

## **Overview of Michigan's Water Use Program and Frequently Asked Questions about Water Withdrawals and Water Users Committees**

The following information is a brief overview of Michigan's Water Use Program and answers to frequently asked questions regarding water withdrawals and Water Users Committees (WUCs) provided by the Department of Environment, Great Lakes, and Energy (EGLE).<sup>1</sup>

### **Background**

There are two important agreements that impact water use regulation in the Great Lakes region. The first is the Great Lakes St. Lawrence River Basin Water Resources Compact (Compact), which was entered into by all of the Great Lakes states (Michigan, Illinois, Indiana, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin). The second is the Great Lakes-St. Lawrence River Basin Sustainable Water Resource Agreement (Agreement), which was entered into by both the Great Lakes states and the Great Lakes Canadian provinces (Ontario and Québec). These agreements detail how the states and provinces will manage and protect the waters of the Great Lakes basin. They also provide a framework for each state and province to enact its own laws and rules designed to protect water resources for generations to come.

The Compact was enacted by each of the Great Lakes states, approved by Congress and signed by President George W. Bush in 2008 giving it the force of federal law. The Compact requires that the states regulate any large quantity withdrawal (LQW), which is defined as any water withdrawal greater than 100,000 gallons per day. In exchange for the states regulating large withdrawals, the Compact bans diversions of water outside the Great Lakes basin, with limited exceptions for straddling communities and communities within straddling counties that meet strict criteria.

Before becoming federal law, Michigan enacted the Compact into law at Michigan Compiled Laws (MCL) § 324.34201 and amended Part 327 of the Natural Resources and Environmental Protection Act, MCL 324.32701, *et seq*, to meet its obligations under the Compact. Together these state laws use a science-driven approach that enables the Water Use Program to manage and regulate large quantity water withdrawals.

In addition to the Agreement, Compact and statutory law, there are other sources of law, including the common law, that impact water use in Michigan. For example, there is a common law doctrine known as the reasonable use doctrine that applies in Michigan as well as in other states in the eastern United States. The reasonable use doctrine permits a landowner to make use of groundwater beneath their property and/or the surface water adjacent to their property so long as the use does not: 1) unreasonably

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<sup>1</sup> This document is for informational purposes only. It is not intended to provide legal advice or to address all circumstances that might arise. Individuals and entities using this document are encouraged to consult their own legal counsel.

interfere other landowners' reasonable use of groundwater beneath their property or surface water next to their property; 2) decrease the value of the neighboring land for legitimate uses; or 3) unreasonably impair the quality of the water.

The correlative rights doctrine also applies in Michigan. Generally, correlative rights holds that in addition to being reasonable, water use during times of shortage must also be prorated among all users.

The application of these common law principles is very fact-driven and the details of how these doctrines impact a water users' legal rights are beyond the scope of this overview. However, they are noted because Part 327 expressly preserves common law water rights as well as property rights and rights related to other applicable laws involving the protection of natural resources or the environment.

Water rights in Michigan, and in the eastern United States in general, are subject to the reasonable use doctrine and the correlative rights rule.

### **Purpose of Michigan's Water Use Program**

The primary purpose of the Water Use Program is to help Michigan effectively manage the waters of the state for the use and enjoyment of present and future residents and for the protection of the environment. To meet these objectives, the Water Use Program registers all LQWs, processes water withdrawal permits, and collects annual water use data. In addition, the Michigan Water Use Program uses an online assessment tool – known as the [Water Withdrawal Assessment Tool](#) (WWAT) – to assess the impact of all proposed withdrawals and screen out those withdrawals which warrant further review by EGLE staff. Based on parameters defined in Part 327, certain proposed withdrawals may be automatically approved. When automatic approval is not possible, an applicant may request a site-specific review or submit a request for an alternative analysis, which are discussed in more detail below.

Michigan's water withdrawal assessment process recognizes that protecting and maintaining healthy waterflow in Michigan's rivers and streams is critical for fisheries and other aquatic life that depend on these water resources. Studies show that some streams are more sensitive than others, and that variation is taken into consideration in program design and implementation. For example, a cold-transitional stream will support cold water species such as trout. But that same stream will lose the ability to support species like trout – which are temperature sensitive – if even a relatively small amount of waterflow (especially the groundwater baseflow) is removed causing the stream temperature to increase. Based on this knowledge, Michigan law allocates a certain amount of water to support human uses such as community water supplies and irrigation for farming, while also preserving a certain level of flow to maintain healthy aquatic systems.

### **Preventing the conditions for an adverse resource impact**

To achieve the purpose of Michigan's Water Use Program, water withdrawals are regulated and managed to prevent conditions that would lead to an "adverse resource impact" (ARI). The definition of an ARI, which can be found at MCL § 324.32701(1), reflects our scientific understanding that negative impacts to aquatic species are most likely to occur during periods of low stream flow. In Michigan, the period of low stream flow is usually late summer, but in some limited circumstances it occurs in the winter months. The withdrawal assessment process is designed to prevent the conditions for an ARI to occur and address potential ARIs when they are discovered.

To gauge the impact of proposed withdrawals, part of the water withdrawal assessment process included estimating an index flow for each river and stream. Once the index flow was estimated, a limit was set for new withdrawals based on the river or stream type. The goal of setting these limits is to prevent the river or stream from dropping to a level at which an ARI would be expected. For purposes of assessing proposed withdrawals, Michigan's rivers and streams are broken into about 5600 water management areas. A water management area is the watershed of a discrete section of a river or stream that is ecologically similar. Beginning in 2008, the predicted effects of new or increased LQWs have been tracked by water management area to ensure they do not exceed the limits established to prevent ARIs. New or increased LQWs that would exceed the established limits are prohibited.

Below are frequently asked questions that EGLE receives regarding Michigan's water withdrawal assessment program and WUCs, along with EGLE's responses.

**1. How do property owners get authorization to install and operate a new water withdrawal?**

Landowners proposing new or increased large quantity withdrawals must register with EGLE prior to beginning a withdrawal. To assess whether an ARI might result from the proposed withdrawal, the landowner's first step is typically using the online WWAT. The WWAT screens for potential ARIs by conservatively estimating a withdrawal's impact to nearby river and stream flow based on the withdrawal's quantity, distance from the stream, and local geology and hydrology. If the withdrawal passes the WWAT screening system, it can be registered immediately, and the registration receipt officially authorizes the landowner to make the withdrawal. If the proposed withdrawal does not pass the WWAT, the landowner has two options. The first option is to request that EGLE perform a site-specific review, which is a more in-depth analysis of the proposed withdrawal's impact on river and stream flows. The second option is to have a professional hydrologist or hydrogeologist (rather than EGLE) perform a similar analysis. Regardless of which option the landowner chooses, EGLE will conduct a more detailed review of the proposed withdrawal considering the best available data to estimate the impact of the proposed withdrawal and determine if it can be registered.

**2. When did water users have to report their use in Michigan?**

Water use reporting requirements for self-supplied large quantity water users began in 1995 when Part 327 of the NREPA was enacted. Initially, only industrial and non-agricultural irrigation water users were required to report their use. Subsequent amendments to Part 327 required agricultural water users to report their use in 2004, and virtually all other previously unreported water users to report their use in 2006. As explained more fully below, due to the limited volume of withdrawals allowed within a water management area, unreported water users should register their LQWs as soon as possible.

**3. What was required of existing water users who had existing LQWs when the withdrawal assessment law was passed in 2008?**

Property owners were required to report their existing LQWs by April 1, 2009. Agricultural water users were required report their LQWs to the Michigan Department of Agriculture and Rural Development and all other water users were required to report their LQWs to EGLE.

**4. What is a water user's baseline capacity?**

Baseline capacity is defined at MCL § 324.32701(d). Generally, baseline capacity is the withdrawal capacity that was reported or registered by April 1, 2009. Baseline capacity is the total water withdrawal capacity a property owner had on February 28, 2006, prior to the legislative amendment that required assessment of new or increased LQWs. LQWs installed from March 1, 2006 to September 30, 2008 are essentially regulated in the same manner as baseline capacity withdrawals. Amendments to the water withdrawal assessment law were made with the intent to limit environmental impacts from new or increased withdrawals that commenced October 1, 2008 going forward.

**5. How does EGLE track cumulative stream flow depletions and LQW registrations?**

The WWAT uses an accounting database to: 1) record LQW registrations authorized by the WWAT, site-specific reviews, and alternative analyses; and 2) to track cumulative stream flow depletions resulting from LQW registrations by water management areas. The database is updated in real time so that the WWAT indicates the current balance of remaining stream flow for each water management area that is available for use.

**6. What water withdrawals are registered versus permitted?**

Water withdrawals with the capacity to withdraw over 100,000 gallons per day and up to two million gallons per day can be registered through the WWAT, site-specific review, or the alternative analysis processes. Once registered, the withdrawal can be installed and operated. If the withdrawal is installed and/or operated differently than the conditions under which it was registered, the owner

is required to update their registration to reflect the withdrawal as installed and operated.

A proposed new or increased water withdrawal with a capacity of more than two million gallons per day must apply for and receive a permit from EGLE. Permits are also required for new or increased withdrawals greater than one million gallons per day in Zone C water management areas or intra-basin transfers greater than 100,000 gallons per day. Permits make up a small fraction (less than 1%) of the authorized water withdrawals.

**7. Are there currently unregistered water users that are not accounted for in the system? How are these users brought into the system?**

Unregistered water users continue to reach out to EGLE or are discovered by EGLE on an ongoing basis. Unregistered LQWs are generally considered new withdrawals that must pass the assessment process and will need to be either registered or permitted to be operated. Unregistered LQWs are potentially subject to fines for failing to report and register.

Due to the limited volume of withdrawals allowed within a water management area, water users should register their LQWs as soon as possible. When a previously unregistered LQW can be authorized, EGLE issues an after-the-fact registration to the property owner, sometimes referred to as an ATF registration. The property owner is reminded that they are required to report their water use annually to either the Michigan Department of Agriculture and Rural Development or EGLE. If an existing withdrawal cannot be authorized through the WWAT, site-specific review, or the alternative analysis, the owner must pursue their other options outlined in FAQ #8 below.

EGLE has ongoing education and outreach efforts to bring unregistered LQWs into compliance. Education and outreach continue to be an important aspect of Michigan's Water Use Program because new landowners may be unaware of Michigan's water use reporting, registration and permitting processes.

**8. What options are available to a person who is not allowed to make a water withdrawal because their site-specific review or alternative analysis for a withdrawal is denied?**

EGLE staff provides alternative options for technical modifications and works with property owners during the site-specific review process prior to issuing a denial of registration to try to assist the applicant in a resolution. But if EGLE cannot approve a water withdrawal after a site-specific review or alternative analysis, the landowner has several options. Though the outcome of each of these options depends on the scenario and each case is unique, the landowner may:

- a. Propose modifications to the withdrawal request, such as changing the location and/or well depth, reducing the pumping rate, and/or changing the

- pumping schedule. Such changes could potentially lessen the withdrawal's impact and avoid an ARI condition.
- b. Hire a consultant to collect field data to better characterize the local hydrogeological and hydrological conditions, and/or to utilize a custom streamflow depletion model. Additional data and/or an appropriate alternative model could potentially yield favorable results that avoid an ARI condition. These options are available to pursue by submitting a new site-specific review or alternative analysis request or by applying for a Part 327 permit.
  - c. Negotiate with other water users in a WUC (see FAQ # 9) to share their allocation of water within the watershed and to accommodate the new user's need for water. There are several ways to reduce withdrawal volume, including changing irrigation schedules or implementing higher efficiency irrigation practices.
  - d. Apply for a permit and include proposals for measures to prevent an ARI. Permit applicants whose applications are denied can appeal via a contested case hearing with an administrative law judge. Administrative appeal rights are not available for site-specific review and alternative analysis requests.
  - e. And finally, the person may assert common law riparian rights to a reasonable use of water in a civil lawsuit against other water users within the watershed. Under Michigan common law, all property owners have a right to reasonable use of water abutting or underlying their property.

#### **9. What is the impact of Part 327 on common law?**

The authorizing statute states Part 327 "shall not be construed as affecting, intending to affect, or in any way altering or interfering with common law water rights or property rights". If a withdrawal triggers the permit requirement, among other requirements, the department must make a determination that the withdrawal represent a reasonable use of water pursuant to Michigan common law.

#### **10. What is a WUC? Who participates in WUCs and why? What is in it for them?**

A WUC may be composed of all persons making large quantity water withdrawals (registrants, permitted and baseline withdrawals) and local government officials within a watershed. A local government official may also create a subcommittee of residents to solicit information and advice.

WUCs provide a framework for the water users within a watershed to reach an agreement on how water resources will be shared. By working collaboratively to reduce their impact on the watershed and accommodate new or increased use by existing users, a WUC encourages prudent management of the shared water resources by the water users. A WUC gives water users direct input into the equitable management of water resources and solutions to prevent or resolve

water use conflicts and ARIs. The goal of a WUC is a voluntary, equitable agreement between water users. These agreements have the potential to avoid the expenses and uncertainties of litigating water rights, but with the advantages of avoiding legal expenses and delays and potentially achieving a more desirable outcome for water users.

#### **11. Under what scenarios are WUC convened?**

WUCs can be convened under three scenarios:

- a. A water user may convene a WUC after EGLE denies a proposed new large withdrawal because it will likely cause an ARI. EGLE is willing to assist the water user and the WUC, if there is interest.
- b. EGLE may convene a WUC after it determines that an ARI is occurring or is likely to occur and no WUC already exists. EGLE will generally include all persons making larger quantity water withdrawals and local units of government in a WUC.
- c. Large quantity water users may convene a WUC to proactively manage local water resources and plan for future use.

#### **12. What is the primary goal of a WUC?**

The primary goal of a WUC is to work cooperatively to develop shared water-use solutions for the successful management of water resources that prevent or resolve water use conflicts and ARIs.

#### **13. What information will be provided to the WUC to assist in the performance of their work?**

EGLE will provide all available information on registered withdrawals affecting the watershed including withdrawal capacity, historical and current reported water use, hydrogeological information, modeled streamflow depletion allotment, and streamflow monitoring data as permitted under the Freedom of Information Act (1976 PA 442, MCL §§ 15.231–15.246.)

Agricultural water use data is reported in aggregate and individual data can only be released under limited circumstances. Therefore, individual agricultural water users would be encouraged to share their water use data to provide more accurate information about water use within the watershed.

#### **14. What are the potential consequences if a WUC cannot resolve a water use dispute?**

EGLE has limited statutory authority to approve new or increased water withdrawals. If EGLE cannot approve the withdrawal after a WUC has been convened to resolve a water use dispute, a property owner may have the ability to assert their common law right to reasonable use of the water abutting or underneath their property. EGLE cannot provide legal advice to water users in water disputes. Property owners should seek the advice of their own attorneys.

**15. What are the potential outcomes if EGLE determines an ARI condition exists and the WUC cannot reach a solution?**

In this situation, EGLE has statutory authority under [MCL § 324.32725(4)] to propose a plan that it believes equitably resolves the potential for an ARI. Though the plan is not binding on the members of the WUC, EGLE has other administrative and legal remedies that it may pursue if the water use issue remains unresolved. For example, EGLE may immediately order a temporary restriction of permitted withdrawals that pose a substantial and immediate threat. A process is set forth in the law for extension of the order and for area property owners to challenge the order. If there is not a substantial and immediate threat of an ARI, the Attorney General may commence a civil action under the statute and/or common law and ask the court to establish an equitable allocation of available water.

**16. What happens when new data is discovered demonstrating that an ARI may occur?**

The discovery of new data might occur as a result of a site-specific review, alternative analysis, or compliance review. If a stream index flow review comes back with a significantly lower index flow, or the stream reach is reclassified into a more restrictive stream temperature classification, previously authorized LQWs may now deplete water levels to the point where an ARI is likely.

If that happens, EGLE will meet with the watershed's WUC or convene a WUC if none exists.

As in other situations, the WUC will seek a voluntary, equitable agreement on water use that prevents an ARI. As mentioned above, if the WUC cannot reach an agreement, EGLE can propose a plan. If that does not resolve the issue, EGLE has other administrative and legal remedies available.