House
Legislative
Analysis
Section

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REVISE DRAIN CODE

House Bill 4337 (Substitute H-6)
First Analysis (9-22-98)

Sponsor: Rep. Howard Wetters
Committee: Agriculture

THE APPARENT PROBLEM:

Drainage in Michigan, with its extensive natural wetlands, is extremely important both to agricultural production and to land development. It also has become an increasingly controversial issue in the state, particularly in the decades since enactment of the last and most recent comprehensive recodification of the state drainage laws, the Drain Code of 1956.

Throughout the last century and well into this century, Michigan's plentiful marshes, swamps, and other "wet" lands have been viewed negatively, as obstacles to economic growth and development. Consequently, the drains needed to turn these otherwise "unproductive" lands into valuable productive farmland or other "developed" land uses have been viewed as both desirable and beneficial. This is the viewpoint that has driven Michigan drain law, which assumes that drains and drainage of "reclaimable" wetlands unquestionably benefits landowners by increasing the economic value of their otherwise "unusable" land. The two main economic goods promoted and protected by the drain laws have been roads and farmland. "Public health" was added to the drain laws relatively early in the last century when it became evident that settlement in the territory (and, later, in the young state) by malaria, which was spread by mosquitos that bred in the state's wetlands. Although drain law has authorized drains under the general rubric of "public health, convenience, or welfare" since the 1897 consolidation of drain laws in Public Act 254, the fundamental purpose of the drain law has been, and has remained, economic development, and primarily specifically agrarian economic development.

In the decades since World War II, however, changing social values concerning the noneconomic value of the environment, as well as the intensified development of land for non-agricultural purposes, have challenged the historical basis and orientation of drain law. The post-war explosion of commercial, industrial, and residential development -- including the phenomenon that came to be called "urban sprawl" -- resulted in uses of the drain code for other than agricultural purposes, uses that actually have decreased rather than expanded land available for agriculture. At the same time as non-agricultural land uses intensified, the growth in public awareness in the 1960s of the ecological and noneconomic value of the environment posed another challenge to the drain law. Although the economic interests protected by the drain law succeeded in exempting the drain law from the wave of environmental protection legislation that began to appear in the 1970s, pressures to require drain law to conserve natural resources and protect the environment have continued to increase. Finally, in the aftermath of the great civil rights movements of the 1960s and 1970s -- and perhaps as a result of a growing and pervasive suspicion of government in general, at least as expressed in various "tax revolts" -- serious challenges both to the lack of due process and to the non-legislative process of taxation in the drain law also have become increasingly prominent.

Though substantive changes to the Drain Code of 1956 have been discussed or recommended for at least the past three decades (see BACKGROUND INFORMATION), no comprehensive revision of the entire drain code has seen successful legislative action until now.

THE CONTENT OF THE BILL:

The bill would rewrite the Drain Code of 1956 (Public Act 40 of 1956), as amended. In general, the bill would update, combine, and consolidate many of the code's current provisions, make numerous technical revisions, and make a number of more substantive changes to the current process for initiating, maintaining, and paying for drains.

For example, instead of having separate chapters, as currently, on county drainage districts (chapter 3), county drains (chapter 4), intercounty drainage districts (chapter 5), and intercounty drains (chapter 6), the bill would have one chapter (chapter 3) on

county drainage districts and county drains and one chapter (chapter 5) on intercounty drainage districts and intercounty drains. And instead of having separate chapters on highways (chapter 13), railroads (chapter 14), and dams in drains (chapter 15), the bill would repeal chapters 14 and 15, and rewrite and rename chapter 13 "Roadways, railroads, utilities, and other structures." The bill also would make numerous technical changes.

In brief, some of the more significant proposed changes would be as follows:

** All public hearings and major meetings would require notification by first-class mail and publication in a newspaper of general circulation.

** The number of petitioners required for a drain project petition would be decreased, but petitions with fewer than 50 percent of the landowners in the proposed drainage district would have to post security.

** There would be a minimum of two board of determination hearings instead of the current single hearing to determine practicability and "necessity."

** Provisions requiring payment for the costs of failed or withdrawn project petitions would be added.

** "Public corporations" (state departments or agencies, including colleges, universities, junior or community colleges, school districts, municipalities -- counties, cities, villages, or townships -- or authorities created by or under state law) would be liable for drain taxes ("drain special assessments").

** New drain projects would have to comply with a "best management practices" manual that included standards regarding the protection and conservation of natural resources.

** The decision-making process on requested drain projects would have to include a "preliminary engineering analysis" that would be made available to the public before the board of determination hearing to determine whether the drain was necessary and conducive to public health, convenience, or welfare.

** Natural Resources and Environmental Protection Act (NREPA) permits would be required for all drain extensions and branches where activity took place outside the originally established boundaries of the drainage district.

** The circuit court would review whether an order of necessity was lawful and supported by evidence on the record only, though parties could offer additional testimony from two expert witnesses.

** Projects with an estimated cost of less than $10,000 would not have to be bid (currently the ceiling is $5,000).

** After the bill took effect, inspections would be required every 3 years for new drains and for improved or restored existing drains.

** Drain commissioners (or drainage boards) could spend up to $5,000 (up from the current $2,500) a year per mile or fraction of a mile for drain maintenance or repair without a petition for the maintenance or repair and without first notifying affected landowners in the district. They also could assess up to $2,500 a mile in any one year.

** Drain commissioners would be required to review all requests to discharge into, connect to, or cross an existing drain.

** A new misdemeanor would be added to the "Penalties" (renamed "Sanctions") chapter of the drain code. It would be a misdemeanor to willfully prohibit, prevent, or obstruct the drain commissioner or drainage board, or their agents, employees, or contractors from (1) going on land to examine it or to make surveys in connection with the drain commissioner's or drainage board's work, or (2) going on a drainage district right-of-way ("with their employees, tools, machinery, instruments, and other equipment") to construct, reconstruct, repair, or maintain the drain commissioner's or drainage board's work.

Authorization for drains. Currently, the drain code authorizes drain projects "whenever [they] shall be conducive to the public health, convenience and welfare." The bill would strike this language and instead say that "a drain may be established, constructed, maintained, and improved consistent with the provisions of this act" (Section 3). Language elsewhere in the bill requires drain projects to be "necessary and conducive to the public health, public convenience, or public welfare," as well as being "practicable."

The county drain process. The bill would establish a new petition process in place of the current application process that is followed for county drain projects.

(There would be a parallel process for drainage boards and intercounty drains.)

** To start the process of establishing a new drainage district and a new drain, a petition would have to be filed with the drain commissioner. The petition would have to be signed by (1) at least 5 landowners in the proposed drainage district whose lands would be liable for drain assessments (if there were fewer than 5 such landowners, the petition would have to be signed by at least 50 percent of the landowners), or (2) landowners representing at least 25 percent of the land area liable for assessment, or (3) 50 percent of the landowners in the proposed district in lieu of posting security. If the proposed drain was necessary for public health, a public corporation also could petition for a new drain. (Currently, an application for a new drain must be signed by not less than 10 freeholders of the township(s) where the proposed drain or lands to be drained are located; at least 5 of the signers must own land liable to assessment for the drain.)

** The drain commissioner then would have 60 days to decide whether or not to appoint a 3-member board of determination. If the drain commissioner chose not to appoint a board of determination, he or she would have to immediately file a copy of the petition with the chairperson of the county board of commissioners, along with an explanation of why the drain commissioner had declined to appoint the board. The chairperson of the county board would then have to appoint a board of determination and notify the drain commissioner of the board members' names and addresses.

** In order to determine which landowners might be subject to assessment for the proposed drain and should be given notice of each board of determination hearing, the drain commissioner would prepare and file in his or her office a tentative description of the proposed drainage district.

** If the drain commissioner appointed a board of determination, he or she would call hearings of the board and have a verbatim record of the proceedings taken. At its first hearing the board would (1) elect a chairperson and secretary, (2) receive testimony and evidence on whether the drain was necessary and conducive to the public health, public convenience, or public welfare, (3) provide an opportunity for landowners who supported the project and whose lands would be liable to assessment to sign the petition, and (4) determine (by majority vote) whether or not the proposed drain was "practicable" and might be "necessary and conducive to public health, public convenience, or public welfare."

** If the board found that the proposed drain either was not practicable or was not necessary and conducive to the public health, convenience, or welfare, it would file an order dismissing the petition with the drain commissioner and a new petition for the drain couldn't be filed for a year.

** If the board found that the drain was practible and might be necessary and conducive to the public health, convenience, or welfare, it would make an *"order of practibility"* to that effect.

** After the board made an order of practibility, no further action would take place unless one or both of the following applied: (1) The petition proposed a location and route for the drain and was signed by at least 50 percent of the number of landowners in the proposed drainage district as tentatively described by the drain commissioner for purposes of notifying landowners; or (2) security consisting of a cash deposit or bond was posted with the drain commissioner amounting to 5 percent of his or her estimate of how much it would cost to go through the drain project process.

** The drain commissioner then would have to hire an engineer to prepare a preliminary engineering analysis that would have to include a hydrologic and hydraulic report (that included present and anticipated land uses in, and the flooding characteristics of, the proposed drainage district), a recommended route and course and an existing and proposed profile of the recommended route and course, a description of the recommended work (including crossings, structures, and facilities), a description of the drainage district, and estimate of the cost of the recommended construction, a description of alternatives that had been considered (including measures to store and retain drainage waters), the impact of the proposed project and alternatives on flooding characteristics downstream of the drainage district, an evaluation of the impacts of the project on natural resources (including water quality and plant and animal life) that identified appropriate practical measures to minimize adverse effects, and any other information requested by the drain commissioner.

** When the preliminary engineering analysis was completed, the drain commissioner would have to file a copy of it in his or her office, give notice of the filing to affected landowners, and reconvene the board

of determination to determine whether the proposed drain was necessary and conducive to public health, convenience, or welfare.

** After the preliminary engineering analysis was filed, a majority of the drain project petitioners could file another petition with the drain commissioner requesting that the original petition be rejected, in which case the drain commissioner would have to file an order dismissing the original drain project petition, costs for the drain project would have to be paid as though the board of determination had rejected the project petition (see below), and the petitioners couldn't sign another petition for the drain for a year.

** The board could decide that additional information was needed -- to determine either the boundaries of the proposed drainage district or whether the proposed drain was necessary and conducive to public health, convenience, or welfare -- and could adjourn the hearing to allow the drain commissioner to gather the information. When the drain commissioner had gathered the additional information, he or she would reconvene the hearing and present the information, which the board then would consider (along with "testimony offered") and then make its determination of whether or not the proposed drain was necessary.

** If the board decided the proposed drain was not necessary and conducive to public health, convenience, and welfare, it would file with the drain commissioner an order dismissing the petition, and the costs of the drain project process would be paid as follows: 5 percent from any security posted, 45 percent from the proposed drainage district, and the balance from county general funds.

** If the board decided the proposed drain was necessary and conducive to public health, convenience, or welfare, it would make an *"order of necessity"* to that effect and file the order with the drain commissioner, who then could choose to hold a meeting to provide or to elicit information and testimony (about the route, type of construction, and estimated cost of the proposed drain) to help him or her in determining the scope of the proposed drain project.

** After the board of determination either filed an order dismissing the petition or an order of necessity, a public corporation or any person (that is, individual, partnership, corporation, association, governmental entity, or other legal entity) could ask the circuit court to review the order on the complete record presented to the board of determination. There could be no additional testimony or information for the circuit court review, which would be to determine whether the order was legal and supported by ("substantial, material, and competent") evidence, other than testimony or information offered for purposes of claim of fraud or error of law and testimony by no more than two expert witnesses for each party.

** After receiving an order of necessity, the drain commissioner would execute a *"first order of determination"* and file it in his or her office. The first order of determination would establish the drainage district and give it a name or number, describe the drainage district and the route, and the type and estimated cost of the proposed construction.

** After the drain commissioner entered a first order of determination, the engineer would prepare final plans, specifications, and an estimate of the costs of the proposed drain. The drain commissioner also would get from the engineer a description of the lands or rights-of-way needed for the proposed drain and an evaluation of the effects of the proposed drain on natural resources that identified appropriate practical measures to minimize adverse effects.

** In approving the drain route furnished by the engineer, the drain commissioner would not be limited to the drain route described in the petition or in the first order of determination if the new drain route were more efficient and serviceable, but the drain commissioner would have to give notice describing the new drain route by first class mail to all landowners, including public corporations and state departments, subject to drain assessments.

** At this point, the drain commissioner could determine that the project was not practical and issue an order of rejection (that is, an order rejecting the petition) and would divide all costs incurred to the proposed district as if the project had been built. The costs then would be assessed and paid in the same way as if the proposed project had gone forward.

** If the drain commissioner did not reject the petition, and if the length of the proposed drain, as provided by the engineer in the final plans, extended more than 10 percent of the total length as described in the preliminary engineering analysis, the drain commissioner would have to reconvene the board of determination, which would undergo the same hearing and decision-making process it went through to issue its original order of necessity.

** The drain commissioner then would get any required NREPA permits, and unless he or she had determined to reject the petition, he or she would proceed to acquire property for the drain, apportion and review the benefits, let contracts, and levy and collect drain special assessments as provided by other sections and chapters of the drain code.

** If the lowest ("responsible") bid for the drain project was more than 20 percent higher than the estimate of the cost of construction in the preliminary engineering analysis, the drain commissioner would have to reconvene the board of determination, which would reopen the decision-making process at the point of making a determination whether the drain was necessary and conducive to public health, convenience, or welfare.

** After the drain commissioner (or drainage board) acquired rights-of-way or easements, he or she would make the *final order of determination* establishing the drain. The drain commissioner could amend the final order of determination to change the boundaries of the drainage district or to change the name or number of the drain either upon petition by at least 5 landowners whose land would be traversed by the drain or at his or her own discretion (if it were the drain commissioner's "opinion that it [was] to the best interest of all concerned").

Notices. All landowners subject to special drain assessments would have to be notified by first-class mail of public hearings for boards of determination, days of review (of apportionment of benefits, which determines assessments), and boards of review; for drainage board hearings of practicability and necessity, the receiving of bids, and the review of apportionments; orders changing a drain's name or number or the boundaries of a drainage district; and orders for inspections of drains. In addition to the first-class mailings, notices would have to be posted in the drain commissioner's office and published in a newspaper of general circulation in the drainage district. The notice would have to explain the consequence of any of the decisions made at the hearing and specify any appeal period for the action taken. Notices for board of determination hearings, days of review hearings or board of review hearings would have to include the name, address, and telephone number of the drain commissioner, while notices for drainage board hearings of practibility or hearings of necessity would have to include the names, addresses, and telephone numbers of the drainage board members. Notices for hearings of practicability would have to state that landowners who supported the project and whose lands would be liable to assessment would have an opportunity to sign the petition at the hearing.

Natural resources. The bill would incorporate for the first time consideration of the impact of drains on natural resources. Petitions for drain projects could request that measures be undertaken which were intended both to enhance or improve the natural resource values of the proposed drain and to provide benefit to the proposed drain's function, longevity, or hydraulic capacity (Sections 3 and 5). The bill also would require *a preliminary engineering analysis* upon the determination that a proposed new drain was practicable and might be necessary and conducive to public health, public convenience, or public welfare. The preliminary engineering analysis, among other things, would have to include an evaluation of the impacts of the proposed drain project on natural resources -- including, but not limited to, water quality and plant and animal life -- as well as identifying appropriate practical measures to minimize adverse effects (Section 52). Then, when a drain commissioner entered a first order of determination, he or she would be required to obtain (from an engineer or from another qualified professional) an evaluation of the effects of the proposed drain on natural resources that identified appropriate practical measures to minimize adverse effects (Section 56). Further, at the discretion of the drain commissioner, measures that were intended to enhance or improve natural resource values could be included as part of the drainage project, even if such measures wouldn't benefit the drain's designed function, longevity, or hydraulic capacity (Section 56). In addition, the bill would require that new drain projects be undertaken in compliance with *a "best management practices" manual* that would be prepared -- and reviewed annually -- by the Department of Agriculture, in consultation with the Department of Natural Resources and the Department of Environmental Quality. The manual would have to contain standards for new drain projects that assured the projects were undertaken in a way that not only preserved and provided drainage but that also protected and conserved natural resources. In addition, the standards in the manual would have to address -- among other things, such as bank stability and sedimentation control -- both water quality protection and improvement, as well as minimization of adverse impacts on plant and animal life. Moreover, when the Department of Agriculture reviewed the manual annually, it could recommend

revisions to the Commission of Agriculture, which would be responsible for approving both the manual and any recommended revisions (Section 3).

In the case of existing drains, petitions could be filed, among other things (such as maintaining or improving a drain or part of a drain), to have measures undertaken that were intended both to enhance or improve the drain's natural resource values and to benefit the drain's designed function, longevity, or hydraulic capacity (Section 221). In addition, the definition of (drain) "improvement" would specify that when an improvement consisted of extending the drain downstream in order to provide an adequate outlet to restore or improve drainage to lands within an established drain district, activity that took place outside the originally established boundaries of the drainage district would be subject to any permits required under the Natural Resources and Environmental Protection Act (Section 2).

Repealers. The bill would repeal Chapters 4 (County Drains), 6 (Intercounty Drains), 14 (Railroads), 15 (Dams in Drains), 16 (Special County Commissioner), and 19 (Consolidated Districts), as well as 70 other sections of the Drain Code.

Chapter	**Drain Code of 1956**	**House Bill 4337 (H-6)**
1	Drains.	*General Provisions*
2	County Drain Commissioner.	County Drain Commissioner
3	County Drainage Districts.	*County drainage districts and county drains*
4	County Drains.	[Repeal]
5	Intercounty Drainage Districts.	*Intercounty drainage districts and intercounty drains*
6	Intercounty Drains.	[Repeal]
7	Apportionment and Review.	Apportionment and Review
8	Cleaning, Widening, Deepening, Straightening and Extending Drains.	*Maintaining, improving, and consolidating drains*
9	Letting of Contracts.	Letting of contracts
10	Inspection and Approval of Construction and Payment for the Drain.	Inspection and approval of construction and payment for the drain
11	Levy and Collection of Drain Taxes.	*Levy and collection of special assessments*
12	Revolving Funds for Drains.	Revolving funds for drains
13	Highways.	*Roadways, railroads, utilities, and other structures*
14	Railroads.	[Repeal]
15	Dams in Drains.	[Repeal]
16	Special County Commissioner.	[Repeal]
17	Abandoned and Vacated Drains -- Disposal of Funds.	Abandoned and vacated drains -- disposal of funds
18	Obstructions in Drains; Sewage; Miscellaneous Provisions.	Obstructions in drains; sewage; miscellaneous provisions

Chapter	**Drain Code of 1956**	**House Bill 4337 (H-6)**
1	Drains.	*General Provisions*
19	Consolidated Districts.	[Repeal]
20	Intracounty Drains; Public Corporations.	*County drains; public corporations*
21	Intercounty Drains; Public Corporations.	Intercounty drains; public corporations
22	Water Management. Districts and Subdistricts.	[not amended]
23	Penalties.	*Sanctions*
24	Repeals and Saving Clauses.	Repeals and saving clauses [Note: amended only to remove period at the end of the chapter title]
25	Alternate Procedures	Alternate Procedures

BACKGROUND INFORMATION:

Michigan's wetlands. The December 1980 special Department of Agriculture task force on drains report noted that over 50 percent of Michigan's "human development" and over 70 percent of the state's agricultural production depended for their existence on "constructed water courses." Since the early settlement days, according to the report, more than half of the state's original wetland acreage has been converted to other uses, and thousands of acres of wetlands continued to be drained and filled every year for industrial, commercial, residential, and recreational purposes in addition to agricultural purposes. By 1956, the report notes, the Department of Agriculture estimated that there were over 17,000,000 acres of land in drainage districts, and by the time of the 1980 report, "virtually all potential agricultural lands worth the initial investment ha[d] been drained." The emphasis of drain projects by 1980 had shifted from constructing new drains to "maintaining or reconstructing the original drainage systems, or improving drains to provide outlets for more intensive drainage of existing croplands."

A 1918 Michigan Geological Survey report on "the drainage situation in Michigan" gives a snapshot of the extent of Michigan's wetlands a century after the first territorial drain law was enacted. The report noted that Michigan was fifth -- behind only Florida, Louisiana, Mississippi, and Arkansas -- in the area of "swamp and overflow" lands among the states. But as the report further noted, these "swamp and overflow" lands were not the only ones that were "too wet to profitably cultivate." Michigan also was relatively rich in another kind of land, that with "clayey" soil, that usually was rich in available plant foods but that also was slow to drain naturally. These "clayey" soils warm slowly in the spring, and, left in their natural state, are too wet to farm during ordinary seasons. Thus in addition to actual swamps and "overflow" lands, land with these "clayey" soils also was considered "wet land" which could be "reclaimed by proper drainage." The report estimated that there were nearly 3 million acres (2,836,000 acres) of "reclaimable wet lands" in the Lower Peninsula, an estimate which "in no way" represented "the total area of swamp and lake lands" in this part of the state. The report also noted that there were 2,598,000 acres of "swamp lands" and another 1,586,000 acres of "clayey" land in the Upper Peninsula, which was very nearly 25 percent of the total land area. But since "[t]he area of land fully reclaimed and made suitable for farming" was so small at that time -- only four counties had spent anything whatsoever on drains, and had only a total of 12 miles of ditches to show for it, while private individuals and corporations had constructed 70 to 80 miles of open ditches under land development schemes -- the report did not try to estimate how much of this swamp land would be "reclaimable."

Michigan drainage laws. The Drain Code of 1956 is the most recent in a long line of legislation regarding artificial drainage that dates back to when Michigan was still a territory. Michigan's earliest drainage law appeared in the 1819 territorial "Act to Regulate Highways," which allowed "supervisors of highways" to enter on lands adjacent to the highways "to cut, make, cleanse and keep open such gutters, drains and ditches therein, as shall be sufficient to convey and draw off the water from said highways, with the least disadvantage to the owner of the land" (Section 9). Owners were prohibited ("upon penalty of eight dollars") "from filling up, stopping or obstructing such gutter, drain or ditch." Subsequently, an 1827 territorial "Act Relative to the Duties and Privileges of Townships" actually required people to "make and maintain" drains or ditches in order to make wetlands "more valuable and productive." Section 19 of the act required "each person interested" in making wetlands adjacent to existing farmland ("low grounds or swails, rendered unproductive by marshy or stagnant waters" which could be "conveniently drained by ditching" through or between "farms of adjoining improved lands") "more valuable and productive" to "make and maintain a just proportion of the crossditches or drains, and also the ditches or drains on the line between improved farms." When disputes arose over drains, they were to be settled by "fenceviewers," who also were responsible for ascertaining the damages to be paid to neighbors when someone neglected or refused to make or maintain their part of the drains or ditches. In 1839, the 1827 territorial townships act was reenacted, unchanged, as "An Act to Provide for the Drainage of Swamps, Marshes, and Other Lowlands." Seven years later, after Michigan became a state in 1837, the 1839 township act was incorporated into the Revised Statutes of 1846 as Chapter 131, "Of the Draining of Swamps and Other Low Lands." For the first time, public health was the statutorily given reason for drains. Under the Revised Statutes of 1846, anyone owning or possessing "any swamp, marsh or other low land" who wanted to drain the land and "deemed it necessary" to open a ditch or ditches through someone else's property could petition the township board "to inquire and determine whether such marsh, swamp or other lands [were] a source of disease to the inhabitants, and whether the public health [would] be promoted by draining the same." One year later, the first de facto county drain law also referred to health concerns as a lawful reason to drain wetlands. Public Act 104 of 1847 appointed Francis H. Hagaman of Dover Township, Joseph H. Cleveland of the village of Adrian, and H. J. Quackenbush of the village of Tecumseh -- all in Lenawee County -- commissioners "to superintend the draining of all such marshes and other low lands in the townships of Ogden, Riga, Blissfield and Ridgeway, in the county of Lenawee, according to the provisions of this act, as do in their judgment affect injuriously the health of the inhabitants." (This law also created a de facto dual system of county and township drainage that was statutorily recognized in the Compiled Laws of 1871, which had separate chapters on county drain law [Chapter 47, formerly Public Act 42 of 1869] and on township drain law [Chapter 48, Public Act 98 of 1871]. This dual system remained in place until Public Act 254 of the Compiled Laws of 1897 abolished township drain commissioners.) Ten years after Public Act 104 of 1847 allowed Lenawee County commissioners to drain all wetlands in four townships for public health reasons, Chapter 38 (Public Act 169) of the Compiled Laws of 1857 continued this emphasis on public health. Entitled "Of the Drainage of Swamps, Marshes and other Low Lands That Affect Injuriously the Public Health," this chapter of the Compiled Laws of 1857 also allowed the reconstruction and improvement of existing drains.

With the consolidation of drainage laws in 1897, language that was to be kept in the subsequent 1923 codification and the 1956 recodification was enacted. Instead of maintaining highways, making wetlands more valuable and productive for farmers, or eliminating sources of disease to promote public health, drains now were authorized whenever they were "conducive to the public health, convenience and welfare," terms which never were defined. Thus, Public Act 254 of the Compiled Laws of 1897 provided "for the construction and maintenance of drains, and the assessment and collection of taxes therefor" and repealed all other drainage laws. The 1897 act -- and the subsequent 1923 codification and the 1956 recodification -- said "That drains may be located, established, constructed and maintained, and drains and water courses may be cleaned out, straightened, widened, deepened and extended, whenever the same shall be conducive to the public health, convenience or welfare." The county drain commissioner, who was appointed by the county board of supervisors, would determine whether a requested drain was "necessary and conducive to the public health, convenience or welfare," and would decide whether the drain was "practicable."

The Natural Resources Management and Environmental Code Commission. In 1991, Governor John Engler issued an executive order creating a Natural Resources Management Environmental Code

Commission to review, analyze, and recommend statutory language to create a comprehensive Natural Resource Management and Environmental Protection Code. More specifically, Executive Order 1991-32 created a Natural Resources Management and Environmental Code Commission and charged it with the following two "functions and responsibilities":

a. To review, analyze and recommend statutory language, in the form of a draft bill or bills, for a Michigan Natural Resources Management and Environmental Protection Code in the form of a single, comprehensive body of law designed to implement Michigan's entire natural resources management and environmental protection program; and to recommend the same to the Governor and the Legislature on or before January 1, 1993, with an interim report to be similarly presented on or before June 1, 1992; provided, however, that the Commission may seek, and the Governor may approve, extension of these time periods if warranted by the circumstances.

b. To review, analyze and recommend changes in the organization of the Michigan Department of Natural Resources, in order that such organization will closely correspond and correlate to the proposed Natural Resources Management and Environmental Code.

One result of the commission's activity was a series of bills that recodified the state's environmental laws into a new Natural Resources and Environmental Protection Act (NREPA), and Executive Order 1995-18, which split the Department of Natural Resources (DNR) into two departments, the DNR and a new Department of Environmental Quality.

In addition, the code commission chair, a past president of the Michigan Association of County Drain Commissioners, created a Drain Code Subcommittee of the code commission with three goals to accomplish: "(1) [To] consider reorganizing the [drain] law into a more workable and rational unit from a procedural standpoint; (2) to identify and propose appropriate policy changes to require environmental consideration in the administration of drain projects, while maintaining essential drainage for the public health, convenience and general welfare; and (3) to identity and propose mechanisms to finance new or expanded environmental components of drainage projects." (Appendix C, Michigan Association of County Drain Commissioners' "Strategic Plan for [MACDC's] Statute Review Committee.") However, the subcommittee reportedly could not come to a consensus on its recommendations: some of the subcommittee favored recommending that the governor appoint a Drain Code Task Force to come up with a revised drain code that included environmental protection, while other subcommittee members favored recommending that both the Inland Lakes and Streams Act (ILSA) the Goemaere-Anderson Wetland Protection Act (Public Act 203 of 1979) be amended to include regulation of drains, while exempting existing drains to allow maintenance of historic widths, depths, and locations. Having failed to come to consensus on either of these recommendations, the Drain Code Subcommittee instead recommended that a new drain code task force be appointed in 1994 "to continue discussions and develop legislative recommendations to amend the Drain Code of 1956" (Report of the NRMECC, p. C-1 of the Appendix, April 1994), though such a task force never was appointed.

Other Drain Code Legislation. As introduced, House Bill 4337 was identical to House Bill 4174, which remains in the House Agriculture Committee, and Senate Bill 122, which is in the Senate Committee on Farming, Agribusiness and Food Systems. A separate bill to revise the Drain Code, House Bill 6095, was introduced on September 17, 1998, and referred to the House Agriculture Committee.

FISCAL IMPLICATIONS:

Fiscal information is not available. (9-21-98)

ARGUMENTS:

For:

It has long been recognized by a broad variety of interests that the Drain Code of 1956 has been in need of serious revision for years, if not decades. However, the complexity of the issues involved -- including the thorny issue of potential conflicts between environmental laws, which emphasize environmental protection, and the drain code, which allows the management of land and water resources in order to facilitate the economic utility of land-based resources -- has resulted in an almost impossible task. However, after literally years of work involving the Department of Agriculture, the drain commissioners, local government associations, environmental groups, and others, including members of the legislature, the bill offers a workable if imperfect compromise. Among other things, the bill reworks the drain code into a more workable and rational form procedurally and administratively; it greatly expands opportunities for public input into drain project decision-making,

including allowing drain project petitioners to decide to withdraw their petition, and strengthens and expands public notification requirements; it allows for the consideration of the impact of drain projects on natural resources and requires drain projects to follow a "best management practices" manual similar to what already is in place for farming practices; it provides a disincentive for frivolous requests for drain projects by requiring security deposits that would be used to pay for some of the costs of the beefed-up decison-making process when such petitions failed to get approval; it requires that public lands be assessed for the costs of drain projects, thereby reducing the unfair burden that currently is placed on private landowners in drainage districts with significant public lands; it addresses the issue of open-ended costs to landowners in a drainage district by requiring a public hearing if responsible bids for a drain project go 20 percent over the estimate provided by the project engineer in the preliminary engineering analysis; and it addresses the issue of land use review by requiring drain commissioners to review all requests to use existing drains. In addition, it addresses the issue of the environmental impact of drains in a number of ways, including requiring NREPA permits for all drain activity that takes place outside the original boundaries of a drainage district, allowing petitions for drain projects to include requests that measures be undertaken that enhance or improve the natural resource values of a proposed drain and allowing drain commissioners to include such measures as part of the project. Two new requirements -- the preliminary engineering analysis
and the best management practices manual -- also would address impacts of proposed drain projects on natural resources, identifying appropriate practical measures to minimize adverse effects, the protection and conservation of natural resources, and water quality protection and improvement. In the case of existing drains, the bill would allow petitions to have measures undertaken to enhance or improve the drain's natural resource values.

At the same time that the bill strengthens public input and natural resource considerations, it would continue to protect the crucial ability of drain commissioners to conduct drain projects that are vitally necessary to agriculture and other responsible land use, and would enhance drain commissioners' ability to pay for the newly expanded decision-making processes and responsibilities for preservation of natural resource values. Drain commissioners would continue to be elected officials, accountable to the voters who elected them, and would responsibly expand their decision-making authority to decide that a drain project was not practical and reject it even if a board of determination had decided otherwise. The bill also would reasonably increase currently unrealistically low maximums on how much money could be spent on drain maintenance and improvement before going before landowners in the drainage district, as well as increasing the threshhold at which bids are required for drainage work.

Agriculture is vital to Michigan's economy, and drains are vital to Michigan agriculture. Indeed, a 1980 Michigan Department of Agriculture estimate said that over 70 percent of the state's enormously valuable agricultural production depended for its existence on drains. The ability of farmers, who are a shrinking minority of the state population as a whole, to establish and maintain drains that enable them to continue to farm must be preserved. In particular, a numerical minority of farm owners must continue to be able to make sure that their agricultural lands are adequately drained regardless of high urban populations that might surround them. The bill would do this, while at the same time acknowledging the importance both of public input into drain projects and of minimizing possible adverse impacts of drains on natural resources.

Against:

While virtually everyone agrees that the current drain code needs to be revised, the changes proposed in the bill would do very little to remedy the really serious problems inherent in the existing drain code. In effect, the bill retains the point of view of the drain commissioners and agribusiness, and makes no real changes to the code's deficiences with regard to due process or environmental protection. Indeed, the bill doesn't even mention environmental protection. Instead it refers only to "natural resources" and "natural resource values," and their "enhancement" or "improvement," or their "protection or conservation," and this twice with reference specifically to the drain's "natural resource values." And the lone reference to the actual environmental protection law, the Natural Resources and Environmental Protection Act, is the requirement that activities outside of an existing drainage district be subject to permits under the act. Even so, this permitting process doesn't cover all drain extensions and drain maintenance activities such as deepening, widening, and straightening, which can be very destructive to the environment. Nor does the permitting process include improvements on or inclusions of private drains.

What is more, all of these references to enhancing, improving, protecting or conserving natural resources are permissive or informational only; with one toothless exception, no natural resource or environmental protection is mandated. People could petition to have measures that would enhance or improve a drain's natural resource values included in drain projects, but there is no requirement that these measures actually be included. Similarly, the required preliminary engineering analysis would have to include an evaluation of the impacts of proposed drain projects on natural resources and to identify appropriate practical measures to minimize adverse effects, but the bill does not require the drain commissioner to act on this evaluation or identification. In fact, the bill explicitly leaves it up to drain commissioners to decide whether or not they will include as part of drain projects measures intended to enhance or improve natural resource values. And although the bill would require new drains to comply with the proposed "best management practices" manual that would include standards regarding the protection and conservation of natural resources, this manual would be written by the Department of Agriculture, whose primary mission is to promote and protect agriculture, not protect the environment, as the exemptions of "standard farming practices" -- which cover so-called "hog hotels," for example -- from environmental laws illustrate. What is more, there are no teeth in the proposed compliance requirement; the only new sanction that the bill would add to the code is not against drain commissioners who failed to protect the environment but against "willfully" obstructing drain commissioner work.

In addition to the failure of the weak proposed language to protect the environment, the bill does not exempt from the drain code natural areas bought and maintained specifically to preserve their natural qualities. Thus the disastrous draining in 1992 of the Walkinshaw Wetlands, owned by the federal Forest Service and once a major habitat for wetland wildlife (including being a major staging ground for sandhill cranes), could be repeated under the bill. The Walkinshaw Wetlands were legally destroyed when a neighboring private landowner, who was willing to fund the drain project, sought and received legal permission from the Oceana County drain commissioner to dredge seven miles of an old designated drain, Beaver Creek, that had not been maintained as a drain for 70 years. Unless such lands are exempted from the drain code, the destructive "benefits" of drainage could continue to destroy even lands intended to preserve the very water that the drain code seeks to get rid of. Also the bill would not protect natural waterways and drains that had reverted to a natural state from drain work from being made over into channelized artificial drains, and the definition of "drain" still includes *every natural body of water* as it pertains to maintenance and improvement activities, which means that natural streams and rivers still could be designated as drains without an environmental agency permit review and could be dredged, straightened, widened and moved without any permit.

What is more, by defining a number of terms (such as "improvement" and "maintenance") that currently are not defined in the drain code but not defining such crucially important terms as "benefit," "necessity," "practicability," or even "public health, public convenience, or public welfare" the bill simply perpetuates the fundamentally economic assumption that "drained" land is a "benefit," regardless of the ecological and noneconomic values that environmental protection has shown to be legitimate. What is more, the use of "benefit" in the bill, as in the drain code, slides between speaking of benefit in terms of (undefined) public health, "convenience," and "welfare," and benefit to private landowners (when determining how much of the drain project the individual landowner will have to pay for, regardless of whether or not the landowner is in favor of the project). What is more, members of boards of determination, whose only qualifications are the relevant residency, and drain commissioners, whose only qualifications are that they have been elected, are the ones who decide on the "necessity" of a drain project to "public health, public convenience, or public welfare." At the very least, public health experts should be involved in decisions that involve real public health issues, and not agricultural drainage needs that have virtually nothing to do with public health but everything to do with individual farmer's or developer's economic benefit. In addition, however, drain commissioners should be required to have expertise not only in public health, but also in watershed management, natural resource management and environmental protection, and, obviously, the drain law, none of which currently is (or would be) required.

In addition to the above objections, the bill would continue the drain commissioner's unique ability to impose taxes ("special drain assessments") without having to submit them to either a legislative process or direct vote of the people affected, and to take private property for public drains. The bill also would

continue to allow drain commissioners to expand the scope of drain projects beyond that in the "first order of determination" as recommended by the preliminary engineering study, and would not specify standardized assessment procedures.

Finally, allowing drain assessments on public lands would mean that taxpayers in the drainage district, who actually "own" these lands, would pay taxes twice on the same project. Further, such assessments could be disastrous for the newly defined "public corporations," which would include not only the state, state departments or agencies and local units of government but also already cash-strapped school districts, community colleges, colleges, and universities. And private development -- including "urban sprawl" -- would continue to be subsidized by taxpayers because the bill has no requirement that new developments or uses bear the costs of drain projects, including maintenance, that they require.

At the same time, landowners affected by a proposed drain project still could not stop a petition for a drain project (the only ones who could do that under the bill are the original petitioners themselves), and there still would be no way for citizens to appeal final projects in their entirety. In addition, despite the increased number of hearings, boards of determination still are not required to base their decisions on public testimony and the preliminary engineering analysis.

POSITIONS:

The Department of Agriculture supports the bill, but has concerns about specific provisions in the version of the bill reported from committee. (9-21-98)

The Michigan Association of Drain Commissioners supports moving the bill. (9-21-98)

The Michigan Farm Bureau supports passage of the bill and would like to continue to work on it. (9-21-98)

The Tri-County Contractors Association supports the increase in the amounts allowed for drain maintenance and for non-bid contracts, as well as the election of drain commissioners, but does not support the petition process in Substitute H-6. (9-18-98)

The Michigan Association of Counties supports the concepts in Substitute H-6 but has some concerns on the issues of the proportioning of the assessment of costs for the hearings and pre-engineering analysis, the $5,000 per mile assessment allowed for drain maintenance, the deputy drain commissioner appointment, and the per diem expenses. (9-18-98)

The Michigan Townships Association has no formal position on the bill, but supports the direction that the revisions affecting local government were taking. (9-21-98)

The Michigan United Conservation Clubs opposes the bill. (9-21-98)

The Michigan Environmental Council (an organization which consists of some 40 member organizations) opposes the bill. (9-18-98)

The Mackinac Chapter of the Sierra Club opposes the bill. (9-21-98)

The Michigan Land Use Institute opposes the bill. (9-21-98)

Clean Water Action opposes the bill. (9-18-98)

The West Michigan Environmental Action Council opposes the bill. (9-18-98)

The League of Women Voters opposes the bill. (9-18-98)

Taxpayers United, Inc. opposes the bill. (9-15-98)

Analyst: S. Ekstrom

■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.