

# **The Need for Water Use Management Regulations in Michigan**

## **BACKGROUND**

On April 12, 2002, a special forum was held in Novi, Michigan to share information and discuss issues related to water use management and protection of the Great Lakes. The following spoke at the workshop:

Chris A Shafer, Professor of Law, Thomas M. Cooley Law School, addressed the current legal framework;

Bill Rustem, Vice President, Public Sector Consultants, provided water use management case studies from around the state;

David Ladd, Director, Office of Great Lakes – addressed the Great Lakes Charter: Annex 2001;

Mike Donahue, President/CEO Great Lakes Commission – addressed the Annex 2002 Decision Support System;

Jon W. Allen, Environmental Supervisor, Consumers Energy, provided the business perspective;

Royce Maniko, Director Monroe County Planning Commission, provided the community perspective; and

James Clift, Policy Director, Michigan Environmental Council, provided the environmental perspective.

Many attendees felt the information provided was very helpful and needed to be shared. They requested a water use management primer based on the proceedings of the forum be prepared for further educational outreach on these issues.

## **INTRODUCTION**

The Great Lakes contain 20 percent of the world's freshwater supply and 95 percent of North American supply of surface water. Less well known is the fact that only one percent of the Great Lakes water is renewed annually by precipitation, surface runoff, and ground water in-flow. In addition, the Great Lakes contain unique fresh water aquatic and coastal environments that are found nowhere else in the world.

The Great Lakes' large fresh water supply has long been sought after by other regions in the United States such as the arid Southwest, as well as international areas such as the Middle East and Asia.

There currently are four major diversions into and out of the Great Lakes:

- Long Lac and Ogoki in the Province of Quebec,
- Chicago River,
- Welland Canal, and
- New York State Barge Canal.

The table below provides information concerning the diversions, including the impacted lakes and volume.

<b>Great Lakes Diversions</b>			
<b>Diversion</b>	<b>Impacted Lake</b>	<b>Diversion Type (Removal/Addition)</b>	<b>Volume</b>
Long Lake & Ogoki	Lake Superior	Addition	2,500 –8,000 c.f.s.
Chicago River	Lake Michigan	Removal	3,200 c.f.s.
Welland Canal	Lake Erie Lake Ontario	Removal Addition	~ 8,500 c.f.s

Most new large diversions and bulk water exports of Great Lakes water have successfully been denied. It is more likely that a series of small municipal diversions could occur. For example, Pleasant Prairie, Wisconsin; Akron, Ohio; and Lowell, Indiana have all applied for permits for the withdrawal of Great Lakes water. Cumulatively, these withdrawals could adversely impact the Great Lakes. It is unclear what the environmental impacts would be on the lakes if large diversions or withdrawals were permitted.

What can be done to prevent diversions or bulk water removals (either surface or ground water) from the Great Lakes basin? To address this question fully one must first examine the legal framework for water use, and then examine the current efforts under way, which are driving forces for change.

## **CURRENT LEGAL FRAMEWORK**

This section examines the current laws and agreements at the federal, regional, and state levels that regulate water withdrawals in the Great Lakes basin.

### **Federal Jurisdiction**

Because the Great Lakes are important channels of interstate and international commerce, they are unquestionably subject to federal commerce power.

### Commerce Clause

The Commerce Clause of the U.S. Constitution is the foundation for federal commerce power. The power to regulate commerce between states, Indian tribes, and foreign nations lies with the federal government, not with the states. Water as a raw natural resource is viewed as an article of commerce and, therefore, is subject to the provisions of the Commerce Clause of the U.S. Constitution.

The Commerce Clause has broad applications. While it maintains the flow of commerce across state lines and with foreign nations, it carries legal restrictions with which states must contend.

### Dormant Commerce Clause

Federal commerce power prevents states from unreasonably restricting interstate or international commerce. The Dormant Commerce Clause prevents states from enacting out right bans or moratoriums on the importation or exportation of commodities such as bait fish, solid waste, and water.

### International Trade Agreements

The Dormant Commerce Clause is used with the General Agreement on Tariffs and Trade (GATT) as supplemented by the World Trade Organization (WTO) agreements in preventing out-right moratoriums on articles of commerce.

The provisions of GATT do, however, permit the adoption or enforcement of measures regulating the conservation of exhaustable natural resources, provided such measures are imposed on domestic production and consumption and not imposed as a means of arbitrary or unjustifiable discrimination between countries, essentially a disguised restriction on international trade.

### Water Resource Development Act of 1986

The Water Resources Development Act (WRDA) is a congressionally authorized tool that permits the Great Lakes states to act in a manner that would otherwise be prohibited under the Dormant Commerce Clause. Under WRDA, new diversions of Great Lakes water outside of the basin, are regulated by the eight Great Lakes states – requiring approval of all eight governors and the premiers of the provinces of Ontario and Quebec. On June 18, 2001, the Council of Great Lakes Governors and Premiers adopted a resolution including the premiers in the governors' review under WRDA.

### Public Trust Doctrine

The Public Trust Doctrine states that certain natural resources such as navigable waters are incapable of private ownership. The Public Trust Doctrine was

originally used to protect uses such as commerce, navigability and fishing. States are now using the doctrine to protect recreational uses, wetland habitat, and water diversions. States have a fiduciary responsibility to protect the Great Lakes for their current and future citizens.

## **Regional Agreements**

There are a number of regional agreements in place within the Great Lakes Basin for managing surface and ground waters.

### Great Lakes Charter

Established by the Council of Great Lakes Governors in 1985, the Great Lakes Charter is a voluntary agreement between the eight Great Lakes states and the provinces of Ontario and Quebec that established a process for regulating water withdrawals or transfers among basins. The charter contains registration requirements for use of more than 100,000 gallons per day and permitting requirements for withdrawals greater than 2 million gallons per day. To date, Michigan has not adopted these registration or permitting requirements. Furthermore, the Great Lakes Charter establishes the Prior Notice and Consultation Process (PNC). The PNC requires the notification of and comment on any proposed consumptive use over five million gallons per day within a state or province.

### Charter Annex 2001

Annex 2001 was adopted by the Council of Great Lakes Governors and Premiers on June 18, 2001. It is an amendment to the Great Lakes Charter. The purpose of the Annex is to create a process for protecting the Great Lakes Basin from water withdrawals and diversions which is consistent with the provisions of the U.S. Constitution and international trade agreements such as NAFTA and GATT.

The governors and premiers have three years from the point of adoption to establish the Annex 2001, including binding agreements (among states and provinces) and implementing legislation.

## **Michigan Laws**

Michigan is a traditional common law riparian state that uses “reasonable use” as the legal concept for regulating water use. Michigan has no water withdrawal permitting program, no administrative process to settle grievances, and is out of compliance with its responsibilities under the Great Lakes Charter Agreement. The only remedy for an aggrieved party is through the courts. Eighteen other

states east of the Mississippi River have adopted “regulated riparianism” by implementing permitting programs for water withdrawal.

Michigan has enacted a law (MCL 324.32703) banning out-of-state transfer of Great Lakes Basin water. The law is almost certainly unconstitutional, violating the Dormant Commerce Clause. It is not even-handed and, discriminates against out-of-state users.

The recent report of the Great Lakes Conservation Task Force – a bipartisan Senate Committee – recommends the following:

- 1) The Michigan legislature should enact comprehensive water withdrawal laws. This process may require a step-by-step approach, beginning with the enactment of an aquifer protection statute.
- 2) The Michigan legislature should also promptly enact any implementation laws arising from the Annex 2001 process.

## **DRIVING FORCES FOR CHANGE**

This section examines Annex 2001, why it is needed and the efforts required for successful development.

### **Annex 2001**

Annex 2001 is an amendment to the Great Lakes Charter, adopted by the Council of Great Lakes Governors and Premiers on June 18, 2002. The Annex is needed because:

- Water is an article of commerce under the Commerce Clause of the U.S. Constitution;
- Michigan’s current law banning out-of-state transfers is likely unconstitutional, and in noncompliance with GATT, NAFTA and WTO;
- The Great Lakes Charter is a voluntary, non-binding agreement, and
- There is currently no legal recourse or dispute resolution for out of basin users.

These issues and concerns, if not rectified, may create conducive conditions within Congress to pass legislation transferring Great Lakes water use decision-making to the federal government.

Annex 2001 would establish a common conservation-based decision-making standard which would apply equally to all users. In addition, the Annex would include an inter-state, inter-provincial, and international dispute resolution process.

The guiding principles for developing Annex 2001 includes:

- Resource protection, conservation, and restoration are the basis for decision-making.
- Legal durability under national and international trade law.
- Simplicity, transparency, and common sense.
- Efficient, flexible, and responsive administration, engage existing institutions.
- Keep water use decision-making within the Great Lakes Basin.

Annex 2001 is an agreement of the Great Lakes governors and premiers to accomplish six specific directives within a three-year implementation period.

#### Directive I: Develop New Basin-wide Agreements

The governors and premiers have agreed to prepare basin-wide agreements such as:

- Multi-state compact between all eight Great Lakes States,
- Provincial agreement between Ontario and Quebec, and
- Cross-border accord.

The purpose of these agreements is to further the stated objective to protect, conserve, restore, improve, and manage use of the waters and water dependent natural resources of the Great Lakes Basin.

#### Directive II: Broad-Based Public Participation

The governors and premiers commit to a continuing public participation process with respect to implementation of Annex 2001 and the binding agreements. Period progress reports will be given as part of the process.

#### Directive III: A New Decision-Making Standard

The binding agreements will establish a new decision-making standard that will be used by the states and provinces to review new proposals for water withdrawal from the Great Lakes basin as well as modification of existing withdrawals.

The new decision-making process will be based on a number of criteria:

- Preventing or minimizing water loss through return flow and implementation of environmentally sound and economically feasible conservation measures.
- No significant adverse individual or cumulative impact on quantity or quality.

- A Resource Improvement Standard will be instituted resulting in an improvement to the resource.
- The proposal complies with all other applicable laws.

#### Directive IV: Interim Decision under WRDA

Canadian premiers participate in the WRDA decision-making process through notice and consent. In doing so, the governors and premiers recognize that the Canadian Provinces are not subject to, or bound by, the WRDA, nor are the governors statutorily bound by comments from the premiers on projects subject to WRDA.

#### Directive V: Development of Decision Support System

The decision support system will be an information system designed by the state and provinces with support from appropriate federal government agencies to provide technical information to the Great Lakes Governors and Premiers to aid in the reviewing of applications for water withdrawal/or diversions.

The objectives of developing the Decision Support System are:

- Perform a status assessment of Great Lakes water resources, their impacts, and relationship to ecosystem health,
- Develop an inventory of the sources and uses of the Great Lakes,
- Achieve an enhanced understanding of ecological consequences of such uses,
- Place emphasis on improving scientific understanding of groundwater, and
- Development of a plan to implement the system.

With a grant from the Great Lakes Protection Fund, the Great Lakes Commission is in the process of establishing a Decision Support System. Work on the Decision Support System should be completed in early 2003.

#### Directive VI: Further Commitments

The governors and premiers further commit to coordinate the implementation and monitoring of the Charter and Annex 2001 as well as:

- Develop implementing legislation or programs to manage and regulate new or increased withdrawals,
- Conduct a planning process for protecting, conserving, restoring, and improving Great Lakes waters and water dependent resources,
- Identify effective mechanisms for decisions and the resolution of disputes,
- Develop guidelines to promote efficient water use and conservation, and
- Develop a mechanism(s) to assess individual and cumulative impacts from water withdrawals.

## Next Steps

Develop jurisdictional agreements:

- Develop multi-state compact legislation.
- Congressional approval of compact.
- State ratification of compact.
- Provincial agreement.
- Cross-border accord.
- State/provincial implementing legislation.

## Process for Developing Annex 2001

- Council of Great Lakes Governors and Premiers: Michigan, Minnesota, Wisconsin, Illinois, Indiana, Ohio, Pennsylvania, New York, Ontario, and Quebec.
- Three subcommittees;  
*Standard*: What is a resource improvement? When is it triggered?  
*Compact*: What is the legal mechanism for implementation? What is the process?  
*International/Provincial*: International dispute resolution? International accords and agreements?
- Advisory committee of basin-wide interest groups: Council of Great Lakes Industries, Great Lakes United, National Wildlife Federation, Agriculture, Power Generation interests, Agricultural interests, Fishing interest, Tribal.
- Resource group: U.S. Geological Survey, U.S. Fish and Wildlife Service, Army Corps of Engineers, and National Oceanic Atmospheric Administration.
- Great Lakes Protection Fund.

## Timeline

- January – December 2002 – Develop draft binding agreements.
- January 2003 – Release draft binding agreements for 90-day (minimum) public comment period.
- Fall 2003 – Revise agreements based on public input.
- Late Fall 2003 – Final recommendations to governors and premiers.

## **CURRENT LEGISLATIVE OPPORTUNITIES**

The Michigan Legislature has followed the recommendation of the Great Lakes Conservation Task Force of “starting the process of enacting comprehensive water withdrawal laws . . . beginning with the enactment of an aquifer protection statute.” In March 2002, legislation was introduced in the Michigan Senate that would regulate withdrawals of ground water.

The draft legislation would amend P.A. 451 of 1994, the Natural Resources and Environmental Protection Act, by establishing Part 328 (Water Withdrawals). Part 328 would establish a permitting process (for new/existing users), a process for administering permits, including an annual permit fee, inspection process, penalties for permit violations, a permit revocation/modification process, and authorization for court action by adversely affected parties.

Aquifer protection is only half the issue of effective water-use management. The other half is surface water withdrawals. It is important that these two aspects of the issue be linked when assessing what is needed for effective water-use management in Michigan, even if they are addressed separately in the legislative process.

As the legislative process moves forward on developing water use regulations in Michigan, it is important to remember that Michigan's regulatory programs will be part of the Annex 2001 effort and as such must be protective and yet even-handed to both in-basin users as well as those located out of basin.

## **PERSPECTIVES ON WHAT IS NEEDED**

Stakeholders in the water-use management issue agree that effective and reasonable water use management laws for regulating water withdrawal, both ground water and surface water, are needed to effectively manage the resource. Reasonable regulations will be consistent with the Annex 2001 process, and contribute to maintaining authority for water use decision making here in the Great Lakes basin. However, what the legislation will contain, and the extent of regulation is and will be a source of great debate between the Michigan legislators and stakeholders.

Municipal stakeholders are concerned with:

- Depleting ground water and surface water supplies and the increasing cost of providing good quality drinking water,
- The unregulated impacts of industry on ground water supplies,
- The impacts of sprawl on aquifer recharge, and
- The need for comprehensive state regulations to sustain the resource for future generations.

Industrial stakeholders are concerned with:

- The need for sensitivity to existing regulatory burdens and avoiding redundancy,
- Ensuring that new regulations are technology and science based,

- The need to respect existing users rights (water use as a fundamental riparian right),
- The need to respect existing levels of investment, commitments, and a reasonable return on investment, and
- The need for consistency between regulations for in-basin users and out-basin diversions.

Environmental stakeholders are concerned with:

- The need for comprehensive state water-use regulations that protect the resource and maintains the decision-making authority in the Great Lakes basin,
- The actual effectiveness of regulatory provisions for protecting the environment as well as the resource, and
- The need for public involvement in establishing new state water-use regulations.

The need for comprehensive state water-use regulations, addressing both ground water and surface water withdrawals is a recommendation of the Great Lakes Conservation Task Force. The Michigan Legislature has begun the process of developing such regulations starting with ground water withdrawals.

The issues involved are complex and the stakeholders have a myriad of perspectives that must be recognized as the legislative debate for establishing comprehensive water-use laws and regulations progress.

For more information about water-use-management issues, contact Jim Bredin, Assistant to the Director, Office of the Great Lakes, 517-333-3588.