

# LakeLinks

Spring/Summer 2002

*A multi-disciplinary forum for dialogue and expression of diverse viewpoints on issues of importance to the Great Lakes region*



**Special point of interest:**

*Spring 2002 Conference*

**Taking the Brown out of Brownfields**

April 25-26, 2002

Legal Institute of the Great Lakes & University of Toledo College of Law

*(See page 7)*



University of Toledo College of Law & LIGL "National Water Crisis" Conference (Nov. 2001) Ohio Senator DeWine



Eastern Lake Superior Photo Courtesy of EPA

## The Great Lakes Charter and Annex 2001

by Dick Bartz, Assistant Chief, Division of Water, Ohio Department of Natural Resources

The Great Lakes Charter, a nonbinding agreement of the Great Lakes Governors and Premiers in 1985, and the Annex 2001, a recently approved addition to the Charter, are both important steps in the ongoing process for a stronger regional water management system for the protection of the Great Lakes, steps that Ohio has fully sup-

*(Continued on page 2)*

## Perrier: A Lightning Rod for Water Wars in Michigan

by Mark Coscarelli, Senior Consultant for Great Lakes and Environmental Policy at Public Sector Consultants, Inc.

The Great Springs Waters of America, Inc. (a.k.a. Perrier) announced in 2000 that it planned to build a \$100 million plant in Mecosta County near Big Rapids to pump and bottle groundwater under the label of Ice Mountain Spring Water. In August 2001, the Michigan Department of Environmental Quality granted the Perrier Group permission

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## Decision Support for Water Resources Management

by Mike Donahue, President/CEO Great Lakes Commission

The Great Lakes Commission is in the midst of a large scale initiative that will lay the foundation for scientifically sound and legally defensible decisions regarding the withdrawal, diversion and consumptive use of the waters of the Great Lakes Basin. Supported by the Great Lakes Protection Fund, the project responds to Directive #5 of Annex 2001 to the Great Lakes Charter, which commits the governors and premiers

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## Compact = Contract

by Suzanne Zazycki, Junior Research Fellow, Legal Institute of the Great Lakes

The Great Lakes Charter Annex outlines the framework for a set of binding agreements among the Great Lakes States and Provinces. *See The Great Lakes Charter and Annex 2001, D. Bartz, above.* Article I, §10, Clause 3 of the United States Constitution grants states the power to enter into such binding agreements after obtaining Congressional consent.

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ported. The Governors and Premiers, in signing the Great Lakes Charter in 1985 and the Annex 2001, made good-faith pledges to develop programs to protect and manage the waters of the Great Lakes basin. In 1986, the authority of the Governors on Great Lakes water management was strengthened pursuant to section 1109 of the Water Resources Development Act, which requires the approval of all of the Great Lakes Governors before a diversion of Great Lakes water for use out of the Great Lakes basin could occur.

In 1998, a bulk water export was proposed from Ontario waters of Lake Superior. As a result of the process for evaluating the water export project, the Governors and Premiers saw the need to re-evaluate the framework for the protection and management of the Great Lakes.

One of the principle tenets of the Governors and Premiers, which is embodied in the Charter, the federal statute, and the Annex 2001, has been that the governance of the basin water resources remains in the basin with the States and Provinces. The Charter recommended that all States and Provinces should adopt similar water management programs. In re-evaluating the management framework, weaknesses that were identified included the non-binding nature and inconsistent implementation across the basin of the Great Lakes Charter. The Annex 2001 represents the framework for developing a consistent and binding program for Great Lakes basin water resources management.

A goal of the next phase of the Annex 2001 is to develop and make recommendations to the Great Lakes Governors and Premiers on how best to formulate a decision-making standard. This standard is to be based upon the Annex principles. Other goals of the Annex include development of binding agreement(s), a process for dispute resolution, and corresponding implementing documents that provide the flexible framework for individual state and provincial water withdrawal statutes, programs, and regulations.

The Water Management Working Group to the Council of Great Lakes Governors has been re-established by Ohio Governor Bob Taft, Chair of the Council of Great Lakes Governors, to accomplish this work. Each Governor and Premier was asked to appoint two people to the Working Group, one person to represent

the Governor or Premier and a technical person. These appointments have been made and the Working Group first met on October 9, 2001. Sam Speck, Director of the Ohio Department of Natural Resources, is serving as Chair of the Working Group. Dennis Schornack, Special Advisor for Strategic Initiatives, Office of the Governor, State of Michigan, is the Co-Chair.

As a part of the Working Group's efforts, an Advisory Committee has been appointed. About 20 organizations have been asked to serve on this committee, giving consideration to geographic as well as sector/interest balance. They will meet periodically throughout the project.

To complete the tasks of the Annex, the Working Group has established three sub-committees that will address specific tasks related to the project. The three sub-committees will address the structure of binding agreements (i.e., an interstate compact in the U.S.), the decision-making standard, and provincial/international agreement(s).

A Resource Group has also been established that will be an informal group of governmental and quasi-governmental bodies that have technical expertise regarding Great Lakes issues. They will serve as collaborating organizations to the Working Group. The members may include, but are not limited to, the Great Lakes Commission, the International Joint Commission, the Great Lakes Congressional Task Force, USGS, Army Corps of Engineers, USEPA, NOAA, and Environment Canada.

Ohio brings a slightly different perspective to this issue from some of the other States and Provinces. In Ohio, several communities straddle the Great Lakes basin watershed divide and, consequently, so do their water and wastewater systems. To just say 'no diversions' may not be in the best interest of those constituents in Ohio. Ohio's statutes provide some flexibility in dealing with projects along the basin divide by defining diversion as a transfer of water to another basin without return.

Further, Ohio's statutes and the Great Lakes Charter have thresholds below which other States and Provinces do not review projects, whereas the federal diversion statute states that all Governors must approve all diversions. This difference in approach needs to be addressed in drafting the binding agreements.

It is not being suggested that smaller diversions or uses not be evaluated by anyone. Rather, the question is: when are projects taken to the regional level? When do projects have to get the approval of all Great Lakes Governors and Premiers? As a practical matter, obtaining an affirmative approval from eight Governors under the federal statute does not result in a streamlined and timely process. It might be preferable to rely on states' regulatory programs for smaller withdrawals and only conduct an interstate and provincial review for projects that have more of a regional impact.

Through the Council of Great Lakes Governors, the States and Provinces are now in a three-year process of developing binding agreements and criteria to review water withdrawal projects. It is hoped that draft documents will be available for public review this year. Once the binding agreements are drafted, the States would enter into an interstate compact ratified by Congress that would be paralleled by laws or agreements approved in the Provinces and, if appropriate, the Canadian federal government. Additional information is available from the Council of Great Lakes Governors at [www.cglg.org](http://www.cglg.org) or at 312/407-0177. ■



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“National Water Crisis” Conference (Nov. 2001)  
ODNR Commissioner Sam Speck

Interstate compacts appeal to states because a “compact” is also a “contract.” The essential elements of a contract are offer, acceptance, and consideration. A compact enters the realm of contract law once one state ratifies the compact into law. This becomes an offer that other states can accept by ratifying the compact into law in their own states. During this process, it is important that no state changes the language of the compact. An altered compact may be construed as a counteroffer rather than acceptance of the compact. Without acceptance, a contract, and thus the compact, would not be binding.

Besides offer and acceptance, each party has to give up something of legal value. This is known as consideration. For example, if two states negotiate an interstate compact to settle a dispute, they give consideration by accepting the proposed solution and abandoning the claim. See Frederick Zimmerman, *THE LAW AND USE OF INTERSTATE COMPACTS* 22 (1976). Likewise, if the compact is negotiated to work on a joint activity, like preserving and protecting certain waterways, then the consideration is the obligation each party owes to the common goal.

Once a compact is legally binding, with offer, acceptance, and consideration, a state that violates the compact can be sued by other party states for breach of contract. *Green v. Biddle*, 8 Wheat. (21 U.S.) 1 (1823); *State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). In the case of water compacts, courts often refer the issue of remedies to a special master to determine if the injured party will be awarded monetary damages, including interest, or will receive repayment in water (specific performance). *Kansas v. Colorado*, 2001 U.S. LEXIS 4488 (June 11, 2001); *Texas v. Mexico*, 482 U.S. 124 (1987).

In addition to basic elements of contract law, the Supreme Court has ruled that interstate compacts are covered by the contract impairment clause of the United States Constitution (“No state . . . Shall pass any law impairing the obligation of contracts”). *Green v. Biddle*, 8 Wheat (21 U.S.) 1 (1823); *State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). This clause provides that “[n]o state . . . shall pass any law impairing the obligation of contracts.” Because of this ruling, a compact cannot be unilaterally amended or repealed by any state legislature without unanimous consent of all member states.

In sum, an interstate compact governing the management of Great Lakes Water resources not only needs Congressional consent, it also must meet basic requirements of contract law in order to be binding among the states. With such an agreement, however, the Great Lakes states can better ensure that all parties are committed to the common goal established by Annex 2001. ■



*(Perrier Continued from page 1)*

to pump 105 million gallons of water per year and approved pipelines for future expansion.

A firestorm of controversy over the Perrier permit and state tax incentives to bring the corporation into Michigan has made one thing abundantly clear: The state must have a comprehensive water policy to protect the Great Lakes, including aquifers that feed into them. Michigan has no such policy, as the world grows thirstier in this era of expanding global markets and free trade.

The question of whether the Perrier Group has the right to transfer this “Great Lakes” water out of central Michigan for commercial sale nationwide is already the subject of several legal arguments. Given the dire predictions made during the debate, one could believe that Michigan is a desert. Nonetheless, Michigan regulations are focused almost exclusively on water quality and do not fully consider potential damage from high-capacity wells on rivers, lakes and the Great Lakes themselves. The Perrier withdrawal will be just one of more than 10,500 large-scale groundwater wells in Michigan that operate with minimal oversight.

Opponents argue that the planned Perrier withdrawal is a bulk, out-of-basin transfer, and therefore subject to the Water Resources Development Act of 1986 (WRDA '86). WRDA '86 is a strong federal statute that requires unanimous approval of all eight Great Lakes governors for any diversion, complemented by the Great Lakes Charter, which created a notice and consultation process among the Great Lakes Governors for water diversions. However, it has always been a bone of contention whether or not WRDA '86 contemplates groundwater diversions as being governed by the gubernatorial approval requirements. This issue of whether groundwater is subject to these requirements fades in and out of focus.

In 1998 the Michigan governor and attorney general co-signed a letter to the Wisconsin governor, asserting that approval of a diversion from the Crandon Mine site would set a dangerous precedent because Great Lakes waters include tributary groundwater. And again in 2000, the Michigan Governor wrote the Mayor of Webster, NY on the same point regarding a proposed sale of water published in the Wall Street Journal. On June 18, 2001, governors from the basin’s eight states, along with the premiers of Ontario and Quebec, signed Annex 2001—an amendment to the Charter that contemplates groundwater withdrawals. Yet the states, collectively, still need to come to terms with this issue for the fu-

ture.

In addition, opponents argue that transferring water out of the basin, without express authorization from the Michigan Legislature and application of public trust principles, amounts to privatization of public water resources—a “public” good that companies can sell for a profit without concern for the public interest. Proponents argue that the Perrier project is a consumptive water use within the basin that falls below the threshold withdrawal rate to invoke the Great Lakes Charter. As such, it would remain under Michigan's jurisdiction for approval—no different than a company that pumps groundwater to process and manufacture a container of yogurt.

The challenge now is for Michigan and the other governments involved to put regional policy goals into practice at home. Michigan, along with other Great Lakes states, needs to learn more about its water cycles and groundwater systems if it hopes to understand how various users—from golf courses to large-scale agriculture—can affect water availability. The Great Lakes region suffers from a dearth of information about its underground hydrology. Elements of a plan should incorporate specific limits on withdrawals, regular monitoring and reporting to state and local agencies, scientific evidence of long-term sustainability, and a commitment to natural resource enhancement. It won't be cheap, and it won't happen overnight, but it's important that leaders adopt a tough, even-handed approach to all water withdrawals throughout Michigan and the entire basin. ■



University of Toledo College of Law & LIGL  
“National Water Crisis” Conference (Nov. 2001)

From L to R: Dean Phil Closius, Professor Robert Abrams,  
and Congresspersons Marcy Kapter and Bart Stupak



Keweenaw Peninsula, Lake Superior  
Photo Courtesy of EPA

*(Decision Support: Continued from page 1)*

to the development of a decision support system to ensure access to, and use of best available information when considering water withdrawal requests that fall under their purview.

Three primary objectives are associated with the effort: a status assessment of the surface and groundwater resources of the Great Lakes Basin; an inventory of the sources and use of Great Lakes water; and an enhanced understanding of the ecological consequences of such use. A large-scale collaborative approach is being taken to accomplish these objectives, led by a Project Management Team comprised of state, provincial, regional and federal officials with scientific, technical and policy responsibilities. A Stakeholders Advisory Committee contributes additional expertise from both governmental bodies and nongovernmental groups that include citizen environmental organizations, business/ industry interests, other user groups and academia.

The decision support project is guided by seven premises. It will 1) be state and province-driven; 2) use Great Lakes Protection Fund monies to leverage additional support; 3) make full use of existing information; 4) yield products with immediate applicability; 5) focus on characterizing existing data and information; 6) provide a strong foundation for follow-up work; and 7) be institutionalized, at some level, to provide state and provincial clients with reliable, long-term access to project outcomes.

The Great Lakes Commission is well into the second and final year of the project, and a number of interim products have been, or will soon be, released. For example:

- A comprehensive, computerized water use data base provides an analysis of 1998 water use in the eight Great Lakes states and two Canadian provinces on the basis of lake basin, jurisdiction and water use category. (Data for 1999 and 2000 is now being gathered.)
- A descriptive inventory and analysis of water management and conservation programs in Basin jurisdictions has been

prepared.

- A comprehensive review and analysis of the literature- both peer reviewed and "grey" literature- has been completed, yielding detailed findings on issues such as cumulative impacts of water withdrawal; ecological thresholds; indicators for impact assessment; and frameworks for impact assessment.
- A manual on computer models for water withdrawal impact assessment has been prepared, featuring the identification of 69 models in multiple categories, with detailed analyses of 33 models that characterize their relevance to impact assessment, data requirements, ease of use, and other factors.
- The proceedings of an "experts' workshop" conducted last November has been published, featuring a list of "essential questions" that must be asked to assess the ecological impacts of a given water withdrawal, both on a local and system wide basis.

Complementing these activities- all of which respond to the three primary objectives identified above- are several additional inquiries prompted by Project Management Team deliberations over the course of the project. In order to fully address its charge and support Annex 2001 implementation, the team agreed that three pressing questions required attention: 1) how might the definition of "consumptive use" (and associated coefficients for estimating such use) be refined to better reflect actual usage; 2) what are the components of an environmentally sound and economically feasible water conservation program; and 3) what might the elements of an improvement standard be in the context of decision making under Annex 2001. Resources are presently being directed to each of these questions.

The Great Lakes Commission and its many collaborators are working closely with key state and provincial officials to ensure that all project outcomes are directed at ensuring sound decision making processes under Annex 2001. Over the next several months, the many interim products will be finalized and synthesized into a single report that state and provincial officials can use as a "tool kit" for decision support. The tool kit will include both conventional (i.e., hard copy) and electronic materials that will walk officials through the steps that must be taken to access scientific and technical information that can inform the decision making process.

It is important to note that this effort is properly regarded as an initial step in the development of a decision support system. Its focus is on identifying the

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*(Decision Support: Continued from page 5)*

types of scientific and technical data and information needed to support sound decisions, documenting gaps in data and information needs, and recommending approaches to addressing those gaps. Additional phases of this inquiry will be needed to generate currently unavailable data and information, and apply it to the decision making process.

Interested parties are invited and encouraged to visit the project website, which allows access to all interim projects. The address is [www.glc.org/waterquantity/wrmdss/](http://www.glc.org/waterquantity/wrmdss/) Details are also available by contacting Mike Donahue, President/ CEO or Tom Crane, Program Manager, at 734-665-9135. ■



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Michael Donahue, President/CEO Great Lakes Commission

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*International Water  
Conference*

**November 8, 2002**



LakeLinks Faculty Advisor  
Sandi Zellmer



LIGL Research Fellow  
Suzi Zazycki (2001-2003)

# Taking the Brown out of Brownfields

University of Toledo College of Law

April 25-26, 2002

## Thursday, April 25, 2002

1:00 PM Welcome

### 1:15 PM **The Economic, Social and Biological Impact of Brownfields on Communities: From Blight to Renewal**

Moderator Sandi Zellmer

#### **Economic Impetus and Implications for Surrounding Communities**

B.F. Goodrich: A Before and After Snapshot  
- **Ron Clark**, *Environmental Design Group*  
Development Implications & Opportunities  
- **Todd S. Davis**, *Hemisphere*

#### **Social Effects: Environmental Justice**

- **Alma Lowry**, *Sugar Law Center*

#### **Impacts on Water Quality**

- **David Altwater**, *Ohio EPA Div. of Surface Water*

3:00 PM - Break

3:15 PM - Breakout Sessions

#### **a) Innovations in Remediation**

Overview - **John Hull**, *Hull & Associates*  
Bioremediation: Using Bacteria in Clean-up Efforts  
- **Dr. Daryl Dwyer**, *UT-Earth, Ecology, and Environmental Sciences*  
Risk Assessment & Brownfields Remediation  
- **Dr. Edward Pfau**, *Hull & Associates*

#### **b) Brownfields and Balanced Growth: Land, Water and Environmental Quality**

Urban Developmental Patterns and Brownfields  
- **Tom Bier**, *Cleveland State Center for Urban Affairs*  
Linking Brownfields Redevelopment and Greenfields  
Protection for Balanced Growth  
- **Victoria Pebbles**, *Great Lakes Commission*  
Development & Financing  
- **John McGill**, *Ohio Dept. of Development*

5:00 PM Adjourn

6:00 PM Reception/ Dinner

**Wildwood Metro Park**

**Tim O'Brien**

Vice President—Real Estate, Ford Motor Company

## Friday, April 26, 2002

8:30 AM Continental Breakfast

9:00 AM Welcome for the Day

### 9:15 AM **Recent Brownfields Legislation**

Exemptions from liability for prospective purchasers, contiguous owners & small generators; clean-up standards; brownfields funding; and more

#### **United States 2002 Brownfields Law**

Federal Perspective: Implementation & Policy  
- **Joe Dufficy**, *US EPA Region 5*  
PRP perspective  
- **John Byl**, *Warner, Norcross & Judd*

#### **Canada's Brownfields Laws**

- **Sarah Powell**, *Davies Ward Phillips & Vineberg LLP, Toronto*

#### **State Voluntary Action Legislation and Rulemaking**

- **James Clift**, *Michigan Environmental Council*

10:45 AM - Break

### 11:00 AM **Hot Topics**

Determining liability for bona fide prospective purchasers, innocent landowners & contiguous property owners

#### **Overview**

- **Heidi Robertson**, *Cleveland State School of Law*

#### **Federal perspective**

- **Greg Madden**, *U.S. EPA, Planning and Evaluation Division, Office of Site Remediation Enforcement*

### 11:45 AM **Corporate Ethics and Social Responsibility**

#### **Ethics 2000: Implications for Environmental Attorneys & Their Clients**

- **Susan Martyn**, *Stoeppler Professor of Law and Values, Univ. of Toledo College of Law*

#### **Brownfields: To Sell or Not to Sell—Reviewing Risk and Disclosure Issues**

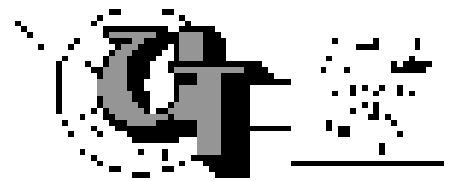
- **Chris Hart**, *General Electric Canada*

12:45 - Adjourn

Cost \$85 (includes dinner). For information, see <http://www.law.utoledo.edu/LIGL/index.htm> or contact Frank Merritt (419) 530-2949.



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**The Legal Institute of the Great Lakes** serves as a forum for the development and exchange of solutions to legal problems of the Great Lakes region. We welcome correspondence.

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