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BILL ANALYSIS



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Senate Bill 1211 (as introduced 11-27-18)
Sponsor: Senator Tom Casperson
Committee: Natural Resources

Date Completed: 11-28-18

CONTENT

The bill would amend Part 301 (Inland Lakes and Streams) and Part 303 (Wetlands Protection) of the Natural Resources and Environmental Protection Act (NREPA) to do the following:

- **Extend a provision requiring a department to contact a permittee and extend an offer to discuss potential civil enforcement actions to any person, and require the department to provide that person a statement of facts and a list of each specific provision of statute, rule, or permit that the person was alleged to have violated.**
- **Require the Director of the Department of Environmental Quality (DEQ) to convene a meeting of an environmental permit panel to determine whether an objection from the Administrator of the United States Environmental Protection Agency (EPA) pertaining to a certain Federal permit provision was without merit.**
- **Specify that certain violations listed under Part 301 and Part 303 would have to be committed negligently before a person could be considered guilty of the violations.**
- **Specify that a civil or criminal fine authorized to be imposed for each day of a violation could not be imposed for a day of violation occurring after commencement of both the enforcement action and negotiations between the Department or the Attorney General or other prosecuting attorney and the violator over the enforcement action.**
- **Require the Department to consider cost, existing technology, and logistics in light of an overall road project's purpose in a wetland in determining whether an alternative would minimize any adverse effects on the wetland.**
- **Omit a requirement that the Department may only request a fee equal to double the standard application fee for a permit when work has been done in violation of a permit requirement under Part 303, and if restoration is not ordered by the Department.**
- **Allow a local unit of government to enact a wetland ordinance to regulate wetland of less than 10 acres in size, instead of five acres in size.**
- **Revise the conditions under which the Department may enter on, upon, or through the premises on which certain activity listed in Part 303 is located or on which information required to be maintained under Part 303 is located.**
- **Specify that, on stipulation of the parties or motion, a court that conducted a civil action under Part 303, or a presiding officer who conducted a contested case under Part 303, would have to award to a prevailing party the costs and fees incurred by the party in connection with the contested case, unless the Department demonstrated otherwise.**
- **Revise terms used throughout the Act.**

The bill would take effect 90 days after its enactment.

Contact & Statement of Facts Before Potential Civil Enforcement Actions

Currently, the department, before initiating a civil enforcement action under the Act against a person holding a permit issued under the Act, must contact the permittee and extend an offer for staff of the Department to meet with the person to discuss the potential civil enforcement action and potential resolution of the issue. If the permittee agrees to meet, the Department may not initiate a civil enforcement action until after the meeting is held, unless the meeting is not held within a reasonable time as determined by the Department.

The bill would extend these provisions to any person, instead of a person holding a permit. In addition, the bill would require the department to provide the person in writing a list of each specific provision of statute, rule, or permit that the person was alleged to have violated and a statement of the facts constituting the violation. Also, if the person agreed to meet with the department, it could not initiate a civil enforcement action until after the meeting was held, unless the meeting was not held within a reasonable time of not less than 60 days.

"Department" means the department, agency, or officer authorized under the Act to approve or deny an application for a permit.

Part 301 Definitions

Currently, the Part 301 of the Act defines "inland lake or stream" as a natural or artificial lake, pond, or impoundment; a river, stream, or creek which may or may not be serving as a drain as defined by the Drain Code; or any other body of water that has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water, including the St. Marys, St. Clair, and Detroit Rivers. The term does not include the Great Lakes, Lake St. Clair, or a lake or pond that has a surface area of less than five acres. The bill would delete these provisions.

Under the bill, "inland lake" would mean a natural or permanent artificial inland lake, pond, or impoundment that meets both of the following requirements:

- Has definite banks, a bed, and visible evidence of a continued occurrence of water.
- Is either more than 10 acres in size or waters of the United States as that term is used in Section 502(7) of the Federal Water Pollution Control Act.

(Under Section 502(7), the term "navigable waters" means the waters of the United States, including the territorial seas.)

The term would not include any of the following:

- The Great Lakes or Lake St. Clair.
- A feature used for treating wastewater or storm water.
- Artificial features created in land unregulated by Part 303 of the Act and used for cooling or storing water, farm of livestock irrigation or watering, log cleaning, swimming, mining or construction activities, or raising fish and other aquatic species.
- An artificially irrigated or flooded area that would revert to dry land if the application of water to that area ceased.

"Stream" would mean a natural or a permanent artificial river, stream, or creek that meets both of the following requirements:

- Has definite banks, a bed, and visible evidence of a continued flow of water.
- Is a waters of the United States as that term is used in Section 502(7) of the Federal Water Pollution Control Act.

The term would not include any of the following:

- A ditch with ephemeral flow that did not flow directly from or through a feature regulated under Part 303 of NREPA.
- An artificially irrigated or flooded area that would revert to dry land if the application of water to that area ceased.
- An erosional feature including gullies, rills, and other ephemeral features not regulated under Part 303.

Environmental Permit Panel For EPA Administrator Objection

Under the bill, if the Administrator of the United States EPA objected under 33 USC 1344(j) (which concerns the transmission of copies of applications for state permits and proposed general permits to the Administrator) to the issuance of a permit under Part 303 or Part 301, the Director would have to convene a meeting of an environmental permit panel to determine whether the Administrator's objection was without merit.

The Administrator's decision would have to be considered a petition and the panel would have to proceed as provided under the Act. After the Director received written notice of the panel's recommendation, he or she would have to determine whether the Administrator's objection was without merit. If the Director determined that the objection was without merit, he or she would have to notify the Administrator of the reasons why it was without merit and request the Administrator to withdraw the objection. The notice and request would have to be in writing and submitted to the administrator within 30 days after the Director received notice of the panel's recommendation. An objection would be without merit if it were any of the following:

- Not supported by competent, material, and substantial evidence on the whole record.
- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
- Affected by other substantial and material error of law.

The bill also specifies that this provision would apply to a permit application under Part 301 of the Act.

Negligent Violations & Fine Impositions

Under the Act, a person who violates Part 301 or a permit issued under Part 301 is guilty of a misdemeanor, punishable by a fine of not more than \$10,000 per day for each violation. A person who commits a minor offense is guilty of a misdemeanor, punishable by a fine of not more than \$500 for each violation. In addition, a person who violates Part 303 is guilty of a misdemeanor, punishable by a fine of not more than \$2,500. The bill specifies that these violations would have to be committed negligently.

A civil or criminal fine authorized to be imposed under Part 301 or 303 for each day of violation could not be imposed for a day of violation occurring after commencement of both the enforcement action and negotiations between the DEQ of the Attorney General or other prosecuting attorney and the violator over the enforcement action.

Part 303 Definitions

Under Part 303 of the Act, "wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh, and which is any of the following:

- Contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond, or a river or stream.
- Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream and more than five acres in size.
- Not contiguous to the Great lakes, an inland lake or pond, or a river or stream, and five acres or less in size if the Department determines that protection of the area is essential to the preservation of the natural resources of Michigan from pollution, impairment, or destruction and the Department has notified the owner.

The bill would revise the term. Under the bill, "wetland" would mean a land or water feature, commonly referred to as a bog, swamp, or marsh, inundated or saturated by water at a frequency and duration sufficient to support, and that under normal circumstances does support, hydric soils, aquatic life, and a predominance of wetland vegetation. A land or water feature would not be a wetland unless it was any of the following:

- Contiguous to the Great Lakes, Lake St. Clair, or an inland lake or stream.
- More than 10 acres in size.
- Water of the United States as that term is used in Section 502(7) of the Federal Water Pollution Control Act.

The term would not include an artificially irrigated or flooded area that would revert to dry land if the application of water to that area ceased.

"Contiguous to" would mean having a continuous surface water connection or other direct physical contact with the Great Lakes, Lake St. Clair, or an inland lake or stream. A wetland would be per se contiguous to an inland lake or stream if it were located within 500 feet of the ordinary high-water mark of an inland lake or stream, unless there was no surface water or groundwater connection. A wetland would be per se contiguous to the Great Lakes or Lake St. Clair if it were located within 1,000 feet of the ordinary high-water mark of a Great Lake or Lake St. Clair, unless there was no surface or groundwater connection.

"Hydric soil" would mean a soil that formed under condition of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part.

DEQ Duty When Considering Alternatives

The Act lists uses that are allowed in a wetland without a permit subject to other Michigan laws and the owner's regulation, such as fishing, trapping, hunting, swimming, and boating. The Act also allows for the construction or maintenance of farm roads, forest roads, or temporary roads for moving mining or forestry equipment, if the roads are constructed and maintained in a manner to ensure that any adverse effect on the wetland will be minimized. Under the bill, in determining whether an alternative would minimize any adverse effect on the wetland, the Department would have to consider cost, existing technology, and logistics in light of overall project purposes.

Work Done In Violation of a Permit

Under the Act, to obtain a permit for constructing, operating, or maintaining any development

in a wetland, a person must file an application with the DEQ on a form provided by the Department.

If work has been done in violation of a permit requirement under Part 303 and restoration is not ordered by the Department, the Department may accept an application for a permit if the application is accompanied by a fee equal to twice the application fee otherwise required. The bill would omit from this provision the requirement that restoration not be ordered by the Department.

Local Government Wetland Regulation

The Act allows a local unit of government to regulate wetland within its boundaries, by ordinance, only as provided under Part 303. An ordinance adopted by a local unit of government must comply with several provisions, including the requirement that the ordinance does not provide a different definition of wetland than is provided, except that a wetland ordinance may regulate wetland of less than five acres in size. The bill would modify this provision to allow a wetland ordinance to regulate wetland of less than 10 acres in size.

Departmental Searches

Under the Act, upon reasonable cause or obtaining a search warrant, the Department may enter on, upon, or through the premises on which an activity listed in Section 30304 is located or on which information required to be maintained under Part 303 is located.

(Section 30304 prohibits a person from performing the following activities without a permit or as otherwise provided: depositing or permitting the placing of fill materials in a wetland; dredging, removing, or permitting the removal of soil or minerals from a wetland; constructing, operating, or maintaining any use or development in a wetland; and draining surface water from a wetland.)

The bill would revise this provision to state that, upon obtaining a search warrant, an administrative warrant, issued by the Director of the Department, or the consent of the person who owned or controlled the premises, the Department could enter on, upon, or through the premises on which an activity listed in Section 30304 was located or on which information required to be maintained under Part 303 was located.

Awards to a Prevailing Party

Under the bill, on stipulation of the parties or motion, a court that conducted a civil action under Part 303 brought by or against the State as a party would have to award to a prevailing party, other than this State, the costs and fees incurred by that party in connection with the civil action, unless the State demonstrated by clear and convincing evidence that its position was substantially justifiable.

Similarly, on stipulation of the parties or motion, the presiding officer who conducted a contested case under Part 303 would have to award to a prevailing party, other than the Department, the costs and fees incurred by the party in connection with the contested case, unless the Department demonstrated by clear and convincing evidence that its position was substantially justifiable.

However, regardless of whether the State's or Department's position was substantially justifiable, expert professional witness fees would have to be awarded to a landowner that prevailed on the issue of whether the landowner's property was wetland.

FISCAL IMPACT

The bill would have a small, but likely positive, fiscal impact on the Department of Environmental Quality, and no fiscal impact on local units of government. The bill effectively would tighten the statutory definition of wetland, which would result in a reduction in the total number of acres subject to regulation as such. Under current law, owners of wetlands must apply for a permit to undertake certain activities on that land. Under the bill, there would presumably be fewer of these owners and, therefore, fewer permits for the DEQ to issue, as some parcels that are currently subject to the permit requirement would be no longer. This would result in the loss of an unknown amount of permit revenue, but also a reduction in costs related to the administration of the wetland permit program. Since wetland permit revenue is not sufficient to cover the entire cost of the wetland program, it is likely that the savings would exceed the amount of revenue lost, and save the DEQ a small amount of General Fund/General Purpose funds.

The bill would have a negative fiscal impact on the State and no fiscal impact on local government. The bill could reduce civil or criminal fine revenue by suspending the imposition of daily fines once the violator entered into negotiations with the State, regardless of whether the violations had ceased. Any decreased civil infraction and penal fine revenue would decrease funding to public libraries. Additional legal costs for the State could accrue when a State agency filed action against a party in violation of the Act. The bill would raise the burden of proof for the State to bring forward evidence to avoid paying the other party's costs, potentially including legal fees, which would likely result in increased court costs to the State.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.