



**An Analysis by Michigan's Job Providers — The Water Works Coalition  
of Proposed Water Withdrawal Legislation**  
*November 2007*

**Introduction**

Water is one of Michigan's greatest assets. Nearly every industry that drives our state's economy uses water. Michigan relies on water to generate electricity, irrigate farmlands, manufacture cars, provide for recreation activities, supply homes, schools and businesses, build roads and Michigan infrastructure, and make a wide range of food and beverage products. This asset is one of the key reasons why so many industries choose to locate in Michigan, and is a critical tool to attract new job providers to our state.

Today, Michigan is engaged in an important discourse about its water resources – how to protect the Great Lakes from potential water siphoning to distant regions; how to ensure water resources and ecologies are responsibly stewarded; and how to provide for growing and sometimes competing needs for water by many.

Michigan lawmakers in the House and Senate have introduced bill packages aimed at addressing these questions. The cornerstone bills of both chambers would result in adoption the Great Lakes Compact, The Compact is a policy developed by the states of the Great Lakes region for coordinated water resource management. The common goal is to protect and enhance the Great Lakes ecosystem and prevent possible diversion of water. The Senate and House have additional legislation that would further and differently regulate water withdrawals and use by Michigan water users.

Michigan's job providers support legislature to adopt the Great Lakes Compact along with necessary state implementing conformance legislation to ensure control by the states of the Great Lakes of the region's water resources.

We also support the development of a "water withdrawal assessment tool" that incorporates sound science into the decision-making process as called for by Michigan's groundwater withdrawal laws enacted in 2006.

Job providers oppose those portions of the House package that impose new costs and impediments to the beneficial use of water through additional and unnecessary regulations would add to the already high cost of doing business in Michigan, further erode the state's weak economy, and discourage chances for future economic growth.

This paper provides policymakers and other interested parties with an analysis of the current bills and the position of the Water Works Coalition, representing Michigan's regulated water use community, including manufacturers, business, municipalities, agriculture and specific industry types.

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## Review of 2006 water legislation

In 2006, the Michigan Legislature enacted comprehensive legislation regulating water withdrawals in Michigan (Public Acts 33 – 37 of 2006). The effort to shape and support this legislation involved discussions on a broad range of issues important to water users, environmental groups, municipalities, and policymakers. The end result was consensus in support of policies that both protect the state's water resources and allow the responsible use of water to support economic activity. Consensus by stakeholders allowed lawmakers to act in bipartisan fashion to pass legislation by unanimous vote in the Senate and near-unanimous vote in the House.

The 2006 legislation established a broad, protective water withdrawal regulatory framework for Michigan. The program includes registration, reporting and permitting requirements. It covers all large quantity withdrawals — no matter the user — and prohibits any large quantity withdrawal from causing an adverse resource impact. Lawmakers took an approach to regulation that is consistent with the fundamental rationale underlying the Great Lakes – St. Lawrence River Basin Water Resources Compact (herein Great Lakes Compact); *i.e.*, regulating water withdrawals based upon the environmental effect of a withdrawal. This was done to set the stage for passage and implementation of the Compact in Michigan.

The 2006 legislation created a comprehensive vision of the statutory scheme needed for Michigan to adopt and implement the Great Lakes Compact. Now is the time for Michigan to adopt the Great Lakes Compact with conformance state implementing legislation.

The 2006 legislation also called for the creation of a water withdrawal assessment tool. The water withdrawal assessment tool has now been developed by the Groundwater Conservation Advisory Council, with assistance from leading scientists from the University of Michigan, Michigan State University and others. Now that the Council has completed its work, it is time to allow for a review of the function and accuracy of the tool. It is also critical that stakeholders have an opportunity to fully review the tool.

*With the exception of legislation proposed to adopt the Great Lakes Compact and completion of a groundwater assessment tool, matters addressed in currently proposed legislation were largely resolved during lawmaking in 2006. On the following page are highlights of the 2006 legislation.*

## PA 33 – 37, 2006 Highlights

### Registration, permitting and regulation

- § No large quantity withdrawal is permitted to cause an adverse resource impact.
- § Gives the MDEQ authority to prevent adverse resource impacts, including revocation of an existing permit.
- § With limited exceptions, requires large quantity withdrawals (above 100,000 gallons per day) to be registered and to report their water use.
- § Requires a permit for all new or increased large quantity withdrawals of 2 million gallons per day or more from an inland lake or stream, or 5 million gallons per day or more from the Great Lakes, or 250,000 gallons per day for water bottling operations.

### No “adverse resource impact” is allowed

Until February 28, 2008, adverse resource impacts to trout streams are prohibited. Beginning March 1, 2008, adverse resource impacts to any of Michigan’s lakes and streams will be prohibited.

Develops a water “withdrawal assessment tool” by the Groundwater Conservation Advisory Council (GWCAC), for use by anyone proposing a new or increased large quantity withdrawal to assist in determining whether the proposed withdrawal may cause an adverse resource impact.

- § GWCAC has completed its charge to develop the water assessment tool by no later than July 1, 2007; the proposed tool has been presented and is now being considered for enactment as part of the Senate legislation, as stipulated in the 2006 legislation.

Prohibition against new or increased diversions of Michigan waters out of the Great Lakes was expanded to include all waters of the Great Lakes basin.

- § Defined diversion consistent with the Great Lakes Compact as water transferred by pipeline, canal, tunnel, aqueduct, channel, modification of a watercourse, tanker ship, tanker truck, rail tanker or similar means from the Great Lakes basin to a watershed outside the Great Lakes basin, excluding consumptive uses, and specifically including waters removed from the basin in containers of more than 5.7 gallons.
- § Defined consumptive use consistent with the Great Lakes Compact as water lost or not returned to the Great Lakes basin due to evaporation, incorporation into products or agricultural products, use as part of packaging, or other processes, specifically including waters removed from the basin in containers of 5.7 gallons or less.

Requires water users to report the volume of withdrawals exceeding 1.5 million gallons per year; allows farmers to file a conservation plan in lieu of registering water use.

Requires water use sectors to begin designing water management and conservation practices by 2008.

Encourages formation of voluntary water users committees to assess impacts of water withdrawals and allow large quantity withdrawers to resolve potential conflicts.

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## Overriding policy objectives for sound water regulation

Water must be maintained as one of Michigan's greatest assets for the economic well being of the state and its citizenry. Michigan's regulated water use community believes laws enacted in 2006 preserved this priority while adding substance to protecting the state's water resources.

At its core, sustainable water use is premised upon avoiding unreasonable injury to other users and/or the environment. Achieving this calls for water use legislation that respects the following principles:

- § Protective of important ecosystems and habitats
- § Applied fairly and equitably across all major water users
- § Based on credible data and scientifically valid measures
- § Focused on areas where water conflicts have occurred and/or where they are most likely to occur
- § Promotes and recognizes conservation steps taken by water users
- § Preserves long-standing private property rights, such as right to reasonable use
- § Provides certainty of law and regulations
- § Recognizes interconnection of surface and groundwater resources

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## Where do Michigan's businesses, manufacturers, farmers, municipal water suppliers and other water reliant industries stand?

### ✓ Support — Senate Bills 212 and 858

Senate Bills 212 and 858 would ensure Michigan's leadership in adopting the Great Lakes Compact and implementing language. Specifically, the Senate bills would:

- § Adopt into Michigan law and implement the Great Lakes – St. Lawrence River Basin Water Resources Compact (the "Compact").
- § Revise and strengthen the current Michigan regulatory framework to achieve consistency with the Compact.
- § Reduce the permit threshold for withdrawals from the Great Lakes from the current 5 million gallons per day to 2 million gallons per day.
- § Impose new permit requirements for withdrawals resulting in intra-basin transfers of more than 100,000 gallons per day.
- § Require all water withdrawal permit applicants after January 1, 2009 to certify compliance with generally accepted water management practices or environmentally sound and economically feasible water conservation measures.

### ✓ Support Direction — Senate Bill 860

### ✓ Support Direction — House Bill 4343 and 4336, with amendments

Senate Bill 860 would adopt into law the groundwater assessment tool while preserving the benefits of the legislation enacted in 2006.

Senate bill 860 would:

- § Adopt into Michigan law the water withdrawal assessment tool that has been developed by the Groundwater Conservation Advisory Council pursuant to the 2006 water legislation.
  - Require use of the tool to screen applications to register large quantity withdrawals that are not otherwise subject to permitting requirements.
  - Provide for internet based registration of large quantity withdrawals that pass the assessment tool screen.
  - Provide for site-specific review by MDEQ of large quantity withdrawals that do not pass the assessment tool screen, and allow for registration of only those that MDEQ determines are not likely to cause an adverse resource impact.
  - Require the Groundwater Conservation Advisory Council to further develop and refine the assessment tool.

House Bill 4343 and 4336 would adopt the Great Lakes Compact. Michigan's regulated water users generally support the direction of these bills; however, several technical issues with both bills need to be addressed to assuage concerns of Michigan job providers, including:

- § Effectuation Clause (HB 4336 and HB 4343, Page 49 Lines 18-19) — need for consistency between the Compact legislation and other Michigan water withdrawal laws to ensure clarity for job providers about which rules are to be followed.
- § Grandfathering (HB 4336 and HB 4343, Page 36, Lines 7, 8) — PA 33 – 36, 2006 provided standards for grandfathering water user amounts based on several options. The Compact and these provisions need to conform.
- § Scope of Permits (HB 4336 and HB 4343, Pg 34, line 7) — Clarification is necessary to determine what standard permit applicants will be held to with respect to potential water withdrawal impacts. Job providers endorse a balanced consideration of multiple factors, including the nature and degree of impacts relative to need, efficiency and proposed use.
- § Water Conservation (HB 4336 and HB 4343, Pg 20, Line 10) — Clarification is needed to ensure that industry developed conservation standards can be used to fulfill requirements of the Compact.
- § Unchecked Ability to Change Standard (HB 4336 and HB 4343, Page 14, Line 26) — The proposed Compact may allow the newly-created Great Lakes-St. Lawrence River Basin Water Resources Council (the "Council"), composed of the Governors or their appointees, to modify the Standard without going back to the State legislatures
- § Michigan must adopt permit thresholds (HB 4336 and HB 4343, Pages 32-33) — It is very important that Michigan clarify that the permit standards required under PA 33-36 are the standards used to meet the Compact requirements.

NOTE: For more detailed examination of these concerns, please refer to Michigan Chamber of Commerce Memorandum "Great Lakes Compact," 10/26/07.

**X Oppose — House Bills 5065 - 5073**

Regulated water users oppose arbitrary, over-reaching and costly regulations that threaten the livelihoods of families, businesses, communities and the state.

Bills introduced in the House, except for HB 4343 that would enact the Great Lakes Compact, are overly burdensome, and if enacted, would choke off economic growth. Industries already here would question expansion, and those looking at Michigan for possible investment would

look elsewhere where the regulatory climate was more amenable and reasonable. As a result, and for the specific reasons below, Michigan's regulated water use community opposes the House bill package.

The proposed legislation would:

- § Completely reverse the near-unanimous consensus achieved by Michigan's one-year-old water legislation;
- § Introduce new uncertainties into the permitting process;
- § Add vague and burdensome permitting standards that go far beyond the Great Lakes Compact and that address matters unrelated to science and resource protection;
- § Cause permits needed by large water users to be highly uncertain and unreliable;
- § Unfairly and unjustly regulate some industries more excessively;
- § Create uncertainty by multiplying opportunities for litigation, even where DEQ has determined that standards have been met and; and
- § Create bias and impose unfair and punitive measures against certain industries.

While the national economy continues to experience solid and sustained growth, Michigan's economy remains in the doldrums. Michigan's unemployment rate at 7.7 percent remains the highest in the nation by more than 1.5 points. Imposing new costs through additional and unnecessary regulations would add to the already high cost of doing business in Michigan and discourage future economic growth.

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## Commonly Used Terms in Talking About Water

**Reasonable Use** "Reasonable use" describes a property owner's legal right to use water. This right allows a property owner to use water found on, under or adjacent to the property as long as that use is not wasteful and does not unreasonably interfere with the reasonable uses of others. If there is a conflict between two competing uses, a balancing test is applied to resolve it. The factors to be considered in the balancing test include the:

- § suitability of the use to the location
- § extent and amount of any harm
- § benefits of the use
- § necessity of the amount and manner of the water use
- § factors that may bear on the reasonableness of the use

**Riparian Rights** "Riparian rights" describes the rights of all landowners who possess property adjoining surface water bodies, such as lakes, rivers and streams. The owner of land with riparian rights has the right to use the adjoining water body for domestic household purposes, access to navigable waters, installing a dock and general enjoyment. Riparian rights also depend upon "reasonable use" as it relates to other riparian owners to ensure that the rights of one riparian owner are weighed fairly and equitably with the rights of adjacent riparian owners.

**Public Trust Doctrine** The "public trust doctrine" refers to the *public's rights with regard to navigable waters*. Michigan's public trust doctrine treats the Great Lakes and their bottomlands differently from navigable inland waters. The state has legal title to Great Lakes bottomlands, which it holds in trust for the public. Regarding navigable inland waters, adjoining property owners have title to bottomlands. In both cases, the public is given a right under the public trust

doctrine to use the waters themselves for commerce, fishing and navigation. The public trust doctrine assigns the State the duty to protect the public's rights to use navigable waters.

Michigan's public trust doctrine does not apply to non-navigable waters, such as groundwater and small creeks, brooks and streams. Michigan uses the "log-flotation" test to determine whether or not a water body is navigable. Under this test, only waters that are capable (in their natural state) of floating large commercial logs are deemed navigable.

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### Conclusion

In 2006 the Michigan Legislature enacted critical legislation that protects Michigan's water resources through fair, reasonable and scientifically merited regulations. The Legislature also laid the groundwork for enactment of the Great Lakes Compact and a water withdrawal assessment tool to provide initial guidance for anyone considering a large quantity withdrawal in the state. The Legislature should now move aggressively forward with enactment of the Compact and related implementation language. Michigan's regulated water users fully support the adoption of the Compact. Lawmakers should halt enactment of House bills that would unravel the important balance achieved a little more than one year ago in 2006, bring further hardship to Michigan job providers and scare off potential investors in our state. Michigan's regulated water users stand opposed to the House package.

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