



Legislative Advisory
Prepared by Water Utility Committee
Michigan Section AWWA

Update on Water Withdrawal Legislation:
SB 850, 851, 852, 876 (all tie-barred)
January 28, 2006

Summary

Senate Bills 850 through 852 and Senate Bill 876 (proposed water withdrawal legislation) were passed by the full Senate on December 8, 2005, and now move on to the House for consideration. The House Natural Resources, Great Lakes, Land Use, and the Environment Committee began hearing testimony on the bills at committee meetings in mid-January 2006. At the initial hearings, certain interests have pushed for amendments to the bills to provide additional restrictions and requirements on water withdrawals. House action is expected in a short timeframe. A summary of the bill package as passed by the Senate is included below, along with a discussion of potential impacts to public water supplies (PWS's), limited information on proposed amendments, and additional talking points:

SB 876 (Bill to amend PA 399):

- DEQ required to evaluate environmental impact of proposals for water system changes as submitted with PA 399 permit if either of the following is proposed:
 - New or increased withdrawal of more than 2 mgd for withdrawals from other than a Great Lake or one of the connecting channels.
 - New or increased withdrawal of more than 5 mgd for withdrawals from a Great Lake or one of the connecting channels.
- Withdrawals above the indicated threshold limits must comply with the "standard" of SB 850 (see below) unless it can be shown that there is no other reasonable alternative location, in which case DEQ then sets design and operational restrictions to balance the identified impact against the public benefit of the withdrawal.

SB 850 (Bill to amend PA 451):

- Provides for a public comment period for any regional diversion proposals.
- No new or increased large quantity (100,000 gallons per day average in any 30 day period) withdrawal is allowed that causes an adverse impact to a designated trout stream (adverse impact defined as decreasing the base flow of a stream or decreasing the level of a body of surface water such that the stream or surface water will no longer support characteristic fish populations). After two years, no new or increased large quantity withdrawal is allowed that causes an adverse resource impact.
- A large quantity withdrawal that exists on the date of the enactment of the bill is presumed (rebuttable) not to cause an adverse impact.
- Prior to development of a withdrawal assessment tool (see SB 851), an increase to an existing large quantity withdrawal or a new large quantity water withdrawal is presumed (rebuttable) not to cause an adverse impact if it is more than 1,320 feet from a trout stream, or if the well is at least 150 feet deep.
- A water withdrawal assessment tool is to be developed that will serve as the basis for assessing adverse impacts (See SB 851).
- Permits are required for new or increased withdrawals to supply a common distribution system of over 2 mgd from other than a Great Lake or connecting channel, or over 5 mgd from a Great Lake or connecting channel; however, PWS's are exempt from permitting if holding a permit under PA 399.
- "Standard" for 2 mgd and larger withdrawal proposals from other than a Great Lake or connection channel is DEQ assessment of "no adverse impact" as evidenced by any decrease to flow/level of the source that would affect the source's ability to sustain characteristic fish populations.
- "Standard" for 5 mgd and larger withdrawal proposals from a Great Lake or connecting channel:

- All water withdrawn, less consumptive use, is returned to the source watershed (source watershed defined as the Great lake watershed from which water is withdrawn; if withdrawal is from a direct tributary to a Great Lake, source watershed is the Great lake watershed with "preference" to the direct tributary)
- No significant individual or cumulative adverse resource impact, as evaluated by DEQ.
- Withdrawal in compliance with all local, state, and federal laws and regional interstate and international agreements.
- Proposed use is reasonable and the applicant has considered voluntary generally accepted water management practices (defined as "standards or guidelines for water use that ensure water is used efficiently").

SB 851 (Bill to amend PA 451):

- Identifies additional members to be appointed to the Groundwater Conservation Advisory Council (GWAC), including one member appointed by the Governor to represent municipal water suppliers.
- GWAC to develop a water withdrawal assessment tool for use in evaluating new or increased large quantity withdrawals.

SB 852 (Bill to amend PA 451):

- Registration and annual reporting required for new or increased water withdrawals of 100,000 gpd or greater in any 30 day period; PWS's exempt from permitting if already doing so under PA 399.
- DEQ to encourage each water use sector to develop conservation practices, with reporting of progress to the legislature.

SB 854 (Bill to amend PA 4541):

- Voluntary water use adverse impact mitigation mechanism:
 - Communities are encouraged to establish "community water users committees" that would be charged with facilitating agreement on measures to prevent adverse impacts and to mediate any alleged adverse impacts.
 - DEQ can take action if no such committee is formed, or if committee can not address issues.
 - Petitions alleging adverse impact can be filed by a water withdrawal registrant or permit holder.

Analysis

As passed by the Senate, these bills will affect PWS's that propose to provide new or increased water withdrawal of:

1. Greater than 2 mgd from other than a Great Lake or connecting channel.
2. Greater than 5 mgd from a Great Lake or connecting channel.
3. Within the first two years of the legislation, 100,000 gallons per day or greater in any 30 day period if the withdrawal causes an adverse impact to a trout stream (within first two years of legislation) and from well(s) that is/are within 1,320 feet of a trout stream or if the well(s) is/are less than 150 feet deep.
4. After two years, 100,000 gallons per day or greater in any 30 day period that causes an adverse impact to any water body.

For conditions 1 and 2 above, the determination of compliance with the indicated standard is the responsibility of DEQ; however, it is not clear at this time if DEQ will require additional information with an Act 399 permit application to aid in this determination, especially prior to the development of the proposed water withdrawal assessment tool. For conditions 3 and 4 above, it is not clear what mechanism will be put in place to judge compliance.

Although "standards" are proposed for assessing compliance when applying under PA 399, actual criteria to judge compliance with such standards is likely left to interpretation. For example:

- Water uses must be deemed "reasonable", but it is unclear what criteria may be used to judge "reasonableness".

- Withdrawal applicants must “consider” water management and efficiency practices; what constitutes acceptable “consideration”, and what standards or guidelines might be applicable?
- “Adverse impact” is defined in relation to withdrawals for other than a Great Lake or connecting channel (sustaining characteristic fish populations), but it is unclear if this definition also applies to “adverse resource impact” as applied to withdrawals from Great Lakes or connecting channels.

The addition of language related to large (5 mgd or larger) withdrawals from a Great Lake or connecting channel that calls for the withdrawal to be in compliance with “regional interstate and international agreements” appears to be in reference to the Annex Implementing Agreements that were signed by the Great Lakes Governors and Premiers in early December 2005. The Annex Implementing Agreements include requirements that could have significant impact on PWS’s, including mandatory conservation requirements and restrictions on the ability to expand water supply systems beyond existing capacity defined as the limiting system component.

The development of a water withdrawal impact assessment tool is a daunting, and possibly impossible task, given the myriad variables and unique site-specific conditions associated with any given withdrawal in the State. Therefore, the ability for DEQ to effectively provide regulatory oversight for the proposed legislation, and the likelihood of regulatory certainty, is suspect.

The SB 854 community based process of mediating adverse impacts of withdrawals focuses solely on adverse impacts (i.e., not on conflicts between users?). The usefulness of this proposed process may hinge on its intent: adverse impact is only defined as being related to sustaining characteristic fish populations. In addition, although specific language is included stating that registrants or permittees can file petitions, additional leeway appears to be provided to the DEQ to investigate and/or act on allegations from other sources.

As illustrated by the above analysis, MI-AWWA and the State’s PWS’s can not necessarily be supportive of the bill package. However, given a presumption that water withdrawal legislation is a certainty, these bills are likely to have more limited impact to PWS’s than other alternative bills that have been suggested or proposed.

Amendments Proposed During House Committee Testimony

During initial House Committee meetings on the bills, testimony was given by critics of the bills calling for more stringent requirements, including:

- Give the Legislature the authority to approve or disapprove of projects to divert water for profit outside of the Great Lakes basin (proposed in concern of future erosion at the federal level of the Governor’s existing authority under the Water Resources Development Act).
- Mandatory conservation requirements.
- The setting of an “Adverse Impact Threshold” to include more than just the measurement of impacts on trout streams; suggestions have included impacts on turtles and personal property.

These proposed amendments are similar to those introduced (but rejected) during Senate debate on the bills. The last two above have potential to impact PWS’s, and would likely not be supported by MI-AWWA and PWS’s.

Talking Points

The overall message to legislators should be that impacts to PWS’s need to be carefully considered in these bills, as PWS’s are already a heavily regulated water use sector, and PWS’s serve the important mission of protecting public health and safety, and providing a service to support economic health of our communities. Although we still have concerns with the bill package as passed by the Senate, we understand that this package is a mature set of bills due to the significant amount of time put in by the stakeholders (including MI-AWWA) and the Senate in the development of these bills.

Therefore, we do not support the amendment of the bills as they move to the House, without significant analysis of potential impacts to those affected. MI-AWWA is supportive of water use policy that will prohibit diversion, provide for resolution of conflicts between users, and protect Michigan's water resources and natural environment. However, any such policy must not inhibit the ability of municipal water utilities to effectively provide a safe reliable source of drinking water in support of public health and fire protection, and must enhance the economic health of our State.

Specific points and additional information:

- *PWS's water withdrawals are already highly and effectively regulated.* A document illustrating the exist regulations under which PWS's must operate and are permitted, including compliance with state and federal environmental protection regulations related to wetlands, floodplains, critical dune areas, Great Lakes bottomlands, etc., and examples of permit applications, is available on the Water Utility Committee page of the Section's website (http://www.mi-water.org/miawwa/committees/Water_Utility/Existing%20Water%20Withdrawal%20Regulations%20Governing%20Public%20Water%20Supplies.pdf). This document provides an impressive look at the scope of existing PA 399 water withdrawal facility permitting. There is no overwhelming evidence in the 100 year history of public water supplies in Michigan of significant adverse environmental impacts due to public water supply withdrawals. Existing permit programs and regulations have worked thus far, and public water supplies should not be subject to additional regulations.
- *Michigan water use already ranks well below national averages.* Data from the US Geological Survey indicates that in 2000 (latest year of data availability) 2/3 of the States use more water per capita than Michigan, and 40 of the 50 states use more water per capita for public water supply purposes than Michigan.
- *Conservation practices for PWS's should not be arbitrarily applied on a supply-side basis.* PWS's are supportive of efficient water use practices in their operations when such practices make economic sense, and in the promotion of wise water use by our customers. However, arbitrary mandated conservation can be a detriment to economic growth and can affect PWS's ability to recover capital investments in water infrastructure, in addition to inhibiting the ability to protect public health and provide for fire protection in our communities.
- *PWS's (through MI-AWWA) should be allowed input on the proposed appointment of a GWAC municipal representative.*
- *The signing of the Annex Implementing Agreements should not be cause for drastic change to the currently proposed bills, nor cause for immediate action to align State legislation.* Any attempt to legislate in advance of Annex Implementing Agreement stated timelines has the potential to put Michigan at an economic disadvantage to the other Great Lakes States and Provinces. In addition, significant concerns exist with the final Agreements. Additional information on the final Agreements can be found on the Water Utility Committee page of the Section's website (http://www.mi-water.org/miawwa/committees/Water_Utility/Annex%20ImpAgr%20Review%201105.pdf).

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