

State of Michigan
The Michigan Legislature
Before the Senate Committee on Natural Resources and Environmental Affairs

Re: Senate Bill 289

A Proposal to Protect Michigan's Freshwater

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On Behalf of

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At the dawn of the 21st century, we realize that freshwater is in short supply. The causes are many and complex, some human, such as pollution, lack of conservation, population increase and demand, and global climate changes, and some natural and not under our control, such as lack of rain due to seasonal or long term weather changes. Recent United Nations and World Bank reports predict that by 2020 well over one-third of the world population will be without adequate drinking water, let alone the water needed for growing food. Other countries and regions of North America undeniably covet the waters of the Great Lakes basin, a large percentage of which is in Michigan and originates as tributary groundwater to lakes and streams. For example, according to the International Joint Commission, groundwater makes up seventy-nine percent of Lake Michigan's water.

The effort of the Michigan Legislature to address any water issues at this time in history will not go unnoticed. Everyone is watching and Michigan, like it or not, has a high and solemn responsibility to guide the decisions affecting the quantity and quality of water for all with great care and stewardship. That process started two years ago with the Great Lakes Task force captained by Senator Sikkema. The process continues with the introduction of Senate Bill 289 and assignment to this Senate Committee.

Senate Bill (ASB) 289 begins a dialogue, and none too soon, to addressing one specific water problem, the conflicts of competing water well owners and users of aquifers that supply the water. But these aquifers, defined in SB 289 as yielding groundwater to a water well, are part of the waters of the Great Lakes basin, and in many instances bear a direct and inseparable relationship to lakes, streams, and wetlands. While SB 289 confines itself mainly to human conflicts between well owners and users, the groundwater itself is part of a much larger global, national, regional, and state concern. In other instances, the groundwater feeds water dependent resources, like riparian waterways enjoyed by so many in Michigan and a backbone of our economy. See **Comments of Dr. David Hyndman** (separate testimony) Thus, while it makes sense to address and come up with elegantly simple solutions to groundwater disputes involving water wells, it also makes great common sense to understand how the resolution process of these specific water well disputes relates to the larger water context.

For these reasons Michigan Citizens for Water Conservation, a non profit organization with over 1,300 members, proposes a Four Part approach, the fourth part of which would include some of the key framework of SB 289. For this reason, in Section 1, below, MCWC presents an admittedly brief overview of the larger water context, so that SB 289 might be seen as part of a larger critical

legislative effort in Michigan, and perhaps elsewhere based on this Committee's and the Legislature's lead. Then in Section 2, MCWC presents a framework for the Four Part legislative approach. Finally, in Section 3, MCWC submits specific comments on SB 289.

1. Overview of the Larger Water Context

There is a global effort to convert water into a commodity which will seriously diminish or curtail the interests of states, municipalities, farming, manufacturing, and the public in water and water dependent natural resources. Michigan must act now to reaffirm and declare its sovereign and public interest in the waters of the State. The State has defined its water resources on numerous occasions, and should do so again with the looming world water crisis and its increasing global demand for freshwater. The global threat over ownership of freshwater includes private interests that seek to acquire water supplies or claim ownership of water without the consent of the Legislature or the citizens of the State. These private interests may seek to claim ownership of water, using the lack of definitive boundaries in water law that has not yet adjusted to the new context of the global water crisis and demand for freshwater. It is critically important that the State of Michigan, especially its Legislature, continues to assert its state sovereign and public interest in its freshwater resources in order to prevent the takeover of its water by private interests. This means that in some instances, such as the private diversion of water out of its watershed for sale inside or outside of the State or the Great Lakes basin, the State must enact legislation that bans such diversions and sale of water unless expressly authorized and licensed pursuant to narrowly and carefully drafted criteria consistent with the State's public interest in the water as a public resource and any compact with other Great Lakes states and/or provinces.

Once the Legislature declares and reaffirms the State of Michigan's public interest in the waters and water resources of the State, which it has done on numerous occasions in the past (Eg., See MCL 324.32702[c], [d]), then the State can proceed with enacting a framework for a sound water protection, management, and use policy and system of laws. This will assure that Michigan's citizens, communities, farming and other business interests, and the State's freshwater and water-dependent natural resources will be sustainable and endure for present and future generations. Regrettably, this kind of approach was not taken during the State's infamous lumbering era. Had there been the vision then to plan, protect, and manage those forest and biological values, they would be conferring sustainable benefits on the people and businesses of this State to this day. Water should not be converted or treated as a private good like lumber. Water is not by its nature a private commodity, but as Justice Cooley, a leading 19th Century jurist noted, "water is a moveable, wandering, thing." Water is to be used, not severed and sold in some distant watershed, no longer available for use in the watershed or community through which it flows. Water belongs to no one, and Michigan should see that it is not taken, diverted, or wasted like the forests for the gain of a few with great costs to the State and its citizens. Its future use must be safeguarded by the State and its citizens so that it can be conserved and used for the long term benefit of all.

Why is this assertive and comprehensive approach so critical?

Because:

(1) the State must guard the supply of the waters of the State to meet the needs of its water dependent natural resources, industries, and other consumptive use, as distinct from the claimed privatization of water for diversion and sale or export by private companies through their claims that they own the water under the common law of groundwater or riparian rights.

(2) a large portion of Michigan's water resources are contained and move through inland lakes and streams and the Great Lakes which are subject to the public trust. Under the public trust doctrine, the state holds the title of these waters for the benefit of its citizens, and may only allow

their alienation or disposition by express statutory authority, and then only if there would be a valid public purpose, no harm to the water resources and public trust, and fair compensation. (See background of common law of water and public trust at [Great Lakes Water, Michigan Bar Journal](#), p. 36, Dec. 2001, **Attachment A**)

(3) the State has the constitutional power to assert control of the waters of the State under the common law and Michigan Constitution of 1963, Art. 4, Sec. 52, by requiring a license for any diversion for sale or export, inside or outside the State, and by requiring a permit for all water withdrawals and related uses, inside or outside the State.

Art 4, Sec. 52 declares that the conservation and development (in the sense of protecting the recognized public interest in the natural resources of the state) are of paramount public concern, and mandates that the legislature shall pass laws to protect the air, water, and natural resources from pollution, impairment, and destruction. The Official Record, Constitutional Convention, shows that the Constitution mandated that the State Legislature protect the public interest waters and natural resources, and noted that it is an interest held by the State for the benefit of its people.

(4) the States immediate exercise of its sovereign ownership and control over its freshwater is less likely to be preempted or hampered by NAFTA, WTO, and other trade agreements designed to insulate international corporations from trading in certain defined goods, including natural resources like water. Last week at the United Nations World Water Forum III, the trade representatives from nations around the world failed to endorse language that freshwater is a public as opposed to a private good. These international trade agreements have already resulted in chilling damage claims against states (Eg. A Canadian company filed a Chapter 11, NAFTA damage claim of \$970 million against the United States as a result of California's banning of its MTBE as a gasoline additive because of MTBE's substantial carcinogenic risks. See Ware, *Paying to Regulate: A Guide to Methanex v United States*, 31 ELR 10986 [Aug. 2001]). Foreign corporations have claimed tens of millions of dollars because states have lawfully prohibited them from dumping wastes or products in a state that pose significant health and environmental risks. The same will happen, only to a much larger even unfathomable degree, if states like Michigan do not act quickly under their inherent powers to assert public control and interests in their water resources. NAFTA, the WTO or other international trade agreements may be able to insulate corporate international trade in private goods and services from state and local regulations, but they cannot affect state declarations and assertions of their *sovereign and public interests*, or definition of *proprietary or water rights*, in the freshwater itself. See Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 ELR 10646 (June 2001); Dhooze, *The North American Free Trade Agreement and the Environment*, 10 Minn. J. Global Trade 209 (2001).

(5) by asserting its sovereign public interest in and control over waters of the State, the State assures its primary position against unforeseen consequences, unanticipated events, or the future need for use by existing industries, such as farming, manufacturing, tourism, and recreation.

(6) by asserting its sovereign position in its water resources, the State assures that in the event of a primary public purpose and need warranting a diversion or sale of its water resources, inside or outside of the State or Great Lakes basin, the diversion or sale will not harm the public's interest or trust in the water, and that the State can demand, if appropriate, fair compensation.

(7) the State would be able to set up a Michigan Water Resource Trust Fund to secure its water future, particularly in difficult economic times.

As noted above, the State has the authority to guard against the onerous impact of NAFTA or other trade agreements that seek to trump local and state regulations to protect natural resources, because the State would assert its sovereign and public interest in the water itself. This is not regulating the water, but claiming ownership and control of the water, subject, of course, to private

rights to use the water in connection with the land or to benefit the community as recognized under common law of private property.

Michigan and other states, under US Supreme Court and Michigan Supreme Court decisions, have an inherent right to assert a sovereign interest in its water resources under the notion of "commons," such as air, wildlife, or water, moveable things that are not owned by anyone, but used under certain principles like reasonable use or subject to limitations like the public trust doctrine. When a state does not declare its interest in these water resources, the "not owned by anyone" and "free use until injury" arguably apply. However, this does not mean a state cannot assert itself by determining the extent to which these water resources can be sold, if at all, by private persons. When the US Supreme Court prohibited states from discriminating against the flow of goods or commodities, including natural resources, between states, it did not prohibit states from asserting their sovereign rights, so long as the assertion is uniform, that is, applied equally to all. Thus, if a state says water cannot be sold and diverted without authorization from the state under its sovereign interest, it will apply to everyone the same.

In summary, the Legislature has the duty and opportunity to continue its protection of the public interest in the water resources of the state for the benefit of its people, industries, and environment. It can and should do so in the evaluation and adoption of any legislation dealing with water or water-dependent natural resources. Michigan can ill-afford to linger any longer in light of the global water crisis and exponential demand for freshwater. It cannot afford it in terms of health, industry, or environment. It cannot afford it economically. It is ill-advised that the State sit by while private interests seek to claim the waters of the State, reaping huge private profits with scant environmental or health protections and nothing of substance for the State and its citizens in return. Even if in a narrow or exceptional circumstance Michigan doesn't need a small quantity of water, the State should be careful to assure there is a valid public purpose and that it assures protection of the public interest, other users, and the environment, and also be fairly compensated given the billions of dollars at stake with the sale of water.

Michigan Citizens for Water Conservation (Michigan Citizens) urges the Senate Committee on Natural Resources and Environmental Affairs and the Legislature to hold hearings, evaluate, and firmly establish a comprehensive framework to address the water and related water resources issues that face the State. Governor Jennifer Granholm has made it clear that safeguarding Michigan's water is critical for its future, and as noted above, Senate Majority Leader Sikkema launched a Great Lakes Task Force last year and submitted a package of four bills. Michigan Citizens is sympathetic to the need to expeditiously address existing ground water conflicts, like those in Saginaw and Monroe Counties, but that this be done in the context of a broader effort to address the reality of the threat from national and global demand for Michigan's freshwater.

2. A Four Part Approach for Protecting and Conserving Michigan's Water Resources

Michigan Citizens recommends that this Senate Committee and the Legislature take an interdependent Four-Part approach to promptly addressing these looming questions involving State's precious, valuable water:

- a. **Part 1 Adopt a Water Resources Planning Act** to establish a framework for the preparation of the State Water Resources Plan that accounts for the water, its use, its scarcity or abundance, its non-renewability if removed or diverted, its future need, conservation and feasible and prudent alternatives, its enhancement, within the State and Great Lakes basin as it relates to people, their health and safety, industry, recreation, and the sustainability of the environment and economy, and that accounts for its value, qualitative, quantitative, and economic. This Part 1 would also

provide authority for local communities, through their planning commissions, to prepare and adopt water use plans as part of their local comprehensive plans. These plans would be submitted to the Department of Natural Resources and/or the Department of Environmental Quality for approval as consistent with the State Water Resources Plan.

- b. Part 2 Adopt a Michigan Public Water Resources Act that declares and asserts the State's common law rights in the water, as a public resource (including public trust where applicable, on behalf of its people and the environment. (Eg. see Great Lakes Preservation Act, MCL 324.32702) The Act would prohibit the diversion of water for sale or export in or outside of the State (or, alternatively, outside of a watershed or other defined hydrogeological unit) consistent with the Michigan Constitution and the common law (public purpose, information and planning- in accordance with any plans in effect under Part 1, above- necessity, no harm, fair compensation), except where expressly authorized by the Legislature or through a delegation of authority to the appropriate administrative agencies, such as the Department of Natural Resources and/or Department of Environmental Quality. If a sale or export of water is authorized, then a license would issue for a period of 10 years, conditioned on obtaining a permit in accordance with the provisions of Part 3, below. The license would be revocable if any material condition was violated, and there would be a clear statement that the license did not grant any private property interest, only a right to sell the water under the license. Because existing municipal water supplies are authorized by statute already, the water systems would be deemed licensed by the State and would not have to comply with this Part. Likewise, consumptive uses for agriculture and manufacturing or other industrial processes or as incorporation into packaging or products, like fruit and vegetable packing, would be exempt from this Part. By its definition it would apply only to the private diversion for sale water as a product by itself by any means, bulk or any size of container. Existing persons selling water would be able to continue withdrawing water for sale, but only at existing limits and for a period of 5 years. After 5 years, an application would have to be filed and at least comply with under Part 3, below. Any increase in the level of withdrawal of water would have to qualify for a license under Part 2. Additionally, in addition to State license requirements, any license under Part 2 would have to comply with any commitment of the State under any compact with the Great Lake states and/or provinces.
- c. Part 3 Adopt a Water Resources Protection, Withdrawal, and Use Act that- consistent with the State's public interest in the water, the public trust in lakes and streams and their tributary waters, and the common law regarding private rights to use water under the riparian or groundwater law- establishes a permit system based on need, conservation alternatives, criteria that protect against actual or likely impairment, loss of water, or harm to other users or lakes, streams, or other water dependent resources. A proposed withdrawal would also have to be consistent with any State's or local community's short and long term water plans, including any commitment of the State under any compact with other Great Lakes states and/or the provinces concerning waters of the Great Lakes basin. This Part 3 would also require hydrogeology studies and standards critical for withdrawals in excess of 50,000 to 70,000 gallons per day. The hydrogeological studies and information would be incorporated by the Department of Environmental Quality into a Water and Water Dependent Resources Information Base, which would be available to the public, and which would be compiled on a regular basis and filed with the Legislature as part of a State of the Water Report that would be prepared every 5 years. This information would also be used to assist the State or local communities in the preparation of their water use plans under Part 1, above.

- d. Part 4 Adopt a Water Resources Protection and Conflict Resolution Act that provides for the resolution of conflicts between water users or water users and the environment, health, safety and general welfare, taking into account the standards in Point 3, above. The resolution process would establish an Office of Water Conflict Resolution, which would process water conflict complaints and assign them to accredited mediators or alternative dispute resolution persons. The mediation or dispute resolution process would proceed in accordance with a procedure conducive to resolution of conflicts adopted by the Department of Environmental Quality (along with Department of Agricultural in the event the conflict involves one or more agricultural users). If the conflicts are not resolved within 90 days, either party could request a de novo contested case type hearing under the Administrative Procedures Act. All interested or affected persons would have a right to notice and to intervene consistent with rules for intervention under the Michigan Court Rules. The decision by the Department would be final as provided by the APA and the Natural Resources and Environmental Protection Act, except that parties would have the right to appeal to circuit court or take such other action as provided by the NREPA.

3. Specific Comments on SB 289

At a time of tight budgets and uncertain revenues, a search for mechanisms to resolve conflicts is refreshing. While this is not a substitute for addressing the larger effort to protect and prevent water issues, it provides an immediate approach to reducing existing groundwater conflicts. MCWC believes SB 289 would be strengthened by the following:

- a. The term aquifer should not only include groundwater that supplies water wells, but lakes, streams, and wetlands consistent with existing laws that protect these water or water-dependent resources. See **Comments on SB 289 by Dr. Barbara Madsen, Attachment B**. The law as written does not provide a voice for riparian owners or the environment. SB 289 should either do so, or very carefully state that any permit, certificate, or decision reached under its provisions does not affect or alter any existing riparian rights or the application of other environmental laws. That is, the withdrawal must be otherwise lawful. The definition of sustainable yield suffers from the same limitation.
- b. The term groundwater conflict should not only address conflicts between well water users in an aquifer, but riparian and public users and the natural resources dependent on the water in lakes, streams, or wetlands that are hydrogeologically connected to the aquifer; that is, aquifers that contain tributary groundwater water.
- c. The distinction between critical aquifers and non-critical aquifers will be difficult to manage, and unnecessarily costly. It would be more prudent and less expensive to require high-capacity wells to apply for and obtain permits for a period of years, subject to conditions that prevent or minimize conflicts and harm to others or the environment. In other words, the permit system and critical aquifer designation should not be tied to one another. Rather, the permit system should be tied to the nature, location, hydrogeology, and capacity of the proposed well. For example, a high-capacity well may not affect other water wells, but could reduce the flow of a stream or drop the water level of a lake or wetland, unreasonably diminishing or reducing riparian property rights or causing likely impairment of these water resources in violation of the Michigan Environmental Protection Act, Part 17,

NREPA, MCL 324.1701 et seq. (Derived from Michigan Const. 1963, Art 4, Sec. 52)

- d. The critical aquifer designation should be retained for the limited purpose of conflict resolution. The definition would be modified to include conflicts with riparian users and water-dependent resources as noted in sub-paragraph b, to provide a quick response and conflict resolution mechanism through the appropriate agency or agencies- i.e the Department of Agricultural and Department of Environmental Quality. There is a growing number of accredited mediators in Michigan that can be tapped to assist in this process. If that process does not result in a resolution between the interested affected persons, then the contested case provisions should be invoked with appeal or direct review by the courts. This system would not affect existing remedies or rights that exist under the common law or other laws.
- e. The standard for harm to the environment, such as water dependent resources, should be the constitutional standard mandated by Mich. Const., Art 4, Sec. 52, supra (protect the air, water, and natural resources of the state from Apollution, impairment, or destruction.®)
- f. Using a ACertificate® approach establishes a limited priority water use system that is contrary to Michigan-s reasonable use rules. It also could arguably create term property interests, which in the event of subsequent evidence of harm or conflict would tie the state-s hands to address the problem. The law should state that a certificate grants only a privilege for use, and does not create any property interests in the right to withdraw any quantity of water. It would be preferable to use the term®permit,®as that is not understood to grant property rights in water that under the common law no one owns. Moreover, any permit (or certificate if that-s the term chosen) must contain standard conditions found in DEQ or other department approvals. Too, by requiring certificates in Agroundwater conflict® areas, there is an implication that water can be withdrawn without limitation in other areas. This is contrary to Michigan-s public interest in its water resources, and tends to undermine existing rights under riparian and groundwater law, and also under lakes, streams, and wetland laws.
- g. An applicant for a high-capacity well permit should file a basic hydrogeological study demonstrating no conflict with other wells, no diminishment or impairment of riparian waters, and no diminishment or impairment of wetlands, or other environmental effects, and if such effects show no other alternative locations or means exist consistent with the public interest in the groundwater under Art 4, Sec. 52, existing water laws, and the sovereign interest under the common law.
- h. The requirement of a hydrogeological study from applicant for high-capacity wells is no different than the basic studies required for public community or non community water wells under the Michigan Safe Drinking Water Act and rules. The data and information from these studies, including any continued required groundwater or surface water monitoring, are essential for the State to compile and develop a water resources inventory and plan.
- i. The intent at Section 32806 to coordinate with the evolving approach to Great Lake water resources, including groundwater, under Annex 2001 is a sound one. However, Annex 2001 is not a substitute for protecting Michigan water resources under Michigan-s standards, even if more stringent. Annex 2001 also contemplates some form of water marketing, and Michigan should go very slow, since it stands to lose or gain the most because of its center in the waters of the basin. Michigan has a standard of no pollution, no impairment or destruction of water and natural resources. The Great Lakes and Michigan-s navigable lakes and streams are subject

to the public trust, which cannot be violated by approvals that may be made under a compact like Annex 2001.

- j. The state should be entitled to reasonable attorney fees and witness costs if it prevails in any enforcement or civil fine action brought under the law.

Michigan Citizens for Water Conservation appreciates the opportunity to present the foregoing testimony and recommendation regarding SB 289 and the critical water issues that face Michigan. Michigan Citizens stands ready to work with this Senate Committee and the Legislature, and all other interested persons or organizations, to enact a comprehensive approach to Michigan's most priceless natural advantage. Again, thank you .