House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

ASSESS LAND USE RESTRICTIONS

House Bills 5969 and 5970 as enrolled
Public Acts 530 and 550 of 1996
First Analysis (1-19-97)

Sponsor: Rep. James McNutt
House Committee: Conservation, Environment and Great Lakes
Senate Committee: Natural Resources and Environmental Affairs

THE APPARENT PROBLEM:

Wetlands are regulated by the federal government under the Clean Water Act. Under Section 404 of this act, a person who wants to remove, dredge, or discharge fill materials into any water must receive a permit from the U.S. Army Corps of Engineers, which follows Environmental Protection Agency (EPA) guidelines in determining which permits are issued. However, in accordance with federal policy that allows the EPA to delegate its authority to states with programs similar to or more stringent than the federal program, Michigan has assumed permit responsibility over state wetlands. Regulatory authority is exercised by the Department of Environmental Quality (DEQ) under the Natural Resources and Environmental Protection Act (NREPA).

Property owners frequently maintain that the DEQ's regulatory program is confusing. For example, some build homes, only to discover that their properties encroach on wetlands. Often, there is no way that the property owner could have known this fact prior to building. During fiscal year 1989-90, the department conducted a Wetlands Determination Program, under which the department, when requested to do so by a property owner, would inspect property and determine whether it was a wetland. However, funding for the program was eliminated in the fiscal year 1990-91 budget, and it was discontinued. It has been suggested that the program be reinstituted, and that its funding be secured by fees imposed on those property owners who request wetland assessments.

Other concerns have been raised regarding wetlands. Occasionally, a wetland is created after land has been subjected to construction activity -- such as a sand mining operation, or creation of a wastewater treatment facility or a landfill -- that has altered the drainage pattern of a parcel of property. Wetland regulations do not distinguish between these "incidental" wetlands and others. Other situations involve land that was drained for farming operations before October, 1980 -- the date on which the Goemaere-Anderson Wetland Protection Act (later recodified into the NREPA under Public Act 451 of 1994) became effective. Unless it has been drained well enough to no longer qualify as wetland, this category is also regulated under the act, even if the property continues to be farmed. In addition, property on which authorized activities are conducted under a federal pollution discharge elimination system permit is also regulated under Part 303 of the act. It has been proposed that the wetland permit requirement be eliminated for an activity that is also monitored under a state or federal discharge permit. Legislation has also been proposed that would eliminate the need for permits on wetlands that have been drained for farming and that are part of ongoing farming operations, and for certain incidental wetlands created as a result of mining or construction operations.

THE CONTENT OF THE BILLS:

House Bills 5969 and 5970 would amend Part 303 (MCL 324.30305 et. al.) of the Natural Resources and Environmental Protection Act (NREPA), which regulates wetland protection, to require that the Department of Environmental Quality (DEQ) conduct an assessment to determine whether a parcel of property, or a portion of a parcel, were a wetland; and to allow certain activities to be conducted in a wetland without a permit.

Assessment Requests. Currently, NREPA specifies that a preliminary inventory be made of all wetland in the state on a county by county basis. Before an inventory is made, interested persons in a county may request to have property inspected by the DEQ, which then makes a determination on whether the property is a wetland. House Bill 5969 would restate this provision to specify that, before an inventory was made of a county, a person who owned or leased a parcel of property could request that the department assess whether the property, or a portion of it, was wetland. The request would have to be

submitted on a department form; be signed by the person owning or leasing the property; contain a legal description of the parcel and, if only a portion of it is to be assessed, a description of that portion; include a map showing the location of the parcel; and grant the department or its agent permission to enter on the property to conduct the assessment.

Assessment Report. Under the bill, the department would have to assess a parcel of land within a reasonable time after a request was made. The bill would also specify that the department could enter upon the parcel to conduct the assessment, and, upon completion, would have to provide the person with a written assessment report. The assessment report would:

- Identify in detail the location of any wetland in the area assessed.
- Describe the types of activities that require a permit under the provisions of the act if wetland is present in the area assessed.
- State, if the report determines that the assessed area, or part of it, is not wetland, that the department lacks jurisdiction under the act over the area and that this determination is binding on the department for three years from the date of the assessment.
- Contain the date of the assessment.
- Advise that the person could request a reassessment of the parcel or any part of it that the person believed had been erroneously classified as a wetland, if the request were accompanied by evidence pertaining to wetland vegetation, soils, or hydrology that differed from the department's.
- Advise that the assessment report did not constitute a determination of wetland that could be regulated under local ordinance, or wetland areas that could be regulated under federal law; and advise how a determination of wetland areas regulated under federal law could be obtained.
- List regulatory programs that could limit land use activities on the parcel, advise that the list was not exhaustive, and advise that the assessment report did not constitute a determination of jurisdiction under those programs. The regulatory programs listed could be those under Part 31 of the act, with respect to floodplains and floodways; Part 91, affecting soil erosion and sedimentation control; Part 301, affecting inland lakes and streams; Part 323, affecting shorelands protection and management; Part 325, concerning Great Lakes submerged lands; and Part 353 of the act, concerning sand dunes protection and management.

Reassessments. A reassessment could be requested for any assessed area that a person believed had been erroneously classified as a wetland. Requests for reassessments would be handled in the same way as assessments. However, the request would have to be accompanied by evidence pertaining to wetland vegetation, soils, or hydrology that differed from, or was in addition to, the information relied upon by the department. The report could not contain information regarding a reassessment request.

If it were determined, due to an assessment report, that the area assessed, or part of the area assessed, was not a regulated wetland, then the property would not be considered wetland nor regulated by the department for a period of three years after the date of the assessment.

Fees. The bill would specify that the department could charge an assessment fee, based upon the cost of conducting an assessment. Fees collected under the provisions of the bill would be deposited in the Land and Water Management Permit Fee Fund.

House Bill 5970. Part 303 of the NREPA allows certain activities to be conducted in wetlands, which, if conducted in an inland lake or stream, or on a marina, would require a permit. House Bill 5970 would amend Part 303 (MCL 324.30305) to add that a discharge that was authorized by a national pollution discharge elimination system permit under Part 31 of the act (which governs water resources protection) could also be conducted without a permit.

Part 303 of the NREPA also specifies that an additional permit is not required for a project solely involving the discharge of fill material subject to the individual permit requirements of Section 404 of Title IV of the federal Water Pollution Control Act, between October 1, 1980, and the date the state program under Title IV is approved. House Bill 5970 would delete this provision. However, under the bill, certain other activities would be excluded from regulation under the act, including an activity in a wetland that had been effectively drained for farming before October 1, 1980, and which, since then, had continued to be effectively drained as part of an ongoing farming operation; and a wetland that had been accidentally created as a result of one or more of the following activities:

- Excavation for mineral or sand mining, provided that the area was not wetland prior to excavation. However, this exemption would not include a wetland on, or adjacent to, a water body of one acre or more in size.

- Construction and operation of a water treatment pond or lagoon in compliance with the requirements of state or federal water pollution control regulations.
- A diked area associated with a landfill, if the landfill complied with the terms of the landfill construction permit and if the diked area wasn't a wetland before diking.

FISCAL IMPLICATIONS:

The House Fiscal Agency (HFA) estimates that House Bill 5969 would result in increases in both costs and revenues, since the department would be allowed, under the bill, to charge a fee equal to the estimated cost of responding to a request for an assessment. However, the agency notes that no startup funds have been provided to initiate the proposed program. These costs are estimated to be in excess of $200,000. The HFA also estimates that House Bill 5970 would result in an indeterminate decrease in revenues, since the bill would result in fewer wetland permits. (1-27-97)

ARGUMENTS:

For:

The wetland determination program established under the provisions of House Bill 5969 would eliminate current misconceptions and confusion regarding a wetland and the types of activities that may or may not be conducted on it. Property owners in general, and farmers in particular, are frequently confused about their property rights with regard to wetland areas. Many would prefer to avoid using areas that are regulated as wetlands, or at least minimize their use of such areas. According to the Department of Environmental Quality (DEQ), the confusion results from a public perception that all land that was once wetland -- no matter how well or how long it has been effectively drained -- continues to be defined as "wetland" by the department, and is regulated under the Natural Resources and Environmental Protection Act (NREPA). In fact, the department supports the concept of exempting agricultural property that has historically been well drained.

Under the act, a "wetland" is defined, in part, as "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 . . . ." The DEQ maintains that it has always interpreted this definition as applying only to areas that have water at or near (within 12 inches of) the surface of the soil for at least 14 days during a normal growing season. According to the department, water that is present for that length of time will support wetland plants or other aquatic life, which will predominate over plants and animals that are not adapted to wet conditions. However, on land that has been farmed, plowing, cultivating, and other activities erase native plans and animals, and -- unless it can be determined how much drainage has taken place -- it is difficult to assess whether the land is still wetland. Consequently, the department's position is that, if a field has been continuously drained well enough to qualify as upland, then it does not qualify as wetland and is not controlled by the NREPA.

Response:

Some argue that the fees which, under the provisions of House Bill 5969, would be charged for each assessment conducted by the DEQ, might prove inadequate to fund the proposed wetland assessment program. Instead, it is argued, a fee schedule should be established to ensure that adequate funds are available to conduct wetland assessments.

For:

The DEQ has been criticized for its regulation of wetlands such as those that are accidentally created from mineral or sand mining excavation, or as a result of a diked area associated with a landfill; and for requiring permits for wetlands that are also regulated under federal law. In recent years, department decisions in these situations have been contested as "takings" issues in formal hearings or in court. By distinguishing between natural wetlands and those that have been created accidently, the provisions of House Bill 5970 would constitute the first part of several department initiatives that would reduce the regulatory burden on property owners and eliminate some of the criticism.

Analyst: R. Young

■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.