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BILL ANALYSIS

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Senate Bill 850 (Substitute S-6 as passed by the Senate)  
Senate Bill 851 (Substitute S-4 as passed by the Senate)  
Senate Bill 852 (Substitute S-5 as passed by the Senate)  
Senate Bill 854 (Substitute S-1 as passed by the Senate)  
Senate Bill 857 (Substitute S-1 as passed by the Senate)

Sponsor: Senator Patricia L. Birkholz (S.B. 850)  
Senator Bruce Patterson (S.B. 851)  
Senator Gerald Van Woerkom (S.B. 852)  
Senator Raymond E. Basham (S.B. 854)  
Senator Liz Brater (S.B. 857)

Committee: Natural Resources and Environmental Affairs

Date Completed: 1-31-06

### **RATIONALE**

Although water is plentiful on a regional basis within the Great Lakes Basin, shortages have occurred in specific areas around Michigan. Normally, water withdrawn from an aquifer is replenished through rainfall and snowmelt. In some cases, however, withdrawals by large-quantity users have contributed in part to the drying up of nearby residential and commercial wells and wetlands, which can create public health problems, harm wildlife habitat, and cause extensive property damage.

Increased Great Lakes protection, including the regulation of water that feeds the Great Lakes, has been in the planning stages for a number of years. In 1985, the Great Lakes governors and Canadian premiers signed the Great Lakes Charter, a voluntary agreement through which the Great Lakes states and provinces cooperatively manage the waters of the Great Lakes. In June 2001, the governors and premiers signed the Great Lakes Charter Annex 2001 ("Annex 2001"), which focuses specifically on water withdrawals by outlining the basic principles that state and provincial governments should use when evaluating water withdrawal proposals. Annex 2001 also calls for coordinated standards that guide water use decisions toward the common goal of protecting and enhancing the Great Lakes ecosystem. Both the original charter and

the Annex are nonbinding, and require statutory authority to be implemented.

In December 2005, the Great Lakes governors signed two documents to implement the Annex 2001 agreement and establish the decision-making standard to be used in evaluating proposed water uses: the Great Lakes Basin Sustainable Water Resources Agreement (a good-faith agreement) and the Great Lakes Basin Water Resources Compact (a binding agreement). The Compact specifies that each party will manage and regulate new or increased withdrawals within its jurisdiction in accordance with the Compact. The Compact will not take effect until it has been approved by the legislatures of all of the Great Lakes states and the U.S. Congress. Under Annex 2001, the affected Canadian provinces are to enact similar policies. (The Compact is described below in further detail, under **BACKGROUND.**)

In August 2001, then-Senate Majority Leader Dan DeGrow created the Great Lakes Conservation Task Force, composed of five Republican and three Democratic State Senators. Senator DeGrow charged the Task Force with upholding Article IV, Section 52 of the Michigan Constitution, in which the Legislature is required to: "provide for the protection of the air, water and other natural resources of the state from pollution,

impairment and destruction". Specifically, the Task Force was asked to recommend to the Legislature policy changes that would improve the Great Lakes ecosystem. Chaired by Senator Ken Sikkema, the Task Force conducted eight public hearing throughout the State, and issued its report in January 2002. The Task Force recommended the following two policy changes to address aquifer protection, diversion, and water withdrawals: "1. The Legislature should enact comprehensive water withdrawal laws. This process may require a step-by-step approach, beginning with the enactment of an aquifer protection statute. 2. The Legislature should also promptly enact any implementation laws arising from the consummation of the Annex 2001 process."

As a result of the Task Force report, Annex 2001, and groundwater shortages in specific locations around the State, legislation was enacted several years ago. Public Act 148 of 2003 required the Department of Environmental Quality (DEQ) to prepare a statewide groundwater inventory and map within two years of the Act's effective date; increased water use reporting fees for certain facilities with a capacity to pump over 100,000 gallons per day; extended the reporting requirement to farms with the same capacity; and created the Groundwater Advisory Council to study the sustainability of the State's groundwater use and monitor the implementation of and make recommendations on statutory conformance with Annex 2001. Public Act 177 of 2003 established a resolution process to address groundwater withdrawal disputes between well owners.

Public Acts 148 and 177 of 2003 were considered preliminary steps to regulate withdrawals from Michigan aquifers. Some people believe that the next step in protecting the State's water resources and implementing the provisions of the Great Lakes Charter and amending documents should be the enactment of comprehensive water withdrawal laws, including permit and registration requirements.

## **CONTENT**

**Senate Bill 850 (S-6) would amend Parts 301 (Inland Lakes and Streams) and 327 (Great Lakes Preservation) of the Natural Resources and**

## **Environmental Protection Act (NREPA) to do the following:**

- **Exempt a water withdrawal from the requirement for a permit under Part 301.**
- **Require the Governor to establish a public comment period for any proposal to divert water outside of the Great Lakes basin and notify the Legislature of receipt of the proposal.**
- **Add Section 32721 to prohibit a person from making a large quantity withdrawal that caused an adverse resource impact to a designated trout stream; or, beginning two years after the bill took effect, from making a large quantity withdrawal that caused any adverse resource impact.**
- **Establish a rebuttable presumption that a new or increased large quantity withdrawal meeting specified criteria would not cause an adverse resource impact, until the enactment of a water withdrawal assessment tool (as proposed by Senate Bill 851).**
- **Add Section 32723 to require certain users to obtain a water withdrawal permit, and prescribe a \$2,000 application fee for five years after the bill took effect.**
- **Prescribe a maximum civil fine of \$5,000 per day for a knowing violation of proposed Section 32721 or 32723.**
- **Increase the annual water use reporting fee from \$100 to \$200 until the water withdrawal assessment tool became effective.**
- **Allow a person who intended to make a new or increased large quantity withdrawal for which a permit was not required to petition the DEQ for a determination that the withdrawal would not cause an adverse resource impact; and prescribe a \$5,000 petition fee.**
- **Require the DEQ to submit a biennial report to the Legislature identifying the Department's costs in reviewing petitions and permit applications, as well as revenue generated from permit and reporting fees.**
- **Prohibit a local unit of government from enacting or enforcing an ordinance that regulated an adverse resource impact caused by a large quantity withdrawal.**

- Exempt withdrawals related to hazardous waste management, solid waste management, environmental remediation, and leaking underground storage tanks from the requirements of Part 327.
- Repeal Section 32711, which exempts from Part 327 a public water supply system that is required to report water withdrawals under the Safe Drinking Water Act.
- Repeal Section 32712, which specifies that the DEQ is not authorized to mandate any permit or regulate water withdrawals covered under Part 327.

**Senate Bill 851 (S-4)** would amend Part 328 (Aquifer Protection) of NREPA to do the following:

- Transfer the Groundwater Conservation Advisory Council from the DEQ to the Department of Natural Resources (DNR).
- Eliminate a provision disbanding the Council.
- Expand the Council's duties.
- Require the appointment of additional members to the Council to assist it in carrying out the additional duties.
- Require the Council to appoint a technical advisory committee of individuals with specific technical and legal expertise relevant to the Council's responsibilities.
- Require the Council, in consultation with the DEQ, the DNR, the Michigan Department of Agriculture (MDA), and the technical advisory committee to design a water withdrawal assessment tool to be used by a person proposing a new or increased large quantity withdrawal, to assist in determining whether the withdrawal would cause an adverse resource impact.
- Require the Council, the specified departments, and the advisory committee to determine an appropriate timetable for periodic changes to the tool, and submit to the Legislature by July 1, 2007, a report on its findings and recommendations.
- Require the Legislature to provide for the adoption of the tool.

**Senate Bill 852 (S-5)** would amend Part 327 to do the following:

- Extend the requirements for registering with the DEQ to the owner of real property who had the capacity on that property to make a large quantity withdrawal from the waters of this State.
- Require the DEQ to aggregate information received by the State related to large quantity withdrawal capacities within and large quantity withdrawals in the State.
- Require the DEQ, in conjunction with the MDA, to encourage each sector of water withdrawal users to develop generally accepted water management practices, identify sectors that had developed those practices, and report that information to the Legislature.

**Senate Bill 854 (S-1)** would amend Part 327 to do the following:

- Encourage large-quantity users in a watershed to form a water users committee through which the DEQ could facilitate the resolution of a situation in which a withdrawal caused an adverse resource impact.
- Allow the DEQ to order a permit holder immediately to restrict a withdrawal that presented the substantial and imminent threat of an adverse resource impact.
- Allow a registrant or permit holder to submit a petition to the DEQ Director alleging that adverse resource impacts were occurring or were likely to occur from a withdrawal.

**Senate Bill 857 (S-1)** would amend the Safe Drinking Water Act to require the DEQ to evaluate the impact of a proposed waterworks system that met certain criteria; and require the DEQ to reject the plans and specifications for the system if it determined it would not meet specified standards, subject to certain exceptions.

The bills are tie-barred to each other. They are described below in further detail.

## **Senate Bill 850 (S-6)**

### **Part 301 Permit Exemption for Water Withdrawals**

Part 301 prohibits a person from engaging in certain activities without a permit from the DEQ. The activities include creating, enlarging, or diminishing an inland lake or stream; dredging or filling bottomland; constructing, enlarging, removing, or placing a structure on bottomland; erecting, maintaining, or operating a marina; structurally interfering with the natural flow of an inland lake or stream; constructing, dredging, or enlarging a waterway for ultimate connection with an existing inland lake or stream; and connecting any waterway with an existing inland lake or stream for any purpose.

Section 30103 specifies that a permit is not required for the following:

- A seasonal structure placed on bottomland to facilitate private noncommercial recreational use of the water if it does not unreasonably interfere with the use of the water by others entitled to use it, or interfere with water flow.
- Reasonable sanding of beaches to the existing water's edge by a riparian owner.
- Construction or maintenance of a private agricultural drain regardless of outlet.
- A waste collection or treatment facility that is approved for construction by the Department of Community Health or ordered or approved by the DEQ.
- Construction and maintenance of minor drainage structures and facilities that are identified by a rule promulgated by the DEQ.
- Maintenance and improvement of all drains legally established or constructed before January 1, 1973, pursuant to the Drain Code, except those legally established drains constituting mainstream portions of certain natural watercourses identified in DEQ rules.
- Projects constructed under the Federal Watershed Protection and Flood Prevention Act.
- Construction and maintenance of privately owned cooling or storage ponds used in connection with a public utility except at the interface with public waters.
- Maintenance of a structure constructed under a permit issued under Part 301 and

identified by DEQ rules, if the maintenance is in place and in kind with no design or materials modification.

The bill would include a water withdrawal among items not subject to the permit requirement under Part 301. Under the bill, "water withdrawal" would mean the removal of water from its source for any purpose.

### **Large Quantity Withdrawals**

The bill would add Section 32721 to NREPA to prohibit a person from making a large quantity withdrawal under Part 327 that caused an adverse resource impact to a designated trout stream.

"Large quantity withdrawal" would mean one or more cumulative total withdrawals averaging more than 100,000 gallons of water per day in any consecutive 30-day period that supply a common distribution system. "Adverse resource impact" would mean decreasing the flow of a stream by part of the index flow, or decreasing the level of a body of surface water, so that its ability to support characteristic fish populations is functionally impaired. "Index flow" would mean the 50% exceedance flow for the lowest flow month of the flow regime for the applicable stream reach as averaged over the period of record or extrapolated from analyses of the United States Geological Survey stream flow gauges in Michigan.

"Designated trout stream" would mean a trout stream identified on the document entitled, "Designated Trout Streams for the State of Michigan", as issued under order of the DNR Director on October 10, 2003.

Beginning two years after the bill's effective date, a person could not make a large quantity withdrawal from the waters of the State that caused any adverse resource impact. ("Waters of the State" would mean groundwater, lakes, rivers, streams, and all other watercourses and waters, including the Great Lakes, within the State's territorial boundaries.)

The bill specifies that proposed Section 32721 would not apply to the baseline capacity of a large quantity withdrawal that existed on the bill's effective date.

Until the water withdrawal assessment tool became effective upon legislative enactment

pursuant to the recommendations of the Groundwater Conservation Advisory Council (under Senate Bill 851 (S-4)), the bill would establish a rebuttable presumption that a new large quantity withdrawal, or an increase to an existing large quantity withdrawal, would not cause an adverse resource impact in violation of proposed Section 32721 if the withdrawal were located more than 1,320 feet from the banks of the stream, or the well were at least 150 feet deep.

Upon the legislative enactment of the water withdrawal assessment tool, the bill would establish a rebuttable presumption that a large quantity withdrawal would not cause an adverse resource impact if the tool determined that the withdrawal was not likely to do so.

The bill specifies that a rebuttable presumption could be rebutted by a preponderance of the evidence that a new or increased large quantity withdrawal from the waters of the State had caused or was likely to cause an adverse resource impact.

#### Water Withdrawal Permit

The bill would add Section 32723 to the Act to require the following people, except as provided in the bill, to obtain a water withdrawal permit before making the withdrawal:

- A person who developed withdrawal capacity to make a new withdrawal of more than 2.0 million gallons of water per day from the State's waters, other than the Great Lakes and their connecting waterways, to supply a common distribution system.
- A person who developed increased withdrawal capacity beyond baseline capacity of more than 2.0 million gallons of water per day from the State's waters, other than the Great Lakes and their connecting waterways, to supply a common distribution system.
- A person who developed withdrawal capacity to make a new withdrawal of more than 5.0 million gallons of water per day from the Great Lakes and their connecting waterways to supply a common distribution system.
- A person who developed increased withdrawal capacity beyond baseline capacity of more than 5.0 million gallons per day from the Great Lakes and their

connecting waterways to supply a common distribution system.

("Great Lakes and their connecting waterways" would mean Lakes Superior, Michigan, Huron, Erie, and Ontario and their connecting waterways, including the St. Marys River, Lake St. Clair, the St. Clair River, and the Detroit River. The bill specifies that, for the purposes of proposed Section 32723, Lakes Huron and Michigan would be considered a single Great Lake.)

A person could apply for a permit by submitting to the DEQ an application containing the information described in Section 32706. Additionally, until five years after the bill took effect, the applicant would have to submit a \$2,000 application fee. The DEQ would have to provide public notice of all the applications it received.

(Section 32706 requires each registration under Part 327 to consist of a statement and supporting documentation that includes the following:

- The place and source of the proposed or existing withdrawal.
- The location of any discharge or return flow.
- The location and nature of the proposed or existing water user.
- The actual or estimated average annual and monthly volumes and rate of withdrawal.
- The actual or estimated average annual and monthly volumes and rates of consumptive use from the withdrawal.)

An application would be considered to be administratively complete effective 30 days after the DEQ received it, unless the Department notified the applicant in writing during the 30-day period that the application was not administratively complete or that the required application fee had not been paid. If the DEQ determined that the application was not administratively complete, the notice would have to specify the information necessary to make it complete. If the DEQ notified the applicant, the 30-day period would be tolled until the applicant submitted to the DEQ the specified information or fee.

The DEQ would have to decide whether to grant or deny a permit within 120 days after receiving an administratively complete application. The DEQ would have to issue a

permit for new or increased withdrawal capacity from waters other than the Great Lakes and their connecting waterways if it determined that the withdrawal would not cause an adverse resource impact. The DEQ would have to issue a permit for new or increased withdrawal capacity from the Great Lakes or their connecting waterways if all of the following conditions were met:

- All water withdrawn, less any consumptive use, was returned, either naturally or after use, to the source watershed.
- The withdrawal would be implemented so as to ensure that the proposal would result in no individual or cumulative adverse resource impacts.
- The withdrawal would be implemented so as to ensure that it was in compliance with all applicable local, State, and Federal laws, as well as all legally binding regional interstate and international agreements, including the Boundary Waters Treaty of 1909 (described below, under **BACKGROUND**).
- The proposed use would be reasonable under common law principles of water law in Michigan.
- The applicant had considered voluntary generally accepted water management practices.

(Under Part 327, "consumptive use" means that portion of water withdrawn or withheld from the Great Lakes basin and assumed to be lost or otherwise not returned to the basin due to evaporation, incorporation into products, or other processes. The bill would define "generally accepted water management practices" as standards or guidelines for water use that ensure water is used efficiently. The bill would define "source watershed" as the watershed from which a withdrawal originates. If water were withdrawn directly from a Great Lake, the source watershed would be considered to be the watershed of that Great Lake and its connecting waterways. If water were withdrawn from the watershed of a stream that was a direct tributary to a Great Lake, then the source watershed would be considered to be the watershed of that Great Lake, with a preference for returning water to the direct tributary stream watershed from which it was withdrawn.)

The bill would require the DEQ to evaluate cumulative adverse resource impacts based upon available information it gathered.

The bill specifies that a permit issued under Part 31 (Water Resources Protection) pursuant to 33 USC 1326(b) would be considered sufficient to demonstrate that there would not be an adverse resource impact, and would satisfy the conditions for a permit under proposed Section 32723. Upon receiving a permit application and evidence that the applicant held such a Part 31 permit, the DEQ would have to grant the applicant a water withdrawal permit under the bill.

(Under 33 USC 1326(b), any standard established under 33 USC 1311 and 1316 and applicable to a point source must require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. Section 1311 pertains to effluent limitations, and Section 1316 pertains to national standards of performance for the control of the discharge of pollutants.)

The DEQ could revoke a permit if it determined following a hearing, based upon clear and convincing scientific evidence, that the withdrawal was causing an adverse resource impact.

A person who was aggrieved by the DEQ's determination related to a permit could file a sworn petition with the Department setting forth the grounds and reasons for the complaint and requesting a contested case hearing under the Administrative Procedures Act (APA). The DEQ could reject as untimely a petition filed more than 60 days after action on the permit. The DEQ would have to issue a final decision on a petition within six months after receiving it. A determination, action, or inaction by the DEQ following a contested case hearing would be subject to judicial review as provided in the APA.

A community supply that held a permit under the Safe Drinking Water Act, and a person who made seasonal withdrawals of an average of up to 2.0 million gallons per day over a 90-day period, would not be required to obtain a permit under proposed Section 32723.

#### Civil Fine

Under Part 327, the DEQ may request the Attorney General to commence a civil action

for appropriate relief, including a permanent or temporary injunction, for a violation of Part 327 or a rule promulgated under it. In addition to any other relief granted, the court may impose a maximum civil fine of \$1,000. Under the bill, a person who knowingly violated proposed Section 32721 or 32723 or the terms of a permit issued under Section 32723 would be responsible for the payment of a maximum civil fine of \$5,000 per day of violation.

#### Large Quantity Withdrawal not Subject to Permit

Under the bill, a person who intended to make a new or increased large quantity withdrawal for which a permit was not required under proposed Section 32723 could petition the DEQ for a determination that the withdrawal would not or was not likely to cause an adverse resource impact. The petition would have to be submitted on a form provided by the DEQ. The person would have to submit with the petition a report containing the information described in Section 32706 and an evaluation of existing environmental, hydrological, and hydrogeological conditions and the predicted effects of the intended withdrawal that provided a reasonable basis for the determination to be made. Additionally, the petitioner would have to include a \$5,000 fee.

A petition would be considered administratively complete effective 30 days after the DEQ received it, unless the DEQ notified the petitioner in writing during the 30-day period that the petition was not administratively complete or that the required fee had not been paid. If the DEQ notified the petitioner, the 30-day period would be tolled until the petitioner submitted to the DEQ the appropriate information or fee.

Within 120 days after receiving an administratively complete petition, the DEQ would have to issue to the petitioner a written determination that either affirmed that the proposed withdrawal would not cause and was not likely to cause an adverse resource impact; or specified the reasons that an affirmative determination could not be made, and stated how the petitioner could meet the criteria to obtain an affirmative determination.

A withdrawal with regard to which an affirmative determination was issued would be presumed not to create an adverse resource impact. The presumption could be rebutted by a preponderance of evidence that the withdrawal had caused or was likely to cause an adverse resource impact.

#### Annual Report

Part 327 requires a person who owns a registered industrial or processing facility, irrigation facility, or farm to file an annual report with the DEQ and remit a \$100 water use reporting fee to be credited to the Water Use Protection Fund. Under the bill, this requirement would apply to a person who was required to register new or increased water withdrawal capacity (as Senate Bill 852 (S-5) would require) or who held a water withdrawal permit under proposed Section 32723.

Currently, if the source of the water withdrawn is groundwater, the report must include the location of the well or wells in latitude and longitude, with the accuracy of the reported location data to within 15 feet. The bill would increase this distance to 25 feet.

The report also currently must include the static water level of the aquifer or aquifers if the source of the water withdrawn is groundwater. Under the bill, this information would have to be included only if practicable.

Additionally, at the discretion of the registrant or permit holder, the report could include the baseline capacity of the withdrawal and, if applicable, a description of the system capacity. If the registrant or permit holder chose to report the baseline capacity, that information would have to be included in the next report the registrant or permit holder submitted after the bill's effective date. Information reported under this provision would have to be reported to the DEQ on only one occasion.

("Baseline capacity" would mean either the highest annual amount of water withdrawn as reported under Part 327 for calendar year 2002, 2003, 2004, or 2005; or the following applicable withdrawal capacity as reported to the DEQ or the MDA, as appropriate, by the person making the withdrawal: 1) for a community supply, the total designed withdrawal capacity for the supply under the

Safe Drinking Water Act on the bill's effective date; 2) unless otherwise reported under this provision, for a quarry or mine that held a discharge permit under Part 31 that included a discharge volume, the discharge volume stated in the permit on the bill's effective date; or 3) the system capacity used to make a withdrawal on the bill's effective date, if the annual report included the system capacity and a description of it.)

Information provided to the DEQ related to the system capacity used to make a withdrawal on the bill's effective date would be exempt from disclosure under the Freedom of Information Act (FOIA), and could not be disclosed unless the DEQ determined that the withdrawal was causing an adverse resource impact.

At the registrant's or permit holder's discretion, the report also could include the amount of water returned to the source watershed.

The bill would increase the water use reporting fee from \$100 to \$200 until a water withdrawal tool (as proposed by Senate Bill 851 (S-4)) became effective upon legislative enactment. The \$100 fee would be restored when the assessment tool took effect.

The bill would retain a provision exempting a farm owner who reports by submitting a water conservation plan from the reporting requirement, as well as the reporting fee.

#### DEQ Report

The bill would require the DEQ to submit to the Senate and House Appropriations Committees, as well as the standing committees with jurisdiction primarily related to natural resources and the environment, a biennial report that identified the Department's costs in reviewing petitions and permit applications. Additionally, the report would have to detail the revenue generated from petitions, permit applications, and reporting fees.

#### Exemption from Part 327 Requirements

The bill would exempt withdrawals under Parts 111 (Hazardous Waste Management), 115 (Solid Waste Management), 201 (Environmental Remediation), and 213

(Leaking Underground Storage Tanks) from the requirements of Part 327.

#### Common Law Water Rights

The bill specifies that Part 327 could not be construed as affecting or intending to affect or in any way alter or interfere with common law water rights or the applicability of other laws providing for the protection of natural resources or the environment.

#### Diversions Outside the Great Lakes Basin

The bill would require the Governor to establish a public comment period with regard to a proposal subject to 42 USC 1962d-20 to divert water from the Great Lakes or from a tributary of the Great Lakes outside of the Great Lakes Basin; and to notify the standing committees of the Legislature with jurisdiction over issues primarily pertaining to natural resources and the environment of his or her receipt of the proposal. The Governor could waive the comment period if he or she determined that it was necessary to take immediate action to provide humanitarian relief or fire-fighting capabilities.

(Section 1962d-20 of Title 42 of the U.S. Code prohibits any water from being diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes Basin unless the diversion or export is approved by the governor of each of the Great Lakes states (i.e., Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin). Additionally, that section prohibits a Federal agency from undertaking any study, or spending any Federal funds to contract for any study, of the feasibility of diverting water from any portion of the Great Lakes or a tributary within the United States, unless the study or expenditure is approved by the governor of each Great Lakes state.)

#### Legislative Finding

The bill states a legislative finding that, "The waters of the Great Lakes basin are capable of concurrently serving multiple uses, and such multiple uses of water resources for municipal, public, industrial, commercial, agriculture, mining, navigation, energy development and production, recreation, water quality maintenance, and the



maintenance of fish and wildlife habitat and a balanced ecosystem and other purposes are encouraged, recognizing that such uses are interdependent and must be balanced.”

(Under Part 327 “water of the Great Lakes basin” means the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including groundwater, within the Great Lakes basin. “Great Lakes basin” means the watershed of the Great Lakes and the St. Lawrence River.)

#### Constitutional Authority

The bill provides, “The legislature has the authority under sections 51 and 52 of article IV of the state constitution of 1963 to regulate the withdrawal and uses of the waters of the state, including both surface water and groundwater, to promote the public health, safety, and welfare and to protect the natural resources of the state from pollution, impairment, and destruction, subject to constitutional protections against unreasonable or arbitrary governmental action and the taking of property without just compensation. This authority extends to all waters within the territorial boundaries of the state.”

(Article IV, Section 51 provides that the public health and general welfare of the people of the State are matters of primary public concern, and directs the Legislature to pass suitable laws for the protection and promotion of the public health. Section 52 provides that the conservation and development of the State’s natural resources are of paramount public concern in the interest of the health, safety, and general welfare of the people, and requires the Legislature to provide for the protection of the air, water, and other natural resources from pollution, impairment, and destruction.)

#### **Senate Bill 851 (S-4)**

Public Act 148 of 2003 created the Groundwater Conservation Advisory Council within the DEQ. The bill would transfer the Council to the DNR.

The bill would eliminate a requirement that the Council study whether the State should provide additional oversight of groundwater withdrawals. The Council still would be required to study the sustainability of the

State’s groundwater use; monitor Annex 2001 implementation efforts and make recommendations on Michigan’s statutory conformance with it; and study the implementation of and the results from the groundwater dispute resolution program. The bill also would require the Council to do the following:

- Develop criteria and indicators to evaluate the sustainability of the State’s groundwater use.
- Design and make recommendations regarding a water withdrawal assessment tool.
- Study and make recommendations as to whether the State should consider as part of its groundwater conservation programs proposals to mitigate adverse impacts to the State’s waters or water-dependent natural resources that could result from groundwater withdrawals.

By February 8, 2006, the Council would have to submit to the Legislature a report, approved by a majority of the voting members, on the Council’s findings and recommendations related to the duties described above as of that date. By July 1, 2007, the Council would have to report its findings and recommendations not previously reported.

The Council would have to appoint a technical advisory committee of individuals with specific technical and legal expertise relevant to the Council’s responsibilities.

In consultation with the DEQ, the DNR, the MDA, and the technical advisory committee, the Council would have to design a water withdrawal assessment tool that could be used to protect and conserve the State’s waters and water-dependent natural resources. The assessment tool would have to be designed to be used by a person proposing a new or increased large quantity withdrawal to assist in determining whether the proposed withdrawal could cause an adverse impact to the State’s waters or water-dependent natural resources. Additionally, in consultation with the specified departments and the technical advisory committee, the Council would have to make factually-based recommendations for the policy-based parameters and variables of the assessment tool, and recommend an appropriate timetable for periodic updates or changes to the tool or its parameters or variables. By July 1, 2007,

the Council would have to submit to the Legislature a report, approved by a majority of the voting members, on its findings and recommendations.

The bill would require the Legislature to provide for the adoption of the tool, including its conceptual framework, the policy-based parameters or variables of and the timetable for updating the tool and its data, and details for the tool's use.

Currently, the Council consists of the following members:

- Three individuals appointed by the Senate Majority Leader representing business and manufacturing interests, utilities, and conservation organizations.
- Three individuals appointed by the Speaker of the House of Representatives representing well drilling contractors, local units of government, and agricultural interests.
- Four individuals appointed by the DEQ Director representing nonagriculture irrigators, the aggregate industry, environmental organizations, and the general public.
- Three individuals representing the DEQ, the MDA, and the DNR.

The individuals representing the DEQ, MDA, and DNR presently are nonvoting members who serve as information resources to the Council. The bill would delete that provision.

To assist the Council in carrying out its additional responsibilities under the bill, in addition to the members serving on the bill's effective date, the bill would require the following members to be appointed within 30 days after it took effect:

- One individual appointed by the Senate Majority Leader representing a statewide agricultural organization.
- One individual appointed by the Speaker of the House who was a registered well driller with knowledge and expertise in hydrogeology.
- Two individuals appointed by the Governor representing municipal water suppliers and a statewide conservation organization.

The additional members could not take office before February 15, 2006. The Council could continue to carry out its

responsibilities under Part 328 in the absence of the additional members.

### **Senate Bill 852 (S-5)**

#### Registration

Currently, a person who makes a withdrawal under Part 327 must register with the DEQ if, during the calendar year in which the withdrawal occurs, the person owns an industrial or processing facility, an irrigation facility, or a farm, with the capacity to withdraw an average of more than 100,000 gallons of water per day in any consecutive 30-day period from the waters of the Great Lakes Basin.

The bill would delete this language. Instead, except as otherwise provided, the owner of real property who had the capacity on that property to make a large quantity withdrawal from the State's waters would have to register with the DEQ.

A person who was developing new or increased withdrawal capacity on the bill's effective date, or a person who was not required to register under Part 327 before the bill's effective date, could register after beginning the withdrawal, but within 90 days after the bill took effect.

The following people would not be required to register:

- A person who had previously registered for that property under Part 327, unless that registrant developed new or increased withdrawal capacity on the property of an additional 100,000 gallons per day from the waters of the State.
- A community supply that held a permit under the Safe Drinking Water Act.
- A person holding a water withdrawal permit under Section 32723 (as Senate Bill 850 (S-6) would add).
- The owner of a noncommercial well on residential property.

The bill specifies that the registration requirement would not limit a property owner's ability to withdraw water from a test well before registration if the well were constructed in association with the development of new or increased capacity and used only to evaluate the development of that capacity.

A registration by a farm owner for a withdrawal intended for an agricultural purpose, including irrigation for an agricultural purpose, would have to be submitted to the MDA, rather than the DEQ.

A registration would have to be submitted on a form provided by the DEQ or the MDA, as appropriate.

The DEQ would have to aggregate information the State received related to large quantity withdrawal capacities within the State and reported large quantity withdrawals in the State.

#### Water Conservation Plan

Under Part 327, a farm owner who makes a withdrawal for an agricultural purpose may register the farm address and report the water use by submitting to the MDA an annual water use conservation plan, instead of registering as described above. The water conservation plan must include all of the following information:

- The amount and rate of water withdrawn on an annual and monthly basis in either gallons or acre inches.
- The type of crop irrigated, if applicable.
- The acreage of each irrigated crop, if applicable.
- The source or sources of the water supply.
- If the water withdrawn is not used entirely for irrigation, the use or uses of the withdrawn water.
- Applicable water conservation practices and an implementation plan for them.
- If the source of the withdrawn water is groundwater, the static water level of the aquifer or aquifers.

Under the bill, if the source of the water withdrawn were groundwater, the conservation plan also would have to include the location of the well or wells in latitude and longitude, with the accuracy of the reported location data to within 25 feet. In addition, the plan would have to include the static water level of the aquifer or aquifers only if practicable.

At the registrant's discretion, the plan could include the baseline capacity of the withdrawal based upon system capacity and a description of the system capacity. If the registrant chose to report this information, it would have to be included in the next report

the registrant submitted after the bill took effect. This information would have to be reported to the MDA only on one occasion.

The bill would delete the requirement that the farm owner register the farm address.

The bill also would delete a requirement that the MDA use the water use conservation plan information to determine an estimate of water use and consumptive use data for each township in the State and forward the data to the DEQ for inclusion in the statewide groundwater inventory and map prepared under Section 32802. (That section requires the DEQ to collect and compile groundwater data into a statewide inventory and map, and update it as new information becomes available.) Instead, the following information received by the MDA in the water conservation plan would have to be forwarded for inclusion in the inventory and map:

- The amount and rate of water withdrawn on an annual and monthly basis.
- The source or sources of the water supply.
- The location of the well or wells in latitude and longitude, if the sources of the water were groundwater.

The bill specifies that information regarding the amount and rate of water withdrawn, the location of the wells, and the baseline capacity would be exempt from disclosure under FOIA. The DEQ, the MDA, and the DNR could not disclose that information unless the DEQ determined that the withdrawal was causing an adverse resource impact.

#### Water Use Conservation Practices

The bill would require the DEQ, in conjunction with the MDA, to encourage each sector of water withdrawal users to develop generally accepted water management practices, such as the practices under the Michigan Agriculture Environmental Assurance Program (described below, under **BACKGROUND**). The DEQ would have to identify those sectors of users that had generally accepted practices and report that information to the standing committees of the Senate and House of Representatives with primary jurisdiction over natural resources and the environment.

### **Senate Bill 854 (S-1)**

The bill would encourage all people making large quantity withdrawals within a watershed to establish a water users committee to evaluate the status of current water resources, water use, and trends in water use within the watershed, and to assist in long-term water resources planning. A committee could be composed of all registrants, water withdrawal permit holders, and local government officials within the watershed.

If the DEQ determined by reasonably scientifically based evidence that adverse resource impacts were occurring or were likely to occur from a large quantity withdrawal, it would have to notify the committee in the watershed or convene a meeting of all registrants and water withdrawal permit holders within the watershed and attempt to facilitate an agreement on voluntary measures that would prevent adverse resource impacts. The DEQ could propose a solution that it believed would resolve the situation equitably and prevent adverse resource impacts if the registrants and permit holders could not voluntarily agree to preventative measures within 30 days. The recommended solution would not be binding on any of the parties. If the recommended solution or other agreement were not implemented, the DEQ could take action as otherwise authorized under Part 327.

The DEQ Director, without a prior hearing, could order a permit holder to restrict immediately a withdrawal if he or she determined that there was a substantial and imminent threat that the withdrawal was causing or was likely to cause an adverse resource impact. The order would have to specify the date on which the withdrawal had to be restricted and the date on which it could be resumed. An order could remain in force and effect for up to 30 days, and could be renewed for an additional 30 days if the Director determined by clear and convincing scientific evidence that conditions continued to pose a substantial and imminent threat of an adverse resource impact. The order would have to notify the permit holder that the person could request a contested case hearing under the APA within 10 business days, unless the permit holder requested a later date.

A registrant or permit holder could submit to the DEQ Director a petition alleging that adverse resource impacts were occurring or were likely to occur from a water withdrawal. The DEQ Director would be required either to investigate the petition or, if the withdrawals were from an agricultural well, to forward it to the MDA Director. The petition would have to be in writing and include all of the information the applicable Director requested.

The DEQ Director could order a person who submitted more than two unverified petitions within one year to pay for the full costs of investigating any subsequent unverified petition. "Unverified petition" would mean a petition in response to which the Director determined that there was not reasonable evidence to suspect adverse resource impacts.

### **Senate Bill 857 (S-1)**

Under the Safe Drinking Water Act, upon receiving the plans and specifications for a proposed waterworks system, the DEQ must evaluate the adequacy of the proposed system to protect the public health by supplying water meeting State drinking water standards. The bill also would require the DEQ to evaluate the impact of the proposed system as described below, if applicable. Currently, the DEQ may reject plans and specifications for a system that it determines will not satisfactorily provide for the protection of public health. Under the bill, the DEQ also could reject plans and specifications if they would not meet the standards described below, if applicable.

The DEQ could evaluate the impact of a proposed waterworks system for a community supply that would do any of the following:

- Provide new total designed withdrawal capacity of more than 2.0 million gallons of water per day from a source of water other than the Great Lakes and their connecting waterways.
- Provide an increased total designed withdrawal capacity of more than 2.0 million gallons of water per day from a source of water other than the Great Lakes and their connecting waterways beyond the system's total designed withdrawal capacity.
- Provide new total designed withdrawal capacity of more than 5.0 million gallons

per day from the Great Lakes and their connecting waterways.

- Provide an increased total designed withdrawal capacity of more than 5.0 million gallons per day from the Great Lakes and their connecting waterways beyond the system's total designed withdrawal capacity.

The DEQ would have to reject the plans and specifications if it determined that the system would not meet the applicable standard provided in Section 32723(5) or (6) (which Senate Bill 850 (S-6) would add), unless both of the following conditions were met:

- The DEQ determined that there was no feasible and prudent alternative location for the withdrawal.
- The DEQ included in the approval conditions related to depth, pumping capacity, rate of flow, and ultimate use that ensured that the environmental impact of the withdrawal would be balanced by its public benefit related to public health, safety, and welfare.

(Proposed Section 32723(5) would require the DEQ to issue a permit to a person who developed new or increased capacity to withdraw more than 2.0 million gallons per day from waters other than the Great Lakes and their connecting waterways to supply a common distribution system if it determined that the withdrawal would not cause an adverse resource impact. Subsection (6) would require the DEQ to issue a permit to a person who developed new or increased capacity to withdraw 5.0 million gallons per day from the Great Lakes and their connecting waterways to supply a common distribution system if specified conditions were met, as listed in the description of Senate Bill 850 (S-6), above.)

MCL 324.30103 et al. (S.B. 850)  
324.32803 (S.B. 852)  
324.32705 et al. (S.B. 852)  
Proposed MCL 324.32725 (S.B. 854)  
MCL 325.1004 (S.B. 857)

## **BACKGROUND**

### Great Lakes Basin Water Resources Compact

The following is a brief overview of the Great Lakes-St. Lawrence River Basin Water Resources Compact. As noted above, the Compact must be approved by the

legislatures of all of the Great Lakes states and the U.S. Congress to take effect. If approved, the binding Compact will implement Annex 2001.

The Compact creates the Great Lakes-St. Lawrence River Basin Water Resources Council, and requires it to promote and aid the coordination of the activities and programs of the parties concerned with water resources management in the Great Lakes-St. Lawrence River Basin. The Council may conduct research and investigations, institute court actions, own property, and enter into contracts.

Within five years after its effective date, the Compact requires any person who withdraws an average of at least 100,000 gallons of water per day over a 30-day period, or diverts any amount of water from the Basin, to register the withdrawal or diversion by a date set by the Council, unless the person previously has registered in accordance with an existing state program.

Also, within five years of the Compact's effective date, each party must create a program for the management and regulation of new or increased withdrawals and consumptive uses by adopting and implementing measures consistent with the decision-making standard (described below). Each party may determine the scope and thresholds of its program, including which new or increased withdrawals and consumptive uses will be subject to it. A party that fails to set threshold levels that comply with the Compact within 10 years after it takes effect must apply a threshold level for management and regulation of all new or increased withdrawals of an average of at least 100,000 gallons per day over a 90-day period.

Beginning five years after the Compact takes effect, an originating party (the party in whose jurisdiction an application is made) must give the other parties detailed and timely notice, as well as an opportunity for comment, on any proposal for a new or increased consumptive use of an average of at least 5.0 million gallons per day over a 90-day period.

Proposals subject to management and regulation of new or increased withdrawals and consumptive uses will be considered to meet the decision-making standard and may

be approved as appropriate only if the following criteria are met:

- All water withdrawn will be returned to the source watershed, less an allowance for consumptive use.
- The withdrawal or consumptive use will be implemented to ensure that the proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters, the water-dependent natural resources, or the applicable watershed.
- The withdrawal or consumptive use will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures.
- The withdrawal or consumptive use will be implemented so as to ensure its compliance with all applicable municipal, state, and Federal laws and regional interstate and international agreements, including the Boundary Waters Treaty of 1909.
- The proposed use is reasonable, based upon specified factors.

Additionally, within two years after the Compact's effective date, each party must develop its own water conservation and efficiency goals and objectives, and develop and implement a conservation and efficiency program, either voluntary or mandatory, within its jurisdiction.

#### Boundary Waters Treaty of 1909

The Boundary Waters Treaty is an agreement into which the United States and the United Kingdom entered to enumerate the rights, obligations, and interests of the United States and Canada regarding the use of boundary waters, and to establish a mechanism to resolve and prevent disputes. The Treaty established the International Joint Commission (IJC) and prescribes its powers and duties. Additionally, the document states that the parties agree to the following:

- The navigation of all navigable boundary waters must remain free and open for the purposes of commerce.
- Each party reserves to itself or to the affected state or provincial governments the exclusive jurisdiction and control over the use and diversion of all waters on its respective side of the boundary that naturally would flow over the boundary or into boundary waters.

- A party may not make a use, obstruction, or diversion of boundary waters on its side that would affect the natural level or flow of boundary waters on the other side without approval from the IJC.
- A party may not permit on its side of the boundary the construction or maintenance of any remedial or protective works or any dams or other obstructions in boundary waters that would raise the natural level of waters on the other side of the boundary without IJC approval.
- Boundary waters may not be polluted on either side to the injury of health or property on the other.

#### Michigan Agriculture Environmental Assurance Program (MAEAP)

The MAEAP is a partnership between agriculture producers, commodity groups, government agencies, and conservation and environmental groups. The Program aims to facilitate compliance with State and Federal environmental regulations and assist farm owners in voluntarily preventing or minimizing agricultural pollution risks.

The MAEAP consists of three systems: Livestock, Farmstead, and Cropping. Program participants must successfully complete three phases for each system. The purpose of the Education phase is to raise awareness of practices that may prevent or reduce legal and environmental risks on farms. The On-Farm Assessment phase focuses on identifying environmental risks and developing and implementing a farm-specific plan to address them. Once MAEAP participants have successfully completed the first two phases, they may request Third-Party Verification from the MDA. To maintain their verification, participants must request an MDA visit every three years.

#### **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

#### **Supporting Argument**

Water is a defining characteristic of Michigan, the only state located entirely within the Great Lakes Basin. Lakes, rivers, and streams are fundamental to the State's economic vitality. Water-based recreation and tourism are the lifeblood of many

communities, and many of the State's industries, including manufacturing and agriculture, rely on an abundant supply of water. Although water is plentiful within the Great Lakes Basin as a whole, groundwater shortages at least partly attributable to large-scale withdrawals have occurred in specific areas. In order to preserve one of the State's most valuable resources for future generations, it is critical that sustainable use policies are enacted. This package of legislation would implement reasonable, science-based regulations that would apply fairly to all large-quantity water users and create certainty for businesses making decisions about location, expansion, and equipment investment.

Senate Bills 850 (S-6) and 852 (S-5) would enact withdrawal permit and registration requirements, provisions necessary for the implementation of the Great Lakes Charter.

Senate Bill 851 (S-4) would ensure that the Groundwater Advisory Council enacted under Public Act 148 of 2003 remained in existence. Under Public Act 148, the Council must submit a report to the Legislature on its findings and recommendations within two and a half years after the Act's effective date (August 8, 2003), and disband six months after that. Under Senate Bill 851 (S-4), in addition to retaining most of its current responsibilities, the Council would be involved with the development of the assessment tool and provide further examination of and make recommendations regarding the State's water use policies.

The assessment tool under Senate Bill 851 (S-4) would provide independent standards by which large users easily could determine the impact of their withdrawals and voluntarily adjust practices. According to Senate Natural Resources and Environmental Affairs Committee testimony, the assessment tool ultimately would consist of an online map of the State on which a user simply could click to establish whether a withdrawal would cause an adverse resource impact.

Senate Bill 854 (S-1) would establish a process through which the DEQ, large-quantity users, and local government officials could address disputes regarding water withdrawals, and provide for the temporary restriction of a withdrawal if necessary. The community-based process should result in timely and equitable

resolution based on voluntary measures, and potentially could reduce the need for stronger enforcement action by the DEQ or costly, time-consuming litigation.

Imposing excessive regulations on large-scale water users could have a negative impact on jobs and communities. The bills would strike the appropriate balance between conservation and concern for the environment, protection of riparian rights, and the ability of commercial interests to continue using water to sustain the State's economic prosperity.

**Response:** Although the bills represent an improvement over current law, other measures should be included. For example, the legislation should contain stronger protections against diversions outside of the Great Lakes Basin. The Federal Water Resources Development Act requires the approval of each governor of each Great Lakes state for diversions outside the Basin, but there is no guarantee that this requirement will remain in place in the future. Additional protections, such as a requirement for legislative approval of diversions, should be implemented at the State level.

Additionally, the criteria by which adverse resource impacts would be measured under Senate Bill 850 (S-6) should be expanded beyond the health of characteristic fish populations. Large withdrawals can cause environmental damage that might affect other biological communities before the body of water's ability to support the fish population is "functionally impaired".

Senate Bill 850 (S-6) also falls short in that, until two years after it took effect, it would prohibit adverse resource impacts to trout streams only. The bill's protections should apply immediately to all lakes and streams without discrimination. Even though trout streams and trout populations provide an effective barometer by which to measure the health of the environment, all bodies of water should be included from the time the bill took effect.

Further, although the bills would require the Council to study water management and conservation practices and would require the DEQ and MDA to encourage users to engage in those practices, they should require each sector to develop industry-specific practices, and businesses to certify that they were complying with those measures. The

demonstration of stewardship by businesses in the State would help strengthen Michigan's opposition to diversions by other states.

### **Opposing Argument**

Under Senate Bill 852 (S-5), information received by the DEQ about wells, including their location, would be exempt from FOIA. That Act requires such information to be made available.

**Response:** This information should be kept confidential due to concerns about vandalism and contamination. In the interest of public safety, it is important that those seeking to do harm do not have access to information that would enable them to dump poisonous chemicals down farmers' wells and threaten food supplies.

Legislative Analyst: Julie Koval

### **FISCAL IMPACT**

#### **Senate Bills 850 (S-6), 851 (S-4), and 852 (S-5)**

The bills would result in an indeterminate cost to the State. Senate Bill 850 (S-6) would establish a \$2,000 application fee for a permit to withdraw more than an average of 2.0 million gallons per day. According to the DEQ, there are five facilities currently withdrawing an amount that would necessitate a permit under the bill, which would result in revenue of \$10,000. The permit fee would sunset five years after the bill's effective date.

Senate Bill 850 (S-6) would increase the water use reporting fee from \$100 to \$200. Doubling the fee would double the annual revenue. Currently, approximately 1,030 facilities pay this fee for annual revenue of \$103,000. The increased fee would result in annual revenue of \$206,000. This would last until a water withdrawal assessment tool was established in law; then, the fee would return to \$100 and the annual revenue would decrease as well.

Senate Bill 850 (S-6) would allow a person to petition the DEQ for a determination that the person's large quantity withdrawal would not have an adverse resource impact. A fee of \$5,000 would have to be submitted with the petition to cover the DEQ's costs for investigating and issuing a determination. It is unknown how many petitions would be

filed or how much revenue would be collected from this fee.

Senate Bill 850 (S-6) would add a civil penalty of up to \$5,000 per day of violation for large quantity withdrawals that caused an adverse resource impact to a designated trout stream or for failure to have a permit or for violation of the terms of a permit for water withdrawals over 2.0 million gallons per day. Fine revenue would depend on the number and length of the violations of the new provisions. Civil fines are deposited into the General Fund.

Senate Bill 851 (S-4) would result in expenses for development of a water withdrawal assessment tool. (Senate Bill 242 (S-2), as passed by the Senate, would appropriate \$500,000 from the Clean Michigan Initiative-Clean Water Fund for this purpose. The Clean Water Fund was funded with \$90.0 million from the Clean Michigan Initiative bond. At the close of FY 2004-05, the unencumbered balance of this Fund was about \$970,000.)

Also, under Senate Bill 851 (S-4), the Department of Natural Resources would incur administrative expenses for assistance it would provide to the Groundwater Conservation Advisory Council. The support would come from existing resources.

Under Senate Bill 852 (S-5), the DEQ would incur slight administrative expenses related to the reporting of water use conservation plans developed by water withdrawal users.

#### **Senate Bill 854 (S-1)**

The bill would increase administrative expenses by an indeterminate amount for DEQ activities, including the convening of meetings of the water users committees, enforcement of orders issued by the Director, and investigation of petitions alleging adverse resource impacts.

#### **Senate Bill 857 (S-1)**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Jessica Runnels

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.