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FLOOD DAMAGE REDUCTION

Senate Bill 151 with House committee amendments

Senate Bill 152 as passed by the Senate
First Analysis (10-25-89)

Sponsor: Sen. Dick Posthumus
Senate Committee: Natural Resources and Environmental Affairs
House Committee: Conservation, Recreation, & Environment

THE APPARENT PROBLEM:

According to the Department of Natural Resources (DNR), approximately six percent of Michigan's land area is considered prone to flooding, and the DNR estimates the cost of flood damage in the state at between $60 million and $100 million annually. Damage to property and natural resources reportedly has increased significantly as floodplains and watersheds have been developed, and some claim that traditional management techniques (e.g., zoning) have led to increased flooding problems. It is contended that there is a need to address the cycle of flooding and rebuilding in Michigan, because current programs and policies may in fact reinforce such a cycle. It is argued that both federal and state emergency programs strive to return flood victims to their property quickly, thus often ignoring the possibility of alternatives such as relocating or flood-proofing the structures. In addition, current flood management programs emphasize regulating only new or replacement floodplain activities and do not provide for the delegation of floodplain regulatory authority to local units of government. Some people feel that a comprehensive flood damage reduction statute should be enacted to centralize the responsibility for storm water and flood management within the DNR, while allowing regulatory authority to be delegated to local units; improve floodplain mapping; authorize the designation of critical storm water runoff areas; and provide for a state fund to mitigate damage due to flooding and encourage flood proofing measures.

THE CONTENT OF THE BILL:

The bill would create the Flood Damage Reduction Act to limit property damage and threats to life from floods and to regulate the alteration of floodplains.

DNR duties. The bill would designate the Department of Natural Resources as the state agency that would determine the location and extent of floodplains, floodways, and critical storm water runoff areas. The department would develop and coordinate information regarding the state's floodplains and storm water runoff areas, including development of guides for flood preparedness planning and for regulations, management programs and studies regarding storm water runoff and floodplains. It would also assist communities in preparation of floodplain regulations and storm water management programs and prepare a standardized permit application form for floodplain alterations. In addition, it would establish a priority list for recommending the order in which floodplain studies and storm water studies would be completed by federal or state agencies. The list would be reviewed and updated annually.

The bill would require the department to cooperate in disaster planning and preparedness activities consistent with the Michigan Emergency Preparedness Plan created under the Emergency Preparedness Act. The department would also participate in the integration of its flood damage reduction resources into the Michigan Emergency Preparedness Plan as well as the integration of the flood damage reduction resources of communities and available private resources into the communities' emergency operation plans. In the case of an actual disaster or a disaster training drill, the DNR would have to provide flood damage reduction resources pursuant to the Michigan Emergency Preparedness Plan.

Flood damage mitigation fund. The bill would create the Flood Damage Mitigation Fund to be expended by the department for grants or a three percent subsidy on a loan from a public lending institution to individuals for flood-proofing measures in areas declared to be in a state of disaster where the department determines appropriate. Grants would not exceed 50 percent of the eligible cost of the flood-proofing measures or $5,000, whichever was less. An interest subsidy on a loan under this provision would be applied to the loan principal in the form of a discounted lump-sum payment based on the first $25,000 of eligible costs of the flood-proofing measures. Payment from the fund would be made upon certification by a licensed engineer, architect or building inspector that not less than 80 percent of the eligible work had been completed and a completed application had been approved by the department. Administration of the grants and loan subsidies by the department would be done in consultation with the Department of State Police. Installation of dikes and seawalls, landscaping, and the backfilling of property would not be eligible for grants or interest subsidies. If money in the fund was insufficient to meet the needs of a flood disaster, a request could be made by the department for a supplemental appropriation for an area declared to be in a state of disaster.

The fund would include appropriations by the legislature, fees established in the bill, and gifts and donations. It could not exceed $1 million exclusive of interest and earnings, and any amount over $1 million would be deposited in the general fund. However, unencumbered balances at the close of each fiscal year would remain in the fund and could not revert to the general fund. Applications for grants or interest subsidies would be postmarked no later than 90 days after the date of the declaration of a state of disaster and would include information describing and estimating flood damage and costs to elevate or flood proof buildings.

Floodplain alteration permits. The bill would prohibit alteration of a floodplain unless a person was in possession

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of a permit from the department or an authorized community or the person was exempt from needing a permit. Permits for alteration of a floodway could not be issued for the construction of a residence, improvement of a residence, or the renovation of a structure into a residence.

Permits for alteration of a floodplain would be issued as long as the following conditions were met: the alteration did not cause "harmful interference" (meaning increased water levels or other problems detailed under the bill); all buildings in the affected floodplain were constructed so that the lowest portion of all of the horizontal structural members supporting floors were elevated above the 100-year flood elevation; all basement floor surfaces were located at or above the 100-year flood elevation; and all nonresidential buildings were elevated or flood-proofed to or above the 100-year flood elevation.

Permits would not be required for the tilling of agricultural land, flood control projects authorized by a federal agency, improvement or maintenance of an existing county or intercounty drain under the Drain Code, a floodplain alteration by an authorized public agency, or stream crossings for logging purposes permitted by the department under the Inland Lakes and Streams Act. Any person could request an informal meeting with the DNR regarding the issuance of a permit by the department or an authorized community within 30 days after action on the permit. Following the meeting, a person could request a contested case hearing on the matter under the Administrative Procedures Act.

Application for a permit under this provision would include information required by the department or an authorized community to assess the proposed alteration's impact on a floodplain. If an alteration included activities at multiple locations in a floodplain, one application could be filed for combined activities. An application for a permit issued by the department would be accompanied by a fee of $500 of which $50 would be credited to the Flood Damage Mitigation Fund, but an application for a permit that was submitted by a public agency would not be required to be accompanied by a fee. However, an application for a permit issued by an authorized community would be accompanied by a fee based on the authorized community's administrative costs and would be retained by the community as compensation for its administrative costs. Applications for a permit for a minor project category issued by the department would require a $100 fee. Fees collected under this provisions of the bill would be credited to the general fund and would be available for use by the department to defray the cost of reviewing plans and specification and field inspections to determine compliance with permits issued under the bill.

Applications for floodplain alteration permits that were submitted to the department would be reviewed by: the director of the Department of Public Health; the city, village, or township, and the county where the project would be located; the county drain commissioner or a person with similar responsibility, the local watershed council organized under the Local River Management Act; and adjacent property owners. If a reviewer did not respond to an application for a permit within 20 days after the application had been mailed to the reviewer, the department could grant the application. The department would attempt to resolve the objections to a permit prior to issuing a permit and could hold a public meeting to try to resolve the objections that had been raised.

The department could establish minor project categories of activities and projects that were similar in nature and had a minimal potential for causing harmful interference. No public notice would be required for the department or an authorized community or public agency to act upon an application for a minor project.

The department would determine whether floodplain mapping in a community accurately defined the elevations and limits of the floodplain and floodway to the extent necessary to allow the community to apply for designation as an authorized community. A map of the floodplain area within a community would be sent to the community with notification of the powers, duties, and responsibilities of an authorized community. In order to become an authorized community, a community would prepare floodplain regulations that met or exceeded rules for floodplain management standards and would submit them to the department for review. It would also agree to maintain a file of all floodplain permits with certifications indicating that the project was built in accordance with approved plans and indicating the elevation of a structure in relation to sea level to which the structure had been flood-proofed. The community would also have to agree to make available or to post in a prominent public location a map depicting the limits of floodplains within the community and agree to fulfill the public notice requirements regarding applications for permits. In addition, it would notify the DNR at least 20 days before taking final action on a permit application.

The DNR would have to review and either approve, reject, or return for correction a community's application within 90 days after its receipt. Authorization would be considered granted if the department took no action. If a community were granted authorization, it would be delegated the authority to review and approve or reject floodplain alteration permits and to administer and enforce floodplain regulations within its jurisdiction.

An authorized community's assessing officers would have to make appropriate allowance in assessed valuation for losses of value resulting from regulation of land in floodplain areas as provided under the General Property Tax Act.

Authorized Public Agencies. A public agency responsible for designing and constructing public facilities that could be located within a floodplain could apply to the DNR for designation as an authorized public agency by submitting floodplain design standards and procedures that at least equaled the bill's requirements or those of rules promulgated under the bill.

The DNR would review an agency's floodplain design standards and procedures within 90 days after receipt. If the DNR did not act within the 90-day period, the standards and procedures would be considered approved and the agency could conduct floodplain alterations without a permit from the DNR or an authorized community. An authorized public agency would have to give public notice of its alteration intentions and notify the DNR of its decision to alter or occupy a floodplain, except for minor project categories. The notice would have to include certification that the alteration was in accordance with the agency's design standards and procedures. The notification also would have to indicate the extent of work to be done in the floodplain and would have to be sent to the DNR at least 20 days before the alteration was begun.

Monitoring and Revocation. The DNR periodically would have to monitor an authorized community's or authorized

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public agency's administration of its programs to ensure compliance with the bill's requirements. If the DNR determined that floodplain regulations or design standards and procedures were not administered or enforced in accordance with the bill, it could revoke an authorization status. A revocation would become effective 31 days after the date of receipt of notice of the revocation.

The revocation would not become effective if, within 30 days after receiving the revocation notice, the public agency or community were able to demonstrate to the DNR satisfactorily that the alleged violations did not occur or that alleged violations were accidental and the agency or community had been operating in compliance with regulations, design standards, and procedures and it was able to provide assurances that corrective measures had been taken and future operation would be in full compliance with regulations, design standards, and procedures.

In addition, the revocation would not become effective if, within 30 days after receipt of the revocation notice, the community or agency requested a contested hearing under the Administrative Procedures Act. Further, any person could request an informal meeting with the department to contest departmental action relating to charges of noncompliance with the objectives and provisions of the bill and its rules against a community or agency. Following the meeting, a person could request a contested case hearing on the matter under the Administrative Procedures Act.

Runoff Areas. The bill would require the DNR to determine if a "critical storm water runoff area," an area where storm water studies had shown that increases in storm water runoff had caused or were projected to cause a harmful interference, should be designated. If such an area were designated, the DNR would notify the affected communities and send a map of the appropriate runoff area, outlining recommendations for management of the area. A public hearing would be held in the area, and communities in the area could appeal the results of the study to the DNR within 90 days after the public hearing.

Upon notification to a community by the DNR that it was within a critical storm water runoff area, the community could regulate a storm water management program within its jurisdiction. Within the runoff area, the DNR would preserve water storage in floodplains and in wetlands, if the wetlands were regulated under the Wetland Protection Act.

Flood Damage Reduction. The bill would require communities to cooperate with the DNR and federal agencies in evaluating flooding potential and identifying floodplains within their jurisdiction. Communities also could develop and implement a flood damage reduction program.

Other Provisions. Any action taken under the bill could not unreasonably impair the public trust and environmental values in adjacent waters and could not be in conflict with any of the following acts:

- the act creating the Water Resources Commission;
- the Environmental Protection Act;
- the Natural River Act;
- the Inland Lakes and Streams Act;
- the Soil Erosion and Sedimentation Control Act;
- the Shorelands Protection and Management Act; and
- the Wetland Protection Act.

Before real property containing a floodplain was sold by the state or an authorized community, the purchaser would be notified of the existence of the floodplain and that the property could be subject to restrictions under the bill.

Penalties for Violations. Anyone who altered or allowed the alteration of a floodplain in violation of the bill would be guilty of a misdemeanor, punishable by a fine of not more than $2,500 for each occurrence. A person who was required to obtain a permit under the bill but did not do so would be fined at least twice the amount of the fee for the appropriate permit application. A person who willfully or recklessly violated a condition of an alteration permit would be guilty of a misdemeanor, punishable by a maximum fine of $2,500 per day.

Legal Action. The DNR, in conjunction with the attorney general's office, could bring an action to implement or enforce the act. The state, community or other person could bring an action to restrain or prevent any violation of the bill, its rules, or local floodplain regulations adopted and approved under the bill.

The bill is tie-barred to Senate Bill 152 and would take effect January 1, 1990.

Senate Bill 152 would amend the act that created the Water Resources Commission, to remove from the commission and grant to the DNR authority and responsibilities in matters concerning the water resources of the state. The bill also would repeal sections of the act authorizing the commission to make regulations regarding the prevention of harmful interference with the discharge and stage characteristics of streams and prohibit the occupation, with certain exceptions, of lands in a floodplain, stream bed, or channel.

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HOUSE COMMITTEE ACTION:

The House Conservation, Recreation and Environment Committee made technical amendments to Senate Bill 151.

FISCAL IMPLICATIONS:

According to the Department of Natural Resources, implementation of the bill would require one additional FTE and $260,000. The FTE and $60,000 would be used to define critical storm water areas. Approximately $200,000 would be used for technical reference center and guidebook activities. There could be some additional costs associated with administration of the Flood Damage Mitigation Fund, but these could be eligible for federal support. The bill would also authorize delegation of some responsibilities to local communities, which could increase local costs.

The $100 to $500 permit fee would generate $150,000 in revenue. Using between $30,000 and the current annual permit volume, a maximum of $15,000 could be credited to the fund and $30,000 for administrative costs. This is an approximation because there could be either an increase in volume due to expanded permitting activities, or a decrease due to delegation of responsibility to local governments (which could then expect a revenue increase). Additional revenue also would be generated from penalties. (10-25-89)

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ARGUMENTS:

For:

The bill would allow the DNR and local units of government to take steps toward reducing flood hazards in Michigan. By requiring the DNR to establish a technical reference center, develop educational programs, and prepare guidebooks for flood preparedness planning and floodplain regulations, the bill would provide for greater awareness of flood hazards and floodplain management techniques. In addition, requiring floodplain alteration permits from either the DNR or an authorized community for floodplain development projects would ensure that proper flood protection measures were taken by the developers of such projects. Further, by establishing the Flood Damage Mitigation Fund, the bill would encourage property owners in areas that were damaged by floods to use flood-proofing measures in making needed repairs.

For:

The DNR already regulates floodplain activities, but that authority is somewhat fragmented and limited. For instance, while Public Act 245 of 1929 grants the Water Resources Commission broad authority to deal with matters concerning the state's water resources, various executive orders, according to the DNR, grant the department the authority to regulate certain floodplain activities. In addition, the DNR claims that the emphasis of the current state Flood Hazard Management Program is on controlling only new or replacement floodplain encroachments and does not address the alteration of current floodplain developments, flood damage mitigation efforts, improved mapping of floodplains, or educational efforts regarding floodplain and storm water management. The bill would codify and centralize the authority to regulate floodplain activities as well as expand regulatory authority over development projects on floodplains.

Against:

The bill would grant too much regulatory authority to both the DNR and the local unit of government. Either of those public entities could use its regulatory authority to hold up other agencies' public projects. For instance, although the Department of Transportation could be designated as an authorized public agency for purposes of its road construction projects, it would have to file floodplain design standards and procedures with the DNR in order to qualify for that designation and would have to notify the DNR of every project it undertook. In addition, the department could be subject to many different local regulations as well as the DNR's state regulations, even on a single project.

Against:

While the bill's proposed efforts to encourage the use of flood-proofing measures in the repair of flood-damaged property are admirable, prevention of such damage should be a matter for the property owners themselves, local zoning authorities, and insurance companies. There is no reason that a public fund, consisting of tax revenues and permit fees, should be used to subsidize floodplain property owners in repairing and improving their damaged property.

POSITIONS:

The Department of Natural Resources supports the bills. (10-25-89)

The Michigan Townships Associations takes no position on the bills. (10-25-89)