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## REGIONAL WATER AND SEWER AUTHORITY

### Senate Bill 195 (Substitute H-2)

Sponsor: Sen. Laura M. Toy

### First Analysis (3-12-03)

House Committee: Government

Operations

Senate Committee: Local, Urban and  
State Affairs

### ***THE APPARENT PROBLEM:***

The Detroit Water and Sewerage Department prides itself on a long, rich history dating back to the city's attempts to ensure protection against fires, like the Great Fire of June 11, 1805, and to provide residents with a clean, reliable alternative to groundwater. Around the turn of the twentieth century three communities outside of the city limits—River Rouge, Hamtramck, and Ecorse—joined the city's water system. Since that time, many other communities have entered into contracts for wholesale water supply and sewerage service provided by the DWSD. Today the DWSD is the country's third largest water and sewer utility, providing wholesale water service to nearly one million people in the city and three million people in 126 communities throughout other parts of Wayne County and Oakland, Macomb, St. Clair, Lapeer, Genesee, Washtenaw and Monroe Counties. In addition, the DWSD provides wholesale sewerage service to two million people scattered throughout 77 neighboring communities as well as the nearly one million residents of Detroit. In a January 2003 fact sheet, the DWSD notes that suburban customers receive the same high quality drinking water and wastewater treatment provided to Detroit customers and that the department offers the fifth lowest rates for water and sewer service of the 20 most populated cities in the U.S.

Last year the *Detroit News* published a number of articles, reports and editorials alleging and documenting security lapses, lax collection policies for delinquent accounts, questionable contracting practices, bribery, and various other forms of irresponsibility and malfeasance. For instance, a September 2002 article reported that a new billing system for the system's customers was "a year behind schedule, \$2.1 million over the original price and the focus of two lawsuits claiming contract bid-rigging". According to the article, a member of Mayor Kilpatrick's transition team runs the firm who was awarded the contract for the billing system

despite the firm's not knowing what kind of system it would create. Moreover, the \$11 million contract allegedly exceeded another firm's bid by over \$2 million. Critics believe that bid-rigging and other flawed contract procedures have led to a "dramatic increase" in water and sewer rates—an increase that, they argue, disproportionately affects suburban customers, who effectively wind up subsidizing rates for Detroit residents.

In testimony before the House Local Government and Urban Policy Committee in the 2001-2002 legislative session, the Interim Deputy Director of the DWSD testified that the department "has demonstrated a willingness to listen to its customers' needs, their concerns as well as their criticisms, and to venture into creative partnering relationships with wholesale customers while exploring new areas of communication with both our retail and wholesale customers, that are based on the exchange of factual information." Not everyone agrees. For instance, in his testimony before the Local Government and Urban Policy Committee last year, the Warren City Attorney described the department as "an inefficient, bloated monopoly that has no incentive and no desire to change". Critics argue that without greater suburban oversight over the department's management decisions, the DWSD will focus on serving city residents, without paying much attention either to the majority of customers who live outside of the city or to the long-term interests of the metropolitan region. Currently the department is headed by a director, who is appointed by the mayor of Detroit, and overseen by a Board of Water Commissioners, which consists of seven mayoral appointees. Four of the board's members represent Detroit residents, and the other three commissioners represent the customers of Oakland, Macomb, and Wayne Counties. Each of the county representatives is chosen by the mayor from a group of three persons nominated by the county to serve as its

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representative. Legislation has been introduced to create an authority to provide additional review and oversight of the process by which DWSD contracts services out to other parties.

### ***THE CONTENT OF THE BILL:***

Senate Bill 195 would create a new act to establish an authority to provide review and oversight of the “contract process” of and the rates charged by a “water or sewer system”—i.e., the Detroit Water and Sewerage Department. (The bill defines “water or sewer system” as a water supply facility or sewerage services facility, or both, that provides water or sewerage service to more than 20 percent of the state’s population, which is understood to apply only to the Detroit Water and Sewerage Department.) The bill would also require the DWSD’s chief financial officer to prepare and submit to each member of the authority a proposed budget for the next fiscal year, require the authority to establish policies and procedures for the contracting of services for the “water or sewer system”, and establish remedies for customers who are overcharged by the system.

Authority membership and representation. Each city with a population of 750,000 or more (“qualified city”) and each county with a population of 400,000 or more (“qualified county”) that is served by the system would be a member of the authority. The mayor of each qualified city (the City of Detroit), with the advice and consent of the city’s governing body, would appoint a city representative to the authority. The county board of commissioners of each qualified county that does not have a qualified city located within its boundaries (Genesee, Macomb, and Oakland Counties) would appoint a county representative to the authority. For a qualified county with a qualified city within the county (i.e., Wayne County), one person who does not live or work within the qualified city would be appointed to represent the county. This Wayne County appointment would be made by the majority vote of the chief elected officials of the five largest local units of government within the county, excluding Detroit.

Appointments would have to be made within 30 days after the act’s effective date. Appointees (and their successors) would serve terms of four years or until a successor is appointed, whichever is later. A person could be reappointed to the authority, and an appointee could be replaced by the appointing city or county at any time. Appointees would be considered public servants under state law. They would be subject to any applicable law with respect to conflicts

of interest, and the authority would have to establish policies and procedures requiring periodic disclosure by appointees of relationships that may give rise to conflicts of interest.

A majority of persons appointed to the authority would constitute a quorum for the transaction of business, and each appointee would have one vote. The authority’s first meeting would have to be held not more than 45 days after the act’s effective date. After its first meeting, the authority would have to meet at least once quarterly and at other times if necessary. The authority would have to elect a chairperson and other officers that it considers necessary and would be required to adopt bylaws and rules to govern the authority’s operation.

Authorization and duties. The authority, created pursuant to section 27 of Article VII of the state constitution, would be a state agency and instrumentality with all the powers of a public corporation in exercising of its duties, as provided in the new act. (See “Background Information” below for the complete text of Article VII, section 27.)

The authority would be required to establish policies and procedures for the contracting of services for the system providing all of the following:

- the authority would have the exclusive authority to review and approve all contracts and contract renewals, extensions, and charge orders or appropriations in an amount greater than \$50,000, and such contracts or appropriations would be void and unenforceable unless approved by the authority;
- the authority would review and approve all contract overruns from the original contract amount for contracts approved and for contracts less than \$50,000 if the overrun causes the contract amount to exceed \$50,000; and
- the policies and procedures for hiring professional service contractors.

Further, the policies and procedures established by the authority would have to require that any contract awarded by the system for the construction, repair, remodeling, or demolition of a water or sewer facility be let pursuant to a procedure that requires competitive bidding, unless any of the following conditions apply:

- the negotiated contract amount is less than \$50,000 over the lifetime of the contract and any contract renewals or extensions;

- procurement by competitive bids is not practicable to efficiently and effectively meet the water and sewer system's needs, or that another procurement method is in the public's best interests;

- the contract is for emergency repair or construction necessitated by a sudden, unforeseen occurrence or situation of a serious and urgent nature—not for convenience or expediency—and is for a period of one year or less; and

- the contract is for repair or construction that is necessary to ensure safety or to otherwise protect life or property, and is for a period of one year or less.

Also, the authority would be required to establish an ethics manual governing the conducting of system business and the conduct of the system's employees, and would have to establish policies no less stringent than those of Public Act 196 of 1973. (Public Act 196 of 1973 sets forth standards of conduct for public officers and employees.) Each person appointed to the authority and each employee of the system who regularly exercises significant discretion over the award and management of authority procurements would have to comply with policies governing the following:

- immediate disclosure of the existence and nature of any financial interest that would reasonably be expected to create a conflict of interest; and

- withdrawal by the appointee or employee from participation in, discussion of, or evaluation of any recommendation or decision concerning procurement involving the water or sewer system that would reasonably be expected to create a conflict of interest for that appointee or employee.

**Duties of DWSD's CFO.** On or before February 1 of each year, the chief financial officer for a water or sewer system would have to prepare and submit to each member of the system's authority a proposed budget for the next succeeding fiscal year covering its anticipated revenues and expenses of administration, operation, maintenance, and contract procurements.

**Remedies for overcharged customers.** A water or sewer system could not charge a customer more than what is allowed under the contract to provide services. If a water or sewer system is found to have charged an amount in violation of this requirement, the system would have to pay to or credit the account of the customer an amount equal to ten times the overcharge or \$100, whichever is greater. A

customer would have to file a complaint with the water or sewer system to recover any amounts allowed within twelve months from the date the excessive payment was made.

If a qualified county, qualified city, or a local unit of government charges its customers a rate that generates an amount greater than the amount that the county, city, or local unit is required to pay under its contract with the water or sewer system, the county, city, or local unit would have to annually itemize the additional charges on the customer's bill.

**Other provisions.** The authority would be a public body for purposes of reporting violations or suspected violations of a law or regulation or rule promulgated under a federal, state, or local law. Persons reporting violations or suspected violations would have all the protections provided under the Whistleblowers' Protection Act (Public Act 469 of 1980). The authority would be subject to the Freedom of Information Act and the Open Meetings Act.

### ***HOUSE COMMITTEE ACTION:***

As reported by the House Government Operations Committee, the bill combines the Senate-passed versions of Senate Bill 195 and House Bill 4206, with some additional changes.

### ***BACKGROUND INFORMATION:***

Article VII, Section 27 of the state Constitution reads as follows: "Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function."

### ***FISCAL IMPLICATIONS:***

According to the House Fiscal Agency, the Senate-passed version of Senate Bill 195 and the House-passed version of House Bill 4206 would have an indeterminate fiscal impact on the City of Detroit. The actual impact would depend upon the administrative costs of the required contract reviews, and on the number and nature of contracts and contract overruns reviewed by the authority. The bills would have no fiscal impact on state government. (3-10-03)

**ARGUMENTS:****For:**

Throughout 2002 the *Detroit News* published a series of articles alleging and documenting various problems with the Detroit Water and Sewer Department. For instance, in July the newspaper reported that the department's water customers collectively paid \$23 million for water that never reached their faucets because it had leaked out of aging pipes along the way. In August, the newspaper reported security lapses including all of the following: the intentional disabling of a state-of-the-art security system at drinking water reservoirs "because false alarms caused too much work"; failure to secure manholes and hatches from potential intruders; broken motion detectors and sensors; poorly designed and maintained fences around reservoirs; and, perhaps most troubling, the failure to address many of these issues a year after they had been brought to the department's attention. On September 3, the *News* reported that the water department's customers owed nearly \$60 million in delinquent water bills. The same article described ways that delinquent customers have successfully avoided having their water turned off—e.g., bribing workers—or have illicitly turned their own water back on—e.g., buying a water valve key at the local hardware store. An article published the very next day detailed allegations of bid-rigging for a new computer billing system: a member of the mayor of Detroit's transition team was employed by the firm awarded the contract, and the firm's offer exceeded another bid by over \$2 million. While the occasional wayward department worker and free-rider might be dismissed as exceptions to the rule, improprieties in the awarding of contracts and the spectacular array of managerial lapses and shortcomings raises questions about the integrity of the system itself.

These practices (and perhaps other practices yet to be discovered) are likely responsible for a dramatic increase in water supply and sewer service rates for those customers who have always paid their fair share and now find themselves paying more than their fair share. Since many of these problems are most prevalent within the city of Detroit—e.g., delinquent bills—suburban customers effectively subsidize rates offered to Detroit customers. To be fair, the DWSD, headed by a new director, has taken steps to address at least some of these problems. Still, as commendable as it is to address problems after the fact, it is more important to ensure that such problems never arise in the first place. Because the DWSD provides utility services to the Detroit

metropolitan area, and because the city has been a poor steward of the system (which has twice as many suburban customers for sewerage service and three times as many suburban customers for water service as there are Detroit customers), it is appropriate to establish true, effective oversight over the department's operations, with full representation for customers who live outside of the city. The three members of the Board of Water Commissioners who represent Wayne, Oakland, and Macomb Counties are appointed by and serve at the pleasure of the mayor. Even if they are selected from a list provided by the counties themselves, commissioners can be (and have been) pressured to either yield to the majority—i.e., the city's representatives—or leave the board. This does not allow for true representation.

Instead, the authority oversight board should more adequately reflect the fact that the vast majority of water and sewerage customers live outside the city. The bill would give Genesee, Macomb, Oakland, and (non-Detroit) Wayne Counties true representation. Also, the bill would require the new board to write an ethics manual governing the conducting of system business and the conduct of employees of the system. This would help ensure that the department is run in the public's best interest, not just the best interests of those who may otherwise profit from dubious managerial decisions and other unethical or illegal practices. In addition, the bill would establish explicit guidelines for reviewing contracts for services exceeding \$50,000 and would provide overcharged customers with fair relief. Together these requirements would ensure that the DWSD looks out for the best interests of its entire customer base—customers in Detroit and the surrounding metropolitan area alike.

**Response:**

The bill proposes an authority to provide review and oversight of the DWSD's "contract process", but the term "contract process" is not defined. It appears that the term could apply to the process by which the DWSD contracts with other municipalities to provide water supply and sewerage services or the process by which the DWSD contracts with agents who perform various functions on behalf of the department, such as repairs, engineering, or it could apply to both.

**Reply:**

Supporters of the bill say that it is intended to apply to contracts with suppliers and those who perform services for the system.

***Against:***

The Detroit Water and Sewerage Department is arguably the most effective and respected water and sewer department in the country, for a metropolitan area the size of Detroit's. While the department has had its troubles, the department has a new director who has taken significant steps to improve the management of the system. The legislation would create a new authority with control—in some cases exclusive control—over the department's contracts and rates. Supporters of the legislation have characterized the proposed regional authority as a "Public Service Commission-like" oversight commission. (The Public Service Commission is the state agency responsible for regulating utilities and for overseeing restructuring of markets to introduce competition.) One crucial distinction between water supply and sewer service provided by the DWSD and the goods and services provided by a utility is that suburban governments have always had the choice of providing water supply and sewer service to their residents themselves. That is, the DWSD's so-called "monopoly" in any community other than Detroit is essentially the product of a decision by that community's government about the most effective way to provide its residents with water and sewer service, as embodied in a freely-negotiated contract between the DWSD and the local government. While communities are bound to the terms of the contract for the life of the contract, once the contract ends, the only "restriction" on a suburban community's decision to renew the contract is the cost of doing otherwise.

While it is reasonable for suburban customers to want access to information about how rates are calculated and how contracts are made, DWSD officials argue that this information is available. Suburban customers have representation on the board, and although critics of the department would like people to believe that the seven-member board's votes are highly contentious 4-3 votes, it is rare that the board acts without unanimity. DWSD officials give communities notice of planned rate increases, and are willing to meet with officials of those communities to consider adjustments to proposed rates. The department holds separate meetings with water customers and sewer customers on a quarterly basis, and makes a rate notebook available to customers who want more detail on how rates are calculated. Critics who think that Detroit is enriching itself by charging high rates for water and sewerage service would do better to look at the markups that suburban communities charge their residents for bringing the water from the border of their communities into customers' homes. It is rather odd that the legislation

asks for the system to have oversight over rates charged by the Detroit Water and Sewerage Department but not over the rates that suburban communities charge to deliver water from their borders to customers.

More importantly, critics should remember that Detroit built and owns the system. Detroit borrowed the money itself, made the investments itself, and took the risk itself. While city officials believe that suburban customers should have a voice in how the system is run, any attempt to wrest control of management decisions away from the city—by, for instance, giving the authority "exclusive authority" to review and approve contracts for over \$50,000—amounts to a "quasi-taking". The mayor selects county representatives to the board from a small pool of nominees made by the county, so perhaps customers should vote for new county government officials if they feel that they are being poorly represented. Likewise, if they are convinced that their local elected officials have made poor decisions about entering into contracts with the DWSD, perhaps in the future they ought to elect officials who are committed to building a new water and sewer infrastructure for their city, village, or township.

On another note, because it has brought so much attention to the Detroit Water and Sewer Department's problems, one might expect the *Detroit News* to be the most vocal advocate of a change in management. Yet, however strongly the editorial board believes the department needs to reform its ways, a September 2002 editorial characterized legislative hearings on restructuring management of the department as "a waste of time". The editorial pointed out that the DWSD is currently under a federal court order resulting from a suit brought by the Environmental Protection Agency. The order names the mayor of Detroit as the "special administrator" of the department, answerable directly to the court. Even the Board of Water Commissioners and the director of the department act only in an advisory capacity, while the mayor holds the authority to make—and responsibility for—any decision that he deems necessary to protect water quality. An October 2002 *Detroit Free Press* editorial elaborates on this point, noting that "[s]tate lawmakers can construct a regional water-sewer authority however they please, but the mayor can ignore it or pay attention to it as he pleases", or at least whenever he deems an action necessary to protect water quality. The *Free Press* editorial suggests that any attempt to impose another layer of oversight on the department would result in a lengthy

battle in federal court. Even more recently, a March 2003 *Detroit News* editorial on the current legislation (as passed by the Senate) goes so far as to suggest that it is “fueled more by suburban resentment of Detroit than logic”. The editorial explicitly recommends that the governor veto the bill. Moreover, while conceding that the suburbs’ bid for more control over the water and sewer system may not be racially motivated, the editorial finds it “worth noting that suburban unrest with Detroit’s control of the system—and legislation to change that—stems from the late 1970’s—about when African Americans gained control of the city”.

### ***Response:***

Detroit’s claim that it owns the system is dubious, at best. Suburban customers have been paying high water and sewerage rates (largely because of mismanagement by city officials), and by doing so they have essentially bought into the system. All of the ratepayers, including ratepayers in the city of Detroit, should be recognized as owners of the system. Still, in its current form, the bill would not divest Detroit of ownership in the system but instead would give suburban communities more or less proportional representation in decisions that affect the rates they are charged.

When opponents of the legislation argue that suburban communities have contracted with the DWSD, they fail to note that those contracts are typically thirty years in length and that the water the department provides is Great Lakes water, a resource which Detroit cannot claim exclusive rights to. Regarding suburban markups of water and sewer rates, residents can hold local officials accountable for mismanagement of the retail components of the water or sewerage system but have little input into decisions made by the DWSD. Even so, the bill would require a qualified city, qualified county, or other local unit to annually itemize on customers’ bills the community’s average additional charges, if the community generates an amount above what it is required to pay in its contract with the DWSD.

Finally, while opponents of the bill have accused supporters of racial motivations, it is the suburban communities who are trying to eliminate the divisiveness in the current Detroit-dominated system. In proposing oversight and accountability the legislation would create sound public policy.

### ***POSITIONS:***

The City of Detroit opposes the bill. (3-11-03)

Analyst: J. Caver

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.