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SOIL EROSION AND SEDIMENTATION CONTROL

Senate Bill 651 (Substitute H-1) First Analysis (10-4-00)

Sponsor: Sen. Ken Sikkema
**House Committee: Conservation and
Outdoor Recreation**
**Senate Committee: Natural Resources and
Environmental Affairs**

THE APPARENT PROBLEM:

One of the greatest pollutants of lakes and streams is the sediment produced by eroded soil. Sediment is the product of uncontrolled erosion, and together sediment and erosion can result in the loss of fertile topsoil; a rise in the level to water bodies, thereby increasing the possibility of surrounding land being flooded; damage to plant and animal life; and structural damage to buildings and roads. According to a report issued by the Department of Environmental Quality (DEQ), construction is one of the major causes of erosion in Michigan, generating more than 100 tons of sediment at some construction sites annually, per acre, if proper planning and management procedures aren't followed. For example, in 1999, the state joined the Manistee County prosecutor in suing the developer of a golf course in that part of the state: the developer had removed protective vegetation from the crest of a bluff on a designated high-risk erosion area on Lake Michigan. The resultant erosion resulted in tons of eroded soil being dumped into the lake.

Under the soil erosion and sedimentation control provisions of Michigan's environmental protection laws, a permit is required for any construction that might result in a change in the topography of the land, or "earth changes." Counties have the primary responsibility for issuing permits, although sometimes cities, villages, or charter township have assumed the responsibility within their jurisdiction. Penalties are imposed on those who conduct earth changes without a permit or who violate permit requirements. However, as a result of the problems encountered by developments such as the proposed golf course in northwest Michigan, local officials have called on state policymakers to make major changes in state law. Consequently, legislation was introduced, and, as a result of the issues raised during testimony before the Senate Natural Resources and Environmental Affairs Committee, a workgroup was formed to deliberate on

the problem. The workgroup identified several key problem areas, which have been addressed the proposed legislation.

THE CONTENT OF THE BILL:

Part 91 of the Natural Resources and Environmental Protection Act (NREPA) regulates soil erosion and sedimentation control. Currently, under the act, counties, cities, villages, and charter townships have the responsibility for issuing permits to persons who want to make earth changes (defined under the act to mean "a human-made change in the natural cover or topography of land, including cut and fill activities, which may result in or contribute to soil erosion or sedimentation of the waters of the state. Earth change does not include the practice of plowing and tilling soil for the purpose of crop production.") Senate Bill 651 would extend enforcement authority to include a general law township. The bill would also expand the duties of the Department of Environmental Quality (DEQ) regarding soil erosion and sedimentation control, allow the DEQ to charge fees for most of these duties, allow the state to require that damaged natural resources be restored, increase the penalties for violations of the provisions of Part 91, and clarify the current permit exemption for logging and mining activities.

The following is a brief summary of the provisions of the bill:

- The bill would require the Department of Environmental Quality (DEQ) to conduct a review of the soil erosion and sedimentation control program in a county, municipality, or public agency, and approve or disapprove them.

- The bill would establish the following penalties: a municipal or state civil infraction fine of up to \$2,500 for a violation of the provisions of Part 91 of the act; a \$10,000 fine for each day a person knowingly violated Part 91, or knowingly made a false statement in an application; and a \$25,000 fine for each day a person knowingly violated Part 91 after receiving a notice.

- The bill would allow the DEQ to charge fees for administering a soil erosion and sedimentation control training program.

- The bill would establish a Soil Erosion and Sedimentation Control Training Fund. Money in the fund would be expended, upon appropriation, only for the administration of the soil erosion and sedimentation control training program and examination established under the bill.

- The bill would require that, in addition to a fine, a person who violated the provisions of Part 91 would be liable to the state for damages to the environment, and would allow a court to order restoration of damaged natural resources.

- The bill would require that the DEQ make education information on soil erosion and sedimentation control available to county and municipal enforcing agencies for distribution to permit holders.

- The bill would allow the DEQ to charge fees for inspections, review of soil erosion and sedimentation control plans, and permits for a county soil erosion and sedimentation control program.

- The bill would specify that approval from the DEQ to enforce a soil erosion and sedimentation control program would only be valid for three years, after which the department would review the agency for reapproval.

- The bill would require that the DEQ determine, based upon specific requirements, whether a municipality was able to effectively administer and enforce a soil erosion and sedimentation control program.

- The bill would require that a local unit of government notify the appropriate county or municipal enforcing agency and the DEQ if it noticed that a violation of the provisions of the bill had occurred within its boundaries.

- The bill would add a definition of “waters of the state”, which would include wetlands.

- The bill would require that a county or municipal enforcing agency approve or deny an permit application within 30 days after a complete application had been filed.

- The bill would extend the current exemption for logging and mining activities from the permit requirements pertaining to earth changes to include the plowing or tilling of land, the harvesting of crops, activities association with well locations, surface facilities, flowlines, or access roads relating to oil or gas exploration and development activities. However, this exemption would not apply to a multi source commercial hazardous waste disposal well.

Senate Bill 651 would also repeal several outdated provisions relating to soil erosion and sedimentation control.

HOUSE COMMITTEE ACTION:

The House Conservation and Outdoor Recreation Committee adopted Substitute H-1, which added a provision requiring a county or municipal enforcing agency to approve or deny a permit application within 30 days after a complete application had been filed. The House substitute bill also specifies that a person need not obtain a permit from a county or municipal enforcing agency for earth changes associated with well locations, surface facilities, flow lines, or access roads that relate to oil or gas exploration and development activities that are regulated under Part 615 of the act, concerning the Supervisor of Wells, if the permit application to drill and operate under Part 615 contains a soil erosion and sedimentation control plan that is approved by the department under Part 615. However, those earth changes must conform to the same standards required for other permits under the provisions of Part 91 of the act, regarding soil erosion and sedimentation control. This provision would not apply to a multi source commercial hazardous waste disposal well, as defined under the act.

FISCAL IMPLICATIONS:

A House Fiscal Agency (HFA) analysis on the bill estimates that the bill would result in an indeterminate increase in state costs. According to the analysis, the Department of Environmental Quality (DEQ) would have increased responsibilities under the bill: reviewing soil erosion and sedimentation control programs and permits, certifying training programs, and preparing and distributing educational materials. According to the DEQ, these additional responsibilities could require adding four new positions, training costs

could be \$50,000, and total costs could be up to \$450,000. However, a portion of the increased costs would be offset by revenue from training and permit fees. (9-18-00)

ARGUMENTS:

For:

Senate Bill 651 was introduced in June, 1999, in response to problems identified with the soil erosion and sedimentation control provisions of the Natural Resources and Environmental Protection Act (NREPA) following a golf course development in northwest lower Michigan that resulted in tons of eroded soil being dumped into Lake Michigan. Eventually, a workgroup was formed to investigate some of the issues raised during testimony heard before the Senate Natural Resources and Environmental Affairs Committee. The following are the eight areas that have been identified by the workgroup as being problem areas in Part 91 (the soil erosion and sedimentation control provisions of NREPA), together with the workgroup's recommendations:

- Current fines are too small to be effective as tools against permit violations. Many local administrators say they never use the current \$500 fine provision as an enforcement tool, preferring instead to use a cease and desist order.

The workgroup suggested that, instead, a variety of penalties be imposed, with fines ranging from \$2,500 to \$10,000.

- There are no requirements that repairs be made to damaged natural resources. Lacking this provision, local governments cannot require violators to make necessary repairs.

The workgroup recommended that, in addition to a fine, a person who violated the provisions of Part 91 would be liable to the state for damages to the environment, and would allow a court to order restoration of damaged natural resources.

- The current law allows inconsistent quality soil erosion programs at the local level. The act delegates authority over soil erosion and sedimentation to various levels of local government. However, certain local governments have adopted ordinances that are more restrictive than state law, and some local governments do not always enforce current laws.

The workgroup proposes that the Department of Environmental Quality (DEQ) develop a schedule of

compliance, which would specify that a local government could not enforce its own ordinance without DEQ approval.

- There is a lack of state sponsored training for local soil erosion law administrators.

The workgroup recommends that each individual who is responsible for administering the provisions of Part 91 be trained by the department, and that the department issue a certificate of training when the trainee passes the appropriate examination.

- There is a general lack of Department of Environmental Quality (DEQ) oversight of local programs. While most people believe that control over soil erosion permits should remain at the local level, most agree that the process would also be improved if the DEQ regularly reviewed local programs.

The workgroup recommended that the DEQ be required to notify counties that were out of compliance with the provisions of Part 91 with an audit evaluation letter, and that a county be placed on probation if it does not make the appropriate changes.

- There is no provision under current law allowing counties to have programs that are more restrictive than state law, although other local governments have this authority.

Under the workgroup's recommendation, a county ordinance could be more restrictive than state law, although it could not make lawful that which is currently unlawful.

- Wetlands are not protected from soil erosion problems.

The workgroup recommends that a definition of "waters of the state" be added to this part of the NREPA, to include the Great Lakes and their connecting waterways, inland lakes, streams, and wetlands.

- State programs provide few educational and informational materials for distribution to regulated communities.

The workgroup proposes that the DEQ work with local enforcing agencies in supplying education materials, to help provide a statewide distribution, and that the department assess the effectiveness of this requirement.

Against:

In written testimony presented to the House committee, the supervisor of Washtenaw County's soil erosion program expressed some concerns about the bill. First, the county questions extending authority from just charter townships, cities, and villages, to general law townships. The county points out that most of these townships are small, rural municipalities which usually delegate authority over soil erosion or sedimentation control to zoning or building officials, and that, since these officials typically have many duties, enforcement may not be as effective as it would be under an agency whose sole responsibility was enforcement of these matters. According to the testimony, the current problem concerning inconsistent enforcement of the provisions of the act would continue under these conditions. Moreover, if counties can adopt ordinances that are satisfactory to local jurisdictions, the county wonders why authority should be delegated to other jurisdictions?

The county's testimony also points out that, when a proposed development crosses municipal boundaries, there is confusion as to which local authority should issue permits. This problem can be easily resolved if the county is the sole enforcing agency. However, the problem would be exacerbated should several municipalities within each county have jurisdiction over soil erosion or sedimentation control. It would be both time-consuming and costly to subject builders, realtors, and property owners, who must currently comply with various state or local codes, to a myriad of new regulations. Instead, the county points out, the provisions of the bill should mirror the Public Health Code, which requires that each county to adopt a code to regulate and enforce environmental health.

Further, the county's testimony questions that it is an effective use of the Department of Environmental Quality time and staff to add the new responsibilities required under the bill. Instead, it is suggested in the testimony that DEQ resources be allocated toward training, evaluating, and providing technical assistance to the state's 83 counties.

Against:

The bill would extend the current exemption for logging and mining activities from the permit requirements pertaining to earth changes to include the plowing or tilling of land, the harvesting of crops, activities associated with well locations, surface facilities, flowlines, or access roads relating to oil or gas exploration and development activities. However, the removal of clay, gravel, sand, peat, or topsoil would not be included under the bill's definition of "mining."

The Michigan Aggregates Association points out that the provisions of Part 91 were intended to apply to the construction industry, and that their industry's activities have been exempt from the permit requirements of Part 91 for decades. Moreover, the association points out that imposing these requirements is an unfair burden: no one has ever accused the industry as being a source of soil erosion problems. In fact, it is in the best interests of aggregate producers to protect their assets from erosion.

POSITIONS:

SEMCOG (Southeast Michigan Council of Governments) supports the bill. (10-2-00)

The Michigan Association of Counties (MAC) supports the bill. (10-2-00)

The Michigan Oil and Gas Association (MOGA) supports the bill. (10-2-00)

The Michigan United Conservation Clubs (MUCC) supports the bill. (10-2-00)

The Michigan Association of Conservation Districts (MACD) supports the bill. (10-2-00)

The Michigan Townships Association (MTA) supports the bill. (10-2-00)

The Michigan Association of Realtors supports the bill, provided that it is amended to provide that the fines imposed under the bill be forwarded to local governments, and not to the enforcing agencies, and to require the DEQ to report to the legislature regarding any complaints received related to county ordinances that are more restrictive than state law. (10-3-00)

The Michigan Association of Home Builders opposes the bill. (10-2-00)

Washtenaw County opposes the bill. (10-3-00)

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.