

# **The Public Trust Doctrine and Offshore Wind in the Great Lakes**

Prepared by the

**Environment and Development Clinic**

**University at Buffalo Law School**

**Robert S. Berger, Director**

**Lou Elliott**

For the

**Great Lakes Wind Collaborative**

May 2010

**THE MATERIAL IN THIS PAPER IS PRESENTED FOR INFORMATION PURPOSES ONLY AND IT DOES NOT CONSTITUTE LEGAL ADVICE. READERS SHOULD NOT RELY UPON OR ACT UPON ANY OF THE INFORMATION PRESENTED HERE WITHOUT SEEKING SPECIFIC PROFESSIONAL ADVICE AS APPROPRIATE.**

## Introduction

In recent years there has been an increasing interest in developing offshore wind facilities in the Great Lakes where wind speeds tend to be stronger and steadier than onshore. Because of its potential to control lakebed alterations, the public trust doctrine is something that a state interested in developing a plan for offshore wind in the Great Lakes must take into consideration in its offshore wind planning process.

The public trust doctrine is a common law doctrine associated with common property rights among citizens. It encompasses the idea that certain resources, particularly navigable waterways, are forever held in trust by the state for the use and benefit of the public. This doctrine encompasses the waters of the Great Lakes and the submerged lands beneath them.<sup>1</sup> Because this is historically a common law doctrine, that is one passed down through judicial decisions as opposed to through legislative or executive actions, it can act as something of a judicial check on the other branches of government.

The public trust doctrine is an evolving doctrine that has been interpreted in a variety of ways. It may be important for the Great Lakes Wind Collaborative to assist states in ensuring they develop the best policies for offshore wind to comply with public trust requirements in the Great Lakes.

## Brief History

---

<sup>1</sup> For a more in depth history of the public trust doctrine in the Great Lakes, *see* Great Lakes Fishery Commission, *Conserving Great Lakes Aquatic Habitat from Lakebed Alteration Proposals*, Appendix F, Chris A. Shafer, *Legal Framework Pertaining to Lakebed Alterations* (2006), available at <http://www.glfrc.org/research/reports/Dempsey.pdf> (last accessed May 16, 2010).

As many courts and commentators have noted, the concept of the public trust doctrine, which protected certain common resources, can be traced back to ancient Rome and was passed down to American law from English common law.<sup>2</sup> The doctrine adopted from English law protected access, navigation, fishing, and commerce rights, particularly in tidal waters.

The English common law, from which American courts adopted the doctrine, distinguished two categories of property owned by the crown: *jus privatum* and *jus publicum*. The *jus privatum* was land, held by the sovereign, which title to could be transferred to private parties outright. The *jus publicum* was land, principally that beneath waterways subject to the ebb and flow of tides (i.e., tidal waters), which the crown held in trust for the public.<sup>3</sup>

The public trust concept was introduced in American courts in the case of *Arnold v. Mundy*, where the court held invalid the transfer of an oyster bed in state waters subject to the ebb and flow of the tide invalid as it was held in trust for the public.<sup>4</sup> The doctrine was expanded beyond tidal waters to the Great Lakes in the landmark case of *Illinois Central Railroad v. Illinois* (hereinafter “*Illinois Central*”).<sup>5</sup> Influential public trust scholar Joseph Sax called the *Illinois Central* decision the “lodestar” case in American public trust law.<sup>6</sup> *Illinois Central* has been also been described by the Supreme Court of Idaho as “the seminal case on the scope of the public trust doctrine and [still] the primary authority today.”<sup>7</sup>

---

<sup>2</sup> See e.g., Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 *Duke Envtl. L. & Pol’y F.* 57 (2005).

<sup>3</sup> See *Illinois Cent. R. Co.*, 146 U.S. 387 at 457-59 (1892).

<sup>4</sup> 6 N.J.L. 1 (N.J. 1821)

<sup>5</sup> 146 U.S. 387, note 3, *Supra*.

<sup>6</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Mich. L. Rev.* 471 (1970).

<sup>7</sup> *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625(1983).

In this decision, the United States Supreme Court found a grant of land of nearly the entire Chicago lakefront to be invalid because the state legislature could not abrogate the land it held in trust for the common use and enjoyment of the people. The Court held that “[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties... than it can abdicate its police powers in the administration of government and the preservation of the peace.”

### Public Trust Principles Codified

Many states have sought to incorporate the public trust doctrine into their state statutes or constitutions.<sup>8</sup> These statutory and constitutional provisions were often enacted during the environmental movement in the 1970’s and sought to use the doctrine as a way of protecting natural resources rather than merely a tool to protect public access.<sup>9</sup> When making public trust determinations, courts often look to these provisions as well as to judicial precedent in forming their decisions.

Most Great Lakes States have coastal management programs in place under the Federal Coastal Zone Management Act which often codify public trust principles. Ohio’s Coastal Management Program, as noted by *Beach Cliff Board of Trustees v. Ferchill*, codifies the state’s public trust doctrine for Lake Erie.<sup>10</sup> The Ohio Code governing its Coastal Management Program in part states: “It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state . . . together with the soil beneath their contents, do

---

<sup>8</sup> Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 *Notre Dame L. Rev.* 699 (2006).

<sup>9</sup> *Id.*

<sup>10</sup> WL 21027604, at 2 (Ohio App. 2003)

now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adopted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands.”<sup>11</sup>

Often these statutory or constitutional provisions seek to protect the resource for future generations. New York, for example, has a statute that states: “All the waters of the state are valuable public natural resources held in trust by this state, and this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment...”<sup>12</sup> Pennsylvania has a constitutional provision that states “The people have a right to clean air, pure water, and to the preservation of natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.”<sup>13</sup> When contemplating offshore wind a state may wish to consider the benefits renewable energy generation may have on future generations.

Professor Alexandra B. Klass of the University of Minnesota Law School, points out that in recent years courts have used a combination of state constitutions, statutes and common law public trust decisions in making public trust determinations.<sup>14</sup> It is likely that courts in Great Lakes States would also consider a combination of these provisions when making public trust determinations. Therefore, it may be important to note that the common law judicial decisions

---

<sup>11</sup> Ohio Rev. Code Ann. § 1506.10

<sup>12</sup> N.Y. Env'tl. Conservation Law § 15-1601

<sup>13</sup> Pa. Const. art. 1, § 27

<sup>14</sup> See 82 Notre Dame L. Rev. 699, note 7, *Supra*.

may not stand alone in a court's decision as these courts could look to the statutory and constitutional directions their state has chosen to codify.

### Alienability of Public Trust Resources

As illustrated by the Illinois Central decision, a basic tenet of the public trust doctrine is that land held in trust by the state cannot be alienated for private uses. Attempts by the legislature to alienate the public trust land may be found by the courts to be void and subject to revocation. This control by the courts may be exercised to prevent self serving or shortsighted legislative abuses of trust lands.

This does not, however, mean all development whatsoever must be precluded from public trust waters. Professor Joseph D. Kearney of Marquette University Law School and Professor Thomas W. Merrill of Columbia Law School have pointed out that the public trust doctrine (at least as recognized by Illinois courts) “from its inception in Illinois Central down to today, has been a rule prohibiting alienation of trust lands, not a rule prohibiting development of those lands.”<sup>15</sup> Kearney and Merrill point out that the Illinois courts applying the public trust doctrine have placed great weight on whether a public entity retains legal title to the property. They also noted that, as long as title remains in public hands, rather extensive development of trust resources has been permitted.

Two Illinois cases illustrate this point. In the first, *Friends of the Parks v. Chicago Park District*, the court upheld the rebuilding of the Chicago Bears football stadium on public trust

---

<sup>15</sup> THE ORIGINS OF THE AMERICAN PUBLIC TRUST DOCTRINE: WHAT REALLY HAPPENED IN ILLINOIS CENTRAL, 71 U. Chi. L. Rev. 799 (2004).

land primarily because the Chicago Park District was able to retain legal title to the land.<sup>16</sup> The court distinguished the case from Illinois Central by noting Illinois Central involved the complete transfer of title of public trust land to a private entity, whereas in this case title was remaining with the Park District. In the second, earlier decision, *Lake Michigan Federation v. United States Army Corps of Engineers*, a transfer of land in fee to a nonprofit university was held in violation of the public trust doctrine despite the fact that certain restrictions were placed on the transfer designed to enhance public access to the lake.<sup>17</sup> The major distinction between the outcomes of these two cases is noticeably based on the type of title being transferred for the use of trust lands.

#### Uses Protected by the Public Trust Doctrine

Another major tenet of the public trust doctrine is that certain public uses cannot be impaired. Early American law sought to protect basic public uses such as navigation, commerce and fishing in public trust waters.<sup>18</sup> Some states, such as Alabama, have not advanced the public trust doctrine past the most basic protections,<sup>19</sup> whereas other states have expanded on their public trust doctrine over the years. In *Phillips Petroleum Co. v. Mississippi*, the United States Supreme Court held that each state could decide how broadly it wished to define its trust lands.<sup>20</sup>

Much of the expansion of the doctrine began after 1970 when Professor Joseph Sax published a landmark article on the public trust doctrine which revived and reinvented the way

---

<sup>16</sup> 786 N.E.2d 161 (2003)

<sup>17</sup> 742 F. Supp. 441 (N.D. ILL. 1990)

<sup>18</sup> See, *Shively v. Bowlby*, 152 U.S. 1 (1894)

<sup>19</sup> See, e.g., *State v. Harrub*, 10 So. 752 (Ala. 1892)

<sup>20</sup> 484 U.S. 469 (1988)

the public trust doctrine was thought of in American jurisprudence.<sup>21</sup> Sax argued that public trust principles should extend beyond the traditional realms. Sax's article was published at a time when political and social views were shifting and society was becoming more concerned with protection of the environment, as well as a time when modern natural resource law was beginning to develop.<sup>22</sup> The public trust doctrine began to evolve into a tool not only to protect public access rights, but a common law method of protecting natural resources. After the publication of this article, many judges began to broaden the protections offered by the public trust doctrine.<sup>23</sup>

An example of this expansion can be seen in a landmark 1983 California case, *National Audubon Society v. Superior Court*. In this decision the court required state regulators to limit private water rights to protect the ecological value of a California lake.<sup>24</sup> In applying the public trust doctrine, the court required regulators to look at ecological and aesthetic considerations when allocating water resources.<sup>25</sup>

As noted above, recognition of certain public trust rights are often codified as well as found in case law. This applies to ecological rights as well as traditional public trust uses. The Indiana Code has provided for public ecological rights in lakes, explicitly stating that the "natural resources and natural scenic beauty of Indiana are a public right."<sup>26</sup> A Wisconsin statute regulating dams in navigable waterways also declares certain environmental uses to be public rights: "[t]he enjoyment of natural scenic beauty and environmental quality are declared to be public rights to be considered along with other public rights and the economic need of electric

---

<sup>21</sup> See generally, Carol M. Rose, Joseph Sax and the Idea of the Public Trust, 25 *Ecology L.Q.* 351 (1998).

<sup>22</sup> 82 *Notre Dame L. Rev.* 699, note 7 *Supra*, at 708.

<sup>23</sup> 16 *Duke Envtl. L. & Pol'y F.* 57, note 1 *Supra*, at 72

<sup>24</sup> 658 P.2d 709, 728-31 (Cal. 1983)

<sup>25</sup> *Id.*

<sup>26</sup> Ind. Code § 14-26-2-5(c)(1)



power for the full development of agricultural and industrial activity and other useful purposes in the area to be served.”<sup>27</sup>

Some courts have placed ecological concerns ahead of the traditional public access protections. An example of this can be seen in a 1998 Washington case, *Weden v. San Juan County*. In this decision, the court upheld a county ordinance that banned the use of personal watercraft on all marine waters on a lake based on the public trust doctrine and other environmental protection statutes.<sup>28</sup> This case illustrates a more modern approach where protection of the resource can trump the traditional public access rights associated with the doctrine. However, the traditional access rights are generally still taken into consideration by courts along with ecological and other concerns where a state has advanced its public trust protections.

### Public Purpose

Another general requirement of the public trust doctrine is that that a grant of rights in public trust lands must serve a public purpose. As the Illinois Central Court noted:

The control of the State for the purposes of the trust can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.<sup>29</sup>

There are several examples of courts finding a public purpose in a grant of rights in trust lands in Great Lakes States. A Minnesota court upheld a state lease agreement with a mining company for a grant of partial rights in trust lands because there was a public purpose of putting

---

<sup>27</sup> Wis. Stat. Ann. § 31.06 (3)(c).

<sup>28</sup> 135 Wash.2d 678, 958 P.2d 273(Wash. 1998)

<sup>29</sup> 146 U.S. at 453.

the lands to productive, beneficial mining uses and by not interfering with navigation.<sup>30</sup> The Illinois Supreme Court has found a public purpose and upheld grants in trust lands where the lands were to be used for a water filtration plant<sup>31</sup> and for also for an exposition hall.<sup>32</sup>

Contrastingly, where public purpose is not shown, courts generally will not allow a grant of rights in trust lands. For example, in *People ex rel. Scott v. Chicago Park District*, the Illinois Supreme Court invalidated a legislative conveyance of submerged land to steel company because there was no public purpose to be served by the grant of land to the private entity.<sup>33</sup> The court found that an economic benefit to the state was not enough by itself to satisfy the public purpose requirement.

It is arguable that offshore wind would serve a public purpose. Great Lakes states have often sought to establish sources of renewable energy such as offshore wind to minimize environmental health problems and climate change. For example many states including New York<sup>34</sup> and Michigan<sup>35</sup> have developed renewable energy portfolio standards. Offshore wind turbines could help to meet these standards.

While this paper will not address any of these issues in detail, studies have shown potential detrimental impacts of climate change on the Great Lakes<sup>36</sup> and have also recognized benefits of renewable energy. Offshore wind, for example, has the potential to offset emissions from coal and greenhouse gases. These offsets may have a beneficial impact on Great Lakes and

---

<sup>30</sup> *State v. Longyear Holding Co.*, 29 N.W.2d 657 (Minn. 1947)

<sup>31</sup> *Bowes v. City of Chicago*, 3 Ill.2d 175 (Ill. 1954)

<sup>32</sup> *Fairbank v. Stratton*, 14 Ill.2d 307 (Ill. 1958)

<sup>33</sup> 66 Ill.2d. 65; 360 N.E.2d 773 (1976)

<sup>34</sup> NYSERDA, *The New York Renewable Energy Portfolio*, available at <http://www.nysesda.org/rps/index.asp> (last accessed May 8, 2010.)

<sup>35</sup> DELEG, *Understanding Michigan's New Renewable Portfolio Standard*, available at [http://www.michigan.gov/dleg/0,1607,7-154-25676\\_25678-201618--,00.html](http://www.michigan.gov/dleg/0,1607,7-154-25676_25678-201618--,00.html), (last accessed May 8, 2010.)

<sup>36</sup> See e.g., *The Union of Concerned Scientists and The Ecological Society of America, Confronting Climate Change in the Great Lakes Region*, available at [http://ucsusa.org/assets/documents/global\\_warming/greatlakes\\_final.pdf](http://ucsusa.org/assets/documents/global_warming/greatlakes_final.pdf) (last accessed May 6, 2010).

therefore serve a public purpose by seeking to help mitigate certain detrimental impacts on the resource. The purpose of placing turbines offshore as opposed to onshore is arguably to capture a greater amount of the wind resource and therefore maximize the amount of dangerous emissions offset.

In *Massachusetts v. E.P.A.*, the United States Supreme Court noted the harms associated with climate change are serious and well recognized and that the risk of catastrophic harm, though remote, is nevertheless real.<sup>37</sup> Modern interpretations of the public trust doctrine take ecological considerations into account, though the question of climate change is a much broader issue than generally considered. A court may also have to contemplate a tradeoff of ecological benefits as there will likely be a certain amount of disruption of bottomlands, while also a reduction of greenhouse gases. It is not entirely clear how a court would interpret this issue. However, it is arguable that any of these reasons would be enough for a court to find a public purpose for trust lands to be used for offshore wind development beyond a mere economic benefit to the state.

### The Role of the Judiciary and Legislative Deference

Another basic tenet of the *Illinois Central* decision was that a state legislature cannot abdicate its trust responsibilities, and if a state has attempted to do so the transfer of land will be held invalid or revoked by the courts. Illustrative of this is a 1991 Arizona Court of Appeals case

---

<sup>37</sup> 549 U.S. 497 (2007)

where the court determined that legislation that substantially relinquished the state's interest in riverbed lands violated the public trust doctrine.<sup>38</sup>

The Arizona court cited to a decision of the Supreme Court of Idaho which described the interplay of the separate branches involving the public trust which stated:

Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will [substitute] its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.<sup>39</sup>

The Arizona court also cited a Maine Supreme Court decision which held that the court will subject legislative dispensations of state natural resource holdings to a "high and demanding" standard of review.<sup>40</sup> Though the judiciary plays an important role and may have a final say in public trust matters, these decisions demonstrates that some deference will be given to legislative or executive determinations on that matter.

In Great Lakes States there is some evidence to suggest that the courts will give a certain amount of deference to state legislatures as well. A 1926 United States Supreme Court case, *Appleby v. City of New York*, in applying New York public trust law, stated that the legislature may alienate public trust lands as long as it is in the public interest and the state gives clear intention of doing so.<sup>41</sup> The Court held that the sale of lots of submerged tidal lands was permissible within the public trust but stated "[t]he contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public."

---

<sup>38</sup> *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991)

<sup>39</sup> *Id.*, citing *Kootenai*, 105 Idaho at 629, 671 P.2d at 1092

<sup>40</sup> *Opinion of the Justices*, 437 A. 2d 597 (Me. 1981).

<sup>41</sup> 271 U.S. 364 (1926)

The Appleby court found there was a public benefit where New York City, with the approval of the state legislature, deeded submerged lands under the Hudson River to private persons for water-related development. This case was decided long before Sax's influential article and modern public trust principles were developed, however it does give some weight to the notion that where the legislature makes a declaration and there is an open process ("clear intention"), courts will uphold a grant of public trust lands as long as there is an appropriate public purpose to the grant.

In *Obrecht v. Nat'l Gypsum Co.*, the Michigan Supreme Court stated that no part of Michigan's Great Lakes beds could be alienated or devoted to private, non-public uses but for an exceptional circumstance.<sup>42</sup> Where such circumstances exist, the court required that the state make the determination in "due recorded form." This was meant to prevent the derogation of trust lands, improve the transparency of the decision making processes, and hold elected officials accountable for their decisions. This again implies that where there is an open, thought out process, the courts will give some deference to legislative decisions when granting rights in submerged lands.

In a Wisconsin case, *Hixon v. Public Service Commission*, the court stated:

In all of these legislative authorizations of fill or structures on the beds of navigable waters, it was the function of the legislature to weigh all the relevant policy factors including the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners. Attaching whatever significance it chose to each of these factors it was up to the legislature to decide to what extent the natural shore lines and the beds of navigable water should be altered in a manner that would be consistent with the trust under which the state holds title to the beds.<sup>43</sup>

---

<sup>42</sup> 105 N.W.2d 143(Mich. 1960)

<sup>43</sup> 146 N.W.2d 577, 583 (Wis. 1966)

This again shows that courts may give a certain amount of deference to legislative decisions where a reasonable grant of land is given for a public purpose. Therefore, it appears that having an open, comprehensive legislative process may be the best way for a state to grant rights in submerged lands for offshore wind without crossing the courts for public trust purposes.

### Conclusion

What the public trust doctrine essentially seeks to do is to protect all public interests in a resource against limited, self serving private interests. Generally speaking, the modern interpretation of the doctrine seeks to protect a wide variety of public uses that occur in trust lands, including recreational, aesthetic and ecological uses. Courts often have the final say in public trust matters. The judiciary may essentially place a check on legislative actions to prevent shortsightedness or abuse to safeguard valuable common resources. However, a state legislature speaking on behalf of its citizens has a voice that likely will not be ignored.

The Great Lakes Wind Collaborative (GLWC) may wish to lay out a set of recommendations regarding a comprehensive legislative scheme to ensure states try to best comply with the common law public trust doctrine regarding offshore wind facilities. These legislative recommendations may help states best comply with their public trust obligations, as it appears courts give a certain amount of deference to legislatures on public trust matters so long as there is an open, comprehensive process.

The Michigan Great Lakes Wind Council (GLOW Council) has recently set the bar for the rest of the Great Lakes States by issuing legislative recommendations to the Michigan

legislature.<sup>44</sup> The GLOW Council's recommendations seek consistency with public trust principles. Recommended standards for permit approval and leasing note that adverse impacts to natural and historic resources should be minimized, that there must be benefits to public health, safety and welfare and also seek to avoid conflicts with other public uses. The recommendations suggest a requirement of liability insurance and well as a decommissioning process. The recommendations also suggest provisions for public engagement and a public auction and bidding process as well as suggesting rental payments to compensate the state for use of trust lands and using that income to create a fund to benefit certain Great Lakes ecological functions and to foster further renewable energy development.

The GLOW Council has done a detailed job of examining potential public trust issues in its legislative recommendations. A comprehensive legislation scheme is strongly recommended for all Great Lakes States planning to develop offshore wind in Great Lakes waters, as courts appear more likely to cede deference to the legislature where there is a thorough process. The GLOW Council's recommendations may be a good starting point of discussion for other Great Lakes States seeking to enact their own legislative procedure, while each state may wish to take into account the particularities of its own interpretation of the doctrine, including statutory and constitutional provisions.

Legislative recommendations for offshore wind in the Great Lakes should take into account the ecological effects of offshore wind turbines, both locally and cumulatively. Recommendations should also take into account all the public uses including navigational, commercial, recreational and fishing interests as well as aesthetic concerns concerning offshore

---

<sup>44</sup> Michigan Great Lakes Wind Council, Input on Offshore Wind Energy Legislation (March, 3 2010), available at [http://www.michiganglowcouncil.org/Offshore%20Wind%20Legislative%20Recommendations\\_03032010.pdf](http://www.michiganglowcouncil.org/Offshore%20Wind%20Legislative%20Recommendations_03032010.pdf), (last accessed May 8, 2010.)

wind turbines. Recommendations should also note that no trust lands should be sold outright, but rather leased for a given time period with title remaining in state control. A competitive bidding process as the GLOW Council has recommended would also be in the best interest of the public and help to show that no one particular special interest is being favored. Also as the GLOW Council's recommendations of liability insurance, thorough public engagement, a decommissioning process and portions of the trust benefiting lake ecosystems are all good standard provisions which may be recommended.

Legislative recommendations may wish to suggest explicitly stating why offshore wind is in the public interest and has a public purpose. These reasons may include the public's interest in reduction of fossil fuel emissions and potential local and global environmental benefits. These may help to protect the resource for future generations as states have often set out to do in statutory or constitutional provisions. A set of recommendations may also wish to explain that the wind resource located offshore is of a stronger and more consistent nature, and therefore the benefits produced will be greater to the public and the resource when taken in a broad view. In essence, recommendations should attempt to help a legislature show it has appropriately exercised its responsibilities and developed an appropriate scheme in its duty as steward of the public interest. Although it is not a certainty how the courts will react to a legislative enactment, it is much more likely that an open, comprehensive legislative process that takes into account all public considerations will be looked upon more favorably and a state will be on much firmer ground when trying to develop offshore wind in its Great Lakes waters.