

Alliance for the Great Lakes – National Wildlife Federation – Michigan Environmental Council
– Tip of the Mitt Watershed Council – The Ohio Environmental Council – Great Lakes
Environmental Law Center – Indiana Wildlife Federation

July 15, 2009

Mr. Brant O. Fisher
Water Withdrawal and Contamination Investigation Unit
Drinking Water and Environmental Health Section
Water Bureau, MDEQ
P.O. Box 30273
Lansing, Michigan, 48909-7773
fisherb@michigan.gov

Re: Application for a New Large Quantity Withdrawal – Genesee County Drain
Commission

Dear Mr. Fisher:

On behalf of the Alliance for the Great Lakes, National Wildlife Federation, Michigan Environmental Council, Tip of the Mitt Watershed Council, Ohio Environmental Council, Great Lakes Environmental Law Center, and Indiana Wildlife Federation, we thank the Michigan Department of Environmental Quality (MDEQ) for this opportunity to comment on the application for a new large quantity withdrawal by the Genesee County Drain Commission (Commission) from Lake Huron. We urge the MDEQ to deny the Commission's application unless the applicant provides sufficient information to demonstrate that this project meets the standards set forth in Part 327, and that it is reviewed utilizing a thorough and publicly accessible process. In addition, any application must fully support the sound implementation of Michigan's legislation, the Charter and the Compact.

Background: The Compact – A Forward-Looking Policy

On October 3, 2008, the President signed a joint resolution of Congress consenting to the Compact. This followed nearly five years of negotiations between the States and three years of review and approval by the eight Great Lakes state legislatures. Our groups were actively engaged in Compact negotiations and worked with state and federal officials for Compact approval. The Compact is intended to provide a comprehensive management and legal framework for achieving sustainable water use and resource protection in the Great Lakes basin.

The Compact requires each state to create a management program for water withdrawals and consumptive uses within the Great Lakes basin. Michigan, in approving amendments to Part 327 of the Natural Resources & Environmental Protection Act (NREPA) and the Safe Drinking Water Act (SDWA), created such a program to comply with the Great Lakes Compact.

Applicable Requirements

Due to the size and location of the withdrawal, the Commission's proposal must comply with three sets of requirements: Michigan's permitting standards for withdrawals over 2 MGD; the Great Lakes-St. Lawrence River Basin Water Resources Compact; and the consultation procedures under the Great Lakes Charter of 1985.

As an initial matter, we note that the purpose of the withdrawal is to provide a public water supply. The proper permit for the Commission (or the ultimate supplier) to seek is a SDWA permit, not a stand-alone permit under Part 327 of NREPA. Indeed, the fact that community suppliers who hold a SDWA permit are not required to obtain a permit under Part 327 implies that suppliers should proceed through the SDWA. We request the department to direct the Commission to resubmit a more comprehensive application and proceed under the SDWA.

MCL 325.1004 of the SDWA requires suppliers of water to file the plans and specifications for a proposed waterworks system. As part of its review of these plans, MDEQ must consider the impact of the waterworks system if it provides new or increased total designed withdrawal capacity of more than 2 million gallons per day from the waters of the state. While the SDWA incorporates the standard of review in Part 327 of NREPA, the additional detailed information provided on the waterworks system under the SDWA is critical to determining whether the withdrawal complies with the Part 327 standard. For example, information required for the capacity assessment would help to determine whether the withdrawal amount is reasonable given the population growth expected for the area. And detailed plans for the system would help to determine whether the Commission can genuinely self-certify that it will comply with the conservation measures for public water suppliers.

We commend the MDEQ for recognizing that, while the prior notice and consultation provisions of the Compact are not yet effective, similar provisions in the Great Lakes Charter are in effect and prior notification was sent to the other nine Great Lakes parties.

New Withdrawal and Consumptive Use

There seems to be some question as to whether the Commission's application is a request for a new withdrawal and consumptive use.

Section 324.32701(1)(dd) of Michigan's legislation defines "new or increased withdrawal capacity" as "new or additional water withdrawal capacity to supply a common distribution system that is an increase from *the person's* baseline capacity. New or increased capacity does not include maintenance or replacement of existing withdrawal capacity" (emphasis added). Presumably a similar definition is intended for the SDWA. This application for withdrawal is from a new entity with no baseline capacity at a new location. And, since Detroit's baseline capacity will not be reduced by 85 mgd, approval of this application creates new capacity to withdraw an additional 85 mgd from Lake Huron. While not necessarily practical in this

economy, Detroit will be free to look for new customers to use the capacity no longer being used through the Genesee County system. Who knows what the future will bring? The Compact is for the long haul, not the short term situation. There should be no doubt that the Commission's application is for a new withdrawal and consumptive use.

Fails To Meet Compact's Water Conservation and Efficiency Requirements

Under MCL 324.32723(6)(e), Michigan shall determine that the applicant has self-certified compliance with environmentally sound and economically feasible water conservation measures developed by the applicable water user's sector under section MCL 324.32708a or has self-certified compliance with environmentally sound and economically feasible water conservation measures developed for the water use associated with that specific withdrawal. Presumably these measures are the "Guidelines for Generally Accepted Water Management Practices for the Public Water Supply Sector," which were developed by the Michigan Section of the American Water Works Association and adopted on January 18, 2008. They can be found on the MDEQ website: http://www.michigan.gov/documents/deq/deq-wb-dwehs-wu-conservmeas-pwss_231927_7.pdf

The Commission does not directly address self-certification of compliance with these environmentally sound and economically feasible water conservation measures. The Commission must amend its application to demonstrate how it will genuinely self-certify its compliance.

Moreover, the permit application includes information only for the system operated by Genesee County. The application is for a withdrawal that serves not only the system operated by Genesee County, but also includes the City of Flint and unnamed customer municipalities in Lapeer, Sanilac, Saginaw, and Shiawassee counties. The Commission must clarify which existing public water supplies will be receiving water through the new pipeline, and the application must be considered incomplete until water conservation and efficiency information from each of the public water supplies that will be receiving withdrawn waters is received and each public water supply submits a self-certification of compliance with these environmentally sound and economically feasible water conservation measures.

Reasonableness of Requested Withdrawal

Under MCL 324.32723(6)(d), the Commission must demonstrate that its proposed use is reasonable under common law principles of water law in Michigan. The Michigan Court of Appeals has described the reasonableness test as follows: "While the nature of the balancing test requires that the appropriate factors be ascertained on a case-by-case basis, . . . several factors can be discerned that will be relevant to every application of the test. These factors include (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use, and (6) any other factor that may bear on the reasonableness of the use."¹ In addition, the Court

¹ *Nestle Waters, Inc. v. Michigan Citizens for Water Conservation*, 269 Mich. App. 25, 71; 709 N.W.2d 174 (2005), aff'd in relevant part, 479 Mich. 280; 737 N.W.2d 447 (2007). While the case concerned the impact of groundwater

of Appeals stated that it would "resort to the Restatement [of the Law, Second, Torts, Section 850A] as an aid to understanding the role of these factors in the balancing test."² The Restatement factors also include the economic value of the use, the social value of the use, the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other, the practicality of adjusting the quantity of water used by each proprietor, the protection of existing values of water uses, land, investments and enterprises, and the justice of requiring the user causing harm to bear the loss.³

We wish to call attention to two critical factors in considering the reasonableness of the requested withdrawal: (1) the impacts of the return of treated wastewater, which could harm other water users and existing resource values; and (2) the necessity of the amount and manner of the withdrawal given the existing alternative of the Detroit system, the efficiencies that can be implemented, and projected demand.

Return Flow

The proposal seeks to continue the return of treated wastewater at four existing treatment locations along the Flint River. The current and new water is from the same source, and the flow paths and treatment will not be altered. However, the requested withdrawal quantity of 85 mgd is based on estimated future growth in water use of 42 percent. The Commission has not supplied information in its application that the Flint River, at the points of discharge and downstream, can absorb this increased discharge without adverse impacts. The current treatment locations have had dozens of combined sewer overflows in the last year. Those overflows have discharged ten of millions of gallons of raw or undertreated sewage into the Great Lakes on storm events of just slightly more than one inch of rain. Prior to the issuance of a permit, the Commission must be required to evaluate the impact of this increased discharge, the potential of larger storms in the future due to climate change, and submit its findings to the State. We note, a detailed application under the SDWA should require this additional information. Without this information, the State cannot make a determination on whether this withdrawal is reasonable.

The State must also determine that the withdrawal is in compliance with all applicable local, state, and federal laws. Regarding the discharge and return flow, the State is asked to verify that the four current discharging facilities meet all current discharge regulation requirements, and will continue to comply. In the event there is any non-compliance, issuance of a water withdrawal permit must be delayed until after all parties come into compliance with existing laws.

Withdrawal Amount

The MDEQ must evaluate whether the withdrawal amount and manner is necessary given the existing alternative of the Detroit water system, the efficient use that can be made of the existing

withdrawals on surface water, the Court of Appeals appeared to extend the reasonableness balancing test to all withdrawals. Further clarification by the Michigan Supreme Court may be necessary.

² *Id.*

³ Restatement Torts, 2d, § 850A, p 220.

supplies, and the efficiencies that can be implemented.⁴ The applicant has not provided sufficient information on any of these points. The Commission's permit application notes that the Genesee County system currently obtains its drinking water from the Detroit system which reports approximately 20% water loss in transmission. The proposed Genesee system expects 5% loss of water. These claims must be evaluated and verified by MDEQ.

In addition, Genesee is requesting a withdrawal level not to exceed 85 MGD. The permit application, on page 13, lists an initial system demand of 55.5 MGD in 2014, and a projected system demand of 78.7 MGD in 2039.⁵ The 25 year projections cited by Genesee seem at odds with the current demographics, population and industrial trends, and economic realities in Genesee and Sanilac counties.

The MDEQ must ensure that the basis for the future water estimates is grounded in reasonable official regional estimates of population.

Ecological Improvement (Restoration) Measures

In approving the Compact, the states agreed to protect, conserve, *restore, improve* and effectively manage Great Lakes resources (*emphasis added*). In considering this first application for a permit, and to meet that obligation, it is critical to establish that approvals for large quantity withdrawals be accompanied by a restorative action that is in addition to those that are unavoidable consequences of receiving and returning Great Lakes water. The Commission should be required to make an affirmative restorative commitment to a resource in the basin.

Conclusion

The Commission's application should not be considered under Part 327 of NREPA and instead the Commission should submit an application under the SDWA.

Moreover, the application is a request for a new withdrawal; and fails to demonstrate how the applicant will genuinely self-certify compliance with the applicable water conservation measures; and fails to demonstrate that the withdrawal is reasonable. Of particular concern is the lack of information pertaining to the potential adverse resource impacts to the Flint River and Lake Huron, and the lack of a sound basis for the requested 85 MGD amount of withdrawal. Therefore, at this time the permit application should be denied unless the Commission provides sufficient information to demonstrate that this project meets the standards set forth in Part 327.

We request that the MDEQ, before further consideration of the application: 1) require the Commission to demonstrate that the Flint River, at points of discharge and downstream, can

⁴ Section 4.11.5 of the Compact (the reasonableness test in the Compact Decision Making Standard) includes whether the proposed withdrawal is planned in a fashion that provides for efficient use of the water and will avoid or minimize the waste of water, as well as whether efficient use can be made of existing water supplies. These factors are consistent with Michigan common law and should be used in reviewing the permit application.

⁵ *Id.*

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absorb the increased discharges without adverse impacts; 2) verify that the four current discharging facilities meet all current discharge regulation requirements; 3) require the Commission to submit self-certification of compliance with the State's environmentally sound and economically feasible water conservation measures; 4) require the Commission to clarify which existing public water supplies will receive water, and submit water conservation and efficiency information and self-certifications for each; 5) ensure that the quantity requested is based on sound official regional population growth estimates; 6) require an affirmative restorative commitment to a resource in the basin; and 7) extend the August 22nd decision date and hold another public comment period if the applicant submits the requested information. And any permit that is issued must clearly indicate that any public water supply that might subsequently receive water from this transmission system must submit self-certification of compliance with the State's environmentally sound and economically feasible water conservation measures before receiving water.

Thank you for the opportunity to submit these comments. Should you have any questions about our comments, please contact Ed Glatfelter at 312-939-0838 x235 or eglatfelter@greatlakes.org and Marc Smith at 734-887-7116 or msmith@nwf.org.

Sincerely,

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