

**MICHIGAN ENVIRONMENTAL COUNCIL**  
**TESTIMONY TO THE AGRICULTURE, FORESTRY AND TOURISM COMMITTEE**  
**OF THE MICHIGAN SENATE**

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**Reforming Michigan's Water Management Laws**

The furthest you can get from water in Michigan is six miles away. Whether it is a Great Lake or a small one, a major river or a trout stream, or one of Michigan's quickly disappearing wetlands, water is the fundamental defining characteristic of our state. You've already heard that the Great Lakes make up 18 percent of the world's fresh surface water. You know that every single community in the state depends on these sources for clean drinking water. And of course you are well aware how fundamental water is to human life. Considering this, the Michigan Drain Code is perhaps the single most important piece of legislation the Senate will consider this year.

The United Nations warns that almost 3 billion people worldwide will be severely short of water within 50 years. The United States faces its own regional water crises already that are prompting interstate and international collaboration about water withdrawals in the Great Lakes region. As the caretakers of 95 percent of the country's fresh water – more than six quadrillion gallons – Michigan citizens have an obligation to manage this resource with the utmost care.

The Michigan Drain Code was originally designed to speed settlement in Michigan by giving county drain commissioners broad taxing and spending authority to provide wholesale swamp drainage. As a settlement and development statute, the Drain Code has been rampantly successful. Michigan develops land at a pace that exceeds population growth by eight times. Fifty percent of the state's wetlands have been drained – including seventy percent of our coastal wetlands. New drains today are more likely to accommodate sprawling development than agriculture.

Times have changed dramatically since even the last update of Michigan's drainage laws in 1956. Our understanding of the importance of our water resources, including wetlands, has deepened significantly, and we now have broad public consensus on the need to manage water on a regional or watershed basis. We know now that land development results in water table, sewage and stormwater impacts that burden our already insufficient public infrastructure. We know that "green infrastructure" is a proven alternative to constructed drains and water treatment facilities. We know that our state's economy depends as much on a strong tourist industry as housing starts, and that a failing environment hurts us all.

As the state's primary water management law, the Michigan Drain Code must be reshaped to reflect the academic research and practical experience of the last fifty years. Our obligation in the 21<sup>st</sup> century is to forge a law that melds both economic development and environmental protection for the betterment of all our communities. Tweaks and mediocre changes to a law that is half a century old are not going to be sufficient for us to live up to our obligation as the primary stewards of the United States' drinking water.

We need a new Michigan water management law:

- One that acknowledges the essential nature of public involvement in water decision-making.
- One that encourages regional approaches to water management.
- One that protects the environment.
- One that integrates water management and growth management.
- One that prioritizes Smart Investments that balance economic and environmental sustainability.

## **Public Involvement Issues**

### **Overview**

Drain Commissioners are afforded significant independence to develop and implement projects with only limited public involvement despite the potential for significant taxation or community change. While it is undoubtedly easier and faster to adopt projects through a limited or streamlined process, the absence of appropriate citizen involvement leads to projects that may not reflect the values of the community. The existing approval process all but guarantees that the project will commence. Projects are initiated with minimal public input, reviewed and approved by a hand-selected board, and under construction before much of the public is fully aware of what happened. To top it off, the appeals process for drain projects is virtually non-existent, making it extremely difficult for impacted citizens to cause a more judicious review of a project. This is not to suggest that there are not drain commissioners extraordinarily dedicated to substantive public involvement, but the system is generally arrayed against the citizen advocate.

### **Areas of Concern**

- Assure transparency and availability of information before the hearing process ensues. All project documents (including instructions to engineering firms or surveyors) should be open to public scrutiny with adequate time for review and analysis before formal hearings begin.
- Provide the public with details of project cost, scope and route before making drain decisions. The public review process, including any appeals process, should have the benefit of the breadth and depth of the project to inform decisions.
- Determine project scope in petition and early hearings. Changes to the scope of the project should be difficult to make, especially if they widely deviate from the need addressed in the petition.
- Provide a cost-benefit analysis for the impacted population. Citizens who are about to be assessed for a project have the right to evaluate the comparative gain or loss they might realize from the project's implementation.
- Guarantee substantive public comment opportunity. Currently the law provides more for meetings than for hearings. Opportunities for public discourse should be outlined in the law that both rely on traditional hearings and avail themselves of new communications technologies.
- Institute a minority petition process. A "remonstrance" process allows a significant portion of citizens objecting to a project petition to counter-petition against the proposal. If the objectors bring petitions equal to a certain percent of the effected population then the petition originators must meet a higher petitioning threshold for the project to be considered.
- Guarantee meaningful citizen appeals. Citizens should have recourse to the judiciary in disputes over process, need, benefit, scope and other aspects of controversial projects.
- A right of referendum should be available. The drain code's assessment process ultimately allows as few as five individuals to tax their neighbors. Ultimate recourse to the citizenry is appropriate here.

## **Environmental Protection**

### **Overview**

Water is perhaps Michigan's most precious natural resource. Our state has a long tradition of leading the nation in water quality protection, but that legacy has been tarnished as our water management laws have become outdated. For the first time since the Clean Water Act was adopted, Michigan faces the unfortunate potential of losing its primacy over water quality protection to the federal government. As the prevalence of non-point source pollution becomes more evident, attention to water management at the local level becomes more important. The role of the drain code can no longer be simply to facilitate the drainage of land; it must encompass, even prioritize, environmental protection. Emphasis on construction in the code also jeopardizes many natural features. Many of the state's waterways are designated as drains, which makes meandering streams and free-flowing rivers subject to widening, straightening, dredging and other so-called maintenance techniques. Our natural heritage is critical to our economic stability; the drain code must recognize this relationship.

### **Areas of Concern**

- Devolving water quality protection authority to drain commissioners compromises agreements with the EPA that give the state rather than the federal government control over our water. Without significant Department of Environmental Quality involvement in water management decisions, Michigan jeopardizes not only a critical natural resource, but also our independence and stature as a leader on water quality policy. Further, water management is foremost a DEQ responsibility and the Department of Agriculture should be replaced as the primary agency in these issues.
- Caution should be exercised regarding creeks and streams that have been designated drains. These natural features provide scenic value, wildlife habitat, recreation, drinking water and a host of other services to Michigan's citizens. They deserve particular attention and protection in water management policies.
- Environmental factors must be considered in every aspect of the project. The law should include clear authority for environmental protection projects.
- The elected official's primary responsibility should no longer be to facilitate drainage but to manage water flow and protect water quality. The law should include a legal duty to protect the environment with clear obligations, the violation of which would be evidence of malfeasance.
- National Pollution Discharge Elimination System (NPDES) permits should be required for most projects. Even simple "maintenance," such as dredging contaminated sediments can cause substantial downstream impacts.
- The law should clearly delineate the Natural Resources and Environmental Protection Act (NREPA) as the preeminent authority on water quality issues. Currently many drain "maintenance" activities are exempt from NPDES permits in Part 303 of NREPA governing wetland and agricultural practices.
- Federal Clean Water Act exemptions should be clarified for the purposes of water management.

## **Water Management and the Built Environment**

### **Overview**

Although the drain code was originally designed to support a burgeoning farm economy, Michigan's land base for agriculture is rapidly deteriorating. The best and most productive lands are being consumed by unmanaged urbanization that is outpacing population growth by eight to one. In the 1990's, southeast Michigan alone saw almost 160,000 acres of land converted to urban development. Overall, if development patterns continue as they have for the last twenty years, Michigan will lose 15 percent of its farmland – 1.5 million acres – by 2040. The drain code must recognize this new reality: we have already converted virtually every potentially arable parcel to farm use; the major demand for drain work now comes from residential development. Water management has been a secondary consideration in new development resulting in dramatic downstream impacts in some communities. New technologies and research have revealed cost-effective and environmentally friendly alternatives to construction for water management.

### **Areas of Concern**

- Consideration of less damaging alternatives and green infrastructure solutions should be an integral part of all major water management projects. Not only are non-construction alternatives often vastly cheaper (New York City, for example, saved \$6.5 billion on new water filtration and treatment plants by purchasing and protecting land in the Catskill Mountains watershed) they offer innovative ways to help communities meet other land use goals.
- Projects should apportion costs to the source of greatest impact, protecting existing residences from assuming the costs of new development.
- Project alternatives should always include consideration of upstream and downstream consequences. Projects involving new development should always have on-site water management that promotes infiltration over Michigan's traditional collect and concentrate model.
- Water management agencies should be empowered to enact impact fees and concurrency (requirements that sewer and water infrastructure be in place simultaneously with proposed developments).
- Water management officials should have site review authority over new developments. Often new developments do not adequately address stormwater and runoff considerations, relying on the current drain process to fund mitigations. New federal and state rules are helping to address this problem, but as long as natural resource protection is separate from the land use planning process, the citizens at large will be compelled to respond to water quality issues that arise from situations in which they had little say.

## **Watershed Management**

### **Overview**

Drain commissioners districts follow county lines, but remarkably most waterways are ignorant of political jurisdictions. There is an ardent need to reshape the political aspects of Michigan's water management law to consider watersheds in a more than peripheral manner. All the communities in a watershed, but especially the ones on the upstream side of their neighbor, need to be engaged in watershed management planning. Regionalizing approaches to water based on flow patterns is an important advance in our water management practices. Many environmental concerns are of greater-than-local impact and should be addressed in a larger public forum that includes the whole of an effected community.

### **Areas of Concern**

- Watershed management should be the main thrust of new law. Rather than sustaining the antiquated intent of the current law, which emphasizes land drainage, water management by watershed should be wholly incorporated into the statute.
- The political jurisdiction of water management officials should be restructured to follow major watersheds and broken down along township and municipal, rather than county, lines. The Phase II NPDES stormwater rules amendment process has laid the groundwork for some of this change already by encouraging some mapping and management by watershed.
- Since virtually all our current water management concerns are brought on by land use issues (development, conservation or agriculture) and those uses are largely determined at the local level, there must be strong integration of local government decision-making into the law, including the development of watershed level land use plans.
- It is important to note that Chapters 20 and 22 of the Drain Code currently allow and facilitate watershed management, but this should be the rule rather than the exception. Senate Bill 217 does not include Chapter 22 on water management districts at all.

## **Smart Investments and Taxpayer Protections**

### **Overview**

Especially in a time of declining state revenues and shrinking local government budgets, we should be sensitive to how tax dollars are being spent, for services or subsidies alike. Current law makes it very difficult to evaluate the anticipated impact of a water management project and the benefit received for the cost to the taxpayer. The law is rife with definitions that are ambiguous at best and often create situations where tax dollars from one agency are used counter to the purpose another agency's investment, such as the case of drain projects draining public lands that were purchased with the intent of keeping them in their natural state.

### **Areas of Concern**

- All drains should be verifiably established. If the easements onto land cannot be verified or the existence of a drain substantiated in a clear manner, then they should be reestablished through the existing process.
- The current intent of drain projects is to protect the public health and welfare. Project petitions or work plans should clearly show the public benefits from the work. Agriculture is not exclusively a public interest and should not be a fundamental rationale for water management projects to proceed. Part 303 of NREPA provides a clear model for addressing the drainage needs of agriculture without elevating the industry to the level of "public health, convenience and welfare."
- The definition of benefit in current law includes every conceivable action, good or bad. Landowners could, under this definition, be assessed for work to drain a wetland that they have been striving to preserve. Urban residents at the bottom of a hill could be taxed for projects that fill their basements with water. We must have a fair and clear definition of benefit that allows public recourse for harms.
- Public lands and lands permanently protected for conservation purposes should be exempted from assessments for projects that do not directly enhance their natural resource value. A new definition of benefit could clarify under what circumstances public lands can be taxed.
- The law needs more comprehensive definitions of maintenance and improvement and NREPA should be amended to reflect the changes. Some "maintenance" projects are significant enough to demand water permits, others not. Some improvements are equal to full-scale construction, others are minor fixes or expansions. The definitions that guide development should reflect the complexity of our water infrastructure system.

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