

Summary of the Revised Water Management Act Regulations – 310 CMR 36.00
Massachusetts Department of Environmental Protection
October 2014

The Massachusetts Department of Environmental Protection (MassDEP) has finalized amendments to the Water Management Act (WMA) regulations (310 CMR 36.00). As described in more detail below, these regulations will implement a framework developed during an extensive Executive Office of Energy and Environmental Affairs (EEA) stakeholder process known as the Sustainable Water Management Initiative (SWMI). The 90 day public comment period for the proposed changes to these regulations began on April 11, 2014 and ended on July 10, 2014, and included six public hearings. In addition to oral testimony at the hearings, MassDEP received over 160 written comments. The final regulations reflect a carefully developed balance to protect the health of our waterbodies while meeting the needs of communities for water.

The current regulations establish enforceable standards, criteria, and procedures (including permit procedures) to implement the Water Management Act (M.G.L. c. 21G). The regulations comprehensively manage water withdrawals throughout the Commonwealth to ensure an appropriate balance among competing water needs and the preservation of water resources. Water withdrawers typically requiring a WMA permit include: public water suppliers, 18-hole golf courses, cranberry growers, ski areas, sand and gravel facilities, fish hatcheries, and agricultural and industrial users. WMA permitting requirements apply to approximately 190 public water supply systems and an additional 140 other kinds of permittees.

The revised WMA regulations and the companion WMA Permit Guidance build upon the current regulations and incorporate a new methodology for calculating “safe yield” and the concept of “streamflow criteria” as developed through the multiyear SWMI stakeholder process¹. SWMI was started in 2010 by EEA for the purpose of incorporating the best available science into the management of the Commonwealth’s water resources. SWMI involved a wide range of stakeholders and support from MassDEP, the Department of Fish and Game, and the Department of Conservation and Recreation. This regulatory package also clarifies WMA permitting requirements and processes.

The following SWMI-related elements are incorporated into the revised WMA regulations:

- Safe Yield: A new methodology for calculating the amount of water that can be withdrawn from a basin. (310 CMR 36.13)
- Baseline: The volume of water, based on 2003 through 2005 water withdrawals, above which a permittee will be required to mitigate the impacts of increasing withdrawal volumes. (CMR 310 36.03)
- Streamflow Criteria: Criteria that were developed to guide permit conditions to protect the natural resources and ecology of waterways by specifying flow alteration percentages and corresponding mitigation requirements for water withdrawals from impaired subbasins. (310 CMR 36.14, 36.19, 36.20 and 36.22)
- Coldwater Fish Resources: Waters that support a population of coldwater aquatic life. (310 CMR 36.03). All applicants seeking groundwater withdrawals that will impact coldwater fish resources will be required to evaluate options for minimizing the impact by shifting withdrawals to their other withdrawal points, if any, and optimizing the timing of withdrawals. (310 CMR 36.21(3) and (4), 36.22 and 36.28(3)(f))

¹ <http://www.mass.gov/eea/waste-mgmt-recycling/water-resources/preserving-water-resources/sustainable-water-management/framework/sustainable-water-management-framework-summary.html>

- Permit Review Categories: Permit review categories, or “tiers,” determine the requirements for obtaining a WMA permit. (310 CMR 36.19)
- Minimization Requirements: All applicants seeking to withdraw water from groundwater depleted subbasins (August net groundwater depletion of 25% or more) will be required to minimize the impact of their withdrawal to the extent feasible through a combination of conservation, optimizing the timing of withdrawals, and returning water to the subbasin. (310 CMR 36.21, 36.22 and 36.28(3)(f))
- Mitigation Requirements: Applicants seeking an increased withdrawal over their baseline (permit tiers 2 and 3) will be required to develop and implement mitigation plans to offset the impacts of their increased withdrawal, to the extent feasible. (310 36.21, 36.22 and 36.28(3)(f))

In addition to these key SWMI elements, the final regulations include the following changes:

- provisions pertaining only to the first round of registrations that are now outdated (formerly 310 CMR 36.07) are deleted;
- substantive provisions of existing policies that exempt certain withdrawals from regulation (310 CMR 36.05) are adopted in regulation;
- provisions for modification or transfer of registrations (310 CMR 36.08 and 36.09) are updated;
- regulations for water supply emergencies (310 CMR 36.40 through 36.42) are incorporated;
- substantive provisions of an existing policy on replacement wells (310 CMR 36.03, 36.08(1)) are adopted in regulation; and
- the basin expiration dates (310 CMR 36.17) are updated.

No major changes were made to the final regulations in response to public comment. The following minor changes were made:

- 36.02 – Language in the definition of “feasible” has been changed from “suitable for” to “capable of”.
- 36.05(3) – Substantive provisions of the existing policy that exempts certain withdrawals have been clarified: “salinity” has been replaced with “specific conductivity” a more accurate metric. Clarification is also provided by the addition of “due to the influence of the ocean.”
- 36.20(2)(a) and (b) – Dates by which data refinements must be submitted to MassDEP in the Buzzards Bay, Concord, Ten Mile and Deerfield Basins are corrected.
- 36.21(2)(c) and 36.26(1)(j) – Added “or where the Commission has not established such standards, other industry-specific best-management practices appropriate to the permitted water use” to incorporate conservation requirements tailored for non-public water supply water uses.
- 36.22(5)(a)(2) – Added “taking into consideration the ability of the applicant to meet demand” to ensure impacts to reservoir firm yield and demonstrated water needs are considered.
- 36.37(1) – The draft regulations incorrectly cited 310 CMR 1.01(7)(i) as the authority allowing a person to intervene in an adjudicatory proceeding. The citation has been corrected to 310 CMR 1.01(7).
- 36.40 – The severability section has been moved to 36.44 and the sections formerly numbered 36.41 - 36.44 have been renumbered to 36.40 – 36.43.

This final regulation package represents a compromise and balance between the interests of environmental advocates and water withdrawers. The Response to Comments includes more detailed information about the concerns raised and MassDEP’s response.

BACKGROUND OF SWMI, REGULATORY DEVELOPMENT AND PUBLIC PROCESS

SWMI included a robust public process and stakeholder involvement including 15 Advisory Committee meetings, 18 Technical Subcommittee meetings, and numerous workgroup meetings. In addition to the formal SWMI Advisory and Technical Committee meetings, MassDEP consulted on many occasions with representatives from the Massachusetts Municipal Association (MMA), the National Association of Industrial and Office Properties (NAIOP), the Massachusetts Rivers Alliance, the Massachusetts Water Works Association (MWWA), and other interested groups upon request.

After the SWMI Framework was released in November 2012, EEA agencies participated in numerous informal stakeholder discussions on key elements of SWMI and the proposed regulatory revisions and gave formal presentations for MMA, MWWA, MCLE – Environmental and Land Use Law Annual Conference, the Irrigation Association of New England, Massachusetts Associations of Conservation Commissions, Citizen Planner Training Collaborative, MA Environmental Business Council, New England Interstate Water Pollution Control Commission, American Council of Engineering Companies – MA Division, New England Water and Environment Association, American Water Resources Association Conference, the Massachusetts Nursery and Landscape Association, the Massachusetts Flower Growers’ Association, and numerous state legislators to discuss both the proposed regulations and their anticipated impact on specific communities.

In order to further inform the agencies and water suppliers on how the SWMI Framework would be implemented, pilot projects in Amherst, Danvers-Middleton, Dedham-Westwood and Shrewsbury were set up to test the on-the-ground impacts of the proposed SWMI Framework and incorporate lessons learned. These pilots influenced MassDEP’s thinking as the new regulations were developed. In addition, lessons learned from the pilots are helping to provide suppliers with additional information about how minimization and mitigation efforts will be included as part of the permitting process. The pilot projects were guided by a Steering Committee that included three public water supply representatives and three environmental advocate representatives.

Regulatory Promulgation. The draft regulations were published and the 90 day public comment period for the proposed changes to these regulations began on April 11, 2014 ending on July 10, 2014, and included six public hearings. In addition to oral testimony at the hearings, MassDEP received over 160 written comments. Those comments and MassDEP’s responses have been compiled in the Response to Comments Document. The final regulations reflect a carefully developed balance to protect the health of our waterbodies while meeting the needs of communities for water.

All supporting documents can be found on Mass DEP’s website at:

<http://www.mass.gov/eea/agencies/massdep/water/regulations/wma-swmi-reg-reform-documents.html>