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BILL ANALYSIS

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Senate Fiscal Agency

Lansing, Michigan 48909

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MAY 12 1988

**Senate Bills 782 and 783**

Sponsor: Senator Vern Ehlers

Committee: Natural Resources and Environmental Affairs

Mich. State Law Library

Date Completed: 4-26-88

***SUMMARY OF SENATE BILLS 782 and 783 as introduced 3-17-88:***Senate Bill 782 would create the "Dam Safety Act" to do all of the following:

- Grant to the Department of Natural Resources (DNR) jurisdiction over all dams and impoundments (i.e., water held back by dams) in the State.
- Provide for the application for and issuance of dam permits and the assessment of fees.
- Specify minimum criteria for determining spillway capacity (i.e., the maximum rate of discharge that will pass through a waterway in or about a dam for the escape of water).
- Require a completion notice for structural work done on a dam and provide for various inspections.
- Provide for limited operation orders and removal orders.
- Authorize the issuance of emergency orders and compliance orders, and the filing of civil actions.
- Specify violations and penalties.
- Make other provisions regarding notice of potential hazards; grievance hearings; promulgation of rules; liability and legal remedies; and compliance with other Acts.

The bill would repeal Public Act 184 of 1963 (MCL 281.131-281.135), which regulates the construction, operation, and inspection of dams.

The bill would take effect on May 1, 1989.

Senate Bill 783 would amend Public Act 156 of 1851, which requires the approval of a county board of commissioners before construction of a dam, to bring it into conformity with Senate Bill 782. Senate Bill 783 is tie-barred to Senate Bill 782.

Senate Bill 782DNR Jurisdiction

The bill specifies that all dams and impoundments in the State would be under the jurisdiction of the DNR. Projects licensed under the Federal Power Act or located on boundary waters under the jurisdiction of the United States Army Corps of Engineers would be exempt from the proposed Act, where "essentially equivalent" Federal provisions applied to a project and a dam owner certified that the Federal requirements were being met.

Under the bill, a person could not construct, enlarge, repair, reconstruct, alter, remove, or abandon a dam except pursuant to the bill. This restriction would not apply to maintenance performed on a dam that did not affect the integrity of the dam. The DNR would have to employ licensed professional engineers as necessary to carry out the proposed Act. The preparation of plans and

specifications and the supervision of related construction activities, with the exception of minor projects, would have to be done by licensed professional engineers.

Dam Permits and Fees

The bill would prohibit the following activities without a valid permit issued by the DNR:

- Construction, reconstruction, or repair of a dam.
- Enlargement of a dam or impoundment or alteration of a dam.
- Removal or abandonment of a dam.

An application for a permit to perform any of the above activities would have to be made to the DNR and include information that the DNR considered necessary. One application would be sufficient for a project that included activities at multiple locations. An application for a permit to construct a new dam or reconstruct a failed dam or enlarge a dam with a head of six feet to 10 feet would require a fee of \$250; for a dam with a head of 10 feet or more but less than 20 feet, a fee of \$500 would be required; and for a dam with a head of more than 20 feet, a \$1,000 fee would be required. A permit to repair, alter, remove, or abandon a dam would require a fee of \$25, which would be waived if a similar application fee under the Inland Lakes and Streams Act or the Wetland Protection Act were required. All fees would be waived for applications from Federal or State agencies, local units of government, and DNR-sponsored projects located on public lands. Fees would have to be deposited in the State Treasury and credited to the General Fund.

Anyone who desired notification of pending application for permits issued under the bill, could make a written request to the DNR accompanied by an annual fee of \$25, which would be credited to the General Fund. The DNR would have to prepare a biweekly list of the applications and mail the list to those requesting it for the remainder of the year. The list would have to include the name and address of each applicant, a legal description of the lands to be included in the applicant's project, and a summary statement of the project's purpose.

The DNR would have to submit copies of applications, accompanied by a statement that the DNR could act on the application without a public hearing unless a written request were filed within 20 days, to the local unit and county where the project would be located, the adjacent riparian owners, and other persons whom the DNR considered appropriate or who requested copies. The DNR could hold a hearing upon a written request of the applicant, a riparian owner, or a person or governmental unit entitled to receive a copy of an application. Such a

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hearing would have to be held in compliance with the Open Meetings Act. The DNR would have to mail copies of the meeting notice to persons who requested the biweekly application list, the person requesting the hearing, and the persons and governmental units entitled to receive copies of permit applications.

The DNR could grant or deny a permit within 60 days after submission of an application or within 120 days, if a public hearing were held. The DNR would have to supply a written statement of reasons for denial of a permit, and, if a minor modification of the application would result in approval, would have to notify the applicant of the nature of the modification. If immediate action were necessary to protect the structural integrity of a dam, the DNR could issue a permit before the standard 20-day period. When imminent danger of failure existed, an owner of a dam could take action necessary to avoid or limit emergency conditions. The DNR could not issue a permit under the bill if it determined that the proposed activity would have "a significant adverse effect on public health, safety, welfare, property, or natural resources or the public trust in those natural resources".

The DNR could establish minor project categories for dam alterations and repairs that would have minimal effect on a dam's integrity. The DNR could act on such an application after an on-site inspection without providing public notice. A final inspection by the DNR or certification of the project by a licensed professional engineer would not be required for such a project.

Permits issued under the proposed Act would require that the permitted activity be completed with a specified time not to exceed two years. The DNR, upon written application and for good cause shown, could extend that deadline. Notice of commencement of the project would have to be given to the DNR at least 10 days before initial construction. Permits could be renewed by the DNR and could specify the terms and conditions of the permit. Such terms would be effective for the life of the project.

A permit could require a performance bond to assure completion of the project or to provide for complete or partial restoration of the project site. A permit also could require that a dam owner establish an escrow account or performance bond that would provide sufficient funds to remove the dam and to remove or stabilize sediments accumulated in the impoundment after the dam outlived its use.

Permits could be suspended, revoked, annulled, withdrawn, recalled, canceled, or amended after a hearing for violation of any of the permit's provisions, violation of the bill or a rule promulgated under it, or any misrepresentation in the application. Such hearings would have to be conducted by the DNR in accordance with the Administrative Procedures Act.

### Spillways

In deciding whether to grant a permit, the DNR would have to consider spillway capacity. The bill would require that "freeboard" be considered when determining spillway capacity. ("Freeboard" would mean "the vertical distance between the design flood elevation and the lowest point of the top of the dam".) Spillway capacity also would have to meet the following minimum criteria:

- Low hazard potential dams would have to be capable of passing the 100-year frequency flood, or the flood of record, whichever was greater.
- Significant hazard potential dams would have to be capable of passing the 200-year frequency flood, or the flood of record, whichever was greater.

- High hazard potential dams, less than 40 feet in hydraulic height, as measured from the 200-year design flood elevation to the lowest downstream toe elevation, would have to be capable of passing the 200-year frequency flood, or the flood of record, whichever was greater. (If this condition were not met, the criterion could be reduced to no less than the 200-year frequency flood, with proper documentation that failure of a dam under "1/2 probable maximum flood conditions" would not cause additional flood damage or loss of life.)
- Spillway design capacity could not be less than the flood of record.

The portion of the spillway design flood discharge in excess of the 25-year frequency flood would have to be provided for by uncontrolled spillway capacity, except where the owner documented, to the satisfaction of the DNR, that the dam was operated by trained personnel and proper means were available to operate the spillway during the design flood.

### Completion Notice and Inspections

With the exception of minor projects, an owner would have to give a notice of completion to the DNR within 10 days after the completion of a new, reconstructed, enlarged, repaired, or altered dam. Within 20 days after the filing of the notice, the owner would have to file with the DNR a statement signed by the licensed professional engineer responsible for supervising the project, certifying that the project was done in conformance with approved plans and specifications. The DNR could inspect the project and would have to provide written notice of final approval to the dam owner. If the project were found not to be completed in accordance with approved plans and specification and permit conditions, the DNR could take enforcement action.

An owner would have to submit inspection reports that were prepared by a licensed professional engineer and evaluate the dam's condition. For high hazard potential dams, such reports would have to be submitted once every three years; for significant hazard dams, once every four years; and for low hazard dams, once every five years. The DNR would determine the hazard classification potential of all dams and establish an inspection schedule that would stagger the reporting years for each classification. The DNR would have to notify owners when inspection reports were due and could order additional inspection reports following an event or change in condition that threatened a dam. Inspection reports would have to include an evaluation of the dam's condition, spillway capacity, and operational adequacy. A report also would have to include an evaluation of whether the dam constituted a danger to public health, safety, welfare, property, or natural resources. The inspection report would have to include recommendations for maintenance, repair, and alterations of a dam to ensure its safety.

Local units of government could request the DNR to conduct a visual inspection of a dam that it owned and prepare a report on the condition of the dam, rather than engaging a licensed professional engineer to prepare the inspection report. If an inspection report revealed a need for further investigation or evaluation of certain features in order to assess the condition of the dam and its impact on natural resources due to operation or failure, the DNR could order the completion and submission of such a detailed investigation or evaluation, which would have to be completed at the owner's expense. If an owner failed to submit any required inspection report, the DNR could cause such a report to be prepared and recover the costs of the report in court.

The bill would allow the DNR to make or cause to be made a hydrologic or other investigation and study to facilitate a decision regarding the integrity and operation of a dam.

If the DNR found that a condition endangered a dam, it would have to order the owner to take actions to alleviate the danger and protect public health, safety, welfare, property, or natural resources or the public trust in those natural resources.

The Director of the DNR, or an authorized representative, would have the right to enter in or upon any private or public property any time where the public safety could be in danger, at reasonable times and with proper identification, for the purpose of inspecting or investigating conditions relating to the construction, operation, or safety of a dam and to determine compliance with the terms, conditions, and requirements of permits, order, or notices issued under the proposed Act or a rule promulgated under it.

#### Limited Operation and Removal Orders

The DNR could order a dam owner to limit dam operations in order to protect public health, safety, welfare, property, and natural resources or public trust in those resources. Such an order could include minimum flow releases, impoundment fluctuation restrictions, or requirements for run-of-the-river operation. In issuing limited operation orders, the DNR would have to consider social, economic, and public trust values. Prior to finalizing such an order, the DNR would have to provide the owner with an opportunity for a hearing.

Where significant adverse environmental impact or damage to persons or property, or both, had occurred as a result of the operation, condition, or existence of a dam, the DNR could order the removal of the dam following a determination that the dam was likely to continue to cause the significant adverse effects or damage. In issuing a removal order, the DNR would have to consider social, economic, and public trust values. The DNR would have to provide a dam owner with an opportunity for a hearing before finalizing such an order.

#### Emergency Orders, Compliance Orders, and Civil Actions

Emergency Orders. The Director of the DNR could issue orders, by written notice, immediately to repair, drawdown, breach, or cease operation of a dam where the dam was in imminent danger of failure and was causing or threatening to cause harm to public health, safety, welfare, property, or the natural resources or public trust in those resources. If a dam owner failed to comply with an order, or were unavailable or unable to be contacted, the DNR could undertake immediate action as necessary to alleviate the danger. If the DNR did so, it could recover incurred costs from the dam owner in court. The emergency order could be terminated upon a determination in writing by the Director that all necessary emergency actions were complied with and that the emergency no longer existed.

When ordering emergency actions, the DNR could specify maximum drawdown level and discharge rates and require sediment surveys, water quality sampling, monitoring, or other actions to insure adequate protection. The DNR could alter or modify the requirements of an emergency order if, during the conduct of ordered actions, the alteration or modification were determined necessary to protect the public health, safety, welfare, property, or natural resources or the public trust in those natural resources.

If the DNR issued an emergency order, it would have to give opportunity for a hearing within 15 days of the date

of issuance. At the hearing, the DNR would have to determine if the emergency order should be continued, modified, or suspended. An owner of a dam would have to prepare, and keep current, emergency action plans for all dams that he or she owned. Emergency action plans would have to be in a form prescribed and approved by the Department. Prior to DNR approval of an emergency action plan, the plan would have to be approved by the applicable county or local emergency management coordinators for consistency with the county or local emergency operations plan.

Compliance Orders and Civil Actions. If the DNR determined that a person was in violation of the bill, a rule promulgated under it, or a prohibition or condition of a permit, the DNR could issue an order requiring the person to comply with the prohibitions or conditions or to restore the site affected by the violation to its original condition. Restoration could include, but would not be limited to, removal of fill material deposited, or replacement of soil, sand, or minerals. In addition, the DNR could request the Attorney General or a county prosecutor or local attorney, to bring a civil action, or the DNR could take other appropriate action to insure compliance with a DNR order. Such an order would have to state the nature of a violation and the required remedial action, and specify a reasonable time for compliance considering the seriousness of the violation and the nature of any public threat that could be involved.

The Attorney General, or county prosecutor or local attorney, could commence a civil action for appropriate relief upon request of the DNR. Such an action could be brought in the Circuit Court for Ingham County or the county in which the dam was located. The court could issue injunctive relief and require compliance with the proposed Act. In addition to any other relief, the court could impose a civil fine of up to \$10,000 for each day of violation. A person who violated an order of the court would be subject to an additional civil fine up to \$10,000 for each day of violation.

#### Violations and Penalties

A person who violated certain specified sections of the bill or failed to respond within 30 days of receiving any of the following Director's orders or permit conditions, would be guilty of misdemeanor, punishable by a maximum fine of \$500:

- An order to have a dam inspected by a licensed professional engineer.
- An order to complete additional investigation.
- An order to repair or remove a dam.
- A first order to stabilize unprotected, unvegetated earth.
- A violation of any of the following permit conditions: 1) failure to supply requested data within the time specified by certified letter; 2) failure to monitor and inspect a dam and to submit a report on findings as prescribed by the bill; 3) violation of minimum flow release requirements, when the DNR determined that no significant impairment had occurred; and 4) violation of a permit condition, when the DNR determined that no significant adverse impact had resulted.

A person who willfully or recklessly violated the bill, a rule promulgated under it, or a condition or limitation of a permit that placed a person in imminent danger of death or serious bodily injury, or which could cause serious damage to property or natural resources, would be guilty of a misdemeanor, punishable by imprisonment for not more than one year or a fine of not less than \$2,500 nor more than \$25,000 for each day of the violation, or both. A person who committed a second such offense would be

guilty of a felony, punishable by imprisonment for not more than two years or a minimum fine of \$10,000 for each day of violation, or both.

A person who otherwise violated the bill, a rule promulgated under it, or a condition of a permit would be guilty of a misdemeanor, punishable by a fine of up to \$10,000 for each day of violation. In addition, the court could order a person who violated this proposed Act or a rule promulgated under it to restore the site affected by the violation to its original condition. Restoration could include, but would not be limited to, removal of fill material deposited or replacement of soil, sand, or minerals.

#### Other Provisions

Notice of Potential Hazards. A dam owner, or his or her agent, would "fully and promptly" have to advise the DNR and affected off-site public authorities and safety agencies of "any sudden or unprecedented flood or unusual or alarming circumstances or occurrence existing or anticipated" that could affect the dam's safety. The owner also would have to notify the DNR of any necessary emergency drawdowns, repairs, breaching, or other action taken in response to an emergency.

Grievance Hearings. Any person aggrieved by an action or inaction of the DNR could request a hearing on the matter involved. Such a hearing would have to be conducted by the DNR according to the Administrative Procedures Act. A determination of action or inaction by the DNR following such a hearing could be subject to judicial review.

Promulgation of Rules. The bill would authorize the DNR to promulgate rules to implement and enforce the proposed Act in accordance with the Administrative Procedures Act.

Liability and Legal Remedies. The bill would prohibit an action brought against the State or the DNR or its agents or employees for the recovery of damages caused by partial or total failure of a dam, or through the operation of a dam, on the grounds that the State, the DNR, or its agents or employees were liable by virtue of the performance of duties required by the proposed Act. With the above exception, the bill could not be construed to deprive an owner of any legal remedy to which he or she was entitled under Michigan law.

The bill specifies that it could not be construed to relieve an owner of a legal duty, obligation, or liability incident to such ownership or operation of a dam or impoundment.

Compliance. The bill specifies that it would not abrogate requirements of any of the following Acts:

- The Inland Lakes and Streams Act.
- The Wetland Protection Act.
- The Inland Lake Level Act.
- The Natural River Act.
- The Soil Erosion and Sedimentation Control Act.
- Public Act 123 of 1929, which regulates the free passage of fish.

#### Senate Bill 783

The bill would amend Public Act 156 of 1851, which requires of dam construction to be approved by a county "board of supervisors", to update the term to "board of commissioners" and to replace a reference to Public Act 184 of 1963 with a reference to the "Dam Safety Act", which would be created by Senate Bill 782. (Senate Bill 782 would repeal Public Act 184.)

MCL 46.22

Legislative Analyst: P. Affholter

## **FISCAL IMPACT**

### Senate Bill 782

Under the existing law an average of \$2,525, annually, was credited to the Game and Fish Protection Fund from FY 1982 through FY 1986. This bill would increase fees and create a \$25 fee to repair, alter, remove, or abandon a dam and a \$25 fee to receive notice of applications for permits. The fee increases and new fees would provide minimal revenue. The revenue would go to the General Fund in lieu of the Game and Fish Protection Fund. There would be indeterminate revenues from new penalties, of which the criminal penalties would go to the library fund and the civil fines to the General Fund.

The bill would result in approximately \$100,000, including 2.0 FTEs, in costs to the State for added administrative duties.

There would be minimal added costs to those local units owning dams for record-keeping, reporting and special maintenance.

### Senate Bill 783

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: A. Rich

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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.