

STATE OF MICHIGAN

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WATER SUPPLY: Regulation of waters of the State

POLICE POWER:

CONST 1963, ART 4, § 51:

CONST 1963, ART 4, § 52:

The Legislature has the authority under Const 1963, art 4, §§ 51 and 52, to regulate the withdrawal and uses of the waters of the State, including both surface water and groundwater, to promote the public health, safety, and welfare and to protect the natural resources of the State from pollution, impairment, and destruction, subject to constitutional protections against unreasonable or arbitrary governmental action and the taking of property without just compensation. That authority extends to all waters within the territorial boundaries of the State.

Opinion No. 7162

September 23, 2004

Honorable Patricia Birkholz  
State Senator  
The Capitol  
Lansing, MI 48909

You have asked the following question regarding regulation of State waters:

Does the Legislature have the authority to regulate the withdrawal and uses of the waters of the state, including both surface and groundwater, under the Michigan Constitution or general police powers and public trust, given any existing rights to the waters of the state? Additionally, what are the boundaries of these waters of the state for purposes of allowable regulation?

The police power is an inherent attribute of state sovereignty. *Pollard v Hagan*, 44 US 212; 11 L Ed 565 (1845); *Clements v McCabe*, 210 Mich 207; 177 NW 722 (1920). As explained by the Michigan Supreme Court in *People v Brazee*, 183 Mich 259, 262; 149 NW 1053 (1914):

The "police power" is said to be a power or organization of a system of regulations tending to the health, order, convenience, and comfort of the people and to the prevention and punishment of injuries and offenses to the public. It is the expression of an instinct of self-preservation and characteristic of every living creature, an inherent faculty and function of life, attributed to all self-governing bodies as indispensable to their healthy existence and to the public welfare. It embraces all rules and regulations for the protection of life and the security of property. It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about "the greatest good of the greatest number." Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction. [Citation omitted.]

Const 1963, art 4, § 51, imposes on the Legislature a broad directive to enact laws to protect the public health, safety, and welfare:

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.

Numerous judicial decisions and opinions of the Attorney General have recognized the importance of a clean and ample supply of water to the preservation of the public health and welfare. *City of Columbus v Mercantile Trust & Deposit Co*, 218 US 645; 31 S Ct 105; 54 L Ed 1193 (1910); *Hudson County Water Co v McCarter*, 209 US 349; 28 S Ct 529; 52 L Ed 828 (1908), quoted in *Obrecht v Nat'l Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *Palmer Park Theater Co v Highland Park*, 362 Mich 326; 106 NW2d 845 (1961); *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913); 1 OAG, 1959-1960, No 3327, p 154 (August 5, 1959); OAG, 2001-2002, No 7117, p 115 (September 11, 2002).

Moreover, Const 1963, art 4, § 52, recognizes the State's paramount interest in the protection of water and other natural resources from pollution, impairment, and destruction:

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.

This constitutional provision imposes a duty on the Legislature to protect the water and other natural resources from pollution, impairment, and destruction. See OAG, 1969-1970, No 4590, p 17, 19-27 (January 27, 1969), for a discussion of the debates of the Constitutional Convention of 1961 relative to the mandatory character of art 4, § 52.

Your letter also refers to the common law public trust doctrine as a source of legislative authority to protect and conserve the waters of the State. The common law public trust doctrine emanates from the ancient mandate that navigable waterways are public highways forever held in trust for the people, and that the sovereign has a duty to preserve these waterways for the benefit of the people. Under this doctrine, the State and its Legislature have not only the authority, but an affirmative obligation to protect the public interest in navigable waters. *Illinois Central Ry Co v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892); *Obrecht v Nat'l Gypsum Co*, *supra*; *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926); OAG, 1961-1962, No 4040, p 381 (May 7, 1962). In *Nedtweg v Wallace*, 237 Mich 14, 17-20; 208 NW 51 (1927), the Michigan Supreme Court explained the history and scope of the common law public trust doctrine in upholding a statute that permitted leasing of certain Great Lakes bottomlands:

The trust is a common-law one; it prevailed in England long before the American Revolution; it was in the Virginia cession of the territory northwest of the River Ohio; it continued during the period the United States held the Northwest Territory and passed as the same trust to the State of Michigan at her admission to the Union; it has not changed in character or purpose and is an inalienable obligation of sovereignty. But at common law the crown and parliament recognized the distinction between the governmental power essential

to be retained to carry out the trust and the mere proprietary interest possible of being parted with, without at all preventing governmental control. The State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. But this does not mean that the State must, at all times, remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters. . . .

\* \* \*

The State is sovereign of the navigable waters within its boundaries, bound, however, in trust, to do nothing in hindrance of the public right of navigation, hunting and fishing. The State may separate the *jus privatum* [the State's proprietary title] from the *jus publicum* [the State's title held on behalf of all the people] by sale of the former, but can never, by sale or otherwise, grant away the *jus publicum*.

Pursuant to Const 1963, art 4, §§ 51 and 52, and in fulfillment of its common law sovereign responsibility to protect the public rights in navigable waterways, the Legislature has enacted laws that regulate the waters of our State for the benefit of the public, including the preservation and protection of water for domestic use, navigation, recreation, aesthetics, fishing, agriculture, commerce, and industry. See, e.g., Part 31 (Water Resources Protection) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*; Part 127 of the Public Health Code (Water Supply and Sewer Systems), MCL 333.12701 *et seq*; and Part 301 (Inland Lakes and Streams), MCL 324.30101 *et seq*. See also, NREPA: Part 17 (Michigan Environmental Protection Act), MCL 324.1701 *et seq*; Part 303 (Wetland Protection), MCL 324.30301 *et seq*; Part 305 (Natural Rivers), MCL 324.30501 *et seq*; Part 313 (Surplus Waters), MCL 324.31301 *et seq*; Part 325 (Great Lakes Submerged Lands), MCL 324.32501 *et seq*; Part 327 (Great Lakes Preservation), MCL 324.32701 *et seq*; Part 341 (Irrigation Districts), MCL 324.34101 *et seq*; Part 451 (Fishing from Inland Waters), MCL 324.45101 *et seq*; and Part 781 (Michigan State Waterways Commission), MCL 324.78101 *et seq*.

Consideration of your question is not complete, however, without reference to the international and interstate aspects concerning Great Lakes water use. Perhaps the most important international agreement in this area is the Boundary Waters Treaty of 1909, 12 Bevans 319, the first of many modern treaties with Canada (originally the United Kingdom) governing use of Great Lakes waters. Among other things, this treaty governs "uses or obstructions or diversions" of all boundary waters between Canada and the United States, including the Great Lakes. The Treaty also resulted in the establishment of the International Joint Commission, a bilateral agency charged with reviewing diversions, resolving disputes, and studying issues affecting the Great Lakes.

Also significant is the interstate relationship between the Great Lakes States. Several consent decrees that were entered in the original action filed in the United States Supreme Court by Michigan and other Great Lakes States against Illinois, *Wisconsin v Illinois*, 281 US 179; 50 S Ct 266; 74 L Ed 799 (1930), have successfully limited Chicago's diversion of Lake Michigan water by reversing the flow of the Chicago River. In this case, in which the Court exercises ongoing jurisdiction, the most recent consent decree was entered in 1980. The consent decrees specify a limit on the amount of water that can be diverted by Chicago and generally provide how that diversion is to be measured. See also, amendments to the Water Resources Development Act of 1986, 42 USC §1962d-20 (prohibiting diversion or exportation of water from the Great Lakes basin without the approval of the governors of all the Great Lakes states).

Under state law, surface water and groundwater are both expressly subject to regulation. For example, the Water Resources Act, 1929 PA 245, now Part 31 of NREPA, originally

covered only surface water. When the scope of the Water Resources Commission's authority was expanded to include groundwater by 1949 PA 117, its validity was readily recognized. See *L.A. Darling Co v Water Resources Comm*, 341 Mich 654, 662; 67 NW2d 890 (1955); OAG, 1949-1950, No 1040, p 322 (August 23, 1949). Part 31 now contains this broad definition:

"Waters of the state" means groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state. [MCL 324.3101(y).]

Your question also asks about the regulation of water withdrawals "given any existing rights to the waters of the state." Michigan law does recognize certain rights to use of surface and groundwater by owners of property adjoining or overlying such water sources. In *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930), a case involving the Great Lakes, the Court identified the following four riparian rights: (1) the right to use water for "general purposes, as bathing, domestic use, etc."; (2) the right to "wharf out"; (3) the right to access navigable waters; and (4) the right to accretions. In *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967), the Court further divided these rights into two categories of uses: (1) for "natural purposes," which are only those uses "absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes"; and (2) for "artificial purposes," which "merely increase one's comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation." The former uses were described as "preferred" as against other users, and the latter were described as "correlative" and subject to the test of reasonableness. *Id.*, at 686-687. See also, *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917) (describing the right to use percolating waters as a "qualified right," subject to the "rule of reasonable user").

Michigan law does not recognize absolute rights in or "ownership" of water in its natural state. In *People v Hulbert*, 131 Mich 156, 160-173; 91 NW 211 (1902), the Court surveyed cases explaining this "usufructuary" interest in water:

Flowing water, as well as light and air, are in one sense 'publici juris' [owned by the public]. They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of the soil belonging to him. The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property and as incidental to it. The law is laid down by Chancellor Kent, in 3 Comm. 439, thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. \* \* \* He has no property in the water itself, but a simple usufruct as it passes along.' [Quoting *Wood v Waud*, 3 Exch. 748.]

\* \* \*

While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. [Quoting *Strobel v Kerr Salt Co*, 164 NY 303; 58 NE 142 (1900).]<sup>1</sup>

Thus, it is difficult to precisely define the nature and extent of any private rights in water, which the courts have described as matters of fact and degree. See, e.g, *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich at 542. However, it is well established that the use or exercise of property, or any other rights, may be limited through the reasonable exercise of the

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<sup>1</sup> See also, *Preston v Clark*, 238 Mich 632, 639; 214 NW 226 (1927), quoting *Hoy v Sterrett*, 2 Watts (Pa.) 327 (1834) ("But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by law"); *Hart v D'agostini*, 7 Mich App 319, 321; 151 NW2d 826 (1967) ("The right to enjoyment of the subterranean water beneath a person's land cannot be stated in the terms of an absolute right."); *Thompson v Enz*, *supra*; *Schenk v Ann Arbor*, *supra*. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471, 485 (1970).

police power. For example, in *People v Litvin*, 312 Mich 57, 64; 19 NW2d 485 (1945), the Michigan Supreme Court outlined the breadth of the police power, relying on cases dating back to the 1920s:

In *Parkes v. Judge of Recorder's Court*, 236 Mich. 460 (47 A.L.R. 1128), we said:

"The constitutional guaranty of life, liberty and of property is subject to such restraints as are reasonably necessary for the public good. As a member of organized society the individual citizen has no right to do those things which are injurious to the common welfare."

In *Kelley v. Judge of Recorder's Court of Detroit*, 239 Mich. 204, 214 (53 A.L.R. 273), we quoted with approval from *Crowley v. Christensen*, 137 U.S. 86 (11 Sup. Ct. 13, 34 L. Ed. 620):

"The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."

Similarly, the United States Supreme Court described the police power as "one of the most essential powers of government, one that is the least limitable." *Hadacheck v Sebastian*, 239 US 394, 410; 36 S Ct 143; 60 L Ed 348 (1915).

Therefore, the existence of potential property rights that may be impacted by the exercise of the police power does not, in itself, limit the State's authority to act in the public interest. For example, limiting riparian use of water for purposes of sewage or manufacturing discharge has been upheld as a legitimate exercise of the police power due to their impacts on public health and other riparian rights. See *Attorney General ex rel Wyoming Twp, supra* (determining that sewage discharges by the City of Grand Rapids constituted a public nuisance); OAG, 1952-1954, No 1872, p 457 (December 13, 1954) (concluding that the Water Resources Commission could order

limits on further discharges by paper mills on the Kalamazoo River: "Riparian rights are property rights. All property is held subject to the superior power of the state to regulate the use under the police power").

Of course, the exercise of any governmental authority will be subject to constitutional protections provided by the United States and Michigan Constitutions against arbitrary or unreasonable government action and the taking of property without just compensation. See, e.g., *L.A. Darling Co*, 341 Mich at 664-665 (determining that an order of the Water Resources Commission failed to provide adequate due process under the Due Process Clauses of the United States and Michigan Constitutions, US Const, Am 14 and Mich Const 1908, art 2, § 16). The reasonableness of any regulation will be evaluated against the recognized, albeit qualified, rights to use of water for certain purposes.

You also ask about the boundaries of the waters of the State for purposes of regulation. The territorial boundaries of the State define the limits of the State's jurisdiction. The Enabling Act of June 15, 1836, c. 99, 5 Stat 49, one of the statutes providing for admission of the State of Michigan to the Union, expressly provided:

*Provided always*, and this admission is upon the express condition, that the said State shall consist of and have jurisdiction over all the territory included within the following boundaries, and over none other, to wit: Beginning at the point where the above described northern boundary of the State of Ohio intersects the eastern boundary of the State of Indiana, and running thence with the said boundary line of Ohio, as described in the first section of this act, until it intersects the boundary line between the United States and Canada, in Lake Erie; thence, with the said boundary line between the United States and Canada through the Detroit river, Lake Huron, and Lake Superior, to a point where the said line last touches Lake Superior; thence, in a direct line through Lake Superior, to the mouth of the Montreal river; thence through the middle of the main channel of the said river Montreal, to the middle of the Lake of the Desert; thence, in a direct

line to the nearest head water of the Menomonie river; thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menomonie river; thence, down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green bay of Lake Michigan; thence, through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan; thence, through the middle of Lake Michigan, to the northern boundary of the State of Indiana, as that line was established by the act of Congress of the nineteenth of April, eighteen hundred and sixteen; thence, due east, with the north boundary line of the said State of Indiana, to the northeast corner thereof; and thence, south, with the east boundary line of Indiana, to the place of beginning.

These territorial and jurisdictional boundaries extend into and encompass over 38,000 square miles of the Great Lakes. 1945 PA 78, sections 1 and 2, MCL 2.1 and 2.2; Michigan Manual 2003-2004, MICHIGAN'S KEY FACTS page. The State's boundaries within the Great Lakes have been confirmed and further delineated through compacts, treaties, and court orders. See, e.g., MCL 2.201 (codifying a 1947 compact between Michigan, Wisconsin, and Minnesota); *Michigan v Wisconsin*, 272 US 398; 47 S Ct 114; 71 L Ed 315 (1926) (resolving a boundary dispute between Michigan and Wisconsin). As sovereign, the State may regulate activities within those boundaries, including the Great Lakes. *Lake Carriers Ass'n v Kelley*, 527 F Supp 1114 (ED Mich, 1981). As noted above, Part 31 of NREPA already broadly defines the extent of the waters of the State to include "groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state." MCL 324.3101(y).

It is my opinion, therefore, that the Legislature has the authority under Const 1963, art 4, §§ 51 and 52, to regulate the withdrawal and uses of the waters of the State, including both surface water and groundwater, to promote the public health, safety, and welfare and to protect the natural resources of the State from pollution, impairment, and destruction, subject to

constitutional protections against unreasonable or arbitrary governmental action and the taking of property without just compensation. That authority extends to all waters within the territorial boundaries of the State.

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