



Everything Old is New

BY SCOTT D. HUBBARD



Water Resource Protection in the 21st Century

Pick up any Michigan newspaper and you will find yourself reading about one of the many initiatives to protect our state's water resources. As we are often reminded, Michigan has greater freshwater resources than any other state.

Water use and consumption, and in particular the thorny question of how (or whether) to regulate them, are high-profile issues. Upcoming decisions at the legislative, executive, judicial, and regulatory levels will directly and profoundly affect Michigan's economy and our recreational, industrial, agricultural, and municipal resources. Water resource protection has resumed its position as the hottest topic in environmental law.

This article will review some significant current developments. All of the issues discussed in this article are rapidly changing; remaining current requires nearly constant monitoring.

Historical Approaches

Before the 20th century, water resource protection focused on maintaining navigability, with little emphasis on pollution prevention. The result, given massive population and industrial growth, was predictable, and by the 1960s, environmental catastrophes galvanized the modern environmental movement. Since then, water resource protection measures in Michigan have centered primarily on preserving or restoring the *quality* of surface water and groundwater resources. The last 40 years witnessed a host of legislative and regulatory measures aimed at the reduction of pollutants to surface waters and groundwater.¹

Now we are seeing efforts to regulate the *use* or *consumption* of Michigan's surface waters and groundwater—in legalese, “waters of the state”—and everyone wants a piece of the action. As explained below, many issues are churning in uncharted waters (pun intended).

Water Use: Getting Comfortable with Big Numbers

Many water uses in Michigan result in large water withdrawals. For some uses (out-of-state shipments of beer, cherries, and potatoes), the water is not returned to the Great Lakes Basin. For others (power plant cooling water, agricultural irrigation), much of the water is returned to the Basin.

Four sectors of Michigan's economy alone pump 10.6 *trillion* gallons of Michigan water *every day*. In 2001, irrigation, self-supplied industrial use, and public water supplies collectively accounted for the withdrawal of some two billion gallons per day (gpd) of water, while thermoelectric power generation facilities drew more than eight trillion gpd. Golf courses commonly use 1,000 to 4,000 gpd, per acre, with courses averaging 20 to 120 acres (a midrange of about 400,000 gpd). In 2001, 622 courses irrigated more than 40,000 acres with 36 million gpd. Ice Mountain's Mecosta water-bottling plant, a subject of much-publicized litigation, was permitted to withdraw up to 400 gallons per minute, but the plant's average pumping rate was actually 200 to 250 gallons per minute, or around 300,000 gpd.

Most of these uses have been occurring for decades without wreaking environmental havoc. Some of these withdrawals are not returned to the Basin, often because the water is incorporated into crops and sold outside the Basin. Other water evaporates. And water that is returned to the environment often ends up in a different watershed, which may be within or outside the Basin. At the same time, many goods imported into Michigan contain water brought from outside that nevertheless ends up in the Basin. The net effect is difficult to quantify, but concerns about the impact on quality of life, economic health, and other considerations are prompting activity at the legislative, regulatory, and international levels.

Again

The following sections explore several current issues bearing on the use or withdrawal of water from Michigan's water resources.

Regulating Water Use: Background

Michigan is a common law riparian state with a "reasonable use" standard.² In 1892, the U.S. Supreme Court extended the public trust standard to the Great Lakes and tributary waters, giving states a fiduciary responsibility to protect the Great Lakes.³ The public trust doctrine was originally employed to protect navigation and fishing, but states are now using it to protect recreational uses, wetland habitat, and to regulate water diver-

latory program including registration requirements for water withdrawals of more than 100,000 gpd and permitting requirements for withdrawals greater than 2,000,000 gpd. The Charter is not itself enforceable, but requires implementing enactments by the participating states and provinces.

The federal Water Resources Development Act (WRDA) was enacted in 1986 to further the policy of the Charter. WRDA prohibits the diversion of Great Lakes water outside the Basin without the unanimous consent of the Great Lakes governors—thus giving each governor veto power over any particular diversion. In 2001, the Council of

to prohibit a pipeline to transport water from Michigan to the Great Plains. In between lies an infinite variety of formulations. As discussed in the following section, we can expect to see more specific proposals in connection with the Great Lakes Charter Annex.

Great Lakes Charter Annex 2001

The Great Lakes Charter Annex 2001 (Annex) is an amendment to the Charter.¹¹ Like the original Charter, the Annex is a non-binding agreement that requires the consent of all governors and premiers of the Basin to authorize a diversion. It also provides for the development of an implementing agreement among the signatories.

The Annex contemplates a process under which consumptive uses meeting certain criteria would require approval by a regional authority. Predictably, much of the discussion on the implementing agreements has centered on the definition of those withdrawals requiring regional authority approval, as opposed to those approvable by individual states and provinces.

The initial Draft Implementing Agreement for Annex 2001 was released in the summer of 2004. Earlier this year, after taking public comment on the initial draft, the Council of Great Lakes Governors and Premiers Water Management Working Group released Revised Draft Implementing Agreements.¹² The new proposal consists of the Great Lakes Basin Sustainable Water Resources Agreement and the Great Lakes Basin Water Resources Compact. Key issues of the revision include a ban on diversions of water out of the Basin with limited exceptions, implementation of common decision-making standards governing new or increased water use proposals, and greater state and provincial decision-making authority (rather than at the regional level) for in-basin water uses.

As with the original Charter, the Annex requires implementing legislation. Given the economic stakes, the Charter's vision for uniform water use regulation throughout the Great Lakes region represents a significant political challenge.

Other Water Use Proposals

Recent water use legislation includes Public Act 177 of 2003, and Public Act 148

Fast Facts

Water regulation has resumed its place as the hottest topic in environmental law.

As the only state located almost entirely within the Great Lakes Basin, Michigan has more at stake.

The Great Lakes contain six quadrillion gallons of water—one-fifth of the fresh surface water in the world.



sions.⁴ Michigan's principal water quality protection statute, Part 31 of the Natural Resources and Environmental Protection Act (NREPA),⁵ authorizes the Department of Environmental Quality (DEQ) to investigate water use, but does not provide for regulation of water use.⁶

Water is an article subject to the commerce clause of the U.S. Constitution, preventing states from unreasonably restricting interstate or international trade.⁷ Before 2003, Michigan had no administrative process to resolve water use disputes. The judiciary, employing the reasonable use standard, offered the sole legal forum for resolution of disputes among competing users.⁸

Great Lakes Charter

In 1985, Michigan entered into the Great Lakes Charter (Charter)⁹ along with seven other states and two Canadian provinces. The Charter establishes a general policy against diversions and consumptive uses of Great Lakes waters that cause "significant adverse impact." The Charter prescribes a regu-

latory program including registration requirements for water withdrawals of more than 100,000 gpd and permitting requirements for withdrawals greater than 2,000,000 gpd. The Charter is not itself enforceable, but requires implementing enactments by the participating states and provinces.

Part 327 of NREPA¹⁰ was enacted in 1990. It prohibits diversion of waters of the Great Lakes within Michigan to areas outside the Basin; however, it does not presently define the "diversion" that is prohibited. Like WRDA, the constitutionality of this provision of Part 327 may be questionable. On a practical level, Part 327 requires registration and reporting by specified facilities that have the capacity to withdraw over 100,000 gpd. The registration and reporting requirements were intended to meet corresponding requirements of the Charter.

Without a definition of "diversion," Part 327 presently has little substantive impact. Proposals to define "diversion" are being advanced by various interests. Presumably no one wants to ban the shipment of Michigan potatoes out of the Basin, but many do want

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of 2003. Act 177, now codified as Part 317 of NREPA,¹³ created a program to investigate and resolve disputes among well owners. The program opened in 2003 to receive complaints in Monroe County and certain townships in Saginaw County, and expanded statewide in 2004. Act 148 established the Water Use Protection Fund for groundwater protection and the Groundwater Conservation Advisory Council to compile water use information.¹⁴

In 2001, the Senate Great Lakes Conservation Task Force made more than 60 recommendations that went unaddressed.¹⁵ It urged lawmakers to protect Michigan aquifers from over-withdrawals. Wishing to conduct more studies, however, the Senate Natural Resources and Environmental Affairs Committee voted in 2003 to postpone any action for at least two years.¹⁶

Governor Granholm's proposed solution is the Water Legacy Act (Legacy). Legacy is a comprehensive water withdrawal statute based on the principles of the Charter. It would subject all significant water withdrawals to review by the DEQ, regardless of the watershed or intended use. Legacy addresses several concerns facing the Great Lakes, including water withdrawals, open water disposal, the NPDES permit program, wetlands protection, and federal funding for Great Lakes restoration projects. Legacy was in-

roduced on March 3, 2004, but no further formal action was taken. It was reintroduced as Senate Bill 7 on January 12, 2005, and referred to the Committee on Natural Resources and Environmental Affairs.

The Ice Mountain Case

The Ice Mountain case exemplifies the focus on water use. Michigan Citizens for Water Conservation filed suit against Nestle in 2001 over the right to pump spring water for Nestle's bottled water plant, arguing that the diversion of pure water out of its natural basin for commercial sale nationwide is unreasonable use. The trial court found in favor of the citizen group and issued an injunction against Nestle on the grounds that (1) riparian rights have precedence over the right to use groundwater when there is any measurable impact on surface water; and (2) Nestle did not have certain permits.¹⁷ The injunction was later stayed, and on June 14 the state appeals court heard arguments on the case.

The suit has been a lightning rod for debate about water use in Michigan. Gov. Granholm issued an extraordinary directive on May 27, 2005, placing a moratorium on new or expanded bottled-water operations in Michigan and calling on the legislature to enact comprehensive water withdrawal legislation as outlined in her proposed Water Legacy Act.¹⁸ At the same time, the DEQ restricted Nestle's distribution of bottled water from the City of Evart to the Great Lakes Basin.¹⁹ Nestle filed suit on June 17, 2005, seeking to strike down the restriction on water distribution as a violation of Constitutional commerce protections.

Conclusion

There is little doubt that we will soon see significant new regulatory controls on water use. The regulatory scheme(s) ultimately adopted could significantly affect Michigan's economic competitiveness. Michigan's vast and unique water resources represent one of the state's principal "calling cards" to attract new industry, particularly as chronic water shortages continue to mount in other regions of the country. Appropriate protection of those resources will facilitate development of all kinds; overdoing it will drive more industry away. ♦



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Footnotes

1. The foremost example may be the National Pollutant Discharge Elimination System (NPDES) under the federal Clean Water Act. NPDES permits are the primary regulatory vehicle for controlling discharges from municipal, industrial, and agricultural "point sources."
2. *The Need for Water Use Management Regulations in Michigan*, available at <http://www.deq.state.mi.us/documents/deq-ogl-water-withdrawal-primer.pdf>.
3. *Illinois Central RR v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892).
4. *The Need for Water Use Management Regulations in Michigan*, supra n 2.
5. MCL 324.101 et seq.
6. MCL 324.3103(1).
7. See, e.g., *Sporbse v Nebraska*, 458 US 941; 102 S Ct 3456; 73 L Ed 2d 1254 (1982).
8. See, e.g., *US v Chandler-Dunbar Water Power Co*, 229 US 53; 33 S Ct 667; 57 L Ed 1063 (1913); *Thunder Bay River Booming Co v Speechly*, 31 Mich 336 (1875).
9. Available at <http://www.cglg.org/pub/charter>.
10. MCL 324.32701 et seq. (1994).
11. Great Lakes Charter Annex 2001, available at <http://www.deq.state.mi.us/documents/deq-ogl-Annex2001.pdf>.
12. *Annex 2001 Draft Agreements Strengthened, Released for Public Comment*; June 30, 2005, available at <http://www.michigan.gov/deq/0,1607,7-135-121629-,00.html>.
13. MCL 324.31701 et seq.
14. See MCL 324.32714 and 324.32801 et seq.
15. *Environmentalists Make New Push for Water Protection*, U.S. Water News Online (May 2005), available at <http://www.uswaternews.com/archives/arcpolicy/5envmake5.html>.
16. Andy Guy, *A Tide of Influence Swamps Groundwater Protections*, Michigan Land Use Institute (May 4, 2005), available at <http://www.mlui.org/landwater/fullarticle.asp?fileid=16486>.
17. *Michigan Citizens for Water Conservation v Nestle*, p 65.
18. *Temporary Moratorium on Bottled Water Permits and Approvals* (May 26, 2005) available at <http://www.michigan.gov/gov/0,1607,7-168-36898-118987-,00.html>.
19. *Granholm Issues Executive Directive Placing Moratorium on Bottled Water Permits* (May 27, 2005), available at <http://www.michigan.gov/gov/0,1607,7-168-23442-119000-,00.html>.