



# *Public Water, Public Justice Act:* A Report from FLOW

## ***PUBLIC WATER, PUBLIC JUSTICE:***

### **A PROPOSAL TO PROTECT THE PARAMOUNT PUBLIC INTEREST OF PUBLIC WATER AND HEALTH FOR THE PEOPLE OF MICHIGAN AND GREAT LAKES<sup>1</sup>**

#### **A REPORT FROM FLOW SEPTEMBER 2018**

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## PREFACE BY JIM OLSON

For over two decades, citizens have witnessed government leaders and elected officials retreat from their constitutional and common law paramount duty to protect public water, health and the common good. Instead, government has favored special economic interests over the duty to safeguard water and health. We have been living in a culture of government indifference in which water, people and health are last, and political and economic interests are first. Lives have been injured and communities turned upside down because of this failure.

Detroit water shutoffs continue without real relief. Flint citizens continue to struggle and suffer, with insufficient attention and lack of support to rebuild their community and lives. Michigan approved yet another permit for Nestlé to take 210 million gallons a year for free, except for token annual registration and administrative fees. Citizens in Flint and Detroit are forced to buy bottled water because they don't have access to safe water. Detroit schools can't open without bottled water. Ohio has dragged its feet since the western one-third of Lake Erie turned into green toxic algae and Toledo's drinking water was shut down in 2014 and a tourist-based economy damaged. Recently, state officials declared a state of emergency in Parchment, Michigan because of the risk of exposure to per- and polyfluoroalkyl substances ("PFAS") more than 20 times the 70 parts per trillion current state limit. This summer, an extreme rainfall event in the Upper Peninsula overwhelmed infrastructure and caused untold damage and destruction, largely due to government indifference toward the increasing intensity and frequency of weather events from human-induced climate change.

Undoubtedly, jobs and economy are vital to our quality of life, but in what manner and at what cost to the lives of hundreds of thousands of people? How much externalized damage to the environment is enough? At what point do citizens and leaders reject this indifference and favoritism toward political and economic interests, and reestablish the overarching paramount interest in water, health and common good? What should citizens, communities, towns and leaders do?

Over the last nine months, I have had the privilege to help FLOW find a holistic approach that would address these complex interconnected concerns in a model law. This past May, I circulated a draft of a proposal for a model water and justice law with our Executive Director Liz Kirkwood and Senior Policy Advisor Dave Dempsey and Board Chair Skip Pruss, highly regarded sages on public policy, water, environment and energy in the Great Lakes Basin. After much discussion, review and collaboration with many organizations and people, and many iterations of the draft law over the summer, FLOW is pleased to release a model *Public Water, Public Justice Law* for citizens, communities and leaders in Michigan and the Great Lakes Basin. The model law, bill summary, this full report and accompanying water law primer are offered as a pathway for education, dialogue and enactment of a comprehensive law. This law declares water as sovereign and held in public trust by state governments for the benefit of citizens, to protect their paramount right to safe, clean and affordable water, public health and a sustainable environment in the challenging decades to come.

The seed for this project was sown during a Michigan Department of Environmental Quality hearing in Big Rapids last April 2017. The hearing showcased the second application for a water permit by Nestlé to divert 210 million gallons of groundwater a year from the headwater creeks near Evart, Michigan for its bottling plant 30 miles to the south. Hundreds of well informed citizens from all over the state crowded the large hall, lined the walls and sat on the floor, and one by one voiced their concerns. Citizens from Detroit and Flint and leaders and members from Michigan's recognized Indian tribes spoke passionately and powerfully, decrying the damage, risks to health, inequity and injustice in Detroit and Flint, while the state authorizes water for Nestlé virtually for free and risks sensitive wetlands and cold-water creeks: *Why do you leave us without water for our homes when we can't afford a \$200 water bill, when a bottled water company like Nestlé gets a permit to take water virtually free? Why is it that we and our children*

*were exposed to lead and disease, that we have to use bottles of water to cook or wash when Nestlé receives hundreds of millions of dollars in profits a year? Why are you forcing our children to be separated from our homes because we are without water? Why is it that you can let a private corporation subordinate 12,000-year old glacial springs and creeks for the convenience of a label with the words “spring water” so a water bottling company can serve a market niche and charge more per bottle? How can you issue a permit from “spring water” in the same watershed where courts have already determined that 400 gallons per minute for bottled water substantially impaired and harmed the upper reaches of a stream and two lakes with nearly the same kind of glacial hydrogeology?*

As we left the hearing room at Ferris State University that evening, I sensed I had just witnessed a turning point in Michigan’s history. For the first time I could recall, citizens from every walk of life had united as one voice to stop the deterioration of our water, health and social justice. It wasn’t just hunters and fishermen, conservationists, or environmentalists. It was African Americans, civil right activists, tribal leaders, elders, children, business men and women, teachers, doctors, scientists and lawyers insisting to government and its leaders that it was time for a paradigm shift in water law and policy that puts our public water, health and social justice first, above all else.

If the seed for this project was sown at Ferris State, it germinated during the “Water Is Life” conference hosted by Woodland Church in the fall of 2017. Inspiring talks, informative workshops, and sobering, stirring testimony from participants called for a new unified, holistic approach to defeat the government’s lack of accountability and action to protect water, health and justice. It seemed unconscionable that over the past 30 years our government leaders had let people sink to the bottom in favor of a narrower political economic agenda. There had to be an approach that tied together in one law a solution to the chasm of inequity and discontinuity of justice between the extreme profit of bottled water and the devastating tragedies in Detroit and Flint, and at the same time promoted resilient communities and a sustainable economy and environment.

We faced many challenges. A model law would have to connect the inalienable nature of public water held by a state as sovereign for the broader needs and benefit of its citizens with the need for individual reasonable use of water for domestic, agriculture, industrial and commercial or private purposes. At the same time, it was necessary to restore the paramount value of water and dignity of people and connect this with public infrastructure and water services in Flint, Detroit, our suburbs and rural towns. It was important to prevent companies from taking water from public supplies at nonprofit rates and turn around and sell it, without state authorization, at high profit. We had to find a way to address the poignant, unconscionable injustice between the hundreds of millions of dollars that packaged water companies make off essentially free water from those in cities or small towns who cannot afford or are denied access to safe, clean water because of contamination or failing infrastructure. Finally, we had to find a way to prevent the continuing adverse impacts from the effects of large-volume water withdrawals and diversions for bottled water that diminish and harm the public trust in our fish, habitat and public enjoyment of our hydrologically connected groundwater, springs, wetlands, lakes and streams.

Today, we present the *Public Water, Public Justice Law*, its report and supporting documents with immense gratitude to everyone who has participated and helped us finish and release this model law. The model law is presented in three parts, designed as one model law or three separate stand-alone laws. Part 1 declares waters of the state sovereign, asserting a paramount right to clean affordable water and health subject to the affirmative duty under public trust law for the state to protect the fundamental right to water. Part 2 prohibits the sale of water itself, but preserves the reasonable use of water incident to land ownership or occupancy; accordingly, the law distinguishes the reasonable use of water in connection with the land from the severance and sale of water in distant markets. If a packaged water company wants to sell water, it must demonstrate no impairment to the public trust through interference with a reasonable use, and that it will not diminish the flows and levels of wetlands, streams or lakes. Only if these strict

environmental standards are met can a company apply for a license to sell water from the sovereign state under Part 3. Part 3 requires a license and royalty from the state. A royalty of 25 cents per gallon, approximately 5 more cents for a 16-ounce plastic bottle, is paid annually into what we labelled the “Public Water, Health and Justice Trust Fund.” The Trust Fund board consists of urban and rural citizens, water engineers and professionals, representatives of government, local water systems, commerce, conservation and citizens at large who are appointed by the Natural Resources Commission. The board is charged with administering the funds for preferred dedicated purposes, including affordability, health, medical monitoring, emergency infrastructure or groundwater pollution threats, help for local governments and other entities like schools. The model law also creates public notice and comment, hearings, oversight, accountability, government and citizen enforcement.

We could not have finished this project without the incredible support and water justice vision of the Mahogany Foundation along with the invaluable contributions of many people and organizations. We are deeply indebted to you all. The young, talented, dedicated staff at FLOW carried and improved the model law and report. The peer review and thoughtful comments from water law experts Professor Noah Hall at Wayne State University, Professor Oday Salim, now at National Wildlife Federation and University of Michigan, Professor Nick Schroeck at University of Detroit Mercy Law School, and Skip Pruss helped us assure that we had designed a comprehensive architecture based on sound principles of water and public trust law.

Cyndi Roper, (Natural Resources Defense Council), encouraged us to move this forward, because of the imminent public need. The constructive comments and questions from the participants in our Water Is Life Coalition grounded us to address the needs of people and the environment. These extraordinary people include Lila Cabbil (The People’s Water Board), Monica Lewis-Patrick (We the People of Detroit), Sylvia Orduno (Michigan Welfare Rights Organization/The People’s Water Board), Claire McClinton (Democracy Defense League), Wenonah Hauter, Mary Grant and Emily Wurth (Food & Water Watch), Maude Barlow and Emma Lui (Council of Canadians), Peggy Case and Karen Turnbull (Michigan Citizens for Water Conservation), Miranda Fox and Stiv Wilson (Story of Stuff), Shannon Abbott, (Grand Rapids Water Protectors), Melissa Mays (Water You Fighting For), Holly Bird (Grand Traverse Band of Ottawa and Chippewa Indians), Alissa Weinman (Corporate Accountability International), Paul Baines and Luke Evans (Great Lakes Commons), and Lin Grist (Wellington Water Watchers). Similarly, we received wonderful guidance from other colleagues, including comments from David Holtz, Allison LaPlatt, Anne Woiwode (Sierra Club), and James Clift and Kate Madigan, (Michigan Environmental Council). And I personally am thankful for the critical response by participants in the People’s Water Board “teach in” when I was given the opportunity to present an outline of the proposed law. Finally, I want to thank Alice Jennings, Kurt Thornbladh and Tom Stephens, leading social justice lawyers in Detroit, for letting me participate in the *Lyda v City of Detroit* bankruptcy court case and appeal, an opportunity that gave me deeper insight into to what happens to families, homes, children and neighborhoods when the paramount needs of public water and health are ignored by a government bent on narrower agendas infected with political interests.

We invite you, the reader, to join with us and others in what could be the most critical challenge that we, our children and their children will face in this century. It is past time that we right the ship of water, health and the public trust in water and governance. All of us, beyond partisanship and self-interests, must unite the principles of the human right to water, health and the public trust in water to promote transparency, accountability and the *paramount* common good, now.

It is our deepest hope that a groundswell of people from our leaders, legislators, local governments, organizations and citizens from all walks of life will work together to reach for and achieve a new framework for water and health. This, we hope, will spark a sea change in the way we value, protect, use and sustain water for the common good. It is time to rebalance the scales of justice to promote and protect

these paramount interests and values from subordinate to paramount. If we do this, we will make good decisions about water use, land development, infrastructure, community, health, energy, food, economy and quality of life.

Jim Olson,  
Traverse City  
September 19, 2018

## **INTRODUCTION**

The people of Michigan collectively own the waters of the state as sovereign – but the lack of state assertion of its sovereign ownership and duty to protect water and public health allows private for-profit corporations to remove these waters and sell them for mammoth profits without explicit legislative authorization to do so. This is not only inconsistent with the need for state authorization to sell water that belongs to all of us, but it violates the governmental duty to assure that the diversion and sale of water do not impair our lakes, streams and wetlands, and it is a raw deal for the citizenry.

To prevent alienation of the public’s water and to protect sensitive water resources, particularly in times of critically threatened groundwater, lakes and streams, and public health, Michigan and the seven other Great Lakes states should pass model legislation like the model bill recently drafted and proposed by FLOW and its founder and legal advisor Jim Olson, after review and comment from other experts and affected interests.

This proposed legislation is designed to affirm state sovereignty and public trust duty to protect the right to water and health; require licenses for any water that is authorized for sale; comply with protective water quantity, quality and environmental standards; recoup for public purposes royalties derived from any authorized water sales; dedicate those royalties in trust to satisfy the rights to access affordable, safe and clean water; assure communities can sustain public water infrastructure and public water sources; provide public notice, participation and rights of enforcement for violations of governments’ legal duty; and provide adequate and fair funding to local communities for safe water lines and other needs of residents, schools, businesses and public buildings and facilities. To do otherwise is to fall short of government’s constitutional, public trust and legal duties as sovereign of our public trust waters to protect the right to water and assure adequate, clean, affordable water and public health.

## **THE MICHIGAN CONTROVERSIES**

### **Nestlé Waters High-Volume Water Diversions for Sale of Bottled Water**

In 2001, the Michigan Department of Environmental Quality (“DEQ”) issued a permit to the Nestlé Corporation to withdraw and divert 400 gallons per minute (“gpm”) of groundwater that feeds Sanctuary Springs and the headwaters of a stream and two lakes. In 2003, a circuit court issued an injunction shutting down the high-volume water wells at Sanctuary Springs after finding the operation violated the common law of groundwater and the Michigan Environmental Protection Act. In 2005, the Court of Appeals affirmed the lower court’s findings, found the operation caused substantial and unreasonable harm, and ordered the lower court to assure adequate water in the stream and lakes by limiting Nestlé’s diversions for sale. Today, the Nestlé Corporation is limited during dry months at Sanctuary Springs to an average of 125 gpm to protect the water courses, adjacent wetlands and rights of riparians and the public.

On April 2, 2018, the DEQ issued a permit to the Nestlé Corporation to extract up to 400 gpm of groundwater that feeds the headwaters of two creeks in Osceola County near Evart, 30 miles north of the Sanctuary Springs wells. Nestlé bottles and sells the water across the Midwest. The DEQ’s decision came in the face of over 80,000 comments in opposition to the proposed permit, signaling the strength of public opinion. News of the permit’s issuance was met with widespread and understandable outrage. The DEQ approved the permit without having in hand sufficient existing hydrological data demonstrating the increased withdrawal would have no adverse impact on creeks, wetlands and sensitive resources associated with the headwaters of Twin and Chippewa Creeks. Michigan Citizens for Water Conservation (“MCWC”) and the Grand Traverse Band of Ottawa and Chippewa Indians have filed petitions contesting the validity of the DEQ permit decision.

In sum, current state law, policy and DEQ decision-making allows a bottled water company like Nestlé to:

- Obtain a permit authorizing a 60% increase in its water withdrawal without demonstrating it can be done in an environmentally sound manner;
- Take waters of the state, divert them from watersheds and convert them to a commodity for sale that reaps considerable private profit;
- Pay almost nothing to compensate the public for the use of sovereign public water.

This makes no sense as a matter of law and policy. It overlooks fundamental constitutional and legal principles inherent in the public trust doctrine and the public nature of water and health and shortchanges the public. It is an abdication of responsibility by the State of Michigan. Change is necessary to bring the State back in line with its constitutional, statutory and moral obligations.

### **Detroit Water Shut-Offs and Flint Water Infrastructure and Health Crisis**

Especially galling to many citizens is the fact that Nestlé pays nothing for the water it removes and sells (an annual \$200 application fee). At the same time, residents in Flint and Detroit and elsewhere pay unconscionably high rates for water bills – as high as \$150 to \$200 a month for a few thousand gallons for essential needs. As a result, thousands of residents who are not able to afford these rates are cut off from water service, or cannot use the water because of health risks, such as lead infrastructure and lead-in pipe to their homes. Adding insult to lifelong injury, many residents are now forced to buy bottled water.

Nestlé pays only a one-time \$5,000 administrative fee for the processing of its permit and a \$200 per year application fee. Although Nestlé does not disclose volume sales from its individual bottled water wells and facilities, it is estimated that Nestlé receives over one-half billion dollars in revenues a year off its Michigan wells and bottling operations. The other [49 water bottling operations](#) in Michigan also pay to the state at most only permit fees. Nestlé, Aquafina and Dasani make up a large percentage of bottled water sales. Aquafina and Dasani acquire water as users served by the Detroit public water system based on extremely low rates determined by a legally mandated cost-based system where prices or rates are determined by dividing the costs by the number of users. Bottled water companies who receive water from public water and infrastructure systems turn around and sell the water at high profits, similar to Nestlé.

While the federal government and state have offered some help to Flint during the crisis, the amount is relatively small compared to the responsibility the federal and state governments bear for the existing and future costs and obligations the city owes and will owe to maintain, improve, and operate its system. The same is true of Detroit, but like Flint with decreasing population, the cost per resident and user is disproportionately higher. Detroit continues to shut off water to thousands of residents, as it did beginning in 2014 as ordered by Detroit's emergency manager to improve Detroit's balance sheet and chances of exiting bankruptcy. Detroit, Flint and other residents who cannot afford high water bills lose their water service for fundamental needs or rights to hydration, cooking, bathing and health. To date, the affordability plans, water rate structures, procedures and other approaches to financing water services for those who cannot afford it have been inadequate, unjust and unfair.

In sum, current state law, policy and DEQ decision-making continue to place business, political and economic interests before the paramount public concern and right to water, health and the environment by:

- Lack of sufficient funding for the water infrastructure, health and education for the residents of Flint;

- Inadequate funding for affordability or other approaches to assure every resident and citizen adequate, clean, safe water;
- Overemphasis on private profit and efficiency;
- Continued institutional discrimination against communities and residents facing serious economic inequality and patterns of social and racial injustice; and
- Resistance to liability and accountability.

Founded to uphold the public trust doctrine as the central organizing principle for water resource protection and stewardship, FLOW is calling for historic reforms in the laws of Michigan and other Great Lakes states that put sovereign public water, public trust and the right to water and public health in their rightful and essential place in this arena of policy and law. These water crises share common threads—private profit first, people second and a continuing lack of serious government commitment. The U.S. EPA Office of Inspector General just released a [report](#) that places blame and accountability on the shoulders of the EPA and Michigan top officials. Michigan’s fixation on saving cities from bankruptcy with emergency managers eviscerated the democratic and constitutional protections that safeguard people’s right to water, health and dignity.

### **THE GREAT LAKES COMPACT**

The Great Lakes Compact arose out of concerns regarding a 1998 proposal to ship 50 tankers annually of Lake Superior water for sale to Asian markets, an idea that met a fierce regional public outcry. Ironically, while the Compact bans or severely restricts water exports in pipelines, canals, aqueducts and other infrastructure, it contains a gaping loophole that permits the export of water for sale.

The eight-state Great Lakes Compact and a side agreement among the states and the provinces of Ontario and Quebec ban water transfers out of the Great Lakes in ships, trucks, rail tankers, pipelines, canals, aqueducts and other infrastructure. Ironically, the Compact exempts from this ban the transfer out of the Great Lakes Basin of water in containers 5.7 gallons or less in volume. This inconsistency is not based on environmental impact or consideration of public trust law. It is purely an accommodation for an industry that turns a public resource into private profit. The proposed law corrects the Compact’s inconsistency by banning the out of Basin transfer of water in these smaller containers unless it does not impair public trust uses, is licensed by the state, and is subject to royalties that benefit public water.

The Compact, however, leaves open the door for states to go beyond its minimum requirements. States in their discretion may treat proposals to export water from the Basin in small containers as diversions. To date, no state has done so.

### **THE LATEST NESTLÉ PERMIT**

The original Nestlé case illuminated a gap in Michigan law – lack of statutory authority to govern water withdrawals. In 2006, the state enacted a law governing such water withdrawals. Its central feature is a screening tool that is designed to determine whether a proposed withdrawal will adversely affect a stream. When the tool assessed Nestlé’s proposed increase to 400 gpm in 2016, it didn’t pass muster. The company then appealed to the DEQ to perform a site-specific analysis. This resulted in the April 2 permit.

MCWC is now once again contesting the permit for 400 gpm, arguing the DEQ failed to follow Michigan law. Its central argument is that the DEQ never obtained the required data on presently existing environmental, hydrological and hydrogeological conditions at the site. This failure means that an evaluation of the actual effects on water flows and levels and resulting environmental impact of pumping at Nestlé’s requested rate of 400 gpm prior to issuing the permit isn’t possible, because the required data



was not provided by Nestlé. Equally disturbing, the DEQ rubber-stamped an earlier approval for 250 gpm without the required permits under the Safe Drinking Water Act and water withdrawal law. In addition, although data from MCWC's own citizen scientists was submitted by MCWC as requested by DEQ public notices, as well as other data sets and analyses submitted by experts working in conjunction with FLOW, that data and those analyses were not given the legally required full consideration by the DEQ. In short, it appears that the interpretation of the law was skewed in favor of the permit.

## **WATER INJUSTICE**

At the same time that Nestlé is taking public water at virtually no cost and reaping windfall profits, thousands of Michigan citizens – both city dwellers and rural residents – do not have access to clean, safe and affordable water. Nearly 12% of U.S. households face unaffordable water bills. Thousands of residents of Detroit have suffered water shutoffs, and the citizens of Flint, in the fourth year of a water crisis, still do not have reliable access to safe drinking water. Thousands of Flint children and residents suffered lead poisoning from their tap water because a perfect storm of state, local and private political interests pushed Flint off Detroit water to temporary water from the Flint River, causing untold health, nuisance, property loss, excess water bills and, ironically, dependence on millions of bottles of water. Thousands of private drinking water well owners in rural areas have contaminated water supplies, and there is no source of public funding to assist them in obtaining clean drinking water.

Federal assistance to local water systems is currently 74% below its peak in 1977. This has contributed to the inability of public water utilities to address failing and aging infrastructure. An infrastructure panel appointed by Michigan Governor Rick Snyder estimated a gap of \$900 million annually over the next 20 years between water infrastructure needs and available funding. Both the Snyder and Trump administrations have cut public funding and loans for infrastructure, putting pressure on municipalities to privatize their water systems. The public interest demands that the state assure access to clean, safe and affordable water to all citizens of Michigan and not subsidize corporations' sale of bottled water with little return and privatization of public water systems with higher bills, mostly poorer service or endangered health.

## **THE PUBLIC TRUST DOCTRINE**

The Public Trust Doctrine holds that public water and certain common public property and natural resources like navigable waters are preserved in perpetuity for public use and enjoyment. Citizens are legal beneficiaries of this trust to protect their uses of water for fishing, sustenance, boating and navigation, drinking water, bathing and health. Applying a banking analogy, the state serves as a trustee to maintain the trust or common resources for the benefit of current and future generations who are the beneficiaries. Just as private trustees are legally and judicially accountable to their beneficiaries, so too are state trustees in managing public trust waters and uses.

In addition, any private, public or commercial existing or proposed use, diversion or discharge cannot harm the waters of the Great Lakes by measurably diminishing or reducing the flow, changing the levels, polluting quality or impairing the trust uses of the waters of the Great Lakes Basin. Furthermore, those who seek to use, continue to divert or alter the waters of the Great Lakes Basin have the burden of proof to show they will not impair, pollute or harm the water. If they do not satisfy this burden of proof, through public notice, participation and government accountability, the proposed action is not authorized and cannot be permitted under the public trust and other water laws of Michigan.

Lastly, under the public trust doctrine, the waters of the Great Lakes Basin can never be controlled by, transferred, sold as a commodity or subordinated by private interests for primarily private purposes or gain. Our rights to use the waters of the Great Lakes Basin cannot be alienated or subordinated by our

governments to special private interests. This means that all reasonable private use and public uses must be protected against loss and harm to water and that these protected uses must be accommodated so long as the public trust waters and ecosystem are not harmed and the paramount public right to public uses is not subordinated or impaired. *FLOW believes the public trust doctrine is a time-tested, flexible and indispensable framework for the management and regulation of water resources and the uses of those waters, including removal of water for sale.*

## **State Constitutions—e.g., Michigan Constitution’s Declared Paramount Concern to Protect Water and Public Health**

### **Article 4, Section 51:**

Sec. 51. The public health and general welfare of the people of the state are hereby declared to be matters of *primary public concern*. The legislature *shall pass suitable laws for the protection and promotion of the public health*.

### **Article 4, Section 52:**

Sec. 52. 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*.

## **PRINCIPLES GUIDING A NEW POLICY**

FLOW’s proposal for reform is based on the tenets of the public trust doctrine. The following principles should guide state policy.

1. Water is public, held by each state as sovereign in public trust for the benefit of the people.
2. Because water is public or held by the sovereign, it may be used within limits of reasonable use in connection with property, municipal public water works, developer, industry, farming, utilities. Such uses are considered proper if not unreasonable in extent and do not cause harm.
3. The reasonable or reasonably beneficial use does *not* mean a landowner, city or corporation has the right to *sell* the sovereign water. That right can only be granted by the state as sovereign; if a law has not granted the right of sale, including the wholesale of water intended for sale in a container to an intermediate consumer, it should be considered unlawful or unauthorized.<sup>2</sup>
4. While there is no “right to sell water” within the traditional notions of reasonable use, a court or state legislature can (as did Michigan and states who signed the Great Lakes Compact) redefine and set terms as it sees fit, so long as it benefits the public and does not subordinate the state’s interest; this means the state or province (as Canada does) can license water to private concerns for sale as bottled water, but it is subject to the sovereign interests of people and overarching public trust principles.

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<sup>2</sup> The prohibition on sale of water would not prohibit the wholesale of water from a public or quasi-public water works system, where another governmental water system would distribute the water as a service for use by its residents and customers. It would prevent, however, the wholesale waterworks system acquiring the water from selling the water, as distinct from delivering the water as a service.

5. If a state chooses to license the sale of water within a narrow range of circumstances, such as existing bottled water operations from public waterworks systems or grandfathering bottled water sale operations,<sup>3</sup> it must do so with care consistent with the limitation on the state as sovereign to divest its control of water for the benefit of citizens or as a public trust; the state should expressly declare that the waters of the State are not a commodity, that the license does not commodify water but grants a privilege to sell within a narrow range of circumstances and conditions; water remains subject to the sovereign and people's interest (or Crown's if in Canada). It is a privilege, not a right. If the license is based on a withdrawal and transfer that impairs materially or measurably the flow, level or quantity characteristics of streams, lakes, wetlands, creeks or it interferes with others' use of groundwater, it cannot be authorized or licensed; further, it must be determined by the state that it is primarily in the public interest, and it must be based on fair and adequate compensation to avoid any subsidy through an appropriation or transfer of water by the sovereign state, province or Crown.
6. A license is for a term, and subject to revocation or modification as a result of unforeseen events, such as those attributed to climate change or breach of covenants or conditions.
7. In addition, where water is withdrawn from groundwater that is connected to creeks, streams and lakes that are subject to the public trust doctrine, then it is considered part of one hydrologic system, and the removal of water may not impair public trust uses or the ecosystem.
8. Public trust uses protected from interference or impairment include navigation, fishing, swimming, boating and sustenance (e.g, drinking water). This means the water removal cannot impair these uses. If it does, the removal is not authorized. The public trust rights and uses are paramount, as well as the government's duty to protect these uses. These obligations and standards are continuing, perpetual, and, if violated, the license or removal of water can be revoked.
9. Once bottled water is authorized, all who want to bottle and sell inside and outside state must be treated equally in accordance with international trade law and the commerce clause of the U.S. Constitution.
10. The state as sovereign cannot subsidize the removal of water for sale; unlike the use of water in connection with land, the sale of water means severance and conversion of a right to use water to water itself (as opposed to incorporated in a product) as a commodity; water can be incorporated into a product, but it cannot be incorporated into itself. The severance of water and conversion into a private sale breaches the fundamental limit and duty imposed by the state's sovereignty and overall public trust in public water. This should not be done without fair compensation and protections from harm or risks, which would help avoid subsidy of, or subordination of, others' use of water by private persons for a private purpose; this could include a provision calling for fair and just compensation for granting the conditional privilege of selling water, in this instance bottled water.

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<sup>3</sup> The requirement of a license, royalty and compliance with all other laws and regulations can implement immediately or within a reasonably short period of time. However, if a state or province decides to prohibit or grandfather existing bottled water sale operations, it should be done in a fair, non-discriminatory manner that allows for the existing operation and withdrawal of water to be amortized or gradually phased out in a reasonable manner over a reasonable period of time consistent with the exigencies and circumstances of each situation.

## PROPOSED LEGISLATION

FLOW's model legislation contains the following key provisions:

- A declaration that water in its natural state and withdrawn and delivered through a public water works system is held by the sovereign and subject to the duty to benefit and protect for all citizens, and it is held in public trust where groundwater, springs, creeks, streams and lakes form a hydrologically connected whole.
- A declaration that persons have a human and/or constitutional right to access safe, clean, affordable, healthy water.
- A prohibition on the transfer or diversion for purpose of sale of water apart from its origination watershed or source-tract, except as narrowly allowed through stringent application of water, health, environmental standards, licensing and emergency water crises and needs as provided under the Act.<sup>4</sup>
- Authorization of the sale of bottled water<sup>5</sup> only if: (a) it is licensed under the Act; (b) it is not “spring water” (or not prohibited based on the common law non-diminishment of streams, lakes, groundwater and wetlands standard); (c) it will not interfere or impair other uses or the environment; and (d) private wells or municipal or public waterworks systems, unfair subsidies below fair public rates or fees for the sale of water are prohibited.
- Establishment of a royalty (e.g., 25 cents per gallon, about a 5-cent increase in a 16-ounce bottle whether the source of water is public waterworks, municipal system or a private water source.
- Creation of a Public Water, Health and Justice Fund, managed by a fairly constituted trust fund board, into which royalties are deposited.
  - Dedication of trust fund revenues to promote: (a) access to clean, affordable water, or to municipalities who provide tiered or reverse-tiered pricing; (b) public notice, participation in local and state decision-making regarding access and affordability, health and other needs of residents, and funding of public infrastructure, assuring systems are in place for equitable, affordable access; (c) implementation of conservation technology and research; (d) special health needs; (e) assurance of public water source protection; and (f) a reserve fund that guards against depleting the fund and provides a source of funds for unanticipated needs or circumstances.
  - Establishment of a trust fund board that is fairly constituted and representative of the public and local governments, water and public health experts, and citizens, subject to public trust obligations in water, with rights of government and citizens to notice and hearing, public participation, and enforcement, including public water protection and justice citizens' suits to enforce the rights, duties and procedures, including costs and fees.

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<sup>4</sup> It is important to emphasize that water itself is not a commodity, and that if the state as sovereign allows exceptions for sale of water by license, it is a privilege and remains subject to the sovereign interests of a state or Crown interest of a province; in this way, the sovereign interest and public trust are not and can never be deemed a commodity; under trade laws or constitution, a person or firm holding a license would recognize it is a privilege to sell and does not create a right to the water itself or a permanent right to consider or sell water as a commodity.

<sup>5</sup> It is recognized that there is a range of options to address the sale of water, including (a) outright prohibition, (b) prohibition of sale of water except presently permitted bottled water facilities and operations; (c) prohibition of spring water sources, but allowing bottled water from municipal public water systems or emergencies, subject to licensing and royalties, and compliance with other measures as proposed in this model law; as noted in the accompanying text, the royalties would be held in a trust fund and the funds themselves impressed with a public trust duty to fulfill the dedicated purposes or preferred uses designated in the act and that are considered a recognized public trust use, like sustenance and drinking water.

## **IMPLICATIONS FOR OTHER STATES AND THE PROVINCES**

The same public trust principles and public interest considerations apply equally in all Great Lakes states as well as the provinces in Canada. Whether water is public and considered held in trust in the states or Crown property in Canada, there is no reason why provisions tailored or taken from this model law cannot be imposed. Protecting water as a public resource, and preventing its alienation for private benefit is not only prudent policy, it satisfies the obligation of state and provincial governments acting as trustee of public trust water resources, especially to protect water as a public, human or constitutional right, for the public health and needs of citizens, free of discrimination and unfair restrictions and treatment.

Moreover, it behooves the region to adopt a consistent public trust framework, licensing process and royalty structure for proposals to extract public water for sale. Doing so will prevent the commercial bottled water industry from exploiting a weak point in the region's current water stewardship regime. It will also establish a priority for protecting public water, health and communities first and foremost, safeguarding against private takeover or control of public water infrastructure and systems and assuring funding for participation and processes for fulfilling this public trust and constitutional accountability.