the size of Rhode Island and Delaware combined on Lake Erie in 2011. HABs emerge perennially in the summer months, and excrete toxins that pose hazards to swimmers, fish and fishers, boaters, tourists, and property owners. Under the premise that HABs interfere with these protected public water uses and impair water quality, state- and province-level officials can invoke the public trust and use it as a policy tool to achieve more aggressive reductions in phosphorous (and related nutrient) run-off from agriculture and municipal sewer operations in order to reduce and prevent future algal blooms.

In the final LEEP report, the IJC encourages states and provinces in the Great Lakes Basin to apply the public trust as a framework for future policy decisions in order to prevent and minimize harmful algal blooms (HABs) in Lake Erie. From the final LEEP report:

“The governments of Michigan, New York, Ohio, Pennsylvania and Ontario should apply a public trust framework consisting of a set of important common law legal principles shared by both countries, as an added measure of protection for Lake Erie water quality; government should apply this framework as an added decision-making tool in policies, permitting and other proceedings...”

Functionally, the public trust guarantees each person as a member of the public the right to fish, boat, swim, and recreate in Lake Erie, and to enjoy the protection of the water quality and quantity of these waters, free of impairment. The effects

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of HABs – from “dead zones” that suffocate aquatic species, to toxic secretions that close beaches and pose health hazards to boaters, fishers, and swimmers – are clear violations of the public trust. Thus, as sworn guardians of the Great Lakes waters under the public trust, the states have a duty to take reasonable measures to restore the water quality and ensure that the public can fully enjoy their protected water uses.

“We applaud the IJC for its foresight and guidance on one of the greatest threats to the Great Lakes, and urge the states to immediately implement and evaluation actions necessary to address nutrient runoff problems,” says FLOW Founder Jim Olson. “The IJC’s sense of urgency and call for cooperation sets the tone for immediate action in reducing reactive phosphorous loading, aimed at the “hot spots” first,” he says.

“The call for a public trust framework recognizes a benchmark adopted by the courts of all eight Great Lakes states and Ontario,” he explains. “This benchmark means governments must act. They have an affirmative duty,” he says.

“It also means that all private interests involved with phosphorous management practices, farming, and the non profit organization sector must work together, because we share this common water held in public trust. Finally, it means that if the states, province, and those engaged activities that fall short of best practices or fail to reduce phosphorous by setting a limit for Lake Erie, then the citizens as legal beneficiaries may seek recourse to make sure that the continuing nuisance and interference with private and public uses of high value are protected,” he says.

FLOW has worked on the issue of public trust as it relates to HABs for several years. In 2011, Olson and Council of Canadians National Chairperson Maude Barlow authored and presented a report to the IJC on the application of public trust principles to the Great Lakes. In 2013, FLOW submitted comments to the IJC on their 2013 draft LEEP report that enumerated how the public trust framework can complement present regulations and cooperative efforts to prevent nutrient run-off from creating HABs in Lake Erie and elsewhere.

HABs are becoming an increasingly common problem in other Great Lakes regions including Green Bay, Saginaw Bay, and along some parts of the eastern shoreline of Lake Michigan. “Utilizing the public trust framework as a means for solving HABs in Lake Erie is just the first step,” says FLOW’s executive director, Liz Kirkwood. “Once the Lake Erie Basin states demonstrate the application and effectiveness of the public trust in solving HABs, it will be much easier for the rest of the Great Lakes Basin states to follow suit. This problem is not limited to Lake Erie.”

The IJC has taken a significant step to lead the governments and citizens and interested parties to a goal of reduced phosphorous loading of Lake Erie, to a point where the reactive devastating harm and public nuisance can be abated.

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FLOW is the Great Lakes Basin’s only public trust policy and education 501(c)(3) nonprofit organization. Our mission is to advance public trust solutions to save the Great Lakes.