



Regulatory Advisory
Prepared by Water Utility Committee
Michigan Section AWWA

**Water Withdrawal Legislation Moves toward
Enactment into Law**

February 22, 2006

Summary

Senate Bills 850, 851, 852, 854, and 8576 (proposed water withdrawal legislation) were passed in an amended form by the full House on February 9, 2006, with the Senate then following suit later that same day. The bill package now goes to the Governor for signing into law. It is expected that the Governor will sign the bills into law on February 28, 2006. A period of regulatory implementation will then ensue. A summary of the bill package as passed by the Legislature is included below, along with a discussion of potential impacts to public water supplies (PWS's), and additional information related to the regulatory implementation process and Michigan Section planned activities:

SB 857 (Bill to amend PA 399):

- DEQ required to evaluate environmental impact of proposals for water system changes for a community supply owned by a political subdivision (political subdivision includes a city, village, township, charter township, county, district, authority or portion or combination thereof), 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.
- Adds requirements for persons engaged in water bottling, including:
 - Any new withdrawal of over 250,000 gallons per day for bottled water must show no adverse resource impact, the use is reasonable, riparian rights will be protected, and activities will be undertaken to address hydrological impacts.
 - Public notice and consultation with local government officials required prior to approval.

SB 850 (Bill to amend PA 451):

- Provides for a public comment period for any regional diversion proposals, and includes language consistent with the Annex Implementing Agreements for legislative review of 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 of connecting channel; however, PWS's are exempt from permitting if holding a permit under PA 399. A voluntary petition process is provided to allow lower capacity withdrawals (down to 100,000 gallons per day) to file for a determination of no adverse impact.

- "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") or environmentally sound and economically feasible water conservation measures.
- Except as authorized by the public health code, a local unit of government may not enact or enforce an ordinance that regulates large quantity water withdrawals.

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.
- Each water use sector must, within 12 months after the effective date of the legislation effective date, begin designing guidelines for generally accepted water management practices or environmentally sound and economically feasible water conservation measures by sector. Within 24 months of the effective date, DEQ must report to the legislature whether or not there are reasonably detailed criteria for assisting a facility in determining whether water is being used in an efficient manner. Guidelines may be adopted by an established statewide professional or trade association representing a sector.

SB 854 (Bill to amend PA 451):

- 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 Legislature, 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 resource 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. Because SB 850 requires that any withdrawal over 100,000 gallons per day cause no adverse resource impact, these lower capacity withdrawal may be left exposed to legal challenge, unless filing for the voluntary determination (at their cost).

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" (other than comparison to common law principles).
- Withdrawal applicants must "consider" water management and efficiency practices; what constitutes acceptable "consideration", and what standards or guidelines might be applicable (subject to development of water use sector guidelines)?

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 Premieres 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 versions of the bills that have now passed the legislature did include additional language and requirements attempting to align the legislation with additional Annex Implementing Agreement language; however, the most concerning of the Annex requirements were not included.

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.

Whereas previous versions of the bill package only required the DEQ to encourage the PWS sector, as well as other water use sectors, to develop water management practices, the final version now requires each water sector to "begin designing guidelines" for such measures within 12 months of enactment. The DEQ will then report progress to the legislature within 24 months of enactment. The progress reporting is referenced specifically to the existence of reasonably detailed criteria to determine if water is being used in an efficient manner. The final bill also specifically references adoption of the guidelines by a "statewide professional of trade association". Although this language still provides only for voluntary conservation, the required development of such measures and DEQ reporting to the legislature appears to set the stage for mandatory requirements in the future. Note that the Annex Implementing Agreements include mandatory conservation requirements.

The SB 854 community based process of mediating adverse impacts of withdrawals focuses solely on adverse resource 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.

Regulatory Implementation Issues

Following the expected enactment into law, a period of regulatory implementation will occur during which the DEQ and other State departments develop rules, guidelines, and policies to implement the new requirements. It will be important for PWS's and MI-AWWA to maintain close contact and communication with the DEQ to provide input on this process. MI-AWWA will be formally requesting representation in this process.

The overall message in such discussions should be that impacts to PWS's need to be carefully considered in how this legislation is implemented, 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. MI-AWWA has adopted a position 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. Therefore, there is much in this bill package that we support. 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.

The following are specific issues of concern and additional information:

- *How will PWS's with new withdrawals falling below the 2 mgd/5mgd threshold of SB 857 (under PA 399) but above the 100,000 gallon per day threshold of SB 850 (under PA 451) be affected?* See the "Analysis" discussion above; permitting requirements apply above the SB 857/PA 399 thresholds, but PA 451/SB850 requires no adverse resource impact down to the lower threshold. Will PWS's be required to file the PA 451/SB850 voluntary petition for determination of no adverse resource impact, or be left exposed to legal challenges?
- *How will the information required for DEQ assessment of potential adverse resource impacts be collected as part of the Act 399 permitting process?* Although the bills reference DEQ responsibility for making the determination, the potential may exist for the DEQ to require applicants to submit information in support of the determination. PWS's already are required to submit a vast amount of information related to existing state and federal environmental protection regulations. 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 information submittal requirements as a result of the pending changes to Act 399.
- *PWS's have a vested interest in efficient water use practices as a good business practice and as a means of minimizing user costs; however, conservation measures 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. 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. PWS's and MI-AWWA should be allowed

a primary role in the development of the referenced guidelines for generally accepted water management practices or environmentally sound and economically feasible water conservation measures for our sector.

- *PWS's (through MI-AWWA) should be allowed input on the proposed appointment of a GWAC municipal representative.* MI-AWWA will also be submitting a formal request to provide input on this appointment.

Future Legislative Issues

Because of the recent signing of the Annex Implementing Agreements by the Great Lakes Governors and Premiers, it is likely that additional pressure will be seen for the legislature to enact even more strict water withdrawal legislation to further align with the Annex language:

- *The signing of the Annex Implementing Agreements should not be cause for drastic change to existing regulations, nor cause for immediate action to further 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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