

DESIGNATION OF NATURAL RIVERS

House Bill 4641 (Substitute H-1)
Sponsor: Rep. Ken Bradstreet

House Bill 4642 (Substitute H-1)
Sponsor: Howard Walker

First Analysis (9-26-03)
**Committee: Conservation and Outdoor
Recreation**

THE APPARENT PROBLEM:

Under Part 305 of the Natural Resources and Environmental Protection Act (formerly the Natural Rivers Act, Public Act 231 of 1970), the Department of Natural Resources (DNR) can designate a river (or a portion of a river) as a “natural river area” with the stated purpose of “preserving and enhancing its values for water conservation, its free flowing condition, and its wildlife, boating, scenic, aesthetic, floodplain, ecologic, historic, and recreational values and uses.”

Currently, before the Department of Natural Resources designates a river as a natural river area, it must hold a public hearing in the county seat of any county in which a portion of the designated natural river area is located. Upon designating the natural river area, the DNR develops a long-range plan for the natural area setting forth the purposes of the designation, proposed uses of lands and waters, and management measures designed to accomplish the purposes. The DNR is also required to inform landowners and agencies as to the plan and its purposes in order to encourage their cooperation in the management and use of their land in a manner consistent with the plan and the purposes of the designation.

After designation of a natural river area and the development of a comprehensive management plan, the DNR may determine that, in order to better effectuate the purposes of the designation, certain zoning regulations may be necessary. Counties and townships affected by the designation are encouraged to establish these zoning regulations as necessary and appropriate. However, if a local unit does not develop adequate zoning regulations consistent with the management plan within one year, the DNR may promulgate zoning rules.

Earlier this month, the director of the DNR designated the Pine and Upper Manistee Rivers as the 15th and 16th natural river areas. These designations are also the first to occur since 1988. Although the DNR has been working on the designations since 1994, the designations drew the ire of several property owners and most of the affected local governments, as several of the persistent criticisms of the natural river program resurfaced. In particular, local residents and officials expressed concern that the program infringes on the rights of property owners, takes away local control of the affected land, and imposes overly restrictive development standards. In addition, many were particularly critical of the DNR’s actions because they were imposed over the objections of many local property owners and most of the affected local governmental units. To that end, legislation to revise the designation process so as to provide for greater input and involvement from local residents and governmental units has been introduced.

THE CONTENT OF THE BILLS:

House Bill 4642 would alter the process by which a natural river area is designated. In particular, the bill would remove the authority for designating such areas from the DNR, and would allow any person to nominate a river for designation as a natural river area at a regularly scheduled meeting of the Natural Resource Commission. Ultimately, the NRC would be responsible for making the designation, although the DNR would continue to have a planning and informational role in substantially the same manner as provided under current law.

Under the bill, following consideration of all testimony, if the NRC determined the nomination met the requirements necessary for designation, the commission would place consideration of the

designation on the agenda of a future meeting and direct the DNR to proceed with consideration of a designation, gather public input, and prepare the long-range comprehensive plan. At a NRC meeting to consider the designation of a natural river area, the NRC would review the plan and receive testimony from the DNR regarding the public input it had received and from the general public. Upon consideration of the plan and testimony, the NRC (not the DNR) could designate a river as a natural river area and approve the plan for that area. The NRC would be permitted to modify the plan for a natural river area if it subsequently determined that such a modification was in the best interest of the natural river area and the state. If the plan was modified, the DNR would be required to notify the counties and townships in which the natural river was located of the modifications.

In addition to holding a public hearing as provided in current law, the DNR would be required to notify, in writing, each landowner within the proposed natural river area and provide them with an opportunity to receive regular updates on meetings related to the proposed designation of a natural river area. The DNR would also be required to notify all local units of government in which the proposed natural river area was located, and encourage them to notify affected landowners within their jurisdiction. Finally, the DNR would be required to attend a meeting of the governing body of each township and county in which the proposed natural river area was located to receive input on the designation and plan.

MCL 324.30502 et al.

House Bill 4641 would require the Natural Resource Commission to rescind the designation of a natural river area if the governing bodies of the majority of the counties and townships within the natural river area pass resolutions rescinding the designation.

Under the bill, beginning two years after a natural river designation had been made, the affected counties and townships could review the natural river designation for a period of time not exceeding 90 days. The resolutions to rescind a designation would have to be passed by the local units during this 90-day period.

Further, every 10 years after the initial review, the counties and townships within the natural river area could again review the designation for a 90-day period, during which the counties and townships could pass resolutions to rescind the designation. Again, if a majority of the governing bodies voted to

rescind the designation, the NRC would have to rescind the designation.

MCL 324.30502a

BACKGROUND INFORMATION:

Designated Rivers: The natural river program covers the following 16 rivers (with the years in which they were designated in parentheses) : Jordan (1972), Betsie (1973), Rogue (1973), Two-Hearted (1973), White (1975), Boardman (1976), Huron (1977), Pere Marquette (1978), Flat (1979), Rifle (1980), Lower Kalamazoo (1981), Pigeon (1982), Au Sable (1987), Fox (1988), Pine (2003), and Upper Manistee (2003). The designation also covers certain tributaries of each river. For instance, the Lower Kalamazoo natural river area covers the mainstream of the river in Kent County, as well as Barkley, Cedar, Duke, Rum, Shaw, and Spring Creeks, all of which are also in Kent County.

In addition, a recent publication of the Michigan Land Use Institute on the Natural River Program lists another 24 designations that are pending or proposed for the following rivers: Lower Jordan, Presque Isle, Ontonagon, Paint, Fence, Sturgeon, Big Huron, Escanaba, Whitefish, Indian, Tahquamenon, St. Joseph, Dowagiac, Paw Paw, Kalamazoo, Grand, Thornapple, Fish Creek, Muskegon, Little Manistee, Black, Thunder Bay, Cass, and Shiawassee.

Zoning Ordinances/Rules: The act provides that DNR should encourage affected counties and townships to develop local zoning ordinances that are consistent with the natural river management plan, or promulgate its own set of zoning rules if the affected counties and townships fail to develop adequate zoning ordinances within one year of the designation. (The DNR cannot promulgate any natural river zoning rule in a city or village.) The DNR's zoning rules are only effective in those areas where a township or county has not adopted an ordinance consistent with the management plan. Townships and counties may adopt local ordinances relating to the natural river area at any time, and once the local ordinance is in effect, any existing state zoning rule no longer applies (provided that the local zoning ordinance is consistent with the management plan). The act further states that the local zoning ordinances or state zoning rules "shall protect the interest of the people of the state as a whole" and shall bear in mind the unique characteristics of the land and water, surrounding development, and existing use, and provide for the consideration of soil, water, stream beds and banks, flood plains, and adjoining uplands.

Zoning ordinances or rules encourage, regulate, or prohibit certain agricultural, recreational, forestry, residential, industrial, or commercial uses. In particular, the zoning ordinances or rules may (1) limit or prohibit the placement of structures or designate their location with respect to the water's edge, property or subdivision lines, and to flood flows; (2) control the location and design of highways, roads, and public utility transmission lines; (3) prohibit or limit the cutting of trees or other vegetation; and (4) prohibit or limit the mining and drilling for oil and gas, among other provisions.

The act further states that in developing a zoning ordinance, a township or county must follow the Township Zoning Act or the County Zoning Act, as appropriate. A property owner is permitted to request a variance to a local zoning ordinance from the local unit's zoning board of appeals, in the manner provided under the Township Zoning Act or the County Zoning Act. Requests for a minor variance to a state zoning rule are presented to the state natural river zoning administrator (a DNR program staff member), and requests for a major variance to a state zoning rule are presented to a natural river zoning review board. The various zoning review boards for each natural river area are distinct from the zoning entity of the local unit of government, and include local citizens and officials and representatives from the DNR. A natural river review board does not hear or act upon a variance request to a local natural river zoning ordinance.

Attorney General Opinion: In 1977, Attorney General Frank Kelley issued an opinion (No. 5231) regarding the constitutionality of the zoning provisions of the Natural River Act. In the opinion, the attorney general noted that (1) "it is clear that the [a]ct does not violate any constitutional protection of property rights", and (2) "there is little doubt that the legislature may delegate to an agency the authority to adopt a zoning rule which limits the right of a property owner to use his [or her] property, although there are limitations on this power..."

DNR's Public Hearing Record for the Pine and Upper Manistee Rivers: In August, the DNR released its record of the public hearings conducted regarding the designation of the Pine and Upper Manistee Rivers. Between April 28, 2003 and May 8, 2003, the DNR conducted 12 public hearings regarding the draft management plans for the Pine and Upper Manistee Rivers. These 12 hearings were held in each of the nine counties (Osceola, Wexford, Lake, Manistee, Antrim, Otsego, Kalkaska, Crawford, and Missaukee) affected by the

designations, as well as in Lansing, Southfield, and Grand Rapids. The public hearings had more than 658 people in attendance and 290 speakers. In addition to the 290 verbal comments received through the 12 public hearings, the DNR also received an additional 760 comments through letters and e-mails. In all, the DNR received more than 1,000 public comments on the designation of the Pine and Upper Manistee Rivers, with 723 comments in support and 327 in opposition. In particular, the DNR notes that while most of the counties and townships passed resolutions in support of natural resource protection and wildlife management, many were nonetheless opposed to the formal designation of the two rivers as natural river areas.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, House Bill 4641 would have no fiscal impact on the state or on local units of government. House Bill 4642 would, however, have an indeterminate fiscal impact on the Department of Natural Resources, depending on the size and population of the area affected by the proposed natural river designation, and the number of public hearings convened pursuant to the bill. (HFA analyses dated 9-25-03)

ARGUMENTS:

House Bill 4641

For:

The recent decision of the Department of Natural Resources to designate the Pine River and the Upper Manistee River as natural river areas pursuant to the Natural Resources and Environmental Protection Act provides for a great opportunity to review the process by which rivers are designated as natural river areas, something that has not occurred in 15 years.

Critics say that, from these recent designations, it appears that local residents, particularly property owners directly affected by the designations and local governments, are provided with little opportunity to provide assistance and input in the designation decision and in the draft of the management plan for a proposed natural river area. Critics claim that the DNR (and, in particular the director of the DNR) unilaterally makes the designation without much consideration of the views of local residents and local governments. Consider that during the designation process, 27 of the 29 affected townships and 6 of the 9 affected counties passed resolutions in opposition to the natural river designation of the two rivers. Furthermore, according to committee testimony,

during the DNR's public hearings, the majority of those who provided oral testimony in the directly affected counties (particularly in Kalkaska County) spoke against the designations. In spite of apparent opposition to the designation of the two rivers, the DNR proceeded with the designations anyway. Once designated, the land is controlled, ultimately, by the DNR in perpetuity. While there appears to be no specific authority, it is presumed that only the DNR could revoke the designation, even amid continued opposition from local property owners and units of government.

In response to these criticisms, House Bill 4641 makes several improvements to the act. First, the bill provides for a review of the natural rivers designation two years after the designation is made and every 10 years thereafter. While it is assumed that the management plan and the related activities for a particular natural river area are constantly reviewed to assure that the plan and the actions on the part of landowners, local governments, and the DNR are meeting their stated purposes, there appears to be no clear way to initiate a review, or ensure that a review is being conducted. It is possible that any request by an affected property owner or local government to initiate a review of the natural river program - out of concern either that requests for variances are summarily denied or are granted without much due diligence, thereby disallowing any reasonable development or allowing unfettered development - will fall on deaf ears within the department. However, there appears to be no way to know (with any certainty) if such a situation actually occurs, save for the rare instances when someone contacts a state legislator to further look into the matter. To address this concern, the bill provides for an automatic review process of the natural river area management plan, for those designations that occur after the bill's enactment.

Second, and perhaps more importantly, the bill permits local governments to opt out of the program, by rescinding the designation upon a majority vote of the affected counties and townships. The necessity of this provision is clearly demonstrated by the overwhelming opposition to the natural river designation of the Pine and Upper Manistee Rivers by local governments (33 of 38 local governments). This ability to rescind a designation should increase the opportunity of local governments to provide meaningful input and oversight into the natural river designation. Under the current system, the DNR can, as demonstrated, impose its will on local governments. One must question the enthusiasm and support these local governments provide the natural

river program, and the DNR, when their views have basically been ignored. Providing local governments with the authority to review and rescind the designation of natural river areas will make them true partners with the DNR in the protection of the watershed, by providing local governments with a more active role and louder voice in how their land is managed.

Against:

Regardless of the noble intentions of House Bill 4641, it presents serious problems to the natural river program. First, permitting local governments to rescind a designation would invariably cripple the program and set a dangerous precedent for other natural resources management activities, such as the fights against bovine tuberculosis, emerald ash borer, and chronic wasting disease, and a host of other wildlife protection initiatives.

The problem is not necessarily the intentions of local governments. Indeed, the DNR notes that while most of the affected local governments passed resolutions in opposition to the designations of the Pine and Upper Manistee Rivers, they were still highly supportive of natural resources protection efforts. The problem, however, is that good intentions, can have serious adverse consequences. All of the beneficial work done between the initial designation and the periodic review could be undone within a relatively short period of time because of ill-advised or uninformed development; that damage could take decades (at least) to repair. While a new golf course, boat dock, or shed, may seem beneficial in the short run, the potential long-term negative consequences of that development may be harder to ascertain.

Further, the problem with empowering local governments to rescind a designation is that they often have less expertise than the DNR. The DNR natural river program staff is composed of trained individuals who understand the biological and environmental implications of development on a particular parcel of land. The development of the management plan, zoning rules and ordinances, and the granting of variances are based on biology, not on convenience. However, a local township's decision to rescind a designation could be based on the lobbying efforts of a few disgruntled property owners, rather than on the best interest of the river (and, ultimately, the entire state).

The DNR has proposed an alternative process that would create an advisory committee to accompany each designation of a natural river area. The advisory committee would meet annually to discuss program

administration and every ten years would review the management plan, administrative rules, and administration of the natural river area. The committee would submit recommendations to the NRC. This would serve as an alternative to the rescinding of a designation while allowing the review and amendment of program administration. This allows for change while providing long-term resource protection.

For:

Any discussion of the natural river program brings with it concerns regarding home rule (local control) and property rights issues, two issues that have dogged the program from its outset. Advocates for local control often contend that the power provided to the DNR circumscribes the authority of local governments to control development on land within their jurisdiction. Michigan has a long-established principle of home rule embedded in the state constitution and a host of statutes. Indeed, the recent work of the Michigan Land Use Leadership Council recognized the importance of home rule in state land use policies and initiatives, when it stated, “[t]he council understands the importance of the home rule concept in Michigan, and its recommendations reflect its interest in enhancing the capacity of locally elected officials to effectively plan and zone land uses of primarily local concern” and the council further “endorses the concept that government decisions should be made at the most cost-effective and efficient level of government that best serves the public, and believes that in most cases decisions on planning and zoning for land use should continue to occur at the local level of government.”

By providing for greater local government involvement in the designation process (particularly the authority to rescind a designation), the bill is consistent with the long-established principle of home-rule in the state.

Against:

The act currently provides local governments with sufficient opportunity to provide input on the merits of designation, the development of the management plan and zoning ordinances, and the actual operation of the plan. The DNR works with over 130 local governments to develop sound management plans and zoning ordinances for each of the natural river areas. Of the 14 natural river areas that existed prior to the designations of the Pine and Upper Manistee Rivers, 1,013 miles of a total of 1,661 miles were zoned solely by local governments. (The remaining 648 miles are zoned by the state.) It is the local

government that makes decisions regarding variances to these locally developed zoning ordinances. Furthermore, local residents (in addition to individuals representing the DNR and other interested groups) also make variance decisions on state-zoned land. So, it is not as if the DNR implements the natural river program with no (or any meaningful) involvement from local governments and residents.

Furthermore, and more importantly, one must keep in mind the stated purpose of the natural river program and the DNR itself. The act provides that the designation as a natural river area is made “*in the interest of the people of the state and future generations*” with the stated purpose of “preserving and enhancing (the river’s) values for water conservation, its free flowing condition and its fish, wildlife, boating, scenic, aesthetic, flood plain, ecologic, historic and recreational values and uses”. Further, the principal function of the DNR is to protect and conserve the natural resources of the state. Allowing local governments to rescind the designation directly contradicts the stated purposes of the natural river program and trumps the authority of the DNR to protect state lands. The bill, then, places the interests of a few disgruntled landowners ahead of those of the entire state population (and the generations to follow).

Finally, many opponents to the designations of the Pine and Upper Manistee Rivers question under what authority the DNR (with its “unilateral” decision) is acting. It is often said that the department is acting without the consent of the governed (that is, property owners). First, the DNR is acting under the authority granted to it by the legislature, under the Natural Resources and Environmental Protection Act. Secondly, the DNR is acting under the authority of the governor (it is, after all, an executive department). So it is not as if the department is exercising authority not expressly provided to them.

Finally, in a recent speech to the Natural Resources Commission, the DNR director stated, “[s]ince the creation of the Natural Rivers Act three short decades ago, the state of Michigan has spent millions of dollars to retrieve those once-pristine rivers from the brink of ecological disaster and start them on the road to recovery. I’m convinced it is wiser and less expensive to conserve and cooperatively manage these resources today than ask our grandchildren to repair them tomorrow.” The bill would sacrifice the future protection of the state’s most vital waterways and push the costs of nurturing the state’s rivers onto future generations.

House Bill 4642

For:

House Bill 4642 would make a number of positive changes. First, the bill returns the authority to designate a natural river area to the Natural Resources Commission. When the program was first created in 1970, it was the NRC that made the designation. The authority for designation later changed to the director of the DNR under the reorganization of the DNR in 1991 (See E.R.O. 1991-22). This proposed change back to the NRC provides for more public input. The decision of the director to designate a natural river area is inherently internal. On the other hand, the NRC operates in a public forum, which provides for increased opportunity for the public to express their opinion.

In addition, the bill makes a number of other changes that are designed to increase the public's awareness of the designation process. In particular, the bill would require the DNR to notify, in writing, each affected landowner within the proposed natural river area. This is in response to the criticism that the process often fails to include property owners directly affected by the proposed designation (and often only includes strong proponents of the designation). Also, it should be noted that a written notification requirement is already required when a local government sets new zoning ordinances.

Response:

The requirement to notify each landowner in writing is particularly burdensome for the DNR. In particular, the department notes that meeting that requirement would be virtually impossible without the full cooperation from local governments who maintain information on property owners (and even that information is not always up to date). Further, there is some concern that the failure to notify just one landowner could derail the entire designation process. Finally, the current notification requirements (whereby the department provides notice through local and statewide newspapers) is quite sufficient and consistent with other notification requirements placed throughout other state laws.

POSITIONS:

The following organizations indicated support of House Bill 4641 to the House Committee on Conservation and Outdoor Recreation on 9-23-03: Michigan Association of Homebuilders, Michigan Association of Counties, Michigan Farm Bureau, Michigan Townships Association, and Kalkaska County Commission.

The Department of Natural Resources opposes House Bill 4641. (9-23-03)

The following organizations indicated opposition to House Bill 4641 to the House Committee on Conservation and Outdoor Recreation on 9-23-03: Michigan Environmental Council, Michigan United Conservation Clubs, Michigan Conservation Foundation, Wexford County Commission, Pine River Association, Pere Marquette Watershed Council, Michigan Wild Turkey Hunters Association, Ann Arbor Area Trout Unlimited, and Pine River Trout Unlimited.

The following organizations indicated support for House Bill 4642 to the Committee on Conservation and Outdoor Recreation on 9-23-03: Michigan Environmental Council, Michigan Association of Homebuilders, Michigan Association of Counties, Michigan Farm Bureau, Wexford County Commission, Michigan Townships Association, Kalkaska County Commission, Pine River Trout Unlimited, and Ann Arbor Area Trout Unlimited.

The Department of Natural Resources supports the provision in House Bill 4642 returning to the Natural Resources Council the authority to designate natural river areas, but opposes the written notification requirements in the bill. (9-23-03)

The following organizations indicated opposition to House Bill 4642 on 9-23-03: Michigan Conservation Foundation, Pine River Association, Pere Marquette Watershed Council, and Michigan Wild Turkey Hunter Association.

Analyst: M. Wolf

■ 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.