

MUCC's Position on Michigan's Groundwater Protection Legislation

Background : Michigan is a water-rich state. Our waters give us both a significant natural resource and an economic advantage. For hundreds of years, people have withdrawn from surface and ground water without understanding the impact that withdrawals will have on Michigan's fishery or other water-dependent natural resources. Fortunately, even with business, industry, power companies, farmers and others withdrawing from ground and surface waters, we still have a world-class fishery with naturally reproducing brook trout, brown trout, and salmon -- a true rarity in this country.

The groundwater protection bills (bills) currently before the legislature are the end result of more than **six years** of work by the legislature and various water stakeholders, including MUCC. These workgroups produced over ten new public acts related to water use regulation and are built upon the knowledge and experience gained in prior years.

Current regulation over groundwater withdrawals : The current law which regulates the removal of ground or surface water provides minimal protection to fish and other water-dependent natural resources and is enforceable only through court decisions. Common law regulates ground and surface water by protecting the navigability of streams and allows for courts to determine the *reasonable use* of ground and surface waters in disputes between water users.

The current law provides that a person may not withdrawal groundwater from a lake, river or stream if it will cause an *adverse resource impact*. An *adverse resource impact* is defined as "decreasing the flow of the stream by part of the average flow such that the stream's ability to support characteristic fish populations is functionally impaired" (The law does not provide a standard for measuring functional impairment). The law assumes that a withdrawal does **not** cause an adverse resource impact if the location of the well is 1.4 miles from a lake, river or stream or if the well depth is greater than 150 feet. In order to prevent withdrawals, the state must prove beyond a *preponderance of evidence* that the withdrawal is causing an adverse resource impact. If the well is less than 150 feet or less than 1.4 miles from a lake, river or stream, than the person making the withdrawal must prove that they are not causing an adverse resource impact if they are challenged in court.

All withdrawals must be registered if they are either new, are in excess of 100,000 gallons a day, or if they constitute an increase of more than 100,000 gpd over baseline capacity. Baseline capacity was required to be reported to the Michigan Department of Environmental Quality (MDEQ) by April 1, 2007.

Any person who makes a new or increased withdrawal over two million gpd from the waters of the state (except the Great Lakes) must obtain a water

withdrawal permit prior to making the withdrawal. Any person who makes a new or increased withdrawal of more than five million gallons a day from the *Great Lakes* is also required to obtain a permit prior to making the withdrawal.

Proposed Water Protection Legislation : The Senate and House Bills are **identical** in most areas, including, but certainly not limited to the following:

1. The Senate and House bills establish a regulatory standard which provides that nobody may create an *adverse resource impact* from the removal of groundwater. These bills are **identical** in what they determine is an *adverse resource impact* on cold small rivers, transitional streams, transitional small rivers, transitional rivers, cool streams, cool small rivers, cool rivers, warm streams, warm small rivers and warm rivers.
2. The Senate and House Bills prohibit more than 25% of the index flow of a stream, or river to be removed, whether or not an *adverse resource impact* is occurring. Again, this is roughly twice as protective as the Council's recommendation based strictly on fish data: it is sensitive to uncertainties in the fish models and also to other social values of rivers and is therefore quite protective. The index flow of the stream is the *aggregate flow* for a water body on its lowest flow month. It is **not** 25% of the flow of a river .
3. Both bills do not allow opportunities to "mitigate" an adverse resource impact. A person can take measures, however, to increase the flow to a stream to ensure their withdrawal does not cause an adverse resource impact.
4. To determine whether such an impact will occur, all new or expanded uses must submit information through the *groundwater assessment tool* . This tool aggregates water flows from 8,000 river segments across the state and applies models that predict the impact a removal of the flow would have on characteristic and thriving fish populations. These models have been peer-reviewed and are also accepted for fish management purposes.
5. Both bills require a "site-specific" review to determine when a withdrawal falls into zone where water supplies are identified by the water assessment tool as being more limited or when it shows that the water withdrawal could cause an adverse resource impact. And for trout streams, this tool is especially sensitive - withdrawals enter this zone more easily, providing extra protection.
6. Both bills provide even more protections for the most thermally-sensitive trout streams -the "cold-transitional" category. A small withdrawal of groundwater can change the nature of the stream. Recognizing that these are the most sensitive streams needing the most protection, both the House and Senate set very strict limits on the amount of flow that can be taken from a stream or river.
7. Each chamber has passed a bill that would adopt the Great Lakes -St. Lawrence River Basin Water Resources Compact.

Major differences between the House and Senate Bills :

- Evaluation of the *Water Assessment Tool* : The House removed language from the Senate bill that would have created an effective 1 year evaluation period for the water use assessment process. House Bill 5065 requires MDEQ to utilize the water use assessment process and the adverse resource impact definitions prior to having the water use assessment tool available for public review. ***MUCC believes that the public should have an opportunity to review the water assessment tool. It is a major change in state policy and should have a period for testing before taking effect.***

- Adverse Resource Impact of Cold Water Streams: The Senate defines *adverse resource impact* for cold water streams at a reduction in thriving fish population of 3%. The House defines adverse resource impact at 1%. ***MUCC would support moving to 1% adverse resource impact for cold water streams. MUCC also recognizes that scientific research shows a negligible difference on the impact of a fishery between the House and Senate legislation. This recommendation seems surprising but a detailed, long-term study conducted by Michigan Department of Natural Resources (MDNR) at the Hunt Creek Research Station ([available here <<<< http://www.michigandnr.com/PUBLICATIONS/PDFS/ifr/ifrlibra/research/abstracts/2068abst!ract.pdf >>>>](http://www.michigandnr.com/PUBLICATIONS/PDFS/ifr/ifrlibra/research/abstracts/2068abst!ract.pdf)) showed that removal of up to 90% of the summer flow could not demonstrate an impact to the trout population. However, Michigan's cold water rivers are like to other in the world and deserve additional protection.***

- *Permits*: The House bills include provisions that would require a large quantity withdrawal within zone "C" to apply for a permit if the use would reduce the flow of a cold small river by 14%, a cool river or warm river system by 20% or more of its index flow (these reductions could still be permitted up to 25% of the index flow of the river). The Senate bills require permit applications at 2 mgd. ***The House is requiring permits for withdrawals that are not causing an adverse resource impact. Recognizing the limited resources, both financial and staff, MUCC questions whether these permits add any value when both bills prohibit a person from causing an adverse resource impact from their water withdrawal.***

- *Aggregate Exemption*: The House bills exempt aggregate companies from requirements of the bill. ***MUCC does not support this provision. We do not believe that any business sector should be able to create an adverse resource impact on Michigan's fishery.***

- *Public Trust: The House requires the MDEQ to apply the public trust doctrine to the groundwater withdrawal. The public trust doctrine is found in common law and very generally protects the public's rights to access the shore for fishing and navigability purposes. Michigan courts have not extended the public trust doctrine to groundwater. Doing so would have implications for property rights which are better determined by the courts. **MUCC does not support the current language in the House bill. MUCC would support MDEQ for considering whether the proposed withdrawal impairs or diminishes the public trust in connected surface waters.***

MUCC's position : *MUCC believes in the collaborative policy process represented by the work of the Council and numerous Senate workgroups, and supports the recommendations that have emerged from these informed and earnest processes. We believe that these recommendations represent a social balance that includes strong consideration of natural resource values and uses. Because of our participation, the Senate bills have strong natural resource safeguards that are supported by sound science . It is not about "opening the spigot" or creating a "dead fish" policy; it is about creating a resource-focused policy that recognizes that water is also critical to our public health, our economy and our quality of life. MUCC believes that the Senate Bills protect the state's fishery resources and are significantly better than the status quo. While MUCC supports many of the provisions of the House package of bills, we have! not taken a position on the House package of bills, partially because the House has had no similar collaborative workgroup sessions.*