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BILL ANALYSIS



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Senate Bills 850, 851, and 852 (as introduced 10-27-05)
Sponsor: Senator Patricia L. Birkholz (S.B. 850)
Senator Bruce Patterson (S.B. 851)
Senator Gerald Van Woerkom (S.B. 852)
Committee: Natural Resources and Environmental Affairs

Date Completed: 11-7-05

CONTENT

Senate Bill 850 would amend Part 301 (Inland Lakes and Streams) and Part 327 (Great Lakes Preservation) of the Natural Resources and Environmental Protection Act to do the following:

- Exempt a water withdrawal from the requirement for a permit under Part 301.
- Add Section 32721 to prohibit a person from making a large quantity withdrawal that caused an adverse resource impact to a designated trout stream.
- Add Section 32723 to require a person to obtain a water withdrawal permit for withdrawals of more than 2.0 million gallons per day over 90 consecutive days, and prescribe a \$1,000 permit application fee.
- Prescribe a maximum civil fine of \$5,000 per day for a knowing violation of Section 32721 or 32723.
- Repeal Sections 32721 and 32723 on December 31, 2007.
- 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 a public water supply system that is required to report water withdrawals under the Safe Drinking Water Act from the requirements of Part 327.
- 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 would amend Part 328 (Aquifer Protection) of the Act to do the following:

- Transfer the Groundwater Conservation Advisory Council from the DEQ to the Department of Natural Resources (DNR).
- Require the appointment of additional members to the Council.
- Require the Council to design a water withdrawal assessment tool, determine an appropriate timetable for periodic changes to the tool, and submit to the Legislature by July 1, 2007, recommendations on its determinations.

Senate Bill 852 would amend Part 327 of the Act to extend the requirements for registering with the DEQ to the owner of real property who developed new or increased water withdrawal capacity, as specified in the bill; and require the DEQ, in conjunction with the Michigan Department of Agriculture, to encourage each sector of water withdrawal users to develop conservation practices, identify sectors that had developed conservation practices, and report that information to the Legislature.

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

Senate Bill 850

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 the bill, "water withdrawal" would mean the removal of water from its source for any purpose.

The bill would repeal Section 30103 on December 31, 2007.

Large Quantity Withdrawals

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

Under the bill, "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 base flow of a stream, or decreasing the level of a body of surface water, so that it no longer would support characteristic fish populations. "Base flow" would mean the 50% exceedance flow for the lowest flow month of the flow regime for the applicable stream reach as averaged over a five-year period or extrapolated by the flow estimates for 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 Director of the Department of Natural Resources (DNR) on October 10, 2003.

The prohibition under the bill would not apply to a large quantity withdrawal from a confined aquifer. The bill would define "confined aquifer" as an aquifer overlain by geologic material that has a low hydraulic conductivity and impedes or prevents vertical groundwater movement.

A large quantity withdrawal that existed on the bill's effective date would be presumed

not to create an adverse resource impact to a designated trout stream. A new large quantity withdrawal, or an increase to an existing large quantity withdrawal, would be presumed not to create an adverse resource impact to a designated trout stream 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 development of a water withdrawal assessment tool (as Senate Bill 851 would require), a large quantity withdrawal would be presumed not to create an adverse resource impact if the tool determined that the withdrawal was not likely to create an adverse resource impact.

Water Withdrawal Permit

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

- A person who intended to make a new withdrawal to supply a common distribution system averaging more than 2.0 million gallons of water per day in any consecutive 90-days period from the State's waters.
- A person who intended to increase a withdrawal that existed on the bill's effective date to supply a common distribution system by an average of more than 2.0 million gallons of water per day in any consecutive 90-day period.

A person could apply for a permit by submitting to the DEQ an administratively complete application containing the information described in Section 32706. Additionally, the applicant would have to submit a \$1,000 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 14 days after the DEQ received it, unless the Department notified the applicant in writing during the 14-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 14-day period would be tolled until the applicant submitted to the DEQ the appropriate information or fee.

The DEQ would have to decide whether to grant or deny a permit within 60 days after receiving an administratively complete application. The DEQ would have to issue a permit if it determined that the withdrawal was from a confined aquifer or would not cause an adverse resource impact.

The DEQ could modify the terms of or revoke a permit if it determined, 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.

Civil Fine

Under Part 301, 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 301 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 proposed Section 32723 would be responsible for the payment of a maximum civil fine of \$5,000 per day of violation.

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.

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 water of the state, including both surface water and groundwater, to promote the public health, safety, and welfare and to protect the state's natural resources 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

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 require the Council 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.

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 technical advisory committee, the Council would have to make a factually based determination of the parameters and variables of the assessment tool that required a policy or other risk-based judgment decision in order to develop the tool. The Council also would have to determine an appropriate timetable for periodic updates or changes to the assessment tool or its parameters or variables. By July 1, 2007, the Council would have to submit to the Legislature for

review and approval specific recommendations on its determinations.

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 Michigan Department of Agriculture (MDA), and the DNR, as nonvoting members who serve as information resources to the Council.

To assist the Council in carrying out its responsibilities related to the development of the assessment tool, 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 Council could continue to carry out its responsibilities under Part 328 in the absence of the additional members the bill would require to be appointed.

Senate Bill 852

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, beginning 90 days after the bill's effective date, except as otherwise provided, the owner of real property who developed new or increased withdrawal capacity of an average of an additional 100,000 gallons of water per day in any consecutive 30-day period from the State's waters would have to register with the DEQ. The registration would have to be submitted on a form provided by the DEQ before a withdrawal using the new or increased capacity was begun. The bill specifies that this provision would not limit a property owner's ability to withdraw water from a test well constructed in association with the development of new or increased capacity.

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

A person holding a permit (as Senate Bill 850 would require) for a new or increased withdrawal of more than 2.0 million gallons would not have to register under Senate Bill 852.

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.

- If the source of the withdrawn water is groundwater, the static water level of the aquifer or aquifers.
- Applicable water conservation practices and an implementation plan for them.

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.

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 in either gallons or acre inches.
- The source or sources of the water supply.
- The location of the well or wells in latitude and longitude, with the accuracy of the data to within 25 feet, if the sources of the water were groundwater.

The bill specifies that information regarding the amount and rate of water withdrawn and the location of the wells would be exempt from disclosure under the Freedom of Information Act. The DEQ, the MDA, and the DNR could not disclose that information unless the DNR determined that the withdrawal was causing 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 or who held a water withdrawal permit (as Senate Bill 850 would require).

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.

A farm owner who reports by submitting a water conservation plan is exempt from this reporting requirement, as well as the reporting fee. Under the bill, the owner of a noncommercial well on residential property also would be exempt from the reporting requirement. A public water supply system that reported withdrawals under the Safe Drinking Water Act would be exempt from both the reporting requirement and the fee.

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 water use conservation practices. The DEQ would have to identify those sectors of users that had developed conservation 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.

MCL 324.30103 et al. (S.B. 850)
 324.32803 (S.B. 851)
 324.32705 et al. (S.B. 852)

Legislative Analyst: Julie Koval

FISCAL IMPACT

The bills would result in an indeterminate cost to the State. Senate Bill 850 would establish a \$1,000 application fee for a permit to withdraw more than an average of 2.0 million gallons per day over a consecutive 90-day period. 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 \$5,000. This

amount likely would be insufficient to cover the costs to review, issue, and enforce a permit, so additional resources would be required.

Senate Bill 850 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.

Under Senate Bill 851, 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, the DEQ would incur slight administrative expenses related to the reporting of water use conservation plans developed by water withdrawal users.

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.