

Legislative Analysis



WETLAND MITIGATION BANK FUNDING PROGRAM

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House Bill 5897

Sponsor: Rep. Jim Stamas

Committee: Natural Resources, Tourism, and Outdoor Recreation

Complete to 9-18-12

A SUMMARY OF HOUSE BILL 5897 AS INTRODUCED 9-12-12

The bill would make several changes to Parts 13 (Permits), 301 (Inland Lakes and Streams), 303 (Wetlands Protection), and 325 (Great Lakes Submerged Land) of the Natural Resources and Environmental Protection Act. These changes mainly (1) establish uniform application fees, (2) alter criteria for activities that are exempt from permitting requirements, and (3) establish a wetland mitigation bank funding program.

(See **Background Information** for a description of wetland mitigation banks.)

Fees

The bill would increase the application fee for minor project category permits from \$50 to \$100, and decrease the fee for general permits from \$100 to \$50, to make them uniform across Parts 301, 303, and 325.

Part 13 (Permits)

Permit denials

The bill would require the Department of Environmental Quality (DEQ) to issue the approval or denial of a permit application in writing and the determination must be based on evidence that meets the standards in Section 75 of the Administrative Procedures Act.

A denial would have to document, and any review upholding the decision would have to determine, the decision (1) was based on specific provisions of applicable rules and statutes, (2) was based on sufficient facts or data recorded in the file, and (3) was the result of reliable scientific principles and methods that were reliably applied to the facts.

Part 301 (Inland Lakes and Streams)

Drains

There are several activities that do not require a permit under Part 301, including the maintenance of an agricultural drain. The bill would require the following conditions be met in relation to agricultural drain maintenance done without a permit:

- Constructed prior to January 1, 1973 or under a Part 301 permit.
- Has a drainage area of less than 160 acres and is entirely in agricultural use.

- The maintenance involves only activities that maintain the as-constructed location, depth, and bottom width of the drain as of January 1, 2013.
- Maintenance is performed by the landowner or as required under the Drain Code.

The bill would also clarify that no permit is needed under Part 301 for the maintenance of a drain that was constructed or modified under a Part 301 permit.

"Maintenance of drains" would mean the physical preservation of the configuration of a drain and appurtenant structures to restore the function and capacity of the drain as constructed, established, or modified, as of January 1, 2013. It would include several activities that would be subject to best management practices to the levels of current engineering standards.

Part 303 (Wetlands Protection)

Allowable uses in a wetland

Part 303 contains several uses that are allowed in a wetland area without a permit, including farming, horticulture, silviculture, lumbering, ranching, irrigation, harvesting, and other agricultural practices. To be allowed without a permit, the bill would require the activities be part of an established ongoing farming, horticultural, silvicultural, or ranching operation.

Farming activities on areas lying fallow as part of a conventional rotational cycle would be considered part of an established ongoing operation unless modifications to the hydrological regime or ongoing mechanized land clearing are necessary to resume operation.

Activities that bring an area into agricultural use or converts an area from a forested or silvicultural use to agricultural use would not be considered part of an established ongoing operation.

Minor drainage would not include (1) draining associated with the conversion of a wetland to a non-wetland, (2) from one wetland use to another, or (3) the construction of a canal, ditch, dike, or waterway that drains or significantly modifies a stream, lake or wetland.

Drains

The bill would exempt an agricultural drain to the as-constructed location, depth, and bottom width from needing a permit under Part 303 as of January 1, 2013 if:

- It was built prior to January 1, 1973, or under a permit issued under Part 303.
- It has a drainage area of less than 160 acres and is entirely in agricultural use.
- The maintenance involves only activities that maintain the as-constructed location, depth, and bottom width of the drain as of January 1, 2013.
- Maintenance is performed by the landowner or as required under the Drain Code.

Drain maintenance would include the placement of spoils that were removed from a drain in locations where spoils have been previously placed along that drain. It would not include any modification to the character, scope, or size of the drain as of January 1, 2013, or any modification that results in additional wetland drainage or conversion of a wetland to a use to which it was not previously subject.

Utility lines

The bill would exempt from the permit requirement under Part 303, the maintenance or repair of utility lines and support structures that (1) is done in a way to minimize adverse effects on wetlands; (2) does not include modifications to the character, scope, or size of the original construction design; and (3) does not convert a wetland area to a use to which it has not previously been subject.

It would also exempt the installation of utility lines with diameters of 6-inches or less using directional drilling or boring, or knifing-in, if the installation is done in a way that minimizes adverse effects on wetlands. The utility lines would be subject to size, depth, and location requirements.

Part 303 permit exemptions removed

The bill would remove the following exemptions:

- The maintenance and operation of gas and oil pipelines.
- The construction of iron and copper mining tailings basins and water storage areas.
- Drainage necessary for the production and harvesting of agricultural products if the wetlands is owned by a commercial farmer and is used to produce and harvest agricultural products.

Incidentally created wetlands

The bill would exclude from regulation wetlands that are incidentally created by the construction of drains in upland for the sole purpose of removing excess oil moisture from upland agricultural areas.

Contiguous to water as a result of commercial excavation

The bill would clarify that an area that becomes contiguous to a body of water that is created as a result of commercial excavation for sand, gravel, or mineral mining is not subject to regulation under Part 303 solely because it is contiguous to the newly created water body. This exemption would only apply while the commercial excavation was active.

Conditional permit

The DEQ would be able to issue conditional permits before the 20-day period expires for a public hearing if emergency conditions warrant a project to protect property or the public health, safety, or welfare.

New administrative rules

By 1-year after the bill takes effect, the DEQ would be required to submit revised administrative rules to the Office of Regulatory Reinvention (ORR) for an informal review to (1) reduce the preference for on-site mitigation, (2) allow flexibility in mitigation ratios, (3) allow a reduction of mitigation ratios when approved credits are used, and (4) allow for the consideration of additional ecologically beneficial features.

The DEQ would be required to submit revised administrative rules that encourage the development of wetland mitigation banks to the ORR within 1-year after the bill's effective date to do the following:

- Enlarge mitigation bank service areas. A service area would have to be in the same watershed or ecoregion as the permitted project, ensure no net loss of wetlands, and protect the predominant wetland functions. The DEQ would have to consider increasing the size of ecoregions for mitigation bank service areas.
- Allow the earlier release of credits if the benefits of a mitigation bank have been established and the credits are revocable or covered by a financial assurance.
- Allow wetland preservation to be used in areas where restoration opportunities do not exist, provided an unacceptable disruption of the water resources would not result.

Establishment of wetland mitigation bank program

The bill would require the DEQ to establish a wetland mitigation bank funding program to provide grants and loans to eligible municipalities to help create mitigation banks.

Part 325 (Great Lakes Submerged Lands)

Conditional emergency permit

The DEQ is required to issue copies of permit applications to local officials and adjacent riparian owners and allow them to file written objections within 20 days. The bill would allow the DEQ to issue conditional permits before the 20-day period has expired if emergency conditions warrant a project to protect property or the public health, safety, or welfare.

Enacting Section 1.

The bill would repeal Sections 30325 and 30329 of NREPA. Section 30325 required the DEQ to pursue an agreement with the U.S. Environmental Protection Agency to expand the categories of discharges subject to the waiver from certain requirements of the federal Water Pollution Control Act. Section 30329 established the Wetland Advisory Council and is set to be automatically repealed on April 1, 2013 (per 2009 PA 120).

FISCAL IMPACT:

House Bill 5897 requires the Department of Environmental Quality to establish a Wetland Mitigation Bank Fund Program to provide grants and loans to eligible municipalities. The proposed funding for this program would be the Strategic Water Quality Initiatives Fund and up to \$10.0 million of this fund would be authorized to be

spent on the program by Section 5204F(1) of a separate proposed bill, House Bill 5673, if enacted.

The provisions of House Bill 5897 would increase the administrative workload for the Department of Environmental Quality. However, any additional costs are anticipated to be expended from current program appropriations. According to the Department, the changes in certain permit fees that the bill proposes are anticipated to offset one another and generate a similar amount of revenue.

BACKGROUND INFORMATION:

A wetland mitigation bank is a site where wetlands are restored, created, or, in some cases, preserved for the express purpose of providing compensatory mitigation in advance of the loss of wetlands. Mitigation banks are maintained in perpetuity and are intended to provide for the replacement of chemical, physical, and biological wetland functions that are lost due to authorized impacts.

The establishment and use of mitigation banks are voluntary and are created through written agreements with the DEQ. Credits in a mitigation bank can be used by the bank operator or sold and are generally based on the acres of created or restored wetlands after verification that the wetlands functions have been established.

Wetland mitigation banks may be located on either public or private lands and are generally planned and managed in a watershed or ecoregion context.

Wetland mitigation banks are generally regulated under NREPA and through R 281.951 - 281.961 (Wetland Mitigation Banking) of the Michigan Administrative Code.

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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.